No. 12-418

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY JAMES KEBODEAUX

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

A person who is required to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA) as a result of a conviction under federal law and who knowingly fails to register or update a registration as required by federal law is subject to criminal penalties under 18 U.S.C. 2250(a)(2)(A). Before SORNA was enacted, respondent was convicted of a military sex offense, completed service of his sentence, and was subject to a federal obligation to register as a sex offender under pre-SORNA law. The court of appeals held in this case that SORNA is unconstitutional as applied to respondent on the ground that the statute exceeded Congress's powers under Article I of the Constitution. The questions presented are as follows:

1. Whether the court of appeals erred in conducting its constitutional analysis on the premise that respondent was not under a federal registration obligation until SORNA was enacted, when pre-SORNA federal law obligated him to register as a sex offender.

2. Whether the court of appeals erred in holding that Congress lacks the Article I authority to provide for criminal penalties under 18 U.S.C. 2250(a)(2)(A), as applied to a person who was convicted of a sex offense under federal law and completed his criminal sentence before SORNA was enacted.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-73a) is reported at 687 F.3d 232. The opinion of the panel of the court of appeals (Pet. App. 75a-113a) is reported at 647 F.3d 137, and an earlier panel opinion is reported at 634 F.3d 293. The opinion of the district court (Pet. App. 114a-132a) denying respondent's motion to dismiss is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2012. The petition for a writ of certiorari was filed on October 4, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the Constitution provides in relevant parts as follows:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *
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> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
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> To make Rules for the Government and Regulation of the land and naval Forces.
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> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

U.S. Const. Art. I, § 8, Cls. 1, 3, 14 and 18.

Relevant statutory provisions are reprinted in the appendices to this brief (App., *infra*, 1a-15a) and to the petition for a writ of certiorari (Pet. App. 177a-228a).

STATEMENT

Following a bench trial, respondent was convicted of failing to register or update his registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to one year and a day of imprisonment, to be followed by five years of supervised release. The court of appeals reversed, finding 18 U.S.C.

2250(a)(2)(A) unconstitutional as applied to respondent. Pet. App. 1a-73a, 78a.

1. a. "Sex offenders are a serious threat in this Nation," in large part because "the victims of sexual assault are most often juveniles" and because "convicted sex offenders * * * are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion); see *Smith* v. *Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). Consequently, Congress has frequently enacted legislation to encourage and assist States in tracking sex offenders' addresses and making information about sex offenders available to the public "for its own safety." *Id.* at 99.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071). The Wetterling Act encouraged States, as a condition of receiving federal funding, to adopt sex-offender-registration laws meeting certain minimum standards. See *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. *Id.* at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community notification provision to the Wetterling Act. See Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e)). Congress also strengthened the national effort to ensure the registration of sex offenders by directing the FBI to create a national sex-offender database, requiring lifetime registration for certain offend-

ers, and making the failure of certain persons to register a federal crime, subject to a penalty of imprisonment of up to one year (for a first offense) or ten years (for a second or subsequent offense). See Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

In 1997, Congress expanded that federal criminal penalty for failure to register to include persons who had been convicted of federal sex offenses (including those sentenced by courts-martial). Department of Justice Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, Tit. I, § 115(a)(2)(F) and (6)(C), 111 Stat. 2463-2464 (42 U.S.C. 14071(b)(7), 14072(i) (Supp. III 1997)). As further amended in 1998, the federal criminal penalty applied to any individual convicted of specified federal or military sex offenses who "knowingly fail[ed] to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation." Department of Justice Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(b) [Tit. I, § 123(3)], 112 Stat. 2681-73 (42 U.S.C. 14072(i)(3) and (4)). Later statutes continued to enhance federal registration and notification requirements.[1]

b. Despite those legislative efforts, Congress grew concerned about "loopholes and deficiencies" in the existing registration and notification statutes, which re-

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[1] See PROTECT Act, Pub. L. No. 108-21, §§ 604-605, 117 Stat. 688 (requiring, *inter alia*, States to make sex-offender-registry information available on the Internet); Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (requiring sex offenders to provide notice concerning institutions of higher education at which they work or are students).

sulted in an estimated 100,000 sex offenders becoming "missing" or "lost." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20, 26 (2005) (*House Report*). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*). SORNA was intended to make "more uniform and effective" the "patchwork" of federal and state sex-offender registration systems that were already in effect. *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012). As *Reynolds* explained, SORNA "repeal[ed] several earlier federal laws that also (but less effectively) sought uniformity; [set] forth comprehensive registration-system standards; [made certain] federal funding contingent on States' bringing their systems into compliance with those standards; [and required] both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current)." *Ibid.* SORNA also "creat[ed] federal criminal sanctions applicable to those who violate the Act's registration requirements." *Ibid.*

SORNA requires that every "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." 42 U.S.C. 16913(a). A "sex offender," in turn, is defined as "an individual who was convicted of" an offense that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7). SORNA specifies, among other things, the kinds of information that must be collected as part of registration (42 U.S.C. 16914), the length of time that offenders must remain registered (42 U.S.C. 16915 (2006 & Supp. V 2011)), and the frequency with which a sex offender must appear and verify registry

information (42 U.S.C. 16916). SORNA requires States to adopt the specified federal standards or risk losing certain federal funds. 42 U.S.C. 16912, 16925.[2]

To enforce SORNA's registration requirements, Congress made noncompliance a federal crime in certain circumstances. As relevant here, SORNA makes it a federal crime when someone who is required to register as a sex offender knowingly fails to register (or to update a registration) and that person either

> (2)(A) is a sex offender as defined for the purposes of [SORNA] 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.

18 U.S.C. 2250(a). In *Carr* v. *United States*, 130 S. Ct. 2229 (2010), this Court held that the interstate travel referred to in Subparagraph (B) must occur after SORNA became effective, but the Court also observed, with respect to Subparagraph (A), that "it is entirely

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[2] The vast majority of States have complied with SORNA or are working toward compliance. Sixteen States have substantially implemented SORNA's requirements. See Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, U.S. Dep't of Justice (SMART Office), *Jurisdictions that Have Substantially Implemented SORNA*, http://smart.gov/newsroom_jurisdictions_sorna.htm (last visited Feb. 24, 2013). Consistent with 42 U.S.C. 16925(c), one of those States (Pennsylvania) and 29 other States received federal approval for fiscal year 2012 "for reallocation of the funding penalty to work solely towards furthering SORNA implementation activities and efforts." SMART Office, *Newsroom*, http://smart.gov/newsroom.htm (last visited Feb. 24, 2013).

reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Id.* at 2238.

Sex offenders convicted before SORNA's July 2006 enactment were not required to register under SORNA until the Attorney General exercised his delegated authority under 42 U.S.C. 16913(d) to "validly specif[y] that the Act's registration provisions apply to them." *Reynolds*, 132 S. Ct. at 980. On February 28, 2007, the Attorney General issued an interim rule specifying 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 [SORNA's] enactment." 72 Fed. Reg. 8897 (codified at 28 C.F.R. 72.3). On July 2, 2008, the Attorney General promulgated final guidelines for the States and other jurisdictions on matters of SORNA's implementation. See 73 Fed. Reg. 38,030. Those guidelines were issued after public notice and comment and reaffirmed SORNA's applicability to all sex offenders. *Id.* at 38,035-38,036, 38,046, 38,063. On December 29, 2010, the *Federal Register* published an Attorney General order finalizing the interim rule, with one clarifying change in an example to avoid any possible inconsistency with the decision in *Carr*. See 75 Fed. Reg. 81,849.[3]

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[3] The courts of appeals have adopted different dates, ranging from February 28, 2007, to August 1, 2008, on which SORNA's registration requirements became applicable to pre-enactment sex offenders. See Pet. 8 n.4 (citing cases). Under Fifth Circuit law, respondent was required to register under SORNA at the time of his offense (between August 2007 and March 2008). Although respondent challenged the interim rule in the district court, *id.* at 118a, he did not

2. In June 1999, respondent, who was then in the United States Air Force, was convicted by a special court-martial for committing, on multiple occasions in March 1999, the offense of carnal knowledge of a female under the age of 16, in violation of Article 120(b) of the Uniform Code of Military Justice, 10 U.S.C. 920(b). Pet. App. 116a, 167a; D. Ct. Doc. 49, at 3 (filed Aug. 26, 2008). He received a sentence of confinement for three months and a bad-conduct discharge. Pet. App. 116a.

Sometime after the September 1999 completion of his sentence, respondent moved to San Antonio, Texas, and later to El Paso, Texas. Pet. App. 167a. In early August 2007, he reported to El Paso authorities and updated his sex-offender registration. *Id.* at 167a-168a; D. Ct. Doc. 49, at 9. Later that month, however, he moved back to San Antonio and failed to update his registration. Pet. App. 169a. In March 2008, he was located in San Antonio and arrested. *Ibid.*

3. In April 2008, a federal grand jury indicted respondent on one count of knowingly failing to register and update a registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a)(2) and (3). Pet. App. 115a. Respondent moved to dismiss the indictment, contending, *inter alia*, that Section 2250 exceeds Congress's au-

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argue on appeal that that prevented SORNA's registration requirements from applying to him—not even before the en banc court, which would not have been bound by circuit precedent. See *id.* at 2a n.1 (citing *United States* v. *Johnson*, 632 F.3d 912, 930-933 (5th Cir.), cert. denied, 132 S. Ct. 135 (2011), which found no prejudice in applying SORNA to a pre-enactment sex offender after March 30, 2007)). As the government explained at the petition stage (U.S. Reply Br. 11-12), respondent's claim (Br. in Opp. 29-30) that the Court may affirm the judgment on the basis that SORNA did not apply to him overlooks his failure to preserve the issue and that it is not an issue of importance otherwise worthy of review.

thority under the Commerce Clause. *Id.* at 118a. The district court denied the motion to dismiss, *id.* at 114a-132a, and respondent was convicted following a bench trial on stipulated facts, *id.* at 78a. The district court sentenced respondent to imprisonment for one year and one day, to be followed by five years of supervised release. *Ibid.*[4]

4. On respondent's appeal, a panel of the court of appeals affirmed his conviction, Pet. App. 75a-113a, but the court granted rehearing en banc and reversed, *id.* at 1a-73a, 74a. Over the dissent of six judges, the court held that Section 2250(a)(2)(A) is unconstitutional as applied to persons who had been convicted of sex offenses under federal law, but who had served their sentences and been "unconditionally released" by the federal government before SORNA was enacted in 2006. *Id.* at 2a, 4a.

a. The majority focused on what it called "former federal sex offenders," by which it meant persons who were convicted of sex offenses under federal law but who had been "unconditionally released from [the federal government's] jurisdiction before SORNA's passage in 2006." Pet. App. 3a, 4a, 41a. With respect to respondent, the court concluded that, by the time SORNA was enacted, he had "fully served" the sentence associated with his sex offense, and "[h]e was no longer in federal custody, in the military, under any sort of supervised release or parole, or in any other special relationship with the federal government." *Id.* at 2a. In ex-

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[4] Respondent's supervised release began in January 2009, but the district court later revoked that release and sentenced him to an additional 17 months of imprisonment for violating his conditions of release. Order at 1, 3, *United States* v. *Kebodeaux*, No. 5:10-cr-117 (W.D. Tex. Sept. 30, 2010). Respondent completed that term in June 2011.

plaining what it meant by "unconditional release," the court rejected the contention—advanced by both the government (Gov't C.A. En Banc Br. 23-24 & nn.4-5) and a dissenting opinion (Pet. App. 65a-73a)—that respondent had in fact been subject to a federal requirement to register as a sex offender "ever since his 1999 conviction," *id.* at 4a n.4. The court concluded that, under pre-SORNA federal law, the only sex offenders who were "subject to federal registration for intrastate changes in residence" were those who were required to register directly with the FBI because they lived in States where sex-offender registries were not compliant with federal guidelines. *Ibid.* (citing 42 U.S.C. 14072(g)(1)-(3) and (i) (repealed by SORNA)). The court found that respondent's "state of residence, Texas, was compliant with federal guidelines at the time of his offense" and he was therefore "subject only to state, not federal, registration obligations" under pre-SORNA law. *Id.* at 5a n.4.

b. Based on its premise that respondent had been "*unconditionally* let * * * free" by the federal government years before SORNA was enacted, the court of appeals concluded that Congress lacked a "jurisdictional basis" to regulate his subsequent conduct because "he once committed a [federal] crime." Pet. App. 4a.

