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No. 08-1301

In the Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit**

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

Since 2006, the Sex Offender Registration and Notification Act ("SORNA") has required newly convicted sex offenders to register with a national sex offender database. See 42 U.S.C. § 16913(a). On February 28, 2007, through a regulation promulgated pursuant to specific authorization in SORNA, the Attorney General made the same registration requirement applicable to persons convicted of sex offenses prior to SORNA's enactment. See 42 U.S.C. § 16913(d); 28 C.F.R. § 72.3.

SORNA makes failure to abide by the registration requirement a federal crime. See 18 U.S.C. § 2250. A ten-year maximum penalty may be imposed on any person convicted of a sex offense under state law who (1) "is required to register under the * * * Act"; (2) "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 * * * Act." 18 U.S.C. § 2250(a)(1), (2)(B), (3).

The questions presented are:

1. Whether a conviction under 18 U.S.C. § 2250(a)(2)(B) may be predicated on interstate travel by the defendant before he or she became subject to the SORNA registration requirement.

2. Whether the Ex Post Facto Clause precludes prosecution under § 2250(a)(2)(B) of a person who was both convicted of a sex offense and traveled in interstate commerce before the enactment of SORNA.

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JURISDICTION

The court of appeals entered judgment on December 22, 2008. On March 12, 2009, Justice Stevens extended the time for filing a petition for a writ of certiorari until April 22, 2009, and petitioner filed the petition on that date. The Court granted the petition on September 30, 2009. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Ex Post Facto Clause, U.S. Const. Art. I, § 9; the Sex Offender Registration and Notification Act (codified at 18 U.S.C. § 2250 and 42 U.S.C. § 16913); and associated regulations (codified at 28 C.F.R. § 72.3) are reproduced in an appendix to this brief.

STATEMENT

The Sex Offender Registration and Notification Act ("SORNA") requires persons who are convicted of certain sex offenses to register in specified jurisdictions. A person who has been convicted of a sex offense under state law commits a federal crime if he or she "is required to register under" SORNA, "travels in interstate or foreign commerce," and knowingly "fails to register * * * as required by" SORNA. In this case, the court of appeals held that the travel element of this offense is satisfied by travel occurring *prior* to SORNA's enactment. That holding was wrong: It departed both from the plain statutory

text, which is written in the present tense, and from the broader structure of SORNA's criminal provision.

Disregard of the statutory language, however, is only the beginning of the mischief worked by the holding below. That decision also creates a set of serious constitutional and interpretive difficulties. As the court of appeals itself recognized, applying SORNA retroactively to persons who both committed their underlying offenses and traveled in interstate commerce prior to SORNA's enactment would appear to violate the Ex Post Facto Clause because that would mean that such persons had no opportunity to avoid criminal liability. The court tried to solve this problem by reading into the statute a "reasonable" grace period for such persons to register before they are subject to prosecution. But that effort, in turn, launched the court on a voyage of impermissible judicial lawmaking, resulting in a vague, confusing, and indeterminate statutory requirement. The court of appeals should simply have applied the statute as written—and held that the "travels" element of SORNA's criminal offense is satisfied only by travel that post-dates enactment of the statute and attachment of the SORNA registration requirement.

A. Statutory And Regulatory Background

1. In 1994, Congress passed SORNA's predecessor, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, establishing guidelines for States to use in tracking sex offenders and giving them three years to implement systems to do so, at the risk of losing federal crime-control funding. Pub. L. No. 103-322 tit. XVII, subtit. A, 108 Stat. 2038-2042 (1994) (codified as amended at 42 U.S.C. § 14071). The Wetterling Act required persons convicted of sexually violent offenses or cer-

tain criminal offenses against minors to register a current address with a designated state law-enforcement agency after release from prison. *Id.* at 2038, 2040-2041. Most offenders satisfied their registration requirement by returning a verification-of-address form to the agency once each year for ten years. *Id.* at 2040-2041. An offender moving his or her residence between States was allowed ten days to register with the new State. *Id.* at 2041. The Wetterling Act did not initially include a federal criminal penalty for failing to register or for failing to keep registration current. See *id.* at 2041 (requiring individual States to criminalize failure to register). By 1996, every State and the District of Columbia had enacted a sex offender registration law. *Smith* v. *Doe*, 538 U.S. 84, 90 (2003).

That year, Congress amended the Wetterling Act and directed the Attorney General to establish a national registry of sex offenders at the FBI. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (codified as amended at 42 U.S.C. § 14072). The amendment required anyone subject to registration under the Wetterling Act who resided in a State without a "minimally sufficient registration program" to send a current address, photograph, and fingerprints to the FBI for inclusion in the FBI database. 110 Stat. at 3094. The amendment made knowing failure to register a federal crime; the maximum penalty for an offender's first conviction for failure to abide by this registration requirement is a one-year term of imprisonment. *Id.* at 3096.

In 1997, Congress amended the Wetterling Act yet again, requiring all States to participate in the national registry. General Provisions of Title I of the

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 115, 111 Stat. 2440, 2461-2467 (1997) (codified at 42 U.S.C. §§ 14071-14072). States were required to provide the FBI with the current address, fingerprints, and conviction information for Wetterling-defined sex offenders to be included in the national registry. *Ibid.*

2. In 2006, Congress decided that "the patchwork of standards that had resulted from piecemeal amendments [to the Wetterling Act] should be replaced with a comprehensive new set of standards." National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,045 (July 2, 2008). The result was the enactment of SORNA. Pub. L. No. 109-248 tit. I, 120 Stat. 590-611 (2006) (codified at 18 U.S.C. § 2250 and scattered sections of 42 U.S.C.).

The President signed SORNA into law on July 27, 2006. See 120 Stat. at 587. The statute created a new, national sex offender registry intended to supplement the one created by the 1996 and 1998 amendments to the Wetterling Act. SORNA requires sex offenders to register and maintain their registration status in each jurisdiction where they live, work, or attend school. 42 U.S.C. § 16913(a).

The statute expanded the Wetterling Act's definition of "sex offense" to cover any "criminal offense that has an element involving a sexual act or sexual contact with another," as well as any attempt or conspiracy to commit such offenses, with qualified exceptions for foreign convictions and consensual activity. 42 U.S.C. § 16911(5). It also expanded the amount of information that States must record about each offender in their registries. See *id.* § 16914(a).

In addition to an offender's current address, photograph, and fingerprints, which were sufficient for States to record for non-"predator" offenders under the Wetterling Act, *id.* § 14072(c), registration under SORNA requires all sex offenders to provide their Social Security number, employer information, school information, and vehicle information, *id.* § 16914(a), as well as Internet aliases, e-mail and instant messaging addresses, telephone and cellular phone numbers, parking information, passport information, and date of birth. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,054-38,058 (July 2, 2008).[1] At the time of registration, SORNA also requires a jurisdiction to record a sex offender's physical description, sexual offense, criminal history, full palm print, DNA sample, and a photocopy of the offender's driver's license. 42 U.S.C. § 16914(b).

Sex offenders are instructed by SORNA to register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than three business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." 42 U.S.C. § 16913(b)(1)-(2). When a sex offender changes, name, residence, employer, or student status, he or she must appear in person to update the registration within three days of the change. *Id.*

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[1] See also the Keeping the Internet Devoid of Sexual Predators [KIDS] Act, directing the Attorney General to "require that each sex offender provide to the sex offender registry those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act." Pub. L. No. 110-400, 122 Stat. 4224 (2008) (codified at 42 U.S.C. §§ 16915a-16915b).

§ 16913(c). The Wetterling Act, by contrast, did not generally require in-person registration.

Of particular relevance here, SORNA also created the new federal felony of failing to register, which—in contrast to the maximum term of one year's imprisonment for violation of the Wetterling Act—is punishable by up to ten years in prison, even for a first offense. 18 U.S.C. § 2250(a). So far as persons who are defined as sex offenders because of a conviction under state law are concerned, SORNA allows for the imposition of this federal criminal penalty on someone who (1) "is required to register under [SORNA]"; (2) "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 [SORNA]." *Ibid.*[2] SORNA also requires States to create a criminal offense with a maximum prison term of *more* than one year for sex offenders who fail to register, 42 U.S.C. § 16913(e), on pain of losing federal funding. *Id.* § 16925(d).

3. SORNA expressly grants the Attorney General "the authority to specify the applicability of the requirements of this subchapter [*i.e.*, the registration requirement] to sex offenders convicted *before* July 27, 2006 or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d) (emphasis added). In the same subsection, SORNA permits the Attorney General to set rules for the registration of such pre-

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[2] Movement in commerce need not be shown when a person is prosecuted for failing to register as a sex offender because of a conviction 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).

