Nos. S156933, S156631, S156633, S156634

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re E.J., S.P., J.S., K.T.
on Habeas Corpus

PETITIONERS' TRAVERSE AND EXCEPTION TO THE RETURN

SUPREME COURT
FILED

PETITIONERS' TRAVERSE AND EXCEPTION TO THE RETURN;
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF

Deputy

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No. S156933, S157631, S157633, S157634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re E.J., S.P., J.S., K.T.
on habeas corpus.

PETITIONERS' TRAVERSE AND EXCEPTION TO THE RETURN

PETITIONERS' TRAVERSE AND EXCEPTION TO THE RETURN; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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PETITIONERS' TRAVERSE AND EXCEPTION TO THE RETURN

Petitioners E.J., S.P., J.S., and K.T. ("Petitioners") hereby enter this Exception and Denial to the Return, filed by Respondent James Tilton ("Respondent") in the above entitled action, and state that Respondent has failed to set forth sufficient facts or law to show cause why the relief requested in the Petition should not be granted.

STATEMENT OF FACTS

1. Petitioners reallege and incorporate by reference herein all the allegations and contentions set forth in the original Petition.

2. The State of California, through A.B. 1015, signed into law in 2006, created a Sex Offender Management Board to study the operation of California laws affecting sex offenders. The Board's objectives, composition and operating procedures are codified in California Penal Code Sections 9000-9003.

3. On February 21, 2008, the California Sex Offender Management Board convened and ratified its first report to the Governor and Legislature. (*See* Ex. O, California Sex Offender Management Board, An Assessment of Current Management Practices of Adult Sex Offender in California, Initial Report (Jan. 2008).)[1]

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[1] Exhibits A – N are attached to Petitioners' Petition for Writ of Habeas Corpus, filed with this Court on October 4, 2007.

4. The Board's report notes that since the enactment of the Sexual Predator Punishment and Control Act ("SPPCA") in November of 2006, there has been a four-fold increase statewide in the number of homeless section 290 registrants. (*See* Ex. O at 000384).

5. On October 11, 2007, the Department of Adult Parole Operations ("DAPO") issued DAPO Policy No. 07-48. (*See* Ex. P, DAPO Policy No. 07-48, Revised Procedures for Jessica's Law Notice to Comply, October 11, 2007), amending DAPO Policy No. 07-36 (Exhibit B to the Petition). The revised policy states that parole agents are no longer required to serve parolees with a Notice to Comply letter and restates that a parolee may become transient to comply with section 3003.5(b).

RESPONSE TO RESPONDENT'S ALLEGATIONS

6. Petitioners admit the allegations in Paragraph 1.

7. Petitioners deny the allegations in Paragraph 2 in that it paraphrases the residence restriction in a manner that implies retrospective application to all registered sex offenders.

8. As to the allegations in Paragraph 3, Petitioners admit that CDCR started taking steps to implement the residency restrictions in Section 3003.5(b), but dispute the sufficiency of the facts stated. Implementation of the statute did not commence until August of 2007, nine months after the statute's passage.

9. Petitioners admit the allegations in Paragraph 4.

10. Petitioners admit the allegations in Paragraph 5, but dispute the sufficiency of facts stated. Petitioners are informed that parole agents were instructed to measure the distance between a parolee's residence and the nearest prohibited area, "as the crow flies."

11. As to the allegations in Paragraph 6, Petitioners admit that CDCR determined that each of the Petitioners was non-compliant or that parole informed them of their non-compliance, but do not admit or deny that their residence is in violation of the residency restriction.

Facts Relating to Petitioner E.J.

12. Petitioners admit the allegations in Paragraph 7, but dispute the sufficiency of facts stated, in that Respondent implies that E.J. was sent to prison. E.J. was a juvenile at the time of this conviction and was incarcerated in the California Youth Authority.

13. Petitioners admit the allegations in Paragraph 8, but dispute the sufficiency of the facts stated. E.J.'s conviction under Section 273a(b)(willful cruelty to a child), did not involve any kind of sex offense against a child. According to the police incident report, the charge stemmed from a purse snatching where the adult holding the purse was with her four children, and the children were pushed during a struggle over the purse. One child hit his head against a metal gate and suffered a bump.

14. Petitioners admit the allegations in Paragraph 9.

15. Petitioners admit the allegations in Paragraph 10.

16. Petitioners dispute the first three allegations in Paragraph 11. Since his parole in August of 2005, E.J. has had four parole violations, three resulting in a return to custody and one in which he was continued on parole. Petitioners admit the last allegation of Paragraph 11 that his last release to parole was on February 5, 2007.

Facts Relating to Petitioner S.P.

17. Petitioners admit the allegations in Paragraph 12, but dispute the sufficiency of the facts stated, in that at the time of the offense in January 1998, S.P. was 16 years old and the victim was 15 years old.

18. As to the first allegation in Paragraph 13, Petitioners admit that S.P. was convicted of a felony violation, but dispute the sufficiency of the facts stated. S.P. was charged with several felonies, but these charges were dismissed. Petitioners admit the second allegation in paragraph 13.

19. Petitioners deny the allegations in Paragraph 14. Petitioner S.P. had a parole revocation because of a traffic citation where alcohol was found in the pocket of a passenger in his car. He was released and credited for two weeks time served after he pled "no plea" at his administrative parole hearing. The traffic citation based on this incident was dismissed.

Facts Relating to Petitioner J.S.

20. Petitioners admit that J.S. was convicted of Texas Penal Code Section 21.08, but challenge the characterization of his offense. J.S.'s conviction under this statute stemmed from a citation for public urination

for which he served time (10 days) because he could not raise bail. Petitioner disputes the allegation that the Texas conviction requires registration under Penal Code section 290(a)(2)(D). The California Department of Corrections and Rehabilitation ("CDCR") and its Department of Adult Parole Operations ("DAPO") has required J.S. to register as a sex offender in California, based on CDCR's and DAPO's contention that the Texas conviction required registration under Penal Code 290(a)(2)(D).

21. Petitioners admit the allegations in Paragraph 16.

22. Petitioners admit the allegations in Paragraph 17.

Facts Relating to Petitioner K.T.

23. Petitioners admit the allegations in Paragraph 18.

24. Petitioners admit the allegations in Paragraph 19.

25. Petitioners admit the first and third allegation in Paragraph 20. As for the second allegation, Petitioners deny that K.T.'s parole was revoked for failure to register; K.T. was late to register, but did not fail to register.

Respondent's Answer to Petitioners' Allegations

26. Petitioners admit Respondent's answers in Paragraphs 21-26.

27. Petitioners admit Respondent's answer in Paragraph 27. J.S. has been able to return to a previous apartment due to this court's stay, and

due to a Superior Court stay of other sex-offense related parole conditions that had been imposed on him.

28. Petitioners admit Respondent's answer in Paragraph 28.

29. Petitioners admit the first two statements in Respondent's answer in Paragraph 29, but clarify that Paragraph 9 of the Petition should have read "the *purported* purpose of the law was to protect children from registered sex offenders."

30. Petitioners admit Respondent's answers in Paragraph 30-33, except to add that Policy No. 07-36 has been amended by Policy No. 07-48, provided here as Exhibit P.

31. Petitioners dispute the first statement of Respondent's answer in paragraph 34, as Petitioners have provided declarations from parolees who assert that CDCR has failed to assist registrants with finding compliant housing. (*See* Declarations of S.P. at DECS003; J.S. at DECS006; K.T. at DECS009; M.M. at DECS019.)[2] Moreover, the State's own Sex Offender Management Board confirms that parole agents do not provide assistance to find compliant housing. (*See* Exhibit O at 000493 ["Neither the state nor local levels have any policy or procedure to locate suitable housing for sex offenders"].) Petitioners admit that CDCR "has not formally adopted any 'definition' of what constitutes a park" and that individual parole units

[2] The Declarations of E.J., S.P., J.S., and K.T. were filed with this Court on October 4, 2007, attached to Petitioners' Writ of Habeas Corpus. The Declarations of M.M., J.T., and D.B. are filed herewith.

throughout the state have the "discretion" to "decide whether a certain space constitutes such a park." Petitioners reallege the lack of such a definition and inconsistency of implementation statewide constitutes a procedural due process violation. (*See* Declarations of E.J. at DECS001; J.S. at DECS007; K.T. at DECS009; M.M. at DECS019; J.T. at DECS021).

32. Petitioners admit Respondent's answer in Paragraph 35, subject to the insufficiency of facts noted in ¶¶ 11-24 above.

