No. 10-6549

In the Supreme Court of the United States

BILLY JOE REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
J. CAMPBELL BARKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner has standing to challenge a regulation issued by the Attorney General confirming that the requirements of the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*, apply to all sex offenders, including those convicted of a qualifying sex offense before the statute's enactment.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulation:

Statutes and regulation—Continued: Page

Statutes and regulation—Continued: Page

Statutes and regulation—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 10-6549

BILLY JOE REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 62-65) is not published in the *Federal Reporter* but is reprinted in 380 Fed. Appx. 125. The opinion of the district court (J.A. 20-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2010. A petition for rehearing was denied on June 16, 2010 (J.A. 68-69). The petition for a writ of certiorari was filed on September 14, 2010, and was granted on January 24, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of failing to register and update his registration as a sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. J.A. 13, 53-56, 62-65.

1. "Sex offenders are a serious threat in this Nation," in large part because "the victims of sexual assault are most often juveniles" and because "convicted sex offenders * * * are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion); see *Smith* v. *Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). As a result, Congress has frequently enacted legislation to encourage and assist States to keep track of sex offenders' addresses and to make information about sex offenders available to the public "for its own safety." *Id*. at 99.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071). Among other things, the Wetterling Act encouraged States, as a condition of receiving federal funding, to adopt sex-

offender-registration laws meeting certain minimum standards. See *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. *Id*. at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community notification provision to the Wetterling Act. See Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e)). Congress also strengthened the national effort to ensure the registration of sex offenders by directing the Federal Bureau of Investigation to create a national sex offender database, requiring lifetime registration for certain offenders, and making the failure of certain persons to register a federal crime, subject to a penalty of imprisonment of up to one year (in the case of a first offense) or ten years (in the case of a second or subsequent offense). See Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (Lychner Act), Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

Later statutes further enhanced federal registration and notification requirements. See, *e.g.*, Department of Justice Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, Tit. I, § 115(a), 111 Stat. 2461 (requiring, among other things, that sex offenders register in States in which they work or are students, in addition to States of residence); Campus Sex Crimes Prevention Act (CSCPA), Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (requiring sex offenders to provide notice concerning institutions of higher education at which they work or are students); PROTECT Act, Pub. L. No. 108-21, §§ 604-605, 117 Stat. 688 (requiring States to make sex-offender-registry information available on the Internet).

Despite these legislative efforts, by 2005, Congress became concerned about "loopholes and deficiencies" in the various registration and notification statutes around the country. H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20 (2005) (*House Report*). One source of particularly grave concern was an estimate that as many as 100,000 sex offenders were "missing" or "lost," in the sense that their locations were unknown to both law enforcement and to residents of their communities. *Id.* at 26. The House Judiciary Committee described the problem of missing sex offenders as "[t]he most significant enforcement issue in the sex offender program." *Ibid*. The Committee concluded that "there is a strong public interest in finding" those missing sex offenders "and having them register with current information to mitigate the risks of additional crimes against children." *Id.* at 24.

On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*). SORNA was "generally designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public," and "to eliminate potential gaps and loopholes under the preexisting standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations." 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, 8895 (2007); *Carr* v. *United States*, 130 S. Ct. 2229, 2232 (2010) (Congress enacted SORNA "[i]n an effort to make [existing] state schemes more comprehensive, uniform, and effective."). In furtherance of those ends, SORNA "establishe[d] a comprehensive na-

tional system for the registration of [sex] offenders," 42 U.S.C. 16901, and repealed the Wetterling Act and related provisions, effective roughly three years from the date of its enactment, SORNA § 129, 120 Stat. 600.[1]

SORNA requires that every "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." 42 U.S.C. 16913(a). A "sex offender," in turn, is defined as "an individual who was convicted of" an 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 imprisonment 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 provides 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 also

---

[1] SORNA repealed those laws (42 U.S.C. 14071, 14072) effective the later of three years after SORNA's enactment or one year after certain software became available. SORNA § 129(b), 120 Stat. 601. SORNA required the described software to be available within two years of SORNA's enactment, see 42 U.S.C. 16923(c), and it became available two days short of that deadline, on July 25, 2008, see 42 U.S.C. 16924 note (Supp. III 2009). Thus, the repeal was effective three years after SORNA's enactment, on July 27, 2009.

specifies, among other things, the kinds of information that must be collected as part of registration (42 U.S.C. 16914), the length of time offenders must remain registered (42 U.S.C. 16915 (2006 & Supp. III 2009)), and the frequency with which a sex offender must appear in person and verify the registry information (42 U.S.C. 16916).

SORNA requires States to adopt the specified federal standards or risk losing federal funds. 42 U.S.C. 16912, 16925. States and other jurisdictions are given roughly three years, with the possibility of two one-year extensions, from the date of SORNA's enactment to "substantially implement" the Act's requirements. 42 U.S.C. 16924, 16925(a).[2]

Congress recognized that administrative guidance and rules would be necessary. Accordingly, SORNA broadly directs that "[t]he Attorney General shall issue guidelines and regulations to interpret and implement

---

[2] Like repeal of the Wetterling Act and related provisions (note 1, *supra*), the initial grace period for jurisdictions to come into compliance is the later of three years after SORNA's enactment or one year after the date on which the relevant software became available. 42 U.S.C. 16924. Because of the software development timing discussed in note 1, each jurisdiction was initially required to implement SORNA three years after SORNA's enactment, on July 27, 2009. On May 26, 2009, the Attorney General (in conjunction with the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office)) granted a blanket one-year extension to and including July 27, 2010, to all jurisdictions. See SMART Office, U.S. Dep't of Justice, *Blanket Extension*, http://www.ojp.usdoj.gov/smart/smartwatch/09_august/blanketextension.html (last visited June 22, 2011). The SMART Office has subsequently issued an additional one-year extension to and including July 27, 2011, to nearly all jurisdictions. See SMART Office, U.S. Dep't of Justice, *SORNA Extensions Granted*, http://www.ojp.usdoj.gov/smart/pdfs/SORNA_Extensions_Granted.pdf (last visited June 22, 2011).

this subchapter." 42 U.S.C. 16912(b). In addition, SORNA authorizes the Attorney General to issue rules in certain specific contexts. As relevant here, Section 16913(d) provides:

> *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).

To enforce SORNA's registration requirements, Congress made noncompliance a federal crime in certain circumstances. 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*, 130 S. Ct. at 2234-2235 (quoting 18 U.S.C. 2250(a)). The statute provides an affirmative defense if "uncontrollable circumstances" prevent compliance. 18 U.S.C. 2250(b).

2. In the months following SORNA's enactment, the Attorney General observed that "sex offenders with predicate convictions predating SORNA" were "attempting to devise arguments that SORNA is inapplicable to them, e.g., because a rule confirming SORNA's applicability has not been issued." 72 Fed. Reg. at 8896. To "foreclos[e] any dispute as to whether SORNA is

applicable where the conviction for the predicate sex offense occurred prior to the enactment of SORNA," the Attorney General issued a rule "making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted." *Ibid.*

In the preamble to that 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." 72 Fed. Reg. at 8896. The Attorney General further stated that "SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral of effectiveness. They took effect when SORNA was enacted on July 27, 2006, and currently apply to all offenders in the categories for which SORNA requires registration." *Id.* at 8895. The Attorney General reasoned that, "[i]f SORNA were deemed inapplicable to sex offenders convicted prior to its enactment, then the resulting system for registration of sex offenders would be far from 'comprehensive,' and would not be effective in protecting the public from sex offenders because most sex offenders who are being released into the community or are now at large would be outside of its scope for years to come." *Id.* at 8896. Accordingly, "to ensure the effective protection of the public from sex offenders through a comprehensive national system for the registration of such offenders" (*ibid.*), the Attorney General issued an interim rule confirming 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 [SORNA]." 28 C.F.R. 72.3.

