No. 11-40

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK ANTHONY VALVERDE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. 2250(a) imposes criminal penalties on a sex offender who is required to register under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, travels in interstate commerce, and knowingly fails to register. The question presented is whether SORNA's registration requirements apply of their own force to persons convicted of qualifying sex offenses before SORNA's effective date.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 628 F.3d 1159. The opinion of the district court (App., *infra*, 21a-43a) is not reported but is available at 2009 WL 4172384.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2010. A petition for rehearing was denied on February 9, 2011 (App., *infra*, 20a). On May 4, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June

9, 2011. On June 3, 2011, Justice Kennedy further extended the time to and including July 9, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix to this petition. App., *infra*, 44a-55a.

STATEMENT

A federal grand jury in the Eastern District of California returned an indictment charging respondent with failing to register and update a registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). The district court dismissed the indictment and the court of appeals affirmed. App., *infra*, 1a-19a.

1. a. Since at least 1996, all 50 States and the District of Columbia have had sex-offender-registration laws. See *Smith* v. *Doe*, 538 U.S. 84, 90 (2003). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, which "establishe[d] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. 16901.

SORNA requires, as a matter of federal law, every sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7). SORNA provides that a sex offender "shall initially register" either "before completing a sentence of imprison-

ment with respect to the offense giving rise to the registration requirement" or, "if the sex offender is not sentenced to a term of imprisonment," "not later than 3 business days after being sentenced for that offense." 42 U.S.C. 16913(b). SORNA also directs that, "not later than 3 business days after each change of name, residence, employment, or student status," a sex offender "shall * * * appear in person in at least 1 jurisdiction involved pursuant to subsection (a) [*i.e.*, where the sex offender resides, is an employee, or is a student] and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 42 U.S.C. 16913(c).

To enforce SORNA's registration requirements, Congress also created a federal criminal offense penalizing nonregistration. Under 18 U.S.C. 2250(a), a convicted sex offender who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and then "knowingly fails to register or update a registration as required by [SORNA]" may be punished by up to ten years of imprisonment. *Carr* v. *United States*, 130 S. Ct. 2229, 2234-2235 (2010) (quoting 18 U.S.C. 2250(a)).

b. SORNA delegates to the Attorney General the permissive authority to promulgate regulations in certain situations:

> *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).

On February 28, 2007, the Attorney General issued an interim rule, effective on that date, specifying 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." 28 C.F.R. 72.3. In the preamble to the rule, the Attorney General explained that "[c]onsidered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA." Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8896 (2007). The interim rule, however, served the purpose of "confirming SORNA's applicability" to "sex offenders with predicate convictions predating SORNA." *Ibid.*

In promulgating the interim rule, the Attorney General explained that "[t]he immediate effectiveness of this rule is necessary" because postponing the rule's implementation could impede the effective registration of "virtually the entire existing sex offender population" and would thereby risk "the commission of additional sexual assaults and child sexual abuse or exploitation offenses * * * that could have been prevented had local authorities and the community been aware of [the] presence" of unregistered sex offenders. 72 Fed. Reg. at 8896-8897. The Attorney General found that this "would thwart the legislative objective of 'protect[ing] the public from sex offenders and offenders against children' by establishing 'a comprehensive national system

for the registration of those offenders,'" *id.* at 8897 (brackets in original) (quoting 42 U.S.C. 16901), because "a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule," *ibid.* The Attorney General therefore determined that it would be "contrary to the public interest to adopt this 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)." *Ibid.*[1]

2. In 2002, respondent was convicted in California state court on 11 counts of sexual abuse of a minor under the age of 16 and one count of possession of child pornography. He was sentenced to 12 years of imprisonment. Before his release from prison, respondent signed a form acknowledging that he had been notified of his obligation to register as a sex offender in California and in any other State to which he might move. In January 2008, respondent was released from prison and, although he was instructed to report to his parole officer the next day, he never did. He was found several weeks later at his grandmother's house in Missouri. Respondent had not registered as a sex offender in California or Missouri. App., *infra*, 2a-3a.

In April 2008, a federal grand jury in the Eastern District of California returned an indictment charging respondent with one count of failing to register and up-

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[1] On December 29, 2010, the Federal Register published an Attorney General order finalizing the interim rule, with one clarifying change in an example to avoid any inconsistency with this Court's decision in *Carr*, *supra*. See Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and Notification Act*, 75 Fed. Reg. 81,849 (2010) (to be codified at 28 C.F.R. 72.3 (2011)).

date a registration as a convicted sex offender as required by SORNA, in violation of 18 U.S.C. 2250(a). The indictment alleged that respondent's interstate travel and failure to register occurred between January 6, 2008, and January 23, 2008. Respondent moved to dismiss the indictment on statutory and constitutional grounds. The district court granted the motion, holding that SORNA's registration and penalty provisions are not valid exercises of Congress's power under the Commerce Clause. The district court did not address respondent's other claims. App., *infra*, 3a, 21a-43a.

3. The court of appeals affirmed on alternative grounds. The court rejected respondent's Commerce Clause challenge because that argument was foreclosed by circuit precedent issued while the case was pending on appeal. App., *infra*, 4a (citing *United States* v. *George*, 625 F.3d 1124, 1130 (9th Cir. 2010)). But the court held that respondent was not required to register as a sex offender under SORNA at the time of his charged interstate travel and failure to register. App., *infra*, 5a-19a.

The court of appeals first concluded that "SORNA did not specify whether it applied to individuals convicted of a sex offense before the statute's July 2006 enactment, but instead delegated that determination to the Attorney General." App., *infra*, 8a-9a (citing *United States* v. *Juvenile Male*, 590 F.3d 924, 929 (9th Cir. 2010), vacated, No. 09-940, 2011 WL 2518925 (June 27, 2011)). The court then concluded that the Attorney General's February 28, 2007, interim rule confirming that SORNA's requirements apply to all sex offenders, including preenactment offenders, is invalid because the Attorney General did not have "good cause" for dispensing with the Administrative Procedure Act's (APA) no-

tice, comment, and publication requirements, 5 U.S.C. 553(b), (c) and (d). App., *infra*, 13a-19a. The court determined that SORNA's requirements became applicable to preenactment sex offenders on August 1, 2008—30 days after publication of final SORNA guidelines, issued after notice and comment, reaffirming that SORNA applies to such offenders. *Id*. at 2a, 19a. Because respondent was convicted of a sex offense in 2002 (before SORNA was enacted), and was charged based on conduct that occurred in January 2008 (before issuance of the final SORNA guidelines), the court of appeals affirmed the dismissal of respondent's indictment. *Id*. at 19a.

4. The government petitioned for panel rehearing and asked the court of appeals to stay the petition pending this Court's decision in *Reynolds* v. *United States*, cert. granted in part, No. 10-6549 (Jan. 24, 2011). The court denied the petition and declined to stay its ruling. App., *infra*, 20a.

REASONS FOR GRANTING THE PETITION

The question whether SORNA's registration requirements apply of their own force to persons convicted of sex offenses before SORNA's effective date is currently before the Court in *Reynolds* v. *United States*, cert. granted in part, No. 10-6549 (Jan. 24, 2011).[2] If the Court concludes that SORNA applies of its own force to

[2] Although the question on which the Court granted certiorari in *Reynolds* asks whether the petitioner has standing to challenge the Attorney General's interim rule, the decision under review in that case found that standing was lacking because SORNA applies of its own force to sex offenders (like the petitioner there) who had already registered, by virtue of pre-SORNA convictions, as sex offenders under state law. See *United States* v. *Reynolds*, 380 Fed. Appx. 125, 126 (3d Cir. 2010), cert. granted in part, No. 10-6549 (Jan. 24, 2011).

this class of sex offenders, then respondent was properly charged under Section 2250(a) and the decision below should be reversed and his indictment reinstated. If, however, the Court concludes that SORNA does not apply of its own force to persons convicted of sex offenses before SORNA's effective date, then SORNA imposed no duty on them to register before the February 28, 2007, promulgation of the Attorney General's interim rule, confirming that SORNA's registration requirements apply to all sex offenders. See 28 C.F.R. 72.3. Contrary to the court of appeals' decision, the government believes that the Attorney General did not violate the APA in issuing the interim rule and that respondent therefore would still have been properly charged with violating Section 2250(a), because he traveled in interstate commerce and thereafter failed to register in January 2008—nearly a year after that rule issued. Although the circuits are divided on that issue, see Gov't Br. at 46 n.21, *Reynolds*, *supra* (No. 10-6549), the APA issue in the present context is of limited and diminishing importance, see Br. in Opp. at note 2, *Nelson* v. *United States*, No. 10-8854 (July 8, 2011). Accordingly, plenary review on that question is not warranted. The Court should instead hold this petition pending its decision in *Reynolds* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Reynolds*, and disposed of as appropriate in light of that decision.

