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SORNA: A Legal Analysis of 18 U.S.C. § 2250 (Failure to Register as a Sex Offender)

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SUMMARY

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SORNA: A Legal Analysis of 18 U.S.C. § 2250 (Failure to Register as a Sex Offender)

Section 2250(a) of Title 18 of the United States Code outlaws an individual's failure to comply with federal Sex Offender Registration and Notification Act (SORNA) requirements. SORNA demands that an individual—previously convicted of a qualifying federal, state, or foreign sex offense—register with state, territorial, or tribal authorities. Individuals must register in every jurisdiction in which they reside, work, or attend school. They must also update the information whenever they move, or change their employment or educational status. For some offenders, the obligations to register and to periodically refresh their registration information may be subject to a term limit whose duration is based on the severity of the sex offense that triggered the obligation to register. Section 2250 applies only under one of several jurisdictional circumstances: the individual was previously convicted of a qualifying federal sex offense; the individual travels in interstate or foreign commerce; or the individual enters, leaves, or resides in Indian Country. The Supreme Court in *Nichols v. United States* held that SORNA, as originally written, had limited application to sex offenders in the United States who relocated abroad. The International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders [Act], P.L. 114-119, however, anticipated and addressed the limitation identified in *Nichols*, by adding a new offense, Section 2250(b), that replicates the attributes of the earlier prohibition.

Individuals charged with a violation of Section 2250 may be subject to preventive detention or to a series of pre-trial release conditions. If convicted, they face imprisonment for not more than 10 years and/or a fine of not more than $250,000 as well as the prospect of a post-imprisonment term of supervised release of not less than 5 years. An offender guilty of a Section 2250 offense, who also commits a federal crime of violence, is subject to an additional penalty of imprisonment for up to 30 years and not less than 5 years for the violent crime.

The Attorney General exercised statutory authority to make SORNA applicable to qualifying convictions occurring prior to its enactment. The Supreme Court in *United States v. Kebodeaux*, 570 U.S. 387 (2013), rejected the suggestion that Congress lacks the constitutional authority to make Section 2250 applicable, because of a prior federal offense and intrastate noncompliance, to individuals who had served their sentence and been released from federal supervision prior to SORNA's enactment. The Supreme Court in *Gundy v. United States*, 139 S. Ct. 2116 (2019), also rejected the argument that SORNA's grant of authority to the Attorney General constituted an unguided delegation of legislative authority.

The lower federal appellate courts have rejected other challenges to Section 2250's constitutional validity. Those challenges have included arguments under the Constitution's Ex Post Facto, Due Process, Cruel and Unusual Punishment, Commerce, Necessary and Proper, and Spending Clauses.

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Introduction

Federal law punishes convicted sex offenders if they fail to register or to update their registration as the Sex Offender Registration and Notification Act (SORNA) demands.[1] The basic offense under Section 2250(a) consists of three elements: (1) a continuing obligation to report to the authorities in any jurisdiction in which the individual resides, works, or attends school; (2) the knowing failure to comply with registration requirements; and (3) a jurisdictional element, *i.e.*, (a) an obligation to register as a consequence of a prior qualifying federal conviction or (b)(i) travel in interstate or foreign commerce, or (ii) travel into or out of Indian Country, or (c) residence in Indian Country.[2] Violators face imprisonment for not more than 10 years. The registration offense[3] carries an additional penalty of imprisonment for not more than 30 years, but not less than 5 years, if the offender is also guilty of a federal crime of violence.[4]

Federal law also punishes overseas travel coupled with a failure to register that intent.[5] The elements of this shadow or supplemental offense, Section 2250(b), are: (1) an obligation to register; (2) a knowing failure to report an intent to travel internationally; and (3) engaging in or attempting to engage in international travel. The affirmative defense and sentencing provisions are the same as those that apply to the original offense.[6]

Background

The Adam Walsh Child Protection and Safety Act created SORNA.[7] SORNA revised an earlier nationwide sex offender registration system under the Jacob Wetterling Act. The Jacob Wetterling Act encouraged the states to establish and maintain a registration system.[8] Each of them had done so.[9] Their efforts, however, though often consistent, were hardly uniform.[10]

The Walsh Act preserves the basic structure of the Wetterling Act, expands upon it, and adds greater specificity to matters that were previously left to individual state choice. The Walsh Act contemplates a nationwide, state-based, publicly available, contemporaneously accurate, online

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[1] 18 U.S.C. § 2250. This report is available in an abridged version, CRS Report R42691, *SORNA: An Abridged Legal Analysis of 18 U.S.C. §2250 (Failure to Register as a Sex Offender)*, without the footnotes or the attribution or citations to authority found here.

[2] *Id.* § 2250(a).

[3] *Id.*

[4] *Id.* § 2250(d). Under 18 U.S.C. § 16(a), "[t]he term 'crime of violence' means -- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

[5] *Id.* § 2250(b).

[6] *Id.* § 2250.

[7] P.L. 109-248, 120 Stat. 587 (2006), codified as amended at 34 U.S.C. §§ 20901-20932 and 18 U.S.C. §2250; *see generally* CRS Report R46863, *Federal Requirements for State and Military Registered Sex Offender Management*, by Emily J. Hanson, Alan Ott, and Hibbah Kaileh.

[8] 42 U.S.C. §§ 14071-14073 (repealed).

[9] Citations to the state statutes in effect at the time of the Walsh Act's enactment appear in CRS Report RL33967, *Adam Walsh Child Protection and Safety Act: A Legal Analysis*, by Charles Doyle, 1-2 n.8. Citations to the principal state SORNA statutes are attached.

[10] Reynolds v. United States, 565 U.S. 432, 435 (2012) ("The new federal Act reflects Congress' awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems.") (here and throughout internal citations have generally been omitted).

system.[11] Jurisdictions that fail to meet the Walsh Act's threshold requirements face the prospect of losing a portion of their federal criminal justice assistance grants.[12]

The Walsh Act vests the Attorney General with authority to determine the extent to which SORNA would apply to those with qualifying convictions committed prior to enactment.[13] After enactment, the Attorney General promulgated implementing regulations that imposed the registration requirements on those with pre-enactment convictions.[14]

Conscious of the legal and technical adjustments required of the states, the Walsh Act afforded jurisdictions an extension to make the initial modifications necessary to bring their systems into compliance.[15] Thereafter, states not yet in compliance have been allowed to use the penalty portion of their federal justice assistance funds for that purpose.[16] The Justice Department

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[11] Office of the Attorney General, *The National Guidelines for Sex Offender Registration and Notification* (*National Guidelines*), 73 Fed. Reg. 38,030, 38,044-45 (July 2, 2008); *see also* Office of the Attorney General, *Supplemental Guidelines for Sex Offender Registration and Notification*, 76 Fed. Reg. 1630 (Jan. 11, 2011); Office of the Attorney General, *Supplemental Guidelines for Juvenile Registration under the Sex Offender Registration and Notification Act (Juvenile Guidelines)*, 81 Fed. Reg. 50,552 (Aug. 1, 2016). The *Guidelines* are available at https://smart.ojp.gov/sorna/current-law#Attorney. *See generally* 28 C.F.R. §§ 72.1–72.3.

[12] 34 U.S.C. § 20927.

[13] *Id.* § 20913(d).

[14] 72 Fed. Reg. 8894-97 (Feb. 28, 2007) (interim rule); 75 Fed. Reg. 18,849-53 (Dec. 29, 2010) (final rule), 28 C.F.R. pt. 72.

[15] 34 U.S.C. § 20926 ("(a) *Deadline*. Each jurisdiction shall implement this subchapter before the later of- (1) 3 years after July 27, 2006; and (2) 1 year after the date on which the software described in section 20925 of this title is available. (b) *Extensions*. The Attorney General may authorize up to two 1-year extensions of the deadline."). 34 U.S.C. § 20927 ("(a) *In general*. For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.). (b) *State constitutionality*. (1) *In general*. When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court. (2) *Efforts*. If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court. (3) *Alternative procedures*. If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter. (4) *Funding reduction*. If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding reduction as specified in subsection (a). (c) *Reallocation*. Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter. (d) *Rule of construction*. The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.").

[16] U.S. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Requests for Reallocation of Byrne JAG Funding Penalty*, available at https://smart.ojp.gov/sorna/substantial-implementation (last visited Nov. 4, 2021).

indicates that 18 states, 4 territories, and numerous tribes are now in substantial compliance with the 2006 legislation.[17]

Elements

Section 2250(a) convictions require the government to prove that (1) the defendant had an obligation under SORNA to register and to maintain the currency of his registration information; (2) the defendant knowingly failed to comply; and (3) one of the section's jurisdictional prerequisites has been satisfied.[18]

Section 2250(b) convictions require the government to prove that (1) the defendant had an obligation under SORNA to register and to maintain the currency of his registration information; (2) the defendant knowingly failed to report an intent to travel in foreign commerce; and (3) the defendant engaged in or attempted to engage in travel in foreign commerce.[19]

Obligation to Register and Maintain Registration

Registration Requirements

SORNA directs anyone previously convicted of a federal, state, local, tribal, or foreign qualifying offense to register and to keep his registration information current for as long as SORNA requires in each jurisdiction in which he resides or is an employee or a student.[20] Initially, he must also

[17] U.S. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *SORNA Implementation Status*, https://smart.ojp.gov/sorna/sorna-implementation-status (last visited Sept. 21, 2021). For a discussion of some difficulties associated with implementation in the states and the efforts of the Justice Department to facilitate the process, *see* Jennifer N. Wang, *Paying the Piper: The Cost of Compliance with the Federal Sex Offender Registration and Notification Act*, 59 N.Y. L. SCH. L. REV. 681 (2015); Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741 (2016); Andrew J. Harris, Kimberly R. Kras, Christopher Lobanov-Rostovsky & Qurat Ann, *States' SORNA Implementation Journeys: Lessons Learned and Policy Implications*, 23 NEW CRIM. L. REV. 315 (2020); U.S. Gov't Accountability Off., GAO-13-211, *Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implement the Act, and Stakeholders Report Positive and Negative Effects* (Feb. 2013); U.S. Gov't Accountability Off., GAO-15-23, *Sex Offender Registration and Notification Act: Additional Outreach and Notification of Tribes about Offenders Who Are Released Needed* (2014).

[18] 18 U.S.C. § 2250(a) ("Whoever - (1) is required to register under the Sex Offender Registration and Notification Act; (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.").
Unless the registration requirement flows from a federal conviction or residence in Indian Country, "the statutory sequence begins when a person becomes subject to SORNA's registration requirements. The person must then travel in interstate commerce and thereafter fail to register." Carr v. United States, 560 U.S. 438, 466 (2010); *see also* United States v. Gundy, 804 F.3d 140, 141 (2d Cir. 2015), *aff'd*, 139 S. Ct. 2116 (2019), *reh'g denied*, 140 S. Ct. 579 (2019); United States v. Seward, 967 F.3d 57, 61 (1st Cir. 2020).

[19] 18 U.S.C. § 2250(b) ("(b) International Travel Reporting Violations.-Whoever- (1) is required to register under the Sex Offender Registration and Notification Act (42 U.S.C. §§ 16901 et seq.) [now 34 U.S.C. §§ 20901et seq.]; (2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and (3) engages or attempts to engage in the intended travel in foreign commerce; shall be fined under this title, imprisoned not more than 10 years, or both.").

[20] 34 U.S.C. § 20913(a) ("A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. . . ."). "The term 'sex

register in the jurisdiction where the conviction occurred if different from his residence.[21] Registrants who relocate or who change their names, jobs, or schools have three business days to appear and update their registration in at least one of the jurisdictions in which they reside, work, or attend school.[22] The courts have said that the obligation runs from the time of departure rather than arrival; that is, from when the offender leaves his former residence, job, or school rather than when he acquires a new residence or a new job or enrolls in a different school.[23]

SORNA defines broadly the terms "resides," "student," and "employee."[24] For example "[t]he term 'resides' means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives."[25] The Attorney General's *National Guidelines* observe that "[t]he scope of 'habitually lives' in this context is not self-explanatory and requires further definition."[26] The *National Guidelines* supply the state, territorial, and tribal authorities some guidance for the task. They point out that the term "habitually lives" may encompass instances where the offender "has no home or fixed address in the jurisdiction, or no home anywhere."[27] Moreover, they state that "[t]he specific interpretation of this element of 'residence' which these Guidelines adopt is that a sex offender habitually lives in the relevant sense in any place in which … the sex offender lives in the jurisdiction for at least 30 days."[28] This 30-day ceiling, however, "does not mean that the registration of a sex offender who enters the jurisdiction to reside may be delayed until after he has lived in the jurisdiction for 30 days. Rather, a sex offender who enters a jurisdiction in order to make his home or habitually live in the jurisdiction may be required to register within three business days."[29]

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offender' means an individual who was convicted of a sex offense." *Id.* § 20911(1). "[T]he term 'sex offense' means – a criminal offense . . . a [designated] Federal offense . . . [or] a military offense. . . ." *Id.* § 20911(5)(A)(1). "The term 'criminal offense' means a State, local, tribal, foreign, or military offense . . . or other criminal offense." *Id.* § 20911(6). SORNA defines "jurisdiction" as "any of the following: (A) A State. (B) The District of Columbia. (C) The Commonwealth of Puerto Rico. (D) Guam. (E) American Samoa. (F) The Northern Mariana Islands. (G) The United States Virgin Islands. (H) To the extent provided and subject to the requirements of section 20929 of this title, a federally recognized Indian tribe." *Id.* § 20911(10).

[21] *Id.* § 20913(a). This requirement to register in the state of conviction does not cover pre-SORNA offenders who were already registered with authorities in the states in which they resided when the Attorney General made SORNA retroactively applicable. United States v. DeJarnette, 741 F.3d 971, 975-82 (9th Cir. 2013).

[22] 34 U.S.C. § 20913(c) ("A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.").

