ORIGINAL

S156933/S157631/S157633/S157634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

S157631/S157633/S157634

FILED

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Frederick K. Ohlrich Clerk

Deputy

RETURN TO THE PETITION FOR WRIT OF HABEAS CORPUS;
CONSOLIDATED MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF RETURN AND ANSWER TO
AMICUS BRIEF

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S156933/S157631/S157633/S157634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re E.J., S.P., J.S., K.T.,	)
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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208 & 8.490)

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(d)(3)).

Date: February 11, 2008

MENNEMEIER, GLASSMAN & STROUD LLP
KENNETH C. MENNEMEIER
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Kenneth C. Mennemeier

Kenneth C. Mennemeier, Attorneys for Respondent James Tilton in his capacity as Secretary of the California Department of Corrections and Rehabilitation

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INTRODUCTION

This return is filed on behalf of respondent James Tilton, in his capacity as the Secretary of the California Department of Corrections and Rehabilitation ("CDCR" or the "Department"). In this Return, pursuant to Penal Code section 1480 and *People v. Duvall*, 9 Cal. 4th 464, 475-76 (1995), the Department both alleges facts relevant to a determination of the issues presented by the Petition and responds to the allegations of the Petition. In the attached Memorandum of Points and Authorities (commencing at page 15), the Department responds to both (1) the Petition for Writ of Habeas Corpus, and (2) the amicus brief filed on behalf of Renee Baum, as trustee of the S. Intervivos Trust, and W.J.S.[1]

FACTUAL ALLEGATIONS RELEVANT TO THESE PROCEEDINGS

Jessica's Law

1. On November 7, 2006, the People of the State of California approved Proposition 83, enacting the "Sexual Predator

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[1] On December 12, 2007, the Court issued Orders to Show Cause in Case Nos. S156933, S157631, S157633, and S157634, directing the Department to show cause why petitioners are not entitled to the relief requested. On February 1, 2008, the Court issued an order authorizing the Department to consolidate its answer to the amicus brief with its return to the Petitions for Writ of Habeas Corpus.

Punishment and Control Act: Jessica's Law" (referred to herein as the "SPPCA" or as "Jessica's Law."

2. One of the provisions of Jessica's Law is a residency restriction, codified at section 3003.5(b) of the Penal Code. That provision prohibits registered sex offenders from residing within 2,000 feet of a school or park where children regularly gather.

The Department's Implementation of Penal Code Section 3003.5(b)

3. CDCR has taken various steps to implement the residency restriction set forth in California Penal Code section 3003.5(b).

4. To that end, CDCR provided parole units with a list of registered sex offenders released to parole on or after the effective date of Jessica's Law who appeared to be non-compliant with section 3003.5(b).

5. CDCR directed parole agents to make an official determination of whether the listed parolees were in fact residing within the 2,000-foot limit. Specifically, CDCR directed parole agents to use handheld GPS devices to measure the distance between the primary entrance of the parolee's residence and the exterior boundary of the affected park or school.

Application of the Residency Restriction to Petitioners

6. Utilizing these procedures, CDCR determined that each of the Petitioners was not compliant with the SPPCA's residency restriction. Specifically, E.J.'s residence is within 2,000 feet of a park containing a playground and after-school recreational facilities; S.P.'s residence is within 2,000 feet of a child care center; J.S.'s residence is within 2,000 feet of an elementary school; and K.T.'s residence is within 2,000 feet of an elementary school.

Facts Relating to Petitioner E.J.

7. Petitioner E.J. was convicted in 1986 of a felony violation of Penal Code section 261(2) (rape accomplished by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury) and former Penal Code section 213.5(2) (robbery of an inhabited dwelling or trailer). He was incarcerated for those offenses.

8. In 1993, E.J. was convicted of violating Penal Code section 273a(b) (willful cruelty to a child) and Penal Code section 212.5 (second degree robbery). He was sentenced to two years in prison.

9. In 2000, he suffered additional convictions for violating Penal Code section 242 (battery) and Health and Safety Code section 11364 (possession of drug paraphernalia).

10. Because of his rape conviction, E.J. was subject to the registration requirements of Penal Code section 290. In May 2004, he was convicted for failing to register under Penal Code section 290(g), sentenced to prison, and released on parole in August 2005.

11. Since then, E.J.'s parole has been revoked seven times. On three occasions, he was re-incarcerated. On the other occasions he was continued on parole. His last release to parole was on February 5, 2007.

Facts Relating to Petitioner S.P.

12. Petitioner S.P. was convicted in 1998 of a felony count under Penal Code section 261(a)(3) (rape where victim is prevented from resisting by reason of intoxication or controlled substance). He was incarcerated and released on parole in August 2001.

13. In early 2002, S.P. was charged with several felonies and ultimately, in February 2003, was convicted of a felony violation of Penal Code 496(a) (knowingly receiving or concealing stolen property). He was sentenced to prison and released on parole in August 2006.

14. In March 2007, S.P. violated parole by being in possession of alcohol. This arose from a citation for driving the wrong way on a one-way street and having an open container in his vehicle, charges to which he pled no contest. He was incarcerated and re-released on parole on March 22, 2007.

Facts Relating to Petitioner J.S.

15. Petitioner J.S. was convicted in 1985 of violating section 21.08 of the Texas Penal Code, which states: "A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act." Because of this conviction, he is required to register as a sex offender in California under Penal Code section 290(a)(2)(D).

16. Since coming to California, J.S. has been convicted of the following offenses: (1) a conviction under Penal Code section 417(a)(1) (exhibiting or using a deadly weapon) in 1990; (2) a conviction under Penal Code section 192(a) (voluntary manslaughter) in 1991; (3) two convictions under Penal Code section 243(e)(1) (battery against a current or former spouse, fiancee or co-habitant) in 1999 and 2000; and (4) a conviction under Penal Code section 273.5(a) (willful infliction of corporal injury on spouse or roommate resulting in a traumatic condition) in 2000.

17. Following this last conviction and prison term, J.S. was released on parole in 2006. In February 2007, his parole was revoked for failing to register under section 290. He was re-incarcerated and then re-released on parole in May 2007.

Facts Relating to Petitioner K.T.

18. In 1990, petitioner K.T. was convicted of one felony violation of Penal Code section 261(2) (rape accomplished by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury) and one felony violation of Penal Code section 288a(c)(2) (oral copulation against victim's will accomplished by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury). These offenses involved a Penal Code section 12022.3(a) allegation of use of a firearm or deadly weapon in the commission of the crime. K.T. was sentenced to state prison and released in 1995.

19. In 2001, K.T. was convicted of felony grand theft, returned to prison, and was released on parole on 2006.

20. Because of his convictions for rape and forcible oral copulation, K.T. was subject to Penal Code section 290. In July 2007, K.T.'s parole was revoked for failure to register, and he was re-incarcerated. He was re-released on parole on September 3, 2007.

ITEMIZED RESPONSE TO PETITIONERS' ALLEGATIONS

21. Paragraph 1 of the Petition merely states the nature of the relief that Petitioners seek. It does not contain any factual allegations, and therefore does not require a response.

22. In response to the allegations of Paragraph 2 of the Petition, the Department acknowledges that Proposition 83 became effective on November 8, 2006, and that the Department has taken steps to enforce the residency restriction set forth therein. That residency restriction is codified at Penal Code section 3003.5(b). Section 3003.5(b) provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." The Department also acknowledges that it has informed Section 290 registrants (i.e., persons required to register pursuant to section 290 of the Penal Code) released on parole after Proposition 83's effective date that they must comply with section 3003.5(b) of the Penal Code, and that failure to comply with that statute could result in arrest and revocation of parole. The Department lacks sufficient information to respond to Petitioners' allegations regarding the "practical effect" of the Department's enforcement of the residency restriction, and on that basis denies those allegations.

