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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13 **JOHN DOE,**

Case No. C06-6968

14 Plaintiff,

15 v.

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

22 Defendants.
 23

24 **OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND**
 25 **DECLARATORY JUDGMENT**

26 Date: November 27, 2006
 27 Time: 11:00 a.m.
 Courtroom: Two, 17th Floor
 Judge: The Honorable Jeffrey S. White
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OPPOSITION TO MOTION
FOR PRELIMINARY
INJUNCTION AND
DECLARATORY
JUDGMENT

Date: November 27, 2006
 Time: 11:00 a.m.
 Courtroom: Two, 17th Floor
 Judge: The Honorable
 Jeffrey S. White

24 Plaintiff John Doe, a registered sex offender under California law, petitions this Court for
 25 preliminary injunction and declaratory relief on the grounds that California’s recently enacted
 26 Sexual Predator Punishment and Control Act: Jessica’s Law (“SPPCA”) (1) violates the Ex Post
 27 Facto Clause of the United States’ Constitution; (2) effects a breach of his plea agreement; and (3)
 28 offends his procedural and substantive due process rights. These claims are without merit.

1 As a preliminary matter, plaintiff has no standing to pursue this action because the SPPCA
2 takes effect prospectively, and therefore, does not apply to him. Nonetheless, the motion should be
3 denied on the merits as well. The SPPCA's residency restriction, the only provision that plaintiff
4 challenges, does not violate the Ex Post Facto Clause because it is not punitive and does not
5 criminalize previously committed acts. Nor does it effect a breach of plaintiff's plea agreement.
6 Indeed, there is no evidence to suggest that the government promised plaintiff that the laws
7 regulating sexual offenders would never change in order to induce him to plead guilty. The
8 residency restriction does not violate plaintiff's procedural due process rights because due process
9 does not require the government to make an individualized determination of dangerousness before
10 it can impose restrictions on convicted sex offenders. Finally, the residency restriction does not
11 offend substantive due process because the restriction is rationally related to well-established public
12 safety concerns. For these reasons, the Court should deny plaintiff's motion.

13 **JURISDICTION**

14 This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 1332.

15 **ISSUES PRESENTED AND SHORT ANSWERS**

16 **1. Does plaintiff have standing to pursue this action?**

17 No. The SPPCA applies prospectively; therefore, the challenged residency provision does
18 not apply to plaintiff.

19 **2. Does the SPPCA's residency restriction violate the Ex Post Facto Clause?**

20 No. The residency restriction is not punitive and does not criminalize previously
21 committed acts; therefore, it does not offend the constitutional ban on ex post facto laws.

22 **3. Does the residency restriction effect a breach of plaintiff's plea agreement?**

23 No. There is no evidence that the government failed to perform under the terms of the
24 agreement, or that the government induced plaintiff to sign the agreement by promising
25 that the laws regulating convicted sex offenders would never change.

26 **4. Does the residency restriction violate plaintiff's due process rights?**

27 No. Procedural due process does not require the government to make an individualized
28 determination of dangerousness before it can impose restrictions on convicted sex

1 offenders. Moreover, the residency restriction comports with the principles of substantive
2 due process because it is rationally related to public safety concerns.

3 **STATEMENT OF FACTS**

4 For purposes of this opposition only, defendant concedes the following facts: Plaintiff
5 pled *nolo contendere* to a single felony (sexual offense) some fifteen years ago, after which he was
6 sentenced and served time in jail. To date, having completed drug treatment and sex offender
7 rehabilitation programs, plaintiff continues to be subject to California’s sex offender registration
8 requirements pursuant to Penal Code section 290.

9 On November 7, 2006, California voters enacted the SPPCA. Shortly thereafter, plaintiff
10 sought and was granted a temporary restraining order, and filed the instant motion for preliminary
11 injunction and declaratory relief. For the reasons that follow, plaintiff’s motion should be denied.

12 **ARGUMENT**

13 **I.**

14 **PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION AND**
15 **DECLARATORY RELIEF SHOULD BE DENIED FOR LACK OF**
16 **STANDING**

17 As an “irreducible minimum,” article III requires a litigant invoking the authority of a
18 federal court to demonstrate that: (1) “he personally has suffered some actual or threatened injury
19 as a result of the putatively illegal conduct of the defendant” (injury in fact); (2) “the injury fairly
20 can be traced to the challenged action” (causation); and (3) the injury “is likely to be redressed by
21 a favorable decision” (redressability). *Valley Forge Christian College v. Americans United for*
22 *Separation of Church & State*, 454 U.S. 464, 472 (1982) (internal quotation marks and citations
23 omitted).

