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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL RICHARDSON, Plaintiff, **v.** **JEFFERSON SESSIONS, in his official capacity; XAVIER BECERRA, in his official capacity,** Defendants.	2:17-cv-1838 JAM AC PS **NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES** Date: February 6, 2019 Time: 10:00 a.m. Dept: 26 Judge: The Hon. Allison Claire Trial Date: None set Action Filed: 9/5/2017

NOTICE OF MOTION AND MOTION

TO PLAINTIFF:

PLEASE TAKE NOTICE THAT on February 6, 2019, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Allison Claire in Courtroom 26 of the United States District Court for the Eastern District of California, located at 501 "I" Street, Sacramento, California, Defendant Xavier Becerra will move this Court for judgment on the pleadings pursuant to rule 12(c) of the Federal Rules of Civil Procedure. This motion is made on the grounds that the first, second, third, fourth, and fifth claims fail to state a claim upon which relief can be granted and because this Court lacks subject matter jurisdiction over those claims.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, and the papers and pleadings on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Michael Richardson was convicted in 2006 of three sex offenses against a minor. After serving his prison sentence and parole term, he now brings this as-applied constitutional challenge to California's Sex Offender Registration Act (SORA), which requires him to register as a sex offender, and Megan's Law, which requires the California Department of Justice (DOJ) to make his sex offender registration information available to the public on an Internet website.

Plaintiff's Complaint alleges nine causes of action. Due to the length of the Complaint, Plaintiff Attorney General Xavier Becerra's initially responded to it by filing a Rule 12(b)(6) motion only in connection with the sixth through ninth claims. The court granted that motion and those claims have now been dismissed. *See* ECF No. 34. This motion for judgment on the pleadings now seeks dismissal of the remaining five claims.

Plaintiffs' first through fifth claims each fail as a matter of law because SORA and Megan's law are only subject to, and pass, rational basis review. The third claim for violation of the right to travel also fails because SORA and Megan's Law do not implicate Plaintiff's right to travel. Finally, to the extent the first through fifth claims relate to any federal laws or local

ordinances, Defendant Attorney General Becerra has Eleventh Amendment immunity to such claims.

BACKGROUND

I. RELEVANT FEDERAL SEX OFFENDER REGISTRATION AND NOTIFICATION STATUTES

The federal Sex Offender Registration and Notification Act (SORNA) requires all states to maintain a statewide sex offender register that conforms to the requirements in the act. 34 U.S.C. 20912(a); 34 U.S.C. 2091(10). Under SORNA, each state registry must collect and maintain, at a minimum, information on sex offenders' names, social security numbers, addresses, employers, educational institutions, vehicles, and travel plans. *Id.* at § 20914(a). Sex offenders are required to register and provide this information in each jurisdiction in which they live, work, and are enrolled as a student. *Id.* at § 2013(a). SORNA requires each state to then post sex offender information on the Internet. *Id.* at § 20920.

II. CALIFORNIA'S SEX OFFENDER REGISTRATION AND NOTIFICATION STATUTES

Offenders convicted of specified sex crimes in California have been required to register with local law enforcement since 1947. *Doe v. Harris*, 772 F.3d 563, 568 (9th Cir. 2014). Today, the statutes requiring registration are found in California's SORA, California Penal Code sections 290–290.024. This program is mandated by the federal SORNA. 34 U.S.C. § 20912. Sex offender registration is designed to promote the state's interest in controlling crime, facilitating investigation of sex crimes, and preventing recidivism in sex offenders. *See Wright v. Superior Court*, 15 Cal.4th 521, 527 (1997). Registration consists of a written statement, signed by the offender, giving information required by the California DOJ, the fingerprints and photograph of the offender, and the license plate number of any vehicle owned by, regularly driven by, or registered in the name of the offender. Pen. Code § 290.015.

In 1994, the California Legislature established a "900" telephone line, which the public could call and, for a fee, obtain information about registered sex offenders who had been convicted of designated sex crimes against children. 1994 Cal. Stats., c. 867, § 4, p. 4396-4400, effective July 1, 1995; *see* former Pen. Code § 290.4. DOJ was to operate the "900" line and furnish information if the individual identified by the caller was one of the designated sex

1 offenders. The caller would receive information about the offender's community of residence,
2 zip code, physical description, and the crimes requiring the sex offender to register. *Id.*

