IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

WILLIAM TAYLOR, et al.,

On Habeas Corpus

Case No. S206143

Fourth Appellate District, Division One, Case No. D059574
San Diego County Superior Court Case Nos. HC19742 (Taylor), HC19731 (Todd), HC19612 (Briley), HC19743 (Glynn)
The Honorable Michael D. Wellington, Judge

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CONSTITUTIONAL PROVISIONS

United States Constitution

California Constitution

FEDERAL CASES

STATE CASES

OTHER STATE CASES

STATUTES

Penal Code

ORDINANCES

San Diego County Code of Regulatory Ordinances

LEGISLATION

OTHER AUTHORITIES

INTRODUCTION

This case stems from habeas corpus petitions filed by San Diego County parolees which raised various constitutional challenges to the blanket residency restriction of Penal Code[1] section 3003.5, subdivision (b), a statutory parole condition which has been strictly enforced by the California Department of Corrections and Rehabilitation ("CDCR"), Division of Adult Parole Operations ("DAPO") since August, 2007. In the wake of this Court's ruling and remand order in *In re E.J.* (2010) 47 Cal.4th 1258, a comprehensive evidentiary hearing was conducted in the San Diego Superior Court to determine the real-life impact of this restriction in San Diego County and whether, as applied to affected people who live there, section 3003.5, subdivision (b) is unconstitutional. The superior court found that it was and enjoined its enforcement, not only as to the four lead petitioners, but countywide.

STATEMENT OF PROCEEDINGS

On November 7, 2006, the voters adopted Proposition 83, "The Sexual Predator Punishment and Control Act: Jessica's Law".[2] In the ballot pamphlet, proponents of Jessica's Law promised that the initiative would

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[1] Subsequent statutory references are to the Penal Code, unless otherwise indicated.

[2] Proposition 83 is referred to as "Jessica's Law" throughout.

create "predator free zones" around schools and parks by preventing sex offenders from living "near where children learn and play". (CT-A, Vol. 3, p. 543.[3]) Section 2 of the initiative included, among its "findings and declarations," that "sex offenders have very high recidivism rates", "are the least likely to be cured and the most likely to reoffend", and "have a dramatically higher recidivism rate for their crimes than any other type of violent felon." These "findings" were purportedly based on a "1998 report by the U.S. Department of Justice". (*Id.* at p. 546.)

Jessica's Law included an amendment to section 3003.5, a statute pertaining to individuals under the jurisdiction of the DAPO. It added subdivision (b), which provides, "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather," and it added subdivision (c), which reserves to municipalities the right to enact local ordinances that further restrict the residency of any person for whom registration is required

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[3] Respondents adopt the same references to the clerk's transcript as used in Appellant's Opening Brief. "CT" refers to the Clerk's Transcript on Appeal certified on May 16, 2011. "CT-A" refers to the Augmented Clerk's Transcript on Appeal certified on August 22, 2011, Volumes 1 through 6. "2CT-A" refers to the Second Augmented Clerk's Transcript on Appeal certified on October 21, 2011, Volumes 1 through 3. "RT" refers to the Reporter's Transcript on Appeal, Volumes 1 through 13.

pursuant to Section 290." (Section 3003.5, subds. (b), (c).) In August, 2007, the CDCR began requiring registered sex offenders under the supervision of the DAPO to comply with the residency restriction of Jessica's Law. Shortly thereafter, the number of homeless affected parolees[4] began to skyrocket. Over a period of only three years, the number of homeless affected parolees increased by 1,236%.

On February 1, 2010, this Court addressed CDCR's enforcement of Penal Code section 3003.5, subd. (b), grappling with various facial and as-applied constitutional challenges raised by four affected parolees, two of whom resided in San Diego County. (*In re E.J., et al.* (2010) 47 Cal. 4th 1258 ("*In re E.J.*") This Court concluded that CDCR was not applying the residency restriction retroactively and that its enforcement of the restriction as a condition of parole did not violate state or federal ex post facto prohibitions. (*In re E.J., supra*, 47 Cal. 4th at p. 1275, p. 1280.) With respect to the remaining as-applied claims, this Court remanded the matters to superior court in the counties where the respective petitioners reside and ordered that evidentiary hearings be conducted to flesh out the relevant facts necessary to decide these claims, including, but not limited to the following:

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[4] Throughout this brief, the term "affected parolees" will be used to describe registered sex offenders, released from state prison after November 7, 2006, who are being actively supervised by the DAPO.

> Establishing each petitioner's current parole status; the precise location of each petitioner's current residence and its proximity to the nearest "public or private school, or park where children regularly gather" (§ 3003.5(b)); a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders in the respective counties and communities to which they have been paroled; an assessment of the way in which the mandatory parole residency restrictions are currently being enforced in each particular jurisdiction; and a complete record of the protocol CDCR is currently following to enforce section 3003.5(b) in those respective jurisdictions.

(*In re E.J.*, *supra*, 47 Cal. 4th at pp. 1283-1284.)

By this time, K.T. and J.S., the two San Diego petitioners in *In re E.J.*, had discharged parole. But there was no shortage of homeless affected parolees in San Diego to pick up where they left off. By May 12, 2010, dozens of habeas petitions had been filed by imprisoned and paroled individuals, and temporary emergency injunctions had been issued in nearly all of these matters. The Public Defender was appointed on all pending matters, and four lead cases were selected and consolidated for the purpose of conducting an evidentiary hearing regarding facts common to affected parolees in San Diego County. Over the next seven months, the number of petitions more than tripled.

The lead cases were the matters of William Taylor, Julie Briley, Jeffrey Glynn, and Stephen Todd, all of whom had been convicted of a single registerable sex offense decades before Jessica's Law and all of whom

paroled after November 8, 2006, on a nonsexual nonviolent commitment offense. Each petitioner, when paroled, had a home available to him or her, but none were compliant with the residency restriction. Each petitioner wound up homeless, but when no longer subject to the residency restriction, was able to secure shelter. Among the claims raised in the petitions were the facial and as-applied claims addressed in *In re E.J.*[5]

Following an evidentiary hearing, at which comprehensive information pertaining to each of the unknowns mentioned in *In re E.J.* was presented, the superior court found that:

- affected parolees are only rarely candidates to buy or rent single family homes, and, if they are to find housing, it is most likely to be in apartments or low-cost residential hotels. (CT, Vol. 2, p. 388, lines 6-16.)
- affected parolees "are legally barred from 97% of the "multi-family housing most likely to be otherwise available to them," (*Id.* at p. 388, lines 17-20.)
- the remaining 3% of "compliant" multi-family housing is exceedingly difficult to find and is not necessarily available to

[5] The petitioners also alleged that the residency restriction violated the Sixth and Eighth Amendments to the United States Constitution and is not rationally related to any legitimate government interest.

this population. (*Id.* at pp. 389-391.)

- Respondents Taylor, Todd, Briley and Glynn were made homeless due to CDCR's enforcement of the residency restriction. (*Id.* at p. 406, lines 3-20.)
- "rigid application of the residency restriction results in large groups of parolees having to sleep in alleys and riverbeds, a circumstance that did not exist prior to Jessica's Law." (*Id.* at p. 409, lines 4-12.)
- this burden is imposed "without any consideration of the degree of restriction justified by the circumstances and history of the individual parolee." (*Id.* at p. 409, lines 13-16.)
- homelessness among the affected parolee population "hinders their treatment, jeopardizes their health and undercuts their ability to find and maintain employment, significantly undermining any effort at rehabilitation." (*Ibid.*)

Applying the legal standard set forth in California cases involving conditions of probation and parole, the court concluded that section 3003.5, subdivision (b), when enforced in San Diego County:

- impinges on the fundamental right to travel within a state, to establish a home, and to choose the people with whom one

lives. (CT, Vol. 2, pp. 404-406.)

- "is not narrowly drawn, much less specifically tailored to the individual. It applies as a blanket proscription, blindly applied to all registered sex offenders on parole without consideration of the circumstances or history of the individual case." (CT, Vol. 2, at p. 407, lines 3-8.)
- "invites anomalies that smack of arbitrariness." (*Id.* at p. 407, line 19.)
- "is unconstitutionally 'unreasonable' under established case law . . . because it oppressively infringes on fundamental constitutional rights, causing significant harm without justifying that infringement by narrowly tailoring the intrusion to the needs of the individual case." (*Id.* at p. 409, lines 17-20.)

In a written decision, filed on February 18, 2011, the superior court ordered the CDCR to cease enforcement of the restriction against the four lead petitioners.[6] (CT, Vol. 2, at p. 416.) Approximately three weeks later, the court issued a supplemental statement of decision, enjoining enforcement of section 3003.5, subdivision (b) county-wide. (CT, Vol. 2, pp. 417-421.)

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[6] The court also found that several regulations adopted by CDCR to implement and enforce the residency restriction violated the Administrative Procedures Act ("APA") and enjoined their enforcement. (CT, Vol. 2, at pp. 411-415.) Appellant did not appeal from this ruling.

CDCR appealed. In September, 2012, a unanimous panel of the Court of Appeal for the Fourth Appellate District, Division One affirmed the trial court's orders. CDCR petitioned this Court to review the Court of Appeal's decision, and review was granted.

STATEMENT OF FACTS

A. Factual Assessment of the Availability of Compliant Housing Available to Petitioners and Other Affected Parolees in San Diego County

In San Diego County, nearly all housing, affordable to and suitable for affected parolees and their families, is located within 2,000 feet of a school or park. As a result, Appellant's enforcement of the residency restriction as a condition of parole has resulted in large numbers of affected individuals becoming and remaining homeless.

1. There is a woeful shortage of affordable housing in the County of San Diego.

The San Diego County Department of Housing and Community Development administer the "Housing Choice Voucher Program," more commonly known as "Section 8." (RT, Vol. 7, at p. 359, p. 362.) This program exists because the need, county-wide, for affordable housing exceeds the amount of housing available to low-income families. The annual vacancy rate for rental housing in this county is extremely low, ranging from only five to eight percent. (*Id.* at pp. 369-370.) To make more units available

to low income individuals or families, the County provides rental subsidies to property owners and rental vouchers to applicants. (*Id.* at pp. 360-364.) To qualify for the program, an applicant family's household income cannot exceed $40,000 per year. (*Id.* at pp. 360-361.)

According to David Estrella, the Director of the Department of Housing and Community Development, there is a substantial need for affordable housing in San Diego County, as evidenced by the exponential increase in the number of program applicants over recent years and the length of the program's wait list. In the past two years alone, the list has more than doubled, growing from 15,000 interested applicants to more than 40,000 interested applicants. (RT, Vol. 7, at pp. 365-367.) The time period during which families are left waiting for rental vouchers also has increased. Currently, the wait time for vouchers is up to eight years, or even longer. (*Id.* at 366:22-28.) At the same time, there has been a considerable decline in the development of rental complexes willing to offer affordable housing to qualified participants. (*Id.* at 366:4-15, 378:5-12.)

Some program participants have special needs, including mental challenges, disabilities, medical conditions, and advanced age. (RT, Vol. 7, at p. 374.) The need for affordable housing is greater for these people, who need access to social and medical service providers. (*Id.* at p. 375.) Due to

these needs, affordable housing is generally located in the more densely populated urban areas of the County. (*Id.* at pp. 364-365.) Individuals with any type of registration requirements, including registered sex offenders, are categorically excluded from the program and may not live in any residence subsidized by the program. (*Id.* at pp. 367-368, 402:23-25.)

2. Affected parolees require affordable housing with access to reliable public transportation and located reasonably close to medical and social services providers.

Upon their release from prison, most affected parolees plan, at least initially, to live with people they know, friends or relatives, in communities with which they are familiar. (RT, Vol. 7, at 473:2-9, 480:1-13; Vol. 8, at 560:12-14, 564:6-10, 746:14-16; Vol. 9, at 901:1-17.) Their housing options are extremely limited. Generally, they have no jobs and no savings. They are categorically barred from all homeless shelters and nearly every residential drug and alcohol treatment program and licensed mental health facility. (RT, Vol. 7, at pp. 403-404, 486:11-18; CT, Vol. 1, p. 102; 2CT-A, Vol. 1, p. 38.) Few affected parolees can afford rent in excess of $850 per month. (RT, Vol. 7, at 405:2-24; Vol. 8, at 585:6-16, 612:5-15, 648:9-11.) Their income is well below the poverty level. (*Id.* at 502:2-6; Vol. 8, at pp. 577-578, pp. 620-621.) For those who are disabled and cannot work, disability benefit payments range from $800 to $1,000 per month, and it can

take months or even years for a qualified applicant to receive his first check. (RT, Vol. 7, at 405:2-24, 483:20-26; Vol. 8, at pp. 643-644, 648:9-11, 747:17-20, pp. 772-773; Vol. 9, at 899:9-15.) Those who can work often find it exceedingly difficult to secure employment which pays a living wage. Blanket parole conditions, including prohibitions against having contact with minors and being near places where they congregate, prohibitions against accepting employment which provides access to a private residence, and prohibitions against having access to or using the internet, even for the purpose of securing employment, substantially limit the jobs available to affected parolees. (RT, Vol. 7, at 398:23-25, 400-402, 498-500, 502:1-6, 518-519; CT, Vol. 2, 285; CT-A, Vol. 4, pp. 350, 632, 905.)

