UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

| Case No. | **EDCV 16-02535 JGB (JCx)** | Date | December 18, 2017 |
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| Title | ***Kirk Clymer v. City of Adelanto, et al.*** | | |

| Present: The Honorable | JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE |
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| MAYNOR GALVEZ | Adele C. Frazier |
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| Deputy Clerk | Court Reporter |

| Attorney(s) Present for Plaintiff(s): | Attorney(s) Present for Defendant(s): |
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| Janice M. Bellucci | Richard T. Egger |

**Proceedings: Order: GRANTING Plaintiff's Motion for Partial Summary Judgment**

Before the Court is Plaintiff Kirk Clymer's ("Plaintiff") Motion for Partial Summary Judgment as to the First Cause of Action (state law preemption claim). ("Motion," Dkt. No. 43.) After considering all documents timely submitted in favor of, and in opposition to, the Motion as well as oral arguments presented at the December 18, 2017 hearing, the Court GRANTS Plaintiff's Motion.

## I. BACKGROUND

On December 8, 2016, Plaintiff filed a complaint in this Court against the City of Adelanto ("Defendant") and Does 1 to 10. (Dkt. No. 1.) On January 24, 2017, Plaintiff filed a first amendment complaint alleging: (1) state law preemption; (2) 42 U.S.C. § 1983 (Fourteenth Amendment); (3) 42 U.S.C § 1983 (Ex Post Facto Clause); (4) 42 U.S.C. § 1983 (void for vagueness); and (5) 28 U.S.C. § 2201 (declaratory relief). (Dkt. No. 13.) On February 23, 2017, Defendant filed a motion to dismiss. (Dkt. No. 14.) The Court granted in part and denied in part Defendant's motion on April 20, 2017. (Dkt. No. 21.) On November 13, 2017, Plaintiff filed this Motion. He attached a separate statement of undisputed facts and conclusions of law, a Declaration of Counsel Janice M. Bellucci, and a Request for Judicial Notice ("Plaintiff's RJN"). (Dkt. Nos. 43-1, 43-2.) Defendant filed its opposition on November 27, 2017. ("Opposition," Dkt. No. 45.) That same day, Defendant filed a Request for Judicial Notice ("Defendant's RJN," Dkt. No. 46) and a statement of genuine disputes of material fact (Dkt. No. 47). Plaintiff filed his reply on December 4, 2017. ("Reply," Dkt. No. 48.)

## II. REQUEST FOR JUDICIAL NOTICE

Neither Plaintiff nor Defendant attaches any exhibits to their respective pleadings in support of or in opposition to Plaintiff's Motion. They both, however, request judicial notice ("RJN") of several documents. Plaintiff requests judicial notice of three items: (1) recording of the Adelanto City Council Workshop on November 29, 2016; (2) Title 9, Chapter 9.95 of the Adelanto Municipal Code ("Adelanto Sex Offender Location Targeting Ordinance"); and (3) excerpts from Defendant's Response to Plaintiff's Request for Admission (Set One), served on September 28, 2017.

Defendant requests judicial notice of seven documents: (1) excerpts of the Official Ballot Pamplet, Proposition 83, The Secual Predator Punishment and Control Act: Jessica's Law ("Jessica's Law"); (2) excerpts from Supplement to the Statement of Vote, Proposition 83; (3) City of Adelanto, Ordinance No. 454; (4) City of Adelanto, Ordinance No. 529; (5) City of Adelanto, Staff Report of August 27, 2014; (6) City of Adelanto, Municipal Code, Chapter 9.95; and (7) report on Kirk Clymer, California's Megan's Law Website.

Pursuant to Federal Rule of Evidence 201, "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice is appropriate for "materials incorporated into the complaint or matters of public record." Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010).

The Court will take judicial notice of the recording of the City Council Meeting Workshop and Chapter 9.95, as they are both matters of public record. The Court declines to take judicial notice of Defendant's responses to request for admission, as such matters are not proper subjects for judicial notice; however, the Court will consider the admissions as part of the evidence in this case. Accordingly, the Court GRANTS in part and DENIES in part Plaintiff's RJN.

The Court declines to take judicial notice of the City of Adelanto Staff Report of August 27, 2014 because the Court does not rely on this document in reaching its decision. The Court, however, finds it appropriate to take judicial notice of the remainder of Defendant's documents, as they are all matters of public record. Thus, the Court GRANTS in part and DENIES in part Defendant's RJN.