Respectfully submitted.

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JULY 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-10063

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARK ANTHONY VALVERDE, DEFENDANT-APPELLEE

OPINION

Filed: Dec. 27, 2010
Argued and Submitted: Sept. 23, 2010

Before: MARY M. SCHROEDER, STEPHEN REINHARDT and MICHAEL DALY HAWKINS, Circuit Judges.

REINHARDT, Circuit Judge:

The Government appeals a decision of the district court dismissing the indictment of Mark Anthony Valverde ("Valverde") under the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901 *et seq.*, on the ground that the registration and penalty provisions of the statute under which Valverde was charged, 42 U.S.C. § 16913; 18 U.S.C. § 2250(a)(2)(B), are invalid exercises of congressional power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. We

stayed this matter pending a decision on that issue in *United States v. George,* 625 F.3d 1124 (9th Cir. 2010). Valverde contends in addition that no valid statute or properly promulgated rule made SORNA's registration requirements applicable to him as of the time that he is charged with failing to register, specifically in January 2008.

We lift the stay issued pending the panel's decision in *George* and reject Valverde's Commerce Clause argument in light of that decision. We **AFFIRM**, however, the district court's dismissal of the indictment. We do so on the separate ground that the Attorney General's interim regulation of February 28, 2007—applying SORNA's registration requirements retroactively to sex offenders, such as Valverde, who were convicted before the statute's enactment—did not comply with the notice and comment procedures of the Administrative Procedure Act ("APA"), and did not qualify for the "good cause" exemption under 5 U.S.C. § 553(d)(3). As a result, the retroactivity provision did not become effective until August 1, 2008—30 days after its publication in the final SMART guidelines along with the Attorney General's response to related public comments.

I. BACKGROUND

A. Factual Background

In 2002, Valverde pled guilty in California Superior Court to eleven counts of sexual abuse of a minor under 16 and one count of child pornography. He was sentenced to twelve years in prison. Prior to his release, Valverde signed a form notifying him that under California law he was required to register as a sex offender within five days of his release from prison, and that if he moved to another state, he was required to register

there within ten days. Valverde was released in California in January 2008 with an instruction to report to a parole officer the next day. He did not report, however, and was apprehended later that month at his grandmother's house in Missouri, having registered as a sex-offender in neither California nor Missouri. Valverde's offenses under California law are not at issue in this case.

B. Procedural Background

In April 2008, defendant was indicted under SORNA, 42 U.S.C. § 16913, for having traveled, between January 6, 2008 and January 23, 2008, in interstate and foreign commerce and thereafter having knowingly failed to register as a sex offender as required by 18 U.S.C. § 2250. In February 2009, the district court dismissed the indictment, holding that neither 42 U.S.C. § 16913, which establishes the requirement that sex offenders register, nor 18 U.S.C. § 2250, which imposes criminal penalties for the failure to register, are valid exercises of congressional authority to regulate interstate commerce. The district court reasoned that these registration and penalty provisions of SORNA did not fall under any of the three categories of activity that Congress may regulate pursuant to its commerce power, as set forth by the Supreme Court in *United States v. Lopez,* 514 U.S. 549, 555, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), and *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). The district court did not rule on Valverde's separate legal contention that no valid statute or properly promulgated rule made SORNA's registration requirements retroactively applicable to him as of the date that he is charged with failing to register under 42 U.S.C. § 16913.

II. ANALYSIS

A. Commerce Clause

On September 29, 2010, this court held that the SORNA provisions that the district court in *Valverde* declared invalid under the Commerce Clause were legitimate exercises of Congress's commerce power. *United States v. George,* 625 F.3d 1124, 1130 (9th Cir. 2010) (reasoning that SORNA's registration requirements "are reasonably aimed at regulating persons or things in interstate commerce and the use of the channels of interstate commerce." (citation and quotation marks omitted)). That holding controls here. We therefore hold that the district court erred in dismissing Valverde's indictment on the ground that 42 U.S.C. § 16913 and 18 U.S.C. § 2250 were an invalid exercises of congressional authority under the Commerce Clause.

The remaining question at issue is when SORNA became effective retroactively to sex offenders convicted before the statute's enactment.[1] Having considered Valverde's argument that SORNA's retroactivity provision did not become valid until the APA's notice and comment requirements were satisfied, as well as having reviewed the Government's brief on that question, and having heard oral argument on that point from both parties, we now hold that the effective date of the retroac-

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[1] The defendant in *George* did not raise, and neither party in that case briefed or argued the question of when SORNA's registration requirements became applicable to pre-enactment sex offenders. Rather, both parties assumed that the effective date was at the latest the date on which the interim regulation was promulgated. Accordingly, the *George* court, in a footnote, made that same assumption for purposes of its discussion regarding the Commerce Clause.

tivity provision is the date on which that provision fulfilled the requirements of the APA.

B. Standard of Review

We need not decide the standard of review in order to determine the date on which the Attorney General's interim rule, 28 C.F.R. § 72.3 (2007), became effective in light of the notice and comment procedures of the APA. 5 U.S.C. § 553(b)(B), (d)(3). Valverde contends that we should apply a de novo standard of review, as we did in *Reno-Sparks Indian Colony v. E.P.A.,* 336 F.3d 899 (9th Cir. 2003). In that case, we considered the validity of rules issued by the Environmental Protection Agency that failed to comply with the Administrative Procedure Act's required notice and comment procedures. The Government argues that we should apply an "arbitrary, capricious, or abuse of discretion" standard, 5 U.S.C. § 706(2)(A), in reviewing the agency's—here, the Attorney General's—determination as to the effective date of its regulation. Because we would, under either standard, affirm the dismissal of the indictment on the ground that no validly promulgated regulation had applied SORNA retroactively to Valverde at the time of his failure to register, we need not determine whether a de novo or an abuse of discretion standard of review applies here.

C. Retroactive Application of SORNA to Valverde

SORNA, which became effective on July 27, 2006, requires an individual convicted of a sex offense to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). The statute does not specify whether its registration requirements apply retroac-

tively to a sex offender who, like Valverde, was convicted before the statute's effective date. 42 U.S.C. § 16913(b). Congress instead delegated to the Attorney General the "authority to specify the applicability of the requirements of [SORNA's registration requirements] to sex offenders convicted before [the statute's] enactment [on July 27, 2006] or its implementation in a particular jurisdiction" and the authority "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 Act's registration requirements. 42 U.S.C. § 16913(d).

Pursuant to this delegation of authority, on February 28, 2007, seven months after the statute's enactment, U.S. Attorney General Alberto Gonzales issued an interim rule applying SORNA to "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 28 C.F.R. § 72.3. In issuing the interim rule, the Attorney General declined to comply with the procedural requirements of the APA. 5 U.S.C. § 551 *et seq*. Under the APA, rulemaking is generally required to comply with a three-step process: (1) notice of a proposed rule must be given by publication in the Federal Register, 5 U.S.C. § 553(b); (2) following publication of the proposed rule, 30 days must be provided for public comment; (3) notice of a final rule must be given by publication in the Federal Register, normally accompanied by a response to concerns raised in the public comments, "not less than 30 days before [the rule's] effective date. . . ." 5 U.S.C. § 553(d)(3). The APA permits an Agency to promulgate valid regulations without complying with these procedures, however, if it "for good cause finds (and incorporates the finding and a brief statement of

reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

The Attorney General relied upon the good cause exception in seeking to make the February 28, 2007 interim rule applying SORNA retroactively effective immediately and to render inapplicable the requirements for advance publication, public comment, and Agency response. 72 Fed. Reg. at 8895. In a statement accompanying the interim rule, the Attorney General did not state that notice and comment was "impracticable" or "unnecessary," but solely that it was "contrary to the public interest."

