No.

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 United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The President signed the Sex Offender Registration and Notification Act ("SORNA") into law on July 27, 2006. Pub. L. 109-248 §§ 101-55, 120 Stat. 587. SORNA requires persons who are convicted of certain offenses to register with state and federal databases. See 42 U.S.C. § 16913(a). The law imposes criminal penalties of up to ten years of imprisonment on anyone who "is required to register * * * travels in interstate or foreign commerce * * * and knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). On February 28, 2007, the Attorney General retroactively applied SORNA's registration requirements to persons who were convicted before July 27, 2006. 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3. The two questions presented are:

1. Whether a person may be criminally prosecuted under § 2250(a) for failure to register when the defendant's underlying offense and travel in interstate commerce both predated SORNA's enactment.

2. Whether the Ex Post Facto Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce both predated SORNA's enactment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Carr respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 551 F.3d 578. The district court's order (App., *infra*, 14a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2008. On March 12, 2009, Justice Stevens extended the time for filing a petition for a writ of certiorari to April 22, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Art. I, § 9 provides in relevant part:

> No bill of attainder or ex post facto law shall be passed.

Section 113 of the Sex Offender Registration and Notification Act ("SORNA"), part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248 §§ 101-55, 120 Stat. 587, codified at 42 U.S.C. § 16913, provides in relevant part:

> (a) A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides * * * .
>
> * * * * *

> (d) The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act * * *.

SORNA's criminal provision, codified at 18 U.S.C. § 2250(a), provides in relevant part:

> Whoever (1) is required to register under [SORNA]; (2) * * * (B) travels in interstate or foreign commerce * * * and (3) knowingly fails to register or update a registration as required by [SORNA]; shall be fined under this title or imprisoned not more than 10 years, or both.

The Attorney General's regulation, 28 C.F.R. § 72.3, provides in relevant part:

> The requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

STATEMENT

The Sex Offender Registration and Notification Act ("SORNA"), Pub. L. 109-248 §§ 101-55, 120 Stat. 587, makes it a crime for a person who is required to register as a sex offender to travel in interstate commerce and then knowingly fail to update his or her registration. 18 U.S.C. § 2250(a). Although national standards for registration of such persons have been in place since enactment of the 1994 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), Pub L. 103-322, 108 Stat. 1796, the enactment of SORNA in 2006 drastically increased the penalties associated with failure to register. In the decision be-

low, the Seventh Circuit held that SORNA's enhanced penalties may be imposed retroactively upon a person who both committed the underlying offense and traveled in interstate commerce prior to enactment of the statute.

That holding contributes to extraordinary confusion in the lower courts on whether SORNA was meant to apply to registration-triggering conduct that took place prior to its enactment and, if so, whether the retroactive application of the statute violates the Ex Post Facto Clause. The Seventh Circuit's decision creates an acknowledged conflict in the circuits on the first of these questions, departing from the contrary rulings of three other courts of appeals and at least 17 district courts—none of which has been appealed by the government. And the ruling below that retroactive application of SORNA to persons who traveled in interstate commerce prior to enactment of the statute is constitutional conflicts with the holdings of more than a dozen district courts—again, none of which has been appealed by the government. Because the questions here are ones of tremendous practical importance (potentially affecting untold thousands of people), have led to extensive litigation and uncertainty in the lower courts, and were answered incorrectly by the Seventh Circuit, review by this Court is warranted.

A. Statutory and Regulatory Background

In 1994, Congress passed the Wetterling Act. Under that statute, as amended, "[a] person who has been convicted of an offense which requires registration * * * and who moves to another State, shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State

of residence." 42 U.S.C. § 14071(b)(5). The maximum penalty for an offender's first conviction for failure to abide by this requirement was a one-year term of imprisonment. *Id.* § 14072(i)(4).

Congress amended the Wetterling Act several times but eventually decided that "the patchwork of standards that had resulted from piecemeal amendments should be replaced with a comprehensive new set of standards * * * that would close potential gaps and loopholes under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs." U.S. Dept. of Justice, National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,045 (July 2, 2008). In 2006, Congress accordingly passed SORNA, which the President signed into law on July 27, 2006. The statute created a new, national sex offender registry to supplement the one created by the Wetterling Act, but it has not yet completely supplanted the older law. Under SORNA's provision repealing the Wetterling Act, the earlier Act remains in effect until at least July 27, 2009, depending on the rate at which the States implement SORNA. See *infra* note 9.

SORNA requires all persons convicted of sex offenses to register and maintain their registration status wherever they live, work, or attend school. 42 U.S.C. § 16913(a). On its face, SORNA requires only that newly convicted persons register. See *id.* § 16913(b). On February 28, 2007, however, the Attorney General exercised his authority under 42 U.S.C. § 16913(b) to issue a regulation expanding SORNA's reach. The regulation provides that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for

which registration is required prior to the enactment of that Act." Office of the Attorney General, Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3.

While SORNA's registration requirements apply to all persons convicted of certain offenses, the statute strictly limits the circumstances under which persons convicted of *state-law* offenses may be criminally convicted for failure to register under federal law. Any person may be prosecuted for failing to register if he or she was convicted under federal law, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States. 18 U.S.C. § 2250(a)(2)(A). But a person who was initially convicted under state law may be prosecuted under § 2250(a) only if he or she "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." § 2250(a)(2)(B).

B. Procedural Background

1. On May 18, 2004, petitioner pled guilty to first-degree sexual abuse in the Circuit Court of Walker County, Alabama. See App., *infra*, 15a. He was sentenced to serve two years in prison and thirteen years' probation, but received credit for time served and was released from prison on July 6, 2004. He was also required to register as a sex offender, and he complied with Alabama's registration requirement upon his release. See *ibid.*

Sometime in 2004 or 2005, petitioner relocated from Alabama to Fort Wayne, Indiana. App., *infra*, 15a. He was arrested there on unrelated charges on July 9, 2007. As of that date, he had not complied in Indiana with SORNA's registration requirements, to

which he was subject pursuant to the Attorney General's regulation issued on February 28, 2007. *Ibid.*

2. On August 27, 2007, petitioner was indicted in the United States District Court for the Northern District of Indiana for violation of SORNA's registration requirement. App., *infra*, 3a, 12a. He moved to dismiss his indictment on the ground that his travel in interstate commerce predated the enactment of the statute. *Id.* at 14a. The district court denied the motion. *Id.* at 18a. Petitioner thereafter entered a conditional guilty plea and was eventually sentenced to serve a 37-month prison sentence.