3 In 2004, the California Legislature enacted Penal Code section 290.46, also known as
4 "Megan's Law." Megan's Law was enacted to "ensure that members of the public have adequate
5 information about the identities and locations of sex offenders who may put them and their
6 families at risk...." 2004 Cal. Legis. Serv., Ch. 745, § 5 (A.B. 488) (West). This was achieved
7 by requiring the DOJ to maintain a publically-accessible Internet website containing sex offender
8 registration information that had previously been available only through the "900" telephone
9 number. Penal Code § 290.46(a); Stats. 2004, ch. 745 (A.B. 488). Maintaining the Megan's Law
10 website is also required by SORNA. 34 U.S.C. § 20920. The information on the site must
11 include the offender's "name and known aliases, a photograph, a physical description, including
12 gender and race, date of birth, criminal history" and, depending on the crime the offender
13 committed, either "the address at which the person resides" or "the community of residence and
14 ZIP Code in which the person resides or the county in which the person is registered as a
15 transient." Pen. Code § 290.46(b)(1), (c)(1), & (d)(1).

16 In 2006, California voters passed Proposition 83, the "Sexual Predatory Punishment and
17 Control Act: Jessica's Law." *People v. Lynch*, 2 Cal.App.5th 524, 527 (2016). Among other
18 provisions, Jessica's Law places residency restrictions on registered sex offenders. *Id.*; Penal
19 Code § 3003.5(b). However, its application is limited to sex offenders who are currently on
20 parole. *Lynch*, 1 Cal.App.5th at 527-529; 3 WITKIN, CAL. CRIM. LAW, Ch. IX, § 133 (4th ed.
21 2012); *see also Murtishaw v. Woodford*, 255 F.3d 926, 964–65 (9th Cir. 2001) (a federal court
22 will look to state court precedent to determine the meaning of a challenged state statute); *Jensen*
23 *v. Hernandez*, 864 F.Supp.2d 869 (E.D. Cal. 2012) (holding prisoner's claim not ripe where no
24 evidence suggested that the residency requirement of section 3003.5 would be a condition of his
25 parole).

26 **III. PLAINTIFF'S COMPLAINT AND FACTUAL BACKGROUND**

27 In 2006, Plaintiff Michael Richardson was found guilty in a court of law and convicted of
28 three serious sex offenses: (1) attempting to commit a "lewd or lascivious act" on a child under 14

years of age (Pen. Code § 288(a)[1]); (2) annoying or molesting a child under 18 years of age (*id.* at § 647.6[2]), and; (3) transmitting harmful matter to a minor (*id.* at § 288.2(b) [3]).[4] *See* Compl. at ¶ 15. Plaintiff does not dispute that he was guilty of these acts. *See id.* at ¶ 49. Plaintiff served a prison sentence for his crimes and completed his period of parole. *Id.* at ¶ 13.

On September 5, 2017, Plaintiff, proceeding pro se, filed the Complaint for declaratory relief. Compl. at ¶ 1. The Complaint names as defendants United States Attorney General Jefferson Sessions and California Attorney General Xavier Becerra, both in their official capacities. *Id.*

The Complaint alleges that, as applied to plaintiff, certain federal, state, and local sex offender regulatory laws are unconstitutional. *See, e.g.*, Compl. at 1, 4-5. Plaintiff alleges that these laws require him to register as a sex offender, require the publication of his information on the Megan's Law website, and restrict his travel and movements. *See id.* at pp. 4-7. The Complaint specifically appears to challenge the following California state laws:

- SORA, Penal Code sections 290[5] – 290.024, which require sex offenders to register with local law enforcement (*see* Compl. at pp. 14-16);

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[1] "Section 288(a) has two elements: (a) the touching of an underage child's body (b) with a sexual intent." *U.S. v. Farmer*, 627 F.3d 416, 419 (9th Cir. 2010); *see also People v. Martinez,* 11 Cal.4th 434, 453 (1995).

[2] Section 646.6, subdivision (a) requires: "(1) conduct a normal person would unhesitatingly be irritated by, and (2) conduct motivated by an unnatural or abnormal sexual interest in the victim. *People v. Brandao*, 203 Cal. App. 4th 436, 440 (2012) (internal quotation omitted).

[3] For the purpose of section 288.2 "harmful matter" means "matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." Pen. Code § 313; *see also id.* at § 288.2, subd. (c).

[4] Defendant Becerra asks this Court to take judicial notice of the content of Plaintiff's profile on the website pursuant to Federal Rule of Evidence 201(b)(2) (facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). *See also Terrebonne v. Blackburn,* 646 F.2d 997, 1000 n. 4 (5th Cir.1981) ("Absent some reason for mistrust, courts have not hesitated to take judicial notice of agency records and reports.").

