

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN DOE,

NO. CIV. S-06-2521 LKK/GGH

Plaintiff,

v.

ARNOLD SCHWARZENEGGER,
Governor of California,
in his official capacity,
et al

O R D E R

Defendants.

_____/

Plaintiffs challenge the constitutionality of the Sexual Predator Punishment and Control Act, which imposes residency restrictions and GPS monitoring on registered sex offenders. Pending before the court is plaintiffs' motion for a preliminary injunction. The court resolves the matter on the parties' papers and after oral argument. For the reasons set forth below, the court finds that the law has only prospective effect and is therefore inapplicable to plaintiffs.¹

¹ By prospective effect, the court means that the law does not apply to persons convicted prior to the effective date of the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. Background

Plaintiffs challenge the constitutionality of the Sexual Predator Punishment and Control Act: Jessica's Law ("SPPCA"), which California voters enacted into law on November 7, 2006. The SPPCA prohibits registered sex offenders from residing within 2,000 feet of any public or private school, or park where children regularly gather, Cal. Penal Code § 3003.5, and requires them to be monitored by a global positioning system ("GPS") for parole, Cal. Penal Code § 3000.07, and for life, Cal. Penal Code § 3004. Previously, on November 17, 2006, the court granted a temporary restraining order with respect to the residency restriction but denied relief as to the GPS requirements. Pending before the court is plaintiffs' motion for a preliminary injunction.

A. John Doe I

Plaintiffs are registered sex offenders residing within California. John Doe I pled no contest over twenty years ago to several felonies requiring him to register as a sex offender under Cal. Penal Code § 290. Amended Decl. of John Doe I ("Doe I Decl.") ¶ 2. Pursuant to the plea agreement, plaintiff was sentenced to a term in state prison and was required to register as a sex offender for his lifetime. Id. 3-4. Thereafter, plaintiff pled no contest for his failure to maintain registration requirements and is currently on parole for that offense. Id. ¶¶ 8-9. In March _____ statute and who were paroled, given probation, or released from incarceration prior to that date. The court expresses no opinion upon the law's effect as to anyone else.

1 2006, his parole conditions were amended by agreement to include
2 GPS monitoring for the remainder of his parole. Id. ¶ 11. The GPS
3 monitoring was conducted pursuant to (then) Cal. Penal Code § 3004.

4 As part of plaintiff's parole, he agreed "not to reside near
5 any parks, schools, or other areas where children congregate." Id.
6 ¶ 9. His current location, where plaintiff has resided for the
7 last nine months, has been approved by the California Department
8 of Corrections and Rehabilitation. Id. ¶ 10. However, it is
9 within 2,000 feet of several parks where children regularly gather.
10 Id. ¶ 14. Plaintiff has also stated that he is currently seeking
11 to relocate to another residence in the near future that is within
12 2,000 feet of a school or park where children regularly gather.
13 Id. ¶ 18.

14 In October 2006, prior to the passage of the SPPCA, plaintiff
15 received a letter from parole authorities informing him of the
16 potential impact of the law. Id. ¶ 12. It stated that "[i]n the
17 event it is determined your residence is within 2000 feet of any
18 public or private school, or a park where children regularly
19 congregate, you will be required to move to a new residence to be
20 in compliance with the changes in the law." Mot. for Preliminary
21 Injunction, Ex. C.

22 **B. John Doe II**

23 John Doe II pled no contest to several felony offenses
24 requiring him to register as a sex offender over fifteen years ago.
25 Decl. of John Doe II ("Doe II Decl.") ¶ 2. Pursuant to the plea
26 agreement, plaintiff served a sentence and thereafter completed his

1 parole. Id. ¶¶ 4-5. He is currently in the process of obtaining
2 a Ph.D. from a university in California. Id. ¶ 10. Plaintiff
3 resides within 2,000 feet of a school or park where children
4 regularly gather and has lived at this location for sixteen months.
5 Id. ¶ 6. Furthermore, plaintiff has stated his intention of moving
6 in the near future to another residence that is also within 2,000
7 feet of a school or park where children regularly gather. Id. ¶
8 14.

