No. 10-6549

In The Supreme Court of the United States

BILLY JOE REYNOLDS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

BRIEF FOR THE PETITIONER

LISA B. FREELAND*
Federal Public Defender
CANDACE CAIN
RENEE D. PIETROPAOLO
TARA I. ALLEN
Assistant Federal Public Defenders
KIMBERLY R. BRUNSON
PETER R. MOYERS
Staff Attorneys

1500 Liberty Center
1001 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 644-6565
lisa_freeland@fd.org
Counsel for Petitioner

**Counsel of Record*

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

QUESTION PRESENTED

Does a sex offender convicted before enactment of the Sex Offender Registration and Notification Act ("SORNA") have standing to contest the validity of the Interim Rule, issued by the Attorney General pursuant to the authority granted in 42 U.S.C. § 16913(d) of the Act, specifying SORNA's applicability to such offenders?

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OPINIONS BELOW

The non-precedential, unpublished opinion of the United States Court of Appeals for the Third Circuit was filed on May 14, 2010 at Appeal No. 08-4747 and appears at pages 62 to 65 of the Joint Appendix (hereinafter "J.A."). The opinion can be found at 380 F. App'x 125, 2010 WL 1936261 (3d Cir. 2010).

The Third Circuit filed an order denying Mr. Reynolds' petition for rehearing en banc on June 16, 2010 at Appeal No. 08-4747. (J.A. 66-67.)

The district court's unpublished memorandum order denying petitioner's motion to dismiss was filed on June 27, 2008. (J.A. 20-23.) The judgment of sentence was entered at Criminal No. 07-412 in the Western District of Pennsylvania on November 24, 2008. (J.A. 20-23.)

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on May 14, 2010 affirming the District Court in an unpublished panel opinion. (J.A. 62-65.) The request for rehearing was denied on June 16, 2010. (J.A. 66-67.)

The Petition for Writ of Certiorari was filed on September 14, 2010 and was granted, limited to Question 1 presented by the petition, on January 24, 2010. (J.A. 70.) This Court has jurisdiction to review

the judgment of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND RULES INVOLVED[1]

Constitutional Provisions Involved:

Art. III, § 2, cl. 1

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[1] The relevant provisions of the Sex Offender Registration and Notification Act (SORNA), codified at 42 U.S.C. §§ 16901-16962, and the Interim and Final Rules, codified at 28 C.F.R. § 72.1 through 72.3; 72 Fed. Reg. 8894, 8897 and 75 Fed. Reg. 81,849, 81,853 are reproduced in the appendices A and B to this brief.

Art. I, § 9, cl. 3

"No Bill of Attainder or ex post facto Law shall be passed."

Statutory Provisions Involved:

42 U.S.C. § 16913(d)

"Initial registration of sex offenders unable to comply with subsection (b)

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 chapter 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)."

18 U.S.C. § 2250

"Failure to Register

(a) In general. Whoever

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both."

* * *

STATEMENT OF THE CASE

1. On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). Title I of the Adam Walsh Act codified the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901 *et seq.* SORNA requires individuals convicted of "sex offenses" to register and keep the registration current, in each jurisdiction where they live, work or attend school. 42 U.S.C. §§ 16911(5)(A), 16913(a) & (c).

In one of SORNA's many provisions, Congress provided that "[t]he 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 chapter or its implementation in a particular jurisdiction."[2] 42 U.S.C.

[2] There is a discrepancy between the language of the provisions in the United States Code Annotated and the United

(Continued on following page)

§ 16913(d). Billy Joe Reynolds is such an offender, because his October 10, 2001, Missouri sex offense conviction pre-dated SORNA's enactment by almost five years.[3]

2. At the heart of this case is whether SORNA's registration requirements were applicable to individuals with pre-SORNA sex offense convictions before the Attorney General acted upon the authority granted in § 16913(d) and provided for their inclusion by issuing a valid regulation. If, as Mr. Reynolds maintains, SORNA's application to him required action by the Attorney General under § 16913(d), he has an interest sufficient to establish constitutional standing to challenge the validity of the Attorney General's rule-making process, and his conviction under SORNA's enforcement provision, 18 U.S.C. § 2250.

States Code. The United States Code Annotated added the words "of this section" to the body of § 16913(c) and to the title and the body of § 16913(d). *See United States v. DiTomasso*, 621 F.3d 17, 20 n.2 (1st Cir. 2010). In addition, the body of subsection (d) in the United States Code Annotated version uses the phrase "before July 27, 2006" whereas the United States Code states "before the enactment of this chapter." 42 U.S.C. § 16913(d). The official United States Code version of SORNA is used throughout this brief. *Id.*

[3] Mr. Reynolds pleaded guilty in Missouri state court to statutory sodomy in the second degree and was sentenced to seven years' imprisonment. (J.A. 13, 15; Presentence Investigation Report ("PSR") ¶ 24.) He was released from custody to parole on July 21, 2005, with parole to expire on July 19, 2008. (J.A. 15.)

Statutory and Regulatory History

3. SORNA represents the most recent congressional effort to "set national standards for state sex-offender registration programs[.]" *See Carr v. United States*, 130 S. Ct. 2229, 2238 (2010). The initial effort came in 1994, when Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), which established guidelines for states to use in tracking sex offenders. The guidelines also provided a period of three years for states to implement necessary systems or risk losing federal funding for crime control. Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994). The Wetterling Act required persons convicted of sexually violent offenses or certain criminal offenses against minors to register a current address with a designated state law-enforcement agency after release from prison. Wetterling Act, § 170101, 108 Stat. at 2038-2041. Offenders who moved between states were given ten days to register in the new state. *Id.* at 2041. Significantly, the Wetterling Act did not initially include a federal criminal penalty for failing to register or for failing to keep registration current. *See id.* at 2041 (requiring individual States to criminalize failure to register).

By 1996, every State and the District of Columbia had enacted sex offender registration laws. *Smith v. Doe*, 538 U.S. 84, 90 (2003). That year, Congress amended the Wetterling Act and directed the Attorney General to establish a national registry of sex offenders at the FBI. Pam Lyncher Sexual Offender

Tracking and Identification Act of 1996 ("Lyncher Act"), Pub. L. No. 104-236, 110 Stat. 3093 (codified as amended at 42 U.S.C. § 14072). It also delegated to the Attorney General the duty to "promulgate[ ]" guidelines directing the FBI to ensure the verification of the registrants' addresses and to develop guidelines for the use of registrants' fingerprints in the FBI's registry. *Id.* at 3094, 3096.

The following year, Congress again amended the Wetterling Act, requiring all states to participate in the national registry. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 115, 111 Stat. 2440, 2461-2467 (1997) (codified at 42 U.S.C. §§ 14071-14072). Under the 1997 amendment, states were required to provide the FBI with information on all sex offenders deemed to be included in the national registry. *Id.* at 2462-2463.

Nine years later, Congress again revisited sex offender registration. Having decided that "the patchwork of standards that had resulted from piecemeal amendments [to the Wetterling Act] should be replaced with a comprehensive new set of standards," Congress passed SORNA, Pub. L. No. 109-248, tit. I, 120 Stat. 587-601 (2006) (codified at 18 U.S.C. § 2250 and 42 U.S.C. § 16901 *et seq.*). National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,045 (July 2, 2008) ("SMART Guidelines").

4. SORNA created a new, national sex offender registry, expanded the Wetterling Act's definition of "sex offense," 42 U.S.C. § 16911(5), and added to the information states must collect about offenders, 42 U.S.C. § 16914(a). In addition to an offender's current address, photograph, and fingerprints, which were sufficient to satisfy the requirements of the Wetterling Act, *see id.* § 14072(c), SORNA requires sex offenders to provide Social Security numbers, employer and school information, as well as license plate numbers and other vehicle information. *Id.* § 16914(a). SORNA also requires a jurisdiction to collect and record a sex offender's physical description, sexual offense, criminal history, full palm print, DNA sample, and a photocopy of the offender's driver's license. *Id.* § 16914(b).

Under SORNA, a sex offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than three business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *Id.* § 16913(b)(1)-(2). When an offender changes his or her name, residence, employer, or student status, he or she must appear in person to update the registration within three days of the change. *Id.* § 16913(c).

5. The new federal felony defined in 18 U.S.C. § 2250 applies to any person who (1) "is required to register under [SORNA]," (2) "travels in interstate or foreign commerce," and (3) "knowingly fails to register or update a registration." 18 U.S.C. § 2250(a).

Whereas the Wetterling Act punished the failure to register with a maximum term of one year imprisonment, a violation of SORNA is punishable by up to ten years' imprisonment. *Id.* § 2250(a). Mr. Reynolds was indicted for violating this statute. (J.A. 13-14.)

6. As noted, SORNA expressly grants the Attorney General "the authority to specify the applicability of the requirements of this subchapter [*i.e.*, the registration requirement] to sex offenders convicted before enactment of this chapter or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). In the same subsection, SORNA authorizes the Attorney General "to prescribe rules for the registration of any such offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section."[4] *Id.*

7. On February 28, 2007, approximately seven months after the enactment of SORNA, the Attorney General exercised his authority under the first clause of § 16913(d) and promulgated an interim regulation, specifying that the requirements of SORNA applied to pre-enactment sex offenders. 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72) ("Interim Rule"). The summary introduction to the Interim Rule announced that "[t]he Department of Justice is publishing this interim rule to specify that the requirements of [SORNA] apply to sex offenders convicted

[4] Subsection (b) of § 16913, as noted above, sets forth the requirements for initial registration under SORNA.

