STATEMENT OF THE CASE

Petitioner Peter John Jones is an enrolled member of the Leech Lake Band of Ojibwe. Petitioner resides on the Leech lake Indian Reservation, located in Cass County, Minnesota. In July 2001, Petitioner completed a Predatory Offender Notification and Registration form, as required by law, after previously being convicted of the felony of kidnapping. On July 21, 2003, Petitioner completed a Change of Address form notifying the Minnesota Bureau of Criminal Apprehension (BCA) that his new residential address was Unit 007, Pike Bay Township, PO Box 225, Cass Lake, in Cass County, Minnesota. On March 11, 2004, a Cass County Sheriff's Department employee, who was performing routine checks on Cass County predatory offenders, discovered that Petitioner appeared to be noncompliant with the registration requirements of Minn. Stat. §243.166. A Cass County Deputy was assigned to check Petitioner's last known address and was informed Petitioner was residing at a new address located in Cass County, Minnesota. It is undisputed both of the addresses are located on the Leech Lake Indian Reservation. Appendix A, 18-19.[1]

The BCA provided documentation that it had sent residence verification letters, as prescribed by law, to Petitioner on July 1, 2002; June 30, 2003; July 24, 2003; March 30, 2004: and June 28, 2004. Petitioner returned none of the annual registration documents within the 10-day time period prescribed by the statute. Appendix A, 19-20.

[1] "Appendix A" refers to the Appendix of Petitioner's Petition for Writ of Certiorari.

Petitioner was charged with one count of violating Minn. Stat. § 243.166,subd. 3(b), Registration of Predatory Offenders. A Person is guilty of this crime if the person fails to advise law enforcement of a change of his primary address at least five days prior to changing address. Appendix A, 20.

Petitioner was charged with five counts alleging violations of Minn. Stat. § 243.166, subd. 4(e), Registration Predatory Offenders. A person is guilty of this crime if the person fails to mail the completed and signed verification of address form to the Bureau of Criminal Apprehension within 10 days after receipt of the form. Appendix A, 20.

The "criminal" penalty for these offenses is found in Minn. Stat. § 243.166, subd. 5, (2002) stating a person required to register under this section who knowingly violates any of its provisions or intentionally provides false information to a corrections agent, law enforcement authority, or the bureau of criminal apprehension is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

The Minnesota Supreme Court described the procedural history as follows:

> In December 2004, the state charged Jones with one count of failing to notify the BCA of his change of address and five counts of failing to return the required address-verification forms in violation of Minn. Stat. § 243.166, subds. 3(b), 4(e), 5 (2002). Jones moved to dismiss the charges, arguing that the State of Minnesota lacked subject matter jurisdiction to prosecute him. A hearing was held on the motion and the district court granted Jones's motion to dismiss. The court concluded that Minn. Stat. § 243.166 is civil/regulatory in nature, and therefore the state lacked subject matter jurisdiction to prosecute Jones. The state appealed, and the court of appeals affirmed the district court. Jones, 700 N.W.2d at 558. The state then sought review by our court, arguing that both the district court and the court of appeals erred in concluding that the state lacked jurisdiction.

Appendix A, 20.

The Minnesota Supreme Court held that the district court and court of appeals erred when they concluded that Minnesota courts do not have jurisdiction to enforce the statute against a tribal member who fails to register while residing on his Indian reservation. The Court further held that Minnesota courts have subject matter jurisdiction to enforce the charge of residing or moving without maintaining a current address registration against Jones, even though he is an enrolled member of the Leech Lake Band of Ojibwe who resides-- and therefore violated section 243.166—on the Leech Lake Reservation. Appendix A, 37.

REASONS FOR DENYING THE PETITION

The petition for writ of certiorari should be denied because petitioner has failed to show any "compelling reasons" for this Court to grant discretionary review. Supreme Court Rule 10. The State of Minnesota has jurisdiction under Public Law 280 to criminally prosecute a Native American tribal member residing on an Indian Reservation for failure to comply with the requirements of Minnesota Statutes §243.166, the Predatory Offender Registration statute. The Minnesota Supreme Court's decision in *State v. Jones*, 728 N.W.2d 1, 12 (Minn. 2007) is consistent with the U.S. Supreme Court decision in *California v. Cabezon Band of Mission Indians*, 480 U.S. 202 (1987). The Minnesota Supreme Court, while having two concurring opinions, did find in a five to two vote, that Minnesota Statute §243.166 met the standard set forth by the U.S. Supreme Court in *Cabezon*. Petitioners are incorrect in their assertion that the Adam Walsh Act, 42 U.S.C. 16901-16991 creates a

federal penalty for failing to register by all predatory offenders and thus State intervention is not necessary. Minnesota Statute §243.166, includes individuals convicted of murder and kidnapping offenses wherein the victims are not juveniles. Federal law does not prohibit the State of Minnesota from passing laws that are more inclusive in order to protect the general public.

