IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY ALLEN MILLIGAN Defendant and Appellant	G039546

Orange County Superior Court Case No. 07WF1983
The Honorable Michael J. Cassidy, Commissioner

APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, SOUTHERN CALIFORNIA, AND SAN DIEGO AND IMPERIAL COUNTIES TO FILE AMICUS BRIEF, AND AMICUS BRIEF ON MERITS, IN SUPPORT OF APPELLANT TIMOTHY MILLIGAN

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APPLICATION TO FILE AMICUS CURIAE BRIEF

The American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and American Civil Liberties Union of San Diego and Imperial Counties respectfully request leave to file the attached amicus brief in support of Defendant Timothy Milligan under California Rules of Court 8.200(c) and 8.360(f).

Interest of Amici Curiae

Proposed *amici* are the three California affiliates of the American Civil Liberties Union, a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights law. Since their founding, the national and local ACLU affiliates have had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions, including the rights of people convicted of crimes and the rights of members of unpopular groups.

ACLU staff testified about the legality and constitutionality of Proposition 83's residency prohibition before the California Joint Assembly-Senate Public Safety Committee. In addition, the ACLU has submitted an amicus brief to the California Supreme Court discussing this

precise question in the pending case of *In re E. J. et al on Habeas Corpus*, Cal. Supreme Court Nos. S156933 *et al.*

The ACLU believes that the attached brief will assist this Court in deciding whether the residency prohibition of Proposition 83 applies retroactively in light of controlling principles of statutory construction, and, if so, whether applying it retroactively violates the federal Ex Post Facto Clause. This question directly affects not only people like Appellant Milligan who are currently under the direct supervision of the criminal justice system, but also the tens of thousands of Californians who must register under Penal Code § 290 but who may have not have had any other contact with law enforcement for many years. The ACLU therefore requests leave to present the attached amicus brief to present additional authorities and discussion in support of Appellants' arguments on this issue.

Under Rule of Court 8.200(c)(3), I certify that no party or counsel for any party in this matter participated in authoring this brief, and that nobody outside of the ACLU made any monetary contribution to fund the preparation or filing of this brief.

Dated: January 14, 2009

Respectfully submitted,

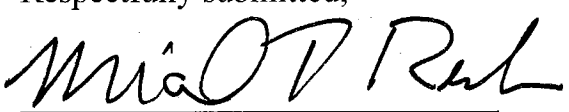

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

CALIFORNIA STATE CASES

OTHER STATE CASES

FEDERAL CONSTITUTION

CALIFORNIA STATE CONSTITUTION

CALIFORNIA STATE STATUTES

OTHER STATE STATUTES

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION OFFICIAL POLICIES

SECONDARY SOURCES

The American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and American Civil Liberties Union of San Diego and Imperial Counties respectfully request leave to file the attached amicus brief in support of Defendant Timothy Milligan under California Rules of Court 8.200(c) and 8.360(f). This brief addresses the question of whether the retroactive operation of the residency prohibition of the Sexual Predatory Punishment and Control Act (Penal Code § 3003.5(b))[1] is lawful and constitutional. As discussed below, the ACLU believes that

1) applying the residency prohibition retroactively would violate the well-established principle that statutes are presumed to operate only prospectively; and,

2) applying the statute retroactively would violate the Ex Post Facto Clauses of the United States and California Constitutions.

INTEREST OF AMICUS

Proposed *amici* are the three California affiliates of the American Civil Liberties Union, a national, nonprofit, nonpartisan civil liberties organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil

[1] Section 3003.5(b) reads: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant t Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

rights law. Since their founding, the national and local ACLU affiliates have had an abiding interest in the promotion of the guarantees of liberty and individual rights embodied in the federal and state constitutions, including the rights of people convicted of crimes and the rights of members of unpopular groups.

The ACLU-NC agrees with Appellant that the well-established rules of statutory interpretation as well as state and federal ex post facto principles demand that the residency restrictions apply prospectively only, meaning that they apply only to persons who have committed qualifying sex offenses after the statute became effective on November 8, 2006.[2]

ARGUMENT

1. The Longstanding Rule That Laws Operate Prospectively Unless they Expressly State Otherwise Means that § 3003.5(b) Applies Prospectively Only.

In *Myers v. Phillip Morris Companies, Inc.*, 28 Cal. 4th 828 (2002), the California Supreme Court fully defined the analytical test that determines the question of whether a statute should operate retroactively: our state honors the "time-honored legal presumption" that legislation "operate prospectively rather than retroactively." *Id.* at 841. This presumption, which governs both federal and state law, is "rooted in

[2] Although it is outside the scope of this amicus brief, the ACLU also agrees with Appellant Milligan that the lifetime GPS tracking provisions of the SPPCA also can apply only to persons convicted of felony sex offenses after November 8, 2006.

constitutional principles." *Id.* California has codified this principle as Penal Code § 3: "No part of [the Penal Code] is retroactive, unless expressly so declared." Under this provision, as under the common law, a statute "may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." *Id.* at 844. The presumption applies to laws adopted by initiative just as it does to statutes passed by the legislature. *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1206-07 (1988).

Section 3003.5(b) does not meet either of these tests, and thus should not be given retroactive effect.[3] This Court should adhere to the "time-honored" standard of statutory interpretation, and not accept the CDCR's implicit invitation to ignore the presumption in this case.[4]

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[3] The residency prohibition is being enforced retroactively because it creates a new disability for persons who are convicted of certain sex-related crimes, and is being applied by the CDCR to parolees whose offenses and convictions predated the effective date of the statute. *See Myers*, 28 Cal.4th at 840.