. . . prior to the enactment of that Act." *Id.* at 8894. It also explained that "[t]he Attorney General has the authority to make this specification pursuant to sections 112(b) and 113(d) of" SORNA.[5] *Id.* at 8896.

The Interim Rule itself states, in its entirety, that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." *Id.* at 8897. The Attorney General provided two illustrative examples along with the Interim Rule – one of which describes an offender who is similarly situated to Mr. Reynolds:

> Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable

[5] Sections 112(b) and 113(d) of SORNA are codified at 42 U.S.C. §§ 16912(b) and 16913(d), respectively.

> under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

Id.

8. The Attorney General promulgated the Interim Rule outside of the notice and comment procedure generally required under the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B). *Id.* at 8896. The Attorney General took the position that the registration requirement applied to pre-SORNA sex offenders from the date of enactment, but nevertheless "exercise[d] his authority under section [16913(d)] of SORNA to specify [the] scope of application of SORNA, regardless of whether SORNA would apply with such scope absent [the] rule." *Id.* at 8896. He also maintained that, due to the immediate need for the Interim Rule, there was "good cause" to forego the notice and public procedure normally required under § 553(b). *Id.* at 8896-8897. Although the Attorney General invited "post-promulgation public comments," to be submitted by April 30, 2007, *id.* at 8895, 8896, he also asserted that it would "be contrary to the public interest to adopt [the] rule with the prior notice and comment period normally required under 5 U.S.C. § 553(b) or with the delayed effective date normally required under 5 U.S.C. § 553(d)," *id.* at 8897.

9. On May 30, 2007, the Attorney General proposed guidelines for the application and execution of SORNA, thereby exercising the authority granted in the second clause of § 16913(d), "to prescribe

rules," and acting on the directive in § 16912(b), to "issue guidelines and regulations," by issuing proposed National Guidelines. 72 Fed. Reg. 30,210 (May 30, 2007); *see also* 42 U.S.C. §§ 16912(b) & 16913(d). The National Guidelines are commonly referred to as the "SMART Guidelines," named after the Office of Sex Offender Sentencing, Monitoring, Apprehending and Registering and Tracking, that was created by Congress to administer SORNA and, under the general authority of the Attorney General, was tasked with developing the proposed guidelines into final administrative rules through the public notice and comment process. 72 Fed. Reg. at 30,210; *see also* 42 U.S.C. § 16945(a).

10. The proposed SMART Guidelines again affirmed the Attorney General's statutory authority to specify the applicability of SORNA's registration requirements to pre-enactment sex offenders. *Id.* at 30,212. The guidelines specifically reference 28 C.F.R. part 72, as the provision that makes SORNA applicable to sex offenders with pre-SORNA convictions. *Id.* The final SMART Guidelines were revised in response to public comments, and did not issue until July 2, 2008 ("Final Guidelines"). 73 Fed. Reg. 38,030 (July 2, 2008). The Final Guidelines stated that "SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporations of the SORNA requirements into their programs." 73 Fed. Reg. 38,063.

After publication of the Final Guidelines, the Attorney General issued proposed supplemental guidelines on May 14, 2010. These supplemental guidelines address SORNA's implementation, as well as new legislation related to SORNA – Keeping the Internet Devoid of Sexual Predators Act of 2008 (KIDS Act of 2008), Pub. L. No. 110-400, 122 Stat. 4224. *See* 75 Fed. Reg. 27,362 (May 14, 2010).

On December 29, 2010, again acting pursuant to the authority granted in 42 U.S.C. § 16913(d), the Attorney General issued a Final Rule, specifying SORNA's applicability to those with pre-SORNA convictions. 75 Fed. Reg. 81,849, 81,850 (codified at 28 C.F.R. § 72.3). The Interim Rule was adopted as the Final Rule. *Id.*

The final Supplemental SMART Guidelines were thereafter issued on January 10, 2011. Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630 (Jan. 11, 2011).

Factual and Procedural History

11. During the period between the issuance of the proposed SMART Guidelines in May of 2007 and the Final Guidelines in July of 2008, a grand jury in the Western District of Pennsylvania returned a single-count indictment against Mr. Reynolds, alleging a failure to register, or update his registration, as a sex offender. (J.A. 13.) The indictment alleged that,

> Between on or about September 16, 2007, and on or about October 16, 2007, in the Western District of Pennsylvania, the defendant, BILLY JOE REYNOLDS, who was required to register under the Sex Offender Registration and Notification Act after having been convicted in 2001 in . . . [Missouri] . . . of the felony sex offense of Statutory Sodomy in the 2nd Degree, traveled in interstate commerce and knowingly failed to register and update a registration as required by the Sex Offender Registration and Notification Act.

(Id.)

12. Mr. Reynolds moved to dismiss the indictment on constitutional and other grounds. (Id. 1.) In the motion, Mr. Reynolds argued that the Attorney General's Interim Rule was issued in violation of the Administrative Procedure's Act, 5 U.S.C. § 553. (Id. 22.) The district court denied the motion to dismiss, and Mr. Reynolds thereafter pleaded guilty to the charge in the indictment under a conditional plea agreement in which he preserved the right to appeal his conviction on the grounds asserted in the motion to dismiss. (Id. 20-23.)

According to the government's recitation of facts during Mr. Reynolds' guilty plea colloquy, he violated SORNA because he did not "comply with Missouri sex offender registration requirements when he left Missouri for Pennsylvania," and did not register in

Pennsylvania after arriving. (Id. 30-31.) The government also maintained that Mr. Reynolds admitted "he did not register as a sex offender in Pennsylvania," and that he knew he should have. (Id.) When asked whether he agreed with the government's proffer, Mr. Reynolds, through counsel, agreed only that he did not register in Pennsylvania.[6] (Id. 31-32.)

The district court sentenced Mr. Reynolds to 18 months' imprisonment and three years' supervised release. (Id. 4-8.) The judgment was entered November 24, 2008, and a timely notice of appeal was filed on December 8, 2008. (Id. 53-61.)

13. On appeal, Mr. Reynolds again challenged the application of SORNA to him. (Id. 63.) On May 14, 2010, the Court of Appeals for the Third Circuit affirmed the judgment of the district court, finding that Mr. Reynolds' challenges under the Commerce, *Ex Post Facto* and Due Process Clauses were foreclosed by its decision in *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010). The Court also held that, under *Shenandoah*, Mr. Reynolds lacked standing to challenge his conviction under the Tenth Amendment

[6] In September 2007, Mr. Reynolds travelled from Missouri to Pennsylvania. (J.A. 31.) He did not register in Pennsylvania, and on October 16, 2007, 29 days after his arrival in Pennsylvania, he was arrested for violating his Missouri parole by leaving the state without permission. (Id.) He was thereafter federally indicted on November 27, 2007. (Id. 13.)

or to assert a claim of error based on the validity of the Interim Rule.[7] (Id. 62-65.)

With respect to the issue upon which *certiorari* was granted here – whether Mr. Reynolds has standing under the plain reading of SORNA to raise a claim concerning the validity of the Attorney General's Interim Rule – the Court found that "the Interim Rule affected only those sex offenders who 'did not have a registration requirement prior to the passage of SORNA but nonetheless were subject to sex offender registration requirements after SORNA became the law.'" (J.A. 64.); *United States v. Reynolds*, 380 F. App'x 125, 126 (3d Cir. 2010) (quoting *Shenandoah*, 595 F.3d at 163). Also relying on *Shenandoah*, the Court found that a person "who was required to register as a sex offender under state law before SORNA was enacted – and was in fact so registered – lacked standing to challenge the Interim Rule." (J.A. 64.); *Reynolds*, 380 F. App'x at 126. Apparently equating Mr. Reynolds' pre-SORNA Missouri Registration and an "initial registration" that "compl[ies] with subsection (b) [of § 16913,]" 42 U.S.C. §§ 16913(b), (d), the Court found that the Interim Rule did not apply to him and that he therefore lacked standing to challenge its validity (J.A. 64.); *Reynolds*, 380

[7] The Court also determined that Mr. Reynolds' argument that he was actually innocent of violating SORNA was foreclosed by the appellate waiver in his plea agreement, which limited his right to appeal to only those issues raised in the motion to dismiss. (J.A. 64-65.)

F. App'x at 126 (quoting *Shenandoah*, 595 F.3d at 163).

Mr. Reynolds filed a Petition for Panel Rehearing and for Rehearing *En Banc*, which the Court denied on June 16, 2010. (J.A. 68-69.) In his Petition for Writ of *Certiorari*, Mr. Reynolds sought review of his challenges under the Commerce, *Ex Post Facto*, and Due Process clauses, as well as of the standing issue upon which the Court ultimately granted *certiorari*. (Id. 70.)

SUMMARY OF ARGUMENT

Billy Joe Reynolds has standing to challenge his conviction under the Sex Offender Registration and Notification Act ("SORNA"). Under SORNA, sex offenders are required to register, and keep the registration current, in each jurisdiction where they live, work or attend school, or face new, substantial federal penalties. The registration requirements are outlined in 42 U.S.C. § 16913. Subsection (d) of § 16913 explicitly grants authority to the Attorney General "to specify the applicability of the requirements of this subchapter [SORNA] to sex offenders convicted before the enactment of this chapter [the Adam Walsh Act]," *i.e.*, after July 27, 2006. This provision delegates to the Attorney General the authority to determine whether the requirements apply to sex offenders with pre-SORNA convictions.