[23] United States v. Murphy, 664 F.3d 798, 800-03 (10th Cir. 2011); United States v. Van Buren, 599 F.3d 170, 174-75 (2d Cir. 2010); United States v. Voice, 622 F.3d 870, 875 (8th Cir. 2010). Each of these cases involved a change of residence rather than employment or education, but the distinction should make no difference. Whether these cases which involve moving abroad remain good law with regard to relocating within the United States after the Supreme Court's *Nichols* decision remains to be seen. In *Nichols*, the Court overturned the Section 2250 conviction of a sex offender who left Kansas for the Philippines. The Court reasoned that he could not be convicted for failure to report the move to the jurisdiction in which he "resides" when he resided in the Philippines, a nonjurisdiction. Nichols v. United States, 578 U.S. 104 (2016).

[24] 34 U.S.C. §§ 20911(11) – 20911(13).

[25] *Id.* § 20911(13).

[26] *National Guidelines*, 73 Fed. Reg. 38,030, 38,061 (July 2, 2008).

[27] *Id*.

[28] *Id*. at 38,062.

[29] *Id*. *See also* United States v. Thompson, 811 F.3d 717, 729-30 (5th Cir. 2016); United States v. Alexander, 817 F.3d 1205, 1214 (10th Cir. 2016) ("The same registration requirements apply in the case at bar. If the jury finds that

SORNA and the *National Guidelines* provide comparable general definitions and minimum standards for the terms "employee" and "student." An "'employee' includes an individual who is self-employed or works for any other entity, whether compensated or not."[30] The *National Guidelines* here speak largely in terms of examples. For instance, they note that "a sex offender who resides in jurisdiction A and commutes to work in jurisdiction B must register and keep the registration current in both jurisdictions."[31] Some examples are designed to alert the state, local, and tribal jurisdiction of challenges to be addressed. One representative illustration suggests that with respect to interstate truck drivers:

> If a sex offender has some employment-related presence in a jurisdiction, but does not have a fixed place of employment or regularly work within the jurisdiction, line drawing questions may arise, and jurisdictions may resolve these questions based on their own judgments. For example, if a sex offender who is long haul trucker regularly drives through dozens of jurisdictions in the course of his employment, it is not required [that] all such jurisdictions must make the sex offender register based on his transient employment-related presence, but rather may treat such cases in accordance with their own policies.[32]
>
> A sex offender who is employed may not have a fixed place of employment - *e.g.*, a long-haul trucker whose "workplace" is roads and highways throughout the country…. Knowing as far as possible where such a sex offender is in the course of employment serves the same public safety purposes as the corresponding information regarding a sex offender who is employed at the fixed location. The authority under section 114(a)(7) [requiring registration employment information] is accordingly exercised to require that information be obtained and included in the registry concerning the places where such a sex offender works with whatever definiteness is possible under the circumstances, such as information about normal travel routes … in which the sex offender works.[33]

The definition of the term "student" is somewhat more confined. The term means "an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education."[34] The *National Guidelines* explain that "enrollment or attendance in this context should be understood as referring to attendance at a school in a physical sense."[35]

In *Nichols v. United States*, the Supreme Court found that SORNA's requirements in place at the time did not apply when offenders relocated abroad.[36] Anticipating the problem, Congress passed the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders [Act], which among other things, amends

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Alexander intended to make Williams' apartment his home or intended to 'habitually live' at Williams' apartment (i.e., that Alexander intended to live at Williams' apartment for thirty days or more), then it would necessarily have to find that he violated SORNA because it is undisputed that he did not register within three business days after arriving in Las Cruces."). Alexander's conviction was ultimately overturned because the jury instructions may have been confusing. *Id*. at 1215.

[30] 34 U.S.C. § 20911(12).

[31] *National Guidelines*, 73 Fed. Reg. at 38,062.

[32] *Id*.

[33] *Id.* at 38,056.

[34] 34 U.S.C. § 20911(11).

[35] *National Guidelines*, 73 Fed. Reg. at 38,062.

[36] Nichols v. United States, 578 U.S. 104 (2016).

SORNA to compel offenders to supplement their registration statements with information relating to their plans to travel abroad.[37]

Qualifying Convictions

Only those convicted of a qualifying sex offense must register. There are five classes of qualifying offenses: (1) designated federal sex offenses; (2) specified military offenses; (3) crimes identified as one of the "special offenses against a minor"; (4) crimes in which some sexual act or sexual conduct is an element; and (5) attempts or conspiracies to commit any offense in one of these other classes of qualifying offenses.[38] Certain foreign convictions, juvenile adjudications, and offenses involving consensual sexual conduct do not qualify as offenses that require offenders to register under SORNA.[39] SORNA does not provide an avenue to challenge the validity of a qualifying domestic conviction.[40]

Federal Qualifying Offenses

Federal qualifying offenses "(including an offense prosecuted under section 1152 or 1153 of title 18)" consist of those "under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18," that is:[41]

- 18 U.S.C. § 1591 (sex trafficking of children or by force or fraud)
- 18 U.S.C. § 2241 (aggravated sexual abuse)
- 18 U.S.C. § 2242 (sexual abuse)
- 18 U.S.C. § 2243 (sexual abuse of ward or child)
- 18 U.S.C. § 2244 (abusive sexual contact)
- 18 U.S.C. § 2245 (sexual abuse resulting in death)
- 18 U.S.C. § 2251 (sexual exploitation of children)
- 18 U.S.C. § 2251A (selling or buying children)
- 18 U.S.C. § 2252 (transporting, distributing, or selling child sexually exploitive material)
- 18 U.S.C. § 2252A (transporting or distributing child pornography)
- 18 U.S.C. § 2252B (misleading Internet domain names)
- 18 U.S.C. § 2252C (misleading Internet website source codes)
- 18 U.S.C. § 2260 (making child sexually exploitative material overseas for export to the U.S.)
- 18 U.S.C. § 2421 (transportation for illicit sexual purposes)
- 18 U.S.C. § 2422 (coercing or enticing travel for illicit sexual purposes)
- 18 U.S.C. § 2423 (travel involving illicit sexual activity with a child)

[37] P.L. 114-119, 130 STAT. 15 (2016), codified at 42 U.S.C. § 16914(a)(7) [now 34 U.S.C. § 20914(a)(7)].

[38] 34 U.S.C. § 20911(1), (5), (7).

[39] *Id.* § 20911(1), (5).

[40] United States v. Diaz, 967 F.3d 107, 109-10 (2d Cir. 2020) ("We agree that SORNA does not permit defendants to challenge [domestic] predicate sex offense convictions. . . . Diaz's argument that SORNA permits collateral attack through 34 U.S.C. § 20911(5)(B) (the 'Foreign Conviction Exception') is unpersuasive.").

[41] 34 U.S.C. § 20911(5)(A)(iii).

- 18 U.S.C. § 2424 (filing false statement concerning an alien for illicit sexual purposes)
- 18 U.S.C. § 2425 (interstate transmission of information about a child relating to illicit sexual activity).

Military Qualifying Offenses

The list of military qualifying offenses in the Uniform Code of Military Justice (UCMJ) varies according to the date of the offense. For offenses committed on or after June 28, 2012, the inventory includes:

- UCMJ art. 120: Rape, Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact
- UCMJ art. 120b: Rape, Sexual Assault, and Sexual Abuse of a Child
- UCMJ art. 120c: Pornography and Forcible Pandering
- UCMJ art. 134: General Article (Prostitution, Child Pornography)
- UCMJ art. 80: Attempt (to commit a qualifying offense)
- UCMJ art. 81: Conspiracy (to commit a qualifying offense)
- UCMJ art. 82: Solicitation (to commit a qualifying offense)[42]

Specified Offenses Against a Child Under 18

Other federal, state, local, tribal, military, or foreign offenses qualify when they involve:

- An offense against a child (unless committed by a parent or guardian) involving kidnapping.
- An offense against a child (unless committed by a parent or guardian) involving false imprisonment.
- Solicitation to engage in sexual conduct with a child.
- Use of a child in a sexual performance.
- Solicitation to practice child prostitution.
- Video voyeurism as described in section 1801 of title 18 committed against a child.
- Possession, production, or distribution of child pornography.
- Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
- Any conduct that by its nature is a sex offense against a minor.[43]

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[42] U.S. Dep't of Defense, *Dep't of Defense Instruction 1325.07, Enclosure 2, Appendix 4* (Mar. 11, 2013), Change 4, Table 6 (Aug. 19, 2020) (offenses committed on or after June 28, 2012), *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132507p.pdf?ver=2020-08-20-082115-117. Table 4 lists the covered offenses committed before Oct. 1, 2007; Table 5 lists the covered offenses committed between Oct. 1, 2007 and June 28, 2012.

[43] 34 U.S.C. § 20911(7), (5)(A)(ii), (6), (14). Rather than the categorical approach, courts inquire into the circumstances of a conviction to determine whether it constitutes a conviction for "conduct that by its nature is a sex offense against a minor" triggering the obligation to register. *See* United States v. Burgee, 988 F.3d 1054, 1058 (8th Cir. 2021); United States v. Dailey, 941 F.3d 1183, 1192-93 (9th Cir. 2019) (discussing circumstances involving a Travel Act conviction); United States v. Price, 777 F.3d 700, 708-10 (4th Cir. 2015) (discussing circumstances

Crimes with a Sex Element

In addition, any federal, state, local, military, or foreign "criminal offense that has an element involving a sexual act or sexual contact with another" qualifies.[44]

Attempt or Conspiracy

Finally, any attempt or conspiracy to commit one of the other qualifying offenses also qualifies.[45]

Foreign Convictions, Juvenile Adjudications, and Consensual Sex Acts

Juvenile Adjudications

Beyond conviction as an adult for a qualifying offense, juvenile adjudications that involve qualifying offenses trigger SORNA's reporting requirements (1) if the individual was 14 years or older at the time of the misconduct and (2) the misconduct "was comparable to or more severe than" the federal crime of aggravated sexual abuse (as defined in 18 U.S.C. § 2241) or was an attempt or conspiracy to engage in such misconduct.[46] The federal aggravated sexual abuse offenses include sexual acts committed by force, threat, or incapacitating the victim.[47] Although the Federal Juvenile Delinquency Act limits disclosure of federal judicial delinquency proceedings,[48] it does not excuse compliance with SORNA's registration requirements.[49]

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surrounding a state "assault and battery of a high and aggravated nature" conviction); United States v. Dodge, 597 F.3d 1347, 1353-56 (11th Cir. 2010) (discussing circumstances surrounding a federal "transfer of obscene material to a child" conviction).

[44] 34 U.S.C. § 20911(5)(A)(i); *see e.g.*, United States v. Vineyard, 945 F.3d 1164, 1168-69 (11th Cir. 2019). SORNA defines neither "sexual act" nor "sexual contact." The terms are defined elsewhere in the *United States Code* as follows: 18 U.S.C. § 2246(2), (3) ("(2) the term 'sexual act' means - (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person . . . (3) the term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person,") (adopted by cross reference in 20 U.S.C. § 6777(e)(8); 20 U.S.C. § 9134(f)(7)(E); 47 U.S.C. § 254(h)(7)(H); and 47 U.S.C. § 902 note (P.L. 106-554, 114 Stat. 2763A-336 (2000)).

[45] 34 U.S.C. § 20911(5)(A)(v).

[46] *Id.* § 20911(8).

[47] *Id.* § 20911(8); 18 U.S.C. § 2241. The *Guidelines* note that, by virtue of 18 U.S.C. § 2246, the "sexual acts" condemned in § 2241 "include any degree of genital or anal penetration, and any oral-genital or oral-anal contact," *National Guidelines*, 73 Fed. Reg. 38,030, 38,050 (July 2, 2008). They do not mention that, by the same token, "sexual acts" for purposes of § 2241 also include "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(2)(D).

[48] *Id.* § 5038(a).

[49] United States v. Under Seal, 709 F.3d 257, 261-63 (4th Cir. 2013).

Consensual Sex Offenses

SORNA excludes from its registration requirements adult consensual sexual offenses.[50] The exception does not extend, however, to instances when the victim is in the custody of the offender. The exception is available, however, when the victim was a child 13 years or older and the offender was "not more than 4 years older than the victim."[51]

Foreign Convictions

Qualifying foreign convictions consist only of those "obtained with sufficient safeguards for fundamental fairness and due process of the accused."[52] The *National Guidelines* state that "[s]ex offense convictions under the laws of any foreign country are deemed to have been obtained with sufficient safeguards for fundamental fairness and due process if the U.S. State Department, in its *Country Reports on Human Rights Practices*, has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial in that country during the year in which the conviction occurred."[53] They go on to point out, however, that SORNA establishes only minimum requirements. States and other jurisdictions remain free to require registration based on any foreign conviction.[54]

Pre-SORNA Convictions

SORNA delegated to the Attorney General "the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before [its] enactment."[55] The Supreme Court resolved a split among the lower federal courts when it declared in *Reynolds v. United States* that SORNA's "registration requirements did not apply to pre-Act offenders until the Attorney General specifies that they did apply."[56]

Yet the Court left unresolved the question of when the Attorney General had specified that they apply. This too is a matter upon which the lower federal appellate courts disagreed. The issue involved Administrative Procedure Act (APA) compliance. The APA provides that the public generally must be given an opportunity to comment before a regulatory proposal becomes final.[57] Good cause may excuse the need to honor this "notice and comment" prerequisite.[58]

The Attorney General issued an Interim Rule on February 28, 2007, in which he announced that SORNA's requirements "apply to all sex offenders, including sex offenders convicted of the

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[50] 34 U.S.C. § 20911(5)(C). The exception is also unavailable for convictions of sexual assault when the defendant induces fear and consent through misrepresentation. United States v. Alexander, 802 F.3d 1134, 1140 (10th Cir. 2015).

[51] 34 U.S.C. § 20911(5)(C). For purposes of § 20911(5)(C), "4 years" is 48 months or 1,461 days. *See* United States v. Brown, 740 F.3d 145, 149 (3d Cir. 2014) (holding that the § 16911(5)(C) [now 20911(5)(C)] exception did not apply when the offender was 17 and the victim 13, but the offender is 52 months older, rather than 48 months older, than the victim); *see also* United States v. Black, 773 F.3d 1113, 1115 (10th Cir. 2014) (holding that §16911(5)(C) exception did not apply when the 18-year-old offender was 55 months older than the 14-year-old victim).

[52] 34 U.S.C. § 20911(5)(B).