## III. FACTUAL ALLEGATIONS[1]

Except as noted, the following material facts are sufficiently supported by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for purposes of the Motion. See Fed. R. Civ. P. 56(e)(2); L.R. 56-3.

On November 7, 2006, California voters passed Proposition 83, "The Sexual Predator Punishment and Control Act: Jessica's Law" ("Jessica's Law") with 70.5% of the votes. (Defendant's RJN, Ex A. at 42; Ex. B at 97.) According to the ballot pamphlet prepared by the attorney general, the purpose of the law was to "[p]rohibit[] registered sex offenders from residing within 2,000 feet of any school or park." (Defendant's RJN, Ex. A at 42.) The "rebuttal to Argument in Favor of Proposition 83" stated the law would "[p]rohibit thousands of *misdemeanor offenders* from living near a school or park for the rest of their lives." (Id. at 46 (emphasis in original).) The ballot pamphlet described the existing law prior to the adoption of Jessica's Law as banning "[p]arolees convicted of specified sex offenses against a child from residing within one-quarter or one-half mile (1,320 or 2,640 feet, respectively) of a school. The longer distance is for those parolees identified as high risk to reoffend by the California Department of Corrections and Rehabilitation (CDCR)." (Id. at 42.) By contrast, under Jessica's Law, the ballot pamphlet stated:

> This measure bars any person required to register as a sex offender from living within 2,000 feet (about two-fifths of a mile) of any school or park. A violation of this provision would be a misdemeanor offense, as well as a parole violation for parolees. The longer current law restriction of one-half mile (2,640 feet) for specified high-risk sex offenders on parole would remain in effect. In addition, the measure authorizes local governments to further expand these residency restrictions.

(Id. at 44.)

On November 8, 2006, the City of Adelanto ("City") adopted Ordinance No. 454 establishing residency restrictions for registered sex offenders which prohibited them from residing within 2,000 feet of child day care centers, parks, schools, school bus stops, and transit stops. (Defendant's RJN, Ex. C.) The ordinance excluded from its definition of "sex offender" any persons who is the subject of parole by any governmental entity. (Id.) Ordinance No. 454 was proceeded by Ordinance No. 529 adopted on September 10, 2014, which amended Chapter

[1] Defendant disputes four facts proffered by Plaintiff and also notes they are legal conclusions. "[O]bjections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself . . . . " Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). Thus, these objections are redundant and need not be considered separately.

9.95 to remove a provision prohibiting registered sex offenders from being present within a 300 foot radius of certain sensitive facilities. (Defendant's RJN, Ex. D.) It defined "sex offender" as "any person for whom registration is required pursuant to section 290 of the California Penal Code or any successor statute." (Id.)

The restrictions are codified in Chapter 9.95 of the Adelanto Municipal Code and titled the "Adelanto Sex Offender Location Targeting Ordinance" ("Targeting Ordinance"). (Defendant's RJN, Ex. F; Plaintiff's RJN, Ex. A.) The Targeting Ordinance regulates and restricts the locations within the City where registered sex offenders may live. (Id.) Particularly, the Targeting Ordinance imposes residency restrictions on "any person for whom registration is required pursuant to Section 290 of the California Penal Code or any successor statute." (Id.) The City imposes the following residency restriction: "No sex offender shall reside within a two thousand (2,000) foot radius of any child day care center, park, school, school bus stop or transit stop." (Id.) The distance shall be measured by following a straight line. (Id.) Any individual who violates such shall be guilty of a misdemeanor and punishable by a fine of up to $1,000, by imprisonment of up to six months, or by both. (Id.)

On November 29, 2016, during an Adelanto City Council Workshop, the Adelanto Mayor, the Adelanto City Attorney, and Adelanto councilmembers discussed sex offender regulations. Comments by the attendees included the following: sex offenders needed to "get the heck out of town" (25:45-25:50) and should be forced to relocate to a "leper colony" (25:40-26:00); and the City should hang "neon sign[s] in [the] windows" of registrants' homes (41:41-41:50) and "paint the street red in front of their house[s]" (Id.). Plaintiff is a registered sex offender. (Defendant's RJN, Ex. G.)