Billy Joe Reynolds is such an offender. He was convicted in Missouri in 2001 before SORNA was enacted. Therefore, under the plain language of § 16913(d), Mr. Reynolds was not subject to SORNA's requirements unless and until the Attorney General acted on the authority delegated to him and issued a valid rule specifying that SORNA applied to offenders like him. Because SORNA was not applicable to Mr. Reynolds until the Attorney General acted, the Interim Rule affected him, and he therefore has constitutional standing to challenge the rule's applicability.

The text and grammatical structure of § 16913(d) unambiguously delegates to the Attorney General the applicability of SORNA's registration requirements to pre-enactment sex offenders like Mr. Reynolds. Settled principles of statutory construction, including SORNA's statutory context and SORNA's purpose confirm SORNA's plain meaning and Mr. Reynolds' standing. Although resort to SORNA's legislative history is neither required nor appropriate when the language of a statute is plain, that history also supports the conclusion that SORNA became applicable to Reynolds when the Attorney General issued a valid regulation.

Finally, to the extent there is any ambiguity in the statutory language, SORNA, like all penal statutes, must be interpreted in Mr. Reynolds' favor under the rule of lenity. Its application compels the interpretation urged here – that SORNA did not apply to Mr. Reynolds upon enactment and only

became applicable to him when the Attorney General issued a valid regulation. Therefore, remand is required.

ARGUMENT

A. BILLY JOE REYNOLDS HAS STANDING TO CONTEST THE VALIDITY OF THE INTERIM RULE ISSUED BY THE ATTORNEY GENERAL PURSUANT TO THE SEX OFFENDER NOTIFICATION AND REGISTRATION ACT.

SORNA imposed a new, comprehensive national registration system for persons convicted of sex offenses. It also created a new federal criminal offense for those who failed to comply with the new registration requirements. The question in this case is whether the registration requirements of SORNA applied to those convicted of sex offenses before its enactment. They did not. The plain language of 42 U.S.C. § 16913(d) demonstrates that Congress left it to the Attorney General to decide whether SORNA's registration requirements should apply to previously convicted persons. That reading of 16913(d) is supported by the context of the statute, the statutory structure, and the legislative history.

The Attorney General eventually decided that SORNA's registration requirements should apply to pre-enactment offenders. He promulgated an interim rule giving effect to that decision on February 28,

2007. That rule, if valid, subjected Mr. Reynolds, who had been convicted of a sex offense in 2001, to SORNA's registration requirements and criminal penalties. Because SORNA's registration requirements did not apply to Mr. Reynolds until the Attorney General issued his Interim Rule, he was in fact injured by the rule and he has standing to challenge its validity.[8]

[8] Noting a conflict among the Courts of Appeals as to when SORNA's registration requirements became applicable to persons convicted of sex offenses prior to the statute's enactment, this Court reserved the issue in *Carr v. United States*, 130 S. Ct. 2229, 2234 n.2 (2010). The answer to the question left open in *Carr* resolves the standing issue presented in this appeal, because a determination that SORNA did not apply to pre-SORNA offenders until the Attorney General provided for their inclusion by issuing an Interim Rule would establish Mr. Reynolds' interest in the validity of the rule-making process and provide standing for his challenge to his conviction.

Courts on both sides of the conflict agree that anyone subject to criminal liability as a result of the Interim Rule has standing to challenge the rule's validity. *See United States v. Johnson*, 632 F.3d 912, 922 (5th Cir. 2011) (finding standing because § 16913(d) delegated power to criminalize failure to register for pre-enactment offenders); *United States v. Valverde*, 628 F.3d 1159, 1161 (9th Cir. 2010) (same); *United States v. Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (finding no standing because defendant was not covered under § 16913(d)); *United States v. May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (same).

1. The Plain Language Of 42 U.S.C. § 16913(d) Delegates The Applicability Of SORNA's Registration Requirements For Sex Offenders With Pre-SORNA Convictions, Like Mr. Reynolds, To The Attorney General.

The Court's "analysis begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). Where the text "is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Here, the plain text of the federal sex offender registration statute resolves the question whether Billy Joe Reynolds has standing to contest the validity of the Attorney General's Interim Rule.

The general requirements for registration of sex offenders under SORNA are contained in one section of SORNA: 42 U.S.C. § 16913. That section contains four subsections, (a) through (d), all of which pertain to the registration of sex offenders as described below. 42 U.S.C. §§ 16913(a)-(d). Subsections (a) through (c) address how sex offenders must register, report or update their registration under SORNA. Subsection (d) addresses special subsets of sex offenders, including sex offenders like Reynolds, who were convicted prior to SORNA's enactment.

Subsection (a) sets forth the general registration rule, requiring sex offenders to register where they live, work, attend school and, for purposes of "initial

registration," in the jurisdiction where they were convicted, if different. *Id.* § 16913(a).

Subsection (b) describes how sex offenders must "initially register," depending on whether the offender received a prison sentence. *Id.* § 16913(b)(1)-(2). The first method provides that "the sex offender . . . shall initially register . . . before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." *Id.* § 16913(b)(1). The second method provides that "the sex offender . . . shall initially register . . . not later than 3 business days after being sentenced for that offense, if the offender is not sentenced to a term of imprisonment." *Id.* § 16913(b)(1)-(2).

Subsection (c) tells the offenders identified in (a) where and when they must register or report, mandating that they "appear in person" in a jurisdiction "involved pursuant to subsection (a)" to report "all changes in the information" in the registry "not later than 3 business days after each change of name, residence, employment, or student status." *Id.* § 16913(c).

Subsection (d) states:

> (d) Initial registration of sex offenders unable to comply with subsection (b)
>
> 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 chapter 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).

42 U.S.C. § 16913(d). Because Reynolds is a "sex offender[ ] convicted before enactment of this chapter," subsection (d) plainly applies to him.

a. Subsection (d) authorizes the Attorney General to specify both *whether* and *how* SORNA applies to previously convicted sex offenders.

The plain wording and grammatical structure of subsection (d) delineates two distinct tasks for the Attorney General, set forth in two separate clauses: (1) "to specify the applicability" of SORNA's requirements to sex offenders who were convicted before it was enacted or implemented, and (2) "to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders" who are unable to comply with the initial registration requirements of subsection (b). The use of the word "and," following the lone comma in the subsection and preceding the words "to prescribe," divides subsection (d) – and the Attorney General's authority – into two distinct parts, each of which begins with separate infinitive verbs – "to specify" and "to prescribe" – which act as adjectives describing the Attorney General's "authority" set out in the subsection and which control the infinitive phrases that follow them. The direct object of "to specify" is "the applicability," and

the direct object of "to prescribe" is "rules." A direct object is a "noun or pronoun that receives the action of a transitive verb," and a transitive verb is one "that requires a direct object to complete its meaning."[9] William Strunk, Jr. & E.B. White, *The Elements of Style* 127 (2005). The use of these two infinitive phrases, separated by the word "and," confirms that subsection (d) involves two distinct grants of authority to the Attorney General.[10]

By its plain terms, the authority granted in the first clause of subsection (d) pertains only to sex offenders convicted before SORNA was enacted or implemented, and it expressly authorizes the Attorney General to specify SORNA's applicability to these offenders.[11] By choosing to follow the phrase "to specify the applicability of" with "to" a group of offenders, Congress made clear that the Attorney General was authorized to determine *whether* SORNA's registration requirements would be applied

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[9] Grammar is, of course, relevant to statutory construction and, in this case, is instructive in determining the plain meaning of § 16913(d). *United States v. Johnson*, 632 F.3d 912, 923-924 n.61 (5th Cir. 2011) (citing *Bloate v. United States*, 130 S. Ct. 1345, 1354 (2010); *Ron Pair Enters., Inc.*, 489 U.S. at 241); *see also United States v. Hatcher*, 560 F.3d 222, 227 (4th Cir. 2009).

[10] Even those circuits that have found that SORNA's registration requirements applied to pre-SORNA offenders upon enactment agree that § 16913(d) contains two separate clauses. *See United States v. Fuller*, 627 F.3d 499, 504 (2d Cir. 2010); *DiTomasso*, 623 F.3d at 21.

[11] The Interim Rule at issue here addresses only the applicability of SORNA to pre-enactment offenders.

to pre-SORNA sex offenders. In other words, when viewed in context, the phrase "to specify the applicability of" in subsection (d) is properly read to mean to determine, in the first instance, that is, *whether* SORNA would apply to offenders who could not have initially registered under SORNA before the statute was enacted.[12] *See United States v. Johnson*, 632 F.3d 912, 924 (5th Cir. 2011) (interpreting § 16913(d)); *see generally Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").[13]

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[12] This authority to determine *whether* SORNA applies to those with pre-SORNA convictions necessarily includes the authority to determine *when* SORNA would be applied to those persons. *See United States v. Cain*, 583 F.3d 408, 417 (6th Cir. 2010) ("Congress employed language specifying that SORNA could apply to all sex offenders, but that the Attorney General would specify when offenders with past convictions and offenders convicted before the states fully implemented SORNA would be required to register. Such a system enables the Attorney General to balance administrative constraints with the goal of complete coverage.").

[13] In *Fuller*, the court refused "to equate 'specify' with 'determine in the first instance.' " 627 F.3d at 504. In the court's view, the authority delegated in the first clause of subsection (d) simply authorized the Attorney General to explain "how" SORNA's registration requirements would be applied to pre-SORNA offenders, and not "whether" they would apply. *Id.* at 506. However, had Congress chosen to delegate to the Attorney General the authority to specify "how" SORNA would be applied to pre-SORNA offenders in the first clause of subsection (d), it would have granted the authority to specify the applicability of

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Significantly, the resulting specification, *i.e.*, the Interim Rule issued pursuant to the authority delegated in the first clause of subsection (d), confirms the plain meaning. The Interim Rule states, in its entirety, that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." *Id.* at 8897. The Attorney General obviously read subsection (d) as granting the authority to indicate *whether* and not *how* SORNA would be applied to pre-enactment offenders.[14]

SORNA *for* sex offenders convicted before enactment. Under such an iteration, the word "specify" might correctly be given an alternative meaning.

