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12 Attorneys for Plaintiffs

13  
14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA**  
16

17 JOHN DOE #1, *et al.*,  
18  
19 Plaintiffs,  
20 v.  
21 U.S. DEPARTMENT OF JUSTICE, *et al.*,  
22 Defendants.  
23

Case No. 5:22-cv-00855

**NOTICE OF MOTION AND MOTION FOR  
PRELIMINARY INJUNCTION**

DATE: December 5, 2022

TIME: 9:00 A.M.

PLACE:  
UNITED STATES COURTHOUSE, 3470  
TWELFTH STREET, RIVERSIDE CA  
92501-3801, COURTROOM 1

BEFORE: HON. JESUS G. BERNAL

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**TO THE COURT, ALL PARTIES AND THEIR COUNSEL:**

NOTICE IS HEREBY GIVEN THAT on December 5, 2022, at 9:00 a.m., before the Honorable Jesus G. Bernal, in the United States Courthouse for the Central District of California, Eastern Division, Courtroom 1, 3470 Twelfth Street, Riverside CA 92501-3801, Plaintiffs, John Doe #1, John Doe #2, John Doe #3, John Doe #4 and the Alliance for Constitutional Sex Offense Laws (ACSOL), will and do move for a preliminary injunction against Defendants, U.S. Dept. of Justice and A.G. Merrick B. Garland, to stop enforcement of the rule, *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed. Reg. 69,856 (Dec. 8, 2021).

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on October 12, 2022.

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, attached declarations, and any further argument as may be offered at the time of the hearing of this motion.

DATED: October 19, 2022

Respectfully submitted,

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By s/ *Jeremy Talcott*  
JEREMY TALCOTT

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By s/ *Steven M. Simpson*  
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17 JOHN DOE #1, *et al.*,  
18  
19 Plaintiffs,  
20  
21 v.  
22 U.S. DEPARTMENT OF JUSTICE, *et al.*,  
23  
24 Defendants.

Case No. 5:22-cv-00855

**MEMORANDUM OF LAW AND POINTS  
OF AUTHORITY IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**

1 Plaintiffs, John Doe #1, John Doe #2, John Doe #3, John Doe #4 and the Alliance for  
2 Constitutional Sex Offense Laws (ACSOL), move for a preliminary injunction against  
3 Defendants, U.S. Dept. of Justice and AG Merrick B. Garland, to stop enforcement of the rule,  
4 *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed.  
5 Reg. 69,856 (Dec. 8, 2021). The rule is the product of a Congressional attempt to improperly  
6 grant the AG the power to write federal criminal laws. And even if Congress hadn't  
7 unconstitutionally tried to delegate away its exclusive power to create federal crimes, the rule  
8 is unlawful because it adopts a definition of "conviction" at odds with statutory text, imposes  
9 an unconstitutional presumption of criminal liability, and improperly restricts protected speech.

10 The plaintiffs represent just some of the hundreds of thousands of Americans who face  
11 irreparable harms from the rule. More than 25 years ago Mr. Doe #1 pled no contest to a  
12 misdemeanor sex offense, but because of his remarkable rehabilitation, today he has no  
13 criminal convictions under California law. Mr. Doe #2 likewise had his prior offense expunged  
14 because of his rehabilitation. And Mr. Doe #3 has been relieved of any registration requirement  
15 under California law. California does not even *allow* these men to register as sex offenders.  
16 Yet the new rule demands that they register and presumes them guilty of a federal crime  
17 despite the DOJ's own acknowledgment that it is "impossible" for them to comply with the rule.  
18 Mr. Doe #4 meanwhile must register but is still presumed guilty of a federal crime simply  
19 because California does not yet collect all of the information required by the new rule. And  
20 even if they could comply, the rule's provisions foreclose their ability to speak freely, and  
21 anonymously, about anything and everything. ACSOL's members face these same dilemmas.  
22 This Court must therefore enjoin the rule pending further proceedings in this case.

## 23 **I. FACTS AND PROCEDURAL HISTORY**

### 24 **A. Legal Background**

25 The Sex Offender Registration and Notification Act (SORNA) conditions federal funding  
26 on a state's implementation of a registry for those convicted of certain sex offenses. See 34  
27 U.S.C. § 20913. To enforce SORNA, Congress passed 18 U.S.C. § 2250, which makes it a  
28 federal crime, punishable by up to 10 years in prison, for anyone to fail to register as directed.



1           SORNA contains a number of delegations of authority to the Attorney General to decide  
2 its implementation and scope. In Section 20912(b) the AG is directed to “issue guidelines and  
3 regulations to interpret and implement” SORNA. In Section 20913(d), the AG is given “the  
4 authority to specify the applicability of the requirements of this subchapter to sex offenders  
5 convicted before the enactment of this chapter.”<sup>1</sup> In Section 20914(a)(7) and (8) the AG can  
6 decide what information a registrant must provide to their local jurisdiction, including “any . . .  
7 travel-related information required by the Attorney General,” or “[a]ny other information  
8 required by the Attorney General.” Finally, the AG may direct a registrant to “provide and  
9 update information” in whatever “time and manner” he prescribes. 34 U.S.C. § 20914(c).

### 10           **B. The New Rule**

11           AG Garland has now issued regulations, which became effective on January 7, 2022,  
12 implementing new SORNA requirements. *Registration Requirements Under the Sex Offender*  
13 *Registration and Notification Act*, 86 Fed. Reg. 69,856 (Dec. 8, 2021). In the rule, the AG  
14 invoked his authority under 34 U.S.C. §§ 20912(b), 20913(d), and 20914(a)(7), (8), (b) to  
15 create much more burdensome registration requirements, and even alter who must register at  
16 all. *Id.* at 69,856. According to the rule, SORNA applies to “all sex offenders,” even if their  
17 convictions were expunged. *Id.* at 69,866; *see also* Office of Sex Offender Sentencing,  
18 Monitoring, Apprehending, Registering and Tracking, *National Guidelines*, 73 Fed. Reg.  
19 38,030, 38,050 (July 2, 2008) (“SMART Guidelines”) (registration is excused only “if the  
20 predicate conviction is reversed, vacated, or set aside, or if the person is pardoned for the

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21           <sup>1</sup> In *Gundy v. United States*, the Supreme Court addressed a non-delegation challenge only  
22 to 34 U.S.C. § 20913(d). 139 S. Ct. 2116, 2123 (2019). While the statute on its face allowed  
23 the AG to determine whether SORNA would apply to pre-enactment convictions, according to  
24 a plurality of the Court, the Court had “already interpreted § 20913(d) to say something  
25 different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as  
26 feasible.” *Id.* (citing *Reynolds v. United States*, 565 U.S. 432, 442–43 (2012)). The plurality  
27 therefore avoided the delegation question entirely. Four justices concluded that “because §  
28 20913(d) does not give the Attorney General anything like the ‘unguided’ and ‘unchecked’  
authority that Gundy says” there was no need to wade into any difficult delegation questions.  
*Id.* The plurality noted, however, that if the statute had granted the discretion Gundy had  
argued, “we would face a nondelegation question.” *Id.*

1 offense on the ground of innocence,” and “an adult sex offender is ‘convicted’ for SORNA  
2 purposes if the sex offender remains subject to penal consequences based on the conviction,  
3 however it may be styled”).

4 The rule also sets out the information a registrant must provide, which now includes a  
5 social security number, his “remote communication identifiers” (e.g., internet usernames), his  
6 work or school information, and information concerning any international travel, passport, and  
7 vehicle registration or professional licenses. 86 Fed. Reg. at 69,885. The registrant must  
8 appear “in-person” at least yearly in his local jurisdiction, and verify all information. *Id.* at  
9 69,885–86. He must also report changes in address within three days, give advance notice if  
10 he plans to change residences jobs or school, report changes in remote communication  
11 identifiers within three days, and international travel plans prior to any trip. *Id.* at 69,886.

12 If a local jurisdiction does not comply with SORNA registration requirements, then a  
13 registrant is guilty of the crime of failing to register unless he proves at trial that registration  
14 was, in essence, *impossible*. That is, the new rule provides individuals who live in non-  
15 compliant states with an affirmative defense to Section 2250, but that defense is only available  
16 if they can prove at trial that “uncontrollable circumstances prevented the sex offender from  
17 complying with SORNA, [that] the sex offender did not contribute to the creation of those  
18 circumstances in reckless disregard of the requirement to comply and complied as soon as  
19 the circumstances preventing compliance ceased to exist.” *Id.*

### 20 **C. The Effect on Plaintiffs**

21 In 1996, Mr. Doe #1 pled no contest to a misdemeanor count of sexual battery under  
22 Cal. Penal Code § 243.4(a) and was sentenced to three years’ probation. Ex. A at ¶ 5 (Doe  
23 #1 Decl.). He was then required to register with the State of California as a sex offender. *Id.*  
24 In 2006, Mr. Doe #1 pled no contest to failing to register under Cal. Penal Code § 290(g)(1).  
25 *Id.* at ¶ 9. Mr. Doe #1’s offense likely imposes a lifetime registration obligation under SORNA.<sup>2</sup>

26 \_\_\_\_\_  
27 <sup>2</sup> A person is required to register under SORNA for life if he is convicted of a “sex offense” that  
28 “occurs after the offender becomes a tier II sex offender.” 34 U.S.C. §§ 20911(4)(C), 20915(a).

1 Under California law, Mr. Doe #1 is no longer required to register as a sex offender and  
2 has no criminal convictions. *Id.* at ¶ 15. Because of his rehabilitation, a state court expunged  
3 his original conviction in 2002 pursuant to Cal. Penal Code § 1203.4. *Id.* at ¶ 12. In 2010, a  
4 state court expunged Mr. Doe #1's failure to register conviction, also pursuant Section 1203.4.  
5 *Id.* at ¶ 13. Then in 2012, a state court issued a "Certificate of Rehabilitation" to Mr. Doe #1,  
6 under Cal. Penal Code § 4852.01, which California law recognizes as a "judicial  
7 recommendation for a pardon," *People v. Ansell*, 25 Cal. 4th 868, 891 (Cal. 2001), and which  
8 relieved him of any state obligation to register. *Id.* at ¶ 14.

9 Mr. Doe #2 was convicted in 2005 of sexual battery under Cal. Penal Code § 243.4(a),  
10 for conduct involving a child under 10, which resulted in a lifetime registration obligation in  
11 California. Ex. B at ¶¶ 3-4 (Doe #2 Decl.). DOJ has asserted that this offense, "at a minimum,"  
12 imposed a 25-year registration requirement under SORNA. See *SORNA Substantial*  
13 *Implementation Review, State of California*, DOJ, at 17 (Jan. 2016). He too had this conviction  
14 expunged under Section 1203.4 in 2012 and was issued a certificate of rehabilitation in 2016,  
15 which relieved him of any obligation to register under California law. Ex. B at ¶ 9.

16 Mr. Doe #3 was convicted in 1997 of violating Cal. Penal Code § 288(a) for conduct  
17 involving a 13-year-old victim, which imposed a lifetime registration requirement in California.  
18 Ex. C at ¶ 3 (Doe #3 Decl.). DOJ has asserted that this offense imposes a lifetime registration  
19 obligation under SORNA. See *SORNA Substantial Implementation Review, State of*  
20 *California*, DOJ, at 19 (Jan. 2016). In 2021, Mr. Doe #3 successfully petitioned to be relieved  
21 from the state registration obligation registry under Cal. Penal Code 290.5. Ex. C at ¶ 11.

