

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROBERT JOSEPH MCCARTY,

Plaintiff,

v.

JOHN V. ROOS, et al.,

Defendants.

2:11-CV-1538 JCM (RJJ)

ORDER

Presently before the court is John Roos and Joseph Koen’s (“federal defendants”) motion to dismiss official capacity claims. (Doc. # 81). *Pro se* plaintiff Robert Joseph McCarty filed an opposition (doc. # 87), and filed a supplemental opposition (doc. # 93).¹ Federal defendants replied. (Doc. # 96).

Also before the court is federal defendants’ motion to dismiss individual capacity claims. (Doc. # 82). Plaintiff filed an opposition (doc. # 91), and federal defendants replied (doc. # 97).

Also before the court is defendants Patrick Saunders and Charlene Hoerth’s (“state defendants”) motion to dismiss individual capacity claims. (Doc. # 100). Plaintiff filed an opposition (doc. # 103), and state defendants replied. (Doc. # 111).

I. Factual background

On September 26, 2011, plaintiff, proceeding *pro se*, filed a civil rights action against Nevada’s attorney general, state defendants, and federal defendants. State defendants are Nevada

¹ Plaintiff filed the supplemental opposition pursuant to court order. (*See* doc. # 90).

1 Department of Public Safety employees. Federal defendants are the U.S. Ambassador to Japan, Roos,
2 and a U.S. consular officer, Koen. Plaintiff sues all defendants in their individual and official
3 capacities.²

4 Plaintiff challenges the constitutionality of the Sex Offender Registration Notification Act
5 (“SORNA”). Plaintiff alleges that he was convicted in 2003, of “Quasi Indecent Assault” in Japan.
6 Plaintiff alleges that the Japanese conviction was obtained in a judicial system that is deficient of
7 constitutional safeguards, including substantive and procedural due process.

8 Upon return to the United States, plaintiff was required to register as a tier I sex offender
9 under SORNA. Plaintiff claims that this registration requirement violates his civil and constitution
10 rights.

11 Plaintiff alleges that federal defendants failed to follow “proper procedures” to “protect” him,
12 resulting in the violation of his right to due process. Plaintiff alleges that state defendants wrongfully
13 designated plaintiff as a sex offender and failed to act to redress the egregious injustice of plaintiff’s
14 registration status.

15 Plaintiff seeks injunctive relief including (1) a declaration that he was denied due process and
16 thus cannot be made to register as a sex offender; (2) expungement of federal and state files relating
17 to his designation as a sex offender; and (3) a full name and identity change. Plaintiff also seeks
18 \$650,000 in damages.

19 **II. SORNA**

20 **A. Background**

21 In 2006, Congress passed the Adam Walsh Child Protection and Safety Act of 2006. Pub.
22 L. No. 109-248, 120 Stat. 587; 42 U.S.C. § 16901 *et seq.* Included among the provisions in the act
23 was an effort by Congress to codify a comprehensive set of standards to govern state sex offender
24 registration and notification programs through SORNA. Pub. L. No. 109-248, Title I, 120 Stat. at
25 590.

26 . . .

27
28 ² The court has already dismissed Nevada’s attorney general Catherine Cotez Masto. (*See* doc. # 70).

1 In 2006, “Congress concluded that the patchwork of standards that has resulted from
2 piecemeal amendments should be replaced with a comprehensive new state of standards—the
3 SORNA reforms[]—that would close potential gaps and loopholes under the old law, and generally
4 strengthen the nationwide network of sex offender registration and notification programs.” *The*
5 *National Guidelines for Sex Offender Registration and Notification*, FINAL GUIDELINES (June 2008)
6 at 4, available at http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf (“SORNA
7 Guidelines”).

8 **B. Compliance**

9 Among other things, in order to be SORNA-compliant, state registrations must collect
10 various specified types of information, such as names, addresses, physical descriptions, criminal
11 history information, and photographs of offenders. 42 U.S.C. § 16914 (a) & (b).

12 SORNA also increased the time of registration for certain classes of sex offenders based on
13 the type of conviction or recidivism, requiring 15 years for tier I offenders, absent a reduction based
14 on maintaining a “clean record” for 10 years; 25 years for tier II offenders; and lifetime for tier III
15 offenders, absent a reduction based on maintaining a “clean record” for 25 years for juvenile
16 delinquent offenders. 42 U.S.C. § 16915 (a) & (b).

17 SORNA requires in-person verification of registry information, 42 U.S.C. § 16916, and
18 permits for public dissemination of certain information on internet sites, 42 U.S.C. § 16918.

19 “SORNA establishes a national baseline for sex offender registration and notification
20 programs. In other words, the Act generally constitutes a set of minimum national standards and sets
21 a floor, not a ceiling, for jurisdictions’ programs.” SORNA Guidelines, at 6 (emphasis in original).

22 SORNA also enacted 18 U.S.C. § 2250, which establishes criminal liability for a sex offender
23 who “knowingly fails to register or update a registration” See Pub. L. No. 109-248, § 141(a).

24 . . .

25 . . .

26 . . .

27 . . .

28

1 **C. Foreign conviction provision**

2 With respect to foreign convictions, SORNA provides:

3 A foreign conviction is not a sex offense for the purposes of this subchapter if it was
4 not obtained with sufficient safeguards for fundamental fairness and due process for
5 the accused under guidelines or regulations established under section 16912 of this
6 title.

6 42 U.S.C. § 16911(5)(B).

7 The “guidelines” referred to are the SORNA Guidelines issued by the Attorney General,
8 which adopted the following standards with respect to foreign convictions:

9 Sex offense convictions under the laws of Canada, United Kingdom, Australia, and
10 New Zealand are deemed to have been obtained with sufficient safeguards for
11 fundamental fairness and due process, and registration must be required for such
12 convictions on the same footing as domestic convictions.