23. Paragraph 3 of the Petition simply restates Petitioners' position and the legal arguments that they seek to raise. It does not contain any factual allegations, and therefore does not require a response.

24. The Department does not dispute the factual allegation in Paragraph 4 regarding petitioner E.J.'s county of residence.

25. The Department does not dispute the factual allegation in Paragraph 5 regarding petitioner S.P.'s county of residence.

26. The Department does not dispute the factual allegation in Paragraph 6 regarding petitioner K.T.'s county of residence.

27. The Department does not dispute the factual allegation in Paragraph 7 regarding petitioner J.S.'s county of residence. The Department does not have sufficient information to respond to the allegation about petitioner J.S.'s present living arrangements, and on that basis denies that allegation.

28. The Department does not dispute the factual allegations in Paragraph 8 of the Petition.

29. In response to the allegations in Paragraph 9 of the Petition, the Department agrees that Proposition 83 was passed by the voters on November 7, 2006. The Department agrees that one of the provisions that Proposition 83 added to the Penal Code was Section 3003.5(b), which provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or

park where children regularly gather." The Department agrees, as Petitioners allege in Paragraph 9 of the Petition, that "the purpose of the law was to protect children from registered sex offenders."

30. In response to the allegations of Paragraph 10 of the Petition, the Department admits that, on August 17, 2007, it issued Policy No. 07-36, and that Policy No. 07-36 relates to the Department's enforcement of the residency restriction set forth in section 3003.5(b) of the Penal Code. The Department also admits that its policy is to apply the residency restriction to all Section 290 registrant parolees who are released from incarceration on or after November 8, 2006.

31. In response to the allegations of Paragraph 11 of the Petition, the Department notes that the allegations of Paragraph 11 simply paraphrase the contents of Policy No. 07-36. In that regard, the Department responds that Policy No. 07-36 speaks for itself.

32. In response to the allegations of Paragraph 12 of the Petition, the Department notes that paragraph 12 simply references portions of Policy No. 07-36, and that Policy No. 07-36 speaks for itself.

33. In response to the allegations of Paragraph 13 of the Petition, the Department does not dispute the allegations therein.

34. In response to the allegations of Paragraph 14 of the Petition, the Department denies the allegation that it provides "little to no assistance to individual parolees attempting to find compliant housing"; it does provide such assistance. The Department denies the allegation that non-compliant parolees "have not been informed of areas in their counties where compliant housing may be found"; to the extent that they are aware of such, parole officers will advise parolees of areas in communities in which compliant housing is available. The Department denies the allegation that "individual parole units statewide are using different definitions as to what constitutes a 'park where children regularly gather.'" The Department has not formally adopted any "definition" of what constitutes such a "park." Instead, the Department vests discretion in its individual officers in the field to decide whether a certain space constitutes such a park, based on the officers' knowledge of those places and how they are used, paying particular attention to whether or not children regularly gather in them. The Department admits that it does not automatically grant out-of-county transfers to a parolee when the parolee has not been able to find compliant housing, because the Department is required by law to handle out-of-county transfer requests in conformity with section 3003 of the Penal Code. Penal Code section 3003, subdivision (a) requires that

parolees be returned to the county of last legal residence. Although subdivision (b) permits transfer to another county if that would be in the best interests of the public, the statute mandates evaluation of a number of factors, including (1) protection of the victim, the parolee, a witness and others, (2) public concerns that could reduce success on parole, (3) the verified existence of a work offer or training program, (4) the existence of family in another county with whom the parolee has maintained strong ties, and (5) the lack of necessary outpatient treatment programs. Penal Code section 3003(c) mandates that priority shall be given to protecting the safety of the community and any witnesses and victims. Of course, additional factors must also be considered, such as the availability of compliant housing and the availability of adequate resources in the other county to monitor the parolee. Such determinations must be made on a case by case basis. Here, petitioners have not alleged that CDCR incorrectly evaluated the foregoing factors with regard to petitioners' counties of placement. The Department admits that parolees who are in non-compliant housing are subject to arrest and parole revocation, and that some parolees who have not found compliant housing have declared themselves to be homeless rather than declaring a residence that is non-compliant.

35. In response to the allegations of Paragraph 15 of the Petition, the Department admits that each of the four Petitioners is a parolee and that each is subject to registration under section 290 of the Penal Code. The Department does not dispute any of the other allegations of Paragraph 15. The Department sets forth its own allegations regarding the particular circumstances of each of the four Petitioners above (in paragraphs 7-20).

36. In response to the allegations of Paragraph 16 of the Petition, the Department notes that it lacks sufficient information to respond to Petitioners' allegation regarding the extent to which they can find residential housing compliant with Proposition 83's residency restriction in each of their respective counties and communities, and on that basis the Department denies that allegation. The Department also notes that Petitioners do not authenticate the maps that they refer to in (and attach as Exhibit E) to their Petition, and on that basis the Department denies the allegations that Petitioners make in reliance on Exhibit E to their Petition.

37. In response to the allegations of Paragraph 17 of the Petition, the Department does not dispute the allegations of Paragraph 17, except that the Department does not have sufficient information to respond to the allegation about petitioner J.S.'s present living arrangements, and on that basis denies that allegation. The Department further responds by

indicating that it sets forth above (in paragraphs 15-17) a more detailed explanation of petitioner J.S.'s background and circumstances. In particular, the Department notes that petitioner J.S. has been in custody, and was released from custody, since Proposition 83 took effect.

38. In response to the allegations of Paragraph 18 of the Petition, the Department does not dispute the allegations of Paragraph 18, but responds further by indicating that it sets forth above (in paragraphs 18-20) a more detailed explanation of petitioner K.T.'s background and circumstances. In particular, the Department notes that petitioner K.T. has been in (and released from) custody since Proposition 83 took effect.

39. In response to the allegations of Paragraph 19 of the Petition, the Department does not dispute the allegations of Paragraph 19, but responds further by indicating that it sets forth above (in paragraphs 12-14) a more detailed explanation of petitioner S.P.'s background and circumstances. In particular, the Department notes that petitioner S.P. has been in custody, and was released from custody, since Proposition 83 took effect.

40. In response to the allegations of Paragraph 20 of the Petition, the Department responds by indicating that it does not dispute the allegations of Paragraph 20, but by also indicating that it sets forth above (in paragraphs 7-11) a more detailed explanation of petitioner E.J.'s

background and circumstances. In particular, the Department notes that petitioner E.J. has been in custody, and was released from custody, since Proposition 83 took effect.

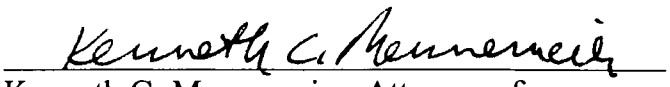
41. In response to the allegations of Paragraph 21 of the Petition, the Department responds by noting that Policy No. 07-36 speaks for itself.

42. The Department does not dispute the allegations of Paragraph 22 of the Petition.

WHEREFORE, it is respectfully submitted that the petition for writ of habeas corpus should be denied and the order to show cause should be discharged.

Date: February 11, 2008

MENNEMEIER, GLASSMAN & STROUD LLP
KENNETH C. MENNEMEIER
KELCIE M. GOSLING



Kenneth C. Mennemeier, Attorneys for Respondent James Tilton in his capacity as Secretary of the California Department of Corrections and Rehabilitation

CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RETURN AND ANSWER TO AMICUS BRIEF

INTRODUCTION

On November 7, 2006, the People of California approved Proposition 83, thereby enacting "The Sexual Predator Punishment and Control Act: Jessica's Law." Proposition 83 passed with more than seventy percent of the vote, and expressed the will of the people to protect children from sex offenders. Jessica's Law contains certain requirements to protect children, including a "residency restriction" that prohibits registered sex offenders from residing within 2,000 feet of a school or park where children regularly gather. Petitioners challenge this residency restriction, but the challenge must fail. The residency restriction is regulatory and non-punitive, and hence does not violate the *Ex Post Facto* Clause. The residency restriction is designed to protect children, not to punish the offender. And the residency restriction clearly applies to these Petitioners, who were released from incarceration after the effective date of Jessica's Law. Petitioners' other challenges also fail. Therefore, the California Department of Corrections and Rehabilitation ("CDCR") respectfully requests that the petition be denied.

