No. 08-1301

In the Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the Untied State Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

REPLY BRIEF FOR PETITIONER

The government evidently recognizes that the issues presented in this case warrant review. On the statutory question, it acknowledges a conflict in the courts of appeals. It has nothing to say about the dozens of district court decisions across the Nation that reflect pervasive confusion on the statutory and constitutional questions—at least 20 of which have held that SORNA either does not apply to, or cannot constitutionally be applied to, persons who traveled in interstate commerce only before the statute's effective date. It does not deny that it continues to prosecute such cases aggressively. And it makes no response to our demonstration that the issues presented here are recurring ones of enormous practical importance.

In nevertheless opposing review on the statutory question presented, the government rests almost exclusively on a single proposition: that the issue was not adequately presented below. But this argument is insubstantial. The court of appeals expressly decided the question, in the course of resolving petitioner's case. In these circumstances, the government offers no reason for the Court to delay consideration of an issue that urgently needs definitive resolution.

A. The Court Has The Authority To Decide Both Issues Presented In This Case, And Prudential Considerations Strongly Support Review

At the outset, the government very notably does not deny the Court's *authority* to decide the statutory issue presented. Nor could it: The Court may properly consider a question so long as it was "pressed *or* passed on by the courts below." *United States* v. *Wil-*

liams, 504 U.S. 36, 43 (1992) (quoting *Springfield* v. *Kibbe*, 480 U.S. 257, 266 (1987) (O'Connor, J., dissenting)). That being so, there is no prudential reason for the Court to delay consideration of the statutory issue presented—and compelling reasons for the Court to address the issue now.

First, whether or not petitioner pressed the statutory question below,[1] it is settled that any issue passed upon in the court of appeals is subject to this Court's "broad discretion over the questions it chooses to take on certiorari." *Verizon Commc'ns* v. *FCC*, 535 U.S. 467, 530 (2002) (holding that issue raised *sua sponte* by court of appeals was properly before this Court); see also, *e.g.*, *United States* v. *United Foods*, 533 U.S. 405, 416 (2001) (explaining this Court may consider any issue "addressed by the court whose judgment [is] being reviewed"); *Va. Bankshares* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented[.]"). In nevertheless opposing review, the government observes that the statutory issue was directly pressed by a defendant in a consolidated case rather than by petitioner. But the government does not offer any reason *why* this consideration should make any difference and

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[1] In fact, petitioner's brief to the Seventh Circuit emphasized that other courts had refused to apply SORNA retroactively because "Congress has used the word 'travels' as opposed to 'traveled,'" Pet. C.A. Br. at 17—the core of the statutory interpretation issue. Moreover, in addressing petitioner's Ex Post Facto argument, any court inclined to invalidate the statute on constitutional grounds would have been required to consider whether SORNA admits of a saving construction under the rule of constitutional avoidance.

points to no authority in which this Court has suggested that it will decline to grant review in such circumstances.[2]

Second, there is no reason for the Court to delay review. Ordinarily, of course, the Court avoids consideration of issues not presented or addressed below to ensure "the adequate development of the record" and "protect[] the Court from deciding questions that could have been resolved by the lower courts." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *United States Philips Corp.*, 510 U.S. 27, 38 n.8 (1993) (Stevens, J., dissenting). But here, the issue *was* presented to, fully considered, and expressly resolved by the Seventh Circuit at the time that it decided petitioner's case. It is manifest that nothing would have been added, and the outcome would have been exactly the same, had it been petitioner rather than the consolidated defendant that fully briefed and argued the issue. Indeed, during oral argument before the Seventh Circuit petitioner's counsel explicitly told the court that, in material part, the facts of petitioner's case were identical to those of the consolidated defendant's, whose case was argued immediately before to the same panel.[3] The government thus is unable to point to any factual or legal aspect of petitioner's

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[2] Pointing to *Williams*, 504 U.S. at 43, the Government suggests that the Seventh Circuit did not decide the statutory issue "in the present case." But there is no doubt that the issue was "addressed by the court whose judgment [is] being reviewed." *United Foods*, 533 U.S. at 416.