[4] Underlying both the presumption against retroactivity and the Ex Post Facto Clause is the danger that "political pressure poses a risk that [a legislature] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landraf v. USI Film Products*, 511 U.S. 244, 266-67 (1994); *INS v. St. Cyr*, 533 U.S. 289, 315 (2001). Prospective application also guards against "arbitrary and potentially vindictive" measures. *Stogner v. California*, 539 U.S. 607, 611 (2003).

A. Prop. 83 Does Not Contain Any Express Language of Retroactivity.

For the purpose of this test, "express language of retroactivity" means wording that is "an unequivocal and inflexible statement of retroactivity ...." *Myers*, 28 Cal. 4th at 843. There is nothing even remotely approaching that standard in the text of the SPPCA.[5] *People v. Whaley*, 160 Cal.App.4th 779, 801 (2008) ("Proposition 83 does not contain an express statement of retroactivity.").[6]

Although the CDCR[7] argues that § 3003.5(b) should apply retroactively because it applies to "any person for whom registration is required pursuant to Section 290," a comparison with the statute that created our state's Meghan's Law Web site demonstrates that this language does not indicate any retroactive intent. The Meghan's Law statute uses language similar to that of § 3003.5(b) to describe who must be listed on the Web site: it instructs the government to "make available information concerning persons *who are required to register pursuant to Section 290.*"

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[5] Examples of express retroactivity provisions abound throughout the California Codes. *E.g.*, Penal Code §§ 290.003, 290.022, 296.1(b), 290.46(m); Code Civ. Pro. § 410.40; Civil Code § 1646.5; Gov't Code § 70217.

[6] Although the court in *Whaley* was addressing other provisions of the initiative, its holding as to the lack of an express statement of retroactivity holds equally true for the residency restrictions.

[7] Because the Governor and the CDCR take the same position in this case, this brief will refer to that position as the CDCR's for the sake of brevity.

Penal Code § 290.46(a)(1) (emphasis added). But, recognizing that this language does not indicate that the law should apply retroactively, the legislature included an explicit retroactivity provision in the statute:

> The public notification provisions of this section are applicable to every person described in this section, without regard to when his or her crimes were committed or his or her duty to register pursuant to Section 290 arose, and to every offense described in this section, regardless of when it was committed.[8]

The SPPCA contains no such retroactivity provision. The reference to § 290 registration in § 3003.5(b), like the reference to it in § 290.46(a)(1), delineates the substantive, not the temporal, reach of the statute. *See Martin v. Hadix*, 527 U.S. 343, 353-54 (1999). The CDCR's attempt to transform this language into an "unequivocal" statement of retroactivity is precisely what the presumption against retroactivity forbids. *Id.; Evangelatos*, 44 Cal.3d at 1209 & n.13; *Gutierrez v. De Lara,* 188 Cal.App.3d 1575, 1580 (1987). *See Californians for Disability Rights v. Mervyns*, 39 Cal. 4th 223, 229-30 (2006) (refusing to infer voters' intent from "broad, general language") (citation omitted).

Our state high court has previously addressed and rejected similar invitations to read an implied retroactive intent into statutes that lack an express retroactivity clause. In *Myers*, the Court was "not persuaded" by the argument that phrases "in isolation" that describe in the present tense

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[8] Penal Code § 290.46(m).

the substantive scope of the statute at issue "are express legislative declarations of retroactivity notwithstanding the absence of the term 'retroactive' in the provision." 28 Cal.4th. at 842. And even more recently the Court reaffirmed the "well-established" presumption against retroactivity, and held that it would apply the presumption in determining prospective versus retroactive operation of a ballot measure rather than the "ambiguous general language" of the measure itself. *Californians for Disability Rights*, 39 Cal. 4th at 230; *accord People v. Whaley*, 160 Cal.App.4th 779, 797-98 (2008).

Instead of trying to distinguish *Myers* or explain why it is not controlling, the CDCR fixates on the earlier case of *People v. Ansell*, 25 Cal. 4th 868 (2001). Whereas in *Myers* the question of applying the statute retroactively was at the heart of the legal question that the Court was addressing on certification from the Ninth Circuit, 28 Cal. 4th at 832, in *Ansell*, neither party raised (nor presumably briefed) the issue of statutory construction, 25 Cal. 4th at 880, and the Court referred to the presumption against retroactivity only in a footnote. *Id.* at 882, n. 21. And in *Ansell*, the Court relied on very explicit and detailed legislative history and committee reports that are absent in this case.

The CDCR makes much of the *Ansell* Court's reliance on the statutory coverage language – "persons convicted of" – and argues that this Court should reach the same conclusion of retroactivity in this case. Yet

our Supreme Court reached a very different conclusion in *Di Genova v. State Bd. of Ed.*, 57 Cal.2d 167 (1962), a case that squarely addressed and rejected the retroactive operation of statute that imposed restrictions on convicted sex offenders. The statute in that case stated that "school districts shall not employ or retain in employment persons in public school service who have been convicted of any sex offense as defined." *Id.* at 175. The Court rejected the government's argument (similar to the CDCR's argument in the case at bar) that this language was sufficient to justify retroactive application; the Court held that "the words 'have been convicted' ... in no way indicate an intent that the provisions apply retroactively." *Id.* at 176.[9]

The Ohio Supreme Court has recently applied this same reasoning to hold that Ohio's new law prohibiting sex offenders from living within 1000 feet of a school applied prospectively only. *Hyle v. Porter*, 882 N.E.2d 899 (Ohio 2008). Ohio, like California, follows the common-law presumption against retroactivity: "A statute is presumed to be prospective in its operation unless expressly made retrospective." Ohio Rev. Code § 1.48; *Hyle*, 882 N.E.2d at 904. Ohio argued that two aspects of the new law's language showed a clear retroactive intent: First, the statute employs the

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[9] *See Evangelatos*, 44 Cal. 3d at 1193-94: ("[I]n the absence of a clear legislative intent to the contrary statutory enactments apply prospectively. The drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively.").

past tense – it applies to anyone who "*has been convicted of*, is convicted of, has pleaded guilty to, or pleads guilty to" a qualifying offense. *Id.* (emphasis added). Second, because the new law prohibited "occupying" as well as "establishing" a residence near schools, the state argued that it must operate so as to force people already living in an exclusion zone to move, or else "occupying" would be mere surplussage. The Ohio high court rejected both arguments, holding, consistent with the California cases discussed above, that although this ambiguous language might present a "*suggestion*" of retroactivity, it could not supply the "clear declaration of retroactivity" that is needed to overcome the presumption. *Id.* at 902-04.

