In the Supreme Court of the State of California

In re **WILLIAM TAYLOR, ET AL.,** **On Habeas Corpus.**	Case No. S206143

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

OPENING BRIEF ON THE MERITS

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ISSUE FOR REVIEW

Does the residency restriction of Penal Code section 3003.5, subdivision (b), when enforced as a mandatory parole condition against registered sex offenders paroled to San Diego County, constitute an unreasonable statutory parole condition that infringes on their constitutional rights?

STATEMENT OF THE CASE

In November 2006, the voters of California approved Proposition 83, commonly called Jessica's Law.[1] Among other things, the proposition made it illegal for registered sex offenders "to reside within 2000 feet of any public or private school, or park where children regularly gather." (Ballot Pamp., Gen. Elec. (Nov. 7, 2006).) This residency restriction is codified in Penal Code section 3003.5, subdivision (b). The drafters of Jessica's Law informed voters that this provision would establish "predator free zones around schools and parks to prevent sex offenders from living near where . . . children learn and play." (*Id.*, argument in favor of Prop. 83, p. 46.) Jessica's Law is not limited to offenders who commit crimes against children; it applies to all offenders who are required to register as a sex offender under Penal Code section 290 regardless of the offender's particular crime or individualized risk of danger to children.[2]

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[1] (See http://www.sos.ca.gov/elections/sov/2006_general/contents.htm [as of July 7, 2011].)

[2] The residency restriction is one of a number of laws intended to protect the public from registered sex offenders. Under Megan's Law, convicted sex offenders are required to register as a sex offender with local law enforcement for life and their residential addresses are posted on the Internet for public access. (Pen. Code, §290.46.) Chelsea's Law restricts sex-offender parolees who were convicted of certain offenses against children under fourteen from entering any park. (Pen. Code, § 3053.8.)

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Before the enactment of Jessica's Law, the California Department of Corrections and Rehabilitation's (CDCR) Division of Adult Parole Operations (DAPO) would exercise its discretionary authority to impose residency restrictions like Jessica's Law on sex offenders based on each sex offender's individualized case factors and risk to the public. After enactment of Jessica's Law, DAPO began enforcing the residency restriction against all registered sex offenders on parole, regardless of whether their offenses were against children, and regardless of whether compliant housing was available—as the law requires. Sex-offender parolees who failed to comply with the residency restriction faced incarceration.

In *In re E.J.* (2010) 47 Cal.4th 1258, this Court was presented with ex post facto and as-applied challenges to the residency restriction. After rejecting the ex post facto claims, the Court addressed the as-applied challenges: "Petitioners further contend section 3003.5(b) is an unreasonable, vague and overbroad parole condition that infringes on various state and federal constitutional rights, including their privacy rights, property rights, right to intrastate travel, and their substantive due process rights under the federal Constitution." (*Id.* at p. 1280.) The Court noted that the as-applied claims were "considerably more complex" (*id.* at p. 1281), and concluded that evidentiary hearings would be needed to establish the facts to decide each claim. (*Id.* at pp. 1283-1284.) Relevant facts to consider include each petitioner's current parole status; the precise location of each petitioner's current residence and its proximity to the nearest public or private school, or park where children regularly gather; a

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And certain high-risk child molesters are precluded from residing within one-half mile of any school while on parole. (Pen. Code, § 3003, subd. (g); Cal. Code Regs., tit. 15, § 3582, subd. (c).)

factual assessment of the compliant housing; an assessment of the way in which the mandatory parole residency restrictions are currently being enforced; and a complete record of the protocol CDCR is currently following to enforce the residency restriction. (*In re E.J.* (2010) 47 Cal.4th at pp. 1283-1284.)

After *E.J.*, as-applied challenges were brought in several counties, including San Diego, Sacramento, Orange, Riverside, Los Angeles, Contra Costa, and San Bernardino. Petitioners William Taylor, Julie Briley, Jeffrey Glynn, and Stephen Todd are four of about 140 registered sex-offender parolees who challenged the application of the restriction in San Diego County. (CT, Vol. 1, at pp. 1-114; CT-A, Vol. 2, at pp. 291-394, Vol. 3, at pp. 583-660, Vol. 4, at pp. 844-1045.[3])

Following an eight-day evidentiary hearing, the San Diego County Superior Court ruled that the residency restriction was unconstitutional as applied to parolees in San Diego County and thus enjoined CDCR from enforcing the law in any manner. (CT, Vol. 2, at pp. 379-416, 417-421.) The court found that the blanket application of the residency restriction forced large groups of parolees into homelessness, thereby impinging on their constitutional rights to travel, establish a home, and privacy. The court stated that the residency restriction is a "blanket proscription, blindly applied to all registered sex offenders on parole without consideration of the circumstances or history of the individual case." (CT, Vol. 2, at p. 421.)

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[3] "CT" refers to the Clerk's Transcript on Appeal (certified on May 16, 2011), Volumes 1 and 2. "CT-A" refers to the Augmented Clerk's Transcript on Appeal (certified on August 22, 2011), Volumes 1 through 6. "2CT-A" refers to the Second Augmented Clerk's Transcript on Appeal (certified on October 21, 2011), Volumes 1 through 3. "RT" refers to the Reporter's Transcript on Appeal Volumes 1 through 13.

CDCR appealed. The Fourth Appellate District affirmed the superior court's order concluding that the blanket residency restriction, as applied to parolees in San Diego County, is excessive and unduly broad in relation to its stated objective—the protection of children—because it "eliminates nearly all existing affordable housing in San Diego County" and because it treats all parolees the same regardless of their risk of reoffending or whether their crimes involved the victimization of children or adults. (Slip opn. at pp. 35-36.) In affirming the superior court order, however, the Court of Appeal reiterated that "[a]gents may, after consideration of a parolee's particularized circumstances, impose a special parole condition that mirrors section 3003.5(b) or one that is more or less restrictive. It is only the *blanket* enforcement—that is, to all registered sex offender parolees without consideration of the individual case—that the trial court prohibited and we uphold." (Slip opn. at p. 37.)

STATEMENT OF FACTS

I. BECAUSE EACH PETITIONER IS A REGISTERED SEX OFFENDER, THE RESIDENCY RESTRICTION BARS HIM OR HER FROM RESIDING NEAR A SCHOOL OR PARK.