The court of appeals first considered the Necessary and Proper Clause. It rejected the government's argument that "its power to criminalize the conduct for which [respondent] was originally convicted includes the authority to regulate his movement even after his sentence has expired and he has been unconditionally released." Pet. App. 6a. The court discussed the five considerations that informed this Court's analysis in *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), in sustaining Congress's power to provide for the civil commitment of

sexually dangerous federal prisoners beyond the time when they would otherwise have been released from custody. The court of appeals found that most of those considerations support respondent. Pet. App. 7a-24a. In its view, SORNA's

> regulation of an individual, after he has served his sentence and is no longer subject to federal custody or supervision, solely because he once committed a federal crime, (1) is novel and unprecedented despite over 200 years of federal criminal law, (2) is not 'reasonably adapted' to the government's custodial interest in its prisoners or its interest in punishing federal criminals, (3) is unprotective of states' sovereign interest over what intrastate conduct to criminalize within their own borders, and (4) is sweeping in the scope of its reasoning.

Id. at 24a.

The court of appeals rejected the government's "alternative argument" that SORNA's registration requirements for federal sex offenders are "necessary and proper to effect Congress's Commerce Clause power." Pet. App. 24a-25a. It concluded that, as applied to federal sex offenders who had not engaged in interstate travel, SORNA is not a permissible regulation of the use of, or things or persons in, the channels of interstate commerce or of conduct that has substantial effects on interstate commerce. *Id.* at 26a-38a.

The court of appeals emphasized that its "finding of unconstitutionality * * * does not affect the registration requirements for (1) any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or (2) any federal sex offender convicted since then." Pet. App. 4a; *id.* at 41a-42a ("Every federal sex offender subject to federal custody or super-

vision when SORNA was enacted, or who was convicted since then, is unaffected."). The court also noted that its reasoning would not preclude prosecution of a federal sex offender when "[s]ome other jurisdictional ground, such as interstate travel," is present. *Id.* at 4a.

c. Judge Owen concurred in the judgment. Pet. App. 42a-46a. She rejected the majority's understanding of the federal criminal penalties in place when respondent was released from custody, concluding instead that respondent "could have been prosecuted under [pre-SORNA] *federal* law * * * for knowingly failing to register in any State in which he resides," "if he moved from El Paso, Texas to San Antonio, Texas and failed to notify Texas authorities of this intrastate change in residence in the manner required by state law." *Id.* at 42a-43a, 44a. In Judge Owen's view, "Congress was well within its powers under the Necessary and Proper Clause to impose conditions such as intrastate registration and reporting requirements on federal sex offenders in connection with their convictions and sentencing." *Id.* at 44a. She found, however, that SORNA had altered "the reporting requirements imposed at the time [respondent] was sentenced" and "increased the punishment for failure to comply with reporting requirements," which meant, in her view, that "Congress could not constitutionally apply SORNA to [respondent's] intrastate relocations under either the Necessary and Proper Clause or the Commerce Clause." *Id.* at 46a.

d. Judge Haynes dissented, joined by Judges King, Davis, Stewart, and Southwick. Pet. App. 61a-73a. She concluded that Section 2250(a)(2)(A) is constitutional facially and as applied to respondent. *Ibid.* Even assuming that the majority had correctly concluded that Congress would be unable to impose a registration require-

ment on a federal sex offender after he has been unconditionally released, she determined that Congress had not done that here, because respondent "was, in fact, continuously subject to federal registration authority from the time of his release through SORNA's inception (and thereafter)." *Id.* at 66a. Under pre-SORNA federal law, respondent was required to register as a sex offender for at least ten years, regardless of which State he chose to reside in after his release from federal custody. *Id.* at 69a. Although SORNA "revamped prior federal registration requirements," Judge Haynes concluded that it would "make[] little sense to contend that Congress lost its power or 'jurisdictional hook' over [respondent] simply because it updated the national sex-offender registration system laws." *Id.* at 71a, 72a. She saw "no reason to distinguish the jurisdiction (as a matter of federal power) exercised over [respondent] under SORNA from that exercised under its predecessor sex offender registry laws that applied to [respondent]." *Id.* at 73a. Accordingly, she concluded that, on the basis of the majority's assumption "that [respondent's] conviction would be constitutional had SORNA been enacted while he was in prison or on supervised release, then his conviction is constitutional given the continuous federal jurisdiction Congress exercised over [respondent] from the time he committed his original sex crime * * * to the present day." *Ibid.*

e. Judge Dennis also dissented, joined by Judge King, concluding that Section 2250(a)(2)(A) is valid as a necessary and proper means of implementing the registration requirement imposed by 42 U.S.C. 16913, which is itself supported by Congress's powers under the Spending and Commerce Clauses. Pet. App. 46a-61a. Judge Dennis criticized the majority for analyzing only

Congress's Commerce Clause and Necessary and Proper Clause powers, when Congress "plainly used three, not just two, of its constitutional powers." *Id.* at 50a. He concluded that SORNA's registration provisions "are manifestly rationally adapted to carry Congress's spending power into execution for the legitimate purpose of establishing a comprehensive national system" for sex-offender registration and notification. *Id.* at 54a. He also concluded that "Section 2250(a)(2)(A) is necessary and proper to bring about parity and a consistent level of enforcement, monitoring and tracking of all sex offenders, so that laxity toward federal sex offenders does not disrupt or interfere with Congress's enumerated powers sought to be executed through SORNA," and that Section 2250(a)(2)(B), which requires interstate travel, is a legitimate exercise of Congress's Commerce Clause authority. *Id.* at 55a, 56a.

SUMMARY OF ARGUMENT

Congress has constitutional authority to subject a federal sex offender to criminal penalties for failing to register or update a sex-offender registration, whether or not that penalty is enacted before the end of the offender's federal criminal sentence. Accordingly, 18 U.S.C. 2250(a)(2)(A) is valid as applied to respondent.

I. The court of appeals believed that Congress could not "constitutionally reassert jurisdiction over [respondent's] intrastate activities after his unconditional release from federal custody." Pet. App. 2a. That analysis was predicated on a mistake about respondent's status under pre-SORNA federal law.

A. When respondent was released from military custody in 1999, his offense of conviction already triggered a potential federal criminal penalty for failure to register as a sex offender under two provisions of the Wetter-

ling Act that were in effect between 1998 and 2009: 42 U.S.C. 14072(i)(3) and (4). Although the Wetterling Act assumed respondent would register with Texas's registry, it still constituted a *federal*-law registration requirement, because it provided a federal sanction for failure to register. As a result, SORNA did not need to initiate a new period of federal jurisdiction over respondent, because Congress had continuously asserted authority over him.

B. The court of appeals' constitutional analysis was fundamentally predicated on its threshold error about federal jurisdiction over respondent in 1999. The Court could correct that error and remand the case to permit the court of appeals to revisit its analysis. In the alternative, the Court may reverse the judgment outright, in light of the court of appeals' correct recognition that Congress had the constitutional authority to assert jurisdiction over respondent in the form of sex-offender-registration obligations while he was still in federal custody (or under some form of federal supervision).

II. Even assuming that respondent was not previously subject to a federal penalty for failing to register, Section 2250(a)(2)(A) is constitutional as applied to him.

A. Like the federal civil-commitment provision that this Court upheld in *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), Section 2250(a)(2)(A) is a necessary and proper measure to effectuate the enumerated powers that support the federal statutes under which federal sex offenders are convicted. Sex-offender registration is a "legitimate" collateral consequence of conviction that is intended to protect the community. *Smith* v. *Doe*, 538 U.S. 84, 102-104 (2003). Section 2250(a)(2)(A) is reasonably adapted because the obligations it enforces relate directly to the sexual nature of the underlying

federal offense. It affects only the narrow class of individuals whose previous criminal conduct has brought them within federal regulation. Indeed, this Court has already recognized that it was "entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." *Carr* v. *United States*, 130 S. Ct. 2229, 2238 (2010). The power at issue here is inherently narrower than civil commitment, both in its effect on the individual and in any incursion on States' interests. It is thus both necessary and proper in the relevant senses.

B. The constitutionality of Section 2250(a)(2)(A) is supported by the "five considerations" that the Court articulated in *Comstock*. 130 S. Ct. at 1956. In particular, it builds upon the federal government's history of using post-release parole, probation, or supervision to protect the public from the risks presented by federal offenders. It reasonably extends authority over a limited category of persons who brought themselves within federal power by committing federal sex offenses. It accommodates state interests, because Section 2250 relies on States' cooperation in registering offenders and because SORNA imposes only a modest financial penalty on States that do not substantially comply with its requirements. By applying only to federal sex offenders, for whom the federal government has a "special role," *Carr*, 130 S. Ct. at 2238, Section 2250's link to the powers underlying their offenses is not too attenuated, and the provision is not too sweeping.

C. Section 2250(a)(2)(A) is also valid under the Necessary and Proper Clause when it is considered within the broader context of SORNA, because it is a focused and rational component of Congress's comprehensive

program to address the risks associated with a mobile sex-offender population. SORNA draws upon, *inter alia*, Congress's spending and commerce powers and its powers to legislate with respect to members of the Armed Forces, the District of Columbia, federal territories, and Indian tribes. Congress reasonably concluded that stronger federal penalties were necessary to support its revised registration requirements and were an appropriate means of ensuring that the federal funds invested in creating a national sex-offender-registration system were well spent. Congress's willingness to shoulder some of the burden of implementing SORNA with respect to sex offenders who had violated federal law was reasonable and does not expand federal power at the expense of traditional state prerogatives.

