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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN DOE #1, an individual, and
JOHN DOE #2, an individual,
Plaintiffs,

v.

CITY OF SAN DIEGO, an
incorporated California
Municipality; and DOES 1 to 10,
inclusive
Defendants.

Case No.: 17-cv-01581-BTM-WVG

**ORDER DENYING DEFENDANT
CITY OF SAN DIEGO’S MOTION
TO DISMISS AND GRANTING IN
PART AND DENYING IN PART
PLAINTIFFS’ REQUEST FOR
JUDICIAL NOTICE**

[ECF NOS. 10, 13-1]

Defendant City of San Diego has filed a motion to dismiss Plaintiffs’ Complaint. (ECF No. 10 (“MTD”).) In response, Plaintiffs John Doe 1 and John Doe 2 filed an opposition, (ECF No. 13 (“Pls.’ Opp’n”)), along with a request for judicial notice in support of the opposition, (ECF No. 13-1 (“Pls.’ RJN”)). Defendant City of San Diego then filed a reply. (ECF No. 14 (“Def.s’ Reply”).) For the reasons discussed below, the Court **denies** Defendant’s motion to dismiss and **grants in part and denies as moot in part** Plaintiffs’ request for judicial notice.

I. BACKGROUND

1
2 Plaintiffs John Doe 1 and John Doe 2 (collectively, "Plaintiffs") bring
3 claims against Defendant City of San Diego ("Defendant" or "the City") under 42
4 U.S.C. § 1983, requesting declaratory and injunctive relief due to the allegation
5 that a local city ordinance restricting the areas where registered sex offenders
6 ("Registrant(s)") may reside is unconstitutional under federal and California state
7 law. (ECF No. 1 ("Compl.")). The local law, entitled the "Child Protection Act,"
8 was adopted on April 13, 2008 by San Diego City Council and codified as San
9 Diego Municipal Code, Chapter 5, Article 8, Division 6. See San Diego, Cal.,
10 Municipal Code § 58.0601-58.0607 (hereinafter "the Ordinance").

11 About a year and a half before the City of San Diego adopted the
12 Ordinance, the California voters adopted Proposition 83, known as "The Sexual
13 Predator Punishment and Control Act: Jessica's Law", which passed on
14 November 7, 2006 and went into effect on November 8, 2006. Cal. Legis. Serv.
15 Prop. 83 (West) (hereinafter "Jessica's Law"). Among other changes, Jessica's
16 Law amended several sections of the California Penal Code, including Section
17 3003.5. *Id.*; see also Cal. Penal Code § 3003.5. The newly amended law
18 retained the original language of Section 3003.5, now codified under subsection
19 (a), which restricts Registrants released on parole from residing with other
20 Registrants in a single family dwelling. See Cal Penal Code § 3003.5(a). Two
21 additional subsections were also added. Subsection (b) makes it unlawful "for
22 any person for whom registration is required pursuant to [California Penal Code]
23 Section 290 to reside within 2000 feet of any public or private school, or park
24 where children regularly gather." *Id.* at § 3003.5(b). Subsection (c) provides that
25 "nothing in this section shall prohibit municipal jurisdictions from enacting local
26 ordinances that further restrict the residency of any person for whom registration
27 is required pursuant to Section 290." *Id.* at § 3003.5(c).

28 The Ordinance mandates additional residency restrictions for Registrants in

1 the City of San Diego. The stated purpose of the Ordinance is “to reduce the risk
2 of harm to children by impacting the ability of sex offenders to be in contact with
3 children” and “to provide additional restrictions beyond those provided for in
4 Proposition 83, Jessica’s law (effective November 8, 2006) by adding locations to
5 the residence restrictions imposed by Jessica’s Law” Ordinance at
6 § 58.0601.

7 The Ordinance provides three main regulations. First, the Ordinance
8 makes it unlawful for Registrants to reside within 2000 feet of listed restricted
9 areas. *Id.* at § 58.0603. The list includes “(a) Amusement center (b) Arcade
10 (c) Child day care facility (d) Library (e) Playground (f) Park (g) School.” *Id.* A
11 separate section also provides brief definitions for each restricted area as well as
12 definitions for other terms in the Ordinance like “[r]egistered sex offender.” See
13 *id.* at § 58.0602. Second, the Ordinance describes how to measure the 2000-
14 foot buffer zone surrounding each restricted area. *Id.* at § 58.0604 (“The 2000-
15 foot buffer zone is measured in a straight line, in all directions, without regard to
16 intervening structures, from the property line of the places listed in section
17 58.0603 (a) through (g).”). Third, two additional sections regulate which
18 Registrants are covered by the residency requirements with provisions specifying
19 an effective date for the Ordinance as well as exemptions. See *id.* at
20 §§ 58.0605-58.0606. The Ordinance only applies to a Registrant whose offense
21 was committed on or after April 13, 2008. *Id.* at § 58.0606. The Ordinance also
22 exempts a Registrant residing outside of the covered entities before April 13,
23 2008, even if one of the listed entities were to then move within 2000 feet of the
24 Registrant after April 13, 2008. *Id.* at § 58.0605(b).

