No. 08-1301

IN THE

Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1] Founded in 1958, NACDL has a membership of more than 12,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. Among other things, NACDL seeks to ensure that criminal statutes comply with fundamental constitutional guarantees, including the prohibition against ex post facto laws. In addition, NACDL has scrutinized laws, including registration and notification regimes, governing convicted sex offenders. Through its Sex Offender Policy Task Force, NACDL seeks to ensure that sex offender notification and registration laws

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

protect due process rights and derive from empirically-based assessments of risk.

Summary Of Argument

The Seventh Circuit's interpretation of the criminal provisions of the Sex Offender Registration and Notification Act ("SORNA" or "the Act") raises significant constitutional concerns, and the Court should construe the Act to avoid them.

First, the Seventh Circuit's construction—under which SORNA's criminal provisions apply retroactively to individuals whose interstate travel predated the Act's enactment—raises serious constitutional concerns under both the Ex Post Facto Clause and the Commerce Clause. Retroactive application implicates the Ex Post Facto Clause because SORNA raises the maximum sentence from one year to ten years for criminal conduct (failure to register within ten days of interstate travel) that took place entirely before SORNA was enacted. Retroactive application raises serious concerns under the Commerce Clause because interstate travel that took place potentially years before the Act's enactment is the only purported basis for the exercise of Congress's commerce authority. In both cases, these serious constitutional concerns can be avoided by rejecting the Seventh Circuit's interpretation and holding, as Petitioner argues, that SORNA applies only to individuals whose interstate travel postdated the Act's enactment.

Second, and contrary to the government's assertions, application of the constitutional avoidance

canon would not undermine Congress's goal of preventing sex-offender recidivism. A substantial body of empirical research illustrates that registration-and-notification regimes such as SORNA fail to prevent sex-offender recidivism and in some cases actually increase it. Among other things, registration-and-notification regimes interfere with offenders' reintegration into society and divert law-enforcement resources from targeting the highest-risk offenders. Because limiting the retroactive reach of SORNA's criminal provisions would not hamper Congress's goal of preventing recidivism, there is no reason to refrain from applying the canon of constitutional avoidance and holding that the Act's criminal provisions do not apply to individuals whose interstate travel predated their enactment.

Argument

I. Retroactive Application Of SORNA's Criminal Provisions Raises Serious Constitutional Concerns Under The Ex Post Facto Clause And The Commerce Clause.

In holding that SORNA's criminal provisions apply retroactively, the Seventh Circuit overlooked the serious constitutional concerns that arise from application to individuals, such as Petitioner, who traveled in interstate commerce before the Act's enactment. The Court "avoid[s] an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Thus, "when deciding

which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

Here, the doctrine of constitutional avoidance requires the Court to construe the criminal provisions of the Act not to reach Petitioner—whose interstate travel predated SORNA's enactment—to avoid serious concerns under (1) the Ex Post Facto Clause and (2) the Commerce Clause.

A. The Seventh Circuit's Construction of SORNA Raises Serious Concerns under the Ex Post Facto Clause.

Petitioner committed the crime that triggers criminal liability under SORNA—a failure to register within three days upon changing his residence—before SORNA was enacted. Yet under the Seventh Circuit's interpretation of SORNA, Petitioner was eligible to receive ten times the sentence that he would have received had he been charged and convicted at the time his offense became complete. Given the dictates of the Ex Post Facto Clause, the Seventh Circuit's construction of the Act "raises substantial enough constitutional doubts to warrant the employment of the canon." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 74 (1982).

1. Retroactive application of the Act's criminal provisions—in a manner that subjected Petitioner to ten times the maximum sentence for a crime committed before SORNA's enactment—conflicts with the fundamental principle that retroactive legislative enactments "neither accord with sound legislation, nor the fundamental principles of the social compact." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798). The Framers considered the prohibition of ex post facto laws among "the first principles of Legislation." James Madison, *The Debates in the Federal Convention of 1787* 449 (G. Hunt & J. Scott eds., 2007) (statement of James Wilson). The sentiment against ex post facto laws was so plain that the Framers debated removing the express prohibition from the Constitution as unnecessary because "there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves." *Id.* (statement of Oliver Ellsworth); *see also id.* (statement of Gouverneur Morris) (finding the "precaution as to ex post facto laws unnecessary"); *id.* (statement of James Wilson) (noting danger in prohibiting plainly invalid laws, which suggested drafters' "ignoran[ce]" of principles of legislation). The prohibition, moreover, "very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws." *Calder*, 3 U.S. at 389–91.

