UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 22-855 JGB (SPx)**	Date	July 5, 2023
Title	***John Doe, et al. v. U.S. Department of Justice, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) DENYING Defendants' Motion to Dismiss (Dkt. No. 56); and (2) VACATING the July 10, 2023 Hearing (IN CHAMBERS)

Before the Court is a partial motion to dismiss the first amended complaint filed by Defendants United States Department of Justice ("DOJ") and Merrick B. Garland, Attorney General of the United States, in his official capacity (collectively, "Defendants"). ("Motion," Dkt. No. 56.) The Court finds this matter appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court DENIES the Motion. The July 10, 2023 hearing is VACATED.

I. BACKGROUND

A. Procedural Posture

On May 24, 2022, Plaintiffs John Doe [#1] ("Mr. Doe #1") and the Alliance for Constitutional Sex Offense Laws ("ACSOL") filed a complaint against Defendants. ("Complaint," Dkt. No. 2.)

On June 3, 2022, Plaintiffs filed a motion for preliminary injunction. ("First Motion for Preliminary Injunction," Dkt. No. 13.) The same day, Plaintiffs filed a motion for leave to proceed using a pseudonym. (Dkt. No. 14.) Plaintiffs also filed a Declaration of Janice Bellucci (Dkt. No. 16) and Declaration of John Doe [#1] (Dkt. No. 14-1). On June 24, 2022, Defendants filed an opposition. ("Opposition to First Motion for Preliminary Injunction," Dkt. No. 21.) On July 1, 2022, Plaintiffs replied. ("Reply ISO First Motion for Preliminary Injunction," Dkt. No. 22.) On July 11, 2022, the parties filed a stipulation for an extension of time for Defendants to

answer the Complaint. (Dkt. No. 23.) On July 12, 2022, the Court approved the stipulation. (Dkt. No. 25.) On July 15, 2022, the Court continued the hearing on the First Motion for Preliminary Injunction from July 18, 2022 to August 1, 2022. (Dkt. No. 27.) On July 25, 2022, the parties filed a stipulation to continue the hearing on the First Motion for Preliminary Injunction to August 8, 2022. (Dkt. No. 29.) On July 27, 2022, the Court approved the stipulation. (Dkt. No. 30.) On August 5, 2022, the Court continued the hearing on the First Motion for Preliminary Injunction from August 8, 2022 to August 15, 2022. (Dkt. No. 32.) On August 12, 2022, the Court continued the hearing on the First Motion for Preliminary Injunction from August 15, 2022 to August 29, 2022. (Dkt. No. 33.) On August 16, 2022, the parties filed a stipulation to continue the hearing on the First Motion for Preliminary Injunction. (Dkt. No. 34.) The same day, the Court approved the stipulation, continuing the hearing on the First Motion for Preliminary Injunction from August 29, 2022 to September 12, 2022. (Dkt. No. 35.) On September 9, 2022, the Court continued the hearing on the First Motion for Preliminary Injunction from September 12, 2022 to September 26, 2022. (Dkt. No. 36.) On September 26, 2022, the Court held a hearing on the First Motion for Preliminary Injunction. (Dkt. No. 39.)

On September 28, 2022, the Court denied the First Motion for Preliminary Injunction without prejudice. ("Order Denying First Motion for Preliminary Injunction," Dkt. No. 40.) The Court denied the First Motion for Preliminary Injunction for lack of standing and granted Plaintiffs leave to file an amended complaint by October 11, 2022. (Id.)

On October 11, 2022, Plaintiffs John Doe #1, John Doe #2 ("Mr. Doe #2"), John Doe # 3 ("Mr. Doe #3"), John Doe #4 ("Mr. Doe #4"), and ACSOL (collectively, "Plaintiffs") filed a first amended complaint. ("FAC," Dkt. No. 41.) The FAC alleges four causes of action: (1) violation of the U.S. Constitution—non-delegation doctrine and separation of powers; (2) violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(c)—rule in excess of statutory authority; (3) violation of the U.S. Constitution—due process; and (4) violation of the U.S. Constitution—First Amendment. (See FAC.) On October 17, 2022, the parties filed a stipulation for an extension of time for Defendants to answer the FAC. (Dkt. No. 42.) On October 18, 2022, the Court approved the stipulation. (Dkt. No. 43.)

On October 19, 2022, Plaintiffs filed a renewed motion for a preliminary injunction. ("Second Motion for Preliminary Injunction," Dkt. No. 44.) The same day, Plaintiffs filed a motion for leave to proceed using pseudonyms. (Dkt. No. 45.) On October 20, 2022, the Court approved the motion for leave to proceed using pseudonyms. (Dkt. No. 46.) On November 3, 2022, the parties filed a stipulation to continue the hearing on the Second Motion for Preliminary Injunction. (Dkt. No. 48.) On November 4, 2022, the Court approved the stipulation, continuing the hearing on the Second Motion for Preliminary Injunction from December 5, 2022 to December 21, 2022. (Dkt. No. 49.) Defendants filed an opposition to the Second Motion for Preliminary Injunction on November 30, 2022. ("Second Motion for Preliminary Injunction Opposition," Dkt. No. 50.) On December 7, 2022, Plaintiffs replied. ("Reply ISO Second Motion for Preliminary Injunction," Dkt. No. 51.) On December 7, 2022, the parties filed a stipulation to continue the hearing on the Second Motion for Preliminary Injunction. (Dkt. No. 52.) On December 8, 2022, the Court approved the stipulation, continuing the hearing on the

Second Motion for Preliminary Injunction from December 21, 2022 to January 13, 2022. (Dkt. No. 53.) On January 12, 2023, the Court vacated the hearing on the Second Motion for Preliminary Injunction set for January 13, 2023. (Dkt. No. 54.)

On January 13, 2023, the Court granted the Second Motion for Preliminary Injunction. ("PI Order," Dkt. No. 55.)[1] As relevant to the instant Motion, the Court held as follows: because the individual plaintiffs apart from Mr. Doe #1 indisputably demonstrated standing, it declined to reach the question of whether Mr. Doe #1 or ACSOL had standing. As to the merits of Plaintiffs' claims, the Court held that they demonstrated a likelihood of success on their due process claim and a substantial question going to the merits on their First Amendment claim. Plaintiffs did not demonstrate a likelihood of success on their nondelegation and APA claims. (See id.)

