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

17
18 JOHN DOE #1,
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20 JOHN DOE #2,
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22 JOHN DOE #3,
23
24 JOHN DOE #4,
&
25 THE ALLIANCE FOR
CONSTITUTIONAL
SEX OFFENSE LAWS,
26
27 Plaintiffs,

28 v.

Case No. 5:22-cv-00855
FIRST AMENDED COMPLAINT
JURY TRIAL DEMANDED

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U.S. DEPARTMENT OF JUSTICE,
&
MERRICK B. GARLAND,
ATTORNEY GENERAL OF THE
UNITED STATES, in his official capacity,
Defendants.

1 Plaintiffs, by their attorneys, Caleb Kruckenberg and Steven M. Simpson of
2 the Pacific Legal Foundation, hereby allege the following:

3 **PRELIMINARY STATEMENT**

4 More than twenty-five years ago, Plaintiff John Doe #1, pled no contest to a
5 single misdemeanor count of sexual battery. When he was 23, he had a consensual
6 but inappropriate encounter with a 16-year-old, which did not involve sexual
7 intercourse. His conviction required him to register as a sex offender.

8 Since then, Mr. Doe #1 has dedicated himself to making amends and becoming
9 a model citizen. He expressed sincere remorse for his crime and voluntarily
10 underwent psychological treatment. And equipped with a healthier perspective, he
11 pursued higher education and has had a rewarding and productive career, became a
12 loving husband and father, and became an active participant in his church. He has
13 done everything one is supposed to do following a criminal conviction.

14 Because of his remarkable rehabilitation, California courts expunged his
15 conviction and issued a certificate of rehabilitation, which is a judicial
16 recommendation for an unconditional pardon. He is no longer a convicted criminal
17 and has not registered as a sex offender for more than a decade.

18 Plaintiff John Doe #2 is in a similar situation. He was convicted 17 years ago
19 of a misdemeanor offense for which he served 60 days in jail. He too was required to
20 register as a sex offender.

21 Mr. Doe #2 has taken his own criminal conduct as the impetus to “make living
22 amends” to his victim, and to all the victims of sex offenses, by dedicating his life to
23 helping others avoid criminal conduct in a therapeutic setting. After years of his own
24 intensive therapy, Mr. Doe #2 obtained a master’s degree in Social Work to help treat
25 other people with sex addictions. He now works full time to help his patients
26 recognize and stop their own destructive and harmful behaviors before they offend,
27 and help those who have offended to repair the damage they have caused.

28 In recognition of his remarkable rehabilitation, California courts also

1 expunged Mr. Doe #2's conviction and issued a certificate of rehabilitation. He is no
2 longer a convicted criminal and has no legal obligation to register as a sex offender
3 in California.

4 Plaintiff John Doe #3 likewise did everything he could to turn away from past
5 criminality. He was convicted 25 years ago of a sex offense, and was required to
6 register for life as a sex offender in California. He too made the decision to build a
7 different life than the one that had resulted in his offense. After his release from
8 custody he started a business, married, and raised two stepchildren. He settled into
9 an ordinary and law-abiding life, and in 2021, he petitioned to be removed from
10 California's sex offender registry. Based on his rehabilitation a court granted that
11 discretionary relief, and Mr. Doe #3 no longer must register in California.

12 California's interest in recognizing these remarkable turns, however, has been
13 disregarded by the Attorney General of the United States. According to the Attorney
14 General in a new rule, *Registration Requirements Under the Sex Offender*
15 *Registration and Notification Act*, 86 Fed. Reg. 69,856 (Dec. 8, 2021), Mr. Doe #1,
16 Mr. Doe #2 and Mr. Doe #3 are all still convicted sex offenders and must register
17 under the federal Sex Offender Registration and Notification Act (SORNA). They
18 must do so, despite the fact that California, which is instrumental to the proper
19 functioning of SORNA, not only doesn't require them to register but prohibits them
20 from doing so.

21 The Attorney General has thus foisted a profound injustice on Mr. Doe #1, Mr.
22 Doe #2 and Mr. Doe #3. He is requiring them to register in California as a sex
23 offender when such registration is impossible. But the failure to register under the
24 provisions of SORNA is a federal crime that carries a penalty of 10 years in prison.
25 And the Attorney General now *presumes* Mr. Doe #1, Mr. Doe #2 and Mr. Doe #3
26 are guilty of this crime.

27 Registering now, even if it were possible, would mean that these men would
28 have to turn the clock back on the past decades and threaten their stable and

1 productive lifes. They would face restrictions on everyday activities like picking their
2 children up from school, face ostracization and harassment from their community,
3 and put their hard-earned career successes at risk. They would even be forbidden
4 from speaking freely about their treatment at the hands of the government.

5 These men are not alone. Hundreds of other individuals who have had their
6 convictions expunged or have been relieved from registration requirements are in the
7 same position. They now face a federal requirement to register, even though they
8 have no criminal convictions. And even those who *can* register in California, like
9 John Doe #4, are presumed to be criminals because that state does not collect all of
10 the information required by the Attorney General.

11 The Attorney General has no lawful authority to overrule California’s decision
12 and classify Mr. Doe #1, Mr. Doe #2, Mr. Doe #3 and others in similar circumstances
13 as sex offenders. In *Gundy v. United States*, a plurality of the Supreme Court upheld
14 a different provision of SORNA over a nondelegation challenge but avoided the
15 constitutional concerns through narrow statutory interpretation. Writing for the four
16 dissenters, Justice Gorsuch recognized that a delegation that “purports to endow the
17 nation’s chief prosecutor with the power to write his own criminal code” “scrambles
18 th[e] design” of the Constitution, which “promises that only the people’s elected
19 representatives may adopt new federal laws restricting liberty.” 139 S. Ct. 2116, 2131
20 (2019).