9 **C. John Doe III**

10 John Doe III was convicted in 1974 of a felony offense
11 requiring him to register as a sex offender. First Amended Compl.
12 ("FAC") ¶ 49. As a result, he served a three year prison term.
13 Id. ¶ 4. Currently, he is on probation for failing to maintain
14 registration requirements. Id. Plaintiff has been residing for
15 six months at a location within 2,000 feet of a park where children
16 regularly gather. Decl. of John Doe III ("Doe III Decl.") ¶ 6.
17 He has also stated his intention of relocating to another residence
18 in the near future that is within 2,000 feet of a school or park
19 where children regularly gather. Id. ¶ 17.

20 **II. Standard**

21 A motion for preliminary injunction requires that the moving
22 party show either (1) a combination of probable success on the
23 merits and the possibility of irreparable injury, or (2) that
24 serious questions are raised and the balance of hardships tips
25 sharply in favor of the moving party. Southwest Voters
26 Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir.

1 2003); Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394,
2 1397 n.1 (9th Cir. 1997). These standards "are not separate tests
3 but the outer reaches of a single continuum." Int'l Jensen, Inc.
4 v. Metrosound U.S.A., 4 F.3d 819, 822 (9th Cir. 1993) (citation
5 omitted). As the probability of success on the merits decreases,
6 the degree of irreparable harm must increase. Big Country Foods,
7 Inc. v. Bd. of Educ. of the Anchorage Sch. Dist., 868 F.2d 1085,
8 1088 (9th Cir. 1989). Under either formulation, the court must
9 find that there is some significant threat of irreparable injury,
10 regardless of the magnitude of that injury. Id.

11 **III. Analysis**

12 Plaintiffs request a preliminary injunction to enjoin
13 defendants from enforcing the provisions of the SPPCA imposing
14 residency restrictions and requiring GPS monitoring. Cal. Penal
15 Code §§ 3003.5, 3004, & 3000.07. As explained below, the court
16 finds that the SPPCA, properly construed, has only prospective
17 effect and is therefore inapplicable to plaintiffs.

18 As an irreducible minimum, Article III of the U.S.
19 Constitution requires plaintiffs to have suffered actual or
20 threatened injury that is caused by a defendant's putatively
21 illegal conduct and that can be redressed by a favorable court
22 ruling. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61
23 (1992). While plaintiffs may credibly fear that the SPPCA will
24 be enforced against them in light of its language and the letter
25
26

1 that John Doe I received from parole authorities,² the court
2 finds that the law does not apply to individuals who were
3 convicted and who were paroled, given probation, or released
4 from incarceration prior to its effective date.³

5 The court notes at the outset that it is obligated to adopt
6 the interpretation of the law that best avoids constitutional
7 problems. See I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001)
8 (“[I]f an otherwise acceptable construction of a statute would
9 raise serious constitutional problems, and where an alternative
10 interpretation of the statute is ‘fairly possible,’ . . . we are
11 obligated to construe the statute to avoid such problems.”); see
12 also Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908,
13 925 (9th Cir. 2004). California courts follow the same rule.
14 See Young v. Haines, 41 Cal. 3d 883, 898 (1986). Here, reading
15 the SPPCA retroactively would raise serious ex post facto
16 concerns, and the court is obligated to avoid doing so if it can
17 reasonably construe the statute prospectively.⁴

18
19 ² This is true even though none of the defendants currently
20 hold the belief that the law should have full retroactive effect.

21 ³ The defendants are in disagreement on the precise scope of
22 the statute's effect, but under any of the proposed
23 interpretations, plaintiffs would fall outside the class of
24 affected individuals.