13 *Sex offense convictions under the laws of any foreign country are deemed to have*
14 *been obtained with sufficient safeguards for fundamental fairness and due process*
15 *if the U.S. State Department, in its Country Reports on Human Rights Practices, has*
16 *concluded that an independent judiciary generally (or vigorously) enforced the right*
17 *to a fair trial in that country during the year in which the conviction occurred.*
18 *Registration must be required on the basis of such convictions on the same footing*
19 *as domestic convictions.*

20 With respect to sex offense convictions in foreign countries that do not satisfy the
21 criteria stated above, a jurisdiction is not required to register the convicted person if
22 the jurisdiction determines—through whatever process or procedure it may choose
23 to adopt—that the conviction does not constitute a reliable indication of factual guilt
24 because of the lack of an impartial tribunal, because of denial of the right to respond
25 to the evidence against the person or to present exculpatory evidence, or because of
26 denial of the right to the assistance of counsel.

27 SORNA Guidelines at 16-17, 73 Fed. Reg. At 38050-51 (emphasis added).

28 The State Department Country Reports for Japan in 2002 and 2003 found that the Japanese
29 government “generally respected in practice the constitutional provisions for the right to a speedy
30 and public trial by an impartial tribunal in all criminal cases.” U.S. Department of State, *Country*
31 *Reports on Human Rights (March 31, 2003), available at*
32 *http://www.state.gov/j/drl/rls/hrrpt/2002/18246.htm (“2002 Japan Country Report”); see also U.S.*
33 *Department of State, Country Reports on Human Rights (February 25, 2004), available at*
34 *http://www.state.gov/j/drl/rls/hrrpt/2003/27772.htm (“2003 Japan Country Report”).*

1 **III. Legal standard**

2 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can
3 be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain
4 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell*
5 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual
6 allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements
7 of a cause of action." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted).

8 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S.
9 at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to
10 "state a claim to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

11 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when
12 considering motions to dismiss. First, the court must accept as true all well-pled factual allegations
13 in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950.
14 Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not
15 suffice. *Id.* at 1949.

16 Second, the court must consider whether the factual allegations in the complaint allege a
17 plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's complaint
18 alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the
19 alleged misconduct. *Id.* at 1949.

20 Where the complaint does not permit the court to infer more than the mere possibility of
21 misconduct, the complaint has "alleged – but not shown – that the pleader is entitled to relief." *Id.*
22 (internal quotations omitted). When the allegations in a complaint have not crossed the line from
23 conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

24 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
25 1216 (9th Cir. 2011). The *Starr* court stated, "First, to be entitled to the presumption of truth,
26 allegations in a complaint or counterclaim may not simply recite the elements of a cause of action,
27 but must contain sufficient allegations of underlying facts to give fair notice and to enable the
28

1 opposing party to defend itself effectively. Second, the factual allegations that are taken as true must
2 plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to
3 be subjected to the expense of discovery and continued litigation.” *Id.*

4 **IV. Discussion**

5 As an initial matter, the court acknowledges that the amended complaint and oppositions to
6 the instant motions are *pro se*, which are held to less stringent standards. *Erickson v. Pardus*, 551
7 U.S. 89, 94 (2007) (“A document filed *pro se* is to be liberally construed, and a *pro se* complaint,
8 however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted
9 by lawyers.”) (internal quotations and citations omitted).

10 **A. Federal defendants’ motion to dismiss official capacity claims (doc. # 81)**

11 Plaintiff’s amended complaint attacks the constitutionality of SORNA’s foreign conviction
12 provision as well as the conduct of federal defendants in relation to the enforcement of this
13 provision. Specifically, plaintiff alleges that this provision is unconstitutionally vague, violates
14 plaintiff’s procedural due process, and violates plaintiff’s substantive due process.

15 **I. Unconstitutionally vague**

16 Plaintiff alleges that the foreign convictions provision is unconstitutional as applied to him
17 and on its face.

18 “To determine whether a statute is unconstitutionally vague as applied, a two-part test is
19 used: a court must first determine whether the statute gives the person of ordinary intelligence a
20 reasonable opportunity to know what is prohibited and then consider whether the law provides
21 explicit standards for those who apply it.” *Pest Comm. v. Miller*, 626 F.3d 1097, 1111 (9th Cir. 2010)
22 cert. denied, 132 S. Ct. 94, 181 L. Ed. 2d 23 (U.S. 2011) (citation omitted). Outside the First
23 Amendment context, a party bringing a facial challenge on vagueness grounds “must demonstrate
24 that the enactment is impermissibly vague in all of its applications”; hence, “if the statute is
25 constitutional as applied to the individual asserting the challenge, the statute is facially valid.” *United*
26 *States v. Dang*, 488 F.3d 1135, 1141 (9th Cir. 2007) (citation omitted).

1 Title 42 U.S.C. § 16911(5)(B) satisfies prong one. The provision gives a person of ordinary
2 intelligence express notice that to be considered a sex offense requiring registration under SORNA,
3 a foreign conviction must meet standards for fairness and due process that are established by specific
4 guidelines or regulations pursuant to 42 U.S.C. § 16912—namely, the SORNA Guidelines issued by
5 the Attorney General.

6 Title 42 U.S.C. § 16911(5)(B) satisfies prong two. The standards outlined in the SORNA
7 Guidelines explicitly state how courts should treat foreign convictions depending on the country of
8 origination. To this point, it appears that plaintiff, appearing *pro se*, was able to determine the
9 standards that applied to his conviction. This is demonstrated by plaintiff vigorously contesting the
10 findings of the 2002 and 2003 Japan Country Reports.

11 Thus, plaintiff has failed to allege sufficient facts to establish that the foreign convictions
12 provision of SORNA is unconstitutionally vague as applied to him. Therefore, he has failed to
13 establish that it is unconstitutionally vague on its face. *See Dang*, 488 F.3d at 1141.