21 This case illustrates why Justice Gorsuch was correct. Under our constitution,
22 no executive official should have the power to transform thousands of law-abiding
23 citizens into criminals with the stroke of a pen—least of all the head of the agency
24 that prosecutes those individuals. Because *Gundy* involved a different provision of
25 SORNA, the Court’s decision does not control the outcome of this case, and this case
26 instead presents the question expressly reserved by the majority. This Court should
27 therefore hold the new rule unconstitutional.
28

THE PARTIES

- 1
- 2 1. Plaintiff, John Doe #1,¹ is an individual residing in the State of California.
- 3 2. Mr. Doe #1 enlisted in the U.S. Marine Corps at age 17 and was honorably
- 4 discharged in 1996.
- 5 3. In 1994, while he was 23 and still serving in the Marines, Mr. Doe #1 engaged
- 6 in an otherwise-consensual encounter with a 16-year-old girl. This incident did not
- 7 involve sexual intercourse.
- 8 4. In 1996, Mr. Doe #1 pled no contest to a single misdemeanor count of sexual
- 9 battery under California Penal Code § 243.4(a) and was sentenced to no jail time and
- 10 three years' probation.
- 11 5. Mr. Doe #1 was then required to register for life with the State of California as
- 12 a sex offender.
- 13 6. After the conviction, Mr. Doe #1 obtained his bachelor's degree, followed by
- 14 a master's degree, and rose through the ranks of various companies.
- 15 7. In 2005, Mr. Doe #1 was engaged to be married and rented a second home for
- 16 him and his future wife. Mr. Doe #1 did not, however, move into the home.
- 17 8. Mr. Doe #1 did not understand that his obligation to register as a sex offender
- 18 included registering his rental home address, where he did not live. He did not
- 19 immediately update his registration information to include the future home as an
- 20 additional residence address.
- 21 9. In 2006, Mr. Doe #1 was charged with a misdemeanor count of failing to
- 22 register under California Penal Code § 290(g)(1). He pled no contest and was
- 23 sentenced to three years' probation.
- 24 10. Mr. Doe #1 subsequently got married and had two children.
- 25 11. Mr. Doe #1 became an involved father, active in his church and community,
- 26 and continued to advance his career.

27 ¹ John Doe #1, John Doe #2, John Doe #3 and John Doe #4 are pseudonyms. Plaintiffs have filed
28 a motion to proceed pseudonymously contemporaneously with this Amended Complaint.

1 12. At present, Mr. Doe #1 is a successful businessman residing in California.

2 13. Because of his rehabilitation, a state court expunged Mr. Doe #1's original
3 conviction in 2002 pursuant to Cal. Penal Code § 1203.4.

4 14. In 2010, a state court expunged Mr. Doe #1's failure to register conviction,
5 also pursuant to Cal. Penal Code § 1203.4.

6 15. Then in 2012, a state court issued a "Certificate of Rehabilitation" to Mr. Doe
7 #1, under Cal. Penal Code § 4852.01, which California law recognizes as a "judicial
8 recommendation for a pardon." *People v. Ansell*, 25 Cal. 4th 868, 891 (Cal. 2001).

9 16. Under California law, Mr. Doe #1 is no longer required to register as a sex
10 offender and has no criminal convictions.

11 17. If not vacated, Mr. Doe #1's original offense of conviction, Cal. Penal Code §
12 243.4(a), likely requires lifetime registration under SORNA.

13 18. A person is required to register under SORNA for life if he is convicted of a
14 "tier III" sex offense. 34 U.S.C. §§ 20911(4), 20915(a).

15 19. A person is a tier III sex offender if he is convicted of a "sex offense" that
16 "occurs after the offender becomes a tier II sex offender." 34 U.S.C. § 20911(4)(C).

17 20. DOJ has asserted that a violation of Cal. Penal Code § 243.4(a) is "at a
18 minimum" a tier II offense, resulting in a 25-year registration obligation. *See SORNA*
19 *Substantial Implementation Review, State of California*, DOJ, at 17 (Jan. 2016).

20 21. DOJ has previously argued, and some courts have agreed, that the failure to
21 register is a generic "sex offense." *See United States v. Tang*, 718 F.3d 476, 484 (5th
22 Cir. 2013) ("Tang's failure to register qualifies as a sex offense."), *not followed as*
23 *dicta by United States v. Segura*, 747 F.3d 323, 329-30 (5th Cir. 2014).

24 22. Mr. Doe #1 thus may be subject to a lifetime requirement under SORNA
25 because he was convicted in 1996 of Cal. Penal Code § 234.4(a) and was
26 subsequently convicted in 2006 of failing to register under Cal. Penal Code §
27 290(g)(1).

28 23. Plaintiff John Doe #2 is an individual residing in the State of California.

1 24. Mr. Doe #2 was convicted in 2005 of one count of sexual battery under
2 California Penal Code § 243.4(a). His conviction was reduced to a misdemeanor, for
3 which he was sentenced to 60 days in jail and three years' probation. He was also
4 required to register as a sex offender for life in the State of California. This remains
5 Mr. Doe #2's only criminal offense.

6 25. After his conviction Mr. Doe #2 began intensive treatment, almost all of it
7 voluntary, including completing an inpatient residential sex offender treatment
8 program, more than 600 hours of individual psychotherapy, and becoming a leader
9 in a local chapter of Sex Addicts Anonymous.

10 26. While attending an intensive inpatient program, Mr. Doe #2 reported that he
11 experienced an epiphany about his prior behavior. In a group session, nearly every
12 one of his fellow patients reported suffering prior abuse. It was then that he realized
13 the "devastating, life-altering toll," that his own behavior had taken on his victim.

14 27. Mr. Doe #2 then devoted his personal and professional life to helping others
15 suffering from addictions, and more specifically, to trying to prevent future instances
16 of sexual abuse. He obtained a certification for alcohol and drug addiction
17 counseling, a bachelor's degree in psychology and then a master's degree in clinical
18 forensic Social Work, and currently holds a provisional license as an associate social
19 worker. From 2016 until 2020 he worked full-time as a case manager and substance
20 abuse counselor for a non-profit serving chronically homeless individuals in Los
21 Angeles.