25 ⁴ In light of the constitutional avoidance doctrine, the task
26 of interpreting the SPPCA does not raise particularly difficult or
27 complex issues of state law. Although defendants Schwarzenegger,
28 Tilton, Davis, and Hoffman urge the court to abstain under the
29 Pullman doctrine, Pullman abstention is only appropriate where the
30 resolution of the potentially determinative state law issues is
31 uncertain, i.e., “[when] a federal court cannot predict with any
32 confidence how a state’s highest court would decide an issue of

1 The SPPCA does not expressly address the issue of
2 retroactivity, but it is well-established in California that
3 statutes operate prospectively unless there is clear evidence of
4 intent to the contrary. See Evangelatos v. Superior Court of
5 Los Angeles County, 44 Cal. 3d 1188, 1207 (1988) (“[S]tatutes
6 are not to be given a retrospective operation unless it is
7 clearly made to appear that such was the legislative intent.”)
8 (internal quotation marks and citation omitted). This principle
9 has been characterized as a “time-honored principle,” id. at
10 1208, that is “familiar to every law student,” id. at 1207
11 (quoting United States v. Sec. Indus. Bank, 459 U.S. 70, 79
12 (1982) (Rehnquist, J.)).

13 Indeed, the principle is expressly codified in the
14 California Penal Code: “No part of [this code] is retroactive,
15 unless expressly so declared.” Cal. Penal Code § 3; see also
16 Cal. Civ. Code § 3. To infer retroactivity is no small feat.
17 “[A] statute will not be applied retroactively unless it is very
18 clear from extrinsic sources that the Legislature or the voters
19 must have intended a retroactive application.” Evangelatos, 44
20 Cal. 3d at 1208. Formulated differently, a law may be given
21 retroactive effect only by “the unequivocal and inflexible
22 import of the terms, and the manifest intention of the
23 legislature.” Id. at 1207 (internal quotation marks and
24 citations omitted).

25 _____
26 state law.” Fireman’s Fund Ins. Co. v. City of Lodi, 302 F.3d 928,
939 (9th Cir. 2002). Plainly, that is not the case here.

1 Here, the SPPCA is silent on the issue of retroactivity,
2 and it is not "very clear" from extrinsic sources that the
3 intent of the voters was to make it retroactive. See Tapia v.
4 Superior Court, 53 Cal. 3d 282, 287 (1991) (interpreting voter-
5 approved proposition as operating only prospectively where
6 proposition was silent on issue of retroactivity). To determine
7 the intent of a voter-approved initiative, the plain meaning of
8 the law is typically most instructive, Davis v. City of
9 Berkeley, 51 Cal. 3d 227, 234 (1990), but the SPPCA evinces no
10 textual intent of retroactivity. With regard to extrinsic
11 sources, plaintiffs note that the "Argument in Favor of
12 Proposition 83" section contained within the official ballot
13 summary stated that "[o]ver 85,000 registered sex offenders live
14 in California," and that the law would "[c]reate PREDATOR FREE
15 ZONES." Def.'s Request for Judicial Notice, Ex. A
16 (capitalization in original). Plaintiffs cite to this as
17 evidence of an intent to apply the law retroactively.

18 This is far from "very clear" evidence of an intent to make
19 the law retroactive. First, the reference to the number of sex
20 offenders in California is a neutral statement of fact, which
21 voters could have reasonably construed as characterizing the
22 scope of the problem and its potential expansion, rather than as
23 purporting to address the problem in its entirety. Second,
24 while the term "predator free zones" is troubling, it is not
25 "very clear" that it contemplates retroactive application.
26 Rather, it is the type of sloganeering to be expected of an

1 argument in favor of the law, not to be taken literally. The
2 SPPCA does not, for instance, bar sex offenders from entering
3 the 2,000 feet zone around schools or parks; it only prohibits
4 them from residing there. Accordingly, voters could reasonably
5 interpret the quoted language as creating a goal of establishing
6 "predator free zones," which the SPPCA takes one step toward
7 achieving, albeit prospectively.⁵

8 Plaintiffs press that construing the SPPCA as having only
9 prospective effect would be at odds with the interpretation
10 currently given to other sex offender laws. First, the law
11 known as "Megan's Law," which established a public internet
12 database of sex offenders, uses language similar to the SPPCA,
13 and contains no express retroactivity provision. Yet, the
14 website lists several thousand sex offenders, the majority of
15 whom committed their offenses prior to the passage of Megan's
16 Law in 2004. Cal. Penal Code § 290.46. Second, in People v.
17 Castellanos, 21 Cal. 4th 785, 789-90 (1999), the California
18 Supreme Court rejected an ex post facto challenge to a law that
19 enabled trial courts to order sex offender registration for any
20 crime if it was committed "for purposes of sexual
21 gratification." Cal. Penal Code § 290(a)(2)(D)(ii). In so

