

No. 08-1301

In the Supreme Court of the United States

THOMAS CARR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELENA KAGAN

*Solicitor General
Counsel of Record*

LANNY A. BREUER

Assistant Attorney General

MICHAEL R. DREEBEN

Deputy Solicitor General

CURTIS E. GANNON

*Assistant to the Solicitor
General*

RICHARD A. FRIEDMAN

*Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2250(a), which imposes criminal penalties on certain sex offenders who travel in interstate commerce and knowingly fail to register or update a registration as required by the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, applies to petitioner, whose interstate travel occurred after his conviction for a sex offense that triggers a registration requirement, but before SORNA's enactment.

2. Whether the Ex Post Facto Clause precludes a prosecution under Section 2250(a) of a person whose underlying sex offense and interstate travel predated SORNA's enactment, but whose failure to register occurred well after SORNA's requirements became applicable to him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 551 F.3d 578. The opinion of the district court (Pet. App. 14a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2008. On March 12, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 22, 2009, and the petition was filed on that date. The petition for a writ of certiorari was granted on September 30, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Article I, Section 9, Clause 3 of the United States Constitution provides: “No Bill of Attainder or ex post facto Law shall be passed.”

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-26a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Northern District of Indiana, petitioner was convicted of failing to register or to update his registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). Pet. App. 1a-2a. He was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. Amended Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-13a.

1. “Sex offenders are a serious threat in this Nation,” in large part because “the victims of sexual assaults 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; see also *id.* at 103 (notification “alert[s] the public to the risk of sex offend-

ers in their communit[y]”) (citation omitted; brackets in original).

By 1993, 24 States had already passed sex-offender-registration laws, which became known as “Megan’s Laws,” after Megan Kanka, a seven-year-old girl who was sexually assaulted and murdered in 1994 by a neighbor who, unbeknownst to her family, had prior convictions for sex offenses against children. See *Smith*, 538 U.S. at 89; 139 Cong. Rec. 31,251 (1993) (statement of Rep. Ramstad). 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, the District of Columbia, and the Federal Government had enacted some variation of Megan’s Law.” *Id.* at 90. Within the same period, Congress had added a mandatory community notification provision to the Wetterling Act’s minimum national standards, see Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345. Congress had also further strengthened the national effort to ensure 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 subject to a penalty of up to one year of imprisonment (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, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

Later statutes further enhanced registration and notification requirements. See, *e.g.*, Campus Sex Crimes Prevention Act, 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); Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 604, 117 Stat. 688 (requiring States to make sex-offender-registry information available on the Internet).

Despite those considerable 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,” in the sense that their locations were unknown both to law enforcement and to the other 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,” and it recognized that a sex offender “typically” went missing by “mov[ing] from one State to another.” *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 responded to those (and other) concerns by enacting 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,” as well as “to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations.” 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). In furtherance of those ends, SORNA “establishe[d] a comprehensive national system for the registration of [sex] offenders.” 42 U.S.C. 16901.

In general, SORNA requires every sex offender to “register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” 42 U.S.C. 16913(a). It defines a “sex offender” as “an individual who was convicted of a sex offense” that falls within the statute’s defined offenses. 42 U.S.C. 16911(1) and (5)-(7). To encourage States to conform their sex-offender registries to certain minimum standards, SORNA requires States to adapt their registries to incorporate the standards set out in SORNA or risk losing federal funds. 42 U.S.C. 16912, 16925. SORNA specifies, among other things, the kinds of information that must be collected as part of registration (42 U.S.C. 16914) and the length of time offenders must remain registered (42 U.S.C. 16915).¹

¹ States may adopt sex-offender-registration requirements that exceed the minimum standards specified by SORNA. 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, 38,032-38,035, 38,044, 38,046 (2008).

SORNA's registration requirements are divided into two categories. First, SORNA requires a sex offender to register following his conviction:

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.

42 U.S.C. 16913(b). Second, SORNA requires a sex offender who has already registered to keep his registration current by updating it within three business days of any change in his “name, residence, employment, or student status.” 42 U.S.C. 16913(c).