Housing in remote and rural areas is generally unsuitable for affected individuals, few of whom can afford to own and operate a private vehicle. Parolees require reasonable access to reliable public transportation to satisfy their reporting and treatment requirements, obtain necessary medical, psychiatric and social services, search for employment and, once it's obtained, get to and from work. (RT, Vol. 7, at p. 407, 493:19-23, 499-504.)

3. In San Diego County, CDCR's enforcement of the residency restriction of Jessica's Law renders off-limits to affected parolees nearly all of the housing most likely to be available to them.

In 2006, Julie Wartell, an experienced crime analyst and mapping expert, employed by the San Diego County District Attorney's Office (RT, Vol. 6, at 215-217; CT-A, Vol. 2, p. 409-414), compiled data and created an electronic map showing the anticipated geographic impact of the residency restriction of Jessica's Law in San Diego County. (*Id.* at pp. 217-219.) She mapped the location of all "schools" in the county, including public and private elementary or secondary schools only, but did not include day care centers,[7] preschools, colleges and universities, or non-academic schools, like dance schools or ice skating schools. (*Id.* at 219:4-10, 235:20-28.) Since the term "parks where children regularly gather" is not defined by section 3003.5(b), she relied on the San Diego Association of Government ("SANDAG") to provide a definition that might reasonably be used to ascertain the location of "parks." (*Id.* at pp. 219-220.) She mapped "parks" based on the "active use park"[8] layer from SANDAG's land-use files. (*Id.* at

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[7] Ms. Wartell stated that plotting all of the licensed day care centers in the county, along with 2,000 foot buffers, would change her analysis by rendering even fewer residential parcels "liveable" for registered sex offenders. (RT, Vol. 6, at 262:7-28, 253:1.)

[8] SANDAG's "Active Use Park" layer adopts the definition set forth in subdivision (1)(a) of section 810.102 of the San Diego County Code of

219:11-16, 266:1-22.) She does not know whether all of the County's active use parks are included.[9] (*Id.* at 230:27-28, 231:1-5.) She created 2,000 foot buffers around all the schools and parks, based on the external boundaries of the designated parcels, and then determined which parcels were located entirely outside of any buffer. (*Id.*, at pp. 222-225.)

In 2010, Wartell updated the mapping and analysis she had done in 2006, and provided her mapping to Roy Pickering and Steven Bleakney, analysts with San Diego County's Department of Planning and Land Use and Planning, Geographic Information System ("GIS"), so that a more "user-friendly" map could be created. (RT, Vol. 6, at pp. 221-225, 229:26.) A few months later, she updated the map again, adding twenty-one new private and

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Regulatory Ordinances: "Active Recreational Uses" means recreation facilities occurring on level or gently sloping land (maximum 10%) restricted for park and recreation purposes in a planned development which are designed to provide individual or group activities of an active nature common to local parks in San Diego County, including, but not limited to, open lawn, sports fields, court games, swimming pools, children's play areas, picnic areas, recreation buildings, dance slabs, and recreational community gardening. Active Recreational Uses do not include natural open space, nature study areas, open space for buffer areas, steep slopes, golf courses, riding and hiking trails, scenic overlooks, water courses, drainage areas, water bodies (lakes, ponds, reservoirs), marinas and boating areas, parking areas, and archaeology areas." (RT, at pp. 255-257.)

[9] She did not designate theme parks, like the San Diego Safari Park, Sea World, the San Diego Zoo, Legoland, and water-slide parks as "parks where children regularly gather"; nor did she include playgrounds located within housing developments or condominium or apartment complexes. (*Id.* at p. 231.)

public schools which had opened during the 2010 academic year, and she provided this updated data to Bleakney and Pickering. (*Id.* at 230:5-15, pp. 232-233; CT-A, Vol. 1, pp. 2-9.) Using Wartell's data, GIS created an online map application and a hard-copy Thomas-Guide style map book, showing parks and schools throughout the County, surrounded by 2000 foot buffers in each direction, and distinguishing, with color-coding, residential parcels zoned for single family use located outside the buffers, and residential parcels zoned for multiple family use located outside the buffers. (CT-A, Vol. 1, pp. 2-9, 11-408.)

After updating the data, Ms. Wartell prepared a spreadsheet, based on Tax Assessor records, in which she determined the number and percentage of parcels and "residential parcels"[10] in each of the nineteen jurisdictions in San Diego County which are located entirely outside any school or park 2,000-foot buffer. (RT, Vol. 6, at 236:5-12, 237:1-4, 238:18-28; CT-A, Vol. 1, p. 1.) In analyzing the data and preparing the spreadsheet, she included, as "residential parcels," all properties designated for long-term residential use, including single family parcels, parcels designated for multiple-family use, like condominiums and apartments, parcels designated for mobile home use, retirement communities and independent living facilities for seniors. (RT,

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[10] The fact that a parcel has been designated as "residential" does not mean that a permanent structure has been built on that parcel. (*Id.* at 240:5-15.)

Vol. 6, at 237:8-23.) She did not include parcels designated solely for RV use, hotels or motels, because she considered them "temporary" residences. (*Id.* at 247:14-19, pp. 254-255.)

County-wide, only 24.5 percent of all residential parcels are located entirely outside of any school or park buffer or "liveable" for a registered sex offender against whom the residency restriction was being enforced. (RT, Vol. 6, at 241:17-24; CT-A, Vol. 1, p. 1.) Removing from the analysis those parcels designated for single-family homes, rarely available for rent or purchase by an affected parolee, only 2.9 percent of all remaining "residential" parcels (i.e. apartment complexes, condominiums, mobile home parks, independent living facilities and residential communities for senior citizens) are located outside of any buffer. (RT, Vol. 6, at pp. 241-243; CT-A, Vol. 1, p. 1.) In many municipalities throughout the county, the percentage of liveable parcels is even smaller. (RT, Vol. 6, at 242:4-7; CT-A, Vol. 1, p. 1.)

Toward the end of the hearing, at the request of Appellant's counsel, Wartell conducted a second analysis, this time using SANDAG's Land Use file instead of the Tax Assessor's Land Use file. (RT, Vol. 12, at pp. 1253-1254; CT-A, Vol. 3, p. 651.) Using the same format Wartell created a second spreadsheet showing the percentage of liveable built residential

parcels broken down by jurisdiction. (RT, Vol. 12, at 1262:11-22, 1264-1270; CT-A, Vol. 1, p. 1; CT-A, Vol. 3, p. 651.) According to this second analysis, 25 percent of built units in the county are located outside of any buffers. (RT, Vol. 12, at 1271:7-20; CT-A, Vol. 3, p. 651.) Removing single family homes from the analysis, .5 percent of all residential units in the county are potentially "compliant"[11] with the residency restriction. (RT, Vol. 12, at pp. 1271-1273; CT-A, Vol. 3, p. 651.)

4. It is exceedingly difficult for affected parolees to locate and obtain the scarce "compliant" housing most likely to be available to them.

In August, 2010, Aron Hershkowitz, an investigator employed by the Public Defender's Office in San Diego County, along with three other investigators and two interns, undertook the task of locating residential property in the County of San Diego where paroled registered sex offenders might actually be able to live. (RT, Vol. 6, at 268:27-28, 269:1-2, 275:9-14.) The team was provided with a copy of the map book and was given access to

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[11] Quotations marks will be used throughout this brief when discussing housing believed to be compliant with the residency restriction. Because no statutory definition exists of the terms "school" and "parks where children regularly gather," and no guidance exists as to the manner in which the 2,000 feet is to be calculated, there has been and continues to be substantial confusion as to whether housing believed to be "compliant" actually is. Moreover, because the law contains no move-to-the-offender provision, housing which may be deemed "compliant" today very well may become "noncompliant" tomorrow with the dedication of a new "school" or "park" be constructed or dedicated within the proscribed distance.

the electronic map prepared by GIS. (RT, Vol. 6, at 269:9-28, 270:1-4, 270:13-24.) They concentrated on areas with reasonable access to public transportation, medical care, and social services providers, including the cities of Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista. (*Id.* at 269:2-9, 273:7-13, 287:19-28, 288:1.) They investigated long-term rental housing, mostly apartment complexes, which might reasonably be affordable for an affected parolee. (RT, Vol. 6, at 272:12-23.) They tried to obtain the following information regarding every "compliant" rental property; (1) whether any units were rentable for $850 or less per month, (2) whether a criminal background check and credit check were conducted as part of the application screening process, and (3) whether the required security deposits exceeded two-times the monthly rent. (*Id.* at 263:23-27, 301:3-19.)

The first step of the screening process, which took approximately eighty hours to complete, was to locate addresses for the "compliant" rental properties. (RT, Vol. 6, at 275:6-12.) They began with the largest properties, expecting that they would be able to get information quickly by exploring internet sites or contacting a property management company. (*Id.* at 276:17-

22.) They could not have done this without the internet. (*Id.* at 275:15-17, 294:19-28, 295:1-7.) Then, using the electronic map, they investigated the smaller complexes – those designated for five or more rental units. (*Id.* at 275-279.) With the larger complexes, after obtaining the address from the electronic map, they would conduct an internet search to find a website or phone number for the complexes. (*Id.* at 279:21-28.)

Hershkowitz and his team successfully investigated the larger "compliant" complexes. Of those complexes containing sixty-one or more units, only thirteen complexes, none of which were located in Central San Diego County, rented any units for $850 or less per month. (RT, Vol. 6, at 282:3-22, 283:8-14.) Out of fifty-seven parcels, containing between fifteen and sixty units, only nine had any units which rented for $850 or less per month. (*Id.* at 284:3-7.) In this initial screening process, it was determined that at least fifty of approximately 150 parcels, containing five-to-fifteen units, did not have units which could be rented for $850 or less per month. (*Id.* at 310:19-21.) Information could not be obtained regarding most of the complexes containing between five-and-fifteen units, and the investigators provided this list to Thomas Green and Chendrika Kelso, professors from National University who had agreed to assist with field investigation. (*Id.* at 274:10-17, 280:4-13, 285:19-24, 303:2-9, 305:8-19; CT-A, Vol. 2, p. 416.)

Hershkowitz also gave them a copy of the map book and the data he had compiled regarding the uninvestigated parcels designated for five-to-fifteen units. (RT, Vol. 6, at 285:3-5, 310:13-21, 311:17-28.)

Drs. Green and Kelso tried to ascertain the following regarding the uninvestigated properties; (1) whether units were rentable for $850 or less per month, (2) whether a criminal background check was required and, if so, whether registered sex offenders were categorically excluded, (3) whether the security deposit exceeded one month's rent plus $500, and (4) whether the property had income verification requirements. (RT, Vol. 6, at pp. 306-309, 322:11-15.) They also tried to find out whether a credit check was routinely conducted as part of the application process and whether an applicant had to show an uninterrupted employment history and verification of current employment. A positive response to any of these inquiries did not cause them to exclude any apartment complex as unsuitable. (*Id.* at 309:2-28, 310:1-4, 322:16-24.)

If the list contained a phone number for a particular complex, they tried reaching a property manager by phone. (RT, Vol. 6, at 313:10-25.) They would call repeatedly and leave messages, but they got no response from sixteen out of sixty-one complexes. (*Id.* at 313:12-25.) They spent approximately thirty hours making phone calls. (*Id.* at 314:10-12.) When

they could not reach someone by phone at a particular property, they would drive to the address on the list. (*Id.* at 313:26-28.) They spent about sixty hours driving hundreds of miles around San Diego County, trying to obtain information regarding the uninvestigated complexes. (*Id.* at 314:4-9, 321:7-9.) They successfully made contact with a knowledgeable person at forty-five out of sixty-one complexes. (*Id.* at 318:13-19.)

In the course of their investigation, they located some complexes which were in the vicinity of a parcel on the list, but not at the address indicated on the map. (RT, Vol. 6, at 320:1-6.) Other times, they noticed a "for rent" sign in a nearby neighborhood, investigated the property, and then called the Public Defender's Office to see whether it was "compliant," according to the electronic map. They canvassed neighborhoods on foot. Twice, they went to an address corresponding to a property on the map and discovered no building there, just a vacant lot. (*Id.* at 319: 1-24, 320:14-22.)

In addition to the properties which had been investigated by Hershkowitz's team and found to be unaffordable, twenty-six of the five-to-fifteen unit properties were excluded based solely on the monthly rent criteria. (RT, Vol. 6, at 332:14-17.) Of the remaining nineteen properties, only five met the criteria in terms of move-in costs, monthly rent, and no categorical exclusion of applicants with a criminal record. (*Id.* at 324:1-20.)

Three out of five conducted a criminal background check as part of the application process. (*Id.* at pp. 322-324.) None had a rental unit available. (*Id.* at 320:23-28, 324:1-4.) Dr. Green was struck by how difficult it was to make contact with property managers by phone. (*Id.* at 325:22-28.) He was also struck by the amount of effort it took to find those two suitable "compliant" complexes: "Besides making phone calls, besides driving all over the county, to only find two, made ... it seems to me like it would be a very difficult proposition to try to find affordable housing that was compliant." (*Id.* at 326:1-4.)

Hershkowitz investigated five R.V. parks which were believed to be "compliant" because Parole was allowing affected parolees to live there. (RT, Vol. 6, at 288:2-26.) He discovered many restrictions. Using the electronic map application, he ascertained that only a tiny area in one of the "compliant" RV parks was completely outside a buffer zone. (*Id.* at 289:3-10.) Another park had trailers available for rent, but the monthly cost, $1,750, well exceeded the $850 affordable limit. (*Id.* at 289:15-28; 290:102.) Every park had restrictions regarding the age or appearance of the RV's, and most of the parks were at least twenty miles from Central San Diego. (*Id.* at 290:7-20, 291:3-7, 293:1-2.) Some parks conducted credit checks and criminal background checks, and some allowed only for short-term stays.