[14] If the phrase "to specify the applicability of the requirements of [SORNA]" in § 16913(d) "refer[red] to [the] authority to work out the complications that may arise in the application of a new federal criminal law to an already existent class of offenders, the myriad permutations of which Congress chose not to address in the Act itself, in order to ensure an efficient and 'comprehensive' national sex offender registration system," *i.e.*, *how*, *Fuller*, 627 F.3d at 506, one would have expected the Interim Rule to address such complications and permutations, but it did not.

Furthermore, as the Attorney General made clear, the purpose of the Interim Rule was "not to address the full range of matters that are within the Attorney General's authority under section 113(d), much less to carry out the direction to the Attorney General in section 112(b) to issue guidelines and regulations to interpret and implement SORNA as a whole." 72 Fed. Reg. at 8895, 8896. This statement is an acknowledgement by the Attorney General that subsection (d) not only granted the

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In explaining the reason for the Interim Rule, the Attorney General announced that "[t]he Department of Justice is publishing this interim rule to specify *that* the requirements of [SORNA] apply to sex offenders convicted . . . prior to the enactment of that Act." *Id.* at 8894 (emphasis added). The Attorney General also noted that he "exercise[d] his authority under [§ 16913(d)] of SORNA to specify th[e] scope of application for SORNA. . . ." *Id.* at 8896.

The substance of the Interim Rule and the Attorney General's above statements demonstrate that he understood his authority "to specify the applicability of [SORNA] . . . to [pre-SORNA offenders]" as the authority to determine whether SORNA's scope would be expanded to cover such offenders.[15]

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authority to specify the applicability of SORNA, but other matters as well. *Id.*

[15] In the commentary to the Interim Rule, the Attorney General pressed the Department of Justice's litigation position: that SORNA applied to pre-enactment offenders upon its enactment. *See, e.g., United States v. Madera*, 528 F.3d 852, 857-858 (11th Cir. 2008) (*per curiam*) (rejecting the government's argument that the Attorney General was "not given full discretion to determine whether SORNA would be retroactively applied to sex offenders convicted before its enactment"); *United States v. Kapp*, 487 F.Supp.2d 536, 541 (M.D. Pa. 2007) (rejecting government's argument that the "fact that Defendant's convictions pre-dated SORNA has no bearing on whether they had an obligation under [§ 16913(d)] to update their registries"). The Attorney General pointedly stated that:

> sex offenders with predicate convictions predating SORNA who do not wish to be subject to the SORNA

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Reading the first clause of subsection (d) as granting authority to the Attorney General to determine *whether* SORNA applies to pre-SORNA sex offenders, adheres with the Attorney General's authority, in the second clause of the subsection, to prescribe *how* SORNA would be applied to pre-SORNA sex offenders, along with others who were unable to comply with the law's initial registration requirement. An interpretation of the first clause of subsection (d) as also granting authority to determine *how* SORNA would apply would impermissibly render the language in the first clause superfluous and violate "a cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), that courts "give effect, if possible, to every clause and word of a statute[.]" *United States v. Menasche*,

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> registration requirements, or who wish to avoid being held to account for having violated those requirements, have not been barred from attempting to devise arguments that SORNA is inapplicable to them, e.g., because a rule confirming SORNA's applicability has not been issued. This rule forecloses such claims by making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted.

72 Fed. Reg. at 8896.

The Attorney General explained that he was exercising his authority to specify that SORNA applied, "regardless of *whether* SORNA would apply with such scope absent this rule," *id.* (emphasis added), revealing that, irrespective of his stated belief that "considered facially" SORNA applied to all sex offenders, *id.*, he also understood the authority granted in § 16913(d) concerned *whether* SORNA would apply.

348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) ("As early as in Bacon's Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). There is no reason to read the statute to authorize the Attorney General to do the same thing twice; nor is there a basis for reading the first clause of subsection (d) out of the statute.

In sum, the meaning of the first clause of § 16913(d) is plain: It delegates to the Attorney General the authority to determine whether SORNA should be applied to sex offenders convicted before SORNA's enactment. As Justice Alito remarked in *Carr*: "The clear negative implication of that delegation is that, without such a determination by the Attorney General, the Act would not apply to those with pre-SORNA sex-offense convictions." *Carr*, 130 S. Ct. at 2246 n.6 (Alito, J., dissenting).

Accordingly, under the plain language of § 16913(d), Mr. Reynolds was not subject to SORNA's requirements until the Attorney General exercised the authority granted to him and issued a valid regulation specifying that SORNA's registration requirements applied to individuals, like Mr. Reynolds, who were convicted of a sex offense prior to SORNA's enactment. As this Court recently stated with respect to SORNA,

> [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the statutory language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.

Carr, 130 S. Ct. at 2241-2242 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).[16]

b. A contrary reading of subsection (d) fails.

The majority of the Courts of Appeals to construe § 16913(d) have found that SORNA did not apply to pre-enactment offenders until the Attorney General exercised his authority and so specified. *See Johnson*,

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[16] In *Carr*, this Court interpreted the enforcement provision of SORNA, 18 U.S.C. § 2250(a), which makes it a federal crime, punishable by up to ten years' imprisonment, for any person who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and "knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). In reaching the conclusion that the present-tense verb "travels" in § 2250(a)(1)(B) did not encompass pre-enactment travel, the Court relied on the statute's plain language, which it found supported by the provision's statutory context. *Carr*, 130 S. Ct. at 2235-2237, 2242. In so doing, the Court rejected the government's efforts to justify construing SORNA to extend to pre-SORNA travel by "invok[ing] one of SORNA's underlying purposes: to locate sex offenders who had failed to abide by their registration obligations." *Id.* at 2240-2241.

632 F.3d at 922; *Valverde*, 628 F.3d at 1161; *United States v. Cain*, 583 F.3d 408, 414-419 (6th Cir. 2009); *United States v. Hatcher*, 560 F.3d at 226-229; *United States v. Dixon*, 551 F.3d 578, 585 (7th Cir. 2008); *Madera*, 528 F.3d at 856-859. A minority found that § 16913(d) did not delegate a decision about SORNA's applicability to all pre-SORNA offenders to the Attorney General. *See United States v. Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 916-919 (8th Cir. 2008); *Reynolds*, 380 F. App'x at 126; *Fuller*, 627 F.3d at 504-505; and *DiTomasso*, 621 F.3d at 24-25. The decisions of these courts run contrary to the canons of construction and the teachings of this Court.

Rather than give the language of § 16913(d) its plain meaning, some of these courts created ambiguity by removing the statutory language from context and by reading § 16913(d) as if it did not contain two distinct and clearly defined clauses. Instead of looking to the specific commands of § 16913(d), these courts are guided only by what they perceive is required to fulfill the congressional purpose underlying SORNA.

Section 16913(d) 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 chapter 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).

42 U.S.C. § 16913(d).

As discussed above, the first clause of § 16913(d) unambiguously grants the Attorney General the authority to specify whether the SORNA registration requirements apply to those persons convicted before SORNA's enactment. The second clause permits the Attorney General to prescribe rules for "any such offenders and for other categories of offenders who are unable to comply with subsection (b)," a construction that plainly differentiates "any such [pre-enactment] offenders" from "other categories" of offenders who are unable to comply with subsection (b).

Some courts found "the use of the statutory terminology '*other* categories of sex offenders who are unable to comply with subsection (b) of this section'" in the second clause of § 16913(d) created ambiguity by providing an alternate meaning to subsection (d), *i.e.*, that "'offenders convicted before July 27, 2006' are [] included within the 'other categories of offenders.'" *May*, 535 F.3d at 918; *see also Hinckley*, 550 F.3d at 932. The supposed ambiguity in the second clause of subsection (d), the *May* court found, "triggers the permissible reference to [§ 16913(d)'s] title." *May*, 535 F.3d at 918 (citing *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991)); *see also Hinckley*, 550 F.3d at 933 (ambiguity "requires us to look beyond the language to the

construction of the statute, the context and subtitle of the subsection").

In these courts' view, when the title and the "overall design of SORNA" are considered, subsection (d) is "very narrow in scope" and applies only to "currently unregistered sex offenders literally *unable* to comply with subsection (b) because of the age of their convictions. . . ." *May*, 535 F.3d at 918-919 (emphasis in original); *see also Hinckley*, 550 F.3d at 933 ("subsection (d)'s subheading . . . clearly limits it to the initial registration requirements in subsection (b)"). Finding that sex offenders who were able to register under state laws prior to SORNA's enactment were not "unable to comply with subsection (b) of [§ 16913(d)]," the courts concluded that the registration requirements in §§ 16913(a)-(c) applied to such offenders upon SORNA's enactment. *May*, 535 F.3d at 919; *Hinckley*, 550 F.3d at 935.

The first problem with the analyses of these courts is that they read § 16913(d) "in isolation and out of context[.]" *May*, 535 F.3d at 918 (quoting *United States v. Beasley*, Crim. No. 07-CR-115, 2007 WL 3489999, *6 (N.D. Ga. Oct. 10, 2007)); *see also Hinckley*, 550 F.3d at 931, thereby violating "a fundamental canon of statutory construction" that the words of a statute must be read in context. *Davis*, 489 U.S. at 809. Even if this were not the case, the analyses of these courts suffer from other substantial problems.