[5] The current version of section 290 is effective until January 1, 2021. Beginning on that date, pursuant to Senate Bill 384, section 290 will provide for three tiers of sex offender registration, rather than lifetime registration. S. 384, 2017-2018 Reg. Sess. (Cal. 2017). The Complaint appears to challenge the currently operative version of section 290. In any event, a challenge to a future version of the statute would be unripe. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (ripeness requirement "designed to prevent

- Megan's Law, Penal Code section 290.46, which mandates that some sex offender's information be posted and available to the public on the Megan's Law website (*see id.*); and,
- California Penal Code § 3003.5(b), part of "Jessica's Law," which restricts where paroled sex offenders may reside (*see e.g. id.* at pp. 4-5, 60).[6]

The Complaint also challenges federal law related to sex offenders, including the federal SORNA (34 U.S.C. 209014 *et seq.*), as well as unspecified local ordinances.

The Complaint originally asserted nine distinct claims. (Compl.. at ¶¶ 66, 91, 117, 155, 195, 223, 234, 310, 326.)

IV. Relevant Procedural Background

On November 27, 2017, pursuant to Federal Rules of Civil Procedure 12(b)(1) & (6), Defendant Becerra moved to dismiss the sixth through ninth causes of action in the Complaint. This court granted that motion without leave to amend in an order dated October 24, 2018. *See* ECF No. 34. Defendant Jefferson Sessions was previously dismissed by Plaintiff on January 22, 2018. *See* ECF No. 21. As a result, the only remaining claims in this action are the first through fifth causes of action against Defendant Attorney General Becerra. These claims allege that the challenged laws:

1. violate of his liberty interest in his reputation (Compl. at ¶¶ 57, 66-90);
2. violate his right to equal protection because he is "not being treated the same as all other felons or other individuals in similar circumstances" (*id.* at ¶¶ 58, 91-116);
3. are vague and infringe on his freedom of movement and association (*id.* at ¶¶ 59, 117-54);
4. constitute unreasonable, arbitrary, and oppressive official action (*id.* at ¶¶ 60, 155-94), and;
5. violate his right to substantive due process (*id.* at ¶¶ 61, 195-222).

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the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements) (internal quotation omitted); *see also Portman v. Cty of Santa Clara*, 995 F.2d 898, 902-03 (1993) (ripeness requires actual injury-in-fact and an adequate record for review).

[6] The Complaint also mentions in passing Penal Code section 3003 and Welfare and Institutions Code section 6608.5, which are not discussed in this motion because clearly they are inapplicable here. Penal Code section 3003, which is also part of Jessica's Law, prescribes the parole process for sex offenders and Plaintiff is not on parole. Welfare and Institutions Code section 6608.5 governs the release and placement of sex offenders following civil commitment (not imprisonment). This case does not involve civil commitment.

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LEGAL STANDARD FOR A MOTION FOR JUDGMENT ON THE PLEADINGS

2 "A motion for judgment on the pleadings "challenges the legal sufficiency of the opposing
3 party's pleadings." *Perez v. Wells Fargo and Co.*, 75 F. Supp. 3d 1184, 1187 (N.D. Cal. 2014)
4 (internal quotation omitted). "[A] judgment on the pleadings is appropriate when the pleaded
5 facts, accepted as true and viewed in the light most favorable to the non-moving party, entitle the
6 moving party to a judgment as a matter of law. *Id.* (citing *Hoeft v. Tucson Unified Sch. Dist.*, 967
7 F.2d 1298, 1301 (9th Cir. 1992) and *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir.2009)).

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ARGUMENT

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I. PLAINTIFF DOES NOT CHALLENGE JESSICA'S LAW

10 As a threshold matter, Plaintiff has conceded that his Complaint does not challenge the
11 constitutionality of California's Jessica's Law. ECF No. 16 at 15 [Plaintiff's Opposition to
12 Motion to Dismiss]. Indeed, any such claim would fail as to him, because he is not subject to
13 Jessica's Law at all.

14 Jessica's Law applies only to sex offenders who are currently on parole. *People v. Lynch*, 2
15 Cal.App.5th 524, 527 (2016); see also *Jensen v. Hernandez*, 864 F.Supp.2d 869 (E.D. Cal. 2012);
16 Pen. Code § 3003.5(b). Plaintiff expressly alleges in the Complaint that he has already completed
17 his parole term. Compl. at ¶ 50. Any declaratory relief or injunction prohibiting application of
18 the law would be moot and is therefore not proper. *See ACLU of Nev. v. Masto*, 670 F.3d 1046,
19 1061-62 (2012) (case rendered moot and court lacked jurisdiction where Nevada admitted that it
20 did not intend to attempt to enforce sex offender residency statute retroactively).