The Ex Post Facto Clause's prohibitions apply not only to legislation that "imposes a punishment for an act which was not punishable at the time it was committed," but also to a law that "imposes *additional punishment* to that then prescribed." *Cummings v. Missouri*, 71 U.S. 277, 325–26 (1866)

(emphasis added). Thus, Petitioner need only show "that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted." *Johnson v. United States*, 529 U.S. 694, 699 (2000).

For Petitioner, and others who traveled before its enactment, SORNA's heightened criminal penalty impermissibly "changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981).

Pre-SORNA (Maximum sentence = 1 year). Petitioner committed and completed the crime of failing to register before SORNA's enactment. After he was released from prison in Alabama in 2004, Petitioner moved to Indiana in 2004 or 2005. Pet. App. 5a. At that time, sex offenders such as Petitioner who moved from one state to another were governed only by the Wetterling Act, Pub. L. 103-322, 108 Stat. 1796 (1994). The Wetterling Act required a convicted sex offender who moved to another state to update his registration in the new state "not later than 10 days after that person establishes a new residence." *Id.* at 2041. Following the law's amendment in 1996, anyone who committed a knowing violation of the Wetterling Act by failing to register, including those who failed to register within ten days of moving to a new state, could be imprisoned for "not more than 1 year." Pub. L. No. 104-236, 110 Stat. 3093, 3096 (1996).

Upon arriving in Indiana in 2004 or 2005, Petitioner failed to register within 10 days of establishing a new residence. As a result, he had committed and completed a violation of the Wetterling Act. Had he been charged and convicted at the time, he would have been subject to imprisonment for "not more than 1 year." *Id.*

Post-SORNA (Maximum sentence = 10 years). SORNA took effect on July 27, 2006—at least a year *after* Petitioner had traveled to Indiana and violated the Wetterling Act by failing to register within 10 days of his arrival there. By interim rule of February 28, 2007, the Attorney General applied SORNA to individuals, like Petitioner, whose conviction predated SORNA's enactment. *See* 72 Fed. Reg. 8894 (Feb. 28, 2007), *codified at* 28 C.F.R. § 72.3.

For someone in Petitioner's circumstances, the crime under SORNA is identical to the crime under the Wetterling Act. First, SORNA does not require the provision of new information. Although SORNA purports to require sex offenders to provide additional information (above and beyond the information required in the Wetterling Act), the United States, in enforcing SORNA, takes the position that its registration requirements are identical to those of the Wetterling Act. *See* Pet'r Br. at 11–12, 39. Thus, the Wetterling Act had already required Petitioner to provide every piece of information required by SORNA.

Second, SORNA did not provide any additional time to register. Whereas the Wetterling Act required registration within ten days of moving to an-

other state, SORNA requires registration within three days of any change of residence. Thus, if SORNA's criminal provisions apply to interstate travel that predated its enactment, then any sex offender like Petitioner who violated the Wetterling Act—by failing to register within ten days of moving to another state—necessarily violated SORNA by failing to register within three days of moving.

As a practical matter, SORNA changed only one thing: the maximum sentence increased tenfold for conduct already completed. Under SORNA, individuals who travel in interstate commerce and knowingly fail to register within three days of moving "shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. § 2250(a). Before SORNA's enactment, Petitioner had already completed (or failed to complete) all of the acts necessary to commit a crime under the Wetterling Act. As a result, retroactive application of SORNA "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder*, 3 U.S. at 390. *See, e.g., Miller v. Florida*, 482 U.S. 423, 431–32 (1987) (Ex Post Facto Clause prohibited retroactive increase in a crime's presumptive prison sentence); *Weaver*, 450 U.S. at 33–35 (Ex Post Facto Clause prohibited "reduc[tion of] the number of monthly gain-time credits available to an inmate").