> The immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements—and related means of enforcement, including criminal liability under 18 U.S.C. § 2250 for sex offenders who knowingly fail to register as required—to sex offenders whose predicate convictions predate the enactment of SORNA. Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would

> thwart the legislative objective of 'protect[ing] the public from sex offenders and offenders against children' by establishing 'a comprehensive national system for the registration of those offenders,' SORNA § 102, because a substantial class of sex offenders could evade the Act's mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule.

72 Fed. Reg. at 8896-97. In issuing the interim rule, the Attorney General requested post-promulgation comments, but did not subsequently publish a response to any comments he may have received or publish the interim regulation in final form. Three months later, the Attorney General solicited comments when on May 30, 2007 he issued preliminary guidelines called Sentencing Monitoring, Apprehending, Registering, and Tracking ("SMART"), which proposed to apply SORNA's requirements retroactively. 72 Fed. Reg. 30,210. This time, the Attorney General responded to the comments about the retroactivity determination when he published the final SMART guidelines on July 2, 2008. 73 Fed. Reg. 38030, 38063.

The parties do not dispute that Valverde was a sex offender by reason of his conviction under California law. Nor do they dispute that after Valverde's release, he knowingly traveled from California to Missouri, where he knowingly failed to register as a sex offender. Because SORNA did not specify whether it applied to individuals convicted of a sex offense before the statute's July 2006 enactment, but instead delegated that determination to the Attorney General, Valverde, having been convicted in 2002, was not subject to prosecution under SORNA until the Attorney General, pursuant to his delegated rulemaking authority under 42 U.S.C. § 16913(d),

determined, in compliance with the APA, that SORNA's registration requirements applied retroactively to him and others convicted before the statute's enactment. *See United States v. Juvenile Male,* 590 F.3d 924, 929 (9th Cir. 2010) ("Congress delegated to the Attorney General the decision whether SORNA should apply retroactively to sex offenders who were convicted before the statute's effective date."). The issue is therefore whether there was a validly promulgated regulation that applied SORNA's registration requirements retroactively to Valverde during the January 2008 period covered by his indictment for failure to register and for traveling in interstate commerce.

III.

There are three instruments that might have been employed to make SORNA effective retroactively to offenders convicted before its enactment: (1) the interim rule issued on February 28, 2007; (2) the proposed SMART guidelines issued on May 30, 2007; and (3) the final SMART guidelines issued on July 2, 2008. The final SMART guidelines complied with the APA's procedural requirements; they were not yet in effect, however, at the time of the act charged in Valverde's indictment—his failure to register in January 2008. The Government does not contend that the May 30, 2007 preliminary SMART guidelines carried the force of law, and rightly so: they neither met the APA's notice and comment requirements, nor did the Attorney General seek to bypass those requirements by invoking the good cause exception with respect to these proposed guidelines.

This leaves only the February 28, 2007 interim rule. Valverde asserts that although his failure to register

occurred after the publication of the interim rule, the issuance of that rule failed to comply with notice and comment procedure, notwithstanding the Attorney General's request for post-promulgation comments. *See Paulsen v. Daniels,* 413 F.3d 999, 1005 (9th Cir. 2005) ("It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later."). Valverde also contends that the Attorney General lacked the necessary "good cause" to bypass the notice and comment requirements under the APA. 5 U.S.C. § 553(b)(B), (d)(3).

The circuits are divided as to the validity of the Attorney General's February 28, 2007 interim rule. The Fourth, Seventh and Eleventh Circuits have ruled that the interim regulation was valid, and the Sixth Circuit has ruled that it was not. *Compare United States v. Dean,* 604 F.3d 1275 (11th Cir. 2010); *United States v. Gould,* 568 F.3d 459 (4th Cir. 2009); and *United States v. Dixon,* 551 F.3d 578 (7th Cir. 2008) *with United States v. Utesch,* 596 F.3d 302 (6th Cir. 2010).[2] Whether the Attorney General, in promulgating the February 28, 2007 interim rule, had good cause to waive the APA's procedural requirements, is a question of first impression in this Circuit.

Our "inquiry into whether the [Agency] properly invoked 'good cause' proceeds case-by-case, sensitive to the totality of the factors at play." *Alcaraz v. Block,* 746 F.2d 593, 612 (9th Cir. 1984). The Agency must over-

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[2] The Fourth Circuit found the interim regulation valid over a strong and persuasive dissent by Judge Michael, and the Eleventh Circuit did so with a concurrence by Judge Wilson that supports the principal argument against "good cause." *See Gould*, 568 F.3d at 475-82 (Michael, J., dissenting) and *Dean*, 604 F.3d at 1282-87 (Wilson, J., concurring).

come a high bar if it seeks to invoke the good cause exception to bypass the notice and comment requirement. *See Jifry v. FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004) (holding that the good cause exception should be "narrowly construed and only reluctantly countenanced"). This court has recognized that a failure to comply with the APA's notice and comment procedures may be excused only in those narrow circumstances in which "delay would do real harm." *Buschmann v. Schweiker,* 676 F.2d 352, 357 (9th Cir. 1982) (quotation and citation omitted). As we have explained, "[t]he good cause exception is essentially an emergency procedure." *Id.* "Emergencies, though not the only situations constituting good cause," we have noted, "are the most common." *Natural Res. Def. Council, Inc. v. Evans,* 316 F.3d 904, 911 (9th Cir. 2003) (citations and quotation marks omitted).

We considered the good cause provision in *Hawaii Helicopter Operators Ass'n v. FAA,* 51 F.3d 212 (9th Cir. 1995), in which we held that the FAA had good cause to bypass notice and comment when it issued a regulation establishing special operating rules and procedures for airplane and helicopter tour operators in Hawaii. *See id.* at 214. In the three years prior to the issuance of the air safety regulation, Hawaii had experienced 20 air tour accidents resulting in 24 fatalities, including seven helicopter accidents involving four fatalities in the nine immediately preceding months. *See id.* We found it persuasive that the imminent threat to public safety posed by the increasing number of air tour accidents provided sufficient "basis for taking emergency action without waiting for public participation." *Id.*

IV.

In the present case, the Attorney General's statement accompanying the interim rule provided no rational justification for why complying with the normal requirements of the APA would have resulted in a sufficient risk of harm to justify the issuance of the February 28, 2007 retroactivity determination on an emergency basis. The Attorney General asserts that in promulgating the interim rule applying SORNA retroactively, compliance with notice and comment was "contrary to the public interest" under 72 Fed. Reg. at 8896. He offered two reasons: delay would (1) undermine assurance about the scope of SORNA's applicability, and (2) threaten public safety. *Id.* First, the "immediate effectiveness of th[e] [interim] rule is necessary," the Attorney General said, in order "to eliminate any possible uncertainty about the applicability of the Act's [registration] requirements [and penalty provisions] . . . to sex offenders whose predicate convictions predate the enactment of SORNA." *Id.* Second, by "imped[ing] the effective registration of [ ] sex offenders [to whom coverage was extended under the interim rule][,]" delay in extending SORNA retroactively would "impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions." *Id.*

The Fourth, Seventh, and Eleventh Circuits held that the above two justifications relating to the provision of clarifying guidance and the promotion of public safety were sufficient to invoke the good cause exception by showing that compliance with the notice and comment requirement would have been contrary to the public interest. *See Gould,* 568 F.3d at 470 ("Delaying implemen-

tation of the regulation to accommodate notice and comment" would compromise "a need for legal certainty about SORNA's 'retroactive' application to sex offenders convicted before SORNA and a concern for public safety that these offenders be registered in accordance with SORNA as quickly as possible"); *Dean*, 604 F.3d at 1280-81 (concluding that the "public safety argument advanced by the Attorney General is good cause for bypassing the notice and comment period" because "the retroactive rule reduced the risk of additional sexual assaults and sexual abuse by sex offenders by allowing federal authorities to apprehend and prosecute them" and because "[t]he retroactive application of SORNA . . . removes a barrier to timely apprehension of sex offenders"); *see also Dixon*, 551 F.3d at 585 (assuming without argument that SORNA "was made applicable to . . . persons convicted of sex offenses before the Act went into effect . . . by the regulation issued by the Attorney General on February 28, 2007").