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II. THE FIRST AND FIFTH CLAIMS ALLEGING VIOLATION OF SUBSTANTIVE DUE PROCESS BOTH FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED
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23 The Complaint asserts two separate claims for violation of Plaintiff's substantive due
24 process rights. The first claim alleges that Megan's Law violates his substantive "right of
25 reputation," specifically. Compl. at 49, ¶ 198. The fifth claim more generally alleges that both
26 Megan's Law and SORA violate his substantive due process rights. Compl. at 49, ¶ 199. Both
27 claims fail as a matter of law because both Megan's Law and SORA are subject to, and pass,
28 rational basis review.

1 **A. Applicable Standard of Review for Substantive Due Process Claims**

2 Substantive due process "forbids the government from depriving a person of life, liberty,
3 or property in such a way that 'shocks the conscience' or 'interferes with the rights implicit in the
4 concept of ordered liberty." *Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009) (quotations
5 omitted).

6 "In a substantive due process analysis, we must first consider whether the statute in
7 question abridges a fundamental right." *U.S. v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir.
8 2012) (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *Ching v. Mayorkas*, 725 F.3d 1149,
9 1155 (9th Cir. 2013). "Those rights are few and include the right to marry, to have children, to
10 direct the education and upbringing of one's children, to marital privacy, to use contraception, to
11 bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment." *Juvenile*
12 *Male*, 670 F.3d at 1012 (citing *Glucksberg*, 521 U.S. at 720). State action that infringes on a
13 fundamental right must be narrowly tailored to serve a compelling state interest. *Doe v.*
14 *Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004); *Washington v. Glucksberg*, 521 U.S. 702, 722
15 (1997).

16 However, state actions infringing on non-fundamental rights need only pass rational basis
17 review to survive a substantive due process challenge. *Doe v. Tandeske*, 361 F.3d 594, 597 (9th
18 Cir. 2004) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997)). That review requires
19 a statute only to implement a "rational means of achieving a legitimate governmental end…."
20 *United States v. Alexander*, 48 F.3d 1477, 1491 (9th Cir. 1995); *see also Patel v. Penman*, 103
21 F.3d 868, 874 (9th Cir. 1996) (to establish a violation of substantive due process, "a plaintiff is
22 ordinarily required to prove that a challenged government action was clearly arbitrary and
23 unreasonable, having no substantial relation to the public health, safety, morals, or general
24 welfare" (internal quotation omitted)). In other words, for rational basis review of a substantive
25 due process challenge "[courts] do not require that [] legislative acts actually advance its stated
26 purposes, but instead look to whether the governmental body *could* have had no legitimate reason
27 for its decision." *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994)
28 (emphasis in original) (internal quotation omitted).

1 **B. Megan's Law Does Not Violate Plaintiff's Substantive Due Process Rights**

2 In this action, Megan's Law is subject only to rational basis review, because fundamental
3 rights do not include the right to be free of sex offender Internet notification laws. *See Doe v.*
4 *Tandeske*, 361 F.3d 594, 596-597 (9th Cir. 2004) (internet publication provisions of Alaska's
5 SORA do not implicate fundamental rights); *U.S. v. Juvenile Male*, 670 F.3d 999, 1011-1013 (9th
6 Cir. 2012) ("adverse publicity or harm to the reputation of sex offenders" resulting from SORNA
7 "does not implicate a liberty interest for the purposes of due process analysis"). This is because
8 this type of right is not "so rooted in the traditions and conscience of our people as to be ranked as
9 fundamental," nor is such right "implicit in the concept of ordered liberty such that neither liberty
10 not justice would exist if they were sacrificed." *Juvenile Male*, 670 F.3d at 1012 (internal
11 quotations omitted); *Tandeske*, 361 F.3d at 597.

12 Megan's Law satisfies rational basis review. California's Megan's Law "serve[s] a
13 legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the
14 risk of sex offenders in their community." *See Tandeske*, 361 F.3d at 597 (internal quotation
15 omitted); *see also Juvenile Male*, 670 F.3d at 1012. Indeed, the enacting statute provided:

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> In order to ensure that members of the public have adequate information about the identities and locations of sex offenders who may put them and their families at risk, it is necessary that this act take effect immediately.

19 2004 Cal. Legis. Serv., Ch. 745, § 5 (A.B. 488) (West). This is a legitimate purpose. Plaintiff
20 was found guilty in a court of law and convicted of three sex offenses. These types of serious
21 crimes involve underage victim(s) who cannot fully protect themselves. It is therefore rational for
22 the Legislature to provide the public, and parents in particular, with "adequate information" about
23 the identity and location of Plaintiff so that they may attempt to protect their children from him
24 and *any* level of risk he may pose.

