IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

No. S156933
Original Writ Proceeding

APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO FILE AMICUS BRIEF AND AMICUS BRIEF ON THE MERITS IN SUPPORT OF PETITIONERS

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The American Civil Liberties Union of Northern California (ACLU-NC) respectfully requests permission under California Rule of Court 8.520(f) to file a brief as amicus curiae in support of Petitioners in this matter.

The ACLU is a nationwide, nonprofit, nonpartisan membership organization with over 550,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The ACLU-NC, founded in 1934, is the largest ACLU affiliate. The ACLU-NC testified about the legality and constitutionality of Proposition 83's residency prohibition before the California Joint Assembly-Senate Public Safety Committee. The ACLU-NC previously submitted a letter brief in this matter, asking this Court to exercise its original jurisdiction and decide this Petition on the merits.

The ACLU-NC believes that the attached brief will assist this Court in deciding whether the residency prohibition of Proposition 83 applies retroactively in light of controlling legal principles[1] and, if so, whether applying it retroactively violates the federal Ex Post Facto Clause. This question directly affects not only people like Petitioners who are currently on parole, 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

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[1] Penal Code § 3 ("No part [of the Penal Code] is retroactive, unless expressly so declared.").

enforcement for many years. The ACLU-NC therefore requests leave to present the attached amicus brief to present additional authorities and discussion in support of Petitioners' arguments on this issue.

Dated: March 10, 2008

Respectfully submitted,

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The American Civil Liberties Union of Northern California (ACLU-NC) respectfully submits this amicus curiae brief in support of Petitioners in this matter pursuant to California Rule of Court 8.520(f). This brief addresses the question of whether the retroactive operation of the residency prohibition of Proposition 83 (Penal Code § 3003.5(b))[2] is lawful and constitutional. As discussed below, the ACLU-NC believes that

1) retroactive application of the residency prohibition violates the well-established principle that statutes are presumed to operate only prospectively; and,
2) applying the statute retroactively violates the Ex Post Facto Clause of the United States Constitution.

INTEREST OF AMICUS

The ACLU is a nationwide, nonprofit, nonpartisan membership organization with over 550,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The ACLU-NC, founded in 1934, is the largest ACLU affiliate. The ACLU-NC testified about the legality and constitutionality of Proposition 83's residency prohibition before the California Joint Assembly-Senate Public Safety Committee. The ACLU-NC previously

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[2] Section 3003.5(b) reads: "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."

submitted a letter brief in this matter, asking this Court to exercise its original jurisdiction and decide this Petition on the merits.

The ACLU-NC agrees with Petitioners that Respondent Tilton is implementing the residency prohibition in violation of statutory and constitutional standards. Because Respondent's current policy is causing unlawful and irreparable injury to Petitioners, and over a thousand other similarly situated persons throughout the state, the ACLU-NC urges this Court to hold that the new law applies prospectively only, and to grant the petition for a writ of habeas corpus.

ARGUMENT

1. Retroactive Application of § 3003.5(B) Violates the Longstanding Rule That Legislation Operates Prospectively Unless it Expressly States Otherwise.

In *Myers v. Phillip Morris Companies, Inc.*, 28 Cal. 4th 828 (2002), this Court fully delineated the legal standard and analytical test that determine the question of whether a statute should operate retroactively. This Court made it clear that the controlling principle is a "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 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 statutes adopted by initiative just as it does to law 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, which is as applicable to statutes relating to sex offenders as it is to other less controversial measures, and not accept Respondent's implicit invitation to ignore the presumption in this case.[4]

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

With respect to the first prong of its test, this Court made it clear that "express language of retroactivity" means wording that is "an unequivocal and

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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 Respondent to parolees whose offenses and convictions predated the effective date of the statute. *See Meyers*, 28 Cal.4th at 840. Respondent does not argue otherwise.

[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).

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]

Although Respondent argues that § 3003.5(b) should apply retroactively because the statute applies to "any person for whom registration is required pursuant to Section 290," a comparison with the statute that created the state's Meghan's Law website 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 website: it instructs the government to "make available information concerning persons *who are required to register pursuant to Section 290.*" 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.[6]

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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] Penal Code § 290.46(m).

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. Respondent's attempt to transform this language into an "unequivocal" statement of retroactivity is precisely what the presumption against retroactivity forbids. *Martin v. Hadix*, 527 U.S. 343, 353-54 (1999); *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).

This 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 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 this 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 v. Mervyns*, 39 Cal. 4th 223, 230 (2006).

Instead of trying to distinguish *Myers* or explain why it is not controlling, Respondent fixates on this Court's earlier decision in *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.