The Attorney General made the interim rule effective immediately, invoking the "good cause" exceptions to the notice, comment, and publication requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553. See 5 U.S.C. 553(b)(3)(B) and (d)(3) (good-cause exceptions); 72 Fed. Reg. at 8896-8897 (Attorney General's statement of good cause). 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. *Ibid.* The Attorney General concluded 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.*

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)).[3]

3. In 2001, petitioner was convicted in Missouri of statutory sodomy in the second degree. J.A. 13, 15; Presentence Investigation Report (PSR) ¶ 24. In 2005, petitioner was released from prison and, pursuant to Missouri law, registered as a sex offender in Missouri. J.A. 15. Petitioner updated and verified his registration information on several occasions. J.A. 15-19, 30. Each time, he signed sex offender forms notifying him of his duty to update his registration in Missouri and to register as a sex offender in any State to which he might move, and informing him that failure to comply is a criminal offense. *Ibid.*

In September 2007, while still on parole, petitioner moved to Pennsylvania without notifying his parole officer. PSR ¶¶ 6-7; J.A. 30-32, 52. He knowingly failed to update his registration in Missouri and to register in Pennsylvania when he arrived. J.A. 31-32, 40-41, 44-45.[4]

---

[3] In the interim, the Attorney General (in coordination with the SMART Office) also promulgated guidelines for the States and other jurisdictions on matters of SORNA's implementation. See Office of the Att'y Gen., U.S. Dep't of Justice, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030 (2008); see also Office of the Att'y Gen., U.S. Dep't of Justice, *Supplemental Guidelines for Sex Offender Registration and Notification*, 76 Fed. Reg. 1630 (2011). The guidelines were issued after notice and comment and they confirmed that SORNA applies to all sex offenders, including those convicted before SORNA's enactment or implementation in a particular jurisdiction. See 73 Fed. Reg. at 38,035-38,036, 38,046, 38,063.

[4] Petitioner suggests that he "agreed only that he did not register in Pennsylvania." Pet. Br. 15. But petitioner pleaded guilty to *knowingly* failing to register and update his registration. See J.A. 13, 29-30, 53.

In November 2007, a federal grand jury in the Western District of Pennsylvania returned an indictment charging petitioner with knowingly failing to register and update a registration as a sex offender, in violation of 18 U.S.C. 2250(a). J.A. 13-14. The indictment alleged that petitioner's interstate travel occurred between September 16, 2007, and October 16, 2007. J.A. 13. Petitioner moved to dismiss the indictment. J.A. 21-22. Among other things, petitioner argued that the Attorney General's interim rule was invalid under the APA because he did not have good cause to forgo notice, comment, and publication procedures. J.A. 22; Pet. C.A. App. 51-54. The district court denied the motion to dismiss, J.A. 20-23, and petitioner thereafter entered a conditional guilty plea reserving the right to appeal the denial of his motion, J.A. 24-38. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. J.A. 55-56.[5]

4. The court of appeals affirmed in an unpublished opinion. J.A. 62-65. After rejecting several of petitioner's claims on the merits, the court held that petitioner lacked standing to raise other arguments, including his claim that issuance of the Attorney General's interim rule violated the APA. J.A. 64. The court relied on its decision in *United States* v. *Shenandoah*, 595 F.3d

[5] Petitioner began serving his term of supervised release in November 2009. See Petition on Supervised Release, *United States* v. *Reynolds*, No. 07-cr-412 (W.D. Pa. filed Dec. 10, 2010). In December 2010, petitioner's probation officer filed a petition in the district court stating that petitioner had moved to Arkansas and had been arrested there for again failing to register as a sex offender. See *ibid.*; J.A. 7. The district court issued a warrant for petitioner's arrest upon his release from state custody. J.A. 7.

151 (3d Cir.), cert. denied, 130 S. Ct. 3433 (2010), which was decided while this case was pending on appeal. The court explained that, in *Shenandoah*, it had held that SORNA's registration requirements apply of their own force, without the need for rulemaking by the Attorney General, to sex offenders like petitioner who had already initially registered with a State. J.A. 64; see *Shenandoah*, 595 F.3d at 163-164 (holding that "subsections (b) and (d) when read together seem to contemplate the need for clarification as to 'initial registrations' by persons convicted of qualifying sex offenses prior to July 27, 2006," but "[t]he allegations in this case clearly pertain to [the defendant's] failure to keep his registration current and, as such, are covered by 42 U.S.C. [] 16913(a) & (c)"). Because petitioner's registration duty under SORNA did not, therefore, depend on the Attorney General's interim rule, the court of appeals held that petitioner lacked standing to pursue his APA challenge. J.A. 64.

SUMMARY OF ARGUMENT

Petitioner's duty to register as a sex offender under SORNA arises directly from the statute itself. The validity of his conviction for failure to register and keep his registration current therefore does not depend on the validity of the Attorney General's rule confirming his registration requirements. The court of appeals correctly declined to reach that issue.

A. SORNA's registration provisions require all sex offenders to register and keep their registration current, including those convicted of a sex offense before SORNA's enactment or its implementation in a particular jurisdiction. The registration requirements are unqualified and do not distinguish between sex offenders

convicted before or after SORNA's enactment, or before or after its implementation in a particular jurisdiction. Rather, they apply to every "sex offender," a term defined as any "individual who *was* convicted of a sex offense." 42 U.S.C. 16911(1) (emphasis added). And those requirements became effective on the date of SORNA's enactment. Thus, as of July 27, 2006, any "individual who *was* convicted of a sex offense" (*ibid.* (emphasis added)) was required to, among other things, "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)).

B. Subsection (d) of Section 16913 does not negate SORNA's express, unqualified registration requirements and it does not implicitly exempt any sex offenders from their reach. It confers discretionary authority on the Attorney General to modify or confirm the facially applicable registration requirements with respect to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction—if needed. Absent regulatory action altering their scope, Subsection (a) and SORNA's other registration requirements fully apply to all sex offenders.

Petitioner's contention that the permissive delegation of regulatory authority to the Attorney General in Subsection (d) implicitly negates SORNA's registration requirements ignores the statutory structure and context, cannot be reconciled with the statutory purpose, and is not compelled by any express statutory text. First, a permissive grant of authority to the Attorney General to specify the applicability of SORNA's requirements to preenactment and preimplementation sex offenders is most naturally read as providing the Attorney

General with the flexibility to adjust those requirements in light of existing realities, and not as a wholesale exemption to the facially applicable and unqualified registration requirements set forth in the remainder of the Act. Second, the consequence of adopting petitioner's reading would be that SORNA's registration regime applied to nobody on the date of enactment and nobody for months and years into the future, unless and until the Attorney General said otherwise. It is simply not plausible to think that Congress would have intended any such blanket exemption for hundreds of thousands of registered sex offenders. Third, petitioner's anomalous interpretation cannot be reconciled with Congress's primary interest in locating and registering the approximately 100,000 "lost" sex offenders, all of whom were (by definition) preenactment offenders.

C. Although the courts of appeals have expressed different views on this issue, five courts of appeals agree that Subsection (d) does not exempt from SORNA's registration requirements all sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction. Those courts generally adopt a more circumscribed reading of the Attorney General's delegated authority under Subsection (d), but they all agree that it cannot be construed as both encompassing and exempting from SORNA's registration requirements all sex offenders convicted before SORNA's enactment.

D. The rule of lenity does not apply here. There is no "grievous ambiguity." The Act's text, along with its structure, context, and purpose, support the government's reading of Section 16913(d) as a grant of regulatory authority, not an open-ended exemption from SORNA's coverage that the Attorney General was left to fill.

ARGUMENT

PETITIONER'S FEDERAL DUTY TO REGISTER AS A SEX OFFENDER ARISES DIRECTLY FROM SORNA ITSELF

Petitioner seeks to challenge the Attorney General's interim rule confirming that preenactment sex offenders are required to register under SORNA. He does not dispute, however, that if SORNA's registration requirements applied to him of the statute's own force, the validity of the Attorney General's interim rule would be irrelevant to his criminal liability and he would have no stake in challenging it. Because petitioner's federal duty to register and update his registration as a sex offender in compliance with SORNA arises from the statute itself, petitioner would be required to register under SORNA regardless of the validity of the Attorney General's interim rule. The court of appeals therefore correctly declined to entertain his APA challenge to the Attorney General's rule and affirmed his conviction.[6]

---

[6] The court of appeals stated that petitioner lacked "standing" to pursue his APA challenge. J.A. 64. Whether or not that statement meant to express a formal view on petitioner's Article III standing, cf. *Bond* v. *United States*, No. 09-1227 (June 16, 2011), slip. op. 4 (indicating that "Article III does not restrict [a criminal defendant's] ability to object to relief being sought at [his] expense"), the court's fundamental point remains sound. If petitioner's duty to register depends on SORNA itself, not on the validity of a later administrative rule, he has no personal stake in the validity of that rule and cannot obtain a judicial pronouncement on that issue. The court of appeals may have used the word "standing" in that more colloquial sense.