25 Because Megan's Law satisfies rational basis review as applied to Plaintiff, it does not
26 violate Plaintiff's substantive due process rights.

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C. SORA Also Does Not Violate Plaintiff's Substantive Due Process Rights

Plaintiff also appears to allege that the sex offender registration requirements in SORA violate his substantive due process rights. The Ninth Circuit has squarely held that the right to be free of SORA's sex offender registration requirements is not a fundamental right and need only satisfy rational basis review. *Litmon v. Harris*, 768 F.3d 1237, 1241-1242 (9th Cir. 2014).

Here, there is a rational basis for application of SORA's registration laws to Plaintiff. Like Megan's Law, SORA promotes public safety, because it provides information to both law enforcement and (through the Megan's Law website) the community to allow them to monitor the location of sex offenders. *See id.* at 1242.[7]

Because SORA satisfies rational basis review as applied to Plaintiff, it does not violate Plaintiff's substantive due process rights.

III. THE FIRST CLAIM FOR RIGHT OF PUBLICITY ALSO FAILS TO STATE A CLAIM TO THE EXTENT IT ALLEGES VIOLATION OF PROCEDURAL DUE PROCESS

Although it is unclear whether Plaintiff's first claim also alleges a violation of procedural due process, such a claim would also fail. A procedural due process claim requires: (1) a cognizable liberty or property interest that has been interfered with by the state; and (2) a lack of constitutionally sufficient procedures attendant to the deprivation. *Juvenile Male*, 670 F.3d at 1013; *Carver v. Lehman*, 558 F.3d 869, 972 (9th Cir. 2009). Neither of these elements has been alleged in the first claim.

First, Plaintiff's reputational interests are not a cognizable liberty interest for the purpose of a procedural due process claim. "Mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 6-7 (2003) (Connecticut sex offender Internet notification provision does not violate procedural due process). As a result, the "adverse publicity or harm to the reputation of sex

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[7] In *Litmon*, the offender was a "sexually violent offender" as defined by section 6600 of the Welfare and Institutions Code. *Litmon*, 768 F.3d at 1240. Although Plaintiff here has not been identified as a "sexually violent offender" under section 6600, his registration requirements are also substantially less that the 90-day requirement at issue in *Litmon*, and still serve the same legitimate public safety purposes.

offenders does not implicate a liberty interest for the purpose of due process analysis." *Juvenile Male*, 670 F.3d at 1013 (holding that SORNA does not violate procedural due process).

Plaintiff may argue that that he has a "stigma-plus" claim based on "the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested, *plus* the denial of 'some more tangible interest such as employment,' or the alteration of a right or status recognized by state law." *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (emphasis in original) (*citing Paul v. Davis*, 424 U.S. 693, 701 (1976)). Here, Plaintiff does not contest the accuracy of the conviction information posted on the Megan's Law website. Moreover, the stigma-plus test requires that alleged defamation "be accompanied by an injury *directly caused* by the Government, rather than an injury caused by the act of some third party" in response to official statements. *WMX Techs., Inc. v. Miller*, 80 F.3d 1315, 1320 (9th Cir. 1996) (emphasis added), *appeal dismissed on other grounds*, 104 F.3d 1133 (9th Cir. 1997) (en banc); *see also Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 971 (9th Cir. 2010). However, Plaintiff claims only that the stigma has caused him to suffer injuries from the acts of private parties. *See e.g.,* Compl. at 68, 69, 76. Plaintiff's reputational injury is therefore not a cognizable interest for the purpose of procedural due process.

Second, the requirement of constitutionally-sufficient procedures is met where, as here, a plaintiff's inclusion in a sex offender registry turns on the fact of his or her past conviction for a sex offense. *See Connecticut Dept. of Public Safety*, 538 U.S. at 6-7 (conviction for sex offense provided adequate procedures for inclusion in Connecticut's sex offender registry); *Tandeske*, 361 F.3d at 597 (conviction for sex offense provided adequate procedures to be subject to federal SORNA requirements). This is because the offender has already had a procedurally-safeguarded opportunity to contest the fact of the sex offense. *Connecticut Dept. of Public Safety*, 538 U.S. at 7. Here, because Plaintiff's inclusion in the Megan's Law Internet database is based on his sex offense conviction, he has not been denied adequate procedures. *See* Pen. Code §§ 290(c) (identifying persons required to register).

To the extent the first claim alleges that Megan's Law violates Plaintiff's procedural due process reputational rights, that claim fails as a matter of law.