25 Since the passage of Jessica’s Law in 2006, cases challenging the
26 constitutionality of residency restrictions applying to Registrants have been
27 litigated in state and federal courts. Of particular relevance here, the California
28 Supreme Court in 2015 held the “blanket enforcement of the mandatory

1 residency restrictions of Jessica’s Law, as applied to registered sex offenders on
2 parole in San Diego County” to be unconstitutional because the law could not
3 “survive even the more deferential rational basis standard of constitutional
4 review.” *In re Taylor*, 60 Cal. 4th 1019, 1038 (2015).

5 Plaintiffs John Doe 1 and John Doe 2 filed a complaint on August 7, 2017,
6 challenging the Ordinance on state and federal constitutional grounds. (Compl.
7 ¶¶ 1-3.) The Complaint alleges that both Plaintiffs are required to register as sex
8 offenders under California Penal Code Section 290 for offenses committed after
9 April 13, 2008. *Id.* at ¶¶ 6-7. Plaintiff John Doe 1 resides in the City of San
10 Diego, and Plaintiff John Doe 2 resides in the County of San Diego. *Id.* Both
11 intend to establish new lawful permanent residencies in the City of San Diego as
12 well as temporary residencies in the City by spending nights in a hotel or inn or at
13 the homes of friends and relatives. *Id.* Thus, Plaintiffs allege that they are
14 subject to the Ordinance. *Id.*

15 II. LEGAL STANDARDS

16 A. Fed. R. Civ. P. 12(b)(1)

17 Defendant City of San Diego challenges the Complaint, in part, on the
18 ground that Plaintiffs lack Article III standing. Standing under Article III of the
19 U.S. Constitution is an element of subject matter jurisdiction. Therefore,
20 Defendants move to dismiss Plaintiffs’ Complaint for lack of subject matter
21 jurisdiction under Fed. R. Civ. P. 12(b)(1).

22 Generally, on a 12(b)(1) motion regarding subject matter jurisdiction, unlike
23 a 12(b)(6) motion, a court need not defer to a plaintiff’s factual allegations. But
24 the Supreme Court has held that where a 12(b)(1) motion to dismiss is based on
25 lack of standing, the Court must defer to the plaintiff’s factual allegations and
26 must “presume that general allegations embrace those specific facts that are
27 necessary to support the claim.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555,
28 561 (1992) (internal quotation marks omitted). “At the pleading stage, general

1 factual allegations of injury resulting from the defendant’s conduct may suffice.”
2 *Id.* at 560. In short, a 12(b)(1) motion to dismiss for lack of standing can only
3 succeed if the plaintiff has failed to make “general factual allegations of injury
4 resulting from the defendant’s conduct.” *Id.*

5 **B. Fed. R. Civ. P. 12(b)(6)**

6 Defendant also moves to dismiss the Complaint for failure to state a claim
7 upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).
8 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be
9 granted only where a plaintiff’s complaint lacks a “cognizable legal theory” or
10 sufficient facts to support a legal claim. *Balistreri v. Pacifica Police Dept.*, 901
11 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the
12 allegations of material fact in the plaintiff’s complaint are taken as true and
13 construed in the light most favorable to the plaintiff. *Parks Sch. of Bus., Inc. v.*
14 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed factual
15 allegations are not required, the factual allegations made “must be enough to
16 raise a right to relief above the speculative level.” *Bell Atlantic v. Twombly*, 550
17 U.S. 544, 555 (2007). Only a complaint that states a plausible claim for relief will
18 survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

19 **III. DISCUSSION**

20 Defendant moves to dismiss the Complaint on the grounds that Plaintiffs
21 lack Article III standing and Plaintiffs’ claims fail to state a claim as required by
22 Fed. R. Civ. P. 12(b)(6). For the reasons discussed below, the Court holds that
23 Plaintiffs have standing to maintain this action. The Court then analyzes
24 Plaintiffs’ various claims to determine whether the claims should be dismissed
25 under Rule 12(b)(6).

