

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11822

THREE REGISTERED SEX OFFENDERS,
PLAINTIFFS-APPELLEES

v.

CITY OF LYNN,
DEFENDANT-APPELLANT

BRIEF OF THE AMICI CURIAE JACOB WETTERLING RESOURCE CENTER,
ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS,
MASSACHUSETTS ASSOCIATION FOR THE TREATMENT OF SEXUAL
ABUSERS, INC., REFORM SEX OFFENDER LAWS, INC.,
AND FLORIDA ACTION COMMITTEE,
AND IN SUPPORT OF THE APPELLEES

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INTRODUCTION

This Court has solicited amicus briefs regarding the whether the City of Lynn's ordinance which restricts the residential possibilities for Level 2 and Level 3 sex offenders ("the restricted class") within the city violates the Home Rule Amendment and, assuming the court reaches the issue, whether the ordinance unconstitutionally infringes on the plaintiffs' rights to move freely within the Commonwealth, an issue not determined by the trial court but urged by the plaintiffs as an alternative basis for affirmance.

The Court's decision in this case will have far-reaching implications for all members of the restricted class, and will significantly impact the work done by Amici who strive to assist the restricted class's successful reintegration into society, to keep the public safe from harm, and to meet the basic human needs of the restricted class in order to promote rehabilitation.

The Amici write to address the constitutional issue raised in the amicus solicitation request and herein urge this Court to rule that the Lynn ordinance

unconstitutionally infringes on the plaintiffs' rights to move freely within the Commonwealth.

STATEMENT OF THE INTEREST OF AMICI CURIAE

Jacob Wetterling Resource Center (JWRC) was founded in 1990 by Patty and Jerry Wetterling following their son's abduction in rural Minnesota. For over 25 years, the organization has been focused on its mission to educate children, families, and community members so children can grow up safe and reach their full potential. JWRC also provides victim assistance to families in cases of missing and exploited children and adults. The Jacob Wetterling Resource Center is a program of Gundersen National Child Protection Training Center.

The Association for the Treatment of Sexual Abusers (ATSA) is an international, multi-disciplinary professional association dedicated to the research, treatment, and prevention of sexual assault. ATSA's members include the world's leading researchers in the study of sexual violence. Membership is also made up of professionals who evaluate and treat sexual offenders, sexually violent predators, and victims. Members work closely with public and private organizations such as prisons, probation departments,

law enforcement agencies, child protection services, State's Attorney's Offices, Public Defender's Offices, victim advocacy groups, and state legislatures in an effort to protect citizens from sexual assault. ATSA advocates for evidence-based practices and policies that are most likely to protect the public from sexual violence, while allowing for the rehabilitation of sexual offenders.

The Massachusetts Association for the Treatment of Sexual Abusers, Inc. (MATSA) is a non-profit local chapter of the national parent organization ATSA. It was formed in 1995 to carry out the mission of ATSA at the state level: to eliminate sexual victimization and protect communities through responsible practices with sex offenders.

Reform Sex Offender Laws, Inc. (RSOL) is a national level civil rights and justice reform organization based in Cambridge, Massachusetts. RSOL is dedicated to raising awareness about the consequences of current sex offender laws and working towards changing them for the better, according to results of scientific research. RSOL envisions effective, fact-based sexual offense laws and policies that promote public safety, safeguard civil liberties,

honor human dignity, and offer holistic prevention, healing, and restoration.

The Florida Action Committee (FAC) is an outreach organization that, among other things, seeks to educate and raise awareness regarding the unintended collateral consequences of enactment of broad reaching legislation in the State of Florida intended to protect the public from dangerous sex offenders, yet has failed to do so. FAC also raises awareness about the profound human collateral damage to families and communities that has resulted from the residency restrictions on sex offenders in place in the State of Florida in the hope of bringing about much needed reform.

The missions of each of these diverse organizations are furthered by the implementation of evidence-based policies and practices that are most likely to protect the public from sexual violence, while allowing for the rehabilitation and successful reintegration of sexual offenders. Each of the Amici asserts that these goals are not accomplished by Lynn's residency restrictions for Level 2 and 3 sexual offenders. For "[p]olicies informed by scientific data are more likely to successfully accomplish their goals

of community protection." *P. Zandbergen, J.S. Levenson, & T. Hart*, "Residential proximity to schools and daycares: An empirical analysis of sex offense recidivism," Criminal Justice and Behavior, Vol. 37(5), 482-502 at 486 (2010).

STATEMENT OF THE ISSUE

Whether the City of Lynn's sex offender residency restriction ordinance unconstitutionally infringes on the plaintiffs' constitutional rights to move freely within the Commonwealth and to familial association.

STATEMENT OF THE CASE

Amici adopt the statement of the case as set forth in the appellee's brief.

STATEMENT OF FACTS

Amici adopt the statement of facts as set forth in the appellee's brief.

SUMMARY OF THE ARGUMENT

The Court should determine that the Lynn sex offender residency restriction ordinance unconstitutionally infringes on the plaintiffs' rights to move freely within the Commonwealth and to familial association. The Lynn ordinance, like more than forty other similar municipal ordinances statewide, impacts

fundamental rights and fails to satisfy both strict scrutiny and rational basis review. (Br.6-20).

A review of the undisputed empirical evidence in the record demonstrates that the ordinance fails to pass even the rational basis test. There is no rational relationship between the restriction imposed and the promotion of a legitimate governmental interest. (Br. 20-31).

If the Court fails to decide this critical issue, research and empirical evidence demonstrate that residency restrictions similar to the Lynn ordinance will proliferate across the state. As a result, the support structures of sex offenders will be substantially destabilized, leading to an increase in homelessness among offenders, and an elevation in recidivism and risk to public safety, undermining the basis for passing sex offender registration laws. (Br. 31-37).