## IV. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party has the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

If the moving party has sustained its burden, the nonmoving party must then show that there is a genuine issue of material fact that must be resolved at trial. Celotex, 477 U.S. at 324. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citing Anderson, 477 U.S. at 252).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. When deciding a motion for summary judgment, the court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991). Thus, summary judgment for the moving party is proper when a "rational trier of fact" would not be able to find for the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

## V. DISCUSSION[2]

Plaintiff argues the local ordinance is preempted by state law, and Jessica's Law does not provide an exception allowing local municipalities to enact ordinances restricting the residency of sex offenders not on parole. (See generally Mot.) Defendant contends the local ordinance is not preempted by state law, and even if it were, Jessica's Law allows local municipalities to adopt ordinances regulating the residency of sex offenders. (See generally Opp.) The Court first considers whether state law preempts the local ordinance and then turns to whether Jessica's Law allows for local municipalities to impose such ordinances.

### A. Preemption

Article XI, Section 7 of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI § 7. "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897 (1993) (in bank) (internal quotation marks and citation omitted). "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." Id. (internal quotation marks and citation omitted).

The California Supreme Court has stated:

> [L]ocal legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area . . . , or when it has impliedly done so in light of one of the following indicia of intent: "(1) the subject matter has been so filly and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local

[2] Defendant's footnotes are not of the proper size font and thus, are not in compliance with the Local Rules and are practically illegible. See L-R 11-3.1.1. The Court admonishes Defendant and warns the parties to comply with the Local Rules in all future filings.

> ordinance on the transit citizens of the state outweighs the possibly benefit to the" locality.

Sherwin-Williams Co., 4 Cal. 4th at 898 (internal citations omitted).

"To evaluate this challenge we must first identify the subject [the local ordinance] regulates and the specific field [the party] claims is occupied by state law. [citations omitted] Next, we must examine the nature and scope of those state statutes to determine whether they are logically regulating an area that includes the subject matter covered by [the local ordinance]." People v. Nguyen, 222 Cal. App. 4th 1168, 1177-78 (Cal. Ct. App. 2014) (citations omitted).

Plaintiff contends the state of California has fully occupied the field of restrictions imposed on a sex offender's residency. (Mot. at 3.) He claims California law preempts all local regulation unless it specifies otherwise. (Id.) Plaintiff relies heavily on People v. Nguyen, 222 Cal. App. 4th 1168. (See, e.g., Mot. at 11-12.)

Nguyen concerned whether a local ordinance requiring sex offenders to obtain permission from the police chief to enter parks or recreational facilities was preempted by state law. 222 Cal. App. 4th at 1172, 1178, 1182. State law prohibited "[a] sex offender on parole for an offense against a child under 14 years of age [from] enter[ing] a park where children regularly gather without permission from his or her parole agent." Id. at 1182. The court defined "the relevant field as the restrictions imposed on a sex offender's daily life to reduce the risk he or she will commit another similar offense." Id. at 1179.

Defendant contends Nguyen only applies to where sex offenders "may go," not where they "may live" (Opp. at 17). Defendant claims the holding was limited to the issue of "whether local ordinances restricting the movements of registered sex offenders are void on grounds of State preemption." (Id. (quoting Nguyen, 222 Cal. App. 4th at 1172).) However, this argument ignores Nguyen's clear definition of the relevant field. See Nguyen 222 Cal. App. 4th at 1179. Defendant further notes that the Nguyen court specifically addressed Penal Code Section 3003.5(c), stating it "expressly authorizes local regulation" of residency restrictions. (Id. (citing Nguyen, 222 Cal. App. 4th at 1185 n.5).)

This case is analogous to Nguyen. The local ordinance here prohibits all registered sex offenders from residing within 2,000 feet of a child day care center, park, school, school bus stop or transit stop. (Defendant's RJN, Ex. F; Plaintiff's RJN, Ex. A.) The state law is narrower than the local ordinance: the state law applies only to parolees, as discussed below, while the ordinance applies to persons registered as sex offenders, whether or not they are on parole. The local and state provisions, however, need not be identical. See Nguyen, 222 Cal. App. 4th at 1182 (citations omitted). Nguyen too concerned a local ordinance that was broader than the state law. The local ordinance applied to all sex offenders, whereas the state law only applied to "[a] sex offender on parole for an offense against a child under 14 years of age." 222 Cal. App. 4th at 1182. Thus, the fact that the local ordinance here is broader does not prohibit a finding of preemption.