14 **ii. Procedural due process**

15 In evaluating procedural due process, the Ninth Circuit has outlined a two-step inquiry: “The
16 first asks whether there exists a liberty or property interest which has been interfered with by the
17 State; the second examines whether the procedures attendant upon that deprivation were
18 constitutionally sufficient.” *United States v. Juvenile Male*, 670 F.3d 999, 1013 (9th Cir. 2012) cert.
19 denied, 133 S. Ct. 234 (U.S. 2012) (citation omitted).

20 It is difficult to discern what protectable liberty or property interest plaintiff alleges to be
21 burdened by SORNA. However, the Ninth Circuit has recognized that “the Supreme court has held
22 that adverse publicity or harm to the reputation of sex offenders does not implicate a liberty interest
23 for the purposes of due process analysis.” *Id.* (citing *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1,
24 7, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003)). And to the extent that other protectable liberty or
25 property interests are allegedly interfered with, plaintiff has failed to identify the source of these
26 rights to support the notion that he has a broader due process right. *See id.*

27 . . .

28

1 Even if there is a protectable interest that this court has failed to ferret out of plaintiff's
2 amended complaint, plaintiff has failed to allege sufficient facts to establish insufficiency of process.
3 The Ninth Circuit has held that because SORNA's registration requirements "turn on an offender's
4 conviction alone—a fact that a convicted offender has already had a procedurally safeguarded
5 opportunity to contest—no additional process is required for due process." *Juvenile Male*, 670 F.3d
6 at 1014 (citations omitted). And plaintiff clearly admits the existence of his conviction and does not
7 contest this fact.

8 To the extent that plaintiff alleges that he did not receive a fair trial in Japan or that the 2002
9 and 2003 Japan Country Reports are inaccurate, additional process is *still* unnecessary. "Additional
10 process is only necessary where it gives a sex offender the ability to prove or disprove facts related
11 to the applicability of the registration requirement." *Juvenile Male*, 670 F.3d at 1014. Plaintiff does
12 not allege any facts to demonstrate the he received an unfair trial that were not considered by the
13 Japan Country Reports. Further, plaintiff has failed to point to any authority on which he bases his
14 conclusion that the reports relied upon are inaccurate. As such, there are no alleged facts discernable
15 by the court related to the applicability of the registration requirement.

16 Plaintiff alleges several deficiencies in the Japanese criminal process that prevented him from
17 receiving a fair trial. However, these deficiencies—that is, the absence of a trial by jury, issues relating
18 to obtaining qualified interpreters for foreign defendants, and issues relating to defendants' access
19 to police records and other evidence—were acknowledged in the 2002 and 2003 Japan Country
20 Reports. And both years, these reports, nonetheless concluded that Japan "generally respected in
21 practice the constitutional provisions for the right to a speedy and public trial by an impartial tribunal
22 in all criminal cases." 2002 Japan Country Report and 2003 Japan Country Report.

23 According to the 2002 and 2003 Japan Country Reports, a criminal defendant in Japan was
24 presumed innocent, assured a public trial by an independent civilian court with defense counsel, had
25 the right to cross-examination, had the right against self-incrimination, had access to private counsel,
26 was protected from the retroactivity of laws, and could appeal a verdict to a higher court including
27 the Supreme Court. *Id.* Plaintiff does not allege that he was denied any of these rights.
28

1 Plaintiff does not point to any authority to support the allegation that the 2002 and 2003
2 Japan Country Reports are inaccurate. Without a basis for finding these reports unreliable, the court
3 finds that relying on these reports, for the purposes of applying SORNA, appropriate.³ Thus, the
4 court finds that plaintiff does not allege sufficient facts to show that the process provided by SORNA
5 is inadequate.

6 Plaintiff also seems to suggest that SORNA should provide an offender an individual
7 opportunity to show that his foreign conviction was not valid or fairly obtained. However, this would
8 require the court to review facts and events of another country's court proceedings and substitute its
9 own judgment for that of a foreign court, before the conviction could be treated as a registerable
10 offense. *See Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991). The court declines to do so.
11 Such a scheme would be unworkable and at odds with the principles of comity. *Cf. id.* The court
12 finds that such a structure would be inconsistent with the many areas of law in which foreign
13 convictions are given effect without inquiring into the validity of individual convictions.

14 Thus, the court finds that plaintiff has failed to allege sufficient factual matter to state a claim
15 for procedural due process "that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949.

16 **iii. Substantive due process**

17 For a substantive due process claim, the Supreme Court has described the "fundamental"
18 rights protected by substantive due process as "those personal activities and decisions that this Court
19 has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of
20 constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Juvenile*
21 *Male*, 670 F.3d at 1012 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997)). "Those
22 rights are few, and include the right to marry, to have children, to direct the education and upbringing
23 of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to
24 refuse unwanted lifesaving medical treatment." *Id.*

25 . . .

26
27 ³ The court notes that in *Small v. United States*, 544 U.S. 385 (2005), the Supreme Court relied on the State
28 Department's Country Reports for assessment of whether certain foreign legal systems comported with "an American
understanding of fairness." *Id.* at 389. Thus, the court finds no reason to discount the findings in the reports.

1 Further, a plaintiff must provide “a careful description of the asserted fundamental liberty
2 interest,” *Glucksberg*, 521 U.S. at 721, or “a narrow definition of the interest at stake,” *Raich v.*
3 *Gonzalez*, 500 F.3d 850, 863, (9th Cir. 2007) (citing *Glucksberg*, 521 U.S. at 722).

4 Lastly, the Ninth Circuit has stated that “individuals convicted of serious sex offenses do not
5 have a fundamental right to be free from sex offender registration requirements.” *Juvenile Male*, 670
6 F.3d at 1012 (relying on *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004)).