33. In response to Respondent's answer in Paragraph 36, Petitioners attach herein as Exhibit R the declaration of Scott Sullivan, author of the maps attached to the Petition as Exhibit E, authenticating the maps.

34. Petitioners admit Respondent's answer in Paragraph 37, subject to the insufficiency of facts noted in ¶¶ 19-21 above.

35. Petitioners admit Respondent's answer in Paragraph 38, subject to the insufficiency of facts noted in ¶¶ 22-24 above.

36. Petitioners admit Respondent's answer in Paragraph 39, subject to the insufficiency of facts noted in ¶¶ 16-18 above.

37. Petitioners admit Respondent's answer in Paragraph 40, subject to the insufficiency of facts noted in ¶¶ 11-15 above.

38. Petitioners admit Respondent's answers in Paragraphs 41-42.

Petitioners respectfully request that this Court grant Petitioners' Writ of Habeas Corpus and enjoin Respondent from enforcing Penal Code

section 3003.5(b) as a parole condition against Petitioners and all those similarly situated.

Dated: March 11, 2008

Respectfully submitted,

PRISON LAW OFFICE
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONERS' TRAVERSE AND EXCEPTION TO THE RETURN

Petitioners seek relief from the threats of imprisonment as a means of enforcing the unjustly severe residency restriction of Penal Code[3] section 3003.5(b), enacted by ballot initiative as part of Proposition 83, the Sexual Predator Punishment and Control Act (the "SPPCA").

The residency restriction of section 3003.5(b) is unconscionable and improperly subjects Petitioners to an unreasonable parole condition. Because there are virtually no compliant residences in the counties in which Petitioners are paroled, it will force Petitioners to leave their families, abandon homes that they own or rent and choose between prison and homelessness. Enforcement of the residency restriction against Petitioners and similarly situated section 290 registrants whose registerable offenses pre-date November 8, 2006 is an impermissibly retroactive application of a statute under California Penal Code section 3 and violates the Constitutional prohibition against ex post facto laws. The vague language of section 3003.5(b) violates the procedural due process of Petitioners and section 290 registrants statewide. For these reasons, Petitioners respectfully request that this Court grant the Writ of Habeas Corpus and enjoin enforcement of section 3003.5(b).

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[3] All statutory cites herein refer to the California Penal Code, unless otherwise noted.

I. THE RESIDENCY RESTRICTION IS AN UNREASONABLE PAROLE CONDITION

A. The Residency Restriction Fails the Test This Court Established in *People v. Lent*, and Respondent Has Not Shown Otherwise

Respondent has applied an unreasonable parole condition to Petitioners which fails the test this Court established in *People v. Lent* (1975) 15 Cal.3d 481, 486, citing *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627-628. Respondent virtually concedes this point by not addressing it in his return, except for contending, incorrectly, that the *Dominguez/Lent* test does not apply here because Petitioners are subject to the residency restriction "as a matter of law...not merely as a parole condition." (Return at 42, n.6.) Respondent misses the point entirely.

First, it completely ignores the fact that Respondent *is applying the law to Petitioners as a modified condition of parole*. It is this very application which Petitioners challenge by seeking to enjoin Respondent from enforcing DAPO Policy No. 07-36, which enforces section 3003.5(b) as a parole condition. (*See* Return at 22; Ex. B at 000023 ["All affected parolees shall be served with a Modified Condition(s) of Parole Addendum..."] & 000033-34 [sample Modified Condition of Parole and Notice to Comply with the condition of parole]; Ex. P at 000589.)

Second, the Attorney General has conceded in his response in *In re Wade,* Case No. S148544, that section 3003.5(b) is *not self-executing*. (*See* Ex. C at 000050.) Since the statute does not make it a crime to violate the

residency restriction, Petitioners cannot be "subject to" its enforcement merely as a "matter of law." As a "matter of law" or by "operation of law," section 3003.5(b) defines neither a felony, nor a misdemeanor, nor even a public offense. It provides for no enforcement, even by citation. The only enforcement of section 3003.5(b) is as a parole condition under the DAPO policy being challenged here.

Third, *Dominguez /Lent* analysis *is* used to evaluate the validity of conditions that have been imposed as a "matter of law." (*See, e.g., In re Naito* (1986) 186 Cal.App.3d 1656, 1661 [applying *Lent* test to assess validity of an administrative regulation applied as a condition of probation].) Accordingly, even under Respondent's analysis, the *Dominguez/Lent* test must be applied. Respondent ignores this case in his return, and cites no contrary law.

Furthermore, despite Respondent's assertion to the contrary, the *Dominguez/Lent* test applies to parole conditions, not just probation conditions, as is clear from the cases previously cited by Petitioners. (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1234 [citing *People v. Lent* (1975) 15 Cal.3d 481]; *In re Naito,* 186 Cal.App.3d at 1661["the criteria for assessing the constitutionality of a condition of probation, which applies as well to a condition of parole, were set forth by our Supreme Court in *People v. Lent"*] citing *People v. Burgener* (1986) 41 Cal.3d 505, 532; *see also In re Corona* (Feb. 20, 2008) __Cal.Rptr.3d __, 2008 WL 444649

[holding condition of parole invalid under *Lent* criteria, as set forth in *In re Stevens*, 119 Cal. App.4th 1228].) Respondent ignores these cases in his return stating instead that he "know[s] of no decision of this Court extending the *Dominguez/Lent* test to parole conditions." (Return at 42, n.6.)

Section 3003.5(b) is clearly invalid under this test: (1) Section 3003.5(b) has no relationship to the crime of which the Petitioners were convicted; and (2) section 3003.5(b) "is not reasonably related to future criminality." (*People v. Lent,* 15 Cal.3d at 486; *see also People v. Welch* (1993) 5 Cal.4th 228, 233-234; *In re Stevens,* 119 Cal.App.4th at 1234 ["A condition [of parole] that bars lawful activity will be upheld only if the prohibited conduct either has a relationship to the crime of which the offender was convicted, or is reasonably related to deter future criminality"]; *see also* Petition at 30-35.)

First, there is a marked absence of any connection between the new parole condition and Petitioners' offenses. Neither E.J., S.P., J.S., nor K.T. have committed crimes even remotely related to predatory sexual attacks on children.[4] (Petition at 7-10.) In addition, none of the four Petitioners are currently on parole for a sex offense. (*Id.*) And yet Petitioners are required to leave their homes because they are too close to schools or parks where

[4] Although S.P.'s sex offense involved a 15 year old, S.P. was 16 at the time and the offense had nothing to do with proximity to schools or parks. S.P. has had no offenses involving children as an adult.

children regularly gather. The requisite connection between places where children gather and Petitioners' crimes is simply lacking.

California courts have held that parole conditions that do not relate to the parolees' underlying offences are invalid under analogous circumstances. In *In re Stevens,* a sex offender pled guilty to lewd conduct with a minor, and a parole condition was imposed upon him which prohibited him from using a computer or the internet. (*In re Stevens* (2004) 119 Cal.App.4th 1228.) While acknowledging that "some child molesters reach their victims through the internet" (*Id.* at 1236), the court found the condition was invalid nonetheless because the parolee's offense had not involved the use of computers. (*Id.* at 1236-1239.) The parole condition therefore bore no relationship to the parolee's actual child molestation conviction. (*Id.* at 1239.) Similarly, although some sex offenders might prey on children by meeting them in the places they gather, Petitioners have no such history -- indeed they have no history of preying on young children at all. The residency restriction's requirement that Petitioners not live within 2000 feet of a school or a park therefore bears no relationship to Petitioners' convictions for indecent exposure and rape, or to the non-sex offenses for which they are currently on parole.

Second, the residency restriction also clearly "forbids conduct which is not reasonably related to future criminality." (*Lent,* 15 Cal.3d at 486.) Public safety is not served by forcing sex offender registrants into

homelessness – to sleep in cars, in parks, near schools and on the streets – disconnected from their support networks. Such an argument also flies in the face of sociological studies, criminological studies and even law enforcement experience. (*See* Petition at 33-35.)

