

Nos. 08-1301

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**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 OF LAW PROFESSORS AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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## INTEREST OF THE *AMICI CURIAE*

*Amici curiae* are law professors who specialize in constitutional law, substantive criminal law, and criminal procedure.<sup>1</sup> As law professors, *amici* have a particular interest in ensuring that the Ex Post Facto Clause of Article I of the United States Constitution is enforced in a manner consistent with its core historic goals and principles. The judgment of the U.S. Court of Appeals for the Seventh Circuit violated these goals and principles, and it prescribed a peculiar new test for application of the Clause that significantly deviates from this Court's settled jurisprudence.

### SUMMARY OF ARGUMENT

In this brief, *amici* explore the critical structural role of the Ex Post Facto Clause, set forth in Article I of the United States Constitution, as applied to the prosecution of Thomas Carr. Since the nation's founding, the Clause has guarded against retrospective criminal legislation targeting unpopular individuals. The prosecution of Carr, a convicted sex offender, is emblematic of the situation feared by the Framers, which is why the Clause was placed in the body of the Constitution itself. The Seventh Circuit,

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<sup>1</sup> *Amici's* names and law school affiliations are listed in the Appendix to this brief. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties has received timely notice of the intent to file this brief and consented to its filing. *Amici's* affiliations are listed for identification purposes. The views expressed herein are those of the *amici* and not the institutions with which they are affiliated.

in addition to disregarding the core purposes of the Clause, adopted a new test, allowing for prosecution of an individual based on behavior occurring before enactment of the criminal law in question. The Court should reverse the erroneous judgment of the Seventh Circuit and restore the firewall wisely embedded by the Framers in the Constitution against retroactive criminal legislation.

## ARGUMENT

### I. THOMAS CARR'S PROSECUTION UNDER 18 U.S.C. § 2250(a) IMPLICATES THE CORE PURPOSES OF THE EX POST FACTO CLAUSE

The Ex Post Facto Clause was included in the United States Constitution to prevent the types of prosecutions that are now occurring under 18 U.S.C. § 2250(a) based on pre-enactment events. Article I, section 9, clause 3 of the Constitution unequivocally proclaims that no “ex post facto law shall be passed.” The Framers’ decision to ensconce the Clause in the body of the Constitution reflected their profound concern for the threat to human liberty posed by retroactive criminal laws. *See, e.g.*, THE FEDERALIST, No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and Titles of Nobility ... are perhaps greater securities to liberty and republicanism than any [the Constitution] contains.”); *id.*, No. 44, at 282 (James Madison) (proclaiming that “ex post facto laws...are con-

trary to the first principles of the social compact, and to every principle of sound legislation.”)<sup>2</sup>

The Ex Post Facto Clause was first interpreted by the Supreme Court in *Calder v. Bull*, 3 U.S. 386 (1798), a decision that continues to control the interpretation of the Clause to this day. See *Stogner v. California*, 539 U.S. 607, 611 (2003) (referring to the rubric used in *Calder* as “a categorization that this Court has recognized as providing an authoritative account of the scope of the Ex Post Facto Clause.”); *Collins v. Youngblood*, 497 U.S. 37, 42, (1990) (referring to the *Calder* categories as “an exclusive definition of ex post facto laws...” (emphasis removed). In *Calder*, Justice Chase identified the four categories of impermissible legislative action under the Clause:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the

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<sup>2</sup> For a more thorough discussion of the history and animating purposes of the Clause, see Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1275-80 (1998).

time of the commission of the offence, in order to convict the offender.

*Calder*, 3 U.S. at 388, 390. After *Calder*, this Court has maintained a commitment to the principle that retroactive punishment is constitutionally unacceptable, even for despised members of the public whom legislative majorities may be eager to subject to new criminal laws.

Notably, in *Cummings v. Missouri*, 71 U.S. 277 (1866), the Court reviewed a portion of the Missouri Constitution approved in the wake of the Civil War, which contained a “test oath” designed to ensure Union loyalty. *Id.* at 316. The provision provided that any person who refused to take the oath could not hold “any office of honor, trust, or profit.” *Id.* at 317. The Court in *Cummings* held that the loyalty oath was inconsistent with the Ex Post Facto Clause because the oath violated the prohibition against punishing behaviors not punishable at the time of commission; enhanced the punishment of behaviors already criminal at the time of their commission; and subverted the “presumptions of innocence,” by altering the rules of evidence. *Id.* at 327-28.