7 Plaintiff does not allege violation of any of the fundamental rights identified by the Supreme
8 Court. *See Juvenile Male*, 670 F.3d at 1012. Further, plaintiff has failed to provide a “careful
9 description of the asserted fundamental liberty interest.” *See Glucksberg*, 521 U.S. at 721. Thus, the
10 court need not consider whether this unidentified right is “deeply rooted in our history and traditions
11” *Juvenile Male*, 670 F.3d at 1012.

12 Therefore, the court finds that plaintiff’s amended complaint does not state a claim for
13 substantive due process.

14 **iv. Other rights**

15 Plaintiff alleges that several of his civil rights were violated by federal defendants.
16 Specifically, plaintiff alleges that his “[r]ight to live and assemble on specific properties; right to
17 petition the Government for a redress of grievances; right to bear arms; right to be secure in person;
18 no person held to answer for infamous crime (sex offender) without legal safeguards; right to
19 impartial jury; right not to be put twice in jeopardy; right to substantive due process and procedural
20 due process; right of trial by jury; cruel and unusual punishment inflicted; no law can be construed
21 to deny the rights of an American Citizen; and the right to vote. Plaintiff was deprived of liberty and
22 property as well as other capriciously imposed limits on employment housing and other aspects of
23 life.” (Doc. # 8, 9).

24 As to the rights that are implicated by the criminal justice system, such as double jeopardy
25 and cruel and unusual punishment, SORNA cannot violate these rights because it is a civil regulatory
26 scheme. *See Juvenile Male*, 670 F.3d at 1013-14. As to the right to petition for redress of grievances,
27
28

1 the right to bear arms, and the right to vote, plaintiff does not provide a sufficient factual basis to
2 determine how SORNA's registration requirements violate these rights.

3 As to the right to trial by jury, to the extent that plaintiff is referring to his lack of jury trial
4 in Japan, plaintiff fails to explain how SORNA confers or deprives this right or why he was entitled
5 to a jury trial in Japan. As to the right to live and assemble on specific properties, plaintiff does not
6 explain how SORNA's requirement to report certain information associated with travel places an
7 unconstitutional burden on his right to travel. While the requirement is burdensome, it is not enough
8 to establish that SORNA violates plaintiff's right to travel. *See United States v. Ambert*, 561 F.3d
9 1202, 1210 (11th Cir. 2009).

10 **v. Federal defendants' conduct**

11 Plaintiff alleges that the rights plaintiff in his amended complaint were violated by federal
12 defendants. Specifically, plaintiff alleges that federal defendants, despite "receiv[ing] multiple
13 registered letters with full knowledge of the deleterious effects of the results of SONRA foreign
14 conviction law" and being aware of the alleged unfairness of the Japanese criminal justice process
15 and the specific's of plaintiff's trial, failed to "protect the Plaintiff's rights" and "follow proper
16 procedures," and that "[a]s retribution and reprisal" for the letters, they "failed to ensure that when
17 Plaintiff returned to the United States there was no requirement to register as a Sex Offender." (Doc.
18 # 8, 3-4, 9-10).

19 However, plaintiff fails to identify any legal authority suggesting that federal defendants, in
20 their official capacities, owed plaintiff an affirmative duty to "ensure" that he would not have to
21 register as a sex offender under SORNA, or that failing to perform this "duty" would violate any of
22 plaintiff's civil or constitutional rights.

23 The court finds that plaintiff's amended complaint has not allege facts that allows the court
24 to draw a reasonable inference that federal defendants, in their official capacities, are liable for the
25 alleged misconduct. *Iqbal*, 129 S.Ct. at 1949.

26 ...

27 ...

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

vi. Federal official immunity against damages claims

Sovereign immunity shields the federal government from suit, including suits against federal officials in their official capacities, in the absence of a waiver. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Balser v. Dep't of Justice, Office of U.S. Trustee*, 327 F.3d 903, 907 (9th Cir. 2003). That waiver cannot be implied, but must be unequivocally expressed in the statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996). If a plaintiff fails to carry the burden of showing that his suit falls within such an unequivocally expressed waiver, subject-matter jurisdiction is lacking, and the suit must be dismissed. *McGuire v. United States*, 550 F.3d 903, 910 (9th Cir. 2008).

Here, plaintiff has not identified any statute unequivocally waiving the United States' sovereign immunity from his claim of monetary damages.

To the extent that plaintiff seeks damages against the United States under 42 U.S.C. § 1983, that statute only creates a cause of action against persons acting under color of state law. *See Stonecipher v. Bray*, 653 F.2d 398, 401 (9th Cir. 1981) (“Section 1983 allows a party to bring a civil action for constitutional deprivations against persons acting under color of state law. [Plaintiff] has no cause of action against the IRS under section 1983 because the IRS is a federal agency and its agents performed no acts under color of state law.”).

Here, plaintiff does not allege facts that federal defendants performed any acts under color of state law, and thus plaintiff has failed to state a claim against federal defendants in their official capacities under § 1983.

To the extent that plaintiff seeks damages under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), it is well established that *Bivens* actions can only be brought against federal employees in their individual capacities. *Corr. Services Corp. v. Malesko*, 534 U.S. 61, 70, 122 S. Ct. 515, 521, 151 L. Ed. 2d 456 (2001); *see also Meyer*, 510 U.S. at 484-86.

Here, plaintiff cannot assert a *Bivens* action against federal defendants in their official capacities.

...
...

1 **B. Federal defendants’ motion to dismiss individual capacity claims (doc. # 82)**
2 Federal defendants, in their individual capacities, move to dismiss plaintiff’s amended
3 complaint under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction; under 12(b)(5) for lack
4 of proper service; and under 12(b)(6) for failure to state a claim upon which relief can be granted.