22 28. In 2021, Mr. Doe #2 began treating patients with sexual addictions full time.
23 He also organized volunteer support groups for registrants and their families. His
24 goal was, and remains, to "make living amends," for his own misconduct.
25 Recognizing that he can never make direct amends to his victim without causing
26 further harm, he hopes to help his patients recognize and stop their own destructive
27 and harmful behaviors before they offend, and help those who have offended to
28 repair the damage they have caused.

1 29. Because of his rehabilitation, a California court expunged Mr. Doe #2's
2 conviction in 2012. Then in 2016 it issued a "Certificate of Rehabilitation," under
3 Cal. Penal Code § 4852.01. Under California law, Mr. Doe #2 is no longer required
4 to register as a sex offender.

5 30. If not vacated, Mr. Doe #2's original offense of conviction, Cal. Penal Code §
6 243.4(a), likely requires him to register for at least 25 years under SORNA.

7 31. DOJ has asserted that a violation of Cal. Penal Code § 243.4(a) is "at a
8 minimum" a tier II offense, resulting in a 25-year registration obligation. *See SORNA*
9 *Substantial Implementation Review, State of California, DOJ*, at 17 (Jan. 2016).

10 32. Plaintiff John Doe #3 is an individual residing in the State of California.

11 33. Mr. Doe #3 was convicted in 1997 of violating Cal. Penal Code § 288(a)
12 ("Lewd Acts With a Minor Under 14"). The original offense involved unlawful
13 contact with a 13-year-old.

14 34. Mr. Doe #3 was imprisoned for two years, and then served a period of parole
15 supervision. Mr. Doe #3 was required to register as a sex offender in California for
16 life.

17 35. While in prison Mr. Doe #3 completed intensive sex offender treatment, which
18 he continued after release.

19 36. After his release from prison in 1999 Mr. Doe #3 started a business and
20 married. He has two stepsons, and two grandchildren. Mr. Doe #3 is currently 62
21 years old.

22 37. In 2011, Mr. Doe #3 was convicted of misdemeanor failing to register under
23 California Penal Code § 290(g)(1), but has no other criminal convictions since his
24 1997 conviction. In 2015 his 2011 misdemeanor conviction was expunged pursuant
25 to Cal. Penal Code § 1203.4.

26 38. Mr. Doe #3's has aspirations to travel both interstate and internationally.

27 39. In 2021, he petitioned to be removed from the California registry under Cal.
28 Penal Code 290.5, which was granted. Mr. Doe #3 is no longer required to register

1 as a sex offender under California law.

2 40. Mr. Doe #3's original offense of conviction, Cal. Penal Code § 288(a), likely
3 requires him to register for life under SORNA.

4 41. DOJ has asserted that a violation of Cal. Penal Code § 288 is a tier III offense,
5 resulting in a lifetime registration obligation. *See SORNA Substantial*
6 *Implementation Review, State of California, DOJ, at 19 (Jan. 2016).*

7 42. Plaintiff John Doe #4 is an individual residing in the State of California.

8 43. Mr. Doe #4 was convicted in 1997 for lewd and lascivious conduct with a child
9 under 16 in violation of Florida Statute 800.04. The victim was a 15-year-old male.

10 44. Mr. Doe #4's conviction required him to register for life in the State of Florida.

11 45. Mr. Doe #4 subsequently moved to California, where he is also required to
12 register for life under state law.

13 46. Mr. Doe #4 has registered as a sex offender California since moving to
14 California more than 15 years ago. As a lifetime registrant in Florida, he also remains
15 on that state's registry and is currently registered with both states.

16 47. Mr. Doe #4 currently works as an auditor and has had no criminal convictions
17 since his original offense.

18 48. Mr. Doe #4's original offense of conviction, Florida Statute 800.04, likely
19 requires him to register for life under SORNA, as it is analogous to Cal. Penal Code
20 § 288, which DOJ has asserted is a tier III offense. *See SORNA Substantial*
21 *Implementation Review, State of California, DOJ, at 19 (Jan. 2016).*

22 49. The Alliance for Constitutional Sex Offense Laws (ACSOL) is a nonprofit
23 organization "dedicated to protecting the Constitution by restoring the civil rights of
24 people listed on the public registries and their families."
25 <https://all4consolaws.org/about-us/>.

26 50. ACSOL is based in California and has more than 100,000 California
27 registrants among its membership.

28 51. Mr. Doe #1, Mr. Doe #2, Mr. Doe #3, and Mr. Doe #4 are ACSOL members.

1 52. ACSOL has members within the Central District of California and regularly
2 advocates for those members' interests in courts, legislative bodies, and the public.

3 53. One of ACSOL's central purposes is limiting unlawful registration
4 requirements for its membership to help its members live law-abiding and
5 productive lives as a part of their communities.

6 54. Defendant Merrick B. Garland is the Attorney General of the United States
7 and is sued in his official capacity.

8 55. Defendant Garland is the head of the U.S. Department of Justice.

9 56. Defendant U.S. Department of Justice (DOJ) is a federal agency, which issued
10 the rule challenged in this case.

11 57. On December 8, 2021, DOJ, at the direction of Defendant Garland, issued the
12 rule, *Registration Requirements Under the Sex Offender Registration and*
13 *Notification Act*, 86 Fed. Reg. 69,856 (Dec. 8, 2021).

14 58. The new rule became effective on January 7, 2022.

15 59. Under the new rule, despite his conviction having been expunged, Mr. Doe #1
16 and Mr. Doe #2 are required to re-register as sex offenders in California.

17 60. Under the new rule Mr. Doe #3 is also required to re-register as a sex offender
18 in California, despite having been granted relief from registration under state law.

19 61. In addition, Mr. Doe # 1, Mr. Doe #2 and Mr. Doe #3 have been directed to
20 provide all of the information required by the new rule to California authorities in
21 person, but California has informed each of them that they cannot do so as they are
22 not considered registrants under California law.