(*Id.* at 290:27-28, 291:1-20.) He also investigated approximately 150 residential rehabilitation programs, board and care facilities, independent living facilities, and long-term motels and inexpensive hotels from a list created by San Diego's Department of Health and Human Services' Homeless Team and made available to county jail inmates. (*Id.* at 295:8-12, 297:9-18.) Only two of the residential rehabilitation programs on the list were "compliant." (*Id.* at 295:26-20.) One accepts only women, and the other, located approximately forty miles from Central San Diego, excludes most registered sex offenders. (*Id.* at 295:2-4, 296:7-21.) Only one long-term hotel included on the list appeared to be "compliant". (*Id.* at 296:22-27.)

5. Enforcement of Jessica's Law in San Diego County has caused a dramatic increase in homelessness among affected parolees.

According to Detective Jim Ryan, who has supervised the San Diego Police Department's Sex Offender Registration Unit for the past thirteen years, the number of registered sex offenders on active parole registering as "transient" in the City of San Diego increased dramatically between September, 2007 and August, 2010, by four-to-five times. (RT, Vol. 11, at 1194:13-17, 1196:10-14, 1201:1-4, 1209:17-28, 1210:5-9.) There has also been a noticeable increase in homelessness among registered sex offenders

who are not on parole, but the percentage is significantly less than with affected parolees. (*Id.* at 1225:8-17.)

As of January 28, 2011, emergency orders had been issued by the San Diego Superior Court, enjoining the enforcement of the residency restriction of Jessica's Law against 132[12] affected parolees. (RT, Vol. 10 at 1010:19-27, 1076:2-14.) Ryan testified that, since September, 2010, the number of parolees registering as transient in the City of San Diego has decreased by approximately twenty percent. (RT, Vol. 11, at 1219:15-17, 24-27.) Ryan researched the registration status of the seventy-five parolees registered in his jurisdiction who had received emergency stay orders from the superior court. (RT, Vol. 11, at 1211:4-28, 1212:1-25.) All but two of them were still on active parole. (*Id.* at 1212:15-25.) Of the remaining seventy-three, sixty-nine parolees had a registered residence, either in the City of San Diego or in Chula Vista. Only four were still transient. (*Id.* at 1212:26-28, 1213:3-6.)

According to Michael Feer, a clinical social worker providing treatment for paroled sex offenders at the Chula Vista parole office, at any given time between March, 2007, and June, 2010, approximately half of his patients were homeless. (RT, Vol. 8, at 631:21-28, 632:1-3, 632:18-28, 640:27-28, 641:1-8.) Sometimes, it was as much as seventy-five or eighty

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[12] By March, 2011, that number had increased to 155.

percent. (*Id.* at 641:12-16.) Between June, 2010, and December, 2010, he saw a reduction in this percentage due to superior court orders staying the enforcement of the residency restriction. (*Id.* at 669:21-28, 670:1-6.) Jack Chamberlin, a clinician treating affected parolees in the East County parole office, observed the same thing, only on a reduced scale. (RT, Vol. 7, at 382:13-28, 389:26-28, 390:1-17, 392:2-3, 394:9-27.)

Maria Dominguez is a parole agent with the California Department of Corrections and Rehabilitation, assigned to the Chula Vista parole office. She has been a parole agent for seven years. (RT, Vol. 8, at 691:17-28.) After the Department began enforcing the residency restriction of Jessica's Law, during a brief time period when agents were allowed to help parolees locate "compliant" areas of the county, approximately forty to forty-five percent of affected parolees on her caseload were homeless. (*Id.* at 717:1-8.) After parole policy changed, and they were no longer permitted to give affected parolees any information about "compliant" housing, the percentage of parolees under her supervision who were homeless increased. (*Id.* at 718:3-27, 720:4-8.) Since mid-summer of 2010, the percentage of homeless individuals on her caseload has decreased dramatically. (*Id.* at 720:12-14.) Currently, only seven percent of affected parolees on her caseload are homeless. (*Id.* at 721:14-17.) This decrease in homelessness is due solely to

the court orders, temporarily enjoining enforcement of the residency restriction of Jessica's Law against affected parolees on her caseload. (*Id.* at 722:15-18.) Every parolee on her caseload who has received such an order has thereafter secured housing. (*Id.* at 722:19-26.)

CDCR attempted to disprove that the residency restriction has made affected parolees homeless through data, entered locally by its agents and clerical staff and maintained in a centralized database called CalPAROLE. This "data" was meant to show how many affected parolees had a "residence." Agent Guerrero testified about what DAPO considers to be a "residence" for purposes of enforcing the residency restriction. According to him, a tent is a "residence." (RT, Vol. 10, at 1022:2-4.) He would also consider a car to be a "residence," if it were parked at night in the driveway or parking lot of a residential structure[13]. (*Id.* at 1022:28, 1023:2.)

Guerrero acknowledged that there is a lack of uniformity among those responsible for entering data into CalPAROLE, about the status of affected parolees on their caseloads, in terms of who is "transient" and who has a "residence." (RT, Vol. 10, at 964:10-28, 965:7-16, 1023:26-28, 1024:1-2, 9-24.) For instance, individuals who can be located at night in the alley behind

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[13] For whatever reason, he would not consider a recreational vehicle parked permanently in the parking lot of a commercial business as being a "residence." (*Id.* at 1023:3-7.)

the parole office are characterized as having a "residence," and, in his opinion, they should not be. (*Id.* at 1024:25-28, 1025:1-8.) These limitations notwithstanding, Guerrero testified that, based on the CalPAROLE data, at the time of the hearing, 154 out of 482 affected parolees were "transient."[14] (RT, Vol. 10, p. 975:22-28, 976:1-9, 985:18-28, 986:1-3.) In addition to those 154 people, at that time 132 affected parolees were not subject to the residency restriction, due to stays issued by the superior court. (*Id.*, at 1010:19-27; Vol. 11, 1076:2-14.) He does not know how many of the non-transient affected parolees have shelter due to the grace of family members, are housed temporarily with funding from SASCA[15] or are housed, for a maximum of sixty days, with CDCR funds. (*Id.* at 1029:18-28.) CDCR's data does not reflect how many of the parolees characterized as not being "transient" actually sleep at night inside a permanent structure, as opposed to inside a car or outdoors in a tent at a street address where they can regularly be located. And the CalPAROLE records pertained only to those who, at the time the report was generated, were on "active parole." It did not account for

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[14] This number cannot possibly be accurate, since, at the time of the hearing, in the City of San Diego, alone, 123 affected parolees were registered as "transient." (RT, Vol. 11, at 1221:24-27; 1229:3-7.)

[15] The Substance Abuse Services Coordination Agency ("SASCA") in San Diego County is a company called Mental Health Systems Inc., which provides services pursuant to a contract with the state. (http://www.mhsinc.org/sasca---san-diego.)

the countless prison or jail inmates on pre-parole, pre-revocation or revoked status with only "noncompliant" shelter available to them upon their release.

B. CDCR's Protocol Regarding Enforcement of Section 3003.5 (b) in San Diego County and the Way in Which it is Actually Being Enforced

CDCR's policy is to place the burden of locating "compliant" housing entirely on affected parolees and to provide financial assistance for housing only for a sixty day period, absent extenuating circumstances. In practice, at least in San Diego County, CDCR has provided little or no financial assistance to affected parolees for housing.

1. CDCR's policies, as written, place the responsibility for finding compliant housing exclusively on the parolees and authorize limited financial assistance.

A packet of all relevant CDCR policies regarding enforcement of the residency restriction of Jessica's Law was admitted at the hearing. (CT-A, Vol. 2, pp. 463-532.) The superseding policy governing compliance with Jessica's Law was DAPO policy 08-14. Among other things, this policy required that the following language be included in every affected parolee's special conditions of parole: "You shall not maintain a residence, or reside within 2,000 feet of any public or private school, and park where children regularly gather." No parole policies have defined what is meant by the terms "school" or "park where children regularly gather," for purposes of

enforcing the residency restriction. (CT-A, Vol. 2, p. 481.)

Before the adoption of DAPO policy 08-14, the term "residence" had been defined by Appellant as "one or more addresses at which a person regularly resides regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational *and other vehicles*." (CT-A, Vol. 2, p. 466, emphasis added.) This definition was modified by DAPO policy 08-14, which added the following restriction: "Transient/homeless parolees must also be compliant with distance restrictions. For example, if a transient/homeless parolee resides under two separate bridges, both locations must be compliant with applicable residency restrictions pursuant to Policy Number 08-14." (CT-A, Vol. 2, pp. 466, 483.) A "transient" parolee is "a person who has no residence." (*Ibid.*)

Transient parolees are subject to additional restrictions. "Any residence where a transient parolee appears to sleep/stay during the day or night must be in compliance with his or her special conditions of parole relative to residence proximity restrictions." (CT-A, Vol. 2, p. 486.) Transient parolees cannot enter any structure or property that can be located by a street address at any time, except: (1) "When the entry is brief or

momentary. Entry shall not exceed the period of time needed to charge the GPS device, or no more than two hours per charging occurrence"; (2) "For the purpose of approved employment"; (3) "For the purpose of conducting legitimate business in licensed business, professional, or government building," and (4) "For the purpose of obtaining care, treatment or other services provided by license providers." (CT-A, Vol. 2, 483.) "[I]f a transient registered sex offender does spend at least one full day or night in a house, apartment, motel, hotel, shelter, or structure that can be located by a street address, this shall be considered the establishment of a residence and he or she must register that address with the law enforcement agency that has jurisdiction over the address within five working days. Further, the residence must be in compliance with the provisions of . . . PC Section 3003.5(b) . . . ." (CT-A, Vol. 2, p. 484.)

Since 2007, DAPO has placed the responsibility to locate compliant housing on affected parolees. (CT-A, Vol. 2, p. 464.) Parole agents are responsible for measuring distance and ensuring compliance. Distance is to be measured, using a handheld GPS device, "from the primary entrance of the residence to the exterior boundary of the prohibited facility/park."[16] (CT-A, Vol. 2, p. 469.) Agents have up to six working days to verify whether a

[16] None of the policies define how to ascertain the location of the "primary entrance" or the "exterior boundary."

proposed residence is compliant, and parolees are prohibited from moving into any residence until the agent has verified that it is compliant. (CT-A, Vol. 2, p. 471, 477.) If a proposed residence is not compliant, "the [agent] shall advise the parolee of the noncompliant status, at which time the parolee shall be required to immediately provide a compliant residence or declare themselves transient." (CT-A, Vol. 2, p. 478.) Or else, the parolee will be arrested. (*Id.*)

Parole also has policies regarding providing financial assistance to parolees. These policies provide that financial aid, in the form of a loan, is authorized for housing and is intended "to provide assistance for parolees who are in immediate need, and when no other resources are available, to allow them an opportunity to transition into self-sufficiency." (CT-A, Vol. 2, p. 474.) Financial aid is limited to sixty days, except in extenuating circumstances; i.e. "a debilitating medical condition," or imminent receipt of VA benefits or SSDI. (CT-A, Vol. 2, p. 490.) In determining the validity of a request for financial assistance, agents must consider the parolee's current employment status or ability to become employed, verifiable family support, SSI or other available government assistance, the nature of the request, and the parolee's current performance on parole. (CT-A, Vol. 2, p. 491.) The unit supervisor must approve any request for financial assistance. (CT-A,

Vol. 2, p. 492.)

Shortly before the hearing, DAPO policy 10-21 was adopted, pertaining to financial assistance for mentally ill parolees. This policy required that transitional financial assistance be provided to parolees determined to be mentally ill "in an ongoing effort to support those in need of housing and/or supportive services that will increase the likelihood of successful reintegration and self-reliance." (CT-A, Vol. 2, p. 520.) The transitional period cannot exceed sixty days, "except in extenuating circumstances, such as debilitating medical condition, imminent receipt of VA benefits or SSI." (CT-A, Vol. 2, p. 520.) A bank draft cannot exceed $1,500 for any individual. (*Id.*)

2. In practice, CDCR employees deny financial assistance to affected parolees in need, refuse to answer questions about the location of compliant housing, and obstruct efforts by staff and community resource providers to help them find suitable housing.

Maria Dominguez testified about the changes in parole policies since 2007, when the Department began enforcing the residency restriction of Jessica's Law. Her first GPS supervisor told her to help parolees find compliant housing and showed her how to do it. (RT, Vol. 8, at 713:25-28, 714:1-8.) The agents would show parolees areas they considered "compliant" or tell them about particular addresses. (*Id.* at 714:9-28, 715:1-

6.) After this supervisor was transferred to a different assignment, implementation of DAPO policy changed. (*Id.* at 717:9-12.) Agents were prohibited from telling parolees about areas they knew to be compliant. (*Id.* at 718:3-20.) If a parolee asked where he could live, all they could say was: "I can't tell you where you could live, but if you bring me an address I will check it and make sure that it's compliant." (*Id.* at 718:21-27.) This is still the policy, although she does not always adhere to it. (*Id.* at 719:1-2, 733-735.) After this policy was implemented, the percentage of parolees under her supervision who were homeless increased. (*Id.* at 720:4-8.) These parolees included individuals who were over the age of seventy, individuals who were wheelchair-bound and individuals afflicted with life-threatening diseases. (*Id.* at 723:10-20.) She has asked for financial assistance to house these individuals, and her requests have been denied. (*Id.* at 723:21-28, 724:1-11.)