The Seventh Circuit consolidated petitioner's case with an appeal from a similarly situated defendant and affirmed Carr's conviction. App., *infra*, 1a-12a. Regarding the meaning of SORNA, the court of appeals held that "the statute does not require that the defendant's travel postdate the Act, any more than it requires that the conviction of the sex offense that triggers the registration requirement postdate it." *Id.* at 3a-4a. The court reasoned that Congress intended the interstate travel element "to establish a constitutional predicate for the statute * * * rather than to create a temporal requirement." *Id.* at 5a.[1]

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[1] Although the decision below suggests that "the only ground of [petitioner's] appeal is that his conviction violates the ex post facto clause," App., *infra*, 12a, petitioner also pressed the antecedent statutory interpretation issue in the proceedings below, citing numerous district court decisions that avoid the ex post facto issue by resolving the statutory question in defendants' favor. See Pet. Br. to 7th Cir. at 16-17 (June 23, 2008). In any event, even if petitioner had not advanced the statutory issue below, this Court's practice "permits[s] review of an issue not pressed so long as it has been passed upon," *United States* v.

The court of appeals also held that applying SORNA to defendants who were convicted and traveled in interstate commerce before the statute was enacted does not violate the Ex Post Facto Clause so long as the defendant is given a "reasonable time" in which to register. App., *infra*, 9a. In the court's view, SORNA "creates a continuing offense in the sense of an offense that can be committed over a length of time," meaning that "the violation continues until [the defendant] does register." *Id.* at 2a-3a. The court affirmed petitioner's conviction under this standard because he was indicted for failing to register by July 2007, providing "a sufficient grace period" to allow him to register after promulgation of the Attorney General's regulation on February 28, 2007. *Id.* at 11a. The court reversed the other appellant's conviction on the ground that his indictment did not give him sufficient notice to allow him to register. *Id.* at 9a-11a.

The Seventh Circuit acknowledged that its construction of SORNA "creates an intercircuit conflict" with the Tenth Circuit. App., *infra*, 6a. *United States* v. *Husted* also involved a defendant prosecuted under SORNA, who had last traveled in interstate commerce prior to SORNA's enactment. 545 F.3d 1240, 1241-1242 (10th Cir. 2008). The Tenth Circuit held that, "[b]ased on SORNA's plain language, * * * § 2250(a)(2)(B) does not apply to an individual whose interstate travel is complete before July 27, 2006." *Id.* at 1243. But the Seventh Circuit reasoned that the Tenth Circuit's reading of SORNA "makes no

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Williams, 504 U.S. 36, 41 (1992)—as the SORNA construction question certainly was.

sense" and it "therefore disagree[d] with the Tenth Circuit's interpretation." App., *infra*, 5a-6a.

REASONS FOR GRANTING THE PETITION

Both the statutory and the constitutional aspects of the holding below warrant this Court's attention. The Seventh Circuit acknowledged that its reading of SORNA differs from that of the Tenth Circuit, and that conflict in the courts of appeals has grown since the decision below was issued. In addition, at least two dozen district courts have held that SORNA either does not apply retroactively or cannot constitutionally be applied to persons whose interstate travel predated the statute's enactment. As a consequence, identical conduct is resulting in wildly divergent treatment of criminal defendants depending upon the circuit or district in which they reside. Particularly because the holding below cannot be squared either with the language and purpose of SORNA or with this Court's precedents, further review is in order.

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A PERSON MAY BE PROSECUTED UNDER SECTION 2250(a) FOR FAILURE TO REGISTER WHEN THE UNDERLYING OFFENSE AND TRAVEL IN INTERSTATE COMMERCE PREDATED SORNA'S ENACTMENT.

The Court should settle whether Congress meant SORNA to apply retroactively to persons whose underlying offense and interstate travel both predated enactment of the statute. The Seventh Circuit's holding on this point conflicts with decisions of other courts of appeals (as the court below acknowledged) and of numerous district courts. And that holding is

wrong: It departs from the plain statutory text; misstates the congressional purpose; and disregards the presumptions against retroactivity, and in favor of lenity and the avoidance of constitutional questions, that have been consistently applied by this Court. Review of the decision below accordingly is warranted.

A. The Seventh Circuit's Construction Of Section 2250(a) Squarely Conflicts With Decisions Of Other Courts Of Appeals.

At the outset, there is a clear conflict in the circuits and pervasive confusion in the district courts on whether SORNA applies to persons whose travel in interstate commerce took place prior to passage of the statute. The Seventh Circuit, of course, held in this case that it does, and the Eleventh Circuit arguably agrees.[2]

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[2] In *United States* v. *Dumont*, 555 F.3d 1288 (11th Cir. 2009), the Eleventh Circuit addressed the case of a defendant who had traveled in interstate commerce after SORNA's enactment but prior to issuance of the Attorney General's rule. *Id.* at 1290. The court held that the defendant was not required to register under SORNA until the Attorney General issued the rule. *Id.* at 1291. But the court also held that the "travels" element of § 2250 is simply a jurisdictional hook, and therefore could be applied retroactively. *Ibid.* Thus, the defendant could be prosecuted under SORNA even though his travel occurred before the Act was applicable to him. This same logic would apply to an individual who traveled prior to enactment of the statute, making the Eleventh Circuit's approach consistent with the Seventh Circuit's decision below. The Eleventh Circuit recently affirmed the *Dumont* rule in dicta in *United States* v. *Ambert*, No. 08-13139, 2009 WL 564677, at *3 (11th Cir. Mar. 6, 2009). But see *United States* v. *Chatterson*, No. 2:08-cr-144, 2009 WL 804617 (M.D. Fla. Mar. 26, 2009) (finding that Eleventh Circuit has reserved this issue).

