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## Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statute's Purpose

Terra R. Lord

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## COMMENT

### Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statute's Purpose\*

#### *I. Introduction*

In the summer of 1991, a thirty-nine-year-old man spotted a young woman walking on the street, got out of his car, and struck her on the head from behind, rendering her unconscious.<sup>1</sup> He then transported her to a downtown parking garage where he raped her, forced her to perform oral sodomy, and robbed her of her jewelry and money. He was tried and convicted of rape and robbery in the first degree in a South Dakota state court and sentenced to seven years in prison. He was not required to register as a sex offender, as South Dakota did not enact a sex offender registration law until 1994.<sup>2</sup>

After release from prison, this man moved to Arizona where he was later convicted of sexual conduct with a minor under the age of eighteen and sentenced to a term of imprisonment in an Arizona state penitentiary. Pursuant to Arizona's sex offender laws, he was required to register as a sex offender in Arizona before being released from prison. In addition, he signed a *Notice of Sex Offender/ Change of Address Registration Requirements* document that stated, "I understand that if I leave the country or state and move to another country or state, I am under the obligation to notify, in writing, the sheriff of the county from which I am moving within 72 hours."

In January 2006 he moved to Colorado and failed to notify Arizona of his move or register in Colorado as required by law. In June 2006 he moved to Oklahoma City and failed to notify Colorado of his change of address or register in Oklahoma. In April 2007, when the Oklahoma City police department eventually discovered that he was living in the state without

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1. This story is a fictional account based loosely on the facts and applicable law in *United States v. Lawrence*, 548 F.3d 1329 (10th Cir. 2008), and *United States v. Lang*, No. CR-07-0080-HE, 2007 U.S. Dist. LEXIS 56655 (W.D. Okla. July 13, 2007).

2. See Act of Mar. 4, 1994, ch. 174, 1993 S.D. Spec. Sess. Laws 209 (codified as amended at S.D. CODIFIED LAWS § 22-24B-1 to -32 (2006 & Supp. 2009)). For a list of state sex offender registration laws in place at the time South Dakota enacted its registration law, see Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 886 n.2 (1995).

registering, he was taken into custody where he admitted that he knew he was required to comply with the registration requirements of any state in which he lived.

This hypothetical sex offender would likely be charged with a violation of the Sex Offender Registration and Notification Act (SORNA), a federal statute enacted July 27, 2006.<sup>3</sup> SORNA makes it a crime for convicted sex offenders to move from one state to another without updating their registrations within three days of relocating to the new state.<sup>4</sup> SORNA is also retroactive—in an Interim Rule issued on February 28, 2007, the Attorney General clarified that SORNA applies to sex offenders convicted of the underlying sex offense before SORNA’s enactment.<sup>5</sup> Based on SORNA’s language, this defendant would argue that SORNA applies only to sex offenders who travel after the law’s enactment.<sup>6</sup> Because the defendant traveled to Oklahoma in June 2006, a month before SORNA’s enactment, he would argue that SORNA does not apply to him.<sup>7</sup> The defendant would likely also argue that SORNA did not require him to register until the Attorney General issued the Interim Rule in February 2007; in other words, he would argue that the Attorney General created his obligation to register in February 2007.<sup>8</sup> Finally, he would argue that retroactive application of SORNA to his pre-Act travel violates the Ex Post Facto Clause of the U.S. Constitution because it punishes him for acts committed before the law was enacted.<sup>9</sup>

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3. 42 U.S.C. § 16913 (2006).

4. See 18 U.S.C. § 2250(a) (2006); 42 U.S.C. § 16913(c).

5. See Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (interim rule Feb. 28, 2007) (codified at 28 C.F.R. § 72.3 (2009)). A key point of contention is whether the Interim Rule merely *clarified* SORNA’s registration requirements for prior sex offenders—meaning that they had an obligation to register beginning on July 27, 2006—or whether it *created* the obligation to register on February 28, 2007. Compare *United States v. Hinckley*, 550 F.3d 926, 934 (10th Cir. 2008) (finding that “Congress did not intend to exempt all sex offenders convicted before July 27, 2006, from SORNA’s requirements”), *cert. denied*, 129 S. Ct. 2383 (2009), with *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008) (finding that “Congress vested the Attorney General with sole discretion to determine SORNA’s retroactivity”); see also discussion *infra* Part IV.C.

6. See 18 U.S.C. § 2250(a)(2)(B) (authorizing punishment of a state sex offender who *travels* in interstate commerce and fails to update his registration within three days of relocating).

7. See, e.g., *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301); see also discussion *infra* Part IV.B.

8. See, e.g., *Madera*, 528 F.3d at 856-57; see also discussion *infra* Part IV.C.

9. See U.S. CONST. art. I, § 9, cl. 3; *Hinckley*, 550 F.3d at 936; see also discussion *infra* Part V.D-E.

Although this is a hypothetical defendant, his story is anything but fictional. Since SORNA's enactment in July 2006, more than one hundred defendants have challenged their convictions under the statute.<sup>10</sup> Like the hypothetical offender, these defendants knew that they had a duty to register before SORNA was enacted because registration requirements existed in every state by 1996.<sup>11</sup> Moreover, all of these defendants remained unregistered after SORNA was enacted. Nevertheless, these defendants have challenged their convictions on many grounds, including statutory inapplicability, the Tenth Amendment, the Ex Post Facto Clause, the Commerce Clause, the nondelegation doctrine, and procedural and substantive due process.<sup>12</sup>

Of these challenges, the statutory inapplicability and ex post facto claims have been the most common and have generated the most controversy among courts. Consequently, this comment focuses exclusively on the arguments surrounding statutory inapplicability and ex post facto claims, highlighting the particular issues that have divided district and circuit courts nationwide.

Because the date of travel plays a fundamental role in defendants' arguments, this comment divides the defendants into two groups based on when their interstate travel occurred. The first group consists of defendants who moved to a new state before SORNA's enactment on July 27, 2006.<sup>13</sup> These defendants are referred to as "pre-Act travelers" because their travel occurred before the law's enactment. The second group of defendants are those who traveled to a new state between July 27, 2006, and February 28, 2007, the date of the Attorney General's Interim Rule.<sup>14</sup> These defendants are referred to as "gap travelers" because their travel occurred after SORNA's enactment but before the Interim Rule was issued.

Part II of this comment explores the history of sex offender registration laws at the state and federal level. Part III discusses SORNA's registration

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10. See, e.g., *United States v. Hatcher*, 560 F.3d 222 (4th Cir. 2009); *Dixon*, 551 F.3d 578; *United States v. Husted*, 545 F.3d 1240 (10th Cir. 2008); *United States v. Pitts*, No. 07-157-JVP-CN, 2008 WL 474244 (M.D. La. Feb. 14, 2008); *United States v. Smith*, 481 F. Supp. 2d 846 (E.D. Mich. 2007).

11. See *Smith v. Doe*, 538 U.S. 84, 90 (2003) ("By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law.").

12. See, e.g., *Dixon*, 551 F.3d at 582 (statutory inapplicability); *United States v. Gagnon*, 574 F. Supp. 2d 172, 179 (D. Me. 2008) (Tenth Amendment); *United States v. Mason*, 510 F. Supp. 2d 923 (M.D. Fla. 2007) (Ex Post Facto Clause, Commerce Clause, nondelegation doctrine, and procedural and substantive due process).

13. See, e.g., *Dixon*, 551 F.3d at 582; *Pitts*, 2008 WL 474244, at \*2; *Smith*, 481 F. Supp. 2d at 847.

14. See, e.g., *United States v. Stinson*, 507 F. Supp. 2d 560, 562 (S.D.W. Va. 2007); *United States v. Kapp*, 487 F. Supp. 2d 536, 538 (M.D. Pa. 2007); *United States v. Hinen*, 487 F. Supp. 2d 747, 749 (W.D. Va. 2007), *rev'd sub nom. Hatcher*, 560 F.3d 222.

and punishment provisions that have formed the basis for sex offender convictions. Part IV explores statutory applicability challenges based on SORNA's language when the statute is applied to pre-Act and gap travel, while Part V addresses ex post facto challenges to retroactive application of SORNA. Finally, Part VI argues that SORNA applies to all defendants, regardless of their dates of travel, so long as their failures to register extended past the date of SORNA's enactment. Part VI also asserts that although SORNA is *subject* to ex post facto review, its *application* to pre-Act travel and failure to register does not violate the Constitution because the statute is not "retrospective" when applied to defendants who failed to register before SORNA's passage and remained unregistered after its passage.

## II. History of Sex Offender Registration Laws

### A. State Registration Laws

The presence of a criminal registration system in the United States dates back to the 1930s, when several municipalities required felons to register to assist police in monitoring offenders in their jurisdictions.<sup>15</sup> In 1957, the U.S. Supreme Court struck down these municipal registration laws on the grounds that such laws violated the felons' due process rights.<sup>16</sup> The principle underlying the Court's holding was that "reasonable persons were not likely to recognize the need to inquire into the existence of the local law."<sup>17</sup>

Despite this ruling, states have gradually reintroduced registration laws, only this time with a narrower focus on convicted sex offenders.<sup>18</sup> California was the first state to implement a sex offender registry in 1947.<sup>19</sup> By 1986, five states had passed sex offender registration laws,<sup>20</sup> and by 1993, almost half of the states had followed suit.<sup>21</sup> The initial sex offender registration laws were relatively narrow in scope; most were enacted primarily to assist law enforcement in the investigation of new sex crimes by helping officers locate

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15. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 279 (2005).

16. *Id.*

17. *Id.* (citing *Lambert v. California*, 355 U.S. 225, 228-29 (1957)).

18. *Id.*

19. Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172 n.25 (1999).

20. Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 164 (2003).

21. *Id.*

possible suspects.<sup>22</sup> Given the limited purpose of the laws, the general public did not have access to the registry information.<sup>23</sup> In the early 1990s, however, a series of highly publicized attacks on children resulted in the expansion of state sex offender laws to include a community protection function.<sup>24</sup>

Washington became the first state to experiment with a community notification requirement following the abduction, rape, and murder of several boys in 1989 and 1990.<sup>25</sup> Outraged Washington citizens pressured the state legislature for a law that would require the state to release information about the presence of sex offenders to the general public.<sup>26</sup> The advocates succeeded, and Washington passed the first community notification law in 1990.<sup>27</sup> Louisiana followed suit in 1992.<sup>28</sup>

But perhaps no case garnered greater national support for community notification laws than the brutal rape and murder of seven-year-old Megan Kanka in New Jersey. When Megan was murdered by a convicted sex offender living across the street, her mother, along with many other New Jersey citizens, argued that Megan's death could have been prevented if New Jersey had maintained a community notification system through which Ms. Kanka could have learned that a sex offender lived nearby.<sup>29</sup> Their lobbying was successful: on October 31, 1994, the New Jersey legislature passed the first "Megan's Law," requiring the state to release information about convicted sex offenders to the public.<sup>30</sup>

New Jersey's Megan's Law, unlike prior community notification statutes, created a three-tier system in which the degree of community notification was determined by the risk of reoffense.<sup>31</sup> The offender's risk of reoffense could

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22. *Id.* at 164-65.

23. *See id.*

24. *See id.* at 165.

25. *See id.*

26. *Id.*

27. *See id.*; *see also* Community Protection Act, ch. 3, 1990 Wash. Sess. Laws 12 (relevant provisions codified as amended at WASH. REV. CODE ANN. § 4.24.550 (West 2005 & Supp. 2010)). Washington's procedure for disseminating sex offender information varied by county and included measures such as posting the information on police bulletin boards and distributing fliers door-to-door. *See* Garfinkle, *supra* note 20, at 165.

28. *See* Act of June 18, 1992, No. 388, 1992 La. Acts 1177 (relevant provisions codified as amended at LA. REV. STAT. ANN. § 15:542 (2005 & Supp. 2010)).

29. Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 700. Megan's attacker, Jesse Timmendequas, shared a house with two roommates who were also convicted sex offenders. *Id.* at 700 & n.29.

30. *See* Garfinkle, *supra* note 20, at 166.

31. *See* Act of Oct. 31, 1994, ch. 128, 1994 N.J. Laws 1132, 1133-34 (relevant provisions codified at N.J. STAT. ANN. § 2C:7-8(a), (c) (West 2005)).

be ranked as low, moderate, or high.<sup>32</sup> The statute assigned the task of classifying the risk of reoffense for a particular offender to the county prosecutor of the county in which the sex offender resided.<sup>33</sup> The statute also specified that prosecutors should take into account factors such as whether the offense was committed against a child, whether the offense involved a weapon or serious bodily injury, whether the offender had psychological problems that indicated a possibility of recidivism, and the offender's response to treatment.<sup>34</sup>

If a low-risk offender moved into the community, only local authorities received notification.<sup>35</sup> Local schools and community groups that dealt with children received information about moderate-risk offenders.<sup>36</sup> Finally, the entire community received notification of the presence of high-risk offenders.<sup>37</sup> Shortly after passage of the law, a spokeswoman for the Attorney General of New Jersey noted that the variety of notification methods ranged from fliers distributed door-to-door to letters mailed out to the community.<sup>38</sup>

#### *B. Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act*

Shortly before New Jersey enacted the first Megan's Law, Congress considered a bill providing that every state must maintain a sex offender registry.<sup>39</sup> Enacted in September 1994, this bill became known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act (Wetterling Act).<sup>40</sup> The Wetterling Act created strong incentives for each state to adopt sex offender registration laws and maintain its own sex offender registry in accordance with guidelines promulgated by the U.S. Attorney General.<sup>41</sup> Though technically not mandatory, the Act effectively ensured registration systems nationwide by conditioning federal funding for state law enforcement on states' compliance with the law.<sup>42</sup> The Wetterling Act also "provided a recommended national baseline for [state] sex

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32. See N.J. STAT. ANN. § 2C:7-8(c).

33. See *id.* § 2C:7-8(d).

34. See *id.* § 2C:7-8(b).

35. See *id.* § 2C:7-8(c)(1).

36. See *id.* § 2C:7-8(c)(2).

37. See *id.* § 2C:7-8(c)(3).

38. See Gwen Florio, *The Legal Challenges of Megan's Law: Three Cases Went to Court. One Issue: Notifying Sex Offenders' Neighbors*, PHILA. INQUIRER, Jan. 29, 1995, at C1.

39. H.R. 3355, 103d Cong. (1994).

40. See Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. §§ 14071-14072 (2006)).

41. See 42 U.S.C. § 14071(a)-(b).

42. See *id.* § 14071(g)(2)(A).

offender registration programs,<sup>43</sup> requiring states to include certain elements, such as procedures for law enforcement to notify sex offenders of their duty to register,<sup>44</sup> requirements that offenders regularly verify and update their information,<sup>45</sup> and criminal penalty provisions for failing to register.<sup>46</sup> Initially, the Wetterling Act gave states the option of including a community notification provision but did not mandate such a provision.<sup>47</sup> After several states followed New Jersey's lead by enacting Megan's Laws, Congress amended the Wetterling Act to require that all states maintain a mechanism for notifying the public about sex offenders in their vicinity.<sup>48</sup> The amendment left states with considerable discretion to determine precisely how they would release the information.<sup>49</sup>

The Wetterling Act was amended again in 1996 to include the Pam Lyncher Sexual Offender Tracking and Identification Act.<sup>50</sup> This addition to the Wetterling Act created a federal database at the Federal Bureau of Investigation to track the whereabouts of sex offenders.<sup>51</sup> Subsequently, throughout the 1990s and early 2000s, Congress amended the Wetterling Act several more times to both reflect and promote "trends in the development of the state registration and notification programs."<sup>52</sup>

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43. LAURA L. ROGERS, DEP'T OF JUSTICE, THE SMART OFFICE: OPEN FOR BUSINESS 1 (2007), available at <http://www.ojp.usdoj.gov/smart/pdfs/register.pdf>.

44. See 42 U.S.C. § 14071(b)(1)(A).

45. See *id.* § 14071(b)(3)-(5).

46. See *id.* § 14071(d). While the Wetterling Act initially vested the states with sole authority to establish criminal penalties for failure to register, it was subsequently amended to provide for no more than one year imprisonment for first-time offenders and no more than ten years imprisonment for repeat offenders. See 42 U.S.C. § 14072(i) (2006) (originally enacted in Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093).

47. See Pub. L. No. 103-322, § 170101(d)(3), 108 Stat. 2038, 2041-42 (1994) (providing that law enforcement agencies "may release relevant information [about a registrant] that is necessary to protect the public" (emphasis added)).

48. See Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345, 1345 (1996) (providing that law enforcement agencies "shall release relevant information [about a registrant] that is necessary to protect the public" (emphasis added)) (current version at 42 U.S.C. § 14071(e)); see also Garfinkle, *supra* note 20, at 167.