On February 13, 2023, Defendants filed the Motion. (Motion.) On February 16, 2023, the parties filed a stipulation to continue the hearing on the Motion from April 3, 2023 to April 17, 2023. (Dkt. No. 59.) On February 22, 2023, the Court approved the stipulation. (Dkt. No. 60.)

On March 14, 2023, Defendants filed a notice of appeal of the PI Order. (Dkt. No. 61.) On March 15, 2023, Plaintiffs filed a notice of (cross)-appeal of the PI Order. (Dkt. No. 62.) On March 20, 2023, the parties filed a stipulation to stay the case pending resolution of their respective appeals. (Dkt. No. 65.) On March 29, 2023, the Court approved the stipulation and stayed the case. (Dkt. No. 66.) On April 13, 2023, the Ninth Circuit Court of Appeals dismissed the appeals following the parties' joint motion of voluntary dismissal. (Dkt. Nos. 67, 68.) On April 14, 2023, the parties filed a status report. ("Status Report," Dkt. No. 69.) On April 19, 2023, the Court reopened the case and set a briefing schedule and hearing on the Motion. (Dkt. No. 70.)

On April 27, 2023, Plaintiffs filed an opposition to the Motion. ("Opposition," Dkt. No. 71.) On May 18, 2023, Defendants replied in support of the Motion. ("Reply," Dkt. No. 72.)

On June 2, 2023, the Court continued the hearing on the Motion from June 5, 2023 to June 12, 2023. (Dkt. No. 73.) On June 9, 2023, the Court continued the hearing on the Motion from June 12, 2023 to June 26, 2023. (Dkt. No. 74.) On June 23, 2023, the Court continued the hearing on the Motion from June 26, 2023 to July 10, 2023. (Dkt. No. 75.)

B. Statutory Background

In 2006, Congress enacted the Sex Offender Registration and Notification Act ("SORNA") as part of the Adam Walsh Child Protection and Safety Act. Pub. L. No. 109-248,

[1] The PI Order is available on Westlaw. See Doe v. U.S. Dep't of Just., 2023 WL 2347428 (C.D. Cal. Jan. 13, 2023). The briefing on the Motion references the Court's PI Order at length. The Court uses the Westlaw citation for the PI Order from this point forward.

§§ 102-155, 120 Stat. 587 (codified in part at 42 U.S.C. §§ 16901 et seq.); see H.R. Rep. 109-218(I), at 27 (emphasizing "gaps and problems with existing Federal and State laws" due to "lack of uniformity" in state registration requirements and notification obligations); see also Nichols v. U.S., 578 U.S. 104, 111-12 ("We are mindful that SORNA's purpose was to make more uniform what had remained a patchwork of federal and 50 individual state registration systems with loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming 'missing' or 'lost.'") (internal quotations and citation omitted).

SORNA "requires those convicted of certain sex crimes to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries." Reynolds v. U.S., 565 U.S. 432, 434 (2012). SORNA is spending clause legislation and sets forth standards for states and territories to follow, and conditions federal funding on the jurisdictions' substantial implementation of its requirements. 34 U.S.C. §§ 20912(a), 20927(a), 20913. It provides that "each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements" of the statute. 34 U.S.C. § 20912(a). It also directs the Attorney General to "issue guidelines and regulations to interpret and implement" its provisions. 34 U.S.C. § 20912(b). SORNA delegates to the Attorney General "the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with" the requirement to register with an applicable jurisdiction. 34 U.S.C. § 20913(d); see also Gundy v. United States, 139 S. Ct. 2116 (2019). In addition to a list of specific requirements set forth by Congress, 34 U.S.C. § 20914(a)(1-6), SORNA states that a sex offender "shall provide . . . to the appropriate official for inclusion in the sex offender registry" "[a]ny other information required by the Attorney General." Id. (a)(8). It also requires the registrant to provide "[i]nformation relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General." Id. (a)(7). Congress dictated that a registrant must provide and update the information required under 34 U.S.C. § 20914(a) "in conformity with any time and manner requirements prescribed by the Attorney General." Id. (c).

SORNA defines a "sex offender" as "an individual who was convicted of a sex offense." 34 U.S.C. § 20911(1). The law makes it a crime for a person who is "required to register" under the Act and who "travels in interstate or foreign commerce" to knowingly fail to register or update a registration. Id. (citing 18 U.S.C. § 2250(a)). The crime is punishable by up to 10 years of imprisonment and a fine. 18 U.S.C. § 2250(a)(3). The same provision establishes an affirmative defense where "uncontrollable circumstances prevented the individual from complying" with registration requirements, "the individual did not contribute to the creation of such circumstances in reckless disregard of the requirements to comply," and "the individual complied as soon as such circumstances ceased to exist." Id. § 2250(c).

On October 13, 2008, Congress, through the Keeping the Internet Devoid of Sexual Predators ("KIDS") Act, Pub. L. No. 110-400, 122 Stat. 4224, provided that the Attorney General "shall require that each sex offender provide to the sex offender registry those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate" under SORNA. See 34 U.S.C. § 20916(a). The Attorney General "shall specify the time and manner for keeping current information required to be provided[.]" Id. § 20916(b). In a provision entitled "[n]ondisclosure to general public," Congress directed that the Attorney General "shall exempt from disclosure all information provided by a sex offender under subsection (a)," namely the registrants' internet identifiers. Id. § 20916(c).

C. Regulatory Background

Pursuant to SORNA, 34 U.S.C. § 20912(b), the Attorney General first issued guidelines regarding registration requirements in 2008. National Guidelines for Sex Offender Registration and Notification ("2008 Guidelines"), 73 Fed. Reg. 38030 (July 2, 2008). The Attorney General issued supplemental guidelines in 2011. Supplemental Guidelines for Sex Offender Registration and Notification ("2011 Supplemental Guidelines"), 76 Fed. Reg. 1630 (Jan. 11, 2011).

Regarding the definition of a "sex offender," the 2008 Guidelines state, "[b]ecause the SORNA registration requirements are predicated on convictions, registration (or continued registration) is normally not required under the SORNA standards if the predicate conviction is reversed, vacated, or set aside, or if the person is pardoned for the offense on the ground of innocence. This does not mean, however, that nominal changes or terminological variations that do not relieve a conviction of substantive effect negate the SORNA requirements." 73 F.R. at 38050. The 2008 Guidelines declare that "an adult sex offender is 'convicted' for SORNA purposes if the sex offender remains subject to penal consequences based on the conviction, however it may be styled. Likewise, the sealing of a criminal record or other action that limits the publicity or availability of a conviction, but does not deprive it of continuing legal validity, does not change its status as a 'conviction' for purposes of SORNA." Id.