As with the Ohio law, the question of retroactive application is "simply not addressed" in the text of Proposition 83, a fact that "strongly supports prospective operation of the measure." *Evangelatos*, 44 Cal. 3d 1188, 1209 (1988). Even if this statutory silence were construed as ambiguous on this point, "a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective." *Myers*, 28 Cal. 4th at 841 (quoting *St. Cyr*, 533 U.S. at 320, 321, n. 45).

This Court should continue to follow the rule of statutory construction found in the plain language of Penal Code § 3 and fully described in *Myers*; under that rule, and consistent with long line of cases including *Californians for Disability Rights, Evangelatos* and *Di Genova*,

there is nothing in the text of Proposition 83 that can overcome the presumption of prospectivity.

B. Extrinsic Sources Do Not Provide a Clear and Unavoidable Implication that § 3003.5(b) was Intended to Apply Retroactively.

In the absence of express and unequivocal language of retroactivity, the *Myers* analysis turns to extrinsic sources. But, as our high court went out of its way to emphasize, that prong of the test to overcome the presumption is equally high: "a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application." *Myers*, 28 Cal.4th at 841 (quoting *Evangelatos*, 44 Cal. 3d at 1209) (emphasis in *Myers*); *see id.* at 844 ("[A] statute may be applied retroactively only if it contains express language of retroactivity *or* if other sources provide a *clear and unavoidable implication* that the Legislature intended retroactive application.") (citing *Evangelatos*) (internal punctuation omitted, second emphasis added).

People v. Alford, 42 Cal.4th 749 (2007) did not overturn this long-established principle. In *Alford* the legislature had passed a series of interlocking laws that, taken together, shifted the source of $34 million of the courts' budget from the general fund to a variety of new fees, including a $20 court security fee. *Id.* at 753-54. "The fee was projected to generate $34 million in revenue and the Budget Act of 2003 reduced, by that same

amount, support for the trial courts from the General Fund." *Id.* at 754 (quoting legislative history). If the new fee could be collected only from persons who had committed their crimes before the law went into effect, the consequence would have been to defund the court system, an outcome that the legislature had absolutely not intended. *Id.* at 754; *see id.* at 756 (fee enacted to "ensure and maintain adequate funding") (quoting Penal Code § 1465.8(a)(1)) (emphasis added). Moreover, the legislature delayed the operation of the new law, a delay that ensured the courts were able to start collecting the new fees as soon as the law went into effect. *Id.* at 755. A majority of the *Alford* Court thus relied on all on *all* of these elements of the legislative scheme, as well as on budget analyses contained in additional committee reports on the urgency provisions of the Budget Act, to hold that the legislature had "necessarily anticipated" that the new law would start generating revenue immediately, and that this "clearly manifest" intent was sufficient to overcome the presumption against retroactivity. *Id.*

Proposition 83's residency restriction is nothing like a $20 fee that necessarily had to apply retroactively to accomplish its express purpose of filling a specific, discrete budgetary gap. And unlike the legislative history and committee reports in *Alford* and *Ansell*, nothing in the extrinsic sources relating to Proposition 83 makes it "*very clear*" that the statute "*must*" have been intended to be applied retroactively. The CDCR's arguments

basically boil down to an opinion that the new law *should*, for policy reasons, apply to people convicted before November 2006. This argument is contrary both to the mandate of Penal Code § 3 and to *Di Genova*, which rejected a nearly identical argument and refused to add a retroactivity provision to a new law based on the argument that retroactivity was necessary to further the statutory goal of protecting children from convicted sex offenders. *Di Genova*, 57 Cal.2d at 177-78. It may well be that applying Prop. 83 retroactively would further the initiative's goals of punishing and controlling people convicted in the past of sex offenses. But courts may not ignore the plain language of Penal Code § 3 and apply a new law retroactively unless the legislator or voters have expressly authorized it. *People v. Whaley*, 160 Cal.App.4th 779, 801 (2008) (holding that other provisions of Prop. 83 apply prospectively only); *see Evangelatos*, 44 Cal.3d at 1213.

C. This Court Should Construe § 3003.5 to Apply Prospectively so as to Avoid Serious Constitutional Questions Under the Ex Post Facto Clause.

A third element of the *Myers* analysis also controls the instant case. Recognizing the "constitutional underpinnings of the presumption against a statute's retroactive application," the Court invoked the "established rule of statutory construction [that] requires courts to construe statutes to avoid constitutional infirmities." *Myers*, 28 Cal. 4th at 846. Recognizing that a retroactive application of the statute at issue would raise constitutional due

process questions, the Court held that this rule of statutory construction reinforced its conclusion that the law should apply prospectively only. *Id.* at 847.[10]

This rule and reasoning applies equally here. As discussed below, construing the residency prohibition as retroactive raises significant questions under the Ex Post Facto Clause, and thus this established rule of statutory construction similarly reinforces the presumption of prospectivity in this case.[11]

Construing the statute to operate prospectively would also avoid raising constitutional questions as to the effect of the new law on persons with old sex-related convictions for old offenses who are not presently on parole and who may not have had any contact with the criminal justice system for years or decades. Although the CDCR quite properly takes the position that § 3003.5(b) should not apply to such persons, some of its arguments suggest a contrary result. Again, applying the presumption of

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[10] "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." *Miller v. Municipal Court of City of Los Angeles*, 22 Cal. 2d 818, 828 (1943).