49. See Garfinkle, *supra* note 20, at 167. Under a 2003 amendment, however, states must maintain a publicly accessible Internet site as one of the methods of community notification. See Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 604, 117 Stat. 650, 688 (amending 42 U.S.C. § 14072(e)(2)).

50. 110 Stat. 3093 (current version at 42 U.S.C. § 14072).

51. See *id.* at sec. 2, § 170102(b), 110 Stat. at 3093-94.

52. See National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30210, 30211 (proposed May 30, 2007) (describing the "piecemeal amendments" to the Wetterling Act).

### C. *The Need for Uniformity*

The Wetterling Act was successful in one key respect: by 1996, every state and the District of Columbia had implemented a sex offender registration system.<sup>53</sup> Still, the inconsistencies among the state registration laws created problems. Because the Wetterling Act established only a baseline recommendation for sex offender registration requirements, the states maintained significant discretion in deciding which crimes triggered registration, appropriate tracking methods, and punishment provisions.<sup>54</sup> As a result, the sex offender registration laws varied significantly from state-to-state.<sup>55</sup>

One of the chief effects of state discretion was that many sex offenders were able to evade the system by moving from one state to another.<sup>56</sup> In February 2007 the National Center for Missing and Exploited Children reported in a press release that, of the 603,000 sex offenders required to register in the United States, over 100,000 had disappeared from the system altogether.<sup>57</sup> The press release cited the discrepancies in state registration laws as one of the primary reasons for noncompliance, noting that under then-existing law, sex offenders were free “to “manipulate the system and relocate to more lenient states.”<sup>58</sup> Thus, while the Wetterling Act was largely successful in obtaining *state* compliance, the problem of *individual*

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53. See *Smith v. Doe*, 538 U.S. 84, 90 (2003).

54. See Lara Geer Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 476 (2008).

55. See *id.* at 476-80.

56. *Id.* at 477.

57. Press Release, Nat'l Ctr. for Missing & Exploited Children, National Center for Missing & Exploited Children Creates New Unit to Help Find 100,000 Missing Sex Offenders and Calls for States To Do Their Part, at para. 1 (Feb. 28, 2007), available at [http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_US&PageId=3081](http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=3081).

58. *Id.* at para 2. One commentator summarized the main differences in the laws as follows:

- (1) [T]wenty-five states treat noncompliance with one or more registration duties as only a misdemeanor;
- (2) four states place the responsibility to notify the state solely on the offender when moving to another state;
- (3) eight states have ambiguous laws as to whether the state or the sex offender must notify the new state when the offender moves to another state; and
- (4) only seven states revoke mandatory parole and require the sex offender to return to prison when the offender fails to register.

Farley, *supra* note 54, at 477 (citations omitted). In addition to discrepancies among the registration laws, the community notification provisions also varied from state-to-state. *Id.* at 477-78. While some states had begun to create websites to disseminate the information, other states were still using more antiquated methods such as posting billboards or signs in front of sex offenders' homes. See *id.* at 478.

noncompliance rose to the forefront because of the large amount of state discretion in drafting the laws. Ultimately, Congress concluded that a new federal law was necessary to combat the growing problem of noncompliance among sex offenders.

*D. The Adam Walsh Act*

In the early 2000s, Congressman Mark Foley, among others, drafted a new piece of legislation aimed at improving the existing sex offender registration laws by deterring noncompliance among sex offenders and increasing public protection.<sup>59</sup> In the congressional hearings regarding the bill, Senators Reid and Biden discussed the discrepancies in state sex offender laws across the country and the effect of such discrepancies on individual noncompliance.<sup>60</sup> Senator Biden noted that interstate travel was a major problem with the old registration system because many states had less sophisticated means of tracking sex offenders than others.<sup>61</sup> He added that the bill authorized grants to local law enforcement agencies and provided software and other tools to ensure that each community had adequate means to enforce the law's requirements.<sup>62</sup> Most important, the bill established uniform rules that each sex offender must abide by, including mandatory registration immediately upon release from prison, periodic in-person check-ins with local authorities, photograph updates to enable parents to identify offenders living nearby, and finally, to deter noncompliance, increased penalties for failure to register.<sup>63</sup>

On July 27, 2006, President Bush signed the bill into law as the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act).<sup>64</sup> Title I

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59. See H.R. 4472, 109th Cong. (2006); Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 6-8 (2008).

60. 152 CONG. REC. S8012, S8013-14, S8030 (daily ed. July 20, 2006) (statements of Sens. Biden and Reid, respectively).

61. *Id.* at S8014 (statement of Sen. Biden).

62. *Id.*

63. *Id.*

64. Pub. L. No. 109-248, 120 Stat. 587. The Act was named after six-year-old Adam Walsh, who was abducted from a department store on July 27, 1981. Nat'l Ctr. for Missing & Exploited Children, *The Adam Walsh Story*, [http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=1156](http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1156) (last visited Jan. 2, 2010). Adam disappeared while accompanying his mother on a shopping outing. *Id.* He had joined a group of children playing video games in one section of the department store while his mother briefly looked for a lamp in another section. *Id.* Ten minutes later, his mother could not find him. *Id.* His remains were discovered sixteen days later, but his killer eluded authorities. *Id.* After Adam's abduction, his family was instrumental in founding the National Center for Missing and Exploited Children. See Nat'l Ctr. for Missing & Exploited Children, *Timeline*, [http://www.missingkids.com/en\\_US/timeline/flash.html](http://www.missingkids.com/en_US/timeline/flash.html) (last visited Jan. 2, 2010); see also 152 CONG. REC.

of the Act contains the Sex Offender Registration and Notification Act (SORNA).<sup>65</sup> According to the Attorney General, the purpose of SORNA was to “strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public, and to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations.”<sup>66</sup>

In its effort to combat noncompliance among sex offenders, SORNA makes the following key changes to the Wetterling Act: (1) an expansion of the number of jurisdictions required to maintain a registry, which now includes tribal jurisdictions; (2) coverage of additional offenses such as child pornography crimes, more sexual assault crimes, and inchoate offenses; (3) a lengthening of the registration period, which now ranges from fifteen years to life, based on a three-tier scheme that classifies offenders according to risk level; (4) a requirement of in-person appearances for registration updates; (5) a requirement of more information on registration forms, including social security numbers, employment and school information, details of the registration offense, current photographs, and fingerprints; and (6) the establishment of a new federal crime for failing to register, punishable by a maximum of ten years imprisonment.<sup>67</sup>

### III. SORNA Registration and Penalty Provisions

#### A. Registration Requirements

Title 42, § 16913(a)–(d) of the U.S. Code sets forth SORNA’s registration requirements.<sup>68</sup> Subsection (a) describes where sex offenders are required to register.<sup>69</sup> According to the statute, an offender is required to register “in each

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S8030 (statement of Sen. Frist). His family was also heavily involved in several pieces of child-protection legislation throughout the 1980s and 1990s, and his father, John Walsh, assisted in drafting the Adam Walsh Act. *See id.* Interestingly, the Adam Walsh case was closed in December 2008. Yolanne Almanzar, *27 Years Later, Case is Closed in Slaying of Abducted Child*, N.Y. TIMES, Dec. 16, 2008, at A18. Convicted serial killer Ottis Toole once confessed to the murder but later recanted prior to his death in prison in 1996. *Id.* The police department in Hollywood, Florida, declared the case closed after considering the “accumulation of all the circumstantial evidence over the years.” *Id.*

65. Adam Walsh Act §§ 101-131, 120 Stat. at 590-601 (codified at 42 U.S.C. §§ 16901-16902, 16911-16929 (2006)).

66. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8895 (interim rule Feb. 28, 2007).

67. ROGERS, *supra* note 43, at 2-4.

68. 42 U.S.C. § 16913(a)-(d).

69. *Id.* § 16913(a).

jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.”<sup>70</sup>

Subsection (b), captioned “Initial registration,” establishes when sex offenders must register for the first time.<sup>71</sup> This subsection divides sex offenders into two groups: (1) those who are sentenced to imprisonment and (2) those who are not sentenced to imprisonment.<sup>72</sup> Sex offenders who are sentenced to imprisonment are required to register before completing their terms of imprisonment.<sup>73</sup> Sex offenders who are not sentenced to imprisonment must register within three days of receiving their sentences.<sup>74</sup>

Subsection (c), captioned “Keeping the registration current,” mandates that sex offenders update their registration to reflect their current status and location.<sup>75</sup> Under this subsection, sex offenders are required to update their registration information within three days of changing name, residence, employment, or student status.<sup>76</sup> The subsection further requires that the sex offender appear in person in at least one of the jurisdictions listed in subsection (a).<sup>77</sup> That jurisdiction is then required to provide the updated information to all jurisdictions in which the sex offender is required to register.<sup>78</sup> For example, if sex offender *S* resides in State *A* and works in State *B*, *S* may choose to appear in person in only State *A* to change his information.<sup>79</sup> State *A* is then required to notify State *B* of *S*’s updated information.<sup>80</sup>

Of all the registration provisions of 42 U.S.C. § 16913, subsection (d) has sparked the most debate about its intended meaning. Both prosecutors and defendants agree that subsection (d) delegates authority to the Attorney General to make some clarifications with respect to SORNA’s application; however, disagreement remains as to precisely *what* the Attorney General is authorized to do. Subsection (d), captioned “Initial registration of sex offenders unable to comply with subsection (b) of this section,” reads as follows:

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70. *Id.*

71. *Id.* § 16913(b).

72. *See id.*

73. *Id.* § 16913(b)(1).

74. *Id.* § 16913(b)(2).

75. *Id.* § 16913(c).

76. *Id.*

77. *Id.* Recall that the jurisdictions listed in subsection (a) include the jurisdictions where the offender resides, where the offender is an employee, and where the offender is a student. *Id.* § 16913(a); *see also supra* text accompanying note 70.

78. *Id.* § 16913(c).

79. *See id.*

80. *See id.*

The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before [the enactment of this Act] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.<sup>81</sup>

There are essentially two interpretations of subsection (d).<sup>82</sup> The first interpretation is that subsection (d) contemplates *one* group of sex offenders who share two characteristics: (1) a pre-SORNA conviction and (2) the inability to comply with subsection (b).<sup>83</sup> Under this interpretation, the phrase “unable to comply with subsection (b)” means that the individual could not initially register because his state did not require him to register at the time he either was released from prison or received his sentence.<sup>84</sup> According to this interpretation, subsection (d) limits the Attorney General’s authority to specifying SORNA’s retroactivity for individuals who were both previously convicted of a sex offense *and* initially unable to register.<sup>85</sup>

The second interpretation of subsection (d) is that it contemplates *two* different groups of sex offenders.<sup>86</sup> The first group consists of sex offenders who were convicted before SORNA’s enactment, and the second group consists of sex offenders who were initially unable to comply with subsection (b).<sup>87</sup> Under this interpretation, the first clause of subsection (d) gives the Attorney General the authority to specify SORNA’s applicability to previously convicted sex offenders, while the second clause vests the Attorney General with the authority to prescribe registration requirements for both groups—previously convicted sex offenders *and* those initially unable to register.<sup>88</sup>

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81. *Id.* § 16913(d).

82. *See* discussion *infra* Part IV.C.

83. *See infra* text accompanying notes 151-53.

84. *See, e.g.*, *United States v. Hinckley*, 550 F.3d 926, 934 (10th Cir. 2008) (“Congress was likely concerned with old convictions—offenders who had already served their sentences and never before had been required to register.”), *cert. denied*, 129 S. Ct. 2383 (2009); *see also id.* at 944 (Gorsuch, J., concurring) (“Prior to SORNA, some states did not have sex offender registration requirements as broad as SORNA’s; others had no registries at all. As a result, some individuals who are classified as sex offenders under SORNA were not previously required or able to register under state law.”).

85. *See id.* at 934-35 (majority opinion).

86. *See infra* text accompanying notes 147-50.

87. *See, e.g.*, *United States v. Hatcher*, 560 F.3d 222, 227 (4th Cir. 2009).

88. *See id.* at 226-27.

### *B. Attorney General's Interim Rule*

Pursuant to subsection (d), on February 28, 2007, Attorney General Alberto Gonzales issued an Interim Rule that stated, "SORNA applies to all sex offenders . . . regardless of when they were convicted."<sup>89</sup> The significance of the Interim Rule depends on the interpretation of subsection (d). For the government, which argues that subsection (d) contemplates a previously convicted sex offender whose jurisdiction did not require him to register at the time of sentencing or release from prison, the Rule's significance is limited to the narrow group of previously convicted sex offenders who were unable to initially register under subsection (b).<sup>90</sup> Conversely, for defendants, who argue that subsection (d) contemplates two different groups of defendants, the Interim Rule applies to a previously convicted sex offender who was able to initially register under subsection (b).<sup>91</sup>

### *C. Penalty Provision of SORNA*

Title 18, § 2250 of the U.S. Code contains SORNA's penalty provision.<sup>92</sup> This provision defines violations of SORNA and sets the maximum penalty for violations at no more than ten years imprisonment.<sup>93</sup>

Because SORNA is a federal statute, the government needs federal jurisdiction to charge an offender under the statute. Thus, there are two basic ways that an individual can violate SORNA.<sup>94</sup> The first applies to individuals who commit federal sex offenses, while the second applies to individuals who commit state sex offenses.<sup>95</sup> Logically, it is easy for the government to obtain federal jurisdiction over the federal sex offenders—the existence of a previous federal sex offense conviction constitutes the jurisdictional link.<sup>96</sup> Under § 2250(a), federal sex offenders must satisfy three elements in order to be in violation of SORNA.<sup>97</sup> First, they must be "required to register under the Sex Offender Registration and Notification Act," as defined by 42 U.S.C. §

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89. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (interim rule Feb. 28, 2007).

90. *See, e.g.*, Brief of Plaintiff/Appellee at 16-17, *United States v. Hinckley*, 550 F.3d 926 (10th Cir. 2008) (No. 07-7107), 2008 WL 2513959, at \*16-17 (quoting *United States v. Zuniga*, No. 4:07CR3156, 2008 WL 2184118, at \*10-12 (D. Neb. May 23, 2008)).

91. *See, e.g.*, Brief of Defendant/Appellant at 13-14, *Hinckley*, 550 F.3d 926 (No. 07-7107), 2007 WL 5110327, at \*13-14.

92. 18 U.S.C. § 2250 (2006).

93. *See id.*

94. *See id.* § 2250(a)(2).

95. *Id.*

96. *See id.* § 2250(a)(2)(A).

97. *See id.* § 2250(a)(1), (a)(2)(A), (a)(3).

16911.<sup>98</sup> Second, they must have a federal sex offense conviction, such as a conviction that occurred on tribal land or under a federal statute (e.g., the statute prohibiting interstate transport of a minor for prostitution).<sup>99</sup> Finally, the sex offender must “knowingly fail[] to register or update a registration as required by” SORNA.<sup>100</sup>

By contrast, for the government to obtain jurisdiction over state sex offenders, there must be a different federal anchor—in this case, interstate travel. Thus, for a state sex offender to violate SORNA, three slightly different elements must be established.<sup>101</sup> First, the individual must be required to register under SORNA.<sup>102</sup> Second, the sex offender must “travel[] in interstate or foreign commerce, or enter[] or leave[], or reside[] in, Indian country.”<sup>103</sup> Third, the sex offender must knowingly fail to register or update a registration as required under SORNA.<sup>104</sup> State sex offenders who travel in interstate commerce make up the vast majority of defendants who challenge the applicability of SORNA to their failures to register. As discussed in the next section, these challenges typically revolve around the dates of their travel and the meaning of the word “travels” in the language of the statute.

#### *IV. Summary of the Challenges and a Closer Look at SORNA’s Applicability to Pre-Act and Gap Travel*

##### *A. An Overview of the Challenges*

The cases challenging SORNA have primarily featured objections to the statute as applied to particular defendants. Most of the defendants adopt a two-part argument: First, they argue that SORNA does not apply to them. Second, they argue that if SORNA does apply to them, it violates the Ex Post Facto Clause.

Defendants raise two distinct textual arguments to support the statutory inapplicability claim. Which of the two arguments a particular defendant advances depends on his status as either a pre-Act or gap traveler. Pre-Act travelers focus on the text of 18 U.S.C. § 2250 and argue that Congress’s use of the phrase “travels in interstate . . . commerce” illustrates an intent to reach only travel that occurs after SORNA’s enactment.<sup>105</sup> In other words, pre-Act

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98. *Id.* § 2250(a)(1); *see also* 42 U.S.C. § 16911 (2006).

99. 18 U.S.C. § 2250(a)(2)(A).

100. *Id.* § 2250(a)(3).

101. *See id.* § 2250(a)(1), (2)(B), (3).