The Tenth and Eighth Circuits, in contrast, both relied on the plain meaning of the statutory language to hold that § 2250(a)(2)(B) applies only to travel completed after the enactment of SORNA. In *Husted*, the Tenth Circuit reversed the conviction of an individual who moved from Oklahoma to Missouri, and failed to register in Missouri, prior to enactment.[3] 545 F.3d at 1241-1242. The court held that, "[b]ased on SORNA's plain language, * * * § 2250(a)(2)(B) does not apply to an individual whose interstate travel is complete before July 27, 2006." *Id.* at 1243. The court relied on Congress's use of the present tense "travels" where it could just as easily have used the past tense ("traveled") or present perfect tense ("has traveled"). *Id.* at 1243-1244. The Tenth Circuit buttressed its statutory interpretation with the presumption against retroactivity, noting that Congress had not clearly stated its intention to apply SORNA to conduct predating its enactment. *Id.* at 1246-1247.

In reaching this conclusion, the Tenth Circuit rejected the government's request that it apply the "absurdity doctrine" to ignore the statute's plain language, finding that Congress's decision to apply the criminal penalties of § 2250 only to sex offenders who travel in interstate commerce after SORNA's enactment does not "shock[] the general moral or common sense." *Husted*, 545 F.3d at 1244-1245. To the contrary, the court opined that Congress had good reason to apply § 2250(a)(2)(B) prospectively only, as "prospective legislation is typical of the legislative

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[3] While the exact date of Husted's move was unclear from the record, there was no dispute that it occurred prior to SORNA's enactment. *Husted*, 545 F.3d at 1242.

task, and Congress may well have wished to avoid the very ex post facto concerns Husted raises before this court." *Id.* at 1245.

The Eighth Circuit reached the same conclusion in *United States* v. *May*, 535 F.3d 912 (8th Cir. 2008). Although it there upheld the conviction of a defendant who traveled in interstate commerce in the "gap" period between the enactment of SORNA and the issuance of the Attorney General's regulation applying the Act to offenders convicted prior to SORNA's enactment, the court stated that "[t]he only punishment that can arise under SORNA comes from a violation of § 2250, which punishes convicted sex offenders *who travel in interstate commerce after the enactment of SORNA* * * *." *Id.* at 920 (emphasis added). The government has since conceded, and the Eighth Circuit has agreed, that *May*'s dicta is the law of the Eighth Circuit, putting that court squarely in conflict with the Seventh Circuit's decision below. *United States* v. *Hulen*, Nos. 08-2265 & 08-2379, 2009 WL 174951, at *1 (8th Cir. Jan. 27, 2009) (referring to *May* as deciding the question in the Eighth Circuit, and stating that "[t]he government concedes that 'pre-SORNA interstate travel cannot violate SORNA' and that it did not have evidence that either defendant had traveled interstate after the effective date of the statute").[4]

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[4] The Fourth Circuit also came to a conclusion that necessarily conflicts with the Seventh Circuit's opinion below. In *United States* v. *Hatcher*, Nos. 07-4839, 07-5070, 07-4845 & 07-5008, 2009 WL 638964 (4th Cir. Mar. 13, 2009), appellants' underlying offenses and interstate travel both occurred prior to February 28, 2007—the date that the Attorney General adopted the interim rule—and they were indicted after that date. 2009 WL 638964, at *1. The court held that, "as a matter of statutory in-

In addition, there has been an extraordinary volume of litigation on this question in the district courts, leading to a nationwide division of authority.[5] At least 17 district court decisions have concluded that SORNA does not apply to pre-enactment travel,[6]

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terpretation, SORNA's registration requirements did not apply to the Appellants at the time they committed the acts giving rise to their indictments." *Ibid.* Although the Fourth Circuit based its opinion on an interpretation of 42 U.S.C. § 16913(d) rather than § 2250, its ultimate conclusion is that SORNA's criminal penalties do not apply to an individual in petitioner's position. Thus, the Fourth Circuit's holding necessarily conflicts with the decision below.

[5] The numbers in text are based on an April 15, 2009, Westlaw search of the term "SORNA" in the "District Court Cases" database. Cases not appearing in the Westlaw database on this date are not included in the total count and not listed here. Thus, these numbers undoubtedly represent only a subset of all relevant cases.

[6] *United States* v. *Chatterson*, No. 2:08-cr-144-FtM-99DNF, 2009 WL 804617 (M.D. Fla. Mar. 26, 2009); *United States* v. *Hardy*, No. 07-mj-108-FHM, 2008 WL 5070945 (N.D. Okla. Nov. 21, 2008) (granting motion to reconsider in light of *Husted*); *United States* v. *Slater*, No. MO-08-CR-131, 2008 WL 4368581 (W.D. Tex. Sept. 16, 2008) (dicta); *United States* v. *Young*, 582 F. Supp. 2d 846 (W.D. Tex. 2008) (dicta); *United States* v. *Natividad-Garcia*, 560 F. Supp. 2d 561 (W.D. Tex. 2008); *United States* v. *Gillette*, 553 F. Supp. 2d 524 (D.V.I. 2008); *United States* v. *Kent*, No. 07-00226-CG, 2008 WL 360624 (S.D. Ala. Feb. 8, 2008), called into question by *Dumont*; *United States* v. *Howell*, No. CR07-2013-MWB, 2008 WL 313200 (N.D. Iowa Feb. 1, 2008); *United States* v. *Terwilliger*, No. 07CR1254 BTM, 2008 WL 50075 (S.D. Cal. Jan. 3, 2008); *United States* v. *Bonner*, No. 07-00264-KD, 2007 WL 4372887 (S.D. Ala. Dec. 11, 2007), called into question by *Dumont*; *United States* v. *Mantia*, No. 07-60041, 2007 WL 4730120 (W.D. La. Dec. 10, 2007); *United States* v. *Rich*, No. 07-00274-01-CR-W-HFS, 2007 WL 4292394 (W.D. Mo. Dec. 5, 2007); *United States* v. *Wilson*, No. 2:06-cr-867 TC, 2007 WL 3046290 (D. Utah Oct. 16, 2007); *United States* v. *Deese*, No. CR-07-167-L, 2007 WL 2778362 (W.D.

Okla. Sept. 21, 2007); *United States* v. *Sallee*, No. CR-07-152-L, 2007 WL 3283739 (W.D. Okla. Aug. 13, 2007); *United States* v. *Bobby Smith*, 481 F. Supp. 2d 846 (E.D. Mich. 2007). In addition, at least seven district courts have found that retroactive application of SORNA would violate the Ex Post Facto Clause. See cases cited *infra* note 12.

