No. 12-418

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY JAMES KEBODEAUX,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT KEBODEAUX

JEFFREY T. GREEN
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
Supreme Court Practicum
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8576

M. CAROLYN FUENTES*
Assistant Federal
Public Defender
**Counsel of Record*

PHILIP J. LYNCH
Assistant Federal
Public Defender

MAUREEN SCOTT FRANCO
Federal Public Defender
WESTERN DISTRICT OF TEXAS
727 E. César E. Chávez Blvd.,
B-207
San Antonio, Texas 78206
(210) 472-6700
Carolyn_Fuentes@fd.org

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), which imposes registration requirements on persons convicted of sex offenses under state or federal law. Both federal and state offenders are subject to criminal penalties if they cross state lines to avoid registration. A federal offender, however, may be punished even without interstate travel. Kebodeaux is a federal offender because of his 1999 military conviction for having consensual sex with a 15-year-old girl. In 2008, he was convicted under SORNA for a registration violation that occurred within the state of Texas – no interstate travel was involved. The Fifth Circuit Court of Appeals ruled that SORNA, as applied to Kebodeaux, was unconstitutional. The questions presented by the Government are:

1. Whether the court of appeals erred in conducting its constitutional analysis on the premise that Kebodeaux was not under a federal registration obligation until 2006, when SORNA was enacted.

2. Whether the court of appeals erred in holding that Congress lacked authority, under Article I of the Constitution, to provide for SORNA's criminal penalties, as applied to a person who was convicted of a federal sex offense and completed his criminal sentence before SORNA's enactment.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Constitutional Provisions

TABLE OF AUTHORITIES – Continued

Statutes

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF FOR RESPONDENT KEBODEAUX

Anthony Kebodeaux respectfully asks this Court to affirm the judgment of the court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Taxing, Commerce, Military, and Necessary and Proper Clauses quoted in the Government's Brief, at 2, Kebodeaux's case involves the Tenth Amendment to the U.S. Constitution, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

FEDERAL REGULATION INVOLVED

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

> The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

STATEMENT OF THE CASE

In March 1999, Kebodeaux was a 20-year-old airman stationed at Peterson Air Force Base, in Colorado. (R. 200; Presentence Report (PSR) 1.) He began a consensual sexual relationship with a 15-year-old girl, who would sneak out of her home at night and take a cab to the base to be with him. (R. 200; PSR 6.)[1] This relationship led to charges that Kebodeaux had "carnal knowledge" of a "female under the age of 16," in violation of Article 120 of the Uniform Code of Military Justice, and that he disobeyed orders to have no contact with the girl and to remain on base. (Pet. App. 167a; R. 200; PSR 6-7.)

In special court-martial proceedings, Kebodeaux pleaded guilty to the charges. (R. 200-01.) The tribunal sentenced him to three months' confinement and a bad-conduct discharge on May 17, 1999. (R. 201.) Kebodeaux served his sentence in the Air Force Corrections System, was unconditionally released from custody, and returned to his home in Texas sometime before September 18, 1999. (Pet. App. 2a-3a; R. 201, 203; PSR 12.)

Kebodeaux's offense subjected him to registration as a sex offender under Texas law. The Sex Offender Registration and Notification Act (SORNA) became law on July 27, 2006. In 2008, nearly 10 years after

---

[1] Kebodeaux's mother describes him as "bashful, insecure, and . . . slow to mature." (PSR Addendum) (Letter from Vivian Bailey to sentencing court Oct. 13, 2008.)

the carnal-knowledge offense, Kebodeaux was convicted under SORNA for failing to update his registration when he moved from El Paso to San Antonio. The Fifth Circuit Court of Appeals reversed that conviction "on narrow grounds," ruling that Kebodeaux's 1999 military conviction for a sex offense was an insufficient basis for federal jurisdiction. (Pet. App. 3a.)

1. ***Kebodeaux's Obligation to Register as a Sex Offender in Texas, and Pre-SORNA Registration Law.*** When Congress "initially set national standards" for sex-offender registration in 1994, it "did not include any federal criminal liability." *Carr v. United States*, 130 S. Ct. 2229, 2238 (2010); *see* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, tit. XVII, subtit. A, § 170101, 108 Stat. 2038, 2038-42 (1994) (codified at 42 U.S.C. § 14071 (1994)). Instead, Congress conditioned the receipt of federal funds on the States' adoption of specified registration and penalty provisions for sex offenders. *See* 42 U.S.C. § 14071(b), (c), (f). Enforcement of those provisions was left to the States. *See id.* § 14071(c); *Carr*, 130 S. Ct. at 2238 ("federal sex-offender registration laws have, from their inception, expressly relied on state-level enforcement").

Texas adopted sex-offender registration standards to comply with the Wetterling Act and subsequent amendments enacted through 1999. *See Creekmore v. Att'y Gen. of Tex.*, 341 F. Supp. 2d 648, 653-54 (E.D. Tex. 2004) (noting Texas's amendment of

its sex-offender registration program "to insure that the program met minimum federal requirements"). Under Texas law, Kebodeaux's carnal-knowledge offense subjected him to state registration requirements because the elements of his offense were similar to the Texas offenses of indecency with a child and sexual assault.[2]

Texas defined Kebodeaux's offense as a "sexually violent offense," because it involved a minor, and Kebodeaux was older than 17 when it occurred. TEX. CODE CRIM. PROC. ANN. art. 62.01(6)(E) (West Elec. Supp. 1999). That classification subjected Kebodeaux to lifetime registration as a sex offender. TEX. CODE CRIM. PROC. ANN. art. 62.12(a) (West Elec. Supp. 1999). He was required to verify his registration annually, and to notify authorities of his changes in residence. TEX. CODE CRIM. PROC. ANN. art. 62.06(a) (West Elec. Supp. 1999).[3] Violation of the Texas

---

[2] Kebodeaux's conviction was a "reportable conviction," which triggered sex-offender registration, because it was a "conviction under . . . the Uniform Code of Military Justice" for an offense with elements substantially similar to the Texas offenses of indecency with a child and sexual assault. *See* TEX. CODE CRIM. PROC. ANN. arts. 62.01(5)(A), (J), 62.02 (sex-offender registration) (West Elec. Supp. 1999).

[3] The Texas Department of Public Safety (DPS) at one time required Kebodeaux to register every 90 days, apparently on the mistaken belief that Kebodeaux had two convictions for a sexually violent offense. *See* (R. 204-06) (listing Kebodeaux's "offense" as "sexual aslt child 2X/indecency"); TEX. CODE CRIM. PROC. ANN. art. 62.06(a) (requiring every-90-day registration for one "who has on two or more occasions been convicted of . . . a

(Continued on following page)

sex-offender registration requirements subjected Kebodeaux to imprisonment for two to 10 years. *See* TEX. CODE CRIM. PROC. ANN. arts. 62.06, 62.10(a), (b)(2) (West Elec. Supp. 1999) (together making Kebodeaux's failure to register a third-degree felony); TEX. PENAL CODE § 12.34(a) (West 2003) (third-degree felony punishable by two to 10 years' imprisonment).[4]

When Kebodeaux completed his sentence and was discharged from the Air Force, he apparently was not notified of his duty to register in Texas. A 1997 amendment to the Wetterling Act required military authorities to inform military sex offenders of their state registration obligations. Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 115(a)(8)(C)(ii)(II), 111 Stat. 2440, 2466. Military correctional facilities were slow to implement this directive. *See* Office of the Inspector General, Dep't of

---

sexually violent offense") (West Elec. Supp. 1998). The DPS may have been misled because the special court-martial order finding Kebodeaux guilty listed two dates on which he "commit[ted] the offense of carnal knowledge[.]" (R. 200.) Both dates were contained in a single charge, however, and Kebodeaux sustained a single conviction. (R. 200; PSR 5.) The error apparently has been corrected, as current DPS registry information on Kebodeaux correctly notes that he is subject to annual registration. *See* Texas Sex Offender Registry, https://records.txdps.state.tx.us/SexOffender/PublicSite/Application/Search/Individual.aspx?IND_IDN=6843376 (last visited March 13, 2013).

[4] The Government's brief notes a higher statutory maximum. Gov't Br. 46-47. That, however, is based on the DPS's apparent misclassification of Kebodeaux's single carnal-knowledge conviction. *See supra* note 3.

Def., EVALUATION OF DOD CORRECTIONAL FACILITY COMPLIANCE WITH MILITARY SEX OFFENDER NOTIFICATION REQUIREMENTS, REPORT NO. CIPO2002S003 (June 26, 2002) (OIG report). The Department of Defense only "began issuing policy to implement the Wetterling Act" and its amendments on September 28, 1999—after Kebodeaux had been released. OIG Report 5 (citing DoD Directive 1325.4 (Sept. 28, 1999)). The policy simply directed the Secretaries of the Military Departments to establish policies and procedures to comply with 42 U.S.C. § 14071's notification requirements. DoD Directive 1325.4, § 5.3.8 (Sept. 28, 1999). In December 1999, the Defense Department published a list of military offenses that triggered the military's duty to notify offenders of state registration obligations, and promulgated procedures to provide for such notice. DoD Instruction 1325.7, §§ 6.18.5, 6.18.6, Enclosure 27 (Dec. 17, 1999).[5]

Although Kebodeaux apparently was not notified of his duty to register, he did register in Texas, in 2004. *See* Texas Sex Offender Registry, https://records.txdps.state.tx.us/SexOffender/PublicSite/Application/Search/Individual.aspx?IND_IDN=6843376 (last visited

[5] A "directive-type memorandum," dated December 23, 1998, also listed the covered offenses. (Pet. App. 171a-76a.) The memorandum was subject to a requirement that a Department of Defense "Directive or Instruction incorporating the substance of [the] memorandum . . . issue[ ] within 90 days." (*Id*. at 174a.)

March 13, 2013). The record does not reveal what prompted that registration.

Wetterling Act amendments created a penalty for federal and military sex offenders who failed to comply with State registration requirements where they resided, were employed, or attended school, following release. *See* 1998 Appropriations Act § 115(a)(2)(F), (a)(6)(C), 111 Stat. at 2463, 2464, 2467 (effective Nov. 26, 1997) (codified at 42 U.S.C. §§ 14071(b)(7), 14072(i) (Supp. III 1997)), § 115(a)(8)(A), (a)(8)(C), 111 Stat. 2464-65, 2466-67 (effective Nov. 26, 1998) (codified at 10 U.S.C. § 951, note, 18 U.S.C. § 4042 (Supp. III 1997)), § 115(c); Department of Justice Appropriations Act, 1999, Pub. L. No. 105-277, div. A, § 101(b) [tit. I, § 123(3)], 112 Stat. 2681-50, 2681-73 (Oct. 21, 1998) (codified at 42 U.S.C. § 14072(i)(3), (4) (Supp. IV 1998)). The penalty also applied to persons subject to federal registration requirements. *See* 42 U.S.C. §§ 14071(c), 14072(c), (g)(3), (i)(1), (i)(2) (Supp. IV 1998). Failure to register was punishable by imprisonment up to one year, in the case of a first offense, and up to 10 years for a subsequent offense. *Id.* § 14072(i).

2. ***SORNA.*** Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act of 2006. *See* Pub. L. No. 109-248, tit. I, 120 Stat. 587, 590-611. Like the Wetterling Act, SORNA required States to adopt national standards for sex-offender registration or forfeit ten percent of certain federal criminal justice funds. Unlike the Wetterling Act, SORNA directly made registration a federal requirement for all sex offenders and created a federal criminal

offense to punish those who violate the requirements. *See* 18 U.S.C. § 2250 (2006); 42 U.S.C. § 16913 (2006); Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007) (SORNA "directly imposes registration obligations on sex offenders as a matter of federal law and provides for federal enforcement of these obligations"). The initial deadline for States to comply with SORNA was July 27, 2009. 42 U.S.C. § 16924(a) (2006). Because no State had substantially implemented SORNA by then, the Attorney General extended the compliance deadline for another two years. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT 2, 9 n.12 (Feb. 2013) (GAO Report). As of February 2013, only 16 states had substantially implemented SORNA's requirements. *See id.* 13.

SORNA dictates that "[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." 42 U.S.C. § 16913(a). The criminal punishment provision for failure to register states:

> § 2250. 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.

Section 2250(a) applies to those "required to register" under SORNA. Those required to register are sex offenders. 42 U.S.C. § 16913(a). A "sex offender" is anyone who has been "convicted of a sex offense[,]" under state, local, tribal, federal, military, and some foreign law provisions. *Id*. § 16911(1), (5)(A), (5)(B), (6). According to the Attorney General, SORNA's federal-offender provisions are "within the constitutional authority of the Federal Government" because "conviction for a federal sex offense [is] the basis for registration[.]" 72 Fed. Reg. at 8895.