[11] The California Supreme Court has previously construed statutes adopted by the voters prospectively to avoid constitutional questions under the Ex Post Facto Clause. *See People v. Smith*, 34 Cal.3d 251, 262 (1983).

prospectivity will serve to avoid these serious constitutional questions.[12] In any event, because people who have completed any grant of parole are not party to this case, this Court should not adjudicate their rights in this action.

2. Retroactive Application of § 3003.5(b) Violates the Ex Post Facto Clause Because it Punishes Registrants for Past Convictions.

The state and federal Ex Post Facto Clauses prohibit the enactment of a new law that "inflicts a greater punishment that the law annexed to the crime, when committed." *Stogner v. California*, 539 U.S. 607, 612 (2003); *see* U.S. Const Art. I § 10; Cal Const. Art I § 9; *People v. Grant*, 20 Cal.4th 150, 158 (2004) (state and federal protections are identical). As noted above, there is no dispute that the residency prohibition of Prop. 83 is being applied by the CDCR retroactively; the sole legal question is whether it imposes "punishment" within the meaning of this constitutional provision.

To answer this question, the courts apply a two-pronged "intent-effects" test. The first prong is one of statutory construction: if the statute is intended to be criminal or punitive, then it constitutes "punishment" without further inquiry. *Smith v. Doe*, 538 U.S. 84, 92 (2003). If the law

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[12] In *Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178 (N.D. Cal. 2007), a federal court did exactly that. The court construed the residency prohibition of Proposition 83 as prospective because of the absence of any "textual intent of retroactivity" and the lack of any clear showing from extrinsic sources. In so ruling, the court noted that it is "obligated to adopt the interpretation of the law that best avoids constitutional problems," and that a retroactive application of the residency prohibition would raise serious "ex post facto concerns." *Id.* at 1181.

does not have a punitive intent, then the court must determine whether its effect is punitive. Either punitive intent or a punitive effect is sufficient to trigger the protections of the Ex Post Facto Clause. *Id.*

The residency prohibition of SPPCA is quite different than civil commitment and sex registration/community notification regulatory statutes that the courts have found not "punishment" and thus outside the ambit of the Ex Post Facto Clause. *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Smith v. Doe*, 538 U.S. 84 (2002). Both with respect to the intent and the effect, the residency prohibition is far more punitive, and thus this case is not controlled by the results in those cases. Instead, as this court has recently held, the residency restrictions of the SPPCA are punitive under this test. *People v. Mosley*, 168 Cal.App.4th 512, 533(2008).

Registration and notification laws simply collect and provide to the public truthful information about convicted sex offenders, information that has long been a matter of public record. *Smith*, 538 U.S. at 98-99. They do not in any way restrict where people can live or work. *Id.* at 100, 101. Even so, and despite the compelling evidence that the state intended the Alaska Sex Offender Registration Act to be civil and regulatory, three members of the Supreme Court in *Smith* believed that that statute constituted punishment, and another thought it a "close[] case." *See id.* at 110 (Souter, J. concurring); *id.* at 113-14 (Stevens, J. concurring); *id.* at 118 (Ginsberg, J., dissenting).

Civil commitment statutes for sex offenders also have marked differences from the residency prohibition of the SPPCA in ways that are significant for ex post facto analysis. These procedures have long been deemed civil and non-punitive and are specifically labeled as such. *Hendricks*, 521 U.S. at 361. Civil commitment statutes do not automatically impose any disability because of a past conviction. Rather, a prior conviction simply makes a person subject to commitment procedures: in order to impose confinement the government must prove beyond a reasonable doubt that the defendant is mentally ill and "dangerous beyond [his] control." *Id.* at 352-53, 355, 358. And the confinement lasts only as long as the person is both mentally ill and dangerous. *Id.* at 363-64. Nonetheless, four members of the *Hendricks* Court believed that the Kansas civil commitment statute was punitive for purposes of the Ex Post Facto Clause. *Id.* at 379-96 (Breyer, J. dissenting).

The residency prohibition of the SPPCA crosses the line from regulation to punishment. The factors that led the Court to find registration/notification and civil commitment statutes non-punitive regulations of sex offenders are not present in this case, and the resulting closely decided decisions in *Smith* and *Hendricks* should not be extended to support a similar conclusion about this very different statute. *See Mikhalof v. Walsh*, 2007 WL 2572268 (N.D. Ohio, Sept. 4, 2007); *State v. Pollard*, 886 N.E.2d 69 (Ind.App. 2008); *ACLU v. Masto*, 08-cv-00822-JCM-PAL,

unpublished order (D.Nev. October 7, 2008) (appeal pending) (attached as per Rule of Court 8.204(d)) (all holding that ex post facto principles prohibit the retroactive application of residency restrictions like SPPCA).

A. The Residency Prohibition is Intended to Punish Registered Sex Offenders.

Proposition 83 was presented to the voters as a "Sexual Predator Punishment and Control Act." Prop. 83 § 1. Section 2 of the measure states that "adequate penalties must be enacted," that the state must "provide adequate penalties for and safeguards against sex offenders," and that "existing laws that punish aggravated sexual assault, habitual sexual offenders, and child molesters must be strengthened and improved." *Id.* §§ (2)(d), (h). Section 31 explicitly states that the voters' intent is to "strengthen and improve the laws that punish and control sexual offenders." Consistent with this general expression of intent, most of the substantive provisions of the new law are indisputably punitive – they enact new criminal prohibitions and increase the penalties for existing crimes. *See, e.g., id.* §§ 3-18.