22 Mr. Doe #4 was convicted in 1997 for lewd and lascivious conduct with a child under  
23  
24 DOJ has asserted that a violation of Cal. Penal Code § 243.4(a) is "at a minimum" a Tier II  
25 offense, resulting in a 25-year registration obligation. See *SORNA Substantial Implementation*  
26 *Review, State of California*, DOJ, at 17 (Jan. 2016). DOJ has previously argued, and some  
27 courts have agreed, that the failure to register is a generic "sex offense." See *United States v.*  
28 *Tang*, 718 F.3d 476, 484 (5th Cir. 2013) ("Tang's failure to register qualifies as a sex offense."),  
*not followed as dicta by United States v. Segura*, 747 F.3d 323, 329-30 (5th Cir. 2014). Mr.  
Doe #1 thus may be subject to a lifetime requirement under SORNA based on his failure to  
register conviction.

1 16 in violation of Florida Statute 800.04. Ex. D at ¶ 3 (Doe #4 Decl.). This offense imposed a  
2 lifetime registration requirement in Florida, and after Mr. Doe #4 relocated to California, in  
3 California as well. *Id.* at ¶¶ 4-6. This offense is analogous to Cal. Penal Code § 288, and likely  
4 also imposes a lifetime registration requirement under SORNA. *Id.* at ¶ 8.

5 All of these plaintiffs fall under the new rule’s directives. Despite their convictions  
6 having been expunged and been relieved of state registration obligations, Mr. Doe #1 and Mr.  
7 Doe #2 are required to re-register as sex offenders in California. 86 Fed. Reg. at 69,866. Mr.  
8 Doe #3 must also comply, even though he has no registration obligation in California. *Id.* Mr.  
9 Doe #4 must comply with both state and federal registration requirements. See Ex. D at ¶¶4-  
10 8. These plaintiffs have been directed to provide information such as their social security  
11 numbers, “remote communication identifiers” (e.g., internet usernames), work or school  
12 information, and information concerning international travel, passport, and vehicle registration  
13 or professional licenses to local authorities. 86 Fed. Reg. at 69,885–86.

14 These plaintiffs *can’t* comply though. Mr. Doe #1, Mr. Doe #2 and Mr. Doe #3 have no  
15 obligations to register in California, but that remains the only mechanism to register. All three  
16 have tried to register and been rebuffed. See Ex. A at ¶ 26; Ex. B at ¶ 21; Ex. C at ¶ 22. Mr.  
17 Doe #3 was even told by his local registry office, “Due to the conviction being in CA and his  
18 obligation to register is terminated, Mr. [Doe #3] would not need to register federally. . . . The  
19 requirement to register is handled on the state side not the federal side, so we do not offer  
20 federal registration and I do not know of any agency that offers it.” Ex. C at ¶¶ 23-24. Yet  
21 because the new rule makes impossibility of registration only an affirmative defense, all three  
22 plaintiffs face potential criminal liability at any time. See 86 Fed. Reg. at 69,886.

23 Even if these plaintiffs could comply, merely being required to register as a sex offender  
24 would likely result in severe career consequences, the loss of professional licenses, potentially  
25 require them to move to avoid being near public schools and parks, prevent them from going  
26 to their children’s schools, and result in ostracization from their community. See Ex. A at ¶ 21;  
27 Ex. B at ¶ 15; Ex. C at ¶ 17.

28 Mr. Doe #4 in turn must register in California, but the state does not collect all of the

1 information required by the new rule, and he too has been denied in his attempt to provide that  
2 information. Ex. D at ¶ 15. He likewise faces prosecution where he would be required to prove  
3 the affirmative defense. See 86 Fed. Reg. at 69,886.

4 The rule has also curtailed all four plaintiffs' speech. These plaintiffs seek to engage in  
5 anonymous speech on the internet using anonymous remote communication identifiers, such  
6 as email addresses and social media usernames. See Ex. A at ¶¶ 22-24; Ex. B at ¶¶ 16-19;  
7 Ex. C at ¶¶ 18-20; Ex. D at ¶¶ 12-13. They wish to remain anonymous to preserve their privacy,  
8 and to avoid adverse reputational and other risks related to their past offenses. *Id.* They also  
9 wish to speak anonymously about issues of public concern. *Id.* But the new rule demands they  
10 at least attempt to disclose their remote communication identifiers, which could be accessible  
11 by members of the public. *Id.* Because of this disclosure requirement these plaintiffs worry that  
12 they cannot speak freely about issues of public concern, particularly the new SORNA rule,  
13 without jeopardizing their reputation, privacy and the safety of their families. *Id.* They have thus  
14 refrained from speaking on these matters because of the new rule. *Id.*

15 ACSOL is a nonprofit organization "dedicated to protecting the Constitution by restoring  
16 the civil rights of people listed on the public registries and their families." Ex. E at ¶ 6 (Bellucci  
17 Decl.). ACSOL is based in California and has more than 100,000 California registrants among  
18 its membership, including all four named plaintiffs. *Id.* at ¶ 7. One of ACSOL's central purposes  
19 is limiting unlawful registration requirements for its membership in order to help its members  
20 live law-abiding and productive lives as a part of their communities. *Id.* at ¶ 9.

21 ACSOL's membership includes individuals convicted of sex offenses and required to  
22 register as sex offenders under both California and federal law, as well as individuals relieved  
23 from registration because of expungements under Cal. Penal Code § 1203.4, or pursuant to  
24 Cal. Penal Code § 290.5. *Id.* at ¶ 12. These members are required to comply with the rule,  
25 even though California does not provide avenues for them to provide all of the required  
26 information to California authorities, and many cannot register at all under California law. *Id.*  
27 ACSOL members are thus presumed to be in noncompliance with the new rule. *Id.*

28 ACSOL's membership includes individuals whose speech has been curtailed. *Id.* at

¶ 15. These members wish to engage in anonymous speech on the internet through the use of anonymous remote communication identifiers, and wish to preserve their privacy to avoid adverse publicity. *Id.* at ¶ 15–16. They hope to comment about issues of public concern, yet the rule orders these ACSOL members to disclose their remote communication identifiers when they register, which could be accessible by members of the public. *Id.* at ¶ 15. Even to the extent that California does not yet collect remote identifier information, because the state is in noncompliance with the rule, these ACSOL members have refrained from speaking on matters of public concern using their anonymous remote communication identifiers because they fear that this information could become public and that they will be subject to negative consequences to their reputation, privacy and the safety of their families. *Id.* at ¶ 16.

## ARGUMENT

Plaintiffs are entitled to a preliminary injunction if they show: (1) a likelihood of success on the merits; (2) a likelihood that they will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 21 (2008). They satisfy each element of this test.

### I. Plaintiffs Are Likely to Succeed on the Merits

#### A. The Rule Is Unconstitutional in Three Ways

A court must set aside agency action that is “contrary to [a] constitutional right.” 5 U.S.C. § 706(2)(B). Plaintiffs are likely to succeed in their challenge because the rule is unconstitutional in three ways: (1) It is an exercise of an unconstitutional delegation of lawmaking authority; (2) It unlawfully limits protected speech in violation of the First Amendment; and (3) It violates due process by presuming Plaintiffs’ guilt of a federal crime.

##### i. The Rule Is the Result of an Unconstitutional Delegation of Legislative Power

Article I, Section 1, of the U.S. Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” “The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” *Liparota v. United States*, 471 U.S. 419, 424 (1985).



1 Thus, agencies may not declare “what circumstances . . . should be forbidden” by criminal  
2 laws. See *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

3 When Congress leaves policy decisions up to another branch, it unlawfully divests itself  
4 of power. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).  
5 What constitutes a policy decision was illustrated as far back as 1825. See *Wayman v.*  
6 *Southard*, 23 U.S. 1, 1 (1825). Writing for the Court, Chief Justice Marshall distinguished  
7 between those “important subjects, which must be entirely regulated by the legislature itself,”  
8 and “those of less interest, in which a general provision may be made, and power given to  
9 those who are to act . . . to fill up the details.” *Id.* at 21.

10 Traditionally the Court has allowed agencies to exercise authority so long as Congress  
11 set out an “intelligible principle to which the person or body authorized to [exercise the  
12 authority] is directed to conform.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989). But  
13 that test lacks clear contours and five of the current members of the Court have expressed  
14 interest in reconsidering that standard. See *Gundy*, 139 S. Ct. at 2131–42 (Gorsuch, J.,  
15 dissenting, joined by Roberts, C.J., and Thomas, J.); *id.* at 2130–31 (Alito, J., concurring in  
16 the judgment); *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement  
17 respecting the denial of certiorari).

18 Still, even under the “intelligible principle” standard, the Court has suggested that it  
19 presents “a nondelegation question” to give the DOJ “unguided” or “unchecked” authority to  
20 define a crime. *Gundy*, 139 S. Ct. at 2123 (plurality op.). “Administrative” rules implementing  
21 a statute are one thing, but rules creating new crimes are quite another. See *id.* at 2129.

22 Moreover, as Justice Gorsuch highlighted in his dissenting opinion in *Gundy*, a  
23 delegation that “purports to endow the nation’s chief prosecutor with the power to write his  
24 own criminal code” “scrambles th[e] design” of the Constitution, which “promises that only the  
25 people’s elected representatives may adopt new federal laws restricting liberty.” *Id.* at 2131.  
26 While Congress might authorize another branch to fill in certain factual details, it cannot  
27 lawfully divest this type of core “policy decision[.]” *Id.* at 2136.

28 The Court provided a concrete example of this distinction in *United States v. Eaton*,

1 144 U.S. 677 (1892). There, the Court struck down a series of federal tax regulations that  
2 purported to impose criminal liability even though Congress had not set out a penalty provision.  
3 *Id.* at 688. As there were “no common-law offenses against the United States,” it was up to  
4 Congress to provide criminal punishment for violation of a regulation. *Id.* at 687. The decision  
5 of whether to punish something as a crime could not be wholly delegated to an agency,  
6 because “[i]t would be a very dangerous principle” to allow an agency to issue regulations that,  
7 themselves, carried criminal penalties under the general rubric of being “a needful regulation”  
8 to enforce a statute. *Id.* at 688. Thus, the Court held that “[i]t is necessary that a sufficient  
9 statutory authority should exist for declaring any act or omission a criminal offense,” even if  
10 the agency could otherwise issue binding regulations. *Id.*

11 The Court has also questioned whether “something more than an ‘intelligible principle’  
12 is required when Congress authorizes another Branch to promulgate regulations that  
13 contemplate criminal sanctions.” *Touby v. United States*, 500 U.S. 160, 165–66 (1991).  
14 Indeed, the Court assumed so where it allowed the AG to temporarily add a substance to a  
15 list of prohibited drugs if he determined that doing so was “necessary to avoid an imminent  
16 hazard to the public safety.” *Id.* at 166. But importantly, the Court blessed the scheme under  
17 review in that case because it delegated a fact-finding role, instead of the policy question of  
18 whether something should be a crime. *See id.* As described by Justice Gorsuch, “In approving  
19 the statute, the Court stressed all the[] constraints on the Attorney General’s discretion and,  
20 in doing so, seemed to indicate that the statute supplied an ‘intelligible principle’ because it  
21 assigned an essentially fact-finding responsibility to the executive.” *Gundy*, 139 S. Ct. at 2141.

