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11
 12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 14

15 **JOHN DOE,**

16 Plaintiff,

17 v.

18 **ARNOLD SCHWARZENEGGER, Governor of**
California, in his official capacity, EDMUND G.
 19 **BROWN JR., Attorney General of California, in his**
official capacity, TOM ORLOFF, District Attorney
 20 **of Alameda County, in his official capacity,**
EDWARD S. BERBERIAN, JR., District Attorney
 21 **of Marin County, in his official capacity, STEPHAN**
R. PASSALACQUA, District Attorney of Sonoma
 22 **County, in his official capacity, KAMALA D.**
HARRIS, District Attorney of San Francisco
 23 **County, in her official capacity,**

24 Defendants.

Case No. C06-6968 JSW

**SUR-REPLY TO
 PLAINTIFF'S RESPONSE TO
 ATTORNEY GENERAL'S
 SUPPLEMENTAL
 OPPOSITION**

Hearing: February 23, 2007
 Time: 9:00 a.m.
 Courtroom: Two, 17th Floor
 Judge: The Honorable
 Jeffrey S. White

25
 26 **INTRODUCTION**

27 This sur-reply focuses on the concerns the Court articulated at the first hearing on
 28 Plaintiff's motion for preliminary injunction. At that hearing, the Court ordered supplemental

1 briefing on the issue of standing and the “travel restriction” in the Sexual Predator Punishment and
2 Control Act: Jessica’s Law (SPPCA).^{1/}

3 As the Attorney General has consistently maintained, Plaintiff lacks the required standing
4 to maintain this action. Plaintiff’s complaint is narrow. It is based on the assertion that the
5 residency provision in the SPPCA will immediately require Plaintiff to move from his home.
6 However, the residency provision does not require Plaintiff to move from his current residence. The
7 provision is prospective in nature. It will only apply to Plaintiff should he attempt to move in the
8 future. Nothing in Plaintiff’s complaint indicates a desire to move or change residences. None of
9 the allegations indicate that Defendants have asked Plaintiff to vacate his residence or taken any
10 action to apply the residency restriction to him. Therefore, Plaintiff lacks standing. The Court must
11 deny Plaintiff’s motion and dismiss this lawsuit.

12 Even if Plaintiff were to have standing, the Attorney General has demonstrated in his
13 earlier briefs that Plaintiff’s claims lack merit. The residency provision does not violate the Ex Post
14 Facto Clause because it is a regulatory provision, not a punitive one. Nor does the provision violate
15 Plaintiff’s due process rights.

16 With respect to the “travel restriction,” the Attorney General respectfully submits that this
17 action has nothing to do with the constitutional right to travel. The court should reject any attempt
18 to construe such a claim in Plaintiff’s narrow complaint. Even if such a claim were alleged and ripe
19 for adjudication, the Attorney General has also demonstrated that it lacks merit.

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25 1. According to the hearing transcript, the Court desired “additional time to order additional
26 briefing on the travel restriction . . . if any, as it relates to standing, as it relates to the merits. So the
27 court can decide both the standing question and, if necessary, the merits question.” (Transcript of
28 Proceedings (Tr.) at 22:13-17.) The Court further explained that it “requires the State’s position on
the retroactivity on the issue of standing and [ripeness] with respect to the Proposition 83. I don’t
need to have the underlying merits reargued.” (Tr. at 29:25 – 30:1-3.)

1 ANALYSIS

2 I.

3 PLAINTIFF LACKS STANDING

4 To establish a “case or controversy,” it is Plaintiff’s burden to show as an “irreducible
5 minimum” the following three elements: (1) a concrete “injury in fact”; (2) a causal connection
6 between the injury and Defendant’s conduct; (3) and a likelihood that the injury will be redressed
7 by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *United Food*
8 *& Comm'l Workers Union, Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996). These
9 constitutional requirements are “rigorous.”^{2/} *Valley Forge Christian Coll. v. Ams. United for*
10 *Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). Moreover, where only declaratory
11 and injunctive relief are sought, such as in this case, any threatened future injury must be real and
12 immediate, not conjectural or hypothetical. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,
13 109 (1998); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

