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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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| **MICHAEL RICHARDSON,**<br><br>Plaintiff,<br><br>**v.**<br><br>**JEFFERSON SESSIONS, in his official capacities; XAVIER BECERRA, in his official capacities,**<br><br>Defendants. | 2:17-cv-1838 JAM AC PS<br><br>**DEFENDANT ATTORNEY GENERAL'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS**<br><br>Judge: The Honorable John A. Mendez<br>Trial Date: None Set<br>Action Filed: 9/5/2017 |

Defendant Attorney General Xavier Becerra respectfully submits the following response to Plaintiff Michael Richardson's Objections to Magistrate Judge's Findings and Recommendations on Defendant Becerra's Motion to Dismiss.

## RESPONSE TO OBJECTIONS

Magistrate Judge Alison Claire recommends that this Court dismiss, without leave to amend, the sixth through ninth causes of action alleged against Defendant Becerra. See Findings and Recommendations, ECF No. 24. Plaintiff raises nine objections. *See* Plaintiff's Objections to Magistrate Judge's Findings and Recommendations, ECF No. 27 (Objections). Because none of these objections has merit, this Court should overrule them and adopt the Findings and Recommendations in full.

### I. RESPONSE TO OBJECTION 1: THIS COURT LACKS SUBJECT MATTER JURISDICTION TO DECIDE CLAIMS AGAINST DEFENDANT BECERRA ARISING FROM FEDERAL LAWS OR LOCAL ORDINANCES

In his first objection, "Plaintiff objects to the Magistrate's Findings that the Court lacks subject matter jurisdiction." Objections at 1. The Magistrate Judge correctly ruled that to the extent Plaintiff challenges the constitutionality of federal laws or local ordinances, the Eleventh Amendment bars Plaintiff's claims against Defendant Becerra, because he has no responsibility for enforcing federal law or local ordinances. Findings and Recommendations at 6, 8, ECF No. 24. Neither the motion to dismiss or the Magistrate Judge's ruling applies to the Court's jurisdiction to resolve Plaintiff's challenges to California statutes: the Sex Offender Registration Act (SORA) or Megan's Law. *Id.*

### II. RESPONSE TO OBJECTION 2: THE NINTH CIRCUIT OPINIONS CITED BY THE MAGISTRATE JUDGE GOVERN HERE

In his second objection, Plaintiff argues that *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004), in which the Ninth Circuit ruled that Megan's Law is not punitive, does not govern here. Objections at 4. He argues that *Hatton* is distinguishable because it was decided before the enactment of an amendment to Megan's Law that requires the California Department of Justice to

publish sex offender information on the Internet.[1] *Id.* at 5. This amendment, however, does not change the analysis or distinguish *Hatton*. There, applying in *Smith v. Doe*, 538 U.S. 84 (2003), the Ninth Circuit held that Megan's Law is not punitive. *Hatton*, 356 F.3d at 961–67. In *Smith*, the U.S. Supreme Court upheld Alaska's Sex Offender Registry Act, which, like the current version of Megan's Law, includes an Internet publication requirement, concluding that the law was not punitive. *Smith*, 538 U.S. at 105–06. Because the Supreme Court has already upheld an identical requirement, there is no reason to believe that the Ninth Circuit would have decided *Hatton* differently if, at that time, Megan's Law imposed an Internet publication requirement. In addition, the Ninth Circuit did not deviate from *Hatton* in *Doe v. Harris*, 640 F.3d 972 (9th Cir. 2011), a 2011 decision post-dating the amendment to Megan's Law in 2004. *Harris*, 640 F.3d 972, 975 n.3; Cal. Pen. Code § 290.46; Assemb. B. 488, 20032004 Reg. Sess. (Cal. 2004). In any event, the Magistrate Judge's analysis independently and correctly applied the *Smith* factors to Megan's Law. Findings and Recommendations at 9–15.

Plaintiff also objects to the Magistrate Judge's citation to *U.S. v. Elk Shoulder*, 738 F.3d 948 (9th Cir. 2013), arguing that *Elk Shoulder* addressed a challenge to the federal Sex Offender Notification Act (SORNA), not to California law, and is factually distinguishable. Objections at 5–6. However, the Magistrate Judge referenced *Elk Shoulder* in support of her conclusion that Plaintiff has no viable challenge to federal law. Findings and Recommendations at 8, n.2.