Moreover, if any of the initiative's provisions conflict with other laws that provide for a "greater penalty or longer period of imprisonment," that other, harsher penalty overrides the initiative. *Id.* § 31. And Proposition 83 provides that a legislative amendment to any provision of the initiative requires a 2/3 majority, except amendments that "increase the

punishment or penalties" of the initiative or expand "the scope of its application" need only a simple majority. *Id.* § 33.

These provisions, plainly intended to impose significant penalties against sex offenders, underscore the punitive intent of the SPPCA. This pervasive language of "punishment" is in sharp contrast to statutory schemes the courts have found to be civil and non-punitive in their regulation of sex offenders. This distinguishes § 3003.5(b) from the "civil commitment procedure" at issue in *Hendricks*, 521 U.S. at 361 and the registration/notification regulatory scheme in *Smith*. In analyzing both of these statutes, the Court found that "nothing on the face of the statute suggests that the legislature sought to create anything other than a civil scheme ...." *Smith*, 538 U.S. at 93; *Hendricks*, 521 U.S. at 361. Because the bulk of Proposition 83 is devoted to imposing or increasing criminal sanctions, it cannot be maintained that the initiative as a whole was intended to be civil and non-punitive. *Smith*, 538 U.S. at 92. *See Mikaloff*, 2007 WL 2572268 at *5; *but see People v. Mosley*, 168 Cal.App.4th 512, 527-28 & n.13 (2008) (noting that issue is "so close" but "narrowly concluding the residency restriction lacks a punitive intent").

That the initiative placed the residency prohibition into the state's Penal Code – and the section of that Code dealing with imprisonment and other punishment – further shows that it is not a civil regulatory measure. *See Hendricks*, 521 U.S. at 361. When this state intends to create a civil,

non-punitive statute to regulate sex-offenders, it states its intent clearly, as it did with the Megan's Law statute (Penal Code § 290.46). *See* 1996 Cal. Legis. Serv. ch. 908, § 1(g) (the legislature ... does not intend that the information be used to inflict retribution or additional punishment"). The voters approving Proposition 83 were given a very different message.

B. The Residency Prohibition Has a Punitive Effect.

Even a law with a non-punitive *intent* will constitute punishment under the Ex Post Facto Clause if it has a punitive *effect*. The United States Supreme Court has established a test for determining whether an ostensibly civil statute is nonetheless punitive in its effect:

> The factors most relevant to the analysis are whether, in its necessary operation, the regulatory scheme: (1) has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a non-punitive purpose; (5) or is excessive with respect to this purpose.
>
> *Smith*, 538 U.S. at 97 (numbering added).

As this Court has recently held, under this test, "Jessica's Law's residency restriction has an overwhelming punitive effect." *Mosley*, 168 Cal.App.4th at 533 (applying same test to hold that residency restrictions constitute punishment for purposes of Sixth Amendment).

(1) The Residency Prohibition is Akin to the Punishment of Banishment.

Although statutory residency restrictions for sex offenders are a new development, the law has long punished unpopular groups and individuals by singling them out and telling them where they can or cannot live. The closest historical analog to § 3003.5(b) is banishment, which has long been considered punishment for ex post facto purposes. *See Stogner v. California*, 539 U.S. 607, 614, 624 (2003). The new restriction effectively prohibits sex offenders from residing almost anywhere in the three largest cities of this State. Jennifer Dacey, *Sex Offender Residency Restrictions: California's Failure to Learn from Iowa's Mistakes*, 28 J. Juv. L. 11, 19-21 (2007) ("*California's Failure to Learn*") (citing the California Senate Office of Research). In striking down restrictions on where a parolee or probationer can live, the courts of this state have acknowledged that such restrictions seriously impact individual rights to travel, to associate and to own property, and the decisions have explicitly recognized them as a form of "banishment." *People v. Beach*, 147 Cal. App. 3d 612, 618, 620-23 (1983) (characterizing probation condition that defendant "relocate herself from the community where she has lived" as "banishment"); *People v. Bauer*, 211 Cal. App. 3d 937, 944-45 (1989) (striking down probation condition including the power meant "to forbid appellant from living with or near his parents - that is, the power to banish him."). Section 3003.5(b)

is more draconian and akin to banishment than these discretionary probationary restrictions, as it is a lifetime exclusion.

(2) The Residency Prohibition Imposes an Affirmative Disability.

The residency prohibition has a direct and serious impact on the lives of those covered. The statute prohibits people from living in large areas of the state and forces people who were living in an exclusion zone to leave their homes and their communities. These effects are exactly those that the Court in *Smith* indicated would constitute a serious disability for ex post facto analysis, noting that the Alaska sex registration law left people "free to change ... residences" and that nobody had suffered "substantial occupational or housing disadvantages" that they would not otherwise have encountered. *Smith*, 538 U.S. at 100. Under registration statutes, convicted sex offenders are "free to move where they wish and to live and work as other citizens." *Id.* at 101. Section 3003.5(b), in contrast, directly and affirmatively imposes restrictions on where individuals can live.

(3) The Residency Prohibition Promotes the Traditional Aims of Punishment.

The traditional aims of punishment include retribution and deterrence. *See Hendricks*, 521 U.S. at 361-62. The residency prohibition serves these goals. The imposition of a lifetime residency exclusion against persons whose offense may have nothing to do with the protection of

children shows an undifferentiated desire to punish registered sex offenders, regardless of any actual threat to public safety or to children.

The knowledge that conviction of a registerable offense will permanently bar one from establishing legal residence in the house, neighborhood, or city where he has spent his life is certainly as much of a deterrent to commit a crime as is a fine or even jail time.

That the law is also intended to keep registrants away from potential victims and prevent future crime does not make this provision regulatory and non-punitive. "One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *United States v. Brown*, 381 U.S. 437, at 458 (1965). Repeat offender statutes (such as California's "3-strikes" law) work by segregating persons with prior convictions from potential victims and even prompting them to move outside of the state, but that does not mean that they are not punishment. *See Ewing v. California*, 538 U.S. 11, 26-27 (2003).