ARGUMENT

CONGRESS HAS CONSTITUTIONAL POWER TO SUBJECT A FORMER FEDERAL SEX OFFENDER TO CRIMINAL PENALTIES FOR FAILING TO REGISTER OR UPDATE A SEX-OFFENDER REGISTRATION

The court of appeals held that 18 U.S.C. 2250(a)(2)(A) is unconstitutional as applied to respondent because it believed that Congress could not "constitutionally reassert jurisdiction over [respondent's] intrastate activities after his unconditional release from federal custody." Pet. App. 2a. A reassertion of jurisdiction, however, was not necessary: when he completed his federal sentence in 1999, respondent was already subject to a pre-SORNA federal criminal penalty for future failures to register as a sex offender. But even assuming that respondent had not been under any federal obligation when he was released from custody, the application of Section 2250(a)(2)(A) is constitutionally valid under the Necessary and Proper Clause. First, a federal sex-

offender-registration obligation is a reasonably adapted means of achieving legitimate ends under the enumerated powers that justified the creation of the underlying federal sex-offense statutes. Second, Section 2250(a)(2)(A) is a narrow and rational component of Congress's larger effort in SORNA—on the basis of multiple enumerated powers—to create a comprehensive national system for sex-offender registration.

I. SORNA DID NOT "REASSERT" FEDERAL JURISDICTION OVER RESPONDENT, BECAUSE HE WAS ALREADY SUBJECT TO A FEDERAL CRIMINAL PENALTY FOR FAILURE TO REGISTER WHEN HE COMPLETED HIS FEDERAL SENTENCE

This Court has recognized that "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Carr* v. *United States*, 130 S. Ct. 2229, 2238 (2010). Consistent with that recognition, the court of appeals did not question "Congress's ability to impose conditions on a [federal] prisoner's release from custody, including requirements that sex offenders register intrastate changes of address after release." Pet. App. 3a-4a. Congress's exercise of such a power regulates a person who has violated federal law and is thus an appropriate subject of federal regulations that address the collateral consequences of the violation.[5]

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[5] As this Court made clear in *Smith* v. *Doe*, 538 U.S. 84 (2003), sex-offender-registration-and-notification requirements are valid civil regulatory measures and raise no ex-post-facto concerns. *Id.* at 105-106 (holding that retroactive application of Alaska's sex-offender-

The court of appeals never disputed that Congress has constitutional authority to impose sex-offender-registration obligations on federal offenders so long as the government *continuously* asserts jurisdiction over such offenders. Pet. App. 3a-4a & n.4, 41a-42a. But it concluded that Congress could not "reassert jurisdiction" over persons who had previously been "unconditionally released from [federal] custody." *Id.* at 11a; see *id.* at 2a ("agree[ing]" with respondent's contention that Congress "cannot constitutionally reassert jurisdiction over his intrastate activities after his unconditional release from federal custody"). In fact, from the time he was released from military custody in 1999, respondent was continuously subject to a federal criminal penalty for knowingly failing to register as a sex offender. That alone is a basis for reversal of the decision below.[6]

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registration-and-notification law was not a violation of the Ex Post Facto Clause applicable to States). Thus, the fact that SORNA adds to the consequences of respondent's federal conviction is not constitutionally problematic. Cf. *Chaidez* v. *United States*, No. 11-820 (Feb. 20, 2013), slip op. 6 n.5 (noting that "sex offender registration" is "commonly viewed as [a] collateral" consequence of conviction).

[6] Whether respondent was already subject to registration requirements enforceable under federal law in 1999 was both pressed and passed upon below. Before the en banc court, the government explained that "a federal criminal penalty for failure to register * * * has expressly applied to federal and military sex offenders since" the 1998 Appropriations Act and that "[respondent's] military sex offense has triggered a federal sex-offender-registration requirement" ever since he committed his crime in March 1999. Gov't C.A. En Banc Br. 23, 24 n.5. Accordingly, the government contended that even if the court of appeals "were to hold that Congress's authority to require registration by a federal sex offender, qua federal offender, depends on the existence at the time of offense of a federal reporting requirement, [respondent's] conviction would still stand." *Id.* at 24 n.5. The court squarely passed upon the threshold question, concluding that

A. In 1999, Respondent Was Already Subject To A Federal Criminal Penalty For Future Failures To Register As A Sex Offender

At the time of respondent's March 1999 offense conduct, his June 1999 conviction, and his September 1999 release from military custody, his offense of conviction triggered a potential federal criminal penalty for failure to register as a sex offender under two provisions of the Wetterling Act that took effect in November 1998 and remained in effect until 2009: 42 U.S.C. 14072(i)(3) and (4).[7] The court of appeals therefore took a wrong turn at the outset of its constitutional analysis when it stated that "before the passage of SORNA, [respondent] was subject only to state, not federal, registration obligations." Pet. App. 5a n.4.

1. Originally, federal sex-offender legislation "relied on state-level enforcement." *Carr*, 130 S. Ct. at 2238. But Congress gradually added federal criminal penalties to "supplement[] state enforcement mechanisms." *Id.* at 2239. One such provision was Section 14072(i)(3), which took effect in November 1998 and provided:

A person who is—

* * * * *

"before the passage of SORNA, [respondent] was subject only to state, not federal, registration obligations." Pet. App. 5a n.4.

[7] See 1998 Appropriations Act § 115(c)(1), 111 Stat. 2467 (setting November 1998 effective date); SORNA §§ 124, 129, 120 Stat. 598, 600 (repealing Wetterling Act upon completion of three-year implementation period for SORNA); see also 64 Fed. Reg. 585 (Jan. 5, 1999) (noting that the 1998 Appropriations Act had "amended the federal failure-to-register offense (42 U.S.C. 14072(i)) in order to bring within its scope federal and military sex offenders who fail to register").

> (3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; * * *
>
> * * * shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

42 U.S.C. 14072(i). The cross-referenced paragraph provided that "[a] person is described in this paragraph if the person was convicted of" certain enumerated offenses in title 18 of the United States Code or of "[a]ny other offense[s] designated by the Attorney General as a sexual offense for purposes of this subsection." 18 U.S.C. 4042(c)(4)(A)-(E) (2000).

In 1998, the Attorney General delegated his authority under Section 4042(c)(4)(E) to the Director of the Bureau of Prisons (BOP). See 63 Fed. Reg. 69,386 (Dec. 16, 1998). The Director, in turn, exercised that authority by designating, *inter alia*, the military offense of carnal knowledge in violation of Article 120(b) of the Uniform Code of Military Justice as a "sexual offense[] for purposes of 18 U.S.C. 4042(c)." 28 C.F.R. 571.72(b)(2).[8]

Accordingly, at the time of respondent's offense, conviction, and release in 1999 and until well after SORNA's enactment, Section 14072(i)(3) applied to respondent and subjected him to a federal criminal penalty for any knowing failure to register as a sex offender

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[8] In light of SORNA's repeal of Section 4042(c)(4), BOP recently proposed deleting the regulation. See 78 Fed. Reg. 9353-9355 (Feb. 8, 2013).

in any State in which he lived, worked, or attended school.

Respondent has contended (Br. in Opp. 23-24) that Section 14072(i)(3) "did not apply to persons, like [him], who were in military custody," because Section 4042 was generally addressed to duties imposed on the BOP, and because 18 U.S.C. 4042(d) specifically stated that "[t]his section shall not apply to military or naval penal or correctional institutions or the persons confined therein." But that merely means that Section 4042's substantive directions to BOP personnel—*e.g.*, to provide notice to state and local authorities when sex offenders were released from prison or placed on probation—were immaterial to respondent while he was in military custody. They do not alter the applicability of Congress's cross-reference to a specific paragraph within that section, which did not refer to BOP's duties but to a list of persons convicted of certain offenses, without any reference to their place of confinement. That list included respondent's military offense, making him a person "described in [S]ection 4042(c)(4)" and therefore triggering the federal failure-to-register penalty in Section 14072(i)(3).

2. The second relevant Wetterling Act provision, Section 14072(i)(4), which also took effect in November 1998 (see note 7, *supra*), provided as follows:

> A person who is—
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> * * * * *
>
> (4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-119, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or

> sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

42 U.S.C. 14072(i). The cross-referenced provision of Public Law 105-119 (*i.e.*, the 1998 Appropriations Act) required the Secretary of Defense to "specify categories of conduct punishable under the Uniform Code of Military Justice which encompass a range of conduct comparable to that described in [42 U.S.C. 14071(a)(3)(A) and (B)], and such other conduct as the Secretary deems appropriate." § 115(a)(8)(C), 111 Stat. 2466.

On December 23, 1998, an Acting Assistant Secretary of Defense, exercising delegated authority, issued a "directive-type memorandum," which was "effective immediately" and designated "covered military offenses" for purposes of "sex offender registration requirements." Pet. App. 171a, 172a, 174a, 175a. The designated offenses included respondent's offense of conviction: carnal knowledge under Article 120(b) of the Uniform Code of Military Justice. *Id.* at 175a.

Accordingly, at the time of his offense, before his release in 1999, and until well after SORNA's enactment, Section 14072(i)(4) applied to respondent and subjected him to federal criminal penalties for any knowing failure to register as a sex offender in any State in which he lived, worked, or attended school. 42 U.S.C. 14072(i)(4); Pet. App. 42a & n.1, 43a-44a, 46a (Owen, J., concurring in the judgment).[9]

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[9] Although the government did not rely on Section 14072(i)(4) in the court of appeals, Judge Owen recognized that respondent had a federal registration obligation under 42 U.S.C. 14072(i)(4) when he

Respondent has suggested (Br. in Opp. 26) that "it appears that he was not subject to [Section] 14072(i)(4)" because the December 1998 memorandum contemplated that the Secretaries of each military department would take further "steps to fully implement the requirements of Federal law" with respect to registration and notification. Pet. App. 172a. Respondent contends (Br. in Opp. 26) that full implementation did not occur "until December 17, 1999," when "the list of specified UCMJ offenses was added to Department of Defense Instruction 1325.7." But Section 14072(i)(4) was not limited by an unstated full-implementation condition. Instead, that provision applied to those who had been "sentenced by a court martial for conduct" specified in the December 1998 memorandum, which was "effective immediately." Pet. App. 174a. Respondent was therefore subject to a potential federal penalty under Section 14072(i)(4) for a knowing failure to register, whether or not the Air Force or the Department of Defense had fully implemented its procedures concerning sex-offender notifica-

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completed his sentence and that he could have been prosecuted under federal law for failing to register. See Pet. App. 42a-44a & n.1. Judge Owen concurred in the judgment reversing respondent's conviction because, in her view, SORNA had expanded the preexisting federal obligation and increased the authorized punishment. *Id.* at 46a. But those adjustments in scope and degree do not change the relevant point: Congress continuously exercised regulatory authority over respondent, requiring him to register as a sex offender in any State where he resides, works, or attends school and imposing criminal penalties for the failure to do so. SORNA's alteration of the specific features of the federal regulatory scheme did not alter its essential character. Nor did its alteration of the collateral consequences of respondent's federal conviction implicate ex-post-facto concerns. See note 5, *supra*.

tion before he was released from military custody in September 1999.[10]

3. Although Judge Owen and Judge Haynes explained in their concurring and dissenting opinions that respondent was subject to Section 14072(i)(3) and (4), Pet. App. 42a-44a & n.4, 66a-70a, the court of appeals concluded that pre-SORNA law imposed federal registration requirements only on those sex offenders who were required to register directly with the FBI because they resided in States where, unlike respondent's State of residence, sex-offender-registration programs did not meet minimum federal standards. *Id.* at 4a n.4. By focusing only on the distinct requirement that sex offenders in non-compliant States register directly with the FBI, see 42 U.S.C. 14072(a)(3), (c), (g)(2) and (i)(1), the court of appeals overlooked the federal registration requirements that were imposed on federally convicted sex offenders by virtue of Section 14072(i)(3) and (4). As Judge Haynes explained in her dissent, "[w]hether a state was minimally compliant or not affected *where* [a federally convicted sex offender] was to register"—*i.e.*, with the FBI or with state authorities—"but not *whether* he had to register." Pet. App. 70a n.7.