Petitioners are four registered sex offenders who, while on parole, are subject to CDCR's enforcement of the residency restriction against them. The individual circumstances of the petitioners are as follows:[4]

A. William Taylor.

In 1991, Taylor was convicted of one count of sexual assault in Arizona and served a seven-year prison sentence after he, along with another male and two females, abducted an adult female victim to a remote area where Taylor and the other male raped her. Upon Taylor's return to

[4] The parties stipulated to each petitioner's criminal and parole revocation history as set forth in the returns. (RT, Vol. 7, at p. 461; Vol. 8, at pp. 599, 743; Vol. 9, at p. 896.)

California, the California Department of Justice determined that his conviction was the equivalent to rape under California Penal Code section 261, subdivision (a)(2), and thus Penal Code section 290 requires Taylor to register with local authorities as a sex offender for life while he remains in California. (CT, Vol. 1, at pp. 151-152, 179, 182; RT, Vol. 8, at p. 744.) Taylor has never subsequently been arrested for another sex offense.

At the time of the underlying evidentiary hearing, Taylor resided in compliant housing paid for by the state. (Vol. 8, at pp. 778, 780-781; CT, Vol. 2, at p. 288.) Taylor suffers from numerous serious health conditions for which he receives ongoing outpatient medical treatment. (*Id.* at pp. 749, 773.) He has an offer of residence from his nephew, whose wife is a medical professional; however, that residence is located within 2,000 feet of a school or park and thus is not compliant with the residency restriction. (RT, Vol. 8, at pp. 746-747.) Taylor is not employed, and is not employable due to his medical problems and other personal circumstances. At the time of the evidentiary hearing, he had applied for, and was awaiting approval for, social security disability payments (SSI). (*Id.* at pp. 772-773.) But for the assistance he receives from the state, and without receiving SSI, Taylor would be homeless. (*Id.* at p. 778; CT, Vol. 2, at p. 288.)

B. Julie Briley.

During the 1980's, Briley sexually abused her daughter over a period of years beginning when her daughter was only five years old. Briley pled guilty to one count of a lewd and lascivious act upon a child less than fourteen years of age. (CT-A, Vol. 5, at pp. 1051, 1075-1084, 1087-1096; RT, Vol. 7, at pp. 461-462, 521-522.) Briley has no other sex-offense convictions. At the time of the evidentiary hearing, Briley lived in a recreational vehicle parked in a lot in exchange for cleaning the lot owner's office. (*Id.* at pp. 500-501.) The lot is noncompliant with the residency restriction. (*Ibid.*) Additionally, Briley cleans the house of an elderly

woman for which she receives approximately $40 per month, and works as a short-order cook four hours a day, one day per month. (*Id.* at pp. 499-502.) If not for her current agreement with the parking lot owner, she would be homeless. (Vol. 7, at pp. 513, 515.)

C. Jeffrey Glynn.

In December 1989, Glynn pled guilty to, and was convicted of, one count of misdemeanor sexual battery for sexually assaulting his adult ex-girlfriend. (CT-A, Vol. 3, at pp. 666-667, 691-692.) More recently, Glynn has been married for 12 years and has three teenaged children. (RT, Vol. 8, at pp. 559, 576.) In 2009, upon his release from prison, Glynn's parole officer informed him that the apartment his family had moved into during his incarceration was located within 2,000 feet of a park. (*Id.* at p. 567.) Instead of asking his family to move from their current residence where they were established in the community, Glynn purchased a van in which he slept, parked near the location of his family's apartment. (*Id.* at pp. 591-594.) Since his 1989 conviction, Glynn has never been arrested for any other sex offense.

D. Stephen Todd.

In 1982, when Todd was fifteen years old, he sexually assaulted his ten-year-old sister and sustained a true finding in juvenile court of one count of committing a lewd and lascivious act with a child under 14 years old. (CT-A, Vol. 2, at pp. 402, 440.) This is Todd's only conviction for a sex offense. Although Todd was not required to register as a sex offender at the time of his conviction, the law in California later changed and Todd is now required to register as a sex offender for the remainder of his life under Penal Code section 290. At the time of the evidentiary hearing, Todd was incarcerated following a conviction for possession of narcotics. (CT, Vol. 2, at pp. 381, 384.)

II. THE SEX-OFFENDER PAROLEE POPULATION AND ENFORCEMENT OF JESSICA'S LAW IN SAN DIEGO COUNTY.

At the time of the evidentiary hearing, there were 482 registered sex offenders on parole in San Diego County who were subject to the residency restriction of Jessica's Law. (RT, Vol. 10, at p. 975.)

Before releasing an inmate from state prison, prison officials provide the offender with his or her conditions of parole. (RT, Vol. 7, at p. 476, Vol. 10, at p. 949.) At that time, prison officials discuss the offender's parole conditions, and answer any questions the offender may have about his or her conditions. (*Ibid.*) If the inmate is a registered sex offender, prison officials notify the offender of his or her obligation to comply with the residency restriction. (RT, Vol. 10, at p. 955.)

When a registered sex offender is released from state prison on parole, the offender is required to report to an assigned parole office. (RT, Vol. 10, at pp. 947, 949.) During the initial meeting between the sex offender and the parole agent, the parole agent will again review the offender's parole conditions, including the parolee's obligation to comply with the residency restriction, and answer any of the parolee's questions. (RT, Vol. 7, at pp. 472-474, Vol. 10, at pp. 949, 955.) CDCR enforces the residency restriction because registered sex offenders have a legal obligation to comply with the law independent of any parole condition CDCR imposes. (RT, Vol. 10, at pp. 955-958.)

When meeting with the parolee, the agent provides the parolee with resources to assist the parolee with his or her transition from prison back into society, such as community college, social services, and medical- and psychological-treatment resources. (RT, Vol. 7, at pp. 516-518, Vol. 8, at pp. 569, 766-767, Vol. 10, at pp. 950-951.) Parolees receive access to job counseling, job preparation, and drug- and alcohol-dependence services, as

well as access to a vendor that provides services to obtain a General Equivalency Degree. (RT, Vol. 7, at pp. 502-503, Vol. 10, at pp. 950-951.) The state provides all of these services without cost to the parolee. (*Ibid.*)

In some circumstances, when a sex offender cannot afford housing, CDCR will provide funds to the parolee so the parolee can obtain temporary transitional housing. (2CT-A, Vol. 2, at pp. 490-496, 518; RT, Vol. 8, at pp. 747-748, Vol. 10, at p. 952.) Because funds are limited, assistance is reserved for mentally ill parolees and non-mentally ill parolees who require housing for the parolee's or public's safety. (2CT-A, Vol. 2, at pp. 490, 520; RT, Vol. 8, at pp. 747-748, Vol. 10, at p. 952.) Generally, housing assistance is limited to 60 days, but may be extended on a case-by-case basis. (2CT-A, Vol. 2, at p. 490; RT, Vol. 10, at pp. 953-954.)