102. *Id.* § 2250(a)(1).

103. *Id.* § 2250(a)(2)(B).

104. *Id.* § 2250(a)(3).

105. *See id.* § 2250(a)(2)(B) (emphasis added).

travelers argue that if Congress had intended to include past travelers within the statute, it would have used both past and present tense. By contrast, gap travelers argue that SORNA is inapplicable to them based on the text of 42 U.S.C. § 16913(d), which delegates to the Attorney General the authority to specify the applicability of SORNA to previous offenders.<sup>106</sup> These defendants argue that subsection (d) gives the Attorney General the exclusive authority to declare whether past sex offenders must register and that, as a result, the obligation to register was *created* by the Interim Rule on February 28, 2007.<sup>107</sup>

After arguing that SORNA is inapplicable by its own terms, both pre-Act and gap travelers argue that the retroactive application of SORNA violates the Ex Post Facto Clause. Defendants argue that SORNA is a punitive statute, and therefore subject to ex post facto review, by distinguishing it from the Alaska sex offender registration statute at issue in *Smith v. Doe*.<sup>108</sup> Defendants then argue that SORNA's retroactive application violates the Ex Post Facto Clause because all of the elements necessary to support a conviction—a previous sex offense, interstate travel, and failure to register—occurred before SORNA's enactment or before SORNA was made applicable through the Interim Rule.

The remainder of Part IV details the two principal arguments for SORNA's statutory inapplicability. Part V then addresses the ex post facto challenges to SORNA's retroactive application.

#### *B. Meaning of the Word "Travels"*

Pre-Act travelers frequently argue that SORNA applies only to individuals who travel after the date of enactment.<sup>109</sup> This argument is based on a literal interpretation of the language used in 18 U.S.C. § 2250(a). Specifically, the

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106. See 42 U.S.C. § 16913(d) (2006).

107. This argument is technically available to both pre-Act and gap travelers, as both groups of defendants could argue that they did not have an obligation to register until the Interim Rule was issued. Nonetheless, this argument has been raised almost exclusively by gap travelers. See, e.g., Petition for a Writ of Certiorari, Carr v. United States, No. 08-1301 (filed Apr. 22, 2009), 2009 WL 1101586 (pre-Act traveler did not challenge SORNA's applicability based on subsection (d)).

108. 538 U.S. 84, 105-06 (2003) (holding that the Alaska statute requiring previously convicted sex offenders to register did not violate the Ex Post Facto Clause because the statute was nonpunitive).

109. See, e.g., United States v. Dixon, 551 F.3d 578, 582 (7th Cir. 2008), cert. granted sub nom. Carr v. United States, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301); United States v. Husted, 545 F.3d 1240, 1243 (10th Cir. 2008); United States v. Pitts, No. 07-157-JVP-CN, 2008 WL 474244, at \*3 (M.D. La. Feb. 14, 2008); United States v. Smith, 481 F. Supp. 2d 846, 849-50 (E.D. Mich. 2007).

provision states that one is subject to a penalty if he “is required to register under the Sex Offender Registration and Notification Act; . . . *travels* in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act.”<sup>110</sup> Many defendants point to the use of the word “travels” and argue that it is forward-looking language suggesting that SORNA was intended to apply only to future travelers.

The first district courts to address this issue sided largely with the defendants and concluded that pre-Act travel does not fall within the reach of the statute.<sup>111</sup> For example, in *United States v. Smith*, the Eastern District of Michigan considered the case of a defendant who moved from New York to Michigan in August 2004, two years before SORNA was enacted.<sup>112</sup> The defendant argued that the plain meaning of the word “travels” indicates a “forward-looking intent that the law would apply to one who travels in interstate commerce after July 27, 2006.”<sup>113</sup> He further argued that because the plain meaning of the word is clear, the court need not go beyond the statute to assist in its interpretation.<sup>114</sup>

The court noted that the question of statutory construction begins with a plain reading of the statute, and that legislative history and policy considerations are irrelevant if the words themselves are clear.<sup>115</sup> The court also stated that “Congress’ use of a verb tense is significant in construing statutes”<sup>116</sup> and that “a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.”<sup>117</sup> The court ultimately concluded that because Congress provided no indication that SORNA was meant to apply retroactively, the word “travels” should be interpreted to mean future travel.<sup>118</sup> The court acknowledged that even if there were competing interpretations, the rule of lenity required the court to select the “less harsh interpretation.”<sup>119</sup> The court therefore held that the defendant

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110. 18 U.S.C. § 2250(a) (emphasis added).

111. *See, e.g.*, *United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3 (W.D. Okla. Sept. 21, 2007); *United States v. Sallee*, No. CR-07-152-L, 2007 WL 3283739, at \*2 (W.D. Okla. Aug. 13, 2007); *United States v. Heriot*, Cr. No. 3:07-323, 2007 WL 2199516, at \*2 (D.S.C. July 27, 2007); *Smith*, 481 F. Supp. 2d at 850-51.

112. *See* 481 F. Supp. 2d at 847.

113. *Id.* at 850.

114. *Id.* at 848.

115. *See id.* at 850.

116. *Id.* (quoting *United States v. Wilson*, 503 U.S. 329, 333 (1992)).

117. *Id.* (quoting *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006)).

118. *See id.*

119. *Id.* at 851 n.1.

did not violate SORNA because the statute did not apply to him at the time he traveled.<sup>120</sup>

Conversely, the United States District Court for the Middle District of Louisiana held that the use of the word “travels” does not prevent prosecutions against pre-Act travelers for failure to register.<sup>121</sup> In *United States v. Pitts*, the court concluded that interstate travel is a jurisdictional element of the crime described in § 2250, rendering the date of travel irrelevant to the court’s analysis.<sup>122</sup> The court noted that the statute “does not criminalize interstate travel”; rather, it criminalizes the failure to register.<sup>123</sup> Thus, because the defendant failed to register after SORNA’s enactment, the statute was applicable to him.<sup>124</sup>

The *Pitts* court further observed that limiting SORNA’s applicability to future travelers would undermine the statute’s purpose.<sup>125</sup> The court recognized that SORNA’s stated purpose was to “establish a comprehensive national registration system”<sup>126</sup> and commented that “[l]imiting the reach of the statute only to those who travel in interstate commerce after enactment of the statute would be clearly contrary to the intent of the Congress to create a *comprehensive* national database of sex offenders and offenders against children for the protection of the public.”<sup>127</sup>

The Tenth Circuit Court of Appeals became the first circuit court to confront the meaning of the word “travels” in *United States v. Husted*.<sup>128</sup> The Tenth Circuit held that the use of the word “travels” indicates forward-looking intent and that SORNA therefore cannot be applied to pre-Act travel.<sup>129</sup> The court agreed with the analysis in *United States v. Smith* that the statutory language is unambiguous and that Congress’s choice in adopting a verb tense is highly relevant.<sup>130</sup> Additionally, the court relied on the Ninth Circuit’s interpretation of a purportedly analogous statute, 18 U.S.C. § 2423, which

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120. *Id.* at 854.

121. *See United States v. Pitts*, No. 07-157-JVP-CN, 2008 WL 474244, at \*3 (M.D. La. Feb. 14, 2008); *see also United States v. Dixon*, No. 3:07-CR-72(01) RM, 2007 WL 4553720, at \*3 (N.D. Ind. Dec. 18, 2007) (finding that the defendant’s date of travel is not relevant to the SORNA analysis), *rev’d*, 551 F.3d 578 (7th Cir. 2008), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301).

122. *See Pitts*, 2008 WL 474244, at \*3.

123. *See id.*

124. *See id.* at \*4.

125. *See id.* at \*3.

126. *Id.* (quoting 42 U.S.C. § 16901 (2006)).

127. *Id.*

128. 545 F.3d 1240 (10th Cir. 2008).

129. *See id.* at 1243.

130. *See id.* at 1243-44.

punishes “any U.S. citizen ‘who *travels* in foreign commerce, and engages in any illicit sexual conduct with another person.’”<sup>131</sup> In *United States v. Jackson*, the Ninth Circuit analyzed the language of the foreign sexual conduct statute and determined that the present tense of the verb “travels” demonstrates Congress’s intent to reach only future foreign travel.<sup>132</sup> The Tenth Circuit found the *Jackson* reasoning persuasive in determining that Congress meant for SORNA to apply to future travelers.<sup>133</sup>

It took less than two months for the circuit courts to split on the meaning of “travels.”<sup>134</sup> In *United States v. Dixon*, the Seventh Circuit Court of Appeals affirmed a conviction based on pre-Act travel, finding that the Tenth Circuit’s interpretation of the word “travels” yields illogical results.<sup>135</sup> The court noted that the statute also refers to one who “*resides* in[] Indian country” and commented that the present tense of the word “resides” clearly indicates a status and not an action.<sup>136</sup> The court reached this conclusion by observing that the statute applies to a convicted sex offender who “enters or leaves” Indian country, as well as one who “resides in” Indian country, meaning that both “old residents . . . , as well as new entrants, are covered.”<sup>137</sup> The court seemed to imply that because Congress covered the full spectrum of travel dates by including past and future residents, it must have meant for “resides” to be a status requirement rather than a temporal requirement.<sup>138</sup> Thus, the court reasoned, interpreting “resides” as a status requirement and “travels” as a temporal requirement would mean that “a sex offender who has resided in Indian country since long before the Act was passed is subject to the Act but not someone who crossed state lines before the Act was passed.”<sup>139</sup> The court concluded that Congress did not intend to create a temporal requirement, but rather a “constitutional predicate” for application of the statute, similar to the movement-in-commerce requirement of the felon-in-possession law.<sup>140</sup>

The Seventh and Tenth Circuits are not the only circuits that have split over the meaning of the word “travels.” As of September 2009, the Eighth Circuit has joined the Tenth Circuit in holding that SORNA is not applicable to pre-

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131. *Id.* at 1244 (quoting 18 U.S.C. § 2423(c) (2006)).

132. 480 F.3d 1014, 1018 (9th Cir. 2007).

133. *See Husted*, 545 F.3d at 1244.

134. *Compare id.*, with *United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008) (refusing to exempt pre-Act travelers from the law’s reach), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301).

135. *See* 551 F.3d at 583.

136. *Id.* (emphasis added) (quoting 18 U.S.C. § 2250(a)(2)(B) (2006)).

137. *Id.*

138. *See id.*

139. *Id.*

140. *Id.*

Act travelers,<sup>141</sup> while the Eleventh Circuit has sided with the Seventh Circuit and found that the word “travels” does not preclude prosecutions under SORNA for pre-Act travel.<sup>142</sup> On September 30, 2009, the United States Supreme Court granted certiorari to resolve this conflict among the circuits.<sup>143</sup>

### C. Significance of the Interim Rule

Because gap travelers, by definition, traveled after SORNA’s enactment, the meaning of the word “travels” is of little consequence to them. Instead, they have focused on the significance of the Interim Rule,<sup>144</sup> arguing that SORNA did not apply to them until the Attorney General issued the Rule in February 2007 declaring that the law was to be applied retroactively. Gap travelers argue that because Congress did not expressly state that the law was to have retroactive effect, but instead chose to delegate that authority to the Attorney General, the registration requirement could not have applied to them at the time they traveled in interstate commerce.<sup>145</sup>

Resolution of this issue requires an interpretation of 42 U.S.C. § 16913(d).<sup>146</sup> Subsection (d), which delegates authority to the Attorney General to specify SORNA’s applicability, has generated considerable debate among courts. The debate essentially boils down to one question: when did

141. See *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008) (stating that “[t]he only punishment that can arise under SORNA comes from a violation of § 2250, which punishes convicted sex offenders who travel in interstate commerce *after the enactment of SORNA*” (emphasis added)), *cert. denied*, 129 S. Ct. 2431 (2009).

142. See *United States v. Dumont*, 555 F.3d 1288, 1292 (11th Cir.), *cert. denied*, 130 S. Ct. 66 (2009).

143. See *Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301) (granting a petition for writ of certiorari from the Seventh Circuit’s decision). The Seventh Circuit consolidated the appeals from *United States v. Dixon*, No. 3:07-CR-72(01) RM, 2007 WL 4553720 (N.D. Ind. Dec. 18, 2007), and *United States v. Carr*, No. 1:07-CR-73, 2007 WL 3256600 (N.D. Ind. Nov. 2, 2007), as they involved overlapping issues. For reasons unrelated to the meaning of the word “travels,” Dixon’s conviction was reversed, while Carr’s conviction was affirmed. See *Dixon*, 551 F.3d at 586-87. As a result, only Carr has appealed the Seventh Circuit decision to the Supreme Court.

144. See *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894 (interim rule Feb. 28, 2007).

145. See, e.g., *United States v. Kapp*, 487 F. Supp. 2d 536, 541 (M.D. Pa. 2007).

146. Subsection (d), captioned “Initial registration of sex offenders unable to comply with subsection (b) of this section,” is reproduced here for the reader’s convenience:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before [the enactment of this Act] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

42 U.S.C. § 16913(d) (2006).

the obligation to register begin for pre-enactment sex offenders? In other words, did the obligation to register arise upon SORNA's enactment, or was it created when the Attorney General exercised his authority to issue the Interim Rule?

To answer this question, one must first determine whether subsection (d) contemplates one or two groups of offenders. Defendants argue that subsection (d) contemplates two groups of offenders.<sup>147</sup> This is because the vast majority of defendants who challenge their SORNA convictions *were* able to comply with subsection (b) because their jurisdictions required them to register at the time they were sentenced for their original sex offenses.<sup>148</sup> Thus, in order for these defendants to argue successfully that their duty to register hinged on the Attorney General's Rule, they must prove that subsection (d) actually imagines two different groups of sex offenders—those who were unable to comply with subsection (b), and those who were convicted before the enactment of SORNA.<sup>149</sup> If a defendant can show that the Rule applies to both classes of offenders, he can prove that he justifiably relied on the Rule to establish his duty to register.<sup>150</sup>

The counterargument to this line of reasoning is that subsection (d) contemplates only one group of sex offenders who share two characteristics: (1) a pre-Act conviction *and* (2) impossibility of initial registration.<sup>151</sup> Prosecutors argue for this interpretation because it prevents defendants who were able to register initially from arguing that they relied on the Interim Rule to create their duty to register.<sup>152</sup> Under this interpretation, if a defendant was convicted of a sex offense before passage of SORNA but was nonetheless required to register in his state under preexisting sex offender registration laws, subsection (d) does not apply to him and the law has been retroactive since the day it was enacted.<sup>153</sup>

The problem of interpreting subsection (d) has resulted in a significant split among district courts.<sup>154</sup> For example, in *United States v. Kapp*, a federal

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147. See, e.g., Brief of Defendant/Appellant, *supra* note 91, at 13-14.

148. See, e.g., *United States v. Hinckley*, 550 F.3d 926, 935 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009).

149. See *id.* at 934-35.

150. See *id.* at 934-35 & n.7.

151. See, e.g., Brief of Plaintiff/Appellee, *supra* note 90, at 16.

152. See *id.* at 16-17.

153. See *Hinckley*, 550 F.3d at 935.

154. Following is a nonexhaustive list of district courts that have found that subsection (d) contemplates two groups of offenders: *United States v. Cole*, No. 07-cr-30062-DRH, 2007 WL 2714111, at \*3 (S.D. Ill. Sept. 17, 2007); *United States v. Stinson*, 507 F. Supp. 2d 560, 568-69 (S.D.W. Va. 2007); *United States v. Heriot*, Cr. No. 3:07-323, 2007 WL 2199516, at \*2 (D.S.C. July 27, 2007); *United States v. Muzio*, No. 4:07CR179 CDP, 2007 WL 2159462, at \*5 (E.D.

district court in Pennsylvania agreed with the defendant in concluding that the two-clause structure of subsection (d) suggests that the statute contemplates two groups of offenders.<sup>155</sup> The court determined that the first clause authorizes the Attorney General to determine how SORNA applies to past offenders.<sup>156</sup> The second clause, according to the court, authorizes the Attorney General “to promulgate *regulations* ‘for the registration of any such [previously convicted] sex offenders and for other categories of sex offenders unable to comply with subsection (b).’”<sup>157</sup> Under this interpretation, the first clause gives the Attorney General authority to declare *whether* past offenders must register, while the second clause gives him authority to declare *how* the past offenders must register.<sup>158</sup> The court concluded that the first clause refers only to past offenders.<sup>159</sup> The second clause, however, contemplates both past offenders and offenders initially unable to register.<sup>160</sup>

In *United States v. Muzio*, a federal district court in Missouri reached a similar conclusion and held that SORNA’s registration requirements were not applicable to pre-Act offenders until the February 2007 Interim Rule.<sup>161</sup> In *Muzio*, the prosecution urged the court to consider the heading of subsection (d), “Initial registration of sex offenders unable to comply with subsection (b),”<sup>162</sup> as support for the view that Congress intended for subsection (d) to apply only to past offenders who were unable to initially register.<sup>163</sup> Nevertheless, the district court refused to consider the heading of the subsection because it did not find the *statutory* language—as opposed to the

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Mo. July 26, 2007); *United States v. Smith*, 528 F. Supp. 2d 615, 619-20 (S.D.W. Va. 2007); *United States v. Kapp*, 487 F. Supp. 2d 536, 542 (M.D. Pa. 2007). Following is a nonexhaustive list of district courts that have found that subsection (d) contemplates only one group of offenders: *United States v. May*, Nos. 4:07-cr-00164-JEG & 1:07-cr-00059-JEG, 2007 WL 2790388, at \*4 (S.D. Iowa Sept. 24, 2007), *aff’d*, 535 F.3d 912 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009); *United States v. Sawn*, No. 6:07cr00020, 2007 WL 2344980, at \*2 (W.D. Va. Aug. 15, 2007), *rev’d sub nom.* *United States v. Hatcher*, 560 F.3d 222 (4th Cir. 2009); *United States v. Gonzales*, No. 5:07cr27-RS, 2007 WL 2298004, at \*4 (N.D. Fla. Aug. 9, 2007); *United States v. Roberts*, No. 6:07-CR-70031, 2007 WL 2155750, at \*2 (W.D. Va., July 27, 2007); *United States v. Mason*, 510 F. Supp. 2d 923, 928 (M.D. Fla. 2007); *United States v. Hinen*, 487 F. Supp. 2d 747, 750-51 (W.D. Va. 2007), *rev’d sub nom. Hatcher*, 560 F.3d 222.

