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No. 03-23-00771-CV

IN THE TEXAS THIRD COURT OF APPEALS

TROY THOELE, *et al.*

Appellants,

v.

RENE HINOJOSA, *et al.*

Appellees.

AMICUS CURIAE BRIEF OF TEXAS VOICES FOR REASON AND JUSTICE IN SUPPORT OF APPELLANTS

On Appeal from the
353rd Judicial District
Travis County, Texas
Cause No. D-1-GN-22-006192

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INTRODUCTION

Texas Voices for Reason and Justice respectfully submits this brief as *amicus curiae* in support Appellants Tory Thoele, Mike Barro, Ryan Partlow, and Adam Ouda. Appellees are—collectively—Rene Hinojosa and David Gutierrez in their official capacities and the Texas Board of Pardons and Paroles. Pursuant to Tex. R. App. P. 11(c), the instant brief was prepared by undersigned counsel *pro bono*.

STATEMENT OF INTEREST OF AMICUS CURIAE

Texas Voices for Reason and Justice (hereinafter "TVRJ") is a Texas-based non-profit and volunteer organization devoted to the promotion of more balanced, effective, and rational criminal legal system that prioritizes safer communities through evidence-based policy. TVRJ in particular focuses on a variety of post-conviction measures that are imposed on people who have been convicted of a sex offense, such as the policy at issue in this case. In line with that mission, TVRJ advocates through public education, legislative work, and litigation. In addition, TVRJ also provides direct support to people who are impacted by the criminal legal system and family members.

In light of these areas of focus, TVRJ has both an interest in the outcome of this case as well as experience and expertise that can aid the Court. Many of TVRJ's membership have been subjected to Special Condition X either personally, or have experienced its effects by way of a family member. Furthermore, TVRJ supports policies that are evidence-based and which promote public safety, especially by ensuring that people returning to their communities from prison have access to stable, safe housing and pro-social support networks which policies like those at

issue herein disrupt. Stated differently, TVRJ is interested in creating safer communities through advocating for evidence-based policy and it is in that spirit that the instant brief is being submitted for consideration by the Court.

SUMMARY OF ARGUMENT

Since the early 1990's, legislators and policymakers have aggressively implemented policies focused on people with past sex offense convictions with an eye towards reducing sexual violence and predation in our communities, particularly of children. Many of these laws and policies were implemented in the wake of high-profile cases of abduction, sexual assault, and murder of children by strangers. Along with sex offense registration schemes and other associated policies, laws (such as those at issue in this case) restricting people who were convicted of certain offenses may reside were implemented. The ostensible rationale underling these location-based restrictions was that by keeping people likely to commit crimes against children away from children, we will make communities safer.

While these laws may have been well-intentioned, they were premised on mistaken assumptions. Three decades social scientific

research has confirmed that we were mistaken, both about the likelihood that someone with a past conviction will go on to offend further, and about how sexual violence and predation happens in our communities. Once someone has been convicted of a sexual offense, the likelihood that they will do so again is far lower than what was commonly believed in our society by members of the public, press, legislators, and even the judiciary (including the Supreme Court). Additionally, physical proximity to locations that legislatures commonly consider "child safety zones" or locations like daycares and parks aren't associated with sexual offending.

With respect to location-based restrictions such as Special Condition X, there is something of a consensus with respect to the effectiveness and wisdom of such laws: they do not make communities safer. Substantial evidence has developed that indicate they do not prevent sexual offenses and instead perversely undermine the goal of public safety by destabilizing the lives, housing, and support networks of people who are trying to re-enter society and live law-abiding lives.

The evidence on this point is so compelling that it has inspired agreement about the illogic of such policies from disparate groups

including advocating organizations, treatment providers, researchers, and law enforcement agencies, including the United States Department of Justice. Simply stated, there is no informed policy reason for location-based restrictions to be utilized and because of that TVRJ joins a chorus opposing their implementation.

ARGUMENT

1. *Laws which impose location based-restrictions on persons with past sex convictions are premised on ideas about sexual offending that are flatly contradicted by available evidence and as a result make communities less safe.*

While sex offense registration schemes existed as far back as 1940's California, they became much more widespread in the early 1990's in the wake of a series of high-profile instances of abduction, sexual assault and murder of children – sometimes by individuals who were previously convicted of offenses against children. Elizabeth Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration,* 37 NYU REV. OF L. AND SOC. CHANGE 727, 2013.