More recently, in *Carmell v. Texas*, 529 U.S. 513 (2000), the Court confirmed the continued vitality of *Calder* and the critical importance of the Ex Post Facto Clause. In its opinion, the Court noted that the Clause prohibits the government from “altering [the rules] in a way that is advantageous only to the State, to facilitate an easier conviction.” *Id.* at 533. The Court proclaimed that the Ex Post Facto Clause is needed to guarantee “fundamental justice” and to

protect the public from “manifestly unjust and oppressive” laws. *Id.* at 531-32.

Through its numerous Ex Post Facto Clause cases, this Court has identified three major purposes of the Clause: 1) preventing the legislature from enacting in “arbitrary and potentially vindictive legislation”; 2) preserving the separation of powers wherein the legislature regulates prospective actions and the judiciary rules in regard to actions already done; and 3) providing fair notice to the members of the general public that their actions are criminal. *See, e.g., Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

Chief Justice Marshall noted that a core rationale of the Ex Post Facto Clause was to prevent a legislature from enacting retroactive punishments when it was caught up in the “feelings of the moment” and subject to “sudden and strong passions” toward a particular population. *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810). This Court in *Cummings* recognized that the public’s outcry for weeding out Confederate sympathizers was no justification for abridging one of the most important protections of liberty in the Constitution. *Cummings*, 71 U.S. at 316-17. If the Ex Post Facto Clause is subject to the whims of a fervent public targeting an unpopular or powerless population, it would cease to act, in James Madison’s words, as a “constitutional bulwark” against instances of impassioned legislative overreach. *See THE FEDERALIST, supra.*

The case of sex offenders, like the Confederate sympathizers in *Cummings*, is an instance where the legislative branch has targeted a disdained segment of the population with a variety of innovative pun-

ishments and regulations. *See* Wayne A. Logan, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA, 85-108 (2009). In this case, the innovation has gone too far by reaching back in time to punish persons for non-criminal conduct that was completed before the passage of the relevant law. The “hydraulic pressures,” *Payne v. Tennessee*, 501 U.S. 808, 867 (1991) (Stevens, J., dissenting), that periodically beset our majoritarian political processes that compel lawmakers to impose retroactive punishments on maligned groups “of the moment.” *Fletcher*, 10 U.S. at 87. Thus, this Court should not allow the disdain for sex offenders to undermine the Ex Post Facto Clause, one of America’s most significant protections of liberty against ill-intentioned or impassioned legislators.

**II. SECTION 2250(A) IS A PUNITIVE PROHIBITION THAT RESTROSPECTIVELY DISADVANTAGES INDIVIDUALS SUCH AS THOMAS CARR**

**A. Section 2250(a) is Punitive in Purpose and Effect**

Because the Ex Post Facto Clause solely regulates criminal legislation, a reviewing court must assess whether the statute in question is punitive in purpose or effect. *Smith v. Doe*, 538 U.S. 84, 92 (2003). Although the Seventh Circuit did not squarely address this threshold requirement, numerous lower courts have, and reached an incorrect result. Notwithstanding that section 18 U.S.C. § 2250(a) is reposed in the federal criminal code, and authorizes a penalty of up to ten years in prison, several lower

federal courts have wrongly concluded that the provision is not punitive in intent, citing *Smith* in support. See, e.g., *United States v. Hinen*, 487 F. Supp. 2d 747, 755 (W.D. Va. 2007) (“The contours of the statutory scheme at issue in *Smith* are nearly indistinguishable from the one at issue here.”); *United States v. Samuels*, 543 F. Supp. 2d 669, 676 (E.D. Ky. 2008); see also Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 387-92 (2009) (citing decisions).

This Court’s decision in *Smith* in no way supports such a conclusion. The *Smith* court simply did not address the criminal prosecution of a defendant – that case was wholly focused on a civil challenge to the public registry listing itself, answering whether application to previously convicted individuals was punitive.

Moreover, actual application of the intent-effects test used by the Court to discern punishment dictates the conclusion that 18 U.S.C. § 2250(a) is punitive in nature. As this Court has explained, “[w]hether a statutory scheme is civil or criminal ‘is first of all a question of statutory construction.’” 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). In *Smith*, the Court noted that the placement of the Alaska requirement in the civil code was indicative of the legislature’s non-punitive intent. *Smith*, 538 U.S. at 94. Here, Congress plainly and purposely situated the crime of failure to register in the federal criminal code.