Agent Guerrero confirmed that DAPO does not tell parolees where they should live or recommend areas where they should look for "compliant" housing. (RT, Vol. 10, at 958:22-28.) Agents have up to six working days to verify that a residence is compliant. (*Id.* at 1014:21-28, 1015:1-10, 1016:3-14, 1018:7-16.) Although agents know where the compliant housing is located, they are prohibited from providing this information to affected

parolees. (*Id.* at 1012:25-28, 1013:1-5, 1038:3-23, 1014:4-20.) And, although DAPO policy provides for an exemption of the residency restriction for mentally ill parolees housed in a licensed mental health facility, none of the parolees supervised by his unit have received such an exemption. (*Id.* at 991:4-28, 992:1-3.)

His unit does not collaborate with community-based programs and local law enforcement to facilitate the identification of compliant housing for sex offender parolees, and he does not remember whether parole policy requires him to do that. (RT, Vol. 10, at 1004:18-22, 1004:23-28, 1005:1; CT-A, Vol. 2, p. 474.) There's a big map in the El Cajon parole office, but he doesn't know who made it or whether or not it is still accurate. (*Id.* at 1006:1-7.)

Michael Feer also discussed the evolution of CDCR's policies regarding enforcement of section 3003.5 (b). He talked about patients, designated by the Department as requiring enhanced mental health services, who were denied financial assistance for housing. (RT, Vol. 8, at 642:2-19, 643:19-23, 644:7-15.) He recounted how he and some agents had tried to help parolees locate compliant housing after the Department began enforcing the residency restriction. (*Id.* at 651:4-26.) He asked four different supervisors what was meant by "school" and "park," and there was no

consistency among their responses. (*Id.* at 652:28, 653:1-16.) So, he guessed. Using Google Earth, he would try and find the compliant land in the county and would share that information with affected parolees and agents with the Seaport GPS Unit. (*Id.* at 654:17-28, 655:1-7, 656:6-13.) He did so in order to help affected parolees become stable so they could reintegrate into society. (*Id.* at 687:7-19, 688:13-28, 689:5-12.) But in the fall of 2010, the Department terminated his access to Google Earth, denied his requests that it be re-installed on his computer, and essentially instructed him to stop helping parolees find compliant housing. (*Id.* at 657:16-19, 658:9-18, 659:6-19, 661:2-7, 15-17, 665:6-23.)

Jack Chamberlin testified that, in October, 2010, after learning that the Public Defender's office had access to a map which showed "compliant" areas throughout the County, he invited a deputy public defender to speak to his treatment groups at the East County parole office. (RT, Vol. 7, at 413:11-27, 414:10-12.) He deemed it appropriate to arrange such a presentation, because if his patients could find secure, stable housing, it would enable him to provide meaningful treatment. (*Id.* at 425:14-22.) After only one group had been addressed, Chamberlin received a call from his supervisor, who told him it was not a good idea to have public defenders speak to treatment groups. (*Id.* at 414:19-23.) Chamberlin explained his purpose in inviting this

speaker and asked if she could address his other groups and, without explanation, was told that it was not "appropriate." (*Id.* at 415:18-22.)

C. All Four Respondents were made Homeless due to Appellant's Enforcement Against them of the Residency Restriction of Jessica's Law

At the time of their release on parole, Taylor, Todd, Briley and Glynn had suitable shelter available to them, after receiving an emergency stay from the court, each secured "noncompliant" shelter. (CT, Vol. 2, p. 406.) As the trial court found, each was made homeless solely due to CDCR's enforcement of the residency restriction of Jessica's Law.

1. Petitioner Briley was made homeless by the residency restriction.

Julie Briley is on parole after having been committed to prison for failing to register. (RT, Vol. 7, at 461:3-11.) She registers due to a conviction she sustained in 1988 for violating section 288, subdivision (a). (*Id.* at 461:15-20.) The offense involved her natural daughter and occurred inside her home. (*Id.* at 462:8-12, 521:26-28, 522:1.) Since 1988, Briley has lived in the community with unfettered access to children and has not sexually reoffended. (*Id.* at 463:7-28, 464:1-13, 482:17-24.)

The night she was released from prison, Briley slept at her sister's home. (RT, Vol. 7, at 480:1-10.) The following day, she reported to the parole office and was served with her special conditions of parole, which

included a requirement that she comply with the 2,000 foot residency restriction of section 3003.5(b). (*Id.* at 416:6-13, 470:2.) She realized that she could not live with her sister or her sister-in-law, both of whom lived within 2,000 feet of a school. (*Id.* at 473:2-9, 480:11-13.) Briley had no money and no other friends or relatives with whom she could live for free. (*Id.* at 480:1-16, 483:23-28, 484:1.) She became homeless.

Because she had completed a two-year substance abuse program during her prison term, Briley thought she would be able to live in a free-of-charge SASCA-funded sober living house for six months following her release. (RT, Vol. 7, at 467:23-28, 468:1-21.) But she was told that she could not reside in any SASCA sober-living house, because no houses for women were "compliant" with the residency restriction. (*Id.* at 469:1-15.)

Unlike most affected parolees Briley had a job waiting for her upon her release, as a grill cook at a restaurant in Balboa Park. (RT, Vol. 7, at 487:26-28, 488:1-28.) But her agent would not let her work there, because the restaurant is located in a park. (*Id.* at 489:9-20.) Because she was not working, Parole required Briley to attend a daily program, called Behavioral Interventions, located in downtown San Diego. (RT, Vol. 7, at 491:23-26, 493:2-5, 516:19-28.) She had to be at Behavioral Interventions each day, by 9:00 a.m. and had to stay there until 1:00 p.m. She would arrive by 7:30

a.m., because it took her an hour to charge her GPS device. (*Id.* at 592:4-21, 493:1-2.) It took her nineteen months to complete this program. (*Id.* at 496:25-28, 497:1-14.) During this time period, she was also required to attend weekly meetings at the parole outpatient clinic in Chula Vista. (*Id.* at 502:19-28.) This made it impossible for her to seek employment. (*Id.* at 493:10-18.)

For about a month following her release, Briley spent her nights sitting at Denny's Restaurant. (RT, Vol. 7, at 479:22-23.) She could not stay at St. Vincent de Paul ("Father Joe's") homeless shelter, because she is a registered sex offender. (*Id.* at 486:11-18.) Each day, she would go to a local women's shelter, hoping to win an available bed through their lottery system. She finally got one, but her agent said she could not live there, because the shelter was within 2,000 feet of Petco Park, the Padres' baseball stadium. (*Id.* at 484:10-28, 485:1-21.)

Eventually, Briley learned that affected parolees were living in an alley near the parole office, and she joined them. (RT, Vol. 7, at 482:25-28, 483:1-9, 486:19-28, 494:3-8.) Each morning, by 5:00 a.m., the parolees would awaken, clean the area, and store their tents and belongings. (*Id.* at 493:24-28, 494:1-11.) Briley would use the restroom at a nearby convenience store or storage facility, then go to her sister-in-law's house to

shower. (*Id.* at 494:12-25.) She had nowhere to store or prepare food. (*Id.* at 495:10-16.) When it rained, she would find an awning under which she could take refuge, sit in a fast food restaurant for a few hours, or ride the trolley from one end of town to the other. (*Id.* at 509:2-25, 510:1-5.)

Briley cleans the house of an elderly woman once a month, earning between $40 and $50 each time. (RT, Vol. 7, at 498:22-24, 499:6-8.) After completing the Behavioral Interventions program, she was permitted to accept a job with her former employer, cleaning his restaurant once a week, earning $10 per hour. (*Id.* at 499:27-28, 500:1-2, 522:8-23.) She earns approximately $250 per month and receives food stamps. (*Id.* at 502:2-6.) Because she cannot afford to own a vehicle, Briley relies exclusively on the bus or trolley for transportation. (*Id.* at 493:19-23, 503:6-8.) Her medical providers are in Central San Diego. (*Id.* 503:20-28, 504:8-12.) Her agent and the parole outpatient clinic are in Chula Vista. (*Id.* at 503:18-19.) Her residence and her primary place of employment are located in downtown San Diego. (*Id.* at 499:27-28, 500:1-2.)

Briley worked out an arrangement with a commercial property-owner regarding her living situation. She lives in an R.V., parked on the property, in exchange for five hours of labor per week. (RT, Vol. 7, at 501:1-9.) The property is not located in a "compliant" area, and Briley could not live there

without the court's order enjoining the enforcement of the residency restriction against her. (*Id.* at 497:15-22, 501:10-16.)

2. **Petitioner Glynn was made homeless by the residency restriction.**

Jeffrey Glynn is married, with three children. (RT, Vol. 8, at 559:3-14.) He is on parole after having been committed to prison for the crime of petty theft. (*Id.* at 558:9-14.) Prior to his arrest and incarceration, he lived with his family in a rented apartment in the community of Ocean Beach. (*Id.* at 560:5-8.) When released on parole, he planned to live with his wife and children. (*Id.* at 560:12-14, 564:6-10.)

Glynn is required to register due to a misdemeanor sexual battery conviction he sustained in 1989, based on an offense involving his adult ex-girlfriend. (RT, Vol. 8, at 560:15-19, 561:4-7.) Glynn has never committed any crime involving a minor and has not sexually reoffended since his 1989 conviction. (*Id.* at 562:23-28, 563:1-9, 567:21-27, 563:10-28, 564:1-5.)

When Glynn was released from prison in January, 2008, he was told that his family's apartment was not compliant with Jessica's Law. (RT, Vol. 8, at 564:14-18, 567:3-20.) He asked what was meant by "school" and "park," and his agent told him that any public-type school was a "school," and anywhere with a patch of grass, and maybe a bench, was a "park". (*Id.* at 567:28, 568:2-13.) When he asked where he could live, his agent showed

him a four-foot by three-foot map of San Diego County, with areas highlighted. (*Id.* at 579:26-28, 580:1-28, 582:1-8.) At his request, his agent gave him a flyer-sized copy of the map. (*Id.* at 582:22-28.)

Like Briley, Glynn had completed a substance abuse program in prison and was entitled to funding for residential after-care, which included food and housing in a sober living facility. (RT, Vol. 8, at 568:20-26, 569:2-18.) He was placed in a males-only sober living house in Spring Valley, where he lived with five other registered sex offenders. (*Id.* at 569:15-24.) But before he could complete the program, it became publicly known that sex offenders lived in the house, and the house was closed down. (*Id.* at 570:3-17, 571:12-13.) At this point, Glynn asked his parole agent for transitional funds for housing and was told they had no money. He was told to live in his vehicle. (*Id.* at 571:19-23, 573:12-17.) He had never been homeless in his life. (*Id.* at 580:14-25.)

Glynn and his wife, Leticia, have been together for sixteen years. (RT, Vol. 8, at 576:7-11.) Leticia works in downtown San Diego, a ten-minute drive from the family's rented apartment in City Heights. (*Id.* at 576:14-24.) The family has lived in that apartment for five years. (*Id.* at 615:20-28, 616:1.) Their rent in City Heights was only $850 per month, which worked well with their limited income. (*Id.* at 578:1-4.) Leticia was earning

approximately $1,600 per month, before taxes. (*Id.* at 577:21-28.) Mr. Glynn was doing odd jobs, but his only steady source of income was a monthly disability benefit of $250 which he receives due to a spinal injury he sustained while serving in the Navy. (*Id.* at 578:5-28, 579:1-17, 620:26-28, 621:1-18.)

All three of Glynn's children are well-established at their neighborhood schools. (*Id.* at 572:22-28, 573:3-21.) Leticia's elderly mother, who has serious medical conditions and does not own a vehicle, lives only two blocks away. (*Id.* at 575:13-23, 577:13-15.) It was important to Leticia to live near her mother, because of her mother's medical needs. (*Id.* at 575:13-18, 577:10-15.) Glynn considered moving his family to a more remote area of the county, where, presumably, there would be more compliant housing. (*Id.* at 577:1-5.) But, understandably, his wife refused. (*Id.* at 577:7-8.)

Glynn tried to secure suitably-located "compliant" rental housing for his family. (RT, Vol. 8, 585:6-8, 585:17-28, 586:1-19.) They could not afford to purchase a house or condominium and could afford to pay between $800 and $1100 per month for rent. (*Id.* at 585:14-16, 612:5-15.) Using Parole's map, Glynn found ten apartments within his price range, all of which appeared to be in "compliant" areas. (*Id.* at 586:20-25.) But, after

measuring the distance, his agent told him that only three of them actually were compliant. (*Id.* at 588:11-18.) Glynn paid fees and submitted applications at all three of those apartment complexes, but he was rejected. (*Id.* at 588:19-28.) At a couple of places, he was told that he did not meet the income verification requirement, and at the third place, he was not given any explanation. (*Id.* at 589:8-28, 590:18.) By this point, Leticia, having viewed some of these "compliant" apartments, told him she didn't want to move. (RT, Vol. 8, at 590:23-26.) Unable to force his family to move, against their will, to an area where they did not want to live, and unable, financially, to maintain two separate residences, Glynn was relegated to living in his van. (*Id.* at 591:3-15, 626:20-28, 627:1-5.)