As it relates to internet identifiers, the 2008 Guidelines require jurisdictions to collect "all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings." Id. at 38055. It "permitted and encouraged" jurisdictions "to provide public access to remote communication address information included in the sex offender registries" through "a function that allows checking whether specified addresses are included in the registries as the addresses of sex offenders." Id. at 38059-60. The 2011 Supplemental Guidelines did not change the definition of internet identifiers. See 76 F.R. at 1630-37. It noted that, "while the [2008] Guidelines discouraged the inclusion of sex offenders' Internet identifiers on the public Web sites, they did not adopt a mandatory exclusion of this information from public Web site posting, which the KIDS Act now requires." Id. at 1637. Accordingly, "jurisdictions cannot, consistent with SORNA, include sex offenders' Internet identifiers (such as e-mail addresses) in the sex offenders' public Web site postings or otherwise list or post sex offenders' Internet identifiers on the public sex offender Web sites." Id. Notwithstanding this change, the 2011 Supplemental Guidelines stated that jurisdictions could retain and use internet

identifiers "for purposes other than public disclosure," including submission of the information to the national (non-public) databases of sex offender information, sharing of the information with law enforcement and supervision agencies, and sharing of the information with registration authorities in other jurisdictions. Id. The change "also does not limit the discretion of jurisdictions to include on their public Web sites functions by which members of the public can ascertain whether a specified e-mail address or other Internet identifier is reported as that of a registered sex offender . . . or to disclose Internet identifier information to any one by means other than public Web site posting." Id. Moreover, "[t]he exemption of sex offenders' Internet identifiers from public Web site disclosure does not override or limit the requirement that sex offenders' names, including any aliases, be included in their public Web site postings." Id.

D. The Rule

In December 2021, the Attorney General adopted a final rule ("the Rule") that specifies various registration requirements, which went into effect on January 7, 2022. Registration Requirements Under the Sex Offender Registration and Notification Act, 86 Fed. Reg. 69856 (Dec. 8, 2021). The Rule states that it was promulgated pursuant to the Attorney General's authority under 34 U.S.C. § 20912(b), as well as other provisions authorizing the Attorney General "to take more specific actions in certain contexts," including 34 U.S.C. §§ 20913 and 20914. Id. at 69856. The Rule declares, "[t]he Attorney General has exercised these authorities in previous rulemakings and issuances of guidelines under SORNA, as detailed in the rulemaking history and section-by-section analysis below, and the interpretations and policy decisions in this rule follow those already adopted in existing SORNA-related documents. The present rule provides a concise and comprehensive statement of what sex offenders must do to comply with SORNA's requirements." Id. The Rule claims it "is not innovative in terms of policy" in that "[m]any of the requirements it articulates reflect express SORNA requirements." Id. at 69856-57. Accordingly, it declares the following:

> Other features of the rule reflect exercises of the Attorney General's powers to implement SORNA's requirements. These include additional specifications regarding information sex offenders must provide, how and when they must report certain changes in registration information, and the time and manner for complying with SORNA's registration requirements by sex offenders who cannot comply with SORNA's normal registration procedures. On these matters, however, the rule embodies the same policies as those appearing in the previously issued SORNA guidelines and prior rulemakings under SORNA.
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> The rule also makes no change in what registration jurisdictions need to do to substantially implement SORNA in their registration programs, a matter that will continue to be governed by the previously issued guidelines for SORNA implementation.

> While this rule does not make new policy, as discussed above, it is expected to have a number of benefits. The rule will facilitate enforcement of SORNA's registration requirements through prosecution of noncompliant sex offenders under 18 U.S.C. 2250. By providing a comprehensive articulation of SORNA's registration requirements in regulations addressed to sex offenders, it will provide a more secure basis for prosecution of sex offenders who engage in knowing violations of any of SORNA's requirements. It will also resolve a number of specific concerns that have arisen in past litigation or could be expected to arise in future litigation, if not clarified and resolved by this rule. For example, as discussed below, the amendment of § 72.3 in the rule will ensure that its application of SORNA's requirements to sex offenders with pre-SORNA convictions is given effect consistently, resolving an issue resulting from the decision in United States v. DeJarnette, 741 F.3d 971 (9th Cir. 2013).

Id. at 69857.

The Rule states:

> A comment proposed adding to § 72.5 a provision requiring that a sex offender be removed from the sex offender registry if he receives a pardon, and that the offense be expunged from all court and law enforcement records. However, only pardons on the ground of innocence terminate registration obligations under SORNA, [citing 2008 Guidelines], and the Attorney General has no authority to require registration jurisdictions to expunge the records of sex offenders who are pardoned in those jurisdictions.

Id. at 69866. The Rule "expands" 28 C.F.R. § 72.3 to "provide a full statement of the registration requirements for sex offenders under SORNA," revises the statement of purpose and definitional sections of that regulation, "maintains [an] existing provision . . . stating that SORNA's requirements apply to all sex offenders, regardless of when they were convicted, and incorporates additional language . . . to reinforce that point." Id. It also "adds . . . provisions . . articulating where sex offenders must register, how long they must register, what information they must provide, how they must register and keep their registrations current to satisfy SORNA's requirements, and the liability they face for violations, following SORNA's express requirements and the prior articulation of standards for these matters in the SORNA Guidelines and the SORNA Supplemental Guidelines." Id. at 69866-67. Accordingly, "sex offenders can be held liable for violating any requirement stated in the [Rule], regardless of when they were convicted, and regardless of whether the jurisdiction in which the violation occurs has adopted the requirement in its own law." Id. at 69868.

Among other things, the Rule requires registrants to provide their remote communication identifiers, defined as "[a]ll designations the sex offender uses for purposes of routing or self-identification in internet or telephonic communications or postings, including email addresses and telephone numbers." Id. at 69885. They must also provide their social security number, work or school information, and information concerning any international travel, passport, vehicle registration or professional licenses. Id. The Rule provides that a registrant must appear "in person" in his local jurisdiction at least once annually if he is a tier I sex offender, every six months if he is a tier II sex offender, and every three months if he is a tier III sex offender, to verify, update or correct this information. Id. at 69885-86. The Rule requires that a registrant report (in person) changes in address within three days, changes in remote communication identifiers within three days, and international travel plans at least 21 days in advance of the trip. Id. at 69886.