23 62. For instance, in September 2020, with the assistance of counsel Mr. Doe #3
24 inquired with his local registry office whether they could either register Mr. Doe #3
25 to satisfy his SORNA obligation or whether the office could direct him to "any
26 location where federal registration can be accomplished if [the] department does not
27 offer that service."

28 63. A detective with the relevant County Sheriff's Office responded in an e-mail,

1 “Due to the conviction being in CA and his obligation to register is terminated, Mr.
2 [Doe #3] would not need to register federally. ... The federal sex offender registry
3 is just a database of State records. The requirement to register is handled on the state
4 side not the federal side, so we do not offer federal registration and I do not know of
5 any agency that offers it.”

6 64. Many of ACSOL’s members are in similar circumstances.

7 65. ACSOL’s membership includes individuals convicted of sex offenses, as
8 described by federal law, and 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.

12 66. ACSOL’s membership also includes individuals convicted of California
13 crimes that are sex offenses, as described by federal law, who are putatively required
14 to register as sex offenders under federal law, but have had their convictions
15 expunged under California Penal Code § 1203.4 and have no other convictions.

16 67. ACSOL’s membership also includes individuals convicted of California
17 crimes that are sex offenses, as described by federal law, who are putatively required
18 to register as sex offenders under federal law, but have been granted relief from
19 registration under California Penal Code § 290.5 and have no other convictions.

20 68. Like Mr. Doe #1, Mr. Doe #2 and Mr. Doe #3, these ACSOL members with
21 either expunged convictions or relief from registration have no obligation to register
22 under California law, and indeed, *cannot* register, yet are presumed to be in non-
23 compliance with the new rule.

24 69. Mr. Doe #4 meanwhile, must register in California under both state and federal
25 law.

26 70. Nevertheless, since California does not presently collect all of the information
27 required under the new rule, Mr. Doe #4 likewise is presumed to be in violation of
28 federal law.

1 71. Throughout this Complaint, Defendants are referred jointly as DOJ or the
2 Department except where otherwise specified.

3 **Jurisdiction and Venue**

4 72. This Court has federal question jurisdiction pursuant to 5 U.S.C. § 702 and 28
5 U.S.C. § 1331.

6 73. This Court also has inherent equitable jurisdiction to decide federal
7 constitutional issues. *See Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019).

8 74. This Court has the authority to grant an injunction and declaratory judgment
9 in this matter pursuant to 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 705, 706(2).

10 75. Venue for this action properly lies in this district pursuant to 5 U.S.C. § 703
11 and 28 U.S.C. § 1391(b)(2), (e)(1) because a defendant resides in this district, and a
12 substantial part of the events or omissions giving rise to the claim occurred in this
13 judicial district.

14 **STATEMENT OF FACTS**

15 **I. Legal Background**

16 76. SORNA conditions certain federal funding on a state’s implementation of a
17 comprehensive federal registration system for those convicted of certain offenses.
18 *See* 34 U.S.C. § 20913. When a jurisdiction fails to “substantially implement”
19 SORNA, the Attorney General shall order that 10% of relevant grant funding be
20 withheld from the state as a penalty. 34 U.S.C. § 20927(a).

21 77. To enforce SORNA, Congress also passed 18 U.S.C. § 2250. This statute
22 makes it a federal crime, punishable by up to 10 years in prison, for anyone to fail
23 to register as directed by SORNA. 18 U.S.C. § 2250(a)(1).

24 78. SORNA contains a number of delegations of authority to the Attorney General
25 to decide its implementation and scope. In Section 20912(b), the Attorney General
26 is directed to “issue guidelines and regulations to interpret and implement” SORNA.
27 In Section 20913(d), the Attorney General is given “the authority to specify the
28 applicability of the requirements of this subchapter to sex offenders convicted before

1 the enactment of this chapter or its implementation in a particular jurisdiction, and
2 to prescribe rules for the registration of any such sex offenders and for other
3 categories of sex offenders who are unable to comply with” initial registration. In
4 Section 20914(a)(7) and (8), the Attorney General can decide what information a
5 registrant must provide to their local jurisdiction, including “any . . . travel-related
6 information required by the Attorney General,” or “[a]ny other information required
7 by the Attorney General.” Finally, the Attorney General may direct a registrant to
8 “provide and update information” in whatever “time and manner” he prescribes. 34
9 U.S.C. § 20914(c).

10 79. In *Gundy v. United States*, the Supreme Court addressed a non-delegation
11 challenge only to 34 U.S.C. § 20913(d) as it related to the initial registration
12 requirement. 139 S. Ct. 2116, 2123 (2019). While the statute on its face allowed the
13 Attorney General to determine whether SORNA would apply to pre-enactment
14 convictions, according to a plurality of the Court, the Court had “already interpreted
15 § 20913(d) to say something different—to require the Attorney General to apply
16 SORNA to all pre-Act offenders as soon as feasible.” *Id.* (citing *Reynolds v. United*
17 *States*, 565 U.S. 432, 442–43 (2012)).

18 80. The plurality, therefore, avoided the delegation question entirely. Four justices
19 concluded that “because § 20913(d) does not give the Attorney General anything
20 like the ‘unguided’ and ‘unchecked’ authority that Gundy says” there was no need
21 to wade into any difficult delegation questions. *Id.* The plurality noted, however, that
22 if the statute had granted the discretion Gundy had argued, “we would face a
23 nondelegation question.” *Id.*

24 81. Justice Alito cast the deciding vote, and joined the outcome, but only
25 concluded that Section 20913(d) set out a “discernable standard that is adequate
26 under the approach this Court has taken for many years.” *Id.* at 2131. He also wrote,
27 however, “[i]f a majority of this Court were willing to reconsider the approach we
28 have taken for the past 84 years, I would support that effort.” *Id.* at 2132.

1 82. Justice Kavanaugh, who had joined the Court but did not participate in the
2 decision, has since expressed his view that “Justice Gorsuch’s scholarly analysis of
3 the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further
4 consideration in future cases.” *Paul v. United States*, 140 S. Ct. 342, 342 (2019)
5 (statement respecting denial of cert.).