STATEMENT OF FACTS

A. Jessica's Law

On November 7, 2006, by an overwhelming majority, California voters adopted Proposition 83, known as "The Sexual Predator Punishment and Control Act: Jessica's Law" ("Jessica's Law" or the "SPPCA").[2] Pursuant to the California Constitution, Jessica's Law went into effect on November 8, 2006. Cal. Const., art. 11, § 10(a).

Jessica's Law adopts measures designed to regulate convicted sex offenders upon their release from custody. At issue here is section 21 of Jessica's Law, codified at Penal Code section 3003.5(b). That statute provides:

> Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to [Penal Code] Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.[3]

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[2] The final result was 5,926,800 "yes" votes (70.5%) and 2,483,597 "no" votes (29.5%). *See* http://www.sos.ca.gov/elections/sov/2006_general/contents.htm (as of February 10, 2008).

[3] Penal Code section 290 requires anyone convicted of certain sex offenses to register for life as a sex offender. Penal Code § 290(a)(1)(A).

B. Petitioners' Criminal Histories

Each of the Petitioners has a lengthy criminal record. Their personal circumstances are as follows:

1. Petitioner E.J.

Petitioner E.J. was convicted in 1986 of a felony violation of Penal Code section 261(2) (rape accomplished by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury) and former Penal Code section 213.5 (2) (robbery of an inhabited dwelling or trailer). He was incarcerated for those offenses.

In 1993, E.J. was convicted of violating Penal Code section 273a(b) (willful cruelty to a child) and Penal Code section 212.5 (second degree robbery). He was sentenced to two years in prison. In 2000, he suffered additional convictions for violating Penal Code section 242 (battery) and Health and Safety Code section 11364 (possession of drug paraphernalia).

Because of his rape conviction, E.J. was subject to the registration requirements of Penal Code section 290. In May 2004, he was convicted for failing to register under Penal Code section 290(g), sentenced to prison, and released on parole in August 2005. Since then, his parole has been revoked seven times. On three of those revocations, he was returned

to custody. On the remaining occasions he was continued on parole. His last release to parole was on February 5, 2007.

2. Petitioner S.P.

Petitioner S.P. describes his sex offense as "arising from sexual contact among teenagers at a party." Petition for Writ of Habeas Corpus, filed October 4, 2007 ("Petition") ¶ 19. In fact, S.P. was convicted in 1998 of a felony count under Penal Code section 261(a)(3) (rape where victim is prevented from resisting by reason of intoxication or controlled substance). He was incarcerated and released on parole in August 2001.

In early 2002, S.P. was charged with several felonies and ultimately, in February 2003, was convicted of a felony violation of Penal Code 496(a) (knowingly receiving or concealing stolen property). He was sentenced to prison and released on parole in August 2006.

In March 2007, S.P. violated parole by being in possession of alcohol. This arose from a citation for driving the wrong way and having an open container in his vehicle, charges to which he pled no contest. He was incarcerated and re-released on parole on March 22, 2007.

3. Petitioner J.S.

Petitioner J.S. characterizes his sex offense as "urinating under a railroad trestle." Petition ¶ 17. In reality, J.S. was convicted in

1985 of violating section 21.08 of the Texas Penal Code, which states: "A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act." Because of this conviction, he is required to register as a sex offender in California under Penal Code section 290(a)(2)(D)(I).

Since coming to California, J.S. has had an extensive criminal career, including the following convictions: (1) a conviction under Penal Code section 417(a)(1) (exhibiting or using a deadly weapon) in 1990; (2) a conviction under Penal Code section 192(a) (voluntary manslaughter) in 1991; (3) two convictions under Penal Code section 243(e)(1) (battery against a current or former spouse, fiancee or co-habitant) in 1999 and 2000; and (4) a conviction under Penal Code section 273.5(a) (willful infliction of corporal injury on spouse or roommate resulting in a traumatic condition) in 2000.

Following this last conviction and prison term, J.S. was released on parole in 2006. In February 2007, his parole was revoked for failing to register under section 290. He was re-incarcerated and then re-released in May 2007.

4. Petitioner K.T.

Petitioner K.T. characterizes his sex offense as an "initially consensual encounter" which resulted in the victim accusing him of "forcing her to have sex with me." Declarations of E.J., S.P., J.S. and K.T to Be Filed Under Seal at DEC 010, ¶ 14. In reality, in 1990, K.T. was convicted of one felony violation of Penal Code section 261(2) (rape accomplished by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury) and one felony violation of Penal Code section 288a(c)(2) (oral copulation against victim's will accomplished by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury). These offenses involved a Penal Code section 12022.3(a) allegation of use of a firearm or deadly weapon in the commission of the crime. K.T. was sentenced to state prison and released in 1995.

In 2001, K.T. was convicted of felony grand theft, returned to prison, and was released on parole on 2006.

Because of his convictions for rape and forcible oral copulation, K.T. was subject to Penal Code section 290. In July 2007, K.T.'s parole was revoked for failure to register, and he was re-incarcerated. He was re-released on parole on September 3, 2007.

C. Implementation of Jessica's Law

On November 8, 2006, Jessica's Law took effect. Since then, the California Department of Corrections and Rehabilitation ("CDCR") has taken steps to implement the SPPCA's residency restrictions.

To that end, CDCR provided parole units with a list, updated weekly, of registered sex offenders released to parole on or after the effective date of Jessica's Law who appeared to be non-compliant with section 3003.5(b). *See* Petition, Exh. B (Department of Corrections and Rehabilitation Memorandum Re: Implementation of Proposition 83, aka Jessica's Law, dated August 17, 2007), at 000020. To ensure that this determination was accurate, CDCR directed parole agents to make an official determination of whether the listed parolees were in fact residing within the 2,000-foot limit. *Id.* Specifically, CDCR directed parole agents to use handheld GPS devices to measure the distance between the primary entrance of the parolee's residence and the exterior boundary of the affected park or school. *Id.* at 000025.

Utilizing these procedures, CDCR determined that Petitioners were not compliant with the SPPCA's residency restriction. Specifically, E.J.'s residence is within 2,000 feet of a park containing a playground and after-school recreational facilities; S.P.'s residence is within 2,000 feet of a

child care center; J.S.'s residence is within 2,000 feet of an elementary school; and K.T.'s residence is within 2,000 feet of an elementary school.

As a mechanism for notifying parolees of the need to comply with section 3003.5(b), CDCR directed that affected parolees be served with a "Modified Condition of Parole Addendum" ("MCOPA") and/or "Notice to Comply." Petition, Exh. B at 000033-000034. The MCOPA advised parolees that section 3003.5(b) applies to them, adding: "The 2000 foot restriction is a matter of law and will not expire upon completion of your parole period." *Id.* at 000033. Similarly, the Notice to Comply advised affected parolees of the terms of section 3003.5(b) and gave them forty-five days to comply with the residency restriction. *Id.* at 000034.

STATEMENT OF THE CASE

On October 4, 2007, Petitioners filed this petition, naming as respondent James Tilton in his official capacity as Secretary of CDCR. Petition ¶ 8. Petitioners claim that, as a threshold matter, section 3003.5(b) does not apply to them because they committed their sex crimes before Jessica's Law was enacted. Petitioners further claim that section 3003.5(b) represents an "unreasonable parole condition" and impinges on their due process rights under the federal and California constitutions. Furthermore,

Petitioners claim that the residency restriction violates the *Ex Post Facto Clause* and is void for vagueness.