5 **I. Lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2)**

6 To bring an action for damages against a federal employee in his individual capacity, plaintiff
7 must show that the court in which he has brought suit has personal jurisdiction over the defendant.
8 *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1459 (9th Cir. 1985). On a motion to dismiss for personal
9 jurisdiction decided solely on the pleadings, a plaintiff bears the burden of demonstrating that his
10 or her allegations, taken as true, would establish a *prima facie* case for personal jurisdiction. *See*
11 *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). A plaintiff must demonstrate jurisdiction
12 over each defendant individually. *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990).

13 In district courts in Nevada, assertion of personal jurisdiction must comport with due process.
14 *Fiore v. Walden*, 688 F.3d 558, 573 (9th Cir. 2012). For general jurisdiction, plaintiff must
15 demonstrate that each nonresident defendant has “at least ‘minimum contacts’ with the relevant
16 forum such that the exercise of jurisdiction ‘does not offend traditional notions of fair play and
17 substantial justice.’” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004)
18 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

19 For specific jurisdiction, plaintiff must establish that defendant’s contacts with the forum are
20 what gave rise to the suit. *Id.* at 801-02. That is, plaintiff must first demonstrate that the defendant
21 purposefully directed his activities at the forum or consummated some transaction in the forum; and
22 second, that the claim arises out of or relates to the defendant’s forum-related activities. *Id.* at 802.

23 Plaintiff does not allege any facts that demonstrate that either federal defendant has
24 “continuous and systematic” contacts with this forum. *Id.* at 801. Thus, plaintiff does not allege
25 general jurisdiction.

26 ...

27 ...

28

1 Further, plaintiff has not satisfied both prongs of specific jurisdiction. Plaintiff does not
2 allege that either Roos or Koen purposefully directed any act at Nevada giving rise to this lawsuit
3 or that they consummated any transaction in this forum giving rise to this lawsuit. That plaintiff must
4 register as a sex offender in Nevada is not sufficient to establish specific jurisdiction. Personal
5 jurisdiction hinges on the contacts of the defendant, and the fact that a plaintiff feels some harm
6 within a forum state does not mean the defendant has minimum contacts there. *See Pebble Beach*
7 *Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006); *Schwarzenegger*, 374 F.3d at 807. Thus, plaintiff
8 does not allege specific jurisdiction.

9 **ii. Lack of proper service under Fed. R. Civ. P. 12(b)(5)**

10 To serve a United States employee in his individual capacity, a party must serve the United
11 States and the individual officer or employee under Fed. R. Civ. P. 4(e), (f), or (g). FED. R. CIV. P.
12 4(i)(3). Rule 4 must be “liberally construed” to uphold service so long as a party receives sufficient
13 notice of the complaint. *Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir.
14 2009).

15 Rule 4(f) provides that service of process upon an individual abroad may be effected “by any
16 internationally agreed means reasonably calculated to give notice, such as those authorized by the
17 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.” FED. R. CIV.
18 P. 4(f)(1).

19 The United States, Mexico,⁴ and Japan⁵ are signatories to the Convention on Service Abroad
20 of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *available at*
21 <http://www.hcch.net/upload/conventions/txt14en.pdf> (“Hague Service Convention”), thus service
22 on both federal defendants must conform to the requirements of the convention. “[C]ompliance with
23 the Convention is mandatory in all cases to which it applies.” *Volkswagenwerk Aktiengesellschaft*
24 *v. Schlunk*, 486 U.S. 694, 705, 108 S. Ct. 2104, 2111, 100 L. Ed. 2d 722 (1988).

25 . . .

26 _____
27 ⁴ Koen resides in Mexico.

28 ⁵ Roos resides in Japan.

1 Article 5 of the Hague Service Convention provides the primary means by which service is
2 accomplished is through a receiving state's "Central Authority." Hague Convention, art. 5, Nov. 15,
3 1965, 20 U.S.T. 361, T.I.A.S. No. 6638. Japan and Mexico have designated their respective
4 ministries of foreign affairs as their "Central Authorities." Accession of Mexico to the Hague Service
5 Convention, 2117 U.N.T.S. 318, 321 ¶ 1: Ratification of Japan to the Hague Convention, 737
6 U.N.T.S. 410 n.1.

7 Article 21 also contemplates certain alternative methods of service under Article 8 and 10,
8 so long as the signatory state has not objected to those alternative means. Hague Service Convention,
9 art. 21.

10 Article 8 provides for service directly through the signatory state's diplomatic or consular
11 agents, while Article 10 makes clear that the convention does not interfere with the sending of
12 judicial documents directly to persons abroad via postal channels or by personal service through
13 judicial officers or other officials. Hague Service Convention, arts. 8 & 10.

14 Here, Plaintiff appears to have sent his amended complaint via certified mail to both
15 defendants, at the U.S. Embassy in Tokyo. Thus, plaintiff has not effectuated service through the
16 Central Authorities of Japan or Mexico pursuant to article 5 or through the diplomatic and consular
17 channels contemplated by article 8. Thus, the court turns to article 10 to determine if plaintiff has
18 substantially complied with this article.

19 Article 10 states:

20 Provided the State of destination does not object, the present Convention shall not
21 interfere with
22 a) the freedom to send judicial documents, by postal channels, directly to persons
23 abroad,
24 b) the freedom of judicial officers, officials or other competent persons of the State
25 of origin to effect service of judicial documents directly through the judicial officers,
26 officials or other competent persons of the State of destination,
27 c) the freedom of any person interested in a judicial proceeding to effect service of
28 judicial documents directly through the judicial officers, officials or other competent
persons of the State of destination.

Hague Service Convention, art. 10.