Congress delegated to the Attorney General the authority to determine whether and when SORNA

would apply to offenders like Kebodeaux, who were convicted of a sex offense before SORNA's enactment. 42 U.S.C. § 16913(d); *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012). The Attorney General waited seven months to exercise that authority. On February 28, 2007, he issued an immediately effective interim rule that purported to make SORNA applicable to all sex offenders, including those convicted before July 27, 2006, when SORNA became law. *See* 72 Fed. Reg. at 8894-95, 8897 (codified at 28 C.F.R. § 72.3 (2007)). This regulation was promulgated without notice and comment, and without publication of the final rule 30 days before its effective date, as required by the Administrative Procedures Act (APA). *See* 72 Fed. Reg. at 8894-95, 8896-97; 5 U.S.C. § 553(b), (c) (requiring notice and comment), (d) (requiring 30 days' advanced publication) (2006). The Attorney General relied on the APA's "good cause" exceptions to excuse compliance with these requirements, and stated that public comments on the already-effective rule would be accepted through April 30, 2007. 72 Fed. Reg. at 8895, 8896-97 (citing 5 U.S.C. § 553(b)(3)(B), (d)(3)).[6]

On May 30, 2007, the Attorney General issued proposed guidelines to implement SORNA. The

[6] *See* 5 U.S.C. § 553(b)(3)(B) (advance notice excused "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"); 5 U.S.C. § 553(d)(3) (30-day advance publication inapplicable "as otherwise provided by the agency for good cause found and published with the rule").

National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210 (May 30, 2007). The guidelines reiterated that SORNA applied to pre-enactment sex offenders. *Id*. at 30,212, 30,228-29. Comments on the guidelines were to be accepted through August 1, 2007. 72 Fed. Reg. at 30,210. Final guidelines, including the final retroactivity rule, were published on July 2, 2008, and purported to become effective immediately. 73 Fed. Reg. 38,030, 38,046-47 (July 2, 2008).

3. ***Kebodeaux's SORNA conviction.*** In August 2007, Kebodeaux updated his registration as a sex offender pursuant to Texas law when he moved from San Antonio to El Paso to be with his long-time girlfriend. (Pet. App. 167a-68a; PSR 3.) He returned to San Antonio shortly afterward. (Pet. App. 168a-69a; PSR 3.) Kebodeaux did not inform the El Paso Police Department of his departure, and he did not register with San Antonio authorities upon his return. *(Id*.) As Kebodeaux later explained, "under normal circumstances," he would have updated his registration. (R. 265.) Because he was devastated over the break-up with his girlfriend, however, Kebodeaux "didn't care about [his] life," tried "to commit suicide," and neglected his registration obligations. (R. 265-66; PSR 3.)

Kebodeaux was arrested in San Antonio on March 12, 2008. (Pet. App. 169a.) A federal grand jury in El Paso indicted him for failing to register and to update registration, as required by SORNA. The indictment alleged that Kebodeaux was a sex offender

because of his military conviction, and that he violated SORNA's requirements from August 14, 2007, until March 12, 2008, in the Western District of Texas. Kebodeaux's motion to dismiss the indictment on constitutional and statutory grounds was denied. (Pet. App. 114a-65a; R. 48-74.) After a bench trial on stipulated facts, the district court convicted Kebodeaux of failing to register, as required by SORNA, and sentenced him to one year and one day of imprisonment, to be followed by five years' supervised release. (Pet. App. 2a-3a, 166a-69a; R. 200-06, 257, 273.)[7]

4. ***Kebodeaux's Appeal.*** Kebodeaux appealed, challenging the constitutionality of his conviction. After a panel of the Fifth Circuit rejected that challenge, the court decided to hear the case en banc. Kebodeaux argued that neither the Constitution's Military, Commerce, nor Necessary and Proper Clauses justified the application of SORNA to his intrastate failure to update his registration. Kebodeaux's Supplemental Brief on Rehearing En Banc at 10-36 (Aug. 16, 2011). The Government contended that SORNA's application to Kebodeaux was necessary and proper to its "authority to enact

[7] In 2010, Kebodeaux's supervised release was revoked in an agreed order. The revocation involved no sexual offense or misconduct. Order at 1-2, *United States v. Kebodeaux*, No. 5:10-CR-117 (W.D. Tex. Sept. 30, 2010), ECF No. 19. The court sentenced him to 17 months' imprisonment and terminated his supervised release. *Id*. at 3.

laws for the responsible operation of a federal penal system" and under the Commerce Clause. En Banc Brief of the United States at 13-14 (Sept. 7, 2011).[8]

The en banc court ruled that SORNA was unconstitutional as applied to Kebodeaux, "under the specific and limited facts of this case[.]" (Pet. App. 2a.) Kebodeaux had "served his sentence and . . . been unconditionally released from prison and the military" in 1999—years before SORNA's enactment. (*Id.* at 2a-3a.)[9] In these circumstances, Congress lacked a "jurisdictional hook" to subject Kebodeaux to SORNA's provisions governing the failure to register after intrastate travel. (*Id.* at 3a.) The Fifth Circuit's "finding of unconstitutionality . . . d[id] not affect the registration requirements for . . . any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or . . . any federal sex offender convicted since then." (*Id.* at 4a.) Neither did it affect any offender—state or federal—who crosses state lines and then fails to register. (*Id.*

---

[8] In the courts below, the Government did not rely on the spending power, the Property Clause, or 42 U.S.C. § 14072(i)(4), all of which it relies upon before this Court. *See* Gov't Br. 15, 17, 20, 22-26 & n.9, 28, 32 n.14, 49, 51-52.

[9] Under the Fifth Circuit's ruling in *United States v. Johnson*, those, like Kebodeaux, who failed to register after March 30, 2007, are subject to the Attorney General's regulation making SORNA applicable to offenders convicted before its passage. *See* Pet. App. at 2a n.1 (citing *Johnson*, 632 F.3d 912, 931-32 (5th Cir. 2011). The court decided that SORNA applied to Kebodeaux under this precedent. *Id.* at 3a n.1.

at 42a (former federal offenders may still be "regulated just as state sex offenders currently are under federal law")).

The Fifth Circuit relied on *United States v. Comstock*, 130 S. Ct. 1949 (2010). (Pet. App. 6a-24a.) *Comstock* upheld the constitutionality of 18 U.S.C. § 4248, which permits the civil commitment of inmates "currently 'in the custody of the [Federal] Bureau of Prisons,'" beyond the date they would otherwise be released, if they are mentally ill and sexually dangerous. 130 S. Ct. at 1954 (alteration in *Comstock*). Unlike the federal inmates in *Comstock*, Kebodeaux's federal sentence had expired, and he had been "unconditionally released from prison and the military." (Pet. App. 3a.) Kebodeaux was not "in prison or on supervised release[.]" (*Id*. at 4a.) Neither was he subject to federal sex-offender registration requirements as "a condition of [his] release from prison[.]" (*Id.* at. 11a.)[10] In these circumstances, the court ruled, the Federal Government lacks authority to "reassert jurisdiction over someone it had long ago

[10] In a footnote, the court rejected dissenting Judge Haynes's argument that Kebodeaux had "been subject to federal registration ever since his 1999 conviction." (Pet. App. 4a n.4.) That argument overlooked "a fundamental difference between SORNA and its predecessors." (*Id*.) While "SORNA directly imposes a registration requirement on covered sex offenders," pre-SORNA law subjected only certain sex offenders to federal registration. (*Id*.) Those residing in states that were not minimally compliant were subject to a federal registration obligation, but Kebodeaux was not in that class of offenders. (*Id*. at 4a-5a n.4.)

unconditionally released from custody just because he once committed a federal crime." (*Id.*); *see also* (*id.* at 16a n.28 (noting Government's concession in *Comstock* that it lacks power to commit a person who "'has been released from prison and whose period of supervised release is also completed'").)

The Fifth Circuit also rejected the Government's "alternative argument" that SORNA's registration and penalty provisions are "necessary and proper to effect Congress's Commerce Clause power." (Pet. App. 24a-25a.) The court concluded that neither the federal power to regulate the channels of interstate commerce; nor the instrumentalities of interstate commerce, and persons or things in interstate commerce; nor activities that substantially affect interstate commerce, supported SORNA's application to Kebodeaux. (*Id.* at 24a-41a.)

In sum, the Fifth Circuit held that SORNA's "registration requirements" and its "criminal penalties for failing to register after intrastate relocation are unconstitutional solely as they apply to former federal sex offenders who had been unconditionally released from federal custody before SORNA's passage in 2006." (Pet. App. 41a.) As to these offenders, SORNA "is an unlawful expansion of federal power at the expense of the traditional and well-recognized police power of the state." (*Id.* at 42a.)

SUMMARY OF THE ARGUMENTS

I. The Fifth Circuit Correctly Determined That the Federal Government Lacked Authority to Create and Enforce National Sex-Offender Registration Requirements, as They Applied to Kebodeaux, Whose Military Sentence Expired in 1999.

SORNA's federal-offender provisions, as applied to Kebodeaux, exceed Congress's authority. Kebodeaux's sentence for a military sex offense expired in 1999, seven years before SORNA's passage, and he resumed life as a private citizen in Texas. Nearly 10 years later, the Federal Government prosecuted him for an intrastate violation of SORNA's provisions. The Fifth Circuit Court of Appeals correctly ruled that, in these circumstances, SORNA was an unlawful expansion of federal authority, at the expense of the States' traditional police power.

A. Through its enactment of SORNA, the Federal Government legislated in an area traditionally reserved to the States. Sex-offender registration programs exist in all 50 States; they represent an exercise of the regulatory authority that is an incident of the States' general power of governing. The Federal Government's intrusion into this area is a significant factor signaling SORNA's unconstitutionality, as applied to Kebodeaux.

B. In *United States v. Comstock*, 130 S. Ct. 1949 (2010), this Court considered whether the Federal Government could detain sexually dangerous inmates

currently in federal custody beyond the date they would otherwise have been released. *Comstock* upheld the detention statute, relying on Congress's powers to create and punish crimes, the fact that the inmates were in custody, and that the Federal Government helped to create the danger posed by the inmates' release. As applied to Kebodeaux, SORNA goes beyond the limits established in *Comstock*. It permits the Federal Government to reach back, after a federal sentence has expired, to impose sex-offender registration and penalty provisions. The five considerations this Court found important in *Comstock* show that such reaching back exceeds Congress's authority.

C. Parts of SORNA are supported by the spending and commerce powers, and the powers over federal property and the Indian Tribes. None of those powers individually authorizes SORNA's federal-offender provisions, as applied to Kebodeaux. The Government proposes bundling these powers, coupling the bundle with the Necessary and Proper Clause, and declaring that the result is a permissible and comprehensive national sex-offender-registration program. The problem with this novel approach is that the Necessary and Proper Clause cannot create a federal power as the Government proposes. It can only help execute enumerated powers, and the Government has not identified any that apply here.

D. The Fifth Circuit's constitutional analysis of SORNA's federal-offender provisions is sound. The Government attempts to vitiate that analysis by arguing that the court was mistaken to say that

federal jurisdiction over Kebodeaux ended when he was released from custody in 1999. It is the Government that is mistaken. Kebodeaux's release from federal custody was unconditional, and upon release he returned to the State's power. The existence of a federal penalty provision for failure to register in a State in 1999 did not subject Kebodeaux to continuous federal jurisdiction, as the Government claims. In any event, the penalty provisions cited by the Government did not apply to Kebodeaux.

II. The Fifth Circuit's Judgment May Be Affirmed on the Alternate Ground That Kebodeaux's Failure to Register Occurred Before SORNA Applied to Him.

This Court can avoid deciding the constitutional issue presented in Kebodeaux's case by finding that SORNA did not apply to him. Kebodeaux's failure-to-register offense ended in March 2008. The Attorney General did not promulgate a valid regulation applying SORNA to pre-enactment offenders like Kebodeaux until the summer of 2008. The effective date of the regulation presents an issue that has divided the courts of appeals. The Government argues that the Court ought not rule on the issue because it was not preserved on appeal. That overlooks the Court's authority to affirm on any ground, even one not argued in the appeals court. Consonant with that authority and the doctrine of constitutional avoidance,

the Court should consider the effective-date issue raised by Kebodeaux, and affirm on that ground.

ARGUMENTS

I. The Fifth Circuit Correctly Determined That the Federal Government Lacked Authority to Create and Enforce National Sex-Offender Registration Requirements, as They Applied to Kebodeaux, Whose Military Sentence Expired in 1999.

The "general power of governing," commonly known as the "'police power'" belongs to the States—not to the Federal Government. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (*NFIB*); *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring) ("Residual power, sometimes referred to . . . as the police power, belongs to the States and the States alone."). That power, "'in the ordinary course of affairs, concern[s] the lives, liberties, and properties of the people[.]'" *NFIB*, 132 S. Ct. at 2578 (quoting THE FEDERALIST NO. 45, at 293 (J. Madison) (Clinton Rossiter ed., 1961)). The Federal Government also has authority to govern, but only pursuant to the powers enumerated in the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

SORNA's registration and penalty provisions for former federal offenders regulate the everyday lives and liberties of the people, albeit a particular class of people, by requiring them to register and punishing them for failure to do so. That exercise of authority does not fall within any of the Federal Government's enumerated powers. The Constitution does not permit this exercise of federal power over a person who satisfied his federal sentence, returned to the authority of the State, and did not travel interstate.

A. By Enacting SORNA, the Federal Government Entered an Area in which State Authority Is at Its Zenith, and Where the States Have Robustly Exercised Their Authority.

Kebodeaux challenges federal-offender provisions only as they apply to him and others like him. The degree to which SORNA's federal-offender provisions intrude into areas traditionally reserved to the States is a significant consideration in determining whether the law is unconstitutional, as applied to Kebodeaux. "It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power." *Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring). In enacting SORNA's federal-offender provisions, Congress compromised essential attributes of State sovereignty.