Respondent contends (Br. in Opp. 22) that Section 14072(i) did not establish "federal *registration* requirements" because it penalized a failure to register as re-

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[10] Treating the specification of offenses as distinct from the ensuing implementation process is consistent with the structure of the authorizing statute that was cross-referenced in Section 14072(i)(4). That provision separated into different clauses the Secretary's initial duty to "specify" qualifying offenses and the additional requirement that he "prescribe procedures and implement a [notification] system" "[i]n relation to persons sentenced by a court martial for conduct in the categories [that he has] specified." 1998 Appropriations Act § 115(a)(8)(C)(i) and (ii), 111 Stat. 2466.

quired by *state* law. See 42 U.S.C. 14072(i)(3) and (4) (providing penalties for persons who "fail[] to register in any State"). But even now, 42 U.S.C. 16913(a)—the provision of SORNA that respondent identifies as an example of a "free-standing federal registration requirement," Br. in Opp. 22—requires sex offenders, as a matter of federal law, to register with States, not with the federal government. A federal law that imposes federal criminal sanctions for failure to register is a "federal registration requirement" under any reasonable understanding of that phrase. That is true even if Texas law also required respondent to register, as it did.[11] Congress's provision of separate sanctions for the failure to register with available state registries represented a federal requirement.

Accordingly, Congress did not relinquish federal authority over respondent when he completed his military sentence in 1999. To the contrary, in prescribing Section 14072(i)'s criminal penalties for a sex offender's failure to register, Congress asserted its Article I power over federal sex offenders such as respondent as early as 1998. As a result, with respect to those offenders, SORNA's subsequent enactment did not, as the court of

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[11] Since 1997, Texas law has required sex-offender registration by someone convicted under the Uniform Code of Military Justice of an offense that was "substantially similar" to certain enumerated Texas offenses, including, as relevant here, sexual assault. See Tex. Code Crim. Proc. Ann. art. 62.001(5)(A) and (H) (West Supp. 2012); *id.* art. 62.01(5)(A) and (I) (West Supp. 1998) (version that took effect in 1997). According to the Texas Sex Offender Registry, respondent first registered on May 11, 2004—long before SORNA was enacted. See Tex. Dep't of Pub. Safety, *TxDPS Sex Offender Registry*, https://records.txdps.state.tx.us/SexOffender/PublicSite/Application/Search/Individual.aspx?IND_IDN=6843376 (last visited Feb. 24, 2013).

appeals believed, require Congress to "reassert jurisdiction over [their] intrastate activities." Pet. App. 2a.

B. The Court Of Appeals' Threshold Error About Federal Jurisdiction Over Respondent In 1999 Vitiates Its Constitutional Analysis

The court of appeals' threshold error about federal sex offenders' pre-SORNA registration obligations was the linchpin of its constitutional analysis. In describing the category of federal sex offenders that it believed fell outside Congress's reach, the court's opinion used the phrase "unconditionally released" or "unconditional release" nine times. Pet. App. 2a, 3a, 4a & n.4, 6a, 11a, 23a, 41a, 42a. While respondent has suggested (Br. in Opp. 18-21) that "[p]re-SORNA sex offender registration law" was relevant to only one factor (the second) of the court of appeals' Necessary and Proper Clause analysis under *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), the point was part of the court's analysis of the third, fourth, and fifth *Comstock* factors as well. See Pet. App. 11a-12a, 18a, 20a, 23a. And the unconditional-release premise was part of the court's repeated articulations of its constitutional holding. *Id.* at 2a, 4a, 41a. In short, the constitutional analysis in the decision below was "based almost exclusively" on the conclusion that respondent was "'long ago unconditionally released from custody.'" *United States* v. *Elk Shoulder*, 696 F.3d 922, 932 (9th Cir. 2012) (quoting Pet. App. 11a).[12]

If this Court corrects that threshold error, the Court could remand the case to the Fifth Circuit and permit

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[12] The defendant in *Elk Shoulder* filed a petition for rehearing en banc, and the Ninth Circuit stayed proceedings pending the decision in this case. See 10-30072 Docket entry Nos. 49 & 52 (Jan. 4 & 18, 2013).

that court to revisit its analysis based on a proper understanding of the pre-SORNA federal sex-offender-registration obligations applicable to respondent. See Pet. 22-24; see also *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing.").

Alternatively, the Court could reverse the judgment outright. The court of appeals recognized, correctly, that Congress does have the constitutional authority to require registration by federal sex offenders who are "subject to federal custody or supervision when [the registration requirement is] enacted, or who [are later] convicted" of a federal sex offense. Pet. App. 42a; see *id.* at 24a n.37 (noting that "SORNA is perfectly constitutional" with respect to persons convicted after its enactment). Respondent was convicted of his federal sex offense in June 1999, after Section 14072(i)(3) and (4) had already taken effect and been made applicable to his offense. Thus, under the court of appeals' own constitutional reasoning, which was correct on this point, Congress's assertion of federal jurisdiction over respondent in the Wetterling Act—in the form of a federal penalty for failure to register—was unquestionably valid. See *id.* at 66a (Haynes, J., dissenting) ("The majority opinion and [respondent] * * * agree * * * that if SORNA had been implemented while [respondent] was in custody or subject to supervised release," the constitutional objection "would not apply.").

If Congress had the power to impose the collateral consequence of sex-offender registration on respondent when he was convicted, it retained the power when it enacted SORNA to continue requiring him to register

as a sex offender. SORNA replaced the Wetterling Act with a more comprehensive sex-offender-registration system. But the changes made by SORNA were irrelevant to the limits of Congress's Article I authority. Pet. App. 72a (Haynes, J., dissenting) ("It makes little sense to contend that Congress lost its power or 'jurisdictional hook' over [respondent] simply because it updated the national sex-offender registration system laws."). Accordingly, the decision below can be reversed on the ground that the federal government never surrendered its valid assertion of jurisdiction to penalize respondent for failing to register in his State of residence, and, accordingly, his as-applied challenge to SORNA fails.[13]

II. CONGRESS HAS AUTHORITY TO REQUIRE REGISTRATION BY FEDERAL SEX OFFENDERS WHO PREVIOUSLY COMPLETED THEIR FEDERAL SENTENCES

Even assuming that respondent was not, when he was released in 1999, already subject to a potential federal penalty if he failed to register as a sex offender, the court of appeals still erred in concluding that Congress lacks authority to criminalize respondent's failure to update his registration following an intrastate change of residence. As applied to a person convicted of a federal sex offense and unconditionally released from federal

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[13] That resolution would likely suffice to resolve pending cases in the courts of appeals involving Article I challenges to Section 2250(a)(2)(A). See *Elk Shoulder*, 696 F.3d at 931 n.10 (noting that defendant was on federal supervised release when SORNA was enacted); *United States* v. *Brunner*, No. 11-2115 (2d Cir. argued June 21, 2012) (involving defendant who was released from imprisonment and discharged from the military in 2003); *United States* v. *Brune*, No. 12-3322 (10th Cir. docketed Dec. 4, 2012) (involving defendant with 2001 federal conviction for possession of child pornography, which would trigger Section 14072(i)(3), see 28 C.F.R. 571.72(a)(2)).

custody and supervision before SORNA's enactment, Section 2250(a)(2)(A) of Title 18 and the underlying registration requirement that it enforces (42 U.S.C. 16913(a)) reflect a reasonable exercise of Congress's authority to enact measures "necessary and proper for carrying into Execution" its other enumerated powers. U.S. Const. Art. I, § 8, Cl. 18. Considered in relation solely to respondent's federal criminal offense, the federal-offender provision in Section 2250(a)(2)(A) is valid. Taking into account the considerations the Court set forth in upholding federal civil commitment of sexually dangerous federal prisoners after their federal sentences had expired, the enumerated power that supports an individual's sex-offense conviction also supports the failure-to-register penalty. See *Comstock*, *supra*. And, within the broader context of SORNA, Section 2250(a)(2)(A) is also justified as a rational component of Congress's overall scheme, which draws on a combination of enumerated powers. Under that scheme, Congress acted in conjunction with the States to make the prior "patchwork" of registration systems in all 50 States "more uniform and effective." *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012). It did so by creating and supporting "a comprehensive national system for the registration of [federal and state sex] offenders," 42 U.S.C. 16901, in which the federal government accepted a "special role in ensuring compliance with SORNA's registration requirements by federal offenders." *Carr*, 130 S. Ct. at 2238.

A. Section 2250(a)(2)(A) Is A Necessary And Proper Measure Under The Enumerated Powers That Support Federal Sex Offenders' Statutes Of Conviction

The Necessary and Proper Clause grants Congress the authority "[t]o make all Laws which shall be neces-

sary and proper for carrying into Execution" its enumerated powers. U.S. Const. Art. I, § 8, Cl. 18. The clause gives Congress "discretion" to choose the "means by which the powers [the Constitution] confers are to be carried into execution," as long as those means are "appropriate" and "not prohibited," and as long as the end they serve is "legitimate" and "within the scope of the [C]onstitution." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see also *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2592 (2012) (*NFIB*) (opinion of Roberts, C.J.) (noting the Court has "been very deferential to Congress's determination that a regulation is 'necessary'" and has "thus upheld laws that are '"convenient, or useful" or "conducive" to the authority's "'beneficial exercise"'") (citation omitted).

In *Comstock*, the Court considered the constitutionality of 18 U.S.C. 4248, which was enacted as part of the same public law that included SORNA. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 302(4), 120 Stat. 620. Section 4248 provides for potentially indefinite federal civil commitment of "a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released." *Comstock*, 130 S. Ct. at 1954. The Court held that Section 4248 "is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others." *Id.* at 1965.