Respondent 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 this 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. This Court rejected the government's argument (similar to the government'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.[7]

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, this Court and the United States Supreme Court are in agreement that "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.

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[7] *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.").

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 this 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 this 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. Respondents' arguments basically boil down to an opinion that the new law *should*, for policy reasons, apply to people convicted before November 2006. *Di Genova* 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.

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," this Court invoked the "established rule of statutory construction [that] requires us 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.[8]

This rule and reasoning applies equally here. As discussed below, construing the residency prohibition as retroactive raises significant questions

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[8] "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).

under the Ex Post Facto Clause of the United States Constitution, and thus this established rule of statutory construction similarly reinforces the presumption of prospectivity in this case.[9]

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 Respondent quite properly takes the position that § 3003.5(b) should not apply to such persons, some of his arguments suggest a contrary result. Again, applying the presumption of prospectivity will serve to avoid these serious constitutional questions.[10] In any event, because people who are not presently on parole are not parties in this case, this Court should not adjudicate their rights in this action.

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[9] This 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).

[10] In *Doe v. Schwarznegger*, 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.

2. Retroactive Application of § 3003.5(B) Violates the Ex Post Facto Clause.

The Ex Post Facto Clause prohibits any state from enacting a 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. As noted above, there is no dispute that the residency prohibition of Prop. 83 is being applied by Respondent 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 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 United States Supreme Court has 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.

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).

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 that 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*. With respect to 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.

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.
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> *Smith*, 538 U.S. at 97 (numbering added).

(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. Amended Petition at 9 and Exhibit E to Amended Pet. at 000059; 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*"). According to Petitioners in this case, the residency prohibition has already forced convicted sex offenders to leave their homes and in some cases the community where they reside. *See* Amended Pet. at 10-15. 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

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. Furthermore, by enforcing this as a parole condition in the face of circumstances that will make compliance extremely difficult if not impossible for many of the registered sex offenders, the inevitable result of the residency prohibition for many will be a parole violation and a return to prison.

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 imprisonment.

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.

Respondent 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 avoid both the residency restriction and the community notification provisions of Meghan's Law.[11] Applying the definition of "residence" that is used for the sex registration statute, persons who are "transient" would not be covered by the residency prohibition. *See* § 290.011(g). This is apparently the position that Respondent has taken – that parolees may lawfully sleep in an exclusion zone such as a park as long as they are considered transient and therefore have no residence.12 CDCR policy explicitly states that parolees who are deemed to be violating the residency restriction must either "provide a compliant residence *or declare themselves transient.*" CDCR Policy No. 07-48 p.2 (Oct. 11,

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

[12] One report states that every single parolee in San Francisco who has been ordered to comply with § 3003.5 has declared him or herself to be transient. *See* Brent Begin, *Legal Loophole Lets Sex Offenders Stay off Radar*, San Francisco Examiner, Nov. 9, 2007, available at http://www.examiner.com/printa-1038303~Legal_loophole_lets_sex_offenders_stay_off_radar.html.

2007) (Exhibit P to Traverse) (emphasis added). *See* CDCR Policy No. 07-36 p. 4 (Aug. 17, 2007) (exhibit B to Amended Pet.) (defining transient status).

This perverse incentive is discussed in a recent report by the California Sex Offender Management Board (CSOMB), a board that the legislature created to study and report to the legislature on issues relating to community management of sex offenders."[13] The CSOMB 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 718 paroled sex offenders listed as transient as of December 2007. CSOMB Report at 126-27.[14] Thus the real effect of the residency prohibition is to make it more difficult for anyone – parole agents or members of the public using the Meghan's Law website – to keep track of registrants, without in any measurable way reducing their access to parks or schools or improving public safety.[15] *See California's Failure to Learn*, 28 J. Juv. L. at 26-27. This is why shortly after the CDCR started implementing the

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[13] The 2006 statute that created CSOMB required it report to the legislature by January 1, 2008. Penal Code §§ 9000, 9002(a). Both the Attorney General and the Secretary of the CDCR are represented on CSOMB. *Id.* § 9001(b)(1)(A), (B).

[14] The report is available on the CDCR website, http://www.cdcr.ca.gov/news/docs/SOMB%20Report022108.pdf.

[15] Empirical research and studies by law enforcement agencies themselves establish that these laws are ineffective to prevent sex offender recidivism. *See* Amended Pet. at 19, n. 3; 32-34.

residency prohibitions, the San Francisco Board of Supervisors felt it necessary to pass a resolution asking the Attorney General to clarify how the new law applied to transients, after finding that CDCR Policy No. 07-48 was "an impediment to the ability of law enforcement to closely monitor sex offenders" and "circumvents the public notification process of Megan's Law."[16] 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. As recent newspaper articles and editorials from around the state make clear, California's residency prohibition is turning out to be equally flawed.[17]

Moreover, residency prohibition laws may actually reduce public safety by diverting attention away from the reality that most sex crimes against children are committed by persons known to the child and the child's family,

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[16] San Francisco Resolution No. 596-07, adopted 10/30/07, signed by Mayor Newsom 11/7/07. A copy is available at http://www.sfgov.org/site/uploadedfiles/bdsupvrs/resolutions07/r0596-07.pdf.