A. SORNA's Registration Requirements Are Unqualified And Directly Apply To Every Sex Offender, Including Those With Preenactment Sex Offense Convictions

To determine whether a sex offender is required to register under SORNA, the analysis must begin with the statutory provisions that set forth SORNA's registration obligations.

Section 16913(a) of Title 42 sets forth registration requirements applicable to all sex offenders: "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." 42 U.S.C. 16913(a); see *ibid.* ("For initial registration purposes only, a sex offender shall also register" in the jurisdiction of conviction if "different from the jurisdiction of residence."). Subsection (b) provides that a "sex offender shall initially register" either "before completing a sentence of imprisonment 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). And Subsection (c) states that "[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" and inform that jurisdiction of the relevant changes. 42 U.S.C. 16913(c); see also 42 U.S.C. 16914(a) (information a "sex offender" must provide); 42 U.S.C. 16915 (2006 & Supp. III 2009) (registration period applicable to different "sex offender" tiers); 42 U.S.C. 16916 ("sex offender" must appear in person at periodic intervals to verify registration information). These requirements are clear and unqualified; they do not distinguish be-

tween sex offenders convicted before or after SORNA's enactment, nor do they distinguish between offenders convicted before or after a jurisdiction's implementation of the Act.

To the contrary, SORNA's registration requirements expressly apply to every "sex offender." And that term is defined to include any "individual who *was* convicted of a sex offense." 42 U.S.C. 16911(1) (emphasis added); see 42 U.S.C. 16911(5)(B) ("A foreign conviction is not a sex offense for purposes of this subchapter if it *was* not obtained with sufficient safeguards.") (emphasis added). This Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr* v. *United States*, 130 S. Ct. 2229, 2236 (2010); see *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). And, as this Court recognized in *Carr*, Congress's use of the past tense ("was") in defining the type of sex offender required to register evidences an intent to cover preenactment convictions. 130 S. Ct. at 2237 n.6. SORNA's registration requirements therefore facially apply to all "sex offenders," *i.e.*, every individual who "was convicted" of a qualifying sex offense.[7]

---

[7] SORNA's predecessor bills in both the House and the Senate similarly used language intended to encompass preenactment convictions. See H.R. 4472, 109th Cong., 2nd Sess. § 111(3) (as passed by House Mar. 8, 2006) ("'sex offender' means an individual who, either before or after the enactment of this Act, was convicted of, or adjudicated as a juvenile delinquent for, a sex offense"); S. 1086, 109th Cong., 2d Sess. § 102(1) (as passed by Senate May 4, 2006) ("'covered individual' means any adult or juvenile * * * who," *inter alia*, "has been convicted of a covered offense against a minor" or "who has been convicted of a sexually violent offense"); cf. *Carr*, 130 S. Ct. at 2237 (citing "numerous federal statutes [that] use the past-perfect tense to describe one or more elements of a criminal offense when coverage of preenactment

The federal directive to those sex offenders went into effect on the date of SORNA's enactment, July 27, 2006. "It is well established that, absent a clear direction from Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991). Section 16913 contains no provision specifying its effective date; nor is there a specified effective date for SORNA as a whole. This stands in contrast to other provisions of the Act. For example, Congress provided that Section 129 of SORNA (which repeals the Wetterling Act and related provisions) "shall take effect on the date of the deadline determined in accordance with [42 U.S.C. 16924(a)]," roughly three years from the date of SORNA's enactment. SORNA § 129(b), 120 Stat. 601; see *id.* § 152(c)(1), 120 Stat. 609 ("The amendments made by subsection (a) shall take effect on October 1, 2006."); *id.* § 152(c)(2), 120 Stat. 609 ("The amendments made by subsection (b) shall take effect on October 1, 2008."). Congress's silence here also contrasts with prior federal sex offender registration and notification laws, several of which had expressly announced a delayed effective date. See, *e.g.*, CSCPA § 1601(b)(2), 114 Stat. 1537 (amendment "shall take effect 2 years after the date of the enactment of this Act"); 1998 Appropriations Act § 115(c)(1), 111 Stat. 2467 (providing that certain provisions would take effect one year after enactment); Lychner Act § 10(a), 110 Stat. 3098 ("This Act and the amendments made by this Act shall

---

events is intended"). In contrast, the registration requirements under the Wetterling Act generally applied to "a person who *is* convicted of a criminal offense against a victim who is a minor or who *is* convicted of a sexually violent offense." 42 U.S.C. 14071(a)(1)(A) (emphases added).

become effective 1 year after the date of enactment of this Act.").[8]

Accordingly, as of July 27, 2006, any "individual who *was* convicted of a sex offense" (42 U.S.C. 16911(1) (emphasis added)) was required to, among other things, "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)).

B. SORNA's Permissive Delegation Of Authority To The Attorney General To Specify The Applicability Of SORNA's Requirements To Preenactment And Preimplementation Sex Offenders Does Not Implicitly Exempt Those Sex Offenders From SORNA's Registration Requirements

Petitioner does not dispute that Subsection (a) of Section 16913 provides that every individual who was convicted of a qualifying sex offense must register and keep his registration current. Instead, petitioner argues that Subsection (d) implicitly negated that registration requirement and all others, exempting every sex offender convicted before SORNA's enactment or imple-

---

[8] Petitioner does not explicitly dispute that the registration requirements became "effective" on the date of SORNA's enactment, but the logical consequence of his argument is that they did not have any effect on that date. That is because petitioner contends that 42 U.S.C. 16913(d) is a "clear direction" (Pet. Br. 37 n.19) that preenactment and preimplementation offenders are exempted from the registration and updating requirements absent Attorney General action. But preenactment and preimplementation offenders constituted *all* sex offenders on SORNA's effective date. See pp. 28-29, *infra*. The upshot of his position, therefore, is that, although SORNA's registration provisions became immediately "effective" upon enactment, they did not apply to anyone at that time.

mentation in a particular jurisdiction. Subsection (d) provides that:

> 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). Resting entirely on the first clause of that provision, petitioner contends that Congress carved out from SORNA's registration requirements all existing sex offenders (preenactment offenders) and all new sex offenders for many months and years into the future (preimplementation offenders)—unless and until the Attorney General were to declare otherwise. That reading ignores the statutory structure and context, is fundamentally inconsistent with the statutory purpose, and is not compelled by the express statutory text.

Subsection (d) does not negate the broad scope of SORNA's express, unqualified registration requirements and it does not implicitly exempt any sex offenders from their reach. It confers discretionary authority on the Attorney General to modify or confirm the facially applicable registration requirements with respect to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction, if and to the extent the Attorney General determines that such specification is needed at some point in the future. Thus, Subsection (a) and SORNA's other registration requirements fully apply to all sex offenders, unless and

until the Attorney General exercises his authority under Subsection (d) to declare otherwise.

1. Subsection (d)'s text does not exempt any sex offenders from SORNA's registration requirements

The structure of Section 16913(d) is straightforward. It contains two clauses each of which makes a distinct grant of authority. The first clause grants the Attorney General "authority" "to specify the applicability" of SORNA's requirements to two groups of sex offenders: (1) those convicted before SORNA's enactment, and (2) those convicted before SORNA's implementation in a particular jurisdiction. The second clause grants the Attorney General "authority" "to prescribe" registration rules for those sex offenders and for other sex offenders who are unable to comply with the initial registration requirements set forth in Subsection (b). Read naturally, therefore, the first clause of Subsection (d) delegates to the Attorney General the authority to "specify" whether or not SORNA's registration requirements apply to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction.

Petitioner relies on the same interpretation to argue that preenactment and preimplementation sex offenders are therefore "necessarily" (Pet. Br. 25 n.12; see *id.* at 18) exempt from SORNA's registration requirements unless and until the Attorney General "specif[ies]" that those requirements apply. That does not linguistically or logically follow.