Indeed, law enforcement organizations in California oppose the residency restriction on the grounds that it destabilizes offenders and "undermine[s] public safety." (Letter from California Coalition on Sexual Offending to Schwarzenegger, Feb. 6, 2006, *available at* http://ccoso.org/CCOSOlettertogovernor.doc [noting SPPCA "will make our communities less SAFE because . . . residency restriction will de-stabilize sex offenders."]; *see also* Press Release from the President of the California Correctional Peace Officers Association (October 12, 2007) *available at* http://www.ccpoa.org/news/?p=53 ["the State's actions are shameful, and dangerous" in that they "risk[] public safety."]; Joshua Sabatini, *Supe Aims to Close Sex Offender Loophole*, San Francisco Examiner, Oct. 16, 2007, available at http://www.examiner.com/a-991850~Supe_aims_to_close_sex_offender_loophole.html [San Francisco Police Department has taken the position that DAPO's policy "impedes the ability of law enforcement to closely monitor sex offenders"]; Christian Burkin, Sex Offenders Wander S.J., The Record (Stockton), March 11, 2008, http://www.recordnet.com/apps/pbcs.dll/article?AID=/20080311/A_NEWS

02/803110307 [quoting a spokesman for the CDCR as saying, "this is the reason we provide temporary housing in the first place...[i]t's not in the best interest of public safety for them to be wandering the streets or living under a bridge."].)[5]

The state's own Sex Offender Management Board[6], created by statute to study the application of California laws affecting sex offenders, has pointed out the lack of connection between residential proximity and risk of harm to children. Children face much more risk from family members and family friends than from strangers lurking near schools. (Ex. O at 000402-403 [Sex Offender Management Board Report] [3% of offenders in sexual assaults of children under age 6 were strangers, 5% of offenders of youth ages 6 through 12 were strangers, and 10% of offenders of juveniles aged 12 through 17].) Recidivism rates among sex offenders have been overestimated, and are in fact lower than recidivism rates for

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[5] That the residency restriction in fact undermines public safety has also been the subject of numerous other recent news reports: *See e.g.,* Editorial: "Jessica's Law not working," Sacramento Bee, (March 4, 2008), p. B6, http://www.sacbee.com/110/story/757605.html; Michael Rothfeld, "Jessica's Law May Increase Crime Risks," Los Angeles Times, (February 22, 2008), p.B1; The Newshour with Jim Lehrer, "Laws Restricting Lives of Sex Offenders Raise Constitutional Questions," January 17, 2008, *available at* http://www.pbs.org/newshour/bb/law/jan-june08/sexoffenders_01-17.html; Bill Ainsworth, "Sex Offenders Limited by Residency rules," Union Tribune, (February 22, 2008), *available at* http://www.signonsandiego.com /news/state/20080222-9999-1n22offender.html; Jamie Fellner, "The wrong sex offender laws," Los Angeles Times, (September 18, 2007), p. A21, *available at* http://www.latimes.com/news/ opinion/la-oe-fellner18sep18,0,177168.story?coll=la-opinion-rightrail; Bill Ainsworth, "Law to boost sex offender monitoring falling short; Proposition 83 possibly making state less safe", San Diego Union-Tribune, (February 14, 2008), *available at* http://www.signonsandiego.com/ news/state/20080214-9999-1n14jessica.html.

[6] The Sex Offender Management Board is comprised of representatives from the Attorney General's Office, the California Department of Corrections, Sheriff's Offices, the Judicial Branch,

non-sex offenders. (*Id.* at 000437-438.) Studies from other states show no evidence that residential proximity to schools or parks affects re-offending. (*Id.* at 000498-501.) In fact, residential restrictions may increase the risk of re-offending by severely limiting housing options and reducing support for reintegration of sex offenders. (*Id.* at 000501.) Indeed, according to the Sex Offender Management Board, "[c]urrent research concludes that suitable and stable housing for sex offenders is critical to reducing recidivism and increasing community safety." (*Id.* at 000497.)

That residency restrictions are contrary to public safety has also recently been acknowledged by the American Correctional Association -- the nation's largest professional organization of corrections practitioners, which recently took a stance against residency restrictions by passing a resolution that states *inter alia*: "there is no evidence to support the efficacy of broadly-applied residential restrictions on sex offenders... statutory prohibitions on where predatory sex offenders may live and go may cause them to become lost to the supervision and surveillance of responsible authorities[.]" (Ex. Q [resolution] at 000591.) Indeed, "it is contrary to good public safety policy to create disincentives for predatory sex offenders to cooperate with the responsible community corrections agencies." (*Id.*; *see also* Richard Tewksbury, *Exile at Home: the Unintended Collateral*

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probation officers, law enforcement, district attorneys, criminal defense attorneys, victim advocates and treatment providers.

Consequences of Sex Offender Residency (2007) 42 Harv. C.R.-C.L. L. Rev. 531, 538 ["The stated purposes of residential restriction laws are maximizing public safety and deterring sexual offenses. Although these are admirable goals, the research to date does not show that these laws help to achieve that goal. As an initial matter, the proportion of known sexual offenders in a neighborhood is not related in a statistically significant way to the number of sexual offenses that occur in that neighborhood"].)

The residency restriction also undermines the purpose of California's Megan's Law, California Penal Code section 290.46, which provides the public with information on the whereabouts of sex offenders "so that members of our local communities may protect themselves and their children." (*See* Office of Attorney General's Megan's Law web site, available at http://www.meganslaw.ca.gov/homepage.aspx?lang= ENGLISH.) When sex offenders are transient, the public cannot learn of the whereabouts of offenders through Megan's Law websites.

In fact, forcing sex offender registrants into homelessness automatically causes future criminal conduct since sleeping in public places is a misdemeanor in California. (*See* Cal. Pen. Code section 647, subd. (j).) The condition is "clearly contrary to the State's goal of reintegrating the parolee into society," (*In re Corona,* __ Cal.Rptr.3d __ 2008 WL 444649 at *3), and therefore invalid under *Lent.*

B. The Residency Restriction is Subject to Strict Scrutiny Review as it Impinges on Petitioners' Constitutional Rights

Lent renders the residency restriction invalid *even in the absence of any impingement of a constitutional right.* (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.) Therefore, as set forth *supra,* even without finding a constitutional violation, the residency restriction is invalid. However, section 3003.5(b) does impinge upon Petitioners' liberty rights and therefore requires an additional level of scrutiny – above and beyond what *Lent* requires: the residency restriction violates Petitioners' substantive due process rights, Petitioners' right to privacy, Petitioners' property rights and Petitioners' rights to intrastate travel.

To challenge Petitioners' constitutional claims, Respondent relies entirely on *State v. Seering* (Iowa 2005) 701 N.W.2d 655 and *Doe v. Miller* (8th Cir. 2005) 405 F.3d 700, both cases that involve challenges to an Iowa residency restriction. Respondent's reliance on these authorities is misplaced.

First, neither case involves a challenge to the reasonableness of a parole condition.

Second, both *Seering* and *Miller* adjudicate a residency restriction that is critically different than the one at issue here. Iowa Code section 692A.2A, at issue in *Seering*, is much more narrowly tailored than the

SPPCA's residency restriction. In fact, had Petitioners committed their crimes in Iowa, Iowa Code section 692A.2A would not apply to any of them. Unlike the SPPCA's residency restriction, the Iowa Code: (1) only applies to people who committed an offense against a minor, (§ 692A.2A(1)); (2) exempts people who are minors (§ 692A.2A(4)(d)); (3) only restricts residences close to schools or childcare facilities, defining both residence and childcare facility in the statute, (§ 692A.2A(2) and § 237A.1(5)); (4) contains a grandfather provision exempting people who already had established a residence prior to the enactment of the statute, (§ 692A.2A(4)(c)); and (5) exempts people residing in a home close to which a childcare or school opens after they have established a residence there (§ 692A.2A(4)(c)). That the Iowa restriction was held not to impinge upon a constitutional right, while the SPPCA residency restriction does impinge upon Petitioners' constitutional rights, is therefore neither surprising nor dispositive.

Furthermore, in Iowa "virtually everyone" who was covered by the statute was able to locate housing in compliance with the statute. (*Miller*, 405 F.3d at 707.) The restriction at issue in *Seering* and *Miller* therefore was not so unreasonably broad so as to leave those to whom it applied with no option but prison or homelessness, as is the case here. (*See* Ex. E at 000058-59; *see also* Sealed Declarations of E.J. at DECS001 and J.S. at DECS007.)

1. The Residency Restriction Violates Petitioners' Federal Substantive Due Process Rights under the Constitution of the United States

Respondent makes two arguments against Petitioners' federal substantive due process claims: (1) Section 3003.5(b) does not prohibit Petitioners from living with their spouses and families, because it merely prohibits Petitioners from living near schools or parks; and, (2) because similar arguments were rejected in *Seering* and *Miller*. (Return at 36-40.)