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IV. The Second Claim for Violation of Equal Protection Fails To State a Claim Upon Which Relief Can Be Granted

Plaintiff's second claim for violation of equal protection also fails.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). "Government actions that do not involve suspect classifications will be upheld if they are rationally related to a legitimate state interest." *Juvenile Male*, 670 F.3d at 1009 (quoting *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005)); *Cleburne*, 473 U.S. at 400. Sex offenders are not a suspect or protected class. *Id.*; *U.S. v. LeMay*, 260 F.3d 1018, 1030-31 (9th Cir. 2001).

To survive rational basis review of an equal protection challenge, there need only be "any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085 (9th Cir. 2015). In other words, "[w]here there are plausible reasons for [the legislature's] action, [the court's] inquiry is at an end." *Beach Communications*, 508 U.S. at 313, 314. "A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315 (citing *Vance v. Bradley*, 440 U.S. 93, 111 (1979) and *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464 (1981)); *Angelotti Chiropractic*, 791 F.3d at 1086.

Plaintiff alleges in the Complaint that his right to equal protection has been violated because as a sex offender, under Megan's Law and SORA, he is being irrationally discriminated against compared to other types of felons. Compl. at p. 22, ¶ 91, 92; p. 28, ¶ 116. Because sex offenders are not a protected class, rational basis review applies. *Juvenile Male*, 670 F.3d at 1009. Megan's Law and SORA both pass this level of review, because Plaintiff cannot show that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications, Inc.*, 508 U.S. at 313.

Megan's Law and SORA, like the Alaska sex offender registration and notification laws at issue in Smith v. Doe, have the "legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." Smith v. Doe, 538 U.S. 84, 102–03 (2003). As explained above in Argument sections 1(A) and 1(B), Megan's Law and SORA legitimately promote public safety by providing law enforcement and the public (including parents of young children) with basic information that allows them to identify convicted sex offenders who live nearby. It is particularly rational to apply these laws to Plaintiff, as opposed to other types of felons, both because of the serious nature of his crimes and because his victim(s) were children.

Because there is a rational basis for SORA's and Megan's Law's application to Plaintiff, his second claim for violation of equal protection must fail.

V. THE THIRD CLAIM FOR "RIGHT TO TRAVEL AND ASSOCIATION AND UNCONSTITUTIONALLY VAGUE" FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. SORA and Megan's Law Are Not Unconstitutionally Vague

Plaintiff alleges in the third claim that the array of state and local residency and presence restrictions across the country against sex offenders infringes on his constitutional rights to travel and associate because they are vague. *See* Compl. at ¶¶ 117-119, 124. These allegations do not allege any claim with respect to SORA or Megan's Law because those laws do not impose any residency or presence restrictions. *See* Compl. at pp. 30-39. His third claim should therefore be dismissed.

Plaintiff should not be granted leave to amend the third claim because, as a matter of law, SORA and Megan's Law are not unconstitutionally vague. "To pass constitutional muster against a vagueness attack, a statute must give a person of ordinary intelligence adequate notice of the conduct it proscribes." *Craft v. Nat'l Park Serv.*, 34 F.3d 918, 921 (9th Cir. 1994); *accord California Pacific Bank v. Federal Deposit Insurance Corp.*, 885 F.3d 560, 571 (9th Cir. 2018). Megan's Law does not proscribe any conduct of Plaintiff; rather, it requires DOJ to publish Plaintiff's information on the Internet. *See* Pen. Code § 290.46. SORA, meanwhile, precisely sets forth the specific events triggering Plaintiff's obligation to register with local law

enforcement. *See id.* at §§ 290(a) (general registration requirement), 290.009 (registration for university students); 290.012 (annual registration update). These provisions provide adequate notice, as demonstrated by Plaintiff's allegations throughout the Complaint regarding the alleged burden of these requirements.

SORA and Megan's Law are therefore not unconstitutionally vague as applied to Plaintiff.

B. SORA and Megan's Law Do Not Otherwise Unconstitutionally Infringe on the Right to Travel

Aside from vagueness, Plaintiff does not allege that SORA or Megan's Law infringes on his constitutional right to travel for any other reason. *See* Compl. at pp. 29-39. He should not be granted to leave amend to so allege.

First, as an Internet notification law only, Megan's Law does not impose any travel restrictions or other obligations on Plaintiff. It therefore does not unconstitutionally infringe on his right to travel.