SORNA's registration requirements are an intrusive form of federal regulation. A person convicted of a sex offense must "register, and keep the registration current, in each jurisdiction where" he lives, works, or attends school. 42 U.S.C. § 16913(a) (2006). The person must report a wide variety of personal information, including his name, Social Security number, residence address and telephone numbers, the name and address of any place where he is or will be an employee, the name and address of any place where he is or will be a student, the license plate number and a description of any vehicle he owns or operates, and information about his travel plans when he leaves home for seven or more days. 42 U.S.C. § 16914(a)(1)-(7) (2006); The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,055-57 (July 2, 2008).[11]

"SORNA lists 22 categories of information sex offenders must provide at registration, and many of these categories have subcategories." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT 15 (Feb. 2013) (GAO Report). The offender must appear in person to report changes in the required information within three days after a "change of name, residence, employment, or student status[.]" 42 U.S.C. § 16913(c). Periodic in-person verification also is required—every

[11] Section 16914(a) and excerpts from the Guidelines are reproduced in Appendix A.

three months for an offender designated as a "tier III" offender, every six months for a "tier II" offender, and annually for a "tier I" offender. 42 U.S.C. § 16916 (2006). These registration provisions "regulate individuals as such," making SORNA an exercise of the police power that properly "remains vested in the States." *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.).

State and local governments were the first to enact sex-offender registration laws, beginning with California in 1947. *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 30 (Stanford University Press 2009). Over the years, other States followed suit. *Id*. at 30-32. In the early 1990s, highly publicized accounts of crimes against children led additional States to adopt registration laws. *Id*. at 49-55. By 1996, all 50 States had adopted sex-offender registration laws. *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). As this Court has recognized, such provisions are an exercise of the general "'regulatory power'" that is "'an incident of the State's power to protect the health and safety of its citizens[.]'" *Id*. at 93-94 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

SORNA's registration and penalty provisions thus intrude on the "ordinary processes and powers of the States." *See Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring); *see also United States v. Lopez*, 514 U.S. 549, 565 (1995) ("States historically have been sovereign" in "criminal law enforcement"). This

intrusion into an area in which State authority is paramount, and where States have robustly exercised their power, is a significant factor signaling SORNA's unconstitutionality, as applied to Kebodeaux.

B. Under the Analysis in *Comstock*, SORNA Is Neither Necessary Nor Proper to Execute the Enumerated Powers Supporting Federal Sex Offenses.

The Government contends that SORNA's federal-offender provisions are necessary and proper to accomplish a legitimate end under Congress's enumerated constitutional powers—the national registration of sex offenders. Gov't Br. 29-48. Much of the Government's argument relies on this Court's reasoning in *Comstock*. *Id*. 31-33, 36-48. Its contentions fail because of the critical distinctions between that case and Kebodeaux's.

In *Comstock*, this Court considered a constitutional challenge to a "civil-commitment statute" that authorized the Federal Government "to detain a mentally ill, sexually dangerous federal prisoner beyond the date [he] would otherwise be released." 130 S. Ct. at 1954. The statute permitted this exercise of federal power only if the State would not accept responsibility for a prisoner whose federal sentence was about to expire. *Id*. at 1954-55, 1960-61. The States' reluctance to accept such prisoners was fueled by "the Federal Government itself," which had

"severed [the inmates'] claim to 'legal residence in any State,' by incarcerating them in remote federal prisons." *Id.* at 1961.

"Congress' desire to address" the States' reluctance to accept responsibility for sexually dangerous federal inmates, the Court ruled, "taken together with its responsibilities as a federal custodian, . . . satisfie[d] the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority." *Id.* at 1962. The Court explained that, in this narrow context, § 4248 was "'reasonably adapted' . . . to Congress' power to act as a responsible federal custodian" for inmates who would pose a danger if released without a State's agreement to accept responsibility for them. *Id.* at 1961 (citation omitted). The custodial role, which was necessary to execute the enumerated powers underlying federal crimes, was also necessary to avert a danger that the Federal Government had helped to create.

No comparable link exists between SORNA's federal-offender provisions and the enumerated powers that support the creation of federal sex crimes. The link suggested by the Government is that the underlying offense is "federal," and the offense "itself creates the risks addressed by sex-offender registration." Gov't Br. 34. The Federal Government, however, played no part in creating that risk, and this case does not involve the difficult issues posed by the potential release of dangerous individuals from federal custody. To the extent that federal sex

offenders should be monitored, the States have not abdicated their public-safety function; they have uniformly assumed responsibility for post-sentence monitoring. *See* Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 6 (2008) (all 50 states had sex-offender registration laws by 1996).[12] In these circumstances, the Federal Government has no power to exercise continued authority over Kebodeaux simply because he committed a military sex offense in 1999.

In *Comstock*, this Court relied on "five considerations, taken together[,]" to conclude that the commitment statute was necessary and proper to the exercise of enumerated powers that supported the creation of federal criminal offenses. 130 S. Ct. at 1956. Acknowledging that SORNA "goes a step further than" the statute approved in *Comstock*, the Government contends that, nonetheless, *Comstock*'s five considerations support SORNA's registration requirement for federal offenders whose sentences had expired before its enactment. Gov't Br. 36. The factors considered in *Comstock* lead to the opposite conclusion. The Necessary and Proper Clause does not permit Congress to subject persons to SORNA solely because they were once convicted of a federal crime.

---

[12] Appendix C contains an index of State laws that require federal and military sex offenders to register.

1. *The breadth of the Necessary and Proper Clause does not support SORNA's application to Kebodeaux.*

The Necessary and Proper Clause provides the Federal Government with broad authority to execute the powers enumerated in Article I, Section 8, of the Constitution. *Comstock*, 130 S. Ct. at 1956. This authority is not without limits; the clause "does not give Congress *carte blanche*." *Id.* at 1970 (Alito, J., concurring). Any exercise of this power must be both "necessary" and "proper."

To determine whether the statute at issue was "necessary" to carry out an enumerated power, the *Comstock* Court looked to see whether it "constitute[d] a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* at 1956 (majority opinion). SORNA's federal-offender provisions, as applied to Kebodeaux, are not "necessary" because they are not rationally related to the implementation of an enumerated power. To be rationally related, a law must have "a tangible link" to an enumerated power—"a demonstrated link in fact, based on empirical demonstration"—"not a mere conceivable rational relation[.]" *Id.* at 1967 (Kennedy, J., concurring). "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17

U.S. (4 Wheat.) 316, 421 (1819). SORNA's regulatory ends are not within the scope of the Constitution.

The Government finds the required rational relationship in "the judgment of Congress," as well as in the "corroborating judgment of States[,]" which enacted similar laws before SORNA's passage. Gov't Br. 37. The "concurrence of multiple governmental actors about the soundness of an approach," it contends, "can provide additional confidence in its rationality." Gov't Br. 38.[13] The Government's reliance on the States' actions, as support for the rationality of Congress's choice of means in SORNA, rests on the unspoken assumption that what the States may do, the Federal Government may do. That is incorrect. The powers of the "'State governments are numerous and indefinite[,]'" while the powers of "'the federal government are few and defined.'" *Lopez*, 514 U.S. at 552 (quoting The Federalist no. 45, at 292-93 (Clinton Rossiter ed., 1961)).

The States may enact sex-offender registration and penalty provisions because they have a general

[13] There is debate about whether sex-offender registration systems are reasonably adapted to address the purportedly higher recidivism rate of sex offenders. *See* Gov't Br. 38 n.19. A report submitted to the Department of Justice in November 2012 concluded that the tiering systems already in use by the states performed better than SORNA's tiering system in predicting recidivism. *See* KRISTEN M. ZGOBA ET AL., A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC-2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT 23, 29 (Nov. 2012).

police power—such provisions are "an incident of the State's power to protect the health and safety of its citizens[.]" *Doe*, 538 U.S. at 93 (internal quotation marks and citation omitted). Registration and penalty provisions are reasonably adapted to carry out that general police power. But the Federal Government does not have a police power. *Comstock*, 130 S. Ct. at 1967 (police power "belongs to the States and the States alone") (Kennedy, J., concurring). For SORNA's federal-offender provisions to be valid, they must be reasonably adapted to the execution of the enumerated powers that created, and provided punishment for, Kebodeaux's underlying offense. They are not—the underlying crime was identified, prosecuted, and punished long ago. SORNA in no way helps to execute the military power that allowed that 1999 prosecution, or the custodial power that served to carry out the punishment for it.

The Government next relies on this Court's observation, in *Carr v. United States*, 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.'" Gov't Br. 34 (quoting 130 S. Ct. 2229, 2238 (2010)); *see also id.* 16, 18, 52. The Court's remark rejected the Government's contention that Carr's proffered statutory interpretation was faulty because it resulted in anomalous and differing treatment for federal and state sex offenders. 130 S. Ct. at 2238. The Court

opined that Congress intended to treat the two classes of offenders differently by assigning the Federal Government a special role with respect to federal offenders. *See id*.

The Government acknowledges that *Carr*'s comment addressed an issue of statutory construction and referred to Congress's likely intent in enacting SORNA's federal-offender provisions. Gov't Br. 34-35 & n.16. Still, it asserts that the Court's observation "has equal force in [the] constitutional analysis[,]" because "[i]t 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." Gov't Br. 35 & n.16. This simply does not follow. The Court's reasoning on a question of statutory construction cannot be taken out of context to resolve a constitutional question that the Court never considered. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("[T]his Court does not decide important questions of law by cursory dicta inserted in unrelated cases.").

SORNA's federal-offender provisions, as applied to Kebodeaux, lack the required rational relationship to "a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. Accordingly, they are not "necessary" to execute the powers that permit the creation of federal sex offenses. Nor are they "proper," because they compromise an essential attribute of State sovereignty—the States' power to make and enforce laws that regulate the everyday conduct of their

citizens. *See NFIB*, 132 S. Ct. at 2578 (police power "'concern[s] the lives [and] liberties . . . of the people'"). A law "that undermine[s] the structure of government established by the Constitution" is "not *proper*" because it is "not 'consist[ent] with the letter and spirit of the constitution[.]'" *Id.* at 2592 (opinion of Roberts, C.J.) (quoting *Printz v. United States*, 521 U.S. 898, 924 (1997), and *McCulloch*, 17 U.S. (4 Wheat.) at 421).

Once Kebodeaux completed his military sentence and was discharged from the military, Texas resumed authority over him. *See Comstock*, 130 S. Ct. at 1965 (federal power expires once inmate "'has been released from prison and [his] period of supervised release is also completed'") (quoting Transcript of Oral Argument at 9). Texas, not the Federal Government, had exclusive authority to decide how and whether Kebodeaux should register as a sex offender and whether to punish him if he failed to register.

2. *The scant historical precedent for federal registration of sex offenders suggests SORNA's unconstitutionality.*

While "a longstanding history of . . . federal action" in a particular area "does not demonstrate a statute's constitutionality[,]" such a history can help to establish "the reasonableness of the relation between the new statute and pre-existing federal interests." *Comstock*, 130 S. Ct. at 1958. The civil-commitment statute considered in *Comstock* was "a

modest addition to a set of federal prison-related mental-health statutes that ha[d] existed for many decades." *Id*. The Federal Government had "been involved in the delivery of mental health care to federal prisoners" since 1855. *Id*. And civil-commitment statutes similar to § 4248 had been enacted in 1949, and again in 1984. *Id*. at 1960.

SORNA's provisions have no such history. The Federal Government first legislated in this area in 1994, by providing inducements to the States to exercise their police power. *See* Wetterling Act, Pub. L. No. 103-322, tit. XVII, § 170101, 108 Stat. 2038-42. Subsequent legislation created limited registration and penalty provisions. *See Carr*, 130 S. Ct. at 2238-39 & n.7. In 2006, SORNA directly imposed registration requirements on all sex offenders, and created a federal criminal penalty for failure to observe those requirements. *See* 18 U.S.C. § 2250 (2006); 42 U.S.C. § 16913. These additions were not modest, and they did not rest on longstanding precedent. "[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)) (alterations in *NFIB*); *see also Virginia Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011).

Perhaps realizing the constitutional infirmity suggested by SORNA's lack of historical precedent, the Government contends that SORNA "is built on"

the history of federal probation, parole, and supervised release provisions, which regulate offenders under sentence but not in prison. Gov't Br. 39. There is a crucial difference between SORNA and these "post-release supervision" programs. Gov't Br. 39. Probation, supervised release, and parole are monitoring programs that are part of a criminal sentence. *See* 18 U.S.C. § 3551(b) (2006) ("term of probation" is a sentence); *id.* § 3583(a) (2006) ("supervised release" imposed "as a part of the sentence"); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("parole is an established variation on imprisonment of convicted criminals"); *cf. Johnson v. United States*, 529 U.S. 694, 700 (2000) ("postrevocation sanctions [are] part of the penalty for the initial offense"). Sex-offender reporting requirements, however, are not part of the punishment for a crime. *See Doe*, 538 U.S. at 101-02.