Even if SORNA somehow did create additional registration obligations (beyond those of the Wetterling Act), it would have been impossible for Petitioner to comply with them. Before SORNA became law, he had already engaged in interstate travel and had already failed to register "not later than 3 busi-

ness days" after his change of residence from Alabama to Indiana. 42 U.S.C. § 16913(c). Thus, his criminal liability would have been instantaneous.

2. Although the Seventh Circuit acknowledged these concerns, the court appeared to address them by stating that the Ex Post Facto Clause permits "[l]aws [1] increasing the punishment for repeating an offense (or [2] punishing the continuation of conduct begun before the law was passed)." Pet. App. 9a. Even assuming that the Seventh Circuit is correct about this general proposition, it does not alleviate the constitutional concerns triggered by applying SORNA retroactively. First, under this Court's precedent, failure to register is not a continuing offense under either the Wetterling Act or SORNA. Second, even if SORNA is thought merely to increase the punishment for "repeating" the offense of failing to register, the Seventh Circuit could avoid the constitutional concerns only by creating an atextual "grace period" in which individuals such as Petitioner who traveled interstate before SORNA was enacted had an additional, "reasonable time" to register. Pet. App. 10a. As a result, SORNA's serious constitutional concerns remain.

a. Under this Court's precedents, neither SORNA nor the Wetterling Act created "a continuing offense in the sense of an offense that can be committed over a length of time." Pet. App. 3a. As discussed above, unless failure to register is somehow a "continuing offense," SORNA subjected Petitioner to enhanced penalties for a crime that he committed and completed before SORNA's enactment.

But failure to register in accordance with the time period prescribed by either the Wetterling Act (10 days) or SORNA (3 days) is not a continuing offense. Criminal conduct is not "continuing" "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *United States v. Toussie*, 397 U.S. 112, 115 (1970). Congress knows how to create a continuing offense and has done so in other statutes requiring certain individuals to register with the government. *See, e.g.*, 22 U.S.C. § 618 (failure to register as foreign agent within 10 days of becoming such an agent is "a continuing offense"); 50 U.S.C. § 856 (same for failure to register as trained in foreign espionage systems). The failure of Congress to do so here—under either the Wetterling Act or SORNA—speaks volumes.

Nor is continuing-offense treatment inherent in the nature of a registration requirement. In *Toussie*, the defendant failed to comply with a criminal statute that required him to register for the draft within five days of reaching age 18, but he was not indicted for the crime until eight years later. In holding that the prosecution was barred by the crime's five-year statute of limitations, the Court rejected the government's argument that the crime was a continuing offense. 397 U.S. at 114. The Court stated: "There is . . . nothing inherent in the act of registration itself which makes failure to do so a continuing crime. Failing to register is not like a conspiracy which the Court has held continues as long as the conspirators

engage in overt acts in furtherance of their plot." *Id.* at 122.

In holding that failure to register was a "continuing offense," the Seventh Circuit overlooked the Court's holding in *Toussie*: "[W]e do not think the Act intended to treat continued failure to register as a renewal of the original crime or the repeated commission of new offenses." *Id.* at 119. Instead, the Court construed the registration provision to provide "that a man must register at a particular time and his failure to do so at that time is a single offense." *Id.* Nothing in Wetterling or SORNA compels a different result.

Because failure to register is not a continuing offense, Petitioner had already committed and completed the crime well before SORNA was enacted and was thus subject to a maximum punishment of one year imprisonment. To hold otherwise and expose him to ten years' imprisonment for the same crime would trigger the prohibitions of the Ex Post Facto Clause.

b. To the extent that SORNA is read to impose a registration obligation distinct from the Wetterling Act, or to "increas[e] the punishment for repeating an offense," Pet. App. 9a, it would have been impossible for Petitioner to comply. At the time of SORNA's enactment, Petitioner had necessarily violated the statute by failing to register within three days of his relocation to Indiana, which had taken place years before. As a result, he could not have brought himself into compliance simply by refraining from certain conduct following SORNA's enactment;

to the contrary, he would have been in violation of SORNA immediately once it took effect.