At first, his parole agent would not let him park at night in a "noncompliant" area; so, when his 7:00 p.m. "curfew" would approach, he would drive his van to his "designated encampment area," approximately two miles from his family's home, park along the curb, and remain inside the van until the next morning. (RT, Vol. 8, at 591:16-28, 592:1-7.) He could spend no more than two hours inside his family's home, twice daily. (*Id.* at 592:8-15.) Sometime in 2009, Glynn's agent allowed him to park at night across the street from his family's apartment. He was not allowed to park in the parking lot, because it was "attached to a residence." (*Id.* 593:23-28,

594:1-2, 5-23.)

Now that the court has enjoined enforcement of the residency restriction against him, Mr. Glynn lives with his family inside their apartment in City Heights. (RT, Vol. 8, at 608:21-23.) Since moving back home, he has obtained stable, suitable employment. (*Id.* at 609:21-28, 610:1-13.) Since moving home with his family, he has remained drug-free. (*Id.* at 612:21-28.)

3. Petitioner Todd was made homeless by the residency restriction.

In 1981, at the age of fifteen, Stephen Todd committed a nonviolent sexual offense against his younger sister, was adjudicated a ward of the juvenile court for violating section 288, subdivision (a), and was eventually committed to the Youth Authority. (RT, Vol. 9, at 902:1-13.) Todd was never subject to any restrictions regarding contact with minors until he paroled in 2008. (RT, Vol. 9, at 923:2-5.) Since 1981, Todd has not sexually reoffended or committed another crime involving a child. (*Id.* at 903:7-12, 918:10-17, 923:6-24.)

Todd is, however, a recovering addict, who has been addicted to methamphetamine for eighteen years. (*Id.* at 919:5-7, 919:24-25.) In 2006, Todd was committed to prison for nonviolent drug possession offenses. (RT, Vol. 9, at 894:9-15, 895:4-28.) He was released on parole in 2008, with

nothing but his gate money. (*Id.* at 899:9-15.)

Todd is totally and permanently disabled. Since 1980, he has been treated for Bipolar Disorder and Depression, and while imprisoned, he participated in the Enhanced Outpatient Program of the Department's Mental Health Services. (RT, Vol. 9, at 899:21, 926:28, 927:1-15.) He also suffers from a seizure disorder and is diabetic. (*Id.* at 920:17-20.) He cannot hold his head up for very long, because of nerve damage along the right side of his body. (*Id.* at 928:15-20.) He has not been steadily employed since 2004 or 2005, when he held a job for approximately three months. (*Id.* at 929:13-19.) Todd hasn't applied for social security benefits, because, for financial reasons, he cannot get a California photo identification card. (*Id.* at 907:10-23.)

When released, Todd planned to stay with a friend at the Plaza Hotel, downtown, but when he asked if he could live there, he was told that downtown was out of the question because of the residency restriction. (RT, Vol. 9, at 901:1-17.) He asked his agent for financial assistance for transitional housing and was told that he was not "crazy enough" for CDCR to provide housing. (RT, Vol. 9, at 899:16-24.) Todd got a pamphlet containing information about resources for homeless people, and he contacted men's shelters and religious organizations and found either that

they excluded "290's" or they weren't "compliant" with Jessica's Law. (*Id.* at 908:16-28, 909:1-5, 930:17-28, 931:7-15.) Todd's parole agent suggested that he go live in the bed of the San Diego River, and so he did. (*Id.* at 905:16-28, 906:1-2.) During this time period, Todd was returned to custody for various parole violations, none of which involved sexual misconduct. (*Id.* at 901:18-28.) Each time he was released, Parole denied him financial assistance for housing. (*Id.* at 907:27-28, 908:1-15.)

In October, 2009, Todd was seriously injured in a bicycle accident. He broke a cervical vertebrae, split open his skull, and bruised his brain. (RT, Vol. 9, at 909:20-28, 911:10-21.) Still, Parole wouldn't pay for his housing. (*Id.* at 911:9-27.) A few weeks later, he was injured again when an SUV collided with a city bus in which he was travelling. (*Id.* at 912:1-6.) After he was released from the hospital, he had an open wound on his neck. (*Id.* at 912:10-13.) He provided his medical records to his agent's supervisor, and Parole paid for a hotel room, but only for ten days. (*Id.* at 901:1-5, 912:14-17, 913:1-27, CT, Vol. 2, p. 371, 388.) Thereafter, the superior court issued an order temporarily enjoining enforcement of the residency restriction against Todd. (*Id.* at 914:6-9.)

The receipt of this court order changed Todd's attitude toward life. (RT, Vol. 9, at 921:3-19.) For the first time in a long time he felt like he

could be a normal person. (*Id.* at 921:7-19.) He moved into a noncompliant apartment with his friend, Robert, and Robert's two-year old daughter, and he paid Robert minimal rent. (*Id.* at 915:18-20, 916:1-1, 922:20-21.) He interacted with Robert's daughter daily without incident. (*Id.* at 922:14-22.) While living with Robert and his family, Todd worked part-time at a 99 cent store and did odd jobs to pay his rent. (*Id.* at 916:1-5, 934:20-28, 935:1.) He didn't resort to criminal activity, and he even stopped using methamphetamine. (*Id.* at 916:13-19, 917:4-8, 925:5-12.) In fact, over the past eighteen years, not counting periods of incarceration, his longest period of sobriety was the time period when he was living at Robert's house.[17] (*Id.* at 919:14-18.) He enrolled in college classes, made honor roll and achieved a perfect score on his mid-term exam. (*Id.* at 916:24-28, 917:1-4.) He could never have done any of this while living in the river bed. (*Id.* at 917:17-24.)

Over the course of his life, Todd has been sporadically homeless. (RT, at 926:4-9.) He was homeless for approximately six or seven months, after he relocated to San Diego from San Bernardino in 2005. (RT, Vol. 9, at 917:24-26, 925:13-28.) During this period, he stopped taking his

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[17] Mr. Todd is a medical marijuana patient due to his inability, as an addict, to take prescription painkillers, and he used medical marijuana during this time period. (RT, Vol. 9, at 919:19-28; 920:1-16.)

psychotropic medications, which have a side-effect of making him sleep. According to Todd, when you are homeless it isn't safe to sleep soundly, because your belongings will be stolen by other homeless people and you can be placed in danger. (*Id.* at 935:6-25.) When Todd would use methamphetamine, he could stay awake. (*Id.* at 917:27-28, 918:1-2.) For him, drug abuse and homelessness often went hand-in-hand. (*Id.* at 936:2-19.)

There have also been times when Todd has not been homeless and has lived with relatives or friends or in a residential treatment program, and during those times he has found it much easier to refrain from using narcotics. (RT, Vol. 9, at 918:5-9, 925:16-18, 926:1-3.) When he is released from custody after serving his revocation term, he has friends with whom he can live in exchange for food stamps and labor. (*Id.* at 932:22-28.) He has also asked his lawyer for assistance in getting placed in a residential treatment program. (*Id.* at 937:6-12.) But if he is subject to the 2,000 foot residency restriction, he will be homeless. (*Id.* at 937:2-5.)

4. Petitioner Taylor was made homeless by the residency restriction.

William Taylor is afflicted with AIDS and cancer. (RT, Vol. 8, at 749:8-10, 773:12-26.) He also has scleroderma, neuropathy, type one diabetes, chronic hypertension, glaucoma, kidney stones, pinched and sciatic

nerves in his lower back, and a torn MCL on his right knee. (*Id.* at 773:15-24.) Taylor has survived three strokes and a heart attack. (*Id.* at 773:20-21.) He suffers from chronic depression and sleep apnea and at some point was diagnosed with Schizophrenia. (*Id.* at 773:21-22.)

Taylor is on parole after having been committed to prison for failing to register. (RT, Vol. 8, at 744:4-10.) He registers due to a conviction he sustained in 1991 for sexually assaulting an adult female. (*Id.* at 744:14-20.) He has never been convicted of any offense involving a child and, over the past twenty years, has not sexually reoffended. (*Id.* at 744:21-27.)

When released on parole, Taylor planned on living in Spring Valley, with his nephew and his wife, who is a health care professional at Scripps Mercy Hospital. (RT, Vol. 8, at 745:21-24, 746:14-26, 747:17-20.) He told his agent the address, and his agent said that it was "non-compliant." (*Id.* at 747:13-16.) Taylor had no idea what areas of the county were compliant, no money to pay for housing, and no friends or family members who live in areas that were compliant. (*Id.* at 748:18-28.) He told his agent that he has AIDS and asked for financial assistance for housing. (*Id.* at 749:22-27.) His agent said, "no," because Taylor hadn't been included in the Enhanced Outpatient Program with CDCR's Mental Health Services. (*Id.* at 747:24-28, 748:1-3.) His agent directed him to the alley behind the parole office, and

Taylor became homeless. (*Id.* at 748:4-17, 749:1-7.) He remained homeless for approximately a month, until he was arrested for using cocaine.[18] (*Id.* at 750:4-13, 754:21-26.) After serving his revocation term, Taylor was again homeless. (*Id.* at 751:3-25, 754:1-4.) Again, he asked Parole for assistance with funds for housing and again was told, "no." (*Id.* at 751:9-13.)

In 2009, Taylor began receiving AIDS treatment at the Owen Clinic in Hillcrest, a community in the City of San Diego. (RT, Vol. 8, at 753:25-28, 754:5-9.) He was introduced to a case manager from the County's Department of Public Health, Sonja Proctor. (*Id.* at 752:3-19, 753:1-3.) With the help of Ms. Proctor, Taylor was given funds which enabled him to move into a residential drug treatment program near downtown San Diego called the Etheridge Center. (*Id.* at pp. 755-757.) The Etheridge Center was a suitable placement for Taylor. It was close to the Owen Clinic and the pharmacy where Taylor filled his twenty various prescriptions. (*Id.* at 756:14-23, 758:11-24.)

In order for Taylor to live at the Etheridge Center, he and Ms. Proctor tried to obtain a "waiver" of the 2,000 foot residency restriction. (RT, Vol. 8, at 757:10-19.) After about a month, Taylor was notified that his waiver had been denied, and he was given two days to move out. (*Id.* at 757:20-25,

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[18] Taylor has been addicted to cocaine for the past decade. (RT, Vol. 8, at 750:12-15.)

758:4-10.) Within those two days, the superior court issued a limited emergency order, temporarily enjoining the Department from enforcing the residency restriction against Taylor. (CT1, Vol. 1, p. 115.)

At the end of October, Taylor ran into a problem because of an annual Halloween Parole project. (RT, Vol. 8, at 759:1-28.) The residents of Etheridge Center were told that they could not be in the front part of the facility in the evening, and Parole posted signs outside the doors saying "no trick-or-treaters allowed." (*Id.* at 759:17-21.) Some female residents gave Taylor a hard time about this, saying things like, "Well, you guys shouldn't be here in the first place, and then we would not have to do this," and "They should put you guys on a mountain somewhere." (*Id.* at 759:21-28, 760:1-5.) Words were exchanged, and one of the resident managers overheard the argument and called the program director. (*Id.* at 760:7-15.) Taylor was suspended from the program for thirty days. (*Id.* at 761:2-14.) Within that thirty-day period, Taylor was arrested for another parole violation and, while he was in custody serving a revocation term, his emergency stay expired. (*Id.* at 761:13-20.)

When he was re-released, Taylor was still destitute with no "compliant" housing, so he returned to the streets. (RT, Vol. 8 at 763:10-21.) By this time, Taylor had been selected as one of the four lead petitioners in

San Diego County's Jessica's Law litigation. (RT, Vol. 2, at pp. 16-19.) A few weeks after he was released, Appellant finally provided Taylor with transitional financial assistance for housing, conditioned upon his living in a "compliant" bug-infested boarding house in Vista. (*Id.* at 763:27-28, 764:1-8, 765:4-14.) The facility was unsuitable for Taylor, in terms of its location. He had grown up in Central San Diego, and he knew nothing about North County. (*Id.* at 768:26-28, 769:1-6.) None of his family members lived anywhere near Vista. (*Id.* at 767:23-28, 768:1-7.) Using public transportation, it took Taylor at least three hours to travel from the boarding house to the Owen Clinic, Ms. Proctor's office, or the Chula Vista parole office where he was required to report. (*Id.* at pp. 765-768.)

Three times, while living at the boarding house, Taylor collapsed and required hospitalization. (RT, Vol. 8, at 746:20-21, 747:1-8, 765:15-19, 770:3-23.) Each time, Taylor's nephew would drive from Spring Valley to Vista and then take Taylor to Grossmont hospital. (*Id.* at 769:28, 770:1-3, 770:14-19.) When Taylor called his parole agent from the hospital's intensive care unit, the agent threatened to arrest him unless he registered the hospital's address with local police as his residence. (*Id.* at 771:2-10.) Shortly after Taylor was released from the hospital, he was arrested, and his

parole was revoked.[19] (*Id.* at 771:13-28.)

This time, when Taylor was released, CDCR agreed to pay for him to live in a hotel for sixty days and told him that, at the end of that time period, no additional funds would be authorized. (RT, Vol. 8, at 778:1-21, 781:8-26.) Since January, 2010, Mr. Taylor, with the assistance of Ms. Proctor, has been pursuing disability benefits, but he still hasn't received a check. (*Id.* at 772:19-28, 773:3-11, 779:2-7.) After sixty days, Taylor will once again be homeless. (*Id.* at 778:18-24.)