Initially, the phrase "other categories of sex offenders unable to comply with subsection (b)" – even when read in isolation – is not reasonably interpreted to modify all pre-enactment offenders. The words "any such offender," in the second main clause of subsection (d), indisputably refer back to "sex offenders convicted before the enactment of this chapter" in the first clause. By referring to "any such offenders" and "other categories of sex offenders," Congress clearly identified two groups for whom the Attorney General had the authority to prescribe rules under the second clause – one which it specifically identified (pre-enactment offenders) and one it did not (other categories of offenders).

The use of the word "other" does not inject ambiguity; rather, it simply signifies that there is a similarity between the two groups of offenders, specified in the descriptive clause "who are unable to comply with subsection (b)." *Cf. Begay v. United States*, 553 U.S. 137, 150-151 (2008) (Scalia, J., concurring) (explaining that the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" as "signif[ying] a similarity between the enumerated and unenumerated crimes" in the preceding clause of 18 U.S.C. § 924(e)). This construction not only makes sense, but also reflects Congress' understanding that there are likely categories of offenders, other than pre-enactment

offenders, who would be unable to comply with § 16913(b) of SORNA.[17]

Thus, even if the second clause of subsection (d) were ambiguous because the word "other" renders it susceptible to an alternate interpretation – which it does not – it would not affect the plain meaning of the first clause, which involves the separate and distinct authority to specify the applicability of SORNA.

The courts' ultimate conclusion that pre-SORNA registrations under state procedures are the equivalent of "initial registrations" that comply with subsection (b) of § 16913, a position the government has consistently pressed, is foreclosed by this Court's recent analysis in *Carr*.[18]

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[17] The *May* and *Hinckley* courts' construction, that pre-enactment offenders are included among the other categories of offenders for whom the Attorney General's authority is limited to prescribing rules, renders most of the language of § 16913(d) superfluous. If Congress had intended such meaning, it would simply have stated, "the Attorney General shall have the authority to prescribe rules for offenders who are unable to comply with subsection (b)."

[18] The Third Circuit also erroneously equated state registrations with "initial registrations" under § 16913(b) of SORNA. *Shenandoah*, 595 F.3d at 163. Applying the faulty reasoning of *Shenandoah*, the court below found that Mr. Reynolds lacked standing to challenge the Interim Rule because it did not apply to him and others who were "required to register as a sex offender under state law before SORNA was enacted – and [were] in fact so registered. . . ." (J.A. 64.).

In *Carr*, the government argued that the first element of § 2250, which can only be satisfied when a person "is required to register under [SORNA]," is "merely a shorthand way of identifying those persons who have a sex offense conviction. . . ." *Carr*, 130 S. Ct. at 2235. Not only did the Court find that such a construction would mean that "Congress used 12 words and two implied cross-references to establish that the first element of § 2250 is that a person has been convicted of a sex offense," but it also pointed out that "a sex offender could not have been required to register *under SORNA* until SORNA became the law." *Id.* (emphasis added).

Similarly, a sex offender could not have been able "to comply with subsection (b) of [§ 16913]" until § 16913(b) became the law. To adopt a construction of the phrase "unable to comply with subsection (b)" as "unable to register, prior to SORNA, in the jurisdiction where convicted," would require the Court to accept what it rejected in *Carr* – that Congress cross-referenced subsection (b) for no reason and that the precise statutory text is "merely 'a shorthand way of identifying'" offenders who could not register in their respective jurisdictions. *See id.*

"Such contortions can scarcely be called 'shorthand.'" *Id.* Just as it was "far more sensible" to conclude that Congress meant what it wrote in § 2250(a), it is far more sensible here to conclude that Congress meant what it wrote in subsection (d): that the Attorney General's authority to prescribe rules

applied to sex offenders who are "unable to comply with subsection (b)."

Not all of the courts that have rejected the plain meaning of subsection (d) adopted the "shorthand" argument. Some have resorted to "that ever-ready refuge from the hardships of statutory text, the (judicially) perceived statutory purpose," *Begay*, 553 U.S. at 152 (Scalia, J., concurring), and found that interpreting subsection (d) as a delegation to the Attorney General to determine whether SORNA should be applied to pre-SORNA offenders would contravene SORNA's statutory purpose.[19] *See, e.g., DiTomasso*, 621 F.3d at 24; *Fuller*, 627 F.3d at 506.

This is clear in *DiTomasso*, where the court stated: "In our judgment, a different canon of construction dominates the interpretive landscape in this instance. When congressional intent is clear and a statute plausibly can be read to effectuate that

[19] These courts found support for their interpretation in the general rule that "a law takes effect on the date of its enactment absent a clear [congressional] direction to the contrary." *Fuller*, 627 F.3d at 506 (citing *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)); *see also DiTomasso*, 621 F.3d at 23. As discussed *supra* at 21-30, § 16913(d) specifically addresses the application of SORNA's registration requirements to pre-SORNA offenders and, by delegating a decision about whether the requirements in subsections (a)-(c) apply to such offenders, it provides a clear direction that SORNA did not apply to them on the day of enactment. Giving effect to subsection (d)'s plain language recognizes another well-settled rule, that a "specific provision controls over one of more general application." *Gozlon-Peretz*, 111 S. Ct. at 407.

intent, that reading must prevail over a more semantically correct reading of the statutory language." *DiTomasso*, 621 F.3d at 23 (citing *In re Hill*, 562 F.3d 29, 32 (1st Cir. 2009)). Similarly in *Fuller*, the court found that because "Congress's stated purpose in enacting SORNA was to create 'a *comprehensive* national system for the registration of [sex] offenders' . . . reading subsection (d) as Fuller does would undermine the entire purpose of the statute." *Id.* at 505.

According to *Fuller*, the

> power "to specify the applicability of the requirements of [SORNA]" refers to [the Attorney General's] authority to work out the complications that may arise in the application of a new federal criminal law to an already existent class of offenders, the myriad permutations of which Congress chose not to address in the Act itself, in order to ensure an efficient and "comprehensive" national sex offender registration system.[20]

Id. at 506.

Although the court in *DiTomasso* also concluded that "Congress did not contemplate a statutory

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[20] As discussed *supra* on 25-26, *Fuller*'s construction unreasonably construes both clauses of subsection (d) as involving only "how" SORNA would be applied to pre-SORNA offenders. 627 F.3d at 506, 507. The court acknowledged that its interpretation of subsection (d) rendered the second clause of the provision superfluous, but found that "such surplusage can be forgiven in light of SORNA's overarching purpose and its general structure." *Id.* 627 F.3d at 507 (citing *Lamie v. U.S. Tr.*, 540 U.S. 536 (2004)).

scheme in which the application of the general rules limned in subsections (a), (b), and (c) to previously convicted sex offenders would hinge on action by the Attorney General[,]" it simultaneously found that Congress authorized the Attorney General to determine *whether* SORNA would apply to "those previously convicted offenders who were unable to comply with subsection (b)," and "narrow SORNA's sweep if and to the extent that he concluded that specific situations invite such narrowing." *Id.* at 23, 25. One such situation, the court explained, is where "problematic permutations [ ] might arise with respect to some previously convicted offenders." *Id.* at 25.

Fuller did not fully embrace *DiTomasso*'s construction, and insisted that subsection (d) pertained only to *how* SORNA would be applied. *Fuller*, 627 F.3d at 505. However, it recognized the Attorney General's substantial discretion "to work out the complications that may arise in the application of a new federal criminal law to an already existent class of offenders, the myriad permutations of which Congress chose not to address in the Act itself[.]" *Id.*

By construing subsection (d) as authorizing the Attorney General to provide relief from SORNA's registration requirements because of the myriad of problematic permutations that might arise in applying SORNA to pre-SORNA offenders, these courts implicitly acknowledge that congressional purpose does not demand that SORNA be applied immediately to all

offenders, irrespective of when they were convicted.[21] They also recognize the unique position of the Attorney General in addressing the myriad of problems that could arise from applying SORNA to pre-enactment offenders and in ensuring SORNA's effectiveness, which makes the delegation eminently reasonable. That is, by delegating to the Attorney General the authority to specify SORNA's applicability to pre-enactment offenders Congress reasonably delegated the decision to someone who could ensure that application in an area that was rife with potential problems would be effective.

Indeed, had Congress made SORNA immediately applicable to pre-enactment offenders, it risked that its "comprehensive national system for the registration of [sex offenders]," § 16901, would be ineffective as to these offenders. Given SORNA's objectives, the risk of implementing an ineffective system far outweighed the risk identified by the courts in *DiTomasso* and *Fuller*, *i.e.*, that the Attorney General might not exercise the discretion granted in subsection (d), thereby leaving all pre-enactment offenders

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[21] The courts assume that Congress's stated purpose for enacting SORNA, "a comprehensive national system for the registration of [sex] offenders" § 16901, necessarily required the immediate application of SORNA's registration requirements to all sex offenders. Such "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." *Carr*, 130 S. Ct. at 2241 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993)).

beyond SORNA's reach. *DiTomasso*, 621 F.3d at 24; *Fuller*, 627 F.3d at 505. As the Sixth Circuit noted in *Cain*, any suggestion that "the Attorney General might not require any pre-SORNA offenders to register[,] disregards the political reality that an Attorney General was unlikely to do so." *Cain*, 583 F.2d 408, 417.