Because SORNA imposed an affirmative obligation that Petitioner had already failed to fulfill, the Seventh Circuit created an accommodation—one that is found nowhere in the Act's text and whose scope was left entirely to the court's discretion. Specifically, the Seventh Circuit surmised that individuals would not have been required to register immediately upon enactment of SORNA; instead, the court "assume[d] that [offenders] would have to register within a reasonable time." Pet. App. 10a. The Seventh Circuit elaborated that "on our interpretation of the statute as filled out by the regulation, the duty to register does not come into force on the day the Act becomes applicable to a person, or on the next day or next week, but within a reasonable time." *Id.* at 12a. Applying this conception of "a reasonable time," the Seventh Circuit held that "[f]ive months is a sufficient grace period," such that Petitioner "had a reasonable time within which he could have registered." *Id.*

The Seventh Circuit's analysis is a recipe for judicial fiat. Neither the Act itself nor the Attorney General's regulations provide sex offenders with a "grace period" within which to register. And the court's holding that five months was a sufficient grace period was conclusory and unaccompanied by any additional discussion, let alone citation to relevant legal authority. The Seventh Circuit was thus forced both to invent a "grace period" that Congress did not provide or authorize, and then to determine

the length of that "grace period" without any guiding principle.

In addition to inviting arbitrary judicial line drawing, the Seventh Circuit's approach raises serious concerns about proper notice. SORNA requires notification to convicted sex offenders of their registration requirements. *See, e.g.*, 42 U.S.C. § 16917(b) ("The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered [before their release from custody or immediately after their sentencing]."). Under the Seventh Circuit's approach, would-be defendants must guess about what length of time is reasonable: more than an hour, a day, or a week, apparently, but also less than five months. Pet. App. 12a. *See, e.g.*, *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) (statute would be unconstitutionally vague if it turned on "a subjective judgment such as whether conduct is 'annoying' or 'indecent'"); *Langford v. City of Omaha*, 755 F. Supp. 1460, 1463 (D. Neb. 1989) (city ordinance's prohibition of "unreasonable" noise "too vague to give adequate notice of what conduct is prohibited, and . . . too vague to ensure against arbitrary enforcement"). And the Seventh Circuit provided no specific guidance for defendants to make an educated guess.

Finally, under the Seventh Circuit's approach, the maximum length of Petitioner's potential sentence depended on the discretion of law enforcement, and law enforcement alone. Had law enforcement officials discovered and prosecuted Petitioner's failure to register at any point between the time of his travel to Indiana and the enactment of SORNA, he

would have been governed only by the Wetterling Act and faced imprisonment "for not more than 1 year." 42 U.S.C. § 14072(i)(4). Had he been charged after SORNA was enacted, but only a week after the Attorney General's implementing regulation went into effect, the Seventh Circuit would have held that he had not received a "sufficient grace period" within which to register. Petitioner faced imprisonment of up to ten years only because law enforcement did not uncover his completed crime until after SORNA's enactment, after the issuance of the Attorney General's regulation, and after the expiration of the Seventh Circuit's "sufficient grace period."

* * *

Because the Seventh Circuit's interpretation raises serious concerns under the Ex Post Facto Clause, the Court should apply the doctrine of constitutional avoidance and hold that SORNA does not apply to individuals whose interstate travel predated the Act's enactment.