The Government dismisses this distinction, arguing that "*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.'" Gov't Br. 40 (quoting *Comstock*, 130 S. Ct. at 1979 & n.12 (Thomas, J., dissenting)). Kebodeaux disagrees. *Comstock* did not suggest that the Federal Government's relationship with its prisoners permitted the exercise of federal power even after a criminal sentence expires. Instead, the Court found it necessary and proper to extend the federal power, when the Federal Government itself, through its prison system, helped to create a danger to the public. The Government's role as custodian of a

sexually dangerous prisoner permitted continued authority over him, so long as the authority was first exercised before his sentence expired. *Comstock* was careful to acknowledge that federal power ceased to exist over an offender who "'has been released from prison and whose period of supervised release is also completed.'" 130 S. Ct. at 1965 (quoting Transcript of Oral Argument at 9).

The history of post-release supervision of federal offenders, imposed as part of a sentence, does not supply historical precedent for federal sex-offender registration and penalty provisions. As applied to Kebodeaux, SORNA's provisions reasserted federal control over an offender after his sentence was complete, and he had returned to the responsibility and control of the State. "[O]nce 'the transfer to State responsibility and State control has occurred[,]'" the Federal Government no longer has any "'appropriate role'" in monitoring the conduct of a former federal inmate. *Id*.

3. *SORNA's registration and punishment provisions are not a reasonable extension of federal authority, as applied to Kebodeaux, who completed his federal sentence before SORNA's enactment.*

The Government contends that SORNA is a "reasonable extension of preexisting federal post-release regulation of sex offenders," relying on the same faulty analogy it relies upon in analyzing the

second *Comstock* factor. Gov't Br. 41. Its analogy fails here as well.

Sentence-based, post-release regulation—through probation, parole, and supervised release—executes the enumerated powers that permit Congress to create federal crimes precisely because it is part of the sentence. Reaching backward to regulate an offender whose sentence has expired, as SORNA's application to Kebodeaux does here, is not a reasonable extension of a sentence-based regulation. The Government conceded as much in *Comstock*. *See* 130 S. Ct. at 1965.

The Government now argues its concession "pertained to the limits on the government's 'power to commit a person.'" Gov't Br. 42. SORNA's provisions, it contends, represent "a significantly more modest assertion of power." *Id*. But the Government's position in *Comstock* was that it lacked power, once the federal sentence expired, because "at that point the State police power over a person has been fully reestablished"—not because of the restrictive nature of the commitment statute. *See* Transcript of Oral Argument at 9, *Comstock*, 130 S. Ct. 1949. When asked whether "the Federal Government [could] order a commitment of anyone who's been in Federal custody over the last 10 years[,]" the Government's response was clear:

> [SOLICITOR GENERAL]: . . . I would say that that would be a different case and that the Federal Government would not have . . . the power to commit a person who . . . has

> been released from prison and whose period of supervised release is also completed. At that point the release has been—the transfer to State responsibility and State control has occurred, and the Federal Government would have no appropriate role.

Id. at 8-9. The Court then inquired further:

> [THE COURT]: So that must be because there is a lack of Federal power.
>
> [SOLICITOR GENERAL]: Yes, I think that that's correct, that at that point the State police power over a person has been fully reestablished.

Id. at 9. The State police power over Kebodeaux was reestablished when he was unconditionally released from custody and the military in September 1999. The Necessary and Proper Clause could not create federal power to require Kebodeaux to register in 2006, or to permit his federal prosecution in 2008.

Nor is the Government correct that SORNA's assertion of federal power is "significantly more modest" than that of § 4248. Gov't Br. 42. SORNA imposes burdensome and long-lasting registration obligations. *See* 42 U.S.C. §§ 16913, 16914(a), 16915(a). Those requirements have "caused difficulties in sex offenders' ability to reintegrate into the community[,]" including problems obtaining housing and finding work, factors that may increase, rather than decrease, offenders' rates of recidivism. GAO Report 23, 31.

In addition, SORNA's registration requirements are imposed without the safeguards that attend § 4248 proceedings. A person committed under § 4248 has access to "a system for ongoing psychiatric and judicial review of the individual's case, including judicial hearings at the request of the confined person at six-month intervals." *Comstock*, 130 S. Ct. at 1955. That hearing may result in discharge. *See* 18 U.S.C. § 4247(h) (2006). By contrast, under SORNA, a tier III offender must register for life, with no relief from registration unless he committed the sex offense when he was a juvenile. 42 U.S.C. § 16915(a)(3). In that case, registration may terminate after 25 years. § 16915(b)(2)(B). A tier II offender must register for 25 years, with no relief from registration, and a tier I offender must register for 10 years before he may apply for relief. § 16915(a)(2), (b)(2).

SORNA's federal-offender penalty provision, 18 U.S.C. § 2250(a)(2)(A), is an additional assertion of federal power that is far from "modest," as illustrated by Kebodeaux's case. Kebodeaux has been registered in Texas as a sex offender since 2004. *See supra* 6. During a difficult period in his life, he failed to update his registration, and was prosecuted by the Federal Government—not Texas. (R. 265-66; PSR 3.) He served a prison sentence for that lapse, as a result of the exercise of federal power. Given the circumstances of Kebodeaux's 1999 offense, the limited punishment he received for it, and his apparent record of substantial compliance with Texas law, it is not surprising that the State, a "government[ ] more

local and more accountable than a distant federal bureaucracy," did not prosecute him. *See NFIB*, 132 S. Ct. at 2578; *see also Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("The federal system rests on" the premise "that 'freedom is enhanced by the creation of two governments, not one.' ") (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)).

4. *SORNA fails to accommodate States' interests.*

Section 4248 did not improperly compromise state sovereignty in part because it "require[d] *accommodation* of state interests[.]" *Comstock*, 130 S. Ct. at 1962. Under § 4248, the Federal Government was required to notify the prisoner's home state of his federal detention, and to release the prisoner to the State if it agreed to assume custody of him. *Id*. No similar accommodation exists under SORNA; it authorizes federal registration and punishment regardless of State interests.

This is starkly illustrated by the fact that Kebodeaux's home state has rejected the Federal Government's judgment—expressed in SORNA—about how an intrastate sex-offender registration system should operate. In a letter to the Department of Justice, explaining why Texas had not complied with SORNA, the General Counsel for the Governor's Office explained: " . . . the adoption of [SORNA's] 'one-size-fits-all' federal legislation in Texas would in fact undermine the accomplishment of [SORNA's]

objectives in Texas, just as it would in most other states."[14] Other states have made similar decisions. Indeed, as noted, only 16 states have substantially implemented SORNA since its enactment. GAO Report 13.

The States, of course, may decline to adopt SORNA's requirements, as the GAO report shows many have. But they lack the power to prevent federal prosecution of a former federal offender's intrastate failure to register. The Government asserts that States can prevent such enforcement, noting that "[s]ection 2250's criminal penalties cannot be enforced if a State is unwilling to register the offender." Gov't Br. 53. On this theory, the State must forfeit its own sovereign interest in regulating sex offenders living within its borders to prevent enforcement of federal sex-offender laws.

States do not want to abandon sex-offender registration; they simply endorse different standards from those dictated by the Federal Government in

---

[14] Letter from Jeffrey S. Boyd, General Counsel and Acting Chief of Staff, Texas Office of the Governor, to Linda Baldwin, Director, SMART Office (Aug. 17, 2011); *see also* Letter from Risa S. Sugarman, Director, New York Office of Sex Offender Management, to Linda Baldwin, Director, SMART Office (Aug. 23, 2011) ("[W]e are convinced that the statutory scheme set out by our legislature is in the best interests of New York State and the best way to protect our citizens."). The letters are reproduced in Appendix B, and are available at http://www.ncleg.net/documentsites/committees/JLOCJPS/October%2013,%202011%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf .

SORNA. For example, Texas has determined that annual in-person registration is sufficient for a person who has a single sex-offense conviction. TEX. CODE CRIM. PROC. ANN. art. 62.058(a) (West 2006). SORNA can require more frequent reporting, based on its tier system for classifying prior convictions. *See* 42 U.S.C. §§ 16911(2)-(4), 16916 (2006). That system itself has been a source of disagreement between the States and the Federal Government. *See* GAO Report 19; Appendix B. Texas, like other States, favors risk assessments over the federal tier system, which determines registration requirements based on the offense of conviction. *See id.*; TEX. SENATE COMM. ON CRIMINAL JUSTICE, INTERIM REPORT TO THE 82D LEGISLATURE at 4, 19 (2011), *available at* http://www.senate.state.tx.us/75r/senate/commit/c590/c590.Interim Report 81.pdf (last visited Mar. 24, 2013).

SORNA compromises, rather than accommodates, States' interests in sex-offender registration. Kebodeaux's failure to register as a sex offender when he moved intrastate was inherently local in nature, and it should have been left to local authorities to address.

5. *The link between SORNA and an Article I, § 8 enumerated power is too attenuated.*

Under the final *Comstock* factor, the link between the challenged federal legislation "and an enumerated Article I power" must not be "too attenuated." 130

S. Ct. at 1963. Section 4248's link to federal power was not too attenuated because that provision's "narrow scope" was "limited to individuals already 'in the custody of the' Federal Government." *Id*. at 1964, 1965 (quoting § 4248(a)). Here, the Federal Government has asserted the power to reach back to regulate a former offender, who had been discharged from the military and released from prison when his sentence expired. Because this power is too attenuated from any Article I power, the fifth *Comstock* consideration weighs against SORNA's constitutionality as applied to Kebodeaux.

C. The Federal Authority Exercised in SORNA Is Not Necessary and Proper to Execute the Multiple Enumerated Powers Relied Upon by the Government.

Recognizing the weakness of its reliance below on *Comstock* and the Commerce Clause, the Government raises a new theory in this Court. SORNA's federal-offender provision is constitutional because it is a focused and rational component of a comprehensive national framework for sex-offender registration. Gov't Br. 48-54. The Government relies on no single enumerated power as authority for this argument. Instead, it contends that SORNA is necessary and proper to effectuate "multiple enumerated powers" that, individually, support some of SORNA's provisions. *See* Gov't Br. 48-49.

The "Spending Clause authority," the Government contends, supports Congress's withholding of federal funds to encourage States to comply with SORNA. *Id*. at 49. The Commerce Clause, now demoted to a minor role in the Government's advocacy, supports SORNA's provisions that punish interstate travel to evade registration requirements. *See id*. at 50-51. The Property Clause supports SORNA's application in federally controlled lands. *Id*. at 51. Finally, the "various sources" of the Federal Government's power over Indian tribes supports SORNA's application to those tribes. *Id*.[15] SORNA's federal-offender provisions, the Government argues, are "necessary and proper to help effectuate . . . a comprehensive national registration system" for sex offenders that is the "legitimate end" served by all of the cited powers. *Id*. at 51.

The Government's argument illustrates that the "Necessary and Proper Clause" is "the last, best hope of those who defend ultra vires congressional action[.]" *Printz*, 521 U.S. at 923. Like the Government's other arguments, its conglomeration-of-powers theory ignores the line between State and Federal sovereignty. Perhaps most important, it "license[s] the exercise of a[ ] 'great substantive and independent power[ ]' beyond those specifically enumerated" in the

---

[15] As the Government concedes, it did not rely on the federal spending authority—itself implied from the power to tax—in the courts below. *See* Pet. 24 n.8. For the first time here, it relies on the Property Clause and its powers over Indian Tribes.

Constitution. *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411, 421).

1. *None of the individual enumerated powers relied upon by the government support SORNA's application to Kebodeaux.*

The Government does not explicitly argue that the spending power authorizes SORNA's application to Kebodeaux. Instead, it asserts that "Congress reasonably concluded" that SORNA's provisions "were an appropriate means of ensuring that the federal funds it invested in creating and enforcing a comprehensive national sex-offender-registration system were well spent." Gov't Br. 52. The Government cites no Congressional findings, or even legislative history, to support this questionable assertion.[16] The Government does cite *Sabri v. United States*, 541 U.S. 600 (2004), in support of this claim, Gov't Br. 52, but its reliance is misplaced.

Sabri was a case about money and its fungibility. A businessman offered bribes to an official employed by a city agency that received federal funds. 541 U.S. at 602-03. The Court found that the Spending and Necessary and Proper Clauses permitted the creation

[16] There is one citation to a House Report, for the proposition that Congress identified a trend of sex offenders failing to comply with existing registration laws. *See* Gov't Br. 52.

of the federal bribery statute under which Sabri was convicted "to safeguard the integrity of the . . . recipients of federal dollars[,]" so that "taxpayer dollars . . . are not frittered away in graft[.]" *Id*. at 605 (discussing 18 U.S.C. § 666). A bribery prosecution aimed at protecting the integrity of federal funds disbursed under the spending power is rationally related to the power to spend for the general welfare.

A criminal prosecution under SORNA for an intrastate failure to register is not related to the power to spend for the general welfare. That Congress may protect the money it spends from theft or diversion is a far different proposition from the claim that it may pass laws regulating purely local conduct of individuals to achieve what it believes to be a desirable policy end, such as a "comprehensive" sex-offender registration scheme. The Federal Government does not gain the power to regulate the lives of private citizens under the Necessary and Proper Clause merely because it provides money to the States in which they reside. The Necessary and Proper "[C]lause is not itself a grant of power[.]" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960). The Government's suggestion that *Sabri* permits it to impose the federal-offender registration requirements and the intrastate penalties on Kebodeaux must therefore fail.