[17] *See, e.g*, Editorial, *Reform Jessica's Law*, CONTRA COSTA TIMES, Feb. 25, 2008. ("Without major reforms, Jessica's Law is not likely to be fully enforced nor particularly effective in protecting children from sexual predators."), available at http://www.contracostatimes.com/news/ci_8357981; Editorial, *Jessica's Law not working*, SACRAMENTO BEE, March 4, 2008, at B6 ("Don't amend it. Repeal it. We will all be safer for it.") available at http://www.sacbee.com/110/story/757605.html; Bill Ainsworth, *Proposition 83 Possibly Making State Less Safe*, SAN DIEGO UNION TRIBUNE, Feb. 14, 2008, available at http://www.signonsandiego.com/news/state/20080214-9999-1n14jessica.html.

not by strangers. *Id.* at 25-26; *see* CSOMB Report at 33 ("Only 14.3% of the women and 19.5% of the men sexually assaulted before age 18 were assaulted by a stranger."). And by causing offenders to become homeless or to relocate into areas that are far away from suitable housing or services the law may actually increase recidivism. As the CSOMB report makes clear, "suitable housing for sex offenders is critical to reducing recidivism and increasing community safety." CSOMB Report at 128; *see 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.[18] 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

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

group of people from residing within the extensive exclusion zones, including all of the state's three largest cities. *See* CSOMB Report at 9 ("research studies over the past two decades have consistently indicated that recidivism rates for sex 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" website 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).

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

The punitive effect of the residency prohibition is clear: the law is analogous to the historical punishment of banishment, it directly imposes an affirmative disability, it promotes the traditional aims of punishment, and it is excessive in relationship to any non-punitive purpose. Even if Proposition 83 had clearly designated this provision as civil, this constitutes a clear showing of punitive effect that would override such a legislative designation. In the absence of any designation or other clear showing of intent, this showing of

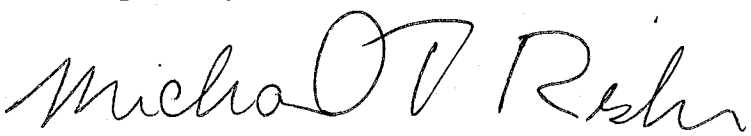
punitive effect points plainly to the conclusion that the residency prohibition is punishment, and is being enforced as an ex post facto law.

CONCLUSION

Applying § 3003.5(b) retroactively would violate California's presumption against retroactivity and the federal 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: March 10, 2008

Respectfully submitted,



ALAN L. SCHLOSSER
MICHAEL T. RISHER
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
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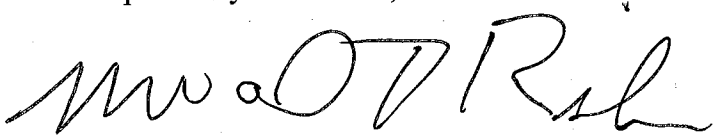
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of the Court 33(b)(1), I certify that the text in the attached **APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO FILE AMICUS BRIEF AND AMICUS BRIEF ON THE MERITS IN SUPPORT OF PETITIONERS** was prepared in Microsoft Word, is proportionally spaces, and contains 5,153 words.

Dated: March 10, 2008

Respectfully submitted,



MICHAEL T. RISHER
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Attorney for Amicus Curiae

PROOF OF SERVICE BY U.S. MAIL

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

No. S156933

I, Meghan Loisel, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to the within action or cause; my business address is 39 Drumm Street, San Francisco, CA 94111.

On March 10, 2008, I served 2 copies of the attached

APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO FILE AMICUS BRIEF AND AMICUS BRIEF ON THE MERITS IN SUPPORT OF PETITIONERS

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:

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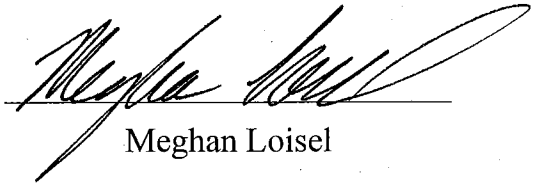
I declare under penalty of perjury that the foregoing is true and correct. Executed on March 10, 2008 at San Francisco, California.



Meghan Loisel