Second, although SORA requires Plaintiff to register as a sex offender with local law enforcement, that requirement does not infringe on Plaintiff's right to travel. *See Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) ("minor burdens impacting interstate travel…do not constitute a violation of that right"). Under SORA, Plaintiff remains free to travel when and where he likes as long as he registers as a sex offender with local law enforcement in person once a year and on occasions related to his college academic terms. Compl. at p. 81; Pen. Code §§ 290(a), 290.009, 290.012.

Even if SORA's registration requirement did restrict Plaintiff's ability to travel, it would be subject only to rational basis review. With respect to inter-state travel, "when the right to travel is implicated but not unreasonably burdened, the statute need only be rationally related to a legitimate governmental interest to pass constitutional muster." *U.S. v. Benevento* 633 F.Supp.2d 1170, 1186 (D. Nev. 2009) (holding that the "inconvenience" of the federal SORNA requirement for sex offenders to register upon interstate travel is "justified in light of the purpose behind the registration requirements"); *compare Matsuo v. U.S.*, 586 F.3d 1180, 1183 (9th Cir. 2009) (strict scrutiny required when a law "(1) prevent[s] citizens from entering or leaving; (2) treat[s]

temporarily-present citizens of other states as 'unfriendly aliens' rather than as 'welcome visitors'; or (3) discriminat[es] against citizens of other states who elect to become permanent residents."). Rational basis review also applies to restrictions on international travel.[8] *Eunique v. Powell* 302 F.3d 971, 973 (9th Cir. 2002). SORA's registration requirements withstand this level of scrutiny because, as explained above, they are reasonably related to promoting public safety.

Plaintiff's claim for violation of his constitutional right to travel fails as a matter of law.

VI. THE FOURTH CLAIM FOR "RIGHT TO BE FREE FROM UNREASONABLE, ARBITRARY, AND OPPRESSIVE OFFICIAL ACTION" FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In his Fourth Claim, Plaintiff alleges that SORA and Megan's Law violate his "constitutionally protected liberty to be free from unreasonable, arbitrary, and oppressive official actions, which is protected under the Fifth and Fourteenth Amendments of the United States Constitution." Compl. ¶¶ 60, 155-94. This claim is simply a reformulation of Plaintiff's substantive due process claim. *See* U.S. CONST. amends. V & XIV, § 1; *see also Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 ("Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality."); *see also U.S. v. Alexander*, 48 F.3d 1477, 1491 (9th Cir. 1995) ("If a statute is not arbitrary, but implements a rational means of achieving a legitimate governmental end, it satisfies due process.").

As explained in Argument section I, *supra*, Plaintiff has not and cannot state a claim for violation of substantive due process, because Megan's Law and SORA satisfy rational basis review.

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[8] Strict scrutiny may be applicable in cases where international travel restrictions also implicate First Amendment concerns. *Eunique*, 302 F.3d at 973; *see Aptheker v. Secretary of State*, 378 U.S. 500, 501-02, 514 (1964) (statute prohibiting international travel by members of the Communist Party was unconstitutional as not "narrowly drawn"). Although Plaintiff generally alleges that restrictions on his travel prevent him from "associating" with family members, he does not allege that any of those family members reside outside the U.S. *See* Compl. at pp. 29-39. Even if he did, this would not implicate the First Amendment, since all travel restrictions could then be challenged based on one's right to "associate" with the people at any destination, thus swallowing the rule of rational basis review. In any event, Plaintiff is free to visit and associate with his family members under SORA and Megan's Law.

1 SORA and Megan's Law are therefore not unconstitutionally "unreasonable, arbitrary, [or]
2 oppressive" under the Fifth and Fourteenth Amendments.

3 4 **VII. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ADJUDICATE CLAIMS 1 THROUGH 5 AGAINST DEFENDANT BECERRA TO THE EXTENT THEY CHALLENGE FEDERAL LAWS OR LOCAL ORDINANCES**

5 In addition to challenging SORA and Megan's Law, Plaintiff's first through fifth claims
6 also appear to challenge the as-applied constitutionality of federal statutes and unspecified local
7 ordinances. *See*, *e.g.*, Compl. at ¶¶ 14-16, 56. Under the Eleventh Amendment, Defendant
8 Becerra is immune from these challenges. This court therefore lacks federal subject-matter
9 jurisdiction over those claims. *See Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992).

10 The Eleventh Amendment bars suit against a state or its instrumentalities for legal or
11 equitable relief in the absence of consent by the state or an abrogation of that immunity by
12 Congress. *Papasan v. Allain*, 478 U.S. 265, 276-77 (1986); *Pennhurst State Sch. & Hosp. v.*
13 *Halderman*, 465 U.S. 89, 100 (1984). Section 1983 does not abrogate a state's Eleventh
14 Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 1145 (1979). Nor
15 has the State of California waived that immunity with respect to claims brought under section
16 1983 in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S.Ct. 3142,
17 3147 (1985).