Congress was clear, specific, and consistent in § 16913(d) – it left it to the informed discretion of the Attorney General to determine whether to apply the requirements of its new, national scheme to pre-enactment offenders. Its delegation was reasonable in light of its stated purpose and the expectation that applying SORNA to pre-enactment offenders would involve complications it could not address through legislation. Congress not only wanted a comprehensive national system, it also wanted an effective one. The delegation of authority in subsection (d), which left a determination about SORNA's applicability to pre-enactment offenders to the Attorney General, was specifically and intentionally designed to ensure SORNA's effectiveness with respect to this class of offenders.

Those courts which found that giving effect to subsection (d)'s plain language would contravene SORNA's purpose "confuse[ ] a general goal of SORNA with the specific purpose of" § 16913(d). *Carr*, 130 S. Ct. at 2240. Their construction is neither supported by the provision's statutory language nor compelled by SORNA's broader statutory purpose.

c. Principles of statutory construction as well as section 16913(d)'s legislative history confirm its plain meaning.

The plain language of § 16913(d), delegating exclusive and full authority to the Attorney General to determine whether SORNA applies to those convicted of sex offenses prior to SORNA's enactment, is essential to the effectiveness of SORNA and does not conflict with "clearly expressed congressional intent" to create a comprehensive system. *Hatcher*, 560 F.3d at 229. In fact, "[s]uch a system enables the Attorney General to balance administrative constraints with the goal of complete coverage." *Cain*, 583 F.3d at 417.

A more limited grant of authority to the Attorney General is inconsistent with Congress' desire to establish "a comprehensive national system" for the registration of sex offenders. 42 U.S.C. § 16901. SORNA's legislative sponsors "'consistently and emphatically expressed displeasure with the existing state-by-state patchwork of sex offender laws and stated their intention to replace them with a uniform, comprehensive federal registration statute.'" *Cain*, 583 F.3d at 419 (quoting *Hinckley*, 550 F.3d at 947). That there was concern about "coverage of the 'approximately 500,000 sex offenders registered under various and patchwork state regimes at the time of the bill's enactment'" does not mean that Congress "expected such coverage to occur automatically by the statute rather than, as the statutory text provides, by the Attorney General's regulation." *Id.* Indeed, an examination of § 16913(d), within its broader statutory

context and in light of its legislative history, confirms that Congress intended SORNA's application to pre-enactment offenders to be determined by the Attorney General.

i. Statutory context supports the plain meaning of section 16913(d).

Viewing § 16913(d) in its statutory context, and with regard to SORNA's statutory purpose, confirms that Congress delegated the authority to determine the applicability of SORNA's registration requirements "to sex offenders convicted before the enactment[,]" to the Attorney General under § 16913(d). The delegation of authority to specify the applicability of SORNA to all pre-SORNA sex offenders is not only intentionally broad, but also is consistent with SORNA's design and purpose. The delegation of authority to determine whether SORNA applies to pre-SORNA offenders is also understandable in light of congressional directives throughout the statute, which make the Attorney General responsible for nearly every aspect of SORNA.

For example, § 16912, the SORNA provision immediately preceding § 16913, requires the Attorney General to "issue guidelines and regulations to interpret and implement this subchapter." 42 U.S.C. § 16912(b). Although § 16912(b) mandates action by the Attorney General, the responsibility given under that provision is quite broad in that it leaves a myriad of determinations, which could delay or otherwise

impact the application of SORNA, to the discretion of the Attorney General. Similarly, under § 16924(b), the Attorney General is authorized to allow jurisdictions to delay implementation of SORNA, which likewise affects the immediate application of SORNA.

The responsibilities given the Attorney General under §§ 16912(b) and 16924(b), which affect the implementation of SORNA for all sex offenders, is comparable to the authority granted in § 16913(d), which permits the Attorney General to determine whether SORNA would be applied to a subset of sex offenders, *viz.*, those with pre-SORNA convictions.

In addition, recognizing the expertise of the Attorney General, Congress delegated other substantial responsibilities to his office, including:

- directing the Attorney General to "maintain a national database," known as the "National Sex Offender Registry," 42 U.S.C. § 16919, and authorizing the Attorney General to add to the information required in the sex offender registry by both offenders and jurisdictions, *see* 42 U.S.C. §§ 16914(a)(7) and (b)(8);
- directing the Attorney General to maintain "the Dru Sjodin National Sex Offender Public Website" and requiring "each jurisdiction" to "participate in that website as provided by the Attorney General," who will also direct jurisdictions to exempt certain information

from disclosure, 42 U.S.C. §§ 16918(a), 16918(b), and 16920(a);

- establishing "within the Department of Justice, under the general authority of the Attorney General, an Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking" referred to as the "SMART Office[,]" which is authorized to, *inter alia*, "administer the standards for the sex offender registration and notification program set forth in" the Adam Walsh Act, 42 U.S.C. § 16945;[22]

- authorizing the Attorney General to consider whether a jurisdiction is unable to implement SORNA because implementation "would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court." 42 U.S.C. § 16925(b)(1), and;

- mandating that the "Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements," 42 U.S.C. § 16941(a).

In short, Congress made the Attorney General responsible for nearly every aspect of

[22] *About SMART*, http://www.ojp.usdoj.gov/smart/about.htm.

SORNA's implementation, enforcement, and administration.[23] When considered in its statutory context, as it must be, *Davis*, 489 U.S. at 809, the delegation of authority in § 16913(d) to specify the applicability of SORNA's registration requirements to pre-SORNA offenders is consistent with SORNA's "overall statutory scheme," *id.* Delegating a decision about the applicability of SORNA to pre-SORNA offenders – an act which would require the expertise and considered judgment of the Attorney General to ensure an effective registration system – best reflects the congressional purpose "to establish[] a comprehensive national system for the registration of [sex]

---

[23] Congress delegated other responsibilities related to SORNA to the Attorney General, including:

1) establishment and maintenance of a system for informing jurisdictions about persons entering the United States who are required to register under SORNA, including providing direction to the Secretary of State and the Secretary of Homeland Security under 42 U.S.C. § 16928;

2) creation and maintenance of the Project Safe Childhood program under 42 U.S.C. § 16942;

3) expanding "training efforts with Federal, State and local law enforcement officers and prosecutors" including "facilitating meetings involving corporations that sell computer hardware or provide services to the general public related to use of the Internet" under 42 U.S.C. §§ 16944(a)(1) and (2); and

4) "fingerprint-based checks of the national crime information databases" pursuant to the "School Safely Acquiring Faculty Excellence Act of 2006" upon request of a state. 42 U.S.C. §§ 16962(a) and (b).

> offenders." 42 U.S.C. § 16901. Thus, authority granted to the Attorney General in § 16913(d) is typical of, rather than at odds with, SORNA.

In fact, given the scope of the Attorney General's responsibilities under SORNA, it was eminently reasonable for Congress to leave to the Attorney General's discretion a determination about whether SORNA should be applied to pre-SORNA offenders. Given the other substantial decisions left to the Attorney General, he was in the best position to determine whether and when SORNA's registration requirements should be applied to the 500,000 pre-SORNA offenders to ensure that its application would be effective.[24]

In light of SORNA's overall structure, there is little reason to doubt that Congress intended § 16913(d) to do exactly what it says: to delegate the authority to determine whether SORNA's newly enacted registration requirements would apply to offenders whose convictions predated enactment.

---

[24] In addition, as the court noted in *Johnson*, "giving the Attorney General authority to determine the statute's application to pre-enactment offenders would allow an agency that is an expert in criminal law to negotiate the details of retroactivity and the interactions between the pre-existing state systems." *Johnson*, 632 F.3d at 926.

ii. Legislative history supports SORNA's plain meaning that the registration requirements did not apply to sex offenders convicted before enactment until the Attorney General exercised his authority to specify their applicability.

The text of § 16913(d) grants the Attorney General the authority to specify whether, when and how SORNA would apply to sex offenders with pre-SORNA convictions. *See* 42 U.S.C. § 16913(d). "Given the straightforward statutory command, there is no reason to resort to legislative history." *Gonzales*, 520 U.S. at 6 (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Nevertheless, consideration of SORNA's limited legislative history confirms the plain meaning of § 16913(d).

In 2005, the Senate proposed its own sex offender registration legislation to SORNA in Senate Bill 1086. After the Senate Judiciary Committee marked it up, the proposed legislation contained a provision similar to SORNA's § 16913(d), titled "Retroactive Application." S.1086, 109th Cong. § 104(a)(8) (2005). This section debuted the phrase "the Attorney General shall have the authority to specify the applicability of the requirements of this title" and provided:

> (8) RETROACTIVE APPLICATION. –
>
> The Attorney General *shall have the authority to* –

> (A) *specify the applicability of* the requirements of this title to individuals who are covered individuals based on a conviction or sentencing that occurred prior to the date of enactment or who are, as of the date of enactment of this Act, incarcerated or under a non-incarcerative sentence for some other offense;
>
> (B) *specify the applicability of* the requirements of this title to all other individuals who are covered individuals based on a conviction or sentencing that occurred prior to the enactment date of enactment of this Act or the implementation of the requirements of this title by a participating State; and
>
> (C) *specify procedures and methods for* the registration of individuals to whom the requirements of this title apply pursuant to subparagraph (A) or (B).

Id. (emphasis added).