The day after filing their petition, Petitioners filed an application for stay. On October 10, 2007, this Court issued an order staying enforcement of the residency restriction as to Petitioners pending the Court's determination of the petition. On December 12, 2007, the Court ordered CDCR to show cause why Petitioners are not entitled to the requested relief.

On or about January 8, 2007, Renee Baum, Esq., as trustee of the S. Intervivos Trust, and W.J.S. filed an Application to File Amicus Brief and Amicus Brief in Support of Petition for Writ of Habeas Corpus ("Amicus Brief"). The Court granted the application to file an amicus brief and, on February 1, 2008, ordered that CDCR could consolidate its answer to the amicus brief with its return to the order to show cause.

ARGUMENT

A. The Residency Restriction Applies to Petitioners, All of Whom Were Released from Incarceration After Jessica's Law Went into Effect

1. The Language and History of Section 3003.5(b) Reflect the Voters' Intent to Apply the Residency Restriction to Registered Sex Offenders in Petitioners' Circumstances

Petitioners argue that the SPPCA's residency restriction may not be applied to them because their "section 290 offenses occurred years before November 8, 2006," the date when the SPPCA went into effect. Petition at 36. According to Petitioners, "[t]his is an impermissible retroactive application of a statute that is silent as to retroactivity," and therefore violates Penal Code section 3. *Id.* at 35, 36. Amicus makes the same claim. Amicus Brief at 14-20. This argument – which would exempt from Jessica's Law the tens of thousands of currently convicted sex offenders who seemed to have been the very focus of the ballot initiative – finds no support in either the statute itself or this Court's authorities.

Section 3003.5(b) provides that "it is unlawful for any person for whom registration is required . . . to reside within 2000 feet of any [school or park]." Penal Code § 3003.5(b). While this arguably suggests that the residency restriction could be applied to all registered sex offenders, regardless of date of offense, conviction, or release on parole, CDCR 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.[4] This approach is entirely consistent with California law.

This Court addressed a similar issue of statutory construction in *People v. Ansell*, 25 Cal. 4th 868 (2001). That case concerned California Penal Code section 4852.01(d), adopted in 1998, which made persons convicted of specified sex offenses ineligible for a certificate of rehabilitation. Until then, convicted sex offenders, like other felons, could apply to the superior court and, upon a sufficient showing of rehabilitation, obtain a certificate of rehabilitation leading to a full pardon by the Governor. This had the effect of restoring certain civil rights and privileges that the offender had lost by virtue of the conviction. But Penal Code section 4852.01(d) removed this option for certain sex offenders, providing that the certificate of rehabilitation procedure "shall not apply to persons convicted of" specified sex crimes. Defendant Ansell, who was convicted of a sex offense in 1980, released from incarceration in 1983, and completed probation in 1988, applied for a certificate of rehabilitation,

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[4] For this reason, CDCR has not applied the residency restriction to persons who were not incarcerated as of the date Jessica's Law was enacted, unless they are re-incarcerated after that date. *See Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178 (E.D. Cal. 2007).

which was denied pursuant to the newly-enacted statute. He challenged the statute on *ex post facto* grounds.

Before rejecting the *ex post facto* challenge, a unanimous Court determined that, under the plain language of the statute, it applied to Ansell "even though he committed his crimes and allegedly reformed before the amended statute took effect." *Ansell*, 25 Cal 4th at 880. The Court first noted that the statute referred broadly to "persons convicted of" violating sex crime statutes. *Id.* at 881. The Court stated: "This language is unqualified, and its meaning is plain." *Id.* "To hold that the amendment does not apply based on the age of the underlying crimes or for some other reason, we would have to engraft onto section 4852.01(d) exceptions and limitations that find no support in its literal terms." *Id.* The Court stated: "We decline to rewrite the statute or to artificially restrict its scope." *Id.*

The Court also noted that the statute's legislative history suggested "an intent to immediately affect the broadest possible range of cases." *Id.* at 881. Specifically, the Court relied on legislative committee reports stating that, based on "high recidivism rates," persons convicted of the enumerated sex crimes remained "a threat to the public long after their crimes are committed and any sentence is served." *Id.* The Court concluded that, in light of these concerns, "the Legislature must have

intended to bar persons convicted for the targeted sex crimes from receiving certificates of rehabilitation under [the statute] as soon as it took effect." *Id.* at 882. The Court noted that "[a] contrary construction would prolong the risk to the public of granting such certificates to convicted sex offenders who had not genuinely reformed . . . ." *Id.* The Court posed a hypothetical about the consequences of such a construction:

> For instance, if [the statute] were found to apply only to qualifying sex crimes committed after its January 1, 1998, effective date, the statute would have no effect until the perpetrator of a post-1997 crime had been convicted, served his sentence, completed a lengthy period of rehabilitation, and sought relief under the statutory scheme.

Id. The Court concluded: "Such a construction would effectively delay implementation of the statute for many years after its enactment. We cannot conceive that the Legislature intended to postpone and frustrate [the statute's] aims in this manner." *Id.* at 882-83.

In holding that the statute applied to all persons convicted of certain sex crimes, regardless of the date of offense, the Court acknowledged that California Penal Code section 3 states: "No part of [the Penal Code] is retroactive, unless expressly so declared." *Id.* at 883 n.21. The Court reasoned: "Although the statute speaks in terms of an 'express' legislative declaration, case law makes clear that section 3 is satisfied, and

'retroactive' application may be found, where there is 'a clear and compelling *implication*' that the Legislature intended such a result." *Id.* at 883 n.21 (emphasis in original). The Court therefore held that "the language and history of [the statute] provide the necessary 'clear and compelling implication' that the statute was intended to apply in this manner." *Id.*

The Court reached a similar result in *People v. Alford*, 42 Cal. 4th 749 (2007). That case concerned Penal Code section 1465.8, which imposed a $20 court security fee on persons upon their conviction of certain offenses. Like Petitioners here, defendant claimed that the statute could not be applied to him under Penal Code section 3 because his criminal conduct occurred before the statute went into effect and contained no express declaration as to retroactivity. This Court disagreed with this interpretation of Penal Code section 3, stating: "As its own language makes clear, section 3 is not intended to be a 'straitjacket.'" *Id.* at 753. The Court explained that, "[w]here the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent." *Id.* (quoting *In re Estrada*, 63 Cal. 2d 740, 746 (1965)). On the contrary, Penal Code section 3 "is to be applied only after, considering all pertinent

factors, it is determined that it is impossible to ascertain the legislative intent." *Id.*; *see also Myers v. Phillip Morris Cos., Inc.*, 28 Cal. 4th 828, 843 (2002) ("no talismanic word or phrase is required to establish retroactivity"). The Court then examined the legislative history and determined that the Legislature intended to apply it to persons in defendant's situation regardless of the date of offense.

This case is even stronger, as both the language and legislative history reflect the California electorate's intent to apply the residency restriction to registered sex offenders without regard to when their sex crimes occurred. Penal Code section 3003.5(b) refers to "any person for whom registration is required," while sections 3000.07(a) and 3004(b) refer to any "inmate" who committed certain sex crimes, was incarcerated and "released on parole." Nothing in this plain statutory language suggests that the statute's application depends "on the age of the underlying crimes." *Ansell*, 25 Cal. 4th at 881. Petitioners' demand that the Court engraft this limitation onto Jessica's Law is therefore unwarranted.