24 Because the SPPCA applies prospectively, the 2,000-foot residency restriction at issue in
25 this case does not require plaintiff to move from his home. Therefore, Plaintiff’s motion for a
26 preliminary injunction and declaratory relief must be denied because he cannot demonstrate any of
27 the elements of standing.

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1 **A. The SPPCA Applies Prospectively Only**

2 Measures adopted through the initiative process are subject to the ordinary rules and
 3 canons of statutory construction. *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1212 (1988).
 4 California has long adhered to the basic rule that statutes operate prospectively unless the
 5 Legislature has clearly indicated it intended retroactive or retrospective application. *Id.*, at 1207;
 6 *Western Security Bank v. Superior Court*, 15 Cal.4th 232, 243 (1997).^{1/} Both the Civil Code and the
 7 Penal Code include a specific codification of that general principle, declaring, “No part of [this
 8 Code] is retroactive, unless expressly so declared.” Cal. Civ. Code § 3; Cal. Pen. Code § 3
 9 (Deering’s 2006). These statutes reflect “the common understanding that legislative provisions are
 10 presumed to operate prospectively, and that they should be so interpreted ‘unless express language
 11 or clear and unavoidable implication negatives the presumption.’ [Citation.]” *Evangelatos*, 44
 12 Cal.3d at 1208. Absent an express retroactivity provision, a statute will not be applied retroactively
 13 unless it is “*very clear* from extrinsic sources that the Legislature or the voters must have intended
 14 a retroactive application.” *Id.*, at 1209 (emphasis added).

15 The SPPCA states, in relevant part:

16 It is the intent of the People in enacting this measure to help Californians better
 17 protect themselves, their children, and their communities; it is not the intent of
 18 the People to embarrass or harass persons convicted of sex offenses It is
 19 the intent of the People of the State of California in enacting this measure to
 20 strengthen and improve the laws that punish and control sexual offenders. It is
 also the intent of the People of the State of California that if any provision in
 this act conflicts with any other provision of law that provides for a greater
 penalty or longer period of imprisonment the latter provision shall apply.

21 SPPCA, §§ 2(f) and 31.

22 Nothing in the text of the legislation suggests that any portion of the SPPCA, including
 23 the residency restriction, was intended to apply retroactively. Moreover, the proponents of the
 24 initiative have publicly stated that the law was always intended to apply prospectively. (*See News*
 25 *Article*, Nov. 9, 2006, attached hereto as Exh. A). While the opinion of drafters or of legislators who

27 1. See also *Fox v. Alexis*, 38 Cal.3d 621, 629 (1985); *Hoffman v. Board of Retirement*,
 28 42 Cal.3d 590, 593 (1986); *Baker v. Sudo*, 194 Cal.App.3d 936, 943 (1987); *Sagadin v. Ripper*,
 175 Cal.App.3d 1141, 1156 (1985).

1 sponsor an initiative cannot establish the intent of the electorate, *Lungren v. Deukmejian*, 45 Cal.3d
2 727, 742 (1988), this Court may consider such evidence in determining whether the electorate
3 reasonably could have concluded that the legislation would apply retroactively. *Evangelatos*, 44
4 Cal.3d at 1202 (“The judiciary’s traditional role of interpreting ambiguous statutory language or
5 ‘filling in the gaps’ of statutory schemes is, of course, as applicable to initiative measures as it is to
6 measures adopted by the Legislature.”).

7 At best, the SPPCA is ambiguous on the question of retroactivity. Nonetheless, the
8 extrinsic evidence of voter intent, while sparse, suggests that the proponents of the law never
9 intended that it apply retroactively. Under these circumstances, the presumption against retroactivity
10 must attach. As Justice Rehnquist succinctly stated in *United States v. Security Industrial Bank*,
11 459 U.S. 70, 79 (1982):

12 The principle that statutes operate only prospectively, while judicial decisions
13 operate retrospectively, is familiar to every law student. [Citations.] This court
14 has often pointed out: “[The] first rule of construction is that legislation must
15 be considered as addressed to the future, not to the past The rule has been
16 expressed in varying degrees of strength but always of one import, that a
retrospective operation will not be given to a statute which interferes with
antecedent rights . . . unless such be “*the unequivocal and inflexible import of
the terms, and the manifest intention of the legislature.*” [Citation.]

