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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL RICHARDSON,

Plaintiff,

v.

JEFFERSON B. SESSIONS, *et al.*,

Defendants.

Case No. 2:17-cv-01838-JAM-AC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT JEFFERSON B. SESSIONS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

United States Constitution

Federal Cases

Federal Statutes and Rules

Federal Legislative Materials

Other Materials

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2006, Plaintiff Michael Richardson was convicted in California of several sex crimes involving children. That same year, Congress passed the federal Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. §§ 20901–62, to overhaul existing federal and state programs to register convicted sex offenders and notify communities of their whereabouts.

Since SORNA's enactment over a decade ago, the Ninth Circuit and other courts have repeatedly upheld the statute against constitutional challenges. Now, Plaintiff seeks to revisit these long-rejected theories in his Complaint for declaratory and injunctive relief against the United States Attorney General. The Complaint also includes claims against California's Attorney General and the State's sex-offender registration and notification laws.

As detailed below, Plaintiff's claims against the United States Attorney General must be dismissed as time-barred. Further, even assuming Plaintiff's claims were timely, they fail for the reasons articulated by the Ninth Circuit and numerous other courts. Finally, most of Plaintiff's claims attack local laws that allegedly restrict where sex offenders may reside, work, recreate, or otherwise be present, which have nothing to do with SORNA and thus fail as a matter of law.

II. BACKGROUND

A. The Sex Offender Registration and Notification Act of 2006

In the early 1990s, States began enacting registration and community-notification programs to monitor the whereabouts of persons convicted of sex crimes. *Nichols v. United States*, 136 S. Ct. 1113, 1116 (2016). Congress followed suit in 1994 by enacting the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, tit. XVII, § 170101, 108 Stat. 2038 (Sept. 13, 1994).

Relying on the federal spending power, the Wetterling Act encouraged states to adopt sex-offender registration laws and imposed federal penalties on federal sex offenders who failed to register in the states in which they lived, worked, and studied. *United States v. Elk Shoulder*, 738 F.3d 948, 950 (9th Cir. 2013). By 1996, every state, the District of Columbia, and the federal government had enacted some form of a sex-offender registry. *Nichols*, 136 S. Ct. at 1116.

Although the Wetterling Act succeeded in encouraging states to enact sex-offender registries, the law ultimately yielded a "'a patchwork of federal and 50 individual state registration systems,' with 'loopholes and deficiencies'" that resulted in sex offenders "becoming 'missing' or 'lost.'" *Id.* at 1119. Thus, in 2006, Congress created a comprehensive set of federal standards to govern state sex-officer registration programs by enacting SORNA as part of the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, tit. 1, §§ 101–55, 120 Stat. 587 (July 27, 2006).

Congress enacted SORNA "to protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." 34 U.S.C. § 20901; *see* H.R. Rep. 109-218, pt. 1, at 24 (Sept. 9, 2005) (recognizing "a strong public interest in finding [sex offenders] and having them register with current information to mitigate the risks of additional crimes against children"). In enacting SORNA, Congress reaffirmed legislative findings that recidivism rates among sex offenders are high and underreported. *See* H.R. Rep. 109-218, pt. 1, at 22–23 (Sept. 9, 2005) (discussing reports from the Center for Sex Offender Management and the Department of Justice finding that official records underreported sex offenses by a factor of 2.4; released sex offenders were four times more likely to be arrested for a sex crime than released non-sex offenders; and 5.3 percent of released sex offenders are arrested for a new sex crime within three years of release).

Like the Wetterling Act, SORNA conditions federal funding on a state's implementation of sex-offender registration and notification requirements. 34 U.S.C. § 20927(a). Each State must collect specific information from sex offenders (*e.g.*, names, addresses, physical descriptions, criminal histories, and photographs) and maintain the registration for a period of time depending on the nature of the sex offense and the offender's history of recidivism. *Id.* §§ 20911, 20914–15. Each state must notify certain federal agencies and other jurisdictions regarding its registrants. *Id.* § 20923. SORNA also provides for public dissemination of registrant information on the Internet. *Id.* § 20920.