Like the civil-commitment statute in *Comstock*, SORNA's registration provision and criminal penalty for federal sex offenders are "means * * * 'reasonably

adapted' to the attainment of a legitimate end under" the enumerated powers that justify the creation of the offenders' statutes of conviction. *Comstock*, 130 S. Ct. at 1957 (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment)); see *id.* at 1969 (Alito, J., concurring in the judgment) (Section 4248 "is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted."). The existence and duration of the registration duty that SORNA imposes on federal sex offenders is tied to the offenders' underlying statutes of conviction, see 42 U.S.C. 16911(1)-(6), 16915(a), and those statutes are supported by various enumerated powers. Here, the relevant statute—Article 120(b) of the Uniform Code of Military Justice, 10 U.S.C. 920(b)—is supported by Congress's authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14.[14]

The Necessary and Proper Clause vests in Congress the authority not only to criminalize the underlying conduct, but to imprison individuals who engage in that conduct, to take steps to ensure the safety of the surrounding community, and to enact laws governing federal offenders' behavior during and after the custodial

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[14] Other federal sex offenses are supported by Congress's Commerce Clause power (U.S. Const. Art. I, § 8, Cl. 3) to prohibit and punish sexual misconduct that involves interstate movement or transmissions. See, *e.g.*, 18 U.S.C. 2423 (illicit interstate transportation of minors); 18 U.S.C. 2252A(a)(1) (Supp. V 2011) (mailing of child pornography). Still others are, for example, supported by the authority "[t]o make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2; see, *e.g*, 18 U.S.C. 2252A(a)(4) (2006 & Supp. V 2011) (possession of child pornography in federal territory or property).

portion of a sentence. See *Comstock*, 130 S. Ct. at 1958, 1964; *id.* at 1969-1970 (Alito, J., concurring in the judgment). Thus, Congress has created a federal prison system, installed a system of supervised release and probation to monitor the post-release behavior of federal offenders, and required prison and court personnel to notify local authorities of the impending release or change of residence of federal offenders convicted of certain crimes, including sex offenses.[15] None of those things is expressly enumerated in the Constitution, but the Necessary and Proper Clause grants Congress the discretion and authority to do each of them.

Sex-offender registration and notification is a "legitimate" collateral consequence of conviction. *Smith* v. *Doe*, 538 U.S. 84, 102-104 (2003). Congress therefore has the power to require federal sex offenders to register with state sex-offender registries following their release and to penalize their failure to do so. See *Elk Shoulder*, 696 F.3d at 929 (the undisputed authority to enact the defendant's crime of conviction "gave Congress the power to enact laws to ensure the safety of the surrounding communities by regulating and monitoring post-release behavior").

Section 2250(a)(2)(A) is reasonably adapted to serve those legitimate ends, enforcing sex-offender-registration obligations for individuals whose underlying federal offenses were of a sexual nature. That ensures a closer relationship to the underlying federal power that sup-

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[15] See, *e.g.*, 18 U.S.C. 3621 (2006 & Supp. V 2011) (providing for imprisonment of a convicted person); 18 U.S.C. 3561-3566, 3583 (2006 & Supp. V 2011) (providing for probation and supervised release); 18 U.S.C. 4042 (2006 & Supp. V 2011) (providing for notice to state and local officials of the release and change of residence of violent offenders, drug offenders, and sex offenders).

ported the crime than existed in *Comstock* itself. There, the Court permitted the federal government to seek civil commitment even when a federal prisoner's sexual dangerousness was unrelated to the federal crime that led to his federal imprisonment. See 130 S. Ct. at 1977 (Thomas, J., dissenting) ("§ 4248 allows a court to civilly commit an individual without finding that he was ever charged with or convicted of a federal crime involving sexual violence"). Here, the federal crime itself creates the risks addressed by sex-offender registration.

Section 2250(a)(2)(A) affects only a narrow class of individuals "who by some preexisting activity" (*i.e.*, the commission of a federal sex offense) "br[ought] themselves within the sphere of federal regulation." *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.). Indeed, this Court has already recognized, with specific reference to Section 2250(a)(2)(A), that it was "entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Carr*, 130 S. Ct. at 2238. That wording encompasses not only federal sex offenders who were still serving their sentences when SORNA was enacted but also those "who typically *would have spent* some time under federal criminal supervision" before then. *Ibid.* (emphasis added).

Although it was not addressed to Congress's Article I power, the Court's description confirms Congress's judgment that the federal government has greater ties to former federal sex offenders than it does to other members of the general public, whether those sex offenders were under federal criminal supervision at the time or had completed their criminal terms. And the

Court's statutory conclusion that it was "entirely reasonable" for the federal government to take special responsibility for SORNA compliance by former federal prisoners has equal force in constitutional analysis of the fit between Congress's enumerated powers to criminalize sex offenses and the means it adopted to address the risk of recidivism by such federal offenders.[16] The logical basis for attaching a collateral registration consequence to a federal criminal conviction does not disappear at the moment of a prisoner's release. As the Court's decision in *Smith* confirms, a post-release imposition of a registration requirement serves the same valid public-protection purposes as a registration requirement imposed during supervised release. See 538 U.S. at 103-104; 42 U.S.C. 16901 (SORNA's purpose is "to protect the public from sex offenders and offenders against children"). A temporal gap in regulating federal sex offenders does not invalidate the rationality of pursuing that purpose through a registration requirement.

The power at issue here—to require that a previously released federal sex offender register with a state sex-offender registry—is inherently narrower than potentially indefinite civil commitment, both in its effect on the regulated individual and in any incursion on States' interests. See *Elk Shoulder*, 696 F.3d at 931 ("[T]he requirement to register is not nearly as significant a

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[16] The quoted passage was integral to *Carr*'s statutory-construction analysis—specifically, its reason for rejecting the government's contention that Section 2250(a)(2)(A) and (B) should be construed as having comparable breadth with respect to pre-SORNA conduct. 130 S. Ct. at 2238. It is difficult to see how the Court's conclusion about what is "entirely reasonable" could be true for purposes of determining what Congress intended to do but not for purposes of determining what Congress was permitted to do.

burden as the indefinite detention authorized in *Comstock*."). As a result, even though Section 2250(a)(2)(A) goes a step further than the civil-commitment statute (in the sense that it can first attach after the end of federal criminal custody or supervision), that difference is more than offset by the comparatively limited nature of the assertion of authority here and by the direct tie between the sexual nature of the conviction and the resulting registration obligation. See *id.* at 932 (finding "no reasoned basis for holding that a law authorizing the federal government to exercise indefinite civil custody over former federal prisoners even after they have served their sentences has less of a rational relationship to an enumerated power than an enactment requiring such former federal prisoners to provide registration information" following their release from custody).

B. The Five *Comstock* Considerations Support Section 2250(a)(2)(A)

In holding that Section 4248 is a legitimate exercise of Congress's powers under the Necessary and Proper Clause, the *Comstock* Court relied on "five considerations, taken together." 130 S. Ct. at 1956. While those "considerations" were not stated as a test that would govern all future Necessary and Proper Clause challenges, the challenge in *Comstock* is "most analogous" to respondent's constitutional objection to SORNA. Pet. App. 6a-7a. The court of appeals therefore organized its analysis around those same considerations. *Id.* at 7a-23a; see also *Elk Shoulder*, 696 F.3d at 928 ("*Comstock*'s analysis of these five factors is directly applicable to the SORNA registration statute."). Contrary to the court of appeals' conclusion, those considerations support the conclusion that Congress acted well within its Article I authority when it required federal sex offenders to reg-

ister even when their federal sentences were completed before SORNA's enactment.[17]

1. The Necessary and Proper Clause gives Congress broad authority and discretion

The first *Comstock* consideration was "the breadth of the Necessary and Proper Clause." 130 S. Ct. at 1965. That consideration is not a "fact-specific" one. Pet. App. 8a. But the Court recognized that, in determining whether a provision is "rationally related to the implementation of a constitutionally enumerated power," the "'choice of means'" is left "'primarily . . . to the judgment of Congress,'" which "'alone'" determines "'the degree of the[] necessity, the extent to which [the means] conduce to the end, the closeness of the relationship between the means adopted and the end to be attained.'" *Comstock*, 130 S. Ct. at 1956, 1957 (quoting *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934)).

Here, the Court has not only the judgment of Congress, to which the Court's rational-basis review is "undoubtedly deferential," *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment), but also the corroborating judgment of States that reached back and imposed registration requirements on sex offenders whose sentences were completed. See *Smith*, 538 U.S.

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[17] SORNA's registration requirements apply to those with pre-SORNA convictions by virtue of the Attorney General's exercise of delegated authority to specify how the statute applies to pre-SORNA offenders. See 42 U.S.C. 16913(d); 28 C.F.R. 72.3; p. 7, *supra*. But Congress foresaw no "[]realistic possibility" that "the Attorney General would refuse to apply the new requirements to pre-Act offenders." *Reynolds*, 132 S. Ct. at 984.

at 91.[18] In a field in which it may be difficult to make an "empirical demonstration" (*Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment)) of the effectiveness of measures that are comparatively new, the concurrence of multiple governmental actors about the soundness of an approach can provide additional confidence in its rationality.[19]

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[18] California enacted a sex-offender-registration law in 1947 (covering those who had been convicted since 1944); a dozen States had adopted sex-offender-registration laws by 1989; and 24 had done so by 1993. See Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* 30-31, 56 (2009). Within two years of Congress's 1994 decision to condition certain federal funding on the adoption of registration laws, all 50 States and the District of Columbia had enacted them. See *Smith*, 538 U.S. at 90. By 1999, well before SORNA, the registration laws in 14 States "were fully retroactive" and "often" triggered by convictions "from the distant past." Logan 71.

[19] Scholars have not reached consensus about the effectiveness of sex-offender-registration-and-notification laws. Some early studies found that they had little or no effect, but one recent analysis of offense data in 15 States concluded that "actual registration of released sex offenders is associated with a significant decrease in crime" and that "the implementation of a notification law * * * is associated with a reduction in the frequency of sex offenses," but the latter effect may be because "notification deters potential (nonregistered) offenders" and does not "reduc[e] recidivism among convicted sex offenders." J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 162-163, 164 (2011). A 2009 review of the research literature found only nine previous studies "with sufficiently rigorous research" and concluded that "[a]dditional research is necessary before definitive conclusions can be drawn" about the deterrent effects of registration-and-notification laws. E.K. Drake & S. Aos, Wash. State Inst. for Pub. Policy, *Doc. No. 09-06-1101, Does Sex Offender Registration and Notification Reduce Crime? A Systematic Review of the Research Literature* 1, 3 (June 2009), www.wsipp.wa.gov/rptfiles/09-06-1101.pdf. Congress need not have conclusive proof that a measure

2. Section 2250(a)(2)(A) builds upon the history of post-release supervision of federal offenders

The second *Comstock* consideration was that the statute providing for civil commitment of sexually dangerous persons was "a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." 130 S. Ct. at 1958.