6 **II. The New Rule**

7 83. The Attorney General has now issued regulations implementing new SORNA
8 requirements under the remaining delegations of authority not discussed in *Gundy*.
9 *Registration Requirements Under the Sex Offender Registration and Notification*
10 *Act*, 86 Fed. Reg. 69,856 (Dec. 8, 2021).

11 84. In a rule that took effect on January 7, 2022, the Attorney General invoked his
12 authority under 34 U.S.C. § 20912(b), 20913(d), and 20914(a)(7), (8), (b) to create
13 much more burdensome registration requirements. *Id.* at 69,856.

14 85. According to the new rule, SORNA applies to “all sex offenders” “regardless
15 of when the conviction . . . occurred” and “regardless of whether a jurisdiction has
16 substantially implemented the Act.” *Id.* at 69,884. According to the Attorney
17 General, this would apply even to convictions that were expunged, as “only pardons
18 on the grounds of innocence terminate registration obligations under SORNA.” *Id.*
19 at 69,866; *see also Office of Sex Offender Sentencing, Monitoring, Apprehending,*
20 *Registering and Tracking, National Guidelines* 73 Fed. Reg. 38,030, 38,050 (July 2,
21 2008) (“SMART Guidelines”) (registration is excused only “if the predicate
22 conviction is reversed, vacated, or set aside, or if the person is pardoned for the
23 offense on the ground of innocence,” and “an adult sex offender is ‘convicted’ for
24 SORNA purposes if the sex offender remains subject to penal consequences based
25 on the conviction, however, it may be styled”).

26 86. The rule also sets out the information a registrant must provide to a local
27 jurisdiction, which now includes a social security number, his “remote
28 communication identifiers” (e.g., internet usernames), his work or school

1 information, and information concerning any international travel, passport, and
2 vehicle registration or professional licenses. *Id.* at 69,885.

3 87. The registrant must also appear “in-person” at least yearly in his local
4 jurisdiction, and verify all information. *Id.* at 69,885–86. Depending on his predicate
5 offense, the registrant may be required to appear as many as four times per year. *Id.*
6 He must also report, in person, changes in address within three days, give advance
7 notice if he plans to change residences, jobs, or school, report changes in remote
8 communication identifiers within three days, and international travel plans prior to
9 any trip. *Id.* at 69,886.

10 88. Any violations are federal felonies. *Id.*

11 89. Moreover, if a local jurisdiction does not comply with SORNA registration
12 requirements, then a registrant is *guilty of the crime* of failing to register unless he
13 proves at trial that registration was, in essence, impossible. That is, the new rule
14 provides individuals who live in non-compliant states with an affirmative defense,
15 but that defense is only available if they can prove at trial that “uncontrollable
16 circumstances prevented the sex offender from complying with SORNA, [that] the
17 sex offender did not contribute to the creation of those circumstances in reckless
18 disregard of the requirement to comply and complied as soon as the circumstances
19 preventing compliance ceased to exist.” *Id.* There is, of course, no guarantee that an
20 individual will be able to prevail on this defense and they must undergo the time and
21 expense of a trial to find out if their state’s non-compliance has turned them into a
22 felon.

23 90. In the rule, the Department addressed non-delegation issues following *Gundy*.
24 First, it read the *Gundy* decision as authorizing any action under Section 20913(d)
25 because it “involved no exercise of legislative authority” and merely implemented
26 SORNA as soon as possible. *Id.* at 69,869. Concerning Section 20914(a)(8), the
27 Department insisted that this “is not an impermissible delegation of legislative
28 authority, but rather is instrumental to the Attorney General’s effectuating the

1 legislative objective to protect the public from sex offenders and offenders against
2 children by establishing a comprehensive national system for the registration of
3 those offenders.” *Id.* at 69,856 (cleaned up). “The Attorney General’s exercise of the
4 authority under section 20914(a)(8) is limited to requiring additional information
5 that furthers the legislative public safety objective or the implementation or
6 enforcement of SORNA’s provisions.” *Id.*

7 **III. The Effect on Plaintiffs**

8 91. Although Mr. Doe #1, Mr. Doe #2 and Mr. Doe #3 are not required—or even
9 permitted—to register as sex offenders under California law, the new rule
10 nevertheless requires them to register and comply with the new rule’s requirements.

11 92. In particular, Mr. Doe #1, Mr. Doe #2 and Mr. Doe #3 are required to provide
12 information such as their social security number, “remote communication
13 identifiers” (e.g., internet usernames), their work or school information, and
14 information concerning any international travel, passport, and vehicle registration or
15 professional licenses to local authorities, in person at least yearly.

16 93. Mr. Doe #1, Mr. Doe #2 and Mr. Doe #3 must also report, in person, changes
17 in address within three days, give advance notice if they plan to change residences
18 jobs or schools, report changes in remote communication identifiers, and
19 international travel plans prior to any trip.

20 94. California does not consider Mr. Doe #1, Mr. Doe #2, or Mr. Doe #3 sex
21 offenders, however, and will not allow them to register in compliance with the new
22 rule. California has no mechanism for registering people with no convictions, so the
23 authorities simply turn them away when they have attempted to comply with the new
24 rule.

25 95. Merely being required to register as a sex offender will harm Mr. Doe #1, Mr.
26 Doe #2 and Mr. Doe #3’s reputations, would likely result in the loss of their jobs,
27 ostracization from their communities, and potentially require them to move to avoid
28 being near public schools and parks.

1 96. Mr. Doe #2 also faces the potential loss of his ability to work as a professional
2 counselor to help those convicted of sex offenses stop the cycle of harm.

3 97. Mr. Doe #4 must also comply with the onerous additional requirements of the
4 new rule, including its reporting requirements for travel and registration of remote
5 communication identifiers.

6 98. But DOJ has found that California has not “substantially complied” with
7 SORNA, in part, because it does not collect all of the information required by the
8 Attorney General. Nevertheless, the Attorney General still requires Mr. Doe #1, Mr.
9 Doe #2, Mr. Doe #3 and Mr. Doe #4 to register as sex offenders with the State of
10 California.