14 Here, Plaintiff cannot meet his heavy burden to show standing because there is no injury
15 in fact, much less causation or redressability. The residency provision does not require Plaintiff to
16 move from his current residence. The provision simply does not result in the only injury alleged in
17 the complaint. The law will impact Plaintiff only to the extent he attempts to move and there has
18 been no allegation or suggestion that Plaintiff desires to move. Indeed, if Plaintiff were to make any
19 such claim, it would fly in the face of the complaint. The complaint alleges in numerous places that
20 Plaintiff very much desires to remain in what has been his home for many years. Because Plaintiff
21 has not shown, and cannot show, that the residency provision is retroactive, there is no injury in fact.
22 Plaintiff therefore has no standing.

23 That the residency provision is prospective in nature is supported by legal authority. As
24 the court is aware, the default rule is that a law is prospective in nature unless the law contains some
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27 2. The doctrine of standing also encompasses prudential considerations, *Gladstone*
28 *Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979), but those considerations are not presently at
issue.

1 specific language regarding retroactivity. *W. Security Bank v. Superior Court*, 15 Cal.4th 232, 243
2 (1997); *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1212-13 (1988). *See also* Cal. Civ. Code
3 § 3 & Cal. Penal Code § 3 (“No part of [this Code] is retroactive, unless expressly so declared.”).
4 Here, there is no retroactivity language in the residency provision. Additionally, and as discussed
5 in an earlier brief, the proponents of the law at issue intended the law to be prospective. (*See*
6 Attorney General’s Opp’n to Mot. for Prelim. Inj. & Decl. Relief at 4-5.) These considerations
7 undermine the contention that the residency provision is retroactive with respect to Plaintiff.^{3/}

8 Additionally, it is important to keep in mind that Plaintiff’s complaint contains no
9 allegations that any defendant or other authority has taken any steps to apply the residency
10 restriction to Plaintiff. These circumstances further undermine any claim of an injury in fact.
11 Plaintiff is mounting a pre-enforcement challenge to the residency restriction. To determine whether
12 such a challenge is ripe, the Court must consider (1) whether the plaintiff has articulated a “concrete
13 plan” to violate the residency provision; (2) whether prosecuting authorities have “communicated
14 a specific warning or threat to initiate proceedings”; and (3) the “history of past prosecution or
15 enforcement under the challenged statute.” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d
16 1134, 1139 (9th Cir. 2000). In *Thomas*, the Ninth Circuit held that a pre-enforcement challenge to
17 housing laws prohibiting discrimination on the basis of marital status was not ripe for review.

18 Here, because Plaintiff already resides within 2,000 feet of a school or park, it might be
19 established that Plaintiff meets the first prong of the *Thomas* test. However, nothing alleged in the
20 complaint or anything else before the court even suggests that the authorities have communicated
21 any specific warning or threat to Plaintiff to enforce the residency provision. Due to the recent
22 passage of Proposition 83, there also is no history of enforcement of the provision. This fact alone
23 “weighs heavily in favor of finding this case unripe for adjudication.” *Weber v. Lockyer*, 365
24 F.Supp.2d 1119, 1126 (N.D. Cal 2005) (finding challenge to compulsory DNA testing unripe). For
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26 3. Plaintiff’s citation to *Myers v. Philip Morris Cos., Inc.*, 28 Cal.4th 828 (2002) and
27 *Evangelatos v. Superior Court*, 44 Cal.3d 1188 (1988) is inapposite. Unlike the circumstances in
28 those cases, this case does not concern the attempted expansion of liability for past conduct that was
not subject to liability when it occurred.

1 this reason as well, this case is not ripe for adjudication.^{4/} The court should decline Plaintiff's
2 invitation to issue an advisory opinion on the SPPCA.