[53] *National Guidelines*, 73 Fed. Reg. at 38,050.

[54] *Id.* at 38,051.

[55] 34 U.S.C. § 20913(d).

[56] Reynolds v. United States, 565 U.S. 432, 435 (2012).

[57] 5 U.S.C. § 553.

[58] *Id.* § 553(b), (d).

offense for which registration is required prior the enactment of that Act."[59] He claimed, as good cause to dispense with notice and comment, the need to eliminate uncertainty and "to protect the public from sex offenders who failed to register."[60]

On July 2, 2008, after a notice and comment period, the Attorney General promulgated the *National Guidelines*, which cited the Interim Rule for the proposition that SORNA's date of enactment (July 27, 2006) marked the date upon which all sex offenders, including those whose convictions predated SORNA, were bound by its dictates.[61] On December 29, 2010, the Attorney General promulgated a final rule, effective January 28, 2011, that declared the 2007 Interim Rule final with respect to SORNA's application to convictions that predate its enactment.[62]

Three U.S. Circuit Courts of Appeals rejected the argument that APA noncompliance invalidated the Attorney General's effort in the 2007 Interim Rule to bring pre-enactment convictions within SORNA requirements.[63] Four other circuits found the Attorney General had failed to meet APA standards in 2006.[64] Of these four, one found prejudicial, reversible error,[65] while another found the error harmless.[66] The other pair concluded that the procedures used to promulgate the 2008 *National Guidelines* satisfied APA requirements,[67] and that SORNA's application to pre-enactment convictions became effective on August 1, 2008 (i.e., 30 days after valid promulgation, as required by the APA).[68] Whichever view on APA compliance the circuits found most convincing, they initially seemed to settle on an application date no later than August 1, 2008.[69] The D.C. Circuit, however, rejected this suggestion and appeared to endorse January 28, 2011, the effective date of the Attorney General's December 29, 2010 final order.[70]

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[59] 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007), 28 C.F.R. § 72.3.

[60] 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007), 28 C.F.R. pt.72.

[61] *National Guidelines*, 73 Fed. Reg. at 38,046 ("Rather, SORNA's requirements took effect, when SORNA was enacted on July 26, 2007, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment. *See* 72 Fed. Reg. 8894, 8895-96 (Feb. 28, 2007).").

[62] 73 Fed. Reg. 81,849 (Dec. 28, 2010).

[63] United States v. Dean, 604 F.3d 1275, 1278-82 (11th Cir. 2010) ("The Attorney General had good cause to bypass the Administrative Procedure Act's notice and comment requirements."); United State v. Gould, 568 F.3d 459, 470 (4th Cir. 2009) ("[T]he Attorney General had good cause to invoke the exception to providing the 30-day notice."); United States v. Dixon, 551 F.3d 578, 583 (7th Cir. 2008) (characterizing the APA argument as "frivolous").

[64] United States v. Reynolds, 710 F.3d 498, 510-14 (3d Cir. 2013); United States v. Johnson, 632 F.3d 912, 927-30 (5th Cir. 2011) ("[W]e do not find the Attorney General's reasons for bypassing the APA's notice-and-comment and thirty day provisions persuasive."); United States v. Valverde, 628 F.3d 1159, 1164-68 (9th Cir. 2010); United States v. Cain, 583 F.3d 408, 419-24 (6th Cir. 2009).

[65] *Reynolds*, 710 F.3d at 514-24.

[66] *Johnson*, 632 F.3d at 933 ("Because the Attorney General's rulemaking process addressed the same issues raised by Johnson and because Johnson makes no showing that the outcome of the process would have been different . . . had notice been at its meticulous best, we find it is clear that the Attorney General's APA violations were harmless error.").

[67] *Valverde*, 628 F.3d at 1164; United States v. Utesch, 596 F.3d 302, 310 (6th Cir. 2010).

[68] *Valverde*, 628 F.3d at 1169; United States v. Stevenson, 676 F.3d 557, 562-66 (6th Cir. 2012).

[69] *Cf.*, United States v. Gundy, 804 F.3d 140, 145 (2d Cir. 2016), *aff'd*, 139 S. Ct. 2116 (2019), *reh'g denied*, 140 S. Ct. 579 (2019); United States v. Brewer, 766 F.3d 884, 885 (8th Cir. 2014); United States v. Whitlow, 714 F.3d 41, 45 (1st Cir. 2013).

[70] United States v. Ross, 848 F.3d 1129, 1131-32 (D.C. Cir. 2017) ("[T]he Supreme Court has read the act not to make its registration requirement inapplicable 'to pre-Act offenders' until the Attorney General so specifies. *Reynolds*, 136 S. Ct. at 984. What is critical for our purposes is when the Attorney General so specified. The obvious candidate for this specification is a rule the Attorney General issued in December, 2010 after a rule making whose APA compliance is not contested here. But this rule took effect too late to support Ross's conviction for failure to update his registration in the wake of his 2009 move to Ohio. The government contends that two earlier actions suffice: an interim rule issued in

Expired Obligation

Section 2250 applies only to those with an obligation to register or to periodically refresh their registration information,[71] and the duration of those obligations under SORNA vary according to the classification of an offender's qualifying offense of conviction.[72] SORNA classifies offenders in tiers, with Tier III reserved for offenders convicted of the most serious federal sex offenses or their equivalents under state law.[73] SORNA assigns offenders with somewhat less serious federal sex offenses or their equivalents under state law to Tier II.[74] Tier I consists of all other offenders required to register.[75]

Absent a reduction for a clean record, Tier I offenders have a registration period of 15 years; Tier II offenders have a registration period of 25 years; and Tier III offenders have a registration period of life.[76] Tier I offenders with a clean record for 10 years are eligible for a 5-year reduction of their registration period.[77] Tier II offenders have no opportunity of a clean-record reduction.[78] Offenders classified as Tier III offenders by virtue of a juvenile adjudication with a clean record for 25 years are eligible for reduction of their life-time registration period to 25 years.[79]

2007 and 'guidelines' proposed in 2007 and finalized in 2008. We find them inadequate."); *see also* Gundy v. United States, 139 S. Ct. 2116, 2122 (2019) ("Under that delegated authority, the Attorney General issued an interim rule in February 2007, specifying that SORNA's registration requirement apply in full to sex offenders convicted of the offense for which registration is required prior to the enactment of the Act. The final rule, issued in December 2010, reiterated that SORNA applies to all pre-Act offenders. That rule remains the same to this day.").

[71] 18 U.S.C. § 2250(a)(1); 34 U.S.C. § 20919(a).

[72] 34 U.S.C. § 20915(a).

[73] *Id.* § 20911(4) ("In this subchapter the following definitions apply: … (4) The term 'tier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year and- (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or (ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years; (B) involves kidnapping of a minor (unless committed by a parent or guardian); or (C) occurs after the offender becomes a tier II sex offender.").

[74] *Id.* § 20911(3) ("In this subchapter the following definitions apply: … (3) The term 'tier II sex offender' means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and- (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor: (i) sex trafficking (as described in section 1591 of title 18); (ii) coercion and enticement (as described in section 2422(b) of title 18); (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of title 18; (iv) abusive sexual contact (as described in section 2244 of title 18); (B) involves- (i) use of a minor in a sexual performance; (ii) solicitation of a minor to practice prostitution; or (iii) production or distribution of child pornography; or (C) occurs after the offender becomes a tier I sex offender.").

[75] *Id.* § 20911(2) ("In this subchapter the following definitions apply: … (2) The term 'tier I sex offender' means a sex offender other than a tier II or tier III sex offender.").

[76] *Id.* § 20915(a) ("A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is- (1) 15 years, if the offender is a tier I sex offender; (2) 25 years, if the offender is a tier II sex offender; and (3) the life of the offender, if the offender is a tier III sex offender.").

[77] *Id.* § 20915(b) ("(1) The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by- (A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed; (B) not being convicted of any sex offense; (C) successfully completing any periods of supervised release, probation, and parole; and (D) successfully completing of an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General. (2) In the case of- (A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; … In the case of- (A) a tier I sex offender, the reduction is 5 years…").

[78] *Id.*

[79] *Id.* ("(2) In the case of- … (B) a tier III sex offender adjudicated delinquent for the offense which required

Federal courts use a variant of the statutory footprint-matching approach known as the "categorical approach" to determine whether an offender's statute of conviction is the equivalent of the federal statutes used to define the various tiers.[80] If the statute of conviction sweeps more broadly than its purported federal statutory equivalent, there is no match for purposes of Tier II or Tier III classification.[81] In any event, a Tier II sex offender's obligation to register ordinarily sunsets after 25 years, and a Tier I sex offender's obligation ordinarily sunsets after either 10 or 15 years depending on a clean-record reduction.[82]

registration in a sex registry under this subchapter, the period during which the clean record shall be maintained is 25 years. (3) In the case of- … (B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.").

[80] United States v. Montgomery, 966 F.3d 335, 338 (5th Cir. 2020) ("Our court and others determine an offender's SORNA tier by comparing the offense for which they were convicted with SORNA's tier definitions using the categorical approach."); United States v. Walker, 931 F.3d 576, 579 (7th Cir. 2019) ("Because SORNA instructs us to compare Walker's offense to the 'offenses' described in corresponding sections of the Federal Criminal Code (18 U.S.C. § 2244 and offenses listed therein), we employ the 'categorical approach.'"); United States v. Vineyard, 945 F.3d 1164, 1169 (11th Cir. 2019) ("The categorical approach applies to determine whether Vineyard's Tennessee sexual battery conviction is a qualifying sex offense under SORNA's sexual contact provision.").

However, at least some courts supplement the straightforward "elements" comparison. *Walker*, 931 F.3d at 579-80 ("SORNA, however, adds a wrinkle to the [categorical] analysis. For a sex offender to qualify to Tier II or III, SORNA also requires that his victim have certain characteristics distinct from the elements of the referenced federal offenses – namely, that the victim be under a specified age . . . A person is a Tier II offender only if his prior offense matches 'abusive sexual contact as described in section 2244 of title 18)' *and* was 'committed against a minor.' 34 U.S.C. § 20911(3)(A). And he is a Tier III offender only if his prior offense matches one of the same federal offenses *and* was committed 'against a minor who has not attained the age of 13 years.' *Id.* § 20911(4)(A).") (emphasis of the court); *see also* United States v. Escalante, 933 F.3d 395, 401 (5th Cir. 2019); United States v. Barry, 814 F.3d 192, 196–98 (4th Cir. 2016); United States v. White, 782 F.3d 1118, 1135 (10th Cir. 2015); United States v. Byun, 539 F.3d 982, 991 (9th Cir. 2008).

[81] *Montgomery*, 966 F.3d at 338 ("If the offense 'sweeps more broadly' than the SORNA tier definition, then the offense cannot qualify as a predicate offense for that SORNA tier regardless of the manner in which the defendant actually committed the crime."); *Walker*, 931 F.3d at 579 ("Under the categorical approach … the court compares the elements of the predicate offense – i.e., the facts necessary for conviction – to the elements of the relevant federal offense. If the elements of the predicate offense are the same (or narrower) than the federal offense, there is a categorical match. But if the elements of the state conviction sweep more broadly such that there is a 'reasonable probability … that the State would apply its statute to conduct that falls outside' the definition of the federal crime, than the prior offense is not a categorical match.").

[82] *Montgomery*, 966 F.3d at 337 ("Because Montgomery should have been classified as a tier I offender under SORNA, meaning that he was not required to register in 2018, we vacate the [Section 2250] conviction."); *Walker*, 931 F.3d at 582 ("Because Walker's Colorado conviction is not a categorical match … he does not qualify for Tier II or Tier III status …. Walker is thus a Tier I offender …. As a Tier I offender, Walker was not required to register during the relevant period …. We therefore … VACATE Walker's conviction and sentence [under Section 2250].").

In *Montgomery*, all three panel members joined in a concurrence expressing the view that "this case illustrates yet another troubling application of the expanded and 'byzantine-like' categorical approach" and noting the dissatisfaction of other circuit judges. 966 F.3d at 330-40 & n.1 ("*See also, e.g.*, United States v. Lewis, 720 F. App'x 111, 120 (3d Cir. 2018) (Roth, J., concurring in the judgment) (describing the categorical approach as 'willful blindness; …); United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017) (observing that the categorical approach carries judges [Alice-in-Wonderland-like] 'down a rabbit hole … to a realm where we must close our eyes as judges … Curiouser and curiouser it has all become[.]'); United States v. Chapman, 866 F.3d 1299, 136-38 (3d Cir. 2017) (Jordan, J., concurring) (expressing dismay at the 'kudzu quality of the categorical approach …'); United States v. Faust, 853 F.3d 39, 61 (Lynch, J., concurring) (observing that the categorical approach 'can lead courts to reach counterintuitive results, and ones which are not what Congress intended'); United States v. Doctor, 842 F.3d 306, 313-15 (4th Cir. 2016) (Wilkerson, J., concurring) (stating that the categorical approach has caused judges to 'swap[] factual inquires for an endless gauntlet of abstract legal questions…').").

Jurisdictional Elements

Section 2250(a) permits prosecution and conviction on the basis of any of three jurisdictional elements: travel in interstate or foreign commerce; residence in, or travel to or from, Indian Country; or a prior conviction of one of the federal qualifying offenses.

Travel

Interstate travel is the most commonly invoked of Section 2250(a)'s jurisdictional elements. It applies to anyone who travels in interstate or foreign commerce with a prior federal or state qualifying offense who knowingly fails to register or maintain his registration.[83] Section 2250 does not "require[] that a defendant's interstate travel not be legally compelled."[84] In the case of foreign travel, it also applies to anyone who fails to supplement his registration with information concerning his intent to travel abroad.[85] The qualifying offense may predate SORNA's enactment; the travel may not.[86]

Indian Country

Travel to or from Indian Country, or living there, will also satisfy Section 2250(a)'s jurisdictional requirements. "Indian Country" consists primarily of Indian reservations, lands over which the United States enjoys state-like exclusive or concurrent legislative jurisdiction.[87]

Federal Crimes

Travel is only one of Section 2250(a)'s jurisdictional elements; prior conviction of a federal qualifying offense will also suffice. An individual need only have a knowing failure to register

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[83] *See* Carr v. United States, 560 U.S. 438, 447 (2010); Reynolds v. United States, 565 U.S. 432, 434 (2012); United States v. Wass, 954 F.3d 184, 186 (4th Cir. 2020); United States v. Lawson, 891 F.3d 407, 408 (1st Cir. 2018).