SORNA defines "sex offender" as "an individual who was convicted of a sex offense." *Id.* § 20911(1). In turn, "sex offense" is defined as "a criminal offense that has an element involving a sexual act or sexual contact with another." *Id.* § 20911(5)(A)(i). A sex offender must initially register before completing a period of imprisonment, or within three business days of sentencing if imprisonment is not part of the sentence. *Id.* § 20913(b). Thereafter, a sex offender must keep his or her

registration current in each jurisdiction where he or she resides, works, or studies by appearing in person quarterly, semiannually, or annually depending on his or her criminal history, and within three business days of a change in name, residence, employment, or student status. *Id.* §§ 20913(c), 20918.

Under SORNA, federal sex offenders or sex offenders who travel in interstate commerce and fail to register or update their registration are subject to criminal penalties. 18 U.S.C. § 2250(a). SORNA does not contain any prohibitions or restrictions on where sex offenders may live, work, worship, study, recreate, or travel, nor does it limit the persons with whom sex offenders may reside or associate. *See generally* Pub. L. No. 109-248, tit. 1, §§ 101–55, 120 Stat. 587 (July 27, 2006).

Since its passage, the Ninth Circuit and other courts have repeatedly rejected constitutional challenges to SORNA, consistent with authorities addressing similar sex-offender registration and notification programs. *See, e.g.*, *United States v. Elk Shoulder*, 738 F.3d 948, 953–54 (9th Cir. 2013); *United States v. Elkins*, 683 F.3d 1039, 1043–49 (9th Cir. 2012); *United States v. Juvenile Male*, 670 F.3d 999, 1008–15 (9th Cir. 2012); *United States v. Young*, 585 F.3d 199, 202–06 (5th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1209 (11th Cir. 2009); *McCarty v. Roos*, 998 F. Supp. 2d 950, 953–57 (D. Nev. 2014), *aff'd*, 689 F. App'x 576 (9th Cir. 2017); *United States v. Benevento*, 633 F. Supp. 2d 1170, 1177–87 (D. Nev. 2009); *see also Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 1–8 (2003); *Smith v. Doe*, 538 U.S. 84, 92–106 (2003); *Doe v. Kerry*, No. 16-654, 2016 WL 5339804, at *16–26 (N.D. Cal. Sept. 23, 2016).

B. Plaintiff's Lawsuit

In 2006, Plaintiff was convicted in California of attempted lewd or lascivious acts with a child under the age of fourteen, Cal. Penal Code § 288(a); annoying or molesting a child under the age of eighteen, *id.* § 647.6(a); and distributing harmful matter depicting a minor or sent to a minor via the Internet or e-mail, *id.* § 288.2(b). *See* Compl. ¶ 223.[1] Plaintiff alleges that his criminal convictions arose from conduct occurring in April 2004. *Id.* ¶ 49.

Plaintiff filed this action on September 5, 2017. Relying on the waiver of sovereign immunity in the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, Plaintiff seeks declaratory and injunctive

[1] *See also* Cal. Dep't of Justice, California Megan's Law Website, https://www.meganslaw.ca.gov (last visited Jan. 29, 2018).

relief against the United States Attorney General in his official capacity for alleged constitutional violations that Plaintiff attributes to SORNA. Compl. (ECF No. 1) ¶¶ 44, 55. Plaintiff identifies nine violations of the First, Fifth, Eighth, and Thirteenth Amendments, as well as the Constitution's prohibition on bills of attainder and *ex post facto* laws.[2] Specifically, Plaintiff contends that SORNA:

1. violates his liberty interest in his reputation, *id.* ¶¶ 57, 66–90;
2. deprives him of the equal protection of the laws because he is "not being treated the same as all other felons or other individuals in similar circumstances," *id.* ¶¶ 58, 91–116;
3. is vague and infringes on his freedom of movement and association, *id.* ¶¶ 59, 117–54;
4. constitutes unreasonable, arbitrary, and oppressive official action, *id.* ¶¶ 60, 155–94;
5. violates his right to substantive due process, *id.* ¶¶ 61, 195–222;
6. is an *ex post facto* law, *id.* ¶¶ 62, 223–33;
7. constitutes a bill of attainder in violation of the separation of powers, *id.* ¶¶ 63, 234–309;
8. inflicts cruel and unusual punishment, *id.* ¶¶ 64, 310–25; and
9. subjects him to involuntary servitude, *id.* ¶¶ 65, 326–37.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see id.* at 679 (explaining that allegations containing "no more than conclusions[] are not entitled to the assumption of truth"). In ruling on a motion to dismiss,

[2] As against the United States Attorney General, Plaintiff's allegations that SORNA constitutes a bill of attainder or *ex post facto* law or deprives him of equal protection arise under Section 9 of Article I and the Fifth Amendment, respectively, rather than Section 10 of Article I and the Fourteenth Amendment, which apply to the states.

the court may consider documents that are not physically attached to the complaint if they are matters of public record, or if their authenticity is not contested and the plaintiff's complaint necessarily relies on them. *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).