11 99. Mr. Doe #1, Mr. Doe #2, Mr. Doe #3 and Mr. Doe #4 all intend to travel
12 interstate and internationally.

13 100. Furthermore, if Mr. Doe #1, Mr. Doe #2, Mr. Doe #3 or Mr. Doe #4 fail to
14 follow any of the rule’s registration requirements, they face criminal prosecution and
15 up to 10 years in federal prison.

16 101. And because the new rule makes the impossibility of registration only an
17 affirmative defense to a criminal prosecution, Mr. Doe #1, Mr. Doe #2, Mr. Doe #3
18 and Mr. Doe #4 face potential criminal liability at any time.

19 102. The Department thus presumes that Mr. Doe #1, Mr. Doe #2, Mr. Doe #3 and
20 Mr. Doe #4 are guilty of violating 18 U.S.C. § 2250(a)(1) and is free to initiate
21 prosecution at will.

22 103. Mr. Doe #1, Mr. Doe #2, Mr. Doe #3 and Mr. Doe #4 also seek to engage in
23 anonymous speech on the internet through the use of anonymous remote
24 communication identifiers, such as email addresses and social media usernames.
25 They wish to remain anonymous to preserve their privacy, and to avoid adverse
26 reputational and other risks related to their past offenses. They also wish to speak
27 anonymously about issues of public concern, including sex offender registration
28 requirements, and the unfairness of the new SORNA rule.

1 104. The new rule requires Mr. Doe #1, Mr. Doe #2, Mr. Doe #3 and Mr. Doe #4
2 to disclose their remote communication identifiers, which could be accessible by
3 members of the public. Because of this disclosure requirement, Mr. Doe #1, Mr. Doe
4 #2, Mr. Doe #3 and Mr. Doe #4 worry that they cannot speak freely about issues of
5 public concern, particularly the new SORNA rule, without jeopardizing their
6 reputation, privacy, and the safety of their families. Mr. Doe #1, Mr. Doe #2, Mr.
7 Doe #3 and Mr. Doe #4 have refrained from speaking on these matters of public
8 concern using their anonymous remote communication identifiers because of the
9 new rule.

10 105. ACSOL has members in California who likewise have been convicted of sex
11 offenses, as described by federal law, and are required to register as sex offenders
12 under both California and federal law. These members would be required to comply
13 with the new rule, even though California does not provide avenues for them to
14 provide all of the required information to California authorities. These members are
15 also presumed guilty of violating 18 U.S.C. § 2250(a)(1) and the United States is
16 free to initiate prosecution at any time.

17 106. 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 for life as sex offenders under federal law, but have had their convictions
20 expunged under California Penal Code § 1203.4 and been issued certificates of
21 rehabilitation or have been granted relief from registration under California Penal
22 Code § 290.5 and have no other convictions. Like Mr. Doe #1, Mr. Doe #2 and Mr.
23 Doe #3, these ACSOL members have no obligation to register under California law,
24 yet are presumed to be in non-compliance with the new rule and presumed guilty of
25 violating 18 U.S.C. § 2250(a)(1).

26 107. ACSOL members who will be forced to re-register, despite having had their
27 offenses of conviction expunged under California law face significant collateral
28 consequences, such as loss of career opportunities and professional licensing,

1 adverse reputation harms, inability to travel freely, and residency restrictions.

2 108. ACSOL’s membership also includes individuals who wish to engage in
3 anonymous speech on the internet through the use of anonymous remote
4 communication identifiers, such as email addresses and social media usernames.
5 These members wish to remain anonymous to preserve their privacy, and to avoid
6 adverse reputational and other risks related to their past convictions. They also wish
7 to speak anonymously about issues of public concern, including sex offender
8 registration requirements and the unfairness of the new SORNA rule.

9 109. The new rule requires these ACSOL members to disclose their remote
10 communication identifiers, which could be accessible by members of the public.
11 Because of this disclosure requirement, these ACSOL members worry that they
12 cannot speak freely about issues of public concern, particularly the new SORNA
13 rule, without jeopardizing their reputation, privacy, and the safety of their families.
14 These ACSOL members have refrained from speaking on these matters of public
15 concern using their anonymous remote communication identifiers, because of the
16 new rule.

17 **COUNT I—VIOLATION OF U.S. CONSTITUTION, NON-DELEGATION**
18 **DOCTRINE, AND SEPARATION OF POWERS**

19 110. Plaintiffs repeat and reallege each and every allegation hereinabove as if fully
20 set forth herein.

21 111. The Administrative Procedure Act (APA) directs a court to “hold unlawful and
22 set aside” an agency’s rule that is “contrary to constitutional right.” 5 U.S.C. §
23 706(2)(B).

24 112. Article I, § 1, of the Constitution provides: “All legislative Powers herein
25 granted shall be vested in a Congress of the United States.”

26 113. No agency has any inherent power to make law, and “an agency literally has
27 no power to act . . . unless and until Congress confers power upon it.” *La. Pub. Serv.*
28 *Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

1 114. Article II, § 3, of the Constitution directs that the President “shall take Care
2 that the Law be faithfully executed”

3 115. A “fundamental precept” of “another strand of [] separation-of-powers
4 jurisprudence, the delegation doctrine,” “is that the lawmaking function belongs to
5 Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or
6 entity.” *Loving v. United States*, 517 U.S. 748, 758 (1996).

7 116. Congress may not “abdicate or [] transfer to others the essential legislative
8 functions with which it is thus vested.” *A.L.A. Schechter Poultry Corp. v. United*
9 *States*, 295 U.S. 495, 529 (1935).

10 117. The President, acting through his agencies, therefore, may not exercise
11 Congress’ legislative power to declare entirely “what circumstances . . . should be
12 forbidden” by law. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

13 118. The provisions in 34 U.S.C. §§ 20912 and 20914 granting the Attorney
14 General authority to issue the SORNA rule at issue, in this case, are unlawful
15 delegations of legislative authority.