D. The Residency Restriction is not Rationally Related to any Legitimate Government Interest

1. The "findings" of Jessica's Law regarding sex offender recidivism are patently untrue.

The "findings" upon which the residency restriction of Jessica's Law is predicated, that "sex offenders have very high recidivism rates," are the "most likely to reoffend," and "have a dramatically higher recidivism rate for their crimes than any other type of violent felon" is belied by every available government study tracking recidivism rates in California and across the nation. The truth is that sex offenders have very *low* recidivism rates and are *less* likely to reoffend with any new crime than any other type of felon. The

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[19] Taylor was arrested and his parole was revoked for failing to register the hospital as a "residence" within five days of his admission and for possessing marijuana. (RT, Vol. 8, at pp. 774-775.)

"1998 report by the U.S. Department of Justice," on which proponents of Jessica's Law purported to rely, doesn't exist, and the reports actually published by the Department of Justice over the past twenty years consistently show that convicted sex offenders released from prisons have extremely low recidivism rates.

Brian Abbott, Ph.D., a licensed clinical psychologist and social worker, testified that the premise underlying Jessica's Law is demonstrably false. (RT, Vol. 9, at 810:10-28, 811:1-13, CT-A, Vol. 2, pp. 437-441.) In fact, according to the research, the vast majority of convicted sex offenders never reoffend. (*Id.* at 853:27-28, 854:1-2.) He based his opinion primarily on two studies published by the United States Department of Justice, tracking recidivism of individuals released from prison in 1994, over a period of three years. The content of both of these studies was judicially noticed. (RT, Vol. 9, at 805:1-2; CT-A, Vol. 2, p. 427, 428[20].) The first, published in 2002, involved prisoners released from thirteen jurisdictions across the United States, including more than 100,000 released from

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[20] These studies were to have been included in the clerk's transcript, as Exhibit 31. (CT, Vol. 2, p. 398, fn. 13.) Unfortunately, they were not, although a summary of their contents was included in the record. (CT-A, Vol. 2, pp. 427-436.) All of these studies are available through the internet. All reports published by the United States Department of Justice's Bureau of Justice Statistics from 1983 to present can be found at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbty&iid=1.

California institutions. (RT, Vol. 9, at 813:11-24, CT-A, Vol. 2, p. 427.) The second study, published a year later, separated from the first study a subgroup of data pertaining to 9,691 sex offenders. (RT, Vol. 9, at 814:6-14; CT-A, Vol. 2, p. 428.)

According to the 2002 study, the only group of released prisoners who reoffended with the same type of offense as their commitment offense at a lower rate than convicted sex offenders was the group of homicide offenders, who reoffended at the rate of 1.2 percent. (RT, Vol. 9, at 816:7-10; CT-A, Vol. 2, p. 442.) The next lowest categories were those convicted of molesting a child younger than fourteen, who reoffended at a rate of 5.1 percent, statutory rapists, who reoffended at a rate of 5.1 percent, and those convicted of rape, who reoffended at a rate of 5.3 percent[21]. (RT, Vol. 9, at 816:10; CT-A, Vol. 2, p. 442.) People who committed violent nonsexual crimes and property crimes reoffended at substantially higher rates. (RT, Vol. 9, at 816:21-28, 817:1-4, CT-A, Vol. 2, p. 442.)

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[21] According to the research, recidivism rates for individuals who, like Todd, committed a single sexual offense as a juvenile, are even lower. (RT, Vol. 9, at 838:14-28, 839:1-28.) To the extent that any adolescent offender ever reoffends with a new sexual offense, that new offense is likely to occur while the offender is still an adolescent. (*Id.* at 839:11-15; CT-A, Vol. 2, p. 442.)

The results of these two studies[22] have been corroborated by studies across the United States and around the world. In order to do an apples-to-apples comparison of the various studies, Abbott extrapolated the data for a five-year period of follow-up. (RT, Vol. 9, at 819:7-26.) This provides for a slight overestimation, because, typically, seventy-five percent of sexual reoffending happens within the first three years after a person's release following a period of confinement based on a conviction for a sexual offense, with a steady decline thereafter. (*Id.* at 820:716, 821:10-23, 823:4-28, 824:1-6.)

A California Department of Corrections publication from 2010, which was also judicially noticed by the court (RT, Vol. 9, at 805:9-10) tracked recidivism of 7,011 sex offenders released from California institutions in 2006, shortly before the adoption of Jessica's Law, over a period of three years. (*Id.* at 817:25-28, 818:1-2, 819:5-6; CT-A, Vol. 2, p. 435.) This group would have been subject to the residency restriction of Jessica's Law and the mandatory GPS tracking requirements. This study revealed a five-year recidivism rate of 5.4 percent. (CT-A, Vol. 2, pp. 436, 442.)

An earlier study by the California Department of Corrections,

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[22] Dr. Abbott has never heard of and has not been able to locate any Department of Justice study published in 1998. (RT, Vol. 9, at 815:13-25.)

published in 2008, which was also judicially noticed by the court, tracked 4,287 sex offenders released from California prisons in 2003, before the adoption of Jessica's Law, and tracked returns to custody over a period of three years. (RT, Vol. 9, at 830:15-26.) These individuals would not have been subject to the 2,000 foot residency restriction or the mandatory GPS monitoring provision of Jessica's Law, which was not adopted until November, 2006. According this study, adjusted for a period of five years, the rate of any type of reoffense, including parole violations, was 5.9 percent. This reveals that the more intensive restrictions imposed on parolees by Jessica's Law, including the residency restriction, have not appreciably reduced recidivism. (*Id.* at 830:15-17; CT-A, Vol. 2, pp. 435-436, 442.) Recidivism data compiled by other states, most of which was publicly available before the adoption of Jessica's Law, is consistent with data from California. (RT, Vol. 9, at 832:2-9, 891:6-28; Vol. 11, at 1095:1-5; CT-A, Vol. 2, p. 442.)

A common criticism of recidivism literature is that rates cannot take into account undetected sex crimes. (RT, Vol. 9, at 856:21-24.) In Dr. Abbott's opinion, this theory does not hold much water. (*Id.* at 857:1-6.) A study conducted in New York and published in a peer-reviewed journal looked at statewide data regarding 144,000 registered sex offenders in New

York between 1986 and 2006. (*Id.* at 857:8-12, CT-A, Vol. 2, p. 443.) The researchers found that during this twenty year period, roughly five percent of the sex offenses were committed by registered sex offenders, whereas the vast majority of the sex crimes, ninety-five percent, were committed by individuals who were not registered sex offenders. (*Id.* at 857:8-23; CT-A, Vol. 2, p. 443.) Based on this study, it appears that the vast majority of unreported sex crimes are committed, not by registered sex offenders, but by first time offenders who have not been detected and sanctioned. (*Id.* at 857:24-27.)

An older study, published in 1997 by the United States Department of Justice, also supports the research discussed by Dr. Abbott. This study compiled and analyzed data accumulated between 1980 and1994. (CT-A, Vol. 2, p. 589.) The recidivism data pertained to a particular subgroup of violent sex offenders, only those convicted of rape or sexual assault, and was accumulated based on surveys completed by state prisoners. (CT-A, Vol. 2, p. 613.) According to this study, over a three year period, 8 percent of released rapists were re-arrested for another rape charge. (CT-A, Vol. 2, p. 614.) Information compiled from official records revealed that a lower percentage of sex offenders were reconvicted and re-imprisoned during the follow-up period than was the case for other violent offenders released from

prison. (*Id.*)

Finally, a peer-reviewed study conducted by Andrew Harris and Karl Hanson, published in 2004, examined sex offender recidivism rates of 4,724 adult male inmates released primarily from Canada and Great Britain, including approximately one thousand California offenders who had been referred for custodial treatment (CT-A, Vol. 2, p. 564), over a longer follow-up period of 15 years. Recidivism rates varied among offender-types, with those who had committed extra-familial offenses involving male minors reoffending at the highest rate (35 percent over 15 years), and incest offenders, like Todd and Briley, reoffending at the lowest rate of any group (13 percent over 15 years). (CT-A, Vol. 2, p. 566.) Reoffense rates of offenders over fifty, like Briley and Taylor, were approximately half that of younger offenders. (CT-A, Vol. 2, p. 566.) Those who had remained free of any sexual or violent offense while in the community for a substantial period of time were also shown to be at reduced risk for reoffense. (*Id.*) The following policy implications, noted in this study, bear mentioning:

> Given that the level of sexual recidivism is lower than commonly believed, discussions of the risk posed by sexual offenders should clearly differentiate between the high public concern about these offences and the relatively low probability of sexual re-offense. The variation in recidivism rates suggests that not all sex offenders should be treated the same. Within the correctional literature it is well known that the most effective use of correctional resources targets truly

> high-risk offenders and applies lower levels of resources to lower risk offenders. (Citation.) ....Research has even suggested that offenders may actually be made worse by the imposition of higher levels of treatment and supervision than is warranted given their risk level. (Citation.) Consequently, *blanket policies that treat all sexual offenders as "high risk" waste resources by over-supervising lower risk offenders and risk diverting resources from the truly high-risk offenders who could benefit from increased supervision and human service.*

(CT-A, Vol. 2, pp. 570-571, emphasis added.)

2. Residency restrictions have no rational connection to public safety and, in fact, diminish public safety by exacerbating dynamic factors known to be correlated to sexual reoffense and impairing law enforcement's ability to supervise registered sex offenders.

According to Thomas Tobin, Ph.D., the Vice Chair of the California Sex Offender Management Board ("CALSOMB") and co-founder of Sharper Future, the blanket residency restriction of Jessica's Law serves no legitimate public safety purpose. In fact, it is counter-productive, with respect to public safety. (RT, Vol. 11, at pp. 1081-1085, 1105:1-10 ; CT-A, Vol. 3, pp. 551-553.) Nothing in the research supports the notion that residency restrictions such as California's actually improve community safety or reduce recidivism. (*Id.* at 1110:3-7.)

In California, two things most visibly reflect the impact of the residency restriction – the experience of treatment professionals working with this population, and the staggering increase in homelessness among the

targeted population since the implementation of Jessica's Law as a parole condition. Based on data provided to the Board by CDCR, since September, 2007, the number of affected parolees who are registering as "transient" has increased exponentially. (RT, Vol. 11, at 1111:4-28, 1112:1-28.) In September, 2007, CDCR reported 178 homeless affected parolees, statewide. By September, 2010, that number had increased to 2,081, an increase of 1,236%. (*Id.* at 1112:14-26.) This was dramatically greater than the increase in homelessness among sex offenders, generally. (*Id.* at 1113:6-11, 1164:19-28, 1165:1-19.)

In terms of sex offender treatment and management, homelessness creates enormous problems. Long term homelessness profoundly affects dynamic factors known to be correlated with sexual reoffense. (RT, Vol. 11, at 1124:19-22.) For example, one cluster of dynamic risk factors is "social engagement and lifestyle stability," the extent to which a person has positive social connections and relationships. In any criminal population, if criminal associations and other negative influences outweighs positive social influences in a person's life, risk of reoffense increases. (*Id.* at 1128:16-28, 1129:1-2.) Homelessness significantly impairs one's ability to maintain stable relationships with relatives and other positive social supports, and if a person's social interactions are limited to those who are also homeless, with

no real degree of intimacy, risk is exacerbated. (*Id.* at 1129:5-13.) Homelessness also causes instability, which is known to be correlated to reoffense. It destroys one's ability to have a stable regulated lifestyle, which is a primary goal of any type treatment. (*Id.* at 1129:17-23.)

Factors related to self-regulation, the manner in which a person regulates and expresses his emotions, are also negatively impacted by the isolation attendant to homelessness. For instance, at times, a sex offender referred for treatment displays pervasive hostility due to a feeling that he has been utterly rejected by society. Homelessness exacerbates this problem and is counterproductive to public safety and treatment goals. (RT, Vol. 11, at 1131:1-26, 1132:2-21, 1133:5-18.) The collapse of social support, which can become chronic for someone who is homeless, also contributes to risk. The residency restriction exacerbates this factor for no demonstrably good reason and does the opposite of what needs to be done to stop victimization. (*Id.* at 1134:9-21.)

Residency restrictions do nothing to prevent sex offenses from occurring. According to the research, the vast majority of sex offenses occur inside the victim's home or inside the offender's home. (RT, Vol. 11, 1136:16-28, 1137:1-8.) A study published in 2009, revealed that 73 percent of sexual reoffending involving adult and child victims occurred inside the

home of the offender and/or the victim. (*Id.* at 1139:3-9, 1163:4-28, 1164:1-4.)

A study published by the United States Department of Justice in 2000, examined the facts of more than 100,000 cases involving sexual assaults of child victims and focused on the circumstances of the offense – in particular, the underlying relationships between the child victims and those who offended against them. (CT-A, Vol. 2, p. 0632.) In roughly one-quarter of the cases examined, the offender was a family member of the victim, and in cases involving very young victims, that number doubles. (CT-A, Vol. 2, p. 641.) The vast majority of sex crimes committed against children six years old or older – 93% - were committed either by a family member of someone else who had a pre-existing relationship with the victim. (*Id.*; RT, Vol. 11, at 1091:7-18.) Only 7 percent of sex crimes against children were committed by an offender who was a stranger. (*Id.*) The results were similar in the 1997 study, discussed above. (CT-A, Vol. 2, p. 586.)