As in Nguyen, the California legislature enacted a comprehensive statutory scheme that fully occupies the field the Targeting Ordinance seeks to occupy. The relevant field here can be defined likewise as "restrictions imposed on a sex offender's daily life to reduce the risk he or she will commit another similar offense." See Nguyen, 222 Cal. App. 4th at 1179. The Penal Code imposes the following restrictions on a sex offender's daily life, as stated in Nguyen:

> (1) a lifetime duty to register with local law enforcement for each city or county in which the offender resides and to update that registration annually or upon any relevant change (§§ 290–290.024); (2) a state-maintained Web site that discloses information about the offender to the public (§§ 290.4, 290.45, 290.46); (3) a sex offender's duty to submit to monitoring with a global positioning device while on parole and potentially for the remainder of the offender's life if the underlying sex offense was one of several identified felonies (§§ 3000.07, 3004, subd. (b)); (4) a prohibition against the offender "enter[ing] any park where children regularly gather without the express permission of his or her parole agent" if the victim of the underlying sex offense was under 14 years of age (§ 3053.8, subd. (a)); (5) a prohibition against the offender residing with another sex offender while on parole and within 2,000 feet of a school or park for the rest of the offender's life (§ 3003.5); (6) a prohibition against the offender entering any school without "lawful business" and written permission from the school (§ 626.81); (7) enhanced penalties for the offender remaining at or returning to "any school or *public place* at or near which children attend or normally congregate" after a school or law enforcement official has asked the offender to leave (§ 653b, italics added); (8) a prohibition against the offender entering a daycare or residential facility for elders or dependent adults without registering with the facility if the victim of the underlying sex offense was an elder or dependent adult (§ 653c); (9) a duty to disclose the offender's status as a sex offender when applying for or accepting a job or volunteer position involving direct and unaccompanied contact with minor children (§ 290.95, subds. (a) & (b)); (10) a prohibition against the offender working or volunteering with children if the victim of the underlying sex offense was under 16 years of age (§ 290.95, subd. (c)); and (11) a prohibition against the offender receiving publicly funded prescription drugs or other therapies to treat erectile dysfunction (§ 290.02).

222 Cal. App. 4th at 1179-80 (emphasis in original). Taken collectively, these statutes show the Legislature intended to fully occupy the field of a sex offender's daily life, which explicitly includes residency restrictions. Id. Accordingly, Nguyen clearly establishes that California's statutory scheme occupies the field of sex offender residency restrictions.

Further, the Sex Offender Punishment, Control, and Containment Act of 2006 includes over 60 sections. Id. at 1180. Section 290.03 of the 2006 act states:

> The Legislature finds and declares that a *comprehensive system* of risk assessment, supervision, monitoring and containment for registered sex offenders residing in California communities is necessary to enhance public safety and reduce the risk of recidivism posed by these offenders.... [¶] ... [¶] ... In enacting the Sex Offender Punishment, Control, and Containment Act of 2006, the Legislature hereby creates a *standardized, statewide system* to identify, assess, monitor and contain known sex offenders for the purpose of reducing the risk of recidivism posed by these offenders, thereby protecting victims and potential victims from future harm." (§ 290.03, subds. (a) & (b), italics added.) A comprehensive system is one that "include[s] or deal[s] with all or nearly all elements or aspects of [that subject]."

Id. at 1181 (emphasis in original) (citations omitted). According to the Ballot Pamphlet, Argument in Favor of Proposition 83, one of the key purposes of Jessica's Law was to: "Create PREDATOR FREE ZONES *around schools and parks* to prevent sex offenders from living near where our children learn and play." (Defendant's RJN, Ex. A at 46 (emphasis in original).) As the Nguyen court concluded, this Court finds "the Legislature's declared intent coupled with the scope and nature of the restrictions the foregoing Penal Code sections imposed" show the Legislature "established a complete system for regulating a sex offender's daily life and manifested a legislative intent to fully occupy the field to the exclusion" of the City's ordinance. Id. Thus, the Court concludes the case at bar is analogous to Nguyen and state law preempts the local ordinance. The only remaining question is whether Jessica's Law has carved out an exception for local governments to create such ordinances.