16 119. The statutes delegate to the Attorney General the unrestrained authority to
17 impose any registration requirement on sex offenders, without any guiding
18 principles.

19 120. The statutes impermissibly allow the Attorney General to unilaterally define
20 the scope of violations of 18 U.S.C. § 2250.

21 121. The new rule exercises this delegated authority to create new registration
22 requirements that are not required or even contemplated by Congressional directive.

23 122. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment
24 and permanent injunction declaring the delegations in 34 U.S.C. §§ 20912 and 20914
25 invalid, barring enforcement of the final rule, vacatur of the rule, attorneys’ fees,
26 expenses, costs and disbursements, and any other relief that may be appropriate.

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1 **COUNT II—VIOLATION OF THE ADMINISTRATIVE PROCEDURE**
2 **ACT, 5 U.S.C. § 706(2)(C)—RULE IN EXCESS OF STATUTORY**
3 **AUTHORITY**

4 123. Plaintiffs repeat and reallege each and every allegation hereinabove as if fully
5 set forth herein.

6 124. The executive branch’s authority “must stem either from an act of Congress or
7 from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.
8 579, 585 (1952). Likewise, “[i]t is axiomatic that an administrative agency’s power
9 to promulgate legislative regulations is limited to the authority delegated by
10 Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The APA
11 directs a court to “hold unlawful and set aside” an agency’s rule that is “arbitrary,
12 capricious, an abuse of discretion, or otherwise not in accordance with law,”
13 “contrary to constitutional right” or “in excess of statutory jurisdiction [or]
14 authority.” 5 U.S.C. § 706(2)(A), (B), (C).

15 125. The final rule was issued in excess of statutory authority and is therefore
16 invalid.

17 126. Under SORNA, “The term ‘sex offender’ means an individual who was
18 *convicted* of a sex offense.” 34 U.S.C. § 20911(1) (emphasis added). As relevant
19 here, “‘sex offense’ means—a criminal offense that has an element involving a
20 sexual act or sexual contact with another[.]” *Id.* at § 10911(5)(A)(i).

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

27 128. The new rule, therefore, considers Mr. Doe #1 and Mr. Doe #2’s expunged
28 convictions, as well as the expunged convictions of other ACSOL members, to be

1 “convictions” requiring registration.

2 129. Under the plain meaning of the statutory text, a “conviction” does not include
3 an adjudication that has been expunged under California law.

4 130. If a defendant satisfies its conditions, Section 1203.4(a)(1) results in him being
5 “permitted by the court to withdraw their plea of guilty or plea of nolo contendere
6 and enter a plea of not guilty; or, if they have been convicted after a plea of not
7 guilty, the court shall set aside the verdict of guilty[.]”

8 131. Section 1203.4 thus “enables [a] defendant to truthfully represent to friends,
9 acquaintances and private sector employers that he has no conviction.” *People v.*
10 *Arata*, 151 Cal. App. 4th 778, 788 (Cal. Ct. App. 2007) (citation omitted).

11 132. When a person with an expunged conviction also obtains a certificate of
12 rehabilitation, they are relieved from the obligation of registering under California
13 law.

14 133. Because the new rule considers expunged convictions that are coupled with
15 certificates of rehabilitation to nevertheless require registration under SORNA, it
16 conflicts with the plain meaning of the statutory term “conviction” and is thus
17 invalid.

18 134. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment
19 and permanent injunction barring enforcement of the final rule, vacatur of the rule,
20 attorneys’ fees, expenses, costs and disbursements, and any other relief that may be
21 appropriate.

22 **COUNT III—VIOLATION OF U.S. CONSTITUTION, DUE PROCESS**

23 **CLAUSE**

24 135. Plaintiffs repeat and reallege each and every allegation hereinabove as if fully
25 set forth herein.

26 136. A court must set aside agency action that is “contrary to [a] constitutional
27 right.” 5 U.S.C. § 706(2)(B).

28 137. The due process clauses of the Fifth and Fourteenth Amendments to the U.S.

1 Constitution require the government to bear the burden of proving beyond a
2 reasonable doubt all of the elements of a crime. *See In re Winship*, 397 U.S. 358,
3 361–62 (1970). This forbids shifting “the burden of proof to the defendant” to “prove
4 the critical fact in dispute.” *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). Indeed,
5 while legislatures have the power to define the elements of offenses, “[i]t is not
6 within the province of a legislature to declare an individual guilty or presumptively
7 guilty of a crime.” *Patterson v. New York*, 432 U.S. 197, 210, (1977) (citation
8 omitted). In all cases, due process requires that the government “must prove every
9 ingredient of an offense beyond a reasonable doubt and that it may not shift the
10 burden of proof to the defendant by presuming that ingredient upon proof of the
11 other elements of the offense.” *Id.* at 215; *see also Dixon v. United States*, 548 U.S.
12 1, 6 (2006) (recognizing that due process does not allow shifting the burden to the
13 defense to disprove “any of the elements of the offense itself”).

14 138. All crimes require an *actus reus*, which the government must prove beyond a
15 reasonable doubt.

16 139. Due process also requires that a person cannot be held criminally responsible
17 for things over which he has no control.

18 140. According to DOJ, California has not substantially implemented SORNA, in
19 part, because it does not require registrants to provide all the information required
20 by the Attorney General.

21 141. Mr. Doe # 1, Mr. Doe #2 and other members of ACSOL are not required to
22 register under California law because their convictions have been expunged under
23 Cal. Penal Code § 1203.4 and have received certificates of rehabilitation.

24 142. Mr. Doe #3 and other members of ACSOL are not required to register under
25 California law because they have successfully petitioned for relief from registration
26 under Cal. Penal Code § 290.5.

27 143. Mr. Doe #1, Mr. Doe #2, Mr. Doe #3, and other members of ACSOL whose
28 sex offense convictions have been expunged under Cal. Penal Code § 1203.4 and

1 obtained certificates of rehabilitation or who have successfully petitioned for relief
2 from registration under Cal. Penal Code § 290.5, are not *permitted* by California
3 authorities to register as sex offenders as required by the new rule.