22 The delegations in Section 20912 and 20914 allow the AG to create a range of new  
23 crimes by unilaterally defining what acts constitute crimes under 18 U.S.C. § 2250. Section  
24 2250 penalizes the “fail[ure] to register or update a registration as required.” But Sections  
25 20912 and 20914 allow the AG the sole discretion to define what is “required.” The AG says  
26 his “power to implement SORNA’s requirements,” includes making “additional specifications  
27 regarding information sex offenders must provide, how and when they must report certain  
28 changes in registration information, and the time and manner for complying with SORNA’s



1 registration requirements by sex offenders who cannot comply with SORNA's normal  
2 registration procedures." 86 Fed. Reg. at 69,857. Perhaps more significantly, the AG has also  
3 interpreted his statutory authority to allow him to decide who must register at all, by re-defining  
4 the word "conviction" to encompass those with expunged adjudications. See 86 Fed. Reg. at  
5 69,866. The only thing "guiding" the AG is his own gut feelings as Sections 20914(a)(7), (a)(8),  
6 and (c) do not include any qualification on "information required by the Attorney General," or  
7 "time and manner requirements prescribed by the Attorney General." Section 20912(b) just  
8 says he "shall issue guidelines and regulations to interpret and implement" SORNA. What  
9 information is required, who must register, or how the AG interprets and implements SORNA  
10 are standardless directives, and lack even an intelligible principle. It would even appear to be  
11 statutorily permissible for the AG to require information that he concluded was detrimental to  
12 the goals of SORNA, as the statute includes absolutely no limiting factors.

13 In the rule, the Department dismissed these concerns by noting, irrelevantly, that the  
14 *Gundy* plurality sustained a rule issued under Section 20913(d). See 86 Fed. Reg. 69,858. But  
15 that was a very different delegation than the ones the Department invokes now. As the plurality  
16 noted, the kind of "unchecked" delegations that are implicated here squarely present the  
17 constitutional question. See *Gundy*, 139 S. Ct. at 2123 (plurality op.).

18 DOJ also claims that some of its new requirements "further[]" SORNA's "public safety  
19 objectives," which might suggest a related limit on its authority. 86 Fed. Reg. at 69,871. But  
20 the delegations themselves contain no such limitation on the AG's discretion. See 34 U.S.C.  
21 §§ 20912(b), 20914(a). And the Supreme Court has already rejected the premise that "an  
22 agency can cure an unlawful delegation of legislative power by adopting in its discretion a  
23 limiting construction of the statute." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001).  
24 Thus, there's nothing limiting the AG's ability to create new crimes at will, and the delegation  
25 here unlawfully "scramble th[e] design" of the Constitution. See *Gundy*, 139 S. Ct. at 2131  
26 (Gorsuch, J., dissenting).<sup>3</sup>

27 \_\_\_\_\_  
28 <sup>3</sup> The Ninth Circuit has previously rejected a non-delegation challenge to SORNA, but only

1  
2 **ii. The Remote Communication Identifiers Provision Violates the First Amendment**

3 “A fundamental principle of the First Amendment is that all persons have access to  
4 places where they can speak and listen[.]” *Packingham v. North Carolina*, 137 S. Ct. 1730,  
5 1735 (2017). The “most important place[] (in a spatial sense) for the exchange of views” today  
6 is “cyberspace . . . and social media in particular.” *Id.* This applies in equal measure to those  
7 previously convicted of sex offenses. *Id.* Because people who have completed their sentences  
8 in full now only live with “collateral consequences of conviction rather than [] a restraint on  
9 liberty,” and are thus “no longer subject to formal punishment,” they “enjoy the full protection  
10 of the First Amendment.” *Doe v. Harris*, 772 F.3d 563, 572 (9th Cir. 2014) (citations omitted).

11 As the Ninth Circuit has held in striking down a nearly identical registration requirement,  
12 when the government requires those convicted of sex offenses to provide law enforcement  
13 with their remote communication identifiers it unlawfully “imposes a substantial burden on sex  
14 offenders’ ability to engage in legitimate online speech, and to do so anonymously[.]” *Id.* at  
15 574, 578. Merely being required to make the “affirmative act of sending written notice to the  
16 police” imposes a “substantial” burden in itself, “[a]nd if that was not enough of a burden, the  
17 Act’s reporting requirement carries with it the threat of criminal sanctions.” *Id.* at 573; *see also*  
18 *Doe 1 v. Marshall*, 367 F.Supp.3d 1310, 1329 (M.D. Ala. 2019) (internet identifier reporting  
19 requirement “chills speech and deters expressive activity,” and where it required in-person  
20 reporting, it was “not only psychologically chilling, but physically inconvenient”) (citation  
21 omitted). Separately, such reporting requirements also have “the inevitable effect of burdening  
22 sex offenders’ ability to engage in anonymous online speech[.]” so long as their information  
23 has even the potential for public dissemination. *Harris*, 772 F.3d at 574, 580.

24 \_\_\_\_\_  
25 with respect to Section 16913(d), and only prior to the *Gundy* decision. *See United States v.*  
26 *Richardson*, 754 F.3d 1143, 1145 (9th Cir. 2014) (“Richardson’s specific contention is that  
27 Congress violated the non-delegation doctrine when it delegated its authority to the Attorney  
28 General to determine the applicability of SORNA’s registration requirements to pre-SORNA  
sex offenders. *See* [34] U.S.C. § [20]913(d).”). The lawfulness of the delegations in Sections  
20912 and 20914 remain issues of first impression in this circuit.

1 Remote communications reporting requirements fail relevant scrutiny. *Id.* at 578. Even  
2 if the government has a legitimate interest in preventing crime through the measure, reporting  
3 requirements “unnecessarily chills protected speech.” *Id.* The “concern that an overbroad  
4 statute deters protected speech is especially strong where, as here, the statute imposes  
5 criminal sanctions.” *Id.* Furthermore, short registration windows impermissibly burden speech.  
6 *Id.* at 581. In *Harris* a reporting obligation by mail “undeniably impede[d] protected First  
7 Amendment activity,” because “anytime registrants want to communicate with a new identifier,  
8 they must assess whether the message they intend to communicate is worth the hassle of  
9 filling out a form, purchasing stamps, and locating a post office or mailbox. The mail-in  
10 requirement is not only psychologically chilling, but physically inconvenient, since whenever a  
11 registered sex offender obtains a new ISP or Internet identifier, he must go somewhere else  
12 within 24 hours to mail that information to the State.” *Id.* at 582. When these reporting  
13 requirements are “applied in an across-the-board fashion” “regardless of [a person’s] offense,  
14 their history of recidivism (or lack thereof), or any other relevant circumstance,” they also  
15 plainly bear little relation to their putative purpose. *Harris*, 772 F.3d at 582.

16 The new rule is virtually indistinguishable from the law enjoined in *Harris*, and likewise  
17 fails First Amendment scrutiny. First, the rule burdens protected speech because it “imposes  
18 a substantial burden on sex offenders’ ability to engage in legitimate online speech, and to do  
19 so anonymously.” See *Harris*, 772 F.3d at 574. The rule’s definition of “remote communication  
20 identifiers,” is nearly identical to the Internet identifiers definition used in *Harris*, and is equally  
21 vague and expansive. Just like the statute in *Harris*, the rule requires registrants to provide  
22 up-to-date “remote communication identifiers,” which are “[a]ll designations the sex offender  
23 uses for purposes of routing or self-identification in internet or telephonic communications or  
24 postings, including email addresses and telephone numbers.” See 86 Fed. Reg. at 69,885. A  
25 registrant therefore cannot maintain anonymity in any “internet or telephonic communications  
26 or postings,” which is a blanket restriction on anonymous speech. See *id.* The rule also  
27 imposes a “substantial” burden on speech by requiring registrants to disclose this information  
28 within 3 days of any changes. See *id.* As plaintiffs have attested, these requirements have

1 already chilled their exercise of protected speech. See Ex. A at ¶¶ 22-24; Ex. B at ¶¶ 16-19;  
2 Ex. C at ¶¶ 18-20; Ex. D at ¶¶ 12-13; Ex. E ¶¶ 15-16.

3 The rule fails relevant scrutiny because it is not narrowly tailored to serve a significant  
4 government interest. To start, the AG's only justification for this provision is that there are an  
5 unstated "number of reasons" supporting past efforts to require a person to provide his phone  
6 number in his registration information, "including facilitating communication between  
7 registration personnel and sex offenders, and addressing the potential use of telephonic  
8 communication by sex offenders in efforts to contact or lure potential victims." 86 Fed. Reg. at  
9 69,872. For this rule, though, there's no justification, much less explanation for why remote  
10 communication identifiers *must* be disclosed. See *id.*

11 Even if one assumes that DOJ's goal is legitimate crime prevention, the rule is hardly  
12 narrowly tailored. It is first overbroad because it "unnecessarily chills protected speech," with  
13 the threat of criminal sanctions. See *Harris*, 772 F.3d at 578. The rule's requirement to disclose  
14 "all Internet identifiers" will impermissibly "lead registered sex offenders either to overreport  
15 their activity or underuse the Internet to avoid the difficult questions in understanding what,  
16 precisely, they must report." See *id.* at 568, 579.

17 Second, this risk is exacerbated by the potential for dissemination of the relevant  
18 information to the public. Just like in *Harris*, the new rule allows that these identifiers can be  
19 disseminated to the public at will. Indeed, the California provision in *Harris* provided that the  
20 information "shall not be open to inspection by the public," unless "necessary to ensure public  
21 safety." *Id.* at 579. Registrants' "fear of disclosure in and of itself chills their speech. If their  
22 identity is exposed, their speech, even on topics of public importance, could subject them to  
23 harassment, retaliation, and intimidation." *Id.* at 581. The new rule doesn't say precisely when  
24 this information would be disclosed to the public, instead referencing 34 U.S.C. § 20916, and  
25 two prior guidelines, the SMART Guidelines, and *Supplemental Guidelines for Sex Offender*  
26 *Registration and Notification*, 76 Fed. Reg. 1630 (Jan. 11, 2011) ("Supplemental Guidelines").  
27 See 86 Fed. Reg. at 69,859. The Supplemental Guidelines had "discouraged the inclusion of  
28 sex offenders' Internet identifiers on the public Web sites, [but] they did not adopt a mandatory

1 exclusion of this information from public Web site posting[.]” 76 Fed. Reg. at 1637. Section  
2 20916 in turn “does not limit jurisdictions’ retention and use of sex offenders’ Internet identifier  
3 information for purposes other than public disclosure, including submission of the information  
4 to the national (non-public) databases of sex offender information, sharing of the information  
5 with law enforcement and supervision agencies, and sharing of the information with  
6 registration authorities in other jurisdictions.” *Id.* Moreover the statute “does not limit the  
7 discretion of jurisdictions to include on their public Web sites functions by which members of  
8 the public can ascertain whether a specified e-mail address or other Internet identifier is  
9 reported as that of a registered sex offender, or to disclose Internet identifier information to  
10 any one by means other than public Web site posting.” *Id.* States are also *encouraged* to allow  
11 members of the public to check specific identifiers to see if they belong to a registrant and  
12 jurisdictions are *encouraged* to share it with law enforcement agencies. *See id.* Plaintiffs  
13 therefore have a well-founded fear that this information will be disclosed publicly, and have  
14 already changed their behavior accordingly. *See* Ex. A at ¶ 24; Ex. B at ¶ 19; Ex. C at ¶ 20;  
15 Ex. D at ¶ 13; Ex. E at ¶ 16. Thus, Plaintiffs’ “fear of disclosure in and of itself chills their  
16 speech. If their identity is exposed, their speech, even on topics of public importance, could  
17 subject them to harassment, retaliation, and intimidation.” *See Harris*, 772 F.3d. at 581.

18 Next, the 3-day reporting requirement is also overbroad. *See* 86 Fed. Reg. at 69,885.  
19 This chills protected speech because registrants “must assess whether the message they  
20 intend to communicate is worth the hassle of filling out a form, purchasing stamps, and locating  
21 a post office or mailbox,” which is “not only psychologically chilling, but physically  
22 inconvenient,” and “that chilling effect is only exacerbated by the possibility that criminal  
23 sanctions may follow for failing to update information[.]” *Harris*, 772 F.3d at 582.