The federal government's legitimate interest in protecting the public from the risks presented by federal offenders after they are released back into the community is built on "the federal government's long history of regulating offenders after their release from incarceration through probation, parole, and supervised release." *Elk Shoulder*, 696 F.3d at 929. The federal parole system dates back to 1910 (see Parole Act, ch. 387, 36 Stat. 819), and federal probation to 1925 (see Probation Act, ch. 521, 43 Stat. 1259). By the 1940s, federal probation officers were supervising military parolees as well. See Victor H. Evjen, *The Federal Probation System: The Struggle To Achieve It and Its First 25 Years*, 39 Federal Probation 3, 13 (June 1975). The current federal supervised-release system—which generally replaced parole—pre-dated SORNA by more than 20 years. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*).

The close connection between the supervised-release system and sex-offender registration is shown by Congress's use of that system in recent years to protect communities from the post-release dangers posed by sex offenders. See *Smith*, 538 U.S. at 103 (noting "the high rate of recidivism among convicted sex offenders and

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will reduce recidivism by federal sex offenders before it can rationally find the measure a necessary-and-proper means of addressing that risk.

their dangerousness as a class"). Congress has, for instance, mandated five-year-minimum terms of supervised release (and authorized lifetime terms of supervised release) for federal sex offenders. See 18 U.S.C. 3583(k) (first enacted in 2003); see also Sentencing Guidelines § 5D1.2(b)(2), p.s. (recommending that the statutory maximum term of supervised release be imposed on federal sex offenders). It has also made compliance with sex-offender-registration requirements a mandatory condition of probation and supervised release. See 18 U.S.C. 3563(a)(8); 18 U.S.C. 3583(d) (2006 & Supp. V 2011) (third sentence).

The court of appeals refused to consider the history of post-release regulation of former federal prisoners because SORNA's registration requirement was not "a condition of [respondent's] release from prison, let alone a punishment for his crime." Pet. App. 11a. But the same was true of the potential civil commitment in *Comstock*, which would not have been a condition of supervised release and would be imposed in a proceeding that would long post-date the prisoner's sentencing (and often take place in a different district court than did the sentencing). See 130 S. Ct. at 1954-1955. The Court in *Comstock* rejected the dissent's analysis that the relationship between the federal government and a federal prisoner ends when "criminal jurisdiction over [the] prisoner ends." *Id.* at 1979 & n.12 (Thomas, J., dissenting). Instead, the Court concluded that the Necessary and Proper Clause supports Congress's "power to regulate the prisoners' behavior even after their release." *Id.* at 1964. If a registration requirement would be a valid exercise of Congress's Article I powers when imposed as part of a criminal sentence—as neither the court of appeals nor respondent could deny—then it is

equally valid when imposed later as a non-punitive collateral consequence of such a conviction.[20]

3. Section 2250(a)(2)(A) is a reasonable extension of authority over a limited category of persons who brought themselves within federal power by committing federal sex offenses

Comstock's third consideration was that Congress had "reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence." 130 S. Ct. at 1961. The Court explained that the federal government "has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose," including after their release. *Ibid.*

The federal-offender provision in Section 2250 is an equally reasonable extension of preexisting federal post-release regulation of sex offenders. Sex-offender registration regimes serve legitimate, non-punitive purposes. See *Smith*, 538 U.S. at 102-103. Here, those purposes are related directly to the actions (*i.e.*, the commission of federal sex offenses) that subjected this narrow class of individuals to federal authority in the first instance.

In finding otherwise, the court of appeals relied (Pet. App. 16a-17a) on *Comstock*'s recognition that the government had conceded that it "would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed." 130 S. Ct. at 1965 (quoting Tr. of Oral

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[20] As the court of appeals recognized, SORNA's "registration requirements are civil regulations whose purpose is not to punish." Pet. App. 11a n.17; see also note 5, *supra*.

Arg. at 9, *Comstock*, *supra* (No. 08-1224)). But, as the Court's quotation from the transcript demonstrates, the statement pertained to the limits on the government's "power to commit a person."[21] SORNA, by contrast, only requires a previously released federal sex offender to register with a state sex-offender registry—a significantly more modest assertion of power. Unlike federal civil commitment, a registration obligation leaves a sex offender in the community and subject to the State's police power. Indeed, when the Court compared Alaska's sex-offender-registration-and-notification program (which, like many other registration statutes at the time, applied retroactively) with civil commitment, it described registration as "the more minor condition." *Smith*, 538 U.S. at 104; see note 18, *supra* (in 1999, 14 States' registration laws were fully retroactive).

For the same reason, the court of appeals erred in concluding that "the chain of causation from Congress's military power to its criminalization of [respondent's] failure to register a change of address" was too long to be "reasonably adapted" to an enumerated power. Pet. App. 14a-15a.[22] As noted above, while the chain here is

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[21] The government's brief in *Comstock* (at 5 n.2) expressly noted that SORNA's "registration and notification requirements" were not "implicated by th[at] case, which deal[t] only with civil commitment by the federal government."

[22] The court of appeals suggested that Congress's power to make rules governing the land and naval forces ceased "after [respondent] was discharged from the military," Pet. App. 19a n.33, but it did so on the basis of *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955), which addressed court-martial jurisdiction over former servicemembers in derogation of Article III jurisdiction, "where persons on trial are surrounded with more constitutional safeguards than in military tribunals." *Id.* at 15; see also *Reid* v. *Covert*, 354 U.S. 1, 21 (1957) (plurality opinion) (holding that Necessary and Proper Clause would

longer in one sense than the one in *Comstock*, Section 2250(a)(2)(A) is also more directly linked to the basis of the underlying federal conviction, and the regulation that it supports—a registration requirement rather than civil commitment—is far more modest.

Upholding Section 2250(a)(2)(A) does not imply that Congress has "never-ending jurisdiction to regulate anyone who was ever convicted of a federal crime of any sort." Pet. App. 19a-20a. The provision does not apply to "any sort" of federal crime, but is instead specifically tailored to the risks associated with sex offenders, whose "high rate of recidivism" and "dangerousness as a class" this Court has already recognized. *Smith*, 538 U.S. at 103. The court of appeals' concern about "never-ending jurisdiction" cannot be reconciled with its recognition that SORNA's registration and penalty provisions *will* apply to all federal sex offenders going forward, even long after they have completed their terms of imprisonment and supervised release. Pet. App. 41a-42a; see, *e.g.*, 42 U.S.C. 16915 (2006 & Supp. V 2011) (registration required for 10 years, 15 years, 25 years, or life depending on crime and subsequent conduct). Nor does it make sense to conclude that Congress has the Article I authority to permit lifetime supervised release, including a mandatory registration condition, for federal sex offenders, see 18 U.S.C. 3583(d) (2006 & Supp. V 2011); 18 U.S.C. 3583(k), but it simultaneously lacks the power to impose a lesser restriction: a collateral, civil requirement to register, which, after the end of any period of supervised release, can be enforced only in a separate

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not support military-tribunal jurisdiction over servicemembers' wives in light of "Article III and the Fifth, Sixth, and Eighth Amendments"). Section 2250(a)(2)(A) does not deprive respondent of any of the procedural safeguards guaranteed by the Constitution.

proceeding subject to the panoply of constitutional safeguards applicable in a prosecution. Compare 18 U.S.C. 2250, with 18 U.S.C. 3583(e)(3) (providing for revocation of supervised release and imprisonment if court finds violation by a preponderance of the evidence).

4. Section 2250(a)(2)(A) accommodates state interests

The fourth *Comstock* consideration—whether "the statute properly accounts for state interests," 130 S. Ct. at 1962—also provides strong support for Section 2250(a)(2)(A). As with the civil-commitment statute in *Comstock*, SORNA's federal-offender provision does not "invade state sovereignty or otherwise improperly limit the scope of powers that remain with the States." *Ibid.* (internal quotation marks and citation omitted). To the contrary, SORNA is an example of cooperative federalism. States are not forced to incorporate SORNA's requirements into their registration programs; they simply face a possible 10% reduction of federal justice assistance funding under a particular program if they fail to do so. See 42 U.S.C. 16925(a); see also 42 U.S.C. 16925(d) ("The provisions of [SORNA] that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section."). That financial penalty is "relatively mild encouragement" rather than "a gun to the head." *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.) (citation omitted); see *South Dakota* v. *Dole*, 483 U.S. 203, 212 (1987).[23]

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[23] A Texas legislative study predicted that Texas would lose $2.2 million of its Byrne Justice Assistance Grant in fiscal year 2010. See Legislative Budget Bd. Staff, *Texas State Government Effectiveness and Efficiency* 358 (Jan. 2011), www.lbb.state.tx.us/Government/Government Effectiveness and Efficiency Report 2011.pdf. In practice, the penalties have been significantly smaller. During fiscal year

Moreover, a prosecution under Section 2250 depends on a State's enforcement of a registration scheme. A sex offender cannot register in the "jurisdiction[s] where the offender resides, * * * is an employee, and * * * is a student" (42 U.S.C. 16913(a)) unless those jurisdictions are willing to accept his registration information. If a State's unwillingness prevents a federal sex offender from registering, then SORNA's express impossibility defense (18 U.S.C. 2250(b)) will preclude a prosecution under Section 2250. See *Kennedy* v. *Allera*, 612 F.3d 261, 269 (4th Cir.) ("[T]he criminal provisions of SORNA also recognize that a State can refuse registration inasmuch as they allow" Section 2250(b)'s affirmative defense.), cert. denied, 131 S. Ct. 554 (2010).

The court of appeals faulted SORNA for failing to provide for a state "veto of the sort present in *Comstock*." Pet. App. 22a. But the veto in *Comstock* was hardly unqualified. That statute allows a State to prevent federal civil commitment only when it is willing to assume the burden of the offender's "custody, care, and treatment," 18 U.S.C. 4248(d), which is unlikely in relation to a federal prisoner. See *Comstock*, 130 S. Ct. at 1962-1963; *id.* at 1970 (Alito, J., concurring in the judgment); *id.* at 1982 (Thomas, J., dissenting) (noting 29 States had appeared as amici and said they "would rather the Federal Government bear th[e] expense"). In any event, neither the majority nor the dissent in *Com-*

2012, the grant amounts that were reallocated in other States pursuant to 42 U.S.C. 16925(c), which corresponded to the penalties they would otherwise have incurred, ranged from $29,462 (for North Dakota) to $397,457 (for New York). See *Awards Made for "BJA FY 12 Solicited - SORNA*," http://grants.ojp.usdoj.gov:85/selector/title?solicitationTitle=BJA FY 12 Solicited - SORNA&po=BJA (last visited Feb. 24, 2013).

stock deemed a state "veto" an essential accommodation of state interests. *Id.* at 1963 (explaining that the civil-commitment statute sustained in *Greenwood* v. *United States*, 350 U.S. 366 (1956), lacked any requirement that the Attorney General "encourage the relevant States to take custody of the individual"); *id.* at 1982 (Thomas, J., dissenting) ("Section 4248's right of first refusal is thus not a matter of constitutional necessity, but an act of legislative grace.").