18 "The Eleventh Amendment [also] bars a suit against state officials when 'the state is the
19 real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101 (citations omitted); *see Almond*
20 *Hill Sch. v. U.S. Dept. of Agric.*, 768 F.2d 1030, 1033 (9th Cir. 1985). The "general rule is that
21 relief sought nominally against an officer is in fact against the sovereign if the decree would
22 operate against the latter." *Pennhurst*, 465 U.S. at 101 (citation omitted). "[A]s when the State
23 itself is named as the defendant, a suit against state officials that is in fact a suit against a State is
24 barred regardless of whether it seeks damages or injunctive relief." *Id.* at 101-02 (citation
25 omitted).

26 The Supreme Court recognized a limited exception to Eleventh Amendment immunity in
27 *Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* exception allows "suits for
28 prospective declaratory and injunctive relief against state officers, sued in their official capacities,

1 to enjoin an alleged ongoing violation of federal law." *Agua Caliente Band of Cahuilla Indians v.*
2 *Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000). However, for the *Ex parte Young* exception to
3 apply "such officer must have some connection with the enforcement of the act, or else it is
4 merely making him a party as a representative of the State, and thereby attempting to make the
5 State a party." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (quoting *Ex parte Young*, 209
6 U.S. at 157). "This connection must be fairly direct; a generalized duty to enforce state law or
7 general supervisory power over the persons responsible for enforcing the challenged provision
8 will not subject an official to suit." *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir.
9 1992) (citing *Long*, 961 F.2d 151, 152; *L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 714 F.2d
10 946, 953 (9th Cir. 1983)).
11 Plaintiff has presumably sued Defendant Becerra, the California Attorney General, because
12 he is the "chief law officer of the State, with the generalized duty "to see that the laws of the State
13 are uniformly and adequately enforced." *See* Cal. Const., art. V, § 13. However, Ninth Circuit
14 case law demonstrates that this connection is insufficiently direct to invoke *Ex parte Young.*
15 In *Long*, deputy sheriffs and members of the California Highway Patrol had conducted a
16 warrantless surprise search of a motorcycle repair shop pursuant to a provision in the California
17 Vehicle Code that authorized such searches. *Long*, 772 F.Supp. at 1142. One of the operators of
18 the repair shop was arrested in connection with a search, and filed suit challenging the
19 constitutionality of the Vehicle Code provision. *Id.* at 1142-1143. The operators named the
20 Attorney General and sought to enjoin the Attorney General from enforcing the statute. *Id.*
21 In directing the district court to dismiss the Attorney General on Eleventh Amendment
22 grounds, the Ninth Circuit stated that "there must be a connection between the official sued and
23 enforcement of the allegedly unconstitutional statute, and there must be a threat of enforcement."
24 *Long*, 961 F.2d at 152. The Ninth Circuit found that the "general supervisory powers of the
25 California Attorney General" did not establish the connection with enforcement required by *Ex*
26 *parte Young. Id.* (citing *S. Pac. Transp. Co. v. Brown*, 651 F.2d 613, 614 (9th Cir. 1980) (as
27 amended)); *accord L.A. County Bar Ass'n*, 979 F.2d at 704. There also was no threat that the
28 Vehicle Code provision would be enforced by the Attorney General, who "ha[d] not in any way

indicated that he intend[ed] to enforce [the provision]." *Id.* "In addition, the searches of plaintiffs' premises were not the result of any action attributable or traceable to the Attorney General." *Id.* Accordingly, the Ninth Circuit held that "[a]bsent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *Id.*

The circumstances here are similar to those in *Long*. Here, the Complaint alleges no direct connection between the Defendant Becerra and the enforcement of any federal laws (other than those already encompassed in SORA and Megan's Law) or any local ordinances against Plaintiff. Moreover, Plaintiff has shown no "real likelihood" that Defendant Becerra will enforce any federal law or local ordinance against Plaintiff. *See Long*, 961 F.2d at 152. Accordingly, the *Ex parte* Young exception does not apply in this case with respect to any claims against Defendant Becerra related to the constitutionality of federal or local laws. The Court, therefore, should grant Defendant Attorney General's motion for judgment on the pleadings for lack of subject matter jurisdiction.

CONCLUSION

For the reasons above, Defendant Becerra's motion for judgment on the pleadings as to the first through fifth claims should be granted without leave to amend.

Dated: October 31, 2018

Respectfully Submitted,

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