No. 10-1544

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAM VAN HOANG

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2250(a) of Title 18 of the United States Code 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 Section 2250(a) applies to a defendant who was convicted of a qualifying sex offense before SORNA's enactment and traveled in interstate commerce between SORNA's July 27, 2006, effective date and the Attorney General's February 28, 2007, regulation confirming that SORNA's registration requirements apply to preenactment sex offenders, and who failed to register as a sex offender after issuance of that regulation.

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

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 Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 636 F.3d 677.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2011. A petition for rehearing was denied on March 25, 2011 (App., *infra*, 13a-15a). 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*, 16a-26a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Louisiana, respondent was convicted of failing to register and to update his registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to 21 months of imprisonment, to be followed by three years of supervised release. The court of appeals reversed and remanded for entry of an order dismissing the indictment. App., *infra*, 1a-12a; 3:07-00267 Judgment 2-3 (M.D. La. June 3, 2009).

1. 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).

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.*[1]

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)).

2. On May 13, 2005, respondent was convicted in Louisiana's Orleans Parish Criminal Court on two counts of attempted aggravated crimes against nature. Respondent was sentenced to 30 months of imprisonment and a term of supervised release. Respondent was further ordered to register as a sex offender, which he did before his release from prison. Before his release,

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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* v. *United States*, 130 S. Ct. 2229 (2010). 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)).

respondent was informed of his obligation to update his registration annually and, if he moved, to notify his previous parish or county of residence and register with his new parish or county of residence. App., *infra*, 2a-3a.

At some point after May 18, 2005, respondent moved to Lubbock, Texas. On June 22, 2006, Lubbock police learned that respondent was a sex offender who had not registered in the City of Lubbock or the State of Texas. Respondent was then required to register as a sex offender with the State of Texas, and he was again informed that, if he changed residences, he was obligated to notify his current jurisdiction as well as his new jurisdiction. App., *infra*, 3a.

On December 1, 2006, Lubbock police learned that respondent had moved and that his whereabouts were unknown. They placed respondent in absconder status for failing to notify the local sex offender unit that he had changed addresses. On September 25, 2007, a Deputy United States Marshal located respondent at a Baton Rouge address listed on his driver's license, which he had obtained on July 11, 2007, and brought respondent to be registered with the Louisiana State Police Sex Offender Registration Unit. Respondent admitted at that time that he had been living in Baton Rouge for nine to 12 months and that he had not registered as a sex offender. App., *infra*, 3a.

A federal grand jury in the Middle District of Louisiana returned an indictment charging respondent with one count of failing to register and to update his registration as a sex offender in Louisiana from July 11, 2007, until September 24, 2007, in violation of 18 U.S.C. 2250(a). Respondent moved to dismiss the indictment on statutory and constitutional grounds. The district court denied the motion, and respondent thereafter entered a

conditional guilty plea reserving his right to appeal the denial of his motion to dismiss. App., *infra*, 4a. The district court sentenced respondent to 21 months of imprisonment, to be followed by three years of supervised release. 3:07-00267 Judgment 2-3 (M.D. La. June 3, 2009).

3. The court of appeals reversed and remanded for entry of an order dismissing the indictment. App., *infra*, 1a-12a. The court held that because 42 U.S.C. 16913(d) "clearly authorizes the Attorney General to specify whether and how SORNA (and not just the statute's initial registration requirements) applies to pre-SORNA sex offenders," respondent did not become subject to SORNA until the Attorney General issued the interim rule, which occurred after respondent's interstate travel. App., *infra*, 6a. The court concluded that Subsection (d) "gives the Attorney General the authority to specify the retroactive application of all subsections of SORNA to pre-SORNA sex offenders. Until the Attorney General did so by promulgating the Interim Rule in February 2007, SORNA did not apply to [respondent]." *Id*. at 8a. The court stated that, although it found the language of Section 16913(d) clear, to the extent there was any ambiguity, the rule of lenity applied. *Id*. at 10a-11a.

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*, 13a-15a.