155. 487 F. Supp. 2d at 542.

156. *Id.*

157. *Id.* (emphasis added) (quoting 42 U.S.C. § 16913(d) (2006)).

158. *See id.*

159. *Id.*

160. *Id.*

161. No. 4:07CR179 CDP, 2007 WL 2159462, at \*5 (E.D. Mo. July 26, 2007).

162. *See* 42 U.S.C. § 16913(d).

163. *Muzio*, 2007 WL 2159462, at \*3-4.

language of the subsection heading—to be ambiguous.<sup>164</sup> Citing *Minnesota Transportation Regulation Board v. United States*,<sup>165</sup> the court concluded that headings cannot be considered when the plain meaning of a statute is clear on its face.<sup>166</sup> The court ultimately agreed with *Kapp* and determined that the sentence structure of subsection (d) supports the two-group interpretation; accordingly, the court held that past offenders did not have a duty to register until the Interim Rule was issued.<sup>167</sup>

The case of *United States v. Beasley* represents the opposing view.<sup>168</sup> There, a federal district court in Georgia found the language of subsection (d) ambiguous.<sup>169</sup> The court determined that an isolated reading of subsection (d) suggests two possible interpretations: the subsection contemplates either two groups of offenders (past offenders and those unable to initially register), or one group of offenders, such that past offenders “are included within (and not a separate group from) the broader category of ‘sex offenders who are unable to comply with subsection (b).’”<sup>170</sup> Given the dual interpretations, the court utilized the heading to resolve the ambiguity in favor of the view that subsection (d) applies exclusively to offenders who were unable to register under their states’ laws at the time of conviction.<sup>171</sup> Additionally, the court reasoned from the statute’s grammatical structure that

[b]y using the word “other” to modify the noun phrase “categories of sex offenders who are unable to comply with subsection (d) [sic],” the statute implies that offenders convicted prior to the law’s enactment are one of the categories of offenders unable to comply with subsection (b). As noted above, this interpretation would limit the Attorney General’s authority to providing regulations instructing offenders unable to comply with subsection (b) on how they should *initially* register.<sup>172</sup>

Moreover, the *Beasley* court acknowledged that a narrower interpretation of subsection (d) is more consistent with Congress’s intent in enacting SORNA.<sup>173</sup> The court noted that it was Congress’s intent “to establish a

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164. *Id.* at \*3.

165. 966 F.2d 335, 339 (8th Cir. 1992) (citing *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528-29 (1947)).

166. *Muzio*, 2007 WL 2159462, at \*3.

167. *See id.* at \*4-5.

168. No. 1:07-CR-115-TCB, 2007 WL 3489999, at \*6 (N.D. Ga. Oct. 10, 2007).

169. *Id.*

170. *Id.* at \*6 (quoting 42 U.S.C. § 16913(d) (2006)).

171. *See id.*

172. *Id.* at \*6 n.6.

173. *See id.* at \*7.

comprehensive and uniform sex offender registration system to ensure that offenders could not evade requirements by moving between states,<sup>174</sup> and that excepting all pre-Interim Rule travel from the registration requirement would defeat this purpose by allowing many sex offenders to slip through more loopholes.<sup>175</sup>

The Eleventh Circuit Court of Appeals became the first circuit court to directly address the subsection (d) interpretation issue in *United States v. Madera*.<sup>176</sup> Agreeing with *Kapp*, the court concluded that subsection (d) contains two clauses—the first “gives the Attorney General the power to determine whether SORNA applies retroactively . . . , and the second gives [him] the authority to promulgate rules regarding initial registration.”<sup>177</sup> The *Madera* court focused specifically on the language, “the Attorney General shall have the authority,” finding that “Congress’s use of the word ‘shall’ indicates that Congress was issuing a directive to the Attorney General specifically to make the [retroactivity] determination.”<sup>178</sup> The court found support for its holding in the very language of the Interim Rule, which stated that SORNA applies to all previously convicted sex offenders.<sup>179</sup> The court reasoned that if SORNA were retroactive on the day it was enacted, the Attorney General would not have been compelled to issue the Interim Rule in the first place.<sup>180</sup> The Eleventh Circuit acknowledged the tension between the text of subsection (d) and its heading, but did not find any ambiguity in the text that necessitated consideration of the heading.<sup>181</sup>

By contrast, three of the six circuits that have addressed this issue since the Eleventh Circuit’s *Madera* decision have agreed with the *Beasley* reasoning and concluded that subsection (d) applies exclusively to previously convicted sex offenders who were initially unable to register in their jurisdictions.<sup>182</sup> In

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174. *Id.*

175. *See id.*

176. 528 F.3d 852 (11th Cir. 2008).

177. *Id.* at 858.

178. *Id.* at 857 (emphasis added).

179. *Id.* at 858 (citing the codified rule at 28 C.F.R. § 72.3 (2008)).

180. *See id.*

181. *See id.* The facts of *Madera* are unique because the defendant was convicted at the district court level before the Attorney General issued the Interim Rule. *Id.* at 857. The Eleventh Circuit reversed the conviction because it found that the lower court impermissibly “undertook a statutory construction analysis” by declaring SORNA’s retroactivity without waiting for the Attorney General to issue the Rule. *See id.*

182. *See United States v. Samuels*, 319 F. App’x 389, 393 (6th Cir. 2009); *United States v. Hinckley*, 550 F.3d 926, 932 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009); *United States v. Lawrance*, 548 F.3d 1329, 1336 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 918 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009). *But see United States v. Hatcher*, 560 F.3d 222, 226-27 (4th Cir. 2009); *United States v. Dumont*, 555 F.3d 1288, 1291 (11th Cir.),

*United States v. Hinckley*, the Tenth Circuit concluded that subsection (d) could reasonably be read to suggest two different interpretations: (1) that Congress gave the Attorney General broad authority to explain whether *all* past offenders must register as well as how offenders who were initially unable to register should go about registering, or (2) that Congress limited the Attorney General's authority to explaining the registration requirements for past offenders who were initially unable to register.<sup>183</sup> Given the ambiguity, the *Hinckley* court turned to the heading of subsection (d) and legislative intent to help clarify subsection (d)'s meaning.<sup>184</sup> The court found that the heading clearly points to the latter interpretation, as it suggests that subsection (d) relates to those sex offenders who were initially unable to register.<sup>185</sup> Furthermore, the Tenth Circuit echoed the *Beasley* court in reasoning that the latter interpretation is more closely aligned with the legislative intent of SORNA.<sup>186</sup> The court recognized that adopting the former interpretation would frustrate Congress's goal of closing loopholes and preventing sex offenders from evading the system: "Reading subsection (d) to exclude all previously convicted sex offenders from SORNA's requirements would, as the Interim Rule explained, exempt 'virtually the entire existing sex offender population.'"<sup>187</sup>

The appropriate interpretation of the impact of the Interim Rule on both pre-Act and gap travelers is yet another issue that circuit courts have not resolved. Moreover, the petition for certiorari in *Carr v. United States* did not challenge SORNA's applicability on the basis of subsection (d); thus, it does not appear that this issue will be resolved by the Supreme Court anytime soon.<sup>188</sup>

#### V. *The Ex Post Facto Challenge to Retroactive Application of SORNA*

Where a court has concluded that SORNA is inapplicable to a defendant, whether on the basis of the meaning of the word "travels" or an interpretation of subsection (d), it has often declined to address the defendant's

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*cert. denied*, 130 S. Ct. 66 (2009); *United States v. Dixon*, 551 F.3d 578, 592 (7th Cir. 2008), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301); *Madera*, 528 F.3d at 858.

183. *See* 550 F.3d at 932-33.

184. *See id.* at 933-34.

185. *See id.* at 934.

186. *See id.* at 932.

187. *Id.* (quoting Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (interim rule Feb. 28, 2007)).

188. *See* Petition for a Writ of Certiorari, *supra* note 107.

constitutional challenges.<sup>189</sup> On the other hand, where a court has confirmed SORNA's applicability to the defendant, it has turned to the ex post facto argument.

*A. Overview of the Ex Post Facto Argument*

The prohibition against ex post facto laws comes from Article 1, Section 9, Clause 3 of the United States Constitution, which reads, "No Bill of Attainder or ex post facto Law shall be passed."<sup>190</sup> This fundamental principle reflects the belief that individuals should be able to prospectively shape their behavior based on the laws known to them at the time they undertake any action.<sup>191</sup> As one court explained, "If all the acts required for punishment are committed before the criminal statute punishing the acts takes effect, there is nothing the actor can do to avoid violating the statute."<sup>192</sup> Thus, the Constitution forbids any law that punishes an act innocent when committed or imposes additional punishment beyond that which was prescribed at the time the act was committed.<sup>193</sup>

The first step in resolving an ex post facto challenge is to determine if a particular statute is subject to ex post facto review.<sup>194</sup> A statute is subject to ex post facto review if it is punitive in nature.<sup>195</sup> If a statute is determined to be punitive, courts then employ the two-part test set forth in *Weaver v. Graham* to determine if the statute violates the Ex Post Facto Clause.<sup>196</sup> Under *Weaver*, a court first asks whether the penal law is being applied retroactively—that is, whether the individual is being punished for action undertaken before the law's enactment.<sup>197</sup> Second, a court asks whether the law disadvantages the individual affected by it.<sup>198</sup>

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189. See, e.g., *United States v. Hatcher*, 560 F.3d 222, 223-24 (4th Cir. 2009).

190. U.S. CONST. art. I, § 9, cl. 3.

191. See *United States v. Dixon*, 551 F.3d 578, 584 (7th Cir. 2008), cert. granted sub nom. *Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301).

192. *Id.*

193. See *United States v. Beasley*, No. 1:07-CR-115-TCB, 2007 WL 3489999, at \*2 (N.D. Ga. Oct. 10, 2007) (quoting *Weaver v. Graham*, 450 U.S. 24, 28-31 (1981)).

194. See *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*3 (S.D. Ala. Feb. 8, 2008) (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)).

195. *Id.* (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)). An ex post facto violation occurs when an individual is *punished* for an act that was innocent when committed; thus, statutes that lack a punitive purpose or effect are not capable of violating the Ex Post Facto Clause. See *id.*

196. 450 U.S. 24, 29 (1981).

197. *Id.*

198. *Id.*

SORNA defendants have alleged ex post facto violations in one of two ways: either they have challenged SORNA's general registration and notification requirements, or they have challenged prosecutions under § 2250(a) as applied to pre-Act travel and failure to register.<sup>199</sup> The crux of the former argument is that the duty to register amounts to additional "punishment" beyond what was mandated at the time the defendant committed the underlying sex offense.<sup>200</sup> Because of the Supreme Court's decision in *Smith v. Doe*,<sup>201</sup> discussed below, this argument has proven wholly unsuccessful.<sup>202</sup> The latter argument, on the other hand, has yielded conflicting decisions among courts. According to this argument, the Ex Post Facto Clause is violated when all of the acts proscribed by SORNA—travel and failure to register—occurred prior to its enactment.<sup>203</sup>

*B. Smith v. Doe: The Supreme Court Determines That Sex Offender Registration and Notification Requirements Are Not Punitive*

As district and circuit courts alike have grappled with the ex post facto implications of SORNA, many have turned to Supreme Court precedent to aid in their analyses. The most recent Supreme Court case to address a sex offender registration law is *Smith v. Doe*.<sup>204</sup> The respondents in the case took issue with an Alaska statute that required sex offenders to verify and periodically update their information.<sup>205</sup> Although the respondents were convicted of sex crimes several years before Alaska passed the sex offender registration law, the law was retroactive and mandated that they register.<sup>206</sup> The respondents sought a declaration that the Alaska statute violated the Ex Post Facto Clause because the registration requirement constituted additional punishment beyond what was imposed when they committed their offenses.<sup>207</sup>

In *Smith v. Doe*, the Supreme Court never reached the two-part test from *Weaver v. Graham*.<sup>208</sup> Instead, the Court focused its efforts on resolving the preliminary matter of whether the Alaska registration requirement was subject

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199. See, e.g., *United States v. Hinckley*, 550 F.3d 926, 936-37 (10th Cir. 2008) (challenging both his prosecution under § 2250(a) and SORNA's general registration requirements), *cert. denied*, 129 S. Ct. 2383 (2009).

200. See *id.* at 936.

201. 538 U.S. 84, 105-06 (2003) (finding that Alaska's registration requirement did not violate the Ex Post Facto Clause because the statute lacked a punitive purpose or effect).

202. See discussion *infra* Part V.C.

203. See discussion *infra* Part V.D-E.

204. *Smith*, 538 U.S. at 89.

205. See *id.* at 90-91.

206. *Id.* at 91.

207. See *id.*

208. See *Smith*, 538 U.S. 84.

to ex post facto review—an inquiry centered on the punitive nature of the statute.<sup>209</sup> Courts employ a two-step test to assess punitive nature.<sup>210</sup> First, a court asks whether the legislative intent was to impose punishment.<sup>211</sup> If a court determines that the legislative intent was nonpunitive, it next asks whether the statute is “so punitive either in purpose or effect as to negate [the legislature’s] intention to deem it civil.”<sup>212</sup>

Using the two-step test, the Court in *Smith v. Doe* began by exploring the Alaska legislature’s intent in enacting the sex offender registration statute.<sup>213</sup> Stating that the proper classification of a statute is “first of all a question of statutory construction,” the Court first considered the text and structure of the statute.<sup>214</sup> The Court noted that the stated purpose of the statute was to protect the public from reoffending sex offenders<sup>215</sup> and determined that imposing certain restrictions on sex offenders achieves a public protection purpose that is “a ‘legitimate nonpunitive government objective.’”<sup>216</sup> Additionally, the Court observed that the notification provisions of the statute were located in Alaska’s Health, Safety, and Housing Code,<sup>217</sup> as opposed to the criminal code, and that the Department of Public Safety, a department responsible for both criminal and civil regulatory laws, was charged with promulgating new regulations to implement the notification procedures.<sup>218</sup> Finally, the Court highlighted the absence of procedural safeguards usually associated with criminal laws.<sup>219</sup> Given these factors, the Court concluded that the legislature intended to enact a civil regulatory scheme.<sup>220</sup>

Because the Alaska legislature intended to enact a nonpunitive statute, the Supreme Court next asked whether the *effects* of the statute rendered it punitive.<sup>221</sup> Here, the Court noted that only the “clearest proof” would negate the Alaska legislature’s civil intent.<sup>222</sup> The Court employed the seven-factor effects test articulated in *Kennedy v. Mendoza-Martinez*, but focused on only

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209. *See id.* at 92.

210. *See id.* A statute is considered punitive if it fails either prong of the test. *See id.*

211. *Id.*

212. *Id.* (internal quotation marks omitted) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

213. *See id.*

214. *Id.* (quoting *Hendricks*, 521 U.S. at 361).

215. *Id.* at 93.

216. *Id.* (quoting *Hendricks*, 521 U.S. at 363).

217. *Id.* at 94.

218. *Id.* at 96.

219. *Id.*

220. *Id.*

221. *See id.* at 97.