Parolees are obligated to look for their own available housing that complies with the residency restriction; CDCR does not assist parolees in searching for compliant housing. (2CT-A, Vol. 2, at p. 464; RT, Vol. 10, at p. 960.) Once a parolee finds a particular residence where they would like to live, the parolee is required to provide the proposed address to his or her parole agent, who will then verify whether the proposed residence complies with the residency restriction. (2CT-A, Vol. 2, at p. 477; RT, Vol. 10, at p. 960.) Until the parolee's agent has verified whether the proposed residence is compliant with the 2,000-foot zone, the parolee may not move into the proposed residence. (2CT-A, Vol. 2, at pp. 477-478; RT, Vol. 10, at p. 961.)

For purposes of the residency restriction, CDCR defines a school as any public or private school from kindergarten through twelfth grade. (RT, Vol. 10, at p. 960.[5]) CDCR defines parks as areas where children would

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[5] Since the time of the evidentiary hearing, CDCR has promulgated regulations under title 15 of the California Code of Regulations regarding its implementation of the residency restriction, which includes defining an (continued...)

normally gather based on certain objective characteristics, including whether the location contains open grassy areas, playground equipment, or soccer and baseball fields, and whether the area is designated as a park. (RT, Vol. 10, at pp. 960-961.) If a school or park is located near the parolee's proposed residence, the agent will measure the distance from the front door of the residence to the school or park's outer most boundary using a Global Positioning System (GPS) device. (2CT-A, Vol. 2, at p. 482; RT, Vol. 10, at pp. 959-960.) If the distance between the front door and the school or park is less than 2,000 feet, the proposed residence is deemed non-compliant with Jessica's Law, and the parolee is not allowed to reside there. (2CT-A, Vol. 2, at p. 482.) A parolee may administratively appeal an agent's determination that a proposed residence does not comply with Jessica's Law. (RT, Vol. 10, at pp. 949, 961.) A parolee who, for whatever reason, cannot establish a compliant residence becomes homeless and must register with the parole office and local law enforcement as a transient. (2CT-A, Vol. 2, at pp. 483-489; RT, Vol. 10, at p. 962.)

III. COMPLIANT HOUSING IN SAN DIEGO COUNTY.

To ascertain the amount of compliant housing located in San Diego County, Julie Wartell, a former crime analyst for the San Diego County District Attorney's Office, gathered and analyzed housing data maintained by the County Tax Assessor's Office. (RT, Vol. 6, at p. 222.) This housing data consisted of parcels that the county identified as residential, including single-family homes, multi-family use (such as apartments), and condominiums. (RT, Vol. 6, at p. 223.) A single "multi-family" parcel contains multiple residential units. (RT, Vol. 6, at p. 248.) The data Ms.

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applicable "school" for purposes of the residency restriction. (Cal. Code Regs., tit. 15, § 3571, subd. (c) [public or private school, kindergarten through 12th grade].)

Wartell compiled and analyzed categorizes multi-family parcels based on a range of units located on that particular parcel, such as 2 to 4, 5 to 14, 15 to 60, and 61 or more units. (RT, Vol. 6, at p. 248.)

Ms. Wartell also incorporated school and park data maintained by the San Diego Association of Governments. (RT, Vol. 6, at pp. 218, 222.) This data identified public and private schools throughout the county defined as kindergarten through twelfth grade. (RT, Vol. 6, at p. 218.) It also identified all "active use" parks throughout the county. (RT, Vol. 6, at p. 219.) With this information, Ms. Wartell was able to extract all public and private schools and active-use parks throughout the county, and draw a 2,000-foot circle around each school and park. (RT, Vol. 6, at pp. 222-223.) She was then able to exclude from the total number of residential parcels any parcel whose boundary intersected the 2,000-foot buffer zone in any manner, which Ms. Wartell deemed as being non-compliant with the residency restriction of Jessica's Law. (RT, Vol. 6, at p. 225.)

Based on Ms. Wartell's analysis, 24.5 percent of residential parcels, or 222,314 actual parcels, within the county comply with the residency restriction. (RT, Vol. 6, at p. 241; 2CT-A, Vol. 1, at p. 1.) Of that 24.5 percent, however, only about 3 percent are comprised of compliant multi-family parcels. Ms. Wartell also determined that the 3 percent compliant multi-family parcels contain about 50,218 individual compliant rental units. (RT, Vol. 12, at pp. 1252-1257; 2CT-A, Vol. 3, at pp. 646-650.)

David Estrella, the Director of the San Diego County Department of Housing and Community Development, testified that the countywide vacancy rate for low-income rental housing is approximately 5 to 8 percent. (RT, Vol. 7, at p. 369.) Therefore, at any given time, there are anywhere from 2,500 to 4,000 compliant multi-family units available for rent for a sex-offender population in San Diego County of fewer than 500.

Although 24.5 percent of all residential parcels in the county comply with the residency restriction, petitioners introduced evidence showing the difficulties sex-offender parolees faced when attempting to obtain a compliant residence. (RT, Vol. 6, at pp. 268-269.) Petitioners' investigation was geographically limited to densely populated urban areas since this is where sex-offender parolees spend most of their time due to their general reliance on public transportation to move about, the location of their parole agents to whom they are required to report on a frequent basis, their need to obtain public medical, psychiatric, and other social services, and access to employment opportunities. (RT, Vol. 7, at pp. 407, 493, 499-500, 503-504.) Thus, rural areas outside of central San Diego were not considered. (RT, Vol. 6, at pp. 267, 274.) Additionally, petitioners' investigation was limited to apartment complexes, a number of senior care facilities, and five RV parks. Short-term rehabilitation programs, other RV parks, condominiums and condominium rentals, and single-family homes were not considered. (RT, Vol. 6, at pp. 272-273, 288.) Further, petitioners considered the following criteria based on the realistic obstacles that sex offenders face when trying to secure housing: (1) no access to public transportation (RT, Vol. 6, at p. 273); (2) advertised rent of more than $850 or $800 per month (RT, Vol. 6, at pp. 273, 306); (3) credit check required (RT, Vol. 6, at p. 301); (4) criminal background check required (RT, Vol. 6, at pp. 300-301); (5) deposit of more than two months rent required (RT, Vol. 6, at p. 301); and (6) income of two and half times (or more) the monthly rent required (RT, Vol. 6, at p. 308). Petitioners deemed otherwise compliant housing to be unsuitable if it met any of these exclusionary criteria. (RT, Vol. 6, at pp. 269-301.)