The district courts are equally confused about SORNA's applicability to travel in the period between the statute's enactment and the Attorney General's promulgation of the interim rule ("gap" travel). The list of cases above includes cases where the defendant travelled in the "gap" period, as any court that finds that SORNA does not apply to "gap" travel would necessarily come to the same conclusion regarding pre-enactment travel. In fact, the language of such holdings almost always encompasses both "gap" and pre-enactment travel. See, *e.g.*, *Natividad-Garcia*, 560 F. Supp. 2d at 570 ("[U]se of the present tense 'travels' shows that Congress did not intend for sex offenders to be prosecuted based on travel done before SORNA was made retroactive."); *Mantia*, 2007 WL 4730120, at *5 ("Clearly, Congress, in enacting § 2250, used the present tense 'travels' rather than the past-tense 'traveled' or past-participle 'has traveled.'").

On the other hand, at least 20 district court decisions have held that the Act does apply to "gap" travel. See *United States* v. *Stevens*, 578 F. Supp. 2d 172 (D. Me. 2008); *United States* v. *Elmers*, No. 08-20033-01-KHV, 2008 WL 4369310 (D. Kan. Sept. 23, 2008); *United States* v. *Fuller*, No. 5:07-CR-462 (FJS), 2008 WL 4240485 (N.D.N.Y. Sept. 12, 2008); *United States* v. *Gagnon*, 574 F. Supp. 2d 172 (D. Me. 2008); *United States* v. *Zuniga*, No. 4:07CR3156, 2008 WL 2184118 (D. Neb. May 23, 2008); *United States* v. *Cardenas*, No. 07-80108-CR, 2008 WL 896206 (S.D. Fla. Mar. 31, 2008); *United States* v. *Samuels*, 543 F. Supp. 2d 669 (E.D. Ky. 2008); *United States* v. *LeTourneau*, 534 F. Supp. 2d 718 (S.D. Tex. 2008); *United States* v. *Elliott*, No. 07-14059-CR, 2007 WL 4365599 (S.D. Fla. Dec. 13, 2007); *United States* v. *Gould*, 526 F. Supp. 2d 538 (D. Md. 2007); *United States* v. *Ambert*, No. 4:07-CR-053-SPM, 2007 WL 2949476 (N.D. Fla. Oct. 10, 2007); *United States* v. *Beasley*, No. 1:07-CR-115-TCB, 2007 WL 3489999 (N.D. Ga. Oct. 10, 2007); *United States* v. *May*, Nos. 4:07-cr-00164-JEG, 1:07-cr-00059-JEG, 2007 WL 2790388 (S.D. Iowa Sept. 24, 2007); *United*

while 13 district court decisions have concluded that it does (although some were overruled in light of *Hulen*).[7] It is worth noting that the government ei-

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States v. *Mitchell*, No. 07CR20012, 2007 WL 2609784 (W.D. Ark. Sept. 6, 2007); *United States* v. *Sawn*, No. 6:07cr00020, 2007 WL 2344980 (W.D. Va. Aug. 15, 2007); *United States* v. *Gonzales*, No. 5:07cr27-RS, 2007 WL 2298004 (N.D. Fla. Aug. 9, 2007); *United States* v. *Marcantonio*, No. 07-60011, 2007 WL 2230773 (W.D. Ark. July 31, 2007); *United States* v. *Roberts*, No. 6:07-CR-70031, 2007 WL 2155750 (W.D. Va. July 27, 2007); *United States* v. *Mason*, 510 F. Supp. 2d 923 (M.D. Fla. 2007); *United States* v. *Hinen*, 487 F. Supp. 2d 747 (W.D. Va. 2007). It is often unclear whether a court applying SORNA to "gap" travel would come to the same conclusion with regard to pre-enactment travel. See, *e.g.*, *Elmers*, 2008 WL 4369310 at *5 (holding that "any travel in interstate commerce after the effective date of SORNA (July 26, 2006) is covered by the express language of Section 2250," which suggests that this court would have held that SORNA *does not* apply to pre-enactment travel).

Finally, the courts of appeals also disagree about SORNA's applicability to "gap" travel. The Sixth, Eighth, Tenth, and Eleventh Circuits have held that SORNA applies to travel in the "gap" period, while the Fourth Circuit has reached the opposite conclusion. Compare *United States* v. *Samuels*, No. 08-5537, 2009 WL 877698 (6th Cir. Apr. 2, 2009); *Dumont*, 555 F.3d 1288 (11th Cir. 2009); *United States* v. *May*, 535 F.3d 912 (8th Cir. 2008); *United States* v. *Lawrance*, 548 F.3d 1329 (10th Cir. 2008); with *Hatcher*, 560 F.3d 222 (4th Cir. 2009).

[7] *United States* v. *Nam Van Hoang*, No. 07-267-FJP-SCR, 2008 WL 4610249 (M.D. La. Oct. 16, 2008); *United States* v. *Akers*, No. 3:07-CR-00086(01)RM, 2008 WL 914493 (N.D. Ind. Apr. 3, 2008); *United States* v. *Dixon*, No. 3:07-CR-72(01) RM, 2007 WL 4553720 (N.D. Ind. Dec. 18, 2007), rev'd on other grounds, App., *infra*, 1a-13a; *United States* v. *Adkins*, No. 1:07-CR-59, 2007 WL 4335457 (N.D. Ind. Dec. 7, 2007); *United States* v. *Pitts*, No. 07-157-A, 2007 WL 3353423 (M.D. La. Nov. 7, 2007); *United States* v. *Carr*, No. 1:07-CR-73, 2007 WL 3256600 (N.D. Ind. Nov. 2, 2007), aff'd, App., *infra*, 1a-13a; *United States* v. *Bennett*, No. 07CR20040, 2007 WL 2461696 (W.D. Ark. Aug. 27, 2007), overruled by *Hulen*, 2009 WL 174951; *United States* v.

ther failed to appeal or withdrew its appeal in *all* of the cases in which it lost on this question, which gives every appearance that the government is concerned about the strength of its position or is attempting to avoid additional losses at the appellate level. But whatever the government's reasoning on this score, the Court should cure this lack of uniformity.