24 But these serious restrictions are not narrowly tailored. DOJ hasn’t even bothered to  
25 articulate a rationale for these requirements, which dooms its rule out of the gate. *See* 86 Fed.  
26 Reg. at 69,872. DOJ certainly hasn’t “demonstrate[d] that the recited harms are real . . . and  
27 that the regulation will in fact alleviate these harms in a direct and material way,” or that  
28 registrants have ample alternative means of communication. *See Harris*, 772 F.3d at 577

1 (citation omitted). The rule also applies to all registrants, regardless of risk or prior conviction.  
2 See 86 Fed. Reg. at 69,859. That means that it restricts protected speech for any number of  
3 registrants without any legitimate need and leaves them completely without any means of  
4 speaking anonymously on the internet. Thus, for instance, the named plaintiffs, who have each  
5 never used the internet for any impermissible purpose, and have decades-old convictions, are  
6 forbidden from speaking anonymously on the internet about anything and everything.

7 **iii. The Presumption of Guilt for All California Registrants Violates Due**  
8 **Process**

9 18 U.S.C. § 2250(c) creates a statutory “affirmative defense” for failure to register or  
10 update registry information if a defendant proves at trial that “(1) uncontrollable circumstances  
11 prevented the individual from complying; (2) the individual did not contribute to the creation of  
12 such circumstances in reckless disregard of the requirement to comply; and (3) the individual  
13 complied as soon as such circumstances ceased to exist.”

14 The new rule expands upon that statutory provision and presumes registrants guilty for  
15 failing to register when they reside in states that don’t adequately implement SORNA. The rule  
16 restates the requirements almost verbatim, and includes new Section 72.7(g), saying, in part,  
17 that a registrant “who does not comply with a requirement of SORNA in conformity with the  
18 time and manner specifications of [the rule] must comply with the requirement in conformity  
19 with any applicable time and manner specifications of a jurisdiction in which the offender is  
20 required to register.” 86 Fed. Reg. at 69,886–87. According to the DOJ, this emphasizes that  
21 a registrant always must prove “an inability to comply with SORNA as an affirmative defense  
22 to liability.” *Id.* at 69,886. “Section 72.7(g) does not, in any case, relieve sex offenders of the  
23 obligation to comply fully with SORNA if able to do so or shift the burden of proof to the  
24 government to establish that a registration jurisdiction’s procedures would have allowed a sex  
25 offender to register or keep the registration current in conformity with SORNA.” *Id.*

26 The rule recognizes that there are “situations in which a sex offender has failed to do  
27 something SORNA requires because it is impossible for him to do so,” as a “jurisdiction’s law  
28 or practice may constrain its registration personnel to register only sex offenders whom its own



1 laws require to register.” *Id.* at 69,868. “[I]t is impossible for the sex offender to register in that  
2 jurisdiction, though subject to a registration duty under SORNA” “because registration is by its  
3 nature a two-party transaction, involving a sex offender’s providing information about where  
4 he resides and other matters as required, and acceptance of that information by the jurisdiction  
5 for inclusion in the sex offender registry. If the jurisdiction is unwilling to carry out its side of  
6 the transaction, then the sex offender cannot register.” *Id.* But the DOJ directs these  
7 “[c]oncerns” simply to the “affirmative defense” in 18 U.S.C. § 2250. *Id.*

8 18 U.S.C. § 2250(a) and (b) make it a crime for an individual “required to register under”  
9 SORNA to travel in interstate commerce or internationally and “knowingly fail[] to register or  
10 update a registration as required.” It is thus an element of the offense that a defendant both  
11 be (1) “required to register” and (2) “knowingly fail[] to register as required.” *Id.*; accord *Carr v.*  
12 *United States*, 560 U.S. 438, 447 (2010). The *actus reus* is the failure to register “as required,”  
13 while the *mens rea* turns on knowledge of that requirement.

14 SORNA in turn defines what is “required” of a registrant. A person must “register, and  
15 keep the registration current, in each jurisdiction where the offender resides, where the  
16 offender is an employee, and where the offender is a student.” 34 U.S.C. § 20913(a). In order  
17 to keep his registration current, a person must “appear in person in at least 1 jurisdiction . . .  
18 and inform that jurisdiction of all changes in the *information required* for that offender in the  
19 sex offender registry.” *Id.* § 20913(c) (emphasis added). A “sex offender registry” is defined in  
20 SORNA as “a registry of sex offenders, and a notification program, maintained by a  
21 jurisdiction,” which includes any state. 34 U.S.C. § 20911(9), (10).

22 The Ninth Circuit has held that “the federal government’s prosecution of an alleged  
23 violation of SORNA is not dependent on the individual state’s implementation of the  
24 administrative portion of SORNA.” *United States v. Elkins*, 683 F.3d 1039, 1046 (9th Cir.  
25 2012). Thus, as the Department recognized, even if state law prevents registration, a registrant  
26 is presumed criminally liable if he has not registered as required by SORNA.

27 The Sixth Circuit has recognized the lurking constitutional problem, but not addressed  
28 it directly. In *United States v. Felts*, 674 F.3d 599, 605 (6th Cir. 2012) a defendant noted that

1 states that failed to fully implement SORNA “would be unable to process the additional  
2 information” required by the federal government, “leaving an offender subject to SORNA  
3 without fair notice and unable to fulfill the registration requirements, through no fault of his  
4 own.” In such circumstances, “an inconsistency between federal and non-complying state  
5 regimes would render it impractical, or even impossible, for an offender to register under  
6 federal law.” The court said, however, that it “need not reach this argument with respect to due  
7 process” because Felts failed to provide information that his jurisdiction did require. *Id.*

8 The government bears the burden of proving beyond a reasonable doubt all of the  
9 elements of a crime. See *In re Winship*, 397 U.S. 358, 361–62 (1970). This forbids shifting  
10 “the burden of proof to the defendant” to “prove the critical fact in dispute.” *Mullaney v. Wilbur*,  
11 421 U.S. 684, 701 (1975). While legislatures have the power to define the elements of  
12 offenses, “[i]t is not within the province of a legislature to declare an individual guilty or  
13 presumptively guilty of a crime.” *Patterson v. New York*, 432 U.S. 197, 210, (1977) (citation  
14 omitted). Due process requires that the government “must prove every ingredient of an offense  
15 beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by  
16 presuming that ingredient upon proof of the other elements of the offense.” *Id.* at 215; see also  
17 *Dixon v. United States*, 548 U.S. 1, 6 (2006) (due process does not allow shifting the burden  
18 to the defense to disprove “any of the elements of the offense itself”).

19 Due process therefore does not allow the rule (or even the statute) to presume that  
20 someone is guilty of a federal crime when he has no obligation to register in the first place or  
21 when he can’t provide the “required” information. California has not fully implemented SORNA,  
22 and it does not require Mr. Doe #1, Mr. Doe #2, Mr. Doe #3, and many of ACSOL’s members,  
23 to register *at all*. The Department insists, however, that this does not excuse them from the  
24 new rule’s registration requirements, and, indeed, new Section 72(g)(1) asserts that the  
25 government has *no obligation* “to establish that a registration jurisdiction’s procedures would  
26 have allowed a sex offender to register or keep the registration current in conformity with  
27 SORNA” before it prosecutes him for failing to do the “impossible.” 86 Fed. Reg. at 69,867,  
28 69,886. But the effect of this rule is to impermissibly “declare an individual guilty or



1 presumptively guilty of a crime.” See *Patterson*, 432 U.S. at 210. Mr. Doe #1, Mr. Doe #2, Mr.  
2 Doe #3, and Mr. Doe #4, like all registrants in California, are presumed to be guilty of the *actus*  
3 *reus* of Section 2250 because the state does not provide any means for them to comply with  
4 the rule’s registration requirements. This gets constitutional imperatives precisely backward.

5 But DOJ’s rule goes even further and penalizes people who have no obligation to  
6 register in the first place for failing to do the *impossible*. It has also long been a feature of the  
7 common law that a person cannot be held criminally responsible for things over which he has  
8 no control. See, e.g., *Willing v. United States*, 4 U.S. (4 Dall.) 374, 376 (1804) (ruling in favor  
9 of defendants, who had argued in the district court that “the law does not compel parties to  
10 impossibilities (*lex non cogit ad impossibilia*)”); *Dr. Bonham’s Case*, 8 Co. Rep. 113b, 118a  
11 (1610) (“when an act of parliament is against common right and reason, or repugnant, or  
12 impossible to be performed, the common law will controul it, and adjudge such act to be void”).

13 This means, in modern practice, that “[i]n the criminal law, both a culpable *mens rea*  
14 and a criminal *actus reus* are generally required for an offense to occur.” *United States v.*  
15 *Apfelbaum*, 445 U.S. 115, 131 (1980). Or as the Court said in *Morissette v. United States*, 342  
16 U.S. 246, 251 (1952), in order for an accused to be held criminally responsible, the government  
17 must prove the “concurrence of an evil-meaning mind with an evil-doing hand.”

18 “But even where the evidence is sufficient to show the necessary *mens rea*, the  
19 government still must always ‘meet its burden of proving the *actus reus* of the offense.’” *United*  
20 *States v. Zhen Zhou Wu*, 711 F.3d 1, 18 (1st Cir. 2013) (quoting *United States v. Whiteside*,  
21 285 F.3d 1345, 1353 (11th Cir. 2002)). For instance, it violates due process to “criminalize[]  
22 wholly innocent and passive nonconduct[.]” *State v. Blake*, 481 P.3d 521, 533 (Wash. 2021).  
23 “Accordingly, an accused cannot be held criminally liable in a case where the *actus reus* is  
24 absent because the accused did not act voluntarily, or where *mens rea* is absent because the  
25 accused did not possess the necessary state of mind when he committed the involuntary act.”  
26 *United States v. Torres*, 74 M.J. 154, 156–57 (C.A.A.F. 2015). “At trial the burden always  
27 [must] rest with the Government to prove beyond a reasonable doubt that [a defendant] had  
28 committed each element of the offense, and one of those elements pertained to the issue of

1 whether [the defendant's] actions were voluntary[.]” *Id.* at 157.

2 Plaintiffs face a perpetual state of criminal liability for failing to do the impossible. Many  
3 cannot register in California and thus cannot follow the rule’s commands. See Ex. A at ¶ 26;  
4 Ex. B at ¶ 21; Ex. C at ¶¶ 22-24. Others can’t provide all of the required information. Thus, they  
5 have no control, over whether they are prosecuted for “wholly innocent and passive  
6 nonconduct.” See *Black*, 481 P.3d at 533. That means the government has been unlawfully  
7 relieved of its basic obligation to prove any *actus reus* at all. See *Torres*, 74 M.J. at 156–57.

### 8 **B. The Rule Contradicts Statutory Text**

9 The APA requires a court to set aside a rule that is “not in accordance with the law,” or  
10 “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C.  
11 § 706(2)(A), (C). A rule thus can’t conflict with statutory text—if “Congress has directly spoken  
12 to the precise question at issue,” and “the intent of Congress is clear, that is the end of the  
13 matter; for the court, as well as the agency must give effect to the unambiguously expressed  
14 intent of Congress.” *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

15 “The term ‘sex offender’ means an individual who was convicted of a sex offense.”  
16 34 U.S.C. § 20911(1). As relevant here, “‘sex offense’ means—a criminal offense that has an  
17 element involving a sexual act or sexual contact with another[.]” *Id.* at § 20911(5)(A)(i). The  
18 term “convicted” is defined only in the sense that it “includes adjudicated delinquent as a  
19 juvenile for that offense,” in certain circumstances. *Id.* at § 20911(8).