In 2007, the Minnesota Department of Corrections published a study in which it examined the effectiveness of residency restrictions on reducing sexual offending. (RT, Vol. 11, at 1139:15-28.) The study revealed that residency restrictions would not have prevented a single sex offense from occurring. (*Id.* at 1140:1-13.) The California Sex Offender Management

Board conducted a similar study, looking at California sex offenders who had reoffended sexually after their release from prison. While one person did reoffend at a park, that park was more than 2000 feet from where the offender lived. Not one of the offenses would have been prevented by residency restrictions. (*Id.* at 1140:14-28, 1141:1-17.)

Dr. Tobin's conclusions were echoed by virtually every witness with experience working with registered sex offenders. Michael Feer had the following to say:

> You cannot adequately treat, really, anybody without some kind of stability in their life. Coming out of prison, parolees are usually normally quite unstable, and they require assistance. Parole agents are mandated as case managers to provide some assistance for coming back, re-entry into the community. 290 registrants, sex offender registrants, were not provided that level of assistance by law and policy. They were excluded from a good deal of assistance by CDCR policy, by Jessica's Law. And without that assistance, without that case management and assistance, their instability not only remains, but that instability grows. They become more unstable and their mental health suffers. Certainly their medical vulnerabilities continue to be aggravated and suffer.

(RT, Vol. 8, at 671:12-26.) Jack Chamberlin has encountered the same obstacles to treatment. He testified that he cannot provide meaningful treatment until his patients secure stable housing. (RT, Vol. 7, at 395:5-21.)

Agent Reuben Hernandez, with fifteen years of experience as a parole agent, seven as a probation officer and eighteen as a deputy marshal, explained how, from a public safety perspective, homelessness impairs supervision. According to Hernandez, it is far easier to effectively supervise "high risk" sex offenders when they are housed. (RT, Vol. 7, at 532:8-16, pp. 538-541.) When parolees are housed, agents have "eyes and ears in the community." When he was supervising a caseload of the highest risk sex offenders on parole, he would let people in the community know about his parolees, and they would call him up, any time of day or night, if something suspicious was going on. (RT:545, 12-21.) GPS monitoring is not a replacement for this – it can tell you where an individual *was,* but not what he was *doing.* (*Id.* at 545:23-26.)

Agent Dominguez agrees that homelessness impairs her ability to effectively supervise her parolees and compromises public safety. (RT, Vol. 8, at 725:11-28, 726:2-14.) When a parolee has a home, she can conduct home visits and parole searches, speak with the neighbors about the activities at the parolee's home, and be aware of the people with whom the parolee is living and associating. (*Id.* at 708:2-10.) Unit Supervisor Guerrero also acknowledged that the public is made safer by having convicted felons reside at night inside a safe warm structure than by having them be homeless. (RT,

Vol. 10, at 1043:9-25.)

These sentiments were echoed by Detective Jim Ryan, who, in addition to his duties at the sex offender registration desk, was one of the initial members of San Diego's SAFE task force. The SAFE task force is responsible for making sure that sex offenders in the community are supervised and contained. (RT, Vol. 11, at 1203:23-27.) In the City of San Diego, alone, there are 1800 registered sex offenders, and there are close to 5000 registered sex offenders countywide. (*Id.* at 1204:6-8.) He places great value on sex offenders having homes. If they have a physical address, it is much easier to check on them, make sure they are complying with their curfew, tell their agents if they've been drinking alcohol, or ask other hotel residents about what they have been doing. (*Id.* at 1199:5-18.) GPS units can tell you where they've gone, but not whether they've been drinking alcohol, using drugs, or possessing contraband. (*Id.* at 1200:18-27.)

Appellant knows this. According to a 2010 report from CDCR's Sex Offender and GPS Task Force,[23] blanket residency restriction of Jessica's Law have not improved public safety and have even compromised the effective monitoring and supervision of sex offender parolees. (CT-A, Vol. 2, p. 436; 2CT-A, Vol. 1, p. 106.)

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[23] The contents of this document were judicially noticed. (RT, Vol. 9, at 805:9-10; CT-A, Vol. 2, p. 436.)

> Homeless sex offenders put the public at risk. These offenders are unstable and more difficult to supervise for a myriad of reasons. They often change sleeping locations, requiring Parole Agents to continually investigate those areas to ensure they are appropriate and not in a high-risk area. Employment is difficult to find and even more difficult to maintain.
>
> . . . .
>
> The Task Force does not recommend that all residence restrictions be repealed. Instead, it recommends that the blanket residence restriction in Proposition 83 be eliminated. Community safety can best be served by relying on those residence restrictions and Parole Agent discretion that were in place prior the passage of Proposition 83.

(2CT-A, Vol. 1, pp. 105-106.)

SUMMARY OF ARGUMENT

While the 2,000 foot residency restriction of Jessica's Law may have been adopted to protect children by creating "predator free zones" around schools and parks, when enforced in San Diego County its effect has been to force large groups of human beings, many of whom pose little or no danger to children, to live apart from their families and to become and remain homeless. Appellant contends that this state of affairs does not impinge upon any right considered fundamental and that, as a statutory parole condition, the restriction should be upheld if rationally related to the government's interest in public safety. These contentions must fail.

When enforced, at least in San Diego County, the residency restriction of section 3003.5, subdivision (b), impinges upon affected parolees' right to intrastate travel, to privacy, and to establish a home – to live in society, albeit subject to supervision and monitoring, able to fulfill their basic human need for shelter. And, as a broad-based mandatory condition of parole, leaving no room for human thought, professional judgment, or consideration of individualized circumstances, the restriction brings within its scope not only those reasonably believed to pose a danger to children, but many who pose no such risk whatsoever. As Appellant notes, Penal Code section 3003.5, subdivision (b) is not narrowly tailored to the circumstances of any affected parolee, and cannot withstand strict scrutiny. (BOM, p. 24.)

But even if, due to the circumscribed rights enjoyed by parolees, a less stringent level of scrutiny is warranted, the residency restriction of Jessica's Law is still unconstitutional, because it is oppressive, arbitrary and bears no rational relationship to any legitimate public safety purpose. While proponents of the initiative promised California voters that the residency restriction would enhance their children's safety, this promise was predicated on demonstrably false "findings" drawn from a nonexistent study, ignored recidivism research published over the past half-century, and neglected to inform the voters of what was already known about residency restrictions –

they are disastrous from a public safety perspective. By causing most affected parolees to become and remain homeless, the residency restriction severely impairs efforts to supervise and provide treatment, does nothing to prevent sex crimes from occurring, and actually increases the likelihood that children will be sexually victimized at the hands of a previously-convicted sex offender. Such a law cannot seriously be deemed a reasonable exercise of the State's power.

I.

BECAUSE THE RESIDENCY RESTRICTION IMPINGES UPON AFFECTED PAROLEES' FUNDAMENTAL RIGHTS, THE COURT OF APPEAL CORRECTLY APPLIED A HEIGHTENED LEVEL OF SCRUTINY

Appellant contends that this Court's remand order in *In re E.J.* implicitly calls for the creation of a new legal standard to be used only when assessing the constitutionality of broad-based statutory parole conditions like the residency restriction. (BOM, p. 17-18.) Appellant is incorrect. This Court's remand order in *In re E.J.*, the language of which is echoed in this Court's description of the issue for review herein, requires application of the same test utilized by California courts over the past half-century when analyzing the constitutionality of parole and probation conditions: "whether the section ... constitutes an unreasonable parole condition to the extent it infringes on such parolees' fundamental rights." (*In re E.J.*, *supra*, 47

Cal.4th at p. 1283, fn. 10.)

The fundamental goal of parole is to help parolees "reintegrate into society as constructive individuals" (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477), "to end criminal careers through the rehabilitation of those convicted of crime." (*People v. Reed* (1994) 23 Cal.App.4th 135, 140.) "Rehabilitation of a felon entails integration into society where he or she can be self-supporting." (*In re* Stevens (2004) 119 Cal.App.4th 1228, 1240.) Conditions of parole must be reasonably related to these interests. (*In re White* (1979) 97 Cal.App.3d 141, 146.)

There is no question that parolees are guaranteed all protections of the federal and state constitutions, even if their enjoyment of many of these protections is, at times, diminished by virtue of their legal status. "Although a parolee is no longer confined in prison[,] his custody status is one which requires and permits supervision and surveillance under restrictions which may not be imposed on members of the public generally." (*People v. Burgener*, *supra*, 41 Cal.3d at p. 531, disapproved on other grounds in *People v. Reyes,* (1998) 19 Cal.4th 743, 754,; see also *U.S. v. Knights* (2001) 534 U.S. 112, 119.) While the State may, therefore, impose conditions reasonably related to parole supervision, parolees retain "constitutional protection against arbitrary and oppressive official action." (*People v.*

Thompson (1967) 252 Cal.App.2d 76, 84; *In re E.J., supra,* at p. 1283, fn. 10; *People v. Reyes, supra,* at pp. 753-754.)

Conditions of probation or parole which impinge upon fundamental rights are subject to strict scrutiny. (*People v. Olivas* (1976) 17 Cal.3d 236, 385.) They must be "narrowly drawn and specifically tailored to the individual." (*In re Babak S.* (1993) 18 Cal.App.4th 1077.) "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." (*In re Stevens*, *supra*, at p. 1237, quoting *Sable Communications of California, Inc. v. F.C.C.* (1989) 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93.) For example, while parolees' freedom of speech may be curtailed by individualized restrictions regarding internet use, blanket prohibitions against internet access cannot survive constitutional scrutiny. (*In re Stevens, supra,* at p. 1239.) And, while privacy rights may be circumscribed as necessary for effective supervision, blanket conditions requiring parolees to waive the patient-psychotherapist privilege are constitutionally unreasonable. (*In re Corona* (2008) 160 Cal.App.4th 315, 321.)

Appellant does not contend that the residency restriction is narrowly tailored – quite obviously, it isn't; rather, Appellant argues that sex-offender parolees have no fundamental rights, including the right to provide for their

basic human needs. (BOM, pp. 18-22.) This assertion, on which all of Appellant's arguments are predicated, fails to take into account that parolees, whatever their criminal histories may be, are still human beings, and, by virtue of that fact, are endowed with inalienable and fundamental constitutional rights.

All four parolees were made homeless because of CDCR's enforcement of the residency restriction. (CT, Vol. 2, p. 406, lines 3-20.) The same can be said for hundreds of affected parolees throughout San Diego County and thousands throughout the state. (CT, Vol. 2, p. 406, lines 17-20.) While, as Appellant points out, the residency restriction doesn't prevent affected parolees from *travelling* within any particular area or, by its terms, banish them from the *entire* county, it does prohibit them from *living* in approximately 77% of the county and renders unavailable to them more than 97% of the housing most likely to be available to them. (CT-A, Vol. 1, p. 1; CT, Vol. 2, p. 388, lines 17-20.) While the restriction doesn't expressly *prohibit* affected parolees from living with friends and family, it does prevent the vast majority of them from doing so. And while, by its terms, the residency restriction doesn't *prohibit* affected parolees from establishing homes, it makes it exceedingly difficult, if not impossible, for them to do so. (CT, Vol. 2, p. 409, lines 8-12.) As established by the record below, and as

the lower courts found, this state of affairs is not merely "incidental" to the residency restriction – it was *caused by* the residency restriction. (CT, Vol. 2, p. 406, p. 409.) In light of the foregoing, the lower courts correctly applied a heightened level of scrutiny in assessing the constitutionality of the residency restriction.

A. The Residency Restriction Impinges upon the Right to Intrastate Travel by Prohibiting Affected Parolees from Living in Their Homes and Preventing them from Living in Entire Communities and Cities in San Diego County.

Appellant initially questions whether affected parolees even possess the right to travel. (BOM, p. 18.) Of course they do. Affected parolees are human beings, and the right to intrastate travel is "a basic human right protected by the United States and California Constitutions as a whole." (*In re White* (1979) 97 Cal.App.3d 141, 148; *People v. Smith* (2007) 152 Cal.App.4th 1245, 1250 [Section 290 registrant on probation has a constitutional right to intrastate travel].)

Appellant next contends that the residency restriction doesn't implicate the right to intrastate travel, because it does not expressly compel or restrict affected parolees' movement, only their residence. (BOM, pp. 18-19.) This unduly restrictive interpretation of the right to intrastate travel ignores the fundamental nature of the right and is contrary to California law.

"Freedom of movement is basic in our scheme of values." (*In re White*, *supra*, 97 Cal.App.3d at p. 149, citing *Kent v. Dulles* (1958) 357 U.S. 116, 126.) It includes "the power of locomotion, of changing situation or moving one's person to whatever place one's inclination may direct; without imprisonment or restraint, unless by due course of law." (*In re White*, *supra*, 97 Cal.App.3d at 149, citation omitted.) In other words, the right to live where one wants, to live in one's family home, or to move to a locale where one can better one's employment and education opportunities is a fundamental right, protected by the United States and California Constitutions. (*In re Fingert* (1990) 221 Cal.App.3d 1575, 1581-82 [order requiring a mother to move, in order to retain custody of her child, held to violate right to intrastate travel]; *People v. Beach* (1983) 147 Cal.App.3d 612. 621-623 [probation condition requiring defendant to move from her home violated right to intrastate travel]; *People v. Bauer* (1989) 211 Cal.App.3d 937, 942 [court characterized the power to make a probationer move out of his family home as "the power to banish him"]; *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1085-1086 [condition of probation prohibiting minor form living within the United States held to violate constitutional rights of travel, association, and assembly].) Appellant's enforcement of the residency restriction impinges upon affected parolees' freedom of intrastate

travel, because it prevents them from living inside a structure in nearly every inhabitable community in the county where they are required to live.