22

23 ⁵ The fact that proponents of the initiative also construed
24 the law as only having prospective effect is further evidence of
25 the reasonableness of this interpretation. See Aff. of Geoffrey
26 Graybill. While the opinion of the drafters of a law cannot
establish the intent of the electorate, Lungren v. Deukmejian, 45
Cal. 3d 727, 742 (1988), it may shed light on whether voters could
have reasonably viewed the law in a similar manner.

1 ruling, the court necessarily assumed that the law applied to
2 the plaintiff (who had committed his offenses prior to the law's
3 passage), but, as here, the law contained no express
4 retroactivity provision.

5 Neither of these points persuades the court that it should
6 read the SPPCA retroactively. First, Megan's Law merely directs
7 the California Department of Justice to make certain information
8 publicly available; it does not appear to regulate sex offenders
9 directly.⁶ Accordingly, the presumption of prospective
10 application is never triggered in the first instance. Second,
11 the court in Castellanos assumed that the law at issue applied
12 to the plaintiff, but its opinion never actually addressed the
13 statutory issue.⁷ More importantly, neither the current
14 enforcement of Megan's Law nor Castellanos relieves this court
15 of its overriding obligation -- driven by both California
16 statute and case law -- to give laws only prospective effect
17 unless there is clear evidence to the contrary.

18 Finally, plaintiffs argue that even if the SPPCA does not
19 currently apply to them, at least some of the defendants will
20 attempt to enforce the law once plaintiffs relocate to another
21 residence within 2,000 feet of a school or park where children

22
23 ⁶ In contrast, the provision of the penal code requiring sex
24 offender registration applies to "[a]ny person who, since July 1,
1944, has been or is hereafter convicted in any court in this state
. . . ." Cal. Penal Code § 290(a)(2).

25 ⁷ It is possible, for instance, that the extrinsic sources
26 relevant to the law in that case may have evinced a clear intent
of retroactivity that is absent here.


1 regularly gather.⁸ This interpretation of the law, which only
2 the Attorney General has advanced, borders on the frivolous.
3 The SPPCA makes absolutely no distinction between sex offenders
4 currently residing within a 2,000 feet zone and those who later
5 relocate within such an area. Accordingly, plaintiffs face no
6 risk of injury from the enforcement of this particular
7 interpretation of the law.

8 **IV. Conclusion**

9 The motion for a preliminary injunction is DENIED.

10 IT IS SO ORDERED.

11 DATED: February 9, 2007.

12
13 
14 LAWRENCE K. KARLTON
15 SENIOR JUDGE
16 UNITED STATES DISTRICT COURT

17 ⁸ Defendants contend this claim is not ripe for review.
18 In determining the ripeness of a pre-enforcement challenge to a
19 law, the court must examine "whether the plaintiffs have
20 articulated a 'concrete plan' to violate the law in question,
21 whether the prosecuting authorities have communicated a specific
22 warning or threat to initiate proceedings, and the history of past
23 prosecution or enforcement." Sacks v. Office of Foreign Assets
24 Control, 466 F.3d 764, 773 (9th Cir. 2006) (describing
25 constitutional component to ripeness).

26 Here, while it is true that the SPPCA does not have a history
of enforcement given its nascency, the other two criteria are met.
First, plaintiffs' declarations reveal unequivocal and non-
speculative intentions to move in the near future. Doe I Decl. ¶
18; Doe II Decl. ¶ 14; Doe III Decl. ¶ 17; see MedImmune v.
Genentech, 127 S. Ct. 764, 772 (2007) (noting that plaintiffs need
not expose themselves to liability before bringing suit). Second,
the Attorney General stated at oral argument that it believed the
plaintiffs would be in violation of the law if they were to move
to another residence within 2,000 feet of a school or park where
children regularly gather.