26 **A. Standing**

27 Defendant first argues that Plaintiffs’ Complaint should be dismissed for
28 lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) because

1 Plaintiffs lack Article III standing. Standing is a necessary element of federal
2 court jurisdiction under Article III of the U.S. Constitution. *Warth v. Seldin*, 422
3 U.S. 490, 498 (1975). To have standing to sue in federal court, a plaintiff must
4 meet the requirements set forth in the “Case or Controversy Clause” of Article III
5 of the Constitution. U.S. Const. art. III, § 2. That is, a plaintiff must allege “such
6 a personal stake in the outcome of the controversy’ as to warrant his invocation
7 of federal court jurisdiction and to justify exercise of the court’s remedial powers
8 on his behalf.” *Warth*, 422 U.S. at 498–99. “[T]he plaintiff must have suffered an
9 ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete
10 and particularized, and (b) actual or imminent, not conjectural or hypothetical.”
11 *Lujan*, 504 U.S. at 560 (citations, internal quotation marks, and footnote omitted).
12 A “particularized” injury is one that “affect[s] the plaintiff in a personal and
13 individual way.” *Id.* at 560 n.1.

14 Defendant argues that Plaintiffs have failed to plead any injury because
15 Plaintiffs do not contend either that they have attempted to purchase or rent a
16 home within the City or that they have been prohibited from doing so because of
17 the Ordinance. Moreover, Defendant argues that Plaintiffs do not have standing
18 because they have not been threatened with prosecution or arrest by city law
19 enforcement. Defendant points out that the Complaint fails to allege that any
20 Registrant has been subjected to prosecution under the Ordinance. Defendant
21 argues that consequently, Plaintiffs fail to allege that they face a credible threat of
22 harm that is both real and immediate. The Court disagrees.

23 The Complaint alleges that Plaintiff John Doe 1 currently resides in the City
24 of San Diego, Plaintiff John Doe 2 resides in the County of San Diego, and both
25 Plaintiffs intend to acquire permanent residency in the City. (Compl. ¶¶ 6-7.)
26 The Complaint further alleges that Plaintiffs are forbidden under the Ordinance
27 from acquiring residency in the City due to the threat of criminal prosecution,
28 including incarceration and/or significant fines. (Compl. ¶¶ 23-25.) Plaintiffs

1 plead that the Ordinance applies to Registrants who wish to spend even one
2 night in the City. *Id.* These facts are sufficient to meet the pleading requirements
3 for standing.

4 First, the standing requirements do not demand that Plaintiffs make an
5 attempt to take up permanent residency in the City before they can challenge the
6 Ordinance on constitutional grounds. The fact that they currently reside in, or in
7 geographical proximity to, the City is sufficient when pled along with the
8 allegations that both Plaintiffs intend to establish residency in the City. These
9 facts adequately establish that the Plaintiffs have suffered an injury that is
10 particularized and imminent because the Ordinance keeps Plaintiffs from moving
11 to the City, where they would otherwise choose to live. *See Vill. of Arlington*
12 *Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (holding that a
13 plaintiff had standing to challenge a local rezoning decision that prevented the
14 development of low-cost housing where plaintiff testified he would “probably
15 move” since it was closer to his job); *Ecological Rights Found. v. Pac. Lumber*
16 *Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000) (explaining that an individual can
17 establish injury in fact in the context of environmental cases by showing a
18 sufficient level of “connection to the area of concern” like “daily geographical
19 proximity”); *Doe v. City of Arcadia*, No. CV15-5736-CAS(ASX), 2016 WL 738272,
20 at *2, *3 (C.D. Cal. Feb. 22, 2016) (holding that plaintiff, who was required to
21 register as a sex offender under California law, had standing to challenge local
22 residency requirements even though he lived 185 miles from the covered city
23 because he intended to travel and take up temporary residence there).

24 Second, contrary to Defendant’s arguments, Plaintiffs do not need to risk
25 liability under the Ordinance to achieve standing to bring a claim challenging its
26 constitutionality. Moreover, Defendant’s argument that the Complaint fails to
27 allege any prior instance of prosecution under the Ordinance is not relevant. The
28 Court finds Plaintiffs’ citation to *Medimmune, Inc. v. Genentech, Inc.* to be on

1 point: The Supreme Court ruled in that case that

2 where threatened action by *government* is concerned, we do not
3 require a plaintiff to expose himself to liability before bringing suit to
4 challenge the basis for the threat—for example, the constitutionality
5 of a law threatened to be enforced. The plaintiff’s own action (or
6 inaction) in failing to violate the law eliminates the imminent threat of
7 prosecution, but nonetheless does not eliminate Article III jurisdiction.