The voter ballot materials for Proposition 83 further demonstrate that California voters did not want to limit the residency restriction only to persons who committed sex crimes after the statute's enactment. On the contrary, the proponents of Jessica's Law noted that the

restriction would "[c]reate PREDATOR FREE ZONES *around schools and parks* to prevent sex offenders from living near where our children learn and play." Petition, Ex. A at 000005 (Proposition 83 Official Title and Summary, Argument in Favor of Proposition 83). *See also* Ex. A at 000003 (using the present tense to inform voters that "[t]his measure *bars* any person required to register as a sex offender from living within 2,000 feet . . . of any school or park"). Applying this Court's hypothetical from *Ansell*, if the residency restriction applied only to sex offenders who committed their crimes after November 7, 2006, the date Jessica's Law was adopted, the statute would have no effect until an offender committed a sex crime, was convicted, and served his sentence. This construction would effectively delay implementation of Jessica's Law for years. The California voters cannot have intended to postpone and frustrate the goals of Jessica's Law in this manner. *See Davis v. City of Berkeley*, 51 Cal. 3d 227, 234 (1990) (when construing a statute enacted by voter initiative, "the intent of the voters is the paramount consideration").

In arguing that Jessica's Law does not apply to them, Petitioners rely on this Court's earlier decisions in *Tapia v. Superior Court*, 53 Cal. 3d 282 (1991), and *People v. Grant*, 20 Cal. 4th 150 (1999), as well as a court of appeal decision, *In re Chavez*, 114 Cal. App. 4th 989 (2004).

The first two decisions are distinguishable, while the third supports CDCR's position.

In *Tapia*, the Court considered Proposition 115, the "Crime Victims Justice Reform Act." The Court found that "[b]oth the text of Proposition 115 and the related ballot arguments are entirely silent on the question of retrospectivity." *Tapia*, 53 Cal. 3d at 287. The Court thus saw "no reason to depart from the ordinary rule of construction that new statutes are intended to operate prospectively." *Id.* Similarly, in *Grant*, the Court found that nothing in Penal Code section 288.5 declared that the statute was retroactive, "nor has our attention been directed to any other evidence of a legislative intent that the section operate retroactively." *Grant*, 20 Cal. 4th at 157. As to the court of appeal's decision in *Chavez*, there the court found that, although a statute lacked an express declaration of retroactivity, the statutory history indicated that the Legislature intended to apply it retroactively. *Chavez*, 114 Cal. App. at 997.

Here, again, *both* the language and history of Penal Code section 3003.5(b) reflect the voters' intent to apply it to sex offenders whose crimes pre-date its enactment. There is no indication that voters intended to exempt sex offenders such as Petitioners based on the date they

committed their crimes. To adopt such an exemption would ignore the statute's express language as well as the will of the electorate.

Amicus relies on *Bourquez v. Superior Court*, 156 Cal. App. 4th 1275, 1288 (2007), in which the court of appeal opined in *dicta* that "Proposition 83 is entirely silent on the question of retroactivity, so we presume it is intended to operate only prospectively." But *Bourquez* addresses an entirely different section of Jessica's Law, and examines neither the language of Penal Code section 3003.5(b) nor the ballot materials arguing for the creation of "predator free zones." It is therefore not dispositive here.

Petitioners in *Bourquez* had been sentenced to two-year involuntary commitment terms under Welfare and Institutions Code section 6604, part of the Sexually Violent Predator Act (SVPA). At that time, the statute required the government to institute new proceedings every two years to extend petitioners' commitment terms by proving that they were still dangerous. While such proceedings were pending with respect to petitioners, Jessica's Law was enacted. Section 27 of Jessica's Law amended Welfare & Institutions Code section 6604 to provide for indefinite commitment terms, and correspondingly deleted all references to proceedings to extend commitments, as they were no longer necessary.

Petitioners claimed that, absent statutory authority to extend their commitments, they must be released at the end of their two-year terms. Alternatively, petitioners argued that, if re-commitment proceedings took place, their commitments could only be extended by two years, not the indeterminate period provided for in Jessica's Law.

The court rejected both arguments. The court read an "implied savings clause" into section 6604 so that pending commitment proceedings would continue after enactment of the amended statute. The court reasoned that, in providing for indeterminate commitment terms, the voters and the Legislature could not possibly have intended to release those previously committed as sexually violent predators. *Id.* at 1287. The court further held that petitioners would be subject to the indefinite commitment terms imposed by Jessica's Law, not the two-year term imposed by former law. *Id.* at 1289. The court reasoned that this did not constitute a retroactive application of the statute because the statute "focuses on the person's current mental state . . . ." *Id.* It was in this context that the court made its sweeping pronouncement that Proposition 83 "is entirely silent on the question of retroactivity."

Plainly, *Bourquez* is not dispositive here. Focusing on section 27 of Jessica's Law, which amended the SVPA, the court of appeal had no

occasion to examine either the language or history of section 21 of Jessica's Law, the residency restriction at issue here. As is explained above, that language and history both reflect the electorate's intent that the residency restriction apply to sex offenders in Petitioners' situation, regardless of the date of their offense.

2. Petitioners May Not Rewrite Section 3003.5(b) to Add Language that the Drafters Purposefully Omitted

Petitioners claims that, even though section 3003.5(b) refers to "any" registered sex offender, that broad language should be limited by subsection "a" of section 3003.5. Petition at 37. Section 3003.5(a), which was enacted in 1998 and was therefore not part of Jessica's Law, provides in pertinent part:

> Notwithstanding any other provision of law, when a person is released on parole after having served a term of imprisonment in state prison for any offense for which registration is required pursuant to Section 290, that person may not, during the period of parole, reside in any single family dwelling with any other person also required to register pursuant to Section 290, unless those persons are legally related by blood, marriage, or adoption.

According to Petitioners, because section 3003.5(a) applies only to offenders released on parole after serving prison terms for registerable sex offenses, section 3003.5(b) should be similarly restricted. Petition at 37.

This argument runs afoul of long-established principles of statutory interpretation.

"It is a well-recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 725 (1989). Had the drafters of Jessica's Law wanted the 2,000-foot residency restriction to apply only to those parolees described in section 3003.5(a), they would have said so. They did not. Instead, Penal Code section 3003.5(b) expressly provides that "[n]otwithstanding any other provision of law" -- that is, notwithstanding Penal Code section 3003.5(a) -- the residency restriction in Jessica's Law applies to "any" Penal Code section 290 registrant.

B. The Residency Restriction Applies to Petitioners by Operation of Law, Not Merely as a Parole Condition, and Petitioners Cannot Show that Section 3003.5(b) Infringes on Any Constitutionally Protected Rights

Petitioners spend fifteen pages arguing that the SPPCA's 2,000 foot residency restriction is an invalid "parole condition" that impinges on their right to live with their families, thereby violating the Due Process clause of the federal constitution and the right to privacy guaranteed by the California Constitution. Petition at 20-35. This argument fails for two reasons.

First, as CDCR has advised all affected parolees, Petitioners are subject to the 2,000 residency restriction as a matter of law under section 3003.5(b), not merely as a parole condition. Petitioners' authorities on what constitutes an unreasonable parole condition are therefore inapposite. Second, and more important, section 3003.5(b) itself does not impinge on Petitioners' rights to due process or privacy under either federal or state law.

1. The Residency Restriction Does Not Violate Petitioners' Fourteenth Amendment Right to Live with Their Families

Petitioners claim that the residency restriction deprives them of their right to live with their families and therefore violates the Due Process Clause of the fourteenth amendment. Petition at 22-23. To support this claim, which sounds in substantive due process, Petitioners invoke a litany of United States Supreme Court decisions establishing a "fundamental right" to "freedom of personal choice in matters of marriage and family life." Petition at 23-34 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977)). This argument fails because section 3003.5(b) does not prohibit Petitioners from living with their spouses and families. Rather, based on Petitioners' convictions for sex offenses, Jessica's Law prohibits them from living near schools and parks where

minors regularly gather. Their asserted right to freedom of choice in family matters is therefore not implicated.