As petitioner's reliance on negative implications reveals (Pet. Br. 25 n.12, 29), his interpretation is not based on what 42 U.S.C. 16913(d) actually says. Subsection (d) does not carve out a class of sex offenders from the otherwise mandatory and unqualified registration

requirements imposed directly on all sex offenders in Subsections (a)-(c), as well as in other provisions of SORNA. Subsections (a), (b), and the first sentence of (c) are federal requirements imposed directly on sex offenders; Subsection (d) is a permissive delegation of authority to the Attorney General.[9] And, unlike with other provisions of SORNA, Congress did not draft Subsection (d) as an exception to, or a qualification of, those other subsections. Cf. 42 U.S.C. 16915(b)(1) ("[t]he full registration period" set forth in Subsection (a) "shall be reduced as described in paragraph (3)"); 42 U.S.C. 16918(a) ("[e]xcept as provided in this section, each jurisdiction shall make" certain information available on the Internet); 42 U.S.C. 16921(b) ("[e]xcept as provided in subsection (c)," an appropriate official shall provide registry information to certain people); 42 U.S.C. 16921(c) ("[n]otwithstanding subsection (b)," certain people can choose to receive registry information on a different schedule).

Section 16913(d) is not even a directive to the Attorney General. Congress did not provide that the Attorney General *shall* "specify the applicability" of SORNA's

---

[9] Petitioner's reliance (Pet. Br. 37 n.19) on the rule of statutory construction that a more specific provision controls over a general provision is therefore misplaced. Unlike Subsections (a), (b), and the first sentence of (c), as well as several other SORNA provisions (see p. 16, *supra*), Subsection (d) is not directed at sex offenders and it therefore does not prescribe any sex offender's registration requirements—whether the offender was convicted before SORNA's enactment, or implementation, or otherwise. Cf. *Corley* v. *United States*, 129 S. Ct. 1558, 1568 (2009) (resolving conflict between different subsections where earlier subsection was a "broad directive" addressing the admissibility of voluntary confessions and later subsection was directed specifically at voluntary confessions obtained after a time delay in presentment to a magistrate).

requirements to sex offenders convicted before SORNA's enactment or its implementation in a particular jurisdiction. It stated instead that the Attorney General "shall have the authority" to do so.[10] As the First Circuit explained, Congress "eschewed the use of mandatory language (e.g., 'shall determine') that would have compelled the Attorney General to make an affirmative determination before the statute could be applied to any previously convicted sex offender." *United States* v. *DiTomasso*, 621 F.3d 17, 25 (2010), petition for cert. pending, No. 10-8532 (filed Jan. 19, 2011).

Subsection (d) does not require the Attorney General to act within a certain time frame or by a date certain; it does not require him to act at all. See *United States* v. *Fuller*, 627 F.3d 499, 505 (2d Cir. 2010) ("[W]hatever authority it grants, it does not require that it be exercised."), petition for cert. pending, No. 10-10721 (filed May 24, 2011). Congress's grant of permissive authority to the Attorney General in Subsection (d) stands in notable contrast to the many other provisions of SORNA that mandate action by the Attorney General. Compare 42 U.S.C. 16913(d) ("shall have the authority"), with 42 U.S.C. 16912(b) ("The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter."), 42 U.S.C. 16917(b) ("The Attorney General shall prescribe rules for the notification of [cer-

---

[10] The first court of appeals to hold that SORNA's registration requirements are not applicable to sex offenders convicted before its enactment, unless and until the Attorney General says otherwise, misread Subsection (d) as imposing a mandatory duty on the Attorney General. See *United States* v. *Madera*, 528 F.3d 852, 857 (11th Cir. 2008) (per curiam) (reasoning from proposition that use of the "word 'shall' indicates that Congress was issuing a directive to the Attorney General specifically to make the determination").

tain] sex offenders."), 42 U.S.C. 16919(a) ("The Attorney General shall maintain a national database."), 42 U.S.C. 16919(b) ("The Attorney General shall ensure * * * that updated information about a sex offender is immediately transmitted."), 42 U.S.C. 16923(a) ("The Attorney General shall, in consultation with the jurisdictions, develop and support software."), 42 U.S.C. 16926(a) ("The Attorney General shall establish and implement a Sex Offender Management Assistance program."), and 42 U.S.C. 16942(a) ("[T]he Attorney General shall create and maintain a Project Safe Childhood program."); see also 42 U.S.C. 16920(a), 16921(b)(1), 16925(a) and (b), 16941(a), 16943; *DiTomasso*, 621 F.3d at 25 ("Congress's decision to couch some provisions of the statute in mandatory language but to couch subsection (d) in discretionary language is a telltale sign.").[11]

Under his delegated authority in Subsection (d), the Attorney General could reaffirm the statutory requirement that every sex offender convicted before SORNA's enactment or its implementation in a particular jurisdiction register; he could require some but not all to register (or comply with some but not all of the registration requirements); he could do nothing at all or wait several years before acting; or he could change his mind at any given time or over the course of different administrations. See *United States* v. *Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring), cert. denied,

---

[11] Subsection (d) also stands apart from provisions of the Act that require action by the Attorney General within a specified time frame. *E.g.*, 42 U.S.C. 16923(c) (two-year deadline for creating certain software); 42 U.S.C. 16942(a) (six-month deadline for creating a Project Safe Childhood program); 42 U.S.C. 16944(c) (deadline of approximately 11 months to submit a report on training and technology efforts).

129 S. Ct. 2383 (2009). A permissive grant of authority to the Attorney General to act—if he so chooses, at any given point in time—to specify the applicability of SORNA's requirements to preenactment and preimplementation sex offenders is most naturally read as a grant of authority to adjust the registration requirements if necessary, and not as an affirmative declaration that those sex offenders are exempt from the facially applicable and unqualified registration requirements set forth in the remainder of the Act. See *DiTomasso*, 621 F.3d at 30 (Boudin, J., concurring) (whatever the scope of Subsection (d)'s delegation of authority, "it still does *not* say that SORNA exempts those convicted before SORNA unless and until the Attorney General so determines").

Nothing about the phrase "specify the applicability" compels a different result. See *DiTomasso*, 621 F.3d at 30 n.10 (Boudin, J., concurring) ("'authority to specify' says nothing express about whether subsection (a) operates with full force if the Attorney General declines to exercise his authority"). Petitioner asks this Court to read "specify the applicability" as "determine [] in the first instance." Pet. Br. 25. But, as discussed above (pp. 16-19, *supra*), the other SORNA provisions make clear that "Congress itself had already made the [initial] determination that SORNA applie[s] to all sex offenders regardless of when convicted." *Fuller*, 627 F.3d at 506. The Attorney General's permissive authority to "specify the applicability" of those requirements operates in light of that statutory backdrop. That is, there already are registration requirements that apply to sex offenders convicted before SORNA's enactment (or implementation), and those requirements might require some modification or clarification in the future.

2. Reading Subsection (d) as permissive authority to regulate, not as a carve out from unqualified duties imposed on individuals, is consistent with SORNA's structure, context, and purpose

"[T]o protect the public from sex offenders and offenders against children," Congress "establishe[d] a comprehensive national system for the registration of those offenders," 42 U.S.C. 16901, that directly imposes registration requirements on all "sex offenders," 42 U.S.C. 16913(a). As petitioner recognizes (Pet. Br. 39-41), putting that comprehensive regime into place could be expected to give rise to difficulties in implementation, some of which could implicate sex offenders convicted before SORNA's enactment or its implementation in a particular jurisdiction. States, for example, might be disinclined to spend their resources tracking down sex offenders convicted many years earlier who are not currently registered and have since entered the general population. *E.g.*, 73 Fed. Reg. at 38,030, 38,046; 76 Fed. Reg. at 1635-1636. Strong resistance by jurisdictions could, in turn, delay or defeat the effectiveness of the comprehensive regime envisioned by Congress. What those difficulties might be, whether they would in fact arise, and what adjustments would best address such concerns while still furthering the statutory objectives, would only become apparent through subsequent experience in implementation.