On the first ground, Respondent is plainly wrong: he ignores the fact that entire cities are off limits under the SPPCA's residency restriction. (*See* Ex. E at 000058-59.) The residency restriction will compel Petitioner K.T. to leave his disabled wife, Petitioner S.P. to sever his ties with his mother, and Petitioner E.J. to leave his wife and four young children. (*See* Sealed Declarations of E.J., S.P., and K.T. at DECS at 001-5, 008-10.) Of course, it is true that the text of the SPPCA does not explicitly state that individuals are barred from choosing their living companions and living with their families. It is plain, however, that the SPPCA directly imposes this result when expansive regions of California are designated "predator free zones" pursuant to the law. (*See* Ex. E at 000059; *see also* Ex. O at 000565.) In refusing to acknowledge the direct effects of this law, Respondent engages in a willful ignorance of the SPPCA's necessary, real-world consequences. The Court, however, should not indulge this

sophistry: When a restriction by its very terms mandates – but does not explicitly state – an unconstitutional imposition, the Court need not, ostrich-like, ignore the transitive violation that the SPPCA works.

Respondent's argument that Petitioner can still live together as a family of homeless people demonstrates its unreasonableness. The Fourteenth Amendment's protection of an individual's right to live with his family and to "establish a home" must encompass something more than the "right" to raise a stable family under a freeway overpass or on a street corner. (*Meyer v. Nebraska* (1923) 262 U.S. 390, 399.) Petitioners will be compelled to leave their families when they become transient. The residency restriction will force them to live under circumstances that do not even meet basic 21st Century living standards, such as shelter from the elements, heat, electricity, sewer, and running water. Where, as here, the government acts in a way that "slic[es] deeply into the family itself", a constitutional right is impinged upon and strict scrutiny analysis is required. (*Moore v. City of East Cleveland* (1977) 431 U.S. 494, 498.)

As to Respondent's second argument, as discussed *supra*, *Seering* and *Miller* are beside the point. *Seering* and *Miller* did not address a restriction that resulted in registrants being unable to find a single compliant home in the cities in which they were paroled. Indeed, in holding that residency restriction valid, the *Miller* court relied upon the fact that the Iowa restriction did not "prevent any family member from residing

with a sex offender in *a residence* that is consistent with the statute." (*Miller,* 405 F.3d at 711 [emphasis added].) Thus, in Iowa, unlike in California, families were able to find compliant housing in which they could all live together.

2. The Residency Restriction Violates Petitioners' Right To Privacy Under California Law

Respondent similarly argues that the residency restrictions do not violate the California Constitution's privacy protection of the freedom to choose one's living companions because: (1) the restrictions "do no such thing"; and (2) "two courts" – i.e., *Seering* and *Miller* – have rejected this claim. (Return at 40-42.) On the first ground, Respondent is plainly wrong, as set forth above. Forced separation from the family with whom one lives undoubtedly violates a right to choose one's living companions.

Second, those two courts – one federal court and one Iowa state court – did not address Petitioners' claim which explicitly sounds in California's right to privacy. California's right to privacy is not coextensive with either the federal or Iowa due process laws through which these two courts adjudicated the issue before them. (Compare *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 131 n.3 ["the federal right of privacy in general appears to be narrower than what the voters approved in 1972 when they added 'privacy' to the California Constitution"] with *Seering*, 701 N.W.2d at 662 [challenge under federal and Iowa state due

process clauses, which are construed similarly and will therefore be analyzed together].) As such, the fact that these two courts have not sustained a privacy right to choose with whom one lives does nothing to controvert the robust body of California law that establishes it.

Moreover, Petitioners do not claim that their privacy rights are violated only because they cannot choose with whom they live. In *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, the Supreme Court made clear that the California Constitution's right to privacy did not – as Respondent would have it – simply protect the ability to choose one's living companions. In rejecting the privacy challenge in *Schmidt*, the Court contrasted the challenged residency restriction with those restrictions that did violate the Constitution, describing what was protected under the right of privacy. (*Id.* at 388-391.) The Court held: "[A]lthough the constitutional right of 'familial privacy' undoubtedly encompasses a parent's right to live with his or her child, the [policy] at issue here does not, of course, purport to compel the separation of parent and child *or to preclude the family from living together in an entire city or neighborhood* (cf. [*Adamson* [(1980)] 27 Cal.3d at 123)[.]" (*Schmidt*, 48 Cal.3d at 389-390 [further internal citations omitted] [emphasis added].)

Schmidt thus holds – and understands *Adamson* to likewise hold – that the right of privacy explicitly protects against those restrictions "that preclude the family from living together in an entire city . . . or

neighborhood." (*Id.* at 389-90.) Such preclusion is just what the residency restrictions impose upon Petitioners: barring them from living with their families in entire cities or neighborhoods. Conspicuously, Respondent simply does not address the fact that *Schmidt* specifically identifies Petitioners' situation as warranting constitutional privacy protection.

Aside from the explicit protections laid out in *Schmidt*, the residency restriction violates Petitioners' privacy rights in another fundamental way. The home is the "place that is traditionally protected most strongly by the constitutional right of privacy." (*Tom v. City and County of San Francisco* (2004) 120 Cal.App.4th 674, 686; *see also Adamson*, 27 Cal.3d at 130 [Constitution protects "right of privacy not only in one's family but also in one's home"]; *White v. Davis* (1975) 13 Cal.3d 757, 774 ["[t]he right of privacy . . . protects our homes, our families[]."] [internal quote omitted].) At the barest of minimums, the protection in one's home must mean the protection from being required to be homeless because one is barred from residing anywhere. This does not imply that the right of privacy must ensure that everyone have a home. Rather, to mean anything, the right must prevent the state from requiring that an individual not have a home – the very compulsion with which the residency restriction threatens Petitioners.

In *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213, the Court found a privacy violation where an individual was compelled "to give up

his home" and "live in a particular location without the freedom to choose his own living companions." *A fortiori* here, Petitioners are not only compelled to give up their homes, but are not even then afforded the ability to "live in a particular location" – to speak nothing of the ability to choose one's living companions. Compulsory homelessness simply cannot square with California's rights to privacy in the home.

3. The Residency Restriction Violates Petitioners' Property Rights and Effects an Illegal Taking

The residency restriction further violates Petitioners' constitutional rights to acquire, own, enjoy and dispose of their property. (Petition at 24-25.) Respondent chose not to address this point in his Return. Both the U.S. Supreme Court and California courts recognize an individual's substantial right to retain property. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 332; *see also Greene v. Lindsey* (1982) 456 U.S. 444, 450-51 ["the right to continued residence in [one's] home" is a "significant interest in property" protected by the Fourteenth Amendment]; *People v. Beach* (1983) 147 Cal.App.3d 612, 622 ["[t]he right to acquire, own, enjoy and dispose of property is also a basic fundamental right...."].) In California, this constitutional protection extends to rented property. (*Mendoza v. Small Claims Court of Los Angeles* (1958) 49 Cal.2d 668, 672 ["[t]he right to retain property already in possession is as sacred as the right to recover it when dispossessed"].) The residency restriction forces Petitioners J.S.,

E.J., and K.T. to leave the homes that they either rent or own, never to return. (Petition at 7-9). By doing so, it impinges upon their constitutionally protected property rights, and should therefore be reviewed with strict scrutiny.

Indeed, without this Court's current stay, section 3003.5(b) would force Petitioners E.J., S.P. and K.T. to forfeit their valuable property rights in legally purchased and rented homes, without any compensation therefore. S.P. and E.J.'s families would be forced to give up the leases on the homes they rent. K.T. would be forced to sell the home that he owns with his wife. Section 3003.5(b) is therefore facially unconstitutional as it effects an illegal *per se* taking under the Fifth Amendment to the United States Constitution and article 1, section 19 of the California Constitution. (*Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 538 [*per se* taking where "government requires an owner to suffer a permanent physical invasion of her property" or where "regulations ... completely deprive an owner of 'all economically beneficial use' of her property."](internal citations omitted).) One State Supreme Court has already invalidated a sex offender residency restriction on this ground. (*Mann v. Georgia Dept. of Corrections* (Nov. 21, 2007) 282 Ga. 754, 758 [residency restriction that requires immediate physical removal from home is "'functionally equivalent to the classic taking in which government directly . . . ousts the owner from his domain.'"] (citing *Lingle*, 544 U.S. at 539).) The residency

restriction here impinges upon Petitioners' constitutionally protected property rights and as such should be reviewed with strict scrutiny for this reason as well.