The lower courts that have found prosecutions under 18 U.S.C. § 2250(a) to be non-punitive have stressed that the legislative intent language contained in SORNA is the same as in the Alaska statute at issue in *Smith*. See, e.g., *Hinen*, 87 F. Supp. 2d at 755. However, the language is simply a reference to guaranteeing public safety. See 42 U.S.C.A. § 16901. Such broad language cannot trump the SORNA’s placement in the criminal code as well as the severe prison penalties Congress attached to 18 U.S.C. § 2250(a): a significant fine and up to ten years in federal prison. Furthermore, the broad language Congress used concerning public safety is not referenced specifically to the provisions of 18 U.S.C. § 2250(a), but rather to SORNA as a whole, which contains numerous civil and criminal provisions.

Even assuming a lack of legislative punitive purpose, 18 U.S.C. § 2250(a) plainly has punitive effect. To determine if a law is punitive in its effects, this Court has used the seven factor test outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). The *Mendoza-Martinez* factors are “neither exhaustive nor dispositive,” but are a useful means of determining whether the effects of a statute are punitive. *Smith*, 538 U.S. at 97. In *Smith*, this Court only found five of the factors to be relevant when analyzing the effect of a sex offender registry listing:

[I]n its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection

to a nonpunitive purpose; or is excessive with respect to this purpose.

*Id.* Unlike in *Smith*, each of those factors as applied in this setting points strongly toward a conclusion that SORNA is punitive in its effects.

In *Smith*, this Court found that mere registration listings and notifications were not historically regarded as punishment, *id.*; here, the law at issue is a criminal prohibition and punishment for failing to register and it includes a substantial prison penalty (which is assuredly a historical form of punishment). In *Smith*, this Court noted that the lower court had factually erred in finding that the statute had numerous reporting requirements which would have constituted definitive affirmative disabilities and restraints. *Id.* at 101. In the case of SORNA, the personal appearance requirements are frequent and of the type that this Court identified in *Smith* as constituting such restraints. *See, e.g.*, 42 U.S.C. § 16916(3) (requiring Tier III offenders to appear in person at least four times per year for a lifetime). In addition, the prison penalties surely constitute such disabilities and restraints as well. As to the “traditional aims of punishment factor,” the prison penalties, again, fit with the goals of retribution, incapacitation, and deterrence (specific and general).

This Court has held that the connection to a non-punitive purpose is the most important of the *Mendoza-Martinez* factors. *Smith*, 538 U.S. at 102-03. However, insofar as the only non-punitive purpose that has been identified is public safety, SORNA is not situated any differently than any other criminal law. The last factor that the Court considered in

*Smith* was whether the statute was excessive in regards to those non-punitive purposes. *Id.* Because sex offenders are a diverse population, see Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. CR-CL LAW REV. (forthcoming 2010), available at: <http://ssrn.com/abstract=1456042>, many persons prosecuted for failing to register are eligible to receive prison sentences far in excess of that available for their original sex offense. This makes the penalty disproportionate to the speculative goal of preventing recidivism.<sup>3</sup>

Also of significance is one *Mendoza-Martinez* factor that the Court did not consider in *Smith*: that the conduct in question was already defined as criminal. *United States v. Ward*, 448 U.S. 242, 249–50 (1980). In the case of sex offender registration, every jurisdiction in the United States has a registration law with criminal penalties giving strong evidence of punitive effects. *Smith*, 538 U.S. at 90. As a result, if the Court reaches this stage of the analysis, it should find that, unlike the registry listing in *Smith*, the punitive effects of SORNA are so punitive as to override even a finding of non-punitive intent.

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<sup>3</sup> This Court should be sure to avoid undue reliance on questionable recidivism statistics in its balancing test, especially given that a Department of Justice study of the 9,691 sex offenders released in fifteen states since 1994 found that sex offender recidivism was only 5.3% in the critical window of three years after release. Lawrence A. Greenfeld, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003). This study documents that, contrary to folk wisdom, sex offender recidivism is in fact significantly lower than recidivism for many other groups of criminal offenders.

Ultimately, there should be little doubt that a statute placed in the criminal code that authorizes a substantial fine and ten-year prison sentence as punishment is, in fact, intended to be punitive. However, even if this Court concludes that the statute was not punitive in intent, the effects of 18 U.S.C. § 2250(a) are so punitive as to overwhelm any ascribed non-punitive intent.

**B. The Application of Section 2250 to Carr was Retrospective**

As this Court has made clear, only retrospective laws come within the ambit of the Ex Post Facto Clause. *Weaver*, 450 U.S. at 29. It is this aspect of the Seventh Circuit’s decision below that presents greatest cause for jurisprudential concern. According to the ruling below, “as long as at least one of the acts” specified by Congress as triggering criminal liability took place after the enactment of 18 U.S.C. § 2250(a), “the clause does not apply.” *United States v. Dixon*, 551 F.3d 578, 585 (7th Cir. 2008). The court elaborated that “[s]ince [Carr’s] violation was not complete when the Act became applicable to him, his rights under the ex post facto clause were not violated.” *Id.* at 587.