B. The Seventh Circuit's Construction Of Section 2250(a) Is Wrong.

The need for review is particularly acute because the Seventh Circuit's analysis is wrong. In the decision below, the Seventh Circuit rejected a plain-meaning interpretation of the statute, instead holding that the tense of the word "travels" is not dispositive and that SORNA does not require the defendant's travel to postdate enactment. App., *infra*, 5a-6a. The court further reasoned that § 2250(a)(2)(B) is simply a jurisdictional hook and that the word "travels" therefore should not be read to "create a temporal requirement." *Id.* at 6a. Finally, the court rejected any invocation of the presumption against retroactivity. *Ibid.* But none of this reasoning withstands scrutiny.

Torres, No. 07-50035, 2007 WL 2343884 (W.D. Ark. Aug. 15, 2007), overruled by *Hulen*; *United States* v. *Hulen*, No. 07-30004, 2007 WL 2343885 (W.D. Ark. Aug. 15, 2007), rev'd, 2009 WL 174951; *United States* v. *Markel*, No. 06-20004, 2007 WL 1100416 (W.D. Ark. Apr. 11, 2007), overruled by *Hulen*; *United States* v. *Manning*, No. 06-20055, 2007 WL 624037 (W.D. Ark. Feb. 23, 2007), overruled by *Hulen*; *United States* v. *Templeton*, No. CR-06-291-M, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007), overruled by *Husted*, 545 F.3d 1240; *United States* v. *Madera*, 474 F. Supp. 2d 1257 (M.D. Fla. 2007), rev'd on other grounds, 528 F.3d 852 (11th Cir. 2008).

The plain language of the statute limits applicability to offenders who travel in interstate commerce after SORNA's enactment. Even if it were appropriate to look beyond the unambiguous language of the statute, the policy underlying SORNA does not support the conclusion that the "travels" requirement should be applied retroactively. Finally, the court of appeals disregarded the presumption against retroactivity, the constitutional avoidance canon, and the rule of lenity.

1. Plain Meaning

Statutory interpretation begins, of course, with the language of the statute; where the language is clear, courts need look no further. See, *e.g.*, *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009). In construing a statute, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

The Seventh Circuit disregarded that rule here. Congress chose to use the present tense of the word "travels" in § 2250(a)(2)(B). One need not look to a dictionary to understand that the common understanding of that word implies present or future action. "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992). The Seventh Circuit's reading presumes "that Congress chose a surprisingly indirect route to convey an important and easily expressed message" concerning § 2250(a)(2)(B)'s retroactivity. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 262 (1994).

Congress could easily have made the travel element retroactive by using the past tense ("traveled")

or present perfect tense ("has traveled"), but it chose not to do so. And this omission is especially significant when considered in conjunction with language in SORNA specifically addressing the statute's retroactive application to offenses (as opposed to travel) that predate the enactment of SORNA. See 42 U.S.C. § 16913(d). The Act expressly delegates authority to the Attorney General to determine whether the requirements of the Act should be made applicable to offenses committed before the enactment of the statute. But no such delegation was included authorizing the Attorney General (or anyone else) to determine whether the Act could apply to travel that occurred before the enactment of the statute. When Congress wanted to make a provision of SORNA retroactive, it did so explicitly. Thus, the Seventh Circuit was wrong when it reasoned that "the statute does not require that the defendant's travel postdate the Act, any more than it requires that the conviction of the sex offense that triggers the registration requirement postdate it." App., *infra*, 4a. In fact, that is precisely what the statute requires.

The Seventh Circuit based its disregard for the plain meaning of the statute, in part, on the view that "subsection (a)(2)(B) is designed to establish a constitutional predicate for the statute * * * rather than to create a temporal requirement." App., *infra*, 6a. But this reasoning is flawed in two respects. First, the Seventh Circuit provides no support for its view that the plain language of the statute may be ignored when a provision serves as a constitutional predicate. If anything, one might expect Congress to be especially careful when crafting language that will bear on the constitutionality of the legislation.

Second, while § 2250(a)(2)(B) is certainly a hook on which Congress rested federal jurisdiction, it is *also* an element of the crime of failing to register under SORNA. See *Husted*, 545 F.3d at 1246 ("At argument, the government conceded that interstate travel is an element of the failure to register offense under 18 U.S.C. § 2250."). To the extent that a distinction between a constitutional predicate and an element of the crime matters in statutory construction, the provision at issue here serves both purposes. There accordingly is every reason to apply in this case the "cardinal canon" of statutory construction and presume that Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

2. Congressional Purpose

Rather than look to the statutory language, the court below relied on what it thought to be the policy underlying SORNA. But as the Tenth Circuit explained in *Husted*, a "broad purpose cannot create ambiguity in a separate, specific portion of the statute where ambiguity does not otherwise exist. Such a reading would contravene the axiom that a specific provision controls over a general one." 545 F.3d at 1246; see, *e.g.*, *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999).

Moreover, even disregarding the statutory language, the Seventh Circuit misunderstood Congress's interest in enacting SORNA. The court reasoned:

> The evil at which [SORNA] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unpro-

> tected. * * * The concern is as acute in a case in which the offender moved before the Act was passed as in one in which he moved afterward.

App., *infra*, 4a. As a justification for the holding below, however, this reasoning is insupportable. Although there is no question that Congress intended to create a "comprehensive national system for the registration of [sex] offenders," 42 U.S.C. § 16901, there are two reasons why this general purpose is consistent with a prospective reading of § 2250(a)(2)(B), and is certainly not sufficient to disregard the plain language of that subsection.

First, Congress may have intended to bring as many sex offenders as possible within SORNA's ambit and, at the same time, still have been concerned with potential constitutional problems were it to apply § 2250 to pre-enactment travel. There is no inconsistency between these two positions, and it is in fact the most logical reading of § 2250. See *United States* v. *Hinckley*, 550 F.3d 926, 944 n.3 (10th Cir. 2008) (Gorsuch, J., concurring) ("The requirement that an offender travel in interstate commerce after the Act's effective date is plainly designed to ensure consistency with the Constitution—both with respect to Congress's power to legislate under the Commerce Clause as well as the prohibition against ex post facto laws. Congress desired SORNA to be both comprehensive *and* constitutional."). As this Court has explained (*Landgraf*, 511 U.S. at 285-286):

> It will frequently be true * * * that retroactive application of a new statute would vindicate its purpose more fully. * * * Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment

> may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute.