I. The State of Minnesota has jurisdiction under Public Law 280 to criminally prosecute a Native American tribal member residing on an Indian reservation for failure to comply with the requirements of Minn. Stat. § 243.166 (2002), the predatory offender registration statute.

A. There is no reason to revisit *California v. Cabazon Band of Indians,* 107 S.Ct. 1083 (1983) and Public Law No. 280, 67 Stat. 588.

It is well established that a state may enforce its laws against enrolled tribal members on the tribal reservation when Congress has expressly so provided. *California v. Cabazon Band of Indians,* 107 S. Ct. at 1087. Minnesota is one of six states to which Congress has granted such subject-matter jurisdiction under Public Law 280. Pursuant to this grant of authority, Minnesota has broad criminal and limited civil jurisdiction over all Indian country within the state, except the Red Lake Reservation, which Public Law 280 excepted from the grant of authority, and the Bois Forte Reservation at Nett Lake. *State v. Stone,* 572 N.W. 2d 725, 728 & n.3 (Minn. 1997). *See* also *State v. R.M.H.,* 617 N.W. 2d 55, 58 (Minn. 2000). Public Law 280 specifically states:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses

> committed elsewhere within the State or Territory and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory(.)

18 USC § 1162 (a).

In *Cabazon,* the United States Supreme Court adopted the following test for determining whether a state law is criminal and hence fully enforceable on a reservation:

> (I)f the intent of the state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

107 S. Ct. at 1088. The Court noted that the distinction it drew is not a bright-line rule, adding: "The applicable state laws governing an activity must be examined in detail before they can be categorized as regulatory or prohibitory." *Id.* at 1089.

Recognizing that *Cabazon* did not clearly state whether the "conduct at issue" that is to be analyzed is the broad conduct or the narrow, the Minnesota Supreme Court in Stone developed a two-step approach. *State v. Stone,* 572 N.W. 2d 725, 729-730 (Minn. 1997). As the Court observed "(t)his distinction becomes crucial when the broad conduct is generally permitted but the narrow conduct is generally prohibited, or vice versa." *Id.* at 729. When the narrow conduct presents substantially different or heightened public policy concerns, we will focus on the narrow conduct. *Id.* at 730. *See* also *Jones,* 729 N.W.2d at 5.

The first step of the *Stone* approach is to determine the focus of the *Cabazon* test. *Id.* at 730. The broad conduct will be the focus of the test unless the narrow

conduct "presents substantially different or heightened public policy concerns." *Id.* Once the focus is identified, the second step is simply to apply the *Cabazon* test: If the conduct is generally permitted, subject to exception, then the law controlling it is civil/regulatory; if the conduct is generally prohibited, the law is criminal/prohibitory. *Id.*; *Jones,* 729 N.W.2d at 5.

The Court in *Stone* specified that in close cases, "conduct is criminal if it violates the state's public policy." *Stone,* 572 N.W. 2d at 730. The Court interpreted "public policy," as used in the *Cabazon* test, to mean public *criminal* policy. Public criminal policy goes beyond merely promoting the public welfare. It seeks to protect society from serious breaches in the social fabric, which threaten grave harm to person or property. Id. The Court identified four factors as useful when determining whether an activity violates the state's criminal policy:

(1) the extent to which the activity directly threatens physical harm to person or property, or invades other's rights;

(2) the extent to which the law provides for exceptions and exemptions;

(3) the blame worthiness of the actor; and

(4) the nature and severity of the potential penalties for a violation of the law.

Id..; *Stone,* 729 N.W.2d 5,6.

In *Jones,* the Minnesota Supreme Court concluded that the broad conduct at issue is residing at an address or moving to a new address by Minnesota residents in general. *Jones,* 729 N.W.2d at 6. The narrow conduct we must analyze is an identified predatory offender residing or moving without maintaining a current address registration with the proper authorities. Id.