The Rule provides that a registrant who does not comply with a requirement of SORNA "in conformity with the time and manner specifications" it sets forth "must comply with the requirement in conformity with any applicable time and manner specifications of a jurisdiction in which the offender is required to register." Id. Nonetheless, "[i]n a prosecution under 18 U.S.C. 2250, [that provision] does not in any case relieve a sex offender of the need to establish as an affirmative defense an inability to comply with SORNA because of circumstances beyond his control as provided in 18 U.S.C. 2250(c) and § 72.8(a)(2)." Id. Because impossibility remains an affirmative defense, the Rule "does not relieve sex offenders of the obligation to comply fully with SORNA if able to do so or shift the burden of proof to the government to establish that a registration jurisdiction's procedures would have allowed a sex offender to register or keep the registration current in conformity with SORNA." Id. at 69882. The Rule reiterates that, as a condition of liability under 18 U.S.C. § 2250, "a sex offender must have been aware of the requirement he is charged with violating, but need not have been aware that the requirement is imposed by SORNA." Id. at 69886-87. It then provides an example regarding the application of this defense:

> A sex offender cannot register in a state in which he resides because its registration authorities will not register offenders on the basis of the offense for which the sex offender was convicted. The sex offender would have a defense to liability because the state's unwillingness to register sex offenders like him is a circumstance beyond his control. However, if the sex offender failed to register after becoming aware of a change in state policy or practice allowing his registration, the 18 U.S.C. 2250(c) defense would no longer apply, because in such a case the circumstance preventing compliance with the registration requirement would no longer exist.

Id. at 69887.

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II. FACTUAL ALLEGATIONS

In the PI Order, the Court outlined at length the factual allegations contained in the declarations filed by Plaintiffs. See Doe, 2023 WL 2347428, at *5-9. The Court incorporates those statements here and references below only the factual allegations material to the Motion, those regarding Mr. Doe #1's registration requirements.

Mr. Doe #1 is a resident of California. (FAC ¶ 1.) Mr. Doe #1 enlisted in the U.S. Marine Corps when he was seventeen years old and was honorably discharged in 1996. (Id. ¶ 2.) In 1994, when he was twenty-three years old and still serving in the Marines, he engaged in an "otherwise consensual encounter" with a sixteen-year-old girl. (Id. ¶ 3.) The incident did not involve sexual intercourse. (Id.) In 1996, he pled no contest to a single misdemeanor count of sexual battery under California Penal Code section 243.4(a). (Id. ¶ 4.) He was sentenced to three years of probation and served no jail time. (Id.) He was required to register as a sex offender for life with the State of California. (Id. ¶ 5.)

After the conviction, he obtained his bachelor's degree, then a master's degree, and rose through the ranks of various companies. (Id. ¶ 6.) In 2005, he rented a second home to live in with his fiancée but did not move into the home. (Id. ¶ 7.) He did not understand that his sex offender status required that he register a rental home address where he did not live. (Id.) He did not immediately update his registration information to include the rental home as an additional residence address. (Id.) In 2006, he was charged with a misdemeanor count for failure to register under California Penal Code section 290(g)(1). (Id. ¶ 9.) Mr. Doe #1 pled no contest and was sentenced to three years' probation. (Id.)

Mr. Doe #1 later got married and had two children. (Id. ¶ 10.) He is now a successful businessman, an involved father and husband, and a dedicated member of his church. (Id. ¶¶ 11-12.) A state court expunged his original conviction in 2002 pursuant to Cal. Penal Code § 1203.4. (Id. ¶ 13.) In 2010, a state court expunged his failure to register conviction, also pursuant to Cal. Penal Code § 1203.4. (Id. ¶ 14.) In 2012, a state court issued a "Certificate of Rehabilitation" to Mr. Doe #1 pursuant to Cal. Penal Code § 4852.01, which officially recommended him for a pardon. (Id. ¶ 15.) Under California law, he is no longer required to register as a sex offender and has no record of criminal convictions. (Id. ¶ 16.)

According to Mr. Doe #1, if his conviction is not vacated, his original offense of conviction "likely requires lifetime registration under SORNA." (Id. ¶ 17.) A person is required to register under SORNA for life if he is convicted of a "tier III" sex offense pursuant to 34 U.S.C. §§ 20911(4), 20915(a). (Id. ¶ 18.) A person is a tier III sex offender if he is convicted of a "sex offense" that "occurs after the offender becomes a tier II sex offender." 34 U.S.C. § 20911(4)(c). (Id. ¶ 19.) "DOJ has asserted that a violation of Cal. Penal Code § 243.4(a) is "at a minimum" a tier II offense, resulting in a 25-year registration obligation. See SORNA Substantial Implementation Review, State of California, DOJ, at 17 (Jan. 2016)." (Id. ¶ 20.) "DOJ has previously argued . . . that the failure to register is a generic 'sex offense." The Fifth Circuit adopted this view in one case, but later declined to follow it. See United States v. 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). (Id. ¶ 21.) "Mr. Doe #1 thus may be subject to a lifetime requirement under SORNA because he was convicted in 1996 of Cal. Penal Code § 234.4(a) and was subsequently convicted in 2006 of failing to register under Cal. Penal Code § 290(g)(1)." (Id. ¶ 22.)

III. LEGAL STANDARD

A. Rule 12(b)(1)

"A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence." Warren v. Fox Fam. Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). Thus, a jurisdictional challenge can be either facial or factual. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).

In a facial attack, the moving party asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). When evaluating a facial attack, the court must accept the factual allegations in the plaintiff's complaint as true. Whisnant v. United States, 400 F.3d 1177, 1179 (9th Cir. 2005).

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air for Everyone, 373 F.3d at 1039. In resolving a factual challenge, the court "need not presume the truthfulness of the plaintiff's allegations" and "may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment." White, 227 F.3d at 1242. "Where jurisdiction is intertwined with the merits, [the court] must 'assume the truth of the allegations in the complaint . . . unless controverted by undisputed facts in the record.'" Warren, 328 F.3d at 1139 (quoting Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)).