8 549 U.S. 118, 128-29 (2007) (emphasis in original). See also *Babbitt v. United*
9 *Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (“[I]t is not necessary that
10 [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to
11 challenge [the] statute that he claims deters the exercise of his constitutional
12 rights.”) (citations omitted) (second and third modifications in the original). The
13 *Medimmune* Court went on to cite several examples of cases where “the plaintiff
14 had eliminated the imminent threat of harm by simply not doing what he claimed
15 the right to do . . . ” and yet subject-matter jurisdiction was not precluded
16 “because the threat-eliminating behavior was effectively coerced.” *Id.* at 129.

17 Thus, the Court holds that the Complaint adequately alleges facts to meet
18 the requirements for standing because the Ordinance applies to Plaintiffs and
19 effectively prevents them from doing what they claim they have a right to do—
20 take up residency, both temporary and permanent, within the City.

21 **B. Sufficiency of Claims**

22 **1. Preemption**

23 Under the California Constitution, “a county or city may make and enforce
24 within its limits all local, police, sanitary and other ordinances and regulations not
25 in conflict with general laws.” Cal. Const., art. 11, § 7. County and city law is
26 preempted by state law “in the event of conflict between the regulations of state
27 and local governments, or if the state legislation discloses an intent to preempt the
28 field to the exclusion of local regulation.” *Bishop v. City of San Jose*, 1 Cal. 3d 56,
62 (1969). Moreover, “[w]here the Legislature has adopted statutes governing a

1 particular subject matter, its intent with regard to occupying the field to the
2 exclusion of all local regulation is not to be measured alone by the language used
3 but by the whole purpose and scope of the legislative scheme.” *People v. Nguyen*,
4 222 Cal. App. 4th 1168, 1179 (2014) (quoting *Am. Fin. Servs. Ass’n v. City of*
5 *Oakland*, 34 Cal. 4th 1239, 1254 (2005), *review denied*, 2014 Cal. LEXIS 3030
6 (2014)).

7 Plaintiffs bring a state law preemption claim based on the theory that the
8 Ordinance is preempted by California state law because California has a
9 comprehensive scheme for the registration of sex offenders. Defendant moves to
10 dismiss Plaintiffs’ preemption claim because it argues that Proposition 83, or
11 Jessica’s Law, amended California Penal Code Section 3003.5 to create an
12 exception that expressly allows municipalities to impose residency restrictions that
13 further regulate where Registrants can reside. The City rests its argument on a
14 textual interpretation of the amended statute, which states that “[n]othing in this
15 section shall prohibit municipal jurisdictions from enacting local ordinances that
16 further restrict the residency of *any person for whom registration is required*
17 *pursuant to Section 290.*” Cal. Penal Code § 3003.5(c) (emphasis added). The
18 City asserts that Section 3003.5(c) extends to all Registrants based on the plain
19 language of the statute. Plaintiffs, however, argue that Section 3003.5(c) is limited
20 to covering parolees only, not all Registrants, and thus, Jessica’s Law did not
21 create an exception allowing localities to extend residency restrictions for all
22 Registrants.

23 The California Court of Appeal held in *People v. Nguyen* that the California
24 state legislature has enacted a comprehensive statutory scheme that fully
25 occupies the field of “restrictions imposed on a sex offender’s daily life to reduce
26 the risk he or she will commit another similar offense.” *Nguyen*, 222 Cal. App. 4th
27 at 1179. The *Nguyen* Court went on to hold that consequently, a municipal
28 ordinance that required sex offenders to obtain permission from local law

1 enforcement before entering parks and recreational areas was “impliedly”
2 preempted by state law. *Id.* at 1188-89. Like the ordinance in *Nguyen*, the
3 Ordinance at issue here also places restrictions on a sex offender’s daily life that
4 are intended to reduce the risk of recidivism. Therefore, under *Nguyen*, the Court
5 finds that without an exception, state law impliedly preempts the City’s residency
6 restrictions codified in the Ordinance.

7 Defendant argues that Jessica’s Law provides such an exception, because
8 the text of Section 3003.5(c) allows municipalities to extend state residency
9 restrictions to cover “any person for whom registration is required.” Cal. Penal
10 Code § 3003.5(c).

11 Plaintiffs state their preemption claim relying on the authority of *People v.*
12 *Lynch*, 2 Cal. App. 5th 525 (2016). There, the California Court of Appeal defined
13 the scope of “any person” in Section 3003.5(b), which states that “[n]otwithstanding
14 any other provision of law, it is unlawful for *any person for whom registration is*
15 *required* pursuant to Section 290 to reside within 2000 feet of any public or private
16 school, or park where children regularly gather.” Cal. Penal Code § 3003.5(b)
17 (emphasis added). Prior to *Lynch*, the California Supreme Court had previously
18 ruled that subdivision (b) “obviously . . . appl[ies] to ‘persons released on *parole*.’”
19 *In re E.J.*, 47 Cal. 4th 1258, 1271 (2010) (emphasis in original) (quoting Cal. Penal
20 Code § 3003.5(a)). The *Lynch* Court then limited the application of “any person”
21 *only to* parolees for the period of their parole term. *Lynch*, 2 Cal. App. 5th at 528.

