

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 STATES OF KANSAS, ET AL.,
AS AMICI CURIAE IN SUPPORT OF RESPONDENT**

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QUESTIONS PRESENTED

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

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

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INTEREST OF THE *AMICI* STATES

The States' primary interest in this particular case is to caution the Court against any decision or language that would undermine over 200 years of the Court's *ex post facto* jurisprudence. That substantial body of law clearly holds that amendments to civil regulatory statutes are by definition "prospective" for *ex post facto* purposes, so long as some act is required of the regulated individuals following the new enactment. The Sex Offender Registration and Notification Act (SORNA) satisfies that standard.

The States have a strong interest in laws regulating sex offenders. To a great extent, the States have been the leaders in this area of the law. The States were the first sovereigns to develop and implement measures such as sex offender civil commitment programs, sex offender registration and notification laws, and greater criminal punishments for sex offenses generally and repeat offenders in particular.

The States recognize that Congress also has played an active role in this area, both in general and with respect to sex offender registration laws. Congress enacted spending power legislation in 1996 that attached the disbursement of certain federal funds to the condition that the States enact sex offender registration laws, as well as imposing federal standards on the laws to be enacted. As a result, sex offender registration laws have existed in all 50 States for well over a decade. Congress has amended and updated the federal requirements and statutes over time, ultimately resulting in the SORNA provisions now before the Court.

As this case and the enactment of the SORNA illustrate, one problem the States frequently have encountered in implementing sex offender registration laws is keeping track of offenders who are required to register but who are mobile and may relocate without informing authorities. That problem arises whether the offenders merely move within a city, they cross county lines within a state, or, in the situation the SORNA addresses, they cross state lines. The SORNA provision at issue here thus addresses a very real challenge that the States face in tracking many dangerous sex offenders subject to these civil registration laws.

The States themselves have with frequency amended and modified their own sex offender laws, particularly as experience has demonstrated shortcomings in those laws. Such amendments have included, for example, increasing the scope of those required to register, the amount of information made available to the public, and the punishment for an offender's failure to register as required. States, like Congress in the SORNA, have tried and continue to try to make these registration statutes as effective as possible in protecting the public.

The challenge in this case arises in the context of sex offender registration laws, which are indisputably civil, as the Court has expressly held. But the States have numerous civil regulatory systems that over time are amended and modified. The States should be free to make such changes—including imposing additional regulatory requirements—without having to defend them against baseless *ex post facto* claims.

SUMMARY OF THE ARGUMENT

The SORNA is not an *ex post facto* law.* Sex offender registration is a civil, non-punitive, regulatory scheme. *Smith v. Doe*, 538 U.S. 84 (2003). In that respect, it is akin to all sorts of civil regulation enacted by the States, including medical licensing, attorney licensing, liquor sale and distribution licensing, and many other regulatory schemes. Such civil regulatory schemes can be, and often are, changed, amended, and modified by the States, sometimes with the result that those being regulated are required to take new measures or are subject to new affirmative duties.

This Court's *ex post facto* jurisprudence makes clear that such changes in civil regulatory systems, even when enforced by criminal or civil penalties for noncompliance, are not *ex post facto* laws. Thus, although the SORNA imposes a criminal sanction for failure to comply with the law's civil registration requirement, that proposition has no effect on the *ex post facto* analysis. Rather, the key question for *ex post facto* purposes is whether those being regulated have both (1) the ability to comply and (2) a reasonable opportunity to comply with a new law's requirements before any punishment can be imposed.

* The States take no position on the proper interpretation of SORNA as a matter of statutory construction (Question 1 in the Petition). This amicus brief solely and strictly addresses whether the SORNA, if construed to apply to petitioner here, is an *ex post facto* law (Question 2 in the Petition). The States argue that it is not.

For well over 100 years, this Court has made clear (and lower courts have many times reiterated) that so long as the person subject to regulation has the ability to comply with new legal duties and has a reasonable opportunity to engage in such compliance and thereby avoid any punishment, there is no *ex post facto* violation. Thus, the Court has upheld statutes imposing new affirmative duties such as to construct drainage openings in railroad beds, to dispose of liquor that was lawful when obtained but is no longer so, and to obtain additional credentials in order to continue holding a medical license. Lower courts similarly have upheld laws increasing failure to register as a sex offender from a misdemeanor to a felony, punishing the continuing possession of stolen property that has moved across state lines even though the interstate movement occurred prior to the law's effective date, and the imposition of criminal liability for money laundering based on commercial transactions entered into prior to a law's effective date but continued after the law took effect. Only when it was actually impossible for a regulated person to comply going forward—for example demanding a sworn oath that includes never having engaged in conduct in which the person in the past had in fact engaged—has the Court found an *ex post facto* violation.