222. *Id.* at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

five of the factors: (1) Has the regulatory scheme been traditionally or historically regarded as punitive in nature? (2) Does the law impose “an affirmative disability or restraint”? (3) Does the law “promote the traditional aims of punishment”? (4) Does the law exhibit “a rational connection to a nonpunitive purpose”? and (5) Is the law “excessive with respect to [that] purpose”?<sup>223</sup>

With respect to the first factor, the Court noted that sex offender registration laws are relatively new in origin; thus, they have not traditionally been regarded as a punishment.<sup>224</sup> Additionally, the Court rejected the argument that sex offender registration laws “resemble shaming punishments of the colonial period,”<sup>225</sup> stating that unlike the stigma generated through traditional shaming punishments, any “stigma” that arises from a public registration system is merely a “collateral consequence of a valid regulation.”<sup>226</sup> Second, the Court found that the law imposed no physical restraint and only minimal affirmative obligations.<sup>227</sup> Third, the Court determined that although the statute arguably served the goals of deterrence and retribution, those effects were only collateral to the chief purpose of public safety.<sup>228</sup> Fourth, the Court found that the statute was rationally related to the nonpunitive purpose of public safety because it notified the public about the presence of sex offenders in the community.<sup>229</sup> Finally, the Court held that the registration requirements—including their duration—were not excessive in relation to the purpose of public safety.<sup>230</sup> Specifically, the Court reasoned

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223. *Id.* at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). The Court did not consider the remaining two factors, stating,

The two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case. The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

*Id.* at 105.

224. *Id.* at 97.

225. *Id.*

226. *Id.* at 99.

227. *See id.* at 99-101. The Court rejected the argument that mandatory registration and publication of sex offender information impose a restraint on the offender’s ability to seek employment or obtain housing, finding that “these consequences flow not from the Act’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record.” *Id.* at 101.

228. *See id.* at 102.

229. *Id.* at 102-03.

230. *See id.* at 103-05.

that the high rate of recidivism and mobility among sex offenders necessitated wide dissemination of sex offender information for a prolonged period of time.<sup>231</sup> Ultimately, because the application of the *Mendoza-Martinez* factors did not produce clear proof of punitive effects, the Supreme Court determined that the Alaska statute was a nonpunitive regulatory law.<sup>232</sup>

*C. The Impact of Smith v. Doe on Challenges to SORNA's Registration and Notification Scheme*

Prosecutors have attempted, with varying degrees of success, to utilize the analysis from *Smith v. Doe* to explain why the retroactive application of SORNA does not violate the Ex Post Facto Clause. To the extent that defendants have challenged only the registration and notification provisions of SORNA—and not the penalty provision—prosecutors have been successful.<sup>233</sup> Courts have focused on the apparent similarities between Alaska's registration requirements and those of SORNA, and have concluded that the retroactive application of SORNA's registration requirements does not violate the Ex Post Facto Clause.

For example, in *United States v. Hinckley*, the defendant challenged SORNA's "overall applicability" by arguing that its registration requirements increase punishment retroactively.<sup>234</sup> In making this claim, the defendant attempted to distinguish SORNA's registration requirements from those in *Smith v. Doe* to show that SORNA is a punitive statute.<sup>235</sup> The defendant cited such factors as mandatory internet dissemination of offenders' information, the community notification requirement, and the possibility of felony criminal penalties as proof that SORNA was intended to be more than just a civil regulatory scheme.<sup>236</sup> The Tenth Circuit, however, noted that the express legislative objective was to "protect the public from sex offenders and offenders against children," a purpose more indicative of a civil intent than a punitive one.<sup>237</sup>

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231. *See id.*

232. *Id.* at 105-06.

233. *See, e.g.,* *United States v. Dixon*, 551 F.3d 578, 584 (7th Cir. 2008) (stating that attack of SORNA's registration requirement is not viable in light of *Smith v. Doe*), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301); *United States v. Hinckley*, 550 F.3d 926, 938 (10th Cir. 2008) (declaring that SORNA is still a civil regulatory scheme despite using criminal penalties to further its objectives), *cert. denied*, 129 S. Ct. 2383 (2009); *see also* *United States v. May*, 535 F.3d 912, 919 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009); *United States v. Stinson*, 507 F. Supp. 2d 560, 565 (S.D.W. Va. 2007).

234. 550 F.3d at 936.

235. *See id.* at 937.

236. *Id.*

237. *Id.*

Next, the *Hinckley* court asked whether SORNA's effects are so punitive as to nullify the civil legislative label.<sup>238</sup> Here, the Tenth Circuit acknowledged that SORNA contains a criminal penalty for failure to register, but noted that "invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive."<sup>239</sup> Furthermore, the court dismissed as insignificant the placement of SORNA's penalty provision within the criminal code, attributing more significance to the placement of SORNA's registration provisions under the civil heading of "public health and welfare."<sup>240</sup> Finally, the court echoed *Smith v. Doe* in concluding that any public shame associated with the dissemination of sex offender information is "but a collateral consequence" of the law's public protection objective.<sup>241</sup> Ultimately, the court found that SORNA's chief purpose—to inform the public about the presence of sex offenders—outweighs any punitive effects that arise from its penalty provision.<sup>242</sup>

#### D. *Smith v. Doe's Influence on Challenges to SORNA's Penalty Provision*

Although *Smith v. Doe* has largely precluded challenges to SORNA's registration and notification provisions, the result has been different for challenges to prosecutions under SORNA.<sup>243</sup> For example, in *United States v. Smith*, the defendant argued that prosecution under 18 U.S.C. § 2250 on the basis of his pre-Act interstate travel violated the Ex Post Facto Clause because it subjected him to additional punishment beyond what was prescribed when he traveled and failed to register.<sup>244</sup> The United States District Court for the Eastern District of Michigan concluded that the facts of the case were distinguishable from *Smith v. Doe*.<sup>245</sup>

The court began by contrasting the placement of SORNA's penalty provision in Title 18 of the United States Code, "Crimes and Criminal

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238. *Id.*

239. *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 96 (2003)).

240. *See id.*

241. *Id.* at 937-38.

242. *See id.* at 938.

243. *See, e.g.*, *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*4 (S.D. Ala. Feb. 8, 2008) (finding that the "government's reliance on *Smith* is misplaced because the case only addresses whether sex offender registration and notification statutes are subject to an ex post facto challenge"); *see also* *United States v. Gillette*, 553 F. Supp. 2d 524, 527 (D.V.I. 2008); *United States v. Smith*, 481 F. Supp. 2d 846, 851 (E.D. Mich. 2007).

244. 481 F. Supp. 2d at 851. At the time of the defendant's travel in 2004, the law capped his potential incarceration at one year. *See id.*; *see also* Wetterling Act, 42 U.S.C. § 14072(i)(4) (2000). SORNA increased the maximum incarceration to ten years. *See id.*; *see also* 18 U.S.C. 2250(a) (2006).

245. *See Smith*, 481 F. Supp. 2d at 852.

Procedure,” with the placement of the Alaska statute’s registration requirement in Alaska’s civil code.<sup>246</sup> The court also pointed to the substantial statutory penalty of up to ten years imprisonment for failure to register as evidence of punitive intent.<sup>247</sup>

Finally, the court distinguished the case from *Smith v. Doe* on the basis of the particular challenge raised.<sup>248</sup> In *Smith v. Doe*, the respondents were not convicted under Alaska’s statute; they merely sought a declaration that the registration requirement was not applicable to previous sex offenders.<sup>249</sup> By contrast, the defendant in *United States v. Smith* was convicted under SORNA and challenged the imposition of *criminal penalties* for travel that occurred before the statute’s enactment.<sup>250</sup> Given the numerous differences in the facts of *Smith v. Doe* and *United States v. Smith*, the court in *United States v. Smith* ultimately concluded that § 2250 constitutes a punitive statute for purposes of an ex post facto challenge.<sup>251</sup>

Conversely, a handful of courts have considered prosecutions under SORNA analogous to the situation in *Smith v. Doe*.<sup>252</sup> Unlike the court in *United States v. Smith*, these courts have failed to recognize a meaningful distinction between the challenge mounted in *Smith v. Doe* and the way in which SORNA defendants have challenged § 2250. Instead, these courts have focused on the similar objectives of the Alaska statute and SORNA and have concluded that the common public protection purpose renders the statutes

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246. *See id.* at 852-53.

247. *See id.* at 853. The court highlighted the shift in classification of the offense from a misdemeanor to a felony as additional proof of punitive intent. *See id.*

248. *See id.* at 852.

249. *Id.* (citing *Smith v. Doe*, 538 U.S. 84, 91 (2003)).

250. *Id.* at 847-48. The court in *United States v. Beasley* elaborated on this crucial distinction:

[W]hile *Smith v. Doe* stands for the proposition that Defendant could be required to register in Georgia without violating the Ex Post Facto Clause, it does not answer the question of whether he can be prosecuted for his interstate travel and failure to timely register after he arrived in Georgia.

2007 WL 3489999, No. 1:07-CR-115-TCB, at \*3 (N.D. Ga. Oct. 10, 2007).

251. *Smith*, 481 F. Supp. 2d at 854.

252. *See, e.g.*, *United States v. Carr*, No. 1:07-CR-73, 2007 WL 3256600, at \*3 (N.D. Ind. Nov. 2, 2007), *aff’d sub nom.* *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008), *cert. granted sub nom.* *Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301); *United States v. Hulén*, No. 07-30004, 2007 WL 2343885, at \*2 (W.D. Ark. Aug. 15, 2007), *rev’d*, 309 F. App’x 79 (8th Cir. 2009); *United States v. Manning*, No. 06-20055, 2007 WL 624037, at \*1 (W.D. Ark. Feb. 23, 2007); *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481, at \*5 (W.D. Okla. Feb. 7, 2007); *United States v. Madera*, 474 F. Supp. 2d 1257, 1264 (M.D. Fla. 2007), *rev’d*, 528 F.3d 852 (11th Cir. 2008).

sufficiently similar to warrant comparable treatment.<sup>253</sup> In essence, these courts have suggested that *Smith v. Doe* precludes *any* ex post facto challenge to a sex offender registration law, regardless of the context in which it is raised.

#### *E. SORNA and the Weaver Two-Prong Test*

Recall that the punitive-intent analysis resolves only the preliminary matter of whether SORNA is subject to ex post facto review.<sup>254</sup> While the first courts to address ex post facto challenges seemed to rely extensively on the *Smith v. Doe* analysis,<sup>255</sup> courts have recently shifted away from *Smith v. Doe*—reflecting their implicit acceptance of the SORNA penalty provision’s punitive nature—toward the two-part test from *Weaver v. Graham* to determine whether SORNA’s retroactive application actually violates the Ex Post Facto Clause.<sup>256</sup>

According to the *Weaver* test, “[T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.”<sup>257</sup> These elements are discussed in reverse order, as the first element has proven much more controversial in the context of SORNA litigation.

The requirement that the law disadvantage the offender has been interpreted to mean that the law either changes the definition of criminal conduct, criminalizes conduct that was innocent when committed, or increases punishment beyond what was in place when the law was broken.<sup>258</sup> No SORNA defendant can reasonably argue that the law criminalizes behavior that was innocent when committed, given that every state and the federal government maintained sex offender registration laws before SORNA’s enactment.<sup>259</sup> Defendants have, however, been able to successfully show that SORNA increases the punishment for the crime of failing to register.<sup>260</sup> While the Wetterling Act fixed the maximum penalty for a first-time failure

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253. See, e.g., *Hulen*, 2007 WL 2343885, at \*2.

254. See *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*6 (S.D. Ala. Feb. 8, 2008) (concluding that § 2250 is a punitive statute and therefore “subject to . . . ex post facto challenge”).

255. See, e.g., *Hulen*, 2007 WL 2343885, at \*2.

256. See, e.g., *United States v. George*, 579 F.3d 962, 968-69 (9th Cir. 2009).

257. *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citations omitted).

258. See *Lynce v. Mathis*, 519 U.S. 433, 441 & n.13 (1997).

259. See *Smith v. Doe*, 538 U.S. 84, 90 (2003).

260. See, e.g., *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*6 (S.D. Ala. Feb. 8, 2008) (finding that “[t]here is no question that § 2250, which increases punishment for Kent’s crime by a factor of ten, disadvantages him”).

to register at one year incarceration, SORNA changed the crime to a felony carrying a possibility of ten years imprisonment.<sup>261</sup> As a result of this increase, most defendants argue that SORNA disadvantages them because it imposes additional punishment for the offense of failing to register. Because this fact is undisputed, courts have spent little time discussing the “disadvantage” element of the *Weaver* test.

By contrast, the issue of whether SORNA is “retrospective” has generated significant debate among federal courts. A penal law is said to be “retrospective” if all the events necessary to charge an individual occurred before the law’s enactment.<sup>262</sup> Like the justification for the ex post facto prohibition generally, the justification for this requirement is one of fairness: if all the events required to charge an individual have already occurred before a law’s passage, there is nothing the individual can do to avoid breaking the law.<sup>263</sup> On the other hand, if at least one of the acts necessary to charge the individual occurred *after* passage of the law, the individual had the ability to avoid breaking the law, and the fairness rationale is not implicated.<sup>264</sup>

The controversy surrounding whether SORNA is “retrospective” has little to do with whether the acts constituting the offense actually occurred.<sup>265</sup> That is, in the ordinary case, the defendant concedes that he was convicted of a previous sex offense, traveled, and failed to update his registration before SORNA was passed.<sup>266</sup> Instead, the controversy surrounds when the offense

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261. Compare 42 U.S.C. § 14072(i)(4) (2006), with 18 U.S.C. § 2250(a) (2006); see also *supra* note 46.

262. See *United States v. Dixon*, 551 F.3d 578, 584 (7th Cir. 2008), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301).

263. See *id.*

264. See *id.*

265. It is important to note that the distinction between pre-Act and gap travel is inconsequential to the ex post facto discussion, as the arguments by both types of defendants are functionally identical. Pre-Act travelers argue that SORNA satisfies the “retrospective” requirement because it punishes them for convictions, travel, and failures to register that occurred before SORNA was passed. See, e.g., *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*2 (S.D. Ala. Feb. 8, 2008). Gap travelers argue that SORNA satisfies the requirement because it punishes them for travel and failures to register that occurred before SORNA was made applicable to them through the Attorney General’s rule. See, e.g., *United States v. Ditomasso*, 552 F. Supp. 2d 233, 240 (D.R.I. 2008). Assuming that a court determines that the duty to register did *not* arise until the Attorney General issued the Interim Rule, the gap travelers’ argument is, for all intents and purposes, the same as the pre-Act travelers’ argument that their convictions, travel, and failures to register all occurred before they had a legal obligation to abide by SORNA’s requirements. In the interest of simplicity, when this comment hereafter refers to events occurring before SORNA’s enactment, it includes events occurring before SORNA’s applicability in the case of gap travel.

266. See, e.g., *United States v. Dixon*, No. 3:07-CR-72(01) RM, 2007 WL 4553720, at \*1 (N.D. Ind. Dec. 18, 2007), *rev’d*, 551 F.3d 578, *cert. granted sub nom. Carr*, 130 S. Ct. 47.

itself is *completed*.<sup>267</sup> The classic SORNA case presents the following scenario: the defendant moved from one state to another and failed to update his registration *before* July 2006, then failed to update his registration *after* SORNA was passed.<sup>268</sup> In this type of scenario, courts have struggled to determine when the offense of failing to register is completed.<sup>269</sup>

To avoid a finding that SORNA violates the Ex Post Facto Clause, prosecutors urge courts to view failure to register as an ongoing offense—an offense that continues until the individual comes into compliance with SORNA. Under this view, if an individual fails to register both before and after SORNA’s enactment, then technically the offense is not “completed” until the individual decides to register. Courts have disagreed about whether this is an accurate characterization of § 2250.<sup>270</sup>

Many district courts have found that failure to register is not an ongoing offense, basing their conclusion on one or both of two related rationales: (1) an individual who traveled before SORNA’s enactment committed all of the acts necessary to establish a conviction for failure to register under the Wetterling Act after the tenth day of failing to register,<sup>271</sup> and (2) failing to register is distinct from other crimes declared to be “ongoing offenses” for purposes of the Ex Post Facto Clause.<sup>272</sup> For instance, in *United States v. Smith*, a district court in Michigan dismissed the ongoing offense characterization, highlighting the ten-day limit for sex offenders to register under the Wetterling Act.<sup>273</sup> Because an unregistered offender could be convicted of failing to register on the eleventh day, the court reasoned that the crime of failure to register, under either the Wetterling Act or SORNA, cannot

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267. *See id.* at \*2-3.

268. *See id.* at \*1.

269. *See id.* at \*2.

