TO BE ARGUED BY: Kathy Manley
TIME REQUESTED: 30 Minutes

NEW YORK STATE COURT OF APPEALS

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

MICHAEL DIACK,

Appellant,

APL-2014-00041

APPELLANT'S BRIEF

May 2, 2014

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PRELIMINARY STATEMENT

This Court should reverse the decision of the Appellate Term of the Supreme Court, 9th and 10th Judicial Districts. The Appellate Term reversed the Nassau County District Court, First District, which had held that Nassau County's sex offender residence restriction was preempted by New York State's comprehensive statutory scheme regarding the regulation of sex offenders. Not only does New York have detailed and comprehensive sex offender management laws, but the Legislature has made it clear in its parole regulations and other policy statements that such blanket residence restrictions are the wrong way to go.

Until the Appellate Term Decision herein, in all the counties where this question has arisen, the courts have held that local residence restrictions are preempted by state law and are thus invalid. Based on both recent and longstanding New York preemption cases, it is submitted that both "conflict preemption" and "field preemption" apply herein. Moreover, the highest courts in both New Jersey and Pennsylvania have come to the same conclusion, even though those states had not made such clear policy statements as New York.

Finally, there are compelling reasons why New York has chosen *not* to adopt blanket sex offender residence restrictions, as research and expert input from law enforcement and treatment providers has shown that such laws do not protect anyone and actually do more harm than good.

QUESTION PRESENTED

1. Does the preemption doctrine invalidate Nassau County's sex offender residence law?

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to CPL 460.20. A Certificate granting leave to appeal was granted on March 5, 2014 and is included at A-1.

The preemption issue was preserved because both Appellant Michael Diack and Respondent Nassau County District Attorney made arguments thereto in connection with Mr. Diack's motion to dismiss. (A-4-8, Affirmation in Opposition.)

STATEMENT OF FACTS

Appellant Michael Diack, a level one sex offender convicted in 2001 of possessing an obscene sexual performance by a child under PL 263.11, who is no longer under any parole or probation supervision, was charged, in Nassau County District Court (First District, Part 3) on March 15, 2010, with violating Nassau County Local Law 4-2006, which prohibits all registered sex offenders from residing within 1000 feet of a school. (A-2-3) Mr. Diack moved to dismiss the charge on the ground that Local Law 4-2006 is invalid because it is preempted by state law. (A-4-7) That motion was granted on March 18, 2011. (A-7-10)

The Decision holding Local Law 4-2006 invalid stated:

> "...It is evident that it has been and remains a high priority of local legislatures to enact severely restrictive residency ordinances in order to satisfy the 'not in my backyard' concerns of their constituencies. However, where challenged, these laws have consistently been found preempted...
>
> ...[T]he Court finds no basis on which it should deviate from the determinations made in these well reasoned cases...
>
> ...Local Law 4 is inconsistent and conflicts with the objective of New York State's statutory scheme for sex offenders. Local Law 4 essentially usurps New York State's articulated function of protecting vulnerable populations from sex offenders and puts in its stead local legislation... As such, this Court finds that Local Law 4 is preempted by New York State's comprehensive statutory scheme for sex offenders." (A-9-10)

Subsequently, the People appealed, and the Appellate Term, 9th & 10th Judicial Districts reversed, finding that Nassau County Local Law 4-2006 was

not preempted by state law. (A-11-17) The Appellate Term Decision stated:

> "...*[W]e find no conflict between Local Law 4-2006... and Penal Law 65.10 (4-a) or any other state laws relating to residency restrictions of sex offenders* (see Correction Law art 6-C; L 2008, ch 568; Executive Law 243[4]; Executive Law former 259[5]; Social Services Law 20[8][a]).
>
> ...*The Legislature recognized that the 'proliferation of local ordinances imposing residency restrictions upon sex offenders, while well-intentioned, have [sic] made it more challenging for the state* and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders' ... *In our opinion, the Legislature has chosen to limit its regulations over sex offenders and not to enact a comprehensive legislative scheme in the area of law concerning the residency restrictions of sex offenders who are not on parole, probation, subject to conditional discharge or seeking public assistance.* While the Legislature has adopted a scheme with respect to registering sex offenders and notifying the public about sex offenders in their communities, *we discern no express or implied sentiment by the Legislature to occupy the entire area so as to prohibit localities from adopting laws concerning residency restrictions for sex offenders who are no longer on probation, parole supervision, subject to a conditional discharge or not seeking public assistance. ... We find it implausible that there could be a need for state-wide uniformity for residency restrictions for such sex offenders given the fact that housing in rural areas is not necessarily in as high demand as it is in urban areas. Thus, local governments are better situated to promote the welfare of their citizens by enacting legislation restricting the residency of sex offenders who are no longer on parole, probation, subject to a conditional discharge or seeking public assistance.* We therefore hold that Local Law 4-2006 and Nassau County Administrative Code 8-130.6 are not preempted by state law (but see Doe v. County of Rensselaer, 24 Misc.3d 1215[A], 2009 NY Slip Op 51456[U] [Sup Ct, Rensselaer County 2009]; People v. Blair, 23 Misc 3d 920 [Albany City Ct 2009]; People v. Oberlander, 22 Misc 3d 1124[A]. 2009 NY Slip Op 50274[U] [Sup Ct, Rockland County [2009])...." (A-15-17, emphasis supplied.)

ARGUMENT

POINT I

BOTH NEW YORK'S STATED POLICY AND ITS COMPREHENSIVE SEX OFFENDER MANAGEMENT SCHEME SHOW THAT LOCAL LAW 4-2006 IS PREEMPTED BY STATE LAW

This Court should reverse the Appellate Term's decision because New York State already has a comprehensive statutory scheme relating to sex offenders, and the current plethora of competing local laws in that area, including Local Law 4-2006, conflict with State policy.

The New York State Legislature passed Chapter 568 (codified as Correction Law 203[1], Executive Law 243[4] and Social Services Law 20[8]) in late 2008, and required state agencies to issue regulations on housing options for level 2 and 3 sex offenders on probation or parole, or homeless offenders needing emergency shelter. In his Approval Message, Governor Paterson mentioned the municipal residency restrictions, and made it extremely clear that this law was intended to preempt local laws such as that challenged herein.

The Governor stated, "This bill recognizes that the placement of these offenders in the community has been and will continue to be a matter that is properly addressed by the State..." (Governor's Approval Message No. 33 of 2008.)

While Respondent has argued that the Governor's Approval Message is akin to a "signing statement" and somehow does not necessarily reflect legislative intent, there is quite a bit of other evidence showing that the New York State Legislature has preempted the field of sex offender regulation, and that local laws such as Nassau County's actually conflict with State policy.