3 Finally, it must be noted that the Attorney General and the Governor are in agreement that
4 Plaintiff lacks standing. Plaintiff expends much effort in his response to the Attorney General's
5 supplemental opposition attempting to create a rift between the Governor and Attorney General
6 where none exists. The Governor's position as articulated to the court is that "[b]ecause the SPPCA
7 only applies prospectively, it does not require that plaintiff move from his home."
8 (Schwarzenegger's Opp'n to Pl.'s App. for Prelim. Inj. (as amended) at 3:15-16, emphasis added.)
9 In contrast, in his latest brief Plaintiff claims the Governor's position is that the residency provision
10 "does not force Plaintiff to move from his current home, nor does it prevent him from moving to a
11 new residence of his choice" (Pl.'s Response to Attorney General's Supp. Opp'n at 4:3-4.)
12 Plaintiff mischaracterizes the circumstances. Nothing before this Court reflects any contention by
13 the Governor that Plaintiff is free to move wherever he desires in the future. Rather, the Governor
14 has taken no position on the issue. No position is set forth in the Governor's brief. Moreover, at
15 the initial hearing, counsel for the Governor stated that, because Plaintiff has not alleged any desire
16 or intention to move, the issue "is not something we have to address on a preliminary injunction

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19 4. The concepts of standing and ripeness are similar, and perhaps indistinguishable. As the
20 Ninth Circuit has explained:

21 The constitutional component of the ripeness inquiry is often treated
22 under the rubric of standing and, in many cases, ripeness coincides
23 squarely with standing's injury in fact prong. Sorting out where
24 standing ends and ripeness begins is not an easy task. Indeed, because
25 the focus of our ripeness inquiry is primarily temporal in scope,
26 ripeness can be characterized as standing on a timeline. The overlap
27 between these concepts has led some legal commentators to suggest
28 that the doctrines are often indistinguishable. And, in "measuring
whether the litigant has asserted an injury that is real and concrete
rather than speculative and hypothetical, the ripeness inquiry merges
almost completely with standing."

28 *Thomas*, 220 F.3d at 1139 (footnote and citations omitted).

1 application.” (Tr. at 8:16-17.) Therefore, despite Plaintiff’s protestations to the contrary, the
2 Governor and Attorney General’s positions are not inconsistent.^{5/}

3 For all of these reasons, Plaintiff cannot meet his heavy burden to demonstrate standing.
4 The court must deny his motion and dismiss this case.

5 **II.**

6 **EVEN IF PLAINTIFF HAD STANDING, HIS CLAIMS WOULD FAIL**

7 The Attorney General’s position on the merits has been thoroughly briefed, and pursuant
8 to the court’s direction, that position will not be reiterated here. Yet one point as to Plaintiff’s
9 primary claim that the residency provision violates the Ex Post Facto Clause is worthy of emphasis.
10 The stated objectives of the SPPCA in general, and the language of the residency requirement in
11 particular, demonstrate that the challenged provision is nonpunitive. The law concerns itself with
12 the health and safety of Californians. “[N]othing on the face of the statute suggests that the
13 legislature sought to create anything other than a civil . . . scheme designed to protect the public
14 from harm.” *Smith v. Doe*, 538 U.S. 84, 93 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361
15 (1997)). Therefore, as a matter of law the residency provision does not operate ex post facto.
16 Federal courts have found an array of sex offender regulatory laws to be non-punitive. *See, e.g.*,
17 *Smith*, 538 U.S. at 105-06 (holding Alaska’s sex offender registration act nonpunitive and therefore
18 retroactive application did not violate Ex Post Facto Clause); *Weems v. Little Rock Police Dep’t*, 453
19 F.3d 1010, 1717 (8th Cir. 2006) (concluding Arkansas’s “civil, non-punitive regulatory scheme”
20 regarding where sex offenders could reside did not violate ex post facto); *Doe v. Miller*, 405 F.3d
21 700, 704-05 (8th Cir. 2005)(holding Iowa’s residency restriction not retroactive criminal punishment
22 in violation of ex post facto). That the residency provision here contains no criminal penalty for its

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26 5. Nor, as Plaintiff somewhat dramatically states, did the Attorney General’s position take
27 a “startling turn” at the initial hearing. The Attorney General’s position regarding the application
28 of the residency provision to Plaintiff has been consistent throughout and admittedly was clarified
at the initial hearing.