IV. ARGUMENT

A. Plaintiff's claims against Defendant Sessions are time-barred.

A lawsuit against an officer of the United States in his or her official capacity is an action against the United States. *Balser v. Dep't of Justice*, 327 F.3d 903, 907 (9th Cir. 2003). Sovereign immunity shields the United States from suit absent a waiver "unequivocally expressed in statutory text." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); *Lane v. Pena*, 518 U.S. 187, 192 (1996). "The party who sues the United States bears the burden of pointing to such an unequivocal waiver of immunity." *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983).

The APA contains a broad waiver of sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity." 5 U.S.C. § 702; *see also id.* § 706(2) (directing federal courts to set aside agency action that is "contrary to constitutional right, power, privilege, or immunity"). Claims asserted under the APA are subject to a six-year statute of limitations. 28 U.S.C. § 2401(a) (providing that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues"); *see Wind River Min. Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991).

Here, Plaintiff relies on the APA's waiver of sovereign immunity to seek declaratory and injunctive relief against Defendant Sessions in his official capacity as the United States Attorney General. Compl. ¶ 44. But Plaintiff did not file this lawsuit until September 2017, even though his convictions occurred in 2006 and SORNA was enacted that same year. *Id.* ¶¶ 49, 223; *see supra* footnote 1. Thus, from the face of the Complaint, it is apparent that Plaintiff's claims against Defendant Sessions are untimely and must be dismissed. *Ayala v. Frito Lay, Inc.*, 263 F. Supp. 3d 891 (E.D. Cal. 2017) ("[A] claim may be dismissed as untimely pursuant to a 12(b)(6) motion when the running of the statute of limitations is apparent on the face of the complaint.").

B. Claim 1: SORNA does not violate any fundamental liberty interest that Plaintiff has in his reputation.

Whether analyzed under the framework of substantive or procedural due process, Plaintiff's claim that SORNA violates his "constitutionally protected liberty interest in [his] reputation" fails as a matter of law. Plaintiff's reputation is not a fundamental right for purposes of substantive due process, nor is it a liberty interest requiring procedural safeguards. Further, SORNA is reasonably related to a legitimate government interest in furthering public safety, and its registration obligations are imposed only after a criminal conviction with the attendant procedural protections.

1. Plaintiff's alleged reputational injury does not violate substantive due process.

The Ninth Circuit has long held "that individuals convicted of serious sex offenses do not have a fundamental right to be free from sex offender registration requirements," and "sex offenders do not have a fundamental right to avoid publicity." *Juvenile Male*, 670 F.3d at 1012; *see Doe*, 2016 WL 5339804, at *21 ("Nor is there any fundamental right for a convicted sex offender to avoid . . . the transmission of accurate information regarding such conviction . . . ."); *see also Ambert*, 561 F.3d at 1209 (holding that the "publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy"). Even the special privacy interests of juveniles do not give rise to a fundamental right for juvenile offenders to be free from SORNA's registration and notification requirements. *See Juvenile Male*, 670 F.3d at 1012.

In the Complaint, Plaintiff marshals various collateral consequences he attributes to registering as a sex offender, such as reduced employability, difficulties maintaining relationships, limited housing options, and the fear of harassment and vigilantism. Compl. ¶¶ 75–90. But, properly construed, these alleged harms flow from Plaintiff's conviction itself and the independent actions of private parties or restrictions imposed by local governments or associations—not SORNA's registration and notification requirements. *Smith*, 538 U.S. at 101 ("Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record."). Nor do these alleged harms impair interests "so deeply rooted in our history and traditions, or

so fundamental to our concept of constitutionally ordered liberty," that they are protected by substantive due process. *Doe v. Tandeske*, 361 F.3d 594, 596 (9th Cir. 2004) (per curiam); *see Juvenile Male*, 670 F.3d at 1012 ("Those rights are few, and include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment.").