When the Division of Probation and Correctional Alternatives (DPCA) made their regulations, in response to the passage of Chapter 568, the regulations, codified at NYCRR 8002.7, made it clear that not only was the State interested in preempting this field, but that the State policy was in conflict with the local residency laws, stating:

> "***
> (b)...Sex *offender management, and the placement and housing of sex offenders, are areas that have been, and will continue to be, matters addressed by the State. These regulations further the State's coordinated and comprehensive policies in these areas, and are intended to provide further guidance to relevant state and local agencies in applying the State's approach.*
> (c) Public safety is a primary concern and these regulations are intended to better protect children, vulnerable populations and the general public from sex offenders. *The State's coordinated and comprehensive approach also recognizes the necessity to provide emergency shelter to individuals in need, including those who are sex offenders, and the importance of stable housing and support in allowing offenders to live in and re-enter the community and become law-abiding and productive citizens. ...*
> ***
> (d) In implementing this statute and the State's comprehensive approach, DOP [Division of Parole], DPCA, OTDA (Office of Temporary and

Disability Assistance) and the Division of Criminal Justice Services' Office of Sex Offender Management (DCJS/OSOM) recognize that:
***
(iv) *to reduce recidivism it is important that offenders be able to re-enter society and become productive and law-abiding citizens whenever possible. A stable living situation and access to employment and support services are important factors that can help offenders to successfully re-enter society.*
***
(v).... *[I]t is not appropriate for any one community to bear an inappropriate burden in housing sex offenders because another community has attempted to shift responsibility for those offenders onto other areas of the State. The proliferation of local ordinances imposing residency restrictions, while well-intentioned, have made it more challenging for the State and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders.*" NYCRR 8002.7

Moreover, in a 2009-2010 Report, the New York State Senate Standing Committee on Crime Victims, Crime and Correction, also made it clear that *residence restrictions are the wrong way to go*, stating:

"EFFECTIVE SEX OFFENDER MANAGEMENT IN NEW YORK STATE

In March, 2010, the Committee conducted two roundtables which included experts in the field of effective sex offender management. ... [T]he following goals were suggested ...

1. Convene public hearings on effective sex offender management and public safety... After fourteen years of sex offender registries and a growing list of restrictions in place in New York, there is little evidence that any of these measures have contributed to a decrease in sexual assault. *There is, however, a growing body of research suggesting that some laws* relating to registration, notification, and *overly harsh laws restricting where sex offenders can be and how they can engage with their communities may exacerbate the risk that they will reoffend.....*

2. Re-examine the method of assessing risk of re-offense[1] among registered sex offenders currently used by the New York State Board of Examiners...

3. *Reject additional residency restriction proposals and instead reinforce the ability of individual probation and parole officers to assess whether there are residences that are inappropriate for certain individuals...* The legislature should also pass affirmative legislation that would require counties to create plans for safe and stable housing for sex offenders. *All of the empirical research examining the effectiveness of residency restrictions shows that residency restrictions do not work to reduce the risk of harm to children. They have been shown to discourage offenders from reporting their whereabouts to law enforcement, and they destabilize offenders' lives, creating roadblocks to successful re-integration into society and increasing the risk of recidivism. Housing stability is a key to reducing recidivism, and a comprehensive sex offender management plan must include provisions to ensure stable housing for offenders...."* NYS Standing Committee on Crime Victims, Crime and Correction 2009-2010 Report, at 28-29.

Even prior to the passage of Chapter 568, New York State had passed

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[1]With regard to recidivism rates and methods of assessing risk, in *People v. Santos*, 25 Misc.3d 1212(A) (NY Co. 2009), the court discussed research data analyzed in 2009 which showed *a significantly lower recidivism rate* than the data previously used. The *Santos* court also noted that there is a better actuarial instrument than the one currently in use in New York, stating:

> "...In making predictions about whether a sex offender will commit a new crimes psychologists and psychiatrists generally rely upon one or both of two methods: clinical judgment and what are known as 'Actuarial Risk Assessments' ('ARA's'). ...
>
> The most widely used ARA in the world is the 'Static 99.' ... The original instrument developed in 2003 contained a list of ten scoring factors. ...Based on how the offender scored on each item in the Static 99 list, a ranking describing the offender as low risk, moderate risk, medium-high risk and high risk was obtained. The Static 99... cannot predict the risk that any particular sex offender will re-offend. It merely describes how an individual's characteristics compare with those of offenders who have re-offended at a given rate over a given period of time. ...
>
> ...The use of ARA's continues to generate controversy and arguments over methodology... In 2009, the developers of the Static 99 completely revised the instrument because *new data indicated a significantly lower recidivism rate for sex offenders than the date which had been collected from the 1960's through the mid-1990's* and had been used to create the original scale." *Santos*, at 7-9, emphasis supplied and citations omitted.

several detailed statutes relating to sex offenders. See, for example, Correction Law 168 et. seq., Penal Law 65.10 and other Penal Law provisions, and Executive Law 259-c. These provisions deal, respectively, with registration requirements for sex offenders; mandatory locational restrictions for most sex offenders on probation or who receive a conditional discharge; and mandatory locational restrictions for most sex offenders on parole or post-release supervision.

In 1995 the State Legislature passed Correction Law 168 et. seq (Megan's Law) which became effective in January, 1996 and required everyone convicted of a sex offense as an adult to register his or her address with the police. A system was created to determine whether an ex-offender would be classified as level one, two or three, with level three ostensibly referring to the highest risk offenders. There are various levels of community notification, and registration requirements vary according to the sex offender level. (For example, level three offenders are required to personally verify their addresses with law enforcement every 90 days.) An internet registry was set up for the public to access, and it now contains all level two and three offenders.

Megan's Law has been amended many times since its passage, showing that the Legislature has a strong continuing interest in this area. In 2000 the Legislature amended Penal Law 65.10 to include a mandatory condition for sex offenders

convicted of an offense against someone under 18 - when such persons are sentenced to probation or conditional discharge, the sentencing court *must* order that the offender stay away from any school "or any other facility or institution primarily used for the care or treatment of persons under the age of 18." Penal Law 65.10(4-A).

The Division of Parole has long had the authority to set special conditions for the release of parolees. Executive Law 259-c(2). Executive Law 259-c now includes Section 14, which mandates that all level three sex offenders on parole or supervised release must stay away from schools and other youth facilities in the same manner as those on probation or conditional discharge under Penal Law 65.10.

Executive Law 259-c (14) also provides that the above locational restriction applies to almost any registered sex offender whose victim was under 18, including level one offenders (this includes Michael Diack, who was convicted under PL 263.11) - it states:

> "...[The locational restrictions apply to] a person serving a sentence for an offense defined in article one hundred thirty, one hundred thirty-five or two hundred sixty-three of the penal law or section 255.25. 255.26 or 255.27 of the penal law and the victim of such offense was under the age of eighteen..."