4. The Residency Restriction Violates Petitioners' Right to Be Free From Banishment

Respondent argues that the Petitioners' right to intrastate travel – including the right not to be banished from their community – is not affected by the residency restriction because it does not actually expel registrants from their communities. (*See* Return at 41-42.) To support this argument Respondent relies entirely on *Miller,* 405 F.3d 700.

In addition to the reasons *Miller* is inapposite, as set forth above, it is immaterial that a federal Eighth Circuit Court of Appeal decision has rejected a similar challenge. Petitioners' claim is rooted in California's right to intrastate travel. (*See* Petition at 25-26.) Unlike California, the Eighth Circuit Court of Appeal has not decided whether to recognize that there even is a fundamental right to intrastate travel. (*Miller,* 405 F.3d at 712-13.) California, in contrast, protects the right to intrastate travel, and in particular has protected it in the banishment context. (*Beach*, 147 Cal.App.3d at 620-622; *see also In re White* (1979) 97 Cal.App.3d 141, 148-149; *People v. Bauer* (1989) 211 Cal.App.3d 937, 944 [condition that required probation officer to approve appellant's residence held invalid where it impinged on the right to travel and freedom of association by

"giv[ing] the probation officer the discretionary power ... to forbid appellant from living with or near his parents - that is, the power to banish him"]; *In ex parte Scarborough* (1946) 76 Cal.App.2d 648, 650; *People v. Blakeman* (1959) 170 Cal.App.2d 596, 597.)

That the federal Eighth Circuit Court of Appeals found that Iowa's residency restriction did not violate a right to intrastate travel therefore does nothing to controvert the body of California law that says otherwise. Notably, Respondent chose not to address the authority Petitioners cite that is most squarely on point: *People v. Beach*, which held a condition of probation constituted impermissible banishment where the defendant was required to relocate herself from what had been her home for 24 years. (*Beach,* 147 Cal.App.3d at 620-623.) Forming restrictive areas that make it so that registrants cannot actually live in a residence anywhere in their community constitutes banishment, and thus infringes upon Petitioners' constitutionally protected right to intrastate travel.

C. The Residency Restriction Fails Strict Scrutiny as it is Overbroad and Not Reasonably Related to the State's Interest in Preventing Recidivism

Because their constitutional rights are affected, the residency restriction must meet the heightened requirement -- above and beyond the *Dominguez/Lent* test -- that it is "narrowly drawn and specifically tailored to the individual probationer." (*In re Babak* (1993) 18 Cal.App.4th 1077,

1084; *see also In re Stevens,* 119 Cal.App.4th at 1237 [total internet ban on sex offender's parole invalid where it is "'not enough to show that Government's ends are compelling: the means must be carefully tailored to achieve those ends'"] (internal citations omitted).) Indeed, "[p]articularized conditions of probation should be directed toward rehabilitation rather than reliance upon some general condition which utilizes a mechanized mass treatment approach." (*In re White*, 97 Cal.App.3d at 151.)

The residency restriction is clearly overbroad. It applies to people who have never committed a sex offense against a child. It makes entire cities off-limits to sex offenders, including Petitioners. (*See* Ex. E at 000058-59.) It does not contain a grandfather clause to protect the rights of individuals who owned homes near prohibited areas prior to the statute's enactment. Nor does it provide protection for individuals whose homes are rendered non-compliant because a day care center, park or school is established after they move to a new residence (if they could find one that was compliant). It does not differentiate between different tiers of offenders, or attempt to assess the actual risk posed by a particular offender. Rather, it paints all sex offenders with the same broad brush, namely, that they are all equally likely to reoffend, but are less likely to do so if they are geographically limited with regard to residency. The SPPCA's residency restriction is significantly broader than other sex offender residency

restrictions in this country, including the Iowa statute upon which Respondent places so much weight. (*See* Petition at 27-29.)

The residency restriction is also not carefully tailored to the government's interest in protecting the safety of children and preventing recidivism. As set forth *supra,* this residency restriction will instead *undermine* public safety in California. Respondent requests that this Court rely on the California electorates' wisdom about the effects of the residency restriction on public safety (Return at 39-40), even where that "wisdom" stands in direct contradiction to the overwhelming – and commonsensical – weight of authority on the subject. (*See* Petition at 19, footnote 3; *see also id.* at 33-35.)

Furthermore, the government has a range of more narrowly tailored methods at its disposal that might actually accomplish its goal of protecting children from sex offenders. Existing statutes allow California's parole agents to evaluate the risks presented by individual parolees and to apply a range of tools, including GPS monitoring and residency restrictions as appropriate, where the agent identifies offenders that actually have a high risk of re-offending.

Contrary to what Respondent would have this Court believe, the fact that California voters approve this restriction does not make it a narrowly tailored condition of parole. The parole condition should be held invalid as it is unreasonably broad and lacks the requisite narrow tailoring.

II. PENAL CODE SECTION 3 FORBIDS RESPONDENT'S APPLICATION OF THE RESIDENCY RESTRICTION OF SECTION 3003.5(b) TO INDIVIDUALS WHO COMMITTED THEIR OFFENSE PRIOR TO THE STATUTE'S PASSAGE

Respondent's enforcement of section 3003.5(b) is a violation of the Penal Code section 3 ("section 3") prohibition of retroactivity. Section 3 states that "[n]o part [of the Penal Code] is retroactive, unless expressly so declared." Indeed, it is "well settled that a new statute is presumed to operate prospectively absent an *express declaration* of retrospectivity or a *clear indication* that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287) (emphasis added).)

Section 3003.5(b) contains no express language declaring that it is intended to be applied retroactively, nor is there any indication in the legislative history of this statute that the electorate intended it to be applied retroactively. Further, Respondent's selective enforcement of this statute against only a small minority of registrants, as well as differences of opinion between the executive branches of the state's government over the enforcement of this statute, reveal that section 3003.5(b) is remarkably unclear as to its intended application.

A. Respondent is Applying Section 3003.5(b) Retroactively

Respondent does not dispute that section 3003.5(b), as applied to those sex offenders whose registerable offenses predate the passage of the

law, constitutes retroactive application of the statute. Section 3003.5(b) imposes a mandatory restriction on parolees that is directly connected to and increases the punishment of their underlying sex offense, regardless of the date of the commission of their crime or whether or not they are on parole for their sex offense. Under this Court's decision in *Tapia*, such an application of section 3003.5(b) is retroactive. (*See Tapia*, 53 Cal.3d at 288 [defining a retroactive law as one which "'change[s] the legal consequences of an act completed before [the law's] effective date"]; *see also People v. Grant* (1999) 20 Cal.4th 150; *In re Chavez* (2004) 114 Cal.App.4th 989.)

B. Nothing in the Language or Legislative History of Section 3003.5(b) Compels Retroactive Application

Neither the express language of section 3003.5(b), nor its legislative history, support Respondent's desired application of section 3003.5(b) to those whose offences predate the passage of the law. There is therefore no reason for this Court to "depart from the ordinary rule of construction that new statutes are intended to operate prospectively." (*Tapia*, 53 Cal.3d at 288 [statute prospective where both the express language of the statute and the legislative history were silent as to retroactivity]; *see also Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1287-1288 [holding indeterminate term statute passed under Proposition 83 prospective, where initiative did not expressly compel retroactivity and legislative history indicates an intent to apply law prospectively]; *People v. Whaley* (March 3,

2008) __Cal.App.4th __, 2008 WL 555365 at * 12 [holding indeterminate term statutes impermissibly retroactive where statutory language is silent on retroactivity and no clear indication that voters intended retroactive application].)

Respondent attempts to overcome the presumption of prospective application by arguing section 3003.5(b) is expressly intended to be applied retroactively because it applies to "any person for whom registration is required [pursuant to Section 290]." (Return at 24.) However, this language does not provide the requisite unequivocal statement of retroactivity. (*See Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 843.) It does not expressly state that the residency restriction should be applied to those sex offenders whose registerable offenses predate the passage of the law. Indeed, this Court has cautioned against such attempts to divine a retrospective intent from general statements of purpose in an initiative. (*Cf. Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 ["'[a] few words of general connotation appearing in the text of statutes should not be given a wide meaning contrary to a settled policy'"] (citations omitted).)

In another Proposition 83 case, a court of appeal considered whether the initiative could be retroactively applied to convert a sex offender's two year commitment to an indeterminate term. (*People v. Whaley*, 2008 WL 555365.) After searching the language of the statute, the voter pamphlet,

and the Attorney Generals' official summary, the court could find neither a clear manifestation nor an unequivocal assertion of retroactivity. Even though the court recognized that the electorate's intent was to "strengthen and improve the laws that punish and control sexual offenders," (*id.* at *12), the court applied this provision of Proposition 83 prospectively. The Court determined that because Proposition 83 is "silent on retroactivity," and there is "no clear indication of voter intent to apply the amendments retroactively," the general presumption of prospective application must prevail. (*Id.*) Similarly, the language of 3003.5(b) – "any person for whom registration is required" -- is silent on the issue of retroactivity and nothing in the legislative history indicates otherwise.