We strongly disagree with the conclusion reached by the courts that hold that compliance with the APA's notice and comment procedures would have controverted the public interest in this case. Like the Sixth Circuit and the dissenting judge in the Fourth Circuit, we find no plausible support for that conclusion in the Attorney General's statement accompanying the issuance of the interim rule that sought to apply SORNA retroactively to pre-enactment offenders. *See Utesch*, 596 F.3d at 309-10 (citing *United States v. Cain*, 583 F.3d 408, 421-23 (6th Cir. 2009)); *Gould*, 568 F.3d at 481 (Michael, J., dissenting); *see also Dean*, 604 F.3d at 1287 (Wilson, J., concurring) (finding that "the Attorney General failed to show good cause to avoid notice and comment").

a.

An interest in "eliminat[ing] any possible uncertainty" about the application of SORNA is not a reasonable justification for bypassing notice and comment. If "good cause" could be satisfied by an Agency's assertion that "normal procedures were not followed because of the need to provide immediate guidance and information[,] . . . then an exception to the notice requirement would be created that would swallow the rule." *Zhang v. Slattery,* 55 F.3d 732, 746 (2d Cir. 1995); *see also Cain,* 583 F.3d at 421 ("A desire to provide immediate guidance, without more, does not suffice for good cause."). There is little if any merit in the Attorney General's contention that it would have frustrated needed guidance about SORNA's retroactive applicability to have waited for notice and comment before issuing a final version of the interim rule. The Attorney General had already let seven months go by after SORNA's enactment before he issued the interim rule on February 28, 2007, and he gave no explanation for why immediate clarification was necessary. He cited no crisis of confusion about whether SORNA applied to pre-enactment offenders and no reason whatsoever to support an urgent need for guidance concerning the reach of the Act's registration requirements. That Congress, in delegating the authority to the Attorney General to determine SORNA's retroactive applicability, declined to eliminate the requisite compliance with the APA's procedures suggests that it did not find a need for immediate determinations by the Attorney General sufficient reason to circumvent public participation in the rulemaking process. *See Dean,* 604 F.3d at 1287 (Wilson, J., concurring) ("Congress's allocation of three years, plus extensions, to the states to comply with SORNA means Con-

gress did not perceive an emergency."); *cf. Levesque v. Block*, 723 F.2d 175, 185 (1st Cir. 1983) ("[I]f Congress was troubled by th[e] prospect [of a delay in rulemaking], it could have mandated immediate implementation."). The Attorney General's request for post-promulgation comments in issuing the interim rule casts further doubt upon the authenticity and efficacy of the asserted need to clear up potential uncertainty about whether SORNA applied retroactively.

To the extent that the interim rule may have served an interest in providing clarification about SORNA's retroactive application to those states deciding whether to implement the Act, such guidance would not have been sufficient reason to invoke the good cause exception. Whereas states were afforded up to five years to implement SORNA, 42 U.S.C. § 16924(a), (b), our court has enforced the APA's procedural requirements under the Clean Air Act in circumstances in which states were given less than one year to draft implementation plans following the EPA's promulgation of a list of areas that failed to meet national air quality standards. *See W. Oil & Gas. Ass'n v. EPA,* 633 F.2d 803, 811 (9th Cir. 1980). As Judge Michael observed in his dissent in *United States v. Gould*, "in spite of the Attorney General's hurried rulemaking, no state thus far has elected to implement SORNA, and the Attorney General recently granted a blanket one-year extension to all jurisdictions to allow substantial implementation of the Act." *Gould*, 568 F.3d at 480 (Michael, J., dissenting) (citation omitted). Nor could the immediate effectiveness of the interim rule be said to serve the interest of clarifying the Act's applicability to pre-SORNA sex offenders like Valverde, who received no notice whatsoever that their failure to register would subject them to substantial new

penalties of federal prosecution and a prison term of up to ten years. *Cf. Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) ("the purpose of the thirty-day waiting period is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect"). The Attorney General's interest in eliminating uncertainty does not justify his having sought to forego notice and comment.

b.

The Attorney General also asserted a public safety justification for why compliance with the APA's notice and comment requirement would have been contrary to the public interest. In offering this public safety justification, the Attorney General did little more than restate the general dangers of child sexual assault, abuse, and exploitation that Congress had sought to prevent when it enacted SORNA on July 27, 2006. He gave no reason why the Act's requirements should be made retroactively applicable on an emergency basis when Congress had declined to do so. He pointed to no changes in the regulatory regime; no increase in the incidence of sex offenses; no reports of underprosecution or underenforcement against pre-enactment offenders; no facts to support the asserted "greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA," 72 Fed. Reg. at 8896-97, that were not already before Congress when it delegated rulemaking authority to the Attorney General in accordance with the APA's procedural requirements.

We agree with the Sixth Circuit that "[t]he conclusory speculative harms the Attorney General cites are not sufficient to upset th[e] balance" of costs and benefits that Congress considered in declining to make

SORNA retroactive immediately and instead delegating the retroactivity determination to the Attorney General pursuant to the APA's procedural requirements. *Cain*, 583 F.3d at 421. As Judge Michael explained in his dissent, the interim rule

> did not have the immediate effect of compelling any additional sex offenders to register; nor did it provide any additional registration information either to states or to the federal government. The announcement of the rule merely allowed the federal government to prosecute under SORNA sex offenders who were currently violating state registration laws and thus were already subject to prosecution under existing state laws.

Gould, 568 F.3d at 478 (Michael, J., dissenting). In addition to concurrent registration requirements under existing state laws, the federal government already had authority under Megan's Law, 42 U.S.C. § 14071 et seq., to prosecute virtually any offender subject to prosecution for interstate travel under SORNA. *Compare* 42 U.S.C. § 14072(g), (i) (Megan's Law) (providing for federal criminal prosecution of any person who knowingly fails to register under a state's sexual offender registration program and who changes address to another state) *with* 18 U.S.C. § 2250(a) (SORNA) (providing for prosecution of any sex offender who knowingly fails to register or update a registration as required by SORNA and "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country").

Judge Wilson of the Eleventh Circuit, echoing the reasoning of the Sixth Circuit and Judge Michael of the Fourth Circuit, observed that "[t]he issue is not whether sex offenders should register, but rather whether the

addition of one more layer of federal protection atop a substantial quilt of existing state and federal laws merited emergency treatment." *See Dean*, 604 F.3d at 1283 (Wilson, J., concurring). Judge Wilson convincingly reasoned that "the existence of stringent state and federal criminal sanctions on the books at the time the [interim] regulation was promulgated obviated the case for an emergency." *Id.* (footnote omitted).[3] The Attorney General provided no reason why, in view of the existing statutory regime that already imposed registration requirements on pre-SORNA sex offenders, it was necessary for the interim rule to be made effective immediately, without providing any opportunity for notice and comment. It is difficult to see what substantial public safety interest was served by overriding Congress's willingness to allow the Attorney General to issue rules regarding retroactivity in the normal course, including the

[3] Judge Wilson concluded that although the Attorney General did not have good cause to promulgate the interim rule on an emergency basis, this failure to satisfy the notice and comment requirement amounted to harmless error. *Dean*, 604 F.3d at 1288-89 (Wilson, J., concurring). He reasoned that the defendant in *Dean* was not prejudiced by the invalidity of the interim rule under the APA because (1) he "didn't show what comment he might have made on the interim rule," *id.* at 1289, and (2) he did not provide "a reason he could have offered that might have persuaded the Attorney General not to extend SORNA to cover pre-enactment convictions." *Id.* at 1288. The Government in the instant case did not raise an argument that the absence of good cause for seeking to avoid notice and comment could be excused by harmless error, and we do not consider that proposition here. We agree, however, with the Sixth Circuit, which expressly held that "the interim regulation's procedural deficiencies were not harmless," *id.* at 313, because, in relevant part, "[t]he fact that the Attorney General eventually made SORNA retroactive through legitimate means cannot sustain prosecution of an individual based on conduct committed long before the final guidelines' enactment." *Id.* at 312.

notice and comment waiting period provided by the APA.