That is where Subsection (d) comes into play. Congress armed the Attorney General with the discretionary authority to "specify the applicability" of SORNA's registration requirements to preenactment and preimplementation offenders, so that he could resolve any such issues about SORNA's applicability that might arise. This delegation of authority reflects "Congress's recog-

nition that specific applications of the registration requirements to previously convicted sex offenders may have unintended consequences," *DiTomasso*, 621 F.3d at 23, and that "problematic permutations * * * might arise with respect to some previously convicted sex offenders," *id.* at 25. See *id.* at 30 (Boudin, J., concurring) (Subsection (d) permits "the Attorney General to qualify the blanket applicability of subsection (a) itself if special problems arose in applying the statute to pre-SORNA convicts."); *Fuller*, 627 F.3d at 506 (Subsection (d) gives the Attorney General "authority to work out the complications that may arise in the application of a new federal criminal law to an already existent class of offenders, the myriad permutations of which Congress chose not to address in the Act itself, in order to ensure an efficient and 'comprehensive' national sex offender registration system."). Subsection (d) is thus best read as "allow[ing]—but * * * not compel[ling]—the Attorney General to narrow SORNA's sweep if and to the extent that he concludes that specific situations invite such narrowing." *DiTomasso*, 621 F.3d at 23; cf. *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) (rejecting broadly applicable language in one statutory subsection where such a reading would render another subsection "nonsensical and superfluous").[12]

[12] The Attorney General has not yet exercised his authority under the first clause of Subsection (d) to exempt from the federal registration requirements any sex offender convicted before SORNA's enactment or implementation in a particular jurisdiction. Difficulties in implementation with respect to such offenders have arisen, but the Attorney General has exercised his discretion to address those issues through other means. For example, the Attorney General, in conjunction with the SMART Office, issued guidelines providing that a jurisdiction will be deemed to have substantially implemented SORNA if it registers preenactment and preimplementation sex offenders who remain in the

3. Petitioner's interpretation cannot be squared with the statutory structure and context

Petitioner's interpretation cannot be squared with the statutory structure and context. See *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

a. To understand why that is so, it is important to explain three crucial aspects of the statutory scheme:

First, Subsection (d) refers to sex offenders convicted before SORNA's "implementation in a particular jurisdiction," in addition to sex offenders convicted before SORNA's enactment. 42 U.S.C. 16913(d).[13] SORNA does not direct States to implement its requirements; it encourages them to do so by conditioning the receipt of certain federal funds on substantial implementation of the Act. 42 U.S.C. 16912(a), 16924, 16925(a) and (d). States may therefore choose to forgo federal

---

system as prisoners, supervisees, or registrants, or who reenter the system because of a subsequent felony conviction. See 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-1636. The Attorney General promulgated those guidelines under his authority to interpret and implement SORNA (42 U.S.C. 16912(b)), to determine whether jurisdictions have substantially implemented the Act (42 U.S.C. 16925), and to prescribe rules governing jurisdictions' initial registration of preenactment and preimplementation sex offenders and other offenders who cannot be registered within the normal time frame in Subsection (b) (second clause of 42 U.S.C. 16913(d)).

[13] Petitioner asserts (Pet. Br. 24 n.11) that the Attorney General's interim rule addresses only the applicability of SORNA's requirements to preenactment sex offenders. That issue is not before the Court, but it is also not true. The interim rule expressly states that SORNA applies "to *all* sex offenders." 28 C.F.R. 72.3 (emphasis added); see 73 Fed. Reg. at 38,046, 38,063.

funding rather than comply. Congress also gave jurisdictions roughly three years to implement SORNA's requirements, with a possibility of two one-year extensions if authorized by the Attorney General. 42 U.S.C. 16924; see note 2, *supra*. At the end of the initial three-year grace period, no State (or other jurisdiction) had substantially implemented SORNA. See Office of Justice Programs, U.S. Dep't of Justice, *Justice Department Announces First Two Jurisdictions to Implement Sex Offender Registration and Notification Act* (Sept. 23, 2009), http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm. And, as of the filing of this brief, nearly five years after SORNA's enactment, only seven States (and four other jurisdictions) have substantially implemented. See Office of Justice Programs, U.S. Dep't of Justice, *Justice Department Announces Four More Jurisdictions Implement Sex Offender Registration And Notification Act* (May 12, 2011), http://www.ojp.usdoj.gov/newsroom/pressreleases/2011/SMART11102.htm. Accordingly, the "special subset[] of sex offenders" (Pet. Br. 21) referred to in the first clause of Subsection (d) in fact encompasses (i) all existing sex offenders on the day of SORNA's enactment (preenactment offenders), and (ii) the vast majority of sex offenders convicted in the ensuing months and years after SORNA's enactment, who live, work, or go to school in jurisdictions that did not implement SORNA before their predicate sex offense convictions (preimplementation offenders).

Second, and relatedly, Section 16913 does more than impose federal obligations on sex offenders; it sets forth some of the many SORNA requirements that jurisdictions must "substantially implement" in order to receive certain federal funds. See 42 U.S.C. 16912(a) (requiring

"[e]ach jurisdiction" to "maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter"); 42 U.S.C. 16925(a) (requiring each jurisdiction to "substantially implement this subchapter" or risk losing certain federal funds). Thus if, for example, Section 16913(d) is read as exempting all sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction from its registration requirements, then no State would be obligated under SORNA (as a condition of federal funding) to register such offenders as part of the State's registration and notification program.

Third, many sex offenders convicted before the enactment of SORNA (and before its implementation in any given jurisdiction) were already required to and had, in fact, registered as sex offenders under preexisting law. (By Congress's estimation, there were at that time more than 500,000 registered sex offenders. See *Fuller*, 627 F.3d at 505.) SORNA overhauled the preexisting federal regime and, in furtherance of that effort, it repealed the Wetterling Act and related provisions, effective July 27, 2009. See note 1, *supra*. Accordingly, as of July 27, 2009, SORNA was the *only* federal registration requirement that could have applied to the approximately 500,000 already registered sex offenders. And because, as noted above, the States are only required to implement SORNA's requirements (to receive federal funds), if SORNA itself imposes *no* requirements on preenactment and preimplementation offenders, States would have no funding incentive to register such offenders at all.

b. Petitioner's reading of Subsection (d)'s first clause is implausible in light of this statutory design. Petitioner effectively argues that, with one hand, Con-

gress enacted a "comprehensive national system" (42 U.S.C. 16901) for the registration of all sex offenders (42 U.S.C. 16911(1), 16913(a)) and, with the other, it exempted from that system all existing sex offenders, and the vast majority of new sex offenders for months and years into the future. See *Hinckley*, 550 F.3d at 945 (Gorsuch, J., concurring). Given that the delegation of authority in Subsection (d) is permissive, petitioner's interpretation would further suggest that Congress was indifferent about whether or when that comprehensive national system would ever include those sex offenders. See *DiTomasso*, 621 F.3d at 30 (Boudin, J., concurring) (such a reading "suppose[s] that Congress left those with pre-SORNA convictions free from registration requirements unless and until the Attorney General got around to regulating"); *Hinckley*, 550 F.3d at 945 n.3 (Gorsuch, J., concurring) (Such a reading would mean that SORNA's registration requirements "presumptively appl[y] *only to future sex offenders*. It is merely if the Attorney General happens to choose, in his or her unfettered discretion and at some unspecified future time or in some future age, to rule otherwise that the Act has any application to existing sex offenders."). Thus, in petitioner's view, an individual convicted of a qualifying sex offense in May 2006 and sentenced to ten years of imprisonment would not have a federal statutory duty to register as a sex offender upon release; nor would an individual who was convicted of a sex offense in 2004, and who registered in compliance with preexisting law, have a federal statutory obligation to keep the registration current upon moving to another State in 2009. See *id.* at 944 (Gorsuch, J., concurring).

It is no answer to say that, today, those sex offenders are required to register because the Attorney General

has exercised his authority under the first clause of Subsection (d) to confirm that SORNA's requirements mean what they say, *i.e.*, they apply to all sex offenders. See 28 C.F.R. 72.3; 72 Fed. Reg. at 8894-8896; 75 Fed. Reg. at 81,849-81,852; see also 73 Fed. Reg. at 38,035-38,036; cf. note 21, *infra*. The question is what Congress intended when it set up a "comprehensive national system" that became effective on July 27, 2006. And looking at the statutory scheme on the day of enactment, it is unreasonable to think that Congress overhauled federal registration law to create a new regime that would apply to *no* existing sex offenders, and *no* new sex offenders for many months and years to come, unless and until the Attorney General chose to exercise his discretionary authority to act at some undefined point in the future. See *Fuller*, 627 F.3d at 505 ("[W]e do not think Congress was so agnostic as to whether the half million sex offenders convicted before SORNA's enactment were required to comply with SORNA's registration requirements.").[14]

c. Even if petitioner's interpretation could be justified if dictated by the express statutory text, but cf. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the

[14] Petitioner suggests (Pet. Br. 40-41) that political forces would necessarily prompt the Attorney General to apply SORNA's registration requirements to preenactment sex offenders. But, in petitioner's view, those political forces were not strong enough to prompt *Congress* to require those sex offenders to register. And if petitioner's argument is that the Attorney General's exercise of his delegated authority would obviously lead him to apply SORNA to those offenders, it is difficult to understand why Congress would have enacted a provision that did nothing more than delay the Act's effectiveness for the entire existing sex offender population.

intentions of its drafters, and those intentions must be controlling."), that is not the case here. Petitioner asks this Court to reach that anomalous result by drawing a negative implication from a three-word phrase ("specify the applicability") contained in one clause of a subsection that delegates permissive authority to the Attorney General. Cf. *Wal-Mart Stores, Inc.* v. *Dukes*, No. 10-277 (June 20, 2011), slip op. 23-24 ("[A] mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features."); *Corley*, 129 S. Ct. at 1573 (Alito, J., dissenting) (broadly applicable provision should control where the only "conflict" is "between the express language of one provision * * * and the 'negative implication' * * * from another"). Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Here, it would be "passing strange" for Congress to "grant the Attorney General sole authority to determine SORNA's criminal reach by cabining this expansive and profound power in a single independent clause preceding an unrelated, highly specific, and purely administrative grant of authority, located under an inapposite heading in the fourth subsection of a subchapter of the statute." *Fuller*, 627 F.3d at 505.