20 Invoking Section 20912(b), the rule creates 28 C.F.R. § 72.2, which says, “All terms  
21 used in this part have the same meaning as in SORNA.” 86 Fed. Reg. at 69,884. In the  
22 explanation for the rule, DOJ elaborated that, notwithstanding a comment asking “that a sex  
23 offender be removed from the sex offender registry if he receives a pardon,” it believed that  
24 “only pardons on the ground of innocence terminate registration obligations under SORNA[.]”  
25 *Id.* at 69,866. It also cited to the SMART Guidelines, which were a prior regulatory action that  
26 had purported to define the terms found in SORNA. *Id.* at 69,866–67.

27 The SMART Guidelines had said that “an adult sex offender is ‘convicted’ for SORNA  
28 purposes if the sex offender remains subject to penal consequences based on the conviction,

1 however it may be styled.” 73 Fed. Reg. at 38,050. “[N]ominal changes or terminological  
2 variations that do not relieve a conviction of substantive effect [do not] negate the SORNA  
3 requirements,” such as a procedure “under which the convictions of such sex offenders may  
4 nominally be ‘vacated’ or ‘set aside,’ but the sex offender is nevertheless required to serve  
5 what amounts to a criminal sentence for the offense.” *Id.* “Likewise, the sealing of a criminal  
6 record or other action that limits the publicity or availability of a conviction, but does not deprive  
7 it of continuing legal validity, does not change its status as a ‘conviction’ for purposes of  
8 SORNA.” *Id.* Only “if the predicate conviction is reversed, vacated, or set aside, or if the person  
9 is pardoned for the offense on the ground of innocence,” is he exempted from registration. *Id.*

10 The new rule thus appears to define the term “conviction” to include the expunged  
11 convictions of Mr. Doe #1 and Mr. Doe #2, and other ACSOL members. See Ex. A at ¶ 18; Ex.  
12 B at 12; Ex. E at ¶¶ 12–15. That interpretation, however, conflicts with the statutory language.

13 A “conviction” implies the “act or process of judicially finding someone guilty of a crime,”  
14 evinced by the “judgment (as by a jury verdict) that a person is guilty of a crime.”  
15 CONVICTION, Black’s Law Dictionary (11th ed. 2019). As the Supreme Court said nearly a  
16 century ago, “A plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive.  
17 More is not required; the court has nothing to do but give judgment and sentence.” *Kercheval*  
18 *v. United States*, 274 U.S. 220, 223 (1927). But sometimes a “court will vacate a plea of guilty  
19 shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such  
20 an application does not involve any question of guilt or innocence. . . . [Yet] [t]he effect of the  
21 court’s order permitting the withdrawal was to adjudge that the plea of guilty be held for  
22 naught.” *Id.* at 224. Or, as the Ninth Circuit has put it, “Legally, [a] plea no longer ha[s] the  
23 effect of a conviction after [a court] ha[s] permitted its withdrawal.” *Standen v. Whitley*, 994  
24 F.2d 1417, 1422 (9th Cir. 1993). Thus, for the term “conviction,” the “plain meaning is that the  
25 fact of a [ ] conviction” is operative “until the conviction is vacated or the felon is relieved of his  
26 disability by some affirmative action, such as a qualifying pardon[.]” *Lewis v. United States*,  
27 445 U.S. 55, 60–61 (1980); see also *Deal v. United States*, 508 U.S. 129, 132 (1993).

28 If a defendant satisfies its conditions, Section 1203.4(a)(1) results in him being

1 “permitted by the court to withdraw their plea of guilty or plea of nolo contendere and enter a  
2 plea of not guilty; or, if they have been convicted after a plea of not guilty, the court shall set  
3 aside the verdict of guilty[.]” “[T]he defendant shall thereafter be released from all penalties  
4 and disabilities resulting from the offense of which they have been convicted,” except “in any  
5 subsequent prosecution of the defendant for any other offense, the prior conviction may be  
6 pleaded and proved and shall have the same effect as if probation had not been granted or  
7 the accusation or information dismissed[.]” Section 1203.4 “enable[s a] defendant to truthfully  
8 represent to friends, acquaintances and private sector employers that he has no conviction.”  
9 *People v. Arata*, 151 Cal. App. 4th 778, 788 (Cal. Ct. App. 2007) (citation omitted).

10 Because Section 1203.4 “withdraws” and “set[s] aside” the plea of guilty, it is not a  
11 “conviction.” DOJ disagrees, though, because an expungement does not arise from innocence  
12 or relieve a person from all penal consequences. See 86 Fed. Reg. at 69,866; 73 Fed. Reg.  
13 at 38,050. Apparently, just because an expunged conviction may still be used to enhance  
14 subsequent prosecutions under Section 1203.4, DOJ still treats them as any other conviction.  
15 See 73 Fed. Reg. at 38,050 The new rule thus improperly defines a “conviction” to encompass  
16 criminal convictions that no longer exist. It requires Mr. Doe #1, Mr. Doe #2 and other ACSOL  
17 members, who can all “truthfully represent to friends, acquaintances and private sector  
18 employers that [they have] no conviction,” to nevertheless register as sex offenders. See  
19 *Arata*, 151 Cal. App. 4th at 788. The rule conflicts with the statute and must be set aside. <sup>4</sup>

20  
21 <sup>4</sup> To the extent DOJ might rely on deference to its interpretation of the statutory term, such an  
22 argument would fail. In resolving “statutory interpretation disputes, a court’s proper starting  
23 point lies in a careful examination of the ordinary meaning and structure of the law itself.  
24 Where, as here, that examination yields a clear answer, judges must stop.” *Food Mktg. Inst.*  
25 *v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citations omitted). There is no ambiguity  
26 in the statutory term “conviction,” as it has a settled meaning. Without an ambiguity, there’s  
27 nothing left for DOJ to do, and deference is inappropriate. See *Chevron*, 467 U.S. at 842–43.

28 Even if there was an ambiguity, moreover, this Court should apply the rule of lenity to  
resolve any uncertainty against DOJ. “[W]hen liberty is at stake,” deference “has no role to  
play.” *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of  
certiorari). “The critical point is that criminal laws are for courts, not for the Government, to

## 1 II. Plaintiffs Are Suffering Irreparable Harm

2 Plaintiffs must show they are “likely to suffer irreparable harm before a decision on the  
3 merits can be rendered.” *Winter*, 555 U.S. at 22 (citation omitted). “Irreparable harm is harm  
4 for which there is no adequate legal remedy, such as an award for damages.” *E. Bay*  
5 *Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) (citation omitted). “But where  
6 parties cannot typically recover monetary damages flowing from their injury—as is often the  
7 case in APA cases—economic harm can be considered irreparable.” *Id.*; accord *California v.*  
8 *Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

9 “Intangible injuries may also qualify as irreparable harm, because such injuries  
10 generally lack an adequate legal remedy.” *E. Bay Sanctuary*, 993 F.3d at 677. “When an  
11 alleged deprivation of a constitutional right is involved, most courts hold that no further showing  
12 of irreparable injury is necessary.” *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir.  
13 2005) (quotation omitted). Thus, “the loss of First Amendment freedoms, for even minimal  
14 periods of time, unquestionably constitutes irreparable injury.” *Harris*, 772 F.3d at 583 (cleaned

15  
16 construe.” *Abramski v. United States*, 573 U.S. 169, 191 (2014). Lenity is just one of the  
17 “traditional tools of statutory construction,” that a court must apply. *Chevron*, 467 U.S. at 843  
18 n.9. But “lenity requires ambiguous criminal laws to be interpreted in favor of the defendants  
19 subjected to them.” *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.). And  
20 “[w]here, as here, the canons [of construction] supply an answer, *Chevron* leaves the stage.”  
21 *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

22 If the term “conviction” were truly uncertain, this Court should apply the rule of lenity  
23 and reject a reading that imposes additional potential criminal liability on people who have no  
24 “convictions” under state law. Otherwise, they have no reasonable notice that they can be  
25 criminally punished for failing to register despite the absence of any criminal convictions.

26 To be sure, the Ninth Circuit has sometimes questioned whether the rule of lenity  
27 should take precedence over *Chevron* deference. See *Mujahid v. Daniels*, 413 F.3d 991, 999  
28 (9th Cir. 2005). But the court also recognized that Supreme Court precedent “supports that  
the rule of lenity can play an important role in statutory construction” even if “it does not  
address when the rule of lenity takes priority over *Chevron* deference.” *Id.* Since that decision  
in 2005, moreover, the Supreme Court has emphasized that every canon of construction  
applies at step one. See *Hylton v. U.S. Att’y Gen.*, 992 F.3d 1154, 1158, 1161 (11th Cir. 2021)  
(noting that rule of lenity is one canon of construction that applies to discern if there is a  
statutory ambiguity and citing *Epic Sys. Corp.*, 138 S. Ct. at 1630).

1 up). A plaintiff need only show a “colorable First Amendment claim” to demonstrate  
2 “irreparable injury sufficient to merit the grant of relief.” *Id.* (cleaned up).

3 Plaintiffs will suffer irreparable harm until this Court enters an injunction. Most  
4 significantly, they are suffering ongoing constitutional harms, including First Amendment  
5 harms that are more onerous than those enjoined in *Harris* and the unconstitutional  
6 presumption that they are guilty of federal crimes. As discussed, the rule violates the  
7 separation of powers, unlawfully chills speech, and violates the due process rights of those  
8 registrants in states like California who face an “impossible” requirement to register and a  
9 presumption of guilt. See Ex. A at ¶ 18; Ex. B at ¶ 12; Ex. C at ¶ 25; Ex. D at ¶ 14; Ex. E at ¶¶  
10 16–18. The plaintiffs could, at any moment, be arrested and criminally charged under the  
11 unlawful rule. Thus, as a preliminary injunction was warranted when the California tried *only*  
12 to impose disclosure requirements for remote communication identifiers that were less  
13 onerous than the ones at issue here, these combined constitutional violations warrant an  
14 injunction here. See *Harris*, 772 F.3d at 583.

15 Plaintiffs also face intangible harms and economic losses from the rule that they cannot  
16 recover because of sovereign immunity. They have burdensome requirements to register (or  
17 attempt to do so) as many as four times a year, and within 3 days after changes in their  
18 information, even though, for Mr. Doe #1, Mr. Doe #2, Mr. Doe #3, and certain ACSOL  
19 members, have no obligation to register under state law. See Ex. A at ¶ 18; Ex. B at ¶ 12; Ex.  
20 C at ¶ 25; Ex. D at ¶ 14; Ex. E at ¶¶ 11, 14, 16. These requirements impose significant costs  
21 for registrants who must take time off work, travel, and, in many cases, retain counsel so that  
22 they can prove that it is impossible for them to register. Even though the rule is invalid, these  
23 losses can never be repaid and thus are irreparable. See *E. Bay Sanctuary*, 993 F.3d at 677.

### 24 **III. The Equities Favor an Injunction**

25 Finally, Plaintiffs must demonstrate “that the balance of equities tips in [its] favor, and  
26 that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. “These factors merge when  
27 the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

28 “[I]t is always in the public interest to prevent the violation of a party’s constitutional



1 rights.” *Am. Beverage Ass’n v. San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019). Indeed, “the  
2 fact that a plaintiff has raised serious First Amendment questions compels a finding that the  
3 balance of hardships tips sharply in the plaintiff’s favor.” *Id.* (cleaned up). Thus, in *Harris*, the  
4 Ninth Circuit concluded that the balance of equities concerning the less onerous remote  
5 communications identifiers provision imposed by California favored the plaintiffs, particularly  
6 because “a prosecution is a likely possibility, yet only an affirmative defense is available, [and  
7 thus] speakers may self-censor rather than risk the perils of trial. There is a potential for  
8 extraordinary harm and a serious chill upon protected speech.” 772 F.3d at 583.