V.

Having failed to identify any "rational connection between the facts found and the choice made" to promulgate the interim rule on an emergency basis, *Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292, 1297 (9th Cir. 1992) (quoting *Sierra Pacific Indus. v. Lyng,* 866 F.2d 1099, 1105 (9th Cir. 1989) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))), we conclude that the Attorney General committed a clear error of judgment in failing to consider the factors relevant for seeking to bypass the APA's notice and comment requirement. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). Because neither the asserted interest in clarifying SORNA's applicability nor the asserted need to protect public safety plausibly constituted good cause for bypassing the APA's procedural requirements, we hold that the interim rule failed to comply with the APA's notice and comment procedures. Accordingly, SORNA did not become effective against pre-enactment offenders like Valverde until August 1, 2008, thirty days after publication of the final SMART guidelines along with the Attorney General's response to comments. As there was no properly promulgated regulation rendering SORNA's registration requirements applicable to Valverde in January 2008, we affirm the district court's dismissal of his indictment.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-10063
D.C. No. 2:08-cr-00187-LKK-1
Eastern District of California, Sacramento

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARK ANTHONY VALVERDE, DEFENDANT-APPELLEE

[Filed: Feb. 9, 2011]

ORDER

Before: SCHROEDER, REINHARDT, and HAWKINS, Circuit Judges.

The Government's request to stay consideration of its petition for panel rehearing is **DENIED**.

The Government's petition for panel rehearing is **DENIED**.

The mandate will issue forthwith. It is so **ORDERED**.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

D.C. No. 2:08-cr-00187-LKK-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK ANTHONY VALVERDE, DEFENDANT

[Filed: Feb. 10, 2009]

ORDER

LAWRENCE K. KARLTON, Senior District Judge.

Defendant appears before the court having been charged with one felony count for Failure to Register as a Sex Offender, in violation of 18 U.S.C. § 2250(a). He moves to dismiss the indictment on several grounds, which the government opposes. The court resolves the motion on the papers and after oral argument.

Resolution of the instant motion is difficult. First, it turns on the restriction of federal power emanating from the Commerce Clause. The clause itself, and the jurisprudence interpreting it, do not provide clear and consistent direction. Moreover, the courts are divided as to the proper application of that jurisprudence to the instant issues. Third, to be frank, those subject to the law

at issue have frequently committed the most heinous of crimes, making it difficult to give their claims the dispassionate analysis the law requires. Nonetheless, it is the sworn duty of judges to do so, and below I engage in that effort.

I. BACKGROUND[1]

The parties represent that defendant previously has pled guilty in California's Superior Court to various charges of sexual abuse. He received a custodial sentence of twelve years. While still in prison, he signed a form entitled "Notice of Sex Offender Registration Requirement—290 P.C.," which set forth his registration requirements under California law as a convicted sex offender. *See* Gov't.'s Opp'n to Def.'s Mot. to Dismiss, Ex. A. Several months later, on January 6, 2008, he was released. Although he was instructed to report to his parole officer the next day, he never did and he was found a few weeks later in Missouri. According to the government, he had not registered as a sex offender in either California or Missouri. The indictment charges that from January 6, 2008 to January 23, 2008, defendant "travel[ed] in interstate and foreign commerce" and failed to register as a sex offender and to update his registration as required by 18 U.S.C. § 2250.

On November 18, 2008, defendant moved to dismiss the indictment on the grounds that 18 U.S.C. § 2250 violates the Commerce Clause, the Tenth Amendment, the Non-Delegation Doctrine, the Administrative Procedures Act and the defendant's substantive and proce-

[1] The allegations underlying the charge brought against defendant are taken from the parties briefs and are assumed true for the purposes of this motion only. Neither party has objected to the other's recitation of the facts of the case.

dural due process rights and his right to travel. Defendant also contended that venue is not proper in this court. The government opposed and a hearing was held on January 6, 2009.

II. STANDARD

Under Federal Rule of Criminal Procedure 12(b)(3), a defendant may move to dismiss an indictment prior to trial asserting that there is a defect in the indictment or information. The court may dismiss an indictment at any time during the pendency of the case if the indictment fails to invoke the court's jurisdiction or otherwise fails to state an offense. Fed. R. Crim. P. 12(b)(3)(B). An indictment is defective if it alleges violation of an unconstitutional statute. *In re. Civil Rights Cases,* 109 U.S. 3, 8-9, 3 S. Ct. 18, 27 L. Ed. 835 (1883).

III. ANALYSIS

Defendant challenges his indictment under 18 U.S.C. § 2250(a) on various Constitutional and other grounds. Because the court holds the statute fails because it does not conform to the requirement of the Commerce Clause. It need not reach defendant's other arguments.

A. The Statutory Scheme

In 1994, Congress passed the Jacob Wetterling Act as part of the Federal Violent Crime Control and Law Enforcement Act which, among other provisions, encouraged states to create a registration program for all violent sex offenders. *See* 42 U.S.C. §§ 14071 et seq. In 1996, it was amended by "Megan's Law," which conditioned receipt of federal funding upon the state's compliance with the registration and community notification scheme. *Id.* That year, every state, the District of Columbia, and the federal government enacted some form

of registration requirement. *See Smith v. Doe,* 538 U.S. 84, 89-90, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act, which operated to repeal the Jacob Wetterling Act and Megan's Law. Pub. L. No. 109-248 § 129, 120 Stat. 587. The Adam Walsh Act "substantially overhauled federal registration and community notification policy." Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy,* Ohio St. J. of Crim. L. 51, 74 (2008). Included among its provisions is the Sex Offender Registration and Notification Act ("SORNA"), codified at 42 U.S.C. §§ 16901 et seq. SORNA created a "comprehensive national system for the registration" of sex offenders, for the purpose of "protect[ing] the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against" listed victims. 42 U.S.C. § 16901. SORNA's requirements were broader than those of previous laws, expanding registration requirements to non-violent and juvenile sex offenders and those convicted of sexual offenses in tribal lands or foreign nations. 42 U.S.C. § 16911.

SORNA's registration requirements for sex offenders are set forth in 42 U.S.C. § 16913, which provides,

> 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.

The sex offender must also update his registration within three days of a change in his name, residence, employment or student status. 42 U.S.C. § 16913(c).

SORNA's enforcement provision is codified at 18 U.S.C. § 2250, which makes failure to register a federal crime, providing,

> (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.

It is this section that defendant is charged with violating.

B. The Commerce Clause

The Constitution vests Congress with the authority to regulate "commercial intercourse" among the states. U.S. Const. art. I, § 8, cl. 3; *Gibbons v. Ogden,* 9 Wheat. 1, 189-190, 6 L. Ed. 23 (1824). The scope of this power has been understood by the courts differently at various times in our nation's history,[2] and presently the Commerce Clause is understood to encompass three spheres of activities that Congress can regulate. The Court in *United States v. Lopez,* 514 U.S. 555 (1995) explained,

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power . . . . First, Congress may regulate the use of the channels of interstate commerce. *See, e.g., Darby,* 312 U.S. at 114; *Heart of Atlanta Motel, supra,* at 256 ("'[T]he authority of Congress to keep the channels of interstate commerce free from immoral

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[2] For instance, the courts have since departed from the concepts that the Commerce Clause permits regulation of trade but not manufacturing, *see, e.g., United States v. E.C. Knight Co.*, 156 U.S. 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895), or regulation of activities that directly, rather than indirectly, affect interstate commerce. *See, e.g., A.L.A Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935).

> and injurious uses has frequently been sustained, and is no longer open to question.' ") . . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities. *See, e.g., Shreveport Rate Cases,* 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); *Southern R. Co. v. United States,* 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in interstate commerce); *Perez, supra,* at 150 ("[F]or example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)"). Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel,* 301 U.S. at 37, *i.e.,* those activities that substantially affect interstate commerce, *Wirtz, supra,* at 196, n. 27.