Unlike the bribery statute considered in *Sabri*, SORNA is not aimed at protecting federal money. It is more like the program considered in *South Dakota v. Dole*, 483 U.S. 203 (1987). South Dakota faced a loss

of federal highway funds unless it raised the State's drinking age to 21. *Id*. at 205. Lack of uniformity in the States' drinking ages threatened highway safety —a main goal of the highway funds—because there was an incentive for young people to travel by car to neighboring states where the drinking age was lower. *Id.* at 208-09. Using federal funds to induce the States to act in a way that created national uniformity in the drinking age was a proper use of the spending power. *Id*. at 211-12.

That the inducement to the State was proper did not allow the Federal Government to regulate intrastate activities of citizens otherwise outside its powers. For instance, the spending power inducement could not grant the national government power to prosecute underage, intrastate drunk drivers. Yet, under the Government's theory, federal prosecution of these drivers would be proper under the spending power as a desirable, comprehensive way of ensuring that federal highway safety funds were well spent. So attenuated a theory—whether applied to an underage drunk driver or to a sex offender who fails to register intrastate—is too far removed from the spending power to pass constitutional muster.

The Government takes the same indirect approach with the Commerce Clause as it does with the spending power. It does not argue that SORNA's application to Kebodeaux is necessary and proper to execute the Commerce Clause power. *See* Gov't Br. 48-51. It simply points out that the Commerce Clause supports SORNA's penalty provision for an offender

who travels in interstate commerce to evade his registration obligations. Gov't Br. 51.[17] Because Kebodeaux failed to register intrastate—no crossing of state lines was involved—the Commerce Clause does not support SORNA's application to him.

The Government mentions additional enumerated powers to suggest that SORNA's application to Kebodeaux is constitutional—the power to regulate federal property and the power over Indian affairs. Gov't Br. 51. These powers have no relation to Kebodeaux, or to SORNA's application to him.

2. *Bundling enumerated powers together does not create a new power that supports SORNA's application to Kebodeaux.*

The Government invokes the spending, commerce, property, and Indian powers to argue that SORNA's penalty provision is necessary and proper to help effectuate "a comprehensive national registration system," various parts of which are supported by those powers individually. Gov't Br. 51-52. To support that argument, the Government cites the concurring opinion in *Gonzales v. Raich*, which says that "Congress may regulate even noneconomic local activity if

[17] In the Fifth Circuit, the Government argued extensively that the Commerce Clause supported SORNA's application to Kebodeaux. *See* En Banc Brief of the United States at 29-41. It apparently has abandoned the argument in this Court.

that regulation is a necessary part of a more general regulation of interstate commerce." Gov't Br. 51-52 (quoting 545 U.S. 1, 37 (2005) (Scalia, J., concurring)). It does not explain how that proposition applies here.

That is unsurprising, as it has no application. The "power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market[.]" 545 U.S. at 38 (Scalia, J., concurring). The registration and punishment of sex offenders cannot, in any sense, be considered the "regulation of an interstate market[.]" *See id*. There is no market, interstate or otherwise, involved here.

3. *The Federal Government lacks a general police power that would permit it to enact "a comprehensive national framework" for sex-offender registration.*

In the Government's view, federal authority over former federal offenders is helpful to the States and "attest[s] to [the Federal Government's] willingness to work cooperatively with the states and to shoulder some of the burden of implementing SORNA[.]" Gov't Br. 52-53. The Federal Government's desire to shoulder some of the burden for implementing SORNA is admirable, and it may do so by exercising its enumerated powers. It may provide federal funds to the States, on condition that they substantially implement SORNA. It may assist the States by federally

prosecuting those who cross state lines to evade registration requirements. And it has independent authority to enforce SORNA on federal property and through its powers over the Indian tribes—there are no competing States' interests there.

What the Federal Government may not do is take over the registration and punishment of federal sex offenders convicted and released before SORNA's enactment, who do not cross state lines. Those offenders returned to the State's authority when their federal sentences expired. Concepts of federalism that protect individual liberty and State sovereignty forbid that extra reach.

D. The Government's Attempt to Vitiate the Fifth Circuit's Constitutional Analysis Fails.

The Fifth Circuit's constitutional analysis is sound. Under the principles articulated in *Comstock*, and well-recognized concepts of federalism, the court correctly concluded that the reassertion of federal jurisdiction over Kebodeaux, through SORNA's enactment, was an unlawful expansion of federal power at the expense of State sovereignty. (Pet. App. 42a.)

The Government attempts to undermine the Fifth Circuit's constitutional analysis, arguing that the court made a threshold error about federal jurisdiction over Kebodeaux in 1999, when his sentence expired and he was discharged from the Air Force. Gov't Br. 18, 27. The court ruled that SORNA was

unconstitutional, as applied to Kebodeaux, in part because he had been unconditionally released from federal custody before SORNA's 2006 enactment. (Pet. App. 41a.) The Government contends that Kebodeaux had not been unconditionally released—instead, he had been "*continuously*" under federal jurisdiction because he "was continuously subject to a federal criminal penalty for knowingly failing to register as a sex offender." Gov't Br. 19.

This argument has multiple flaws. First, the Government takes "unconditional release" to mean release free from a federal registration requirement. Gov't Br. 9-10, 19. Second, it equates the existence of "a potential federal criminal penalty for failure to register" Gov't Br. 20, with a "federal registration requirement[.]" Gov't Br. 25. Third, it relies on federal penalty provisions that did not apply to Kebodeaux. For these reasons, the Government is mistaken.

1. *Kebodeaux was unconditionally released from federal custody in 1999.*

The Fifth Circuit correctly concluded that, in 1999, Kebodeaux had been "unconditionally released from prison and the military." (Pet. App. 3a.) The Government's argument to the contrary misunderstands the court's view of what it means for an offender to be unconditionally released. In the Fifth Circuit's view, Kebodeaux had been unconditionally released in 1999 because "[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[.]" (Pet. App. 2a.) The court stated this proposition several times. It observed that Kebodeaux "fully served [his] sentence, and the federal government severed all ties with him." (Pet. App. 2a.) By 2006, when SORNA was enacted, Kebodeaux had been "long free from federal custody or supervision." (Pet. App. 12a); *see* (Pet. App. 24a ("no longer subject to federal custody or supervision").) He was "*someone who was once in prison but seven years ago had fully served his sentence and has not since been in contact with the federal government*." (Pet. App. 15a.) Sex-offender registration requirements "were not a condition of Kebodeaux's release from prison[.]" (Pet. App. 11a.) For that reason, Kebodeaux was unlike those who "are in custody or have been released from custody on the condition that they comply with SORNA." (Pet. App. 18a.)

Assuming Kebodeaux was subject to a federal registration requirement in 1999—and Kebodeaux disputes that —the requirement was not a condition of his release. Kebodeaux was not set free on condition that he comply with a federal registration requirement any more than he was set free on condition that he not commit murder. Any registration requirement that may have existed in 1999 imposed a new obligation—it was not a condition of his release. The Fifth Circuit's reasoning relies on Kebodeaux's release free from conditions, not the absence of a federal registration requirement. That is why the

court addressed the issue of a purportedly extant federal registration requirement only in a footnote, and only to respond to the dissenters' complaint that the existence of a registration requirement meant that Kebodeaux was not released unconditionally. *See* (Pet. App. 4a n.4.)

As the Fifth Circuit recognized, current registration requirements, under SORNA, are a condition of a sex offender's release from custody. (Pet. App. 13a & n.23, 18a & n.32.) As of 2006, registration is a condition of a federal offender's release—either as a statutory requirement, or because the sentencing court adds it as a condition of supervised release. *See* 18 U.S.C. §§ 3553(a), 3583(d) (2006). Indeed, the court explicitly contrasted Kebodeaux with the defendant in *United States v. George*,[18] whose "compliance with [registration provisions] was an explicit condition of his sentence." (Pet. App. 24a n.37.) Kebodeaux was not subject to supervised release, or any other type of federal supervision in 1999; he was unconditionally released, as the court of appeals correctly found.

The Government's view is that release can be unconditional only if no federal requirement to register as a sex offender exists at the time of release, and it builds its analysis on that premise. *See* Gov't Br. 19-27. That was not the Fifth Circuit's view. Because the Government improperly equates "unconditional

[18] 625 F.3d 1124, 1130 (9th Cir. 2010), *vacated on other grounds*, 672 F.3d 1126 (9th Cir. 2012).

release" with release free from a registration requirement, its argument fails.[19]

2. *Pre-SORNA law did not impose a federal registration requirement on Kebodeaux when he was released in 1999.*

The Government effectively concedes that pre-SORNA federal law did not impose a federal registration requirement upon Kebodeaux's 1999 release from custody. Instead, Kebodeaux was subject to "a potential federal criminal penalty" if he failed to register as required by State law. Gov't Br. 20. According to the Government, however, a "federal law that imposes federal criminal sanctions for failure to register is a 'federal registration requirement' under any reasonable understanding of that phrase." Gov't Br. 26. A possible future federal criminal penalty is not the same as a federal registration requirement.

The plain language of the statute the Government relies upon, 42 U.S.C. § 14072, distinguishes between a penalty and a registration requirement.

[19] The Government is also mistaken in its assertion that the Fifth Circuit "recognized . . . that Congress [has] . . . constitutional authority to require registration" of offenders in custody or under supervision when a registration requirement is enacted. Gov't Br. 28 (citing Pet. App. 42a). The court simply said that such offenders are "unaffected" by its narrow ruling. (Pet. App. 42a.) The court did not decide whether such action was constitutional.

Section 14072 set out two registration requirements: (1) the "[r]egistration requirement" in subsection (c) stated that a sex offender "*shall register* . . . with the FBI" if he "resides in a State that has not established a minimally sufficient sexual offender registration program[;]" and (2) the "[i]ndividual registration requirement" under subsection (g)(3) stated that an offender who "change[d] address to a State other than the State in which [he] resided at the time of the immediately preceding registration *shall* . . . *register* a current address . . . with . . . the FBI[.]" 42 U.S.C. § 14072(c), (g)(3) (Supp. IV 1998) (emphasis added). Those are registration requirements. They provide that an individual "shall register."

Another provision imposed a penalty for offenders who were "required to register"—those who lived in a non-compliant state, or who changed residence to a State other than that in which the immediately preceding registration occurred. *See* 42 U.S.C. § 14072(i)(1). The penalty also applied to persons "required to register" under 42 U.S.C. § 14071(c)—those registered in one State, who worked or attended school in another. *See* 42 U.S.C. §§ 14071(c) (Supp. IV 1998), 14072(i)(2).[20] These provisions, which the Government has never claimed applied to Kebodeaux,

[20] Subsection (i)(2) does not reference § 14071(c), but that latter provision requires a person registered in his State of residence to also register in the State where he works or attends school—the same class of persons who were subject to a penalty under 42 U.S.C. § 14072(i)(2).

actually "required" persons to register under federal law.

By contrast, the plain language of the provisions relied upon by the Government imposed only a penalty. Gov't Br. 20-27. Section 14072(i)(3) imposed a penalty on an offender "described in" 18 U.S.C. § 4042(c)(4), who "fails to register in any State" where the person lives, works, or attends school. Gov't Br. App. 9a. Subsection (i)(4) provides the same for an offender "sentenced by a court martial for conduct in a category specified by the Secretary of Defense[.]" Gov't Br. App. 9a-10a.

These provisions imposed a penalty; they did not impose a federal registration requirement. Under the plain language of the statute, the Fifth Circuit majority was correct.[21] Kebodeaux was not "subject to federal registration" when he was released in 1999. (Pet. App. 4a n.4.)

Conceptually, a requirement to register and a penalty for failing to register are different. A registration requirement imposes an immediate and affirmative duty to act. The person subject to that duty must take the action required, by virtue of the authority asserted. A penalty provision that punishes a failure

---

[21] *See*, *e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[I]n any case of statutory construction, our analysis begins with the language of statute. And where the statutory language provides a clear answer, it ends there as well.") (internal quotation marks and citations omitted).

to act does not take effect unless and until that failure actually occurs and a prosecution is initiated. No jurisdiction is asserted until then.

This difference is important for the point the Government urges. It argues that SORNA did not reassert jurisdiction over Kebodeaux because he "was continuously subject to a federal criminal penalty" for failing to register, as required by State law. Gov't Br. 19. According to the Government, the existence of that penalty means that the Federal Government "*continuously* asserts jurisdiction over such offenders." *Id*.; *see also id*. 26 (because "federal criminal sanctions" existed "Congress did not relinquish federal authority over" Kebodeaux). But, because a penalty provision may never apply, its existence does not represent an exercise of continuous jurisdiction. If it did, the Federal Government would have continuous jurisdiction over everyone, as it may punish anyone who violates a federal criminal law. If the penalty provisions in § 14072(i)(3) or (4) applied to Kebodeaux, they did not subject him to continuous federal jurisdiction of the sort considered in *Comstock*, or contemplated by the Government here.

3. *The federal penalty provisions relied upon by the Government did not apply to Kebodeaux.*

The Government argues that Kebodeaux was subject to 42 U.S.C. § 14072(i)(3) and (i)(4), which imposed penalties on two categories of persons. Gov't

Br. 20-25. They included persons who were "described in section 4042(c)(4) of title 18," or who were "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 105-109[.]" § 14072(i)(3), (i)(4). Kebodeaux fit neither category.