The Iowa Supreme Court considered exactly this issue in *State of Iowa v. Seering*, 701 N.W.2d 655 (Iowa 2005), a case involving Iowa's 2,000-foot residency restriction. Defendant there claimed that the residency statute violated substantive due process guarantees because he was unable to "find an acceptable place to live together with his family." The court rejected this argument, stating: "While the residency restriction may impact the Seerings insofar as they cannot choose the precise location where they can establish their home, it does not absolutely prevent them from living together." *Id.* at 664. The court remarked, "While we may be sympathetic to the difficulties created by the residency restriction for an offender and family who lack financial resources, these difficulties result from a social or political judgment that must be made by the legislature and not this court." *Id.*

Presumably aware of the problems with their argument based on familial rights, Petitioners also assert a more generalized due process right "to live and work where one will." Petition at 22. Again, this argument was made and rejected in the context of Iowa's 2,000-foot residency restriction. In *Doe v. Miller*, 405 F.3d 700, 714 (8th Cir. 2005),

cert. denied, 126 S. Ct. 757 (2005), convicted sex offenders challenged that restriction as violative of "a fundamental right 'to live where you want.'" The federal appeals court disagreed, commenting: "This ambitious articulation of a proposed unenumerated right calls to mind the Supreme Court's caution that we should proceed with restraint in the area of substantive due process, because 'by extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.'" *Id.* at 713-714 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).[5] The court noted that plaintiffs had not shown "that the right to 'live where you want' is 'deeply rooted in this Nation's history or tradition' or 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'" *Miller*, 405 F.3d at 714. Thus, the court was "not persuaded that the Constitution establishes a 'right to live where you want' that requires strict scrutiny of a State's residency restrictions." *Id.* Applying rational basis review, the court held that the statute was rationally

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[5] In *Washington*, the Court enumerated the fundamental liberty interests protected by the due process clause: "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." 521 U.S. at 720 (citations omitted).

related to the state's legitimate interest in promoting the safety of children. *Id.* at 714-16.

The same holds true here. No federal authority has established a right "deeply rooted in this Nation's history" for convicted sex offenders to "live where they want." Because the SPPCA's residency restriction rationally advances the California electorate's legitimate interest in promoting the safety of its most vulnerable residents, its children, Petitioners' due process claim fails as a matter of law.

Petitioners argue at length that the residency restriction is overbroad because it applies to sex offenders who have targeted adults, not just children, and theorize that residency restrictions do not prevent recidivism. Petition at 26-35. As the *Miller* court said in rejecting similar arguments: "We reject this contention because we think it understates the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human nature is necessarily unpredictable." 405 F.3d at 714. The court explained:

> Where individuals in a group, such as convicted sex offenders, have "distinguishing characteristics relevant to interests the State has authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation

> of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.

Id. at 715-16 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)). Petitioners cannot establish a substantive due process violation by second-guessing the wisdom of the California voters' policy judgments.

2. The Residency Restriction Does Not Violate Petitioners' Right to Privacy Under the California Constitution

Petitioners also claim that section 3003.5(b) violates Article I, Section 1 of the California Constitution by preventing them from living with persons of their choice. Petition at 23-24. But, once again, Jessica's Law does no such thing, but simply restricts registered sex offenders from establishing permanent residences near schools and parks where children play. Thus, because Jessica's Law does not burden a fundamental right, rational basis review applies. The California voters' decision to restrict sex offenders from living in close proximity to places where children gather is rationally related to their compelling interest in protecting children from known sex offenders.

In this regard, Petitioners' authorities are inapposite. Petitioners first cite a number of decisions that, like the federal due process cases, uphold a right to live with companions of one's choosing. *See, e.g.,*

City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130 (1980) (holding that city ordinance prohibiting more than five unrelated persons from sharing a house violated "the right to live with whomever one wishes"); *Robbins v. Superior Court*, 38 Cal. 3d 199, 213 (1985) (holding that county could not condition welfare benefits on recipient's residence in a county shelter because he would be "forced to live in a particular location without the freedom to choose his own living companions"); *Tom v. City and County of San Francisco*, 120 Cal. App. 4th 674, 680 (2004) (following *Adamson* and recognizing an "'autonomy privacy' interest in choosing the persons with whom a person will reside, and in excluding others from one's private residence"); *People v. Bauer*, 211 Cal. App. 3d 937 (striking probation condition that had the effect of forbidding probationer to live with his parents). But again, as two courts have already held, a 2,000-foot residency restriction does not restrict sex offenders' freedom to choose their living companions, and Petitioners' authorities do not help them. *See Seering*, 701 N.W.2d at 660; *Doe v. Miller*, 405 F.3d at 714.

Similarly unavailing is Petitioners' citation of several court of appeal cases invalidating probation conditions that had the effect of entirely expelling the offender from his or her community. *See, e.g., In re Scarborough*, 76 Cal. App. 2d 648, 649-50 (1946) (invalidating probation

condition that ordered offender to "leave . . . San Joaquin County"); *People v. Blakeman*, 170 Cal. App. 2d 596, 597 (1959) (invalidating probation condition that ordered plaintiff to "leave the community"); *In re White*, 97 Cal. App. 3d 141, 143 (1979) (invalidating probation condition barring plaintiff from entering "at any time, day or night" certain areas of Fresno, which prevented her from taking public transit and engaging in other lawful activities). These cases are inapposite because, as the Eighth Circuit Court of Appeals pointed out in *Doe v. Miller*, a residency restriction "does not 'expel' the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence." 405 F.3d at 719.[6]

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[6] Petitioners also contend that, even if the residency restriction did not impinge upon a constitutional right, it would still be "invalid as an unreasonable condition under the *Dominguez/Lent* test." Petition at 30 (citing *Dominguez*, 256 Cal. App. 2d 623 (1967) and *People v. Lent*, 15 Cal. 3d 481 (1975)). As noted above, this argument fails because Petitioners are subject to the residency restriction as a matter of law. Moreover, both the *Dominguez* and *Lent* decisions set forth a test applicable to a sentencing court's imposition of probation conditions. Petitioners, of course, are not on probation, and CDCR knows of no decision of this Court extending the *Dominguez/Lent* test to parole conditions.

C. The Residency Restriction Does Not Violate the *Ex Post Facto* Clause

Petitioners next argue that application of the residency restriction to them offends the *Ex Post Facto* Clause of the United States Constitution. Petition at 38-40. The framework for the *ex post facto* inquiry is "well established." *Smith v. Doe*, 538 U.S. 84, 92 (2003). "[T]wo factors appear important in each case: whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent." *People v. Castellanos*, 21 Cal. 4th 785, 795 (1999) (holding that California's sexual offender registration statute was not an *ex post facto* law). Here, the SPPCA's residency restriction is not punitive in purpose or effect, and Petitioners' *ex post facto* claim fails.

1. In Adopting the SPPCA's Restrictions on Sex Offenders, the Voters Intended to Establish Nonpunitive Regulatory Measures to Protect the Public

The intent underlying the adoption of the SPPCA's residency restriction was to create a non-punitive regulatory scheme to better protect the public from sexual predators.

Crime studies have shown that persons who commit sex offenses have a high rate of recidivism. *See, e.g.,* U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997).[7] In response, lawmakers have adopted various measures designed to better protect the public from such recidivist behavior. For example, many states have adopted statutes that require convicted sex offenders to register with law enforcement authorities. Some states release information about registered sex offenders to the public. Several states have established procedures for the civil commitment of persons deemed likely to engage in predatory acts of sexual violence. The United States Supreme Court has held that such measures reflect legislative efforts to create non-punitive regulatory schemes to protect the public, and has upheld these measures against *Ex Post Facto* Clause challenges. *Smith v. Doe*, 538 U.S. 84 (2003) (rejecting *ex post facto* challenge to Alaska statute that required convicted sex offenders to register with law enforcement authorities and authorized the State to publish the offender's

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[7] The United States Supreme Court cited these studies in observing that "the risk of recidivism posed by sex offenders is frightening and high," and "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Smith*, 538 U.S. at 103.

name, address, and photograph); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (rejecting *ex post facto* challenge to Kansas statute that established procedure for the civil commitment of persons deemed likely to engage in predatory acts of sexual violence).