B. Rule 12(b)(6)

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Federal Rule of Civil Procedure 8(a), which requires a "short and plain statement of the claim showing that a pleader is entitled to relief," in order to give the defendant "fair notice of what the claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); see Ileto v. Glock Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994). Courts are not required, however, "to accept as true allegations that are merely conclusory, unwarranted deductions of

fact, or unreasonable inferences." In re Gilead Scis. Sec. Litig., 536 F.2d 1049, 1055 (9th Cir. 2008) (internal citation and quotation omitted). Courts also need not accept as true allegations that contradict facts which may be judicially noticed. See Mullis, 828 F.2d at 1388.

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Id. at 570; Ashcroft v. Iqbal, 556 U.S. 662 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). The Ninth Circuit has clarified that (1) a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and (2) "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

C. Rule 15

Rule 15 provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit has held that "'[t]his policy is to be applied with extreme liberality.'" Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quoting Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)). Generally, a "district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks and citation omitted). Despite this liberal standard, leave to amend may be denied if amendment would be futile to rectify the deficiencies in a pleading. Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008).

IV. DISCUSSION

In the PI Order, the Court held that Plaintiffs demonstrated a likelihood of success on their third cause of action (due process) and a substantial question going to the merits on their fourth cause of action (First Amendment). It held that Plaintiffs were unlikely to succeed on the merits of their first (nondelegation) and second (APA) causes of action. It found that Mr. Doe #2, Mr. Doe. #3, and Mr. Doe #4 demonstrated standing to challenge the Rule, and thus declined to reach the standing of Mr. Doe #1 and ACSOL. See Doe, 2023 WL 2347428.

In the Motion, Defendants seek the dismissal of the two causes of action for which the Court held Plaintiffs had not demonstrated a likelihood of success on the merits. Defendants also move to dismiss Mr. Doe #1 from the case for lack of standing. The basis for the Motion is that the Court's analysis in the PI Order compels each of these results. (See Motion.) Because the Court has already analyzed the issues discussed below at some length in the PI Order, it does not restate its analysis in its entirety, instead incorporating the PI Order by reference below.

A. Standing of Mr. Doe #1

Defendants argue that Mr. Doe #1 lacks standing to challenge the Rule because if the facts he alleges are true, then his obligation to register under SORNA has expired, presumably sometime in 2021. (See Motion at 9-10.) The Court construes this as a facial attack on standing. See Safe Air for Everyone, 373 F.3d at 1039; Whisnant, 400 F.3d at 1179.

In the PI Order, the Court held that Mr. Doe #2, Mr. Doe #3, and Mr. Doe #4 had standing to challenge the Rule, and thus declined to decide whether Mr. Doe #1 had standing. See Doe, 2023 WL 2347428, at *12 (citing Leonard v. Clark, 12 F.3d 885, 888 (9th Cir. 1993), as amended (Mar. 8, 1994) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.")). In a footnote, the Court made the following observation:

> Plaintiffs appear content to conclude that, "[n]ow that DOJ has made its position clear, and is estopped from making a contrary argument in future proceedings, Mr. Doe #1 agrees that he is relieved of the obligation of registering. [Reply ISO Second Motion for Preliminary Injunction at 1.] If the Court did reach the issue, it would likely find that Plaintiffs therefore concede Mr. Doe #1 lacks standing. But even if they did not, assuming the clearest authority Plaintiffs can muster in their favor is the dicta referenced in the FAC, Tang, 718 F.3d. at 484, because the Fifth Circuit declined to follow Tang in Segura, 747 F.3d at 329-30, the Court would likely find that Mr. Doe #1 again fails to demonstrate standing.

Id. at *12 n.1. Defendants ask the Court to apply this analysis, find Mr. Doe #1 lacks standing, and dismiss him from the case. Plaintiffs argue that the Court should decline to reach the standing of Mr. Doe #1 again because it has already found that Mr. Doe #2, Mr. Doe #3 and Mr. Doe #4 have standing to challenge the Rule. They note that "[t]hroughout this litigation DOJ has hemmed and hawed and consistently refused to make its position clear"; it has previously declined to state with certainty whether it considered Mr. Doe #1 a Tier II or Tier III registrant under SORNA, and again refuses to take a position on the issue. (Opposition at 2; see Motion at 9 n.5.) Defendants also reject Plaintiffs' claim that they are estopped from arguing that Mr. Doe #1 is required to register in future proceedings:

> As a collateral matter, Plaintiffs have contended that Defendants, by virtue of addressing arguments concerning Doe #1's alleged registration status, should be "estopped from making a contrary argument in future proceedings." The question of estoppel, and the general question of what effect a hypothetical future court would give to these proceedings, are not before the Court. Nevertheless, Defendants have not taken a position on Doe #1's registration obligations as a matter of fact. On the contrary, Defendants have addressed circumstances that would apply if Doe #1's factual allegations are true.

(Motion at 11) (internal citations omitted). Plaintiffs take issue with DOJ's pursuit of strategic ambiguity, for "the uncertainty seems to fall on Mr. Doe #1, and if DOJ changes its mind in the future, he fears future prosecution." (Opposition at 2-3.)

While the Court again finds it unlikely that Mr. Doe #1 is required to register under SORNA, that he is thus subject to the Rule, and therefore that he has standing to challenge it, it again declines to reach the issue at the pleadings stage because it has already found that at least one Plaintiff has standing to bring each cause of action. See Leonard, 12 F.3d at 888; Steele v. Cnty. of Tehama, 2020 WL 4480386, at *5 (E.D. Cal. Aug. 4, 2020) (in ruling on motion to dismiss, holding that "should one Plaintiff in each action be able to assert standing, the case may proceed. The Court need not make a standing determination for each individual."). Defendants have indicated they intend to file a motion for summary judgment on any remaining claims based on a full factual record. (See Motion at 2 n.2.) In the Court's view, summary judgment is a more appropriate juncture to seek the dismissal of Mr. Doe #1 for lack of standing, where the Court can make a determination as to whether Mr. Doe #1 is required to register based on evidence, not facts alleged in a pleading. Had Defendants been willing to take an unequivocal stance on Mr. Doe #1's registration, one that would clearly estop the DOJ from taking a contrary position should it ever seek to prosecute Mr. Doe #1 in the future, the Court would likely have dismissed Mr. Doe #1 now. But as long as there remains any ambiguity or uncertainty as to whether Mr. Doe #1 is required to register, the Court agrees with Plaintiffs that the burden of that uncertainty should not fall on Mr. Doe #1. Defendants can renew the argument in a motion for summary judgment, wherein they can produce the relevant records regarding Mr. Doe #1's legal history and a declaration from a DOJ official that, based on those records, it is the official position of DOJ that he is not registered to register under SORNA. Doing so will ensure that DOJ is estopped from changing its mind in the future and provide the clarity to which Mr. Doe #1 is entitled before his dismissal from this suit. The Court DENIES the Motion as to Mr. Doe #1.