First, Kebodeaux was not a person "described in section 4042(c)(4) of title 18[.]" § 14072(i)(3). Subject to § 4042(d), the persons described in subsection (c)(4) were those who had been convicted of specified federal sex offenses, including an "offense designated by the Attorney General as a sexual offense[.]" 18 U.S.C. § 4042(c)(4)(E) (Supp. III 1997). Kebodeaux's carnal-knowledge offense was one of the offenses designated by the Attorney General. But Kebodeaux was not included in the class of offenders described in section 4042(c)(4) because of the limitation in § 4042(d), which states that § 4042 "shall not apply to military or naval penal or correctional institutions or the persons confined therein." § 4042(d). Because Kebodeaux served his sentence in a military correctional institution, he was not a person "described in section 4042(c)(4) of title 18[.]" § 14072(i)(3).

The Government disputes subsection (d)'s explicit limitation on the reach of § 4042, arguing that it "merely means that Section 4042's substantive directions to BOP personnel . . . were immaterial to [Kebodeaux] while he was in military custody." Gov't Br. 22. That is not what subsection (d) says. It dictates that "[t]his section," which includes subsection (c)(4), "shall not apply to military or naval penal or

correctional institutions or the persons confined therein." § 4042(d). Kebodeaux was a person confined in a military correctional institution. Accordingly, he was not a person described in subsection (c)(4).[22]

Second, the Government has failed to show that the other penalty provision it relies upon, § 14072(i)(4), applied to Kebodeaux when he was released. That provision applied to "[a] person who is . . . 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[.]" The Secretary of Defense had not specified the offenses, as the law required, by the time Kebodeaux was released on September 18, 1999. Instead, an "Acting Assistant Secretary" specified the military carnal-knowledge offense as one subject to § 14072(i)(4) in a directive-type memorandum issued on December 23, 1998.

---

[22] There is another problem with former § 14072(i)(3). Congress delegated to the Attorney General the authority to designate an offense a "sexual offense" for purposes of section 4042(c)(4). *See* 1998 Appropriations Act, Pub. L. No. 105-119, § 115(a)(8)(A), 111 Stat. 2240, 2465 (Nov. 26, 2007). The Attorney General, in turn, delegated that authority to the director of the Bureau of Prisons. *See* Designation of Offenses Subject to Sex-Offender Release Notification, 63 Fed. Reg. 69,386 (Dec. 16, 1998) (codified at 28 C.F.R. § 571.71 (2012)). The Director, finding good cause, dispensed with the APA's notice and comment requirements, and issued an immediately effective interim rule designating the offense of carnal knowledge as a "sexual offense" for purposes of § 4042(c)(4). *Id*.; 28 C.F.R. § 571.72(b)(2). That rulemaking is likely invalid for many of the same reasons cited in Part II, *infra*.

(Pet. App. 171a-76a.) According to the Government, the Acting Assistant Secretary was "exercising delegated authority," but no delegation has been cited by the Government, nor does one appear in the record. Gov't Br. 23. Absent a valid delegation, the directive-type memorandum does not meet the statutory requirement that the Secretary of Defense specify offenses.

Even if the Acting Assistant Secretary's directive-type memorandum was valid, it was effective for only 90 days. By its terms, the memorandum provided that "a DoD Directive or Instruction incorporating the substance of this memorandum shall be issued within 90 days[,]" but there is nothing in the record to show that this requirement was met. (Pet. App. 174a.)[23] To the contrary, the Defense Department's Inspector General has found that the Department of Defense only "began issuing policy to implement" Wetterling Act amendments on September 28, 1999—after Kebodeaux's release from custody and discharge from the Air Force. OIG Report 5 (citing DoD Directive 1325.4). The Directive referenced by the Inspector General did not include the list of covered military

[23] Current Department of Defense policy provides that a directive-type memorandum (DTM) is "effective for no more than 6 months from the date signed, unless an extension is approved[.]" DoD Instruction 5025.01, at 2, 19, 31 (Sept. 26, 2012). Within that period, the DTM must be reissued as a DoD Directive, Instruction, Administrative Instruction, or Manual, or cancelled. *Id*. at 19. In 1999, a DTM required reissuance within 90 days. *See* DoD Directive 5025.1, at 3 (June 24, 1994).

offenses—the list required to trigger § 14072(i)(4)'s application. *See* DoD Directive 1325.4 (Sept. 28, 1999).

The record fails to show that, at the time Kebodeaux was released from custody and discharged from the military, the Secretary of Defense had validly designated military offenses as required to trigger § 14072(i)(4)'s penalty provision. Accordingly, the Government is incorrect that Kebodeaux was subject to the penalty in subsection (i)(4).

II. The Fifth Circuit's Judgment May Be Affirmed on the Alternate Ground That Kebodeaux's Failure to Register Occurred Before SORNA Applied to Him.

The Fifth Circuit correctly ruled that Kebodeaux's conviction should be reversed because Congress lacked the power to require him to register and to prosecute his intrastate failure to register. This Court, however, can avoid deciding the constitutional question and affirm the judgment below on the alternative ground that Kebodeaux was not covered by SORNA.

Pre-enactment offenders, such as Kebodeaux, were not made subject to SORNA by statute. Instead, Congress left it to the Attorney General to specify, by regulation, whether and when SORNA would apply to them. *Reynolds v. United States*, 132 S. Ct. 975 (2012) (interpreting 42 U.S.C. § 16913(d)). The Attorney General did not promulgate a valid regulation applying SORNA to pre-enactment offenders until the

summer of 2008, after Kebodeaux's failure to register. Because there was no valid regulation, SORNA's registration requirement did not apply to him.

The Government suggests that the Court cannot affirm on this ground because Kebodeaux failed to "preserve" it. Gov't Br. 7-8 n.3. This ignores that the Court may consider issues not raised in the court of appeals. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). Deciding the case on this ground accords both with this Court's longstanding precedent that a respondent "may urge any ground in support of the judgment," regardless whether it "was relied upon or even considered by the court below[,]" *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984), and with its "deeply rooted" practice "'not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). "[T]he traditional practice of this Court" is to decline to "decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised . . . by the parties." *Neese* v. *Southern R. Co.*, 350 U.S. 77, 78 (1955).

Affirming on this basis will not only resolve Kebodeaux's case, it will resolve the division among the circuits about when SORNA's registration requirements became applicable to pre-enactment offenders. *Compare United States v. Stevenson*, 676 F.3d 557, 565-66 (6th Cir.) (regulation effective August 1, 2008), *cert. denied*, 133 S. Ct. 168 (2012), *with*

United States v. Gould, 568 F.3d 459, 469-70 (4th Cir. 2009) (regulation effective February 28, 2007). Resolving the effective-date issue will eliminate the well-developed circuit split and will leave for another day the constitutional question raised by SORNA's application to pre-enactment offenders.

The circuits' disagreement over the effective date, though pronounced, is fairly easy to resolve. All agree the Attorney General promulgated an interim rule on February 28, 2007, that purported to make SORNA immediately applicable to pre-enactment offenders. 72 Fed. Reg. 8894 (codified at 28 C.F.R. § 72.3). All agree that the Attorney General bypassed the notice-and-comment period required by the APA, 5 U.S.C. § 553 (2006). All agree that the Attorney General claimed good cause for avoiding notice and comment, *see* 5 U.S.C. § 553(b)(3)(B), and good cause for making the regulation immediately effective, *see* 5 U.S.C. § 553(d)(3). All agree on the reasons he gave for his claims. *See* 72 Fed. Reg. 8896-99. Finally, all agree that the Attorney General waited seven months before issuing his immediately effective regulation. *See, e.g., United States v. Valverde*, 628 F.3d 1159, 1166 (9th Cir. 2010) (noting delay between enactment of SORNA and supposedly emergency regulation).

The question that remains is whether the Attorney General's reasons constituted good cause for bypassing the APA. They did not. Good cause is evaluated on a "case by case [basis], sensitive to the totality of the factors at play." *Valverde*, 628 F.3d at 1164. Agencies bear a heavy burden when they seek

to justify an invocation of the good-cause exception, for it is "narrowly construed and only reluctantly countenanced." *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quoting *State of New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)). The good-cause exception "is essentially an emergency procedure" that should be invoked only when "delay would do real harm." *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) (internal quotation marks and citation omitted). At all other times, Congress's preference for the "traditional, deliberative rulemaking process" must be respected. *United States v. Johnson*, 632 F.3d 912, 928-29 (5th Cir. 2011). To do otherwise would be to "provid[e] agencies with an escape clause" whenever the agency "finds it inconvenient to follow [the statutory requirements]." *Id.* (internal quotation marks and citations omitted).

The Attorney General claimed that immediate action was needed to clear up uncertainty about SORNA's application and to speed up registration to protect public safety. 72 Fed. Reg. at 8896-99. Neither justification constituted good cause. Neither required emergency action. Congress had expressed no need for quick action. Quite the opposite. It gave the States three years to consider whether to accept and implement SORNA. It chose not to decide whether SORNA would apply to pre-enactment offenders, leaving that decision to the Attorney General. It could have directed immediate action or suspended the APA's requirements, but it did not. *See, e.g., Asiana Airlines v. F.A.A.*, 134 F.3d 393, 397-98 (D.C. Cir. 1998) (discussing

such congressional directions). Nor did the Attorney General conduct himself in a way that suggested that time was actually, as opposed to rhetorically, of the essence. He waited seven months before promulgating the purportedly urgent interim rule, a period that would have allowed for several notice-and-comment cycles. *Valverde*, 628 F.3d at 1166. Because there was no urgency, the Attorney General's good-cause claims must fail.

The first asserted justification fails for more than lack of urgency. The immediately effective rule was not, contrary to the Attorney General's claim, "necessary to eliminate any possible uncertainty about the applicability of the Act's requirements." 72 Fed. Reg. at 8896. Mere guidance is not good cause for avoiding APA-required procedures. *Johnson*, 632 F.3d at 929. If it were, then an agency's view that its pronouncement clarified a matter would swallow the exception. *Valverde*, 628 F.3d at 1166. Additionally, the Attorney General's promulgation of an interim rule, which implied that the final rule could be different, may actually have increased, rather than diminished uncertainty. *United States v. Reynolds*, No. 08-4747, 2013 WL 979058, at *8 (3d Cir. Mar. 14, 2013). The Attorney General's first assertion did not provide good cause.

Nor did his public-safety claim provide good cause. The Attorney General asserted that delay would "impede the effective registration of such sex offenders" and impair "efforts to protect the public

from sex offenders who fail to register through prosecution and the imposition of criminal sanctions." 72 Fed. Reg. at 8896. This claim "did little more than restate the general dangers" Congress "had sought to prevent when it enacted SORNA." *Valverde*, 628 F.3d at 1167. It did not demonstrate the need for an immediate rule—a rule that Congress declined to enact. *Id.*

The claim of urgency was undermined further by the fact that most sex offenders affected by the Interim Rule were already subject to state registration requirements and penalties. *See, e.g., Johnson*, 632 F.3d at 928. The Attorney General made no claim that this existing regulatory and criminal framework was insufficient, and Congress itself clearly thought that system sufficient for at least three years—it initially provided an implementation date for SORNA of July 2009. *Valverde*, 628 F.3d at 1166-67. All the Attorney General accomplished by declining to follow the APA's requirements was to let federal prosecutors bring cases about registration violations, which is a far cry from the prosecution of, let alone the prevention of, sex offenses. The second claim for a good-cause exception also fails.

Because the Attorney General lacked "good cause" for bypassing the APA's requirements, the interim rule was not valid. The Government cannot show that bypass was harmless. *Reynolds,* 2013 WL 979058, at *12-*13 (government bears burden because of liberty interest at stake). This is so for two reasons.

First, the Attorney General's bypass caused a "complete failure" of the notice-and-comment procedure and its goals. *Id.* at *13-*14. An "utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). Uncertainty exists here. SORNA's application to pre-enactment offenders was not a simple yes-or-no question. The decision presented "practical problems" that required thought, that might prove unduly expensive, and that might "warrant[ ] different federal registration treatment of different categories of pre-Act offenders." *Reynolds,* 132 S. Ct at 981.[24] None of these issues was aired adequately. Instead, "the process used to promulgate the rule was completely devoid of the 'exchange of views, information, and criticism between interested persons and the agency' that ensures well-reasoned and fair rules." *Reynolds*, 2013 WL 979058, at *17 (quoting *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449 (3d Cir. 2011)).

The resulting interim rule came not from thoughtful comment and consideration, but from a hardening of the Government's litigation position that SORNA was retroactive, even without a regulation. *Reynolds*, 2013 WL 979058, at *17. As the Third

[24] The Texas and New York letters to the Department of Justice show that these concerns are real. *See* Appendix B; *see also* GAO Report 19.

Circuit noted, that hardening demonstrated a lack of openness on the Attorney General's part to the questions implicated by retroactive application, and to post-promulgation comments. This lack of openness, in light of the fact that the decision regarding retroactivity was not an inescapable conclusion under the statute, showed that obviating notice-and-comment was harmful. *Reynolds,* 2013 WL 979058, at *16-*17 (citing *Reynolds,* 132 S. Ct. at 981).