4. Petitioner's interpretation is fundamentally inconsistent with SORNA's broader purpose

Petitioner's interpretation is also impossible to square with SORNA's broader purpose. See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the par-

ticular statutory language, but to * * * its object and policy.").

a. As discussed above (see pp. 2-3, *supra*), Congress enacted multiple laws in the dozen years before SORNA that were intended to provide for sex-offender registration and community notification. Despite these many laws, by 2005, Congress perceived a need to strengthen the effectiveness of sex offender registration and notification programs; to eliminate potential gaps and loopholes under the then-current laws; and to create a comprehensive national system such that both law enforcement and the public would be aware of sex offenders living in their communities. See p. 4, *supra*; 72 Fed. Reg. at 8895; *House Report* 181 ("The accuracy and completeness of the sexual offender registry system is vitally important to our national efforts to fight crimes against kids. It is essential.") (statement of Rep. Green).

More specifically, one of Congress's primary concerns was that an estimated 100,000 sex offenders in the United States were "missing" or "lost," *i.e.*, their locations were "unknown to the public and law enforcement." 152 Cong. Rec. 15,713 (2006) (statement of Rep. Sensenbrenner). The House Judiciary Committee stressed the problem of these "missing" sex offenders and made clear that SORNA was designed to help locate them: "The combination of incentives for the sex offender to comply, enhanced criminal penalties, and additional law enforcement resources to focus on this problem will reduce the overwhelming number of noncomplying or 'lost' sex offenders in our communities." *House Report* 26; see *id.* at 24 (new legislation would address the "strong public interest" in finding the 100,000 "lost" sex offenders and "having them register

with current information to mitigate the risks of additional crimes against children"); 152 Cong. Rec. at 15,331 (statement of Sen. Allen) ("[T]here are more than 550,000 registered sex offenders in the United States, and there are an estimated 100,000 sex offenders who are missing from the system. Loopholes in this current system have allowed some sexual predators to evade law enforcement and place our children at risk. That is why the national registry aspect of this bill is so important."); *id.* at 15,338 (statement of Sen. Kyl) ("There currently are over 100,000 sex offenders in this country who are required to register but are 'off the system.' They are not registered. The penalties in this bill should be adequate to ensure that these individuals register."); *id.* at 13,050 (statement of Sen. Frist) ("There are currently 550,000 registered sex offenders in the U.S. and at least 100,000 of them are missing from the system. Every day that we don't have this national sex offender registry, these missing sex predators are out there somewhere."). In light of the pressing public interest in registering "lost" sex offenders, it would be strange indeed for Congress to have enacted a statutory scheme that exempted those very offenders from the Act's registration requirements.

b. Petitioner does not dispute this purpose. But he is unable to reconcile his position with it.

Petitioner first argues that, in *Carr*, this Court found "[s]uch 'vague notions of a statute's "basic purpose" * * * inadequate to overcome the words of its text regarding the specific issue under consideration.'" Pet. Br. 40 n.21 (quoting *Carr*, 130 S. Ct. at 2241); *id.* at 41. But *Carr* involved the interstate travel element contained in the criminal sanction provision, 18 U.S.C. 2250; this case calls for an interpretation of the registration

requirements at the very core of SORNA's "broader statutory scheme." See *Carr*, 130 S. Ct. at 2240 (distinguishing between "the specific purpose of [Section] 2250" and the "broader statutory scheme"). In *Carr*, the Court recognized that these broader provisions, including 42 U.S.C. 16913(a), "stand at the center of Congress' effort to account for missing sex offenders." 130 S. Ct. at 2240-2241. And the statute's broad purpose is entirely consistent with the statutory text at issue here. See pp. 16-25, *supra*.

Petitioner next asserts (Pet. Br. 40-42, 46-47) that reading SORNA as imposing an immediate duty on preenactment sex offenders to provide current registration information would risk defeating Congress's objectives by rendering SORNA "ineffective as to these offenders" (*id.* at 40). To the extent that petitioner suggests SORNA would be "ineffective" because complications could arise with respect to the registration of preenactment and preimplementation offenders, petitioner misunderstands the statutory scheme.

To comply with SORNA's registration requirements, a sex offender must register and keep his registration current in any jurisdiction where he lives, works, or goes to school. 42 U.S.C. 16913(a). All 50 States and the District of Columbia had sex-offender registries in place for years before SORNA's enactment. *Smith* v. *Doe*, 538 U.S. 84, 90 (2003). SORNA requires sex offenders to use those preexisting registries. See 42 U.S.C. 16911(9) ("The term 'sex offender registry' means a registry of sex offenders, and a notification program, maintained by a jurisdiction."). If a State declines to implement SORNA's requirements and forgoes a portion of federal criminal justice funding, that would have no impact on a sex offender's obligation to register and update his reg-

istration in compliance with SORNA. Cf. *Kennedy* v. *Allera*, 612 F.3d 261, 268 (4th Cir.) ("Maryland law creates a sex offender registry in which [the defendant] can register even if we were to assume, for purposes of argument, that Maryland law does not of its own force require him to register."), cert. denied, 131 S. Ct. 554 (2010). And SORNA accounts for the possibility that a State could decline a particular sex offender's attempt to register by providing an affirmative defense to criminal prosecution for any person who was prevented from complying by circumstances beyond his control. 18 U.S.C. 2250(b); see *Kennedy*, 612 F.3d at 269 ("[T]he criminal provisions of SORNA also recognize that a State can refuse registration inasmuch as they allow, as an affirmative defense to prosecution, the claim that 'uncontrollable circumstances prevented the individual from complying.'"). Thus, any suggestion that preenactment or preimplementation sex offenders would face widespread difficulties in complying with their SORNA registration duties lacks merit.[15]

---

[15] As petitioner notes (Pet. Br. 34-35), Subsection (b) sets forth a particular time frame by which a sex offender must initially register: "before completing a sentence of imprisonment 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). Some unregistered sex offenders convicted before SORNA's enactment will not be able to comply with this time frame, because they were released from prison for the predicate sex offense before SORNA's enactment or because they received a nonincarcerative sentence for the predicate sex offense more than three business days before SORNA's enactment. Recognizing this, Congress expressly delegated authority to the Attorney General in the second clause of Subsection (d) to set forth alternative timing requirements. In the meantime, sex offenders who cannot comply with the timing requirements in Subsection (b) are sim-

Finally, petitioner relies (Pet. Br. 48-51) on SORNA's drafting history to claim that Congress delegated authority to the Attorney General to specify whether SORNA's registration requirements apply to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction. But this argument does not prove the further point that petitioner must establish to prevail: that the delegation of power to the Attorney General to specify also automatically exempted preenactment and preimplementation offenders from the facially unqualified registration duties.