1 **a. Service by Mail in Japan as to Roos**

2 Japan has not objected to article 10(a); however, this article does not in itself affirmatively
3 authorize service by international mail. *See Brockmeyer v. May*, 383 F.3d 798, 804 (9th Cir. 2003).
4 Any affirmative authorization of service by international mail must come from the law of the forum
5 in which the suit is filed. *Id.*

6 While Rule 4 is construed leniently, the court still finds that plaintiff has not sufficiently
7 effectuated service on Roos. Rule 4(f)(2)(A) provides that service may be “as prescribed by the
8 foreign country’s law for service in that country in an action in its courts of general jurisdiction.” *Id.*
9 Japan’s laws of civil procedure provide that service of process is a purely judicial function that may
10 only be performed by an empowered governmental agency. *See Minji Soshoho*, 1996, art. 153
11 (Japan) (“Japanese Code of Civil Procedure”); G. Brian Raley, *A Comparative Analysis: Notice*
12 *Requirements in Germany, Japan, Spain, the United Kingdom and the United States*, 10 ARIZ. J.
13 INT’L & COMP. L. 301, 315-17 (1993). Here, plaintiff does not appear to have served Roos via an
14 “empowered governmental agency.”

15 Rule 4(f)(2)(C)(ii) provides “if there is no internationally agreed means, or if an international
16 agreement allows but does not specify other means, by a method that is reasonably calculated to give
17 notice, unless prohibited by the foreign country’s law, by, using any form of mail that the clerk
18 addresses and sends to the individual and that requires a signed receipt.” *Id.* Here, the clerk of the
19 court did not address and send the summons or amended complaint.

20 Thus, the court finds that plaintiff has not effectuated service on Roos in compliance with
21 Rule 4(f).⁶

22 **b. Service by Mail in Mexico as to Koen**

23 Mexico has objected to article 10(a). Accession of Mexico, 2117 U.N.T.S. 318, 321 IV, V.
24 Thus, service through Mexico’s Central Authority—that is, its ministry of foreign affairs—is the
25

26 ⁶ At this time, the court declines to order an alternate method of service. *See* FED. R. CIV. P. 4(f)(3)
27 (affirmatively authoring the federal district court to direct any form of service that is not prohibited by an international
28 agreement). Since plaintiff must amend his complaint, if he chooses to continue litigating this case, the court finds that
plaintiff has an opportunity to comply with proper service as outlined in IV.B.ii.a & b.

1 exclusive means by which effective service may be accomplished in Mexico. *See Cardona v.*
2 *Kreamer*, 225 Ariz. 143, 235 P.3d 1030 (2010) (“Mexico’s blanket objection to any alternative
3 methods of service under Articles 8 and 10 renders service through its Ministry of Foreign Affairs
4 the exclusive means available under the Convention.”). Here, plaintiff did not serve Koen through
5 Mexico’s Central Authority, as such, there has not been sufficient service on Koen.

6 **c. Re-attempt service on federal defendants**

7 A federal court does not have jurisdiction over a defendant unless the defendant has been
8 served properly under Fed. R. Civ. P. 4. *Direct Mail Specialists, Inc. v. Eclat Computerized*
9 *Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). Nevertheless, “Rule 4 is a
10 flexible rule that should be liberally construed so long as a party receives sufficient notice of the
11 complaint.” *Id.* (quoting *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d
12 1371, 1382 (9th Cir. 1984)).

13 However, actual notice will not provide the court with personal jurisdiction if the plaintiff
14 did not substantially comply with Rule 4. *Id. Pro se* plaintiffs are held to a less stringent standard
15 than those who are represented by counsel. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

16 Here, while it appears that plaintiff has not complied with Rule 4, the court finds that, in
17 fairness, plaintiff may re-attempt service on Roos and Koen in their individual capacities. Pursuant
18 to the magistrate judge’s April 4, 2012, order, plaintiff may re-attempt service on unserved
19 defendants if the marshal was unable to effect service the first time. (Doc. #31). Thus, the clerk of
20 court shall issue new summons as to defendants Roos and Koen, and deliver same to the marshal for
21 service. Plaintiff shall have twenty (20) days in which to furnish to the marshal the required forms
22 SM-285. Within thirty (30) days after plaintiff receives copies of the completed USM-285 forms
23 from the marshal, plaintiff must file a notice with the court identifying which defendants were served
24 and which were not served, if any.

25 While the court permits plaintiff to re-attempt service on federal defendants in their
26 individual capacities, plaintiff is advised that he is still required to familiarize himself with the
27
28

1 Federal Rules of Civil Procedure as well as the local rules of this court. Failure to comply with these
2 rules could warrant future sanctions, including dismissal. *See Jacobsen v. Filler*, 790 F.2d 1362,
3 1364-65 (9th Cir. 1986) (holding that *pro se* parties are not excused from following the rules and
4 orders of the court).

5 **iii. Failure to state a claim under Fed. R. Civ. P. 12(b)(6)**

6 “[Q]ualified immunity protects government officials ‘from liability for civil damages insofar
7 as their conduct does not violate clearly established statutory or constitutional rights of which a
8 reasonable person would have known.’” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting
9 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity applies “regardless of whether
10 the government official’s error is mistake of law, a mistake of fact, or a mistake based on mixed
11 questions of law and fact.” *Pearson*, 555 U.S. at 231 (citation omitted).

12 In addressing qualified immunity, a court must determine (1) whether the facts alleged, taken
13 in the light most favorable to the party asserting the injury, show that the defendant’s conduct
14 violated a constitutional right, and (2) whether that right was “clearly established.” *Cnty. House, Inc.*
15 *v. City of Boise, Idaho*, 623 F.3d 945, 967 (9th Cir. 2010) (quoting *Saucier v. Katz*, 533 U.S. 194,
16 201 (2001), modified by *Pearson*, 555 U.S. 223). Addressing the two prongs of the test in this order
17 is often beneficial, but it is not mandatory. Courts may “exercise their sound discretion in deciding
18 which of the two prongs of the qualified immunity analysis should be addressed first in light of the
19 circumstances in the particular case at hand.” *Cnty. House, Inc.*, 623 F.3d at 967; *see also Pearson*,
20 555 U.S. 235.