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 does not apply of its own force to this class of sex offenders, then SORNA imposed no duty on them to register before the February 28, 2007, promulgation of the interim SORNA rule. See 28 C.F.R. 72.3. That conclusion would mean that respondent's interstate travel, which occurred after SORNA's July 27, 2006, effective date and before the Attorney General's interim rule, could not subject him to criminal liability under SORNA, and that the court of appeals properly ordered vacatur of his conviction. See *Carr* v. *United States*, 130 S. Ct. 2229, 2236 (2010). If, however, the Court concludes that SORNA applies of its own force to persons convicted of sex offenses before SORNA's effective date, then respondent was properly convicted under Section 2250 and the decision below should be reversed and his conviction reinstated. Accordingly, the Court should hold this petition pending its decision in *Reynolds* and then dispose of the petition as appropriate in light of that decision.

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[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).

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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JUNE 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30484

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NAM VAN HOANG, DEFENDANT-APPELLANT

[Filed: Feb. 23, 2011]

Appeal from the United States District Court for the Middle District of Louisiana

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OPINION

Before: JONES, Chief Judge, JOLLY and GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Appellant Nam Van Hoang ("Hoang") appeals from his conviction for failure to register pursuant to the Sex Offender Registration and Notification Act ("SORNA"). Hoang was convicted of a sex offense and registered as a sex offender under state law prior to the enactment of SORNA, which requires a sex offender to register in each jurisdiction where he resides and to keep his regis-

tration current. Section 2250 of Title 18 prohibits sex offenders who are required to register under SORNA from traveling in interstate commerce and knowingly failing to register. Hoang's interstate travel took place after SORNA's enactment but before the Attorney General issued an Interim Rule declaring SORNA applicable to all sex offenders whose underlying sex-offense convictions predate SORNA's enactment. There is a split of authority among the courts of appeals as to whether SORNA's registration requirements became effective to already-registered, pre-SORNA sex offenders (1) on the date SORNA was enacted, or (2) when the Attorney General issued the Interim Rule declaring SORNA retroactive. We hold that Hoang did not become subject to SORNA's registration requirements until the Attorney General issued the Interim Rule. We reverse the judgment of the district court and remand for entry of an order of dismissal.

I.

The facts of this case are undisputed. On May 13, 2005, Hoang was convicted in Orleans Parish Criminal Court of two counts of attempted aggravated crimes against nature, in violation of Louisiana Revised Statute 14:89:1. This conviction renders him a sex offender as defined by SORNA. Hoang was sentenced to 30 months in prison and a term of supervised release. He was further ordered to register as a sex offender, which he did prior to release from prison. Before his release, Hoang was informed of his obligation (under his state-law conviction and sentence) to register with his new parish or county of residence in the event that he moved; he was further informed that he was required to update his reg-

istration with Orleans Parish annually and to notify his previous parish or county of residence if he ever moved.

At some point after May 18, 2005, Hoang moved to Lubbock, Texas. On June 22, 2006, Lubbock police learned that Hoang was a sex offender who had not registered in the City of Lubbock or State of Texas. Hoang was then compelled to register as a sex offender with the State of Texas, and was once again informed of his obligations to notify his current jurisdiction as well as his receiving jurisdiction in the event that he changed his residence. SORNA was enacted on July 27, 2006, setting forth registration requirements for sex offenders under federal law.

Lubbock police were informed on December 1, 2006 that Hoang had moved from his residence, and that his whereabouts were unknown. At that point he was placed in absconder status for failing to notify the local sex offender unit that he had changed addresses. Texas law enforcement later notified a Deputy United States Marshal that Hoang had obtained a Louisiana driver's license on July 11, 2007, and that the license showed a Baton Rouge address. The deputy marshal discovered that Hoang had not registered with the relevant local or state authorities in Louisiana, as required by SORNA. On September 25, 2007, the deputy marshal located Hoang at the Baton Rouge address listed on his license and brought him to be registered with the Louisiana State Police Sex Offender Registration Unit. Hoang admitted at that time that he had been living in Baton Rouge for nine to twelve months and that he had not registered as a sex offender.

Hoang was indicted for failure to register as a sex offender in the State of Louisiana from on or about July 11, 2007 until on or about September 24, 2007, in violation of 18 U.S.C. § 2250(a). Hoang filed a motion to dismiss the indictment and challenged the constitutionality of SORNA. His motion was denied. Pursuant to a conditional plea agreement reserving his right to appeal the district court's ruling on his motion to dismiss, Hoang pleaded guilty to the charge and was convicted. This appeal under 28 U.S.C. § 1291 timely followed.

II.