B. Plaintiffs' First and Second Causes of Action are Suitable for Resolution at Summary Judgment

In the PI Order, the Court held that Plaintiffs were unlikely to succeed on their first cause of action, which alleges that the Rule violates the nondelegation doctrine. See Doe, 2023 WL 2347428, at *25. In sum, the Court reasoned that it is bound by Supreme Court precedent, even

that which has been called into question by multiple Justices. Thus, while the writing is on the wall that the Supreme Court will at some point overturn its longstanding nondelegation doctrine precedent, this Court must apply the "intelligible principle" test to Plaintiffs' claim.[2] "For better or for worse, the Supreme Court's guidance to the lower courts has been clear: by 'uniformly reject[ing] nondelegation arguments and . . . up[holding] provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards,' it has been all but impossible for nondelegation challenges like Plaintiffs' to succeed." Doe, 2023 WL 2347428, at *27 (quoting Gundy v. United States, 139 S. Ct. 2116, 2130 (2019)) (Alito, J., concurring in the judgment). Under the extremely forgiving intelligible principle test, the Court found that "Congressional guidance to the Attorney General 'to protect the public from sex offenders and offenders against children,' 34 U.S.C. § 20901" did not "provide much direction at all" to the Executive Branch. Doe, 2023 WL 2347428, at *27. Nonetheless, it was "something," and "thus the kind of 'broad general directive' . . . that the Supreme Court has routinely blessed, no broader than regulating in the 'public interest' or doing what is 'fair and equitable' or 'just and reasonable.'" Id. (citations omitted). Defendants ask the Court to apply the same analysis and hold that this claim fails as a matter of law. (See Motion at 11-15.) "Mindful of this Court's conclusions concerning their ultimate odds of success on their non-delegation claim, Plaintiffs request that this Court deny DOJ's motion to dismiss so that the full administrative record can be produced." (Opposition at 2.)

Plaintiffs' second cause of action asserts that the definition of "conviction" supplied by the Rule is in conflict with SORNA's definition of "sex offender"[3] as related to Plaintiffs and those similarly situated, for the Rule considers "expunged convictions . . . to be 'convictions' requiring registration" when "under the plain meaning of the 'statutory text, a 'conviction' does not include an adjudication that has been expunged under California law." (FAC ¶¶ 126-130.) In the PI Order, the Court held that Plaintiffs were unlikely to succeed on this claim. See Doe, 2023 WL 2347428, at *29. Addressing the Attorney General's interpretation of the term "conviction" in the context of those who have obtained relief under Section 1203.4, the Court found that the Attorney General's interpretation was not erroneous. See id. at *33. It also noted that it found "at least one aspect of the Attorney General's interpretation of SORNA puzzling,"

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[2] On May 18, 2022, the Fifth Circuit held in a 2-1 opinion that Congress violated the nondelegation doctrine when it gave the Securities and Exchange Commission (SEC) the authority to choose whether to bring enforcement actions in Article III courts or within an agency. See Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446 (5th Cir. 2022), cert. denied sub nom. JARKESY, GEORGE R., ET AL. v. SEC, No. 22-991, 2023 WL 4278466 (U.S. June 30, 2023), and cert. granted sub nom. SEC v. JARKESY, GEORGE R., ET AL., No. 22-859, 2023 WL 4278448 (U.S. June 30, 2023). Now that the Supreme Court has granted cert on a nondelegation claim, see 2023 WL 4278448 (U.S. June 30, 2023), it may revisit the "intelligible principle" test, which would potentially have a significant impact on the analysis of Plaintiffs' nondelegation claim. But until the Supreme Court replaces the "intelligible principle" test, the Court must apply it.

[3] "The term 'sex offender' means an individual who was convicted of a sex offense." 34 U.S.C. § 20911(1).

indicating that it "cannot discern how the Attorney General decided that 'only pardons on the ground of innocence terminate registration obligations under SORNA[.]'" Id. (citations omitted). It found that nothing in SORNA, the Rule, the 2008 Guidelines, or the 2011 Supplemental Guidelines, or any authority cited by the parties, explained how the Attorney General decided what, if any, postconviction relief terminated registration obligations under SORNA. See id. That remains true to date, for DOJ has not provided any clarification or further explanation, and Plaintiffs have consistently maintained that they are equally at a loss for how the Attorney General arrived at this understanding. In opposing the Motion, Plaintiffs ask the Court to reconsider much of its analysis in the PI Order, to apply the rule of lenity in construing the statutory scheme, and to conduct a broader analysis of the application of SORNA to those whose convictions have not only been expunged under California Penal Code Section 1203.4, but who have also obtained Certificates of Rehabilitation. (See Opposition at 4-8.)

The Court finds that both of these causes of action are more appropriate for resolution at the summary judgment stage, based upon a full review of the administrative record. Plaintiffs argue that "in its decision concluding that the non-delegation claim is unlikely to succeed, this Court resolved a dispute concerning what criteria guided the Attorney General's discretion under SORNA." (Opposition at 3.) That is, the Court found that the Rule was promulgated in consideration of Section 20919 and its directive to "protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901. Even though the Court based on its analysis in the PI Order on some of the references to Section 20901 in the Rule itself, see 86 F.R. at 69856, 69858, 69857, 69864, 69874, 69878, it is fair to characterize the Court's finding as one of fact, for it implicitly found that each and every one of the relevant delegations challenged by Plaintiffs was based on this statutory authority, even if the Rule does not state that squarely, particularly where it simply references the 2008 Guidelines.