Jessica's Law is yet another example of lawmakers' continuing efforts to adopt measures designed to enhance public safety. In fact, in the SPPCA's "Findings and Declarations," the voters declared that "[i]t is the intent of the People in enacting this measure to help Californians better protect themselves, their children, and their communities; it is not the intent of the People to embarrass or harass persons convicted of sex offenses," and "Californians must also take additional steps to monitor sex offenders, to protect the public from them." Proposition 83, §§ 2(f), 2(h). *See* Petition, Exh. A (Proposition 83, Official Title and Summary).

Courts in several jurisdictions have recently upheld 2,000 foot residency restrictions against *ex post facto* challenges. In *State of Iowa v. Seering*, 701 N.W. 2d 655, 667 (Iowa 2005), the Iowa Supreme Court held that Iowa's 2,000 foot residency restriction did not violate the *Ex Post Facto* Clause because the statute was enacted "to protect the health and safety of individuals, especially children, not to impose punishment." The United States Court of Appeals for the Eighth Circuit reached the same

result, observing that the Iowa statute was part of a "non-punitive regulatory scheme to protect the public." *Doe v. Miller*, 405 F.3d 700, 718-23 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (2005); *see also Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017 (8th Cir. 2006) (rejecting *ex post facto* challenge to Arkansas' 2,000 foot residency restriction), *cert. denied*, 127 S. Ct. 2128 (2007); *Lee v. State of Alabama*, 895 So. 2d 1038 (Ala. Crim. App. 2004) (rejecting *ex post facto* challenge to 2,000 foot residency restriction, which was part of regulatory scheme to provide "vulnerable segments of the public" with "extra protection from sex offenders").

Petitioners argue that certain language in Jessica's Law's preamble evinces a punitive intent. Petition at 39-40. This argument fails because Petitioners focus on the wrong prefatory language. Admittedly, portions of the preamble assert the need to enact "adequate penalties . . . to ensure predators cannot escape prosecution." Proposition 83, § 2(d). Certain portions of Jessica's Law do just that, by broadening the definition of certain crimes, providing longer penalties for specified offenses, prohibiting probation in lieu of prison for some offenses, and extending parole for some offenders. *See* Petition, Exh. A (Voter Pamphlet, at 43). But, as noted above, other parts of Jessica's Law are designed to enhance the monitoring and control of convicted sex offenders to better protect

communities from recidivist tendencies. Proposition 83, §§ 2(f), 2(h), 2(I). Nowhere does Jessica's Law or the ballot summary characterize the residency restriction as an "increased penalty." *See People v. Ansell*, 25 Cal. 4th 868, 885 (2001) (statute that made sex offenders ineligible for certificate of rehabilitation, regardless of date of offense, did not violate *Ex Post Facto* Clause because, in weighing the costs and benefits of the statutory scheme, "the Legislature expressed no interest in imposing new criminal sanctions or exacting fresh revenge").

In a recent *Ex Post Facto* Clause case, the United States Supreme Court stated: "[W]here a legislative restriction is an incident of the State's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." *Smith*, 538 U.S. at 93-94; *see also Miller*, 405 F.3d at 718 (quoting same language from *Smith* in rejecting *ex post facto* challenge to Iowa's residency restriction). That language applies here. With the SPPCA's residency restriction, California's voters adopted legislation designed to better protect their communities against recidivist conduct by sex offenders. In doing so, they simply exercised their regulatory powers, and were not adding punishment.

2. Jessica's Law Is Not Punitive in Effect

Although the voters had a non-punitive intent in adopting the SPPCA's residency restriction, the *Ex Post Facto* Clause would still apply if the measure were so punitive in effect "that it raises ex post facto concerns notwithstanding legislative evidence to the contrary." *People v. Ansell*, 25 Cal. 4th at 885. "This determination requires the 'clearest proof' and is not lightly made." *Id.* In evaluating whether a statute has a punitive effect, this Court has used the several factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), as "useful guideposts." *Id.* at 886.

One factor is whether the restrictions at issue have historically been used as punishment. *Ansell*, 25 Cal. 4th at 886. Petitioners cite no examples of residency restrictions being used as punishment, and CDCR is aware of none. The residency restriction affects only where an offender may live. It does not expel offenders from their communities or prohibit them from accessing areas near schools or parks for employment, commercial transactions, or any other legitimate purpose. *See Miller*, 405 F.3d at 719.

Another factor is whether the restriction "imposes an affirmative disability or restraint." *Smith*, 538 U.S. at 97. A residency restriction is far less disabling than the civil commitment scheme upheld by

the United States Supreme Court in *Hendricks*. *See Miller*, 405 F.3d at 721 (making same observation).

The most important factor is whether the restriction "has a rational connection to a nonpunitive purpose," and whether the restriction is "excessive" with respect to that purpose. *Smith*, 538 U.S. at 97, 102-03. Here, Jessica's Law serves the legitimate nonpunitive purpose of enhancing public safety by distancing offenders from places where the most vulnerable potential victims (i.e., minors unaccompanied by adults) gather and reducing the frequency of contact between sex offenders and children. This reduces opportunity and temptation, which can lower the risk of recidivism. *See Miller*, 405 F.3d at 722 (citing expert testimony for this point). For these reasons, the Eighth Circuit found Iowa's residency restriction reasonably related to its legitimate, nonpunitive purpose. *Miller*, 405 F.3d at 721-23.

Petitioners argue that the SPPCA's restrictions are "excessive" because they apply to all registered sex offenders, including those whose crimes were against adult victims instead of children. Petition at 41. This argument fails because the State may reasonably determine that applying the residency restriction to all offenders furthers its goal of protecting the most vulnerable targets of sex crimes, unaccompanied

minors. "[T]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Miller*, 405 F.3d at 721 (quoting *Smith v. Doe*, 538 U.S. at 103). Petitioners also argue that the residency restriction "degrade[s] public safety" by forcing sex offenders to become transient. This argument fails because "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith v. Doe*, 538 U.S. at 103.

D. Contrary to Amicus's Claims, the Residency Restriction Does Not Violate the Double Jeopardy Clause or Constitute an Unlawful Bill of Attainder

Amicus argues that the residency restriction violates the Double Jeopardy Clause. Amicus Brief at 30-32. But, as explained above, the SPPCA'S residency and GPS monitoring provisions are not punitive, but are instead part of a "non-punitive statutory scheme to protect the public." *Doe v. Miller*, 405 F.3d 700, 718-23 (8th Cir. 2005). Because the Double Jeopardy Clause prohibits the State from "punishing twice, or attempting a second time to punish criminally, for the same offense," Plaintiff's double jeopardy claim fails along with his *ex post facto* claim. *See Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (because State's civil commitment statute was "not tantamount to punishment," sex offender's

involuntary confinement did not violate double jeopardy clause "even though that confinement may follow a prison term").

Amicus also argues that the residency restriction is an unlawful bill of attainder. Amicus Brief at 30-31. Again, this claim fails because the residency restriction does not inflict "punishment" on sex offenders. As this Court has noted, "A bill of attainder has been defined as a 'legislative *punishment*, of any form or severity, of specifically designated persons or groups." *Legislature of the State of California v. Eu*, 54 Cal. 3d 492, 525 (1991) (emphasis in original). In determining whether a statute imposes punishment, courts have applied three different tests:

(1) a "historical test" to "determine whether the subject legislation imposes a kind of punishment traditionally prohibited by the federal constitution";

(2) a "functional test," analyzing whether the challenged law "*reasonably can be said to further nonpunitive legislative purposes*"; and

(3) a "motivational test . . . inquiring whether the legislative record evinces a congressional intent to punish." *Id.* at 526 (emphasis in original).