[3] No transcript of the argument before the court of appeals was made. An audio recording of the argument is available at http://www.ca7.uscourts.gov (last visited Aug. 18, 2009). The relevant discussion may be found in the first minute of the recording and at 5 minutes 45 seconds into the recording.

case that would have made any difference to the Seventh Circuit's decision had the case been presented differently, and there is no doubt that, had the Seventh Circuit ruled in favor of the consolidated defendant on the statutory issue, it would have reversed petitioner's conviction as well.

Third, prudential considerations point strongly and decisively *in favor* of immediate review. As the dozens of conflicting lower court decisions graphically illustrate, there is pervasive confusion in the courts on this issue. Pet. 12 n. 6 & 14 n.7. Because the government continues aggressive prosecutions under SORNA of persons who traveled before the statute's enactment, continued litigation of the issue across the country will guarantee an enormous waste of judicial and litigants' resources. It also would ensure that many persons will be prosecuted and convicted for conduct that (if we are correct in our reading of SORNA) is not criminal at all. And that is especially so because, even as the government urges the Court to wait for a different case to address the questions presented, it is doing all it can to prevent definitive resolution of those questions by strategically declining to appeal or withdrawing its appeal whenever it loses in district court—a strategy it does not deny but makes no attempt to explain.[4] Further review therefore is in order.

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[4] The Government notes that the pending petition in *Akers* v. *United States*, No. 08-10318 (May 4, 2009), presents the same questions regarding SORNA's retroactive application. U.S. Br. 9 n.4. As it does here, it opposes the statutory question presented in that petition on procedural grounds.

B. The Conflict And Confusion In The Lower Courts On Both Issues Presented Warrants Review

On the substance of the petition, the government makes no serious argument that the statutory question does not warrant review. It acknowledges the conflict between the Seventh and Tenth Circuits. U.S. Br. 16-17. Although it discounts the Eighth Circuit's agreement with the Tenth as dicta (U.S. Br. 17 n.6), it does not deny that *it* has informed the Eighth Circuit that "[t]he government concedes that pre-SORNA interstate travel cannot violate SORNA'" and that the Eighth Circuit accepted that concession as binding. *United States* v. *Hulen*, Nos. 08-2265 & 08-2379, 2009 WL 174951, at *1 (8th Cir. Jan. 27, 2009). And while the government doubtless is correct that isolated disagreements between district courts ordinarily do not warrant review by this Court, the extent of the conflict in the lower courts on the statutory issue presented here is extraordinary in its volume and scope: There have been no fewer than thirty district court decisions on these issues, with at least seventeen holding against the government. The government's blithe dismissal of such litigation as immaterial would be incorrect in any circumstance, and is especially so when the government itself has made extraordinary efforts to forestall resolution of the issue at the appellate level by declining to challenge adverse decisions on appeal.

The same is true of the constitutional issue presented in the petition. Here again, there have been almost two dozen lower court decisions, with at least seven holding SORNA unconstitutional as applied to pre-enactment travel. And here, too, the government has suppressed development of the law at the appel-

late level by declining to appeal or withdrawing appeal whenever it has lost. As a consequence, dozens of prosecutions have been pressed, and many more will be, in circumstances that (if we are correct on the merits) violate the Constitution.[5]

Moreover, the government does not deny that the issues presented here are ones of enormous practical importance. As we explained in the petition, the legal rules at stake likely affect the obligations of many thousands of persons. Notwithstanding its understandable reluctance to test its theories before appellate courts, the government continues to prosecute these cases with significant frequency. The result, as we showed in the petition, has been confusion, the waste of resources, and unacceptably inconsistent outcomes for identically situated persons. The government makes no response to these points. The questions presented call for review.

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[5] Since the petition was filed in this case, litigation on the constitutional issue has proceeded apace. Several district courts have upheld the constitutionality of SORNA where the defendant's *post-enactment* interstate travel was recited as a dispositive fact precluding an Ex Post Facto challenge. *United States* v. *Johnson*, No. 3:09-cr-8, 2009 WL 2144132, at *4 (S.D. Miss. July 15, 2009); *United States* v. *Harris*, No. 1:08-cr-211, 2009 WL 1549288, at *5 (M.D. Ala. May 29, 2009); *United States* v. *Talada*, No. 5:08-cr-00269, 2009 WL 1587178, at *7 (S.D. W. Va. June 5, 2009). Similarly, the court in *United States* v. *Burkey* rejected a constitutional challenge in substantial part because it understood that § 2250(a) "*only* punishes convicted sex offenders who travel in interstate commerce after the enactment of SORNA and who fail to register or update registration." No. 2:08-cr-00145, 2009 WL 1616564, at *22 (D. Nev. June 8, 2009) (emphasis added). One additional court of appeals also has rejected an Ex Post Facto issue. *United States* v. *Gould*, 568 F.3d 459 (4th Cir. 2009).