SORNA sex offenders. *Ibid.* Although the Attorney General took the position that the registration requirement has applied to such persons from the very date of the statute's enactment,[3] on February 28, 2007, he exercised his authority to issue a regulation expressly expanding the statute's reach to pre-SORNA sex offenders. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. § 72.3.)[4] 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." *Ibid.* At the same time, however, the Attorney General declined to issue guidance clarifying the rules for the registration of those sex offenders, such as the procedure for registration. Although the statute itself sets the time frame for registration by

[3] Four courts of appeals, including the Seventh Circuit in the instant case, have interpreted this grant of authority to mean that SORNA did *not* apply to sex offenders convicted before its enactment until the Attorney General so specified. See *United States* v. *Cain*, 583 F.3d 408, 414-419 (6th Cir. 2009); *United States* v. *Hatcher*, 560 F.3d 222, 226-229 (4th Cir. 2009); *United States* v. *Dixon*, Pet. App. 9a-10a; *United States* v. *Madera*, 528 F.3d 852, 856-859 (11th Cir. 2008). But see *United States* v. *Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (agreeing with Attorney General's interpretation); *United States* v. *May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (same).

[4] The Attorney General published the regulation without undertaking the notice and comment process or the thirty-day waiting period generally required under the Administrative Procedure Act. See *United States* v. *Cain*, 583 F.3d 408, 413 (6th Cir. 2009). For those reasons, the Sixth Circuit held that the regulation could not be applied to a defendant indicted less than thirty days after the regulation was promulgated and a month before the close of the comment period. *Id.* at 420.

persons convicted of sex offenses *after* SORNA went into effect, it establishes no such grace period for persons convicted prior to SORNA's enactment, and the Attorney General's regulation also does not address the subject. *Ibid.*[5]

4. A State's implementation of SORNA must include "maintain[ing] a jurisdiction-wide sex offender registry conforming to the requirements of [SORNA]," 42 U.S.C. § 16912(a); "provid[ing] a criminal penalty" for a sex offender's failure to register, *id.* § 16913(e) ; "mak[ing] available on the Internet * * * all information about each sex offender in the registry," *id.* § 16918(a); and "provid[ing] the information in the registry" about each offender to various national and local law enforcement agencies and community organizations, including the Attorney General, *id.* § 16921(b). A jurisdiction's failure substantially and timely to comply with SORNA will result in a substantial reduction in its federal crime-control funding. 42 U.S.C. § 16925(a).

[5] The regulation stated: "The purpose of this interim rule is not to address the full range of matters that are within the Attorney General's authority under section 113(d), much less to carry out the direction to the Attorney General in section 112(b) to issue guidelines and regulations to interpret and implement SORNA as a whole." 72 Fed. Reg. at 8896. The Attorney General did not issue guidelines for the registration of sex offenders convicted before SORNA's enactment until July 2, 2008, when he allowed jurisdictions between three and twelve months to enter pre-SORNA-convicted offenders into the registration system once those jurisdictions have implemented SORNA. 73 Fed. Reg. at 38,063-38,064. Even so, these regulations still do not establish registration procedures or timelines for compliance by *individual* offenders.

Congress gave States a three-year grace period to implement SORNA, tying the repeal of the Wetterling Act to the deadline for States to implement SORNA, with up to two one-year extensions available at the discretion of the Attorney General. See SORNA §§ 129, 124, 120 Stat. at 600, 598 (codified in part at 42 U.S.C. § 16924). On May 26, 2009, with no jurisdictions likely to meet the three-year deadline, the Attorney General issued a blanket one-year extension until July 26, 2010, for States to implement SORNA, delaying the repeal of the Wetterling Act to no sooner than that date. Att'y Gen. Order No. 3081-2009, available at http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf.

As this delay suggests, States have not readily complied with SORNA, complaining of expense, technical difficulty, complexity, and bureaucratic obstacles. See SEARCH, *SEARCH Survey on State Compliance with the Sex Offender Registration and Notification Act (SORNA)* (April 2009), at http://bit.ly/6Aor3t. The Department of Justice has certified only two jurisdictions as having substantially implemented SORNA's requirements, Ohio and the Confederated Tribes of the Umatilla Indian Reservation. U.S. Dep't of Justice, Press Release, *Justice Department Announces First Two Jurisdictions To Implement [SORNA]* (Sept. 23, 2009), available at http://www.ojp.usdoj.gov/smart/pdfs/smart09154.pdf. California volunteered to suffer the federal financing penalty rather than implement SORNA, which would cost the State an estimated $59 million to implement completely. See Tracy Breton, *Implementing Sex Offender Registration Law May Prove Impossible*, Providence J. (Mar. 15, 2009), available at http://bit.ly/61O2wQ.

When this case was decided by the Seventh Circuit on December 22, 2008, the court found that Indiana, the State where petitioner was required to register, "ha[d] yet to establish any procedures or protocols for the collection, maintenance, and dissemination of the detailed information required by the Act * * *." Pet. App. 3a. Indiana remains out of compliance to this day: its current sex offender registration law, Indiana Code Ann. §§ 11-8-8-1 to 11-8-8-22 (LexisNexis Supp. 2009), fails to require collection of telephone and cellular phone numbers, parking information, passport information, a DNA sample, and a palm print, all of which are required by SORNA. See Ind. Code Ann. § 11-8-8-8. Indiana has, however, created a criminal penalty for failure to register, effective July 1, 2006, making such failure a Class D felony in most cases (Pub. L. 140-2006, § 13, 2006 Ind. Acts 2327-28 (codified as amended at Ind. Code 11-8-8-17)), carrying a prison sentence of up to three years. Ind. Code § 35-50-2-7(a).

5. Despite most jurisdictions' lack of implementation, the Attorney General has stated that "SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral of effectiveness. They took effect when SORNA was enacted on July 27, 2006 * * * ." 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007). Similarly, the final regulations in the National Guidelines for SORNA issued by the Attorney General declare expressly that SORNA requires registration by sex offenders regardless of whether the relevant jurisdiction has implemented the statute. 73 Fed. Reg. 38,030, 38,063 (July 2, 2008) ("SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA *or prior to particular jurisdictions' incorporation of the SORNA requirements into their pro-*

grams." (emphasis added)). Under SORNA, then, sex offenders must register "as required by [SORNA]," 18 U.S.C § 2250(a)(3), whether or not their jurisdictions have fully implemented SORNA, as indeed almost none have.

Because every State and the District of Columbia had enacted a sex offender registration law prior to SORNA, however, the government's consistent position in litigating SORNA prosecutions has been that registration under one of these pre-SORNA state procedures suffices as registration "under [SORNA]" for purposes of avoiding § 2250 criminal liability. See pages 38-40, *infra*. The five circuits that have ruled on the question, including the court of appeals here, have accepted this position. *United States* v. *Brown*, No. 08-17244, 2009 WL 3643477, at *5 (11th Cir. Nov. 5, 2009); *United States* v. *George*, 579 F.3d 962, 966 (9th Cir. 2009); *United States* v. *Gould*, 568 F.3d 459, 464 (4th Cir. 2009); *United States* v. *Dixon*, Pet. App. 3a-4a; *United States* v. *Hinckley,* 550 F.3d 926, 939 (10th Cir. 2008). Every district court to confront the issue has held the same. See *United States* v. *Leach*, No. 3:09-CR-00070(01)RM, 2009 WL 3762331, at *3 (N.D. Ind. Nov. 6, 2009).

The government's position has had the consequence that, until a jurisdiction fully implements SORNA, the new statute requires satisfaction of the *Wetterling Act's* (and existing state) registration requirements and nothing more. Thus, offenders who were in compliance with the Wetterling Act and with state registration law when SORNA came into effect have not been prosecuted as being in violation of SORNA, even though those registrations do not in fact comport with the form of registration or scope of information required by SORNA. That has necessar-

ily been the case, as compliance with the technical requirements of SORNA registration, in virtually all jurisdictions, has been a literal impossibility.

B. Factual and Procedural Background

1. On February 6, 2003, petitioner was arrested and charged with first-degree sexual abuse in Alabama state court for inappropriately touching a 14-year-old female over her clothes. Presentence Report ¶¶ 70-71. He pled guilty and on May 17, 2004, received a fifteen-year sentence, with all but two years suspended and the remainder to be served on probation.. *Id.* ¶ 70. He received credit for time served, earned release from prison on July 3, 2004, and registered with Alabama as a sex offender three days later, complying with the then-existing registration requirement. Pet. App. 15a. Congress had not enacted SORNA when petitioner was released.