[84] United States v. Lusby, 972 F.3d 1032, 1035 (9th Cir. 2020). A federal court in Nevada convicted Lusby, previously convicted of a qualifying offense, of a violation of Section 2250. He served his sentence in a federal prison in Arizona. At Lusby's request, federal authorities petitioned the court to modify his conditions of supervised release to require him to begin serving his term of supervised release at a half-way house in Nevada. The court agreed. Prison authorities in Arizona bought him a bus ticket to Las Vegas. Once in Nevada, Lusby reported neither to the half-way house nor to his probation officer. Nor did he also did not register as a sex offender with Nevada authorities. A federal grand jury indicted him for violating Section 2250 because of his travel from Arizona to Nevada. The district court dismissed the indictment on the grounds that Lusby was legally compelled to travel to Las Vegas by virtue of the condition of his supervised release. The Ninth Circuit reversed and remanded, but highlighted that the government had agreed that a Section 2250 prosecution would be required to show that Lusby's travel was voluntary. *Id*. at 1041 n.6. The Supreme Court side-stepped a similar issue in *Gundy*. Gundy petitioned for review of four questions including delegation and "whether a defendant violates 18 U.S.C. § 2250(a), which requires interstate travel, where his only movement between states occurs while he is in custody of the Federal Bureau of Prisons and serving a prison sentence." The Court granted certiorari only with respect to the delegation question. Gundy v. United States, 138 S. Ct. 1260 (2018).

[85] 18 U.S.C. § 2250(b) ("Whoever – (1) is required to register under the Sex Offender Registration and Notification Act [34 U.S.C. § 20901 et seq.]; (2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and (3) engages or attempts to engage in the intended travel in foreign commerce; shall be fined under this title, prisoned not more than 10 years, or both.").

[86] *Carr*, 560 U.S. at 458.

[87] 18 U.S.C. § 1151 ("[T]he term 'Indian country' . . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

and a prior conviction for a qualifying sex offense under federal law or the law of the District of Columbia, the UCMJ, tribal law, or the law of a United States territory or possession.[88] Federal jurisdiction flows from the jurisdictional basis for the underlying qualifying offense.[89]

Knowing Failure to Register

Section 2250(a)'s third element, after the jurisdictional element and an obligation to register or update, is a knowing failure to register or to maintain current registration information as required by SORNA.[90] The government must show that the defendant knew of his obligation and failed to honor it. The prosecution need not show that he knew he was bound to do so by federal law generally or by SORNA specifically.[91]

Affirmative Defense

SORNA insists that convicted sex offenders register with state authorities, even when state law does not require registration.[92] Prior to SORNA, more than a few state sex offender registration laws applied only to convictions occurring subsequent to their enactment or only to a narrower range of offenses than contemplated in the Walsh Act. As a consequence of SORNA and the Attorney General's determination to cover pre-SORNA convictions, states must often adjust their registration laws to come into full compliance. Conscious of the delays and difficulties that might attend this process, Section 2250(c) affords offenders an affirmative defense when they seek to register with state authorities, are turned away, and remain persistent in their efforts to register: "In a prosecution for a violation under subsection (a), it is an affirmative defense that - (1) uncontrollable circumstances prevented the individual from complying; (2) the individual did

[88] *Id.* § 2250(a) ("Whoever . . . (2)(A) is a sex offender . . . by reason of a conviction under Federal law . . . *or* (B) travels in interstate or foreign commerce . . . ." (emphasis added)); United States v. Spivey, 956 F.3d 212, 215 n.4 (4th Cir. 2020) ("Interstate travel is not a required element for sex offenders under Federal law ...."); United States v. Holcombe, 883 F.3d 12, 16 (2d Cir. 2018) ("A federal sex offender, unlike a state sex offender, does not need to travel interstate to commit a SORNA offense.").

[89] United States v. George, 625 F.3d 1124, 1130 (9th Cir. 2010); *cf.* United States v. Comstock, 560 U.S. 126, 149 (2010) ("[A] statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.").

[90] 18 U.S.C. § 2250(a)(3).

[91] United States v. Fuller, 627 F.3d 499, 507 (2d Cir. 2010), *vac'd on other grounds*, 565 U.S. 118 (2012) ("[E]very Circuit to have considered the matter has held that SORNA is a general intent crime . . . . 'There is no language requiring specific intent or a willful failure to register such that the defendant must know his failure to register violated federal law.'" (quoting United States v. Gould, 568 F.3d 459, 468 (4th Cir. 2004)) (citing United States v. Shenandoah, 595 F.3d 151, 159 (3d Cir. 2010); United States v. Vasquez, 611 F.3d 325, 328-29 (7th Cir. 2010))). S*ee also* United States v. Collins, 773 F.3d 25, 29 (4th Cir. 2014) ("[T]he government can establish a defendant's guilty knowledge by either of two different means. The government may show that a defendant actually was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion. " (internal quotations and citations omitted)); United States v. Crowder, 656 F.3d 870, 873-76 (9th Cir. 2011); United States v. Voice, 622 F.3d 870, 875-66 (8th Cir. 2010).

[92] 34 U.S.C. § 20913(a) ("A sex offender shall register . . . ."); Willman v. Att'y Gen. of the U.S., 972 F.3d 819, 824 (6th Cir. 2020) ("[F]ederal SORNA obligations are independent of state-law sex offender duties." (citing in accord United States v. Del Valle-Cruz, 785 F.3d 48, 55 (1st Cir. 2015); United States v. Pendleton, 636 F.3d 78, 86 (3d Cir. 2011); United States v. Billiot, 785 F.3d 1266, 1269 (8th Cir. 2015))); *see also* United States v. Stock, 685 F.3d 621, 626 (6th Cir. 2012) ("The obligation SORNA does impose—the obligation to register—is imposed on sex offenders, not states . . . . That obligation exists whether or not a state chooses to implement SORNA's requirements and whether or not a state chooses to register sex offenders at all.").

not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and (3) the individual complied as soon as such circumstances ceased to exist."[93]

Other Attributes

Venue

Although some courts remain to be convinced, it seems that a Section 2250 prosecution involving interstate travel may be brought in either the state of departure or the state of arrival.[94]

Bail

Federal bail laws permit the prosecution to request a pre-trial detention hearing prior to the pre-trial release of anyone charged with a violation of Section 2250.[95] The individual may only be released prior to trial under conditions, which may include among others, that he be electronically monitored; be subject to restrictions on his personal associations, residence, or travel; report regularly to authorities; and be subject to a curfew.[96]

Fine and Imprisonment

Upon conviction, the individual may be sentenced to imprisonment for a term of not more than 10 years and/or fined not more than $250,000.[97] Section 2250(d) also sets an additional penalty of imprisonment for not more than 30 years, but not less than 5 years, for the commission of a federal crime of violence when the offender has also violated Section 2250.[98] Section 16(a)

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[93] 18 U.S.C. § 2250(c). *See also* Kennedy v. Allera, 612 F.3d 261, 269 (4th Cir. 2010) ("Thus, while SORNA imposes a duty *on the sex offender* to register, it nowhere imposes a requirement *on the State* to accept such registration. Indeed, the criminal provisions of SORNA also recognize that a State can refuse registration in as much as they allow, as an affirmative defense to a prosecution, the claim that 'uncontrollable circumstances prevent the individual from complying.'" (emphasis in the original)); United States v. Picard, 995 F.3d 1, 5 (1st Cir. 2021).

[94] United States v. Seward, 967 F.3d 57, 67 (1st Cir. 2020) (holding venue proper in the district of departure "because the nature of the offense reveals that its locus delicti encompasses the departure jurisdiction"); United States v. Spivey, 956 F.3d 212, 216-17 (4th Cir. 2020) (holding venue was proper in the district of departure and noting that "this conclusion is bolstered by 18 U.S.C. § 3237(a) which provides that 'for offenses begun in one district and completed in another' … venue may lie 'in any district in which such offense was begun, continued, or completed'"); United States v. Holcombe, 883 F.3d 12, 15 (2d Cir. 2018) ("[A] SORNA offense begins under Section 3237(a) in the district where the defendant leaves …."); United States v. Kopp, 778 F.3d 986, 988-89 (11th Cir. 2015) (citing United States v. Lewis, 768 F.3d 1086, 1092-94 (10th Cir. 2014); United States v. Lunsford, 725 F.3d 859, 863 (8th Cir. 2013); United States v. Leach, 639 F.3d 769, 771-72 (7th Cir. 2011)). The Eleventh Circuit was unpersuaded by the defendant's argument to the contrary based on an unreported district court opinion from the Southern District of Ohio, *Kopp*, 778 F.3d at 989. *But see* United States v. Haslage, 883 F.3d 331, 335-36 (7th Cir. 2017) (holding that venue for a prosecution of a Section 2250 offense was not proper in the district of departure).

[95] 18 U.S.C. § 3142(f)(1)(E).

[96] *Id.* § 3142(c)(1)(B); *e.g.*, United States v. Doby, 928 F.3d 1199, 1201 (10th Cir. 2019) (magistrate set conditions that included a curfew, location monitoring, monitoring computer use).

[97] 18 U.S.C. § 2250(a).

[98] *Id.* § 2250(d) ("(1) In general. - An individual described in subsection (a) or (b) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years. (2) Additional punishment. - The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).").

defines "crime of violence" for purposes of title 18 as "[a]n offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[99]

Sentencing Guidelines

The *Sentencing Guidelines* heavily influence the sentences imposed for violations of Section 2250. A district court must begin by calculating the sentencing range recommended by the *Sentencing Guidelines*.[100] The court must then consider the recommendation along with the general statutory sentencing principles.[101] The defendant, as well as the prosecution, may appeal the sentence imposed,[102] which the appellate courts may overturn if it is either procedurally or substantively unreasonable.[103] A sentence is procedurally unreasonable when it is the product, among other things, of an erroneous Guideline calculation.[104] It is substantively unreasonable when it is "[dis]proportionate to the seriousness of the circumstances of the offense [or] offender, [or] [in]sufficient or greater than necessary to comply with the purposes of the federal sentencing statute."[105]

Sections 2A3.5 and 2A3.6 of the *Sentencing Guidelines* provide the initial guidelines for Section 2250 offenses.[106] Section 2A3.5 applies to cases other than those under the aggravated sentencing provisions of 18 U.S.C. § 2250(d), and sets a defendant's base offense level according to SORNA's tier classifications.[107] A SORNA Tier III sex offender for sentencing purposes is:

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[99] Section 16(b) contains an alternative definition that the Supreme Court found unconstitutionally vague in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018).

[100] Gall v. United States, 552 U.S. 38, 49 (2007); United States v. Chambers, 956 F.3d 667, 672 (4th Cir. 2020); United States v. Alcius, 952 F.3d 83, 87-88 (2d Cir. 2020).

[101] *Gall*, 552 U.S. at 49-50 ("The Guidelines are not the only consideration …. [T]he district judge should then consider all of the § 3553(a) factors …."); *see also* United States v. Dailey, 958 F.3d 742, 746 (8th Cir. 2020); *Alcius*, 952 F.3d at 87-88; United States v. Nance, 957 F.3d 204, 212 (4th Cir. 2020); United States v. Díaz-Rivera, 957 F.3d 20, 25 (1st Cir. 2020). The § 3553(a) factors include things like "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense …." 18 U.S.C. § 3553(a)(1), (2)(A).

[102] 18 U.S.C. § 3742.

[103] *Gall*, 552 U.S. at 51; *see also* United States v. Trailer, 827 F.3d 933, 936 (11th Cir. 2016); United States v. James, 792 F.3d 962, 967 (8th Cir. 2015).

[104] *Gall*, 552 U.S. at 51; *see also Dailey*, 958 F.3d at 746; United States v. Benton, 957 F.3d 696, 700 (6th Cir. 2020); United States v. Douglas, 957 F.3d 602, 606 (5th Cir. 2020).

[105] United States v. Alsante, 812 F.3d 544, 551 (6th Cir. 2016); *see also* United States v. Haverkamp, 958 F.3d 145, 148 (2d Cir. 2020) ("A sentence is substantively unreasonable if it cannot be located within the range of permissible decisions, shocks the conscience, or constitutes a manifest injustice."); *Nance*, 957 F.3d at 215 ("To assess this [substantively-reasonable] argument, we 'examin[e] the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a).'" (quoting United States v. Mendoza-Mendoza, 597 F.3d 212, 216 (4th Cir. 2011))); United States v. Fuentes-Moreno, 954 F.3d 383, 396 (1st Cir. 2020) ("'[T]he substantive reasonableness of a sentence turns on whether the sentencing court articulated a plausible sentencing rationale and reached a defensible result.'" (quoting United States v Matos-de-Jesús, 856 F.3d 174, 179 (1st Cir. 2017)))); United States v. Fraga, 704 F.3d 432, (5th Cir. 2013) ("In sum, we find that in light of Fraga's criminal history and characteristics, the nine-month deviation from the Guidelines range was substantively reasonable and, in accordance with §3553(a), was 'not greater than necessary' to effectuate the goals of sentencing.").

[106] U.S.S.G. §§ 2A3.5, 2A3.6.