In *State v. Busse,* 644 N.W. 2d 79 (Minn. 2002), the respondent was charged by complaint with driving after cancellation as inimical to public safety, a gross misdemeanor. His driver's license had been cancelled, following his fourth alcohol-related offense. Respondent, an enrolled member of the White Earth Band of Ojibwe, moved to dismiss for lack of subject-matter jurisdiction as the offense occurred within the boundaries of the White Earth Reservation. Respondent was charged and convicted of Driving After Cancellation as Inimical to Public Safety, a gross misdemeanor, under Minn. Stat. § 171.24, subd. 5. The Court explained as follows: Busse's gross misdemeanor offense is but one piece of a larger fabric of laws aimed at increasing the severity of punishment against those persons who, due to their alcohol and drug use, pose a particularly severe threat to the safety of others. The pattern of behavior signals both a significant alcohol or drug problem and a defiance of the laws of our state and, thus, a significant risk to public safety. The ability of Minnesota to protect its citizens would be severely compromised if the state is not allowed to enforce cancellation of driving privileges, one of the most important remedies in terms of public safety, for driving while intoxicated. Id. at 86. The court followed *Stone's* direction to consider the extent to which the activity

directly threatens physical harm. *Stone,* 572 N.W.2d at 730. Busse argued his driving could not pose heightened public policy concerns because he was not intoxicated while driving. The Court explained however, Busse's license was canceled because the commissioner determined that any driving of a motor vehicle on a public road by Busse was inimical to public safety. Busse would only be labeled as inimical to public safety under the statute if he had demonstrated at least three incidents in which he consumed sufficient alcohol or drugs to put him over the legal limit, drove, and was caught. Given this history, we can conclude that his driving poses a risk to public safety and implicates heightened public policy concerns. *Busse,* Id. at 85, 86. The court summarized, the criminal sanction imposed, the direct threat to physical harm, the need for the state to be able to enforce cancellations based on a threat to public safety, and the absence of exception to the offense of driving after cancellations based on a threat to public safety, and the absence of exception to the offense of driving after cancellation based on being inimical to public safety all demonstrate heightened public policy concerns. The court concluded the offense of driving after cancellation as inimical to public safety presents substantially different or heightened public policy concerns. *Busse,* 644 N.W.2d at 87, 88.

In *State v. Busse,* 644 N.W. 2d at 88, the court concluded under the first step of the *Cabazon*/*Stone* test that Busse's offense presented heightened public policy concerns, and that under the second step of the test driving after cancellation or denial as inimical to public safety is strictly prohibited conduct within the border of

the state of Minnesota. Unlike driving in general, driving after cancellation as inimical to public safety, is generally prohibited conduct and under the *Cabazon*/*Stone* analysis the offense is criminal/prohibitory.

In *Jones* the Minnesota Supreme Court citing *Busse* explained its characterization of the broad and narrow conduct at issue based on what is required or prohibited of certain populations is consistent with the approach taken in *Busse*. *Jones,* 729 N.W. 2d at 6.

B. A predatory offender's failure to register is inimical to public safety, and, consequently, presents heightened public criminal policy concerns.

The predatory offender registration requirement involves heightened public policy concerns because predatory offenders being free to burrow into communities undetected and strike anonymously is inimical to public safety because of the threat of criminal acts. The laws were created to protect the public from the most heinous of crimes. Their intent is evident by the stiff penalty for violation of the law, and the fact that the penalty continues to rise. Additionally, registration laws may help deter crimes. First, no one wants to register as a sex offender. Like jail or a criminal record, which can deter crime because of a fear of those consequences, criminals may fear having to register. The law also may serve to deter crime because offenders know they are being monitored, and thus are more likely to be caught if they break the law. A third cause of deterrence is that, where communities have been notified of the offender's presence, offenders are more readily accessible for locating and questioning by law enforcement. This can help

prevent crimes the offender would commit if not monitored. Without notification, the public is prey to predators for a much longer period of time, which certainly threatens public safety.

C. The plain language and history of Minn. Stat. § 243.166, subd. 5, demonstrates that it is "criminal/prohibitory" for purposes of state jurisdiction under public law 280.

In order to properly apply the jurisdictional test established in *Cabazon* and *Stone,* it is necessary to understand the state's public policy regarding predatory offenders and the felony offense of failure to register as a predatory offender. Minn. Stat. § 243.166, subd. 5, and its registration requirements clearly address heightened public policy concerns of protecting the public from dangerous predators.