Also before SORNA's enactment, sometime in 2004 or 2005, petitioner moved from Alabama to Fort Wayne, Indiana. Pet. App. 15a. On July 19, 2007, he was arrested for his involvement in a fight, unrelated to any sex offense. Presentence Report ¶¶ 71-72. After petitioner's arrest, authorities determined that he had previously committed a sex offense and that he had not yet complied in Indiana with SORNA's since-enacted registration requirements.

On August 22, 2007, a federal grand jury in the Northern District of Indiana indicted petitioner for failing to register as a sex offender under 18 U.S.C. § 2250, SORNA's criminal provision.[6] Presentence

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[6] Although the indictment identified travel on or about July 2007, Pet. App. 14a, there is in fact no dispute that petitioner's relevant travel in interstate commerce occurred in 2004 or

Report ¶ 1. He moved to dismiss the indictment on the ground that his interstate travel predated both SORNA's enactment in 2006 and its application to him in 2007. Pet. App. 15a. The district court denied the motion. *Id.* at 19a. Petitioner then entered a conditional guilty plea preserving the right to appeal the denial of his motion to dismiss (Presentence Report ¶¶ 5, 14), and was sentenced to serve thirty months in prison.

2. The court of appeals consolidated petitioner's case with the appeal of a similarly situated defendant and affirmed petitioner's conviction. Pet. App. 1a-13a. Rejecting the Tenth Circuit's contrary conclusion in *United States* v. *Husted*, 545 F.3d 1240 (10th Cir. 2008), the Seventh Circuit held that § 2250(a)(2)(B) does not require that a defendant's interstate travel postdate the Act. Pet. App. 4a-6a. The court found Congress's use of the present-tense verb "travels" in § 2250(a)(2)(B) to be immaterial, opining that "'Congress's choice of tenses is not very revealing'" (*id.* at 6a, quoting *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977)) and that "'the present tense is commonly used to refer to past, present, and future all at the same time.'" *Id.* at 6a (citation omitted). The court also observed that SORNA's criminal provision applies to someone who "resides in" Indian country and that "on the Tenth Circuit's logic, a sex offender who has resided in Indian country since long before the Act was passed is subject to

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2005, before the date of SORNA's enactment. See Gov't C.A. Br. at 2 ("The facts pertinent to this issue in this case are not in dispute. * * * In either 2004 or 2005, the Defendant moved to Indiana. On July 19, 2007, the Fort Wayne police became aware that the Defendant was living in Fort Wayne. As of that date, he was not registered as a sex offender in the state of Indiana.").

the Act but not someone who crossed state lines before the Act was passed. That result makes no sense[.]" *Id*. at 5a. Instead of looking to SORNA's language, the court of appeals turned to the statute's policy, finding that "[t]he 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 unprotected"; the court found that this "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." *Id*. at 4a.

The court of appeals did hold that § 2250(a)(2)(B) violates the Ex Post Facto Clause when applied to defendants who committed a SORNA-triggering sex offense and traveled interstate before SORNA was passed, *and* who were not given a "reasonable time" to register under SORNA. *Id.* at 10a-13a. The court observed that neither SORNA nor the Attorney General's retroactivity regulation gave previously convicted sex offenders a grace period within which to register when SORNA became applicable to them (*id.* at 10a), but it ruled that "[w]hatever the minimum grace period required to be given a person who faces criminal punishment for failing to register as a convicted sex offender is, it must be greater than zero." *Id.* at 12a. The court therefore reversed the conviction of the other appellant in the consolidated appeal because it was not evident to the court when that appellant's "failure to register" occurred, or that he had sufficient time to register under SORNA before criminal liability attached to him. *Id*. at 10a, 12a. But the court affirmed petitioner's conviction because the indictment charged that he had not registered as of July 2007, five months after the Attorney General issued his retroactivity regulation, and "[f]ive months is a sufficient grace period." *Id*. at 12a.

The court therefore rejected petitioner's Ex Post Facto Clause challenge to his conviction. *Id*. at 12a-13a.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. The decision below is wrong on several levels. The most obvious is its departure from the plain statutory language. Section 2250(a)(2)(B) provides that a crime is committed by someone who, among other things, "travels in interstate or foreign commerce." The Seventh Circuit read the statute as though it says, instead, that a crime is committed by someone who "traveled in interstate or foreign commerce years ago." But that, very simply, is not how Congress wrote SORNA.

There is no mystery about the meaning of the word "travels"; in ordinary usage it refers to current or future travel. That understanding of the word as used in SORNA is supported by the remainder of § 2250(a)(2)(B), all of which is written in the present tense so as to refer unambiguously to post-SORNA activity. This reading also is confirmed by the usual rules of statutory construction, which disfavor retroactivity and do not read ambiguities into criminal statutes so as to disfavor defendants in a manner not contemplated by Congress. And—to the extent that it is thought proper to look beyond the plain statutory text—the present-tense reading is wholly consistent with SORNA's broader statutory policy. That is enough to resolve this case.

B. Disregarding the statutory language in the manner of the Seventh Circuit did more than frustrate the intent of Congress, however; it also rendered SORNA unconstitutional under the Ex Post Facto Clause as applied to persons like petitioner, in

one of two respects. If compliance with SORNA presently requires no more than satisfaction of the preexisting Wetterling Act registration requirement (as the government argued below) and if no post-SORNA travel is required to establish a violation of § 2250(a)(2)(B), SORNA simply, and impermissibly, enhances the punishment for a pre-SORNA crime. If, instead, SORNA is thought to require a post-enactment act of registration but post-SORNA interstate travel need not be shown under § 2250(a)(2)(B) (as the court below held), the statute's failure to give persons like petitioner a registration grace period made them guilty of a crime at the moment of the statute's enactment, which also is impermissible. Either understanding of the statute poses a serious constitutional concern.

The court of appeals sought to resolve this problem by rewriting the statute, reading SORNA to require registration within a "reasonable time" after enactment. But this judicial law-making was too clever by half, establishing a vague and indefinite rule that will multiply SORNA's interpretive difficulties. There was no need to strain for a creative solution to the problems posed by twisting "travels" to mean "traveled long ago"; it suffices to read the statute as Congress wrote it.

ARGUMENT

I. SECTION 2250(a)(2)(B) APPLIES ONLY TO PERSONS WHO TRAVEL IN INTERSTATE COMMERCE AFTER THEY WERE REQUIRED TO REGISTER UNDER SORNA.

The Court's inquiry in this case should go no further than the plain language of § 2250(a)(2)(B), which applies to a person who "travels" in interstate

commerce. Congress's use of the present tense is unambiguous, and the statutory language accordingly should be the end of the matter. See, *e.g.*, *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1063-1064 (2009). Looking further, in any event, leads to the same answer. Related statutory text, the statutory structure, the usual principles of construction, and the broader statutory purpose all point toward one conclusion: Section 2250(a)(2)(B) does not reach a person whose underlying conviction for a state-law sex offense and travel in interstate commerce both predated SORNA's enactment.

A. Based On The Plain Meaning Of § 2250(a)(2)(B), The Statute Does Not Apply To A Person Who Traveled In Interstate Commerce Only Before He Was Required To Register Under SORNA.