Because SORNA does not infringe Plaintiff's fundamental rights, it must be upheld as long as it bears a "reasonable relation to a legitimate state interest." *Juvenile Male*, 670 F.3d at 1012 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997)). In upholding SORNA against substantive due process challenges, the Ninth Circuit found that the law furthers "a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* (quoting *Tandeske*, 361 F.3d at 597); *see also Ambert*, 561 F.3d at 1209 (holding that SORNA is "rationally related to Congress' legitimate goal in protecting the public from recidivist sex offenders"). Thus, to the extent that Plaintiff alleges SORNA violates his substantive due process rights by harming his reputation, this claim must fail as a matter of law.

2. Plaintiff's alleged reputational injury does not violate procedural due process.

Courts analyze procedural due process claims in two steps. *Carver v. Lehman*, 558 F.3d 869, 872 (9th Cir. 2009). "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* (alteration in original).

The Supreme Court has long held that "[m]ere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." *Conn. Dep't of Pub. Safety*, 538 U.S. at 6–7. The Ninth Circuit further instructs that "adverse publicity or harm to the reputation of sex offenders does not implicate a liberty interest for the purposes of due process analysis." *Juvenile Male*, 670 F.3d at 1013. Thus, without more, Plaintiff's averred reputational injury is insufficient to state a due process claim.

Nor do Plaintiff's allegations give rise to a "stigma-plus" claim—*i.e.*, "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) (alteration and emphasis in original). 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 Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 971 (9th Cir. 2010). While Plaintiff claims to suffer collateral harms carried out by private parties and local governments, he fails to identify any concrete, tangible interest or legal status altered by SORNA itself. Plaintiff also does not dispute the accuracy of any information collected and disseminated under SORNA's provisions.

At any rate, even if Plaintiff could plausibly allege that SORNA implicated a liberty interest, "adequate procedural safeguards at the conviction stage are sufficient to obviate the need for any additional process at the registration stage." *Juvenile Male*, 670 F.3d at 1014. "In other words, where the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest—no additional process is required for due process." *Id.* (quoting *Tandeske*, 361 F.3d at 596); *see Conn. Dep't of Pub. Safety*, 538 U.S. at 7 (same); *Ambert*, 561 F.3d at 1208 ("The fact that Ambert seeks to prove, that he is neither dangerous nor likely to be a repeat offender, is of no moment under SORNA, because the reporting requirements likewise turn on the offender's conviction alone . . . ."). Thus, to the extent that Plaintiff alleges SORNA violates his procedural due process rights by harming his reputation without adequate safeguards, this claim must fail as a matter of law.

C. Claim 2: SORNA does not deprive Plaintiff of equal protection under the law.

"The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *see United States v. Navarro*, 800 F.3d 1104, 1113 (9th Cir. 2015) ("[O]ur approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." (internal quotation marks omitted)). The Constitution's guarantee of equal protection, however, does not mandate equal treatment in all circumstances, and "[g]overnment 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, 1208 (9th Cir. 2005)).

Here, Plaintiff does not contend that laws affecting sex offenders are subject to heightened scrutiny, and the Ninth Circuit has expressly "rejected the argument that sex offenders are a suspect or protected class." *Juvenile Male*, 670 F.3d at 1009 (citing *United States v. LeMay*, 260 F.3d 1018, 1030–31 (9th Cir. 2001)). Plaintiff's equal protection claim thus fails unless he can establish that SORNA is not "rationally related to a legitimate state interest." *Id.* He cannot do so. *Id.* at 1009–10 ("[T]here is no doubt that preventing danger to the community is a legitimate regulatory goal. Thus, SORNA's requirements satisfy rational basis review and do not violate the Equal Protection Clause." (internal quotation marks and citation omitted)); *see supra* Section IV.B.1.

Plaintiff's equal-protection claim largely asserts that sex-offender registration and notification programs are ineffective and based on faulty recidivism studies. Compl. ¶¶ 98–116. These contentions are wholly misplaced. "[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)) (alteration in original). Likewise, equal-protection analysis "does not properly involve courts in weighing conflicting expert opinions and engaging in judicial fact-finding as to whether a statute does or does not serve its intended purposes." *Doe*, 2016 WL 5339804, at *22 (collecting authorities); *United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015) (holding that a law "may be overinclusive, underinclusive, illogical, and unscientific and yet pass constitutional muster"). As long as "there is some conceivable rational purpose that Congress could have had in mind when it enacted" SORNA, Plaintiff's equal-protection claim fails as a matter of law. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014).