270. Following is a nonexhaustive list of courts that have concluded that 18 U.S.C. § 2250 penalizes an ongoing offense: *United States v. George*, 579 F.3d 962, 968-69 (9th Cir. 2009); *Dixon*, 551 F.3d at 582; *United States v. Hinckley*, 550 F.3d 926, 936 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009); *United States v. Akers*, No. 3:07-CR-00086(01)RM, 2008 WL 914493, at \*6 (N.D. Ind. Apr. 3, 2008); *United States v. Villagomez*, No. CR-08-19-D, 2008 WL 918639, at \*3 (W.D. Okla. Apr. 2, 2008). Following is a nonexhaustive list of courts that have found that § 2250 does not describe an ongoing offense: *Kent*, 2008 WL 360624, at \*8; *United States v. Wilson*, No. 2:06-cr-867 TC, 2007 WL 3046290, at \*2 (D. Utah Oct. 16, 2007); *United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3 (W.D. Okla. Sept. 21, 2007); *United States v. Sallee*, No. CR-07-152-L, 2007 WL 3283739, at \*3 (W.D. Okla. Aug. 13, 2007); *United States v. Smith*, 481 F. Supp. 2d 846, 852 (E.D. Mich. 2007).

271. *See, e.g., Smith*, 481 F. Supp. 2d at 852; *Wilson*, 2007 WL 3046290, at \*2; *Deese*, 2007 WL 2778362, at \*3.

272. *See, e.g., United States v. Gillette*, 553 F. Supp. 2d 524, 527 (D.V.I. 2008); *Kent*, 2008 WL 360624, at \*8.

273. 481 F. Supp. 2d at 852; *see also* 42 U.S.C. § 14072(g) (2006).

be an ongoing offense.<sup>274</sup> In other words, the government had all the “facts” it needed to support Smith’s prosecution for failure to register before July 2006, illustrating that the offense was completed before SORNA was enacted.<sup>275</sup>

In *United States v. Kent*, the government argued that a violation of § 2250 was similar to a violation of the felon-in-possession statute, which had previously been declared a continuing offense by the Eighth Circuit Court of Appeals.<sup>276</sup> The Eighth Circuit had found that the fact that a felony conviction predated the felon-in-possession statute was “immaterial” in an ex post facto challenge, provided that the prohibited conduct—possession of a firearm—continued after the law was enacted.<sup>277</sup> By analogy, the prosecution in *Kent* argued that if the felon-in-possession statute is not retrospective even when it draws on an antecedent felony conviction, SORNA cannot be retrospective just because it draws on a previous sex conviction.<sup>278</sup> The district court in *Kent*, however, was quick to distinguish the felon-in-possession case from the SORNA prosecution at issue, noting that the prohibited conduct in Kent’s case, traveling and failing to update his registration, *both* occurred before the law was enacted.<sup>279</sup> The court summarized the difference as follows: “Kent’s ex post facto challenge is not based on the argument that his prior conviction of a[n] . . . offense occurred before SORNA was enacted, it is based on the argument that all of the facts necessary to make the criminal case against him occurred before SORNA was enacted.”<sup>280</sup>

The court determined that failing to register as a sex offender is more comparable to failing to register for the draft.<sup>281</sup> The court noted that, similar to the act of failing to register for the draft,

[t]here 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 [Supreme] Court has held continues as

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274. *Smith*, 481 F. Supp. 2d at 852. Interestingly, the court seemed to view the crime of failure to register in the abstract, rather than as two separate crimes under the Wetterling Act and SORNA. See discussion *infra* Part VI.D.2 for further development of this idea.

275. See *Smith*, 481 F. Supp. 2d at 852.

276. See *Kent*, 2008 WL 360624, at \*8; see also 18 U.S.C. § 922(g) (2006) (felon-in-possession statute).

277. *United States v. Pfeifer*, 371 F.3d 430, 436 (8th Cir. 2004) (citing, inter alia, *Brady v. United States*, 26 F.3d 282, 290-91 (2d Cir. 1994)).

278. See *Kent*, 2008 WL 360624, at \*8.

279. See *id.*

280. *Id.*

281. See *id.*

long as the conspirators engage in overt acts in furtherance of the substantive evil Congress sought to prevent.<sup>282</sup>

While a handful of district courts have held that failure register is not an ongoing offense, the four circuit courts to address the issue have reached the opposite conclusion.<sup>283</sup> In *United States v. Dixon*, the Seventh Circuit Court of Appeals analogized failure to register under SORNA to a prisoner's escaping after receiving a two-week furlough.<sup>284</sup> While the prisoner is technically guilty of escape after two weeks of failing to appear, he remains in violation of the law for the duration of his unauthorized absence.<sup>285</sup> Likewise, the court determined that although a sex offender violates § 2250 after three days of failing to update his registration (or ten days in the case of the Wetterling Act), he remains in violation of the law as long as he fails to register.<sup>286</sup> Interestingly, despite concluding that failure to register is an ongoing offense, the court nevertheless reversed Dixon's conviction after finding inadequate proof regarding the timing of his failure to register.<sup>287</sup> The indictment charged that Dixon failed to register "from on or about February 28, 2007 to on or about April 5, 2007," but the trial transcript did not contain any proof that his failure extended beyond February 28, 2007.<sup>288</sup> The Seventh Circuit, after determining that SORNA was not applicable to Dixon until the Attorney General issued the Interim Rule, held that Dixon was entitled to a "reasonable time" to register after February 2007.<sup>289</sup> Without any proof that he was given a reasonable time to register, the court concluded that all of the elements of Dixon's crime occurred before the law was applicable to him and that punishing Dixon under § 2250 would run afoul of the Ex Post Facto Clause.<sup>290</sup>

The timing issues confronted by the court in *Dixon* are unique, and most courts that adopt the ongoing offense characterization also conclude that

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282. *Id.* (quoting *Toussie v. United States*, 397 U.S. 112, 119 (1970)).

283. *See United States v. George*, 579 F.3d 962, 968-69 (9th Cir. 2009); *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301); *United States v. Hinckley*, 550 F.3d 926, 936 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009); *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009).

284. 551 F.3d at 582 (concluding that failure to register is an ongoing offense, but finding an ex post facto violation because of inadequate proof of failure to register after SORNA became applicable).

285. *See id.*

286. *Id.*; *see also* 42 U.S.C. §§ 14072(g), 16913(c) (2006).

287. *Dixon*, 551 F.3d at 585-86.

288. *See id.* at 585.

289. *See id.* at 585-86.

290. *See id.* at 586.

punishing pre-Act travel is not violative of the Ex Post Facto Clause. In *United States v. Hinckley*, the Tenth Circuit Court of Appeals revisited SORNA's legislative intent to explain why failure to register necessarily implies a continuing violation.<sup>291</sup> Citing *Toussie v. United States*, the court stated that an offense is deemed "continuing" when either (a) the language of the statute expressly designates it as such, or (b) the nature of the crime itself supports the inference that Congress must have intended for it to be considered "continuing."<sup>292</sup> The Tenth Circuit noted the absurdity of Congress's passing a law, the primary purpose of which was to prevent sex offenders from evading the system, and then exempting those same offenders from the consequences of violating the law.<sup>293</sup> The court ultimately concluded that Hinckley's conviction did not violate the Ex Post Facto Clause, both because failing to register is an ongoing offense and because SORNA is a civil, nonpunitive law.<sup>294</sup>

As with questions regarding SORNA's applicability to pre-Act and gap travelers, courts remain split on the question whether the retroactive application of § 2250 violates the Ex Post Facto Clause. Only four circuit courts have squarely addressed the issue, and while all four courts held that failing to register is a continuous offense,<sup>295</sup> only three found that convictions did not run afoul of the Ex Post Facto Clause.<sup>296</sup> The other circuit courts to address SORNA have avoided addressing constitutional questions by resolving cases on grounds of statutory inapplicability.<sup>297</sup> The Supreme Court will have the opportunity to confront and resolve the ex post facto issue in *Carr v. United States*.<sup>298</sup>

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291. See 550 F.3d 926, 936 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009).

292. *Id.* (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970)).

293. *Id.* (quoting *United States v. Hinen*, 487 F. Supp. 2d 747, 753 (W.D. Va. 2007), *rev'd sub nom.* *United States v. Hatcher*, 560 F.3d 222 (4th Cir. 2009)).

294. See *id.* at 936-38.

295. See cases cited *supra* note 283.

296. *United States v. Dixon*, 551 F.3d 578, 586 (7th Cir. 2008), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301); *Hinckley*, 550 F.3d at 936; *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009).

297. See *Hatcher*, 560 F.3d at 223 (finding that the court "need not reach the[] constitutional questions because [it] find[s] that, as a matter of statutory interpretation, SORNA's registration requirements did not apply to the Appellants at the time they committed the acts giving rise to their indictments"); *United States v. Husted*, 545 F.3d 1240, 1247 (10th Cir. 2008) (stating that "[b]ecause we hold that SORNA does not apply to Husted, whose interstate travel was complete prior to the Act's effective date, we need not reach any of the remaining arguments"); *United States v. Madera*, 528 F.3d 852, 859 (11th Cir. 2008) (declining to address the constitutional issues after determining that an indictment brought before the Interim Rule was grounds for dismissal).

298. See *Petition for a Writ of Certiorari*, *supra* note 107, at 29-32 (asking the Court to

### VI. Analysis

Because of tremendous inconsistency in the lower federal courts, the answers to the following four questions raised by the retroactive application of SORNA remain inconclusive: (1) Does Congress's use of the present-tense word "travels" preclude application of SORNA to past travel?<sup>299</sup> (2) Was SORNA retroactive from the date of its enactment, or did the Attorney General make it retroactive with the Interim Rule?<sup>300</sup> (3) Is SORNA punitive and therefore subject to ex post facto review?<sup>301</sup> and (4) Does the retroactive application of SORNA to a defendant who both traveled and failed to register before the statute's passage violate the Ex Post Facto Clause?<sup>302</sup>

This comment argues that the present-tense word "travels" does not preclude application of SORNA to past travel because limiting SORNA's applicability to future travel squarely conflicts with Congress's intent in passing the statute, and because language used in the statute suggests that interstate travel was intended to be a status, rather than temporal, requirement. Next, this comment argues that SORNA was retroactive from the date of its enactment because subsection (d) limits the Attorney General's authority to specifying SORNA's applicability to previously convicted sex offenders who were not required to register in their states at the time they committed their sex offenses.

This comment then contends that SORNA's penalty provision is clearly punitive in nature, thereby rendering the *Smith v. Doe* inquiry unhelpful to the SORNA analysis. Finally, this comment argues that the retroactive application of § 2250 to pre-Act travel and failure to register does not violate the Ex Post Facto Clause because SORNA is not "retrospective" when applied to defendants who also failed to register after the statute's enactment.

#### *A. Limiting SORNA's Reach to Future Travel Undermines the Purpose of the Law*

Congress passed the Adam Walsh Act for the express purpose of "clos[ing] potential gaps and loopholes under the old law, and generally strengthen[ing] the nationwide network of sex offender registration and notification

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resolve whether failure to register is an ongoing offense).

299. See discussion *supra* Part IV.B.

300. See discussion *supra* Part IV.C.

301. See discussion *supra* Part V.D.

302. See discussion *supra* Part V.E. Recall that the issues concerning the constitutionality of SORNA's retroactive application apply to both pre-Act and gap travelers. See *supra* note 265.

programs.”<sup>303</sup> Specifically, Congress was concerned with the number of recorded sex offenders that were able to evade the system by moving to states with more lenient registration laws.<sup>304</sup> Senator Frist summarized SORNA’s stern message as follows: “If you don’t register, we will find you, and you will go to jail.”<sup>305</sup>

The Tenth Circuit, along with several district courts, have all but dismissed Congress’s objective by limiting SORNA’s reach to individuals who travel and fail to register after July 2006.<sup>306</sup> While it might be tempting to sympathize with defendants who had no duty to register before SORNA and were suddenly faced with criminal prosecutions under the new law, these are not the type of individuals at issue. Rather, the individuals prosecuted under SORNA had state and federal obligations to register before passage of SORNA, moved before July 2006, and *continually failed to register* for months and even years before and after SORNA was passed.<sup>307</sup> Given the legislature’s intent to combat this type of noncompliance, the decision to exclude these individuals defies common sense.

Courts like the Tenth Circuit Court of Appeals in *Husted* have focused exclusively on Congress’s use of the present tense, concluding that the deliberate choice to use present tense evidences an intent to target only future travel.<sup>308</sup> This rigid interpretation of the word “travels” not only ignores SORNA’s intent, but is inconsistent with the rest of 18 U.S.C. § 2250.<sup>309</sup> As

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303. OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, FREQUENTLY ASKED QUESTIONS: THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) PROPOSED GUIDELINES 3 (2007), [http://www.ojp.usdoj.gov/smart/pdfs/sorna\\_faqs.pdf](http://www.ojp.usdoj.gov/smart/pdfs/sorna_faqs.pdf).

304. See 152 CONG. REC. S8012, S8030 (daily ed. July 20, 2006) (statement of Sen. Frist).

305. *Id.*

306. See, e.g., *United States v. Husted*, 545 F.3d 1240, 1243-44 (10th Cir. 2008).

307. See, e.g., *United States v. May*, 535 F.3d 912, 915 (8th Cir. 2008) (noting that the defendant had a history of noncompliance with sex offender registration laws, having been charged with failure to register under state law in 2002 and 2004, and most recently under SORNA in 2007), *cert. denied*, 129 S. Ct. 2431 (2009); *United States v. Pitts*, No. 07-157-JVP-CN, 2008 WL 474244, at \*2 (M.D. La. Feb. 14, 2008) (stating that the defendant, convicted of a sex crime in Virginia in 1992, failed to register from October 1998 through November 2006 despite moving to Louisiana sometime before February 2001).

308. See *Husted*, 545 F.3d at 1243-44; see also *United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362, at \*3 (W.D. Okla. Sept. 21, 2007); *United States v. Sallee*, No. CR-07-152-L, 2007 WL 3283739, at \*2 (W.D. Okla. Aug. 13, 2007); *United States v. Heriot*, Cr. No. 3:07-323, 2007 WL 2199516, at \*2 (D.S.C. July 27, 2007); *United States v. Smith*, 481 F. Supp. 2d 846, 847 (E.D. Mich. 2007).

309. Recall that an individual violates § 2250 if she is required to register under SORNA because of a previous sex-offense conviction, “travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country,” and fails to register or update her registration under SORNA. 18 U.S.C. § 2250(a) (2006); see also *supra* text accompanying note 110.

the Seventh Circuit correctly noted, SORNA also applies to one who “enters or leaves” Indian country, as well as one who “resides” in Indian country.<sup>310</sup> The deliberate use of all three verbs suggests that Congress intended to include within the statute’s reach anyone who has ever lived in Indian country.<sup>311</sup> By targeting both past and future residents of Indian country, Congress demonstrated its intent to create a status requirement rather than a temporal requirement.<sup>312</sup> As the Seventh Circuit observed, if one interprets “travels” as a temporal requirement and “resides” as a status requirement, “a sex offender who has resided in Indian country since long before the Act was passed is subject to the Act but not someone who crossed state lines before the Act was passed.”<sup>313</sup> This illogical result supports the view that Congress meant for “travels” to be interpreted broadly, covering the entire spectrum of travel dates. As the *Dixon* court noted, “the present tense is commonly used to refer to past, present, and future all at the same time.”<sup>314</sup>

Additional support for a broad interpretation of “travels” comes from the fact that SORNA targets, as the principal evil, the act of failing to register.<sup>315</sup> As Judge Posner correctly noted in *Dixon*, “the statute does not require that the defendant’s travel postdate the Act, any more than it requires that the conviction of the sex offense that triggers the registration requirement postdate it. The evil at which it is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected.”<sup>316</sup> To put it simply, SORNA does not care about the interstate travel itself, which merely serves as the jurisdictional hook. Thus, it makes sense for Congress to use “travels” in the broad sense—not as a temporal requirement, but as a jurisdictional requirement. Had Congress purposefully injected time into the statute by writing “traveled” or “will travel,” it would have suggested that the time of travel was somehow important to the crime. That Congress chose not to inject time into the statute is strong evidence that SORNA punishes the act of failing to register and not the act of travel.

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310. *United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301).

311. *See id.*

312. *See id.*

313. *Id.*

314. *Id.* (quoting *Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992)).

315. *See* 42 U.S.C. § 16913 (2006); *see also supra* text accompanying notes 59-63, 66 (discussing the legislative history and purpose of SORNA).

316. *Dixon*, 551 F.3d at 582.