We begin with the "travels" language of § 2250(a)(2)(B), which is dispositive here. In that provision, Congress chose to use the third-person present tense "travels": Whoever "is required to register as a sex offender" under SORNA, "*travels* in interstate or foreign commerce," and "knowingly fails to register or update a registration as required" by SORNA, commits a federal crime. 18 U.S.C. § 2250(a) (emphasis added). Although the court of appeals thought otherwise (Pet. App. 5a-6a), "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992). In particular, the Court repeatedly, consistently—and unsurprisingly—has held that statutory provisions written with present-tense verbs (like § 2250(a)(2)(B)) do not apply to past acts. 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."); *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Comp. Programs*, 519 U.S. 248, 255 (1997) ("[T]he use of the present tense (*i.e.*, 'enters') indicates that the 'person entitled to compensation' must be so entitled at the time of settlement."); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987) ("One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout § 505."); *cf. Wilson*, 503 U.S. at 333 ("By using these verbs in the past and present perfect tenses, Congress has indicated that computation of the credit must occur after the defendant begins his sentence."). This is consistent with the Court's general approach of reading statutes in a manner that comports with "ordinary English grammar" and usage (see, *e.g.*, *Flores-Figueroa* v. *United States*, 129 S. Ct. 1886, 1890 (2009)), while rejecting constructions that run counter to "basic grammar." *Dep't of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002).[7]

In this case, the use of the present tense in the statute should be decisive. "The natural and most

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[7] Pointing to *Scarborough* v. *United States*, 431 U.S. 563 (1977), the court of appeals opined "that 'Congress's choice of verb tenses is not very revealing.'" Pet. App. 5a (quoting *Scarborough*, 431 U.S. at 571). But the Court made that observation because the statute at issue in *Scarborough* was "ambiguous at best"; its operative language was "affecting commerce," and it was not apparent to the Court that an article moving in commerce "affects commerce" only at the time of movement. See 431 U.S. at 570-571. The Court plainly did not suggest that, as a general matter, "choice of verb tenses is not revealing." *Id.* at 571.

frequent use of the present tense is in contexts of present time[,]" R.W. Burchfield, ed., *The New Fowler's Modern English Usage* 620 (3d ed. 1998), or to refer to future events. See *ibid.* ("the * * * train * * * leaves at 9.15 pm"); William Shakespeare, *King Henry IV, Part 1*, act 2, sc. 2 ("If I travel but four foot by the squier further afoot, I shall break my wind.").[8] This proposition would not seem to require elaborate proof; when Ahab ordered "Turn up all hands and make sail! [H]e travels faster than I thought * * *," the captain could hardly have been referring to the whale's travels 18 months earlier. Herman Melville, *Moby Dick* 490 (Oxford World's Classics 2008) (1851).

By contrast, the present-tense conjugation "travels" is rarely, if ever, used to refer to conduct that occurred in the past. Instead, in common usage, the past tense "traveled" is used to indicate an act of travel in the past that has already been completed, and the perfect forms "has traveled" or "had traveled" for the state of having completed such travel. See, *e.g.*, Saul Bellow, *The Adventures of Augie March* 13 (Penguin Books 1999) (1953) ("This widower traveled down from Iowa City for just the purpose of marriage, and after they were married the news came back that he locked her a prisoner in his house and made her sign away all rights of legacy."); Owen Wister, *The Virginian* 108 (Oxford World's Classics 2009) (1902) ("So we six legs in the jerky traveled harmoniously on over the rain-gutted road, getting no deeper knowledge of each other than what

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[8] The present tense may also refer to a snapshot in time in some specialized contexts where space is at a premium, as in a newspaper headline. *Fowler's* at 620 ("writer wins the Nobel prize"). But that hardly describes § 2250.

our outsides might imply."). Thus, "Congress could have phrased its requirement [in § 2250(a)(2)(B)] in language that looked to the past * * * but it did not choose this readily available option." *Gwaltney of Smithfield, Ltd.,* 484 U.S. at 57.

Lest there be any doubt about this seemingly obvious point, the rules of construction set by Congress itself in the Dictionary Act appear to confirm that the present tense generally does not to apply to the past. One of the prescribed rules relates to the interpretation of verb tenses: "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." 1 U.S.C. § 1.[9] That Congress specifically provided that the present tense includes future conduct suggests by implication that the present tense ordinarily does *not* reach past acts. See, *e.g.*, *United States* v. *Vonn*, 535 U.S. 55, 65 (2002). Many States have enacted similar language in their codes of statutory interpretation, indicating that legislatures commonly expect the present tense to include the future but not the past.[10]

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[9] Congress enacted that provision when revising and codifying Title 18 of the United States Code, the "Crimes and Criminal Procedure" title, under which petitioner was prosecuted. Act of June 25, 1948, ch. 645, sec. 6, 62 Stat. 683, 859-860. That Congress provided these rules in the context of codifying Title 18 suggests that they should have special force in the criminal context.

[10] Compare 1 U.S.C. § 1 ("words used in the present tense include the future as well as the present") with Ariz. Rev. Stat. Ann. § 1-214(A) (2002); Cal. Civ. Code § 14 (West 2007); Colo. Rev. Stat. Ann. § 2-4-104 (West 2008); Ga. Code Ann. § 1-3-1(d)(7) (Supp. 2009); Idaho Code Ann. § 73-114 (2006); 5 Ill. Comp. Stat. Ann. 70/1.02 (West 2005); Iowa Code Ann. § 4.1 (West 2008 & Supp. 2009); Minn. Stat. Ann. § 645.08 (West

Statutory interpretation treatises are to the same effect. See 2B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 49:2 (7th ed. 2009). And that is enough to dispose of this case: The language of § 2250(a)(2)(B) simply does not reach travel occurring years ago, before SORNA and its registration requirement were even a twinkle in the congressional eye.

B. The Whole Act Supports The Plain Meaning Of Section 2250(a)(2)(B).

In disagreeing with this proposition and opposing the petition for certiorari, the government appeared to place emphasis on the qualifying phrase in the Dictionary Act, "unless the context indicates otherwise." Opp. 13 (emphasis omitted). But that phrase points the reader to the surrounding statutory text, or to the text of other related acts. See *Rowland* v.

Supp. 2009); Mont. Code Ann. § 1-2-105 (2009); Neb. Rev. Stat. § 49-802 (2004); Nev. Rev. Stat. Ann. § 0.030 (LexisNexis 2008); N.M. Stat. Ann. § 12-2a-5 (LexisNexis 2004); N.Y. Gen. Constr. Law § 48 (McKinney 2003); N.D. Cent. Code § 1-01-35.1 (2008); Ohio Rev. Code Ann. app. § 1.43(C) (LexisNexis 2009); Okla. Stat. Ann. tit. 25, § 26 (West 2008); 1 Pa. Cons. Stat. § 1902 (2008); S.C. Code Ann. § 2-7-30 (2005); S.D. Codified Laws § 2-14-7 (2004); Tenn. Code Ann. § 1-3-104(a) (2003); Tex. Gov't Code Ann. § 311.012(a) (Vernon 2005); Utah Code Ann. § 68-3-12(1)(d) (2008); Wis. Stat. Ann. § 990.001(3) (West 2007); Wyo. Stat. Ann. § 8-1-103(a)(iv) (2009). See also Unif. Statute & Rule Constr. Act § 5(c), 14 U.L.A. 486 (2005) ("Use of a verb in the present tense includes the future tense."). But see Ala. Code § 1-1-2 (LexisNexis 1999) ("Words used in this code in the past or present tense include the future, as well as the past and present."); Alaska Stat. § 01.10.050(a) (2008) ("Words in the present tense include the past and future tenses, and words in the future tense include the present tense."); Cal. Bus. & Prof. Code § 14 (West 2007) ("The present tense includes the past and future tenses; and the future, the present.").

Cal. Men's Colony, 506 U.S. 194, 199-200 (1993). It thus reflects the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "Statutory interpretation * * * is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme * * *." *United Savings Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). And here, the structure of § 2250(a)(2)(B), the broader structure of § 2250(a), and other provisions of SORNA all compel a prospective reading of "travels."

First, the exclusive use of the present tense throughout § 2250(a)(2)(B) indicates that the provision applies only to travel that occurred after SORNA was enacted. "Where, as here, Congress uses * * * similar statutory structure in two adjoining provisions," this Court reasonably infers a similar meaning. *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301 (2009). In particular, the Court has explained that "the undeviating use of the present tense strongly suggests[] [that] the harm sought to be addressed * * * lies in the present or the future, not in the past." *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 59. This rule of statutory construction accords with basic English grammar and style rules. See William Strunk, Jr. & E.B. White, *The Elements of Style* 26 (4th ed. 1999) ("The likeness of form enables the reader to recognize more readily the likeness of content and function.").

And that is just what Congress did in § 2250(a)(2)(B). The provision uses the present tense in all four of its verbs: "*travels* in interstate or for-

eign commerce, or *enters* or *leaves*, or *resides* in, Indian country" (emphasis added). This undeviating use of the present tense indicates that the provision as a whole is addressed to conduct in the present or the future, not the past. Curiously, the court of appeals found support for its holding in the "resides in Indian country" formulation, but it surely was wrong in that; "resides in" could not possibly describe someone who resided for many years in Indian country but left, never to return, before SORNA's enactment.[11] In just the same way, the present tense indicates that the first portion of § 2250(a)(2)(B) does not apply to someone who traveled in interstate commerce before SORNA's enactment, but has not done so since.