D. Claim 3: SORNA is not unconstitutionally vague.

Under the "void-for-vagueness" doctrine, a penal statute must define a criminal offense "[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) (alterations in original). As relevant here, SORNA penalizes federal sex offenders or sex offenders who travel

interstate in interstate commerce and fail to submit specified information to a registry in the jurisdiction where the offender lives, works, or studies. 18 U.S.C. § 2250(a); *see* 34 U.S.C. §§ 20913(c), 20918. SORNA defines "sex offender" as "an individual who was convicted of a sex offense," and the statute defines "sex offense" as "a criminal offense that has an element involving a sexual act or sexual contact with another." 34 U.S.C. § 20911(1), (5)(A)(i). These provisions are sufficient to give Plaintiff fair notice of SORNA's requirements and prevent arbitrary enforcement of SORNA's criminal penalties against him. *See, e.g.*, *United States v. Jackson*, No. 09-1115, 2010 WL 3325611, at *4–10 (N.D. Cal. Aug. 23, 2010) (rejecting an as-applied constitutional challenge to SORNA on vagueness grounds).

Rather than show how SORNA is impermissibly vague, Plaintiff assails various state and local laws that allegedly limit "where a registered person may reside, work, recreate or be present." Compl. ¶¶ 120, 124; *see id.* ¶¶ 135–45 (discussing Tennessee's "Exclusion Zones"); *see also id.* ¶ 124 ("Even though these are all state laws and would normally be outside the jurisdiction of the federal courts . . . it isn't any single law or ordinance but a conglomerate of these laws in all different states, counties, and municipalizes that make them unconstitutionally vague . . . ."). But nothing in SORNA imposes restrictions on where Plaintiff may reside, work, recreate, or otherwise be present, nor does it direct states or localities to impose such restrictions. SORNA merely conditions federal funding on a state maintaining a system for sex-offender registration and notification, and penalizes certain offenders for failing to register and keep their registrations current. *See generally* Pub. L. No. 109-248, tit. 1, §§ 101–55, 120 Stat. 587 (July 27, 2006). Plaintiff's allegations concerning state and local laws cannot state a plausible claim against SORNA on vagueness grounds.

E. Claim 3: SORNA does not infringe Plaintiff's right to travel and associate.

"The Supreme Court has recognized a fundamental right to interstate travel." *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) (citing *N.Y. Att'y Gen. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (Brennan, J., plurality opinion)). Nonetheless, "[b]urdens placed on travel generally" or "minor burdens impacting interstate travel . . . do not constitute a violation of that right." *Id.*; *see also United States v. Benevento*, 633 F. Supp. 2d 1170, 1186 (D. Nev. 2009) ("[W]hen 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.").

Here, Plaintiff again complains about local laws limiting where sex offenders may reside, work, recreate, or otherwise be present and which, by implication, allegedly burden sex offenders' ability to travel interstate and associate with others. *See, e.g.*, Compl. ¶¶ 117, 130 (alleging that "it is virtually impossible for a person of average intelligence to research, assimilate and abide by . . . different state laws and local ordinances that apply to registered sex offenders across the country"). But the restrictions Plaintiff assails are not found in SORNA, which merely directs sex offenders to provide certain identifying information to registries where they reside, work, or study, and to update this information periodically. 34 U.S.C. §§ 20913(c), 20918. Thus, like the law upheld by the Supreme Court in *Smith*, SORNA "does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." 538 U.S. at 100; *see Benevento*, 633 F. Supp. 2d at 1186 (finding that, under SORNA, "[s]ex offenders traveling from state to state may still do so freely without first seeking permission from authorities"); *see also United States v. Byrd*, 419 F. App'x 485, 491 (5th Cir. 2011) ("SORNA's registration requirements do not implicate the fundamental right to travel of convicted sex offenders because nothing in the statute precludes an offender from 'entering or leaving another state' . . . ." (alterations omitted)).