Finally, Plaintiff objects that the Findings and Recommendations do not address *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016), but that case does not govern here. First, *Snyder* is a Sixth Circuit decision, and Ninth Circuit authority controls. Second, *Snyder* is distinguishable because the "most significant burden imposed by the Michigan statute was its regulation of where registrants may live, work, and loiter." *U.S. v. Morgan*, 255 F. Supp. 3d 221, 231 n.2 (D.D.C. 2017) (distinguishing *Snyder* and holding that, consistent with *Smith*, SORNA's registration and

[1] The Ninth Circuit has examined SORA's registration provisions and found that they are not punitive. *Hatton*, 356 F.3d at 961–67; *accord Doe v. Harris*, 640 F.3d 972, 975 n.3 (9th Cir. 2011), *accord U.S. v. Hardeman*, 704 F.3d 1266, 1268 (9th Cir. 2013); *Litmon v. Harris*, 768 F.3d 1237, 1242–43 (9th Cir. 2014). Accordingly, Plaintiff's challenges to SORA as a bill of attainder and for cruel and unusual punishment, which require a threshold finding that the challenged law is punitive, are therefore foreclosed.

Internet publication provisions do not impose an affirmative disability or restraint); *see* Repy in Support of Motion to Dismiss (Reply) at 4, ECF No. 6. SORA and Megan's Law do not impose these types of constraints. *See* Cal. Pen. Code §§ 290–290.024, 290.46.

Plaintiff's second objection should be overruled.

## III. RESPONSE TO OBJECTION 3: *SMITH V. DOE* GOVERNS HERE

In his third objections, Plaintiff quarrels with the Magistrate Judge's application of *Smith v. Doe* to determine that Megan's Law is not punitive. Objections at 9. Contrary to Plaintiff's argument, the Magistrate Judge properly applied the *Smith* analysis with respect to both the legislative intent and effects of the statute. Findings and Recommendations at 9-15. To the extent the Court believes it necessary to reconsider these arguments, Defendant Becerra refers to the Court to pages 7–17 of his Motion and pages 2–6 of his Reply.

Plaintiff's third objection should be overruled.

## IV. RESPONSE TO OBJECTION 4: LEAVE TO AMEND WAS PROPERLY DENIED

In his fourth objection, Plaintiff argues that leave to amend should be granted so that he may allege that SORA and Megan's Law are punitive "as applied" to him. Objections at 34. The Magistrate Judge correctly ruled that amendment would be futile, because such a claim is foreclosed by *Seling v. Young*, 531 U.S. 250, 267 (2001), which held that a civil statute cannot be deemed punitive as applied to a particular plaintiff. Findings and Recommendations at 18. Plaintiff incorrectly argues that, unlike in *Selig*, no court has yet determined that Megan's Law and SORA are facially non-punitive as a matter of law. In fact, the Ninth Circuit so ruled in *Hatton*, *Harris* and, with respect to SORA, in additional Ninth Circuit cases. *Hatton*, 356 F.3d at 961–67; *Harris*, 640 F.3d 972, 975 n.3; *see* fn. 1, *supra*.

Plaintiff's fourth objection should be overruled.

## V. RESPONSE TO OBJECTION 5: PLAINTIFF'S REQUESTS FOR JUDICIAL NOTICE WERE PROPERLY DENIED

In his fifth Objection, Plaintiff argues that the Magistrate Judge should have judicially noticed the lists of "government studies," academic empirical evidence," and "legislative statements" that Plaintiff attached as exhibits to his Memorandum of Points and Authorities.

Objections at 36; *see* ECF No. 23, Exhibits J–M; Findings and Recommendations at 5. He also argues that the Magistrate Judge should have judicially noticed the witness affidavits submitted in support of his opposition to the Motion Dismiss. Objections, at 36; *see* ECF No. 16, Ex. A–E; Findings and Recommendations at 5.

The Magistrate Judge properly denied judicial notice of these matters, because they were not "generally known" or able to be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. Rule 201(b). Local Rule 240(a)(5), cited by Plaintiff, does not relate in any way to judicial notice. It merely provides that the subjects discussed at a status conferences may include "the formulation and simplification of the issues, including elimination of frivolous claims and defenses." Loc. R. 240(a)(5).

Plaintiff's fifth objection should be overruled.

## VI. RESPONSE TO OBJECTION 6: THE MAGISTRATE JUDGE CORRECTLY DETERMINED THAT PLAINTIFF CANNOT SHOW WITH "CLEAREST PROOF" THAT CALIFORNIA'S SEX OFFENDER LAWS ARE PUNITIVE

Plaintiff's sixth objection reiterates his argument that SORA and Megan's Law are punitive under the applicable legal test. For the reasons explained in the Findings and Recommendations and in Defendant Becerra's Motion and Reply, this objection should be overruled.

## VII. RESPONSE TO OBJECTION 7: THE MAGISTRATE JUDGE PROPERLY DISMISSED THE CLAIMS FOR BILL OF ATTAINDER, EX POST FACTO, AND CRUEL AND UNUSUAL PUNISHMENT

Plaintiff's seventh objection argues that his challenges based on unlawful bill of attainder, violation of the Ex Post Facto Clause, and cruel and unusual punishment do not fail "simply because this Court has found the laws to be non-punitive." Objections at 37. This argument lacks merit.