In 1991, Minnesota enacted its first sex offender registration law. *See* Minn. Laws 1991, ch. 285 § 3, codified at Minn. Stat. § 243.166. Prior to the enactment of that law, the Governor's Task Force on Missing Children was commissioned by then Governor Rudy Perpich in July, 1990, in direct response to the abduction and kidnapping of Jacob Wetterling with the ultimate goal of benefiting all missing children. *See* 1991 Task Force Report, Appendix R, 7.[2]

The legislative history of the registration law also demonstrates the public safety concerns addressed by registration. Initially, the statute required persons convicted of certain enumerated felony offenses to register upon release from prison pursuant to the 1991 Task Force Report. Appendix R, 5. This law was amended in 1993 to require registration by persons charged with an enumerated felony offense

[2] "Appendix R" refers to the Appendix of Respondent's Brief in Opposition.

and convicted of that offense or of another offense arising out of the same set of circumstances, pursuant to the Act of May 20, 1993, ch. 326, art. 10, §1, 1993 Minn. Laws 2090. This change stopped the use of plea negotiation to avoid registration. *Boutin v. LaFleur,* 591 N.W.2d 711, 714-715 (Minn. 1999).

A 1995 Task Force on Sexual Predators recommended further amendments and noted, "These measures will provide an added level of safety to the public by strengthening Minnesota's sex offender registration law . . . " Task Force on Sexual Predators, Final Report to the Legislature, Jan. 4, 1995 (1995 Task Force Report).[3]

After Donald Blom kidnapped and killed Katie Pourier, the legislature in 2000 made major changes to the statute. These included requiring reporting of all real property owned and all cars regularly driven by the offender. *See* Minn. Stat. § 243.166, subd. 4a (1-5) (2000). The Legislature also increased the severity of failure to register to a felony level offense, thus further emphasizing that failure to register is a serious crime which is completely prohibited in this state. *See* Journal of the House, 81st Leg. Session, 5569 (Minn. Feb. 3, 2000). The Senate sponsor described the felony penalty as "perhaps the most important" change in the statute and indicated that for public safety, Minnesota needed "a strong deterrent" against failing to maintain registration. (*See* statements of Senator Reichgott-Junge, *Senate Crime Prevention Committee,* Feb. 7, 2000 and Feb. 9, 2000.)?? In *Jones,* 729 N.W.2d at 7, the Minnesota Supreme Court concluded the legislative history of section 243.166 indicates a predatory offender residing or moving without

[3] The 1995 Task Force Report is part of the legislative history of the offender registration law, and a copy of it is reproduced in the Appendix of Respondent's Brief in Opposition at Appendix R, 40.

maintaining a current address registration with the proper authorities presents a substantially different or heightened public policy concern when compared with Minnesota residents in general. The Court therefore concluded the narrow conduct of a predatory offender should be the focus under the *Cabazon*/*Stone* test. *Id*. at 8.

The Minnesota legislature has exercised its authority to target and to promote the effective investigation and enforcement of predatory crimes. This criminal conduct is particularly harmful to victims, prone to recidivism, and difficult to investigate. The purpose of Minn. Stat. § 243.166 is to create a database of prior predatory offenders to assist law enforcement investigation. (*See* Minn. Laws 1994, ch. 636, preamble.) The value of such data base increases if it becomes as complete as possible. The ability to criminally prosecute all offenders who fail to register or otherwise fail to comply with the statute is thus essential. Failure to register raises heightened public safety concerns, is strictly prohibited in this state, is contrary to the public policy against predatory behavior, and is therefore "criminal-prohibitory" for purposes of state criminal jurisdiction under Public Law 280.

D. Analyzing the failure to register under the shorthand test in *Stone* dictates the conduct is criminally prohibited and is consistent with *Cabazon*.

Under the *Cabazon*/*Stone,* when applying "shorthand test public policy test," the Minnesota Supreme Court considers four non exclusive factors in determining "whether an activity violates the state's public policy in a nature serious enough to be considered 'criminal.'" *Stone,* 572 N.W.2d at 730. The

first issue is whether the conduct directly threatens physical harm, or invades the rights of others. The operative word is threatens. A predator failing to register, without anything else occurring, threatens the community because at that point he cannot be observed. It is important to note that this factor does not state that "should the conduct occur, physical harm is imminent." In order to violate public criminal policy, the law does not have to stop the individual from driving drunk; to violate public criminal policy the law can stop the driver from driving at all because any driving by someone with the history of driving under the influence directly threatens public safety because of the increased likelihood the driver will drive drunk. The situation is similar in Jones, predators living unregistered directly threaten public safety because they are (at least have been deemed by legislature) more likely to commit predatory crimes than others, and the legislature has determined registration helps stop them.