Based on petitioners' investigation, Aron Hershkowitz, an investigator with the San Diego County Public Defender's Office, testified that he located 54 compliant parcels containing 61 or more apartment units, 57

compliant parcels containing 15 to 60 apartment units, and 167 compliant parcels containing 5 to 14 apartment units. (RT, Vol. 6, at pp. 282-284.) Applying their additional "suitability" restrictions, petitioners found only two compliant, suitable apartment complexes. (RT, Vol. 6, at pp. 323-324.)

According to uncontradicted CDCR parole database reports, of the 482 sex-offender parolees on active parole at the time of the hearing, 165 were registered as transient. (2CT-A, Vol. 2, at pp. 452-457; RT, Vol. 10, at p. 985.) The remaining 317 parolees had a residential address on file with their parole office. (2CT-A, Vol. 2, at pp. 452-457; RT, Vol. 10, at pp. 975-978.) Nearly all sex-offender parolees who filed habeas petitions challenging the residency restriction (about 140) received a stay of its enforcement pending the resolution of the lead cases. (RT, Vol. 10 at p. 1010.) Thus, assuming that the 317 parolees with a residential address on file includes the 140 parolees who received a stay and would be homeless without one, as many as 305 or 63 percent of sex-offender parolees may have been homeless as a result of the enforcement of Jessica's Law.

IV. THE RISE IN SEX-OFFENDER PAROLEE HOMELESSNESS SINCE THE ENACTMENT OF JESSICA'S LAW AND THE EFFECT OF HOMELESSNESS ON SEX-OFFENDER REHABILITATION.

An abundance of evidence received during the evidentiary hearing suggested a strong correlation between the enforcement of the residency restriction and a substantial increase in the reported number of homeless sex-offender parolees. The superior court took judicial notice of statistics reported in 2008 by the California Sex Offender Management Board (CASOMB), a legislatively created advisory board comprised of judges, lawyers, sex-offender treatment professionals, and law enforcement personnel who are tasked with assessing current sex-offender management practices and providing recommendations to the legislature and Governor's Office. According to those statistics, the total number of all sex-offender

parolees registering as transient increased from 88 in November 2006, when the residency restriction was enacted, to 1,056 in June 2008—an increase of more than 800 percent. (CT, at pp. 396-397; 2CT-A, at p. 431.) These statistics were corroborated by the testimony of Detective Jim Ryan, a supervisor for the San Diego Police Department's Sex Offender Registration Unit, who described a similar dramatic increase in the number of transient sex-offender parolees who registered with his department during that time. (RT, Vol. 11, at pp. 1194, 1196, 1201, 1209-1210; 2CT-A, at p. 432.)

The evidence further demonstrated that the dramatic increase in homelessness has a profound impact on public safety. First, from a law enforcement perspective, homeless parolees are more difficult to supervise compared to one who has an established residence. Parole agents Maria Dominguez and Ruben Hernandez both described the significant challenges of trying to supervise a homeless parolee because, even with GPS monitoring that could identify where the individual was located, it was difficult, if not impossible to determine what a parolee was doing at any given time as contrasted to a parolee who could be housed in a known, central location that could be regularly searched by parole agents and could be observed by neighbors, landlords, etc. who would then report back to the parole agents. (RT, Vol. 7, at pp. 532-533, 540, 545; Vol. 8, at pp. 707-710, 725-726; 2CT-A, at p. 432.) Supervising Parole Agent Manuel Guerrero agreed that homeless sex-offender parolees posed more of a risk to public safety than those with residences. (RT, Vol. 10, at p. 1043.)

Similarly, homelessness poses significant challenges to sex-offender treatment professionals in their attempts to rehabilitate the offenders. Michael Feer, who is a clinical social worker previously employed by CDCR to treat sex-offender parolees, testified that no less than fifty percent of his caseload was homeless. (RT, Vol. 8, at pp. 631-632, 640-641.)

Mr. Feer stated that being homeless was a significant impediment to his patients' mental and physical health and stability, and that without this stability, he was unable to provide his patients with adequate treatment. (RT, Vol. 8, at pp. 670-671.) John Chamberlain, who was also employed by CDCR to provide psychotherapy to paroled sex-offenders (RT, Vol. 7, at pp. 384, 387-388), testified that a parolee's homelessness is both morally and psychologically destabilizing to the parolee, which interferes with the parolee's rehabilitation. (*Id.* at pp. 395-397.)

Finally, CDCR's Sex Offender Supervision and GPS Monitoring Task Force, which is a multi-disciplinary group comprised of CDCR staff, law enforcement personnel, and other outside participants tasked with making recommendations on various sex-offender topics, studied the increased rate of homelessness following the enactment of the residency restriction. This task force issued a report in 2010 that concluded that the residency restriction did not improve public safety, but rather compromised the effective monitoring and supervision of sex offender parolees, placing the public at risk. Ultimately, the report concluded that the blanket residency restriction should be repealed in favor of a more targeted residency restriction. (CT, at pp. 398-399; CT-A, Vol. 2, at p. 436; 2CT-A, Vol. 1, at pp. 083-108.) Thus, while the residency restriction prevents sex offenders who can locate and secure compliant housing from living near schools and parks, there is no dispute that the residency restriction has significant and serious consequences that were not foreseen when it was enacted.

SUMMARY OF ARGUMENT

Although *E.J., supra,* 47 Cal.4th 1258, instructs that the threshold question regarding petitioners' as-applied claims is whether the residency restriction "constitutes an unreasonable parole condition to the extent it infringes on such parolees' fundamental rights," it does not specify the legal test courts should use to analyze the constitutionality of CDCR's

enforcement of the residency restriction as a statutory condition of parole. No appellate decision, other than in the underlying matter, addresses the proper standard of review for a statutory residency restriction that is enforced as a mandatory condition of parole.

The Court of Appeal reasoned it was constrained by what it described as a mandate from this Court in *E.J.* to analyze the residency restriction using a general reasonableness test—a test similar to analyzing a discretionary parole condition imposed on an individual parolee. And it interpreted *E.J.* as establishing that the rights the law allegedly infringed—intrastate travel, banishment, privacy—are fundamental despite petitioners' status as sex-offender parolees. In concluding that CDCR's enforcement of the residency restriction as a parole condition was unreasonable, the appellate court noted that the law was overbroad in relation to its purpose and failed to take into account each sex-offender parolees' individual circumstances. But the appellate court's assumption that the residency restriction infringed upon petitioners' fundamental constitutional rights is contrary to the evidence that demonstrates that no constitutional rights are actually implicated by CDCR's enforcement of the law. Further, the focus of the appellate court's reasonableness inquiry seems at odds with the express language of the statute, which applies to *all* sex-offender parolees regardless of whether they committed a crime against a child or an adult or whether they pose a particular risk to children. Thus, while the application of a reasonableness test is consistent with the standard of review used to analyze a parole condition, this test is not appropriate to assess the constitutionality of CDCR's enforcement of a statutory mandate that expressly applies to a broad category of individuals.