17 *Id.* (emphasis added); see also *United States Fidelity & Guaranty Co. v. United States ex rel.*
18 *Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (“The presumption is very strong that a statute was
19 not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible
20 of any other.”) Here, there can be no argument that “the unequivocal and inflexible import of the
21 terms, and the manifest intention” of the proponents of SPPCA demonstrate that it was intended to
22 apply retroactively. Accordingly, this Court must presume that it applies prospectively. *Security*
23 *Industrial Bank*, 459 U.S. at 79.

24 Since there is no evidence to suggest that the SPPCA was intended to apply retroactively,
25 the Court should deny plaintiff’s motion for lack of standing because the residency restriction does
26 not apply to him. Plaintiff therefore has not suffered any personal injury as a result of the SPPCA’s

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1 recent enactment, nor is he likely to suffer such injury in the future. *Valley Forge Christian College*,
2 454 U.S. at 472. Nonetheless, even if the Court determines that plaintiff has standing to proceed,
3 the motion should be denied on the merits.

4 **II.**

5 **PLAINTIFF’S MOTION SHOULD BE DENIED ON THE MERITS**

6 Plaintiff alleges that the SPPCA’s residency restriction violates the Constitution’s ban on
7 ex post facto lawmaking as well as procedural and substantive due process. For the reasons that
8 follow, these arguments lack merit.

9 **A. The SPPCA’s Residency Restriction Does Not Violate The Ex Post Facto Clause**
10 **Because It Is Regulatory Rather Than Punitive**

11 Although the Latin phrase “ex post facto” literally encompasses any law passed “after the
12 fact,” it has long been recognized by the U.S. Supreme Court that the constitutional prohibition on
13 ex post facto laws applies only to penal statutes that disadvantage the offender affected by them.
14 *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-392 (1798).
15 In *Beazell v. Ohio*, 269 U.S. 167 (1925), the Supreme Court summarized the well-established
16 meaning of the Ex Post Facto Clause as follows:

17 It is settled, by decisions of this Court so well known that their citation may be
18 dispensed with, that any statute which punishes as a crime an act previously
19 committed, which was innocent when done, which makes more burdensome the
20 punishment for a crime, after its commission, or which deprives one charged
with crime of any defense available according to law at the time when the act
was committed, is prohibited as ex post facto.

21 *Id.*, at 169-170. Accordingly, only laws that punish or criminalize acts previously committed can
22 violate the Ex Post Facto Clause. The SPPCA’s residency restriction does not raise ex post facto
23 concerns because (1) it is not punitive, and (2) it does not criminalize an act previously committed.

24 **1. The Residency Restriction Is Not Punitive**

25 In *Collins v. Youngblood*, the Supreme Court clarified that the Ex Post Facto Clause
26 should not be read to include as “punishment” every change in the law that “alter[s] the situation of
27 a party to his or her disadvantage.” *Collins*, 497 U.S. at 50. The Court has explained that to

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1 determine whether a statute imposes “punishment” for purposes of an ex post facto analysis, a court
2 must begin with the statute itself:

3 The categorization of a particular proceeding as civil or criminal “is first of all
4 a question of statutory construction.” *Allen [v. Illinois]*, 478 U.S. 364, 368
5 (1986)]. We must initially ascertain whether the legislature meant the statute to
6 establish “civil” proceedings. If so, we ordinarily defer to the legislature’s
7 stated intent.