[107] Section 2A3.5 sets a base offense level of 16 for Tier III defendants; 14 for Tier II defendants; and 12 for Tier I defendants, respectively. Without further adjustment, this would translate to a sentence of imprisonment somewhere between 24 and 30 months for a Tier III defendant; between 18 and 24 months for a Tier II defendant; and between 10

> [A] sex offender whose offense is punishable by imprisonment for more than 1 year and-
> (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
> (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or
> (ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;
> (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
> (C) occurs after the offender becomes a tier II sex offender.[108]

A SORNA Tier II sex offender is:

> [A] sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and-
> (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
> (i) sex trafficking (as described in section 1591 of title 18);
> (ii) coercion and enticement (as described in section 2422(b) of title 18);
> (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of title 18;
> (iv) abusive sexual contact (as described in section 2244 of title 18);
> (B) involves-
> (i) use of a minor in a sexual performance;
> (ii) solicitation of a minor to practice prostitution; or
> (iii) production or distribution of child pornography; or
> (C) occurs after the offender becomes a tier I sex offender.[109]

A SORNA Tier I sex offender is any sex offender who is not a Tier II or III sex offender.[110]

As noted earlier, the courts use a "categorical approach" to determine whether a prior state, military, or foreign conviction qualifies a defendant as a Tier I, II, or III sex offender. In the categorical approach, they examine the elements of the state offense. Here too, courts favor the categorical approach when SORNA describes the qualifying state statute of conviction by reference to a particular federal statute or statutes;[111] or when it refers to "elements" rather than "conduct";[112] or to "convictions" rather than "conduct committed."[113] Under the categorical

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and 16 months for a Tier I defendant. U.S.S.G. § 4A1.1; *id.* Sentencing Table.

[108] U.S.S.G. § 2A3.5 app. n. 1 ("For purposes of this guideline: . . . 'Tier III offender' ha[s] the meaning given the term[] tier III sex offender' … in 34 U.S.C. §20911."); 34 U.S.C. § 20911(4).

[109] U.S.S.G. § 2A3.5 app. n. 1 ("For purposes of this guideline: . . . 'Tier II offender' ha[s] the meaning given the term[] tier II sex offender' … in 34 U.S.C. §20911."); 34 U.S.C. § 20911(3).

[110] U.S.S.G. § 2A3.5 app. n. 1 ("For purposes of this guideline: . . . 'Tier I offender' ha[s] the meaning given the term[] tier I sex offender' … in 34 U.S.C. §20911."); 34 U.S.C. § 20911(2).

[111] United States v. Walker, 931 F.3d 576, 579 (7th Cir. 2019); United States v. Barcus, 892 F.3d 228, 232-32 (6th Cir. 2018); United States v. Berry, 814 F.3d 192, 197 (4th Cir. 2016); United States v. Morales, 801 F.3d 1, 6 (1st Cir. 2015); United States v. White, 782 F.3d 1118, 1134 (10th Cir. 2015).

[112] United States v. Rogers, 804 F.3d 1233, 1237 (7th Cir. 2015); United States v. Cabrera-Gutierrez, 756 F.3d 1125, 1133 (9th Cir. 2013).

[113] *Morales*, 801 F.3d at 5. Recall that the courts apply a circumstance-specific approach in analyzing the age elements of federal offenses in the categorical federal-elements-versus-state-elements approach. United States v. Escalante, 933 F.3d 395, 401-02 (5th Cir. 2019) ("Applying that hybrid approach to this case, SORNA's sex offender tier classification imposes circumstance-specific conditions on the cross-referenced offenses. Title 34 U.S.C. § 20911(3)

approach, the statutory elements of the prior state offense must fit completely within the footprint created by the elements of the federal statute or statutes. There is no match if the state statute sweeps more broadly than its federal counterpart, in which case the state conviction may not serve as a SORNA predicate for tier-classification purposes.

For example, the Fourth Circuit used the categorical approach to determine whether a defendant convicted under a state "endangering the welfare of a child" statute qualified as a Tier III sex offender.[114] It decided that he did not.[115] The relevant portion of SORNA requires that to qualify as a Tier III defendant, there must be a conviction under a statute outlawing conduct comparable or more severe (1) than aggravated sexual abuse or sexual abused as described in 18 U.S.C. §§ 2241 and 2242, respectively; or (2) sexual contact as described in 18 U.S.C. § 2244 committed against a child under 13 years of age.[116] The Fourth Circuit reasoned that Sections 2241, 2242, and 2244 each require physical contact.[117] The state courts, however, had interpreted the endangering statute to encompass conduct that did not involve physical contact.[118] Conviction under the state endangering statute was not necessarily a conviction for conduct comparable or more severe than that outlawed in federal aggravated sexual abuse, sexual abuse, or sexual contact statutes.[119] Therefore, the defendant could not be classified as a Tier III sex offender.[120]

Section 2A3.6 of the *Sentencing Guidelines* applies to offenses under the aggravated sentencing provisions of 18 U.S.C. § 2250(d). Section 2A3.6 sets the guideline sentence at the minimum (imprisonment for 5 years),[121] but acknowledges that upward departure may be warranted in a particular case.[122]

Section 2A3.6 also supplies the sentencing guidance for a second offense whose existence may help to explain why section 2259(d) is so infrequently invoked. Regardless of whether a sex offender has failed to register, a sex offender who is required to register under federal or any other law faces a sentencing enhancement of 10 years' imprisonment, 18 U.S.C. § 2260A, when he

modifies the cross-referenced offenses with 'when committed against a minor,' and 34 U.S.C. §20911(4)(A) (ii) modifies the cross-reference offenses with 'against a minor who has not attained the age of 13 years.' Therefore … we hold that when classifying sex offender tier levels under 34 U.S.C. §§ 20911(2)-(4), the text of SORNA requires a circumstance-specific inquiry into the victim's age to determine whether the victim was, in fact, a minor at the time of the offense."); *see also Berry*, 814 F.3d at 197; *White*, 782 F.3d at 1135; United States v. Byun, 539 F.3d 982, 991 (9th Cir. 2008).

[114] *Berry*, 814 F.3d 192, 199-200 (4th Cir. 2016).

[115] *Id.*

[116] 42 U.S.C. § 16911(4)(A)(i), (ii) [now 34 U.S.C. § 20911(4)(A)(i), (ii)].

[117] *Berry*, 814 at 199.

[118] *Id.* at 200.

[119] *Id.*

[120] *Id.*

[121] U.S.S.G. § 2A3.6(a).

[122] *Id.* app. n.4.

commits any of a list of sex offenses.[123] Moreover, recidivist federal sex offenders face the prospect of mandatory life imprisonment.[124]

Supervised Release

Generally, when a court sentences a defendant to prison, it may also sentence him to a term of supervised release.[125] Supervised release is a parole-like regime under which a defendant is subject to the oversight of a probation officer following his release from prison. The term of supervised release for most crimes is either 1, 3, or 5 years depending on the severity of the crime of conviction.[126] Congress has authorized, or insisted upon, longer terms when the crime of

[123] 18 U.S.C. § 2260A ("Whoever, being required by Federal or other law to register as a sex offender, commits a felony offense involving a minor under section 1201 [kidnaping], 1466A [obscene visual depiction of sexual abuse of a child], 1470 [transfer of obscenity to a child], 1591 [commercial sex trafficking], 2241 [aggravated sexual abuse], 2242 [sexual abuse], 2243 [sexual abuse of a minor or ward], 2244 [abusive sexual contact], 2245 [sexual abuse resulting in death], 2251 [sexual exploitation of a child], 2251A [selling a child], 2260 [production of child pornography for U.S. import], 2421 [transportation for illicit sexual purposes], 2422 [coercion or enticement to travel], 2423 [transportation for illicit sex with a child], or 2425 [interstate transmission of information related to a child], shall be sentenced to a term of imprisonment of 10 years in addition to the imprisonment imposed for the offense under that provision. The sentence imposed under this section shall be consecutive to any sentence imposed for the offense under that provision.").

[124] 18 U.S.C. §3559(e) ("(e) Mandatory Life Imprisonment for Repeated Sex Offenses Against Children.-

(1) In general.-A person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless the sentence of death is imposed.

(2) Definitions.-For the purposes of this subsection-

(A) the term 'Federal sex offense' means an offense under section 1591 (relating to sex trafficking of children), 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2244(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a minor into prostitution), or 2423(a) (relating to transportation of minors);

(B) the term 'State sex offense' means an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense if, to the extent or in the manner specified in the applicable provision of this title-

(i) the offense involved interstate or foreign commerce, or the use of the mails; or

(ii) the conduct occurred in any commonwealth, territory, or possession of the United States, within the special maritime and territorial jurisdiction of the United States, in a Federal prison, on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country (as defined in section 1151);

(C) the term 'prior sex conviction' means a conviction for which the sentence was imposed before the conduct occurred constituting the subsequent Federal sex offense, and which was for a Federal sex offense or a State sex offense;

(D) the term 'minor' means an individual who has not attained the age of 17 years; and

(E) the term 'State' has the meaning given that term in subsection (c)(2).

(3) Nonqualifying Felonies.-An offense described in section 2422(b) or 2423(a) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that-

(A) the sexual act or activity was consensual and not for the purpose of commercial or pecuniary gain;

(B) the sexual act or activity would not be punishable by more than one year in prison under the law of the State in which it occurred; or

(C) no sexual act or activity occurred.").

[125] *Id.* § 3583(a).

[126] *Id.* § 3583(b).

conviction is a particular drug, terrorist, or sex offense.[127] Section 2250 is not among the sex offenses that triggers the longer terms of supervised release and consequently comes with a maximum three-year term of supervised release.[128] Like the term of imprisonment, the term and conditions of supervised release must be procedurally and substantively reasonable.[129] A term of supervised release is procedurally unreasonable when the district court miscalculates the *Sentencing Guidelines*' recommendation or fails to provide an individualized explanation for a discretionary condition.[130] A term of supervised release is substantively unreasonable when the district court inappropriately weighs the statutory sentencing factors in the context of the defendant and the circumstances of the case, or the sentence is shockingly severe or shockingly lenient.[131]

The statute and the *Sentencing Guidelines* establish an array of mandatory and discretionary conditions for those on supervised release. The mandatory conditions require the defendant to

- avoid committing any additional federal, state, or local offenses;
- refrain from the unlawful possession of controlled substances;
- participate in a domestic violence rehabilitation program, if he has been convicted of domestic violence;
- submit to periodic drug tests, unless the court suspends the condition if the defendant poses a low risk of future substance abuse;
- pay installments to satisfy any outstanding fines or special assessments;
- satisfy any outstanding restitution requirements;
- comply with any SORNA registration demands; and
- submit to the collection of a DNA sample.[132]

A sentencing court may also impose any condition from the statutory inventory of discretionary conditions for probation.[133] In addition, the *Sentencing Guidelines* specify thirteen "standard"

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[127] *E.g.*, 21 U.S.C. § 841(b); 18 U.S.C. § 3583(j), (k).

[128] 18 U.S.C. §§ 3583(k), 2250, 3581(b)(3), 3583(b)(2).

[129] United States v. Eaglin, 913 F.3d 88, 94 (2d Cir. 2019); United States v. Trailer, 827 F.3d 933, 935-36 (11th Cir. 2016); *see also* United States v. Jones, 798 F.3d 613, 619 (2d Cir. 2015); United States v. James, 792 F.3d 962, 967 (8th Cir. 2015).

[130] *E.g.*, *Eaglin*, 913 F.3d at 94; United States v. Brown, 826 F.3d 835, 839 (5th Cir. 2016); United States v. Medina, 779 F.3d 55, 58-59 (1st Cir. 2015); United States v. Baker, 755 F.3d 515, 522-23 (7th Cir. 2014).

[131] *Eaglin*, 913 F.3d at 94; *Trailer*, 827 F.3d at 936; *James*, 792 F.3d at 968; *see also Jones*, 798 F.3d at 619 ("In determining the length and conditions of supervised release … a court must consider the same § 3553(a) factors that guide sentencing determinations generally.").

[132] 18 U.S.C. § 3583(d), (e); U.S.S.G. § 5D1.3(a)(1)-(8).

[133] 18 U.S.C. § 3583(d). The applicable discretionary conditions for probation under Section § 3563(b) include "that the defendant - (1) support his dependents and meet other family responsibilities; (2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)); (3) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555; (4) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment; … (16) permit a probation officer to visit him at his home or elsewhere as specified by the court; (17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment; … (23) if required to register under the Sex Offender Registration and Notification Act, submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions."

conditions;[134] eight "special" conditions;[135] and "additional" special conditions.[136] Finally, the district court may impose any "specific" condition that, like the other discretionary conditions, meets the following statutory standards:

- "(1) is reasonably related to the factors set forth in section 3553(a)(1) [the nature and circumstances of the offense and the history an characteristics of the defendant], (a)(2)(B), (a)(2)(C), and (a)(2)(D) [the need – (B) to afford adequate deterrence … (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocation training, medical care, or other correctional treatment in the most effective manner];
- (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
- (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)."[137]

Restrictions on a defendant's association with children often appear among the discretionary conditions for supervised release for Section 2250 offenders. Whether the conditions survive appellate review turns upon their breadth, the district court's justification for imposing them, and the features of individual cases.[138]

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[134] Under U.S.S.G. § 5D1.3(c), the standard conditions require an individual on supervised release to (1) report promptly to the probation office upon release; (2) comply with directions to report thereafter; (3) remain in the judicial district unless the probation officer approves departure; (4) answer the probation officer's questions truthfully; (5) live in a place the probation officer approves; (6) permit the probation officer to engage in searches and seizures; (7) seek employment and remain employed; (8) avoid felons and those who engage in criminal activity; (9) notify probation officer of arrests or police questioning; (10) refrain from possession of firearms, ammunition, or dangerous weapons; (11) avoid becoming an informant without court approval; (12) obey probation officer instructions to notify third persons of the risks to them that defendant poses; and (13) comply with the probation officer's interpretation of the conditions imposed.

[135] Under U.S.S.G. § 5D1.3(d), the special conditions require an individual on supervised release to (1) support dependents; (2) meet debt obligations; (3) provide the probation officer with access to financial information if the defendant has pending restitution, forfeiture, fine, or victim notification obligations; (4) if the court suspects controlled substance or alcohol abuse, refrain from possession of alcohol and participate in a substance abuse program if the court suspects controlled substance or alcohol abuse; (5) participate in mental health program if the court believes defendant needs treatment; (6) submit to deportation; (7) for sex offenders (the definition does not include Section 2250 offenders) participate in sex offender treatment and monitoring and limit computer use; and (8) notify the probation officer of any change in economic circumstances that might affect payment of outstanding obligations relating to restitution, fine, or special assessment.

[136] Under U.S.S.G. § 5D1.3(e), the "additional" special conditions include: (1) "community confinement"; (2) "home detention"; (3) "community service"; (4) "occupational restrictions"; (5) "curfew"; and (6) "intermittent confinement."