According to the approach adopted by the Seventh Circuit, as long as any conduct required by the statute (even an omission) occurred after the enactment of the criminal law, then there can be no Ex Post Facto Clause challenge. This interpretation of the Ex Post Facto Clause, if adopted by the Court, would become the exception that swallows the rule and would allow legislatures to render the Clause a constitutional nullity.

In support of its unusual interpretation of the Ex Post Facto Clause, the Seventh Circuit cited to circuit opinions that are simply inapplicable. In *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), the Ninth Circuit Court of Appeals rejected an Ex Post Facto challenge against a conviction for conspiracy to conduct a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d). *Id.* at 355. In that case, the government established a pattern of extortion by the defendant that spanned the period before and after the enactment of the relevant statute. Because the conduct of the defendants established a pattern, the conduct before the law was enacted was relevant as to the acts after the passage of the law. *Id.* at 364-65. Unlike the present matter, however, the acts at issue in *Campanale* before and after the enactment of the law were pertinent to the *same* element of the new law. *Id.* at 365. There was no basis for the Seventh Circuit's far-reaching and potentially limitless one-act-under-any-element rule. In Carr's case, unlike *Campanale*, one essential element of the crime, travel in interstate commerce, consisted of conduct that was completed before the passage of SORNA. Further, there was no element of 18 U.S.C. § 2250(a) that required a showing of a pattern by the defendant which might have necessitated the consideration of conduct before and after the passage of a law. The Seventh Circuit also cited *United States v. Brown*, 555 F.2d 407, 416-17 (5th Cir. 1977), which is inapplicable for the same reasons as *Campanale*. Instead of the Seventh Circuit's unprecedented and problematic approach, a simpler version consistent with prior case law would simply

be that: *one act for each element must be completed after the enactment of a statute.*<sup>4</sup>

The Seventh Circuit also cited to a body of cases concerning instances when greater punishment was applied for a new crime based upon the commission of a prior crime. *See, e.g., McDonald v. Massachusetts*, 180 U.S. 311 (1901). In those instances, however, the Court found that the prior conduct was not used as the basis for an element in the new crime – it was simply an enhancement to sentencing. *Id.* at 312-13. Such cases, therefore, are not analogous to the present case.

The only possible way the Seventh Circuit could reconcile its holding with prior case law was if 18 U.S.C. § 2250(a) was construed as a continuing offense analogous to conspiracy.<sup>5</sup> This argument fails

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<sup>4</sup> There are other settings in which no Ex Post Facto Clause violation was found even though a defendant's conviction was based in part upon prior conduct. However, such cases have concerned instances when the prior conduct served as the basis for a duty by the defendant in a new crime. For example, in the case of felons in possession of firearms, *see, e.g., United States v. Mitchell*, 209 F.3d 319, 322–23 (4th Cir. 2000), the past conduct was not actually an element of the crime. Rather, the past conduct supported a conviction that was the basis for a duty to avoid possessing a firearm. However, in this matter, unlike the felon in possession case, an additional element, interstate travel, was completed before the passage of the law in question.

<sup>5</sup> Notably, the Government, in its opposition to the grant of a writ of certiorari, contended that the Seventh Circuit did not find that the failure to register under 18 U.S.C. § 2250 was a continuing offense. Opp. Brief, p. 19 (“At any rate, the court of appeals did not rest its ex post facto analysis on a finding that petitioner’s violation of SORNA began before, but then continued until after, the date on which the statute took effect with

because the conspiracy cases cited by the lower court did not allow prosecutions for instances when all of the conduct related to one element occurred prior to the enactment of the relevant law. *See, e.g., Campanale*, 518 F.2d at 355.

Further, the continuing offense characterization of the failure to register is wrong as a matter of law. This Court has made clear that “[continuing] offenses are not to be implied except in limited circumstances.” *United States v. Toussie*, 397 U.S. 112, 121 (1970). The Seventh Circuit failed to cite any legislative support or special circumstances for a finding that 18 U.S.C. § 2250(a) includes a continuing offense element. In *Toussie*, this Court instructed that courts should not identify an element of a crime as being continuing “unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.” *Id.* at 115. As the facts of *Toussie* concerned the registration for the military draft, the Court’s reasoning is directly applicable to the present matter: “There is ... nothing inherent in the act of registration itself which makes failure to do so a continuing crime.” *Id.* at 122.