Because the SORNA provision at issue in this case falls into the former category, it is constitutional. First, petitioner here had the ability to comply with the SORNA. All he had to do was re-register after the law took effect. He is being prosecuted for that failure, not for moving across state lines prior to the law's effective date. Second, as the court below held, petitioner had a reasonable time to re-register after

the law's effective date. The judgment below should be affirmed.

ARGUMENT

THE SORNA IS NOT AN *EX POST FACTO* LAW

If the United States prevails on the first question presented in this case, then once the SORNA became effective it required petitioner to re-register as a sex offender in Indiana. Importantly, this prosecution against petitioner was not commenced until almost 6 months after the Attorney General promulgated regulations implementing the SORNA and about 13 months after the SORNA was enacted. Indeed, it was not until almost 5 months after the Attorney General's regulations were promulgated that authorities became aware that petitioner was living in Indiana but was registered in Alabama. Thus, at a minimum, petitioner had almost 5 months to comply with the SORNA's re-registration requirement while living in Indiana, but he failed to do so.

The second question presented is whether the SORNA, if interpreted to apply to petitioner and others similarly situated, is an *ex post facto* law. As the States explain below, it is not.

A. The Court's Decision In *Smith v. Doe*, 538 U.S. 84 (2003), Requires Rejection Of Any *Ex Post Facto* Claim Here.

The Court upheld the constitutionality of sex offender registration laws against *ex post facto* challenges in *Smith v. Doe*, 538 U.S. 84 (2003). In *Smith*, the Court upheld an Alaska sex offender

registration law (that was not, in material respects, any different than the laws of the other States), concluding that the statute was both civil (regulatory) and not punitive. Indeed, as the Court pointed out, “[t]he Act does not restrain the activities sex offenders may pursue but leaves them free to change jobs or residences.” *Id.* at 100. Further, the Court noted that “an imposition of restrictive measures on sex offenders adjudged to be dangerous is a ‘legitimate nonpunitive governmental objective and has been historically so regarded.’” *Id.* at 93 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)).**

Importantly, the Court commented on the very question whether prosecuting a sex offender for failing to register is “punishment” for past conduct (the underlying sexual offense). The Court’s emphatic and clear answer was “NO”: “A sex offender who fails to comply with the reporting requirements may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding *separate from the individual’s original offense.*” 538 U.S. at 101-02 (emphasis added).

** At least 21 States now have sex offender civil commitment laws, sometimes referred to as “sexually violent predator acts,” the type of law at issue in *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997), a case in which the Court upheld the Kansas statute against *ex post facto*, substantive due process, and double jeopardy challenges. Later, in *Seling v. Young*, 531 U.S. 250 (2001), the Court rejected an *ex post facto* challenge to the Washington program, holding that a statute found to be civil on its face cannot be deemed punitive as applied to any particular individual. A federal sex offender civil commitment statute is at issue in the pending case of *United States v. Comstock*, No. 08-1224 (argued January 12, 2010).

Thus, in *Smith*, the Court recognized two fundamental principles that effectively require rejection of petitioner's constitutional *ex post facto* claim in this case. First, sex offender registration laws are by their nature *civil, regulatory* measures designed to protect the public, not to punish the sex offenders who are subject to these laws. Second, failure to register as required by law can be made its own, separate criminal offense—as Congress made it so in the SORNA—without making the law a prohibited *ex post facto* measure.

Thus, as further explained below, it matters not whether a sex offender subject to the SORNA traveled across state lines *before or after* the SORNA took effect. Either way, the legal obligation the SORNA imposed is to *re-register*, an obligation that sprang forth only with the enactment of the SORNA and an obligation which is strictly and solely “prospective” for purposes of *ex post facto* principles.

That clearly would be the result, for example, were Congress to reinstate the military draft for all able-bodied citizens age 45 or less who had never volunteered for military service, even though many of those citizens might well have anticipated and expected that they would never be subject to such a measure and thus made conscious choices in the past never to volunteer for such service. The fact that a new legal obligation springs forth and takes into account in some fashion past conduct does not render a statute an *ex post facto* law. The entire history of the Court's *ex post facto* cases makes that proposition clear, as briefly illustrated below.