[137] 18 U.S.C. § 3583(d).

[138] *E.g.*, United States v. Edwards, 944 F.3d 631, 633 (7th Cir. 2019) (upholding conditions, imposed on a Section 2250 defendant previously convicted of possession and distribution of child pornography, that banned contact with children without permission of their parents and the defendant's probation officer); United States v. Jennings, 930 F.3d 1024, 1026-27 (8th Cir. 2019) (upholding condition restraining the Section 2250 defendant from contacting his adult son without the approval of his probation officer in light of the defendant's "long history of abusive conduct" and noting that the Eighth Circuit had "repeatedly upheld no-contact orders requiring defendants to seek permission from a probation officer before contacting their own minor children, even where there is no history or likelihood of abusive conduct"); United States v. Fey, 834 F.3d 1, 4 (1st Cir. 2016) ("'[W]e have vacated associational conditions where the defendant's prior sex offense occurred in the distant past, the intervening time was marked by lawful social activity, and the district court did not otherwise explain the need for such restrictions.' … And although the condition does not place an outright ban on Frey's association with minors, it operates not in limited contexts but in all contexts." (quoting United States v. Pabon, 819 F.3d 26, 31 (1st Cir. 2016))); United States v. Baker, 755 F.3d 515, 526-27 (7th Cir. 2014) (remanding for resentencing after the government conceded that a ban on the defendant's contact with his children

The court may modify the conditions of supervised release at any time.[139] It may also revoke the defendant's supervised release and sentence him to prison for violating the conditions of supervised release.[140]

Constitutional Considerations

Much of the litigation relating to Section 2250 and SORNA involves constitutional challenges taking one of two forms. One argues that SORNA or Section 2250 operates in a manner that the Constitution specifically forbids, for example in its clauses on Ex Post Facto laws, Due Process, and Cruel and Unusual Punishment. The other argues that the Constitution does not grant Congress the legislative authority to enact either Section 2250 or SORNA. These challenges probe the boundaries of the Commerce Clause, the Necessary and Proper Clause, and the Spending Clause, among others.

The Supreme Court addressed two of the most common constitutional issues associated with sex offender registration laws before the enactment of SORNA. One addressed the Ex Post Facto Clause implications of sex offender registration, *Smith v. Doe*;[141] the other addressed Due Process Clause implications, *Connecticut Department of Public Safety v. Doe*.[142]

Ex Post Facto

Neither the states nor the federal government may enact laws that operate Ex Post Facto.[143] The prohibition covers both statutes that outlaw conduct that was innocent when it occurred and statutes that authorize imposition of a greater penalty for a crime than applied when the crime occurred.[144] The prohibitions, however, apply only to criminal statutes or to civil statutes whose intent or effect is so punitive as to belie any but a penal characterization.[145]

In *Smith*, the Supreme Court dealt with the Ex Post Facto issue in the context of the Alaska sex offender registration statute. It found the statute civil in nature and effect, not punitive, and consequently its retroactive application did not violate the Ex Post Facto Clause.[146] Its analysis[147]

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should be vacated).

[139] 18 U.S.C. § 3583(e)(2).

[140] *Id*. § 3583(e)(3), (h). Section 3583(k) purports, under certain circumstances, to require revocation of supervised release imposed upon conviction for violating various federal sex offenses other than Section 2250. In *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019), the Supreme Court held in a plurality opinion that for a federal judge to do so, without a jury and by a preponderance of the evidence, violates the Fifth and Sixth Amendments.

[141] 538 U.S. 84 (2003).

[142] 538 U.S. 1 (2003).

[143] U.S. CONST. art. I, § 10, cl. 1; art. I, § 9, cl. 3.

[144] Stogner v. California, 539 U.S. 607, 612 (2003).

[145] Smith v. Doe, 538 U.S. 84, 92 (2003) ("This is the first time we have considered a claim that a sex offender registration and notification law constitutes retroactive punishment forbidden by the Ex Post Facto Clause. The framework for our inquiry, however, is well established. We must ascertain whether the legislature meant the statute to establish 'civil' proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.' Because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.").

[146] *Id*. at 107-08.

[147] *Id.* at 97 ("In analyzing the effects of the Act we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*,

has colored the lower federal courts' treatment of Ex Post Facto challenges to Section 2250 and SORNA. "Relying on *Smith*, circuit courts have consistently held that SORNA does not violate the Ex Post Facto Clause,"[148] with one apparently limited exception. The Ninth Circuit initially held that the SORNA obligations for pre-enactment juveniles constituted punishment, because they stripped juveniles of the confidentiality that then surrounded juvenile proceedings.[149] Thus, their enforcement against such juveniles would constitute an Ex Post Facto violation, the Ninth Circuit decided.[150] It subsequently concluded that "not all applications of SORNA to individuals based on juvenile sex offender determinations are sufficiently punitive to violate the Ex Post Facto Clause."[151] This is particularly true, the Ninth Circuit opined, when SORNA did not result in a loss of confidentiality because of the disclosure requirements that accompanied the original qualifying juvenile adjudication.[152]

Due Process

The Supreme Court's assessment of state sex offender registration statutes has been less dispositive of due process issues because of the variety of circumstances in which they may arise. Neither the federal nor state governments may deny a person of "life, liberty, or property, without due process of law."[153] Due process requirements take many forms. They preclude punishment without notice: "[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[154] They bar restraint of liberty or the enjoyment of property without an opportunity to be heard: "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case."[155] They proscribe any punishments or restrictions that are so fundamentally unfair as to violate fundamental fairness, that is, substantive due process.

In *Connecticut Dep't of Public Safety v. Doe*, the Court found no due process infirmity in the Connecticut sex offender registration regime in spite of its failure to afford offenders an

372 U.S. 144, 168-69 (1963), as a useful framework . . . .The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.").

[148] United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012) (citing, among others, United States v. Guzman, 591 F.3d 83, 94 (2d Cir. 2010); United States v. Gould, 568 F.3d 459, 466 (4th Cir. 2009); United States v. Young, 585 F.3d 199, 203-06 (5th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1207 (11th Cir. 2009)); *see also* Willman v. Att'y Gen., 972 F.3d 819, 824-25 (6th Cir. 2020) (collecting cases in accord); United States v. Diaz, 967 F.3d 107, 110-11 (2d Cir. 2020); United States v. Wass, 954 F.3d 184, 192-93 (4th Cir. 2020) (holding Wass's Ex Post Facto claim fails because SORNA is punitive neither in purpose nor effect); United States v. Holcombe, 883 F.3d 12, 18 (2d Cir. 2018); United States v. Billiot, 785 F.3d 1266, 1269-70 (8th Cir. 2015); United States v. White, 782 F.3d 1118, 1126-27 (10th Cir. 2015); United States v. Elk Shoulder, 738 F.3d 948, 953-54 (9th 2012); United States v. Parks, 698 F.3d 1, 4-6 (1st Cir. 2012); United States v. W.B.H., 664 F.3d 848, 852-60 (11th Cir. 2011).

[149] United States v. Juvenile Male, 590 F.3d 924, 941-42 (9th Cir. 2010), *vac'd as moot*, 564 U.S. 932, 933 (2011).

[150] *Id*.

[151] United States v. Elkins, 685 F.3d 1038, 1048 (9th Cir. 2012) (citing United States v. Juvenile Male, 670 F.3d 999 (9th Cir. 2012)).

[152] *Id.* at 1048-49.

[153] U.S. CONST. amends. V, XIV.

[154] United States v. Williams, 553 U.S. 285, 304 (2008).

[155] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

opportunity to prove they were not dangerous.[156] Doe suffered no injury from the absence of a pre-registration hearing to determine his dangerousness, in the eyes of the Court, because the system required registration of all sex offenders, both those who were dangerous and those who were not.[157] *Connecticut Dep't of Public Safety* forecloses the assertion that offenders are entitled to a pre-registration "dangerousness" hearing; the relevant question under SORNA is prior conviction, not dangerousness.[158]

In *Lambert v. California*, the Court dealt with sufficiency of notice. There, the Court held invalid a city ordinance that required all felony offenders to register within five days of their arrival in the city.[159] The Court explained that "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process."[160] Since "by the time that Congress enacted SORNA, every state had a sex offender registration law in place,"[161] attempts to build on *Lambert* have been rejected, because the courts concluded that offenders knew or should have known of their duty to register.[162] Suggestions that differences between state and federal requirements result in impermissible vagueness have fared no better.[163]

To qualify as a violation of substantive due process, a governmental regime must intrude upon a right "deeply rooted in our history and traditions," or "fundamental to our concept of

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[156] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).

[157] *Id*. at 7-8.

[158] United States v. Ambert, 561 F.3d 1202, 1208 (11th Cir. 2009).

[159] Lambert v. California, 355 U.S. 225 (1957).

[160] *Id*. at 229-30.

[161] Smith v. Doe, 538 U.S. 84, 90 (2003). A list of the citations to existing state sex offender registration laws is attached at the end of this report.

[162] United States v. Hester, 589 F.3d 86, 92-93 (2d Cir. 2009) ("In *Lambert*, the Supreme Court stated: 'Registration laws are common and their range is wide. . . . But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking.' Like our sister circuits, we find this last statement – regarding 'circumstances which might move one to inquire as to the necessity of registration' – to be critical." (citing United States v. Whaley, 577 F.3d 254, 262 (5th Cir. 2009); United States v. Gould, 568 F.3d 459, 468-69 (4th Cir. 2009); United States v. Dixon, 551 F.3d 578, 584 (7th Cir. 2009); United States v. Hinckley, 550 F.3d 926, 938 (10th Cir. 2009); and United States v. May, 535 F.3d 912, 921 (8th Cir. 2008))). *See also* United States v. Gagnon, 621 F.3d 30, 33 (1st Cir. 2010); United States v. W.B.H., 664 F.3d 848, 852-60 (11th Cir. 2011); United States v. Elkins, 683 F.3d 1039, 1049-50 (9th Cir. 2012).

[163] United States v. Pendleton, 636 F.3d 78, 86 (3d Cir. 2011) ("Pendleton's federal duty to register under SORNA was not dependent upon his duty to register under Delaware law. A person of ordinary intelligence would not assume that as long as he or she complied with state law on a particular issue, there would be no risk of running afoul of federal law."). *See also* United States v. Alsante, 812 F.3d 544, 547-48 (6th Cir. 2016) ("[T]he Due Process Clause does not offer convicted defendants at sentencing [for violation of § 2250] the same constitutional protections afforded defendants at a criminal trial."); United States v. Elk Shoulder, 738 F3d 948, 955 (9th Cir. 2012) (noting that state notice that the sex offender must register with state authorities is all the Due Process Clause demands for SORNA purposes). The Sixth Circuit in *Felts* expressed a possible due process concern that it was not required to address but one that might arise "where an inconsistency between federal and non-complying state regimes would render it impractical, or even impossible, for an offender to register under federal law." United States v. Felts, 674 F.3d 599, 605 (6th Cir. 2012). The affirmative defense in 18 U.S.C. § 2250(c) seems designed to address this concern. *See supra* "Affirmative Defense" section of this report. In any event, the *Felts* concern apparently no longer troubles the Sixth Circuit, *see* Willman v. Att'y Gen., 972 F.3d 819, 827 (6th Cir. 2020) ("A person of ordinary intelligence would know if he had been convicted of a sex offense, and he would know that being removed from his state sex offense registry – on its own – would not change whether he had been convicted. Accordingly, Willman's vagueness claim is not plausible on its face."); *see also* United States v. Burgee, 988 F.3d 1954, 1060 (8th Cir. 2021); United States v. Collazo, 984 F.3d 1308, 1325 (9th Cir. 2021).

constitutionally ordered liberty."[164] Perhaps because the threshold is so high, Section 2250 and SORNA have only infrequently been questioned on substantive due process grounds.[165]

Right to Travel

"The 'right to travel' . . . embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[166]

Section 2250, it has been contended, violates the right to travel because it punishes those who travel from one state to another yet fail to register, but not those who fail to register without leaving the state. The courts have responded, however, that the right must yield to compelling state interest in the prevention of future sex offenses.[167]

Cruel and Unusual Punishment

The Eighth Amendment bars the federal government from inflicting "cruel and unusual punishment."[168] A punishment is cruel and unusual under the Eighth Amendment when it is grossly disproportionate to the offense.[169] Section 2250's 10-year maximum has survived the claim that is grossly disproportionate to the crime of failing to maintain current and accurate sex offender registration information.[170] The courts have also declined to hold that SORNA's registration regime itself violates the Eighth Amendment, either because they do not consider the requirements punitive or because they do not consider them grossly disproportionate.[171]

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[164] Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

[165] *See* United States v. Ambert, 561 F.3d 1202, 1208-09 (11th Cir. 2009) (rejecting a substantive due process claim).

[166] Saenz v. Roe, 526 U.S. 489, 500 (1999).

[167] United States v. Holcombe, 883 F.3d 12, 18 (2d Cir. 2012); United States v. Shenandoah, 595 F.3d 151, 162-62 (3d Cir. 2010), *abrogated on other grounds*, Reynolds v. United States, 565 U.S. 432 (2012); *Ambert*, 561 F.3d at 1209-10; *cf*. Bacon v. Neer, 631 F.3d 875, 878 (8th Cir. 2011); *see also Willman*, 972 F.3d at 826 ("But those [SORNA] registration obligations do not burden a sex offender's movement in a way that violates a person's right to travel." (collecting cases in accord)).

[168] U.S. CONST. amend. VIII.

[169] Graham v. Florida, 560 U.S. 48, 59 (2010).

[170] United States v. Martin, 677 F.3d 818, 821-22 (8th Cir. 2012).