With respect to the bill of attainder claim, controlling precedent holds that a statute must inflict punishment in order to constitute a bill of attainder. *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). *United States v. Brown*, 381 U.S. 427 (1965) does not state a contrary rule. See Objections at 38. The Supreme Court stated that a bill of attainder is "legislative *punishment*, of any form or severity, of specifically designated persons or groups." *Brown*, 381 U.S. at 447

(emphasis added). And the Court analyzed the law at issue to determine whether it did, indeed, inflict some form of punishment. *Id.* at 446–449.

With respect to the Ex Post Facto Clause claim, Plaintiff merely argues that the Findings and Recommendations were incorrect to conclude that SORA and Megan's Law are non-punitive. Objections at 39. For the reasons explained fully in the Findings and Recommendations and Defendant Becerra's Motion and Reply, this argument is incorrect.

Finally, Plaintiff argues that the provisions in SORA and Megan's Law are cruel and unusual. *Id.* However, to constitute cruel and unusual *punishment*, a law must first be punitive. *U.S. v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013) (federal Sex Offender Registration and Notification Act not punitive under Eighth Amendment); *Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999) (Tennessee sex offender law not punitive under Eighth Amendment). The Magistrate Judge correctly found that, because SORA and Megan's Law are non-punitive for the purposes of a claim for violation of the Ex Post Facto Clause, they are also non-punitive for the purposes of a claim for cruel and unusual punishment. Findings and Recommendations at 17; *see also Under Seal*, 709 F.3d at 263; *Cutshall*, 193 F.3d at 477.

Plaintiff's seventh objection should be overruled.

## VIII. RESPONSE TO OBJECTION 8: THE MAGISTRATE JUDGE ADDRESSED SEPARATION OF POWERS

Plaintiff's eighth objection claims that the Findings and Recommendations do not address his separation of powers claim. Objections at 41. This is mistaken; the Magistrate Judge recommends dismissing Plaintiff's seventh cause of action, entitled "Separation of Powers and Bill of Attainder." Findings and Recommendations at 17–18. As Defendant Becerra explained in his Motion to Dismiss, "[t]he Bill of Attainder Clause implements the doctrine of separation of powers." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002); Motion at 18; Reply at 6. Thus, the two doctrines constitute a single cause of action that the Magistrate Judge addressed. Plaintiff has not articulated in the Complaint, in his Opposition to the Motion to Dismiss, or in his Objections, any theory for violation of separation of powers other than in his claim for bill of attainder.

Dated: April 9, 2018

Respectfully Submitted,

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*/s/ Gabrielle D. Boutin*
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*Attorneys for Defendant Attorney General Xavier Becerra*

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# CERTIFICATE OF SERVICE

Case Name: **Richards, Michael v. Jefferson Sessions, et al.** No. **2:17-cv-1838 JAM AC PS**

I hereby certify that on April 9, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT ATTORNEY GENERAL'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On April 9, 2018, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Michael Richardson
4624 Ashdale Court, #4
Sacramento, CA 95841

*Pro Per*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 9, 2018, at Sacramento, California.

Eileen A. Ennis
Declarant

*s/Eileen A. Ennis*
Signature

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Plaintiff's eighth objection should be overruled.

## IX. RESPONSE TO OBJECTION 9: MEGAN'S LAW AND SORA DO NOT IMPOSE "INVOLUNTARY SERVITUDE" IN VIOLATION OF THE 13TH AMENDMENT

In his ninth objection, Plaintiff argues that the Magistrate Judge incorrectly found that Megan's Law and SORA do not impose involuntary servitude in violation of the 13th Amendment. Objections at 42–44. This argument also lacks merit.

With respect to Megan's Law, the Magistrate Judge reasoned that "[b]ecause Megan's Law does not impose any physical coercion or compulsory labor on plaintiff, see Cal. Penal Code § 290.46, it cannot possibly constitute involuntary servitude." *Id.* at 17. Plaintiff fails to rebut this reasoning by identifying any way in which Megan's Law imposes on him physical coercion or compulsory labor. *See* Objections at 42–43. In fact, Megan's Law only requires the California Department of Justice to publish on the Internet certain sex offender information. Cal. Penal Code § 290.46.

With respect to SORA, the Magistrate Judge reasoned that "[w]hile SORA does compel action by plaintiff, the compelled action is not "service" and thus cannot constitute involuntary servitude in the vein of African slavery, peonage, serfdom, or feudalism." Findings and Recommendations at 18. Plaintiff responds by arguing that scientific evidence on sex offender recidivism proves that SORA's registration requirements serve no regulatory purpose. Objections at 44. Even if true, this would not transform SORA's requirements into the type of compulsory labor that constitutes involuntary servitude under the 13th Amendment.

The Court should overrule Plaintiff's ninth objection.

## CONCLUSION

For the reasons above, Defendant Becerra respectfully asks this Court to overrule all of Plaintiff's objections and to adopt the Findings and Recommendations in full.