Second, the larger structure of § 2250(a) further indicates that § 2250(a)(2)(B) is targeted only at travel after SORNA's enactment. Two of the statutory elements applicable in this case could reasonably be read to apply *only* to events occurring after SORNA took effect. Section 2250(a)(1) applies to whoever "*is* required to register *under the Sex Offender Registration and Notification Act*"; and § 2250(a)(3) applies to whoever "knowingly fails to

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[11] The court of appeals thought that on our reading of the statute "a sex offender who has resided in Indian country since long before the Act was passed is subject to the Act but not someone who crossed state lines before the Act was passed. That result makes no sense * * *." Pet. App. 5a. But that logic ignores the relevant point and language. What matters is not that the offender "resided in" Indian country before the Act was passed; it is that he or she *currently "resides in"* Indian country. There is an obvious reason Congress would make nonregistration by such a person a federal offense; that person is not subject to state prosecution.

register or update a registration *as required by the Sex Offender Registration and Notification Act*." Necessarily, these provisions must refer to a post-SORNA duty and failure to register. The "travels" element, lodged between these other two (is required to register, travels in interstate commerce, and knowingly fails to register), is also most naturally read to refer to conduct post-dating enactment of SORNA.

Third, other provisions of SORNA show that Congress knew very well how to make a statutory provision retroactive where it wished to do so—and it chose *not* to do so regarding the travel element. Congress explicitly delegated authority to the Attorney General to specify the retroactive application of SORNA's civil registration requirements, a decision that Congress knew also would subject past sex offenders to the statute's criminal provisions. See SORNA § 113(d) (codified at 42 U.S.C. § 16913(d)). But Congress made no express provision for the use of past *travel* to trigger SORNA criminal prosecutions, by conferring such authority on the Attorney General or otherwise. That Congress provided the Attorney General authority to make one but not other provisions of SORNA retroactive strongly suggests that the travel element must remain prospective. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001).

C. The Rule Of Lenity And The Presumption Against Retroactivity Counsel In Favor Of The Same Result In This Case.

1. The Rule of Lenity

The statutory language and structure thus leave little doubt that § 2250(a)(2)(B) applies only to inter-

state travel that post-dated the enactment of SORNA. If any question remained, however, the usual tools of statutory construction would lead to the same conclusion. Under the rule of lenity, courts will not adopt an interpretation of a criminal statute that is harsher than what Congress's clear expression supports. See, *e.g.*, *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987). In this case, if the statutory language is ambiguous, the rule of lenity counsels against adopting the government's strained reading of § 2250(a)(2)(B).

The rule of lenity applies when, "after seizing everything from which aid can be derived," the Court can make "no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (internal quotation marks and citation omitted); see also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (rule of lenity resolves ambiguities in favor of criminal defendants "where text, structure, and history fail to establish that the Government's position is unambiguously correct"). As we have shown, the text and structure of § 2250(a)(2)(B) are more compatible with petitioner's reading of the statutory language than with the government's favored reading. But even if that were not so, nothing about the text or legislative history of SORNA makes it clear that Congress, in enacting § 2250(a)(2)(B), affirmatively meant for that provision to apply retroactively.

The rule of lenity serves two important purposes, both of which are implicated in this case. It embodies our system's "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (quoting Henry J. Friendly, *Mr. Jus-*

tice Frankfurter and the Reading of Statutes, in *Benchmarks* 196, 209 (1967)). And it ensures "that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (opinion of Marshall, C.J.); see also Einer Elhauge, *Statutory Default Rules* 169 (2008) ("By providing the most lenient reading in unclear cases, the rule of lenity forces legislatures to define just how anti-criminal they wish to be, and how far to go with the interest in punishment crime when it runs up against other societal interests.").

Both of these principles come into play here. The statutory language cannot be thought to clearly favor the government's reading. And the court of appeals reached far beyond the plain meaning of the statute and the clear intent of Congress to ensure that § 2250(a)(2)(B) would reach the petitioner's conduct. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.

2. Presumption Against Retroactivity

In addition, even if the text and structure of SORNA did not demonstrate that § 2250(a)(2)(B) applies only to prospective travel, the presumption against retroactivity compels that interpretation. See *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997). Under that presumption, reading § 2250(a)(2)(B) to attach only to prospective travel is required by the rule that "congressional enactments . . . [are not] construed to have retroactive effect unless their language requires this result." *INS* v. *St. Cyr*, 533 U.S. 289, 315-316

(2001) (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). "The standard for finding such unambiguous direction is a demanding one." *Id.* at 316. "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-317 (quoting *Lindh*, 521 U.S. at 328 n.4). In this case, however, Congress provided no statutory text indicating "with unmistakable clarity" its intent that § 2250(a)(2)(B) apply retroactively. The text is certainly not "so clear that it could sustain only" the government's interpretation. See *id.* at 317-318.

That principle governs here because the effect of § 2250(a)(2)(B) is retroactive. It "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 268-269 (1994) (quoting *Soc'y for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13,156)). The "degree of connection between the operation of the new rule and a relevant past event" is very high, as the new rule cannot operate on petitioner without applying to the prior travel. See *Landgraf*, 511 U.S. at 270. Such an outcome is strongly disfavored.

In ruling to the contrary, the court of appeals opined that, in the criminal context, the presumption against retroactivity works only through the constitutional dictates of the Ex Post Facto Clause. Pet. App. 6a. But that is not so. As this Court explained in a case dealing with a criminal statute:

> The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially

> of the criminal sort, is not to be applied retroactively. *Quite independent* of the question whether the *Ex Post Facto Clause* bars retroactive application of [the criminal provision], then, there is the question whether Congress intended such application. Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests.

Johnson v. *United States*, 529 U.S. 694, 701 (2000) (internal citations omitted) (emphasis added). See *United States* v. *Head*, 552 F.3d 640, 641 n.1 (7th Cir. 2009) ("When the statute is silent the presumption against retroactivity, particularly in criminal cases, directs us to apply the amendment prospectively. [*Johnson*, 529 U.S.] at 701-02."); see also *St. Cyr*, 533 U.S. at 324 ("As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law."). There is "no clear statement of that intent" here.

D. Applying § 2250(a)(2)(B)'s Travel Element Only To Post-Enactment Travel Is Consistent With SORNA's Purpose.

In nevertheless applying §2250(a)(2)(B) to past travel, the court of appeals placed heavy emphasis on what it believed to be the congressional purpose behind SORNA. Pet. App. 4a-6a. Relying on *Scarborough* v. *United States*, 431 U.S. 563 (1977), the court opined that SORNA's travel element serves only as a jurisdictional hook that establishes a "constitutional predicate for the statute" (Pet. App. 6a), and that Congress was wholly unconcerned with when a sex offender traveled in interstate commerce. We note that, even if there were anything to this observation about the supposed congressional purpose, that un-

enacted policy could not stand against the plain statutory language. In fact, however, the court of appeals is wrong even on its own terms, in several respects.

1. To begin with, in crafting a new sex offender registration system, Congress was particularly concerned that sex offenders were able to evade then-existing registration requirements by moving between jurisdictions. As one of the bill's Senate cosponsors explained, SORNA was designed to "sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders." 152 Cong. Rec. S8012 (daily ed. July 20, 2006) (statement of Sen. Hatch); see also 152 Cong. Rec. S8012, 8013 (daily ed. July 20, 2006) (statement of Sen. Biden) ("This is about uniting 50 States in common purpose and in league with one another to prevent these lowlifes from slipping through the cracks."). The "lack of basic uniformity and effective operation among the various States in administering sex registry programs" made it possible for sex offenders to avoid registering by moving between jurisdictions (H.R. Rep. No. 109-218, pt. 1, at 24 (2005)), and SORNA was designed to close this "loophole in the sex offender * * * registration program." *Id.* at 167 (statement of Rep. Sensenbrenner); see also 152 Cong. Rec. S8030 (daily ed. July 20, 2006) (statement of Sen. Frist) (observing that "[l]oopholes in the current [registration] system allow some sexual predators to evade law enforcement").

In this context, far from serving as from a mere "constitutional predicate" for a general federal sex offender registration requirement (Pet. App. 6a), addressing interstate travel by unregistered sex offenders was *itself* an important part of the "mischief"

SORNA "was enacted to end." *Guaranty Trust Co.* v. *Henwood*, 307 U.S. 247, 257 (1939).[12] Indeed, the legislative history's frequent reference to inter-jurisdictional problems is particularly striking given that these problems related to only one part of the much larger Adam Walsh Act, a bill both Houses of Congress passed by voice vote and that generated only forty minutes of debate in the House. See 152 Cong. Rec. S8031 (daily ed. July 20, 2006) (passing Senate by voice vote); 152 Cong. Rec. H692 (daily ed. March 8, 2006) (passing House by voice vote); 152 Cong. Rec. H676 (daily ed. March 8, 2006) (allocating forty minutes for debate in the House).