1 violation is further evidence the law is a regulatory one, not a punitive one.^{6/} (See Attorney
2 General’s Opp’n to Mot. for Prelim. Inj. & Decl. J. at 10-12.)

3 If the Court were to reach the substance of Plaintiff’s claims, it must conclude that they
4 lack merit. Plaintiff’s motion must be denied and this matter must be dismissed accordingly.

5 **III.**

6 **THIS CASE IS NOT ABOUT THE RIGHT TO TRAVEL**

7 The Attorney General has discussed the right to travel in his supplemental opposition
8 pursuant to the Court’s request. However, to conclude that discussion it is respectfully submitted
9 that this case is not about the constitutional right to travel. There is no ripe dispute with respect to
10 the right to travel. The complaint does not concern whether Plaintiff is able to travel from state to
11 state or how as a resident of California he is treated when visiting Nevada. It concerns where
12 Plaintiff can reside in his home state. The word “travel” only entered the discussion at the first
13 hearing when counsel for Plaintiff uttered it in an apparent attempt to circumnavigate the standing
14 obstacle. Plaintiff’s complaint is very narrow. Its entire structure, from the introduction to the
15 delineation of its causes of action to the prayer for relief, clearly shows that this lawsuit concerns
16 three claims: one claim that the residency provision violates the Ex Post Facto Clause and two
17 claims that it violates due process. There is not a glimmer of an allegation speaking to the
18 Commerce Clause or Privileges and Immunities Clause, the sources of the constitutional right to
19 travel. (See Attorney General’s Supp. Opp’n to Mot. for Prelim. Inj. & Decl. J. at 6-7.) Thus, this
20 case does not implicate the right to travel and the court should not be misled by any clever use of
21 the word “travel.”

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24 6. For similar reasons, plaintiff’s reliance on the rule of lenity is misplaced. The residency
25 provision has no “criminal applications” and therefore the rule of lenity does not apply. See
26 *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)(“Although here we deal with §16 in the deportation
27 context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because
28 we must interpret the statute consistently, whether we encounter its application in a criminal or
noncriminal context, the rule of lenity applies.”); *Handyman Connection of Sacramento, Inc. v. Sands*, 123 Cal.App.4th 867, 895 (2004)(declining “to import the so-called ‘rule of lenity’ from criminal law into civil administrative law”).

1 The Attorney General is aware of the very brief allegation in the complaint that the
 2 SPPCA “interferes with [Plaintiff]’s right to work, his right to privacy, and his right to travel
 3 freely” (Compl. ¶ 27.) However, the allegation is nothing more than a stray remark that is
 4 inconsistent with the substance of the complaint. Counsel for Plaintiff apparently concedes there
 5 is no ripe issue with respect to the right to travel, counsel having declined to address the issue in his
 6 supplemental papers despite the court’s invitation.^{7/} Moreover, as demonstrated in the supplemental
 7 opposition, any right to travel claim lacks merit. (See Attorney General’s Supp. Opp’n to Mot. for
 8 Prelim. Inj. & Decl. J. at 5-8.)

9 CONCLUSION

10 Plaintiff cannot meet his heavy burden to demonstrate standing and this case is unripe for
 11 review. Nor do Plaintiff’s ex post facto and due process claims have merit. The court must
 12 therefore deny Plaintiff’s motion for preliminary injunction and declaratory relief and dismiss this
 13 action.

14 Dated: February 9, 2007

15 Respectfully submitted,

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 23 Attorneys for Defendant EDMUND G. BROWN JR.,
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 26 7. The Attorney General is also aware Plaintiff has named a number of District Attorneys
 27 as defendants. Plaintiff may argue naming those defendants demonstrates this case is about
 28 Plaintiff’s ability to travel. Any such argument falls flat. Plaintiff is proceeding as a Doe plaintiff
 and he has made clear he desires the location of his residence to remain private. Naming a number
 of District Attorneys is likely a way for Plaintiff to keep his county of residence private.