"In the absence of an express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the . . . voters must have intended a retroactive application." (*Evangelatos,* 44 Cal.3d at 1209 (emphasis added); *accord Myers*, 28 Cal.4th at 841 [requiring "a clear manifestation" or an "unequivocal and inflexible . . . assertion of retroactivity"]; *Tapia*, 53 Cal.3d at 287 [when the statutory language does not expressly declare retroactivity, courts inquire whether the legislative history "*clearly*" indicated such intent].) The history of the SPPCA does not indicate any intent to have it apply retroactively, let alone evidence a "clear" and "unequivocal" manifestation of such intent.

Respondent contends that the "very focus of the ballot initiative" was "tens of thousands of convicted sex offenders," including those whose offenses predated the enactment of the statute. (Return at 24.) Respondent does not cite to anything to support this contention, and by doing so concedes there is no such intent evidenced in Proposition 83's ballot pamphlet or elsewhere. (*See People v. Whaley*, 2008 WL 555365 at *9, 12 [contrasting Proposition 83 to other cases in which the retroactivity question was specifically discussed during legislative debate, or was part of a statutory scheme which had expressly been made retroactive, the court held Proposition 83 evidenced no such intent to apply indeterminate civil commitments retroactively].)

Respondent also argues that the expressed intent in ballot materials for Proposition 83 was to create "predator free zones" around schools and parks. (Return at 30.) However, this general language is not enough to overcome the presumption of prospective application. This Court has noted that initiatives generally begin with statements of the problems to be remedied, but such statements do not evince an intent to apply a retrospective application to address all existing problems immediately. (*See Evangelatos,* 44 Cal.3d at 1213 [a purported "remedial purpose does not necessarily indicate an intent to apply [a] statute retroactively," as "most statutory changes are . . . intended to improve a preexisting situation and to bring about a fairer state of affairs."]; *see also People v. Whaley*,

2008 WL 555365 at *12 [recognizing that the electorate's intent regarding Proposition 83 was "to strengthen and improve laws that punish and control sexual offenders . . . and if such an objective were itself sufficient to demonstrate clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively"].) Furthermore, as set forth *infra*, the government's selective enforcement of the law to only a fraction of the registered sex offenders belies this intent.

Contrary to Respondent's assertion, this Court's decisions *Ansell v. People* (2001) 25 Cal.4th 868 and *People v. Alford* (2007) 42 Cal.4th 749 support Petitioners' contention that the legislative history of section 3003.5(b) does not clearly compel retroactive intent. In *Ansell* this Court acknowledged that the statute eliminating certificates of rehabilitation to certain classes of sex offenders was 'retroactive' within the meaning of section 3. (*See Ansell*, 25 Cal.4th at 883, n. 21.) However, the Court read the plain language of the statute in tandem with its legislative history and determined, "*by clear and compelling implication*," that the legislature intended for the statute to apply to those individuals convicted and rehabilitated prior to the enactment of the statute. (*Id.* (emphasis added).)

Similarly, in *Alford*, this Court determined that a statute imposing a fee on people convicted of a criminal offense was intended to apply retroactively. (*See Alford*, 42 Cal.4th at 754.) As in *Ansell*, the court relied

heavily on the legislative history of the statute, in addition to the language of the statute, in reaching its decision. (*Id.* at 754-755.) The Court also stated that a statute is not retroactive where, as here, the "[l]egislature has not set forth in so many words what it intended," and "it is impossible to ascertain the legislative intent." (*Id.* at 753-754.)

Unlike *Ansell* and *Alford*, neither the plain language nor the legislative history of section 3003.5(b), even read together, *clearly compels* retroactive application of the residency restriction. The section 3 prohibition on retroactive statutes must be applied here because, as Respondent's enforcement of section 3003.5(b) demonstrates, the electorate did not clearly intend for this residency restriction to apply retroactively.

This Court should not attempt to guess the intent of the voters regarding the question of retroactivity. (*See Evangelatos,* 44 Cal.3d at 1217 [noting that where there is no express retroactivity language, the court has no basis for determining how the electorate would have resolved the issue of prospective or retroactive application or the "question of how retroactively the proposition should apply if it was to apply retroactively"].) To the extent this Court were to find the intent of the voters is ambiguous, the law is clear that any ambiguity in a statute's retrospective or prospective intent should be construed prospectively. (*See Myers*, 28 Cal.4th at 841 ["a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective"] (citations omitted).)

Indeed, courts across the country have invalidated residency restrictions on these same grounds. In *Hyle v. Porter* (Feb. 20, 2008 Ohio) __ N.E.2d ___, 2008 WL 467895, the Ohio Supreme Court held that Ohio's residency restriction could not be applied retrospectively to a person who committed his sex offense before the date of enactment.[7] (*Id.* at *2.) The Ohio Supreme Court applied Ohio's statutory presumption that new laws apply prospectively, codified at Ohio Revised Code Section 1.48.[8] Just as Respondent does here, in *Hyle,* the government argued that the court should infer broad application of the law to all sex offense registrants regardless of the date of their offense. They argued that the use of both past and present tenses to describe convicted sex offenders, was evidence that the law was intended to apply retroactively. (*Id.* at *3.) The Ohio Supreme Court disagreed, and struck down the residency restriction because ambiguous language, absent a clear declaration of retroactive intent, was not sufficient to overcome the presumption of prospective application. (*Id.*)

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[7] The challenged restriction, Ohio Revised Code 2950.031, enacted in 2003, provides that "no person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to . . [a sex offense] . . . shall establish a residency or occupy residential premises within one thousand feet of any school premises." (*Id.*)

[8] Ohio R.C. section 1.48 on retroactivity states: "A statute is presumed to be prospective in its operation unless expressly made retrospective." This statute is analogous to California Penal Code Section 3, and based on the same presumption of statutory prospectivity and the prohibition against retroactivity. In *Evangelatos*, this court noted that "California authorities have long embraced [the] general principle [of retrospective application]." (*Evangelatos*, 44 Cal.3d at 1207.) The legislature codified this general legal principle in the various state codes, articulating "the common understanding that legislative provisions are presumed to operate prospectively . . . and should be so interpreted 'unless express language or clear and avoidable implication negatives the presumption.'" (Id. at 1207-08 (citations omitted).)

The Supreme Court of Missouri has reached the same result, based on Missouri's state law limitations on retroactive lawmaking. (*R.L. v. State of Missouri Dept. of Corrections* (Feb. 19, 2008) __ S.W.3d___, 2008 WL 433235 at *2 [residency restriction for sex offenders violated the Missouri constitutional bar on retroactivity where it imposed new obligations that required offenders to change their place of residence based solely upon offenses committed prior to the enactment of the statute].)

An established rule of statutory construction dictates section 3003.5(b) be construed to apply prospectively. Statutes are to be construed to avoid constitutional infirmities. (*See e.g., Myers*, 28 Cal.4th at 846; *see also Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394 ["when faced with a statute reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, we should construe it in a manner that avoids any doubt about its validity"]; *People v. Whaley*, 2008 WL 555365 at *6 [same].) Since as set forth below, interpreting section 3003.5(b) as applicable retroactively or those whose offenses occurred prior to its enactment invalidates it under the Ex Post Facto Clause, the Court should not so construe it for this additional reason.