Effectuating this purpose dictated an emphasis on *post*-SORNA travel. Rather than creating a fully

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[12] Had Congress intended § 2250(a)(2)(B)'s travel element to operate merely as a jurisdictional hook for a general federal registration requirement, surely it would have grounded the registration requirement in its broader authority to regulate activities that "substantially affect" interstate commerce. *United States* v. *Lopez*, 514 U.S. 549, 559 (1995). Other parts of the Adam Walsh Act presume that sexual violence substantially affects interstate commerce. See SORNA § 302, 120 Stat. at 619-622 (codified at 18 U.S.C. §§ 4241, 4247-4248) (creating a federal civil commitment program for sexually dangerous prisoners without providing any jurisdictional hook). Moreover, SORNA's registration requirement is codified separately from § 2250 and does not itself include an interstate travel element. See 42 U.S.C. § 16913. Sex offenders are required to register under § 16913 irrespective of whether they ever travel in interstate commerce or are exposed to potential criminal liability under § 2250. Considering the Adam Walsh Act as a whole, it thus is not possible that Congress believed its authority to require sex-offender registration was limited by its power to regulate the channels of interstate commerce—which indicates that the travel element of § 2250 serves a substantive and not a jurisdictional purpose.

federal registration scheme, SORNA establishes "uniform standards" for state registration programs. 152 Cong. Rec. S8022 (daily ed. July 20, 2006) (statement of Sen. DeWine). Thus, SORNA imposes a baseline set of data that States must gather when registering sex offenders (§ 114, 120 Stat. at 594), directs which state crimes must trigger registration requirements (§ 111, 120 Stat. at 591-593), and requires States to provide the Attorney General with information about sex offenders who fail to comply. § 112, 120 Stat. at 597-598. The premise of these reforms is that "cooperation and coordination among the various States improves the effectiveness of each State's registry." 152 Cong. Rec. S8029 (daily ed. July 20, 2006) (statement of Sen. Leahy).

In the absence of § 2250(a) liability, however, post-enactment travel would pose a threat to SORNA's uniform system of state registration requirements. Under the previously uncoordinated system, sex offenders might avoid apprehension and criminal liability for failure to register by repeatedly moving between jurisdictions. Congress included § 2250(a)(2)(B) to address this concern. See 151 Cong. Rec. H7890 (daily ed. Sept. 14, 2005) (statement of Rep. Keller) (observing that "[n]early 100,000 sex offenders remain unregistered and are moving freely about the country"). But there was no need to create a federal criminal statute to provide for punishment of sex offenders who failed to register but had traveled in interstate commerce only prior to SORNA's enactment; these offenders will be subject to state prosecution pursuant to the new statutes, carrying enhanced penalties, that SORNA directs the States to enact.

In contrast to post-enactment travel, pre-enactment travel does not jeopardize SORNA's overall implementation. An unregistered sex offender who has previously traveled in interstate commerce is no different from an unregistered sex offender who has not: both are outside the registration system, both are unknown to local law enforcement, and both are subject to prosecution under SORNA-mandated state registration laws. Yet the government's reading of § 2250 presumes that Congress arbitrarily distinguished between these two identically-situated individuals, imposing a harsh new federal penalty on the former while leaving the latter to be prosecuted under state law. There is no reason to believe that Congress intended such a distinction.[13]

Had Congress meant to establish a federal crime for failure to register that would have reached all then-unregistered sex offenders, it could have done so by simply omitting § 2250(a)(2)(B)'s travel element, as it has omitted any travel predicate from the basic SORNA registration requirement. In rejecting

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[13] General statements in the legislative history that SORNA "cracks down on those sex offenders who refuse to follow registration requirements" do not suggest a different result. 151 Cong. Rec. H7890 (daily ed. Sept. 14, 2005) (statement of Rep. Keller). "'The Act must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting); see also *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 447 (2003) (rejecting reading of statute that comported with its general purpose where this reading was inconsistent with Congress's more specific policy choices). Congress's general intent to punish sex offenders who fail to register sheds little light on the question whether it specifically intended to create § 2250(a) liability for pre-enactment travel.

this course, Congress chose to rely instead on a federally coordinated state registration scheme. To read § 2250(a)(2)(B) as reaching past travel would frustrate Congress's choice of means by creating a broader federal crime than the one Congress intended.

2. The court of appeals nevertheless supported its conclusion by pointing to what it described as the "close analogy" of *Scarborough*, which held that a convicted felon may be punished for possession of a firearm under the statute currently codified at 18 U.S.C. § 922(g)(1) even when the gun had crossed state lines prior to the time that the defendant became a felon. *Scarborough*, however, actually points clearly away from the Seventh Circuit's conclusion.

The statute at issue in *Scarborough* used language that differed materially from that of § 2250(2)(2)(B). Rather than refer simply to "travel in" commerce, the felon-in-possession law permitted punishment of a felon who "receives, possesses, or transports in commerce *or affecting commerce* . . . any firearm." 431 U.S. at 564 (quoting 18 U.S.C. app. § 1202(a) (1976) (currently codified at 18 U.S.C. § 922(g)(1)) (emphasis added)). The Court reasoned that "the phrase 'affecting commerce'" was of central importance in construing the reach of the felon-in-possession statute; express statutory findings indicated that receipt, possession, or transportation of firearms by felons constitutes "a burden on commerce or threat affecting the free flow of commerce," and Congress "implemented those findings by prohibiting possessions 'in commerce and affecting commerce.'" *Id.* at 571. This choice of language was significant: "Congress is aware of the distinction between legislation limited to activities in commerce

and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce." *Ibid.* (citation and internal quotation marks omitted). This understanding was buttressed by legislative history indicating that Congress actually sought to "outlaw the mere possession of weapons." *Id.* at 572 (citation and internal quotation marks omitted). This purpose, reflected in the breadth of the statutory language, led the Court to conclude that Congress's focus was on the felon's possession (or receipt or transfer) of a weapon, and not on *when* the felon encountered the weapon.

In contrast, 18 U.S.C. § 2250(a)(2)(B) *is* limited to activity "in commerce." It contains no language (or history) indicating that Congress meant to legislate to the full scope of its Commerce Clause power. The statute does not contain the phrase "affecting commerce," which would have indicated such an intent. Rather, by imposing the travel element of § 2250(a)(2)(B), Congress exercised its authority to regulate "the channels of interstate commerce," *United States* v. *Lopez*, 514 U.S. 549, 558 (1995), excluding from those channels sex offenders who knowingly fail to register. That power is inherently prospective, as the statutory language itself indicates. While Congress has authority to keep the channels of interstate commerce free from immoral and injurious uses, it cannot possibly keep these channels free from *prior* misuse that occurred before enactment of the governing statute. Nothing in *Scarborough* supports a different conclusion.

3. Moreover, applying § 2250(a)(2)(B)'s "travels in commerce" language retrospectively so that it serves as a broad jurisdictional hook has very curious consequences. If the "travels" element of § 2250 does not

refer to travel that post-dates the enactment of SORNA or the attachment of the SORNA registration requirement, nothing in the statutory language can plausibly be read to impose *any* temporal limit on when that travel must have taken place. Thus, if the reader is free to ignore the present tense used in the statutory text, and if the travel need not have been undertaken by someone required at the time to register under SORNA, the statutory language would seem to mean that interstate travel undertaken at *any* point during the offender's lifetime would suffice; it would be enough for the defendant to have crossed a state line on the way home from the hospital as an infant and to have committed a sex offense forty years later. A Congress concerned with effects on commerce (to preserve the statute's constitutionality or for any other reason) could not have had such an outcome in mind—and the Court should avoid a construction that would lead to such an absurd result. See generally *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

II. IF § 2250(a)(2)(B)'s TRAVEL ELEMENT REFERS TO TRAVEL PREDATING ENACTMENT OF SORNA, THE STATUTE VIOLATES THE EX POST FACTO CLAUSE

If the Court does not adopt the plain meaning of § 2250 and instead interprets "travels" to include travel that predated SORNA's enactment, SORNA's criminal provision will violate the Constitution's prohibition against ex post facto laws. U.S. Const. Art. I, § 9. The Court has established that "two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that

is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981) (internal citation omitted). Under the court of appeals' reading of SORNA, both of these considerations are present in the prosecution of persons whose sex offenses and travel occurred prior to the enactment of the statute.