ARGUMENT

I. THIS COURT SHOULD DETERMINE THAT THE LYNN SEX OFFENDER RESIDENCY ORDINANCE UNCONSTITUTIONALLY INFRINGES ON THE PLAINTIFFS' RIGHTS TO MOVE FREELY WITHIN THE COMMONWEALTH.

The City's sex offender residency ordinance, which will force the plaintiffs and other similarly

situated individuals to leave their homes and render them homeless, violates basic human rights. See Doe v. Police Comm'r of Boston, 460 Mass. 342, 349 (2011).

As there is no material factual dispute and no practical impediment to the Court's consideration of the constitutional viability of the City's residency restriction, the Court should conclusively decide the issue. See Gabbidon v. King, 414 Mass. 685, 686 (1993).

More than forty municipalities in the Commonwealth have adopted residency restrictions, with the approval of the Attorney General's Office, which has noted that "no Massachusetts appellate court has yet reviewed municipal restrictions on where sex offenders may be."¹ (Add.37). These restrictions are often enacted as a reaction to a neighboring community's residency ordinances and render many sex offenders homeless. See, e.g., In re Taylor, 60 Cal. 4th 1019, ___ (Cal. 2015) (slip op. at 2-3) (residency restriction substantially increased San Diego's homeless sex offender population). If the Court were

¹ References: Supplemental Appendix of Amici (AA.[page #]); Appellee's Addendum (Add.[page#]); Record Appendix of Appellant's Brief: (RA[page #]).

to solely address the Home Rule Amendment issue and not consider whether such restrictions violate the fundamental rights of citizens of the Commonwealth, the Legislature could then step in and pass a statewide residency restriction. Such an action would relegate the plaintiffs and those similarly situated to a life of homelessness, undermine their personal stability, and thus trigger an increased risk of recidivism and a greater degree of dangerousness to the public, as has been seen in the State of Florida. See *infra* at section (I)(B)(2).

A. The Lynn Sex Offender Residency Ordinance Burdens The Fundamental Right Of Intrastate Travel.

The right of our citizens to freedom of movement, both within and between states, is well settled. See United States v. Guest, 383 U.S. 745, 757-760 (1966) (freedom to travel throughout the United States has long been recognized as a basic right under the Constitution (citations omitted); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement").

A constitutional right to intrastate travel, one's right to travel within a particular state, flows directly from the freedom of movement implicit in the concept of ordered liberty and is thus a fundamental right to be protected by the states pursuant to the Fourteenth Amendment. See e.g., Palko v. Connecticut, 302 U.S. 319, 324-325 (1937); Guest, 383 U.S. at 758-759 ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."), quoting Crandall v. Nevada, 73 U.S. 35, 49 (1868); United States v. Wheeler, 254 U.S. 281, 293 (1920) (endowing all citizens with "the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress and egress therefrom"); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971) ("meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative [right to intrastate travel]").

The right to intrastate travel is also guaranteed by the Massachusetts Declaration of Rights within Articles 1, 10 and 12. See Commonwealth v. Weston W., 455 Mass. 24, 32-33 (2005) (declaring a fundamental right of citizens to move freely within the Commonwealth). In particular, this Court has previously struck down a restriction barring Level 3 offenders from living in a "rest home or other long-term facility." See Doe v. Police Comm'r of Boston, 460 Mass. at 345, 347-348. This Court ruled sex offenders "are free to live where they choose and to move freely within and without the Commonwealth." Id. at 347-348.

B. The Lynn Sex Offender Residency Ordinance Burdens The Fundamental Right Of Familial Relationships.

Individuals also possess fundamental rights in the nature of their familial relationships. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944). "[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity

that is central to any concept of liberty." Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

C. As The Lynn Sex Offender Residency Ordinance Significantly Burdens The Fundamental Rights Of Intrastate Travel And Familial Association, It Should Be Subject To Strict Scrutiny.

The Lynn sex offender residency restriction's substantial impairment of fundamental rights renders it subject to a strict scrutiny standard of review. To survive strict scrutiny, the law must: 1) be narrowly tailored to further a legitimate and compelling governmental interest; and 2) must be the least restrictive means available to vindicate that interest. See Finch v. Commonwealth Health Ins. Connector Auth., 461 Mass. 232, 236 (2012); United States v. Virginia, 518 U.S. 515, 533 (1996). This court applies the same analysis under strict scrutiny in cases arising under the State Constitution as Federal courts apply when analyzing cases under the Federal Constitution. See Weston W., 455 Mass. at 30 n.9.

Although fundamental rights are not absolute, strict scrutiny applies where the burden imposes a significant penalty. See Weston W., 455 Mass. at 33-34, citing Commonwealth v. Bruno, 432 Mass, 489, 503

(2000). Here, the burden imposed on the plaintiffs is so significant that it triggers strict scrutiny protection.

1. The penalty imposed by the Lynn residency restriction ordinance is significant.

Lynn is a community that offers affordable housing to individuals, such as the plaintiffs, who are of low or modest income. "Underemployment is not unusual for those with a felony conviction, and as a result, sex offenders often reside in less affluent communities." Zandbergen (2010) at 483, citing *R. Tewksbury & E. Mustaine*, "Stress and collateral consequences for registered sex offenders," Journal of Public Management and Social Policy (2006).

While densely populated urban areas coincide with lower income neighborhoods where residential dwellings are in close proximity to schools and other child-oriented sites, there is no correlation between the number of schools and a greater frequency of sex offenses, nor is there a significant correlation between a higher concentration of registered sex offenders in a neighborhood and the incidence of sex offenses. See id. at 483-484.