C. Respondent's Selective Enforcement of Section 3003.5(b) and the Differences of Opinion Within the Government Over its Application Suggest that the Electorate Did Not Unambiguously Compel Retroactive Application

Respondent's own application and enforcement of section 3003.5(b) is evidence that the residency restriction was not clearly intended to be applied retroactively. There are approximately 67,000 registrants currently residing in the state of California. (*See* Ex. O at 000375.) Of these registrants, approximately 10,000 are on parole, 4,435 of whom were released from custody after the statute's passage. (*See* Ex. O at 000427.) Under Respondent's premise that the law could be "applied to all registered sex offenders, regardless of date of offense, conviction or release on parole," Respondent should be enforcing the residency restriction against all 67,000 of the State's registrants. (Return at 24.) However, Respondent has "*elected* to enforce the section as to those sex offenders who have been incarcerated and then were released on parole after Jessica's law went into effect." [9] (*Id.* at 24-25 (emphasis added).) Respondent admits to enforcing this restriction against only 4,435 registrants, a small fraction of the

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[9] Respondent cites *Doe v. Schwarzenegger* (E.D. Cal. 2007) 476 F.Supp.2d 1178 to support the application of the law to those registrants released from custody after the passage of the statute. This is not a correct interpretation of *Doe*. *Doe* stated that the law "does not apply to persons convicted prior to the effective date of the statute and who were paroled, given probation, or released from incarceration prior to that date." (*Id.* at 1079, fn. 1.) The court in *Doe* ruled under Penal Code section 3 only as to persons released prior to the effective date because only such a person, and no other, was before the court. The court expressly reserved opinion about the law's effect as to anyone else, including those who were incarcerated and released on parole after Jessica's law went into effect—the every people against whom Respondent is now applying the residency restrictions. (*Id.*)

individuals it asserts that it is able to restrict. (*See* Ex. O at 000427.) This application is in direct contradiction to Respondent's articulation of the intent of the electorate. If, in fact, the electorate intended to create "predator free zones" around schools and parks by controlling the residency of all sex offenders, Respondent's selective enforcement of the statute would frustrate that intent. (Return at 29-30.)

Moreover, the lack of any clear voter intent on the subject is demonstrated by the wide disparity of positions even within the executive branch of state government. In pleadings presented to this Court in *In re Wade,* Case No. S148544, the Attorney General and the Governor took contrary positions as to how the section 3003.5(b) should be applied. The Attorney General contended that the provisions were triggered whenever a sex offender moved, no matter how old the offense, and the Governor took the position that the provisions were triggered whenever the sex offender was released from any form of custody. (*See In re Wade,* Informal Response at 15, Ex. C at 000049.) The state's own Sex Offender Management Board recently stated that this conflict within the executive branch continues. (*See* Ex. O at 000434.)

The selective enforcement of section 3003.5(b) and the executive branch's differences of opinion further demonstrate that the statutory language and legislative history are ambiguous as to who should be subject to these residency restrictions.

D. Respondent's Attempt to Rewrite Section 3003.5(b) Must Be Rejected

Acknowledging the lack of any express statutory text to support retroactive application of section 3003.5(b), Respondent asks the Court to rewrite section 3003.5(b) by stitching in individual words from other parts of the statute. (Return at 29.) Respondent isolates a few words from section 3000.07(a) and section 3004(b) (both regarding monitoring by global positioning systems) to argue that the section 3003.5(b) was intended to be enforced against registrants released from custody after the statute's enactment. (*Id.*)

However, there is nothing in the language of the SPPCA to suggest that words from the sections on GPS monitoring were to be used in determining the temporal scope of the residency restrictions in section 3003.5(b). Respondent's attempt to write parts of sections 3000.07 and 3004 into section 3003.5(b) to achieve retroactivity must be rejected. (*People v. Superior* Court *(Aishman)* (1995) 10 Cal.4th 735, 740 ["[t]he judiciary ordinarily has no power to insert in a statute an element the Legislature has omitted"].)

III. THE RESIDENCY RESTRICTION VIOLATES THE EX POST FACTO CLAUSE

Section 3003.5(b) violates the ex post facto clause of the Constitution because it makes punishment for registrants significantly more

burdensome after the commission of their underlying registerable offense. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42 ["any statute which . . . makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto"]; *Weaver v. Graham* (1981) 450 U.S. 24, 29-30; *Johnson v. United States* (2000) 529 U.S. 694, 699.)

Respondent errs by analyzing the residency restriction in the same way as laws regarding civil commitment and registration of sexually violent predators are analyzed — i.e., as a non-punitive, regulatory measure. (Return at 44-45, 48-89.) Section 3003.5(b) does not merely require registration and publication of the offender's whereabouts, it puts violators in the regular mainline prisons with other felons, not in any type of civil commitment facility. Section 3003.5(b) is therefore unlike the civil commitment schemes upheld in *Kansas v. Hendricks* (1997) 521 U.S. 346 [civil commitment in a psychiatric treatment program]; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 [same], and *Smith v. Doe* (2003) 538 U.S. 84 [registration]. Respondent does not (nor can he) deny that the effect of the policy challenged here is to send people to prison. Respondent is not enforcing section 3003.5(b) through civil injunctions. This is simply not a civil regulatory scheme.

Respondent argues at length that the voters did not intend for the SPPCA to punish. (Return at 43-48.) Respondent is wrong -- the voters'

intent is clearly to punish.[10] (*See* Petition at 39-40.) Even so, it is in fact beside the point where, as here, the effect of the residency notification is clearly punitive. (*Lynce v. Mathis* (1997) 519 U.S. 433, 442 [warning against placing an "undue emphasis on the legislature's subjective intent . . . rather than on the consequences of [the statute]"].) As it is applied, the sanction this residency restriction imposes upon violators is imprisonment. (Ex. P at 000590.) Imprisonment is paradigmatic punishment. Indeed, it is difficult to imagine an effect more punitive than the effect section 3003.5(b) has had on the hundreds of non-compliant registrants who are now in prison as a result of violating it. (*See* Ex. O at 000495.)

There is extensive case law to support the commonsensical proposition that laws which have the effect of putting a person in prison are punitive. (*See e.g., Lynce*, 519 U.S. at 446-447; *In re Griffin* (1965) 63 Cal.2d 757, 760-761.) But more specifically, both the U.S. Supreme Court and this Court have held that laws, which are applied retroactively to parolees and result in their re-arrest (when the laws existing at the time of their convictions would have allowed them to be on parole), violate the ex post facto clause. (*Lynce*, 519 U.S. at 446-447.) In *Lynce* the Supreme Court held that a statute which retroactively cancelled early release credits, with the result that a parolee had to return to prison, violated the Ex Post

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[10] Indeed, the voters' intent is highlighted by the placement of section 3003.5(b) in the Penal Code. (*Smith v. Doe,* 538 U.S. at 94 ["the manner of [a statute's] codification... [is]

Facto Clause. (*Id.*) The *Lynce* Court warned against placing too much emphasis on the *intent* of the legislature where the *effect* of the law was to re-arrest the parolee, noting that "the ...statute has unquestionably disadvantaged petitioner because it resulted in his re-arrest and prolonged imprisonment." (*Id.*)

Similarly, this Court held in *In re Griffin,* 63 Cal.2d at 761, that a statute that had the effect of extending a parolee's term violated the Ex Post Facto Clause when applied retroactively. Indeed, a long line of California cases hold that retroactively extending parole is punitive and thus violates the ex post facto law. (*See e.g., In re Thomson* (1980) 104 Cal.App.3d 950, 954 [where "the amendment to the statute extends the time on parole for two additional possible years . . . [i]t is the purest sophistry to argue there is no increase in punishment"]; *In re Bray* (1979) 97 Cal.App.3d 506, 513-514 [holding that a statute which retroactively extended the length of petitioner's parole period was an invalid ex post facto law, even though the law became operative while petitioner was in custody for a parole violation]; *In re Harper*, 96 Cal App.3d 138, 141 [in dicta].) If the extension of parole is punitive, then imprisonment for a parole violation must *a fortiori* also be punishment.

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probative of the legislature's intent."]; *see also In re Alva* (2004) 33 Cal.4th 254, 275 [noting that placement of a statute in the Penal Code is relevant in determining legislative intent].)

Since the effect of violating section 3003.5(b) is the severest form of punishment a society can impose on an individual, besides death, and since this severe punishment is imposed on those who committed an offense prior to the statute's enactment, this law is ex post facto.

IV. SECTION 3003.5(B) IS IMPERMISSIBLY VAGUE AND VIOLATES THE DUE PROCESS RIGHTS OF ALL PAROLEES SUBJECT TO THE RESIDENCY RESTRICTION

A statute is unconstitutionally vague when it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*Grayned v. City of Rockford* (1972) 408 U.S. 104,108-109.) Section 3003.5(b) is vague in two significant ways: (1) with respect to the determination of whether the place where an individual currently resides is compliant, and (2) with respect to which areas an individual could move in order to come into compliance. Because the prohibited areas are so vaguely defined, the statute provides Petitioners with no notice of where they might move in order to avoid going to prison if this Court were to lift the current stay.

Respondent relies upon *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, for the proposition that the Petitioners "cannot complain of the vagueness of a statute if the conduct with which they are charged falls clearly within its bounds." (*Id.* at 765 [quoting *Bowland v. Municipal Court* (1976)18 Cal.3d 479].) However, unlike the disputed terms or conduct in

Cranston, the vagueness of the disputed terms in section 3003.5(b) is not remedied by reference to any California authority and enables arbitrary and *ad hoc* enforcement that is not in accord with the legislative intent.