Instead, the appellate court should have used a different standard to evaluate the law. Because the residency restriction at issue arose from statute instead of a discretionary parole condition imposed by the parole

authority in the exercise of its judgment, and because the law by its language applies to all registered sex offenders who are on parole solely because of their status as registered sex-offender parolees, the constitutionality of the residency restriction should be analyzed like any other statute of general applicability. Under this analysis, the relevant inquiry is whether the enforcement of the law infringes on any constitutional rights, and if so, whether that infringement is constitutionally permissible based on the appropriate level of judicial scrutiny, such as rational basis or strict scrutiny.

While the residency restriction may make it more difficult for a sex-offender parolee to obtain housing, the residency restriction does not restrict with whom a parolee may live, nor does it inhibit a parolee's movement in any manner. And because compliant housing exists in San Diego County, the law does not "banish" parolees from residing within the county. Because the residency restriction does not infringe on petitioners' rights, the law is constitutional as-applied to them.

But even assuming the residency restriction infringes petitioners' rights in some manner, the restriction survives constitutional scrutiny because it is rationally related to a legitimate government purpose. This Court stated in *E.J.* that the constitutionality of the residency restriction must be analyzed with the understanding that parolees' rights are lawfully circumscribed in many ways. And while some of the rights petitioners assert may be considered fundamental when advanced by the general public, the rights of parolees are necessarily protected to a lesser degree than ordinary citizens. Rational-basis review, therefore, is the appropriate judicial standard to apply in this case in light of petitioners' unique status as parolees. Any other standard of judicial review would impermissibly elevate the limited rights parolees retain to above those of ordinary, law-abiding citizens.

Applying the correct judicial standard of review, the residency restriction is constitutional because it bears a rational relationship to a legitimate government purpose—protecting public safety by creating predator-free zones around schools and parks. And while the law applies to all registered sex offenders—not just those convicted of a sex offense against a child—the initiative reflects the people's will to protect children from those individuals who have been convicted of a sex offense serious enough to require registration as a sex offender.

ARGUMENT

I. THE REASONABLENESS TEST THE COURT OF APPEAL ADOPTED IS INAPT TO ASSESS THE VALIDITY OF A STATUTORY PAROLE CONDITION THAT IMPOSES A MANDATORY RESTRICTION ON A DEFINED CLASS OF INDIVIDUALS.

Although *E.J., supra,* 47 Cal.4th 1258, noted that parole conditions are required to be reasonable because parolees retain constitutional protection against arbitrary and oppressive official action and that the threshold question regarding petitioners' as-applied claims is whether the residency restriction "*when enforced as a statutory parole condition against registered sex offenders* constitutes an unreasonable parole condition to the extent it infringes in *such parolees'* fundamental rights" (see 47 Cal.4th at p. 1282, fn. 10), it does not specify the legal test courts should use to analyze the constitutionality of CDCR's enforcement of the residency restriction as a statutory condition of parole. And no appellate decision, other than the underlying matter, addresses the proper standard of review for a statutory residency restriction that is enforced as a mandatory condition of parole.

Without any specific instruction as to how the residency restriction should be analyzed, the appellate court analyzed the reasonableness of the residency restriction as it would a discretionary probation or parole

condition. (Slip opn. at pp. 35-36.) When analyzing discretionary conditions, the reasonableness test looks to whether the restrictive condition has been imposed in an arbitrary or capricious manner and, when constitutional rights are at issue, whether the restriction is narrowly drawn to the circumstances of the affected individual. (*People v. Olguin* (2008) 45 Cal.4th 375 [probation]; *In re Stevens* (2004) 119 Cal.App.4th 1228 [parole].) Thus, the appellate court analyzed the reasonableness of the statutory residency restriction and, based on its reading of *E.J.,* considered the alleged constitutional rights at issue as fundamental. (Slip opn. at p. 25.) In this context, the appellate court concluded that the residency restriction was unreasonably excessive and unduly broad in relation to its stated objective—the protection of children—because it "eliminates nearly all existing affordable housing in San Diego County" and because it treats all parolees the same regardless of their risk of reoffending or whether their crimes involved the victimization of children or adults. (Slip opn. at pp. 35-36.)

But there are multiple reasons why the appellate court's analysis is incorrect. First, the appellate court's presumption that the residency restriction implicated the constitutional rights alleged by petitioners is erroneous.

A. The Residency Restriction Does Not Infringe upon Petitioners' Right to Travel.

Although petitioners alleged that the law burdened their right to travel, it is questionable whether sex-offender parolees even possess such a right. (*People v. Mills* (1978) 81 Cal.App.3d 171, 181 [rejecting claim that sex-offender registration requirement violates parolee's rights to interstate travel because by committing his sex offense, the parolee forfeited his right to travel while on parole].) But even if such a right does exist, it is not implicated here because the residency restriction does not expressly compel

or restrict sex-offender parolees' movement in any manner. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1101; *R. H. Macy & Co. v. Contra Costa County* (1990) 226 Cal.App.3d 352, 368-369 ["It is well settled that even if an enactment affects interstate travel, it still must be sustained against a constitutional attack if the invasion is inconsequential and does not unreasonably burden freedom of movement."], citing *Shapiro v. Thompson* (1969) 394 U.S. 618, 629 and *CEED v. Cal. Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 331; see also *Atty. Gen. of N.Y. v. Soto-Lopez* (1986) 476 U.S. 898, 903 ["State law implicates the right to travel when it actually deters such travel, when impending travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right."].)

To the contrary, even when the residency restriction is enforced against them, petitioners remain free to live or associate with whomever they want, and may, subject to the conditions of their parole, travel throughout California. The only constraint the law imposes is that registered sex offenders may not establish a permanent residence near a school or park. This constraint, however, does not implicate the right to travel because no person, let alone a registered sex-offender parolee, has a constitutional right to live wherever he or she wants. (*Tobe, supra*, 9 Cal.4th at p. 1103 ["The right to travel does not . . . endow citizens with a right to live or stay where one will."].)