C. The Government's Defense Of The Merits Of The Seventh Circuit's Holding Is Incorrect

Rather than offer any reason to believe that the case does not warrant the Court's consideration, the government devotes much of its opposition to a defense of the merits of the Seventh Circuit's decision. On this point, for present purposes it should be enough to observe that the government's position is, to say the least, highly debatable: Its reading of the statute has been rejected by several courts of appeals and well more than a dozen district courts, while more than half a dozen other district courts have held SORNA prosecutions unconstitutional as applied to pre-Act travel. In such circumstances, this Court should decide who is right.

There are plain weaknesses in the government's position on the merits. Concerning the meaning of SORNA, perhaps the most notable of these is the government's disregard for the statutory language. Like the Seventh Circuit, the government maintains that courts should overlook Congress's choice of verb tense in SORNA. U.S. Br. 13. But this Court has often explained that Congress's choice of verb tense determines the meaning of statutory language. See, *e.g.*, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003) ("We think the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed."); *Bragdon* v. *Abbott*, 524 U.S. 624, 661 (1998) ("[T]he ADA's definition of a disability is met only if the alleged impairment substantially 'limits' (present tense) a major life activity.").

In arguing to the contrary, the government, somewhat bafflingly, cites 1 U.S.C. § 1, which pro-

vides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise * * * words used in the present tense include the *future* as well as the present" (emphasis added). But a presumption that the present tense includes the *future* tense does not support the idea that the present tense also includes the *past* tense. Indeed, both the Ex Post Facto Clause and the presumption against retroactivity strongly suggest just the opposite in the context of criminal-law statutes.[6]

As for the Ex Post Facto issue, the Government is correct that the Seventh Circuit concluded that petitioner's conduct was not yet complete when the statute became applicable to him. Pet. App. 13a. But both the government and the court fail to explain how that is so unless failure to register is a continuing offense. In the companion *Dixon* case, the court of appeals concluded that the other defendant's conviction violated the Ex Post Facto Clause because there was no evidence specially showing that the other defendant failed to register other than on February 28, 2007, when the law became applicable to him. Pet. App. 10a. The court of appeals distinguished petitioner's case because petitioner admitted having not registered by July 2007. Pet. App. 12a. But both petitioner and the other defendant "completed" the act of

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[6] The government insists that our reading of the statute leads to inconsistent treatment of persons living in "Indian country" and those who have traveled in interstate commerce. U.S. Br. 14. But even if that were so, in the context of a statute allocating a number of law-enforcement responsibilities between state and federal authorities, Congress could well have envisioned different treatment for persons living under federal jurisdiction on the one hand, and those who simply have traveled in interstate commerce on the other.

failing to register on the day that the law became applicable to them. Unless petitioner's offense "continued" until July 2007, the two cases are indistinguishable. Because petitioner's failure to register (whether under SORNA or the predecessor Wetterling Act) is not a continuing offense under this Court's precedents (see Pet. 29-32), petitioner's conviction under SORNA violated the Ex Post Facto Clause. See, *e.g.*, *United States* v. *Mantia*, 2007 WL 4730120, at *5 (W.D. La. Dec. 10, 2007) ("Section 2250 cannot be constitutionally applied here because neither the travel nor the failure to register were crimes covered by § 2250 when [the defendant] traveled to Louisiana and failed to register" and rejecting the "government['s] * * * argu[ment] that § 2250 proscribes a 'continuing offense'").[7]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] The government's contention that this "is a statutory argument, not a constitutional one," and therefore not properly before the Court (U.S. Br. 19), is silly; under its theory, SORNA is saved from unconstitutionality by the nature of the statute.

Respectfully submitted.

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