[171] *Willman*, 972 F.3d at 825 ("SORNA is not a punishment for purposes of the Ex Post Facto Clause. It follows, therefore, that SORNA is not a punishment for purposes of the Eighth Amendment either."); United States v. Diaz, 967 F.3d 107 (2d Cir. 2020) ("Our precedent precludes the argument that sex offender registration and notification requirements are punitive, see [Doe v.] Pataki, 120 F.3d [1263,] 1285 ([2d Cir. 1997)], and the Supreme Court's similar conclusion in *Smith v. Doe* [, 538 U.S. 84, 105 (2003)] forecloses this Court's ability to revisit the *Pataki* decision. 538 U.S. at 105. Accordingly, the district court correctly concluded that SORNA does not violate the … Eighth Amendment."); United States v. Under Seal, 709 F.3d 257, 263-66 (4th Cir. 2013) (holding that SORNA's registration requirements do not constitute punishment); United States v. Juvenile Male, 670 F.3d 999, 1010 (9th Cir 2012) ("Given the high standard that is required to establish cruel and unusual punishment, we hold that SORNA's registration requirements do not violate the Eighth Amendment."); *cf.* United States v. May, 535 F.3d 912, 920 (8th Cir. 2008) (not punishment).

Legislative Authority

The most frequent constitutional challenge to SORNA and Section 2250 is that Congress lacked the constitutional authority to enact them. Some of these challenges speak to the breadth of Congress's constitutional powers, such as those vested under the Tax and Spending Clause, the Commerce Clause, or the Necessary and Proper Clause. Others address contextual limitations on the exercise of those powers imposed by such things as the non-delegation doctrine or the principles of separation of powers reflected in the Tenth Amendment.

Tenth Amendment

The federal government enjoys only such authority as may be traced to the Constitution; the Tenth Amendment reserves to the states and the people powers not vested in federal government.[172] Challengers of Congress's legislative authority to enact SORNA or the Justice Department's authority to prosecute failure to comply with its demands on Tenth Amendment grounds have had to overcome substantial obstacles. First, several of Congress's constitutional powers are far reaching and SORNA appears within their grasp. Among them are the powers to regulate interstate and foreign commerce, to tax and spend for the general welfare, and to enact laws necessary and proper to effectuate the authority the Constitution provides.[173] Second, although a particular statute may implicate the proper exercise of more than one constitutional power, only one is necessary for constitutional purposes.[174] Third, "while SORNA imposes a duty on the sex offender to register, it nowhere imposes a requirement on the State to accept such registration."[175] Finally, until recently some courts have held that individual defendants lacked standing to contest the statutory validity on the basis of constitutional provisions designed to protect the institutional interests of governmental entities rather than to protect private interests.

Standing

Several earlier courts rejected SORNA challenges under the Tenth Amendment on the grounds that the defendants lacked standing. Standing refers to the question of whether a party in litigation is asserting or "standing" on his or her own rights or only upon those of another. At one time, there was no consensus among the lower federal appellate courts over whether individuals had standing to present Tenth Amendment claims.[176] More specifically, at least two circuits had held

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[172] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[173] U.S. CONST. art. I, § 8, cls. 1, 3, 18 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[174] *Cf.* U.S. CONST. art. I, § 8, cl. 18.

[175] United States v. White, 782 F.3d 1118, 1128 (10th Cir. 2015) (quoting Kennedy v. Allera, 612 F.3d 261, 269 (4th Cir. 2010); citing United States v. Richardson, 754 F.3d 1143, 1146-47 (9th Cir. 2014); United States v. Felts, 674 F.3d 599, 602 (6th Cir. 2012); United States v. Johnson, 632 F.3d 912, 920 (5th Cir. 2011); United States v. Guzman, 591 F.3d 83, 94 (2d Cir. 2010)).

[176] United States v. Johnson, 632 F.3d 912, 919 (5th Cir. 2011) ("The First, Second, Third, Eighth, and Tenth Circuits have held that private parties do not having standing to bring such claims. The Seventh and Eleventh Circuits have permitted private parties to assert Tenth Amendment claims.").

that defendants convicted under Section 2250 lacked standing to challenge their convictions on Tenth Amendment grounds.[177]

Those courts, however, did not have the benefit of the Supreme Court's *Bond* and *Reynolds* decisions. In *Bond*, the Court pointed out that a defendant who challenges the Tenth Amendment validity of the statute under which she was convicted "seeks to vindicate her own constitutional rights . . . . The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the State."[178] In *Reynolds*, the Court implicitly recognized the defendant's standing when, at his behest, it held that SORNA did not apply to pre-enactment convictions until after the Attorney General had exercised his delegated authority.[179] Yet the fact that a defendant's Tenth Amendment challenge may be heard does not mean it will succeed.[180]

Spending for the General Welfare

"The Congress shall have Power To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ."[181] "Objectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[182] In the past, the Supreme Court has described the limits on Congress in general terms:

> [First,] the exercise of the spending power must be in pursuit of the general welfare . . . Second . . . if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously . . . . Third . . . conditions on federal grants . . . [must be] []related to the federal interest in particular national projects or programs. . . . Finally. . . other constitutional provisions may provide an independent bar to the conditional grant of federal funds.[183]

Moreover, at the end of its 2011 term in *National Federation of Business v. Sebelius*, seven members of a divided Court found that the power of the Spending Clause may not be exercised to

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[177] United States v. Shenandoah, 595 F.3d 151, 161-62 (3d Cir. 2010), *abrogated by* Reynolds v. United States, 432 U.S. 432 (2012) ("Shenandoah argues that SORNA is unconstitutional because it compels New York law enforcement to accept registrations from federally-mandated sex offender programs in violation of the Tenth Amendment . . . . . We need not tarry long on this argument, because Shenandoah lacks standing to raise this issue."); United States v. Zuniga, 579 F.3d 845, 851 (8th Cir. 2009).

[178] Bond v. United States, 564 U.S. 211, 220 (2011); *see also* United States v. Felts, 674 F.3d 599, 607 (6th Cir. 2012) ("The United States counters that Felts lacks standing to assert SORNA's alleged violation. This is no longer an accurate statement of law. The United States' brief was filed on June 6, 2011, ten days before the Supreme Court decided *Bond* . . . . An individual can assert that the enforcement of a law violates the Tenth Amendment, particularly when a defendant has a significant liberty interest at stake. Because Felts was prosecuted for violating SORNA, he has standing to challenge the act for being enforced in violation of the Tenth Amendment.").

[179] *Reynolds*, 565 U.S. at 442-43; *see also* United States v. Knutson, 680 F.3d 1021, 1023 (8th Cir. 2012) ("This court had previously held that pre-Act offenders lack standing to challenge SORNA. However, after the parties filed their briefs, the Supreme Court ruled that pre-Act offenders have standing to challenge SORNA under the non-delegation doctrine. *Reynolds*, 132 S. Ct. at 984.").

[180] *White*, 782 F.3d at 1128 ("We join all of the federal circuits to have considered this issue in holding that SORNA does not violate the Tenth Amendment.") (citing cases from the Ninth, Eighth, Fifth, and Second Circuits).

[181] U.S. CONST. art. I, § 8, cl. 1*; see generally* Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation*, S. DOC. NO, 112-9, https://constitution.congress.gov/browse/essay/artI-S8-C1-2/ALDE_00001055/.

[182] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[183] *Id.* at 207-08.

coerce state participation in a federal program.[184] Congress may use the spending power to induce state participation; it may not present the choice under such circumstances that a state has no realistic alternative but to acquiesce.[185]

SORNA establishes minimum standards for the state sex offender registries and authorizes the Attorney General to enforce compliance by reducing by up to 10% the funds a non-complying state would receive in criminal justice assistance funds.[186] Some defendants have suggested that this impermissibly commandeers state officials to administer a federal program and therefore exceeds Congress's authority under the Spending Clause. Generally, while Congress may encourage state participation in a federal program, it is not constitutionally free to require state legislators or executive officials to act to enforce or administer a federal regulatory program.[187] To date, the federal appellate courts have held that SORNA's reduction in federal law enforcement assistance grants for a state's failure to comply falls on the encouragement, rather than the directive, side of the constitutional line.[188] The fact that most states do not feel compelled to bring their systems into full SORNA compliance may lend credence to that assessment.[189]

Commerce Clause

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[190] The Supreme Court explained in *Lopez*, and again in *Morrison*, that Congress's Commerce Clause power is broad but not boundless.

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[184] Nat'l Fed. of .Indep. Bus. v. Sebelius, 567 U.S. 519, 575-86 (2012) (Roberts, Ch. J. joined by Breyer and Kagan, JJ.); *id*. at 671-89 (Scalia, J., dissenting, joined by Kennedy, Thomas, and Alito, JJ.).

[185] *Cf. id.* at 581-82 (Roberts, Ch. J.) ("It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a 'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact.' The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."); *id.* at 676 (Scalia, J., dissenting) ("[W]hile Congress may seek to induce States to accept conditional grants, Congress may not cross the 'point at which pressure turns into compulsion, and ceases to be inducement.'"). *See generally* CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by Kenneth R. Thomas.

[186] 34 U.S.C. § 20925(a).

[187] New York v. United States, 505 U.S. 144, 175-76 (1992); Printz v. United States, 521 U.S. 898, 935 (1997) ("We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly.").

[188] United States v. Felts, 674 F.3d 599, 608 (6th Cir. 2012) ("SORNA does not fall under the rubric of *Printz*, but rather relies on Congress's spending power. Failure to implement SORNA results in a loss of 10% of federal funding under [the law enforcement assistance program]. Conditioning of funds in this manner is appropriate under *South Dakota v. Dole* (stating that Congress's power to condition the receipt of federal funds under the spending power is valid so long as (1) the spending/withholding is in the pursuit of the general welfare; (2) the conditional nature is clear and unambiguous; (3) the condition is rationally related to the purpose of the federal interest, program, or funding; and (4) the conduct required to comply with the condition is not barred by the constitution itself)."). *See also* United States v. White, 782 F.3d 1118, 1127-28 (10th Cir. 2015); United States v. Smith, 655 F.3d 839, 848 (8th Cir. 2011); United States v. Johnson, 632 F.3d 912, 920 (5th Cir. 2011); Kennedy v. Allera, 612 F.3d 261, 268-70 (4th Cir. 2010); United States v. Guzman, 591 F.3d 83, 95 (2d Cir. 2010).

[189] The Justice Department indicates that eighteen states are now in substantial compliance with SORNA requirements. U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registration, and Tracking (SMART), *SORNA Implementation Status*, available at https://smart.gov/sorna-map.htm.

[190] U.S. CONST. art. I, § 8, cl. 3*; see generally* Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation*, S. DOC. NO, 112-9, https://constitution.congress.gov/browse/essay/artI-S8-C3-1-1/ALDE_00001057/.

> Modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.[191]

The lower federal appellate courts have rejected Commerce Clause attacks on Section 2250 in the interstate travel cases, because there they believe Section 2250 "fits comfortably with the first two *Lopez* prongs[, i.e. the regulation of (1) the "channels" of interstate commerce and (2) the "instrumentalities" of interstate commerce]."[192] They have also rejected Commerce Clause attacks on SORNA in intrastate cases based on the strength of the Necessary and Proper Clause:

> Requiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines. To the extent that §16913 regulates solely intrastate activity, its means are reasonably adapted to the attainment of a legitimate end under the commerce power and therefore proper.[193]

Necessary and Proper

The Supreme Court in *Comstock* described the breadth of Congress's authority under the Necessary and Proper Clause in the context of another Walsh Act provision. The Walsh Act authorizes the Attorney General to hold federal inmates beyond their release date to initiate federal civil commitment proceedings for the sexually dangerous.[194] Comstock and others questioned application of the statute on the grounds that it exceeded Congress's legislative authority under the Commerce and Necessary and Proper Clauses.[195]

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[191] United States v. Morrison, 529 U.S. 598, 608-09 (2000) (citing *inter alia* United States v. Lopez, 514 U.S. 549, 558-59 (1995)). Of late, seven Justices of the Court have explained that the Commerce Clause does not authorize Congress to punish those who elect not to engage in commerce. *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 558 (Roberts, Ch. J. joined by Breyer and Kagan, JJ.) ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'"); *id*. at 649 (Scalia, J., dissenting, joined by Kennedy, Thomas, and Alito, JJ.) ("But that failure—that abstention from commerce—is not 'Commerce.' To be sure, purchasing insurance is 'Commerce'; but one does not regulate commerce that does not exist by compelling its existence.").

[192] United States v. Coleman, 675 F.3d 615, 620 (6th Cir. 2012) (citing *inter alia* United States v. Vasquez, 611 F.3d 325, 330-31 (7th Cir. 2010); United States v. Guzman, 591 F.3d 83, 89-92 (2d Cir. 2010); United States v. Whaley, 577 F.3d 254, 259-61 (5th Cir. 2009); United States v. Gould, 568 F.3d 459, 470-75 (4th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1210-12 (11th Cir. 2009); United States v. Lawrence, 548 F.3d 1329, 1337 (10th Cir. 2008); and United States v. May, 535 F.3d 912, 911-22 (8th Cir. 2008)). *See also* United States v. Bollinger, 798 F.3d 201, 217 (4th Cir. 2015) ("This Court has concluded that SORNA is constitutional because it regulates the use of the channels and instrumentalities of interstate commerce."); United States v. Manning, 786 F.3d 684, 685-86 (8th Cir. 2015); United States v. White, 782 F.3d 1118, 1123-26 (10th Cir. 2015); United States v. Parks, 698 F.3d 1, 6-7 (1st Cir. 2012).

[193] United States v Thompson, 811 F.3d 717, 723-25 (5th Cir. 2016); United States v. Pendleton, 636 F.3d 78, 87-88 (3d Cir. 2011) (quoting *Guzman*, 591 F.3d at 90-91; citing *Vasquez*, 611 F.3d at 330; *Ambert*, 561 F.3d at 1211-12; and United States v. Howell, 552 F.3d 709, 717 (8th Cir. 2009)).

[194] 18 U.S.C. § 4248.

[195] United States v. Comstock, 560 U.S. 126, 132 (2010); *see generally* Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation*, S. DOC. NO. 112-9 (discussing the Necessary and Proper Clause), https://constitution.congress.gov/browse/essay/artI-S8-C18-1/ALDE_00001242/.