21 **a. Violated a constitutional right**

22 In a personal capacity suit, “each government official, his or her title notwithstanding, is only
23 liable for his or her own misconduct.” *Iqbal*, 129 S.Ct. at 1949. However, plaintiff does not
24 sufficiently allege a violation of his constitutional rights. As discussed *supra*, IV.A.i-iv., plaintiff’s
25 allegations have not established that SORNA’s foreign convictions provision violates due process
26 or any of the other rights identified by plaintiff.

27 . . .

28

1 Further, plaintiff does not allege facts supporting a claim that either Roos or Koen are
2 personally, legally, responsible for SORNA's alleged violation of his due process or other rights.
3 Plaintiff does not allege that either Roos or Koen had authority to enforce SORNA against plaintiff.
4 Even plaintiff's allegation that Koen sent a letter to plaintiff telling plaintiff to "register
5 immediately" under SORNA, without more, does not establish that Koen's actions potentially caused
6 a violation of plaintiff's constitutional rights. Thus, any harm plaintiff claims to have suffered from
7 SORNA's requirements has not been sufficiently tied to defendants' conduct. *See Iqbal*, 129 S.Ct.
8 at 1949.

9 Lastly, Congress has provided immunity for good faith action under SORNA. *See* 42 U.S.C.
10 § 16929 ("The Federal Government, jurisdictions, political subdivisions of jurisdictions, and their
11 agencies, officers, employees, and agents shall be immune from liability for good faith conduct under
12 this subchapter."). To the extent that plaintiff alleges that federal defendants acted "maliciously,"
13 plaintiff has failed to identify any legal authority suggesting that federal defendants, in their
14 individual capacities, owed plaintiff an affirmative duty to "ensure" that he would not have to
15 register as a sex offender under SORNA, or that failing to perform this "duty" would violate any of
16 plaintiff's civil or constitutional rights.

17 On this prong alone, plaintiff fails to establish that federal defendants violated any of his
18 constitutional rights. If the facts alleged do not show conduct that violated a constitutional right, or
19 if that right was not clearly established, the defendant is immune from suit. *See Pearson*, 555 U.S.
20 at 243-44; *see also Bull v. City & County of San Francisco*, 595 F.3d 964, 971 (9th Cir. 2010) (en
21 banc). Thus, federal defendants are entitled to qualified immunity in their individual capacities.

22 **b. Right asserted clearly established**

23 Plaintiff must prove that the rights he alleges were violated were clearly established "in light
24 of the specific context of the case, not as a broad general proposition." *Cnty. House, Inc.*, 623 F.3d
25 at 967 (quoting *Saucier*, 533 U.S. at 201, modified on other grounds by *Pearson*, 555 U.S. 223).

26 Here, plaintiff's allegations fall short of this burden. Even assuming, *arguendo*, that
27 plaintiff's allegations established that SORNA's foreign convictions provision violated his
28

1 constitutional rights, this would be a matter of first impression. Therefore, neither federal defendant
2 could reasonably have been on notice that plaintiff's registration based on a foreign conviction would
3 be unconstitutional. And even further, federal defendants could not have known that their failure to
4 protect plaintiff from registering under SORNA violated his constitutional rights.

5 Plaintiff also fails to establish that this right was clearly established. Thus, federal defendants
6 are entitled to qualified immunity in their individual capacities.

7 **c. Individual immunity against injunctive relief**

8 Declaratory or injunctive relief designed to affect the conduct of a government entity is
9 available only in an official capacity suit. *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004).
10 Thus, to the extent that plaintiff seeks injunctive relief against federal defendants in their individual
11 capacities, the court dismisses these claims.

12 However, plaintiff may seek damages under *Bivens*, 403 U.S. 388 (1971), against federal
13 defendants in their individual capacities. *See Malesko*, 534 U.S. at 70. But plaintiff has not pleaded
14 a constitutional violation that would entitle him to relief, even though this remedy is available. *See*
15 *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (noting *Bivens* remedy is "not an automatic entitlement"
16 for a constitutional violation).

17 To the extent that plaintiff seeks damages against federal defendants in their individual
18 capacities under 42 U.S.C. § 1983, that statute only creates a cause of action against persons acting
19 under color of state law. *See Stonecipher*.653 F.2d at 401. Here, plaintiff does not allege facts that
20 federal defendants performed any acts under color of state law, and thus plaintiff has failed to state
21 a claim against federal defendants in their individual capacities under § 1983.

22 **C. State defendants' motion to dismiss individual capacity claims (doc. # 100)**

23 **i. Legal standard**

24 State defendants move to dismiss plaintiff's individual capacity claims under the doctrine of
25 qualified immunity.

26 ...

27 ...

28

1 As previously stated, “qualified immunity protects government officials ‘from liability for
2 civil damages insofar as their conduct does not violate clearly established statutory or constitutional
3 rights of which a reasonable person would have known.’” *Pearson*, 555 U.S. at 231 (quoting
4 *Harlow*, 457 U.S. at 818). Qualified immunity applies “regardless of whether the government
5 official’s error is mistake of law, a mistake of fact, or a mistake based on mixed questions of law and
6 fact.” *Pearson*, 555 U.S. at 231 (citation omitted).