As Plaintiffs observe, "[a] substantive, fact-intensive inquiry . . . is more suitable after discovery, at summary judgment[.]" Produce Pay, Inc. v. Izguerra Produce, Inc., 39 F.4th 1158, 1164 (9th Cir. 2022). Judicial review of agency action is predicated on a review "of the record on which the administrative decision was based," Thompson v. U.S. Dep't of Lab., 885 F.2d 551, 555 (9th Cir. 1989), and "[t]he whole administrative record, . . . 'is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record," but rather "all documents and materials directly or indirectly considered by agency decision-makers[,] includ[ing] evidence contrary to the agency's position." Id. (citations omitted). Although Plaintiffs have mostly argued so far in this case that the Rule was issued in excess of statutory authority in violation of 5 U.S.C. § 706(2)(C), the FAC also references 5 U.S.C. § 706(2)(A) and (B), which provide the authority to hold unlawful and set aside agency action, findings and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "contrary to constitutional right, power, privilege, or immunity." Id. (See FAC ¶ 125.) Defendants recognized early on in the litigation that the "gravamen of [Plaintiffs'] argument is . . . that the Attorney General interpreted SORNA incorrectly," which would "properly fall under § 706(2)(A), not (C)." (Opposition to First Motion for Preliminary Injunction at 22-23.) Plaintiffs responded by noting that they are arguing that the "rule conflicts with the textual language—which is impermissible under an agency's substantive authority, and

has nothing at all do with whether the A.G.'s reasoning was fully articulated," though they are also invoking review under Section 706(2)(A). (Reply ISO First Motion for Preliminary Injunction at 10 n.6.)

The Court construes Plaintiffs' second cause of action to assert two overlapping theories arising under the APA. The first, asserted under § 706(2)(C), claims that Congress decided the question of the meaning of a "conviction," and that the DOJ's interpretation of what counts as a predicate conviction in the Rule was *ultra vires*, in the sense that it did not have the authority to decide what it did. It is somewhat unclear what Plaintiffs think SORNA's definition of conviction is, for the most they say in the FAC is what the term does *not* mean. (See FAC ¶ 129) ("Under the plain meaning of the statutory text, a 'conviction' does not include an adjudication that has been expunged under California law."). For their part, Defendants have taken the position that the Rule's interpretation is correct, or at least reasonable and entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).[4] Nonetheless, apparently because it does not think it has to in order to prevail in this case, Defendants' Counsel has declined to expand on the DOJ's interpretation of "conviction" in the Rule or the 2008 Guidelines; it has strongly implied, but not definitively stated, that the postconviction relief awarded Plaintiffs or ACSOL members is irrelevant for purposes of SORNA registration, demurring on the basis that (1) that question comes down to whether any of them are subjected to "penal consequences" and (2) it need not concern itself with the peculiarities of state law. Thus, both parties' litigation positions have infused this issue with an unfortunate, abstract character, making it particularly difficult to resolve at the pleadings stage.

Plaintiffs' second theory, seemingly asserted under § 706(2)(A), is that DOJ came up with a concept of predicate convictions in the 2008 Guidelines and reinforced it in the Rule, without ever showing its work or fully explaining what it means. The Court shares Plaintiffs' concerns, which is also why it is premature to rule on Plaintiffs' APA challenge now: the Court does not fully understand what DOJ's interpretation of "conviction" means, and certainly does not fully understand how it arrived at the contours of its position. The administrative record would likely provide valuable clarification.

Among DOJ's core interpretive moves seem to be the following: (1) whether predicate convictions count under SORNA is solely a matter of federal, not state, law, even though the vast majority of predicate convictions arise under state law, and SORNA is silent on whether federal or state law defines the meaning of "conviction" (see Opposition to Second Motion for Preliminary Injunction at 22); (2) Congress decided that most post-conviction relief would be irrelevant to the question of whether someone is required to register under SORNA on the basis of a prior conviction; (3) on the other hand, "registration (or continued registration) is normally

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[4] Since Chevron deference is probably on its deathbed, see Loper Bright Enterprises v. Raimondo, 2023 WL 3158352 (U.S. May 1, 2023) (granting writ of certiorari as to petitioner's question presented, "[w]hether the Court should overrule Chevron . . ."), there is some chance the Supreme Court will have eliminated this latter argument before a final judgment is entered here, or at least reviewed on appeal.

not required under the SORNA standards if the predicate conviction is reversed, vacated, or set aside, or if the person is pardoned for the offense on the ground of innocence," which implies that some postconviction relief is relevant, as is some action at the state level; (4) Congress intended that the states could not get around SORNA's registration requirements by "varying its terminology" as to what constitutes a conviction and enacting procedures that allow convictions to be "set aside" or "vacated" only in a "nominal" sense; and (5) that the applicable test for deciding whether someone is still required to register is whether the "sex offender remains subject to penal consequences based on the conviction," which is somehow both a question that is meant to be decided by federal, not state law, and also something that must be decided by assessing whether vacatur of a conviction is "nominal" or not (presumably by applying state law). See 73 FR at 38039-40. It has not explained the apparent internal tension with these positions. DOJ has also never provided a definition of "penal consequences," presumably as distinguished from "collateral consequences" or some other kind of "consequences." It has also not explained why a statute that turns on whether someone "*was convicted*" (paste tense) calls for an inquiry into whether someone "*remains subject to penal consequences*" (present tense).[5] In all this, the Court observes that DOJ appears to have been engaging in more than a narrow exercise in statutory interpretation, but also engaging in some degree of policy judgment. It seems to have gathered facts about how the registration schemes of different states operate, then interpreted SORNA, and weighed choices as to how SORNA should interact with state registration schemes, ultimately deciding in favor of a maximalist interpretation of the federal scheme. Under that interpretation, most state postconviction relief is irrelevant, and therefore much concomitant relief from registration obligations under state law affords no relief under SORNA. In turn, many offenders across the country who cannot register with their states are apparently supposed to hope they are not prosecuted by the federal government, and if they are, they should try to prove "impossibility" at trial. The Court's review of DOJ's rulemaking thus will likely need to assess the reasonableness of its statutory interpretation, the sufficiency of DOJ's stated reasoning, and the decision-making process it employed to arrive at its conclusions. See Michigan v. E.P.A., 576 U.S. 743, 750-51 (2015) (explaining that, even when conducting Chevron analysis, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational," while "agency action is lawful only if it rests 'on a consideration of the relevant factors.'") (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983); Judulang v. Holder, 565 U.S. 42, 53 n.7 (2011) (explaining that Chevron and arbitrary and capricious analysis can overlap in some circumstances, for under Chevron step two, "we ask whether an agency's interpretation is 'arbitrary or capricious in substance'") (citations omitted); Arent v. Shalala, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995) ("The Chevron analysis and the 'arbitrary, capricious' inquiry set forth in State Farm overlap in some circumstances, because whether an agency action is 'manifestly contrary to the statute' is important both under Chevron and under State Farm.").