The court of appeals also suggested that SORNA prevents States from using "a more moderate" approach because it subjects offenders residing in a State to federal penalties for conduct that may not violate the precise timing requirements of—or be punished as severely by—the State's registration laws. Pet. App. 21a-22a. But the court identified no instances in which Section 2250(a)(2)(A) has been used to prosecute offenders who had violated federal, but not state, registration requirements. In any event, the court's concern is especially misplaced in this case, where Texas imposed timing requirements on respondent that were more demanding than those mandated by SORNA. Compare *id.* at 167a-168a (noting that respondent signed a form acknowledging his Texas-law duty to report in person at least seven days *before* an anticipated move and again within seven days *after* the move), with 42 U.S.C. 16913(c) (federal provision requiring registration to be updated within three business days after move). Here, respondent's failure to update his registration for more than six months after his change of residence (Pet. App. 168a-169a) plainly violated both state and federal deadlines. Moreover, because he is subject to a lifetime duty to register under Texas law and a duty to verify his registration every 90 days (*id.* at 167a), a first offense by re-

spondent for failure to register would be a second-degree felony under Texas law, punishable by a term of imprisonment between 2 and 20 years. See Tex. Code Crim. Proc. art. 62.102(b)(3) (West 2006); Tex. Penal Code Ann. § 12.33(a) (West 2011). Compare 18 U.S.C. 2250(a) (ten-year-maximum federal sentence); Pet. App. 78a (respondent's sentence was a year and a day).

5. Section 2250(a)(2)(A) is narrow in scope and not too attenuated from the powers that support the underlying federal sex offenses

The final *Comstock* consideration was that "the links" between the civil-commitment statute "and an enumerated Article I power [were] not too attenuated," and the statute was not "too sweeping in its scope." 130 S. Ct. at 1963. The same is true of the SORNA registration requirement and underlying criminal penalty applicable to federal sex offenders.

Comstock rejected the contention that Section 4248 exceeded Congress's authority because it was "more than a single step" removed from an enumerated power. 130 S. Ct. at 1964. Section 4248, the Court instead held, was supported by "the same enumerated power that justifies creation of a federal criminal statute," which also justifies Congress's authority to imprison people for violating that statute and "to regulate the prisoners' behavior even after their release." *Ibid.* Similarly here, "[i]t is a small step from Congress's power" to criminalize conduct and "protect the public from federal convicts even after their release, to requiring federal convicts who may be dangerous to the public to provide information regarding their residence, and punishing those who fail to do so." *Elk Shoulder*, 696 F.3d at 930-931 (citation omitted).

In addition, the challenged provisions of SORNA are "narrow in scope," *Comstock*, 130 S. Ct. at 1964, and constitute "a discrete and narrow exercise of authority over a small class of persons [who have] already [been] subject to the federal [government's] power," *id.* at 1968 (Kennedy, J., concurring in the judgment). SORNA's criminal penalty applies only to sex offenders, whose presence in the community has repeatedly been recognized as raising grave public-safety concerns. See *Reynolds*, 132 S. Ct. at 982-983; *Smith*, 538 U.S. at 103. Even within that class of persons, the provisions at issue apply only to those convicted under federal law, a subclass for whom it is "entirely reasonable" for the federal government to have "a special role in ensuring compliance" with registration requirements. *Carr*, 130 S. Ct. at 2238. Upholding SORNA's application in these narrow circumstances does not risk "confer[ring] on Congress a general 'police power'" of the kind that the Constitution "'reposed in the States.'" *Comstock*, 130 S. Ct. at 1964 (quoting *United States* v. *Morrison*, 529 U.S. 598, 618 (2000)).

C. Section 2250's Federal-Offender-Specific Provision Is A Focused And Rational Component Of A Comprehensive National Framework That Rests On Multiple Enumerated Powers

As discussed above, Section 2250(a)(2)(A)'s penalty for federal offenders is a necessary and proper means of effectuating the power that supported the criminalization of a federal sex offender's offense of conviction. But, "Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is embedded in a broader statutory scheme enacted to address the deficiencies in prior law." *Carr*, 130 S. Ct. at 2240. Within that broader context, Section 2250(a)(2)(A) is also a fo-

cused and rational component of a comprehensive program—resting on multiple enumerated powers and reinforcing States' efforts rather than supplanting them—to address the risks associated with a mobile sex-offender population. It is accordingly necessary and proper to effectuate those enumerated powers as well.

1. Congress employed multiple enumerated powers in establishing SORNA's "comprehensive national [registration] system" "to protect the public from sex offenders and offenders against children." 42 U.S.C. 16901. As it had done since 1994, see *Carr*, 130 S. Ct. at 2232, Congress used its Spending Clause authority (U.S. Const. Art. I, § 8, Cl. 1) to encourage States to create "more uniform and effective" registration systems, *Reynolds*, 132 S. Ct. at 978. But Congress did not rely on States alone to bear the entire burden of implementing and enforcing SORNA's reforms.

Various provisions of SORNA—also resting on Congress's power to authorize expenditures for the general welfare—prescribe federal action and depend on cooperation between federal and state law-enforcement authorities. See 73 Fed. Reg. at 38,034 (explaining that SORNA provides incentives for States to incorporate its registration and notification requirements into their own programs and that "[t]he overall SORNA scheme also incorporates federal superstructure and assistance measures that support and leverage the [States'] programs"); *id.* at 38,045 ("SORNA strengthens the federal superstructure elements that leverage and support the sex offender registration and notification programs of the [States]."). Congress required the Attorney General, *inter alia*, to maintain a "National Sex Offender Registry" with information about "each sex offender" nationwide, to ensure that updated registration infor-

mation about sex offenders be electronically transmitted to "all relevant jurisdictions," to maintain a public website with "relevant information for each sex offender," and, in consultation with States and other jurisdictions, to "develop and support software to enable jurisdictions to establish and operate uniform sex offender registries and Internet sites." 42 U.S.C. 16919(a) and (b), 16920, 16923. Congress also created an office within the Department of Justice to assist States and other jurisdictions in implementing registration-and-notification standards. 42 U.S.C. 16945.[24] Consistent with Congress's concern about sex offenders who had gone "missing" despite earlier registration programs, see *Carr*, 130 S. Ct. at 2240, SORNA affirmatively requires the use of federal-law-enforcement resources "to assist jurisdictions in locating and apprehending sex offenders who violate [their] registration requirements." 42 U.S.C. 16941. That assistance is far from illusory; the Sex Offender Investigations Branch within the United States Marshals Service apprehended 3683 sex offenders in fiscal year 2009 who had "failed to register or were noncompliant." U.S. Marshals Service, *Fact Sheets*, www.usmarshals.gov/duties/factsheets/iod-1209.html (last visited Feb. 24, 2013).

To prevent sex offenders from "us[ing] the channels of interstate commerce [to] evad[e]" individual States' reach (*Carr*, 130 S. Ct. at 2238), Congress also exercised its authority under the Commerce Clause (U.S. Const.

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[24] In addition to reallocated Byrne grants (see notes 2 & 23, *supra*), the SMART Office has awarded more than $50 million in SORNA implementation grants to state and tribal jurisdictions since 2008. See SMART Office, *Funding Opportunities*, www.smart.gov/funding.htm (last visited Feb. 24, 2013) (linking to lists of annual grant recipients, some of which include amounts).

Art. I, § 8, Cl. 3), as supplemented by the Necessary and Proper Clause, to enact a criminal penalty applicable to a sex offender who "travels in interstate or foreign commerce" and "knowingly fails to register or update a registration as required" by SORNA. 18 U.S.C. 2250(a)(2)(B) and (3); see *Carr*, 130 S. Ct. at 2238. That prohibition follows a long tradition of federal statutes aimed at "keep[ing] the channels of interstate commerce free from immoral and injurious uses." *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917); see also *United States* v. *Lopez*, 514 U.S. 549, 558 (1995).[25]

Congress also provided for SORNA's implementation by the District of Columbia, federal territories, and Indian Tribes (42 U.S.C. 16911(10), 16927), thus exercising its constitutional authority to legislate with respect to the District of Columbia (Art. I, § 8, Cl. 17) and with respect to "the Territory or other Property belonging to the United States" (Art. IV, § 3, Cl. 2), as well as the various sources of its powers over Indian affairs (see *United States* v. *Lara*, 541 U.S. 193, 200 (2004)).

2. Section 2250(a)(2)(A) is necessary and proper to help effectuate the legitimate end that Congress pursued in SORNA (a comprehensive national registration system to help protect the public from the risks posed by sex offenders) pursuant to its Spending Clause, Commerce Clause, Property Clause, and other powers. Cf. *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment) ("Congress may regulate even noneconomic

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[25] Every court of appeals to consider a Commerce Clause challenge to Section 2250(a)(2)(B) has rejected it, see *United States* v. *Parks*, 698 F.3d 1, 7 & n.5 (1st Cir. 2012) (collecting cases), petition for cert. pending, No. 12-8185 (filed Jan. 10, 2013), and this Court has denied review of the question more than a dozen times, most recently in *Clark* v. *United States*, No. 12-6067 (Jan. 14, 2013).

local activity if that regulation is a necessary part of a more general regulation of interstate commerce").

Having identified a dangerous trend of sex offenders' failures to comply with existing registration laws (see *House Report* 23-26), Congress reasonably concluded that stronger criminal penalties were necessary to support revised registration requirements and were an appropriate means of ensuring that the federal funds invested in creating and enforcing a comprehensive national sex-offender-registration system were well spent. The federal funding and logistical support offered to States for their sex-offender-registration-and-notification programs can be effective only if persons required to register actually do so. Congress may impose penalties on such individuals as a means of achieving that goal. See *Sabri* v. *United States*, 541 U.S. 600, 605-606 (2004) (upholding criminal statute that prohibited bribes paid to agents of a federally funded entity as a necessary and proper means of effectuating Congress's Spending Clause authority); *Comstock*, 130 S. Ct. at 1969 (Alito, J., concurring in the judgment) ("[M]ost federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct."). Although Section 2250(a)(2) subjects federal (but not state) sex offenders to criminal penalties in the absence of interstate travel, this Court has already recognized that it was "entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." *Carr*, 130 S. Ct. at 2238; see pp. 34-35, *supra*. By assuming a special enforcement role with federal offenders, Congress attested to its willingness to work co-

operatively with States and to shoulder some of the burden of implementing SORNA with respect to a class of sex offenders who had violated federal law.