Second, only the rule allowed Kebodeaux to be prosecuted in federal court for his failure to register in late 2007 and early 2008. *Reynolds*, 132 S. Ct. at 980-84. "[A] criminal prosecution founded on an agency rule should be held to the strict letter of the APA." *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) (reversing conviction for notice-and-comment failure). The Sixth Circuit applied that principle in reversing a SORNA conviction because of notice-and-comment failure. *United States v. Utesch*, 596 F.3d 302, 312-13 (6th Cir. 2010).

Kebodeaux's conviction was not a harmless error to him. Allowing it to stand on a theory that the final valid rule was essentially the same as the invalid interim rule would offend a basic premise of our justice system—that an individual cannot be convicted and "punished for conduct occurring before the criminal regulation of that conduct." *Utesch*, 596 F.3d at 312-13 (citing U.S. Const. art. I, § 9, cl. 3 and *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). It is rare that criminal liability attaches through regulation. *Cf. Reynolds*, 132 S. Ct. at 986-87 (Scalia, J.,

dissenting). It should be rarer still that it can attach without the proper regulatory procedures.

CONCLUSION

FOR THESE REASONS, Kebodeaux respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

MAUREEN SCOTT FRANCO
Federal Public Defender
WESTERN DISTRICT OF TEXAS
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
(210) 472-6700
Fax: (210) 472-4454
Carolyn_Fuentes@fd.org

M. CAROLYN FUENTES*
Assistant Federal Public Defender

PHILIP J. LYNCH
Assistant Federal Public Defender

**Counsel of Record*

DATED: March 27, 2013.

APPENDIX A

1. 42 U.S.C. § 16914 provides, in pertinent part:

§ 16914. Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Any other information required by the Attorney General.

2. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030-70 (July 2, 2008) provide, in pertinent part:

VI. Required Registration Information

Section 114 of SORNA defines the required minimum informational content of sex offender registries. It is divided into two lists. The first list, set forth in subsection (a) of section 114, describes information that the registrant will normally be in a position to provide. The second list, set forth in subsection (b), describes information that is likely to require some affirmative action by the jurisdiction to obtain, beyond asking the sex offender for the information. Supplementary to the information that the statute explicitly describes, section 114(a)(7) and (b)(8) authorize the Attorney General to specify additional information that must be obtained and included in the registry. This expansion authority is utilized to require including in the registries a number of additional types of information, such as information about registrants' e-mail addresses, telephone numbers, and the like, information concerning the whereabouts of registrants who lack fixed abodes or definite places of employment, and information about temporary lodging, as discussed below.

Whether a type of information must be obtained by a jurisdiction and included in its sex offender registry is a distinct question from whether the jurisdiction must make that information available to

the public. Many of the informational items whose inclusion in the registry is required by section 114 and these Guidelines are not subject to a public disclosure requirement under SORNA, and some are exempt from public disclosure on a mandatory basis. The public disclosure requirements under SORNA and exceptions thereto are explained in Part VII of these Guidelines.

In order to implement requirements for the sharing of registration information appearing in other sections of SORNA (sections 113(c), 119(b), 121(b) – see Parts VII and X of these Guidelines for discussion), jurisdictions will need to maintain all required registration information in digitized form that will enable it to be immediately accessed by or transmitted to various entities. Hence, the jurisdiction's registry must be an electronic database, and descriptions of required types of information in section 114 should consistently be understood as referring to digitizable information rather than hard copies or physical objects. This does not mean, however, that all required registration information must be reproduced in a single segregated database, since the same effect may be achieved by including in the central registry database links or identification numbers that provide access to the information in other databases in which it is included (e.g., with respect to criminal history, fingerprint, and DNA information). These points are further discussed in connection with the relevant informational items.

As with SORNA's requirements generally, the informational requirements of section 114 and these Guidelines define a floor, not a ceiling, for jurisdictions' registries. Hence, jurisdictions are free to obtain and include in their registries a broader range of information than the minimum requirements described in this Part.

The required minimum informational content for sex offender registries is as follows:

Name, Aliases, and Remote Communication Identifiers and Addresses (§ 114(a)(1), (a)(7)):

Names and Aliases (§ 114(a)(1)): The registry must include "[t]he name of the sex offender (including any alias used by the individual)." The names and aliases required by this provision include, in addition to registrants' primary or given names, nicknames and pseudonyms generally, regardless of the context in which they are used, any designations or monikers used for self-identification in Internet communications or postings, and ethnic or tribal names by which they are commonly known.

Internet Identifiers and Addresses (§ 114(a)(7)): In the context of Internet communications there may be no clear line between names or aliases that are required to be registered under SORNA § 114(a)(1) and addresses that are used for routing purposes. Moreover, regardless of the label, including in registries information on designations used by sex offenders for purposes of routing or self-identification in Internet communications – e.g., e-mail and instant

messaging addresses – serves the underlying purposes of sex offender registration and notification. Among other potential uses, having this information may help in investigating crimes committed online by registered sex offenders – such as attempting to lure children or trafficking in child pornography through the Internet – and knowledge by sex offenders that their Internet identifiers are known to the authorities may help to discourage them from engaging in such criminal activities. The authority under section 114(a)(7) is accordingly exercised to require that the information included in the registries must include all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings.

Telephone Numbers (§ 114(a)(7)): Requiring sex offenders to provide their telephone numbers (both for fixed location phones and cell phones) furthers the objectives of sex offender registration. One obvious purpose in having such information is to facilitate communication between registration personnel and a sex offender in case issues arise relating to the sex offender's registration. Moreover, as communications technology advances, the boundaries blur between text-based and voice-based communications media. Telephone calls may be transmitted through the Internet. Text messages may be sent between cell phones. Regardless of the particular communication medium, and regardless of whether the communication involves text or voice, sex offenders may potentially utilize remote communications in efforts to

contact or lure potential victims. Hence, including phone numbers in the registration information may help in investigating crimes committed by registrants that involved telephonic communication with the victim, and knowledge that their phone numbers are known to the authorities may help sex offenders to resist the temptation to commit crimes by this means. The authority under section 114(a)(7) is accordingly exercised to require that the information included in the registries must include sex offenders' telephone numbers and any other designations used by sex offenders for purposes of routing or self-identification in telephonic communications.

Social Security Number (§ 114(a)(2), (a)(7)): The registry must include "[t]he Social Security number of the sex offender." In addition to any valid Social Security number issued to the registrant by the government, the information the jurisdiction requires registrants to provide under this heading must include any number that the registrant uses as his or her purported Social Security number since registrants may, for example, attempt to use false Social Security numbers in seeking employment that would provide access to children. To the extent that purported (as opposed to actual) Social Security numbers may be beyond the scope of the information required by section 114(a)(2), the authority under section 114(a)(7) is exercised to require that information on such purported numbers be obtained and included in the registry as well.

Residence, Lodging, and Travel Information (§ 114(a)(3), (a)(7)):

Residence Address (§ 114(a)(3)): The registry must include "the address of each residence at which the sex offender resides or will reside." As provided in SORNA § 111(13), residence refers to "the location of the individual's home or other place where the individual habitually lives." (For more as to the meaning of "resides" under SORNA, see Part VIII of these Guidelines.) The statute refers to places in which the sex offender "will reside" so as to cover situations in which, for example, a sex offender is initially being registered prior to release from imprisonment, and hence is not yet residing in the place or location to which he or she expects to go following release.

Other Residence Information (§ 114(a)(7)): Sex offenders who lack fixed abodes are nevertheless required to register in the jurisdictions in which they reside, as discussed in Part VIII of these Guidelines. Such sex offenders cannot provide the residence address required by section 114(a)(3) because they have no definite "address" at which they live. Nevertheless, some more or less specific description should normally be obtainable concerning the place or places where such a sex offender habitually lives – e.g., information about a certain part of a city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places) where the sex offender stations himself during the day or sleeps at night, shelters among which the sex offender circulates, or places in public buildings, restaurants,

libraries, or other establishments that the sex offender frequents. Having this type of location information serves the same public safety purposes as knowing the whereabouts of sex offenders with definite residence addresses. Hence, the authority under SORNA § 114(a)(7) is exercised to require that information be obtained about where sex offenders who lack fixed abodes habitually live with whatever definiteness is possible under the circumstances. Likewise, in relation to sex offenders who lack a residence address for any other reason – e.g., a sex offender who lives in a house in a rural or tribal area that has no street address – the registry must include information that identifies where the individual has his or her home or habitually lives.

Temporary Lodging Information (§ 114(a)(7)): Sex offenders who reoffend may commit new offenses at locations away from the places in which they have a permanent or long-term presence. Indeed, to the extent that information about sex offenders' places of residence is available to the authorities, but information is lacking concerning their temporary lodging elsewhere, the relative attractiveness to sex offenders of molesting children or committing other sexual crimes while traveling or visiting away from home increases. Hence, to achieve the objectives of sex offender registration, it is valuable to have information about other places in which sex offenders are staying, even if only temporarily. The authority under SORNA § 114(a)(7) is accordingly exercised to provide that jurisdictions must require sex offenders to provide

information about any place in which the sex offender is staying when away from his residence for seven or more days, including identifying the place and the period of time the sex offender is staying there. The benefits of having this information include facilitating the successful investigation of crimes committed by sex offenders while away from their normal places of residence, employment, or school attendance, and decreasing the attractiveness to sex offenders of committing crimes in such circumstances.

Travel and Immigration Documents (§ 114(a)(7)): The authority under SORNA § 114(a)(7) is exercised to provide that registrants must be required to produce or provide information about their passports, if they have passports, and that registrants who are aliens must be required to produce or provide information about documents establishing their immigration status. The registry must include digitized copies of these documents, document type and number information for such documents, or links to another database or databases that contain such information. Having this type of information in the registries serves various purposes, including helping to locate and apprehend registrants who may attempt to leave the United States after committing new sex offenses or registration violations; facilitating the tracking and identification of registrants who leave the United States but later reenter while still required to register (see SORNA § 128); and crosschecking the accuracy and completeness of other types of information that registrants are required to provide – e.g., if

immigration documents show that an alien registrant is in the United States on a student visa but the registrant fails to provide information concerning the school attended as required by SORNA § 114(a)(5).

Employment Information (§ 114(a)(4), (a)(7)):

Employer Name and Address (§ 114(a)(4)): The registry must include "[t]he name and address of any place where the sex offender is an employee or will be an employee." SORNA § 111(12) explains that "employee" includes "an individual who is self-employed or works for any other entity, whether compensated or not." As the definitional provisions indicate, the information required under this heading is not limited to information relating to compensated work or a regular occupation, but includes as well name and address information for any place where the registrant works as a volunteer or otherwise works without remuneration. The statute refers to places in which the sex offender "will be an employee" so as to cover, for example, cases in which a sex offender is initially being registered prior to release from imprisonment and has secured employment that will commence upon his release, and other circumstances in which a sex offender reports an initiation or change of employment to a jurisdiction before the new employment commences. It does not mean that jurisdictions must include in their registries merely speculative information sex offenders have provided about places they may work in the future.

Other Employment Information (§ 114(a)(7)): A sex offender who is employed may not have a fixed place of employment – e.g., a long-haul trucker whose "workplace" is roads and highways throughout the country, a self-employed handyman who works out of his home and does repair or home-improvement work at other people's homes, or a person who frequents sites that contractors visit to obtain day labor and works for whatever contractor hires him on a given day. Knowing as far as possible where such a sex offender is in the course of employment serves the same public safety purposes as the corresponding information regarding a sex offender who is employed at a fixed location. The authority under section 114(a)(7) is accordingly exercised to require that information be obtained and included in the registry concerning the places where such a sex offender works with whatever definiteness is possible under the circumstances, such as information about normal travel routes or the general area(s) in which the sex offender works.

Professional Licenses (§ 114(a)(7)): The authority under section 114(a)(7) is exercised to require that information be obtained and included in the registry concerning all licensing of the registrant that authorizes the registrant to engage in an occupation or carry out a trade or business. Information of this type may be helpful in locating the registrant if he or she absconds, may provide a basis for notifying the responsible licensing authority if the registrant's conviction of a sex offense may affect his or her eligibility

for the license, and may be useful in crosschecking the accuracy and completeness of other information the registrant is required to provide – e.g., if the registrant is licensed to engage in a certain occupation but does not provide name or place of employment information as required by section 114(a)(4) for such an occupation.

School Information (§ 114(a)(5)): The registry must include "[t]he name and address of any place where the sex offender is a student or will be a student." Section 111(11) defines "student" to mean "an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education." As the statutory definition indicates, the requirement extends to all types of educational institutions. Hence, this information must be provided for private schools as well as public schools, including both parochial and non-parochial private schools, and regardless of whether the educational institution is attended for purposes of secular, religious, or cultural studies. The registration information requirement of section 114(a)(5) refers to the names and addresses of educational institutions where a sex offender has or will have a physical presence as a student. It does not require information about a sex offender's participating in courses only remotely through the mail or the Internet. (Internet identifiers and addresses used by a sex offender in such remote communications, however, must be included in the registration information as provided

in the discussion of "INTERNET IDENTIFIERS AND ADDRESSES" earlier in this list.) As with residence and employment information, the statute refers to information about places the sex offender "will be" a student so as to cover, for example, circumstances in which a sex offender reports to a jurisdiction that he has enrolled in a school prior to his commencement of attendance at that school. It does not mean that jurisdictions must include in their registries merely speculative information sex offenders have provided about places they may attend school in the future.