The ex post facto problem emerges in one of two ways, depending on whether the government is correct in its view (expressed below but not in its opposition to certiorari) that, during the interval when States are not compliant with SORNA, satisfaction of SORNA's registration requirement demands nothing more than registration under the pre-existing Wetterling Act. If that view is correct, § 2250 simply enhances the punishment for a completed failure to register under the Wetterling Act. On this understanding of SORNA, a person in petitioner's situation was required to register in precisely the same way pre- and post-SORNA; he traveled before SORNA; and he had become noncompliant with the Wetterling regime before the enactment of SORNA. Each element was complete, subjecting him to prosecution for a crime with a maximum penalty of *one* year's imprisonment, before SORNA applied to him. The enactment of SORNA added no additional obligation. In these circumstances, adding exposure to an additional nine years' imprisonment for that same completed crime violates the Ex Post Facto Clause.

Were the government to try avoiding this problem by taking the position that registration "under" and "as required by" SORNA constitutes a new duty that actually did differ from the one existing under the pre-SORNA regime, as the Seventh Circuit

seems to have held, it would create a different constitutional problem. On that reading, petitioner was *immediately* in violation of SORNA upon enactment of the statute (or upon promulgation of the Attorney General's regulation applying SORNA to past sex offenders), with no fair opportunity to avoid liability. That, too, would violate the Ex Post Facto Clause and related due process principles. Interpreting the "travels" element to apply only to post-SORNA travel, however, resolves these constitutional difficulties as to persons like petitioner.[14]

A. Application Of SORNA's Criminal Provision To Petitioner Violates The Ex Post Facto Clause Because It Retroactively Increases Punishment For His Failure To Register Under the Wetterling Act

We begin with the government's understanding of SORNA's requirements during the period while States are not in compliance with the statute. SORNA creates a number of new registration requirements beyond those imposed by prior law, including new forms of required information and mandatory in-person registration. The statute's criminal provision then punishes knowing failure to register "as required by" SORNA, which one might suppose refers to failure to provide in person *all* of the information required. But satisfaction of these new requirements is literally impossible almost everywhere

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[14] We note that the travel element does not apply to prosecution for nonregistration under SORNA of offenders who committed *federal* sex offenses, although the prosecution of such persons may raise similar ex post facto issues. The question how, or whether, SORNA prosecutions may constitutionally proceed against such persons is not presented by this case.

because 49 States have not yet created SORNA-compliant registries. See U.S. Dep't of Justice, Press Release, *Justice Department Announces First Two Jurisdictions to Implement Sex Offender Registration and Notification Act* (Sept. 23, 2009) (announcing Ohio and the Confederated Tribes of the Umatilla Indian Reservation as first jurisdictions to substantially implement SORNA), available at http://www.ojp.usdoj.gov/smart/pdfs/smart09154.pdf.

The government accordingly has prosecuted cases on the theory that compliance with SORNA, at present, requires nothing more than compliance with the pre-SORNA Wetterling Act registration regime. As the government argued below in the case consolidated with petitioner's, a SORNA defendant "was already notified of his registration obligations [under Wetterling], and *SORNA did nothing to change those obligations*." Gov't C.A. Br. at 17, *United States* v. *Dixon* (No. 08-1438) (emphasis added). According to the government, "[w]hether the states' registries are in compliance with SORNA is immaterial" to SORNA criminal liability (*id.* at 20), and "it is not an element of that offense that the defendant register and provide the whole panoply of information that is required by SORNA." Oral Argument, *Dixon*, recording available at http://www.ca7.uscourts.gov. In the government's view, "[a] sex offender is able to comply with SORNA even if not a single state implements SORNA's registry requirements, so long as his jurisdiction provides a means to register as a sex offender." Gov't C.A. Br. at 20, *Dixon*. As noted above (at 11), the courts uniformly have accepted this understanding of what compliance with SORNA currently requires.

As we understand it, the government thus takes the position that, for persons already registered under the Wetterling Act, compliance with SORNA imposes *no* new obligations; satisfaction of the preexisting statutory registration requirement means that those persons are not subject to prosecution under SORNA. And for persons like petitioner, who had not been in compliance with the Wetterling Act at the time of SORNA's enactment, the almost universal failure of the States to create SORNA compliant registries meant that SORNA could, as a practical matter, have required them to do nothing more than what they already had been required to do when SORNA went into force. In these circumstances, the elements of the Wetterling Act and the SORNA criminal offenses are identical: the Wetterling Act (as amended) subjects to a maximum of one year's imprisonment someone who is "required to register," "chang[es] address to a State other than the State in which [he] resided at the time of the immediately preceding registration," 42 U.S.C. § 14072(g)(3), and knowingly fails to comply with those obligations, *id.* § 14072(i).

Petitioner, however, was charged under § 2250, a felony with a maximum penalty a full order of magnitude greater than that of the Wetterling Act misdemeanor; he ultimately received a 30-month sentence. By adding no new element to a completed crime while imposing a longer sentence of imprisonment, prosecutions of this sort offend the Ex Post Facto Clause.[15] It is a settled principle that the

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[15] The problem would not be avoided if, in a given case, a defendant received a SORNA sentence that is within the maximum for a Wetterling Act violation because the Ex Post Facto analy-

Clause prohibits "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). See *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990) ("[l]egislatures may not retroactively * * * increase the punishment for criminal acts."); *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981) (law in question unconstitutionally "increase[d] punishment beyond what was prescribed when the crime was consummated"); *Dobbert* v. *Florida*, 432 U.S. 282, 294 (1977) (upholding statute against ex post facto challenge because it did not increase the "quantum of punishment attached to the crime"). But as a practical matter, that is, in the government's view, just what Congress did in SORNA: application of SORNA to petitioner thus "aggravates" his crime and "makes it greater than it was when committed." *Calder*, 3 U.S. at 390.

B. Retroactive Application Of SORNA's Criminal Provision To Petitioner Violates The Ex Post Facto Clause Because It Does Not Provide Any Opportunity To Avoid Criminal Punishment

We suppose that the government might attempt to avoid this trap by insisting, as it appeared to suggest in its opposition to certiorari (at 18-19), that SORNA does add some additional element to the nonregistration crime beyond that constituting a Wetterling Act violation. If so, however, it skips from Scylla to Charybdis. On this construction of the statute, petitioner had *no* opportunity to avoid liability

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sis turns on the maximum possible, not the actual, term imposed. See *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937).

for the supposedly new SORNA felony. Such an outcome denies petitioner the "fair notice" that is "[c]ritical to relief under the Ex Post Facto Clause" (*Weaver*, 450 U.S. at 30-31) and offends basic precepts of due process: "A statute which denies the affected party a reasonable opportunity to avoid the consequences of noncompliance may work an injustice similar to that of invalid retroactive legislation. In both instances, the party who 'could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct.'" *Hodel* v. *Irving*, 481 U.S. 704, 733 n.18 (1987) (Stevens, J., concurring); *cf. Lambert* v. *California*, 355 U.S. 224 (1957) (providing "no opportunity to comply with the law and avoid its penalty" violates the Due Process Clause).

As a practical matter, SORNA provides adequate notice and an opportunity to comply with its registration requirement for persons convicted of a sex offense *after* the statute went into effect. Such persons are instructed to register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." 42 U.S.C. § 16913(b)(1)-(2). An offender is also required to update his or her registration "not later than 3 business days after each change of name, residence, employment, or student status." *Id.* § 16913(c).

But for persons like petitioner, who completed their incarceration and changed residence before SORNA was enacted, the normal time frame for registration provided by the statute expired *before* the registration requirement was imposed. The Attorney

General's regulation applying SORNA retroactively to such persons does not provide an extension of time within which they may register. Although Congress authorized the Attorney General to "specify the applicability of" SORNA registration "to sex offenders convicted before the enactment" of SORNA "or its implementation in a particular jurisdiction, *and to prescribe rules for the registration of any such sex offenders*" (42 U.S.C. § 16913(d) (emphasis added)), the regulation actually promulgated did not address the means or timing of registration; for such persons, the regulation does not provide any process or extended time limit for completing registration. See 28 C.F.R. § 72.3; see also Pet. App. at 10a. ("The regulation just says that such persons have to register. It doesn't say by when."). But without a prospective time interval in which to register, the statutory text made individuals such as petitioner *immediately* guilty of failing to register under SORNA at the moment the Attorney General's retroactivity regulation took effect.

This point would not seem debatable. The Seventh Circuit acknowledged that "[i]t would hardly be reasonable to require that [an offender] have registered no later than February 28[, 2007], since that was the day on which the interim regulation, subjecting him to the Act, was issued," and that "[w]hatever the minimum grace period required to be given a person who faces criminal punishment for failing to register as a convicted sex offender is, it must be greater than zero." Pet. App. 10a, 12a. (The court's solution to this problem, which we address below, was to invent an extra-statutory time period within which sex offenders would be permitted to register.)