The following decade saw registration laws and associated restrictions continued to gain steam legislatively, and they were premised two interrelated beliefs: that strangers posed a far greater threat to children as opposed to family members and acquaintances, and

that people convicted of a sex offense are likely or very likely to commit another sex offense. Indeed, in one such challenge to Alaska's sex offense registry considering whether registration violated the constitution prohibitions against Ex Post Facto laws, the Supreme Court noted that "the risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith v. Doe,* 538 U.S. 84, 103 (2003) *citing McKune v. Lile*, 536 U.S. 24, 34 (2002).

What has become increasingly clear in the decades since these laws were originally passed and since cases like *Smith* were decided is that we were wrong about these ideas. Evidence has scuttled widely-held myths both about how likely people convicted of a sex offense are to commit another sex offense, and about whether location-based restrictions would be helpful.

The science has been clear that recidivism rates are far less than public and policymakers believed in the early 90's and 00's, and that the Supreme Court took its conclusions about recidivism rates from a Psychology Today article. Ira Ellman & Tara Ellman*, "Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMNT. 495, 2015 (exploring how the Supreme Court's

holdings in *McKune, Smith*, and numerous subsequent lower court decisions were influenced by unsupported assertions in a mass market magazine article).

Leaving an exploration of recidivism rates aside, this brief is primarily focused on the extant research into the question of whether laws and policies that impose location-based restrictions onto people convicted of sex offenses are effective at improving community safety. The answer is a resounding "no."

Two of the earliest studies on the topic that are cited often were done by the Minnesota Department of Corrections in 2003 and 2007. The 2003 study focused on a small sample size of 13 individuals who were categorized by Minnesota authorities of being "level 3" meaning the highest risk to reoffend, and did in fact reoffend. While the 2003 sample was small, the finding was that residential proximity to a park, school, or daycare did not contribute to sexual recidivism. Minnesota Department of Corrections, *Residential Proximity & Sex Offense Recidivism in Minnesota*, at 6, 2007 (noting that the 2003 study was a report to the legislature)). At approximately the same time, the Colorado Department of Public Safety also examined the issue. Colorado

Department of Public Safety, *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community*, 2004.

Following up on those findings, the 2007 Minnesota Department of Corrections study examined the trajectories of 3,166 individuals released from Minnesota prisons between 1990 and 2002. Of those individuals, 224 were reincarcerated for a new sex offense prior to 2006. Based an analysis of those 224 individuals their offenses, researchers concluded that not one of those offense would have been prevented by residency restrictions. Id.; *see also* Grant Duwe, et al., *Does Residential Proximity Matter? A Geographic Analysis of Sex Offense Recidivism,* 35 CRIM. J. AND BEH. no. 4, 2008.

In subsequent years, other researchers took aim at the question of effectiveness of location-based restrictions and concluded that—in line with the experiences of the Minnesota and Colorado authorities—such restrictions are ineffective at their ostensible goals and often result in unintended consequences such as homelessness. Zandbergen et al., *Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism* 37 CRIM. J. AND BEH. no. 5, 2010 (finding no association between sexual recidivism and distance between residence

and typical prohibited locations such as schools); Jill Levenson and Leo Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?,* 49 INTL. J. OF OFFENDER THERAPY AND COMP. CRIM. 49, no. 2, 2005 (survey results indicating that such restrictions increase risk factors for offending and do not appear to be helpful in managing risk). Mogavero Clark and Leslie Kennedy, *The Social and Geographic Patterns of Sexual Offending: Is Sex Offender Residence Restriction Legislation Practical?* 12 VICTIMS & OFFENDERS no. 3, 2017 (similar); Jill Levenson, *Hidden Challenges: Sex Offenders Legislated into Homelessness*, 18 J. OF SOCIAL WORK, no. 3, 2016 (finding that location-based restrictions force people into homelessness and do not prevent reoffending); Jill Levenson, et al., *Where for Art Thou? Transient Sex Offenders and Residence Restrictions,* 26 CRIM. J. POL'Y REV. no. 4, 2015 (finding that such policies were associated with transience and absconding from supervision); Joanne Savage and Casey Windsor, *Sex offender residence restrictions and sex crimes against children: A comprehensive review*, 43 AGG. AND VIOL. BEH. 2018 (finding that location-based restrictions are not effective in reducing sexual offending after a review of the existing literature).

Owing to the results of scientific inquiry into the effectiveness of these laws, as early as 2014 the Association for the Treatment of and Prevention of Sexual Abuse issued a position paper opposing the use of location-based restrictions, stating that "[r]esearch consistently shows that residence restrictions do not reduce sexual offending or increase community safety. In fact, these laws often create more problems than they solve, including homelessness, transience, and clustering of disproportionate numbers of offenders in areas outside restricted zones. Housing instability can exacerbate risk factors for reoffending." Association for the Treatment and Prevention of Sexual Abuse, *Sexual Offender Residence Restrictions*, 2014.