(4) The Residency Prohibition Does Not Bear a Rational Connection to Any Non-Punitive Purpose.

The CDCR asserts that the regulatory purpose of the residency prohibition is the protection of children. Yet the statute does not bar a convicted sex offender from spending all of his days in a park where children play, or near a school, as long as he does not actually reside in an

exclusion zone. The statute and official CDCR policy in fact provide a perverse incentive for § 290 registrants to become homeless and thereby completely avoid both the residency restriction and the community notification provisions of Meghan's Law.[13] Applying the definition of "residence" that is used for the sex registration statute,[14] the CDCR's official policy is that persons who are "transient" are not subject to the residency prohibition. CDCR Policy No. 07-48 p.2 (Oct. 11, 2007) (attached as exhibit B to request for judicial notice (RJN)) (parolees who are violating the residency restriction must either "provide a compliant residence or *declare themselves transient.*") (emphasis added).[15] Moreover, a parolee who spends a single night in any sort of "structure that can be located by a street address" – specifically including a homeless shelter – is considered to reside at that address, but a person who lives "under a bridge or on a bench" is transient and thus not subject to the residence restrictions. CDCR Policy No. 08-35 p.1 (Sept. 16, 2008) (Attachment D to RJN); CDCR Policy No. 07-36 p.4 (Aug. 17, 2007) (Attachment A to RJN).[16]

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[13] Penal Code § 290.46(c)(1), (d)(1).

[14] *Id.* § 290.011(g).

[15] Courts must consider these types of official policy statements in evaluating whether a law, as implemented, has a punitive effect under the Ex Post Facto Clause. *Garner v. Jones*, 529 U.S. 244, 256 (2000).

[16] From February to September of 2008, the CDCR had a contrary policy: "Transients/homeless parolees must also be compliant with distance

Thus, a registrant cannot lawfully spend the night in a homeless shelter that is 1/3 mile from a park, but can *live* on a bench *in* that same park.

This perverse policy is discussed in a December 2008 report by the California Sex Offender Management Board (CASOMB), a board that the legislature created to study and report to the legislature on issues relating to sex offenders."[17] This report reveals a dramatic increase in the number of parolees affected by the CDCR's implementation of § 3003.5(b) who have declared themselves to be transient: from 88 such persons in November 2006, to 1056 paroled sex offenders listed as transient as of June 2008. *Homelessness Among Registered Sex Offenders in California: The Numbers, the Risks and the Response* at 9 (CASOMB 2008).[18] Thus the real effect of the residency prohibition is to make it more difficult for anyone –police, parole agents, or members of the public using the Meghan's Law Web site – to keep track of registrants, without in any measurable way reducing their access to parks or schools or improving public safety. *See California's Failure to Learn*, 28 J. Juv. L. at 26-27.

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requirements." CDCR Policy No. 08-14 p.3 (Feb. 28, 2008) (Attachment C to RJN). Policy 08-35 explicitly amended this policy.

[17] Penal Code § 9002(a); *see id.* § 9000. Both the Attorney General and the Secretary of the CDCR are represented on CASOMB. *Id.* § 9001(b)(1)(A), (B).

[18] The report is available on the CASOMB Web site, http://www.casomb.org/docs/Housing%202008%20Rev%201%205%20FINAL.pdf

For similar reasons, and because the residency restrictions drain law-enforcement resources without reducing crime, Iowa law enforcement and prosecutors have lobbied for the repeal of that state's residency restriction law. *Id.* at 17-19.

Moreover, residency prohibition laws may actually reduce public safety. First, they divert attention away from the reality that most sex crimes against children are committed by persons known to the child and the child's family, not by strangers. *Id.* at 25-26. *See CASOMB Report to the Legislature and Governor's Office January 2008.*[19] ("Only 14.3% of the women and 19.5% of the men sexually assaulted before age 18 were assaulted by a stranger."). Not even the staunchest proponents of residency restrictions would claim that they prevent victimization by family members or acquaintances. Second, the law may actually increase recidivism by causing offenders to become homeless or to relocate into areas that are far away from suitable housing or services. As CASOMB has repeatedly emphasized, "evidence shows that homelessness increases the risk that a sex offender may re-offend." *Homelessness Among Registered Sex Offenders*, *supra*, at 9; *see id.* at 15-20; *CASOMB Report to Legislature*,

[19] Available on both the CDCR and CASOMB Web sites: http://www.cdcr.ca.gov/news/docs/SOMB%20Report022108.pdf; http://www.casomb.org/docs/SOMBReport1.pdf.

supra, at 128 ("suitable housing for sex offenders is critical to reducing recidivism and increasing community safety."); *id* at 128-135.

(5) The Residency Prohibition is Excessive in Relation to Any Non-Punitive Purpose.

Certainly the provision sweeps far more broadly than can be rationally related to its purpose of protecting children. It applies to people who have never committed any sort of offense against a child. Also, by encompassing all the offenses included within the sex registration statute, it applies equally to somebody convicted of a relatively minor offense as to a violent sex offender.[20] And it is being enforced against parolees where the sex offense may have been committed years ago and who are on parole for another offense that has nothing to do with the conduct covered by the sex registration statute.