Data from other states demonstrate that residential restrictions present significant obstacles to offender reintegration and correlate to increased homelessness and transience. In a survey of registered sex offenders:

- In Oklahoma and Kansas, 54-percent reported that a housing restriction law forced them to relocate.
- In Indiana, 26-percent reported they were unable to return to their homes after incarceration, 37-percent were not allowed to live with family members, and nearly a third experienced a landlord's refusal to rent to them or to renew a lease.
- Many in Florida and Indiana reported that affordable housing is less available due to limits on where they can live and that they are made to live farther away from employment, public transportation, social services, and mental health clinics.
- Those in New Jersey indicated residential restrictions have led to financial hardship and pushed them farther away from employment, treatment, and family support.
- In Broward County, Florida 39-percent reported spending at least 2 days homeless or living with someone else and 22-percent said that they were forced to relocate more than twice.²

See id. at 485.

² The background surrounding the Broward County residency restriction is discussed in more detail *infra* at section (I)(D)(2).

The survey results also reflect that the larger the buffer zone imposed, the higher the rate of transience and homelessness among the offender population and the fewer the employment opportunities. See id. "Young adults seemed to be especially affected by these laws; age was significantly inversely associated with being unable to live with family and having difficulties securing affordable housing..." Id.

"[T]he forced removal of offenders from established residences also appears to have had an adverse impact on family members, causing children to be pulled out of school and away from friends, and resulting in the loss of jobs and community connections for spouses. This in no way promotes the articulated and intended goals of the statute."

Minnesota Department of Corrections, Residential Proximity & Sex Offense Recidivism in Minnesota, April 2007 at 25-26.

Residence restriction zones create barriers to reentry and inhibit the factors known to contribute to successful reintegration, such as employment, housing stability, prosocial relationships, and civic engagement... When criminal offenders sustain jobs and social bonds, they are more likely to become invested in conformity and community norms. Housing instability, transience, unemployment, and a lack of support systems are known to increase the

likelihood of recidivism for criminal offenders in general and sex offenders specifically.

See Zandbergen (2010) at 499. See 803 CMR 1.40(9), (12), and (22) (Sex Offender Registry Board recidivism factors; detailing that an offender who is "currently residing in a positive and supportive environment lessens the likelihood of reoffense by reducing the stressors in his life and surrounding himself with family, friends and acquaintances.")

The plaintiffs in this case describe similar burdens and hardships placed on them and their families as a result of the Lynn ordinance.

Fifty-eight year old Paul Poe³ is mentally retarded and cannot read, had to leave his residence at 195 Union Street and is now homeless. He has a friend who would take him in, but the friend lives near a school. He has resorted to sleeping at bus stops. He has lived in Lynn most of his life, and sees a therapist in Lynn. He receives medical care once a month at Lynn Community Health Services. He has been sober for 16 years thanks to AA/NA meetings he attends in Lynn, sometimes twice daily. He is very close to his elderly aunt and uncle who live in Lynn. He has no

³ Paul Poe, Charles Coe and John Doe are pseudonyms.

family or friends who live outside of Lynn. If forced out of the Lynn Emergency Shelter he is currently in, he will have no choice but to live on the streets. (RA 46-48). Sixty-five year old Charles Coe received an eviction notice from his home at 41 Light Street. He is indigent and has no family or friends who can house him. If he is forced to leave his home, he will be living on the streets. (RA 49-50).

Fifty-one year old John Doe received an eviction notice from his home at 196 Locust Street as a result of the ordinance. Doe is an insulin dependent diabetic that receives medical treatment at Lynn Community Health Services for his diabetes and a variety of other health problems, including depression. He also sees a therapist there once a week. He has lived continuously in Lynn since 1985 when not incarcerated. He has friends and family in Lynn he would lose contact with if forced to leave the area. (RA 51-54).

2. The Lynn sex offender residency restriction ordinance is not narrowly tailored and is not the least restrictive means available to vindicate the government's stated interest of protecting children.

The stated goal of the ordinance is to protect children from sexual offenders. Yet the Lynn ordinance restricts the movement of all Level 2 and 3 offenders without distinction. As a result, offenders with sexual offense convictions not involving children are subject to this severe residency restriction. The Lynn ordinance casts too wide of a net, ensnaring numerous citizens within its scope, many of whom pose no safety risk to children.

Contrary to long-held beliefs, most sexual offenders do not re-offend sexually. See Harris, Andrew J.R. and Hanson, R. Karl, "Sex Offender Recidivism: A Simple Question", Public Safety and Emergency Preparedness Canada, March 2004 at 11; see also Langan, Patrick A., Schmitt, Erica L., and Durose, Matthew R., "Recidivism of Sex Offenders Released From Prison in 1994", Bureau of Justice Statistics, United States Department of Justice, November 2003 (study of 9,691 sex offenders determined sexual recidivism rate of only 5.3-percent after three

years); Zgoba, Kristen M., Miner, Michael, Levenson, Jill, Knight, Raymond, Letourneau, Elizabeth, and Thornton, David, "The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems", Sexual abuse: A Journal of Research and Treatment, 2015 (four state follow-up study of 1,789 sexual offenders determined a sexual recidivism rate of only 5.1-percent at five years). Similarly, "recent data reveal that recidivists account for a relatively small portion of the total number of sex offenses. Of the 591 criminal sexual conduct sentences during 2004, only 10 percent (N=58) involved offenders who had a previous sex crime conviction." See Minnesota Recidivism Study at 24.

The ordinance creates the illusion of safety and runs the risk of creating a false sense of security within the community. The plaintiffs' expert, Professor Jill S. Levenson, Ph.D., has averred that one of the principal effects of residence restrictions is to increase "the number of offenders who fail to register, abscond, or become more difficult to track and monitor" (RA 78). Similarly, Laurie Guidry, Psy.D., concluded that residency restrictions "actually interfere with registration regimes, because

"[w]hen sex offenders are left with nowhere to live, they begin to disappear" (RA 22). Lynn's ordinance is not narrowly tailored as is required and actually restricts the freedom of citizens who do not fall within the class of offenders the ordinance aims to monitor.