The offenses covered above under Article 130 of the Penal Law comprise

most sex offenses, including all levels of rape, all levels of sexual abuse, sexual misconduct, forcible touching, course of sexual conduct against a child, female genital mutilation, facilitating a sex offense with a controlled substance, sexually motivated felony, and predatory sexual assault against a child. The offenses under PL Article 135 include all levels of unlawful imprisonment, all levels of kidnaping, labor trafficking, all levels of custodial interference, substitution of children, and all levels of coercion. The offenses under PL Article 263 include use of a child in a sexual performance, all levels of promoting an obscene sexual performance by a child, all levels of possessing a sexual performance by a child, and facilitating a sexual performance by a child with a controlled substance or alcohol. Finally, PL 255.25, 255.26 and 255.27 cover incest in the third, second and first degrees, respectively.

Thus it is clear that almost all sex offenders, including level ones, whose offenses were against those under 18, are subjected to the aforementioned locational restrictions while they are on probation, parole or supervised release.

In 2006 Executive Law 259-c was amended again, this time to require the parole board to notify local social service departments of the release of level two and three offenders in their county if it appears that these people are likely to seek services for homeless persons. Executive Law 259-c(16).

The Appellate Term Decision herein flies in the face of all of New York's stated policy. While recognizing the Legislature has noted that the multitude of local ordinances is contrary to state policy, the Decision found no conflict between them and state law, and found no state intent to occupy the field of sex offender management, stating:

> "...[*W*]*e find no conflict between Local Law 4-2006... and Penal Law 65.10 (4-a) or any other state laws relating to residency restrictions of sex offenders* (see Correction Law art 6-C; L 2008, ch 568; Executive Law 243[4]; Executive Law former 259[5]; Social Services Law 20[8][a]).
>
> ...*The Legislature recognized that the 'proliferation of local ordinances imposing residency restrictions upon sex offenders, while well-intentioned, have [sic] made it more challenging for the state* and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders' ... *In our opinion, the Legislature has chosen to limit its regulations over sex offenders and not to enact a comprehensive legislative scheme in the area of law concerning the residency restrictions of sex offenders who are not on parole, probation, subject to conditional discharge or seeking public assistance.* While the Legislature has adopted a scheme with respect to registering sex offenders and notifying the public about sex offenders in their communities, *we discern no express or implied sentiment by the Legislature to occupy the entire area so as to prohibit localities from adopting laws concerning residency restrictions for sex offenders who are no longer on probation, parole supervision, subject to a conditional discharge or not seeking public assistance. ... We find it implausible that there could be a need for state-wide uniformity for residency restrictions for such sex offenders given the fact that housing in rural areas is not necessarily in as high demand as it is in urban areas. Thus, local governments are better situated to promote the welfare of their citizens by enacting legislation restricting the residency of sex offenders who are no longer on parole, probation, subject to a conditional discharge or seeking public assistance.* We therefore hold that Local Law 4-2006 and Nassau County Administrative Code 8-130.6 are not preempted by state law

(but see Doe v. County of Rensselaer, 24 Misc.3d 1215[A], 2009 NY Slip Op 51456[U] [Sup Ct, Rensselaer County 2009]; People v. Blair, 23 Misc 3d 920 [Albany City Ct 2009]; People v. Oberlander, 22 Misc 3d 1124[A]. 2009 NY Slip Op 50274[U] [Sup Ct, Rockland County [2009])...." (A-15-17, emphasis supplied.)

It is hard to reconcile the Decision's finding of no "express or implied sentiment by the Legislature to occupy the entire area" with the statements of all the relevant state agencies (the Division of Parole, the NYS Division of Probation and Correctional Alternatives [DPCA], and the Office of Temporary and Disability Assistance [OTDA]) such as this one, that "[s]ex offender management, and the placement and housing of sex offenders, are areas that have been, and will continue to be, matters addressed by the State." (NYCRR 8002.7) Going even further, the agencies have noted their *explicit opposition* to these local ordinances, stating, for example, "it is not appropriate for any one community to bear an inappropriate burden in housing sex offenders because another community has attempted to shift responsibility for those offenders onto other areas of the State." (9 NYCRR 365.3)

Contrary to the Decision's holding that by *choosing not to* enact a residence restriction applying to all registered sex offenders, the State has somehow signaled an intent not to occupy the field of sex offender management, it is submitted that, as shown by the 2009-2010 Report, the New York State Senate Standing

Committee on Crime Victims, Crime and Correction, the relevant State agencies studied this issue, consulting with experts including law enforcement personnel and treatment providers, and determined that across-the-board residence restrictions were counter-productive. Moreover, it would make no sense for only those registered sex offenders *not* under supervision and not seeking public assistance to be subjected to these extremely harsh local laws which often banish people from whole communities.

In addition, in saying, "[w]e find it implausible that there could be a need for state-wide uniformity for residency restrictions for such sex offenders given the fact that housing in rural areas is not necessarily in as high demand as it is in urban areas" the Decision seems to be implying that it makes sense for localities to essentially banish sex offenders from urban areas and relegate them to outlying rural areas where they don't have access to transportation or treatment.

Not only do those in the rural areas object to this (often leading small towns and villages to pass even harsher laws to banish these pariahs from *their* communities) but it runs counter to State policy, quoted above, as stated by DPCA: "The State's coordinated and comprehensive approach also recognizes... the importance of stable housing and support in allowing offenders to live in and re-enter the community and become law-abiding and productive citizens."

A. New York Preemption Case Law Shows that Both Conflict Preemption and Field Preemption Apply Herein

While localities are allowed to legislate in certain designated areas, they may *not* act in an arena where the state has preempted the field by showing its intent to act with respect to a particular subject. *Matter of Cohen v. Board of Appeals of Village of Saddle Rock*, 100 NY2d 395 (2003); *Albany Area Builders Assn. v. Town of Guilderland*, 74 NY2d 372 (1989); *Jancyn v. County of Suffolk*, 71 NY2d 91 (1987); *Consolidated Edison v. Town of Red Hook*, 60 NY2d 99 (1983); *People v. DeJesus*, 54 NY2d 465 (1981).

The intent to preempt need not be express - the intent may be implied where the state has created a statutory scheme dealing with the subject matter in question. *Cohen*; *Albany Area Builders*; *Jancyn* (all supra). One of the purposes of the preemption doctrine is to prevent localities from creating many different standards on an issue of statewide concern. *Cohen; Jancyn; Consolidated Edison* (all supra.) This is exactly what is occurring with the plethora of sex offender residence restrictions - the counties (and cities and towns) seem to be in a race to create the most stringent restrictions, thus driving sex offenders out of their localities. In *Cohen*, supra, this Court held that the state had preempted the field of zoning variances, stating:

> "The Legislature may expressly state its intent to preempt, or that

intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including *the need for statewide uniformity in a particular area.* A comprehensive and detailed statutory scheme may be evidence of the Legislature's intent to preempt. This Court will examine whether the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations. ..." *Cohen*, supra, at 400, emphasis supplied.