22 The California Court of Appeal based its interpretation on the following
23 analysis. Jessica’s Law amended an existing statute regulating sex offender
24 registrants that was applicable only to parolees. *Id.* The newly amended law
25 retained the original language of Section 3003.5, now codified as Section
26 3003.5(a), which limits its coverage to “a person [who] is released on parole after
27 having served a term of imprisonment in state prison for any offense for which
28 registration is required pursuant to Section 290,” i.e, a parolee. *Id.* (quoting Cal.

1 Penal Code § 3003.5(a)). In adding subdivision (b), the drafters of Jessica’s Law
2 placed (b) immediately following (a). *Id.* The *Lynch* Court reasoned that this
3 placement

4 indicates the intent of [the] drafters to align and limit the “any person”
5 reference in subdivision (b) to the class of persons identified in
6 subdivision (a)—parolees. Therefore, the language of Section 3003.5
7 as a whole indicates the subdivision (b) residency restriction applies,
8 as does subdivision (a), only to parolees for the period of their parole
9 term.

10 *Id.* Plaintiffs argue that *Lynch* applies in limiting the scope of subdivision (c) to
11 parolees as well, while Defendant requests that the Court decline extending the
12 holding in *Lynch* to Section 3003.5(c).

13 To survive Defendant’s motion to dismiss, the Complaint must present a
14 “cognizable legal theory” in stating the state law preemption claim. *Balistreri*, 901
15 F.2d at 699. Under *Lynch*, the Complaint satisfies this requirement. Therefore,
16 the Court denies Defendant’s motion to dismiss with respect to the preemption
17 claim. As to whether the Ordinance is preempted by state law, the Court declines
18 to rule on this issue at the motion to dismiss stage. The Court presumes that this
19 is a question better suited for disposition at the summary judgment stage, once the
20 parties have had the opportunity to provide full briefing on the issue, including a
21 comprehensive analysis of available case law as well as any legislative history.

22 **2. Fourteenth Amendment Due Process**

23 The Fourteenth Amendment Due Process Clause forbids the government
24 from infringing upon “fundamental liberty interests in any manner unless the
25 infringement is narrowly tailored to serve a compelling state interest [i.e., strict
26 scrutiny].” *In re Taylor*, 60 Cal. 4th 1019, 1036 (2015) (internal quotations and
27 omissions omitted) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).
28 When bringing a facial constitutional challenge under the Due Process Clause
where the requirements for strict scrutiny are not met, “all that is required is that a

1 reasonable relation to a legitimate state interest (i.e., a rational basis) be shown
2 in order to justify the state action or find the challenged statute constitutional.” *Id.*
3 (internal quotations and citations omitted).

4 Plaintiffs challenge the Ordinance on the basis that it violates due process
5 under the Fourteenth Amendment. Defendant concedes that as long as the
6 Court rules that Plaintiffs have standing to bring their claims, a due process claim
7 can survive if properly pled. Because the Court holds that Plaintiffs have met the
8 standing requirements at the motion to dismiss stage, the Court goes on to
9 determine whether Plaintiffs adequately allege a claim under the Due Process
10 Clause of the Fourteenth Amendment.

11 Plaintiffs allege their due process claim in part by relying on the California
12 Supreme Court’s federal constitutional ruling in the case *In re Taylor*. In *Taylor*,
13 San Diego County sex offender parolees brought habeas corpus petitions to
14 challenge the constitutionality of the residency restrictions mandated in Jessica’s
15 Law. 60 Cal. 4th at 1023. Specifically, the parolees challenged California Penal
16 Code Section 3003.5(b), which made it illegal for Registrants “to reside within
17 2000 feet of any public or private school, or park where children regularly
18 gather.” *Id.* (quoting Cal. Penal Code § 3003.5(b)). Parolees alleged that the
19 residency restrictions, as applied to them, were unconstitutional because under
20 the Due Process Clause, the restrictions violated their fundamental rights “to
21 intrastate travel, to establish and maintain a home, and to privacy and free
22 association with others within one’s home” and “effectively ‘banishe[d]’ them from
23 establishing home or residing anywhere in the county [of San Diego].” *Id.* at
24 1036. The *Taylor* Court ruled in favor of the parolees, emphasizing the results of
25 the evidentiary hearing at the trial court that found that the enforcement of
26 Section 3003.5(b) barred the parolees from residing in large areas of San Diego
27 County. *Id.* at 1039-40, 1042. Declining to decide whether rational basis or
28 heightened strict scrutiny review should be used to analyze the parolees’ claims,