Though SORNA's obligations may incidentally burden travel or association, Plaintiff fails to offer any specific, concrete facts showing that this burden is substantial or unreasonable as applied to him. *United States v. Shenandoah*, 595 F.3d 151, 162 (3d Cir. 2010) (holding that "moving from one jurisdiction to another entails many registration requirements required by law which may cause some inconvenience, but which do not unduly infringe upon anyone's right to travel"), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432 (2012). Further, federal courts consistently hold that "[t]he inconvenience of updating one's registration upon traveling interstate is also justified in light of the purpose behind the registration requirements," and—"[a]t a minimum"—"SORNA is rationally related to a legitimate government interest in tracking sex offenders as they move in interstate commerce." *Benevento*, 633 F. Supp. 2d at 1186; *see Ambert*, 561 F.3d at 1208; *United States v. Stacey*, No. 12-15, 2013 WL 1891342, at *4 (W.D. Pa. May 6, 2013); *United States v. Lesure*, No. 11-30227, 2012 WL 2979033, at *4 (S.D. Ill. July 19, 2012); *McCarty v. Roos*, No. 11-1538, 2012 WL 6138313, at *7 (D. Nev. Dec. 7, 2012).

F. Claim 4: SORNA is not unreasonable, arbitrary, or oppressive.

In his fourth cause of action, Plaintiff rehashes his due process claim by alleging SORNA is unreasonable, arbitrary, and oppressive. Compl. ¶¶ 60, 155–94. But as discussed, "[l]egislative 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.'" *Kim v. United States*, 121 F.3d 1269, 1274 (9th Cir. 1997); *see United States 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."). The Ninth Circuit has expressly held that SORNA "satisf[ies] rational basis review" and serves "a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Juvenile Male*, 670 F.3d at 1010, 1013; *see also Doe*, 2016 WL 5339804, at *22.

Plaintiff nonetheless insists that SORNA is irrational and arbitrary because the law is not "narrowly tailored to [his] particular situation, circumstances, or actual threat to society," and because the convictions that trigger registration and determine the duration of this obligation "are not based on any data or research to further any of the state's legitimate goals." Compl. ¶ 157. But SORNA does not implicate Plaintiff's fundamental rights, and thus no "narrow tailoring" is required. *Juvenile Male*, 670 F.3d at 1012–13. As the Supreme Court observed in *Smith*, sex-offender registration and notification programs are "reasonable in light of [their] nonpunitive objective," and legislatures may make "categorical judgments that conviction of specified crimes should entail particular regulatory consequences" regardless of "any corresponding risk assessment." 538 U.S. at 104 (holding that "the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions"). Plaintiff's claim that SORNA is unreasonable, arbitrary, or oppressive must accordingly be rejected.

G. Claim 5: SORNA does not violate Plaintiff's right to substantive due process.

Plaintiff's fifth cause of action reprises his claim that SORNA violates his right to substantive due process. As discussed, this theory fails because SORNA does not implicate fundamental rights and bears a "reasonable relation to a legitimate state interest." *See supra* Section IV.B.1; *see also, e.g.*,

Juvenile Male, 670 F.3d at 1012; *Doe*, 2016 WL 5339804, at *21 (collecting authorities). Plaintiff's fifth cause of action must accordingly be dismissed.

H. Claim 6: SORNA does not subject Plaintiff to *ex post facto* punishment.

The Constitution prohibits Congress from passing any *ex post facto* law, *i.e.*, a law that retroactively alters the definition of criminal conduct or increases the punishment for a crime. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *see* U.S. Const. art. I, § 9, cl. 3. Though SORNA did not retroactively criminalize the conduct underlying Plaintiff's 2006 convictions, he contends that SORNA imposes a substantially increased criminal punishment. Compl. ¶ 62. As detailed below, however, SORNA (1) did not substantially increase the preexisting obligations of California sex offenders like Plaintiff, and (2) does not impose criminal punishment.

1. SORNA did not substantially alter Plaintiff's legal obligations as a convicted sex offender in California.

California was the first state in the Nation to establish a sex-offender registry in 1947. *See* Cal. Dep't of Justice, California Sex Offender Information: Megan's Law, at 3 (2003 Report to Cal. Legislature), *available at* http://ag.ca.gov/megan/pdf/megan_leg_rpt04.pdf. By 1996, California's Megan's Law required a sex offender to register within five business days of moving to any law enforcement agency's jurisdiction or after he or she acquired a new name or residence. *Id.* In 2001, the California Department of Justice implemented an electronic interface transferring California sex-offender information to the national sex-offender registry, allowing "law enforcement agencies nationwide to access California's most current sex-offender registration information." *Id.* at 3–4. Members of the public could access this information on a CD-ROM, and by 2002, the California Department of Justice "implemented a Web-based application to replace the CD-ROM as the method for disseminating California's Megan's Law information to the public." *Id.* at 13.