9 On the other side of the equation, when an agency acts unlawfully, this Court must not  
10 “weigh [] tradeoffs” between putative benefits of an invalid rule and harms to a plaintiff. *NFIB*  
11 *v. OSHA*, 142 S. Ct. 661, 666 (2022). “In our system of government, that is the responsibility  
12 of those chosen by the people through democratic processes.” *Id.* In light of the harms to  
13 Plaintiffs, the equities thus warrant an injunction.

14 DATED: October 19, 2022.

15 Respectfully submitted,

16 JEREMY TALCOTT  
17 By s/ *Jeremy Talcott*  
JEREMY TALCOTT

18 STEVEN M. SIMPSON  
19 By s/ *Steven M. Simpson*  
STEVEN M. SIMPSON

20 CALEB KRUCKENBERG  
21 By s/ *Caleb Kruckenberg*  
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22  
23 \**Appearing Pro Hac Vice*  
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**CERTIFICATE OF SERVICE**

I certify that on this day, October 19, 2022, I served copies of the foregoing on counsel of record for all Defendants using the Court's CM/ECF system.

By s/ *Jeremy Talcott*  
JEREMY TALCOTT



# EXHIBIT

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15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17  
18 JOHN DOE #1, ET AL.,

19 v.

20 U.S. DEPARTMENT OF JUSTICE, ET  
21 AL.,

Case No. 5:22-cv-00855

**DECLARATION OF JOHN DOE  
#1**

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1 I, John Doe #1, declare under penalty of perjury that the following is true and  
2 correct to the best of my present knowledge, information, and belief:

3 1. I am a resident of the State of California.

4 2. "John Doe" is a fictitious name. With my signature, I will nevertheless  
5 affirm the truth of the statements in this declaration.

6 3. I enlisted in the U.S. Marine Corps at age 17 and was honorably  
7 discharged in 1996.

8 4. In 1994, while I was 23 and still serving in the Marines, I engaged in an  
9 otherwise-consensual encounter with a 16-year-old girl. This incident did not involve  
10 sexual intercourse.

11 5. In 1996, I pled no contest to a single misdemeanor count of sexual  
12 battery under California Penal Code § 243.4(a) and was sentenced to no jail time and  
13 three years' probation. I was then required to register as a sex offender in the State  
14 of California.

15 6. In 1998, the California Department of Probation requested that I be  
16 given early termination of my probation, which a court accepted.

17 7. After the conviction, I obtained my bachelor's degree, followed by a  
18 master's degree, and rose through the ranks of various companies.

19 8. In 2005, I was engaged to be married and rented a second home for me  
20 and my future wife. I did not, however, move into the home. I did not understand,  
21 however, that my obligation to register as a sex offender included registering my  
22 rental home address, where I did not live. I did not immediately update my  
23 registration information to include the future home as an additional residence  
24 address.

25 9. In 2006, I was charged with a misdemeanor count of failing to register  
26 under California Penal Code § 290(g)(1). I pled no contest and was sentenced to three  
27 years' probation.

28 10. I then got married and had two children.

1           11. Today, I am a successful businessman, an involved father and husband,  
2 and a dedicated member of my church.

3           12. Because of my rehabilitation, a state court expunged my original  
4 conviction in 2002 pursuant to Cal. Penal Code § 1203.4, which set aside my  
5 conviction and replaced it with a plea of not guilty.

6           13. In 2010 a state court expunged my failure to register conviction, also  
7 pursuant to Cal. Penal Code § 1203.4.

8           14. Then in 2012, a state court issued a “Certificate of Rehabilitation” to  
9 me, under Cal. Penal Code § 4852.01, which officially recommended me for an  
10 unqualified pardon.

11           15. Under California law, I am no longer required to register as a sex  
12 offender and have no criminal convictions.

13           16. If not vacated, my original offense of conviction, Cal. Penal Code §  
14 243.4(a), likely requires lifetime registration under SORNA.

15           17. On December 8, 2021, the Department of Justice issued a rule,  
16 *Registration Requirements Under the Sex Offender Registration and Notification Act*,  
17 86 Fed. Reg. 69,856 (Dec. 8, 2021), which became effective on January 7, 2022.

18           18. According to the new rule, because my original conviction was only  
19 expunged, instead of being set aside due to factual innocence or vacated, I am  
20 required to register as a sex offender in California.

21           19. The rule orders me to provide information in person to California  
22 officials, such as my social security number, my “remote communication identifiers”  
23 (e.g., internet usernames), my work and school information, and information  
24 concerning any international travel, passport, and vehicle registration, or professional  
25 licenses to local authorities, in person at least yearly.

26           20. I must also report, in person, changes in address within three days, give  
27 advance notice if I plan to change residences jobs or schools, report changes in  
28

1 remote communication identifiers within three days, and international travel plans  
2 prior to any trip.

3 21. If I am forced to register as a sex offender, I will no longer be allowed  
4 to freely visit my children at their schools, I will likely face ostracization from my  
5 community and church, and will lose out on work and career opportunities. When I  
6 was previously required to register, I suffered instances of harassment and had faced  
7 adverse employment and social consequences, including rescinded job offers. These  
8 consequences were, in part, what motivated me to seek an expungement and then  
9 certification of rehabilitation. If I am forced to re-register, I will suffer these  
10 consequences once again.

11 22. I also wish to engage in anonymous speech on the internet through the  
12 use of anonymous remote communication identifiers, such as email addresses and  
13 social media usernames. I wish to remain anonymous to preserve my privacy, and to  
14 avoid adverse reputational and other risks related to my past offenses. I also wish to  
15 speak anonymously about issues of public concern, including sex offender  
16 registration requirements and the unfairness of the new SORNA rule.

17 23. The new rule requires me to disclose my remote communication  
18 identifiers as a part of registration, which could be accessible by members of the  
19 public. Because of this disclosure requirement, I am worried that I cannot speak  
20 freely about issues of public concern, particularly the new SORNA rule, without  
21 jeopardizing my reputation, privacy, and the safety of my family. I have refrained  
22 from speaking on these matters of public concern using my anonymous remote  
23 communication identifiers because of the new rule.

24 24. Even though I cannot currently register under California law, I am  
25 concerned that California may attempt to comply with the new rule at any time. I  
26 have therefore refrained from speaking anonymously online for fear that this  
27 information will eventually need to be disclosed as a part of my registration.  
28



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15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17  
18 JOHN DOE #1, ET AL.,

19 v.

20 U.S. DEPARTMENT OF JUSTICE, ET  
21 AL.,

Case No. 5:22-cv-00855

**DECLARATION OF JOHN DOE  
#2**



1 I, John Doe #2, declare under penalty of perjury that the following is true and  
2 correct to the best of my present knowledge, information, and belief:

3 1. I am a resident of the State of California.

4 2. "John Doe #2" is a fictitious name. With my signature, I will  
5 nevertheless affirm the truth of the statements in this declaration.

6 3. I was convicted in 2005 of one count of sexual battery under California  
7 Penal Code § 243.4(a), for conduct involving a child under 10.

8 4. My conviction was a felony "wobbler" and got reduced to a  
9 misdemeanor in 2012, for which I was sentenced to 60 days in jail and three years'  
10 probation. I was also required to register as a sex offender for life in the State of  
11 California. This remains my only criminal offense.

12 5. After my conviction I began intensive treatment, almost all of it  
13 voluntary, including completing an inpatient residential sex offender treatment  
14 program, more than 600 hours of individual psychotherapy, and becoming a leader  
15 in a local chapter of Sex Addicts Anonymous.

16 6. While attending an intensive inpatient program, I experienced an  
17 epiphany about my prior behavior. In a group session, nearly every one of my fellow  
18 patients reported suffering prior abuse. It was then that I realized the devastating, life-  
19 altering toll, that my own behavior had taken on my victim.

20 7. I then devoted my personal and professional life to helping others  
21 suffering from addictions, and more specifically, to trying to prevent future instances  
22 of sexual abuse. I obtained a certification for alcohol and drug addiction counseling  
23 from the state of California (2010), a bachelor's degree in psychology (2012) and  
24 then a master's degree in clinical forensic Social Work (2015). I currently hold a  
25 provisional license with the CA BBS as an associate social worker. From 2016 until  
26 2020 I worked full-time as a case manager and substance abuse counselor for a non-  
27 profit serving chronically homeless individuals in Los Angeles.

28

1           8.     In 2021 I began treating patients with sexual addictions full time. I also  
2 organized volunteer support groups for registrants and their families. My goal was,  
3 and remains, to make living amends, for my own misconduct. Recognizing that I can  
4 never make direct amends to my victim without causing further harm, I hope to help  
5 my patients recognize and stop their own destructive and harmful behaviors before  
6 they offend, and help those who have offended to repair the damage they have caused.

7           9.     Because of my rehabilitation, a California court expunged my  
8 conviction in 2012. Then in 2016 it issued a “Certificate of Rehabilitation,” under  
9 Cal. Penal Code § 4852.01. Under California law, I am no longer required to register  
10 as a sex offender.

11          10.    If not vacated, my original offense of conviction, Cal. Penal Code §  
12 243.4(a), likely requires me to register for at least 25 years under SORNA.

13          11.    On December 8, 2021, the Department of Justice issued a rule,  
14 *Registration Requirements Under the Sex Offender Registration and Notification Act*,  
15 86 Fed. Reg. 69,856 (Dec. 8, 2021), which became effective on January 7, 2022.

16          12.    According to the new rule, because my original conviction was only  
17 expunged, instead of being set aside, I am required to register as a sex offender in  
18 California.

19          13.    The rule orders me to provide information in person to California  
20 officials, such as my social security number, my “remote communication identifiers”  
21 (e.g., internet usernames), my work and school information, and information  
22 concerning any international travel, passport, and vehicle registration, or professional  
23 licenses to local authorities, in person at least yearly.

24          14.    I must also report, in person, changes in address within three days, give  
25 advance notice if I plan to change residences jobs or schools, report changes in  
26 remote communication identifiers, and international travel plans prior to any trip.

27          15.    If I am forced to register as a sex offender, I will likely lose my license  
28 to practice therapy and be forced to cease my practice. I will also likely face

1 ostracization from my community. When I was previously required to register, I  
2 suffered instances of harassment and had faced adverse employment and social  
3 consequences, including rescinded job offers. These consequences were, in part,  
4 what motivated me to seek an expungement and then certification of rehabilitation.  
5 If I am forced to re-register, I will suffer these consequences once again.

6 16. I also wish to engage in anonymous speech on the internet through the  
7 use of anonymous remote communication identifiers, such as email addresses and  
8 social media usernames. I wish to remain anonymous to preserve my privacy, and to  
9 avoid adverse reputational and other risks related to my past offenses. I also wish to  
10 speak anonymously about issues of public concern, including sex offender  
11 registration requirements and the unfairness of the new SORNA rule.

12 17. The new rule requires me to disclose my remote communication  
13 identifiers as a part of registration, which could be accessible by members of the  
14 public. Because of this disclosure requirement, I am worried that I cannot speak  
15 freely about issues of public concern, particularly the new SORNA rule, without  
16 jeopardizing my reputation, privacy, and the safety of my family. I have refrained  
17 from speaking on these matters of public concern using my anonymous remote  
18 communication identifiers because of the new rule.

19 18. Even though I cannot currently register under California law, I am  
20 concerned that California may attempt to comply with the new rule at any time. I  
21 have therefore refrained from speaking anonymously online for fear that this  
22 information will eventually need to be disclosed as a part of my registration.

23 19. If my true identity is disclosed as a result of this lawsuit, I will face all  
24 of the same negative consequences of registering. I will again face harassment,  
25 negative social and career consequences, and will have to surrender my anonymity  
26 just to protect my right to anonymous speech.

27 20. I also regularly travel outside of the State of California and intend to do  
28 so in the future. Because of my travel and my current inability to register in California

1 as directed under the new rule I am concerned that I may be subject to criminal  
2 liability under federal law at any time.