4 144. New Section 72(g)(1) asserts that the government has no obligation “to
5 establish that a registration jurisdiction’s procedures would have allowed a sex
6 offender to register or keep the registration current in conformity with SORNA”
7 before it prosecutes them for failing to do the “impossible.” 86 Fed. Reg. at 69,867,
8 69,886.

9 145. The new rule presumes Mr. Doe #1, Mr. Doe #2, Mr. Doe #3, and other
10 members of ACSOL whose sex offense convictions have been expunged under Cal.
11 Penal Code § 1203.4 and been issued certificates of rehabilitation or have been
12 granted relief under Cal. Penal Code § 290.05 are guilty of the *actus reus* of Section
13 2250 because the state does not provide any means for them to comply with the
14 rule’s registration requirements.

15 146. The new rule also requires people like Mr. Doe #4, and other members of
16 ACSOL, who must still register in California to provide all of the information
17 required by the new rule, even though California does not substantially comply with
18 SORNA and does not collect the required information.

19 147. The new rule thus presumes that Mr. Doe #4, and every member of ACSOL
20 who must register in California, to be presumptively guilty of the *actus reus* of
21 Section 2250 because the state does not provide any means for them to comply with
22 the rule’s registration requirements.

23 148. The new rule “declare[s] an individual guilty or presumptively guilty of a
24 crime,” in violation of due process. *See Patterson*, 432 U.S. at 210.

25 149. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment
26 and permanent injunction barring enforcement of the final rule, vacatur of the rule,
27 attorneys’ fees, expenses, costs and disbursements, and any other relief that may be
28 appropriate.

**COUNT IV—VIOLATION OF U.S. CONSTITUTION, FIRST
AMENDMENT**

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3 150. Plaintiffs repeat and reallege each and every allegation hereinabove as if fully
4 set forth herein.

5 151. A court must set aside agency action that is “contrary to [a] constitutional
6 right.” 5 U.S.C. § 706(2)(B).

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

17 153. As the Ninth Circuit has held, when the government requires those convicted
18 of sex offenses to provide law enforcement with their remote communication
19 identifiers it “imposes a substantial burden on sex offenders’ ability to engage in
20 legitimate online speech, and to do so anonymously,” in violation of the First
21 Amendment. *Id.* at 574, 578.

22 154. The new rule violates the First Amendment because it requires Mr. Doe #1,
23 Mr. Doe #2, Mr. Doe #3, and Mr. Doe #4, as well as ACSOL’s members, to provide
24 up-to-date “remote communication identifiers” as a part of their registration
25 information. *See* 86 Fed. Reg. at 69,885. The definition of “remote communication
26 identifiers” is impermissibly vague, and chills free expression and anonymous
27 speech. *See* 86 Fed. Reg. at 69,859. The identifiers can also be disseminated to the
28 public at will, states are encouraged to allow members of the public to check specific

1 identifiers to see if they belong to a registrant, and jurisdictions are encouraged to
2 share them with law enforcement agencies. *See Id.* Plus registrants must update any
3 changes within three days, *in person* with law enforcement. *Id.* at 69,885. There is
4 little doubt that this provision unlawfully chills protected speech, particularly
5 anonymous speech, yet fails to meet constitutional scrutiny.

6 155. As a result of the foregoing, Plaintiffs are entitled to a declaratory judgment
7 and permanent injunction barring enforcement of the final rule, vacatur of the rule,
8 attorneys' fees, expenses, costs and disbursements, and any other relief that may be
9 appropriate.

10 **PRAYER FOR RELIEF**

11 **WHEREFORE**, for the foregoing reasons, Plaintiffs demand judgment against
12 Defendants as follows:

13 (i) The issuance of a preliminary injunction prohibiting Defendants from
14 enforcing the final rule pursuant to 5 U.S.C. § 705 and 28 U.S.C. § 2201;

15 (ii) A declaratory judgment, pursuant to 5 U.S.C. § 706(2) and 28 U.S.C. §
16 2202, holding unlawful and setting aside 34 U.S.C. §§ 20912 and 20914 and the final
17 rule;

18 (iii) An award of attorneys' fees and costs to Plaintiffs; and

19 (iv) Any other relief as the Court deems just, equitable and proper.

20 **JURY DEMAND**

21 Plaintiffs herein demand a trial by jury of all triable issues in the present matter.
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DATED: October 11, 2022

Respectfully submitted,

JEREMY TALCOTT

By *s/ Jeremy Talcott*
JEREMY TALCOTT

STEVEN M. SIMPSON

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

CALEB KRUCKENBERG

By *s/ Caleb Kruckenberg*
CALEB KRUCKENBERG*

**Appearing Pro Hac Vice
Attorneys for Plaintiffs*

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CERTIFICATE OF SERVICE

I certify that on this day, October 11, 2022, I served copies of the foregoing on counsel of record for all Defendants using the Court’s CM/ECF system.

JEREMY TALCOTT
By *s/ Jeremy Talcott* _____
JEREMY TALCOTT

Kiren Mathews

From: cacd_ecfmail@cacd.uscourts.gov
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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 10/11/2022 at 5:56 AM PDT and filed on 10/11/2022

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

The Alliance for Constitutional Sex Offense Laws

Document Number: [41](#)

Docket Text:

First AMENDED COMPLAINT against Defendant Merrick B. Garland, U.S Department of Justice amending Complaint (Attorney Civil Case Opening), [2], filed by Plaintiffs John Doe, The Alliance for Constitutional Sex Offense Laws(Talcott, Jeremy)

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

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Original filename:C:\fakepath\Amended Complaint_final.pdf

Electronic document Stamp:

[STAMP cacdStamp_ID=1020290914 [Date=10/11/2022] [FileNumber=34708518-0] [30f7b61338c12a8c68ec14d171fe23190f5fb255a4c0598bf19643ba3c36cb0e437da003cda27bef529b9253ca41a76c9e0122a893343057bf58f67a3b1a602d]]