In line with these authorities, judicial decisions that have evaluated the science and logic undergirding these restrictions have articulated similar reasons for being skeptical of them or of striking them down entirely. *See Doe v. City of Lynn*, 36 N.E.3d 18 (Mass. 2015) (in striking down residency restrictions, noting that "[a]s a supervised and stable home situation minimizes the sex offender's risk of reoffense, [the disruption caused by residence restrictions] is inconsistent with the Legislature's goal of protecting the public." *See also In re Taylor*, 343 P.3d

867 (Cal. 2015) (striking down residence restrictions under 14th Amendment's Due Process Clause, finding that such restrictions have no rational relationship with the state's goal of public safety, have "greatly increased the incidence of homelessness amongst [registrants], and hindered their access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services available to all parolees, while further hampering the efforts of parole authorities and law enforcement officials to monitor, supervise, and rehabilitate them in the interests of public safety."); *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (in striking down Michigan's SORA scheme, noting that the exclusion zones resulted in difficulty of Plaintiff's being able to find housing and being unable to reside with family members);

Perhaps surprisingly, some of the most vocal opposition to location-based restrictions has come from law enforcement. In 2006, an association of Iowa prosecutors opposed the implementation of location-based restrictions in Iowa, stating *inter alia* that there is "no correlation between residency restrictions and reducing sex offenses against children or improving the safety of children" and noting increases in homelessness, disruption in people's lives, and absconding from

supervision. Iowa County Attorneys Association, *Statement on Sex Offender Restrictions in Iowa*, 2006 *available at* https://www.aclupa.org/sites/default/files/IowaDAstatement.pdf (last accessed March 16, 2024).

Similarly, the Kansas Department of Corrections very expressly states on their website that "[h]ousing restrictions appear to be based largely on three myths that are repeatedly propagated by the media: 1) all sex offenders reoffend; 2) treatment does not work; and 3) the concept of 'stranger danger.' Research does not support these myths," before delving deeper into various research findings on the subject.[1] The Maryland Department of Public Safety and Correctional Services states on their public site regarding housing restrictions that:

> No, Maryland does not have any residency restrictions. Information put out by other states has shown that residency restrictions do not help to prevent sexual offenses from occurring because the victims and the offenders, in most situations, know each other. Having ready access to victims, in private and secretive environments, is how sex offenders thrive.
>
> Some states, such as Iowa and Florida, have found that residency restrictions can make it very difficult to track sex offenders who have become homeless. Homeless sex offenders

[1] Kansas DOC, *Sex Offender Housing Restrictions*, available at https://www.doc.ks.gov/publications/CFS/sex-offender-housing-restrictions (last accessed Mar 16, 2024).

> are also more difficult to register and without an address the registry is unable to tell the public where the offender lives. Homeless sex offenders are better able to operate in private and secretive environments. By registering a sex offender with a valid address the police, the Sex Offender Registry and the community are all better able to make sure that offender is not able to re-offend.[2]

A number of states have also formed multi-disciplinary task forces to examine various aspects of state sex offense registration schemes and make recommendations. In 2017, the Illinois Sex Offenses & Sex Offender Registration Task Force – which included prosecutors, police, and sheriff's agencies – examined the question of residence restrictions and concluded that:

> In sum, residency restrictions do not decrease sexual reoffending or the sex crime rates in the areas where they are used. There are several reasons for this, including that most offenders do not victimize strangers and instead meet their victims in private residences. In addition, the increased homelessness and loss of family support associated with residency restrictions put offenders at higher risk of recidivism.[3]

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[2] Maryland Department of Public Safety and Correctional Services, *Sex Offender Registry FAQs*, n.15, available at https://www.dpscs.state.md.us/onlineservs/sor/frequently_asked_questions.shtml (last accessed March 16, 2024).

[3] Sex Offender Registration Task Force (2017). Sex Offenses and Sex Offender Registration Task Force Final Report. Springfield, IL: State of Illinois at 28.