514 U.S. at 558-59 (parallel citations omitted). The Court subsequently has reaffirmed this conception of there being three categories of activities that fall under the ambit of the Commerce Clause. *See Gonzales v. Raich,* 545 U.S. 1, 16-17, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005); *Pierce County, Washington v. Guillen,* 537 U.S. 129, 146-47, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003); *United States v. Morrison,* 529 U.S. 598, 608-609, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

The *Lopez* Court's description of the three categories of the Commerce power was based on the historical understanding of Congress's authority under the Commerce Clause; the Court did not perceive itself as creating new or broader bases of the Commerce power. *See*

Morrison, 529 U.S. at 609-610; *Lopez,* 514 U.S at 558-59. To understand the meaning of these categories, then, it is helpful to consider the cases defining them.

The first category, the "channels of interstate commerce", includes the regulation of the waterways and byways between the states, *see, e.g., Gibbons,* 9 Wheat. at 189, 6 L. Ed. 23, as well as "prohibit[ion] [of] the interstate transportation of a commodity through" those channels. *Lopez,* 514 U.S. at 559. The latter definition the *Lopez* Court expanded on with reference to *United States v. Darby,* 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941) and *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964).

Both of those cases had held that the Commerce Clause permits Congress to prohibit the interstate transport of "noxious articles," *Darby,* 312 U.S. at 113, or other use of interstate channels for "immoral or injurious uses." *Heart of Atlanta Motel,* 379 U.S. at 256. Both cases based their holdings on the *Lottery Case,* 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903), upholding the criminalization of the interstate transport of lottery tickets, and *Hoke v. United States,* 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523 (1913), upholding the criminalization of transporting a woman across state lines for "immoral practices" such as prostitution, among others. *See also Hipolite Egg Co. v. United States,* 220 U.S. 45, 31 S. Ct. 364, 55 L. Ed. 364 (1911); *Reid v. Colorado,* 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (1902).

In *Heart of Atlanta Motel,* the Court emphasized that Congress's power to regulate these areas derived from their commercial character and that "Congress was not restricted by the fact that the particular ob-

struction to interstate commerce with which it was dealing was also deemed a moral and social wrong." 379 U.S. at 257. This echoed the Court's holding in *Darby,* that "[t]he distinction . . . that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property . . . has long since been abandoned." 312 U.S. at 116; *see also Raich,* 545 U.S. at 33-34 (Scalia, J., concurring) ("The first two [*Lopez*] categories are self-evident, since they are the ingredients of interstate commerce itself."); *United States v. Rambo,* 74 F.3d 948, 951-52 (9th Cir. 1996) (upholding federal criminal law of unlawful possession of a machine gun under the first *Lopez* factor because of the interstate commercial character of the market for such guns, without reference to moral ill of machine guns). In other words, it was the innate commercial character of the subject of the regulation, not its moral effect, that gave Congress the ability to regulate it under the Commerce clause.

The second *Lopez* category includes "the instrumentalities of interstate commerce, or the persons or things in interstate commerce." *Lopez,* 514 U.S. at 558. In setting forth this definition, the *Lopez* Court cited the *Shreveport Rate Cases,* 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914) and *Southern R. Co. v. United States,* 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72 (1911), both of which involved regulations affecting vehicles used in interstate commerce.[3] After *Lopez,* the Court clarified that this prong includes not only the mechanisms of in-

[3] The Court also cited *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) for this rule generally, although later discussed *Perez* as implicating the third *Lopez* category. *Lopez*, 514 U.S. at 558-59.

terstate commerce, such as vehicles, but also the items sold in interstate commerce. *Reno v. Condon,* 528 U.S. 141, 148-49, 120 S. Ct. 666, 145 L. Ed. 2d 587 (2000) (holding that Congress could regulate the sale of information gathered by state departments of motor vehicles because this information has historically been sold by states to a variety of industries and because it is used "for matters related to interstate motoring"); *see also United States v. Reynard,* 473 F.3d 1008, 1023 (9th Cir. 2007) (holding that Congress could regulate release of DNA information because that information was a "thing in interstate commerce"); *United States v. Jones,* 231 F.3d 508, 514 (9th Cir. 2000) (holding that criminalization of possession of a weapon that has traveled in interstate commerce is valid under *Lopez's* second category).[4]

The third *Lopez* category includes Congress' power to regulate "those activities having a substantial relation to interstate commerce." 514 U.S. at 559. The Court observed that this has included "intrastate coal mining, intrastate extortionate credit transactions, restaurants

[4] Other courts have viewed this category more restrictively, understanding it to encompass the instrumentalities of commerce and the things that those instrumentalities are moving. *See Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000) (although a wolf had been transported by the Fish and Wildlife Service across state lines, this did not permanently render the wolf a "thing in interstate commerce" sufficient to meet *Lopez*'s second category); *United States v. Rybar*, 103 F.3d 596, 598 (7th Cir. 1996) (Alito, J., dissenting) (the second *Lopez* category includes the "means of conveying people and goods across state lines" and the "people and goods traveling in interstate commerce"); *United States v. Patton*, 451 F.3d 615, 622 (10th Cir. 2006) ("The illustrative cases for this category involve things actually being moved in interstate commerce, not all things or persons that have ever moved across state lines.").

utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat." *Id.* at 559-60 (citations omitted). It identified *Wickard v. Filburn,* 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," where the Court had held that an individual's cultivation of wheat for his own personal use implicated interstate commerce due to its aggregate effect on the national market. *Lopez,* 514 U.S. at 560.

In striking down the statute at issue in *Lopez*,[5] the Court held that this category had not been satisfied because the statute did not implicate " 'commerce' or any sort of economic enterprise, however broadly one might define those terms," nor was it "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561; *see also Morrison,* 529 U.S. at 610-11 (where regulation has been upheld under *Lopez*'s third category, "the activity in question has been some sort of economic endeavor"). Although Congressional findings were not necessary to uphold the constitutionality of a statute, there were no findings for that statute that would have aided the Court in determining to what extent the criminalized conduct would affect interstate commerce. *Lopez,* 514 U.S. at 563. The Court also observed that the statute had no express jurisdictional element limiting its application "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562. Finally, the Court rejected as too attenuated

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[5] The statute in *Lopez* made it a federal crime to knowingly possess a firearm in a school zone.

the government's argument that local crime affects interstate commerce by making the citizenry less productive. *Id.* at 563-65.

In *Morrison,* the Court struck down the civil remedies provisions of the Violence Against Women Act as violative of the Commerce Clause, as analyzed pursuant to *Lopez'* s third category. 529 U.S. at 613-14. Several factors led the Court to this conclusion. First, the statute addressed violent crimes against women and, as such, was not innately economic or commercial in character. *Id.* Second, there was no express jurisdictional element linking the statute to interstate commerce. *Id.* Although there were congressional findings supporting the interstate implications of violence against women, the Court found these to resemble the general "costs of crime" justification that it had rejected as inadequate in *Lopez. Id.* at 615. The Court cautioned that Congress's authority did not reach local policing:

> The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulations and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

Id. at 617-18 (internal citations omitted).

Although some courts have had difficulty reconciling *Morrison* and *Lopez*'s analysis with that of *Raich, see, e.g., United States v. Maxwell,* 446 F.3d 1210, 1217 n.6

(11th Cir. 2006), the distinction seems clear. In *Raich,* the Court held that federal criminalization of marijuana cultivation, distribution, and possession could reach purely intrastate activities. 545 U.S. at 9. Marijuana cultivation and distribution was a "quintessentially economic" activity, unlike those at issue in *Lopez* and *Morrison,* and thus Congress could regulate it through a comprehensive regulatory scheme that included purely intrastate activities. *Id.* at 24-26. Like the individual wheat grower in *Wickard,* the individual cultivating marijuana for intrastate use engages in economic activities that could rationally be viewed as having an aggregate effect on a national market and thus requiring national regulation. *Id.* at 17-19 (citing *Wickard,* 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122); *see also United States v. Gomez,* 87 F.3d 1093, 1096 (9th Cir. 1996) (third *Lopez* category permits Congress to criminalize arson of an apartment building because the building is a commercial establishment and as such has a substantial effect on interstate commerce). Accordingly, this court, like the Ninth Circuit, understands *Raich* to implicate the power of Congress to regulate innately economic activity, while *Lopez* and *Morrison* addressed the question of how to consider regulation of non-economic activity in relation to Congress' Commerce power. *See United States v. McCalla,* 545 F.3d 750, 754 (9th Cir. 2008) (distinguishing *Raich* from *Lopez* and *Morrison* on these grounds).