Ordinances such as in Lynn create a risk to the safety of children by destabilizing sex offenders and increasing their risk of recidivism. See 803 CMR 1.40 (9), (12), and (22). The Lynn ordinance not only fails to achieve the stated goal in any respect but it directly undercuts its stated purpose as well as the stated purpose of the Sex Offender Registration Law (SORL), G.L. c. 6, §§ 178C-178P, inserted by St. 1999, c. 74, § 2 (enacted to identify, classify and track all sex offenders living, working or studying in Massachusetts).

[H]ousing instability is consistently and strongly correlated with increased criminal recidivism and absconding. In a sample of more than 6,000 criminal offenders in Georgia, each time a parolee relocated, the risk of being rearrested increased by 25%, doubling the odds of recidivism by moving three times while on parole... Residential instability was determined to be the most robust predictor of absconding in a study of more than 4,000 parolees in California, and in a national sample of probationers (N = 2,030), those who moved multiple times during their period of supervision

were almost twice as likely as stable probationers to have a disciplinary hearing... In a New Zealand study of sex offenders, poor housing accommodation was the aspect of reintegration most strongly linked with sexual recidivism... A subsequent validation study confirmed that poor reintegration planning characterized by unstable housing, unemployment, and a lack of social support predicted recidivism in a sample of 141 sex offenders from New Zealand...

Zandbergen (2010) at 485.

The residency restriction frustrates the stated goal as opposed to forwarding it, as demonstrated by the empirical evidence.

D. In The Alternative, Should This Court Choose To Apply Rational Basis Review, The Ordinance Is Not Rationally Related To A Legitimate Governmental Interest.

Protecting citizens from sexual offenders is indisputably a compelling government interest supported and promoted by each of the Amici. However, the rational basis test is not met where residency restrictions such as Lynn's actually undermine the goals of community safety and the treatment and rehabilitation of offenders rather than promote them. Sex offender residency restrictions contravene the empirical data showing that such recidivism is the exception, rather than the rule.

1. **There is no rational relationship between the Lynn residency restriction and the stated goal of protecting children from harmful sexual offenders.**

"Over the past decade, great gains have been made in the ability to assess and identify high-risk sex offenders...Unfortunately, such research has not been consistently incorporated into policy development or implementation." *J. S. Levenson & L. P. Cotter*, "The impact of sex offender registry restrictions: 1,000 feet from danger or one step from absurd?"

International Journal of Offender Therapy and Comparative Criminology, 49(2), 168-178 at 169 (2005).

"Living close to a school or daycare does not appear to increase access to children in a way that facilitates recidivism for known sex offenders."

Zandbergen 2010 at 499.

Residency restrictions result from the widely held and mistaken belief that sex offenders as a group have a high rate of recidivism. Proponents such as the City of Lynn, often advocate for these restrictions by adopting popularly held beliefs about the dangers sex offenders pose, without citing investigation into or reliance on authoritative sources or studies in support of such a conclusion, a point noted by the

trial court in its decision. To the contrary, “[r]esearch indicates...that the majority of sex offenders are unlikely to be rearrested for new sex crimes following a conviction. Average recidivism rates range from 5.1% (Bureau of Justice Statistics 2003; Zgoba 2015) to 14%...over 3- to 5-year follow-up periods, with slightly higher rates of 24% over 15 years....” *Levenson, J.S. & Hern, A., “Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry,” Justice Research and Policy, Vol. 9, No.1, (2007) 59-74, at 61-62* (further citation omitted). A study tracking sex offenders for new sex offense arrests between the years 2004 and 2006 “indicate no empirical association between where a sex offender lives and whether he reoffends sexually against a minor (recidivists who reoffended against adults were not included in the current analysis). Sex offenders who lived in closer proximity to schools and daycares were not more likely to reoffend than those who lived farther away.” Zandbergen (2010) at 498.

The justification for Lynn’s residency restriction is that of child safety. Yet numerous factors that coincide with low recidivism of sex offenders: social stability, stable employment, family

relationships and support systems, are frustrated by residency restrictions like Lynn's that serve as obstacles to reintegration of an offender post-incarceration. See Levenson & Hern (2007) at 62.

Further demonstrating a lack of rational relationship is the absence of evidence supporting a conclusion that these laws in fact protect children. To the contrary, those states that carefully have studied the issue have found no relationship between sex offense recidivism and the proximity of sex offenders' residences to schools or other places where children congregate. See Minnesota Recidivism Study at 25-26; Levenson & Hern (2007) at 67 ("Housing restrictions appear to disrupt the stability of sex offenders by forcing them to relocate, sometimes multiple times, creating transience, financial hardship, and emotional volatility. Zoning laws appear to push sex offenders out of major metropolitan areas into more rural communities where employment, social services, mental health treatment, and social support are less accessible.")

The researchers involved in the Minnesota Department of Corrections advised blanket policies restricting where sex offenders can live are unlikely

to benefit community safety. See id. at 61. Their study concluded that residential proximity to schools and parks did not increase sex offender recidivism. A sex offender focused on re-offense was more likely to travel to another neighborhood in order to seek out victims so as to avoid recognition. See Levenson & Cotter (2005) at 169. The researchers in Minnesota analyzed 224 recidivistic sex offenses and concluded not a single one of them would have been prevented by a residency restriction law because:

- 1) most offenders made the first contact with victims more than a mile from their homes;
- 2) predatory assaults within a mile of the offenders' residences were most likely to be perpetrated against adult victims; and
- 3) where children were the victims, none of the contact with the child victims was facilitated by proximity to a school, daycare or park.

See Zandbergen (2010) at 484.