3 21. Because of this concern I have attempted to register as a sex offender in  
4 California. I have been unable to do so, however, and been told by local law  
5 enforcement that I cannot register as required.

6 22. The new rule, however, informs me otherwise, and I am concerned that  
7 I could be arrested and prosecuted by federal authorities, despite these assurances  
8 from local law enforcement.

9 23. I will not be able to maintain this lawsuit if my true identity is publicly  
10 disclosed as the adverse reputational consequences will deter me from trying to  
11 vindicate my constitutional rights.

12 DATED: October 9, 2022

13 John Doe #2  
14 John Doe #2

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# EXHIBIT C

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11 \* *Admitted Pro Hac Vice*

12 *Attorneys for Plaintiffs*

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14  
15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17  
18 JOHN DOE #1, ET AL.,

19 v.

20 U.S. DEPARTMENT OF JUSTICE, ET  
21 AL.,

Case No. 5:22-cv-00855

**DECLARATION OF JOHN DOE  
#3**

1 I, John Doe #3, declare under penalty of perjury that the following is true and  
2 correct to the best of my present knowledge, information, and belief:

3 1. I am a resident of the State of California.

4 2. "John Doe #3" is a fictitious name. With my signature, I will  
5 nevertheless affirm the truth of the statements in this declaration.

6 3. I was convicted in 1997 of violating Cal. Penal Code § 288(a) ("Lewd  
7 Acts With a Minor Under 14"). My original offense involved unlawful contact with  
8 a 13 year-old.

9 4. I was imprisoned for two years, and then served a period of parole  
10 supervision.

11 5. I was then required to register as a sex offender in California for life.

12 6. While in prison I completed intensive sex offender treatment, which I  
13 continued after release.

14 7. After my release from prison in 1999 I started a business and married. I  
15 have two stepsons, and two grandchildren. I am currently 62 years old.

16 8. In 2011 I was convicted of misdemeanor failing to register under  
17 California Penal Code § 290(g)(1), but have no other criminal convictions since my  
18 1997 conviction.

19 9. In 2015 my 2011 misdemeanor conviction was expunged pursuant to  
20 Cal. Penal Code § 1203.4.

21 10. I have aspirations to travel interstate and internationally.

22 11. In 2021 I petitioned to be removed from the California registry under  
23 Cal. Penal Code 290.5, which was granted. I am no longer required to register as a  
24 sex offender under California law.

25 12. DOJ has asserted that my original offense of conviction, Cal. Penal  
26 Code § 288(a), likely requires me to register for life under SORNA.

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1           13. On December 8, 2021, the Department of Justice issued a rule,  
2 *Registration Requirements Under the Sex Offender Registration and Notification Act*,  
3 86 Fed. Reg. 69,856 (Dec. 8, 2021), which became effective on January 7, 2022.

4           14. According to the new rule, even though I am no longer required to  
5 register under California law, I am required to register as a sex offender in California.

6           15. The rule orders me to provide information in person to California  
7 officials, such as my social security number, my “remote communication identifiers”  
8 (e.g., internet usernames), my work and school information, and information  
9 concerning any international travel, passport, and vehicle registration, or professional  
10 licenses to local authorities, in person at least yearly.

11           16. I must also report, in person, changes in address within three days, give  
12 advance notice if I plan to change residences jobs or schools, report changes in  
13 remote communication identifiers, and international travel plans prior to any trip.

14           17. If I am forced to register as a sex offender, I will likely suffer serious  
15 reputation injuries. I will also likely face ostracization from my community. When I  
16 was previously required to register, I suffered instances of harassment and had faced  
17 adverse employment and social consequences, including rescinded job offers. These  
18 consequences were, in part, what motivated me to seek relief from registration. If I  
19 am forced to re-register, I will suffer these consequences once again.

20           18. I also wish to engage in anonymous speech on the internet through the  
21 use of anonymous remote communication identifiers, such as email addresses and  
22 social media usernames. I wish to remain anonymous to preserve my privacy, and to  
23 avoid adverse reputational and other risks related to my past offenses. I also wish to  
24 speak anonymously about issues of public concern, including sex offender  
25 registration requirements and the unfairness of the new SORNA rule.

26           19. The new rule requires me to disclose my remote communication  
27 identifiers as a part of registration, which could be accessible by members of the  
28 public. Because of this disclosure requirement, I am worried that I cannot speak



1 freely about issues of public concern, particularly the new SORNA rule, without  
2 jeopardizing my reputation, privacy, and the safety of my family. I have refrained  
3 from speaking on these matters of public concern using my anonymous remote  
4 communication identifiers because of the new rule.

5 20. Even though I cannot currently register under California law, I am  
6 concerned that California may attempt to comply with the new rule at any time. I  
7 have therefore refrained from speaking anonymously online for fear that this  
8 information will eventually need to be disclosed as a part of my registration.

9 21. I also intend to travel outside of the State of California in the future.  
10 Because of my intent to travel and my current inability to register in California as  
11 directed under the new rule I am concerned that I may be subject to criminal liability  
12 under federal law at any time.

13 22. Because of this concern I have attempted to register as a sex offender in  
14 California to comply with SORNA. I have been unable to do so, however, and been  
15 told that I cannot register as required.

16 23. In September 2020, with the assistance of counsel I inquired with my  
17 local registry office whether they could either register me to satisfy my SORNA  
18 obligation or whether the office could direct me to “any location where federal  
19 registration can be accomplished if [the] department does not offer that service.”

20 24. A detective with the relevant County Sheriff’s Office responded in an e-  
21 mail, “Due to the conviction being in CA and his obligation to register is terminated,  
22 Mr. [Doe #3] would not need to register federally. ... The federal sex offender  
23 registry is just a database of State records. The requirement to register is handled on  
24 the state side not the federal side, so we do not offer federal registration and I do not  
25 know of any agency that offers it.”

26 25. The new rule, however, informs me otherwise, and I am concerned that  
27 I could be arrested and prosecuted by federal authorities, despite these assurances  
28 from local law enforcement.

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26. If my true identity is disclosed as a result of this lawsuit, I will face all of the same negative consequences of registering. I will again face harassment, negative social and career consequences, and will have to surrender my anonymity just to protect my right to anonymous speech.

27. I will not be able to maintain this lawsuit if my true identity is publicly disclosed as the adverse reputational consequences will deter me from trying to vindicate my constitutional rights.

DATED: October 10, 2022

John Doe #3  
John Doe #3

# EXHIBIT D

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11 \* *Admitted Pro Hac Vice*

12 *Attorneys for Plaintiffs*

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14  
15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17  
18 JOHN DOE #1, ET AL.,

19 v.

20 U.S. DEPARTMENT OF JUSTICE, ET  
21 AL.,

Case No. 5:22-cv-00855

**DECLARATION OF JOHN DOE**  
**#4**

1 I, John Doe #4, declare under penalty of perjury that the following is true and  
2 correct to the best of my present knowledge, information, and belief:

3 1. I am a resident of the State of California.

4 2. "John Doe #4" is a fictitious name. With my signature, I will  
5 nevertheless affirm the truth of the statements in this declaration.

6 3. I was convicted in 1997 for lewd and lascivious conduct with a child  
7 under 16 in violation of Florida Statute 800.04. The victim was a 15-year-old male.

8 4. My conviction required me to register for life in the State of Florida.

9 5. I subsequently moved to California, where I am also required to register  
10 for life under state law.

11 6. I have registered as a sex offender California since moving to California  
12 more than 15 years ago. As a lifetime registrant in Florida, I also remain on that  
13 state's registry and I am currently registered with both states.

14 7. I currently work as an auditor and have had no criminal convictions  
15 since my original offense.

16 8. My original offense of conviction, Florida Statute 800.04, likely  
17 requires me to register for life under SORNA.

18 9. On December 8, 2021, the Department of Justice issued a rule,  
19 *Registration Requirements Under the Sex Offender Registration and Notification Act*,  
20 86 Fed. Reg. 69,856 (Dec. 8, 2021), which became effective on January 7, 2022.

21 10. The rule orders me to provide information in person to California  
22 officials, such as my social security number, my "remote communication identifiers"  
23 (e.g., internet usernames), my work and school information, and information  
24 concerning any international travel, passport, and vehicle registration, or professional  
25 licenses to local authorities, in person at least yearly.

26 11. I must also report, in person, changes in address within three days, give  
27 advance notice if I plan to change residences jobs or schools, report changes in  
28 remote communication identifiers, and international travel plans prior to any trip.



1           12. I wish to engage in anonymous speech on the internet through the use  
2 of anonymous remote communication identifiers, such as email addresses and social  
3 media usernames. I wish to remain anonymous to preserve my privacy, and to avoid  
4 adverse reputational and other risks related to my past offenses. I also wish to speak  
5 anonymously about issues of public concern, including sex offender registration  
6 requirements and the unfairness of the new SORNA rule.

7           13. The new rule requires me to disclose my remote communication  
8 identifiers as a part of registration, which could be accessible by members of the  
9 public. Because of this disclosure requirement, I am worried that I cannot speak  
10 freely about issues of public concern, particularly the new SORNA rule, without  
11 jeopardizing my reputation, privacy, and the safety of my family. I have refrained  
12 from speaking on these matters of public concern using my anonymous remote  
13 communication identifiers because of the new rule.

14           14. I have attempted to provide the information required by the new rule to  
15 the State of California as a part of my registration. I have not been allowed to fully  
16 comply with the new rule, however, because California does not collect all of the  
17 information required under the new rule.

18           15. Even though California does not currently collect the remote  
19 communication identifiers information required by the rule, I am concerned that  
20 California may attempt to comply with the new rule at any time. I have therefore  
21 refrained from speaking anonymously online for fear that this information will  
22 eventually need to be disclosed as a part of my registration.

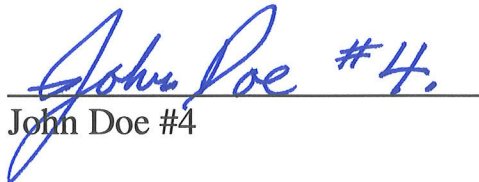
23           16. I also regularly travel outside of the State of California, and intend to do  
24 so in the future. Because of my travel and my current inability to provide all the  
25 information to California as directed under the new rule I am concerned that I may  
26 be subject to criminal liability under federal law at any time.

27           17. If my true identity is disclosed as a result of this lawsuit, I will face many  
28 of the harms I seek to avoid by engaging in anonymous online speech. I will likely

1 face harassment, negative social and career consequences, and will have to surrender  
2 my anonymity just to protect my right to anonymous speech.

3 18. I may not be able to maintain this lawsuit if my true identity is publicly  
4 disclosed as the adverse reputational consequences will deter me from trying to  
5 vindicate my constitutional rights.

6 DATED: October 10, 2022

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9 John Doe #4  
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# EXHIBIT E

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12 *Attorneys for Plaintiffs*

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15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17  
18 JOHN DOE, ET AL.,

19 v.

20 U.S. DEPARTMENT OF JUSTICE, ET  
21 AL.,

22 Defendants.  
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Case No. 5:22-cv-00855

**DECLARATION OF JANICE  
BELLUCCI**

1 I, Janice Bellucci, declare under penalty of perjury that the following is true  
2 and correct to the best of my present knowledge, information, and belief:

3 1. I am a resident of the State of California and a member of the bar of  
4 California.

5 2. I am the Executive Director of the Alliance for Constitutional Sex  
6 Offense Laws (ACSOL), which is a plaintiff in this matter.

7 3. My legal practice specializes in issues that arise because of sex offender  
8 registration laws. Over the course of my career, I have represented hundreds of  
9 people who have been required to register as sex offenders and have engaged in both  
10 affirmative litigation to challenge registration requirements and collateral litigation  
11 to help registrants seek relief from registration. I have also represented individuals in  
12 expungement, relief from registration and certificate of rehabilitation proceedings in  
13 California state courts, and have accompanied numerous registrants who have  
14 attempted to register as sex offenders with the state of California.