Under SORNA, a person convicted of a sex offense is required to register as a sex offender and to keep the registration current in each jurisdiction where the offender resides. 42 U.S.C. § 16913. It is a criminal offense, punishable by up to ten years of imprisonment, for anyone who is required to register and travels in interstate commerce to knowingly fail to register or update a registration. 18 U.S.C. § 2250(a). Sex offenders must initially register before completing their term of imprisonment for the underlying sex offense or, if not incarcerated, within three business days after sentencing. 42 U.S.C. § 16913(b). Furthermore, 42 U.S.C. § 16913(d), entitled "Initial registration of sex offenders unable to comply with subsection (b) of this section," provides that

> [t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other

> categories of sex offenders who are unable to comply with subsection (b) of this section.

42 U.S.C. § 16913(d).

Pursuant to the foregoing authority, the Attorney General issued an Interim Rule on February 28, 2007 ("Interim Rule"), which provided that the 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 [SORNA]." 28 C.F.R. § 72.3. The instant dispute concerns the scope of SORNA and the applicability of this Interim Rule. Specifically, we are asked whether SORNA applies to a convicted sex offender who fails to register when (1) the offender's predicate sex-offense conviction predated the enactment of SORNA, (2) the offender was registered as a sex offender prior to the enactment of SORNA, and (3) the offender traveled in interstate commerce after SORNA's enactment but prior to the date on which the Attorney General promulgated the Interim Rule declaring SORNA applicable to sex offenders whose underlying convictions predate SORNA.

A.

In *Carr v. United States*, 130 S. Ct. 2229 (2010), the Supreme Court held that SORNA does not apply to persons with pre-SORNA sex-offense convictions whose interstate travel occurred prior to the enactment of SORNA. However, the Court explicitly declined to rule upon whether a sex offender whose interstate travel occurred in the gap between SORNA's enactment and the Attorney General's promulgation of the Interim Rule falls within the ambit of SORNA's criminal prohibi-

tion on failure to register. *See id.* at 2234 n.2. The courts of appeals have divided on this question, and this panel is the first to consider it since *Carr* was decided.

The core dispute before us is when the statute became applicable to Hoang—that is, whether action by the Attorney General was required as a condition precedent to the enforcement of SORNA against all sex offenders who traveled between July 27, 2006 and February 28, 2007. Four circuits have held that sex offenders whose convictions predate SORNA did not become subject to SORNA's registration requirements until the Attorney General issued the Interim Rule in February 2007. *See United States v. Hatcher*, 560 F.3d 222, 226-29 (4th Cir. 2009); *United States v. Cain*, 583 F.3d 408, 414-19 (6th Cir. 2009); *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008), *rev'd on other grounds*, *United States v. Carr*, 130 S. Ct. 2229 (2010); *United States v. Madera*, 528 F.3d 852, 857-59 (11th Cir. 2008) (per curiam). Two circuits have held that sex offenders whose convictions predate SORNA became subject to SORNA's registration requirements upon SORNA's enactment in July 2006. *See United States v. May*, 535 F.3d 912, 915-19 (8th Cir. 2008); *United States v. Hinckley*, 550 F.3d 926, 929-35 (10th Cir. 2008).

B.

We are persuaded that the text of subsection (d) clearly authorizes the Attorney General to specify whether and how SORNA (and not just the statute's initial registration requirements) applies to pre-SORNA sex offenders such as Hoang. Hoang therefore did not become subject to SORNA until the Attorney General

issued the Interim Rule, after the interstate travel on which Hoang's conviction is based.

As we earlier noted, subsection (d) reads thus:

> 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) of this section.

42 U.S.C. § 16913(d). As the Fourth Circuit has observed, the first clause of subsection (d) provides that the Attorney General "shall," prospectively, have the authority to specify whether and how SORNA applies to pre-SORNA sex offenders. *Hatcher*, 560 F.3d at 227. Plainly, this authority is altogether distinct from that granted in the second clause of subsection (d), which authorizes the Attorney General to prescribe rules for the registration of (1) "any such sex offenders," that is, any sex offenders whose convictions predate SORNA's enactment; and (2) "other categories of sex offenders" who are unable to comply with the initial registration requirements of subsection (b). *Id.* *See also Hinckley*, 550 F.3d at 949-50 (McConnell, J., dissenting); *Madera*, 528 F.3d at 858. The instant dispute implicates only the first of these two clauses. We are concerned not with particular rules for registration but with whether "this subchapter" applied to Hoang, a pre-SORNA sex offender, such that he was subject to SORNA's registration requirements at the time he traveled in interstate commerce. "This subchapter" refers to "the entirety of

SORNA—not just the initial registration requirements." *Hinckley*, 550 F.3d at 951-52 (McConnell, J., dissenting).