Notably, the sex offenses against children were most likely to be perpetrated by offenders who were well acquainted with their victims - parents, caretakers, mothers' boyfriends, babysitters, family friends. See Zandbergen at 484. A juvenile was the victim in 16 of the 28 cases where the offender initiated victim contact within one mile of the

offender's residence, yet none of the 16 cases involved offenders who established victim contact near a school, park, or other prohibited area. See Minnesota Recidivism Study at 2.

"Only in 3.6% of the cases was the sex offender a neighbor of the victim. The authors concluded that in child sexual abuse cases, social or relationship proximity to victims is a more important factor than residential proximity." See Zandbergen (2010) at 484.

Protection of children from sexual predators is an important policy endeavor. Strategies employed to accomplish that objective should therefore be informed by research to enhance the probability of their success. The current data suggest that the expenditure of resources allocated to the implementation and enforcement of residence restrictions does not appear to be justified and might be better targeted toward other methods of community protection. A glaring irony of residence restrictions is that they regulate only where offenders sleep at night and not where they travel during daytime hours when children are more vulnerable to sexual predation. It is therefore perhaps unsurprising that housing restrictions do little to deter reoffending.

Id. at 499.

The chances that [a residency restriction] would have a deterrent effect are slim because the types of offenses it is designed to prevent are exceptionally rare and, in the case of Minnesota, virtually non-existent over the last 16 years. Rather than lowering sexual recidivism, housing restrictions may work against this goal by fostering conditions that exacerbate sex offenders' reintegration into society.

Minnesota Recidivism Study at 3-4

Finally, prosecutors have claimed the prospect of lifetime residency restrictions has reduced the number of offender confessions and led to more plea agreement refusals...Therefore, by making it more difficult for sex offenders to successfully re-enter society, housing restrictions might promote conditions that work against the goal of reducing the extent to which they recidivate sexually.

Id. at 25-26

In light of these findings, the Minnesota researchers advocated in favor of case-by-case analysis to determine whether residency restrictions might be an appropriate supervision strategy based on the risks and needs of individual offenders. See Levenson & Hern (2007) at 61.

Researchers from the Colorado Department of Public Safety utilized mapping software to study of a group of sex offenders on probation, and their proximity to schools and daycare centers. Over the course of the 15-month-long study, 12-percent of the group recidivated by committing non-contact sex offenses. These recidivists were randomly located throughout the geographical area and were not usually living within 1,000 feet of a school. Of particular note, the researchers confirmed that in densely populated areas, residences that are not close to a

school or childcare center are virtually nonexistent. They concluded residency restrictions are not viable means of protecting communities from sexual offenders.

See id. at 61.

Given the paucity of data suggesting that sex offender residence restrictions prevent recidivism and the growing body of evidence indicating that housing policies increase transience, homelessness, and unemployment, these laws may be contraindicated. The belief that keeping sex offenders far from schools and other child-friendly locations will protect children from sexual abuse appears to be a well-intentioned but flawed premise.

Zandbergen (2010) at 501.

Research has shown that sex offenders with stable housing and social support are much less likely to commit new sex offenses compared to those offenders who lack stability. See 803 CMR 1.40(12). Residency restrictions deprive sex offenders of stable housing and social support, and thus significantly increase the risk of recidivism. Sex offenders who become homeless, or fail to provide accurate addresses as a result of these restrictions, will be more difficult to supervise and monitor in the community, thereby increasing the risk to children. Recent studies have concluded that sex offender residence statutes create

a false sense of security that may leave children more vulnerable to sexual abuse.

Recently, the California Supreme Court struck down a San Diego residency restriction less burdensome than the Lynn residency restriction. See In re Taylor, 60 Cal. 4th 1019 at ___ (slip opinion). The San Diego restriction, section 3003.5(b), which deals with parole matters and conditions of release on parole, made it "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." Id. at 2. The California Court used a rational basis analysis to strike down the San Diego residency restriction, ruling that even were strict scrutiny to apply, the residency restriction at issue would fail either test.

The Court ruled:

[W]e need not decide whether rational basis or heightened strict scrutiny review should be invoked in scrutinizing petitioners' constitutional challenges to section 3003.5(b). [W]e are persuaded that blanket enforcement of the mandatory residency restrictions of Jessica's Law, as applied to registered sex offenders on parole in San Diego County, cannot survive even the more deferential rational basis standard of constitutional review. Such enforcement has imposed harsh and severe restrictions and disabilities on the affected parolees' liberty and privacy rights, however limited, while

producing conditions that hamper, rather than foster, efforts to monitor, supervise, and rehabilitate these persons. Accordingly, it bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and has infringed the affected parolees' basic constitutional right to be free of official action that is unreasonable, arbitrary, and oppressive.

Id. at 22.

The Court further ruled that blanket enforcement of this residency restriction affected all registered sex offenders on parole in San Diego County by limiting their access to medical treatment, psychological counseling, drug and alcohol dependency services, and other rehabilitative social services.

Id. at 24-25. Such services available to parolees are generally located in the densely populated areas of the county, and if relegated to less populated areas of the County, "registered sex offender parolees can be cut off from access to public transportation, medical care, and other social services to which they are entitled, as well as reasonable opportunities for employment." The residency restrictions were found to "place burdens on petitioners and similarly situated sex offenders on parole in the county that 'are disruptive in a way that hinders their treatment, jeopardizes their health and undercuts their ability

to find and maintain employment, significantly undermining any effort at rehabilitation.'" Id. at 25.