B. The SORNA Cannot Be An *Ex Post Facto* Law Because It Punishes Only Conduct That Occurs After The Law's Effective Date.

1. Almost 100 years ago the Court rejected the same *ex post facto* argument the petitioner makes in this case. In *Chicago & Alton RR Co. v. Tranbarger*, 238 U.S. 67 (1915), the Court considered whether it was an *ex post facto* violation for a Missouri statute to impose on railroads a new requirement to construct and maintain “suitable openings across and through the right of way and roadbeds . . . and suitable ditches and drains along each side of the roadbed . . . sufficient [] to drain and carry off the water” *Id.* at 71. A railroad was fined \$100 for failure to comply with the statute and it appealed to the Court, arguing that the Missouri statute was an *ex post facto* law if it was applied to railroads constructed prior to the law’s enactment.

The Court had little trouble rejecting the claim, pointedly observing that the railroad’s *ex post facto* argument “is sufficiently answered by pointing out that [the railroad] is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act . . . , but because after that time it maintained the embankment in a manner prohibited by the act.” 238 U.S. at 73. Noting that the Missouri statute allowed three months after construction of new railroad lines for compliance with the drainage requirement, the Court concluded that the statute was not an *ex post facto* law with regard to pre-existing rail lines so long as the railroad companies were allowed “a reasonable time after the

passage of the enactment within which to construct the openings.” *Id.* Thus, the Court concluded that “the statute is of course to be construed as allowing some time—either three months, or a reasonable time more or less than that period—for the[] construction [of openings] by railroads already in existence.” *Id.* at 74. The Court, however, declined to decide what would constitute such a “reasonable time” in this case, because the railroad had not raised or argued that question in the courts below.

The analogy to the SORNA provision here is compelling. So long as those subject to the SORNA re-registration provision have a “reasonable time” to comply after the SORNA took effect, whether they traveled across state lines prior to or after the SORNA’s enactment (or even were on an airplane flying from one state to another the moment the SORNA took effect) is of no constitutional relevance. As the Court recognized in *Smith v. Doe*, it is the failure to *re-register after the SORNA took effect* that is the offense; the offense is not the act of traveling across state lines.

2. Several other decisions recognize and apply the same fundamental *ex post facto* principles as *Tranbarger*. For example, in *Samuels v. McCurdy*, 267 U.S. 188 (1925), the defendant was prosecuted for unlawful possession of liquor, liquor that he claimed he lawfully possessed before a change in the laws made such possession a crime. In essence, the defendant argued that he simply had failed to dispose of the liquor after the law changed, but he never took any affirmative action to acquire liquor in violation of the law. The Court easily rejected the claim, observing that the statute was not an *ex post facto* law because

the “penalty it imposes is for *continuing to possess* the liquor after the enactment of the law. It is quite the same question as that presented in *Chicago & Alton R. Co. v. Tranbarger . . .*” 267 U.S. at 193 (emphasis added).

Similarly, the Court has upheld laws changing the requirements for medical licenses and punishing non-compliance with the new rules, even for those who held a valid license under prior rules. In *Reetz v. Michigan*, 188 U.S. 505 (1903), the Court held that *ex post facto* principles did not bar the prosecution of a man who, although he had been practicing medicine lawfully for many years, failed to comply with new regulations that required proof of graduation from an established and reputable medical school in order to hold a valid medical license in Michigan. The Court held that the statute was not an *ex post facto* law because it “does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon.” *Id.* at 510. To same effect, see *Dent v. West Virginia*, 129 U.S. 114 (1889) (upholding validity of West Virginia law increasing requirements for medical licenses as applied to a person who had been practicing medicine lawfully for many years prior to the new law.)

Likewise, the Court upheld a law depriving those who currently supported or practiced bigamy or polygamy of their right to vote. In *Murphy v. Pratt*, 114 U.S. 15 (1885), the Court held that disenfranchising anyone who currently practiced bigamy or polygamy at the time they sought to register to vote did not violate *ex post facto* principles: “disenfranchisement operates upon the existing state

and condition of the person, and not upon a past offense. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or polygamist.” *Id.* at 43. In other words, because anyone practicing bigamy or polygamy could gain the right to vote by taking the necessary steps to end his unlawful conduct, the law at issue had no unconstitutional “retrospective” effect.