The second factor in the shorthand test is to consider whether there are exceptions to the prohibition of the conduct in question. There are no exceptions statewide to the enforcement of predatory registration. The third factor is blameworthiness of the offender. Blameworthiness means the perpetrator knew what they are legally required to do, and did not do it. *State v. Johnson,* 598 N.W.2d 680, 689 (Minn. 1999). In *Jones,* 729 N.W.2d at 9, the Court concluded Jones was aware of the requirements of section 243.166 and knowingly refused to comply with those requirements, and therefore demonstrated a high level of blameworthiness in failing to maintain a current address registration.

The fourth factor is the penalty of the conduct. Failing to register as a predatory offender is a felony, and can be punished by being sent to prison for up to five years. *See* Minn. Stat. § 243.166.

E. Taking jurisdiction away from the states would make the state less safe, and should be avoided at all costs.

Taking jurisdiction away from the state on Indian Reservation would have the cumulative effect of making all communities, on and off the reservation, less safe. The inability to monitor predatory offenders on the reservation would create a break in the chain of registration; offenders could slip through the cracks of the monitoring system by moving onto a reservation, and then moving off. While the predatory offender would be under the state's jurisdiction once off the reservation, it would be difficult for authorities to enforce the requirement because they would not be able to track them when they were on the reservation. Also, pursuant to Minn. Stat. § 243.166, the general public is required to be informed of the location of highly ranked, dangerous sex offenders.

F. The United States Congress has granted power to the states to enforce predatory offender statutes.

Jacob Wetterling crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071, provided mandatory guidelines for Attorney Generals to adopt state registration programs for certain crimes. The act is the result of a national program to track certain predatory offenders. Section 14071 (d) – Penalty provides as follows:

> A person required to register under a state program established pursuant to this section who knowingly fails to so register and keep such registration

current, shall be subject to criminal penalties in any state in which the person has so failed. (emphasis added).

It can certainly be argued that Congress intended a violation of State registration laws to be criminal in nature based on the plain meaning of Section 14071 (d). The State of Minnesota has adopted Minnesota Statute § 243.166 – Registration of Predatory Offenders in an effort to comply with the federal legislation. The Minn. Stat. § 243.155, subd. 5(a) provides for a maximum penalty of five years in prison and a $10,000 fine for violation of registration statutes. Taking jurisdiction away from the State on Indian Reservation would create a checkerboard effect of enforcement on Indian Reservations such as the Leech Lake Reservation. The Leech Lake Reservation is an open reservation, wherein both Indian and non-Indians reside. 25 U.S.C. § 1302 (7) of the United States Code only allows Indian tribes exercising the power of self-government to impose maximum penalties of up to one year in prison and a fine of $5,000 or both. It does not appear that barring passage of federal legislation, that Indian tribes could enforce penalties similar to the State's felony laws, even if it were so inclined to do so.

G. The Leech Lake Reservation Tribal Council has recognized that predatory offender registration statutes serve a strong public policy interest.

On November 21, 2005, the Leech Lake Reservation Tribal Council passed Resolution No. 2006-37, signed by the Chairman and Secretary/Treasurer of the Leech Lake Tribal Council. Appendix R, 4. The Resolution was duly presented and acted upon by a vote of three for, zero against,

and one silent at a special meeting of the Leech Lake Tribal Council, quorum being present, held on November 21, 2005 at Cass Lake, Minnesota. Appendix R, 1. The resolution states as follows:

> BE IT FINALLY RESOLVED, the act of failing to register raises significant public safety concerns because it restricts the ability of law enforcement to track those persons whose prior convictions have conclusively established that they are dangerous to others.

Appendix-R, 3.

Although the Leech Lake Tribal Council exercised its tribal sovereignty in declaring that it viewed the predatory offender registration code as a criminal matter, the tribe effectively returned its jurisdiction back to the State. *The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country,* 101 Nw.U.L. Rev. 897, 926 (2007). This decision was motivated by the strong public safety threat posed by predatory offenders; the tribe's view that under Public Law 280 this matter should be under the State's jurisdiction; and the tribe lacked resources to effectively implement its own registration code. *Id.* Obviously, the Leech Lake Tribal Council recognizes the seriousness of having predatory offenders register with the State of Minnesota and wants the State to enforce its statutes on the reservation.

CONCLUSION

The Petition for Writ of Certiorari should not be granted as Petitioner has failed to establish any compelling reason for the Court to accept review. The Minnesota Supreme Court's decision in *Jones* does not conflict with U.S. Supreme

Court decisions. The State of Minnesota has properly exercised its authority in requiring predatory offenders to register pursuant to Minnesota Statute §243.166.

Dated: _____ Respectfully submitted,

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