The Taylor Court cited the final report of a multidisciplinary Task Force convened to study this issue. Id. at 26. The Task Force concluded that the San Diego "residency restriction failed to improve public safety, and instead compromised the effective monitoring and supervision of sex offender parolees, placing the public at greater risk." Id. A specific finding was made with respect to homeless sex offenders, indicating they put the public at risk because they "are unstable and more difficult to supervise for a myriad of reasons." Id. The Task Force also reported "homelessness among sex offender parolees weakens GPS tracking, making it more difficult to monitor such parolees and less effective overall." Id. In conclusion, "[t]he evidence... demonstrated that the dramatic increase in homelessness has a profound impact on public safety," and left no dispute "that the residency restriction[s] [have] significant and serious consequences that were not foreseen" when the restriction was enacted." Id.

2. Upholding the Lynn ordinance will likely result in the widespread passage of similar residency restrictions across the state, resulting in significant increases in homeless sex offender populations as shown by other communities with similar restrictions.

The inevitability of the unintended harmful consequences of residency restrictions on sex offenders as described above is dramatically and tragically illustrated by the plight of the homeless community once living under the Julia Tuttle underpass in Dade County, Florida. As a result of a Miami-Dade County residency restriction passed in 2005 prohibiting sex offenders on parole from living within 2,500 feet of school or park, a sex offender colony was established under Miami's Julia Tuttle Causeway. There was no running water, no toilets (a pickle bucket was used, its contents then dumped into the bay), and no electricity except "a communal generator plugged into a tangle of extension cords." See Lane DeGregory, "Miami Sex Offenders Limited to Life Under a Bridge," Tampa Bay Times, August 14, 2009.

"You had to see it to appreciate the juxtaposition of this horrible poverty - shanties with signs saying 'Help' - right under the bridge on the way to glamorous Miami Beach. No one wanted to do

anything about it because it was political suicide to ask for help for sex offenders." *Derek W. Logue*, "The Julia Tuttle Causeway Camp Saga: Ron Book, the city of Miami, and the Issue of Homeless "Sex Offenders", Once Fallen, October 24, 2014. AA. It was described by Miami Herald reporter Fred Grimm as a "stinking monument to bad public policy" and an "unsanitary affront to civilized society." See id.

The number of transient sex offenders in Dade County soared from 20 in 1995, the year after the residency restriction was passed, to 324 as of July 2013. See Terrence McCoy, "Miami Sex Offenders Live on Train Tracks Thanks to Draconian Restrictions," Miami New Times, March 13, 2014. Correspondingly, the difficulty in tracking this population has presented a huge problem for law enforcement and a significant public safety concern, because they live in local train tracks.⁴ See id.

⁴ After being evicted from under the Julia Causeway Bridge, the Miami sex offender population eventually migrated to its current location, next to the railroad tracks.
<https://offender.fdle.state.fl.us/offender/searchNeighborhood.do?actionPerformed=neighborhoodSearchMain> - Address search: 'NW 71 ST AND NW 36 CT', city entered 'Miami' and radius '1/4 mile'.

The record here demonstrates that the named plaintiffs in this case will no doubt suffer the same or similar situations of homelessness and transience should the Lynn residency restriction be upheld. As the named plaintiffs averred in affidavits and testified at depositions, they each will be rendered homeless as a result of the residency restriction. (RA 46-54). A significant number of the other class members are likely similarly situated, as it is well-established that many sex offenders experience an inability to find employment sufficient to meet the cost to purchase or rent a home or apartment in areas such as Lynn. In 2009, the ACLU released a study that found only 43 units were available for rent in Miami-Dade County for \$1250 or less per month, and 15 units at \$1000 or less, and zero at under \$750. See Logue (2014). The plaintiffs here noted that they have experienced a similar inability to find affordable housing based on the average price and the limited availability of suitable housing options. (RA 46-54).

The consequence of the Miami-Dade residency restriction of an increased population of homeless sex offenders was unintended by its author, Ron Book, a powerful lobbyist who lashed out in anger and sought

revenge in the aftermath of discovering his daughter had been sexually abused by a nanny. See DeGregory (2009). "It's a terrible situation for everyone, for the public and for those living out there in third-world squalor. ... I've got to put my own emotions in check and figure out how to deal with all this. We didn't anticipate how big this problem could get." Id.

The likelihood that the collateral consequences that developed in Dade County will develop in Massachusetts communities with residency restrictions is supported by empirical data. Data were gathered over a ten-year period (1997-2007) to examine the effect of a Florida residency restriction that prohibited sex offenders who offended against minor children from living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate. The results revealed the following:

- 50-percent of the respondents reported that proximity restrictions had forced them to move from a residence in which they were living, and 25-percent indicated that they were unable to return to their residence after their conviction.
- Nearly half reported that residence restrictions prevented them from living with supportive family members.

- A considerable proportion reported that the geographical limitations created a financial hardship for them.
- Nearly 60-percent agreed or strongly agreed that they have suffered emotionally because of the restrictions.
- The groups of offenders most challenged by residency restrictions were sex offenders who were younger, married, or of a minority race.

See Levenson & Cotter (2005) at 172-173. The sex offenders in the study expressed their need for social support from family and friends. Residency restrictions isolated them from family and friends and served to banish them to ghettos in order to find affordable housing frustrated reintegration goals. See id. at 173. The sex offenders in the study who had abused children reported in large numbers that if they were to reoffend they would take care to not do so near where they live so as to avoid getting caught. Therefore the residency restrictions served only to create an "illusion of safety" for the public. See id. at 174.

Brandon Buskey of the ACLU observed that forcing sex offenders into homelessness increases the chances that they will end up in prison, not for committing another sex offense, but "another crime in service of trying to simply survive." See Greg Allen, "ACLU

Challenges Miami Law on Behalf of Homeless Sex Offenders," National Public Radio, October 23, 2014. "In the absence of evidence that such policies are effective in preventing sexual assault, we should consider whether the collateral consequences of these laws on offenders create more problems than they solve." See Levenson & Hern (2007) at 68.