8 *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If a nonpunitive intent can be shown, a law should
9 be considered punishment only if the defendant carries the “heavy burden” of providing the “clearest
10 proof” that the law is so punitive in purpose or effect as to negate the legislature’s intent for it to
11 serve a nonpunitive purpose. *Id.*

12 Section 2 of the SPPCA, entitled “Findings and Declarations,” explains the broad
13 objectives of the Act as follows:

14 With these changes, Californians will be in a better position to keep themselves,
15 their children, and their communities safe from the threat posed by sex
16 offenders It is the intent of the People in enacting this measure to help
17 Californians better protect themselves, their children, and their communities .
18 Californians have a right to know about the presence of sex offenders in
19 their communities, near their schools, and around their children California
20 must also take additional steps to monitor sex offenders, to protect the public
21 from them, and to provide adequate penalties for and safeguards against sex
22 offenders, particularly those who prey on children [E]xisting laws that
23 provide for the commitment and control of sexually violent predators must be
24 strengthened and improved Additional resources are necessary to
25 adequately monitor and supervise sexual predators and offenders. It is vital that
26 the lasting effects of the assault do not further victimize victims of sexual
27 assault [T]his act allows California to protect the civil rights of those
28 persons committed as a sexually violent predator while at the same time protect
society and the system from unnecessary or frivolous jury trial actions where
there is no competent evidence to suggest a change in the committed person.

SPPCA, § 2(a), (e), (f), (g), (h), (i) and (k).

Since plaintiff challenges only the residency restriction, the Court should confine its
examination to that provision alone.^{2/} The Court’s most important inquiry is whether the residency

2. The Act in question is entitled “The Sexual Predator *Punishment* and *Control* Act:
Jessica’s Law” (emphasis added). Plaintiff suggests that it is impossible to read the residency
restriction as a “*Control*” provision, while interpreting other SPPCA sections as “*Punishment*”
provisions, citing the “one subject rule” set forth in the California Constitution, art. II, sec. 8.
Plaintiff’s Memorandum of Points and Authorities (“Plaintiff’s P & A”), p. 8, fn 3. This argument
is squarely refuted by the California Supreme Court’s decision in *Tapia v. Superior Court*, 53 Cal.3d

1 restriction serves significant nonpunitive goals. *United States v. Ursery*, 518 U.S. 267, 290 (1996).
2 A plain reading of the SPPCA's broadly stated objectives suggests that the residency restriction is
3 intended to serve nonpunitive community needs because it strengthens community safeguards
4 against potential future acts of child molestation by placing greater distance between the residency
5 of known sex offenders and the places where children congregate.

6 Notwithstanding the SPPCA's stated objectives, plaintiff argues that the residency
7 restriction is punitive in its effect, and thus violates the Ex Post Facto Clause, because it "banishes"
8 him from his home. Plaintiff's P & A, pp. 10-11. This is an overstatement. "Banishment" is
9 defined in Black's Law Dictionary as follows:

10 A punishment inflicted upon criminals, by compelling them to leave a country
11 for a specified period of time, or for life. Synonymous with exilement or
12 deportation, importing a compulsory loss of one's country. See also
13 Deportation.

13 BLACK'S LAW DICTIONARY 97 (Abridged 6th ed. 1991). The residency restriction does not "banish"
14 plaintiff from his community; rather, it restricts him from living within 2,000 feet of schools and
15 parks because he is a known sex offender. Such residency restrictions have been deemed
16 nonpunitive. See e.g., *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005); *Weems v. Little Rock Police*
17 *Dep't*, 453 F.3d 1010 (8th Cir. 2006); *Graham v. Henry*, 2006 U.S. Dist. LEXIS 65880 (N.D. Okla.
18 2006). Indeed, in *Miller*, the court dismissed plaintiff's argument that a nearly identical residency
19 restriction was the "effective equivalent of banishment, which has been regarded historically as a
20 punishment," reasoning that unlike "banishment," the residency restriction at issue did not "expel"
21 the offenders from their communities or prohibit them from accessing areas near schools or child
22 care facilities for employment, to conduct commercial transactions, or for any purpose other than
23 establishing a residence." *Miller*, 405 F.3d at 720.

24 Plaintiff also contends that the residency restriction is punitive because it has no rational
25 connection to a nonpunitive purpose. Plaintiff's P & A, p. 12. To support this claim, plaintiff points

27 282, 297 (1991), wherein the court expressly acknowledged that the proposition at issue fell into
28 four categories, the purposes of which were both punitive and regulatory.

1 out that laws imposing similar residency restrictions in other jurisdictions have not yielded
2 consistent results. Defendant does not concede this point. Even assuming that plaintiff's data is
3 accurate, the assertion that similar laws have fallen short elsewhere does not suggest that the
4 SPPCA's residency restriction is not rationally related to a nonpunitive purpose. Indeed, California
5 voters are entitled to take measures to ensure their own safety – a purpose clearly set forth in Section
6 2 of the SPPCA. Plaintiff's claim that similar laws in other states have been unsuccessful does not
7 undermine the rational, nonpunitive intent of the California electorate.