B. The Seventh Circuit's Construction of SORNA Raises Serious Concerns under the Commerce Clause.

The Seventh Circuit's interpretation of SORNA also raises serious concerns that the Act exceeds Congress's authority under the Commerce Clause. In these circumstances, "it is appropriate to avoid the constitutional question that would arise were we to read [the statute] to render . . . 'traditionally local criminal conduct' . . . 'a matter for federal enforcement.'" *Jones v. United States*, 529 U.S. 848, 858

(2000) (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

Congress almost certainly would lack the authority to enact a sex-offender registration requirement devoid of any connection to interstate travel. Unlike regulations of commercial or economic transactions, criminal provisions like SORNA are within Congress's commerce clause authority only if the prohibited conduct itself has "an explicit connection with or effect on interstate commerce." *United States v. Morrison*, 529 U.S. 598, 611–12 (2000); *see United States v. Lopez*, 514 U.S. 549, 562 (1995). Applying this standard, several courts have invalidated SORNA's registration requirement, which requires all sex offenders to register in certain jurisdictions whether or not the individual has traveled or otherwise affects interstate commerce. *See, e.g.*, *United States v. Waybright*, 561 F. Supp. 2d 1154, 1164 (D. Mont. 2008) ("Section 16913 has nothing to do with commerce or any sort of economic enterprise; it regulates purely local, non-economic activity."); *United States v. Hall*, 577 F. Supp. 2d 610, 619–22 (N.D.N.Y. 2008) (Section 16913 exceeds Congress's commerce authority); *United States v. Myers*, 591 F. Supp. 2d 1312, 1332–36 (S.D. Fla. 2008) (same); *United States v. Guzman*, 582 F. Supp. 2d 305, 310–14 (N.D.N.Y. 2008) (same).

The courts that have upheld § 2250 against Commerce Clause challenges have explicitly or implicitly rested on its requirement that covered individuals have previously traveled in interstate commerce. *See, e.g.*, *United States v. Whaley*, 577 F.3d 254, 258 (5th Cir. 2009) ("Because § 2250 applies only to those failing to register or update a reg-

istration after traveling in interstate commerce—in this case, Whaley traveled from Kansas to Texas—it falls squarely under the first *Lopez* prong."). This type of jurisdictional element, however, provides a meaningful limitation on the federal government's commerce power only if the travel at issue postdated SORNA's enactment.

Indeed, and as Petitioner explains, if SORNA is applied to pre-enactment travel, it necessarily would apply even to travel that predated the underlying conviction for a sex offense. Pet'r Br. 34–35. Thus, an individual who moved from Alabama to Indiana in 1950, was convicted of a sex crime in 1990, was released from prison in 2000, and then resumed living at his Indiana residence would still be subject to SORNA's enhanced criminal penalties. Under these circumstances, the link between interstate travel and interstate commerce could hardly be more attenuated. Even the Seventh Circuit recognized the potential for this illogical result and asserted only that "[s]ince the statutory aim is to prevent a convicted sex offender from circumventing registration by leaving the state in which he is registered, it can be argued that the travel must postdate the conviction." Pet. App. 4a. Like the Seventh Circuit's invention of a "grace period," this assertion lacks any basis in SORNA's text.

If *Lopez* and *Morrison* meaningfully limit the federal government's authority, the Commerce Clause "could never mean that once a person has traveled across state lines Congress is free to attach any regulation to him it deems fit." *Myers*, 591 F. Supp. 2d at 1349. The Court has rejected the proposition that

Congress could "use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority," *Morrison*, 529 U.S. at 615, or that broad theories of commerce power could be established from which it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S. at 564. Yet here, the government seeks to impose registration requirements based on an individual's interstate travel that predated the Act, and the logic of the government's argument would result in application of SORNA even to someone who traveled prior to his conviction for a sex offense.

If Congress is permitted to exercise commerce clause power over sex offenders based on nothing more than their interstate travel in the distant past, then it might also regulate marriages performed by clergy who at one point traveled in interstate commerce or local kindergarten classes taught by teachers who at one point traveled in interstate commerce. Such a regime would be a far cry from *Lopez*, in which the Court contemplated that Congress might have acted within its authority if the defendant "had *recently* moved in interstate commerce." *Lopez*, 514 U.S. at 567 (emphasis added).

The Seventh Circuit's reading of the statute imposes federal criminal liability for wholly intrastate criminal conduct so long as an individual has previously traveled in interstate commerce—even if years or decades ago. This interpretation raises serious questions about whether Congress's commerce au-

thority stretches so far as to allow Congress to regulate anyone who has ever traveled in interstate commerce. Petitioner's interpretation avoids these serious constitutional concerns and should be adopted.