Indeed, this is the critical distinction between this line of cases and the infamous “oath” cases, several of which arose in the aftermath of the Civil War. In the oath cases, Congress and some states imposed as a condition of exercising certain aspects of citizenship (*e.g.*, admission to the bar of this Court, holding office, voting, pursuing various professions) a requirement that citizens swear, for example, that they had never supported or sympathized with the Confederacy. Obviously, for anyone who had supported or sympathized with the Confederacy during the Civil War, such an oath simply could not be taken, at least not honestly, and thus the effect was to disqualify such individuals absolutely and forever from holding the relevant offices or pursuing the professions at issue. In several cases, the Court (and other courts) struck down such “oath” requirements as *ex post facto* laws. *See, e.g., Ex parte Garland*, 71 U.S. 333 (1867) (striking down an Act of Congress that prohibited any lawyer from being admitted to the bar of this Court without first taking such an oath); *Cummings v. Missouri*, 71 U.S. 277 (1867) (striking down Missouri law used to bar a Roman Catholic priest from holding his religious position unless and until he took such oath); *Pierce v. Carskadon*, 83 U.S. 234 (1873) (striking down a West Virginia law that prohibited setting aside

a default judgment unless the movant first took such an oath). *Cf. In the matter of Dorsey*, 7 Porter 293 (Ala. 1838) (striking down a law prohibiting admission to the bar of any man who did not take an oath that he had never engaged in any duel).

The thrust of these cases is that so long as a new rule of law applies to a current condition (1) over which the regulated person has actual control (such as the ability to create drainage openings in railroad beds, the ability to dispose of a prohibited substance in one's possession, the ability to obtain required medical credentials, the ability to cease engaging in polygamy, or the ability to re-register as a convicted sex offender in a new state to which one has moved), and (2) there is a "reasonable time" for the regulated person to comply with the law, there is no *ex post facto* violation.

3. Modern decisions in the state courts and the federal circuits have recognized the continuing validity of these fundamental *ex post facto* principles. For example, in *Wright v. Superior Court*, 15 Cal. 4th 521 (1997), the California Supreme Court held that it was not an *ex post facto* violation to apply a felony non-registration provision to a sex offender whose initial failure to register occurred while a prior version of the law was in effect, a version under which failure to register was a misdemeanor. Relying on this Court's decisions in *Tranbarger* and *Samuels*, the California Supreme Court held that the *ex post facto* prohibition "does not encompass offenses for which the defendant is prosecuted or punished based on acts continuing beyond a change in the law." *Id.* at 531. Because the offender in that case had a duty to re-register, and he failed to do so even after the statutory amendment

made failure to do so a felony, he could be prosecuted for a felony.

In *United States v. Trupin*, 117 F.3d 678 (2d Cir. 1997), the defendant obtained a stolen painting in 1978 and moved it across state lines in 1980, but he was prosecuted under a version of 18 U.S.C. § 2315, which had been enacted in 1986 to include among its prohibitions the receiving, possessing, concealing, storing, bartering, selling or disposing of any stolen goods that have a value of \$5,000 or more and which have moved across state lines. Defendant argued that the 1986 version of the statute could not be applied to him, because he moved the painting across state lines in 1980, several years before § 2315 was broadened, but the Second Circuit rejected his *ex post facto* argument: “the relevant conduct in this case was not the receipt of the painting which [the defendant took across state lines] in 1980, but the continued possession of it after the 1986 amendment. [The defendant] could have avoided conviction for possession by ceasing his possession *within a reasonable time after* the 1986 amendment.” 117 F.3d at 686 (emphasis added; citing *Tranbarger*); *see also United States v. De La Mata*, 266 F.3d 1275, 1292 (11th Cir. 2001) (“it is well settled that Congress may pass new laws which require us to alter our conduct or risk prosecution”, holding that the defendants were properly convicted of money laundering offenses, even though they entered the offending leases before such activity was made criminal by federal law, because the defendants’ conduct continued after enactment of the new statute; citing *Samuels* and *Tranbarger*).

From a constitutional perspective, it makes no difference that some sex offenders subject to the

SORNA's criminal penalties for failure to re-register after moving across state lines completed their travel prior to the SORNA's effective date. The SORNA does not punish such sex offenders for traveling interstate; it punishes their failure to *re-register* as required by the civil regulatory scheme. *Smith v. Doe*, 538 U.S. at 101-02 ("A sex offender who fails to comply with the reporting requirements may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.") So long as the offenders have had a reasonable time to comply with the SORNA requirement after the law took effect, there is no *ex post facto* violation.

CONCLUSION

The SORNA is not an *ex post facto* law.

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