In *Consolidated Edison*, supra, this Court held that a town was prohibited from regulating the siting of steam power plants, and pointing out the danger of an "uncoordinated welter" of local laws in the area, which is precisely what is occurring with sex offender residence restrictions. This Court stated:

> "Local Law No. 2 is invalid because the Legislature has pre-empted such local regulation in the field of siting of major steam electric generating plants. The intent to pre-empt need not be express. It is enough that the Legislature has impliedly evinced its desire to do so. *A desire to preempt may be implied from a declaration of State police by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area.*
>
> ***
>
> On the heels of the enactment of Local Law No. 2, a neighboring town adopted a similar regulation. *Obviously, the proliferation of such local laws would lead to the very 'uncoordinated welter of approvals" article VII* [regulating utilities] *was meant to replace, and thereby defeat the purpose and operation of the State regulatory scheme.*" *Consolidated Edison*, at 104-105, 107, emphasis supplied and citations deleted.

Like the local laws in *Cohen* and *Consolidated Edison*, Local Law 4-2006 is part of a "proliferation of ...local laws" which fly in the face of the State's comprehensive scheme of sex offender regulation. In fact, as discussed below, it is

submitted that this Court should find that Local Law 4-2006 *expressly conflicts with State policy.*

Nassau County has No Special Local Circumstances Justifying the Local Law

Moreover, Respondent has failed to identify any particular circumstances in Nassau County which would render it different from any other county in the State with regard to the management of sex offenders. This lack of local distinctiveness is a factor which comes up in the preemption analysis, as discussed in *People v. DeJesus*, supra, where this Court held that a local law aimed at patrons of after hours clubs was preempted by State law, and stated:

> "... In *Robin* [*Robin v. Incorporated Vol. of Hempstead,* 30 NY2d 347], the nature of the subject matter being regulated, *the lack of any perceived 'real distinction' between any particular locality and other parts of the State in this regard*, and the accompanying legislative declaration... combined to demonstrate a 'design to pre-empt the subject of abortion legislation... (id, at p. 350)
>
> ***
>
> Measured against these criteria, the Alcoholic Beverage Control Law is surely preemptive. For one thing, the regulatory system it installed is both comprehensive and detailed. ...
> Nor is the police behind the legislation left to the imagination.
> ...[I]mplicitly here too *no 'real distinction' is to be drawn between the parochial interest of a particular city or other locality on the one hand and that of the State as a whole on the other.* ..." *De Jesus*, at 469-470, emphasis supplied.

Parole and Probation Supervision

The Appellate Term Decision held that because the State had not chosen to

apply residence restrictions to those former offenders not under any supervision and not seeking public assistance, that it was permissible for local governments to do so. As discussed in *Doe v Albany*, infra, as well as the other cases cited herein, no such conclusion can be fairly drawn. Not only has the State shown clearly, based on the many statutes and regulations impacting sex offenders, that it intends to preempt this field, but the State has expressly stated its disapproval of residence restrictions such as that contained in Local Law 04-2006. As noted above, these residence laws violate State policy by severely restricting housing options, and often barring individuals from living with their families and having access to transportation, treatment and other services.

It is also noted that the time periods of state supervision are generally quite long. Sentencing laws were amended several years ago to mandate *10 year probation terms* for sex offenses. (PL 65.00[3][a][iii]). Moreover, where there are flat prison sentences, there is also a required term of post-release supervision, in addition to the period of parole supervision, which can be lifelong in the cases of certain indeterminate sentences. (PL 70.45)

PL 70.45 (2-a) provides that the term for post-release supervision (PRS) for felony sex offenders is significantly longer than that imposed for other offenses. That section provides that the PRS term is between three and fifteen years for a

"D" or "E" felony sex offense (between three to ten years for a first felony offense and between five to fifteen years for various types of subsequent felony offenses); between five and twenty years for a "C" felony sex offense (between five and fifteen years for a first felony and between seven and twenty years for a subsequent felony); between five and twenty-five years for a "B" felony sex offense (between five and twenty years for a first felony offense and between ten and twenty-five years for a subsequent felony); and, between ten and twenty years for certain offenders who have a predicate felony conviction for sexual assault against a child. Thus it is not uncommon for the PRS period to last for many years.

Conflict Preemption

It is submitted that based on the Approval Memorandum, the DPCA regulations cited above, the 2009-2010 Report of the New York State Senate Standing Committee on Crime Victims, Crime and Correction, and other statements of State policy, Nassau County Local Law 4-2006 *does* conflict with State policy.

One specific example is when homeless sex offenders are seeking shelter, state law controls where they may reside, and specifies flexible criteria, including access to family members, friends, and supportive services. Yet Local Law 4-2006 not only doesn't consider those factors, but, under the reasoning of the Decision

herein, may actually displace those with homes and render them homeless. Once they are homeless, state law controls and can permit them to live in a location otherwise prohibited by the local law. See 9 NYCRR 365.3(d)(iii). This is a direct conflict. *See Sunrise Check Cashing and Payroll Services Inc. v. Town of Hempstead*, 91 A.D.3d 126 (2nd Dep't 2011) (local law invalidated based on conflict preemption because it prohibited something state law expressly allowed).

In *Sunrise Check Cashing,* the court found conflict preemption in analogous circumstances, holding that a local law banning check cashing companies from much of the Town of Hempstead was preempted by state banking policy, because the State had expressed an intent to regulate banking, and this local law prohibited something that State law allowed. The Second Department discussed both conflict preemption and field preemption, and stated:

> "'...[C]onflict preemption occurs when a local law prohibits what a state law explicitly allows...' (*Matter of Chwick v. Mulvey*, 81 AD3d 161, 168...) 'In determining the applicability of conflict preemption, we examine not only the language of the local ordinance and the state statute, but also whether the direct consequences of a local ordinance "render[s] illegal what is specifically allowed by State law."' (*Matter of Chwick v. Mulvey*, 81 AD3d at 168...) ...
>
> Under the doctrine of field preemption, '"a local law regulating the same subject matter [as a state law] is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute."' (*Matter of Chwick v. Mulvey*, 81 AD3d at 172...) 'Field preemption applies under any of three difference scenarios' (*Matter of Chwick v. Mulvey*, 81 AD3d at 169...) 'First, an express statement in the state statute explicitly avers that it preempts all local laws on the same

subject matter' (*Matter of Chwick v. Mulvey*, 81 AD3d at 169...) *'Second, a declaration of state policy evinces the intent of the Legislature to preempt local laws on the same subject matter'* (*Matter of Chwick v. Mulvey*, 81 AD3d at 169..) *'And third, the Legislature's enactment of a comprehensive and detailed regulatory scheme in an area in controversy is deemed to demonstrate an intent to preempt local laws'* (*Matter of Chwick v. Mulvey*, 81 AD3d at 169-170...)