Second, limiting the applicability of § 2250(a)(2)(B) to post-enactment travel does not frustrate the overall intent of Congress. The purpose of SORNA is to create "a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. § 16901; see also 73 Fed. Reg. 38,030, 38,045 (July 2, 2008) ("Congress concluded that the patchwork of standards that had resulted from piecemeal amendments should be replaced with a comprehensive new set of standards"). SORNA accomplishes this goal in a myriad of ways wholly apart from the criminal provisions of § 2250 that are unaffected by whether § 2250(a)(2)(B) applies retrospectively rather than prospectively.

For example, SORNA requires each jurisdiction to maintain a registry consistent with the requirements of the Act, 42 U.S.C. § 16912, and make registry information available to the public via the Internet, as well as to ensure compatibility with a national public website, 42 U.S.C. § 16918. The statute also provides for the creation of a National Sex Offender Registry maintained at the FBI, 42 U.S.C. § 16919, and the aforementioned national website, 42 U.S.C. § 16920. SORNA ensures the sharing of information between jurisdictions by requiring each to report changes in its registry to the national registry, as well as to each other jurisdiction to which the information is directly relevant. 42 U.S.C. § 16921. Any jurisdiction that fails to comply with these re-

quirements faces the loss of a portion of its federal crime-control funding. 42 U.S.C. § 16925.

Furthermore, Congress's decision to make § 2250(a)(2)(B) prospective is understandable when one considers the other existing enforcement mechanisms acting on individual sex offenders who are beyond the reach of SORNA's criminal penalties because their last interstate travel predated enactment. This class of offenders is still subject to state laws requiring registration. See *Smith* v. *Doe*, 538 U.S. 84, 90 (2003) (explaining that every State and the District of Columbia adopted a sex offender registration law by 1996). States will be better able to enforce these laws under the information-sharing regime created by SORNA, as fewer offenders will fall through the cracks. In addition, SORNA requires States to establish a criminal penalty with a maximum term of imprisonment of more than one year for individuals failing to register as required by the Act. 42 U.S.C. § 16913(e).[8]

Finally, the Wetterling Act remains in effect until at least July 2009.[9] SORNA § 129(b). The Wetterling Act provides for a penalty of up to one-year imprisonment for a first offense of failing to register, and up to 10 years for a second offense. 42 U.S.C.

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[8] This section applies to all sex offenders who fail to register, and is not subject to the interstate travel limitation of § 2250 (or any other federal jurisdictional hook).

[9] The date of repeal of the Wetterling Act is based on the deadline for jurisdictions to implement SORNA, described in 42 U.S.C. § 16924. This deadline may be extended in many jurisdictions, as States have been slow to comply with SORNA's requirements. See Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance From States*, N.Y. Times (Feb. 9, 2009), at A1.

§ 14072(i)(4). Therefore, in light of the existing individual enforcement mechanisms, Congress seems to have made a reasonable calculation that the marginal cost of making § 2250(a)(2)(B) retroactive (in the form of risk that the provision would be held unconstitutional if made retroactive) outweighed the marginal benefit.

3. The Presumption Against Retroactivity, The Constitutional Avoidance Doctrine, And The Rule Of Lenity

In holding that interstate travel pre-dating SORNA's enactment is made criminal by § 2250(a)(2)(B), the Seventh Circuit ignored three additional principles of statutory construction. First, the court failed to adhere to the rule requiring a clear statement from Congress before applying a statute retroactively. Second, by failing to adhere to the presumption against retroactivity, the Seventh Circuit was required to decide important constitutional issues that it need not have addressed, in violation of the constitutional avoidance canon. Finally, even if the court below were correct in determining that the statutory language is ambiguous, the rule of lenity should have led to a result in petitioner's favor.

First, the presumption against applying a statute retroactively "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have the opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265 (internal footnotes omitted). This presumption is embodied in several provisions of the Constitution, including

the Ex Post Facto and Due Process Clauses. See *id.* at 266.[10]

The Court accordingly has required that "Congress first make its intention clear [to help] ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268; see also *id.* at 272-273; *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 315-316 (2001). Therefore, "[a] statute may not be applied retroactively * * * absent a clear indication from Congress that it intended such a result. * * * The standard for finding such unambiguous direction is a demanding one." *St. Cyr*, 533 U.S. at 316; see also *Landgraf*, 511 U.S. at 286-288 (Scalia, J., concurring) ("clear statement" must appear in the text of the statute itself); *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 79-80 (1982) ("'The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.'") (quoting *United States Fidelity & Guaranty Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 314 (1908)).

In the case of § 2250(a)(2)(B), there is no indication from Congress remotely sufficient to overcome this strong presumption against retroactivity. As we have explained, the plain language of the statute suggests that it was meant to be prospective, and this is not contradicted by the policy underlying the Act. See *Husted*, 545 F.3d at 1247 ("the legislative history [of SORNA] is not sufficiently clear to pre-

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[10] "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 282-283 n.35.

clude the effect of" the "longstanding canon" against retroactivity).

Second, in rejecting the presumption against retroactivity and applying § 2250(a)(2)(B) retroactively, the Seventh Circuit's decision necessarily raises the constitutional concerns that justify the presumption in the first place. See *Landgraf*, 511 U.S. at 267-268 n.21. Thus, the Seventh Circuit failed to apply the doctrine of constitutional avoidance, a "cardinal principle" of statutory construction. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). By interpreting SORNA to apply to pre-enactment travel, the court below was required to resolve important constitutional issues that it need not have addressed. Indeed, as we describe in more detail below, numerous federal district courts have held that retroactive application of the SORNA travel element violates the Ex Post Facto Clause.

This Court has explained that,

> where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. * * * "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

DeBartolo, 485 U.S. at 575 (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)); see also *St. Cyr*, 533 U.S. at 299-300. And as other courts have held, there is certainly a reasonable interpretation of SORNA that avoids potential constitutional prob-

lems. The Seventh Circuit should have followed that approach.