The Court pointed out that the Necessary and Proper Clause has long been understood to empower Congress to enact legislation "rationally related to the implementation of a constitutionally enumerated power."[196] Moreover, be the chain clear and unbroken, the challenged statute need not necessarily be directly linked to a constitutionally enumerated power.[197] The *Comstock* "statute [18 U.S.C. § 4248] is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws [(to carry into effect its Commerce Clause power for instance)], to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others."[198]

The Court, however, warned that its conclusion depended on several factors specific to the case before it.[199] Acting on this suggestion, the Fifth Circuit, sitting en banc, concluded, erroneously according to the Supreme Court, that SORNA, as applied to Kebodeaux, rested beyond Congress's legislative reach.[200]

Kebodeaux had been convicted by a military court for having sexual relations with a consenting fifteen-year-old while he was a twenty-one-year-old airman. He was sentenced to six months and given a bad conduct discharge in 1999. He registered as a sex offender with Texas authorities in 2007. He was convicted for violating Section 2250 in 2008, when he failed to report that he had relocated from El Paso to San Antonio.[201]

The Constitution empowers Congress to make rules for the governing and regulation of the armed forces.[202] It also vests Congress with broad implementing authority to enact legislation necessary and proper to carry into effect this military governance power and the other powers conveyed by the Constitution.[203] The Fifth Circuit believed that, unlike the *Comstock* statute, the application of SORNA was insufficiently proximate to a federal custodial interest and was too sweeping in its conceptual foundation ("[t]hat reasoning opens the door . . . to congressional power over anyone who was ever convicted of a federal crime of any sort").[204]

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[196] *Id*. at 133-34 (citing, among others, McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316, 421 (1810); Gonzalez v. Raich, 545 U.S. 1, 22 (2005)).

[197] *Id*. at 148 ("[W]e must reject respondents' argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.").

[198] *Id.* at 149.

[199] *Id.* ("We take these five considerations together. They include (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws . . . . ").

[200] United States v. Kebodeaux, 687 F.3d 232, 253-54 (5th Cir. 2012), *rev'd*, 570 U.S. 387 (2013) (Congress lacks the legislative authority to require under SORNA "a former federal sex offender to register an intrastate change of address after he has served his sentence and has already been unconditionally released from prison and the military.").

[201] United States v. Kebodeaux, 647 F.3d 137, 138-39 (5th Cir. 2011), *vac'd for reh'g en banc*, 647 F.3d 605 (5th Cir. 2011), *rev'd*, 570 U.S. 387 (2013).

[202] U.S. CONST. art. I, § 8, cl. 14 ("The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."). Some of the analysis that follows was borrowed from a *Kebodeaux* CRS Legal Sidebar, CRS, *SORNA Clears Constitutional Hurdle*.

[203] U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[204] *Kebodeaux*, 687 F.3d at 244-45 ("In summary, even taking into account 'the breadth of the Necessary and Proper

Justice Breyer, the author of the Supreme Court's *Kebodeaux* majority opinion, provided a two-fold response.[205] First, by operation of SORNA's predecessor, the Wetterling Act, Kebodeaux's registration requirement arose proximate to his release from federal custody. "[A]s of the time of Kebodeaux's offense, conviction and release from federal custody, these Wetterling Act provisions applied to Kebodeaux and imposed upon him registration requirements very similar to those that SORNA later imposed."[206] Second, "[n]o one here claim[ed] that the Wetterling Act, as applied to military sex offenders like Kebodeaux, falls outside the scope of the Necessary and Property Clause. And it is difficult to see how anyone could persuasively do so."[207]

Perhaps the same might be said of federal sex offenses enacted under Congress's enumerated powers other than the military clauses. Yet Chief Justice Roberts in his *Kebodeaux* concurrence asserted that, "[t]he fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's purely intrastate conduct."[208] Nevertheless, a subsequent circuit court opinion concluded that Congress's authority under the Necessary and Proper Clause extends to a defendant convicted of a Commerce Clause-based federal offense who was never unconditionally released from federal supervision.[209] There, the U.S. Court of Appeals for the Tenth Circuit acknowledged the *Kebodeaux* concurring views of Chief Justice Roberts and Justice Alito, but observed that, "for our purposes, the majority opinion binds us, and its analysis does not confine SORNA's constitutionality to applications involving only the Military Regulation Clause. Nothing in the majority opinion isolates the Military Regulation Clause as the sole foundation of congressional authority in support of SORNA."[210]

Clause,' *Comstock*, 130 S. Ct. at 1965, SORNA's registration requirements and criminal penalty for failure to register as a sex offender, as applied to those, like Kebodeaux, who had already been unconditionally released from federal custody or supervision at the time Congress sought to regulate them, are not 'rationally related' or 'reasonably adapted' to Congress's power to criminalize federal sex offenses to begin with. The statute's regulation of an individual, after he has served his sentence and is no longer subject to federal custody or supervision, solely because he once committed a federal crime, (1) is novel and unprecedented despite over 200 years of federal criminal law, (2) is not 'reasonably adapted' to the government's custodial interest in its prisoners or its interest in punishing federal criminals, (3) is unprotective of states' sovereign interest over what intrastate conduct to criminalize within their own borders, and (4) is sweeping in the scope of its reasoning.").

[205] United States v. Kebodeaux, 570 U.S. 387 (2013).

[206] *Id*. at 393.

[207] *Id.* at 393-94. *See also* United States v. Coppock, 765 F.3d 921, 924-25 (8th Cir. 2014); United States v. Brunner, 726 F.3d 299, 303 (2d Cir. 2013).

[208] *Kebodeaux*, 570 U.S. at 400 (Roberts, Ch. J., concurring); Justice Alito also concurred only in the judgment, *id*. at 403 (Alito, J., concurring).

[209] United States v. Brune, 767 F.3d 1009, 1016-17 (10th Cir. 2014).

[210] *Id*. *See also* United States v. Thompson, 811 F.3d 717, 723 & n.9 (5th Cir. 2016) ("He claims that the Necessary and Proper Clause of the U.S. Constitution does not authorize Congress to criminalize his 'purely intrastate conduct'—namely, relocating from one city in Texas to another city in Texas without updating his sex offender registration. According to Thompson, Congress may only criminalize a sex offender's intrastate conduct if the defendant either (1) 'served in the armed forces' or (2) committed an offense on 'federal property.' Thompson does not fall into either of these categories. Thus, claims Thompson, the district court should have dismissed the indictment…. Thompson's constitutional challenge is meritless. The Courts of Appeals have repeatedly upheld SORNA's registration and penalty provisions under the Necessary and Proper Clause, even when the defendant neither served in the military, nor committed an offense or lived on federal property, nor moved within interstate or foreign commerce.") (collecting cases).

Separation of Powers: Non-Delegation

The first section of the first article of the Constitution declares that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[211] This language means that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'"[212] This non-delegation doctrine, however, does not prevent Congress from delegating the task of filling in the details of its legislative handiwork, as long as it provides "intelligent principles" to direct the effectuation of its legislative will."[213] In *Reynolds*, the Supreme Court read SORNA to "require[] the Attorney General to apply SORNA to all pre-Act offenders *as soon as feasible*."[214] The question later in *Gundy* was whether "Congress ma[de] an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible?"[215] For a majority of the Court, "under [the] Court's long-established law, that question is easy, its answer is no."[216] Similarly, the U.S. Court of Appeals for the Second Circuit concluded "that the Secretary [of Defense]'s discretion in designating certain military offenses as sex offenses under § 20911(5)(A)(iv) [of SORNA] has been clearly and intelligibly limited by Congress."[217]

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[211] U.S. CONST. art. I, § 1; *see generally* Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation*, S. DOC. NO. 112-9, https://constitution.congress.gov/browse/essay/artI-S1-1-1/ALDE_00000009/.

[212] Gundy v United States, 139 S. Ct. 2116, 2123 (2019) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825)); *see also* Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) ("Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested."); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

[213] *Gundy*, 139 S. Ct. at 2123 ("So we have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority is directed to conform.'" (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989))); *see also* Hampton & Co. v. United States, 276 U.S. 294, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [perform the delegated task] is directed to conform, such legislative action is not a forbidden delegation of legislative power."); *see also* Am. Power Co. v. SEC, 329 U.S. 90, 105 (1946) ("The legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474-75 (2001) ("The scope of discretion §109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'. . . . [W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'").

[214] Reynolds v. United States, 565 U.S. 432, 442-43 (2012) (emphasis added).

[215] *Gundy*, 139 S. Ct. at 2129.

[216] *Id*. Justice Kagan wrote the opinion for the Court joined by three colleagues; Justice Alito concurred in the judgment, *id*. at 2132 ("Because I cannot say that the statute lacks a discernible standard that is adequate under the approach this Court has taken for many years, I vote to affirm."); Justice Gorsuch, joined by the Chief Justice and Justice Thomas, dissented, *id*. at 2131. Justice Kavanaugh took no part, *id*. at 2116.

[217] United States v. Mingo, 964 F.3d 134, 138-39 (2d Cir. 2020) (rejecting nondelegation doctrine argument).

Attachments

18 U.S.C. § 2250 (text)

Failure to register

(a) In General.-Whoever-
(1) is required to register under the Sex Offender Registration and Notification Act;
(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
shall be fined under this title or imprisoned not more than 10 years, or both.

(b) International Travel Reporting Violations.-Whoever-
(1) is required to register under the Sex Offender Registration and Notification Act (42 U.S.C. §§16901 et seq.) [now 34 U.S.C. §§ 20901et sec.]; [1]
(2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and
(3) engages or attempts to engage in the intended travel in foreign commerce;
shall be fined under this title, imprisoned not more than 10 years, or both.

(c) Affirmative Defense.-In a prosecution for a violation under subsection (a) or (b), it is an affirmative defense that-
(1) uncontrollable circumstances prevented the individual from complying;
(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and
(3) the individual complied as soon as such circumstances ceased to exist.

(d) Crime of Violence.-
(1) In general.-An individual described in subsection (a) or (b) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.
(2) Additional punishment.-The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a) or (b).

Principal State SORNA Statutes (citations)

ALA. CODE §§ 15-20a-1 to 15-20a-48;

ALASKA STAT. §§ 12.63.101 to 12.63.100;

ARIZ. REV. STAT. ANN. §§ 13-3821 to 13-3829;

ARK. CODE ANN. §§ 12-12-901 to 12-12-930;

CAL. PENAL CODE §§ 290 to 290.94;

COLO. REV. STAT. ANN. §§ 16-22-101 to 16-22-115 (Millard v. Rankin, 265 F. Supp. 3d 1211 (D. Colo. 2017) (holding unconstitutional as applied));

CONN. GEN. STAT. ANN. §§ 54-250 to 54-261;

DEL. CODE ANN. tit. 11, §§ 4120 to 4123;

FLA. STAT. ANN. §§ 943.0435 to 943.0436;

GA. CODE ANN. §§ 42-1-12 to 42-1-19;

HAW. REV. STAT. §§ 846E-1 to 846E-10;

IDAHO CODE §§ 18-8301 to 18-8331;

730 ILL. COMP. LAWS ANN. §§ 150/1 to 150/12;

IND. CODE ANN. §§ 11-8-8-0.2 to 11-8-8-23;

IOWA CODE ANN. §§ 692a.101 to 692a.130;

KAN. STAT. ANN. § 22-4901 to 22-4913;

KY. REV. STAT. ANN. §§ 17.500 to 17.580;

LA. REV. STAT. ANN. §§ 15:540 to 15:553;

ME. REV. STAT. ANN. tit. 34-A, §§ 11201 to 11256;

MD. CODE ANN. CRIM. PRO. §§ 11-701 to 11-727;

MASS. GEN. LAWS ANN. ch. 6, §§ 178c to 178q;

MICH. COMP. LAWS ANN. §§ 28.721 to 28.735 (Doe #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016) (holding retroactive application unconstitutional));

MINN. STAT. ANN. §§ 243.166 to 243.167;

MISS. CODE ANN. §§ 45-33-21 to 45-33-63;

MO. ANN. STAT. §§ 589.400 to 589.425;

MONT. CODE ANN. §§ 46-23-501 to 46-23-520;

NEB. REV. STAT. §§ 29-4001 to 29-4014;

NEV. REV. STAT. §§ 179d.010 to 179d.850;

N.H. REV. STAT. ANN. § 651-B:1 to 651-B:12;

N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-23 (*In re* C.K. 233 N.J. 44, 182 A.3d 917 (N.J. 2020) (holding lifelong registration requirement for juveniles unconstitutional));

N.M. STAT. ANN. §§ 29-11a-1 to 29-211a-10;

N.Y. CORR. LAW §§ 168 to 168-W;

N.C. GEN. STAT. §§ 14-208.5 to 14-208.45;

N.D. CENT. CODE §§ 12.1-32-15;

OHIO REV. CODE ANN. §§ 2950.01 to 2950.99 (*In re* Bruce S., 983 N.E.2d 350 (Ohio 2012) (holding retroactive application unconstitutional));

OKLA. STAT. ANN. tit. 57 §§ 581 to 590.1;

OR. REV. STAT. §§ 163a.005 to 163a.235;

42 PA. STAT. ANN. 9799.10 to 9799.75 (Pennsylvania v. Wood, 208 A.3d 131 (Pa. Super. 2019) and T.S. v. Pa. State Police, 231 A.3d 103 (Pa. Commw. 2020) (holding retroactive application unconstitutional));

R.I. GEN. LAWS §§ 11-37.1-1 to 11-37.1-21;

S.C. CODE ANN. §§ 23-3-400 to 23-3-555;

S.D. COD. LAWS ANN. §§ 22-24b-1 to 22-24b-37;

TENN. CODE ANN. §§ 40-39-201 to 40-39-218 (Doe v. Lee, 518 F. Supp. 3d 1157 (M.D. Tenn.) (holding retroactive application unconstitutional);

TEX. CODE OF CRIM. PRO. arts. 62.001 to 62.408;

UTAH CODE ANN. §§ 77-41-101 to 77-41-113;

VT. STAT. ANN. tit. 13, §§ 5401 to 5416;

VA. CODE ANN. §§ 9.1-900 to 9.1-923

WASH. REV. CODE ANN. §§ 9A.44.128 to 9A.44.148;

W. VA. CODE §§ 15-12-1 to 15-12-10;

WIS. STAT. ANN. §§ 301.45 to 301.50;

WYO. STAT. §§ 7-19-301 to 7-19-310.

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