1 the Court found the “blanket enforcement of the mandatory residency restrictions
2 of Jessica’s Law, as applied to registered sex offenders on parole in San Diego
3 County” to be unconstitutional because the law could not “survive even the more
4 deferential rational basis standard of constitutional review.” *Id.* at 1038. The
5 Court determined that the enforcement of the residency restrictions
6 has imposed harsh and severe restrictions and disabilities on the
7 affected parolees’ liberty and privacy rights, however limited, while
8 producing conditions that hamper, rather than foster, efforts to
9 monitor, supervise, and rehabilitate these persons. Accordingly, it
10 bears no rational relationship to advancing the state’s legitimate goal
11 of protecting children from sexual predators, and has infringed the
12 affected parolees’ basic constitutional right to be free of official action
13 that is unreasonable, arbitrary, and oppressive.

12 *Id.*

13 Plaintiffs argue that they plead claims consistent with *Taylor* and also that
14 their claims are against a regulation that is in fact more restrictive than the one at
15 issue in *Taylor*. Plaintiffs point out that while the regulation in *Taylor* excluded
16 Registrants from residing within 2000 feet of parks and schools, the City’s
17 Ordinance covers amusement centers, arcades, child day care facilities, libraries,
18 and playgrounds, in addition to parks and schools. Moreover, as discussed
19 above, the California Court of Appeal has limited the regulation at issue in *Taylor*
20 to parolees, *Lynch*, 2 Cal. App. 5th at 528, while the City’s Ordinance applies to
21 all Registrants. The Court agrees that the Ordinance that Plaintiffs’ challenge is
22 even more restrictive than the regulation in *Taylor* and thus likely unconstitutional
23 under the Due Process Clause.

24 Defendant argues that to challenge the constitutionality of the Ordinance
25 under the Due Process Clause, Plaintiffs should be required to set forth their
26 post-conviction status. The Court disagrees. The status that is relevant under
27 the Ordinance is whether Plaintiffs are required to register as sex offenders
28 under California Penal Code Section 290. Plaintiffs allege as much in the

1 Complaint. (Compl. ¶¶ 6-7.) Moreover, Defendant even concedes that “whether
2 plaintiffs are parolees, probationers, or ex-offenders is of little consequence given
3 the liberty impact of PC § 290 registration.” (Def.s’ Reply, 8.)

4 Defendant also requests that Plaintiffs set forth any attempts they have
5 made to secure housing in the City. In *Taylor*, however, the California Supreme
6 Court did not rest its holding on the nature of any attempts that the parolees may
7 or may not have made to find homes in San Diego County. Rather, it was
8 sufficient for the Court to strike down the regulation in *Taylor* as unconstitutional
9 because it “prevented paroled sex offenders as a class from residing in large
10 areas of [San Diego] [county], including most of the downtown area in the City of
11 San Diego.” *Taylor*, 60 Cal. 4th at 1041. Thus, Plaintiffs are not required to
12 plead any attempts to secure housing in the City in order for the Complaint to
13 survive Defendant’s motion to dismiss.

14 Thus, because the Complaint adequately challenges the constitutionality of
15 the Ordinance under the Due Process Clause, the Court denies Defendant’s
16 motion to dismiss with respect to Plaintiffs’ Due Process claim.

17 **3. Fourteenth Amendment Equal Protection**

18 The Fourteenth Amendment Equal Protection Clause mandates that
19 “no State shall ‘deny to any person within its jurisdiction the equal protection of
20 the laws,’ which is essentially a direction that all persons similarly situated should
21 be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439
22 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

23 Plaintiffs challenge the Ordinance as unconstitutional under the Equal
24 Protection Clause because based on the date it went into effect, it distinguishes
25 between similarly situated Registrants. The Ordinance only applies to a
26 Registrant whose offense was committed on or after April 13, 2008. Ordinance
27 at § 58.0606. The Ordinance also exempts a Registrant residing outside of the
28 covered entities before April 13, 2008, even if one of the listed entities were to

1 then move within 2000 feet of the Registrant after April 13, 2008. Ordinance at
2 § 58.0605(b). Plaintiffs argue that because the Ordinance creates distinctions
3 among Registrants that are not even rationally related to public safety, the
4 Ordinance violates the Equal Protection Clause.

5 Defendant generally puts forth the premise that a prospective-only change
6 in the regulation of certain groups does not violate the Equal Protection Clause.
7 Defendant cites *People v. Floyd*, 31 Cal. 4th 179 (2003) as authority.