The above-quoted language, which grants authority to the Attorney General to specify the applicability of the legislation to those persons convicted before its enactment, closely tracks the language ultimately enacted by Congress in 2006 in § 16913(d) of SORNA. 42 U.S.C. § 16913(d). Furthermore, the language in S.1086 highlights the distinction between the phrases "specify the applicability" and "specify procedures and methods." S.1086, 109th Cong. § 104(a)(8). Like SORNA, S.1086 granted the Attorney General two

separate authorities in this context: 1) to determine *whether* the sex offender registration provisions applied to individuals who were convicted or sentenced before enactment (in § 104(a)(8)(A) and (B) above) and; 2) to determine *how* to register individuals convicted or sentenced before enactment (in § 104(a)(8)(C) above). *Id.* "Subsection 16913(d) reads like a revised version of this provision of Senate Bill 1086, suggesting that Congress did not intend any substantive change between those provisions." *Cain*, 583 F.3d at 418.

This favorable comparison is strong evidence that the text of § 16913(d), enacted less than one year after a similar bill passed the Senate in May 2005, expresses the legislative intent to grant authority to the Attorney General to determine whether SORNA applies to those with pre-SORNA convictions. *See* S.1086, 109th Cong. § 104(a)(8). As noted by this Court, "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'"[25] *United States v. James*, 478 U.S. 597, 606 (1986).

---

[25] Another piece of proposed legislation, The Children's Safety Act of 2005, passed the House of Representatives in September 2005 and included a subsection entitled "Retroactive Duty to Register." H.R. 3132, 109th Cong. § 113 (2005). Section 113 pertained generally to the registration of sex offenders whose convictions predated the proposed legislation. *Id.* It did not delegate any authority to the Attorney General. *Id.* Instead, it provided that "the Attorney General *shall prescribe a method*

(Continued on following page)

Because the legislative record confirms that Congress intended to delegate to the Attorney General *both* the authority to determine *whether* and *how* SORNA would be applied to pre-enactment offenders, the language of § 16913(d) must be given its plain meaning.[26]

---

for the registration of sex offenders convicted before the enactment of this Act or its effective date in a particular jurisdiction." *Id.* (emphasis added).

The difference between the text of the Children's Safety Act, which was not enacted, and SORNA is significant, because it reflects an intentional policy choice and demonstrates that Congress's choice of words "was no drafting inadvertence." *United States v. James*, 478 U.S. 597, 608 (1986), abrogated on other grounds by *Cent. Green Co. v. United States*, 531 U.S. 425, 436 (2001); *see Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

[26] If, after employing all of the canons of construction, any question remains about the meaning of subsection (d), strict construction and the rule of lenity demand that the unusual reading of SORNA's delegation provision, pressed by the government in this case and in others, should not be adopted. *United States v. Santos*, 553 U.S. 507, 514 (2008) ("[T]he rule of lenity, requires ambiguous criminal statutes to be interpreted in favor of the defendants subject to them."). A "tie must go to the defendant." *Id.*

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals for the Third Circuit and remand for consideration of the merits of Mr. Reynolds' challenge to the validity of the Attorney General's Interim Rule.

Respectfully submitted,

LISA B. FREELAND*
Federal Public Defender
CANDACE CAIN
RENEE D. PIETROPAOLO
TARA I. ALLEN
Assistant Federal
Public Defenders
KIMBERLY R. BRUNSON
PETER R. MOYERS
Staff Attorneys

1500 Liberty Center
1001 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 644-6565
lisa_freeland@fd.org
Counsel for Petitioner

**Counsel of Record*

APPENDIX A

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TITLE 42 –
THE PUBLIC HEALTH AND WELFARE

* * *

CHAPTER 151 –
CHILD PROTECTION AND SAFETY

* * *

SUBCHAPTER I –
SEX OFFENDER REGISTRATION
AND NOTIFICATION

§ 16901. Declaration of purpose

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

* * *

PART A –
SEX OFFENDER REGISTRATION
AND NOTIFICATION

§ 16911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) *Sex offender*

The term "sex offender" means an individual who was convicted of a sex offense.

* * *

(9) *Sex offender registry*

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) *Jurisdiction*

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

* * *

§ 16912. Registry requirements for jurisdictions

(a) *Jurisdiction to maintain a registry*

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

(b) *Guidelines and regulations*

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

* * *

§ 16913. Registry requirements for sex offenders

(a) *In general*

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) *Initial registration*

The sex offender shall initially register –

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) *Keeping the registration current*

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) *Initial registration of sex offenders unable to comply with subsection (b)*

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 chapter 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).

(e) *State penalty for failure to comply*

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex

offender to comply with the requirements of this subchapter.

(Pub. L. 109–248, title I, § 113, July 27, 2006, 120 Stat. 593.)

REFERENCES IN TEXT

This subchapter, referred to in subsecs. (d) and (e), was in the original "this title", meaning title I of Pub. L. 109-248, July 27, 2006, 120 Stat. 590, known as the Sex Offender Registration and Notification Act. For complete classification of title I to the Code, see Short Title note set out under section 16901 of this title and Tables.

This chapter, referred to in subsec. (d), was in the original "this Act", meaning Pub. L. 109-248, July 27, 2006, 120 Stat. 587, known as the Adam Walsh Child Protection and Safety Act of 2006, which was approved July 27, 2006. For complete classification of this Act to the Code, see Short Title note set out under section 16901 of this title and Tables.

§ 16914. Information required in registration

(a) *Provided by the offender*

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

* * *

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

(b) *Provided by the jurisdiction*

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

* * *

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

* * *

§ 16915. Duration of registration requirement

* * *

(b) *Reduced period for clean record*

(1) *Clean record*

The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by –

* * *

(D) successfully completing of [ ] an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

* * *

§ 16915a. Direction to the Attorney General

(a) *Requirement that sex offenders provide certain Internet related information to sex offender registries*

The Attorney General, using the authority provided in section 114(a)(7) of the Sex Offender Registration and Notification Act [42 U.S.C. 16914(a)(7)], shall require that each sex offender provide to the sex offender registry those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act [42 U.S.C. 16901 et seq.] . . .

* * *

(b) *Timeliness of reporting of information*

The Attorney General, using the authority provided in section 112(b) of the Sex Offender Registration and Notification Act [42 U.S.C. 16912(b)], shall specify the time and manner for keeping current information required to be provided under this section.

(c) *Nondisclosure to general public*

The Attorney General, using the authority provided in section 118(b)(4) of the Sex Offender Registration and Notification Act [42 U.S.C. 16918(b)(4)], shall exempt from disclosure all information provided by a sex offender under subsection (a).

(d) *Notice to sex offenders of new requirements*

The Attorney General shall ensure that procedures are in place to notify each sex offender of changes in requirements that apply to that sex offender as a result of the implementation of this section.

* * *

§ 16915b. Checking system for social networking websites

(a) *In general*

(1) *Secure system for comparisons*

The Attorney General shall establish and maintain a secure system that permits social networking websites to compare the information contained in the National Sex Offender Registry with the Internet identifiers of users of the social networking websites, and view only those Internet identifiers that match. The system –

* * *

(B) shall use secure procedures that preserve the secrecy of the information made available by the Attorney General, including protection measures that render the Internet identifiers and other data elements indecipherable.

(2) *Provision of information relating to identity*

Upon receiving a matched Internet identifier, the social networking website may make a request of the

Attorney General for, and the Attorney General shall provide promptly, information related to the identity of the individual that has registered the matched Internet identifier. This information is limited to the name, sex, resident address, photograph, and physical description.

(b) *Qualification for use of system*

A social networking website seeking to use the system shall submit an application to the Attorney General which provides –

* * *

(7) such other information or attestations as the Attorney General may require to ensure that the website will use the system –

(A) to protect the safety of the users of such website; and

(B) for the limited purpose of making the automated comparison described in subsection (a).

(c) *Searches against the system*

(1) *Frequency of use of the system*

A social networking website approved by the Attorney General to use the system may conduct searches under the system as frequently as the Attorney General may allow.

(2) *Authority of Attorney General to suspend use*

The Attorney General may deny, suspend, or terminate use of the system by a social networking website . . .

(3) *Limitation on release of Internet identifiers*

(A) *No public release*

Neither the Attorney General nor a social networking website approved to use the system may release to the public any list of the Internet identifiers of sex offenders contained in the system.

(B) *Additional limitations*

The Attorney General shall limit the release of information obtained through the use of the system established under subsection (a) by social networking websites approved to use such system.

* * *

(D) *Rule of construction*

This subsection shall not be construed to limit the authority of the Attorney General under any other provision of law to conduct or to allow searches or checks against sex offender registration information.

(4) *Payment of fee*

A social networking website approved to use the system shall pay any fee established by the Attorney General for use of the system.

* * *

§ 16917. Duty to notify sex offenders of registration requirements and to register

(a) *In general*

An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register –

(1) inform the sex offender of the duties of a sex offender under this subchapter and explain those duties;

(2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and

(3) ensure that the sex offender is registered.

(b) *Notification of sex offenders who cannot comply with subsection (a)*

The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection (a).

* * *

§ 16918. Public access to sex offender information through the Internet

(a) *In general*

* * *

. . . The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General.

(b) *Mandatory exemptions*

A jurisdiction shall exempt from disclosure –

* * *

(4) any other information exempted from disclosure by the Attorney General.

(c) *Optional exemptions*

A jurisdiction may exempt from disclosure –

* * *

(4) any other information exempted from disclosure by the Attorney General.

* * *

§ 16919. National Sex Offender Registry

(a) *Internet*

The Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry. The database shall be known as the National Sex Offender Registry.

(b) *Electronic forwarding*

The Attorney General shall ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.