Two other circuits have held that sex offenders who were registered under state law prior to SORNA's enactment, and therefore were not subject to the initial registration requirements of subsections (b) and (d), were required to register under subsection (a) of 42 U.S.C. § 16913 as of the date on which SORNA was enacted. *May*, 535 F.3d at 918-19; *Hinckley*, 550 F.3d at 935. Subsection (a) contains the general requirement that sex offenders register and keep their registration current in their jurisdiction of residence. 42 U.S.C. § 16913(a). Courts that have applied SORNA to pre-SORNA sex offenders by way of subsection (a) have reasoned that a sex offender who was already registered under state law at the time of SORNA's enactment is not subject to the *initial* registration requirements referenced in subsections (b) and (d). However, this conclusion overlooks the plain language of subsection (d), the first clause of which does not deal with initial registration at all. That clause—the only clause conferring the authority implicated in this appeal—deals with the applicability of *all* of SORNA, including subsection (a), to sex offenders like Hoang who were convicted before SORNA's enactment. The clause gives the Attorney General the authority to specify the retroactive application of all subsections of SORNA to pre-SORNA sex offenders. Until the Attorney General did so by promulgating the Interim Rule in February 2007, SORNA did not apply to Hoang.

C.

In reaching the foregoing conclusion, we need not look beyond the plain text of subsection (d). Courts that have found that state-law-registered, pre-SORNA sex offenders became subject to SORNA on the date of its enactment have done so by looking to the title of subsection (d) to limit the scope of that subsection to pre-SORNA sex offenders who were unable to comply with the initial registration requirements.[1] We find reference to the subtitle unnecessary and inappropriate because, as explained above, we find no ambiguity in subsection (d). *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 308-09 (2001); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase." (internal quotation marks and citations omitted)). Courts that have interpreted subsection (d) to be ambiguous have done so by reading what they perceive to be an ambiguity in the second clause of the subsection to create an ambiguity in the first clause. Specifically, these courts have found that the phrase "other categories of sex offenders who are unable to comply with subsection (b)" means other

[1] The title of subsection (d) is "Initial registration of sex offenders unable to comply with subsection (b) of this section." As an initial matter, we agree with the Fourth Circuit that there is no necessary conflict between this title and our reading of the statutory text, since the title refers to the authority to set registration rules, an authority conferred in the second clause of subsection (d), but not to the authority to specify SORNA's applicability to pre-SORNA sex offenders, which is conferred in the first clause. "Nothing in the title is inconsistent with the literal meaning of the statute, nor is the limited nature of the title especially significant." *Cain*, 583 F.3d at 416.

categories of sex offenders who are *also* unable to comply with the initial registration requirements of subsection (b). This phrase modifies the phrase "any such sex offenders," which in turn refers to the phrase used in the first clause of subsection (d), "sex offenders convicted before the enactment of this chapter." The courts have reasoned that the phrasing of the second clause limits the scope of the first clause to those pre-SORNA sex offenders unable to comply with the initial registration requirements. *See Hinckley*, 550 F.3d at 929-35; *May*, 535 F.3d at 916-19.

We respectfully disagree. "'Other categories of sex offenders' plainly means types of sex offenders *not* encompassed within the former category, that is, those who are not past offenders." *Hinckley*, 550 F.3d at 951 (McConnell, J., dissenting) (emphasis added). To read the statute otherwise "ignores the key term 'other,' which indicates that the two categories are distinct." *Id.* *See also Cain*, 583 F.3d at 415. We do not disregard "the cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). We simply conclude that nothing in the second clause of subsection (d) or the broader context of SORNA requires us to strip the first clause of its plain meaning and replace it with a contradictory one.

III.