C. Validity of SORNA and 18 U.S.C. § 2250(a) Under the Commerce Clause

Given this analytical framework, it appears that in enacting 42 U.S.C. § 16913 (SORNA) and its enforce-

ment provision of 18 U.S.C. § 2250(a) Congress overstepped its authority under the Commerce Clause.[6]

1. *Lopez*'s First Category

SORNA and § 2250 cannot be sustained under *Lopez*'s first category, which permits Congress to regulate the "channels of interstate commerce." Broadly speaking, section 2250 makes an individual criminally liable for failing to register in accordance with SORNA and traveling across state lines. Plainly, it does not regulate the literal channels or other byways among the states. *See Gibbons,* 9 Wheat. at 189, 6 L. Ed. 23.

Other courts have likened SORNA, enforced through § 2250 to activity at issue in the *Heart of Atlanta Motel* and *Darby,* holding that Congress possesses the authority to regulate "immoral" or "noxious" uses of the channels of interstate commerce. *See United States v. May,* 535 F.3d 912, 921-22 (8th Cir. 2008); *United States v. Lawrence,* 548 F.3d 1329, 1337 (10th Cir. 2008). Respectfully, this court must disagree with such an interpretation of the scope of Congress's authority. In *Darby* and *Heart of Atlanta Motel,* which the Court relied on in defining the first *Lopez* category, the Court made clear that it was the innately economic character of the activity being regulated that gave Congress its authority to

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[6] Other courts have analyzed only § 16913 or § 2250 or analyzed them separately. There is analytical force to the perspective that if § 16913 is unconstitutional, then § 2250 is as well, because the government cannot penalize a person for failing to comply with an unconstitutional regulation. *See, e.g., United States v. Hall,* 577 F. Supp. 2d 610, 622 (N.D. N.Y. 2008); *United States v. Waybright,* 561 F. Supp. 2d 1154, 1168 (D. Mont. 2008). Because these two statutes are so closely related, the court will consider them both together, except where there are differences material to the Commerce Clause analysis.

regulate or criminalize it. The immoral nature of the activity being regulated was not the feature that brought the activity within the scope of the Commerce Clause. *See Raich,* 545 U.S. at 33-34 (Scalia, J., concurring).[7] There he identified this first category as being one of the "ingredients of interstate commerce itself." *Id.* Thus analyzed, plainly neither § 16913 nor § 2250 meets *Lopez*'s first category, as it does not proscribe any sort of economic activity. A person who fails to register per § 16913 or who violates § 2250 is not necessarily engaged in commercial transactions or participating in a market for goods or services. *See Heart of Atlanta Motel,* 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258; *The Lottery Case,* 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903). Even if Congress viewed crossing state lines without registering under SORNA as an "immoral or injurious use[ ]" of the channels of commerce, *Heart of Atlanta Motel,* 379 U.S. at 256, that alone does not bring the conduct under the umbrella of *Lopez*'s first category.

2. *Lopez*'s Second Category

Many of the courts that have upheld SORNA or § 2250 under the Commerce Clause have done so on the grounds that it falls under *Lopez*'s second prong. *See,*

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[7] While not directly addressed by the Court since *Lopez,* it appears that there also is a subgroup of statutes, such as the Mann Act and the Lindbergh Law, where Congress may criminalize conduct that possesses a direct link to the interstate travel or where the travel itself is part of the harmfulness of the conduct. Even if statutes like these remain lawful after *Lopez,* neither SORNA nor § 2250 can be sustained on this basis as the conduct that is criminalized in them is an offender's failure to register; the offender's travel across jurisdictional lines is not proscribed by the statutes so long as the offender registers and maintains updated registrations in the origin and destination jurisdictions.

e.g., United States v. Shanandoah, 572 F. Supp. 2d 566 (M.D. Penn. 2008); *United States v. Thomas,* 534 F. Supp. 2d 912 (N.D.Iowa 2008); *United States v. Senogles,* 570 F. Supp. 2d 1134 (D. Minn. 2008); *United States v. Mason,* 510 F. Supp. 2d 923 (M.D. Fla. 2007); *United States v. Gonzales,* No. 5:07-cr-27-RS, 2007 WL 2298004 (N.D. Fla. Aug. 9, 2007); *United States v. Gould,* 526 F. Supp. 2d 538 (D. Md. 2007). Again, this court cannot agree.

Lopez's second prong includes the things and persons that move in interstate commerce. The Ninth Circuit interprets this fairly broadly, to permit regulation of a good that at one time in the past has passed through interstate commerce. *Jones,* 231 F.3d at 514. Accordingly, so the reasoning of other courts goes, once a sex offender passes across state lines, he may be prosecuted for his later failure to register per SORNA's requirements.

This interpretation of the Commerce power as expressed in *Lopez*'s second category appears insupportably broad. Like *Lopez*'s first prong, the second prong encompasses innately economic goods and activities or, in other words, those goods and activities that move within a national market. These have been the only types of regulations upheld by the Supreme Court or Ninth Circuit upon invocation of the language of the second category. *See, e.g., Raich,* 545 U.S. at 17-18 (citing *Perez v. United States,* 402 U.S. 146, 150, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971)); *Lopez,* 514 U.S. at 558 (collecting cases); *Reynard,* 473 F.3d at 1023; *Jones,* 231 F.3d at 514. As one court observed, "[T]he text of *Lopez* . . . could never mean that once a person has traveled across state lines Congress is free to attach any regula-

tion to him it deems fit. Such a reading would mean Congress has greater power under the second *Lopez* category than it does under the third." *United States v. Myers,* No. 08-60064, 2008 WL 5156671 at *33 (S.D. Fla. Dec. 9, 2008). Such an interpretation flies in the face of the High Court's recent holdings and ignores the principle that has always guided the Court's understanding of the Commerce Clause, which is the textual limitation that the Commerce power extends, in some way or another, to commerce.

Consequently, § 2250 and § 16913 cannot be valid under *Lopez*'s second category. The sex offenders who are implicated by these statutes have had no necessary relationship to economic activities. They are not a good that is a part of a national market. They are not engaged in transactions within a national market. Put plainly, nothing about them or the conduct proscribed by the statutes is innately economic and, hence, the statute cannot be sustained under *Lopez'* s second category.

3. *Lopez*'s Third Category

Many of the courts that have found SORNA or § 2250 a valid exercise of the Commerce power have done so under *Lopez*'s third category. *See, e.g., United States v. Howell,* No. 08-2126, 2009 WL 66068 (8th Cir. Jan. 13, 2009); *Shanandoah,* 572 F. Supp. 2d at 577-58 (collecting cases). This category does appear to hold the most promise, as it permits Congress to regulate non-economic activity under the Commerce Clause. A careful consideration of the limits of this category, however, lead the court to conclude that § 16913 and § 2250 are outside of it.

a. Whether the Statutes Regulate Economic Activity

First, *Lopez*, *Morrison*, and *Raich* identified that the third category includes intrastate economic activity that aggregates to effect a national economic market. *See Raich*, 545 U.S. at 17; *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 560-61. *Wickard* typifies this. *See Raich*, 545 U.S. at 17-19; *Lopez*, 514 U.S at 560. Here, as was true of the statutes at issue in *Lopez* and *Morrison*, neither § 2250 nor § 16913 address an economic activity that could affect the supply or demand of or ability to regulate a good in the national market. The fact that the conduct regulated is not innately economic militates against finding that it is encompassed by the Commerce power. *See Morrison*, 529 U.S. at 610-11 (explaining that "the noneconomic, criminal nature of the conduct at issue was central to [the Court's] decision in" *Lopez*).

b. Presence of a Jurisdictional Element

Second, the *Lopez* Court considered whether there was an "express jurisdictional element which might limit [the statute's] reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562. The absence of such an element in the statutes at issue in *Lopez* and *Morrison* led the Court to conclude that those statutes were not valid exercises of the Commerce power. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561. Here, there similarly is no express jurisdictional element in § 16913, which thus requires a finding that it is not valid under the Commerce Clause.