8 In considering the same issue, the court in *Doe v. Miller* found that although the residency
9 restriction at issue could have a deterrent effect, the main goal of the statute was in “protecting the
10 health and safety of children.” *Id.* at 720. The court determined that while the statute did impose
11 an element of “affirmative disability or restraint,” the statute had a “rational connection to a
12 nonpunitive purpose” – a factor which the Eighth Circuit deemed “most important.” *Id.* at 721; *see*
13 *Weems v. Little Rock Police Department*, 453 F.3d at 1017 (finding that Arkansas' statute, which
14 prohibited sex offenders from living within 2,000 feet of a school or daycare center, constituted a
15 “non-punitive regulatory scheme”); *Lee v. State of Alabama*, 895 So.2d 1038, 1040 (Ala. Crim.App.
16 2004) (finding the Alabama legislature did not intend Alabama's sex offender statute, prohibiting
17 sex offenders from living within 2,000 feet of a school or child care facility, to be punitive, in part
18 because the legislature's focus in passing the statute was on public safety). “[W]here a legislative
19 restriction is an incident of the State's power to protect the health and safety of its citizens, it will
20 be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to
21 the punishment.” *Smith v. Doe*, 538 U.S. 84, 93-94 (2003) (considering ex post facto challenge to
22 an Alaska statute requiring sex offenders to register).

23 Finally, plaintiff argues that the residency restriction is punitive because it is excessive.
24 Plaintiff's P & A, p. 13. Plaintiff maintains that the restriction is overly broad because it applies to
25 all California residents required to register as sex offenders without regard to the danger that they
26 pose to the community. The Eighth Circuit rejected this argument in *Doe v. Miller*:

27 The absence of a particularized risk assessment . . . does not necessarily convert
28 a regulatory law into a punitive measure, for “the Ex Post Facto Clause does not
preclude a State from making reasonable categorical judgments that conviction

1 of specified crimes should entail particular regulatory consequences.” *Smith v.*
2 *Doe*, 538 U.S. at 103. The Supreme Court over the years has held that
3 restrictions on several classes of offenders are nonpunitive, despite the absence
4 of particularized determinations, including laws prohibiting the practice of
5 medicine by convicted felons, *Hawker v. New York*, 170 U.S. 189, 197 (1898),
laws prohibiting convicted felons from serving as officers or agents of a union,
De Veau v. Braisted, 363 U.S. 144, 160 (1960) (plurality opinion); *Id.* at 160-61
(opinion of Brennan, J.), and of course laws requiring the registration of sex
offenders. *Smith v. Doe*, 538 U.S. at 106.

6 *Miller*, 405 F.3d at 721-722. For the same reasons, this Court should reject plaintiff’s claim that the
7 residency restriction imposed by the SPPCA is overly broad and therefore punitive.

8 In light of the significant authority holding that residency restrictions imposed on sexual
9 offenders are not punitive in purpose or effect, plaintiff’s argument to the contrary must be rejected.

10 **2. The Residency Restriction Does Not Criminalize A Previously Committed**
11 **Act Because Violation Of The Residency Restriction Is Not A Crime**

12 Plaintiff also argues that the residency restriction is punitive because it restricts the areas
13 in California where he may reside under penalty of imprisonment. Plaintiff’s P & A, p. 10. The
14 thrust of this argument is that violation of the residency restriction is a crime or public offense, yet
15 plaintiff fails cite any language in the statute that renders violation a crime or public offense.
16 Indeed, the SPPCA does not call for punishment, much less imprisonment, for violation of the
17 residency restriction.