***

...[A]s the clear language of Banking Law 369(1) demonstrates, the Legislature has vested the Superintendent [of Banking] with the duty to determine whether each applicant for a check-cashing license proposes to perform that function in an appropriate location...

Here, Section 302(K) adopted by the Town prohibits check-cashing establishments from being located anywhere in the Town, with the exception of industrial and light manufacturing districts. ...

However, through the enactment and amendment of Banking Law 369, the Legislature has specifically delegated to the Superintendent the task of determining whether particular locations are appropriate for check-cashing establishments. ... *Accordingly, we conclude that the Town's attempt to control the determination of the appropriate locations of these establishments by the enactment of Section 302(K) is in conflict with existing State law.*

It is true that '"separate levels of regulatory oversight can coexist"' (*DJL Rest. Corp. v. City of New York*, 96 NY2d 91, 97...) 'State statutes do not necessarily preempt local laws having only "tangential" impact on the State's interests' (*DJL Rest. Corp. v. City of New York*, 96 NY2d at 97...) *However, here, the facts of this case demonstrate that Section 302(K) has more than a tangential impact on the relevant Banking Law provisions.*

...As a direct consequence of Section 302(K), existing check-cashing establishments at locations in the Town's business district, each of which was necessarily determined by the Superintendent to be appropriately located to serve a community need, will now find themselves in violation of a provision of the Town's Building Zone Ordinance. *Because this violation does not exist under State law, and because the Legislature has vested the Superintendent with the authority to determine appropriate locations for check-cashing establishments, Section 302(K) is preempted by State law. ...*

In light of our determination that Section 302(K) is invalid based on the doctrine of conflict preemption, we need not reach the parties'

remaining contentions..." *Sunrise Checking v. Hempstead*, at 395-399, emphasis supplied.

As with Hempstead's check-cashing law in *Sunrise Check Cashing,* Local Law 04-2006 conflicts with State policy in an arena where the State has made its interests clear (via the policy statements cited above.) Like the check-cashing businesses relegated to only a few sections of town, many sex offenders, such as Appellee, whose residences are *not* restricted under State laws and policies, find their residence choices severely curtailed by Local Law 04-2006. Thus, this Court should find conflict preemption herein

Field Preemption

Even if, *arguendo*, this Court does not find conflict preemption, it is clear that the State has evinced an intent to preempt the field of sex offender regulation by passing a detailed and comprehensive statutory scheme in that area. In *Chwick v. Mulvey*, 81 AD3d 161 (2nd Dep't 2010), the Second Department found that Nassau County's "deceptively colored" firearm ordinance was preempted by Penal Law firearm provisions for that reason. This Court should find, based on the foregoing, that the State has preempted the field of sex offender regulations, and that Local Law 4-2006 is invalid.

B. Prior to the Appellate Term Decision Herein, in all Counties Where this Issue Arose, Local Sex Offender Residence Restrictions Were Found to be Preempted

Prior to the Appellate Term Decision herein, in all counties where this issue had been ruled upon in New York, the courts had held that local sex offender residency laws such as Local Law 4-2006 are preempted by state law[2]. *Doe v. County of Saratoga*, Index No. 2001-493 (Sup. Court, Saratoga County, 2011); *Doe v. Schenectady County*, Index No. 2009-1596 (Sup. Ct., Schenectady Co. 2010); *Doe v. Rensselaer County*, 24 Misc.3d 1215(A) (Sup. Ct, Rensselaer Co. 2009); *People v. Oberlander*, 2009 WL 415558 (Sup. Ct., Rockland Co. 2009); *Doe v. Albany County,* Index No. 2622-08 (Sup. Ct., Albany Co. 2009); *People v. Blair*, 23 Misc.3d 902 (Albany City Ct. 2009).

Moreover, in *Terrance v. City of Geneva*, 2011 WL 2580530 (WDNY 2011) the federal District Court for the Western District of New York recently made the very same ruling, holding that the City of Geneva's sex offender residence

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[2]Also Warren County recently stipulated that their residence restriction was invalid as preempted by state law and Washington County withdrew their law for the same reason. *Doe v. Warren County*, Index No. I-58425 (Sup. Ct., Warren Co. 2013); *Doe v. Washington County,* Index No. 11481 (Sup. Ct. Washington Co. 2011). Currently challenges to these laws in Buffalo, Niagara County (and the City of North Tonowanda) and Suffolk County are pending. *Doe and Roe v. Niagara County and City of North Tonowanda,* Index No:144806 (Sup. Ct. Niagara Co. filed 2011 and amended in 2013); *Doe v. City of Buffalo*, Index No.: I 2012001039 (Sup. Ct. Erie Co. summary judgment motion pending); *Moore v. County of Suffolk*, 2013 WL 4432351 (EDNY 2013).

restriction law was invalid because it was preempted by state law.

In the Albany County case, the Defendants even *conceded* that the local law would be preempted as to sex offenders on parole or probation, but tried to argue that it should still apply as to those not subject to such supervision. The court, however, rejected that argument, stating:

> "As a result of defendants' significant concession as to the preemption argument, the issue before the Court is now rather narrow. ...[T]hey seek to salvage Local Law "8" by asserting that the State's actions, including Chapter 568, do not preempt Local Law "8" as to the residential status of unsupervised sex offenders. The Court finds this argument to be unpersuasive.
>
> ...[A] review of Chapter 568 reveals that it also addresses the residential status of certain 'unsupervised sex offenders.' ... Said portion of Chapter 568 is in now way limited to sex offenders on parole, probation or subject to post-release supervision. It is therefore manifestly clear that the Legislature enacted legislation that significantly impacts the residential status of both supervised and unsupervised level two and three sex offenders. ...In light of the enactment of Chapter 568, the Court finds that the State has acted upon the specific subject addressed by Local Law "8". Further, *the Court holds that the breadth and detail of Chapter 568 evince a legislative intent to preempt the possibility of discordant local legislation regarding the residency of level two and three sex offenders. Accordingly, the Court is constrained to invalidate Local Law "8"...*" *Doe v. Albany County*, at 4-5.

In *Doe v. Schenectady County,* the court found *express and implied preemption,* and stated, in March, 2010:

> "...The issue before me is purely an issue of law, rendering it appropriate to decide this case upon summary judgment as a matter of law.
> ***

Schenectady's local law 03-07, as amended, prohibits level two and three registered sex offenders from moving to a residence within 2000 feet of a school, child care facility, public park, public playground, public swimming pool or youth center. ...