Unintended consequences of the Florida residency restrictions were acutely felt in Broward County. "As one nearby city after another enacted residency restrictions, predators poured in." See Catharine Skipp, "The Lobbyist Who Put Sex Offenders Under a Bridge," Newsweek, July 24, 2009. In August 2007, the unincorporated enclave of Broadview Park, Broward County had four registered sex offenders; a year later there were 39, a few months later there were 106, causing the county to pass an emergency 2,500 foot residency restriction. See id. The not-in-my-backyard policy accomplishes nothing, however, as Patty Wetterling cautions, "If an offender ends up with no residence, that shouldn't make any of us feel safer." See id.

Although residency restrictions remain popular legislative topics, the record evidence demonstrates

that such local ordinances remain far from the bold and effective public safety initiatives they are promoted to be. Instead of promoting the legitimate state interest of protecting children, residency restrictions undermine public safety by destabilizing the lives of former offenders, resulting in increased risks of reoffense. As the expansive and invasive restrictions impact a wide number of individuals, without any rational or significant connection to promoting the legitimate state interest of protecting children, this court should address the issue.

CONCLUSION

For all of the foregoing reasons, the Amici urge this Court to rule as a matter of state and federal constitutional law that residency restrictions such as the Lynn ordinance passed by municipalities are unconstitutional as violative of the fundamental rights of the citizens of the Commonwealth to engage in intrastate travel and to familial association.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I, Andrew S. Crouch, hereby certify, pursuant to Massachusetts Rule of Appellate Procedure 16(k), that this brief complies with all applicable rules of court pertaining to the filing of briefs.

Andrew Crouch

Andrew S. Crouch

ADDENDUM

Fourteenth Amendment, United States Constitution...A.1

Article 1, Massachusetts Declaration of Rights.....A.2

Article 10, Massachusetts Declaration of Rights....A.2

Article 12, Massachusetts Declaration of Rights....A.3

803 CMR 1.40.....A.3

Fourteenth Amendment, United States Constitution

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

...

Article 1, Massachusetts Declaration of Rights

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article 10, Massachusetts Declaration of Rights

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Article 12, Massachusetts Declaration of Rights

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

803 CMR 1.40: Specific Guidelines for Each Factor

Pursuant to its authority to promulgate Guidelines for determining each sex offender's level of risk of reoffense and degree of dangerousness posed to the public (M.G.L. c. 6, § 178K(1)), the Board reviewed the statutory factors enumerated in M.G.L. c. 6, § 178K(1)(a) through (l) as well as the available literature regarding these statutory factors and developed the Guidelines, definitions, explanations, and principles contained in 803 CMR 1.40. The Board shall use the following Factors to develop the policies, procedures, protocols, and objective standards it will apply in its Recommendation Process. Similarly, at a hearing conducted pursuant to 803 CMR 1.07 through 1.26, the definitions, explanations, principles, and authorities contained in these Factors shall guide the Hearing Examiner in reaching a Final Classification decision.

...

(9) Factor 9: Date(s), Number, and Nature of Prior Offenses [M.G.L. c. 6, § 178K(1)(b)(iii)].

An offender's prior criminal history is significantly related to his likelihood of sexual recidivism and

degree of dangerousness, particularly when his past includes violent crimes or sex offenses (*Hanson & Bussiere, 1996; Quinsey, Lalumiere, Rice & Harris, 1995; Romero & Williams, 1985; Longo & Groth, 1983*). The SORB considers "prior" to be prior to the date of the offender's classification by the SORB.

(a) This Factor captures three relevant areas that need to be considered in the determination of risk. First, this Factor relates to the length of time the offender has had access to the community without committing any new offenses. Studies have shown that the likelihood of recidivating decreases for most offenders after the first five to ten years following release from incarceration and becomes substantially lower after ten years in the community (*Epperson et al., 2000; Hanson & Thornton, 2000; Prentky et al., 1997*). For purposes of this Factor, the SORB defines a new offense as a conviction or adjudication for any sex offense, or, a conviction or adjudication for any offense that results in the offender serving a period of confinement that exceeds 60 days. Information in this area only applies to those offenders who are 17 years old or older as of the date of classification.

(b) The second relevant area captured by this Factor addresses the propensity the offender has demonstrated for lawlessness and anti-social behavior (*Bench, Kramer & Erickson, 1997*). The SORB chose to use separate sentencing dates to distinguish between those offenders who commit distinctly separate offenses over a period of time and those whose conviction or adjudication total is based on multiple counts related to a single offending episode. Information in this area only applies to those offenders who are 17 years old or older as of the date of classification.

(c) The third relevant area addressed by this Factor is the nature of the offenses. Much can be learned about an offender by studying the nature of the offenses he has committed, including the level of dangerousness the offender has demonstrated (*Quinsey et al., 1998*). Based on its review of the research, the Board found the presence of deviant sexual interests dramatically increases the risk of reoffending and that the strongest deviant sexual interests have empirically been found to be more prevalent among those offenders who victimize strangers, prepubescent children, non-consenting males, vulnerable persons, and/or use excessive force.