18 The California Attorney General has formally addressed the question of whether violation
19 of a statute constitutes a crime or public offense:

20 A crime or public offense is defined in section 15 of the Penal Code as “an act
21 committed or omitted in violation of a law forbidding or commanding it, and
22 to which is annexed “any of certain enumerated punishments (death,
imprisonment, fine, or removal from or disqualification to hold public office).
A statute requiring or prohibiting an act makes violation of the statute a crime
or public offense only if there is some means of determining the punishment to
23 be imposed for the violation. *Matter of Ellsworth*, 165 Cal. 677 (1913);
People v. McNulty, 93 Cal. 427 (1892). The statute may itself expressly
24 designate the punishment for its violation, or it may do so indirectly by
designating the violation as a felony or misdemeanor, enabling the punishment
to be ascertained by reference to other statutes []. A statute may merely declare
25 the violation to be a public offense, in which case it is punishable as a
misdemeanor under [Penal Code] Section 177. Moreover, a statute merely
26 prohibiting or commanding an act may be a valid penal provision if it can be
read together with a general provision making all violations of provisions of the
27 same or a different code, or part thereof, misdemeanors (or felonies or public
28 offenses). See 30 Ops. Cal. Atty. Gen. 67 (1957).

1 53 Ops. Atty Gen. Cal. 309. Thus, a statutory violation is not a crime or public offense unless there
2 is a direct or indirect provision for punishment.

3 The SPPCA's residency restriction provides:

4 Notwithstanding any other provision of law, it is unlawful for any person for
5 whom registration is required pursuant to [Penal Code]Section 290 to reside
6 within 2000 feet of any public or private school, or park where children
7 regularly gather.

8 SPPCA, § 21(b).

9 There is no provision that violation of the residency restriction ("Section 21") constitutes
10 a felony, misdemeanor, crime, or public offense. Nor does it set out the punishment for such a
11 violation. There is no general provision in the same chapter, title, or part of the Penal Code to the
12 effect that violation of any section of that chapter, title, or part is a misdemeanor or other crime. The
13 only section of the Penal Code which could conceivably serve the function of providing a
14 punishment for violation of Section 21 is Section 19.4, which provides:

15 When an act or omission is declared by a statute to be a public offense, and no
16 penalty for the offense is prescribed in any statute, the act or omission is
17 punishable as a misdemeanor.

18 Cal. Penal Code, § 19.4.

19 In considering the consequences of violating "silent" statutes, the Attorney General has
20 concluded that Section 19.4 does not provide a means for criminal punishment:

21 The wording of [Section 19.4], particularly when viewed in the light of its
22 history,[] clearly permits its application only with reference to statutes which
23 declare an act or omission to be a "public offense." Section 12021.5 [like
24 Section 21 of the SPPCA] does not do so. Therefore, there being no means of
25 ascertaining the punishment for a violation [], it must be concluded that such
26 violation is not a criminal offense.

27 53 Ops. Atty Gen. Cal. 309.

28 Nor does the fact that Section 21 renders it "unlawful" for sex offenders to live near
schools and parks suggest that violation of Section 21 is a crime. As the California Supreme Court
has noted:

Unlawful is not synonymous with criminal. To speak of an act as unlawful is
not equivalent to saying it has been denounced as a crime. Every criminal act
is illegal or unlawful, but illegal or unlawful acts may not be criminal.

People v. Ranney, 213 Cal. 70, 77 (1931) (internal quotation marks and citation omitted).

1 Thus, plaintiff can offer no persuasive evidence that violation of the residency restriction will
2 subject him to criminal penalties.

3 In summary, the residency restriction imposed by the SPPCA does not violate the Ex Post
4 Facto Clause because the restriction is regulatory rather than punitive, and violation of the residency
5 restriction is not a crime. Accordingly, this Court should reject plaintiff's claim that the residency
6 restriction violates the Ex Post Facto Clause.

7 **B. The Residency Restriction Does Not Violate Plaintiff's Due Process Rights**

8 Plaintiff also complains that the residency restriction violates his due process rights
9 because it breaches the terms of his plea agreement, and deprives him of liberty and property
10 interests without notice and an opportunity to be heard, and without rational justification. For the
11 reasons that follow, these arguments fail.

12 **1. The Residency Restriction Does Not Breach Plaintiff's Plea Agreement**

13 Plaintiff contends that the residency restriction effects a breach of his plea agreement
14 because it imposes "additional penalties" after he served his sentence and fulfilled his obligations
15 under the agreement. Plaintiff's P & A, p. 14. This argument is without merit because, as
16 previously noted, the residency restriction is not punitive; rather, it serves the well-recognized
17 nonpunitive purpose of protecting the health and safety of the community. *Doe v. Miller*, 405 F.3d
18 at 720; *Weems v. Little Rock Police Department*, 453 F.3d at 1017; *Lee v. State of Alabama*, 895
19 So.2d at 1040.