Although certain classes of sex offenders may pose a high risk of reoffending, it is excessive to permanently bar such a broad, undifferentiated group of people from residing within the extensive exclusion zones, including all of the state's three largest cities. *See CASOMB Report to Legislature*, *supra*, at 9 ("research studies over the past two decades have consistently indicated that recidivism rates for sex

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[20] For example, misdemeanor indecent exposure is a registerable offense. Penal Code §§ 314, 290(c). Our high court has previously held that this crime does not justify a lifetime disability. *In re Lynch*, 8 Cal.3d 410, 429-39 (1972).

offenders are, in reality, lower than the re-offense rates for most other types of offenders"); *id.* at 67-83. As our legislature has recognized, the state's coercive power and law-enforcement resources can – and should -- be focused on those offenders who pose a continuing risk to public safety. Thus, Penal Code § 3003(g) imposes residency restrictions on parolees whom the CDCR "determines poses a high risk to the public." And the state's "Megan's Law" Web site also provides differing amounts of information about registrants depending on the specific offense and circumstances of conviction. *See* Penal Code § 290.46; *id.* § 290.46(e)(2)(C).[21]

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[21] Although a divided panel of the United States court of appeals held that a similar Iowa law was not so punitive in effect as to overcome the legislative's civil designation, that case is distinguishable. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2004). Unlike with Prop. 83, there was no argument in *Miller* that the law was intended to be anything other than a non-punitive civil measure. *Id.* at 718-19, 723. Also, the Iowa law was less harsh- and less akin to banishment- because it, unlike Prop. 83, had a "grandfather clause" that meant nobody would be force to change an established residence. *Id.* at 719-20. Finally, nothing in the court's opinion suggests that Iowa imposed the law as irrationally as does California, allowing offenders to declare themselves transient and then live in a park. In any event, *Miller* is not binding on this court, and *amici* submit that the opinions of the district court and the dissenting circuit judge – both of whom would have held that the law could not be imposed retroactively – are more persuasive than that of the majority analysis. *See Mosley*, 168 Cal.App.4th at 533 (criticizing *Miller*).

(6) These Factors Show that the Residency Prohibition is Punitive.

As this Court recently wrote in *Mosley*,

> Jessica's Law's residency restriction has an overwhelming punitive effect. It effectuates traditional banishment under a different name, interferes with the right to use and enjoy real property near schools and parks, and subjects housing choices to government approval like parole or probation. It affirmatively restrains the right to choose a home and limits the right to live with one's family. It deters recidivism and comes close to imposing retribution on offenders. While it has a nonpunitive purpose of protecting children, it is excessive with regard to that purpose. It would oust a person never convicted of any offense against a child from his family home near a school or park, forcing him to leave his family or consigning the family to perpetually threatened transience. Relocation would be limited to the few outskirts of town lacking a school or park. Yet the residency restriction would allow a convicted child molester to stroll past the school, eat ice cream in the park, and live next door to small children or even in the park-as long as he retreats at night to housing far from a school or park. Building exclusion zones around all schools and parks for all registered sex offenders is excessively punitive.
>
> *Mosley*, 168 Cal.App.4th at 533.

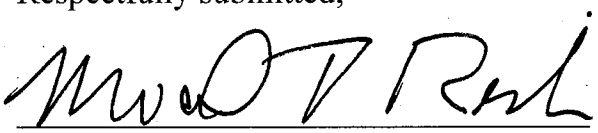
Even if Proposition 83 had clearly designated the residency restriction as civil, this clear showing of punitive effect would override that designation. In the absence of any designation or other clear showing of intent, this punitive effect points plainly to the conclusion that the residency prohibition is punishment, and is being enforced as an ex post facto law.

CONCLUSION

Applying § 3003.5(b) retroactively would violate California's presumption against retroactivity and the Ex Post Facto Clause. This Court should therefore hold that the statute applies only to persons who have committed registerable sex offenses after November 8, 2006, when Proposition 83 took effect.

Dated: January 14, 2009

Respectfully submitted,



MICHAEL T. RISHER
ACLU FOUNDATION
OF NORTHERN CALIFORNIA

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of the Court 8.204(c)(1), I certify that the text in the attached Amicus Brief was prepared in Microsoft Word, is proportionally spaces, and contains 8,273 words, including footnotes but not the caption, the table of contents, the table of authorities, or the application.

Dated: January 14, 2009

Respectfully submitted,

Michael T. Risher
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
NORTHERN CALIFORNIA, INC.

By 
Michael T. Risher

Attorney for Amici

Attachment to Brief (Rule of Court 8.204(d)):

ACLU v. Masto, 08-cv-00822-JCM-PAL, unpublished order (D.Nev. October 7, 2008) (appeal pending)

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

The American Civil Liberties Union of Nevada, Does 1-8 and Does A-S, individuals,

Plaintiffs,

v.

Catherine Cortez Masto, Attorney General of the State of Nevada; Jerald Hafen, Director of the Nevada Department of Public Safety; Bernard W. Curtis, Chief, Parole and Probation Division of the Nevada Department of Public Safety; Captain P.K. O'Neill, Chief, Records and Technology Division of the Nevada Department of Public Safety; Michael Haley, Sheriff of the Washoe County Sheriff's Office; Michael Poehlman, Chief of the Reno Police Department; Richard A. Gammick, District Attorney of Washoe County; Douglas Gillespie, Sheriff of the Las Vegas Metropolitan Police Department; Joseph Forti, Chief of the North Las Vegas Police Department; David Roger, District Attorney of Clark County; Chief Richard Perkins, Henderson Police Department,

Defendants.

2:08-cv-00822-JCM-PAL

PLAINTIFFS' REVISED ORDER GRANTING PERMANENT INJUNCTION

On September 10, 2008, a hearing was held before Hon. Judge James C. Mahan on Plaintiffs' Motion for Summary Judgment. Appearing for plaintiffs the American Civil Liberties Union and Does 1 through 8 were Margaret McLetchie and Allen Lichtenstein. Robert Langford appeared for Plaintiffs Does A through S. Binu Palal and Kimberly Buchanan appeared for defendants.