In the alternative, we hold that to the extent SORNA may be ambiguous, the rule of lenity requires that we interpret the statute in Hoang's favor. Notwithstanding our conclusion that 42 U.S.C. § 16913(d) is clear, we rec-

ognize that two other circuits disagree and would interpret the statute to include Hoang within its ambit at the time of enactment. It is familiar learning that "[a] statute is ambiguous if it is susceptible to more than one reasonable interpretation or more than one accepted meaning." *In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010) (internal quotation marks and citations omitted). We recognize, of course, that "[a] statute is not 'ambiguous' for purposes of lenity merely because there is a division of judicial authority over its proper construction." *Reno v. Koray*, 515 U.S. 50, 64-65 (1995) (internal quotation marks and citation omitted). Nevertheless, insofar as the reasoning of other circuits may reveal that SORNA is susceptible to "more than one accepted meaning," the question of whether SORNA applies to a pre-SORNA sex offender whose interstate travel took place prior to the promulgation of the Interim Rule is, at best, ambiguous. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). *See also Cain*, 583 F.3d at 417 (holding, with respect to SORNA, that insofar as ambiguity "clouds the meaning of a criminal statute, the tie must go to the defendant") (internal quotation marks and citations omitted). In the light of these observations, we hold that any residual ambiguity in SORNA discernible from the conflicting decisions of our sister circuits must be read in Hoang's favor.

IV.

Defendant Hoang, a sex offender registered under state law prior to the enactment of SORNA, traveled in interstate commerce and failed to register in his new

jurisdiction after SORNA's enactment but before the Attorney General issued an Interim Rule declaring SORNA applicable to all sex offenders whose underlying sex-offense convictions predate SORNA's enactment. Hoang's conviction under 18 U.S.C. § 2250 was based on the premise that he was required to register under SORNA at the time of his interstate travel. We hold today that this premise is flawed. The defendant did not become subject to SORNA's registration requirements until the Attorney General issued the Interim Rule in February 2007 that made SORNA retroactive. Subsection (d) of 42 U.S.C. § 16913 clearly authorizes the Attorney General to specify whether and how SORNA applies to pre-SORNA sex offenders such as Hoang. Because the meaning of subsection (d) is plain, we need not look beyond the statutory text in construing the statute. Moreover, to whatever extent SORNA may be characterized as ambiguous, the rule of lenity requires that we interpret the statute in Hoang's favor. In the light of these considerations, we REVERSE the judgment of the district court and REMAND for entry of an order of dismissal.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30484

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NAM VAN HOANG, DEFENDANT-APPELLANT

[Filed: Mar. 25, 2011]

Appeal from the United States District Court for the Middle District of Louisiana

---

REHEARING ORDER

Before: JONES, Chief Judge, JOLLY and GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The government's petition for panel rehearing is DENIED.

In denying this petition, we should observe that shortly before our opinion in this case issued, another panel decided *United States v. Johnson*, — F.3d —, 2011 WL 338802 (5th Cir. Feb. 4, 2011). Because the cases

were decided virtually simultaneously, our opinion failed to note *Johnson*, in which the panel addressed whether the Sex Offender Registration and Notification Act ("SORNA") applied to pre-enactment sex offenders at the time of enactment, or whether the statute delegated to the Attorney General the decision to apply SORNA to pre-enactment offenders. The panel held that "SORNA delegated authority to the Attorney General to determine the applicability of SORNA to pre-enactment offenders." *Id.* at *6. Although our opinion failed to cite *Johnson*, our reasoning and holding in this case are not inconsistent with it.

To be sure, we reached an alternative holding—that is, that to whatever extent SORNA may be characterized as ambiguous, the rule of lenity precludes us from applying it to Hoang—but this alternative holding yields no inconsistency between our opinion and *Johnson*. Furthermore, although *Johnson* additionally held that the Attorney General did not have good cause for failing to comply with the Administrative Procedures Act in promulgating the Interim Rule that declared SORNA retroactive, our panel was not presented with that issue. The fact that we said Hoang, a pre-enactment sex offender, "did not become subject to SORNA's registration requirements until the Attorney General issued the Interim Rule," should not be construed otherwise. Finally, although our opinion did not refer to three additional recently-decided cases from other circuits—one consistent with our holding and two conflicting—nothing in

those cases alters the reasoning applied or the outcome reached in this appeal.

DENIED.[1]

[1] The government's motion for a stay of our ruling on this petition for panel rehearing is also DENIED.

APPENDIX C

1. 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 (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.

(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.

* * * * *

2. 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:

* * * * *

3. 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))[1] 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.

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

(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;

(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.

4. 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.

5. 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.

6. 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.

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Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released

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