And while there is no dispute that the residency restriction makes it more challenging for sex-offender parolees to obtain housing where they want, their difficulties in obtaining a residence is merely incidental to the enforcement of the restriction and therefore, does not contravene any right of travel. (See *Tobe, supra*, 9 Cal.4th at p. 1101 [ordinance that forbids overnight sleeping in public places "did not penalize travel and resettlement, although an incidental impact was to make it more difficult to establish

residence in the place of one's choosing."]; *Associated Home Builders, etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 602-603 ["Both the United States Supreme Court and this court have refused to apply the strict constitutional test to legislation, such as the present ordinance, which does not penalize travel and resettlement but merely makes it more difficult for the outsider to establish his residence in the place of his choosing."], citations omitted; *Buhl v. Hannigan* (1993) 16 Cal.App.4th 1612, 1624-1625 [law requiring motorcycle riders to wear helmets is constitutional despite incidental impact on a motorcycle-riding Sikh, who is required by his religion to wear a headdress at all times while he is in public but cannot fit a helmet over his headdress].)

B. There is No Constitutional Right to Affordable Housing.

The appellate court's implication that petitioners' difficulty in obtaining "affordable" compliant housing makes the law unconstitutional is flawed because there exists no fundamental right to housing—let alone affordable housing. Despite acknowledging that compliant housing exists within San Diego County, the appellate court here nonetheless concluded that the residency restriction was unconstitutional because enforcement of the law against petitioners left them with limited opportunities to obtain low-cost residential housing in urban areas, and that housing was further restricted in those urban areas based on a multitude of other circumstances unrelated to the residency restriction, which necessarily forced convicted sex offenders to choose between "living in rural areas or becoming homeless." (Slip opn. at p. 31.) But the appellate court's decision presupposes that sex offender parolees possess a constitutional right to low-cost housing in the area of their choosing. But contrary to these presumptions and conclusions, no such rights exist. (See *Lindsey v. Normet* (1972) 405 U.S. 56, 74 ["We do not denigrate the importance of decent,

safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."].)

C. The Residency Restriction Does Not Banish the Petitioners from the Community.

Because the residency restriction does not expel the petitioners from any community or prohibit them from accessing and enjoying any locale, including areas near schools or parks, they have failed to establish a cognizable banishment claim. (See *Smith v. Doe* (2003) 538 U.S. 84, 98 [banishment expels individual from community]; *Kungys v. United States* (1988) 485 U.S. 759, 790 [banished when citizenship revoked]; *In re James C.* (2008) 165 Cal.App.4th 1198, 1205 [banished when prohibited from returning to country]; *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 390 [banished when forced to leave and remain outside of state]; *Ex parte Scarborough* (1946) 76 Cal.App.2d 648 [banished when required to leave city and county for two years].) Rather, the residency restriction is limited in that it only prohibits registered sex offenders from establishing a permanent residence near a school or park. (*In re Pham* (2011) 195 Cal.App.4th 681, 688 [difficulty in finding compliant housing or practical exclusion from certain areas does not constitute banishment from the community].) And contrary to the conclusion of the appellate court (slip opn. at p. 36), "effective" banishment is a legal fiction as one cannot be banished without express expulsion. (*Id.* at p. 688 ["No court in this state [or any other state] has held that exclusion from a part of a political subdivision, such as a county, constitutes banishment."], citing *State v. Lhasawa* (2002) 334 Or. 543 [55 P.3d 477] ["banishment traditionally meant exclusion from a sovereign's *entire territory* for life, or a significant period of time"] and *State of Iowa v. Seering* (2005) 701 N.W.2d 655, 667-668 [Iowa's 2,000-feet sex-offender residency restriction "is far removed from the traditional concept of banishment"].)

D. The Residency Restriction Does Not Infringe upon Petitioners' Privacy or Association Rights.

The residency restriction does not implicate any privacy rights. It has been suggested that sex-offender parolees do not possess any privacy rights at all while serving out their period of parole. (*Mills*, *supra*, 81 Cal.App.3d at p. 181 [rejecting claim that sex-offender registration requirement violates parolee's privacy rights because, by committing his sex offense, the parolee "waived any right to privacy"]; see also *People v. Adams* (2004) 115 Cal.App.4th 243, 259 ["By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities."].) But to the extent parolees do retain some degree of privacy, no such right is implicated here because the residency restriction neither prohibits petitioners from establishing a home or living or associating with friends or family. Rather, because of their status as registered sex offenders, the residency restriction only prevents them from living near schools or parks where children regularly gather. Thus, the evidence petitioners presented to show a violation of their purported privacy and related association rights—that Taylor was not allowed to move into the residence where his nephew offered to house him, that Glynn was not permitted to move into the apartment his wife and family had rented when Glynn was released from prison, and that Briley was not permitted to move in with her sister (CT, Vol. 2, at p. 406)—does not implicate any constitutional rights. Rather, because of their status as registered sex offenders, the residency restriction only prevents them from living near schools or parks where children regularly gather.

E. Because a Statutory Parole Condition Imposing a Mandatory Restriction Cannot Be Applied Arbitrarily When Enforced Against the Class of Persons Specified in the Statute, the Reasonableness Test is Inapplicable to the Residency Restriction.

Next, a statutory condition of parole, given its mandatory application, simply cannot be evaluated under the "reasonableness" standard, which traditionally has been applied only to discretionary executive actions. (See *Olguin*, *supra*, 45 Cal.4th at p. 384, citing *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121 [discretionary condition of probation reviewed under abuse of discretion standard].) Discretionary conditions of probation or parole apply to an individual based solely on the probationer or parolee's individual circumstances. (See e.g., *People v. Lent* (1975) 15 Cal.3d 481, 486; *In re Stevens*, *supra*, 119 Cal.App.4th at p. 1234 [discretionary condition of parole must either be related to the crime of which the offender was convicted or reasonably related to deter future criminality].) But unlike a discretionary restriction imposed as a condition of probation or parole, the residency restriction by its clear language is a *mandatory* law applicable to *all* paroled registered sex offenders based solely on one criteria—a conviction that imposes a duty to register as a sex offender. (Pen. Code, § 3003.5, subd. (b); see also *In re Marks* (1969) 71 Cal.2d 31, 39-40 [based on plain language of statute, statutory condition of supervision requiring periodic and surprise drug testing for all outpatient drug addicts committed to state rehabilitation program is mandatory and not subject to executive discretion].) Thus, because the residency restriction applies to all sex-offender parolees as a matter of law, CDCR's enforcement of the restriction against all sex-offender parolees who fall within its jurisdiction cannot be considered to be an arbitrary exercise of executive authority as it is merely enforcing the law as it exists. (See *In re Kacy S.* (1998) 68 Cal.App.4th 704, 709 [juvenile court's decision to

require drug testing as a condition of probation for a juvenile whose underlying crime did not involve drugs or alcohol is not an abuse of discretion because statute "commits the decision to order testing in a particular case to the juvenile court's discretion."].)