II. Construing SORNA To Avoid Constitutional Concerns Would Not Undermine Congress's Efforts To Reduce Recidivism.

As Petitioner explains, SORNA need not apply retroactively to fulfill its purpose. Pet'r Br. 28–35. In addition, recent empirical evidence illustrates that registration-and-notification requirements, such as those contained in SORNA, do not reduce recidivism and in some cases increase it. Thus, application of the avoidance canon to SORNA would not interfere with Congress's goal of preventing sex-offender recidivism.

The benefits of registration-and-notification regimes, such as those implemented by SORNA, appear to be marginal at best. Sex offenders re-offend far less frequently than commonly believed; "approximately 96% of offenders arrested for sexual offenses have no prior sexual offense convictions, and, thus, would not have been on a sex offender registry at the time of the offense." Jeffrey C. Sandler et al., *Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychol. Pub. Pol'y & L. 284, 297 (2008). Although some subgroups of sex offenders do appear to pose a higher risk of recidivism than do sex offenders as a whole, SORNA's "risk tier" registra-

tion system fails to incorporate these factors. Rather, SORNA divides offenders into three tiers based solely on their crime of conviction and the length of their sentence: Tier 1 includes misdemeanors with less than one year of imprisonment, and Tiers 2 and 3 include felonies differing in type and level of severity. *See* 42 U.S.C. § 16911.

Remarkably, SORNA gets it backwards: "those offenders classified as Tier 1 (lowest risk) were rearrested for both sexual and nonsexual offenses more quickly than both Tier 2 (moderate risk) and Tier 3 (highest risk) offenders and were rearrested for sexual offenses at a higher rate than Tiers 2 and 3 offenders." Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?* (Crim. Just. Pol'y Rev. Online First, June 2009), at 13. Thus, "the system proposed in SORNA actually decreases the ability of states to predict which sex offenders will sexually reoffend and which ones will not." *Id.* at 15.

Whatever the recidivism rates of sex offenders, registration-and-notification laws, including federal laws, do not appear to lower them. Studies of registration and notification in several states have found no statistically significant differences in recidivism rates between offenders subject to registration-and-notification requirements and those who are not.[2]

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[2] *See* Donna D. Schram & Cheryl Darling Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism* 3 (1995), *available at* http://www.wsipp.wa.gov/rptfiles/chrrec.pdf (Washington); Geneva Adkins et al., Iowa Dept. of Human Rights, *The Iowa Sex Offender Registry and Recidivism* 19 (2000), *available at* http://www.state.ia.us/gov-

According to a recent analysis of recidivism rates using Bureau of Justice Statistics data from fourteen states, "sex offender recidivism is not reduced by having to register and if anything it is slightly increased." Amanda Y. Agan, *Sex Offender Registries: Fear without Function?* 25 (Dec. 1, 2008) (unpublished manuscript, University of Chicago Department of Economics), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437098.

Although one study has found a reduction in recidivism attributable to the registration component of sex offender laws, this same study also concluded that the notification component of laws such as SORNA resulted in a statistically significant *increase* in subsequent crimes by registered offenders. *See* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 23–26 (Nat'l Bureau of Econ. Research, Working Paper No. 13803, 2008), *available at* http://www.nber.org/papers/w13803.[3] And notifica-

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ernment/dhr/cjjp/images/pdf/01_pub/SexOffenderReport.pdf (Iowa); Richard G. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 Crim. Just. Stud. 193, 193 (2006) (Wisconsin); Jeffrey C. Sandler et al., *Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychol. Pub. Pol'y & L. 284, 295-97 (2008) (New York); Kristen Zgoba et al., N.J. Dept. of Corr., *Megan's Law: Assessing the Practical and Monetary Efficacy* 39 (2008), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf (New Jersey).