The Tenth Circuit held that SORNA does not apply to pre-Act travel by improperly drawing on the Ninth Circuit's decision in *United States v. Jackson*.<sup>317</sup> The statute in *Jackson* punished any person who "travels" in foreign commerce and "engages" in illicit sexual conduct.<sup>318</sup> The Ninth Circuit interpreted the word "travels" to reach only post-enactment travel.<sup>319</sup> In reaching this conclusion, the court relied heavily on the use of the present tense throughout the entire statute.<sup>320</sup> Specifically, the court reasoned that the phrase "engages in any illicit sexual conduct" necessarily applied to acts occurring after the statute's enactment.<sup>321</sup> Otherwise, the court explained, the Ex Post Facto Clause would be implicated because both the defendant's travel and the sexual act occurred before the law's passage.<sup>322</sup> Because Congress's use of the word "engages" represented a deliberate attempt to preclude past acts, consistency of interpretation demanded a similar interpretation of "travels."<sup>323</sup>

*Husted* overlooked the key distinction between SORNA and the statute in *Jackson*: the statute in *Jackson* had to be interpreted to require future travel to avoid an ex post facto violation. SORNA does not. That is, the element of failing to register is distinguishable from the element of engaging in sexual conduct because it is something that can be accomplished over time; the offense is potentially ongoing. Accordingly, the phrase "fails to register" could be interpreted to include a failure beginning before SORNA's enactment but continuing after its enactment without violating the Ex Post Facto Clause. Because SORNA need not be interpreted to require future failure to register to avoid the possibility of an ex post facto violation (unlike the situation in *Jackson*), an interpretation of "travels" that encompasses only future travel should not be mandated.

Congress's use of the word "travels" should not be interpreted to exclude pre-Act travelers from SORNA's reach. SORNA's language encompassing one who "resides" in or "enters or leaves" Indian country demonstrates that "travels" was intended to be a status requirement, rendering the time of travel irrelevant. This interpretation is logical, as SORNA does not criminalize interstate travel; rather, it criminalizes the act of failing to register. Moreover, unlike with the foreign sexual conduct statute at issue in *Jackson*, a limited

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317. See *United States v. Husted*, 545 F.3d 1240, 1244 (citing *United States v. Jackson*, 480 F.3d 1014 (9th Cir. 2007)).

318. See 480 F.3d at 1015 n.1, 1020 (discussing 18 U.S.C. 2423(c) (2000 & Supp. 2003)).

319. See *id.* at 1020.

320. See *id.*

321. See *id.*

322. See *id.*

323. See *id.*

application to future travel is not necessary to avoid an Ex Post Facto Clause violation.

*B. A Careful Examination of the Rest of SORNA's Language, Subsection (d)'s Heading, and Legislative Intent Resolves Subsection (d)'s Ambiguity in Favor of Application Only to Past Sex Offenders Who Were Initially Unable to Register in Their Jurisdictions*

The language of subsection (d) suggests two possible interpretations: either the Attorney General's authority to specify SORNA's retroactivity extends *only* to previously convicted sex offenders who were unable to register when they committed their offenses, or his authority extends to *all* previously convicted sex offenders, including those who were initially unable to register.<sup>324</sup> An examination of the rest of SORNA's language, subsection (d)'s heading, and legislative intent resolves the ambiguity in favor of the former interpretation.

Courts have avoided looking beyond the text of subsection (d) by simply concluding that it is not ambiguous.<sup>325</sup> This conclusion ignores the fact that valid arguments exist for both interpretations. The proponents of the "two-group interpretation," which holds that Congress delegated to the Attorney General the authority to specify whether all past offenders must register and to promulgate registration rules for past offenders and offenders initially unable to register, have a legitimate argument that subsection (d)'s sentence structure supports their interpretation, as the comma could be seen as a separation between two clauses that serve different functions.<sup>326</sup> The two clauses have different verbs that seem to refer to different groups—"specify" refers to past offenders, while "prescribe" refers to past offenders *and* other

324. See 42 U.S.C. § 16913(d) (2006); see also discussion *supra* Part IV.C.

325. See, e.g., *United States v. Hatcher*, 560 F.3d 222, 226-27 (4th Cir. 2009); *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008); *United States v. Cole*, No. 07-cr-30062-DRH, 2007 WL 2714111, at \*3 (S.D. Ill. Sept. 17, 2007); *United States v. Stinson*, 507 F. Supp. 2d 560, 568-69 (S.D.W. Va. 2007); *United States v. Heriot*, Cr. No. 3:07-323, 2007 WL 2199516, at \*2 (D.S.C. July 27, 2007); *United States v. Muzio*, No. 4:07CR179 CDP, 2007 WL 2159462, at \*5 (E.D. Mo. July 26, 2007); *United States v. Smith*, 528 F. Supp. 2d 615, 619 (S.D.W. Va. 2007); *United States v. Kapp*, 487 F. Supp. 2d 536, 542 (M.D. Pa. 2007).

326. Recall that subsection (d), captioned "Initial registration of sex offenders unable to comply with subsection (b) of this section," reads as follows:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before [the enactment of this Act] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

42 U.S.C. § 16913(d).

offenders initially unable to register—and it could be argued that the two-group interpretation is necessary to give full meaning to both clauses. Additionally, proponents of the “two-group interpretation” have a strong argument that subsection (d) contemplates two groups of offenders based on the use of the words “any such” and “other categories.”<sup>327</sup> These words could indicate that past sex offenders are one group contemplated by the law and that other offenders initially unable to register are another group.

On the other hand, proponents of the “one-group interpretation” have a strong argument that the last half of the sentence suggests that the drafters targeted a single group of offenders who were initially unable to register.<sup>328</sup> The phrase “and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b)” could be interpreted as listing previously convicted sex offenders as an example of one category of persons that is part of the larger group of persons initially unable to register.<sup>329</sup> The words “and for other categories” suggest that sex offenders convicted before July 2006 may be included within this larger group *if they were initially unable to register*.<sup>330</sup>

As the Tenth Circuit noted in *Hinckley*, “Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”<sup>331</sup> A search for “compatibility” between one interpretation of subsection (d) and the rest of SORNA requires careful consideration of the language used in other subsections. In his dissenting opinion in *United States v. Hatcher*, Judge Shedd correctly observed that other sections of SORNA strongly suggest an intent to reach pre-enactment sex offenders.<sup>332</sup> For example, he noted that subsection (a) requires a sex offender to keep his registration current, and 42 U.S.C. § 16911 defines “sex offender” as “an individual who *was* convicted of a sex offense.”<sup>333</sup> According to Judge Shedd, two observations about subsection (a) point toward the one-group interpretation. First, the use of the past tense demonstrates Congress’s intent

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327. See, e.g., *Kapp*, 487 F. Supp. 2d at 542.

328. See, e.g., *United States v. Hinckley*, 550 F.3d 926, 932 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009).

329. See 42 U.S.C. § 16913(d).

330. See *id.*

331. *Hinckley*, 550 F.3d at 934 (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

332. See 560 F.3d 222, 232-33 (4th Cir. 2009) (Shedd, J., dissenting).

333. *Id.* at 232 (citing 42 U.S.C. §§ 16911, 16913(c)).

to capture *all* sex offenders, irrespective of the dates of their convictions.<sup>334</sup> Second, subsection (a)'s directive "is absolute"; that is, Congress provided no exceptions for previously convicted sex offenders.<sup>335</sup> If the use of "was convicted" was not, in fact, a purposeful attempt to cover prior sex offenders, Congress could have clarified the language by exempting prior sex offenders.<sup>336</sup> Instead, Congress chose to do nothing, strongly suggesting that it intended to capture previously convicted sex offenders. Judge Shedd further observed that both subsections (b) and (c) (requiring sex offenders to register initially and update their registrations, respectively) employ the same "absolute" commands, providing no exceptions for prior sex offenders.<sup>337</sup>

The heading of subsection (d) and SORNA's legislative intent also clarify the ambiguity. The heading provides a clear indication that subsection (d) applies only to individuals unable to initially register, as it reads "Initial registration of sex offenders unable to comply with subsection (b) of this section."<sup>338</sup> The fact that the heading mentions only "sex offenders unable to comply with subsection (b)" suggests that inability to comply is the sole focus of subsection (d).<sup>339</sup> The legislative intent also supports the one-group interpretation, as SORNA was designed to close loopholes in the old system and combat the growing problem of noncompliance.<sup>340</sup> Judge Gorsuch noted the absurd and potentially dangerous result of exempting all previously convicted sex offenders in his concurring opinion in *Hinckley*:

Absent some action by the Attorney General, those convicted before its enactment would *never* have to register. Quite literally, a sex offender convicted one day before SORNA's enactment on July 26, 2006 of raping a child, and who thereafter serves twenty years' imprisonment, would have no obligation to register for the rest of his or her life, *even after* leaving prison in 2026. Under Mr. Hinckley's reading, then, it might well be the late [twenty-first] century before all sex offenders must register. The databases SORNA created for the public and law enforcement would sit idle, taking decades to be of any meaningful value. Such a regime would be better described as cursory than comprehensive.<sup>341</sup>

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334. *See id.*

335. *Id.*

336. *See id.*

337. *See id.*

338. *See* 42 U.S.C. § 16913(d).

339. *See id.*

340. *See* Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8895 (interim rule Feb. 28, 2007).

341. *United States v. Hinckley*, 550 F.3d 926, 944 (10th Cir. 2008) (Gorsuch, J.,

As Judge Gorsuch correctly observed, Congress's stated purpose of "strengthen[ing] and increas[ing] the effectiveness of sex offender registration and notification for the protection of the public" and "eliminat[ing] potential gaps and loopholes under the pre-existing standards" would be virtually defeated had Congress purposely exempted all previously convicted sex offenders from SORNA's coverage.<sup>342</sup>

Defendants often point to the Interim Rule as proof that SORNA did not apply retroactively when it was enacted.<sup>343</sup> The theory underlying this argument is that the Attorney General *made* SORNA retroactive by virtue of issuing the Interim Rule.<sup>344</sup> These defendants have overlooked a critical portion of the Rule, which reads,

The current rulemaking serves the narrower, immediately necessary purpose of foreclosing any dispute as to whether SORNA is applicable where the conviction for the predicate sex offense occurred prior to the enactment of SORNA. This issue is of fundamental importance to the initial operation of SORNA, and to its practical scope for many years, since it determines the applicability of SORNA's requirements to virtually the entire existing sex offender population.<sup>345</sup>

Two observations about the Interim Rule's language are worth noting. First, the language supports the government's position that the Interim Rule was merely a clarification of SORNA's already-established retroactivity, as it does not contain any language indicating that it "created" or "established" the duty to register. Indeed, the stated purpose of "foreclosing any dispute" connotes an intent to *clarify* an existing obligation rather than *create* a new duty to register. One would expect the creation of a new duty to be marked by forward-looking language, e.g., "from this day forward," rather than backward-looking language. Second, the Attorney General's acknowledgment that his clarification "determine[d] the applicability of SORNA's requirements to *virtually the entire existing sex offender population*" highlights the absurdity of exempting this enormous group of sex offenders, whose

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concurring), *cert. denied*, 129 S. Ct. 2383 (2009).

342. See Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. at 8895.

343. See, e.g., *United States v. Madera*, 528 F.3d 852, 856-57 (11th Cir. 2008).

344. See *id.*

345. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. at 8896.

noncompliance with the old law prompted SORNA's passage in the first place, from the statute's reach.<sup>346</sup>

A closer look at the rest of SORNA's language, considered in conjunction with SORNA's legislative history and subsection (d)'s heading, resolves subsection (d)'s ambiguity in favor of the view that SORNA was intended to be retroactive from the day it was enacted. Accordingly, courts should conclude that SORNA is applicable to sex offenders who moved from one state to another before the Interim Rule.

*C. Reliance on Smith v. Doe Is Misplaced Because SORNA's Penalty Provision Is Punitive in Nature*

To the extent that a defendant challenges the retroactive application of 18 U.S.C. § 2250, the punitive-intent analysis from *Smith v. Doe* is superfluous. The question in *Smith v. Doe* was whether it was constitutional to require previously convicted sex offenders to register, given that the obligation did not exist when they committed their original offenses.<sup>347</sup> These defendants were never prosecuted for failing to register; they merely asked the Court to declare the registration requirement unconstitutional because it constituted additional punishment for their original offenses.<sup>348</sup> Thus, the punitive-intent analysis was necessary because it was not immediately clear whether registration and dissemination of registry information constituted "punishment" within the traditional meaning of the word.<sup>349</sup>

The Supreme Court declined to address the appropriate resolution of a constitutional challenge to Alaska's penalty provision because this issue was not on the table.<sup>350</sup> Accordingly, any attempt to analogize a prosecution under SORNA to the facts of *Smith v. Doe* is misguided. SORNA defendants do not challenge the mere obligation to register; they challenge their *federal prosecutions for failing to register*. Unlike the registration and notification provisions in *Smith v. Doe*, § 2250 is clearly a punitive statute—its sole purpose is to penalize noncomplying sex offenders with a maximum of ten

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346. *See id.* (emphasis added).

347. *See Smith v. Doe*, 538 U.S. 84, 89, 92 (2003).

348. *See id.* at 91.

349. *See id.* at 91-92.

350. *See id.* at 101-02. The court found that

[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense. Whether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion.

*Id.*

years imprisonment.<sup>351</sup> To conclude that a felony penalty provision constitutes a civil regulatory law is simply illogical, not to mention unnecessary, because, as the next subpart contends, failure to register is an ongoing offense for which the imposition of punishment does not violate the Ex Post Facto Clause.

Lower courts' reliance on *Smith v. Doe* may stem from the misguided belief that courts should consider § 2250 in conjunction with SORNA's general registration requirements, rather than focusing on § 2250 in isolation.<sup>352</sup> The district court in *United States v. Kent* dismissed this approach after finding no authority to support the proposition that a court should consider the broader context of a statute when determining if a particular *penalty* provision is punitive.<sup>353</sup> While acknowledging that consideration of the broader scheme may prove helpful when "reference to the scheme sheds light on whether the challenged statute subjects a criminal defendant to additional punishment," the court found this approach unnecessary for § 2250 because SORNA indisputably subjects defendants to more severe punishment than the previous federal law.<sup>354</sup>

Nonetheless, several courts have seemingly endorsed the broad approach by discussing SORNA's general registration scheme—and simultaneously avoiding its penalty provision—in an attempt to analogize SORNA to Alaska's sex offender registration laws.<sup>355</sup> For example, in *United States v. Mason*, a gap traveler argued that SORNA's retroactive application effectively "punishe[d] him for conduct occurring before the SORNA's enactment."<sup>356</sup> Admittedly, the defendant could have better articulated the challenge, as the words do not pinpoint precisely what was at issue—whether it was the retroactive application of the registration provisions or the penalty provision.<sup>357</sup> This imprecision notwithstanding, the fact that he challenged being "punished" for conduct occurring before SORNA's enactment strongly suggests that he took issue with more than just the basic registration

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351. See 18 U.S.C. § 2250(a) (2006).

352. Compare *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*3-4 (S.D. Ala. Feb. 8, 2008) (holding that § 2250 should be considered separately from SORNA's registration requirement), with *United States v. Mason*, 510 F. Supp. 2d 923, 929-30 (M.D. Fla. 2007) (considering the placement of SORNA's registration provisions).

353. *Kent*, 2008 WL 360624, at \*4.

354. *Id.* at \*5.

355. See, e.g., *United States v. Lawrance*, 548 F.3d 1329, 1333-34 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 919-20 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2431 (2009); *Mason*, 510 F. Supp. 2d at 929; *United States v. Manning*, No. 06-2005, 2007 WL 624037, at \*1 (W.D. Ark. Feb. 23, 2007).

356. 510 F. Supp. 2d at 929.

357. See *id.*; see also Motion to Dismiss Indictment at 11, *Mason*, 510 F. Supp. 2d 923 (No. 6:07-cr-52-Orl-19JGG).

provisions.<sup>358</sup> Nevertheless, the court ignored the emphasis on punishment and proceeded to discuss SORNA's registration requirements, revisiting the punitive-intent analysis from *Smith v. Doe* and resolving that Congress intended to establish a civil, nonpunitive statute.<sup>359</sup>

At one point, the court may have alluded to the penalty provision when it stated, "It is unnecessary to address Defendant's alternative arguments with respect to retroactive application in great detail because Defendant is not being punished for conduct that occurred before SORNA was enacted."<sup>360</sup> Unfortunately, the court did not clarify precisely what those "alternative arguments" were, nor did it attempt to explain why the retroactive application of § 2250 was constitutional.<sup>361</sup>

The *Mason* court's unwillingness—or worse, inability—to acknowledge the distinction between challenges to SORNA's registration provisions and challenges to SORNA's penalty provision is troubling. While it may be true that the defendant did not precisely identify the particular sections being challenged, one would expect the court, at the very least, to formally recognize that a federal prosecution for failure to register is vastly different from a declaratory judgment action seeking to confirm a law's inapplicability, such that a SORNA prosecution cannot neatly fit within the *Smith v. Doe* mold.