* * *

§ 16920. Dru Sjodin National Sex Offender Public Website

(a) *Establishment*

There is established the Dru Sjodin National Sex Offender Public Website (hereinafter in this section referred to as the "Website"), which the Attorney General shall maintain.

(b) *Information to be provided*

* * *

. . . The Website shall allow the public to obtain relevant information for each sex offender by a single query for any given zip code or geographical radius set by the user in a form and with such limitations as may be established by the Attorney General and shall have such other field search capabilities as the Attorney General may provide.

* * *

§ 16921. Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program

(a) *Establishment of Program*

There is established the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program (hereinafter in this section referred to as the "Program").

(b) *Program notification*

Except as provided in subsection (c), immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:

(1) The Attorney General, who shall include that information in the National Sex Offender Registry or other appropriate databases.

* * *

§ 16922. Actions to be taken when sex offender fails to comply

An appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with the requirements of a registry and revise the jurisdiction's registry to reflect the nature of that failure. The appropriate official, the Attorney General, and each such law enforcement agency shall take any appropriate action to ensure compliance.

* * *

§ 16923. Development and availability of registry management and website software

(a) *Duty to develop and support*

The Attorney General shall, in consultation with the jurisdictions, develop and support software to enable jurisdictions to establish and operate uniform sex offender registries and Internet sites.

* * *

(c) *Deadline*

The Attorney General shall make the first complete edition of this software available to jurisdictions within 2 years of July 27, 2006.

* * *

§ 16924. Period for implementation by jurisdictions

* * *

(b) *Extensions*

The Attorney General may authorize up to two 1-year extensions of the deadline.

* * *

§ 16925. Failure of jurisdiction to comply

(a) *In general*

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent

of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

(b) *State constitutionality*

(1) *In general*

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

(2) *Efforts*

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

(3) *Alternative procedures*

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing [ ] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

* * *

§ 16926. Sex Offender Management Assistance (SOMA) program

(a) *In general*

The Attorney General shall establish and implement a Sex Offender Management Assistance program (in this subchapter referred to as the "SOMA program"), under which the Attorney General may award a grant to a jurisdiction to offset the costs of implementing this subchapter.

(b) *Application*

The chief executive of a jurisdiction desiring a grant under this section shall, on an annual basis, submit to the Attorney General an application in such form and containing such information as the Attorney General may require.

(c) *Bonus payments for prompt compliance*

A jurisdiction that, as determined by the Attorney General, has substantially implemented this subchapter not later than 2 years after July 27, 2006, is eligible for a bonus payment. The Attorney General may make such a payment under the SOMA program for the first fiscal year beginning after that determination.

* * *

(d) *Authorization of appropriations*

In addition to any amounts otherwise authorized to be appropriated, there are authorized to be appropriated such sums as may be necessary to the Attorney General, to be available only for the SOMA program, for fiscal years 2007 through 2009.

* * *

§ 16927. Election by Indian tribes

(a) *Election*

* * *

(2) *Imputed election in certain cases*

A tribe shall be treated as if it had made the election described in paragraph (1)(B) if –

* * *

(C) the Attorney General determines that the tribe has not substantially implemented the requirements of this part and is not likely to become capable of doing so within a reasonable amount of time.

* * *

§ 16928. Registration of sex offenders entering the United States

The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

* * *

PART B – IMPROVING FEDERAL CRIMINAL LAW ENFORCEMENT TO ENSURE SEX OFFENDER COMPLIANCE WITH REGISTRATION AND NOTIFICATION REQUIREMENTS AND PROTECTION OF CHILDREN FROM VIOLENT PREDATORS

§ 16941. Federal assistance with respect to violations of registration requirements

(a) *In general*

The Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements. For the purposes of section 566(e)(1)(B) of title 28, a sex offender who

violates a sex offender registration requirement shall be deemed a fugitive.

* * *

§ 16942. Project Safe Childhood

(a) *Establishment of program*

Not later than 6 months after July 27, 2006, the Attorney General shall create and maintain a Project Safe Childhood program in accordance with this section.

* * *

§ 16943. Federal assistance in identification and location of sex offenders relocated as a result of a major disaster

The Attorney General shall provide assistance to jurisdictions in the identification and location of a sex offender relocated as a result of a major disaster.

* * *

§ 16944. Expansion of training and technology efforts

(a) *Training*

The Attorney General shall –

(1) expand training efforts with Federal, State, and local law enforcement officers and prosecutors to effectively respond to the threat to children and the public posed by sex offenders who use the Internet and technology to solicit or otherwise exploit children;

(2) facilitate meetings involving corporations that sell computer hardware and software or provide services to the general public related to use of the Internet, to identify problems associated with the use of technology for the purpose of exploiting children;

(3) host national conferences to train Federal, State, and local law enforcement officers, probation and parole officers, and prosecutors regarding proactive approaches to monitoring sex offender activity on the Internet;

(4) develop and distribute, for personnel listed in paragraph (3), information regarding multidisciplinary approaches to holding offenders accountable to the terms of their probation, parole, and sex offender registration laws; and

(5) partner with other agencies to improve the coordination of joint investigations among agencies to effectively combat online solicitation of children by sex offenders.

(b) *Technology*

The Attorney General shall –

(1) deploy, to all Internet Crimes Against Children Task Forces and their partner agencies, technology modeled after the Canadian Child Exploitation Tracking System; and

(2) conduct training in the use of that technology.

(c) *Report*

Not later than July 1, 2007, the Attorney General, [ ] shall submit to Congress a report on the activities carried out under this section. The report shall include any recommendations that the Attorney General considers appropriate.

(d) *Authorization of appropriations*

There are authorized to be appropriated to the Attorney General, for fiscal year 2007 –

* * *

§ 16945. Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking

(a) *Establishment*

There is established within the Department of Justice, under the general authority of the Attorney General, an Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (hereinafter in this section referred to as the "SMART Office").

(b) *Director*

The SMART Office shall be headed by a Director who shall be appointed by the President. The Director shall report to the Attorney General through the Assistant Attorney General for the Office of Justice Programs and shall have final authority for all grants, cooperative agreements, and contracts awarded by

the SMART Office. The Director shall not engage in any employment other than that of serving as the Director, nor shall the Director hold any office in, or act in any capacity for, any organization, agency, or institution with which the Office makes any contract or other arrangement.

(c) *Duties and functions*

The SMART Office is authorized to –

(1) administer the standards for the sex offender registration and notification program set forth in this chapter;

(2) administer grant programs relating to sex offender registration and notification authorized by this chapter and other grant programs authorized by this chapter as directed by the Attorney General;

(3) cooperate with and provide technical assistance to States, units of local government, tribal governments, and other public and private entities involved in activities related to sex offender registration or notification or to other measures for the protection of children or other members of the public from sexual abuse or exploitation; and

(4) perform such other functions as the Attorney General may delegate.

* * *

PART C – ACCESS TO INFORMATION AND RESOURCES NEEDED TO ENSURE THAT CHILDREN ARE NOT ATTACKED OR ABUSED

§ 16961. Access to national crime information databases

(a) *In general*

Notwithstanding any other provision of law, the Attorney General shall ensure access to the national crime information databases (as defined in section 534 of title 28) by –

(1) the National Center for Missing and Exploited Children, to be used only within the scope of the Center's duties and responsibilities under Federal law to assist or support law enforcement agencies in administration of criminal justice functions; and

(2) governmental social service agencies with child protection responsibilities, to be used by such agencies only in investigating or responding to reports of child abuse, neglect, or exploitation.

(b) *Conditions of access*

The access provided under this section, and associated rules of dissemination, shall be –

(1) defined by the Attorney General; and

(2) limited to personnel of the Center or such agencies that have met all requirements set by the Attorney General, including training, certification, and background screening.

* * *

§ 16962. Schools Safe Act

(a) *Short title*

This section may be cited as the "Schools Safely Acquiring Faculty Excellence Act of 2006".

(b) *In general*

The Attorney General of the United States shall, upon request of the chief executive officer of a State, conduct fingerprint-based checks of the national crime information databases (as defined in section 534(f)(3)(A) of title 28) pursuant to a request submitted by –

* * *

(d) *Fees*

The Attorney General and the States may charge any applicable fees for the checks.

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APPENDIX B

Interim Rule and Final Rule

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PART 72 – SEX OFFENDER REGISTRATION AND NOTIFICATION [Interim Rule]

Sec.
72.1 Purpose.
72.2 Definitions.
72.3 Applicability of the Sex Offender Registration and Notification Act.

Authority: Pub. L. 109-248, 120 Stat. 587.

28 CFR § 72.1

§ 72.1 Purpose.

This part specifies the applicability of the requirements of the Sex Offender Registration and Notification Act to sex offenders convicted prior to the enactment of that Act. These requirements include registering and keeping the registration current in each jurisdiction in which a sex offender resides, is an employee, or is a student. The Attorney General has the authority to specify the applicability of the Act's requirements to sex offenders convicted prior to its enactment under sections 112(b) and 113(d) of the Act.

28 CFR § 72.2

§ 72.2 Definitions.

All terms used in this part that are defined in section 111 of the Sex Offender Registration and Notification Act (title 1 of Pub. L. 109-248) shall have the same definitions in this part.

28 CFR § 72.3

§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

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

* * *

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under

18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

* * *

PART 72 – SEX OFFENDER REGISTRATION AND NOTIFICATION [Final Rule]

1. The authority citation continues to read as follows:

Authority: Pub. L. 109-248, 120 Stat. 587.

28 CFR § 72.3

2. In § 72.3, Example 2 is revised to read as follows:

28 CFR § 72.3

§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

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Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

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