Notably, the lower court only considered the purpose of providing fair notice to the defendant, which is only one of three recognized purposes of the Ex Post Facto Clause. *Dixon*, 551 F.3d at 584-87. In-  

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respect to him.”). But the Seventh Circuit’s opinion suggests that the continuing offense rationale is the basis for its holding. *Dixon*, 551 F.3d at 582 (“The Act creates a continuing offense in the sense of an offense that can be committed over a length of time.”).

deed, the court found, without any discussion of prior case, that:

Carr's ... interstate travel ... preceded the application of the Sex Offender Registration and Notification Act to him... [T]he only ground of his appeal is that his conviction violated the ex post facto clause. But he does not and cannot complain that he was not given enough time to register in Indiana in order to avoid violating the Act, because he admits that he had still failed to do so "on or about July, 2007," almost five months after the Attorney General's regulation was issued that made the statute applicable to him. Five months is a sufficient grace period.... Since his violation was not complete when the Act became applicable to him, his rights under the ex post facto clause were not violated.

*Id.* at 586-87. As this Court recently emphasized, however, the Ex Post Facto Clause was primarily designed to ensure governmental restraint, independent of notice and reliance concerns:

[T]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his life or liberty.

*Carmell v. Texas*, 529 U.S. 531, 533 (2000).

Also of significance, the ruling of the Seventh Circuit is directly at odds with law derived from the *Calder* categories. The first *Calder* category, that “[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.” *Calder*, 3 U.S. at 390-91, is certainly relevant to the present matter. The second *Calder* category, that “Every law that aggravates a crime, or makes it greater than it was, when committed,” *id.*, is also applicable. In the case of SORNA as applied to Carr, it criminalized, at the federal level, travel in interstate commerce prior to the enactment of SORNA as an essential element of Carr’s criminal conduct and increased the punishment of a state law or pre-existing federal law failure to register by applying federal punishment to that prior violation.

The Seventh Circuit’s analysis would make possible a broad and potentially limitless range of options for legislatures seeking to adopt retrospective laws without running afoul of the Constitution. If Congress desired to apply federal penalties for crimes that occurred at the state level for decades previous, it could meet the Seventh Circuit’s test without much trouble. This hypothetical statute, for example, would easily allow prosecution of persons at the federal level with previous convictions for fraud:

(a) In General. – Whoever –

(1) is subject to the requirements of the Pervasive Fraud Act [including all persons who had been convicted of any fraud crime]; and

(2) knowingly travels in interstate commerce;

shall be fined under this title or imprisoned not more than 8 years, or both.

The aforementioned statute would meet the Seventh Circuit's test because, as that court noted, a person "by not committing that act (provided of course that it is a voluntary act and so can be avoided by an exercise of volition) he [or she] would have avoided violating the new law." *Dixon*, 551 F.3d at 585. So, a defendant could avoid criminal prosecution by avoiding travel in interstate commerce after the enactment of the hypothetical Pervasive Fraud Act. However, if a person subject to the Pervasive Fraud Act briefly crossed state lines years after the commission of the qualifying offense, he or she would be subject to substantial prison penalties and, if the Seventh Circuit's reasoning was utilized, have no recourse under the Ex Post Facto Clause. While it might seem farfetched to believe that such a statute would be passed or enforced in that manner, a recent SORNA case that was before the Eleventh Circuit Court of Appeals illustrates that such a situation is very real.

In *United States v. Ambert*, Gene Felix Ambert, on July 6, 2007, had a warrant issued for his arrest for violation of Florida registration law. 561 F.3d 1202, 1205 (11th Cir. 2009). On July 9, 2007, Ambert took a brief trip to California and returned to Florida two days later. *Id.* He did not trigger any new obligation to change his registration status based upon that brief trip. Nonetheless, that three-day excursion, which was wholly unrelated to Ambert's failure

to register, served as the sole basis for alleged travel in interstate commerce needed to support his indictment under § 2250(a). *Id.* at 1207. Because that interstate travel occurred after the enactment of SORNA, the Eleventh Circuit cited Ambert’s traveling between Florida and California as a basis for rejecting his Ex Post Facto Clause argument since the travel occurred after the passage of the Act. *Id.* at 1208 (“[Ambert] performed every action necessary for prosecution – i.e., ... traveling in interstate travel – after the effective date of the Attorney General’s retroactivity determination. The application of SORNA to these facts does not violate the ex post facto clause.”).