And the Attorney General himself recognized that SORNA provides no time interval for compli-

ance to those whose offense and interstate travel occurred prior to SORNA's enactment. In the July 2008 National Guidelines for Sex Offender Registration and Notification, promulgated under 42 U.S.C. § 16912(b), the Attorney General discussed retroactive application of SORNA to those convicted of a sex offense prior to SORNA's enactment. The guidelines provide the following example:

> A sex offender convicted by a state for an offense in the SORNA registration categories * * * is not registered near the time of sentencing or before release from imprisonment, because the state did not require registration for the offense in question at that time. The state subsequently implements SORNA in 2008, which will include registering such a sex offender. But it is *impossible* to do so near the time of his sentencing or before his release from imprisonment, *because that time is past*.

72 Fed. Reg. at 38,063 (emphasis added).[16] Hence the Attorney General recognized that, insofar as SORNA registration is not coextensive with Wetterling Act registration, retroactive application of SORNA im-

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[16] Similarly: "[A] person convicted of a sex offense by an Indian tribal court in, e.g., 2005 may have not been registered near the time of sentencing or release because the tribe had not yet established any sex offender registration program at the time. If the person remains under supervision when the tribe implements SORNA, registration will be required by the SORNA standards, *but the normal time frame for initial registration under SORNA will have passed some years ago, so registration within that time frame is impossible*." 73 Fed. Reg. at 38,063 (emphasis added).

poses an impossible duty on both the offender and the registering State.

Of course, such persons ultimately would be able to come into compliance. They would, however, have been out of compliance for some period and therefore subject to prosecution. And subjecting someone to criminal liability that cannot be avoided is the essence of what is prohibited by the Ex Post Facto and Due Process Clauses. *Cf. Robinson* v. *California*, 370 U.S. 660, 666 (1962) (holding unconstitutional under the Eighth Amendment a statute which makes the "status" of narcotic addiction a criminal offense); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 169 (1972) (finding a vagrancy law void for vagueness because it did not give fair notice).

III. TO AVOID AN UNCONSTITUTIONAL RESULT, THE COURT SHOULD INTERPRET § 2250(a)(2)(B) TO APPLY ONLY TO INTERSTATE TRAVEL THAT OCCURS AFTER A PERSON IS REQUIRED TO REGISTER UNDER SORNA.

For the reasons just explained, there is an "exceeding real" possibility that § 2250(a)(2)(B), if applied to pre-SORNA travel, leads to an unconstitutional result. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 211 (1967). As we also have noted, the court of appeals acknowledged this problem. That reality provides an imperative to read § 2250(a)(2)(B) in accord with its plain terms, as applying to post-SORNA travel; such a construction is not only the most natural understanding of the statutory text, but also the approach compelled by the rule that, "[w]hen the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be

reasonably construed to avoid the constitutional difficulty." *Ellis* v. *Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984); see also *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder,* 129 S. Ct. 2504, 2513 (2009) ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.") (quoting *Escambia County* v. *McMillan*, 466 U.S. 48, 51 (1984) (per curiam)); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 541 (1979) ("[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.") (citing *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).[17]

Rather than embrace this straightforward way of avoiding the constitutional problem, however, the court of appeals determined to rewrite SORNA, inventing its own statutory structure. Recognizing that SORNA does not provide an express period to register for persons whose offense and travel occurred prior to enactment, the court looked "[b]y analogy to contract offers that do not specify a deadline for acceptance," concluding that persons in this position should "have to register within a reasonable time."

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[17] Reading § 2250(a)(2)(B) as applying only to travel that occurs after promulgation of the Attorney General's regulation would cure the constitutional infirmity at issue here: Pre-SORNA sex offenders who violated state law and therefore are subject to § 2250(a)(2)(B) could avoid criminal liability by registering within three business days of traveling in interstate commerce *after SORNA applied to them*. See *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901) (recidivism statute did not violate the Ex Post Facto Clause because one element of the offense was commission of a crime after the statute's enactment).

Pet. App. 10a. But this approach creates its own set of problems.

First, "[t]he canon of constitutional avoidance does not supplant traditional modes of statutory interpretation." *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2271 (2008). When adopting a saving construction, a court remains bound by the statute's text and it is inappropriate to "press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States* v. *Locke*, 471 U.S. 84, 96 (1985) (quoting *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373 (1933)). Yet the Seventh Circuit's interpolation of a "reasonable time" to register has no basis in the statutory text. SORNA provides a set of registration procedures and time limits to be followed by persons convicted of a sex offense *after* its enactment. See 42 U.S.C. § 16913(b). But Congress did not specify procedures that might be required of persons with pre-SORNA offenses, leaving that to the Attorney General. See *id.* § 16913(d). That the Attorney General has failed to address the problem is no justification for a court to write its own regulation and decide what, if any, "reasonable time" for registration might be built into the system.[18]

Second, and relatedly, the Seventh Circuit's exercise in judicial lawmaking simply multiplied, in sorcerer's apprentice fashion, the interpretive diffi-

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[18] It is notable in this regard that the United States did not seek certiorari from the adverse judgment in the companion appeal below, notwithstanding the Seventh Circuit's having found an Act of Congress unconstitutional as applied to a significant number of people. If the Attorney General agrees with the Seventh Circuit, he presumably could promulgate a regulation extending a "reasonable time" rule to all jurisdictions.

culties presented by SORNA. As Justice Frankfurter noted:

> There are * * * fundamental objections to loose judicial reading. In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language.

Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 545-546 (1947).

This case illustrates the wisdom of Justice Frankfurter's observation. Accepting the court of appeals' "reasonable time" construction would require lower courts to engage in common-law "judicial law-making without any guidance from Congress." *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F. by Charlene F.*, 526 U.S. 66, 77 (1999). In any case involving a defendant in the same position as petitioner, the district court would have to confront a series of questions with no clear answers. How long is a constitutionally sufficient "reasonable time"? (The Seventh Circuit did not say, holding only that in the case of petitioner five months was a reasonable time and that in the case of co-appellant Dixon one day was not. See Pet. App. 10a-11a, 12a). Does the "reasonable time" element include a *mens rea* requirement? Does it differ for those whose interstate travel preceded SORNA's enactment? For those who either did not or were not required to register under the Wetterling Act? Will a State's failure to establish a regis-

tration system as required by SORNA extend the registration period? A saving construction that permits SORNA's retroactive application so long as a defendant had a "reasonable" time to comply thus does not serve "to *avoid* the decision of constitutional questions," but instead *creates* an entirely new set of constitutional and interpretive problems. *Clark* v. *Suarez Martinez*, 543 U.S. 371, 381 (2005).

That is not an appropriate way to interpret a statute in the face of constitutional doubt when a more straightforward solution is available. The purpose of the avoidance doctrine is to simplify judicial decision-making, not to complicate it unnecessarily. See Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-1961 (1997). The avoidance canon presumes "that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381. For persons prosecuted under § 2250(a)(2)(b), reading the travel element to encompass only post-enactment travel accomplishes that purpose. That is all that is necessary to resolve this case—and "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc.* v. *U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). The court of appeals erred in doing so.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, § 9 of the United States Constitution provides, in relevant part:

No * * * ex post facto law shall be passed.

The registration provision of the Sex Offender Registration and Notification Act ("SORNA"), title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, § 113, 120 Stat. 587, 593-594 (codified at 42 U.S.C. § 16913), provides:

REGISTRY REQUIRMENTS FOR SEX OFFENDERS.

(a) IN GENERAL.—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. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) INITIAL REGISTRATION.—The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offence giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) KEEPING THE REGISTRATION CURRENT.—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.

(d) INITIAL REGISTRATION OF SEX OFFENDERS UNABLE TO COMPLY WITH SUBSECTION (b).—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 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) STATE PENALTY FOR FAILURE TO COMPLY.—Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title.

SORNA's criminal provision, Pub. L. 109-148, § 141, 120 Stat. at 601-602, codified at 18 U.S.C. § 2250, provides in relevant part:

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) AFFIRMATIVE DEFENSE.—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 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. * * *

The Attorney General's regulation applying SORNA's registration requirements to persons convicted before SORNA's enactment, 72 Fed. Reg. 8896 (2008), codified at 28 C.F.R. § 72.3, provides in relevant part:

> The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.
>
> * * *
>
> *Example 2.* A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. [§]2250 for the violation because he traveled in interstate commerce.