8 Defendant's position may be correct in certain contexts, but it is not a complete
9 statement of the law. The *Floyd* Court based its holding on the proposition that it
10 is not "unconstitutional for the legislature to specify a classification between
11 groups differently situated, *so long as a reasonable basis for the distinction*
12 *exists.*" *Floyd*, 31 Cal. 4th at 189-90 (emphasis added). In *Floyd*, the California
13 Supreme Court found that applying a regulation only to convictions that occurred
14 after the date the regulation went into effect was constitutional because the Court
15 found a "reasonable basis" for the distinctions the regulation generated. *Id.* at
16 190.

17 Defendant, however, does not provide any reasonable basis for the
18 distinctions created by the City Ordinance. Thus, the Defendant fails to
19 challenge the plausibility of the claim in the Complaint that the Ordinance is
20 unconstitutional under the Equal Protection Clause. As a result, the Court denies
21 Defendant's motion to dismiss with respect to Plaintiffs' Equal Protection claim.

22 **4. Void for Vagueness**

23 Under the Due Process Clause, "a penal statute [must] define the criminal
24 offense (1) with sufficient definiteness that ordinary people can understand what
25 conduct is prohibited and (2) in a manner that does not encourage arbitrary and
26 discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03
27 (2010) (alteration in original) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357
28 (1983)). "The void-for-vagueness doctrine embraces these requirements," *id.* at

1 403, thus addressing concerns about “fair notice” and “arbitrary and
2 discriminatory prosecutions,” *id.* at 412.

3 Plaintiffs challenge the Ordinance on vagueness grounds. Defendant
4 argues that the terms in the Ordinance are sufficiently clear so that a person of
5 ordinary intelligence would understand which places in the City are prohibited
6 and how far the boundaries of exclusion surrounding those places extend. The
7 Court, however, finds that the Complaint sufficiently alleges a cognizable void-
8 for-vagueness claim.

9 **a. Restricted Areas**

10 Section 58.0603 of the Ordinance states that “[it] is unlawful for any
11 registered sex offender to reside within 2000 feet of any of the follow places:
12 (a) Amusement center (b) Arcade (c) Child day care facility (d) Library
13 (e) Playground (f) Park (g) School.” Plaintiffs allege that the definitions of these
14 terms are open-ended and lack publication of the facilities that are covered. The
15 definition of “amusement center,” for example, includes “any establishment open
16 to the public who provides entertainment directed at minors, or whose play
17 equipment is primarily used by minors.” Ordinance at § 58.0602. Plaintiffs
18 assert that a person of ordinary intelligence cannot be expected to know
19 necessarily what kind of entertainment is “directed at minors” or what sort of play
20 equipment is “primarily used by minors.” Plaintiffs allege that the insufficient
21 definitions of the terms in Section 58.0603 “prevent Registrants from knowing the
22 precise identity and size of the facilities that meet these definitions”
23 (Compl. ¶ 47.) Plaintiffs claim that these ambiguities prevent an ordinary person
24 from being able to comply with the Ordinance and risk arbitrary enforcement.
25 Drawing all inferences in Plaintiffs’ favor, the Court finds it plausible that the
26 Ordinance does not give fair notice as to what compliance requires and exposes
27 Registrants to arbitrary and discriminatory prosecutions.

28 Defendant asserts that the “terms and phrases used in the Ordinance have

1 routinely been upheld by California courts.” (Def.s’ Reply, 10.) The Court does
2 not find Defendants’ analysis to be persuasive.

3 First, Defendant argues that this Court in *Fantasyland Video, Inc. v. County*
4 *of San Diego* cited an opinion with approval from the Florida District Court of
5 Appeal for the proposition that “a parole condition forbidding those convicted of
6 sexual crimes against children from working, volunteering, or living near any
7 ‘school, daycare center, park, playground, or other place where children regularly
8 congregate’ was ‘sufficiently precise’ and not unconstitutionally vague.” 373
9 F. Sup. 2d 1094, 1126 (S.D. Cal. 2005) (quoting *Britt v. State of Florida*, 775 So.
10 2d 415, 416-17 (Fla. Dist. Ct. App. 2001)). However, the question in *Britt v. State*
11 *of Florida* was not whether the specific terms—school, daycare center, park,
12 playground—were sufficiently precise. Rather, the Florida state court was asked
13 whether the phrase “*or other place where children regularly congregate*” was void
14 for vagueness. *Britt*, 775 So. 2d at 416-17 (emphasis added). Likewise, this
15 Court in *Fantasyland Video* did not cite *Britt* because it informed a constitutional
16 vagueness challenge to the terms school, daycare center, park, or playground.
17 The question in *Fantasyland Video* was whether the word “regularly”
18 in the context of an adult entertainment regulation including the phrase “regularly
19 appears in a state of semi-nudity” was impermissibly vague. 373 F. Sup. 2d at
20 1125-26. Thus, Defendant’s reliance on *Fantasyland Video* is misplaced.