Thus, well before Plaintiff allegedly committed his sex crimes in 2004, California had a robust and longstanding program for sex-offender registration and notification. Plaintiff fails to show that SORNA substantially increased his obligations under preexisting law. Under prevailing Ninth Circuit authority, Plaintiff's *ex post facto* challenge must fail. *See Elkins*, 683 F.3d at 1048–49 (finding no *ex post facto* violation as applied to a sex offender in Washington state, where "differences between the

registration requirements under Washington law and SORNA" were "minor" and "did not substantially change Elkins's obligation to register as a sexual offender").

2. SORNA does not impose punishment.

Even if SORNA substantially changed the consequences of Plaintiff's convictions, his *ex post facto* challenge fails because SORNA's obligations are civil, regulatory requirements—not criminal punishments. Consistent with "all of the circuit courts that have considered this issue," as well as the Supreme Court's discussion in *Reynolds v. United States*, 565 U.S. 432, 435 (2012), the Ninth Circuit held that SORNA was not punitive in purpose or effect, and thus its retroactive application does not offend the Ex Post Facto Clause. *United States v. Elkins*, 683 F.3d 1039, 1043–45 (9th Cir. 2012); *see also id.* at 1044–45 nn.6–7 (collecting authorities). This is so even where an offender's conviction occurred when he or she was a juvenile. *Id.* at 1046–49.

One year after the Ninth Circuit's decision in *Elkins*, the court again addressed whether SORNA is punitive based on "substantial changes in society." *United States v. Elk Shoulder*, 738 F.3d 948, 953–54 (9th Cir. 2013). There, as here, a sex offender argued that SORNA

> imposes significant hardships on offenders, who are held to public ridicule by community members, and face difficulty finding and maintaining both employment and housing. . . . [L]ocal newspapers frequently maintain interactive maps of the registered residences of sex offenders, and [there are] reports of incidents of citizens standing on street corners bearing signs with the names and addresses of offenders blazoned across the front.

Id. at 954 (some alterations and internal quotation marks omitted).

The *Elk Shoulder* panel rejected this argument, recognizing that the panel (like this Court) was bound to follow *Elkins*. *Id.* (citing *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc)). The *Elk Shoulder* panel further noted that "internet notification was nonpunitive because its principal effect was to 'inform the public for its own safety, not to humiliate.'" *Id.* (quoting *Smith*, 538 U.S. at 99). The panel also found scant evidence that alleged employment or housing disadvantages "would not have otherwise occurred through the use of routine background checks by employees and landlords." *Id.* (quoting *Smith*, 538 U.S. at 100). Ultimately, conclusory statements and anecdotal hardships were insufficient to revisit longstanding precedent holding that sex-offender registration and notification requirements are not punitive. *Id.*

Here, as in *Elk Shoulder*, Plaintiff's conclusory arguments and vague anecdotes cannot transform SORNA's requirements into a criminal penalty. Compl. ¶¶ 230–33; *see Elk Shoulder*, 738 F.3d at 954 (holding that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" (quoting *Smith*, 538 U.S. at 92)). Plaintiff's *ex post facto* claim accordingly fails.

I. Claim 7: SORNA is not a bill of attainder.

The Constitution prohibits bills of attainder, *i.e.*, "[l]egislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Brown*, 381 U.S. 437, 448–49 (1965); *see* U.S. Const. art. I, § 9, cl. 3. This prohibition is not meant to invalidate "every Act of Congress . . . that legislatively burdens some persons or groups." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 471 (1977); *see Carmony v. Hunter*, No. 03-927, 2006 WL 3762110, at *10–11 (E.D. Cal. Dec. 20, 2006) (finding no bill of attainder where a law "merely designates a properly general characteristic . . . and then imposes upon all who have that characteristic a prophylactic measure reasonably calculated to achieve a nonpunitive purpose"), *aff'd*, 2007 WL 2904090 (E.D. Cal. Oct. 1, 2007).