3. The few recent cases in which the Court has concluded that a statute exceeded Congress's enumerated powers have been animated principally by concerns that it would substantially expand federal power and do so at the expense of traditional state prerogatives. See, *e.g.*, *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.); *Morrison*, 529 U.S. at 618; *Lopez*, 514 U.S. at 567; *id.* at 580 (Kennedy, J., concurring). But federal authority here can be exercised only in tandem with state consent. Section 2250's criminal penalties cannot be enforced if a State is unwilling to register the offender. See 18 U.S.C. 2250(b). And, when SORNA is considered more broadly, it does not compel state compliance at all, as courts of appeals have consistently recognized in rejecting Tenth Amendment challenges to it. See, *e.g.*, *United States* v. *Felts*, 674 F.3d 599, 608 (6th Cir. 2012); *Kennedy*, 612 F.3d at 269; cf. *Printz* v. *United States*, 521 U.S. 898, 935 (1997). Instead, SORNA conditions a small percentage of federal funding under one grant program on the adoption of federal standards, which is plainly permissible. See *Dole*, 483 U.S. at 212. Moreover, it does so to aid efforts—first initiated at the state level—to track sex offenders, alert the public to their presence, and thereby prevent future sex crimes.

As the court of appeals observed (Pet. App. 20a), SORNA does touch on one area of traditional state authority—defining criminal conduct, see *Lopez*, 514 U.S. at 561 n.3—by requiring that States prescribe failure-to-register offenses carrying a maximum punishment of more than one year of imprisonment (or else lose a modest amount of federal funding). See 42 U.S.C. 16913(e),

16925(d). That provision, of course, is not at issue here. In any event, that funding condition hardly supplants state policy choices. Before SORNA, every State had already criminalized sex offenders' failure to register, and federal criminal penalties for violating those registration requirements had existed for almost a decade. See pp. 3-4, *supra*; note 18 *supra*. Congress simply sought to make those laws more uniform by ensuring that failure-to-register offenses were treated as crimes of comparable gravity nationwide. See 73 Fed. Reg. at 38,069 ("SORNA contemplates that substantial criminal penalties will be available for registration violations at the state, local, and federal levels."). Nothing about this or any other aspect of SORNA makes it an instance in which "essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *Comstock*, 130 S. Ct. at 1967-1968 (Kennedy, J., concurring in the judgment).

Nor, finally, do the challenged provisions of SORNA threaten to "work a substantial expansion of federal authority." *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.). As explained above, SORNA applies to only a narrow class of offenders, and its federal-offender-specific provisions cover an even more limited group. The statute's registration requirement is non-punitive; it relates directly to the nature of the offenders' federal convictions; and it requires those offenders only to provide the kind of information to States (and other jurisdictions) that those jurisdictions generally already require them to provide.

Under the circumstances, Section 2250(a)(2)(A) is a legitimate and narrow part of SORNA's comprehensive national framework for sex-offender registration and

is therefore supported by the Necessary and Proper Clause.

CONCLUSION

The judgment of the court of appeals should be vacated or reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 2250 provides in pertinent 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.

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2. 18 U.S.C. 4042 (2000, repealed in part in 2006) provides in pertinent part:

Duties of Bureau of Prisons

* * * * *

(c) NOTICE OF SEX OFFENDER RELEASE.—(1) In the case of a person described in paragraph (4) who is released from prison or sentenced to probation, notice shall be provided to—

(A) the chief law enforcement officer of the State and of the local jurisdiction in which the person will reside; and

(B) a State or local agency responsible for the receipt or maintenance of sex offender registration information in the State or local jurisdiction in which the person will reside.

The notice requirements under this subsection do not apply in relation to a person being protected under chapter 224.

(2) Notice provided under paragraph (1) shall include the information described in subsection (b)(2), the place where the person will reside, and the information that the person shall be subject to a registration requirement as a sex offender. For a person who is released from the custody of the Bureau of Prisons whose expected place of residence following release is known

to the Bureau of Prisons, notice shall be provided at least 5 days prior to release by the Director of the Bureau of Prisons. For a person who is sentenced to probation, notice shall be provided promptly by the probation officer responsible for the supervision of the person, or in a manner specified by the Director of the Administrative Office of the United States Courts. Notice concerning a subsequent change of residence by a person described in paragraph (4) during any period of probation, supervised release, or parole shall also be provided to the agencies and officers specified in paragraph (1) by the probation officer responsible for the supervision of the person, or in a manner specified by the Director of the Administrative Office of the United States Courts.

(3) The Director of the Bureau of Prisons shall inform a person described in paragraph (4) who is released from prison that the person shall be subject to a registration requirement as a sex offender in any State in which the person resides, is employed, carries on a vocation, or is a student (as such terms are defined for purposes of section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994), and the same information shall be provided to a person described in paragraph (4) who is sentenced to probation by the probation officer responsible for supervision of the person or in a manner specified by the Director of the Administrative Office of the United States Courts.

(4) A person is described in this paragraph if the person was convicted of any of the following offenses (including such an offense prosecuted pursuant to section 1152 or 1153):

(A) An offense under section 1201 involving a minor victim.

(B) An offense under chapter 109A.

(C) An offense under chapter 110.

(D) An offense under chapter 117.

(E) Any other offense designated by the Attorney General as a sexual offense for purposes of this subsection.

(5) The United States and its agencies, officers, and employees shall be immune from liability based on good faith conduct in carrying out this subsection and subsection (b).

(d) APPLICATION OF SECTION.—This section shall not apply to military or naval penal or correctional institutions or the persons confined therein.

3. 42 U.S.C. 14072 (2006, repealed effective 2009) provides in pertinent part:

FBI database

(a) Definitions

For purposes of this section—

(1) the term "FBI" means the Federal Bureau of Investigation;

(2) the terms "criminal offense against a victim who is a minor", "sexually violent offense", "sexually violent predator", "mental abnormality", "predatory", "employed, carries on a vocation", and "stu-

dent" have the same meanings as in section 14071(a)(3) of this title; and

(3) the term "minimally sufficient sexual offender registration program" means any State sexual offender registration program that—

(A) requires the registration of each offender who is convicted of an offense in a range of offenses specified by State law which is comparable to or exceeds that described in subparagraph (A) or (B) of section 14071(a)(1) of this title;

(B) participates in the national database established under subsection (b) of this section in conformity with guidelines issued by the Attorney General;

(C) provides for verification of address at least annually;[1]

(D) requires that each person who is required to register under subparagraph (A) shall do so for a period of not less than 10 years beginning on the date that such person was released from prison or placed on parole, supervised release, or probation.

(b) Establishment

The Attorney General shall establish a national database at the Federal Bureau of Investigation to track the whereabouts and movement of—

(1) each person who has been convicted of a criminal offense against a victim who is a minor;

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[1] So in original. Probably should be followed by "and".

(2) each person who has been convicted of a sexually violent offense; and

(3) each person who is a sexually violent predator.

(c) Registration requirement

Each person described in subsection (b) of this section who resides in a State that has not established a minimally sufficient sexual offender registration program shall register a current address, fingerprints of that person, and a current photograph of that person with the FBI for inclusion in the database established under subsection (b) of this section for the time period specified under subsection (d) of this section.

* * * * *

(g) Notification of FBI of changes in residence

(1) Establishment of new residence

For purposes of this section, a person shall be deemed to have established a new residence during any period in which that person resides for not less than 10 days.

(2) Persons required to register with the FBI

Each establishment of a new residence, including the initial establishment of a residence immediately following release from prison, or placement on parole, supervised release, or probation, by a person required to register under subsection (c) of this section shall be reported to the FBI not later than 10 days after that person establishes a new residence.

(3) Individual registration requirement

A person required to register under subsection (c) of this section or under a State sexual offender offender[2] registration program, including a program established under section 14071 of this title, who changes address to a State other than the State in which the person resided at the time of the immediately preceding registration shall, not later than 10 days after that person establishes a new residence, register a current address, fingerprints, and photograph of that person, for inclusion in the appropriate database, with—

(A) the FBI; and

(B) the State in which the new residence is established.

(4) State registration requirement

Any time any State agency in a State with a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, is notified of a change of address by a person required to register under such program within or outside of such State, the State shall notify—

(A) the law enforcement officials of the jurisdiction to which, and the jurisdiction from which, the person has relocated; and

(B) the FBI.

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[2] So in original.

(5) Verification

(A) Notification of local law enforcement officials

The FBI shall ensure that State and local law enforcement officials of the jurisdiction from which, and the State and local law enforcement officials of the jurisdiction to which, a person required to register under subsection (c) of this section relocates are notified of the new residence of such person.

(B) Notification of FBI

A State agency receiving notification under this subsection shall notify the FBI of the new residence of the offender.

(C) Verification

(i) State agencies

If a State agency cannot verify the address of or locate a person required to register with a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, the State shall immediately notify the FBI.

(ii) FBI

If the FBI cannot verify the address of or locate a person required to register under subsection (c) of this section or if the FBI receives notification from a State under clause (i), the FBI shall—

(I) classify the person as being in violation of the registration requirements of the national database; and

(II) add the name of the person to the National Crime Information Center Wanted person file and create a wanted persons record: *Provided*, That an arrest warrant which meets the requirements for entry into the file is issued in connection with the violation.

* * * * *

(i) Penalty

A person who is—

(1) required to register under paragraph (1), (2), or (3) of subsection (g) of this section and knowingly fails to comply with this section;

(2) required to register under a sexual offender registration program in the person's State of residence and knowingly fails to register in any other State in which the person is employed, carries on a vocation, or is a student;

(3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; or

(4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105–119, and knowingly fails to register in any State in which the person resides, is employed, carries on a voca-

tion, or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

* * * * *

4. 42 U.S.C. 16901 provides in pertinent part:

Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

* * * * *

5. 42 U.S.C. 16912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

6. 42 U.S.C. 16913 provides:

Registry requirements 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 offense 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) of this section 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) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 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) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

7. 42 U.S.C. 16925 provides:

Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or

is in the process of implementing[1] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

(4) Funding reduction

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding reduction as specified in subsection (a) of this section.

(c) Reallocation

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

(d) Rule of construction

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

8. Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Tit. I, § 115(a)(8)(C), 111 Stat. 2466 provides:

(i) The Secretary of Defense shall specify categories of conduct punishable under the Uniform Code of Military Justice which encompass a range of conduct

[1] So in original. Probably should be followed by a comma.

comparable to that described in section 170101(a)(3)(A) and (B) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(a)(3)(A) and (B)), and such other conduct as the Secretary deems appropriate for inclusion for purposes of this subparagraph.

(ii) In relation to persons sentenced by a court martial for conduct in the categories specified under clause (i), the Secretary shall prescribe procedures and implement a system to—

(I) provide notice concerning the release from confinement or sentencing of such persons;

(II) inform such persons concerning registration obligations; and

(III) track and ensure compliance with registration requirements by such persons during any period of parole, probation, or other conditional release or supervision related to the offense.

(iii) The procedures and requirements established by the Secretary under this subparagraph shall, to the maximum extent practicable, be consistent with those specified for Federal offenders under the amendments made by subparagraphs (A) and (B).

(iv) If a person within the scope of this subparagraph is confined in a facility under the control of the Bureau of Prisons at the time of release, the Bureau of Prisons shall provide notice of release and inform the person concerning registration obligations under the procedures specified in section 4042(c) of title 18, United States Code.