Vehicle Information (§ 114(a)(6), (a)(7)): The registry must include "[t]he license plate number and a description of any vehicle owned or operated by the sex offender." This includes, in addition to vehicles registered to the sex offender, any vehicle that the sex offender regularly drives, either for personal use or in the course of employment. A sex offender may not regularly use a particular vehicle or vehicles in the course of employment, but may have access to a large number of vehicles for employment purposes, such as using many vehicles from an employer's fleet in a delivery job. In a case of this type, jurisdictions are not required to obtain information concerning all such vehicles to satisfy SORNA's minimum informational requirements, but jurisdictions are free to require such information if they are so inclined. The authority under § 114(a)(7) is exercised to define and expand the required information concerning vehicles in two additional respects. First, the term "vehicle" should be understood to include watercraft and

aircraft, in addition to land vehicles, so descriptive information must be required for all such vehicles owned or operated by the sex offender. The information must include the license plate number if it is a type of vehicle for which license plates are issued, or if it has no license plate but does have some other type of registration number or identifier, then information concerning such a registration number or identifier must be included. To the extent that any of the information described above may be beyond the scope of section 114(a)(6), the authority under section 114(a)(7) is exercised to provide that it must be obtained and included in the registry. Second, the sex offender must be required to provide and the registry must include information concerning the place or places where the registrant's vehicle or vehicles are habitually parked, docked, or otherwise kept. Having information of this type may help to prevent flight, facilitate investigation, or effect an apprehension if the registrant is implicated in the commission of new offenses or violates registration requirements.

APPENDIX B

[SEAL]

OFFICE OF THE GOVERNOR

RICK PERRY
GOVERNOR

August 17, 2011

Linda M. Baldwin
Director
SMART Office
Office of Justice Programs
U.S. Department of Justice
810 7th Street, NW, 6th Floor
Washington, D.C. 20531

Dear Ms. Baldwin:

Thank you for your July 28 letter inquiring about the implementation of the federal Sex Offender Registration and Notification Act (SORNA) in Texas. Although we in Texas certainly appreciate and agree with the stated goals of SORNA, the adoption of this "one-size-fits-all" federal legislation in Texas would in fact undermine the accomplishment of those objectives in Texas, just as it would in most other states.

As you may be aware, the bipartisan Texas Senate Committee on Criminal Justice (Committee) carefully considered the question of compliance with SORNA over the past two years. After extensive review, including the receipt of public testimony during several "well attended and informative" hearings, the Committee firmly recommended that the Texas Legislature should not implement SORNA in Texas. As the Committee explained in its Interim

Report to the 82nd Legislature (*see* http://www.senate.state.tx.us/75r/Senate/commit/c590/c590.htm), implementation of SORNA would be both unnecessary and, counter-productive in Texas because:

- Texas already has a comprehensive array of statutes to punish, supervise, and protect the public from sex offenders, including those that require registration and publication, community supervision, child safety zones, future risk assessments, and civil commitment for certain high-risk offenders. Indeed Texas's sex offender laws are undeniably among the most stringent in the nation.

- SORNA's oversimplified registration and publication requirements, which apply based solely on the particular criminal offense, fail to accommodate for Texas's more appropriately tailored future risk assessments.

- By tying specific requirements, such as re-verification, DNA testing, and duration of registration, to offense "tiers," SORNA imposes expensive and burdensome requirements without regard to whether those requirements are necessary or appropriate in a particular case.

- By imposing such requirements in cases in which they are unnecessary, SORNA would create backlogs and strains on local law enforcement agencies that, as a practical matter, would effectively

undermine the objectives that SORNA is intended to meet.

– In dealing with juvenile sex offenders, Texas law more appropriately provides for judges to determine whether registration would be beneficial to the community and the juvenile offender in a particular case.

– By imposing oversimplified blanket registration requirements, SORNA would make it more difficult for Texas to focus on and address the most dangerous sex offenders, who pose the greatest public threat. Moreover, SORNA does so while merely assuming that the requirements are necessary in all cases, while failing to account for the negative impacts that unnecessary registration has on both juvenile offenders and the children of low-risk adult offenders.

– Implementation of all of SORNA's requirements would cost Texas more than 30 times the amount of the federal funds that the federal government has threatened to withhold from Texas if it fails to comply.

For these reasons, Texas's sex offender laws are more effective in protecting Texans than SORNA's requirements would be. In short, while Texas shares the federal government's objectives, the oversimplified means by which SORNA seeks to meet those objectives, while costing Texans significantly more,

would provide them with far less than Texas law already provides. While SORNA's approach might be appropriate for some states, it is not right for Texas.

In fact, we are advised that, to date, only 14 states have substantially implemented SORNA as the federal government has demanded. We would encourage you to consider that fact, as well as the information detailed in the Texas Senate Committee's report, as you evaluate the reality that there is a better way to achieve the goals that we share. We would look forward to discussing those alternatives with you.

Sincerely,

/s/ Jeffrey S. Boyd
Jeffrey S. Boyd
General Counsel and
Acting Chief of Staff

[LOGO]

STATE OF NEW YORK
DIVISION OF CRIMINAL JUSTICE SERVICES
4 Tower Place
Albany, New York 12203-3764
http://criminaljustice.state.ny.us

SEAN M. BYRNE
ACTING COMMISSIONER

RISA S. SUGARMAN
DEPUTY COMMISSIONER
DIRECTOR, OSOM

August 23, 2011

Linda Baldwin
Director
U.S. Department of Justice
Office of Justice Programs, SMART Office
810 7th Street, NW
Washington, DC 20531

Re: New York State

Dear Ms. Baldwin;

I am in receipt of your letter dated July 28, 2001 to Governor Cuomo indicating your preliminary findings that New York State has not substantially implemented the Sex Offender Registration and Notification Act (SORNA). Please accept this letter as notification that New York does not disagree with your findings. While New York looks forward to continuing to work together with the Department of Justice in the future, we are convinced that the statutory scheme set out by our legislature is in the best interests of New York State and the best way to protect our citizens. While we are concerned about the loss of federal financial support, especially in this

fiscal environment, the issues set out below when combined with the projected cost of SORNA requirements resulted in our decision. New York will continue to cooperate with the federal authorities and all other states in the effort to protect all victims against sexual predators by preventing the attacks against child and adult victims and bringing sexual predators to justice.

New York believes that our present laws and risk assessment method provide our citizens with effective protection against sexual predators. Initially enacted in 1996, New York law implements a risk assessment that considers the offender's background, prior criminal history, the manner in which the crime was committed and whether there was a plea bargain to a lesser included offense, the age of the victim and the offender's mental health history. This comprehensive look gives us an accurate prediction of the risk an offender poses to the community. After examining the proposed federal approach which focuses on the crime of conviction, we are concerned that the federal approach may both over- and understate threat in a way that is not consistent with our public safety goals.

New York has a long standing public policy of treating juvenile offenders differently from adult offenders so that juveniles have the best opportunity of rehabilitation and re-integration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy. While New York law provides that the most dangerous juvenile offenders may be

prosecuted in adult courts and, if convicted, they would be placed on the Sex Offender Registry, our laws and public policy also acknowledge that other than those most dangerous offenders, children who commit crimes should avoid the ramifications of adult convictions.

Finally, the fiscal impact of implementation is significant with no improvement of public safety. As unfortunate as the loss of the funds will be to important programs in New York, the costs would be far greater than the loss. The in person reporting requirements for all Tiers would impose significant costs on law enforcement without a foreseeable public safety justification. The likelihood of required separate reporting facilities for juvenile offenders would also place an undue burden on local law enforcement. In addition, there are significant costs of technical construction a new registry and the likelihood of litigation to defend the implementation of the Act.

New York will continue its commitment to ensuring that our citizens are protected from sexual predators by the enforcement of all of our laws and the continued cooperation with your office. If you have any questions, please contact me at your earliest convenience.

Very truly yours,

/s/ Risa Sue Sugarman

Risa S. Sugarman
Deputy Commissioner
Director, Office of Sex Offender Management

Via Regular Mail and email to
Linda.Baldwin@usdoj.gov

An Equal Opportunity/Affirmative Action Employer

APPENDIX C

INDEX OF STATE SEX-OFFENDER REGISTRATION STATUTES IN EFFECT ON JULY 27, 2006 COVERING MILITARY AND FEDERAL OFFENDERS

Alabama
ALA. CODE 1975 A § 13A-11-200(b) (2006)

Alaska
ALASKA STAT. ANN. § 12.63.100 (West 2006)

Arizona
ARIZ. REV. STAT. § 13-3821 (2006)

Arkansas
ARK. CODE ANN. § 12-12-903(12)(A)(iii) (West 2006)

California
CAL. PENAL CODE § 290(2)(D)(I) & (ii) (West 2006)

Colorado
COLO. REV. STAT. ANN. § 16-22-103(1)(B) (West 2006)

Connecticut
CONN. GEN. STAT. § 54-253(a) (West 2006)

Delaware
DEL. CODE ANN. § 4120(e)(1) (2006)

District of Columbia
D.C. CODE § 22-4001(6)(e) (2006)

Florida
FLA. STAT. ANN. § 944.607(1)(a)(2) (West 2006)

Georgia
GA. CODE ANN. § 42-1-12(e)(5) (West 2006)

Hawaii
HAW. REV. STAT. § 846E-1 (2006)

Idaho
IDAHO CODE ANN. § 18-8303(8) (2006)

Illinois
730 ILL. COMP. STAT. ANN. 150/2(a)(1) (West 2006)

Indiana
IND. CODE ANN. § 11-8-8-5(a)(15) (West 2006)

Iowa
IOWA CODE ANN. § 692A.2(1) (West 2006)

Kansas
KAN. STAT. ANN. § 22-4902(a)(8) (West 2006)

Kentucky
KY. REV. STAT. ANN. § 17.500(8)(c) (West 2006)

Louisiana
LA. REV. STAT. ANN. § 15:541(14.1) (2006)

Maine
ME. REV. STAT. ANN. tit. 34-A, § 11203(3-A) & (6)(C) (2006)

Maryland
MD. CODE ANN. CRIM. PROC. § 11-701(b)(4) & (d)(9) (West 2006)

Massachusetts
MASS. GEN. LAWS ANN. ch. 6, § 178C (West 2006)

Michigan
MICH. COMP. LAWS ANN. § 28.722, sec. 2(a)(I) (West 2006)

Minnesota
MINN. STAT. ANN. § 243.166 (Subd.1b)(4) (West 2006)

Mississippi
MISS. CODE ANN. § 45-33-23(a) (West 2006)

Missouri
MO. ANN. STAT. § 589.400(1)(5) (West 2006)

Montana
MONT. CODE ANN. § 46-23-502(9)(b) (2006)

Nebraska
NEB. REV. STAT. § 29-4003(1)(b) (2006)

New Hampshire
N.H. REV. STAT. ANN. § 651-B:1(III)(b) (2006)

New Jersey
N.J. STAT. ANN. § 2C:7-2(b)(3) (West 2006)

New Mexico
N.M. STAT. ANN. § 29-11A-3(D)(2) (West 2006)

New York
N.Y. CORRECT. LAWS § 168-a(2)(d) (McKinney 2003)

Nevada
NEV. REV. STAT. ANN. § 179D.410(18)(B) (West 2006)

North Carolina
N.C. GEN. STAT. ANN. § 14-208.6(4)(c) (West 2006)

North Dakota
N.D. CENT. CODE ANN. § 12.1-32-15(1)(a) (West 2005)

Ohio
OHIO REV. CODE ANN. § 2950.01(D)(1)(f) (West 2006)

Oklahoma
OKLA. STAT. ANN. tit. 57, § 582(B) & (C)
(West 2006)

Oregon
OR. REV. STAT. ANN. § 181.594(5)(d) (West 2006)

Pennsylvania
tit. 42 PA. CONST. STAT. ANN. § 9795.2(b)(4)
(West 2006)

Rhode Island
R.I. GEN. LAWS ANN. § 11-37.1-3(a) (West 2006)

South Carolina
S.C. CODE ANN. § 23-3-430 (2006)

South Dakota
S.D. CODIFIED LAWS § 22-24B-1(17) (2007)

Tennessee
TENN. CODE ANN. § 40-39-301 (1) & (3) (West 2006)

Texas
TEX. CODE CRIM. PROC. ART. 62.001(5)(H) (West 2006)

Utah
UTAH CODE ANN. § 77-27-21.5(1)(F) (ii) & (iii) (West 2006)

Vermont
Vt. STAT. ANN. tit. 13, § 5401(10)(C) (West 2006)

Virginia
VA CODE ANN. § 9.1-902(F) (West 2006)

Washington
WASH. REV. CODE ANN. § 9A.44.130(4)(a)(iii) (West 2006)

Wisconsin
WIS. STAT. ANN. § 301.45 (1d)(a)(4) (West 2006)

West Virginia
W. VA. CODE ANN. § 15-12-2(b) (West 2006)

Wyoming
WYO. STAT. ANN. § 7-19-301 (a)(iv) (West 2006)