Respondent also relies upon a number of non-controlling and readily distinguishable cases to support the argument that the language of section 3003.5(b) is not vague. The restrictions at issue in *United States v. Paul* (5th Cir. 2001) 274 F.3d 155, *State v. Simonetto* (Ct.App. 1999) 232 Wis.2d 315, *People v. Delvalle* (1994) 26 Cal.App.4th 869, and *Leach v. State of Texas* (Tex. App. 2005) 170 S.W.3d 669, concern conditions of parole, probation or community supervision specifically addressed to individual parolees rather than a statutory scheme whose implementation statewide has resulted in arbitrary enforcement.

Contrary to Respondent's assertion, the Petitioners plainly demonstrate that the law is vague as applied to them. Petitioners' claims of vagueness are not based upon "hypothetical situations," but upon actual *ad hoc* and subjective determinations by parole agents. For example, after receiving notice of the housing restriction, Parolee K.T. found a residence that he believed to be further than 2000 feet away from a "school or a park where children regularly gather." (Declaration of K.T., at DECS009.) K.T.'s agent checked it on his GPS and initially approved the new residence. (*Id.*) Subsequently, however, the agent's supervisor determined that the proposed location was too close to a beach and that, in the agent's

opinion, a beach is considered a "park" within the meaning of the law. (*Id.*) The statute provides no notice to parolees that a beach is within the purview of the restrictions. This is a classic instance of a statute that delegates the most basic decisions about what is and is not illegal to local law enforcement. (*See Kolender v. Lawson* (1983) 461 U.S. 352, 358.)

In San Francisco County, Respondent's parole agents told Petitioner E.J. that "AT&T Park," the San Francisco Giants baseball stadium, is not a park where children gather. Petitioner E.J. was informed by his parole agent that if he could find housing near the stadium but not near schools or parks (as the agent defined them), then such housing would be compliant with the section 3003.5(b) residency restriction. (*See* Declaration of E.J., at DECS001.) In San Diego County, however, Respondent's parole agents have been enforcing the restriction to apply to any parolees living within 2000 feet of "Petco Park," the San Diego Padres baseball stadium. (*See* Declaration of J.S., at DECS007.) Indeed, Petitioner J.S.'s parole agent informed him that this law prohibited J.S. from living within 2000 feet of anything that is called a "park," baseball stadiums included. (*Id.*) The vagueness of Section 3003.5(b) leaves Petitioners unable to predict what locations will be acceptable, because the most basic decisions are delegated to the individual parole agent.

The impermissibly *ad hoc* and subjective application of this residency restriction is further revealed by M.M., J.T., and D.B.'s

experiences. Prior to his being paroled on an auto theft conviction, M.M. was informed that he would not be permitted to live with his mother because she lived too close to a school and that he would have to move to a hotel in downtown San Diego. (Declaration of M.M. at DECS019.) M.M. moved into the hotel where he had been told by DAPO he had to live. (*Id.*) Months later, he was informed by his parole agent that even this residence was not compliant because of its proximity to Petco Park. (*Id.*) M.M.'s experience demonstrates that, without explicit standards set forth in the statute, parole agents do not have a clear sense of what conduct is prohibited by the statute.

Respondent suggests that CDCR's enforcement of the 2000 foot restriction by measuring the distance "as the crow flies" is not vague. (*See* Return at 52.) Respondent is mistaken. Section 3003.5(b) provides neither parolees nor their agents sufficient notice of which locations might be compliant. Petitioner S.P., for example, searched for new housing and identified several possible apartments that he believed would be compliant with these restrictions based on information from Google Maps. (*See* Declaration of S.P., at DECS003.) However, his agent informed him that these locations were not compliant due to his measurement of the distance "as the crow flies." (*Id.*) Section 3003.5(b) is void for vagueness as applied to S.P.

Like Petitioner S.P., parolee J.T. was informed that his housing was not compliant with section 3003.5(b) based upon the parole agent's measurements "as the crow flies." (*See* Declaration of J.T., at DECS021.) J.T.'s agent believed that an open space wilderness preserve, without any playground or play structures such as swings or slides, located within 2000 feet of J.T.'s residence if the distance is measured "as the crow flies," rendered J.T.'s home noncompliant. (*Id.*) J.T.'s agent also believed that the dirt patch across the street from J.T.'s residence, which contained a few shrubs and concrete walkways and did not have any play structures, rendered J.T.'s home non-compliant with the 2000 foot restriction. (*Id.* at DECS021-22.)

When, in practice, ballparks are interpreted by some law enforcement agents but not by others as "a park where children regularly gather" under section 3003.5(b), and when areas where there is no evidence that children gather are considered parks "where children gather," it is clear that the vagueness of this provision promotes *ad hoc* and subjective enforcement.

In addition, because section 3003.5(b) does not provide a definition of "school," D.B.'s parole agent has enforced this provision against him in an arbitrary fashion. D.B., who lives in Fremont, has been searching for permanent compliant housing where he can live with his wife and son. (Declaration of D.B., at DECS023.) D.B. recently identified an available

townhouse that he believed was located beyond 2000 feet from a school or park where children gather. (*Id.*) When informed of the possible site of relocation, D.B.'s agent stated that the townhouse was not compliant because it was within 2000 feet of a local community college. (*Id.* at DECS023-24.) The agent suggested that because there might be high school students attending courses at the college, the townhouse's proximity to the college meant that it was not compliant. (*Id.* at DECS024.) D.B.'s example further demonstrates the vagueness of this statute.

Furthermore, the provision is vague in several other respects. First, the provision does not indicate from where the distance measurements should be taken with respect to a "park where children regularly gather." In its report on problems with the SPPCA, the Sex Offender Management Board focused on, among other things, the vagueness of section 3003.5(b)'s use of the term "park where children regularly gather." (*See* Ex. O at 000503.) The Board stated that the term "park where children gather" is not defined by the initiative and "[i]t is unclear if this term refers to the entire grounds of a park (sizeable portions in which children may not routinely gather) or the portion (such as location where a play structure is located) where children are intended to be present." (*Id.*; *see also* Sex Offenders Wander S.J., [quoting a spokeman for the State Attorney General's Office of saying that "the law as written is not clear on whether a motel room is considered a single-family dwelling"].) Without this

information, parole agents are left to arbitrarily determine from which points the 2000 foot boundary is to be measured.

V. AN INJUNCTION BARRING ENFORCEMENT OF DAPO POLICY NO. 07-36, AND ANY SIMILAR POLICY USING THE THREAT OF IMPRISONMENT TO ENFORCE SECTION 3003.5(B) IS NARROWLY TAILORED TO REMEDY THE INFIRMITIES OF THE STATUTE

An injunction barring the use of imprisonment to enforce section 3003.5(b) against Petitioners and all other Section 290 registrants on parole is not too broad and is the minimum relief necessary to remedy the statutory and constitutional violations. Petitioners and all other section 290 registrant parolees are identically harmed by the unreasonableness of a parole condition that restricts permitted residences without regard to any individual case factors or risks of harm to children and the public, and employs a return to prison as a sanction for not being able to find compliant housing. Petitioners are similarly situated with all other Section 290 registrant parolees whose registerable offenses pre-date November 8, 2006, with regard to the infirmities of section 3003.5(b) under Penal Code Section 3 (non-retroactivity) and under the prohibition against ex post facto laws. Petitioners and all other Section 290 registrant parolees are identically harmed by the vagueness of the statute, in that none can know what locations are allowable for them to relocate.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant Petitioners Writ of Habeas Corpus and enjoin Respondent from enforcing Penal Code Section 3003.5(b) as a parole condition against Petitioners and all those similarly situated.

Dated: March 11, 2008

Respectfully submitted,

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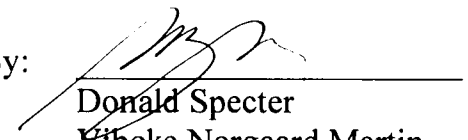
By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word software, this brief contains 11,421 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 11, 2008.

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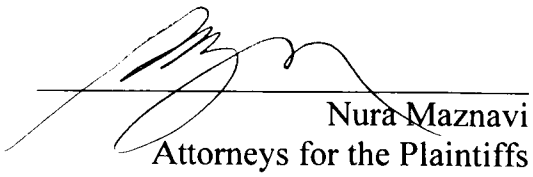

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