[3] Another study concluded that Washington State's 1990 law reduced certain types of sexual offense recidivism, but this study suffered from significant methodological limitations. For

tion is an integral part of SORNA's registration regime. To implement the Act, states must "make available on the Internet . . . all information about each sex offender in the registry," 42 U.S.C. § 16918(a), and "provide the information in the registry" to *any* "organization, company, or individual who requests such notification," *id.* § 16921(b).

In using registration as a vehicle for widespread notification, SORNA increases the risk of recidivism. Research confirms that "convicted sex offenders become more likely to commit crime when their information is made public because the associated psychological, social, or financial costs make crime more attractive." Prescott & Rockoff, *supra*, at 4. These costs—which include job loss, housing disruption, threats of harassment, property damage, and even physical assault[4]—increase the likelihood of re-

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instance, the study was unable to rule out historical variations in the general crime rate. *See* Robert Barnoski, Wash. State Inst. for Pub. Policy, *Sex Offender Sentencing in Washington State: Has Community Notification Reduced Recidivism?* 3 (2005), *available at* http://www.wsipp.wa.gov/rptfiles/05-12-1202.pdf; Sandler et al., *supra*, at 286–87.

[4] *See* Jill S. Levenson et al., *Megan's Law and its Impact on Community Re-Entry for Sex Offenders*, 25 Behav. Sci. & L. 587, 593–94, 597 (2007) (surveys of offenders in Indiana, Connecticut, and Florida showed job loss ranging from 19–27%, housing disruption from 15–21%, threats and harassment from 21–33%, and property damage from 17–21%.); *id.* at 596 (in Kentucky, 43% of offenders reported job loss, 45% housing problems, and 47% harassment); Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 Behav. Sci. Law 375 (2000) (in Wisconsin, overwhelming majority reported these types of consequences)); *id.* (offenders also reported being

cidivism by making it more difficult for registrants to reintegrate and thus harder to resist further criminal activity. *See* Freeman & Sandler, *supra*, at 16; Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 Psych. Pub. Pol'y & Law 505, 556 (1998).

Not only do the side effects of registration-and-notification laws lead offenders to re-offend, but broad-based laws like SORNA also impose significant financial costs and distract law enforcement from focusing on the specific individuals who pose the highest risk of recidivism. SORNA requires that states register all sex offenders, regardless of the seriousness of the crime. In Virginia, the total cost of implementing SORNA was estimated to be almost $12.5 million in the first year, and $8.9 million every year thereafter. Justice Policy Inst., *What Will It Cost States to Comply with the Sex Offender Registration and Notification Act?* 1 (2008), *available at* http://www.njjn.org/media/resources/public/resource_840.pdf. Compliance costs are estimated to be in the millions for every state except Wyoming, and in the tens of millions for larger states such as California ($59 million), Florida ($29 million), New York ($31 million), Texas ($39 million), and others. *Id.* at 2.

Thus, the addition of thousands of offenders, many or most of whom are unlikely to re-offend, hinders law enforcement in monitoring the smaller subset of registrants who represent true recidivism

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physically assaulted due to their status, at rates ranging from 3–16% across different states).

threats. *See* Ryan Knutson & Justin Scheck, *Sex-Registry Flaws Stand Out*, Wall St. J., Sept. 3, 2009, at A5 (describing concerns raised by law-enforcement officials). Moreover, states that spend the millions of dollars needed to operate the registries have fewer if any funds to devote to offender rehabilitation, which, unlike registries, has demonstrated at least some promise of reducing recidivism. *See* Jill S. Levenson, Sex Offense Recidivism, Risk Assessment, and the Adam Walsh Act (Testimony before Vermont State Legislature 6 (Oct. 16, 2008)), *available at* http://www.leg.state.vt.us/WorkGroups/sexoffenders/AWA_SORNsummary.pdf.

In sum, Congress's goal of reducing sex-offender recidivism does not offer a reason to refrain from applying the doctrine of constitutional avoidance, given the serious constitutional concerns raised by the Seventh Circuit's interpretation and SORNA's dubious ability to combat recidivism.

Conclusion

The Seventh Circuit's judgment should be reversed.

Respectfully submitted,

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