7 In addressing qualified immunity, a court must determine (1) whether the facts alleged, taken
8 in the light most favorable to the party asserting the injury, show that the defendant’s conduct
9 violated a constitutional right, and (2) whether that right was “clearly established.” *Cnty. House,*
10 *Inc.*, 623 F.3d at 967 (quoting *Saucier*, 533 U.S. at 201, modified by *Pearson*, 555 U.S. 223).
11 Addressing the two prongs of the test in this order is often beneficial, but it is not mandatory. Courts
12 may “exercise their sound discretion in deciding which of the two prongs of the qualified immunity
13 analysis should be addressed first in light of the circumstances in the particular case at hand.” *Cnty.*
14 *House, Inc.*, 623 F.3d at 967; *see also Pearson*, 555 U.S. 235.

15 **ii. Analysis**

16 NRS 179D.460 requires individuals convicted of a sexual offense as defined by NRS
17 179D.097 to register with local law enforcement agencies within 48 hours after arriving or
18 establishing residence in Nevada. Under NRS 179D.097(s), a sexual offense committed in another
19 jurisdiction requires registration in Nevada. This provision requires registration for foreign
20 convictions.

21 Here, plaintiff’s amended complaint suffers similar deficiencies as to state defendants.
22 Plaintiff has failed to establish that state defendants violated a “clearly established” constitutional
23 right of plaintiff “in light of the specific context of the case” *Cnty. House, Inc.*, 623 F.3d at 967
24 (quoting *Saucier*, 533 U.S. at 201, modified on other grounds by *Pearson*, 555 U.S. 223).

25 Further, plaintiff has not shown how enforcement of NRS 179D.460 violates clearly
26 established law. Although plaintiff argues that any person of normal intelligence would come to the
27
28

1 conclusion that his Japanese conviction was obtained without due process; this does not negate the
2 registration requirement under NRS 179D.460.

3 Also, to the extent that plaintiff disputes the accuracy of the 2002 and 2003 Japan Country
4 Reports, this contention underscores that it would not have been clear to any reasonable officer that
5 his conduct, in requiring plaintiff to register as a sex offender, violates clearly established law. *See*
6 *Saucier*, 555 U.S. at 202.

7 Lastly, plaintiff argues that state defendants took an oath of office that obligated them to
8 come to the defense of those wronged. However, plaintiff fails to establish how this duty requires,
9 or even permits, state defendants to disregard plaintiff's Japanese conviction so as to protect plaintiff
10 from the requirement that he register as a sex offender.

11 **V. Leave to Amend**

12 Under Rule 15(a)(2) leave to amend is to be "freely given when justice so requires." FED. R.
13 CIV. P. 15. In general, amendment should be allowed with "extreme liberality." *Owens v. Kaiser*
14 *Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (quoting *Morongo Band of Mission*
15 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)). Absent a showing of an "apparent reason"
16 such as undue delay, bad faith, dilatory motive, prejudice to the defendants, futility of the
17 amendments, or repeated failure to cure deficiencies in the complaint, leave to amend should be
18 granted. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

19 Accordingly, the court will afford plaintiff an opportunity to amend his complaint. The court
20 reminds plaintiff that if he chooses to amend his complaint, he must comply with the requirements
21 of Local Rule 15-1 and file a motion to amend, attaching the proposed amended complaint.
22 Additionally, if the second amended complaint is similarly deficient, the court may conclude that
23 further leave to amend would be futile.

24 ...

25 ...

26 ...

27 ...

28

1 **VI. Conclusion**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that federal defendants' motion
4 to dismiss official capacity claims (doc. # 81) be, and the same hereby is, GRANTED. Plaintiff's
5 amended complaint is dismissed without prejudice as to federal defendants in their official capacity.⁷

6 IT IS FURTHER ORDERED that federal defendants' motion to dismiss individual capacity
7 claims (doc. # 82) be, and the same hereby is, GRANTED. Plaintiff's amended complaint is
8 dismissed without prejudice as to federal defendants in their individual capacity.

9 IT IS FURTHER ORDERED that the clerk of court shall issue new summons as to
10 defendants Roos and Koen, and deliver same to the marshal for service. Plaintiff shall have
11 twenty (20) days in which to furnish to the marshal the required forms USM-285. Within thirty
12 (30) days after plaintiff receives copies of the completed USM-285 forms from the marshal, plaintiff
13 must file a notice with the court identifying which defendants were served and which were not
14 served, if any. Failure to comply with this court order could result in sanctions, including dismissal.

15 IT IS FURTHER ORDERED that state defendants' motion to dismiss individual capacity
16 claims (doc. # 100) be, and the same hereby is, GRANTED.⁸ Plaintiff's amended complaint is
17 dismissed without prejudice as to state defendants.

18 ...

19 ...

20 ...

21 ...

22


23

24 ⁷ The court finds that plaintiff may seek prospective injunctive relief against federal defendants in their official
25 capacity. However, plaintiff, if he would like to continue litigating this case, will need to amend his complaint to allege
sufficient facts to demonstrate how federal defendants violated plaintiff's constitutional and civil rights.

26 ⁸ The court notes that in its previous ordering granting in part and denying in part state defendants' motion to
27 dismiss (doc. # 70), the court dismissed plaintiff's claims against state defendants in their official capacity to the extent
28 plaintiff sought money damages. Plaintiff's claims seeking prospective injunctive relief were not dismissed against state
defendants in their official capacity. *See Bair v. Krug*, 853 F.2d 672, 675 (9th Cir. 1988); *see also Shaw v. State of
California Dept. of Alcoholic Beverage Control*, 788 F.2d 600, 604 (9th Cir. 1986).

1 IT IS FURTHER ORDERED that plaintiff, if he chooses to amend his complaint, file the
2 motion to amend, attaching the proposed amended complaint, within thirty (30) days of the date of
3 this order. The court reminds plaintiff that if he chooses to amend his complaint, he must comply
4 with the requirements of Local Rule 15-1.

5 DATED December 7, 2012.

6
7 
8 UNITED STATES DISTRICT JUDGE