The same drafting history suggests, to the contrary, that Congress did not use the specify-the-applicability phrase to transform a facially applicable and comprehensive registration regime into a null set. As petitioner explains (Pet. Br. 50 n.25), the House version of what became Subsection (d) provided that "[t]he Attorney General *shall* prescribe rules for the registration of sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction, and for other categories of sex offenders who are unable to comply with subsection (b)." H.R. 4472, 109th Cong., 2d Sess. § 113(d) (as passed by House Mar. 8, 2006) (em-

---

ply required to initially register within a reasonable time. See *United States* v. *Dixon*, 551 F.3d 578, 585 (7th Cir. 2008) ("By analogy to contract offers that do not specify a deadline for acceptance, we can assume that they would have to register within a reasonable time."), rev'd on other grounds *sub nom. Carr*, *supra*. Significantly, petitioner is not such an offender. See p. 10, *supra* (noting that petitioner had initially registered with the State of Missouri and was convicted for failing to update his registration in Missouri and to register in Pennsylvania after moving to the State).

phasis added).[16] Had that version been enacted by Congress, petitioner would presumably agree that SORNA's registration requirements apply of their own force to all sex offenders, including those convicted before the Act's enactment or implementation in a particular jurisdiction. Subsection (a), and all the other SORNA registration provisions, would still impose a direct and unqualified obligation on all "sex offender[s]," *i.e.*, any person who "was convicted" of a qualifying sex offense; and nothing in Subsection (d) could be read as expressly or implicitly negating that clear directive. Cf. *DiTomasso*, 621 F.3d at 22 ("[B]ut for subsection (d), any argument that the section cannot operate in advance of action by the Attorney General would be absurd.").

Petitioner is thus effectively arguing that by moving from a mandatory directive ("shall") limited to prescribing "rules" for the registration of preenactment and preimplementation offenders, to a permissive delegation of authority ("shall have the authority") to "specify the applicability" of SORNA's requirements for the registration of those same offenders, Congress expressed its intent to exempt from SORNA all existing sex offenders and all new sex offenders for months and years to come—unless and until the Attorney General declares otherwise. That is a strained reading at best, and, for the reasons discussed, one that is contrary to the statutory context, structure, and purpose.

---

[16] Petitioner refers to H.R. 3132, 109th Cong. § 113 (2005), but H.R. 4472 is the bill that was ultimately enacted as amended.

C. Five Courts Of Appeals Agree That Subsection (d) Does Not Exempt All Preenactment And Preimplementation Sex Offenders From SORNA's Registration Requirements

Although the circuits are divided on the issue, five courts of appeals agree that Subsection (d) does not exempt from SORNA's registration requirements all sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction.[17] Those courts, however, have generally arrived at this conclusion through a more circumscribed reading of the authority delegated to the Attorney General under Subsection (d).

In the case that controlled the panel below, the court of appeals adopted a more limited interpretation of Subsection (d). As the court explained, in *United States* v. *Shenandoah*, 595 F.3d 151 (3d Cir.), cert. denied, 130 S. Ct. 3433 (2010), it had "held that the Interim Rule affected only those sex offenders who 'did not have a registration requirement before the passage of SORNA but nonetheless were subject to sex-offender-registration requirements after SORNA became law.'"

---

[17] Six courts of appeals have held to the contrary. See *United States* v. *Johnson*, 632 F.3d 912, 922-927 (5th Cir. 2011), petition for cert. pending, No. 10-10330 (filed May 3, 2011); *United States* v. *Valverde*, 628 F.3d 1159, 1163-1164 (9th Cir. 2010); *United States* v. *Cain*, 583 F.3d 408, 414-419 (6th Cir. 2009); *United States* v. *Hatcher*, 560 F.3d 222, 226-229 (4th Cir. 2009); *Dixon*, 551 F.3d at 585 (7th Cir.); *Madera*, 528 F.3d at 856-859 (11th Cir.). In *Carr*, Justice Alito's dissenting opinion indicated agreement with courts of appeals adopting that view. 130 S. Ct. at 2246 n.6. But that issue, while referenced in two footnotes in the government's brief (Gov't Br. at 10 n.4, 20 n.7, *Carr*, *supra*), was not presented in *Carr* (*id.* at 10 n.4) and the arguments in favor of reading Section 16913(a) and SORNA's other registration requirements to apply absent excepting action by the Attorney General were not developed.

J.A. 64 (quoting *Shenandoah*, 595 F.3d at 163). In *Shenandoah*, the court had concluded that "[w]hile subsections (b) and (d) when read together seem to contemplate the need for clarification as to 'initial registrations' by persons convicted of qualifying sex offenses before July 27, 2006, that need for clarification applies to [that] limited class of persons." 595 F.3d at 163. The court thus held that when a defendant "had already initially registered as a sex offender under state law when SORNA was enacted, subsection (d) of Section 16913 did not apply." *Id.* at 164. Those sex offenders, the court explained, are required to keep their registration current under Subsections (a) and (c) and can be federally prosecuted under 18 U.S.C. 2250 for failure to do so. *Ibid.*

Several other courts of appeals have adopted similar interpretations. The Eighth and Tenth Circuits have found ambiguity in Subsection (d) and have resolved that ambiguity by relying on the provision's title and the overall statutory design and purpose to read its delegation of authority as limited to currently unregistered sex offenders unable to initially register under the time frame specified in Subsection (b). See *Hinckley*, 550 F.3d at 932 (10th Cir.); *United States* v. *May*, 535 F.3d 912, 918-919 (8th Cir. 2008), cert. denied, 129 S. Ct. 2431 (2009); see also *United States* v. *Waddle*, 612 F.3d 1027, 1030-1031 (8th Cir. 2010); *United States* v. *Zuniga*, 579 F.3d 845, 850-851 (8th Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 3384 (2010); *United State*s v. *Lawrance*, 548 F.3d 1329, 1335-1336 (10th Cir. 2008).[18] The First Circuit reached the same result after finding the statu-

[18] Relying on the Eighth Circuit's decision in *May*, the government made a similar argument in the court of appeals. See Gov't C.A. Br. 21-22 & n.6, 44-45.

tory provision unambiguous. See *DiTomasso*, 621 F.3d at 24; see also *United States* v. *Gagnon*, 621 F.3d 30, 32-33 (1st Cir. 2010), petition for cert. pending, No. 10-8097 (filed Dec. 22, 2010).[19]

Although these courts have adopted slightly different modes of analysis, they have generally read Subsection (d) in the following manner. The second clause of Subsection (d) confers authority on the Attorney General "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) (emphases added). "[A]ny such sex offenders," the courts reason, refers back to the first clause and thus includes "sex offenders convicted before [SORNA's enactment] or its implementation in a particular jurisdiction." Because the second clause grants rulemaking power with respect to that category of offenders as well as "*other* categories of sex offenders who are unable to comply with subsection (b)," the courts read the delegation as limited to those preenactment and preimplementation sex offenders who are *also* "unable to comply with subsection (b)." And because Subsection (b) addresses *initial* registration, Subsection (d) does not cover preenactment and preimplementation offenders who have already initially registered as sex offenders before SORNA's enactment, as those offenders are not "unable to comply with subsection (b)." That reading is rein-

[19] Although the First Circuit appears to read Subsection (d)'s delegation of authority in this more limited manner, *DiTomasso*, 621 F.3d at 24, it also concludes that Congress did not design a statutory scheme whereby "application of the general rules limned in Subsections (a), (b), and (c) to previously convicted sex offenders would hinge on action by the Attorney General," *id.* at 25.

forced by the title: "Initial registration of sex offenders unable to comply with subsection (b)." *Ibid.*

The Second Circuit adopted a somewhat different reading of Subsection (d), concluding that it "grants the Attorney General two separate but closely related powers: (1) the power to specify how—not whether—SORNA's registration requirements apply to the subset of sex offenders who were convicted before SORNA's enactment, and (2) the power to promulgate the precise registration rules applicable to that subset, as well as to sex offenders unable to comply" with Subsection (b) "for any other reason." See *Fuller*, 627 F.3d at 506.[20]

Whatever the precise approach, these courts of appeals generally agree that Subsection (d) cannot be construed as both encompassing *and* exempting from SORNA's registration requirements all sex offenders convicted before SORNA's enactment. The United States fully agrees with that proposition. The most straightforward path to that result, however, is to read

---

[20] Some judges have relied in part on the doctrine of constitutional avoidance. See *Fuller*, 627 F.3d at 508-513 (Raggi, J., concurring); accord *Hinckley*, 550 F.3d at 948 (Gorsuch, J., concurring). They expressed reservations about the "substantial delegation concerns" that, in their view, would be raised by petitioner's interpretation. *Fuller*, 627 F.3d at 512 (Raggi, J., concurring); *Hinckley*, 550 F.3d at 948 (Gorsuch, J., concurring). The government disagrees that any such delegation would be unconstitutional, or raise a serious question in that regard. Cf. *Touby* v. *United States*, 500 U.S. 160, 165 (1991) (upholding the Attorney General's power to schedule controlled substances on a temporary basis). But it agrees with the Second Circuit that "the reasonableness" of a reading that would grant the Attorney General the power to decide in the first instance whether an entire class of individuals could become subject to criminal liability "bears on" the proper construction. *Fuller*, 627 F.3d at 504-505. As explained, attribution of that intent to Congress is unreasonable.