A similar task force comprised partially of law enforcement and prosecutors in Washington State conducted an extensive review regarding the effectiveness of policies limiting where individuals convicted of a sexual offense may reside and concluded:

> The SOPB's review of the literature in this area found no research evidence to support the effectiveness of residence restrictions in terms of deterring or preventing future crimes. Despite the intuitive notion that some residence restrictions must reduce sex offense recidivism, this work group could find no studies that indicated a meaningful improvement in public safety. In fact, the research empirically identified a number of negative consequences, including homelessness, transience, loss of housing, loss of support systems, and financial hardship that may aggravate rather than mitigate offender risk. In addition, residence restrictions lead to the clustering of sex offenders into other areas, particularly rural areas. Thus, public policies that rely on residence restrictions to prevent sexual re-offenses have been implemented without any supporting evidence and in the face of a growing body of evidence of no meaningful effect and harmful consequences.
>
> The SOPB is aware that many, if not most people, do not want sex offenders living in their neighborhoods or communities – period. While this may be an understandable response to fear and disgust, it is important for policy makers to know it does not comport with the empirical evidence of what contributes to community safety. Implementing policies that are not consistent with best practices runs the risk of creating a false sense of security that *something* constructive is being done.

State of Washington Sex Offender Policy Board, *Review of Policies Relating to the Release and Housing of Sex Offenders in the Community*, 2014 at 17 (emphasis in original).

Finally, the United States Department of Justice has also weighed in on the issue through the SMART office, which is responsible for federal policy in this area. In 2015, they published a research brief which, with respect to location-based restrictions, concluded that "the evidence is fairly clear that residence restrictions are not effective. In fact, the research suggests that residence restrictions may actually increase offender risk by undermining offender stability and the ability of the offender to obtain housing, work, and family support. There is nothing to suggest this policy should be used at this time." Christopher Lobanov-Rostovsky, U.S. Dep't of Justice, *Adult Sex Offender Management*, 2015 at 4.

CONCLUSION

In sum, a brief review of some of the available evidence in the field of location-based restrictions for people convicted of sex offenses provides overwhelming support for the proposition that policies like those at issue in this case undermine public safety, and that doing away with them in

favor of evidence-based practices would benefit (rather than harm) communities. This is so because location-based restrictions are based ideas about sexual offending that is not supported by data. While this brief has not endeavored to be an exhaustive review of the literature, it is important to note the efforts of multidisciplinary task forces and law enforcement that *have* engaged in exhaustive reviews of the literature concluded that location-based restrictions undermine community safety.

To be sure, sex offenses are serious and can inflict tremendous and lasting harm onto survivors, which is why it is essential that best practices be followed with respect to preventing sex offenses and reducing recidivism. Providing people who are reintegrating to our communities access to a host of pro-social factors such as stable housing, support networks, and resources (as well as making them easier for law enforcement to supervise) is an approach that promotes community safety. To the extent people leaving prison succeed, we all succeed.

It is rare in any area of life that one encounter unanimous agreement. While these policies may be politically popular, one would be hard-pressed to find any expert or organization that would support the effectiveness or wisdom of policies like Special Condition X. To the

knowledge of Amicus, there exists **no** study or other empirical evidence which supports the imposition of laws or policies that restrict where people with past sex convictions may permissibly live.

TVRJ recognizes that these are politically popular policy choices despite the evidence they make communities less safe and that legislatures are afforded deference when making those policy choices. However, such deference is not infinite as the judiciary "retains an independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzales v. Carhart*, 127 S.Ct. 1610, 1637 (2007). In addition to the policy implications of Special Condition X, the constitutional rights of Appellants are at stake in this matter[4] and thus TVRJ urges the court to consider the materials provided herein.

Texas Voices for Reason and Justice as *amicus curiae* respectfully asks the Court to reverse the order below and remand for further proceedings.

Respectfully submitted,

/s/ Guy Padraic Hamilton-Smith
Counsel for Amicus Curiae Texas

[4] It has long been settled that the right of an individual to, *inter alia*, establish a home is an essential part of the liberty guaranteed by the Fourteenth Amendment and is one that "may not be interfered with under the guise of protecting the public interest." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

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CERTIFICATE OF SERVICE

I certify that on March 18, 2024, the foregoing Amicus Curiae Brief in Support of Appellants was submitted to the Clerk of this Court and served on the following parties of record via EFileTexas.gov e-filing service:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Amicus Curiae Brief of Texas Voices for Reason and Justice in Support of Appellants comports with the typeface and word-count requirements as set out in the Texas Rules of Appellate Procedure. This brief was prepared using Microsoft Word for Mac in the 14-point Century Schoolbook font for the body and 12-point Century Schoolbook font for footnotes. In compliance with Tex. R. App. 9.4(i)(3) and excluding those portions of this brief identified in Tex. R. App. P. 9.4(i)(1), this brief contains 3,235 words as determined by the word count feature of the software that was used to prepare this brief.

/s/ Guy Padraic Hamilton-Smith