B. The Residency Restriction Impermissibly Impinges upon Respondents' Fundamental Right to Establish a Home

Appellant contends that no provision of the state or federal constitutions guarantees an affected parolee or any individual the right to establish a home. (BOM, pp. 20.) This is not true. The Fourteenth Amendment may not require the government to provide shelter for all citizens, but it does guarantee that, when a person has a home available to him, the government cannot take it away absent some compelling and particularized justification. Such is the case, even with parolees. As the United States Supreme Court noted in *Morrissey v. Brewer*:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and *is free to be with family and friends and to form the other enduring attachments of normal life*. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.

(*Morrissey v. Brewer, supra,* 408 U.S. at p. 482, emphasis added.) "It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the

liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." (*Id.*, at p. 482.)

"[P]ersonal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) The right to personal liberty protected by the Fourteenth Amendment includes "'the right . . . to live and work where [one] will.'" (*Washington v. Glucksberg* (1997) 521 U.S. 702, 760 [Kennedy, J., concurring]; *Moore v. East Cleveland* (1977) 431 U.S. 494.) It includes freedom of personal choice in matters of family life. (*Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 639-640; *Griswold v. Connecticut* (1965) 381 U.S. 479, 495 [Goldberg, J., concurring]; *Moore v. City of East Cleveland*, *supra*, at p. 499.) It includes the right "to … establish a home". (*Meyer v. Nebraska* (1923) 262 U.S. 390, 399.)

In determining whether a right is fundamental, courts weigh not only the economic aspect of the right, "'but the effect of it in human terms and the importance of it to the individual in the life situation.'" [Citation.] (*Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 926-927, citation omitted.)

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-

> willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, (citation), on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

(*Rochin v. California* (1952) 342 U.S. 165, 172 [72 S.Ct. 205, 209, 96 L.Ed. 183].) There can be no question that the right to secure shelter and establish a home is fundamental. Far worse than traditional banishment[24], which at least allows affected individuals to satisfy their basic human needs, albeit in someone else's backyard, the

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[24] A more narrowly tailored residency restriction than the one at issue here, enacted in the State of Iowa, was found not to effectuate "banishment". (See *State v. Seering* (Iowa 2005) 701 N.W.2d 655; *Doe v. Miller* (8th Cir. 2005) 405 F.3d 700.) But the population demographics of Iowa are drastically dissimilar to those of California; accordingly, the result of enforcing the residency restriction wasn't nearly as dramatic. San Diego County, for instance, is a densely-populated coastal community, unlike any region of Iowa. The population density is 735.8 people per square mile, whereas the population density in Iowa is only 54.5 people per square mile. Additionally, Iowa's residency restriction was far less restrictive than section 3003.5(b), in terms of its breadth. It applied only to those who had been convicted of a violent sexual offense or sexually offending against a minor, but did not include, within its prohibition, any "parks." Moreover, unlike the statute at issue here, Iowa's restriction contained a grandfather clause, exempting from the restriction those who had established a residence prior to the statute's enactment, and a move-to-the-offender provision, allowing offenders to continue living in their established homes when a school opens within the prohibited area. Finally, neither *Seering* nor *Doe v. Miller* was decided after an evidentiary hearing in which it was proved, by substantial evidence, that the residency restriction has caused hundreds in the county and thousands in the state to become and remain homeless.

residency restriction relegates those against whom it is enforced to living on the streets, in alleyways, riverbeds and cars, without dignity, safety, or stability. As the United States Supreme Court recently held in the Eighth Amendment context, "As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons." (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1928 [179 L.Ed.2d 969].) The pointless and widespread suffering caused by enforcement of the residency restriction violates the very essence of human dignity.

C. The Residency Restriction Impinges upon the Right to Privacy Guaranteed by the California Constitution

Central to the California Constitution's guarantee of privacy is the right to live in one's home and with whom one chooses. (See Cal. Const. art. I, § 1; *White v. Davis* (1975) 13 Cal.3d 757, 774 ["The right of privacy . . . protects our homes, our families"]; *Robbins v. Superior* Court (1985) 38 Cal.3d 199, 213 [in-kind benefit program infringed on right to privacy because it "compels the individual to give up his home . . . [and] force[s him] to live in a particular location without the freedom to choose his own living companions."]; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130

[Constitution protects "right of privacy not only in one's family but also in one's home"]; *Tom v. City and County of San Francisco* (2004) 120 Cal.App.4th 674, 680, 686 [recognizing "'autonomy privacy' interest in choosing the persons with whom a person will reside" and that home is "a place that is traditionally protected most strongly by the constitutional right of privacy"]; *Park Redlands Covenant Control Committee v. Simon* (1986) 181 Cal.App.3d 87, 97 [recognizing privacy rights to choose with whom one lives and to live as a family]; cf. *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 389-90 [rejecting privacy challenge on grounds that policy, *inter alia,* does not "purport to compel the separation of parent and child or to preclude the family from living together in an entire city or neighborhood[.]"] [internal citations omitted].)

Appellant contends that the right to privacy is not implicated by enforcement of the residency restriction, because it does not *prohibit* affected parolees from living with their relatives and friends. (BOM, p. 22.) But it does make it exceedingly difficult, if not impossible, for most of them to do so. Jeffrey Glynn's situation illustrates this problem in a palpable way. He and his wife have been together for 16 years and are raising three children, all of whom were quite young in 2008, when Glynn first became subject to the residency restriction. (RT, Vol. 8, pp. 564:14-18, 567:3-20, 576:7-11,

pp. 572-573.) When Glynn was released from prison, his family lived in an affordable apartment in a suitable location, in terms of its proximity to the home of Glynn's ailing mother-in-law, his children's respective schools, and his wife's place of employment. (*Id.* at pp. 576-578.) But the apartment was within 2,000 feet of a school or park. Glynn's wife was not willing to uproot the children and move to a remote area of the county, far from work and her mother, and Glynn either would not or could not force her to move. (*Id.* at pp. 590-591.) Unable, financially, to maintain two separate households, Glynn became homeless, living inside his van, separated from his wife and children. (*Id.*, at pp. 591-593, 626-627.)

Enforcement of the residency restriction in San Diego County prevented all four petitioners from establishing a home with their relatives and friends. (CT, Vol. 2, p. 406, lines 3-20.) This state of affairs is not unique to the four lead petitioners or to the County of San Diego and, given the practical realities of family life, is not surprising. Affected parolees cannot uproot their families at a moment's notice, pull their children out of school, and move their entire households to "compliant" residences in remote regions of the county. The few parolees who own homes cannot reasonably be expected to sell their homes and relocate at the whim of the electorate. Families living in rental housing cannot be expected to break

leases, forfeit security deposits, mar credit histories, pay countless application fees, moving costs and security deposits, uproot children from their neighborhood schools, and move far from family, friends and places of employment whenever a new park is dedicated or a new school opens nearby. It is not surprising that so many affected parolees, like Glynn, become homeless in order to minimize the suffering of their loved ones. Because the residency restriction separates affected parolees from their family members and prevents them from establishing homes, it unduly impinges upon the right to privacy.

II.

WHEN ENFORCED AS A MANDATORY CONDITION OF PAROLE, THE RESIDENCY RESTRICTION IS ARBITRARY, OPPRESSIVE AND UNREASONABLE

Appellant contends that statutory parole conditions required to be enforced against "sex-offender parolees" should be analyzed applying a rational basis test. (BOM, p. 23-24.) Even of this were the applicable test, the residency restriction of section 3003.5, subdivision (b) is still an oppressive, arbitrary and unreasonable statutory parole condition, because it infringes on affected parolees' constitutional rights without being rationally related to any legitimate government interest.

Appellant contends that the residency restriction is reasonable, because members of the public are concerned about the "frightening and high" risk of recidivism posed by sex offenders. (BOM, at p. 27.) But, as this Court recently noted, with regard to the "findings" of Jessica's Law,

> . . . [A]ssertions, written into the findings of Proposition 83 by those who drafted the initiative, are not the same as facts, and an allusion to an uncited United States Department of Justice study does not make them so. When a constitutional right . . . is at stake, the usual judicial deference to legislative findings gives way to an exercise of independent judgment of the facts to ascertain whether the legislative body 'has drawn reasonable inferences based on substantial evidence.' [Citations.] Thus, for example, where a constitutional right to privacy is at issue, evidence introduced at trial may call into question legislative fact-finding. [Citations.]

(*People v. McKee* (2010) 47 Cal.4th 1172, at pp. 1206-07, citations omitted.)

The findings of Jessica's Law are not evidence-based – quite to the contrary. The overwhelming and uncontroverted body of data compiled and analyzed by the Department of Justice, CDCR, various states across the nation, and preeminent researchers in Europe and Canada, consistently reveals that recidivism rates for convicted sex offenders are remarkably low.[25] Over a five-year period in the community, approximately 95% of

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[25] The recidivism data discussed herein may not have been as widely known more than a decade ago, when the United States Supreme Court characterized the risk of sex offender recidivism as "frightening and high," in

convicted sex offenders *do not reoffend*. (RT, Vol. 9, at 816:10, 830:15-17, pp. 838-839; CT-A, Vol. 2, pp. 435-436, 442, 566, 570-571, 614.) Moreover, according to the published research, 95% of sex crimes committed against children are perpetrated by "first time offenders" – people who have not been arrested and convicted of any prior sex offense – in other words, *not* the people to whom the residency restriction applies. (RT, Vol. 11, at 857:8-23; CT-A, Vol. 2, p. 443.)

It is also widely known that residency restrictions do nothing to prevent sex crimes from occurring. According to statistics compiled by the Department of Justice, the vast majority of sex crimes committed against children, 93%, are committed by a person to whom the child is related or with whom he or she had a pre-existing relationship and occur inside the home of the child or the perpetrator. (RT, Vol. 11, at 1091:7-18; CT-A, Vol. 2, p. 641.) They are not committed by convicted sex offenders, lurking near schools and parks. In 2007, the Minnesota Department of Corrections examined the effectiveness of residency restrictions and concluded that they do nothing to prevent sex offenses from occurring. (RT, Vol. 11, at 1139-1140.) A similar study, conducted by the California Sex Offender Management Board, concluded that not a single sex offense committed by a

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McKune v. Lile (2002) 536 U.S. 24, 34 ("*McKune v. Lile*"), language it repeated a year later in *Smith v. Doe* (2003) 538 U.S. 84.

previously-convicted sex offender would have been prevented by implementing and enforcing residency restrictions. (*Id.* at pp. 1140-1141.)

Much of this data was publicly available before the adoption of Jessica's Law, which explains why, after taking testimony and considering evidence, the Legislature rejected the residency restriction. (RT, Vol. 9, at 891:6-28; Vol. 11, at 1095:1-5.) While the public understandably may be concerned about the risk to children posed by convicted sex offenders, that concern derives in large part from media attention, political sloganeering, and strong emotions, rather than fact. Demonstrably false "findings" presented to the electorate as truth are not entitled to judicial deference, particularly where fundamental rights are concerned. (*McKee, supra,* 47 Cal.4th at pp. 1206-1207.)

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property ...and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

(*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 638 [63 S.Ct. 1178, 1185-86, 87 L.Ed. 1628].)

The residency restriction of Jessica's Law bears *no* rational relationship to protecting children, and worse, to the extent that any affected

parolee actually poses a risk of sexually reoffending, it exacerbates factors known to increase risk while making effective treatment and supervision, things which actually might reduce the risk of recidivism, exceedingly difficult. (CT, Vol. 2, p. 409, lines 13-16.) There can be no question that the residency restriction of section 3003.5, subdivision (b), is an oppressive, arbitrary and unreasonable statutory parole condition.

CONCLUSION

When enforced in San Diego County, the residency restriction of Jessica's Law, renders affected parolees homeless and forces them to live apart from their family members, in violation of state and federal constitutional guarantees. Moreover, it increases the potential for sexual reoffense by exacerbating factors known to be related to sexual recidivism and substantially impairing treatment and supervision efforts, leaving the public less safe. Section 3003.5, subdivision (b) is not merely an unwise statutory parole condition: it is oppressive, it is arbitrary, and it is constitutionally unreasonable. Respondents respectfully ask this Court to declare it so.

Dated: 5/23/13

Respectfully submitted,

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

In re	Supreme Court No.: S206143
WILLIAM TAYLOR, et al.,	
On Habeas Corpus	Ct. of App. No.:D059574
	(San Diego County Super. Ct. Nos. HC19742 (consolidated lead case), HC19731, HC19612, HC19743)

CERTIFICATION OF WORD COUNT

I, Laura Arnold, hereby certify that based on the word processor counter, the number of words in this document is 19,182.

Dated: 5/23/13

By: _____
LAURA ARNOLD
Deputy Public Defender

PROOF OF SERVICE

CASE NAME: WILLIAM TAYLOR, et al.
California Supreme Court No.: S206143
Court of Appeals 4th – Div. 1 No.: D059574
Superior Court Nos: HC19742, HC19731, HC19612, HC19743

I am a citizen of the United States and a resident of San Diego County. I am over the age of 18 years and not a party to the within action. My office address is 450 "B" Street, Suite 1100, San Diego, California 92101.

On **May 24, 2013**, I personally served a true and correct copy of the ***RESPONDENTS' ANSWER BRIEF ON THE MERITS*** to the following:

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I certify under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of May 2013, at San Diego, California.

Vanessa Thompson
Declarant