Furthermore, considering the intent of the people to apply the residency restriction to a specified broad base of individuals—those individuals convicted of a sex offense serious enough to require lifetime registration as a sex offender—it is difficult to imagine that any broad-based statutory parole condition could survive the "reasonableness" analysis the appellate court engaged in below. By definition it would not be narrowly tailored to the circumstances of each affected parolee. In *Doe v. Cal. Dept. of Justice* (2009) 173 Cal.App.4th 1095, the court held, in accordance with United States Supreme Court authority, that convicted sex offenders did not have a right to challenge their legal obligation to register as a sex offender and have their personal information posted on the state's Megan's Law website as required under the Penal Code because in passing the law, the people of California determined that the law should apply to all registered sex offenders based on their underlying conviction for a registerable sex offense. (*Id.* at p. 1113, citing *Conn. Dept. of Pub. Safety v. Doe* (2003) 538 U.S. 1, 7-8.) Similarly, in *Smith v. Doe* (2003) 538 U.S. 84, the United States Supreme Court endorsed as constitutional legislative determinations imposing regulatory burdens on convicted sex offenders without requiring any corresponding risk assessment. (*Id.* at p. 104.) Thus, as the nation's high court has made clear, it is constitutionally permissible to enact and enforce civil regulatory measures even though the legislation does not take into account an affected party's individual circumstances.

Accordingly, the underlying mandatory nature of the residency restriction makes the application of the reasonableness test adopted by the appellate court unfeasible.

II. BECAUSE OF THE MANDATORY NATURE OF THE RESIDENCY RESTRICTION, IT SHOULD BE ANALYZED AS A LAW OF GENERAL APPLICABILITY.

Because the residency restriction applies to a specific class of people without regard to their personal circumstances, it follows that the issue of whether the residency restriction is constitutional as applied should be evaluated in a manner similar to any other law of general applicability—whether the facts and circumstances of any given case actually violate the rights of the individual challenging the law. The first step of this analysis is to determine whether the enforcement of the residency restriction infringes on any constitutional rights. And because, as indicated above, the petitioners have not demonstrated that the residency restriction implicates any constitutional rights, the constitutional inquiry need go no further. But even assuming the law in its application intrudes on petitioners' rights to some degree, the next step is to ascertain the level of judicial scrutiny that should apply to determine whether the intrusion is constitutionally permissible given their underlying status as sex-offender parolees.

This Court stated that petitioners' status as sex-offender parolees must inform the inquiry of whether the residency restriction infringes upon any rights considered fundamental. (*In re E.J.*, *supra*, 47 Cal.4th at p. 1283, fn. 10.) But the appellate court did not analyze the true nature and scope of the constitutional rights at issue within this context. Instead, it erroneously concluded that petitioners' purported rights were fundamental. (Slip opn. at p. 25.) Contrary to the appellate court's conclusions, when the analysis of the residency restriction properly focuses on the limited nature of the rights sex-offender parolees retain, it necessarily follows that the residency restriction does not substantively impinge on any of petitioners' fundamental constitutional rights.

That a parolee has previously been convicted of a crime "justifies imposing extensive restrictions on the individual's liberty." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 483.) Although parolees may be entitled to basic constitutional protection from arbitrary or oppressive official action, their custody status means that their constitutional rights are tested by different rules than those that apply to citizens who possess full civil rights. (*People v. Burgener* (1986) 41 Cal.3d 505, 531, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 754, 756; *Prison Law Office v. Koenig* (1986) 186 Cal.App.3d 560, 566.) This is so because "the liberty of a parolee is 'partial and restricted.'" (*Koenig, supra,* at p. 566, citing *People v. Denne* (1956) 141 Cal.App.2d 499, 508; see also *Reyes, supra,* 19 Cal.4th at p. 752 ["As a convicted felon still subject to the Department of Corrections, a parolee has conditional freedom—granted for the specific purpose of monitoring his transition from inmate to free citizen."].)

Accordingly, courts have regularly recognized a state's ability to restrict a parolee's rights that would otherwise be unconstitutional if the parolee was a free citizen. (*Koenig, supra,* 186 Cal.App.3d at p. 567, citing *Morrissey, supra,* 408 U.S. at p. 477; *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 874 [parolee does not exercise control over his residence, his associates or living companions, his travel, his use of intoxicants, and other aspects of his life]; *In re Schoengarth* (1967) 66 Cal.2d 295, 300 ["The conditions customarily invoked, for example, govern the parolee's residence, employment and civil rights, restrict his use of alcoholic beverages and motor vehicles, and forbid his possession of narcotics and weapons. But the circumstances of the case may dictate still further conditions."]; *Faucette v. Dunbar* (1967) 253 Cal.App.2d 338, 341 [general rule is that a parolee has no right to choose his own residence].) Thus, a parolee's legal status defines to what lesser extent he or she retains any

constitutional rights that would be considered fundamental to an ordinary citizen. (See *People v. Lacy* (2011) 192 Cal.App.4th 1481, 1495 ["Because misdemeanants subject to [statute restricting firearm possession] are disqualified to the same extent as felons from exercising Second Amendment rights (*People v. Flores* (2008) 169 Cal.App.4th 568, 575), they can claim no 'fundamental' right that would invoke elevated scrutiny under the equal protection clause."]; see also *United States v. Vongxay* (2010) 594 F.3d 1111, 1115 [statute barring felon from possessing firearms does not violate the Second Amendment because "felons are categorically different from the individuals who have a fundamental right to bear arms"].) Given their status, rights that are typically viewed as fundamental for ordinary citizens are not given such strict protection when advanced by parolees.

And because no fundamental rights are at issue here, the residency restriction should be upheld if there is a rational basis between the law and a legitimate governmental purpose. (*Washington v. Glucksberg* (1997) 521 U.S. 702, 722 [state actions that implicate anything less than a fundamental right require only that the government demonstrate "a reasonable relation to a legitimate state interest to justify the action."]; see also *People v. Jeha* (2010) 187 Cal.App.4th 1063, 1074 ["Restrictions on privacy following a criminal conviction have not been subjected to strict scrutiny by the courts."].)