In that sense, *Ambert* seems to be the reverse of the present case since the travel clearly occurred after the passage of SORNA. However, the *Ambert* facts illustrate that the federal government, under the Seventh Circuit’s ruling, would be free to punish conduct before the passage of a law if it simply attached a jurisdictional element that required conduct after the enactment of that statute. By holding that the travel was wholly separate element of conduct that need not be tied to a failure to register,<sup>6</sup>

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<sup>6</sup> Indeed, this is why the Commerce Clause claim of Carr was also mishandled by the Seventh Circuit. Although not before this Court, the Commerce Clause and Ex Post Facto Clause issues are often intertwined because both arguments focus on the relationship between the interstate travel element and the failure to register element. The Seventh Circuit disposed of the argument that the government lacked the jurisdiction for the prosecution of Carr under the Commerce Clause in a single sentence by stating that, “Dixon’s lawyer must in the heat of argument have forgotten the Mann Act, 18 U.S.C. §§ 2421 et seq.” *Dixon*, 551 F.3d at 583. The Mann Act is clearly distin-

the *Ambert* court, and other courts that have reached similar conclusions, have made the impact of the Seventh Circuit holding in this matter even more significant. Indeed, under the Seventh Circuit’s reasoning, the Alaska legislature could have made the Ex Post Facto issue much easier for the Court in *Smith v. Doe* if it had simply included an element for listing based upon a defendant’s inter-county travel (or some other action by the defendant). Then, the law would have ceased to be retrospective. This renders the Ex Post Facto Clause meaningless in the face of any legislature determined to impose retrospective criminal legislation.

Similarly, if Congress or a state legislature wanted to punish *unprosecuted* thefts from previous decades, it could pass this statute:

(a) In General. – Whoever –

(1) is subject to the requirements of the Property Crime Amnesty Act [including all persons who have committed property theft which had a nexus with interstates commerce,

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guishable, however, because it “criminalizes action in the course of traveling across state lines.... Thus, there is no strong connection with interstate travel under SORNA as there is under the Mann Act.” Yung – *New Questions, supra* at 516. Further, “the Mann Act applies to persons who have the requisite intent to commit prostitution by crossing state lines. The travel is part of the *mens rea* of the criminal act. For SORNA, the offender’s travel is wholly unrelated to the mental state needed to fail to register.” *Id.* at 516-17. The facts of the *Ambert* case, discussed above, also illustrate that the disconnection between the interstate travel element and the failure to register element puts the jurisdictional basis for SORNA in such cases on shaky ground.

but were never punished for their criminal conduct]; and

(2) knowingly fails to report their unpunished prior crimes;

shall be fined under this title or imprisoned not more than 5 years, or both.

Such a law, perhaps passed under the guise of providing amnesty and absolution for those with guilty consciences, would force persons to confess prior misdeeds for which they were never punished by the state or face criminal penalties for a failure to report such misdeeds. Persons subject to the Act would confront the difficult situation of confessing crimes and facing public ridicule and embarrassment or exposing themselves to criminal liability (assuming they were even aware of the statute). The result for many persons would be to punish them for acts for which the statute of limitations had run. As the Court noted in *Stogner*, 539 U.S. at 611, the revival of prosecution beyond the statute of limitations by legislative act is inconsistent with the Ex Post Facto Clause. *Id.* at 616. Nonetheless, the above statute would surely meet the Seventh Circuit's one-act test because the failure to report the old unprosecuted crime would have occurred after the passage of the law.

In the alternative, assuming that this Court adopts the Seventh Circuit's one-act-under-any-element rule or crafts a similar rule, the Court should still find for the petitioner because the nature of the post-SORNA conduct alleged. In this case, the only conduct that allegedly occurred after the en-

actment of SORNA was an act by omission, the failure to register. Statutes punishing acts of omission are rarities in American criminal law, in part, because such statutes essentially punish a defendant for doing nothing. See A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1293-99 (1983); Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 611 (2001) (“... [L]iability for any kind of omission or failure to act is exceptional.”). In the case of Carr, he neither committed a sex offense after the enactment of SORNA nor travelled in interstate commerce. He simply did nothing. Further, unlike instances such a felon in possession of a firearm, a sex offender is unable to shed the registration requirements like the felon can dispose of the illegal weapon. Yung – *New Questions, supra*, at 390. To allow that failure to act alone to be the basis for finding that SORNA, as applied to Carr, was not retrospective is inconsistent with the purposes of the Ex Post Facto Clause described above and basic Constitutional fairness. *Hodel v. Irving*, 481 U.S. 704, 733 n.18 (1987) (Stevens, J., concurring). It would also create an easy loophole for legislatures to exploit in punishing past deeds.