The Ninth Circuit and other courts have held that SORNA imposes civil, regulatory requirements—not punishment. *See supra* Section IV.H.2 (discussing *Elk Shoulder*, 738 F.3d at 953–54, and *Elkins*, 683 F.3d at 1043–49); *see also, e.g.*, *Benevento*, 633 F. Supp. 2d at 1182–84. In light of these authorities, Plaintiff's claim that SORNA constitutes a bill of attainder must fail as a matter of law. *Nixon*, 433 U.S. at 475–76 (instructing that a law "further[ing] nonpunitive legislative purposes" cannot be a bill of attainder); *see also, e.g.*, *Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999) (rejecting a bill of attainder claim after finding that sex-offender registration requirements were not punitive).

J. Claim 8: SORNA does not impose cruel and unusual punishment.

The Eighth Amendment mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. As discussed, the Ninth Circuit and other courts have held that SORNA's requirements are not punitive, and thus Plaintiff's Eighth Amendment claim must fail as a matter of law. *See supra* Sections IV.H.2, IV.I; *see also Cutshall*, 193 F.3d at 477 ("We have already concluded that the Act does not impose punishment; it

is regulatory in nature. Therefore, it does not violate the Eighth Amendment's prohibition on cruel and unusual punishment."). Further, the Ninth Circuit has expressly held that SORNA's requirements are not so shocking and onerous as to "meet the high standard of cruel and unusual punishment"—even when those requirements are imposed on juvenile offenders. *Juvenile Male*, 670 F.3d at 1010 (finding that SORNA's requirement that juveniles register as sex offenders for at least 25 years did not violate the Eighth Amendment, even though it "may have the effect of exposing juvenile defendants and their families to potential shame and humiliation for acts committed while still an adolescent").[3]

K. Claim 9: SORNA does not subject Plaintiff to involuntary servitude.

The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII. Courts narrowly interpret the words "slavery" and "involuntary servitude" to cover only "those forms of compulsory labor akin to African slavery." *United States v. Kozminski*, 487 U.S. 931, 942 (1988); *see, e.g.*, *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 199 (1921) (finding no Thirteenth Amendment violation where a statute penalized a landlord's failure to furnish water or heat to tenants); *United States v. Bertoli*, 994 F.2d 1002, 1022 (3d Cir. 1993) (same, for requiring attorneys to perform *pro bono* services); *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986) (same); *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 1000 (3rd Cir. 1993) (same, for a public school's mandatory community service program); *Wright v. Clark County*, 132 F.3d 37, 1997 WL 764387 at *1 (7th Cir. 1997) (unpublished) (same, for a county's mandatory recycling program); *Kasey v. C.I.R.*, 457 F.2d 369, 370 (9th Cir. 1972) (same, for record-keeping and tax-return filing requirements imposed by the Internal Revenue Code and Internal Revenue Service); *Neill v. Weinstein*, No. 01-2333, 2001 WL 34036322, at *4 (D. Md. Nov. 14, 2001) (same, for appearing for jury duty).

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[3] *See generally, e.g.*, *Ewing v. California*, 538 U.S. 11, 28–30 (2003) (affirming a sentence of 25 years to life imposed for felony grand theft of three golf clubs under California's three-strikes law); *Harmelin v. Michigan*, 501 U.S. 957, 961, 966 (1991) (affirming a sentence of life in prison without the possibility of parole for a first-time offender possessing 672 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370, 370–71 (1982) (finding no constitutional error in two consecutive terms of 20 years in prison for possession with intent to distribute and distribution of nine ounces of marijuana)).

Here, Plaintiff cannot plausibly allege that SORNA's requirements resemble the institution of African slavery. Registering under SORNA is analogous to civic and administrative obligations such as registering with the Selective Service, appearing for jury duty, or the periodic filing of tax returns. *Butler v. Perry*, 240 U.S. 328, 333 (1916) (holding that the Thirteenth Amendment "certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc."); *see also, e.g.*, *Larson v. Swanson*, No. 09-2270, 2009 WL 3246854, at *3 (D. Minn. Oct. 5, 2009) ("The simple truth is that predatory offender registration bears no meaningful resemblance to the American experience with slavery in the 1800's.") Plaintiff's Thirteenth Amendment claim fails as a matter of law.

V. CONCLUSION

For the foregoing reasons, Defendant Sessions' Motion to Dismiss must be granted.

Dated: January 17, 2018

Respectfully submitted,

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