20 Moreover, and in any event, plea agreements are governed by contract law standards.
21 *United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993). In determining whether a breach
22 of a plea agreement occurred, the courts must look to "what the defendant reasonably understood
23 to be the terms of the agreement when he pleaded guilty." *Id.* "When a plea rests in any significant
24 degree on a promise or agreement . . . so that it can be said to be part of the inducement or
25 consideration, such promise must be fulfilled." *Mabry v. Johnson*, 467 U.S. 504, 509 (1984)
26 (internal quotations and citation omitted).

27 Plaintiff does not suggest that the superior court or the district attorney, parties to the
28 agreement, failed to perform under its terms. Rather, he claims that the breach occurred several

1 years later, when California voters enacted the SPPCA . There can be no genuine argument that the
2 district attorney and superior court induced plaintiff to sign his plea agreement by promising that
3 the laws regulating sex offenders would never change. *People v. Borja*, 95 Cal.App.4th 481, 486
4 (2002). Indeed, because it would have been impossible to fulfill this promise, any reliance on such
5 an inducement would have been entirely unreasonable. Thus, plaintiff’s claim that the residency
6 restriction effects a breach of his plea agreement has no merit.

7 **2. The Residency Restriction Does Not Violate Plaintiff’s Procedural Due**
8 **Process Rights**

9 Plaintiff contends that the residency restriction violates due process because it deprives
10 him of liberty and property interests based on an irrebuttable presumption of dangerousness.
11 Plaintiff’s P & A, pp. 16, 18. He maintains that the State must make an individualized determination
12 of dangerousness before it can require him to leave his home. *Id.* In *Doe v. Miller*, the Eighth
13 Circuit rejected precisely the same procedural due process challenge to Iowa’s sex offender
14 residency restriction:

15 This argument misunderstands the right to procedural due process. As the
16 Supreme Court recently explained in connection with a comparable challenge
17 to Connecticut’s sex offender registration law, “even assuming, *arguendo*, that
18 [the sex offender] has been deprived of a liberty interest, due process does not
19 entitle him to a hearing to establish a fact that is not material under the [state]
20 statute.” *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003). States “are
21 not barred by principles of ‘procedural due process’ from drawing”
22 classifications among sex offenders and other individuals. *Id.* at 8 (quoting
23 *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion))
24 (emphasis in original).

25 *Doe v. Miller*, 405 F.3d at 709. As the Supreme Court explained in *Michael H.*:

26 A conclusive presumption does, of course, foreclose the person against whom
27 it is invoked from demonstrating, in a particularized proceeding, that applying
28 the presumption to him will in fact not further the lawful governmental policy
the presumption is designed to effectuate. But the same can be said of any legal
rule that establishes general classifications, whether framed in terms of a
presumption or not Thus, as many commentators have observed,
[citations], our “irrebuttable presumption” cases must ultimately be analyzed
as calling into question not the adequacy of procedures but – like our cases
involving classifications framed in other terms, [citations], the adequacy of the
“fit” between the classification and the policy that the classification serves.

Michael H. v. Gerald D., 491 U.S. at 120.

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2 The SPPCA's residency restriction establishes a non-suspect classification that furthers
3 a lawful government policy to promote public safety. Thus, even if the residency restriction could
4 be characterized as an "irrebuttable presumption of dangerousness," such classification does not
5 offend procedural due process rights. *Id.* Accordingly, the Court must reject plaintiff's argument.

6 **3. The Residency Restriction Does Not Violate Plaintiff's Substantive Due**
7 **Process Rights**

8 Finally, plaintiff argues that the residency restriction violates his substantive due process
9 rights because it deprives him of the right to live in his home "without any rational justification."
10 Plaintiff's P & A, p. 18. The Supreme Court has recognized unenumerated constitutional rights
11 relating to personal choice in matters of marriage and family life that could be considered
12 "fundamental" and thus subject to heightened scrutiny, but the Court defined those rights more
13 narrowly, in terms of "intimate relation of husband and wife," *Griswold v. Conn.*, 381 U.S. 479, 482
14 (1965), or "intrusive regulation" of "family living arrangements." *Moore v. East Cleveland*, 431
15 U.S. 494, 499 (1977) (plurality opinion).