### **C. Thomas Carr Was Disadvantaged By Retrospective Application of 18 U.S.C. § 2250**

Finally, application of the Clause also requires that an individual be newly disadvantaged by application of the challenged law, based on the categories identified by the *Calder* Court. Here, such disadvantage arises in two forms.

The first *Calder* category, that “[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.” *Calder*, 3 U.S. at 390-91, is certainly implicated. Further, the second *Calder* category, that “Every law that aggravates a crime, or makes it greater than it was, when committed,” *id.*, is also applicable.

In the case of SORNA as applied to Carr, it criminalized, at the federal level, travel in interstate commerce prior to the enactment of SORNA as an essential element of Carr’s criminal conduct and increased the punishment of a state law or pre-existing federal law failure to register by applying federal punishment to that prior violation. Thomas Carr’s interstate travel, which was a necessary element of his alleged crime, was alleged to have occurred sometime in 2004 or 2005, well before the enactment of the Sex Offender Registration and Notification Act (“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.), signed into law on July 26, 2006. SORNA required sex offenders to register and maintain their registration status in each jurisdiction where they lived, worked, or attended school. 42 U.S.C. § 16913(a). If a sex offender failed to register or maintain accurate registration information in any of those jurisdictions, the result would be a violation of a new crime established in SORNA, “Failure to register.” 18 U.S.C. § 2250(a). Section 18 U.S.C. § 2250(a), as is relevant to this matter, provided that:

(a) In General. – Whoever –

(1) is required to register under the Sex Offender Registration and Notification Act;

(2) ... (B) travels in interstate or foreign commerce...; 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.

There were two elements of conduct embodied in the crime as applied to Carr:<sup>7</sup> traveling in interstate commerce (specified in (a)(2)(B)); and the failure to register (specified in (a)(3)) with a corresponding duty to register (specified in (a)(1)). The Seventh Circuit held that the Act was consistent with the Ex Post Facto Clause even though all of the conduct under one element, travel in interstate commerce, was completed before the enactment of SORNA because the acts in the other element, failure to register, were in part completed after the enactment of SOR-

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<sup>7</sup> Textually, it appears as though there are three elements. However, 18 U.S.C. § 2250(a)(1) is best read as the corresponding duty for the act by omission of failing to register embodied in 18 U.S.C. § 2250(a)(3). It is long settled in American criminal law that for an act by omission to create criminal culpability, there must be a corresponding duty. See Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 624 (1958). Consequently, the only possible location for the duty (since sex offender registration is not based upon any common law duty) is 18 U.S.C. § 2250(a)(1).

NA. *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008).

Initially, it was unclear as to whether the requirements of SORNA would apply to those who had committed sex offenses before the law went into effect. However, pursuant to delegated authority under 42 U.S.C. § 16913(d), the Attorney General on February 27, 2007 declared that the crime of failure to register could be charged against those who had committed sex offenses before the passage of the Act. 72 Fed. Reg. 8896, 28 C.F.R. § 72.3. Consequently, those sex offenders who had committed sex offenses even decades before the enactment of SORNA were required to register and maintain their registry information or face potential prosecution under 18 U.S.C. § 2250(a).

Exactly what constituted a failure to register was still ambiguous after the Attorney General's directive was issued because of the varying registration systems that were in effect at the time. SORNA mandated that each state assist in the creation of a national sex offender registry or lose federal funds. 42 U.S.C. § 16925(a). However, at the deadline for states to comply with the requirements necessary to form the national registry in July of 2009, not one state had met them. *See Leahy Urges Attorney General to Extend Deadline for State Compliance with Sex Offender Registry Act*, STATES NEWS SERVICE, Mar. 19, 2009 ("The deadline for compliance is July 2009, and no state or jurisdiction has yet met the requirements mandated in SORNA."). Consequently, the deadline was extended by one year. *See Att'y Gen. Order No. 3081-2009*, available at

<http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf>.<sup>8</sup> While it might, then, appear that it is impossible for an offender to comply with the requirements of SORNA and thus any prosecution under 18 U.S.C. § 2250(a) is impossible, courts have universally rejected such a conclusion. One district court explained why the unusual situation presented by states' failure to comply with SORNA did not preclude prosecutions of persons under 18 U.S.C. § 2250(a):

An offender's registration under SORNA does not hinge on implementation in his state. Gould highlights the differences between SORNA and existing Maryland sex offender registration requirements and contends that Maryland did not have the infrastructure available for Gould to comply with SORNA. Gould contends that his failure to register under Maryland law has no bearing on his failure to register under SORNA. Gould's argument is misplaced. Although the obligations imposed under SORNA differ from those under Maryland law, Gould had a duty to register his name and address with the Maryland authorities. Maryland's failure to implement SORNA does not

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<sup>8</sup> In particular, as relevant to Carr's case, the Seventh Circuit noted that in Indiana, the state "ha[d] yet to establish any procedures or protocols for the collection, maintenance, and dissemination of the detailed information required by the Act...." *Dixon*, 551 F.3d at 582.

preclude Gould's prosecution under § 2250(a).