[5] The Court expects Defendants to provide a comprehensive explanation of these interpretations at the summary judgment stage. The Court also expects Defendants to explain to what extent DOJ assessed California's sex offender registration scheme in arriving at its conclusions.

It may very well be possible, plausible, probable, likely, or beyond doubt that the DOJ carefully considered all relevant factors, every aspect of the policy problem, and applicable sources of authority before arriving at these conclusions, and that its interpretation is an eminently sound construction of a complex statutory scheme. Perhaps it engaged in a careful inquiry into how the registration schemes of all 50 states work, and on the basis of that review, concluded its nominal/not nominal vacatur test is coherent. But the Court has no basis to make any such conclusions on the record before it, because it *has no* (administrative) record. The Rule simply references the 2008 Guidelines as to the critical question raised by this case, and the most that the 2008 Guidelines contain by way of explanation for its conclusions is a reference to "SORNA's purpose to establish 'a comprehensive national system for the registration of [sex] offenders.'" Id. at 38040. Without assessing the administrative record, the Court can just as easily conclude that the DOJ simply created some reasonable-sounding principles out of thin air than it can find that the Attorney General followed lawful procedures and arrived at a correct (or reasonable) conclusion.[6]

With regard to a claim arising under Section 706(2)(A), and likely with any claim that calls for consideration (at least in part) of how an agency arrived at a decision, the issues cannot be decided on a Rule 12(b)(6) motion, for "judicial review of the agency's decision must proceed on the administrative record." Atieh v. Riordan, 727 F.3d 73, 75 (1st Cir. 2013). Twombly-Iqbal plausibility pleading standards do not apply to such claims, for their screening rationale would serve no purpose: "APA review . . . involves neither discovery nor trial. Thus, APA review presents no need for screening. It follows that the plausibility standard has no place in APA review." Id. "This makes perfect sense" because the "focal point of APA review is the existing administrative record," so the "relevant inquiry is—and must remain—not whether the facts set forth in a complaint state a plausible claim but, rather, whether the administrative record sufficiently supports the agency's decision." Id. Thus, "when parties ignore" the "customary practice" of waiting until the government has certified that the administrative record is complete before asking a district court to reach a determination, "they undermine a court's ability to perform meaningful review of agency action." Id. at 77. As such, review of agency action should generally be decided on a motion for summary judgment, based on the complete administrative record. See Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1472 (9th Cir. 1994) ("[T]his case involves review of a final agency determination under the Administrative Procedure Act, 5 U.S.C. § 706; therefore, resolution of this matter does not require fact finding on behalf of this court. Rather, the court's review is limited to the administrative record[.]"). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." Sierra Club v. Mainella, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). Likewise, courts routinely decide nondelegation challenges at the summary judgment stage, also on the basis of the administrative record. See, e.g., Michigan Gambling Opposition v. Kempthorne, 525

[6] It is not clear to the Court if Plaintiffs argue that the Rule should be set aside because it is contrary to a constitutional right. See 5 U.S.C. § 706(2)(B). If their APA challenge does rest upon some constitutional violation, perhaps of due process, Plaintiffs should more clearly spell that out before resolution on the merits.

F.3d 23 (D.C. Cir. 2008) (affirming district court's grant of summary judgment on nondelegation claim); Cnty. of Charles Mix v. U.S. Dep't of Interior, 674 F.3d 898 (8th Cir. 2012) (affirming district court's grant of summary judgment on nondelegation and arbitrary and capricious claims); TOMAC, Taxpayers of Michigan Against Casinos v. Norton, 433 F.3d 852 (D.C. Cir. 2006) (same); S. Dakota v. U.S. Dep't of Interior, 787 F. Supp. 2d 981, 991 (D.S.D. 2011) (granting summary judgment on nondelegation challenge). There is also good reason to decide the merits of the nondelegation and APA challenges together, for Plaintiffs' theory of the case is essentially that these are two sides of the same coin. (See First Motion for Preliminary Injunction at 10) ("[T]he Attorney General has also interpreted his statutory authority to allow him to decide who must register at all, by re-defining the word 'conviction' to encompass those with expunged adjudications. . . . The only thing 'guiding' the Attorney General is his own gut feelings as Sections 20914(a)(7), (a)(8), and (c)") (internal citations omitted).

Because the Motion is not the appropriate vehicle for resolution of the merits of Plaintiffs' first and second causes of action, it is DENIED. The parties shall proceed to discovery in due course. After discovery has closed and Defendants have certified that the administrative record is complete, they may move for summary judgment on all four of Plaintiffs' claims.[7]

V. CONCLUSION

For the reasons above, the Court **DENIES** the Motion. The July 10, 2023 hearing is **VACATED**.

IT IS SO ORDERED.

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[7] Although the Court will not order the parties to produce a particular evidentiary record, it does issue the following guidance. First, the administrative record for the 2008 Guidelines will be as essential as that for the Rule. Second, the Court strongly encourages the parties to provide the Court with a definitive accounting of every legal consequence of obtaining relief through Section 1203.4 and a Certificate of Rehabilitation, and the limitations thereof. It appears that neither Plaintiffs' Counsel nor Defendants' Counsel are experts in California law, and thus far, the Court finds their discussion of the nuances of California law and the interplay between federal and state law somewhat lacking. It is not necessarily the Court's responsibility to conduct exhaustive independent research, but to the extent it has attempted to do so thus far, it has yet to find reliable resources that comprehensively outline the scope of such relief, particularly with regard to Certificates of Rehabilitation. If possible, the parties could engage the California Department of Justice (or another entity) in producing some kind of official statement, or expert report, that purports to answer as comprehensively as possible to what extent Section 1203.4 relief or a Certificate of Rehabilitation, or these forms of relief in combination with another, leave in place any "penal consequences." It may also be useful to answer this question with regard to pardons by the Governor of California on grounds other than "innocence." The Court hopes that the full factual record and the parties' summary judgment briefing will thus contain a comprehensive analysis of federal and California law and how the two interact.