In contrast, § 2250 does possess a purportedly jurisdictional element, as it penalizes a person who is required to register under SORNA and knowingly fails to do so or to update his or her registration and who trav-

els in interstate commerce. In this way, unlike the statutes considered in *Lopez* and *Morrison,* the section limits the class of those who can be penalized to only those who have traveled in interstate commerce. The problem, however, is that this jurisdictional hook still creates a class that is too broad for Commerce Clause purposes.

Under the statute, a person may be prosecuted for failing to register in his home state, then crossing state lines and registering in the next state.[8] The harm, therefore, may be entirely intrastate. Were this a sufficient jurisdictional element, there would be no limit to Congress's ability to penalize any crime whatsoever, so long as the defendant at some point in the course of his life traveled across state lines. This appears to be a plain usurpation of the state's police power; as the Court expressed in *Morrison,* there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." 529 U.S. at 618. As such, the jurisdictional language in § 2250 cannot alone render the statute valid under the Commerce Clause.

c. Existence of Congressional Findings Identifying the Nexus to Interstate Commerce

Next, the court considers whether there were Congressional findings explaining the link between the activity the statute regulates and interstate commerce. While Congress' findings are not dispositive, they may be helpful. *Morrison,* 529 U.S. at 614. There were no

[8] Indeed, that resembles the defendant's circumstance here, as he was incarcerated in California, failed to register upon his release, and then traveled to Missouri. He was subsequently prosecuted under § 2250 in this district.

express Congressional findings for either § 16913 or § 2250 describing how sex offender registration affected interstate commerce nor any discussion by members of Congress, of which the court is aware, identifying that nexus.[9] *See* H.R. Rep. No. 109-128; 152 Cong. Rec. S8012-02 (July 20, 2006).

d. Whether the Statutes Exist in a Broader Regulatory Scheme That Itself Implicates Interstate Commerce

Finally, regulation of a purely non-economic activity can be sustained under the Commerce Clause if that activity exists within a national regulatory scheme that affects interstate commerce. This court's view is that this analysis is not necessary, as an activity that is not economic under any of the other aspects of the *Lopez* analysis cannot be valid under the Commerce Clause simply because it may aggregate to effect interstate commerce. Although other courts analyzing SORNA have approached it in this manner, it seems that the High Court could not have been more direct when stating, "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison,* 529 U.S. at 617.

Many other courts that have upheld § 2250 or § 16913 under this *Lopez* category have done so based on the

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[9] In enacting the Adam Walsh Act, Congress did identify that child pornography, which is criminalized in the Act, related to interstate commerce. Pub. L. 109-248, § 501(D). These findings do not create a constitutional justification for SORNA or its enforcement through § 2250, despite these sections having been passed as part of the Adam Walsh Act. *Cf. Morrison,* 529 U.S. at 612-14 (considering only the legislative findings of the civil remedies provision of VAWA, not those relating to its other sections).

conclusion that those statutes regulate intrastate conduct that has an effect on interstate commerce. *See, e.g., Howell,* 552 F.3d 709, 2009 WL 66068 at *11-14; *United States v. Madera,* 474 F. Supp. 2d 1257 (M.D. Fla. 2007); *United States v. Hinen,* 487 F. Supp. 2d 747, 757 (W.D. Va. 2007). As explained above, this seems to misapprehend the Commerce Clause jurisprudence, as the cases defining this aspect of the Commerce power, particularly *Wickard* and *Raich,* dealt with intrastate regulation of economic commodities that exist as part of a national market. The principle deriving from those cases is minimally instructive when noneconomic activity is at issue.

Courts upholding SORNA and § 2250 have also relied on Justice Scalia's concurrence in *Raich,* in which he opined that Congress may, through both its Commerce power and authority under the Necessary and Proper Clause, regulate noneconomic activity that in aggregate substantially affects interstate commerce. *Raich,* 545 U.S. at 33-35 (Scalia, J., concurring). This line of reasoning appears unpersuasive for several reasons. First, Justice Scalia's observations were included in a concurrence on a case in which the activity at issue was economic, so his statement is simply dicta. Second, his observation cited as authority *Lopez,* 514 U.S. at 561. That passage of *Lopez,* however, holds,

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot,

> therefore, be sustained under our cases upholding regulations of activities *that arise out of or are connected with a commercial transaction,* which viewed in the aggregate, substantially affects interstate commerce.

Lopez, 514 U.S. at 561 (emphasis added). It is apparent that the *Lopez* Court did not hold that noneconomic, intrastate activities may be regulated when they aggregate to affect interstate commerce. Finally, to the extent that Justice Scalia's conclusion contradicts the express holding of the majority in *Morrison,* this court is obligated to follow the latter.

Nevertheless, in an abundance of caution, the court considers whether there is a basis to believe that SORNA or § 2250 regulate intrastate activities that aggregate to affect interstate commerce or exist within a regulatory scheme that implicates interstate commerce. The court concludes that they do not. Neither SORNA nor the Adam Walsh Act, of which it is a part, are economic regulatory schemes. Although SORNA provides for the accumulation of sex offender information into a national database, there is nothing to indicate that there is a national market for such information that Congress was seeking through SORNA to regulate. Indeed, the express purpose of SORNA is "to protect the public from sex offenders and offenders against children." 42 U.S.C. § 16901. The Congressional record is replete with discussion of the importance of SORNA in creating uniformity among the state's registration requirements and the perceived problem of offenders failing to register after relocating to a new jurisdiction. *See generally* 152 Cong. Rec. S8012-02 (July 20, 2006). There is no indication, however, that uniformity in registration re-

quirements or federalizing the crime of failing to register in any way implicates a national commercial market. The link to a regulatory scheme is even more attenuated for § 2250, as a defendant's failure to register in one jurisdiction seems to relate only minimally, if at all, to disparate reporting requirements among the states or any other national regulatory scheme.

Finally, although the Adam Walsh Act contains components that arguably implicate economic goods, such as its restrictions on child pornography or use of the Internet to facilitate sexual misconduct, this alone do not render the entire Act economic in nature. As explained above, whether an Act as a whole possesses economic aspects does not suffice to render all of its provisions valid under the Commerce Clause. *See Morrison,* 529 U.S. at 611-15 (analyzing the provision of VAWA at issue, not VAWA as a whole).

Consequently, the court holds that neither 42 U.S.C. § 16913 nor 18 U.S.C. § 2250(a) are valid exercises of Congressional authority under the Commerce Clause. As such, the court need not reach defendant's other challenges to the indictment.

IV. CONCLUSION

Defendant's motion to dismiss the indictment is GRANTED.

IT IS SO ORDERED.

APPENDIX D

1. 5 U.S.C. 553 provides in pertinent part:

Rule making

* * * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to partici-

pate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

* * * * *

2. 18 U.S.C. 2250 provides in pertinent part:

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 (in-

cluding 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.

(b) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

* * * * *

3. 42 U.S.C. 16901 provides in pertinent part:

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:

* * * * *

4. 42 U.S.C. 16911 provides:

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.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18);

(ii) coercion and enticement (as described in section 2422(b) of title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[10] of title 18;

(iv) abusive sexual contact (as described in section 2244 of title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

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[10] So in original. The second closing parenthesis probably should follow "18".

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term "sex offense" means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18), or was an attempt or conspiracy to commit such an 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.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

5. 42 U.S.C. 16913 provides:

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.

6. 28 C.F.R. 72.3 provides:

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 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

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.

7. 28 C.F.R. 72.3 (as promulgated by 75 Fed. Reg. 81,849 (2010)) provides in pertinent part:

Applicability of the Sex Offender Registration and Notification 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 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 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.