The Board otherwise, or unless indicated in this Factor, does not consider sexual gender orientation of either the offender or the victim in determining the risk to reoffend and/or degree of dangerousness posed. Information in this area is applicable to both Adult and Juvenile Offenders except as noted. Elements related to the nature of the offense are:

1. The offender committed a sex offense in a public place. The commission of any sex offense in a place where detection is more likely addresses the offender's lack of impulse control and/or the strength of sexual deviance. (*Epperson et al., 2000*). "Public place" is defined as an area maintained for or used by the people or community, or an area that is open to the scrutiny of others.
2. The male offender who commits a sex offense, as defined in M.G.L. c. 6, § 178C, against a male victim. This demonstrates the degree of sexual deviance associated with this offender (*Hanson & Bussiere, 1998; Hanson & Bussiere, 1996; Freund & Watson, 1991*).
3. The offender committed multiple sexual acts on a single victim during a single sexual offending episode. This demonstrates increased deviant arousal demonstrated by the offender and/or increased compulsivity (*Epperson et al., 2000*). Also included in this element is the offender who offends against the same victim more than once over a period of time (*Worling and Curwen, 2001*).
4. The offender committed a sexual offense against an extra-vulnerable victim. For the purposes of 803 CMR 1.40, "extra-vulnerable" means any condition or circumstance, including, but not limited to a physical or mental condition that tends to render a victim more susceptible to sexual assault. An extra-vulnerable victim shall also include a victim under the age of ten and over the age of 60. This demonstrates the deviancy of the offender who chooses victims who cannot adequately defend themselves and/or effectively report the abuse (*McGrath, 1991*). The offender poses a greater risk to public safety since his crimes are difficult to detect and prosecute.
5. The offender committed a sex offense while on community supervision or he was convicted or adjudicated of violating a restraining order subsequent to his first conviction or adjudication

- for a sex offense. A sex offender who ignores the external controls placed on him by the courts or corrections indicates a stronger drive toward sexual offending (*Epperson et al., 2000*). Lack of impulse control and the ignoring of external controls are key elements in the determining the risk of recidivism and dangerousness (*Epperson et al., 2000*). This element will be applied only to offenders who are 17 years old or older as of the date of classification. Factor 14 will be used to capture this information for Juveniles.
6. The offender has been convicted or adjudicated of any non-sexual violent offenses. This element identifies the violent offender. Research suggests that an offender is more likely to reoffend and present a greater danger if he has previously demonstrated that he can act violently and with no regard to the safety of others (*Quinsey et al., 1998; Bench et al., 1997; McGovern & Peters, 1988*). This element will be applied to Adult Offenders only.
 7. The SORB has determined that the level of physical contact between the offender and the victim during the sex offense is another important element to be considered in understanding the nature of the offense and in determining a level of dangerousness.
 8. The SORB also considers the length or duration of the sex offending behavior as important and useful information in determining dangerousness, especially when viewed with the other described elements related to the nature of the sexual offense.
 9. The number of persons victimized by a sex offender is also useful information in determining the degree of dangerousness presented by an offender. The SORB determined that the offender who has offended against two or more victims should be considered to present a heightened risk of reoffense and a greater degree of dangerousness. (*Worling & Curren, 2001; Hanson and Thornton 1999, Epperson et al, 1998; Quinsey et al, 1998*).
 10. Offenders who demonstrate a diverse array of sexual offending behavior are more likely to reoffend than those offenders who do not (*Hanson & Bussiere, 1996; Worling & Curwen, 2001*). The SORB has determined that offenders who have committed a variety of offenses present a significantly greater

risk to reoffend and a greater degree of dangerousness.

11. Offenders who have committed sexual offenses against both males and females, and/or both within and outside the family, and/or against known and stranger victims; and/or against victims of a variety of ages are likely at a higher risk to reoffend and present an increased level of dangerousness (*Worling & Curwen, 2001, Hanson & Bussiere, 1998, Boer et al, 1997*).
12. Pursuant to M.G.L. c. 6, § 178C, the legislature designated certain sex offenses to be sex offenses involving children and/or sexually violent offenses. The SORB has determined that the commission of one or more of these offenses, in and of itself, demonstrates an increased risk to children and other vulnerable persons.
13. Any other information relating to the nature of the sex offenses the SORB may deem useful in determining the risk and dangerousness posed by an offender including, but not limited to, whether, or to what degree, the offender accepts responsibility that he committed his sex offenses and that he did so for his own personal gratification; whether, or to what degree, the offender expresses remorse for his sex offenses and empathy for his victim(s); and whether, or to what degree, the offender's level of violence or deviancy escalated in the commission of his sex offenses.

...

(12) Factor 12: Current Home Situation [M.G.L. c. 6, § 178K(1)(c)].

M.G.L. c. 6, § 178K has identified this Factor as minimizing the sex offender's risk to reoffend and degree of dangerousness. This Factor shall be applied to both Adult and Juvenile Offenders. Sex offenders are criminals whose likelihood of reoffending increases when their community environment gives them access to victims or reduces the probability of early detection (For Adult Offenders: *Abel, Mittelman & Becker, 1985*; for Juvenile Offenders: *Worling & Curwen, 2001; Epps, 1997; Ross & Loss, 1991*). The offender who is currently residing in a positive and supportive environment lessens the likelihood of

reoffense by reducing the stressors in his life and surrounding himself with family, friends and acquaintances. As a result, parole and probation officers and treatment providers often evaluate the home situation of the offender under supervision or treatment.

The SORB shall give consideration to the offender whose current living and work situation is stable and considered to be a positive and supportive environment that minimizes the likelihood of reoffense and degree of dangerousness posed by the offender.

(22) Factor 22: Materials Submitted by the Sex Offender; Recent Behavior [M.G.L. c. 6, § 178K(1)(i)].

This Factor is applicable to all Adult and Juvenile Offenders. The SORB will provide the offender with the opportunity to present Documentary Evidence and input in consideration of his recommended classification. In addition to the information the SORB will specifically request in relation to Factors 11, 14, and/or 24, the offender will be invited to submit Documentary Evidence regarding any other information the offender wishes to highlight for the SORB. To consider recent behavior, the SORB will ask the offender to provide an overview of his behavior and lifestyle within the 24 months preceding the date of the notification. In addition, the SORB will consider information received from other reliable sources regarding the offender's recent behavior. Of particular interest to the SORB is the offender's home situation, education/employment stability, type of employment, and non-work related activities. The SORB will consider all evidence submitted by the offender pertaining to this Factor.