21 Second, Defendant cites *People v. Trantham* for the proposition that the
22 word “park” is not unconstitutionally vague. The question in *Trantham*, however,
23 was not about the term “park” in and of itself. *Trantham* addressed whether a
24 late night park closure regulation was void for vagueness. 161 Cal. App. 3d
25 Supp. 1, 6 (1984). Specifically the Court analyzed the regulation in question for
26 its “proscription against any person entering, remaining, staying, or loitering in a
27 public park between the hours of 10:30 p.m. and 5 a.m.” *Id.* Consequently,
28 Defendant’s reliance on *Trantham* for the proposition that a California court found

1 that the word “park” is not unconstitutionally vague is misplaced.

2 Based only on its citations to *Fantasyland Video* and *Trantham*, Defendant
3 then contends that “[g]iven that the very words, on their own, that are used in the
4 ordinance have been upheld, plaintiffs’ [void for vagueness] claim fails.” (Def.s’
5 Reply, 10.) However, as discussed above, these two cases do not address
6 whether the language of the Ordinance is void for vagueness and are not
7 relevant to Plaintiffs’ claim.

8 **b. Measure of Distance**

9 Section 58.0604 of the Ordinance states that “[t]he 2000-foot buffer zone is
10 measured in a straight line, in all directions, without regard to intervening
11 structures, from the property line of the places listed in section 58.0603 (a)
12 through (g).” Ordinance at § 58.0604. This language, in and of itself, is
13 sufficiently clear. However, Plaintiffs claim that the Ordinance is void for
14 vagueness because it is unclear whether the measure of distance designating
15 the restricted areas includes “parking lots, storage spaces, and other structures
16 that do not typically shelter or contain people.” The Court holds that this
17 allegation supports a plausible vagueness challenge because without clarity
18 on what exactly constitutes a given restricted area, Registrants are not able to
19 determine the 2000-foot buffer zone. Without sufficient definiteness as to what is
20 included in “the places listed in section 58.0603 (a) through (g)” it is unclear how
21 to measure the buffer zone.

22 Defendant argues that the language is sufficiently precise and provides
23 example of similar language in other California statutes. Defendant is correct
24 that boundary limitations exist throughout California laws. But Plaintiffs do not
25 argue that the buffer zone created by the Ordinance is vague merely because it
26 is a boundary limitation. The Complaint asserts that the measure of distance that
27 Registrants and law enforcement are expected to calculate is impermissibly
28 vague because within the context of the Ordinance, it is difficult to ascertain the

1 property lines of the covered facilities.

2 Thus, because the Court finds that Plaintiffs' allegations sufficiently set
3 forth a cognizable legal theory challenging the Ordinance on vagueness grounds,
4 Defendant's motion to dismiss is denied as to the void for vagueness claim.

5 **5. Declaratory Relief**

6 The Declaratory Judgment Act "does not create new substantive rights, but
7 merely expands the remedies available in federal courts." *Shell Gulf of Mexico*
8 *Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014).

9 Because Plaintiffs have adequately pled violations of substantive rights in their
10 first, second, and third claims, the Court denies Defendant's motion to dismiss
11 with respect to Plaintiffs' claim for declaratory relief.

12 **IV. PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE**

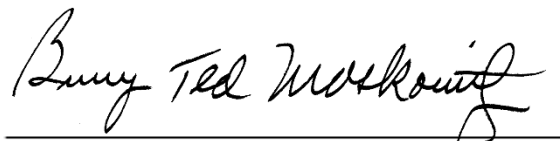
13 Plaintiffs have submitted a request for judicial notice in support of their
14 opposition to the motion to dismiss. (See Pls.' RJN.) As to the cases submitted,
15 the Court takes judicial notice and grants Pls.'s RJN in part. As to all other
16 materials submitted, the Court did not consider or rely on them and therefore
17 denies Pls.' RJN as moot in part at the motion to dismiss stage of the
18 proceedings.

19 **V. CONCLUSION AND ORDER**

20 For the foregoing reasons, the Court **denies** Defendant's motion to dismiss,
21 (ECF No. 10), and **grants in part and denies as moot in part** Plaintiffs' request
22 for judicial notice, (ECF No. 13-1).

23 IT IS SO ORDERED.

24 Dated: January 29, 2019



25
26 Honorable Barry Ted Moskowitz
27 United States District Court
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