The residency restriction does not qualify as a bill of attainder under any of these tests. As noted above, residency restrictions have not historically been imposed as punishment. *See* Section C.2, *supra.* Moreover, the residency restriction is reasonably related to further the

nonpunitive public purpose of protecting California's most vulnerable residents from sex crimes. *See id.* Finally, the history of the residency restriction reveals an intent to protect children, not punish sex offenders. *See* Section C.1, *supra*. Thus, Amicus's bill of attainder argument also fails along with Petitioners' *ex post facto* claim.

E. The Residency Restriction Is Not Vague and Therefore Does Not Violate Due Process

Finally, Petitioners argue that the residency restriction is vague and therefore violates their right to due process. In this vein, Petitioners claim that section 3003.5(b) does not adequately define the terms "reside" or "park where children regularly gather," and does not specify how the 2,000 foot distance between a parolee's residence and a school or park should be measured. Petition at 43-45. This claim is meritless.

A statute will be found unconstitutionally vague when it "not only fails to provide adequate notice to those who must observe its strictures, but also 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." *People v. Gallo*, 14 Cal. 4th 1090, 1116 (1997) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). "It is well-

established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *Cranston v. City of Richmond*, 40 Cal. 3d 775, 764 (1985). Thus, courts "must determine not whether the rule is vague in the abstract but, rather, whether it is vague as applied to this appellant's conduct in light of the specific facts of this particular case." *Id.* at 765. "*Thus plaintiffs cannot complain of the vagueness of a statute if the conduct with which they are charged falls clearly within its bounds.*" *Id.* (italics in original).

Under these principles, Petitioners cannot establish that the residency restriction is void for vagueness as applied to them. Section 3003.5(b) unambiguously prohibits them from living within 2,000 feet of a "public or private school, or park where children regularly gather." CDCR parole agents, using GPS mapping devices, objectively determined that each petitioner resided within 2,000 feet of a school or park where children regularly gather and play. Specifically, petitioner E.J.'s residence is within 2,000 feet of a park containing a playground and after-school recreational center; petitioner S.P.'s residence is within 2,000 feet of a private child care center; petitioner J.S.'s residence is within 2,000 feet of a charter elementary school; and, petitioner K.T.'s residence is within 2,000 feet of a public elementary school. Petitioners cannot point to any aspect of these

determinations that was *ad hoc*, subjective, arbitrary or discriminatory. Because Petitioners' conduct -- that is, their residency within the specified area -- clearly falls within the bounds of the SPPCA's residency restriction, they cannot claim that it is unconstitutionally vague.

Tacitly conceding that they cannot show that the SPPCA's residency is vague as applied to them personally, Petitioners argue that the terms "reside" and "park where children gather" are vague as applied to others and thereby "encourag[e] arbitrary enforcement by law enforcement personnel throughout the State." Petition at 44. As noted above, this argument ignores this Court's admonition that a void for vagueness challenge "can succeed *only* where the litigant demonstrates, not that it affects a substantial number of others, but that the law is vague as to her or impermissibly vague in *all of its applications*." *Gallo*, 14 Cal. 4th at 1116 (emphasis in original); *see Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1095 (1995) ("The rule is well-established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations."). Having failed

to make this showing, Petitioners cannot save their due process claim by vague allusions to arbitrary enforcement statewide.

Moreover, courts have repeatedly rejected the argument that the terms "reside" and "park where children gather" are unconstitutionally vague. In *State v. Zichko*, 129 Idaho 259, 923 P.2d. 966 (1996), the Idaho Supreme Court held that the term "reside" was not vague as used in Idaho's sex offender registry statute, but instead "clearly connote[s] more than a passing through or presence for a limited visit." *Id.* at 262, 923 P.2d at 969. *See also United States v. Namey*, 364 F.3d 843, 845 (6th Cir. 2004) ("The term 'reside' has a commonly accepted meaning. . . . An ordinary person would understand that a person resides where the person regularly lives or has a home as opposed to where a person might visit or vacation.").

Similarly, in *People v. Delvalle*, 26 Cal. App. 4th 869, 878 (1994), the court rejected a vagueness challenge to a parole condition that instructed the offender to "stay away from any places where minor children congregate." Likewise, in *United States v. Paul*, 274 F.3d 155, 166 (5th Cir. 2001), the court found that the phrase "places, establishments, and areas frequented by minors" was not unconstitutionally vague. The court commented that "it would be impossible to list . . . every specific location" that the offender was prohibited from frequenting," and that using

"categorical terms" to describe the off-limits locations was therefore permissible. *Id.* at 167; *see also State v. Simonetto*, 232 Wis. 2d 315, 606 N.W.2d 275 (Ct. App. 1999) (probation condition that offender was "not to go where children congregate," including schools and parks, was not impermissibly vague); *Leach v. State of Texas*, 170 S.W.3d 669, 674-75 (Tex. App. 2005) (statute employing phrase "where children commonly gather" was not impermissibly vague).

As this Court has held, "few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." *Gallo*, 14 Cal. 4th at 1117 (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)). "Consequently, no more than a reasonable degree of certainty can be demanded." *Id.*; *see Grayned*, 408 U.S. at 112 n.15 ("It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of disputed terms will be in nice question."); *People v. Superior Court*, 19 Cal. 3d 338, 345 (1977) ("Many statutes will have some inherent vagueness for in most English words and phrases there lurk uncertainties."). Nevertheless, despite these inherent uncertainties,

Jessica's Law specifically and concretely tells registered sex offenders where they may not reside, i.e., within 2,000 feet of a school or park where children regularly gather. Therefore the statute is not void for vagueness.[8]

F. The Relief Petitioners Seek is Too Broad

Petitioners seek an injunction barring CDCR from enforcing the residency restriction as to "Petitioners and all other parolees who must register pursuant to Penal Code section 290" -- regardless of when they committed their crime, were convicted, or released from parole. Petition, at 11. Such far-reaching relief is unwarranted because Petitioners cannot show that they are similarly situated to the other parolees on whose behalf they seek relief. *See In re Brindle*, 91 Cal. App. 3d 660, 671 (1979) (trial court order covering all inmates in all correctional institutions was improper for lack of evidence that they were similarly situated to named petitioners). Therefore, should the Court determine that relief is appropriate, such relief should extend only to Petitioners.

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[8] Petitioners also claim that the SPPCA's residency restriction is impermissibly vague because CDCR has "chosen to define the 2,000 foot distance term of the statute to mean 2,000 feet 'as the crow flies.'" Petition at 45. Petitioners complain that this interpretation is unconstitutional because, according to them, a freeway may run between the offender's residence and the park or school. But this does not establish a void-for-vagueness challenge. Just because Petitioners disagree with CDCR's method for measuring the 2,000 foot distance does not render the statute vague.

CONCLUSION

Because Petitioners' challenges to the residency restriction set forth in Jessica's Law are meritless, the petition for writ of habeas corpus should be denied and the order to show cause should be discharged.

Date: February 11, 2008

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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 WordPerfect software, this brief contains 12,129 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 January 11, 2008.

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Case Name: *In re E.J., S.P., J.S., K.T., on Habeas Corpus*

Case Nos: S156933/S157631/S157633/S157634

PROOF OF SERVICE

BY OVERNIGHT MAIL

I hereby declare:

I am a citizen of the United States and employed in Sacramento County, California; I am over the age of eighteen years, and not a party to the within action; my business address is 980 9th Street, Suite 1700, Sacramento, California 95814-2736. On February 11, 2008, I served the within documents:

RETURN TO THE PETITION FOR WRIT OF HABEAS CORPUS; CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RETURN AND ANSWER TO AMICUS BRIEF

by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and delivering to a Federal Express agent for delivery.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 11, 2008, at Sacramento, California.

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