Third, the rule of lenity dictates that the court below should have resolved any ambiguity in petitioner's favor. See *United States* v. *R.L.C.*, 503 U.S. 291, 305-306 & n.6 (1992); *United States* v. *Bass*, 404 U.S. 336, 347 (1971). To bypass the rule of lenity in this case, the Seventh Circuit would have had to find that the statute unambiguously requires a retroactive application of § 2250(a)(2)(B). As we have explained, there is no such clear statement in SORNA.

II. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER PROSECUTING A PERSON UNDER SECTION 2250(a) WHEN THE UNDERLYING OFFENSE AND TRAVEL IN INTERSTATE COMMERCE BOTH PREDATED SORNA'S ENACTMENT VIOLATES THE EX POST FACTO CLAUSE.

Because the Seventh Circuit decided the question of statutory interpretation as it did, it was required to resolve the important constitutional question whether retroactive application of SORNA's criminal penalties violates the Ex Post Fact Clause. Its decision on that question also warrants review. The district courts are deeply divided on the question—although the government has managed to suppress creation of a conflict in the courts of appeals by failing to appeal in those cases where it has been unsuccessful. Particularly in light of substantial flaws in the Seventh Circuit's constitutional analysis, this Court's guidance on the issue is essential.

A. The Decision Below Conflicts With Decisions Of Other Federal Courts On The Constitutionality Of Convicting A Person Under Section 2250(a) When The Underlying Offense And Travel In Interstate Commerce Both Predated SORNA's Enactment.

As with the statutory construction issue addressed above, the question whether prosecuting pre-enactment travel under SORNA violates the Ex Post Facto Clause has been widely litigated across the Nation and has deeply divided the district courts.[11] At least seven courts, disagreeing with the conclusion of the Seventh Circuit in this case, have concluded that such a retroactive application of SORNA is *not* constitutional.[12] These courts have reasoned

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[11] In addition to the problem that the Seventh Circuit's interpretation renders SORNA unconstitutional under the Ex Post Facto Clause, several district courts have also found that SORNA exceeds Congress' power under the Commerce Clause. See, *e.g.*, *United States* v. *Guzman*, 582 F. Supp. 2d 305 (N.D.N.Y. 2008), appeal docketed, No. 08-5561 (2d Cir. Mar. 27, 2009); *United States* v. *Hilton-Thomas*, No. 08-20721-CR, 2009 WL 89280 (S.D. Fla. Jan. 13, 2009), overruled by *Ambert*, 2009 WL 564677; *United States* v. *Waybright*, 561 F. Supp. 2d 1154 (D. Mont. 2008).

[12] *United States* v. *Nugent*, No. 07-5056-01-CRSW-GAF, 2008 WL 413273 (W.D. Mo. Feb. 13, 2008) (dicta); *United States* v. *Davis*, No. 07-60003, 2008 WL 510599 (W.D. La. Jan. 22, 2008); *United States* v. *Patterson*, No. 8:07CR159, 2007 WL 3376732 (D. Neb. Nov. 8, 2007); *United States* v. *Gill*, 520 F. Supp. 2d 1341 (D. Utah 2007); *United States* v. *Cole*, No. 07-cr-30062-DRH, 2007 WL 2714111 (S.D. Ill. Sept. 17, 2007), overruled by *Dixon*, App., *infra*, 1a-13a; *United States* v. *Stinson*, 507 F. Supp. 2d 560 (S.D. W. Va. 2007); *United States* v. *Muzio*, No. 4:07CR179 CDP, 2007 WL 2159462 (E.D. Mo. July 26, 2007). In addition, many of the 17 district court decisions holding that

that SORNA "violates the Ex Post Facto Clause because it increases the penalty, from 1 year to 10 years, for a first offender defendant who travels in interstate commerce prior to [its enactment]." *United States* v. *Bobby Smith*, 481 F. Supp. 2d 846, 853 (E.D. Mich. 2007). In each of these cases, the United States has either declined to appeal or withdrawn its appeal prior to an appellate decision. On the other hand, at least 14 district courts have reached the opposite conclusion, holding that retroactive application of SORNA is consistent with the Clause. See cases cited *supra* note 7; see also *United States* v. *Kelton*, No. 5:07-cr-30-Oc-10GRJ, 2007 WL 2572204 (M.D. Fla. Sept. 5, 2007).

This important question is ripe for consideration by this Court. Although a conflict in the circuits has not yet developed on the point, that is substantially attributable to the government's reluctance to appeal the decisions in which it has lost. Because the question is an important one that has been widely litigated and has generated considerable disagreement —and because there is no prospect that this confusion will be dispelled absent intervention by this Court—further review is warranted.

SORNA does not apply to pre-enactment or gap travel on statutory construction grounds also state that to hold otherwise would raise serious ex post facto concerns. See, *e.g.*, *Bobby Smith*, 481 F. Supp. 2d 846; see also cases cited *supra* note 6.

B. The Seventh Circuit's Ex Post Facto Analysis Is Wrong.

1. As Interpreted By The Seventh Circuit, SORNA Violates The Ex Post Facto Clause.

Because the application of SORNA to persons who traveled in interstate commerce prior to enactment "aggravates" petitioner's crime and "makes it greater than it was, when committed," that use of the statute violates the Ex Post Facto Clause. *Calder* v. *Bull*, 3 U.S. 386, 390 (1798). It is a long-settled principle that "[l]egislatures may not retroactively * * * increase the punishment for criminal acts." *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990). But SORNA's criminal sanctions are harsher than those to which petitioner was subject at the time of his criminal conduct.

Petitioner's failure to register when he moved to Indiana was a crime under the Wetterling Act in effect at that time. But the maximum punishment to which an unregistered offender is subject under SORNA is a full order of magnitude greater than the punishment to which petitioner was subject at the time of his failure to register. Under the Wetterling Act, a first offender such as petitioner may be "imprisoned for not more than 1 year." 42 U.S.C. § 14072(i)(4). In contrast, SORNA's ten-year maximum sentence (and the 37-month sentence petitioner actually received) constitutes a dramatically "increase[d] punishment beyond what was prescribed when the crime was consummated." *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981). Because retroactive application of SORNA "changes the legal consequences of acts completed before its effective date," the Ex Post Facto Clause prohibits the prosecution in this

case. *Id.* at 31; see also *Youngblood*, 497 U.S. at 46 ("[T]he constitutional prohibition is addressed to laws, 'whatever their form,' which * * * alter the nature of the offense, or increase the punishment.").