To be sure, the *Mason* court is not the only court to muddle the issues by not clearly distinguishing a challenge to SORNA's registration requirements from a challenge to SORNA's penalty provision.<sup>362</sup> This disturbing trend seems to suggest that many courts do not understand the proper role of *Smith v. Doe* in a SORNA analysis. As discussed above, the punitive-intent analysis proves unhelpful when defendants challenge their prosecutions under § 2250.<sup>363</sup> Unlike in *Smith v. Doe*, where there was a legitimate question whether registration constituted punishment, there is little room to argue that a statute providing for ten years imprisonment is not punitive.

Moreover, even if courts conclude that *Smith v. Doe* is the proper starting place for a challenge to § 2250, there are sufficient distinctions between Alaska's sex offender registration law and SORNA's penalty provision to warrant disparate treatment. The *Kent* court noted that contrary to Alaska's law, SORNA has three subtitles: "(A) Sex Offender Registration and Notification; (B) Improving Federal Criminal Law Enforcement To Ensure Sex [O]ffender Compliance With Registration and Notification Requirements

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358. See *Mason*, 510 F. Supp. 2d at 929.

359. See *id.* at 929-30.

360. *Id.* at 928.

361. *Id.* at 923.

362. See cases cited *supra* note 355.

363. See *supra* text accompanying notes 350-54.

and Protection of Children From Violent Predators; and (C) Access to Information and Resources Needed To Ensure That Children Are Not Attacked or Abused.”<sup>364</sup> The court noted that § 2250 falls under Subtitle (B), just one indication that Congress intended for it to be a criminal, punitive statute used to enforce “the presumably civil laws passed in Subtitles (A) and (C).”<sup>365</sup>

Furthermore, the Court in *Smith v. Doe* stated that a probative factor in determining legislative intent is where the legislature opted to codify the provision in question.<sup>366</sup> Because the respondents challenged the Alaska registration and notification scheme as a whole, the Court focused on the location of the registration and notification provisions.<sup>367</sup> Alaska’s registration requirement was located in the state’s criminal code, while the notification requirement was located in the civil code.<sup>368</sup> Noting the conflicting placement of Alaska’s registration and notification provisions, the Court turned to alternative ways of assessing legislative intent.<sup>369</sup>

Challenges to prosecutions under SORNA do not present the same dilemma. Section 2250 is the only provision in question, as defendants do not challenge the registration requirement itself. The felony failure to register provision is located in Title 18 of the U.S. Code, “Crimes and Criminal Procedure,” a fact highly probative of punitive legislative intent.<sup>370</sup> The government may urge courts to consider the fact that SORNA’s registration requirement is located in a civil title; however, this fact is irrelevant to the analysis because the registration requirement is not under attack. Much as *Smith v. Doe* did not consider the impact of Alaska’s failure-to-register penalty provision for failure to register because it was not at issue in the case,<sup>371</sup> it is inappropriate for courts to consider the impact of SORNA’s registration and notification provisions.

In short, *Smith v. Doe* should not play a role in assessing ex post facto challenges to prosecutions under SORNA. *Smith v. Doe* involved entirely different circumstances and is not helpful to the analysis. Moreover, it is inappropriate for courts to examine SORNA as a whole when assessing the

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364. *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*5 (S.D. Ala. Feb. 8, 2008) (referencing subtitles shown in the table of contents to the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 587-88).

365. *Id.*

366. 538 U.S. 84, 94 (2003).

367. *See id.* at 91, 94.

368. *Id.* at 94.

369. *See id.* at 95-96.

370. *See* 18 U.S.C. § 2250(a) (2006).

371. *Smith*, 538 U.S. at 94.

punitive nature of § 2250. Section 2250 is a punitive statute, as illustrated by its placement within the federal criminal code, its location in a subtitle of the Adam Walsh Act entitled “Improving Federal Criminal Law Enforcement To Ensure Sex Offender Compliance With Registration and Notification Requirements and Protection of Children From Violent Predators,” and its potential penalty of ten years imprisonment for failing to register. Instead of prematurely dismissing SORNA as nonpunitive, courts should concede its punitive purpose and instead focus on the *Weaver* test to resolve whether the retroactive application of SORNA violates the Ex Post Facto Clause.

*D. Retroactive Application of SORNA to Pre-Act Travel and Failure to Register Does Not Violate the Ex Post Facto Clause Because § 2250 Is Not “Retrospective” When Applied to Offenders Who Remained Unregistered After the Statute’s Passage*

Recall that under the *Weaver* two-prong test, the application of a penal law violates the Ex Post Facto Clause if the law is “retrospective” and “disadvantages the offender affected by it.”<sup>372</sup> Under *Weaver*, a law is deemed “retrospective” if all the events necessary to charge the individual occurred before the law’s enactment.<sup>373</sup> The retroactive application of SORNA to pre-Act travel is not “retrospective” within the meaning of *Weaver* for two reasons. First, failing to register is an ongoing offense, meaning that a sex offender who fails to register both before and after July 27, 2006, has not “completed” the act of failing to register before SORNA’s enactment. Rather, a sex offender who fails to register remains in violation of the law for as long as he remains unregistered. Second, two of the elements necessary to establish a conviction under § 2250 are that the offender is “required to register under [SORNA]” and “knowingly fails to register or update a registration as required by [SORNA].”<sup>374</sup> Logically, an offender is incapable of being required to register *under*, and knowingly failing to register *under*, a law that was not in existence when he acted. The implication of these two observations is simple: even if an offender was convicted of the registration-triggering sex offense, traveled, and failed to register before passage of SORNA, it cannot be said that the application of SORNA to the offender violates the Ex Post Facto Clause if the offender remained unregistered after SORNA’s enactment.

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372. *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citations omitted); *see also supra* text accompanying note 257.

373. *Weaver*, 450 U.S. at 29.

374. 18 U.S.C. § 2250(a)(1), (3).

1. *Failure to Register Is an Ongoing Offense*

An offense is deemed continuous when “the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”<sup>375</sup> There are two chief reasons why failing to register as a sex offender constitutes a continuing violation. First, when a sex offender fails to register, he poses a continuing threat to society. In other words, the threat to society does not cease after the single act of failing to register occurs on the fourth day; rather, it continues each and every day that the individual remains unregistered.<sup>376</sup> Second, “Congress must assuredly have intended that [failing to register] be treated as a continuing [offense]” because the drafters’ express goal of combating noncompliance among previously convicted sex offenders would not be attained by exempting all defendants who moved and failed to register before July 2006.<sup>377</sup>

Some defendants have attempted to analogize failure to register as a sex offender to the crime of failing to register for the draft.<sup>378</sup> In *Toussie v. United States*, the Supreme Court held that failing to register for the draft is not a continuing offense because it does not pose a “renewed threat of the substantive evil Congress sought to prevent.”<sup>379</sup> By contrast, failing to register as a sex offender *does* pose a renewed threat to society. When a sex offender moves to a new state and fails to register, this poses a potential threat to neighbors, coworkers, and any other person who may come in contact with the offender but is unaware of the individual’s history. This threat does not cease on the fourth day of failing to register, but rather, the threat continues to exist as long as the sex offender remains unregistered. Anyone who doubts this proposition should consider the continuous threat posed to Maureen Kanka’s family by an unregistered sex offender who raped and murdered her daughter *two years* after moving into their neighborhood.<sup>380</sup>

A better analogy to failing to register as a sex offender is the offense of escaping from prison. In *United States v. Bailey*, the Supreme Court held that escape from prison is an ongoing offense because the escapee poses a

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375. *Toussie v. United States*, 397 U.S. 112, 115 (1970). This test for “continuous” is one of two set forth in *Toussie*, the other being express designation by Congress. *Id.*; see also *supra* text accompanying note 292.

376. Recall that an individual technically violates § 2250 after he fails to update his registration within three days of changing residence. See 18 U.S.C. § 2250; 42 U.S.C. § 16913(c) (2006); see also *supra* text accompanying note 76.

377. See *supra* text accompanying notes 59-66, 340-42.

378. See, e.g., *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*8 (S.D. Ala. Feb. 8, 2008).

379. 397 U.S. at 122.

380. See William Glaberson, *Stranger on the Block – A Special Report; At Center of ‘Megan’s Law’ Case, a Man No One Could Reach*, N.Y. TIMES, May 28, 1996, at A1.

continuing threat to society.<sup>381</sup> As with prisoners, Congress has determined that the freedom of sex offenders must be limited in certain ways to avoid harm to society. By failing to register, these sex offenders function like prison escapees: they break the chains that society has deemed necessary to protect others and pose a serious danger to the public.

Another offense similar to failing to register is failing to appear for sentencing.<sup>382</sup> The Ninth Circuit reasoned that the failure to appear for sentencing is continuous for the same reason cited in *Bailey*.<sup>383</sup> Additionally, the court noted the absence of a separate crime for failing to return for sentencing after initially failing to appear: “The two actions pose the same danger to society and the legal system. Both are part and parcel of one continuing offense.”<sup>384</sup> Likewise, there is no separate criminal statute prohibiting continuing to fail to register after one initially fails to register within three days of moving. The continuing failure is “part and parcel” of the offense of initially failing to register. Thus, failure to register should be treated as an ongoing violation.

Finally, a § 2250 violation should be treated as an ongoing offense because to hold otherwise would undermine Congress’s reason for enacting the law. As discussed above, it would have been illogical for Congress to purposefully increase the punishment for failing to register with the goal of bringing unregistered offenders into compliance, and then to exempt those same individuals from the law’s reach.<sup>385</sup> To use the Attorney General’s words, a conclusion that § 2250 describes a one-time offense would exempt “virtually the entire existing sex offender population.”<sup>386</sup>

## *2. A Sex Offender Could Not Fail to Register “Under SORNA” Before SORNA Was Enacted*

Even if a court does not accept that failing to register constitutes an ongoing offense, it should still conclude that § 2250 is not “retrospective” because, technically speaking, an individual was not capable of committing all of the acts necessary to violate SORNA until after the law was passed. Consider the three facts required to charge a state sex offender under § 2250: (1) the individual was required to register *under SORNA*, (2) the individual traveled in interstate commerce, and (3) the individual knowingly failed to

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381. 444 U.S. 394, 413 (1980).

382. *See* United States v. Gray, 876 F.2d 1411, 1419 (9th Cir. 1989).

383. *See id.*

384. *Id.*

385. *See supra* text accompanying notes 59-66, 340-42.

386. *See* Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (interim rule Feb. 28, 2007).

register *as required by SORNA*.<sup>387</sup> To say that a particular defendant violated committed all of the acts necessary to violate SORNA before July 2006 is inconsistent with the plain language of the statute, given that it is impossible to knowingly fail to register *under a law* that was not in existence when the failure to register occurred.<sup>388</sup>

At least one district court has rejected this argument, stating that it “elevates form over function,” and that “[a] new statutory definition or categorization for [a sex offender’s] misdeeds does not detract from the proper focus on the *actions* [he] took to draw the government’s attention: traveling in interstate commerce and failing to register.”<sup>389</sup> Unfortunately, the *Kent* court’s reasoning is divorced from the statute’s language. *Kent* failed to recognize that the plain language of SORNA indicates that what is being punished is not failing to register in the abstract, but failing to register *under SORNA*. In other words, § 2250 should not be viewed as merely providing a new statutory *definition* of “failing to register,” but instead as creating an entirely new and separate *offense* from failing to register under the Wetterling Act.

This conclusion is bolstered by the fact that the *Kent* court’s understanding of failing to register under § 2250 provides a defense that is inconsistent with SORNA’s underlying purpose to those individuals who failed to register before the statute’s enactment. A simple hypothetical illustrates this point. Suppose Sex Offender *S* traveled in interstate commerce in July 2002 and subsequently failed to update his registration for seven years. In July 2009, *S* was arrested for violating § 2250. If a court followed *Kent*’s guidance in viewing his failure to register in the abstract, the court would conclude that *S*’s failure was completed before SORNA’s enactment and that a prosecution under SORNA would violate the Ex Post Facto Clause. Sex Offender *S* would walk away unpunished. Now Suppose Sex Offender *T* traveled in interstate commerce on July 27, 2006, the day of SORNA’s enactment, and was arrested only seven days later for failing to update his registration. Because Sex

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387. 18 U.S.C. § 2250(a) (2006); *see also supra* text accompanying notes 101-04.

388. Moreover, because it takes at least four days after changing residence to violate SORNA, even if an individual moved to a new state the same day SORNA was enacted, the individual would not yet have completed every act necessary to violate the statute until the fourth day of failing to register. *See* 42 U.S.C. § 16913(c) (2006). It should be noted, however, that a prosecution on the fourth day under this hypothetical fact pattern could implicate the Due Process Clause, as it is not clear that the defendant would have had a reasonable opportunity to comply with the law after its enactment. *See* *United States v. Dixon*, 551 F.3d 578, 585-87 (7th Cir. 2008), *cert. granted sub nom. Carr v. United States*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-1301).

389. *United States v. Kent*, No. 07-00226-CG, 2008 WL 360624, at \*7 (S.D. Ala. Feb. 8, 2008).

Offender *T* had the misfortune of traveling the day SORNA was enacted, he would face punishment of up to ten years imprisonment.<sup>390</sup> Thus, Sex Offender *S*, who failed to register for seven years, would benefit from a defense, while Sex Offender *T*, who failed to register for only seven days, would be punished. Considering that Congress's chief reason for enacting SORNA was to crack down on noncompliance among existing sex offenders and send the message that unregistered sex offenders will be found and put in jail, the result in this hypothetical is entirely inconsistent with the statute's purpose.<sup>391</sup>

### VII. Conclusion

Since SORNA's enactment in July 2006, over one hundred defendants have challenged their convictions. These challenges have not been limited to statutory inapplicability and ex post facto claims; defendants have attacked SORNA under the Commerce Clause, the Due Process Clause, the Tenth Amendment, and the non-delegation doctrine.<sup>392</sup> And the arguments continue to multiply, as illustrated by the emergence of a new argument in 2008 regarding states' lack of compliance with SORNA.<sup>393</sup> Of all these arguments, however, courts have divided most sharply over SORNA's applicability and its potential violation of the Ex Post Facto Clause.

Although SORNA's language is admittedly ambiguous, courts should be wary of reaching narrow interpretations without considering the broader context and purpose of SORNA. Reading "travels" to preclude all pre-Act travel is not only unfair to SORNA's legislative intent but also endangers society by allowing more sex offenders to break the registration laws with minimal consequences. The same is true of the "two-group interpretation" of the Attorney General's Interim Rule. As specifically stated in the Rule, it was meant to serve as a clarification of SORNA's already-established retroactivity; it was not intended to create new obligations to register.

Furthermore, courts should avoid using *Smith v. Doe* to aid their analyses of ex post facto claims. *Smith v. Doe* involved an entirely different statute and, more important, an entirely different challenge. Instead, courts should

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390. This assumes that there would be no due process concerns with a prosecution only seven days after the statute's enactment.

391. See 152 CONG. REC. S8012, S8030 (daily ed. July 20, 2006) (statement of Sen. Frist).

392. See cases cited *supra* note 12.

393. See, e.g., *United States v. Hall*, 577 F. Supp. 2d 610, 614 (N.D.N.Y. 2008) (addressing the argument that because New York had not yet implemented SORNA's requirements into its registry, the defendant should not have been expected to comply); *United States v. Shenandoah*, 572 F. Supp. 2d 566, 578-79 (M.D. Pa. 2008) (addressing the same arguments with respect to SORNA implementation in New York, Pennsylvania, and Florida).

concede that a statute that prescribes ten years imprisonment for failing to register is clearly punitive and move on to the more important question: whether the law punishes individuals for acts completed before its enactment. After considering the continuous risk to society posed by unregistered sex offenders and the plain language of § 2250, courts should find that the statute is not “retrospective” and conclude that SORNA does not violate the Ex Post Facto Clause.

The bottom line in these cases is simple: The defendants had an obligation to register as sex offenders before passage of SORNA. When the law was passed in 2006, they could have updated their registrations in their old states *or* registered in their new states, either one of which would have put them in compliance with SORNA. They chose to do neither. The real question for courts is whether they want to condone this behavior with a slap on the wrist<sup>394</sup> or send a message that sex offenders who fail to register will no longer be tolerated. This is the message that SORNA’s drafters intended to send. Whether it will be delivered is up to the courts.

*Terra R. Lord*

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394. Recall that the Wetterling Act fixed the maximum penalty at no more than one year imprisonment for a first-time failure to register. 42 U.S.C. § 14072(i)(4) (2006); *see also supra* text accompanying note 261.