15 4. I helped found ACSOL because of my professional experience  
16 representing individuals who have suffered unfair consequences because of sex  
17 offense registration requirements.

18 5. I am familiar with the internal operations, goals, and membership of  
19 ACSOL.

20 6. ACSOL is a nonprofit organization “dedicated to protecting the  
21 Constitution by restoring the civil rights of people listed on the public registries and  
22 their families.” <https://all4consolaws.org/about-us/>.

23 7. ACSOL is based in California and has more than 100,000 California  
24 registrants among its membership, including John Doe, the other plaintiff in this  
25 matter.

26 8. ACSOL’s membership includes individuals convicted of sex offenses  
27 who reside in the Central District of California.

28

1           9.     One of ACSOL’s central purposes is limiting unlawful registration  
2 requirements for its membership in order to help its members live law-abiding and  
3 productive lives as a part of their communities.

4           10.    I am familiar with the rule that is challenged in this case, *Registration*  
5 *Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed.  
6 Reg. 69,856 (Dec. 8, 2021), and its effect on ACSOL’s membership.

7           11.    ACSOL’s membership includes individuals convicted of sex offenses,  
8 as described by federal law, who are required to register as sex offenders under both  
9 California and federal law. These members are required to comply with the new rule,  
10 even though California does not provide avenues for them to provide all of the  
11 required information to California authorities. For instance, in my experience  
12 California does not currently collect remote communication identifier information,  
13 or collect information about anticipated travel by registrants, despite the rule’s  
14 directions that registrants must provide such information to local authorities.  
15 California’s collection of information can change, however, at the discretion of local  
16 authorities.

17           12.    ACSOL’s membership also includes individuals convicted of California  
18 crimes that are sex offenses, as described by federal law, who are putatively required  
19 to register as sex offenders under federal law, but have had their convictions  
20 expunged under California Penal Code § 1203.4 or have been granted relief from  
21 registration under California Penal Code § 290.5 and have no other convictions. Like  
22 Mr. Doe, these ACSOL members have no obligation to register under California law,  
23 yet are presumed to be in non-compliance with the new rule.

24           13.    ACSOL’s membership includes, for instance, an individual who was  
25 convicted of violating California Penal Code § 243.4(a) with a victim younger than  
26 13, which is likely a Tier III offense under the Sex Offender Registration and  
27 Notification Act (SORNA), requiring registration under federal law for life. That  
28 conviction was expunged pursuant to California Penal Code § 1203.4, and the



1 member is no longer required to register under California law. This member resides  
2 in the Central District of California. According to the new rule this member must re-  
3 register in California. However, California authorities will not allow this member to  
4 register as a sex offender.

5 14. In fact, California prohibits individuals like Mr. Doe and other ACSOL  
6 members from registering as sex offenders because they have no criminal convictions  
7 under state law. I have personally accompanied an individual who has an expunged  
8 sex offense conviction while he attempted to register with local law enforcement in  
9 California, and he was denied the ability to register by local police. I have therefore  
10 verified that individuals with expunged convictions cannot register under state law.

11 15. ACSOL's membership also includes an individual who was convicted  
12 of violating California Penal Code § 288(a) lewd of lascivious acts with a minor  
13 under the age of 14 and is required to register under SORNA. That member has been  
14 granted relief from registration under California Penal Code § 290.5 and no longer  
15 must register under California law. According to the new rule this member must re-  
16 register in California. However, California authorities will not allow this member to  
17 register as a sex offender.

18 16. ACSOL members who will be forced to re-register, despite having had  
19 their convictions expunged under California law or having been relieved from  
20 registration requirements, face significant collateral consequences, such as loss of  
21 career opportunities and professional licensing, adverse reputational harms, inability  
22 to travel freely, and residency restrictions. In the course of my career, I have also  
23 witnessed serious incidents of harassment and even violence against individuals who  
24 must register as sex offenders because of their registration status.

25 17. ACSOL's membership also includes individuals whose speech has been  
26 curtailed by the rule. These members wish to engage in anonymous speech on the  
27 internet through the use of anonymous remote communication identifiers. They wish  
28 to remain anonymous to preserve their privacy, and to avoid adverse reputational and

1 other risks related to their past convictions. They also wish to speak anonymously  
2 about issues of public concern, including sex offender registration requirements and  
3 the unfairness of the new SORNA rule. Yet the new rule requires these ACSOL  
4 members to disclose their remote communication identifiers when they register,  
5 which could be accessible by members of the public.

6 18. Even though the new rule has yet to be fully implemented by California  
7 authorities, these ACSOL members have altered their conduct because of the  
8 potential for local authorities to begin collecting remote communication identifier  
9 information at any time. These ACSOL members worry that they cannot speak freely  
10 about issues of public concern, particularly the new SORNA rule, without  
11 jeopardizing their reputation, privacy and the safety of their families. These ACSOL  
12 members have thus refrained from speaking on these matters of public concern using  
13 their anonymous remote communication identifiers, because of the new rule.

14 DATED: June 3, 2022

15   
16 Janice Bellucci  
17 Executive Director  
18 ACSOL  
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11 *\*Admitted Pro Hac Vice*

12 *Attorneys for Plaintiffs*

13  
14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA**

16  
17 JOHN DOE #1, *et al.*

Case No. 5:22-cv-00855

18 Plaintiffs,

19 v.

**[PROPOSED] ORDER ON MOTION FOR  
PRELIMINARY INJUNCTION**

20 U.S. DEPARTMENT OF JUSTICE, *et al.*,

21  
22 Defendants.





**From:** [caed\\_ecfmail@caed.uscourts.gov](mailto:cacd_ecfmail@caed.uscourts.gov)  
**To:** [noreply@ao.uscourts.gov](mailto:noreply@ao.uscourts.gov)  
**Subject:** Activity in Case 5:22-cv-00855-JGB-SP John Doe et al v. U.S Department of Justice et al Motion for Preliminary Injunction  
**Date:** Wednesday, October 19, 2022 11:36:39 AM

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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**Notice of Electronic Filing**

The following transaction was entered by Talcott, Jeremy on 10/19/2022 at 8:35 AM PDT and filed on 10/19/2022

**Case Name:** John Doe et al v. U.S Department of Justice et al  
**Case Number:** [5:22-cv-00855-JGB-SP](#)  
**Filer:** John Doe  
John Doe  
John Doe  
The Alliance for Constitutional Sex Offense Laws

**Document Number:** [44](#)

**Docket Text:**

**NOTICE OF MOTION AND MOTION for Preliminary Injunction re To stop enforcement of the rule, Registration Requirements Under the Sex Offender Registration and Notification Act, 86 Fed. Reg. 69,856 (Dec. 8, 2021) filed by plaintiff John Doe, John Doe, John Doe(#4), John Doe(#3), The Alliance for Constitutional Sex Offense Laws. Motion set for hearing on 12/5/2022 at 09:00 AM before Judge Jesus G. Bernal. (Attachments: # (1) Memorandum, # (2) Exhibit, # (3) Exhibit, # (4) Exhibit, # (5) Exhibit, # (6) Exhibit, # (7) Proposed Order) (Talcott, Jeremy)**

**5:22-cv-00855-JGB-SP Notice has been electronically mailed to:**

Caleb J. Kruckenberg [ckruckenberg@pacificlegal.org](mailto:ckruckenberg@pacificlegal.org)

Jeremy Brennan Talcott [jtalcott@pacificlegal.org](mailto:jtalcott@pacificlegal.org), [cpiett@pacificlegal.org](mailto:cpiett@pacificlegal.org),  
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Steven Simpson ssimpson@pacificlegal.org

**5:22-cv-00855-JGB-SP Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**C:\fakepath\Notice of Motion, Doe #1 v DOJ (PI).pdf

**Electronic document Stamp:**

[STAMP cacdStamp\_ID=1020290914 [Date=10/19/2022] [FileNumber=34757018-0] [787f6c1408f78c16e32ac1d22928e091d48b842bca7a05d1c47bdb438d98d26d972cd7dcbe4bb479b54570e21d6e82eb78a00b2c5240e55229241a8459e90086]]

**Document description:**Memorandum

**Original filename:**C:\fakepath\Final Memo for PI, for filing.pdf

**Electronic document Stamp:**

[STAMP cacdStamp\_ID=1020290914 [Date=10/19/2022] [FileNumber=34757018-1] [47afddd44fe85917c610c1ee9342024f7d74ef4a29c51d3eeb8845cd2f67f72d30a0b5b42cb4f7f04a29811e20998c29be7e6c798ec750a4abac4fa34755eac7]]

**Document description:**Exhibit

**Original filename:**C:\fakepath\Exhibit A, Declaration of John Doe #1 - 10.10.22.pdf

**Electronic document Stamp:**

[STAMP cacdStamp\_ID=1020290914 [Date=10/19/2022] [FileNumber=34757018-2] [908f3153b8efe4a5c51b47ef9f66bafa12102c68c52ddab1e02e4d60d0ee802cb57ab091aa252a3be80996aabe518701d87a7cad586bcc94f19c28039a4629e]]

**Document description:**Exhibit

**Original filename:**C:\fakepath\Exhibit B, Declaration of John Doe #2 (signed).pdf

**Electronic document Stamp:**

[STAMP cacdStamp\_ID=1020290914 [Date=10/19/2022] [FileNumber=34757018-3] [0fb189621f8dfcae3453cefe4cef99b8efdd6305f61fc303f3b3d0b60375b285df2901fd80364f26a495f0740e7aabea7c478716d55f5c760f1f425ab14ebdfb]]

**Document description:**Exhibit

**Original filename:**C:\fakepath\Ex. C, Declaration of John Doe #3 (revised) (signed).pdf

**Electronic document Stamp:**

[STAMP cacdStamp\_ID=1020290914 [Date=10/19/2022] [FileNumber=34757018-4] [6401366f80e114ab0e0d26c8a764584978cb0808e02525bd0001bb8f8283035c71f7f9cdc7814fff9c9d995760a650f05050ec56c481f1f64b6b2f325fe7110cc]]

**Document description:**Exhibit

**Original filename:**C:\fakepath\Exhibit D, Declaration of John Doe #4.pdf

**Electronic document Stamp:**

[STAMP cacdStamp\_ID=1020290914 [Date=10/19/2022] [FileNumber=34757018-5] [2ccc071f32e8be23ed9fec5efc94cf1041059d4b2b1dde2b88d24ec0898d53f53cc4765581bb61de28fb82d00bec2bd9843e7311c3f6a63003853a5c3b528e67]]

**Document description:**Exhibit

**Original filename:**C:\fakepath\Exhibit E, Declar of Janice Bellucci - June 202206032022.pdf

**Electronic document Stamp:**

[STAMP cacdStamp\_ID=1020290914 [Date=10/19/2022] [FileNumber=34757018-6] [66c1fda5634ada7c1fbe41ba32d5c786bb2ad23ecb432528076da37f1285c208c34e24875d3e5ecc657e6e9a0bcee528ab7e7b78463f696f3685a4a6f5d37eb1]]

**Document description:**Proposed Order

**Original filename:**C:\fakepath\Proposed Order, Doe 1 v. DOJ (PI).pdf

**Electronic document Stamp:**

[STAMP cacdStamp\_ID=1020290914 [Date=10/19/2022] [FileNumber=34757018-7] [31f99d73f0e3fe9ee98ed1e38d1b00bc6dc8f51e52cc09511195666b72a264c24e0d0cad9b93c5e1bc5eb1f4cb831285f7d00a96a82c9df0b6373fc3c61836db]]