2. Failure To Register Under SORNA Is Not A Continuing Offense Under The Ex Post Facto Clause.

Although there is no doubt that SORNA increases the penalties for acts committed prior to its enactment, the Seventh Circuit held the statute consistent with the Ex Post Facto Clause because the court regarded failure to register as a "continuing offense." App., *infra*, 2a. But that holding disregarded this Court's instruction that "such offenses are not to be implied except in limited circumstances." *United States* v. *Toussie*, 397 U.S. 112, 121 (1970). The Seventh Circuit failed to deploy the textual and purposive analysis that this Court's precedents require.

Toussie instructed that courts should not construe criminal conduct as continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." 397 U.S. at 115. Far from looking to the text and purpose of SORNA, however, the Seventh Circuit simply analogized the unregistered sex offender to an escaped prisoner, who is "guilty of escape * * * as long as he remains at large." App., *infra*, 3a. But this conclusory analogy short-circuits the careful statutory analysis that *Toussie* commands. Because continuing offenses "are not to be implied except in limited circumstances," *Toussie* recognized a presumption against finding such offenses absent explicit language instructing otherwise. 397 U.S. at 121. In

Toussie "a somewhat ambiguous statute" and a government regulation imposing a "continuing duty" were not enough to establish a continuing offense, and SORNA's silence on this issue should similarly be construed as establishing a non-continuing crime. *Id.* at 119, 122.

The common congressional practice of using explicit language to create continuing offenses confirms this conclusion. See, *e.g.*, 22 U.S.C. § 618 (making failure to register as a foreign agent "a continuing offense"); 50 U.S.C. § 856 (making failure to register as a person trained in foreign espionage systems "a continuing offense"); 18 U.S.C. § 3284 (making concealment of debtor assets "a continuing offense"); see also *United States* v. *Del Percio*, 870 F.2d 1090, 1096 (6th Cir. 1989) (finding that the first prong of the *Toussie* test was not satisfied where statutory text did not specifically describe crime as a "continuing offense"). Notwithstanding this regular congressional practice, SORNA includes no such provision. For this reason, SORNA's "explicit language" does not "compel the conclusion" that failure to register is a continuing offense. *Toussie*, 397 U.S. at 115.

Not only does the text fail to support the Seventh Circuit's treatment of failure to register as continuing indefinitely until the offender does register, but "the nature of the crime involved" is not "such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115. The Court held in *Toussie* that "[t]here is * * * nothing inherent in the act of registration itself which makes failure to do so a continuing crime." *Id.* at 122. Although the *Toussie* Court addressed registration for the draft rather than for a sex offender database, its conclusion that registration is an "in-

stantaneous event[] and not a continuing process" is squarely applicable here. *Ibid.* Like the defendant in *Toussie*, petitioner committed his offense when he failed to register within a specified period of time. His crime was an "instantaneous event" and should not be construed as continuing years after he failed to comply with the statute's requirements.

This understanding of SORNA's registration requirement comports with the general principle that a statute creates a continuing offense only if it involves "a prolonged course of conduct" rather than a single, discrete act or omission. *United States* v. *Rivera-Ventura*, 72 F.3d 277, 281 (2d Cir. 1995). Numerous courts have applied this principle across a wide range of criminal statutes. Compare *Toussie*, 397 U.S. 112 (failure to register for draft not continuing offense); *United States* v. *Trupin*, 117 F.3d 678 (2d Cir. 1997) (receipt of stolen goods not continuing offense); *United States* v. *Del Percio*, 870 F.2d 1090 (6th Cir. 1989) (failure to submit accurate regulatory compliance information not continuing offense); *United States* v. *Hare*, 618 F.2d 1085 (4th Cir. 1980) (payment of bribe in form of a long-term loan not continuing offense); *State* v. *Anderson*, 669 S.E.2d 793 (N.C. Ct. App. 2008) (receipt of contraband not continuing offense); *State* v. *Saathoff*, 29 P.3d 236 (Alaska 2001) (same); *State* v. *Masino*, 43 So.2d 685 (La. 1949) (negligent homicide not continuing offense) with *United States* v. *Bailey*, 444 U.S. 394 (1980) (ongoing escape from prison is continuing offense); *United States* v. *Berndt*, 530 F.3d 553 (7th Cir. 2008) (ongoing possession of a pipe bomb is continuing offense); *United States* v. *Brazell*, 489 F.3d 666 (5th Cir. 2007) (ongoing failure to pay child support is continuing offense); *United States* v. *Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994) (alien's ongoing

presence in the United States after deportation order is continuing offense). Taken together, these cases strongly support the proposition that a criminal act or omission that occurs at a specific time—in this case, three business days after petitioner moved to Indiana—does not give rise to a continuing offense.

III. BOTH OF THE QUESTIONS PRESENTED INVOLVE MATTERS OF EXCEPTIONAL IMPORTANCE.

The two questions in this case are of considerable practical import. There has been an enormous volume of federal court litigation over the meaning and constitutionality of SORNA, and the issues addressed in that litigation will continue to arise until this Court resolves them. Such a decision by this Court would significantly reduce the burden on the lower federal courts by conclusively resolving these frequently litigated issues.

Moreover, the issues presented in this case almost certainly affect many thousands of persons who are subject to federal prosecution under SORNA. When SORNA was under consideration in Congress, the House Judiciary Committee reported that "over 100,000 sex offenders, or nearly one-fifth in the Nation are 'missing,' meaning that they have not complied with sex offender registration requirements." H.R. Rep. No. 109-218, at 26 (2005). Untold numbers of persons subject to the SORNA registration requirement traveled across state lines prior to enactment of the statute, and the government continues to aggressively pursue indictments under the statute.

In this context, the conflict and confusion in the lower courts leads to intolerable inconsistency: Identical conduct may result in the imposition of widely

divergent penalties depending upon the circuit, or the district, in which the defendant resides. Such an outcome frustrates the well-established principle of sentencing uniformity in the federal criminal justice system. See *United States* v. *Booker* 543 U.S. 220, 246 (2005). And although the government doubtless has a significant interest in tracking the movement of persons who have committed sex offenses, the conflict of authority in federal courts over SORNA's meaning and constitutionality poses a threat to the effectiveness of the registration system. Review by this Court accordingly is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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