Subsection (d) as covering all preenactment and preimplementation offenders, but to recognize that it does not exempt those offenders from the unqualified reach of Subsection (a) and SORNA's other registration requirements.

If, however, this Court were to disagree with the latter proposition and conclude (as petitioner argues) that "authority to specify" is the equivalent of "determine in the first instance," then it would be necessary to revisit precisely what category of sex offenders Subsection (d) covers. In reading a statute, this Court does not "look merely to a particular clause," but considers "the whole statute," including its "design," "object and policy." *Dada* v. *Mukasey*, 554 U.S. 1, 16 (2008) (citations omitted). For all the reasons set forth above, it would be antithetical to Congress's clear intent to read Subsection (d) as exempting from SORNA's registration requirements all existing sex offenders and all new sex offenders for months and years to come, unless and until the Attorney General declares otherwise.

D. The Rule Of Lenity Has No Application In This Case

Despite petitioner's cursory suggestion to the contrary (Pet. Br. 18, 51 n.26), the rule of lenity has no application here. As petitioner correctly notes (*id.* at 51 n.26), the rule of lenity only applies when, "'after seizing everything from which aid can be derived,'" the Court "can make 'no more than a guess as to what Congress intended.'" *Reno* v. *Koray*, 515 U.S. 50, 65 (1995) (quoting *Smith* v. *United States*, 508 U.S. 223, 239 (1993), and *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). Resort to lenity principles is only appropriate when there is a "grievous ambiguity" in the statutory text, *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (cita-

tion omitted), such that "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). And a statute does not have a "grievous ambiguity" simply because courts have disagreed as to its meaning. *Reno*, 515 U.S. at 64-65; *Moskal* v. *United States*, 498 U.S. 103, 108 (1990).

In light of the text, context, structure, and purposes of SORNA, there is no "grievous ambiguity" here. See *Abbott* v. *United States*, 131 S. Ct. 18, 31 n.9 (2010) (rejecting application of rule of lenity where interpretation "reflects 'an implausible reading of the congressional purpose'") (citation omitted); *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (same); see also *United States* v. *Hayes*, 129 S. Ct. 1079, 1089 (2009) (rejecting application of rule of lenity after considering "text, context, purpose, and * * * drafting history"). All sex offenders, including those convicted before SORNA's enactment or implementation in a particular jurisdiction, are required to register and keep their registration current. 42 U.S.C. 16913(a). Section 16913(d), in turn, grants the Attorney General the discretionary authority to determine at some later date, if needed, that those registration requirements (or some subset thereof) should no longer be applicable to certain offenders within that broad class.

* * * * *

Because SORNA's registration requirements applied to petitioner of the statute's own force on July 27, 2006, petitioner does not stand to benefit from his challenge to the Attorney General's interim rule, and the court of appeals correctly declined to entertain that challenge.[21]

[21] If this Court disagrees, the court of appeals will have to decide on remand whether the Attorney General's interim rule violates the APA's notice, comment, and publication requirements. If the interim rule is valid, petitioner's conviction should be affirmed because he traveled in interstate commerce and thereafter failed to register between September 16, 2007, and October 16, 2007 (J.A. 13), several months after the February 28, 2007, promulgation of the interim rule. As this Court noted in *Carr*, 130 S. Ct. at 2234 n.2, the APA question has itself given rise to a split among the courts of appeals. Compare *United States* v. *Dean*, 604 F.3d 1275, 1278-1282 (11th Cir.) (no APA violation), cert. denied, 131 S. Ct. 642 (2010), *United States* v. *Gould*, 568 F.3d 459, 469-470 (4th Cir. 2009) (same), cert. denied, 130 S. Ct. 1686 (2010), and *Dixon*, 551 F.3d at 583 (7th Cir.) (same), with *Johnson*, 632 F.3d at 920-933 (5th Cir.) (APA violation but harmless error), with *Valverde*, 628 F.3d at 1164-1168 (9th Cir.) (APA violation), and *Cain*, 583 F.3d at 419-424 (6th Cir.) (APA violation). This Court, however, only granted certiorari on the more limited question whether petitioner has standing to pursue his APA claim. And the court of appeals did not decide the merits of that claim. See Br. in Opp. 9 n.1. Although the government argued below that the interim rule is valid (Gov't C.A. Br. 45-47), and although this would provide an alternative ground for affirmance, the government does not believe the issue independently warrants this Court's review and, accordingly, has not addressed the validity of the interim rule in this brief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
J. CAMPBELL BARKER
Attorney

JUNE 2011

APPENDIX

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. 14071 (2006) provides in pertinent part:

Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program.

(a) In general

(1) State guidelines

The Attorney General shall establish guidelines for State programs that require—

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6) of this section; and

* * * * *

4. 42 U.S.C. 14072 (2006) provides in pertinent part:

* * * * *

FBI database

* * * * *

(i) Penalty

A person who is—

(1) required to register under paragraph (1), (2), or (3) of subsection (g) of this section and knowingly fails to comply with this section;

(2) required to register under a sexual offender registration program in the person's State of residence and knowingly fails to register in any other

State in which the person is employed, carries on a vocation, or is a student;

(3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; or

(4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-119, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

5. 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:

* * * * *

6. 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;

---

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

(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.

7. 42 U.S.C. 16912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

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

(b) Guidelines and regulations

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

8. 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.

9. 42 U.S.C. 16914 provides in pertinent part:

Information required in registration

(a) Provided by the offender

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

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

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

* * * * *

10. 42 U.S.C. 16915 (2006 & Supp. III 2009) provides:

Duration of registration requirement

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is—

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) the life of the offender, if the offender is a tier III sex offender.

(b) Reduced period for clean record

(1) Clean record

The full registration period shall be reduced as described in paragraph (3) for a sex offender who main-

tains a clean record for the period described in paragraph (2) by—

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole; and

(D) successfully completing of[1] an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period

In the case of—

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this subchapter, the period during which the clean record shall be maintained is 25 years.

(3) Reduction

In the case of—

(A) a tier I sex offender, the reduction is 5 years;

---

[1] So in original. The word "of" probably should not appear.

(B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

11. 42 U.S.C. 16916 provides:

Periodic in person verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than—

(1) each year, if the offender is a tier I sex offender;

(2) every 6 months, if the offender is a tier II sex offender; and

(3) every 3 months, if the offender is a tier III sex offender.

12. 42 U.S.C. 16918 provides in pertinent part:

Public access to sex offender information through the Internet

(a) In general

Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for

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

* * * * *

13. 42 U.S.C. 16919 provides:

National Sex Offender Registry

(a) Internet

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

(b) Electronic forwarding

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

14. 42 U.S.C. 16924 provides:

Period for implementation by jurisdictions

(a) Deadline

Each jurisdiction shall implement this subchapter before the later of—

(1) 3 years after July 27, 2006; and

(2) 1 year after the date on which the software described in section 16923 of this title is available.

(b) Extensions

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

REFERENCES IN TEXT

The software described in section 16923 of this title, referred to in subsec. (a)(2), became available on July 25, 2008. See Office of Justice Progs., U.S. Dep't of Justice, Annual Report to Congress 26 (Fiscal Year 2008).

15. 42 U.S.C. 16925 provides in pertinent part:

Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

* * * * *

(d) Rule of construction

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

16. Sex Offender Registration and Notification Act, 2006, Pub. L. No. 109-248, 120 Stat. 600, § 129 provides:

REPEAL OF PREDECESSOR SEX OFFENDER PROGRAM.

(a) REPEAL.—Section 170101 (42 U.S.C. 14071) and 170102 (42 U.S.C. 14072) of the Violent Crime Control and Law Enforcement Act of 1994, and section 8 of the Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (42 U.S.C. 14073), are repealed.

(b) EFFECTIVE DATE.—Notwithstanding any other provision of this Act, this section shall take effect on the date of the deadline determined in accordance with section 124(a).

17. 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 jurisdic-

tion 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.

18. 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 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.