Plaintiff cites to several supreme court decisions ... which have held that local sex offender residency laws similar or identical, in fact, to the one at issue in this case are preempted by state law. ...

***

...I find that the local law does conflict with the less restrictive residency requirements for sex offenders under state law, which is a 1000 foot restriction as opposed to Schenectady County's 2000-foot restriction, and it conflicts with certain provisions in the Penal and the Corrections Law as well...

I also find that *the state legislature has expressly and impliedly assumed full responsibility for the regulation and management of sex offenders, including residency restrictions, given the governor's approval message that I've quoted above.*

Accordingly, I find that Schenectady County's local law 03-07 ... is in fact preempted by state law and is therefore unenforceable. ..." (Motion and Decision in *Doe v. Schenectady County*, at 9-12.)

In *Terrance v. Geneva*, supra, the federal court stated:

"...[T]he Court finds that Chapter 285 of Geneva's Municipal Code is preempted by New York State's comprehensive, detailed and thorough scheme for regulating sex offenders. Accordingly, judgment in favor of Plaintiff is granted to the extent that Chapter 285 is declared invalid and will not be given effect. ...

***

The Court agrees with the cogent and thorough opinions of the New York State courts discussed above that the State's legislative pronouncements to date establish that the regulation and management of sex offenders (including sex offender residency restrictions) is the exclusive province of the State...." *Terrance v. Geneva*, at 2, 7.

C. High Courts in Other Jurisdictions Have Ruled Local Sex Offender Residence Restrictions Invalid under a Nearly Identical Preemption Analysis

Very significantly, the highest courts of Pennsylvania, New Jersey and California[3], as well as the federal Third Circuit Court of Appeals, have all found that the same types of local sex offender residence laws, using a very similar preemption analysis, were preempted by those states' schemes of regulating sex offenders. This is the case even though both Pennsylvania and New Jersey have less state locational sex offender restrictions than New York, and even though the legislatures and governors of those states have not clearly stated that said laws run counter to state policy, as in the instant case.

In *Fross v. Allegheny County*, 438 Fed. Appx 99 (3rd Cir. 2011), the Third Circuit Court of Appeals recently held that an Allegheny County, Pennsylvania sex offender residency ordinance was preempted by Pennsylvania state law. The Third Circuit first certified this question to the Supreme Court of Pennsylvania, which offered a detailed opinion holding that the ordinance was preempted. The

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[3]In California, the California Supreme Court very recently declined to hear the case of *People . Godinez*, 2014 WL 99188 (Cal.App. 4 Dist. 2014), review den. April 23, 2014, which had invalidated a county sex offender locational restriction as preempted by state law. The Orange County District Attorney, which had supported the law, stated this meant these local laws are effectively dead in California. (**http://www.sacbee.com/2014/04/24/6352316/california-courts-strike-down.html**)

Third Circuit stated:

> "...[A]ppellees challenged the validity of Allegheny County Ordinance, No. 39-07-OR, entitled 'Residence Requirements, Registered Sex Offenders,' on various federal grounds and the state law ground that Pennsylvania law preempts the ordinance. ... The District Court held that the ordinance conflicts with Pennsylvania statutory law...
>
> ***
>
> ...[W]e certified the question of whether Pennsylvania law preempts the ordinance to the Supreme Court of Pennsylvania...
>
> ***
>
> On May 25, 2011, the Supreme Court of Pennsylvania answered the certified question in an opinion which, after a comprehensive review of Pennsylvania law, concluded as follows:
>
> 'The County's legislative effort in this instance undermines the General Assembly's policies of rehabilitation, reintegration and diversion from prison of appropriate offenders, and significantly interferes with the operation of the Sentencing and Parole Codes. For these reasons, we agree with the federal district court that the County's Ordinance stands as an obstacle to accomplishing the full purposes [and] objectives of the General Assembly and is, therefore, preempted.'
>
> When we received the Supreme Court opinion our Clerk directed the parties to file letter briefs commenting on the effect of the Supreme Court's decision. The parties ... are in agreement that the Supreme Court's decision should lead us to affirm the District Court's decision. ..." *Fross*, supra, at 100-101.

In *Fross v. County of Allegheny*, 20 A.3d 1193 (Sup. Ct. PA 2011), the Pennsylvania Supreme Court refuted the same arguments made by the County herein and stated:

> "...For the reasons that follow, we hold that the [sex offender residence] Ordinance impedes the accomplishment of the full objectives of

the General Assembly, as expressed in the Sentencing and Parole Codes, and is, therefore, invalid pursuant to our conflict preemption doctrine.

***

...In relevant part, the Ordinance states:

'It shall be unlawful for any Sex Offender to establish a Permanent Residence of Temporary Residence within 2,500 feet of any Child Care Facility, Community Center, Public Park or Recreational Facility, or School for the duration of his or her registration under the terms of Megan's Law...'

...The County emphasizes its status as a home rule county, whose locally-tailored legislation is entitled to deference. The County claims the Ordinance conflicts neither with Megan's Law nor with the Parole Code. According to the County, the Ordinance shares with the two statewide acts the goal of protecting public safety, albeit by different means specific to the necessities and concerns of Allegheny County. Thus, the County argues that the Ordinance regulates where sex offenders may reside, a subject different from the concerns of Megan's Law-registration and public notification. ... Similarly, with respect to the Parole Code, the County claims that there is no conflict arising from the Ordinance because, although the Parole Code grants the Board exclusive power over parole decisions and seeks to establish a uniform statewide system of parole... by its plain language. the Ordinance does not seek 'to regulate or intrude upon' these prerogatives. ...

***

...Appellees emphasize that the supervision of sex offenders on probation and parole is highly regulated in Pennsylvania through comprehensive and detailed statutes. ...

***

...Acts of the General Assembly may circumscribe, either expressly or impliedly, the power of a home rule county to legislate in a particular arena, which may give rise to conflicts between local and state legislation. ... *Preemption may be express or implied, in the form of field or conflict preemption.*

This ... Court agreed that a local ordinance is invalid if it stands 'as an obstacle to the execution of the full purposes and objectives' of the General Assembly, as expressed in a state law. [*Holt's Cigar Co. v. City of Phila.*, 10 A.3d 902, 907]...

The parties here agree that neither the Sentencing Code nor the Parole Code expressly prohibits the County from adopting ordinances with respect to released sex offenders. Further, there is no dispute that the County's authority to adopt local legislation must be liberally construed. But, even construed in the most liberal light, the Ordinance here clearly interferes with the statewide operation of the Sentencing and Parole Codes and with the General Assembly's policies in these arenas.