Plaintiffs filed their complaint on June 24, 2008, requesting that this court declare A.B. 579 and S.B. 471 unconstitutional and to issue an injunction prohibiting the enforcement of changes to various N.R.S. provisions to be modified by the implementation of A.B. 579 and S.B. 471. Plaintiffs stated several causes of action, including that the laws violated:

(1) Procedural Due Process under the U.S. Constitution; (2) the Ex Post Facto Clause under the U.S. Constitution; (3) the Double Jeopardy Clause under the U.S. Constitution; (4) the Contracts Clause under the U.S. and Nevada Constitutions; (5) the Separation of Powers under the Nevada Constitution; and (6) the prohibition against Vague and Ambiguous laws under the U.S. Constitution.

Plaintiffs originally named two sets of defendants:

(1) the "State Defendants:" Defendant Cortez Masto, Attorney General of the State of Nevada; Defendant Jerald Hafen, Director of the Nevada Department of Public Safety; Defendant Bernard W. Curtis, Chief of the Parole and Probation Division of the Nevada Department of Public Safety; and Defendant Captain P.K. O'Neill, Chief of the Records and Technology Division of the Nevada Department of Public Safety; and

(2) Defendant Michael Haley, Sheriff of the Washoe County Sheriff's Office; Defendant Michael Poehlman, Chief of the Reno Police Department; Defendant

Richard A. Gammick, District Attorney of Washoe County; Defendant Douglas Gillespie is Sheriff of the Las Vegas Metropolitan Police Department; Joseph Forti, Chief of the North Las Vegas Police Department; including but not limited to the community notification provisions therein; Defendant David Roger, District Attorney for Clark County, Nevada; and Defendant Chief Richard Perkins of the Henderson Police Department.

Plaintiffs subsequently entered stipulations, approved by this court, with all the Law Enforcement Defendants, dismissing them from this action on the condition that they abide by the terms of any relief.

On June 30, 2008, the court denied plaintiffs' request for a Temporary Restraining Order but granted Plaintiffs' Preliminary Injunction Motion.

In July of 2007, the Nevada Legislature passed A.B. 579 which mandated that its restrictions, notification provisions, and potential criminal penalties apply retroactively, not just to pedophiles, but to anyone who has committed any offense that involves "any sexual act or sexual conduct with another" – no matter how minor the sexual offense was – and to offenses committed as long ago as July 1, 1956. In July of 2007, the Nevada Legislature also passed S.B. 471, which imposed G.P.S. monitoring and movement and residency restrictions on certain sex offenders. Plaintiffs submitted declarations, uncontroverted by the defendants, making clear that the Parole and Probation Department was applying S.B. 471's provisions retroactively.

Together, A.B. 579 and S.B. 471 redefine who is considered a "sex offender," the way in which sex offenders are classified and monitored, and what restrictions apply to which sex offenders. Prior to the enactment of these laws, sex offenders had been individually assessed

and classified based on psychological assessments focusing on whether the offenders pose a risk to society and are likely to re-offend. The statutes mandated that sex offenders would henceforth be automatically classified based on one factor, the crime committed. Because of the changed standards, numerous people: (1) whose crimes were committed in the distant past; (2) who have been determined by the state of Nevada to be unlikely to re-offend; and (3) who have complied with the law, attended counseling, and who have not committed additional crimes would be thrown back into the system or be subject to more onerous monitoring and residency requirements.

A.B. 579 and S.B. 471 do not provide any procedural due process protections, leaving even people who believe that they have been miscategorized as sex offenders with no means to challenge the application of A.B. 579 and S.B. 471.

The application of these laws retroactively is the equivalent a new punishment tacked on to the original sentence – sometimes years after the fact – in violation of the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution, as well as the Contracts clauses of the U.S. and Nevada Constitutions. Moreover, because they do not provide any procedural protections from their retroactive application, A.B. 579 and S.B. 471 violate the Due Process Clause of the U.S. Constitution.

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For these reasons, the Court hereby grants Plaintiffs' Motion for Summary Judgment, making the June 30, 2008 Preliminary Injunction enjoining the enforcement of A.B. 579 and S.B. 471 a Permanent Injunction.

Respectfully submitted,

DATED: October 7, 2008

ACLU of NEVADA, Attorneys for the ACLU of Nevada and Does 1-8

By: /s/
Margaret A. McLetchie

DATED: October 7, 2008

ROBERT L. LANGFORD & ASSOCIATES, Attorneys for the ACLU of Nevada and Does 1-8

By: /s/
Robert L. Langford

IT IS SO ORDERED.

James C. Mahan

HONORABLE JUDGE JAMES C. MAHAN

Dated: October 7, 2008

PROOF OF SERVICE BY U.S. MAIL

People v. Timothy Allen Milligan

Case No G039546

I, Nigar Shaikh, declare that I am employed in the City and County of San Francisco, over the age of 18 years, and not a party to the within action or cause. My business address is 39 Drumm St., San Francisco, CA 94111. On January 15, 2009, I served a copy of the attached:

1) **APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, SOUTHERN CALIFORNIA, AND SAN DIEGO AND IMPERIAL COUNTIES TO FILE AMICUS BRIEF, AND AMICUS BRIEF ON MERITS, IN SUPPORT OF APPELLANT TIMOTHY MILLIGAN**

2) **MOTION OF AMICUS AMERICAN CIVIL LIBERTIES UNION FOR JUDICIAL NOTICE**

3) **DECLARATION OF MICHAEL T. RISHER IN SUPPORT OF AMICUS AMERICAN CIVIL LIBERTIES UNION'S MOTION FOR JUDICIAL NOTICE**

4) **MEMORANDUM OF POINTS AND AUTHORITIES OF AMICUS AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF MOTION FOR JUDICIAL NOTICE**

5) **[PROPOSED] ORDER GRANTING JUDICIAL NOTICE**

on each of the following by placing true copies in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

Jackie Menaster
2658 Griffith Park Blvd., Suite 503
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Attorney for Defendant and Apellant Timothy Allen Milligan

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San Diego, CA 92101-2939

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 15, 2009 at San Francisco, California.

Nigar Shaikh