**B. Jessica's Law**

Defendant contends Jessica's Law expressly states municipalities are not prohibited from enacting local ordinances further restricting residency requirements. (Opp. at 1.) Plaintiff argues Jessica's Law only provides that municipalities are not prohibited from enacting local ordinances further restricting residency requirements of parolees.

Jessica's Law provides:

> (a) Notwithstanding any other provision of law, when a person is released on parole after having served a term of imprisonment in state prison for any offense for which registration is required pursuant to Section 290, that person may not, during the period of parole, reside in any single family dwelling with any other person also required to register pursuant to Section 290, unless those persons are legally related by blood, marriage, or adoption.
> (b) Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.

(c) Nothing in this section shall prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290.

Cal. Penal Code § 3003.5. The question before the Court boils down to what "any person" means in the context of Section 3003.5(c). The parties disagree whether it encompass all sex offenders, or only those on parole. Plaintiff contends that it covers only parolees (Mot. at 5), while Defendant argues that it includes all sex offenders (Opp. at 1.).

This is not a question wholly of first impression. The California Court of Appeal, First District, decided in People v. Lynch the 2000 feet restriction articulated in subdivision (b) of Jessica's Law did not apply to sex offenders on probation; it only applied to sex offenders on parole. 2 Cal. App. 5th 524, 526 (Cal. Ct. App. 2016). The court reasoned, "[t]he drafters of Jessica's Law chose to locate the provision following section 3003.5, subdivision (a), arguably incorporating that section's scope of coverage." Id. at 527. The California Supreme Court in In re E.J., 47 Cal. 4th 1258, 1271 (Cal. 2010), stated: "[A]s the section's language reflects, its provisions are obviously intended to apply to 'person[s] . . . released on *parole*.'" (emphasis in original.) The California Supreme Court, however, did not address whether the restriction applied to individuals who were not on parole. Similarly, in People v. Mosley, 60 Cal. 4th 1044 (Cal. 2015), the California Supreme Court did not specifically address this issue.

"When interpreting state law, federal courts are bound by decisions of the state's highest court." In re Kirkland, 915 F.2d 1236, 1238 (9th Cir. 1990). "In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate courts decisions . . . as guidance." Id. at 1239. Further, the federal courts, when considering state substantive law, are bound by the state high court's interpretation of legislative intent. Nunez v. Sahara Nevada Corp., 677 F. Supp. 1471, 1472 (D. Nev. 1988) (citing Lost Timber v. Power City Const. Inc., 809 F.2d 590, 592 (9th Cir. 1987); Olympic Sports Prods., Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 913 (9th Cir. 1985)). Here, the California Court of Appeal's decision is instructive and the state court engaged in its own interpretation of legislative intent. Accordingly, it is unnecessary, and would be inappropriate, for this Court to undertake an interpretation anew.

Defendant's attempt to discount the Court of Appeal's decision in Lynch is not well received. Defendant contends the Court should disregard Lynch because it was a non-adversarial opinion, the court "relied on statutory context for its conclusion to the detriment of the plain meaning without any serious analysis of legislative history," and the decision applies to Subdivision (b) not (c). (Opp. at 18-19.) As to the second argument, this Court declines to stand in the shoes of an appellate court and review the state court decision for the adequacy of its reasoning and analysis.

Turning to Defendant's final argument, although Defendant is correct that the court ruled with respect to subdivision (b), not (c), the decision is highly instructive. "[S]tatutes should be interpreted in such a way as to make them consistent with each other, rather than

obviate one another." Nickelsberg v. Workers' Comp. Appeals Bd., 54 Cal. 3d 288, 298 (Cal. 1991) (citation omitted). "A word or phrase, or its derivatives, accorded a particular meaning in one part or portion of a law, should be accorded the same meaning in other parts or portions of the law, especially if the word is used more than once in the same section of the law." Miranda v. Nat'l Emergency Servs., Inc., 35 Cal. App. 4th 894, 905 (Cal. Ct. App. 1995) (citations omitted). To define "any person" in subdivision (c) differently (i.e., broader) than a court has defined it in subdivision (b) would be inconsistent with the appellate court's decision. Thus, the Court finds that the term "any person" as used in subdivision (c) refers only to parolees, as the California Court of Appeal found with respect to subdivision (b).

## VI. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion.

**IT IS SO ORDERED.**