The General Assembly has expressly listed among its purposes for adopting the Sentencing and Parole Codes the rehabilitation, reintegration and diversion from prison of appropriate offenders. ...

The Ordinance fails to acknowledge, and effectively subverts, these goals of the General Assembly. The Ordinance banishes many sex offenders from their pre-adjudication neighborhoods and support systems. ... *The Ordinance appears to attempt to ensure public safety, in certain parts of Allegheny County, by isolating all Megan's Law registrants in localized penal colonies of sorts, without any consideration of the General Assembly's policies of rehabilitation and reintegration.*

***

The Ordinance relatedly obstructs the operation of the Sentencing and Parole Codes in several respects. First ... the General Assembly has generally rejected the option of simply excluding released offenders from entire communities... The General Assembly adopted instead a calibrated regulatory scheme of registration, notification, and counseling for sex offenders-Megan's Law. ...

Generally, however, sentencing courts and the Board assess individual sex offenders (like all other offenders) regarding their suitability for probation or parole, and impose conditions tailored to the offender. ... *For example, a parolee's residency is subject to approval by the paroling entity...* The Ordinance, however, establishes a blanket prohibition against residency within 2,500 feet of 'places where children congregate,' on all Megan's Law registrants. ... *The Ordinance would thus obstruct the operation of the statewide statutory scheme...*

...*[T]he General Assembly has already weighed in on the policy priorities of the Commonwealth with respect to the reintegration of offenders, including sex offenders, and has devised an approach for how best to accomplish them. The County reveals no countervailing local concerns to justify its attempt to opt-out of the General Assembly's overall*

scheme. ...

...Isolating all sex offenders from their communities, support systems, employment, and treatment is an approach contrary to that of the General Assembly..." *Fross*, supra, at 1195, 1197, 1200, 1202-1207, emphasis supplied.

As with the ordinance invalidated in *Fross*, Local Law 4-2006 has created "localized penal colonies" which are in conflict with the purposes expressed by this State. In this case, the State has even gone so far as to state, in NYCRR 8002.7(v), that "the proliferation of local ordinances imposing residency restrictions upon sex offenders .... have made it more challenging for State and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders." Moreover, New York's preemption doctrine does not appear to require that local laws be liberally construed in favor of the localities, as does the doctrine in Pennsylvania. For both of those reasons, and additionally because of New York's specific parole and probation regulations placing locational restrictions on certain sex offenders, there are even stronger reasons for finding preemption herein.

Similarly, in *G.H. v. Galloway*, 971 A.2d 401 (Sup. Ct. NJ 2009), New Jersey's Supreme Court invalidated a pair of town sex offender residence restrictions using essentially the same analysis, stating:

"...We now affirm the judgment of the Appellate Division

substantially for the reasons expressed in Judge Lisa's comprehensive opinion. ... Accordingly, we hold that Cherry Hill Township's and Galloway Township's ordinances, establishing residency restrictions that formed buffer zones for convicted sex offenders living within their communities, are precluded by the present, stark language of Megan's Law. It is that language which controls." *G.H.*, at 401.

In *G.H. v. Galloway,* 951 A.2d 221 (Sup. Ct. NJ, App. Div. 2008) NJ Appellate Division had stated:

"The Galloway ordinance prohibits a person over the age of eighteen who has been convicted of a sexual offense against a minor... and who is required to register with the authorities pursuant to Megan's Law, from living within 2500 feet of any school, park, playground or daycare center in the Township. ... The ordinance contains a grandfather clause, exempting anyone who established a residence prior to the introduction date of the ordinance.

***

Galloway Township and Cherry Hill Township (the municipalities) argue that the trial courts erred in finding their ordinances preempted by state law because the State has neither expressly nor impliedly occupied the field covered by the ordinances. Their argument rests upon the assertion that the applicable state law, Megan's Law, deals with registration and notification regarding CSOs [Convicted Sex Offenders], but does not include provisions restricting locations in which they live. ...

We do not agree with the municipalities' narrow characterization of the purpose of Megan's Law. The farreaching scope of Megan's Law and its multilayered enforcement and monitoring mechanisms constitute a comprehensive system chosen by the Legislature to protect society from the risk of reoffense by CSOs and to provide for their rehabilitation and reintegration into the community. ... We conclude that the ordinances conflict with the expressed and implied intent of the Legislature to exclusively regulate this field, as a result of which the ordinances are preempted.

***

...Even without a direct conflict, a municipality may not exercise a

power where the Legislature clearly intended to preempt the field. ...

***

Consonant with the goal of rehabilitation of CSOs and their reintegration into the community, parole officers must approve an appropriate residence for them when they complete their term of incarceration. An important consideration in selecting a residence is the support system that will be available to the CSO. Often, the best place for a CSO to live is in a household with responsible family members. ...[I]t should be in relative proximity to treatment programs and employment, with available transportation resources. ...

***

The statutory and regulatory scheme, viewed in light of the exclusionary effect of the ordinances, provides strong evidence that the ordinances substantially interfere with the ability of parole officers to carry out their statutorily mandated function of finding the most appropriate housing for CSOs. In many cases, the most appropriate housing would be in a location prohibited by the residency restriction ordinances.

***

...[W]e see nothing unique from one locale to another regarding the need to protect children from sexual predators. ... The resulting mischief is that municipalities are racing to exclude CSOs from their communities, banishing them to live elsewhere. ...

***

...[W]e reject the municipalities' contention that uniformity is impossible and each municipality should legislate according to its own needs.

***

...The Legislature did not include residency restrictions in its chosen remedy, but did include a complex system of particularized case-by-case assessment of risk of reoffending with a corresponding tailored form and scope of notification...

We conclude that the residency restriction ordinances conflict with the policies and operational effect of the statewide scheme implemented by Megan's Law, which was intended, both expressly and impliedly, to be exclusive in the field. The subject matter reflects a need for statewide uniformity. The scheme chosen by the Legislature, refined by the judiciary, and firmly entrenched for more than a decade on a uniform state basis, is

pervasive and comprehensive, thus precluding the coexistence of municipal regulation. The ordinances interfere with and frustrate the purposes and operation of the statewide scheme." *G.H.*, supra, at 223, 225, 229-230, 236, 238, emphasis supplied.

New Jersey doesn't appear to have any locational requirements for sex offenders on parole or probation, other than the fact that a residence must be approved by a parole officer. Nor did the New Jersey Legislature make the kind of clear policy statements against local residence restrictions which are found in NYCRR 8002.7 and elsewhere. Thus, as with the Pennsylvania case, the argument for preemption is much stronger herein.