16 In this case, the residency restriction does not operate directly on the family relationship.
17 Although the law restricts where a residence may be located, nothing in the statute limits who may
18 live with the plaintiff in his residence. The plurality in *Moore* emphasized this distinction, observing
19 that the impact on family was "no mere incidental result of the ordinance," because "on its face [the
20 ordinance] selects certain categories of relatives who may live together and declares that others may
21 not." *Moore*, 431 U.S. at 498-99 (plurality opinion).

22 Because the residency restriction does not impinge on "fundamental rights," *id.*, it is
23 subject to rational basis scrutiny, which merely requires that it be rationally related to a legitimate
24 governmental purpose. *Schweiker v. Wilson*, 450 U.S. 221 (1981). As such, it carries with it a
25 presumption of rationality that can only be overcome by a clear showing of arbitrariness and
26 irrationality. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83 (1978). In *Vance v.*
27 *Bradley*, 440 U.S. 93, 97 (1979), the Supreme Court explained that social and economic legislation
28 is valid unless "the varying treatment of different groups or persons is so unrelated to the

1 achievement of any combination of legitimate purposes that [a court] can only conclude that the
2 legislature's actions were irrational." This is a "heavy burden", *Hodel v. Ind.*, 452 U.S. 314, 332
3 (1981), and plaintiff has not carried it.

4 Plaintiff's claim that the residency restriction is "without rational justification" fails for
5 the same reasons that his ex post facto argument fails. As previously noted, and as numerous other
6 courts have concluded, residency restrictions such as the one at issue in this case, serve legitimate
7 public safety concerns. *Doe v. Miller*, 405 F.3d at 721; *Weems v. Little Rock Police Department*,
8 453 F.3d at 1017; *Lee v. State of Alabama*, 895 So.2d at 1040. Section 2 of the SPPCA states that
9 the Act is intended to "maintain[] public safety" by taking "additional steps to monitor sex
10 offenders, to protect the public from them" and to provide adequate "safeguards against sex
11 offenders, particularly those who prey on children." SPPCA, § 2(a), (f) and (h). The residency
12 restriction is rationally related to these goals.

13 Plaintiff's anecdotal evidence that similar restrictions in other jurisdictions have yielded
14 inconsistent results is not sufficient to overcome the presumption of rationality. Indeed, plaintiff has
15 not made a "clear showing of arbitrariness and irrationality." *Duke Power Co.*, 438 U.S. at 83. As
16 the Supreme Court explained in *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 463 (1988):

17 In performing this analysis, we are not bound by explanations of the statute's
18 rationality that may be offered by litigants or other courts. Rather, those
19 challenging the legislative judgment must convince us "that the legislative facts
on which the classification is apparently based could not reasonably be
conceived to be true by the governmental decisionmaker."

20 *Id.*, citing *Vance v. Bradley*, 440 U.S. at 111. Because plaintiff has not met this heavy burden, his
21 substantive due process argument falls on the merits.

22 CONCLUSION

23 Plaintiff lacks standing to proceed in this matter because the SPPCA takes effect
24 prospectively only, and therefore, does not apply to him. Even if the Court concludes otherwise,
25 plaintiff's motion for preliminary injunction and declaratory relief fails on the merits. The residency
26 restriction does not violate the Ex Post Facto Clause because it is not punitive and does not
27 criminalize a previously committed act. Likewise, for the reasons stated above, the restriction does
28 not effect a breach of plaintiff's plea agreement or impose an impermissible "presumption of

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2 dangerousness” in violation of procedural due process rights. Finally, because the residency
3 restriction is rationally related to well-established public safety concerns, plaintiff’s substantive due
4 process claim lacks merit as well.

5 Dated: November 15, 2006

6 Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Doe v. Schwarzenegger, et al.**

No.: **USDC-ND No. C06-6968**

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 that same day in the ordinary course of business.

On November 15, 2006, I served the attached **OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY JUDGMENT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Dennis P. Riordan Attorney at Law Riordan & Horgan 523 Octavia Street San Francisco, CA 94102 Attorneys for Plaintiff	The Honorable Thomas Orloff District Attorney Alameda County District Attorney's Office 1225 Fallon Street, Room 900 Oakland, CA 94612-4203
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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 November 15, 2006, at Sacramento, California.

Jo Farrell

Declarant

Signature

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