

APR 27 2010
CLERK OF SUPREME COURT

No. 09-940

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUVENILE MALE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

ELENA KAGAN
*Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

Blank Page

In the Supreme Court of the United States

No. 09-940

UNITED STATES OF AMERICA, PETITIONER

v.

JUVENILE MALE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

The Ninth Circuit partially invalidated the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, by holding unconstitutional the application of SORNA to juvenile federal sex offenders adjudicated delinquent before SORNA's enactment. The court of appeals' decision conflicts with *Smith v. Doe*, 538 U.S. 84 (2003), and undermines Congress's legitimate and compelling interest in protecting the safety of the community from sex offenders. Respondent argues that review is not warranted because the court of appeals' decision is a narrow constitutional holding that does not apply to post-SORNA convictions. But whenever an Act of Congress is invalidated on *ex post facto* grounds, the decision leaves open prospective applications. That is not a reason to leave unreviewed the Ninth Circuit's constitutional holding. Respondent's attempt to distinguish this Court's decision in *Smith*

echoes the court of appeals' opinion and falls short for the same reasons. The Court should grant the writ of certiorari or, for the reasons set forth in the petition, grant the petition, vacate the judgment, and remand for further proceedings on the issue of mootness.

A. Respondent Provides No Sound Basis To Deny Review Of The Partial Invalidation Of An Act Of Congress

Respondent argues (Br. in Opp. 10-12) that this Court should not review the decision below because the court of appeals did not declare SORNA unconstitutional on a ground, such as the Due Process Clause, that would have "impair[ed] the SORNA's prospective effect," *id.* at 12. But the retrospective consequences of the Ninth Circuit's decision itself merit review. The court of appeals' decision in *Smith* involved only an Ex Post Facto issue. See *Doe I v. Otte*, 259 F.3d 979, 982 (9th Cir. 2001) (declining to decide the due process question), rev'd *sub nom.* *Smith v. Doe*, 538 U.S. 84 (2003). And any decision declaring a law unconstitutional on ex post facto grounds could be minimized on the same basis. The court of appeals declared SORNA's registration provisions unconstitutional as applied to juvenile offenders adjudicated delinquent in the federal system before the law's enactment, and the decision casts a cloud over the constitutionality of SORNA's juvenile registration provisions as applied to juveniles adjudicated delinquent before that time in other jurisdictions. See Pet. 26-27. Congress specifically intended to expand sex offender registration to the most serious juvenile offenders, Pet. 27, and the court of appeals decision seriously undermines that intent.

Respondent also briefly defends the court of appeals' decision on its merits, arguing that this Court's decision

in *Smith* is distinguishable because “it involved an adult sex offender convicted in a public proceeding.” Br. in Opp. 10-11. Respondent, like the court of appeals, misreads *Smith* and ignores this Court’s other ex post facto precedents. Respondent never mentions the words “punishment” or “punitive,” even though that is the touchstone of any ex post facto violation. The Ex Post Facto Clause does not forbid the adoption of civil, regulatory measures with retroactive operation; it prohibits only passage of laws that retroactively impose criminal “punishment.” See *Smith*, 538 U.S. at 92; see also Pet. 15 (citing cases). The factual distinction that respondent draws between *Smith* and this case—*i.e.*, that *Smith* involved an adult sex offender convicted in a public proceeding whereas this case involves a juvenile offender adjudicated delinquent in a closed proceeding—does not transform an otherwise regulatory law into a form of criminal punishment. See Pet. 17-23.

Finally, respondent appears to suggest that if this Court grants the writ of certiorari, it would have to address “larger and more complex constitutional concern[s]” that the court of appeals was able to avoid. Br. in Opp. 12. Respondent does not suggest why these “larger” issues are relevant to the ex post facto question on which the government seeks certiorari. And he does not cross-petition on any ground. Accordingly, the only issue properly before the Court is the ex post facto question that the court of appeals decided—and on that discrete and significant issue, plenary review is warranted.

B. The Court May Wish To Remand For Further Consideration Of Mootness

The petition explained that a potential question of mootness could counsel in favor of granting the petition,

vacating the judgment, and remanding for further proceedings. Respondent argues (Br. in Opp. 5-9) that this case is not moot because he previously registered as a sex offender with the State of Montana, and because any failure on his part to remain registered could subject him to criminal prosecution under SORNA, 18 U.S.C. 2250(a).

That continuing obligation might have provided grounds for respondent to bring a pre-enforcement challenge to SORNA's registration requirement. But this Court has never held that a criminal defendant may maintain an appeal from a now-expired sentence as an alternative way of making such a pre-enforcement challenge. And respondent does not address the contours of Montana law, which may have a direct bearing on respondent's continuing registration obligations apart from the decision below. See Pet. 29-32 & n.10. In light of that uncertainty, the Court may wish to grant the petition, vacate the judgment, and remand for further proceedings.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted. In the alternative, the Court may wish to vacate the judgment below and remand the case for consideration of mootness.

Respectfully submitted.

ELENA KAGAN
Solicitor General

APRIL 2010