In *People v. Godinez*, 2014 WL 99188 (Cal. App 4 Distr. 2014), review den, April 23, 2014, the Court of Appeal upheld a lower appeal court's decision finding that an Orange County, California ordinance restricting the ability of registered sex offenders to enter county parks was preempted by California state law. The court stated:

> "Defendant Hugo Godinez appeals from his conviction for violating a county ordinance that made it a misdemeanor for a registered sex offender to enter a county park without the county sheriff's written permission. Godinez argues that state law preempts the county ordinance and therefore his conviction is void. We agree. The Legislature has enacted a comprehensive statutory scheme regulating the daily life of sex offenders... ...[W]e conclude the state statutory scheme imposing restrictions on a sex offender's daily life fully occupies the field and therefore preempts the county's efforts to restrict sex offenders from visiting county parks.
>
> ***

...[T]he trial court conducted a one-day bench trial and found Godinez guilty of violating Section 3-18-3 [the county ordinance].

Godinez appealed to the Superior Court Appellate Division... The Appellate Division reversed the trial court's judgment because it found the 'extensive state legislation restrict[ing] and regulat[ing] numerous areas of the lives of registered sex offenders preempted Section 3-18-3. ...

...[T]he Appellate Division certified transfer of Godinez's appeal to this court ... 'to *settle the "important question" of whether cities and counties may enact their own local ordinances* prohibiting registered sex offenders from being present in or near locations including parks and other places "where children regularly gather," *or whether such local ordinances are barred by... a "standardized, statewide system* to identify, assess, monitor and contain known sex offenders." ...[W]e ordered Godinez' appeal transferred to this court.

***

...Godinez's primary challenge is that state law impliedly preempts Section 3-18-3 by fully occupying the field it regulates. ...

***

...[W]e must first identify the subject Section 3-18-3 regulates and the specific field Godinez claims is occupied by state law. ... Next, we must examine the nature and scope of those state statutes to determine whether they are logically related and establish a ' "patterned approach" ' to regulating an area that includes the subject matter covered by Section 3-18-3. [citations deleted] *A preempted field ... requires closely related statutes that regulate an area in a manner that reveals a legislative intent to occupy the field.*

***

...[W]e define the relevant field as the restrictions imposed on a sex offender's daily life to reduce the risk he or she will commit another similar offense. ...[T]he Legislature has not only adopted numerous statutes placing geographical restrictions on sex offenders, but has also adopted other regulations governing other aspects of an offender's life... We must consider all of those statutes together to determine whether they ... manifest a legislative intent to fully occupy the field to the exclusion of all local legislation.

***

As part of the 2006 act [the Sex Offender Punishment, Control, and

Containment Act of 2006, which contained many regulations managing registered sex offenders] the Legislature enacted section 290.03, which states, 'The Legislature finds and declares that a *comprehensive system* of risk assessment, supervision, monitoring and containment for registered sex offenders residing in California is necessary...'

...[W]e conclude the Legislature established a complete system for regulating a sex offender's daily life and manifested a legislative intent to fully occupy the field...

***

Precisely how to restrict a sex offender's access to places where children regularly gather reflects the Legislature's considered judgment on how to protect children and other members of the public ... *while also recognizing a sex offender's right to live, work, assemble and move about the state.* The Legislature's enactment of a comprehensive statutory scheme that includes significant restrictions on a sex offender's access to places where children regularly gather, but excludes an outright ban on all sex offenders entering a park without written permission, *manifests a legislative determination that such a ban is not warranted. ...*" *Godinez*, supra, at 1-2, 4, 6-7, emphasis supplied.

Research has not uncovered any state appellate decisions allowing local sex offender residence restrictions under a preemption analysis. Whenever the preemption issue has been raised, it appears that these laws have been held to be invalid because the states have taken on the task of sex offender management. New York should join the other states which prohibited counties, cities and towns from imposing harsher restrictions on former offenders.

D. There are Strong Policy Reasons to Oppose Blanket Sex Offender Residence Restrictions

There are compelling reasons, based on research and input from law

enforcement, treatment providers and other experts, why New York State has decided that blanket residence restrictions are the wrong way to go. As is the case with all such blanket sex offender residence restrictions, Local Law 4-06 is ineffective, cumbersome and ultimately counterproductive. This law sweeps too broadly, causing great hardship to those caught in its ambit; it creates a huge extra workload for law enforcement personnel who are expected to determine and enforce the exclusion zones; and it ultimately renders many sex offenders homeless and/or drives them underground, thus making them much more difficult to monitor.

A 2008 *New York Law Journal* article ("State Preemption of Local Sex-Offender Residency Laws" by Alfred O'Connor, on 11/24/08) discussed this issue at length, arguing that there is no evidence that these local banishing laws support public safety in any way, but rather tend to lead former offenders to recidivate by cutting off their re-entry into society and driving them undergound.

A November, 2011 article in Clinical Psychiatry News entitled "*Study Finds Fault with Sex-Offender Restriction Laws*" discusses recent studies, often focused on New York, showing how blanket residence restrictions are counter-productive, stating:

> "...[Residence restrictions] often keep offenders far away from needed

psychiatric services, job prospects, and social support, researchers said at the annual meeting of the American Academy of Psychiatry and Law.

***

'One of the conclusions that has come from a number of studies is that the legislation is not only not helping with the recidivism rates of sex offenders in the community, but may actually be worsening recidivism rates, and that the collateral damage being done by this legislation nationally is self-defeating.' [Dr. Jacqueline A. Berenson, a forensic psychiatrist] said.

***

...Dr. Berenson said ... that there may be ... an unwillingness on the part of law enforcement agencies to follow the restriction statutes. She noted that courts have overturned sex offender residency restrictions in eight New York counties, and that the Washington County board of supervisors recently voted to repeal that county's law."
http://www.clinicalpsychiatrynews.com/news/more-top-news/single-view/study-finds-fault-with-sex-offender-restriction-laws/2c8d6a0528.html.

Finally, Nancy Sabine, the Director of the Jacob Wetterling Research Center, which led the push for tougher sex offender laws, has come out strongly against residence restriction laws, stating in a 2009 interview:

"Residency laws don't do one shred of good. We've worked all the Minnesota cases backwards from 2007 to see if any residency restrictions would have prevented one crime. Not one. The crimes are happening because they are connected to relationships. ...

It's ridiculous. We didn't think it through far enough to make sound policy. What we're doing is grandstanding around one of the most loaded issues in the public mind."
http://sexoffenderresearch.blogspot.com/2009/07/mn-too-close-to-home.html.

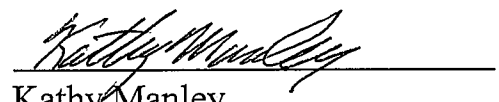
CONCLUSION

Based on the foregoing, this Court should reverse the Decision of the

Appellate Term and hold that Nassau County Local Law 4-2006 is preempted by State law.

Dated: May 5, 2014

Respectfully submitted,
KINDLON SHANKS & ASSOCIATES

By: 

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