*United States v. Gould*, 526 F. Supp. 2d 538, 542 (D. Md. 2007).

The result of lower court willingness to comply with the wishes of federal prosecutors in such cases, wherein the statute has been used to prosecute persons even when the means of compliance were absent, has been that SORNA effectively applied federal punishment to persons for a state law violation. Thus, the prosecution of Carr, like that of other defendants subject to 18 U.S.C. § 2250(a) indictments, will result in increased punishment for such individuals.

However, a state law violation was not the only means underlying a theory for prosecuting sex offenders under 18 U.S.C. § 2250(a) without a new federal apparatus for compliance in place. Another way that federal prosecutors have contended that a sex offender could be prosecuted under SORNA was based upon a violation of the previous federal scheme for the registration of sex offenders under the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), Pub. L. No. 103-322 tit. XVII, subtit. A, 108 Stat. 2038-2042 (1994). In its brief before the Seventh Circuit, the government contended that 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).<sup>9</sup>

But the penalties under both the Indiana law and the Wetterling Act were very different than those under SORNA. In most cases, under Indiana law, failure to register was a Class D felony with a possible prison sentence of up to three years. (Pub. L. 140-2006, § 13, 2006 Ind. Acts 2327-28 (codified as amended at Ind. Code § 11-8-8-17)); Ind. Code § 35-50-2-7(a). The Wetterling Act treated failing to register as a misdemeanor. *United States v. Patterson*, No. 8:07CR159, 2007 WL 2904099, at \*2 (D. Neb. Sept. 21, 2007). SORNA, however, authorized a penalty of up to ten years imprisonment. 18 U.S.C. § 2250(a). Regardless of which theory for a violation

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<sup>9</sup> Notably, the requirements and definitions in SORNA were greater than those of the Wetterling Act and the various state laws. For example, SORNA required far more information to be given as part of the registration process. The Wetterling Act required an offender’s current address, a photograph, and fingerprints. 42 U.S.C. § 14072(c). In contrast, SORNA required sex offenders to provide their Social Security number, a palm print, DNA, employer information, school information (if relevant), details of the offenders vehicle, copy of the offender’s driver’s license, aliases used on the Internet including email addresses and instant messaging names, telephone numbers, and details of the offenders passport. 42 U.S.C. § 16914(a)-(b); National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,054-38,058 (July 2, 2008). Similarly to the narrow requirements of the Wetterling Act, the Indiana registration statute did not require, for example, telephone numbers, a palm print, passport details, or DNA. Ind. Code § 11-8-8-8.

was applied, the government asked for greater punishment to be applied to a pre-existing crime based upon conduct that occurred before the enactment of SORNA.

Because the prosecution of Thomas Carr under 18 U.S.C. § 2250(a) necessitated that he was punished for an action that was completed before the enactment of SORNA, it is incompatible with the Ex Post Facto Clause. Whether the prosecution was based upon a state law or Wetterling Act violation, the constitutional outcome is the same: Carr was subject to the very type of retrospective punishment that the Framers sought to prevent.

## CONCLUSION

While the petitioner's brief makes a compelling case for resolving this case in favor of Carr on statutory grounds, there are significant reasons for the Court to address and resolve the Ex Post Facto Clause argument in favor of the petitioner as well. Lower courts have created a complete mess of Ex Post Facto law in SORNA cases by confusing the rules of retrospectivity, as the Seventh Circuit did, deciding that a criminal statute with substantial prison penalties was not intended to be punitive, and that lengthy imprisonment and other restraints in SORNA are not punitive in effects. Especially because the Government has effectively neutralized the Ex Post Facto issues by not appealing any district court judgments where it lost the issue, this is an issue that should be addressed in the present matter. The Court should take this opportunity to restate the importance of the Ex Post Facto Clause and provide clear guidance to lower courts in addressing SORNA and other statutes. This will ensure that the Clause provides the necessary bulwark against ill-intentioned legislatures, maintains a proper separation of powers, and preserves the basic

right of fair notice. Accordingly, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 9, 2009

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