III. THERE IS A RATIONAL BASIS BETWEEN THE RESIDENCY RESTRICTION AND A LEGITIMATE PUBLIC PURPOSE—PUBLIC SAFETY.

Because of the destructive impact sex crimes have on the victims and society in general, sex-offender recidivism is a significant problem that affects public safety. As the United States Supreme Court has concluded, "the risk of recidivism posed by sex offenders is frightening and high," and

"when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." (*Smith, supra*, 538 U.S. at p. 103, citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, at p. 6 (1997); *McKune v. Lile* (2002) 536 U.S. 24, 33 [same].) The nation's high court is not alone in its assessment of the dangers sex offenders pose; the California Legislature has repeatedly voiced similar concerns about sex offenders' effect on public safety. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527 ["Plainly, the Legislature perceives that sex offenders pose a 'continuing threat to society' (*United States v. Bailey* (1980) 444 U.S. 394, 413) and require constant vigilance. (See *In re Parks* (1986) 184 Cal.App.3d 476, 480-481.)"; *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1509 ["The Legislature has found and declared that sex offenders pose a high risk of recidivism, and keeping track of their whereabouts is necessary to protect the public."].)

In response to the real danger sex offenders pose, lawmakers across the nation have adopted various measures attempting to protect the public from such recidivist behavior. For example, many states have adopted statutes that require convicted sex offenders to register with law enforcement authorities. The United States Supreme Court has held that such measures reflect legislative efforts to create non-punitive regulatory schemes to protect the public. (*Smith, supra*, 538 U.S. 84 [rejecting ex post facto challenge to Alaska statute that required convicted sex offenders to register with law enforcement authorities and authorized the state to publish the offender's name, address, and photograph]; *Kansas v. Hendricks* (1997) 521 U.S. 346 [rejecting ex post facto challenge to Kansas statute that

established procedure for civil commitment of persons deemed likely to engage in predatory acts of sexual violence].)

Jessica's Law, and in particular the residency restriction, is but another example of society's continuing efforts to implement measures designed to enhance public safety. In fact, the underlying intent for the adoption of Jessica's Law was to "'help Californians better protect themselves, their children, and their communities' from the problems posed by sex offenders by 'strengthen[ing] and improve[ing] the laws that punish and control sexual offenders.'" (*In re E.J.*, *supra*, 47 Cal.4th at p. 1263, quoting Proposition 83 ballot initiative; see also *Davis v. City of Berkeley* (1990) 51 Cal.3d 227, 234 [when construing a statute enacted by voter initiative, "the intent of the voters is the paramount consideration."].) As this Court further noted, the objective of the initiative was clear:

> "Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon," that they "prey on the most innocent members of our society," and that "[m]ore than two-thirds of the victims of rape and sexual assault are under the age of 18." (Prop. 83, § 2, subd. (b).) Section 2 further declares that "Californians have a right to know about the presence of sex offenders in their communities, near their schools, and around their children" (*id.* subd. (g)), and that "California must also take additional steps to monitor sex offenders, to protect the public from them, and to provide adequate penalties for and safeguards against sex offenders, particularly those who prey on children." (*Id.* subd. (h).) Section 2 also states, "It is the intent of the People in enacting this measure to help Californians better protect themselves, their children, and their communities; it is not the intent of the People to embarrass or harass persons convicted of sex offenses." (*Id.* subd. (f).)

(*In re E.J.*, *supra*, 47 Cal.4th at pp. 1265-1266.) Thus, as the official ballot pamphlet set forth, Proposition 83 sought to achieve its proponents' goal of promoting public safety by creating "'predator free zones around schools

and parks to prevent sex offenders from living near where our children learn and play.'" (*In re E.J.*, *supra*, 47 Cal.4th at p. 1266 (citation omitted).)

While the residency restriction is broad and may have numerous unintended negative consequences, the constitutional analysis of the residency restriction like any other law does not depend upon the law's merit or effectiveness. And while the reflective assessment of whether the residency restriction is a good law or a bad law, whether it accomplishes its intended purposes, or whether it creates more harm than it prevents are all relevant and important legislative policy questions, the answers to these questions do not inform the judicial inquiry of whether the law is valid. (*Tobe*, *supra*, 9 Cal.4th at p. 1092, fn. 12 [resolution of chronic social problems are issues for the legislature, not the judiciary, and the failure to remedy social ills does not make legislative policy unconstitutional]; *Buhl*, *supra*, 16 Cal.App.4th at p. 1619 ["'The fact that a congressional directive reflects unprovable assumptions about what is good for the people...is not a sufficient reason to find that statute unconstitutional'"], quoting *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 60-62.) And even though the petitioners presented evidence as to why the residency restriction should be modified, if not repealed, the unforeseen effects and consequences of the law do not justify the judicial invalidation of the law. (*Federal Communications Com. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 314 ["'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwise we may think a political branch has acted.'"], quoting *Vance v. Bradley* (1979) 440 U.S. 93, 97.)

Thus, regardless of the unintended consequences of the law, California's decision to restrict sex offenders from living in close proximity

to places where children regularly gather is rationally related to the compelling interest in protecting children from known sex offenders. (See *Doe v. Miller* (8th Cir. 2005) 405 F.3d 700, 714-716 [holding that Iowa's 2,000-foot residency restriction on sex offenders was rationally related to the state's legitimate interest in promoting the safety of children].) And because the law has a rational relationship to the legitimate societal interest of public safety, CDCR's enforcement of the residency restriction under this standard is valid. (See *Warden v. The State Bar of Cal.* (1999) 21 Cal.4th 628, 644 [where "plausible reasons" exist for a particular law, judicial inquiry comes to an end] citations omitted; *People v. Perez* (2001) 86 Cal.App.4th 675, 680 ["The statute is rationally related to the intent offered by the Legislature and supports legitimate state interests of citizen safety and deterrence of violent crime."]; *People v. Sipe* (1995) 36 Cal.App.4th 468, 482-483 [The 'three strikes law' does not violate due process because "'it is reasonably related to a proper legislative goal' of curbing recidivist criminal activity."], quoting *Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) Accordingly, although there is no dispute that legislative changes to the residency restriction may be necessary to make it a better, more effective law, the law in its current state is constitutional.

CONCLUSION

Because petitioners have failed to demonstrate that the residency restriction impermissibly violates their fundamental constitutional rights, the Court of Appeal's decision should be reversed.

Dated: March 4, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 9,200 words.

Dated: March 4, 2013

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Taylor, et al.** Case No.: **S206143**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 4, 2013, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 4, 2013, at San Diego, California.

I. Chavarin
Declarant

Signature

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