SORNA delegates to the Attorney General the authority to further specify registration requirements in certain situations:

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

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

42 U.S.C. 16913(d).

On February 28, 2007, the Attorney General issued an interim rule, effective on that date, specifying that

“[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.” 28 C.F.R. 72.3. In the preamble to the rule, the Attorney General explained that “[c]onsidered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA.” 72 Fed. Reg. at 8896. The interim rule, however, served the purpose of “confirming SORNA’s applicability” to “sex offenders with predicate convictions predating SORNA.” *Ibid.*

In order to enforce SORNA’s registration requirements, Congress also created a federal criminal offense penalizing non-registration. Under 18 U.S.C. 2250, a sex offender required to register under SORNA, who, *inter alia*, “travels in interstate or foreign commerce” and “knowingly fails to register or update a registration” as required under SORNA may be punished by up to ten years of imprisonment. 18 U.S.C. 2250(a). The statute provides an affirmative defense if “uncontrollable circumstances” prevent an individual from complying with the registration requirements. 18 U.S.C. 2250(b).

After confirming that SORNA’s registration requirements apply to individuals who were sex offenders by virtue of pre-SORNA convictions, 28 C.F.R. 72.3, the text of the Attorney General’s February 2007 rule included an example that addressed the prospect of criminal liability under Section 2250 for sex offenders who had moved from one State to another and, after SORNA was enacted, were found to be unregistered in the new State:

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 [SORNA], the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under [SORNA] 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.

28 C.F.R. 72.3 (Example 2).

2. In 2004, petitioner was convicted of first degree sexual abuse in Alabama. When he was released from custody, petitioner registered in Alabama as a sex offender. Near the end of 2004, he moved to Indiana.² On July 19, 2007, he was discovered living in Fort Wayne, Indiana. As of that date, petitioner had not registered as a sex offender in Indiana. Pet. App. 15a.

In August 2007, a federal grand jury charged petitioner with violating 18 U.S.C. 2250(a). Pet. App. 14a. Petitioner moved to dismiss the indictment, asserting that “his prosecution and any conviction would violate the Ex Post Facto Clause of the United States Constitution” because his interstate travel had occurred before

² The district court described petitioner’s move from Alabama to Indiana as occurring “in 2004 or 2005.” Pet. App. 15a. In his statement accepting responsibility for his offense conduct, petitioner was more specific about the timing: “I registered as a Sex Offender on July 6, 2004, in Alabama. I then traveled to Indiana between Christmas 2004 and New Year’s [D]ay 2005 and did not register as a Sex Offender.” Pre-sentence Investigation Report ¶ 24 (PSR).

SORNA's enactment. Mot. to Dismiss 1; Pet. App. 15a. The district court rejected petitioner's constitutional claim either because SORNA is a "civil, regulatory statute" that "does not implicate the ex post facto clause," or, in the alternative, because petitioner was "not being held accountable for pre-SORNA conduct," but rather for "remain[ing] unregistered in the state of Indiana after the passage of SORNA." *Id.* at 19a. The court thus denied his motion to dismiss the indictment. *Ibid.* Petitioner then entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss. *Id.* at 2a; Plea Agreement ¶ 7(g). The court sentenced him to 30 months of imprisonment, to be followed by three years of supervised release.³ Amended Judgment 2-3.

3. a. On appeal, petitioner presented a single issue: "Is the conviction of the Defendant in violation of the Ex Post Facto Clause of the Constitution?" Pet. C.A. Br. 5. After oral argument, the Seventh Circuit consolidated petitioner's appeal with that of another defendant-appellant, Marcus Dixon, whose underlying conduct was unrelated to petitioner's and whose district court proceedings were conducted before a different judge. See Pet. App. 15a; 08-1438 Docket entry No. 31 (7th Cir. Dec. 22, 2008); 08-2008 Docket entry No. 17 (7th Cir. Dec. 22, 2008). Like petitioner, Dixon argued that his conviction for violating SORNA violated the Ex Post Facto Clause. Pet. App. 2a, 8a-12a. But Dixon also argued that, as a matter of statutory construction, "he did not violate [SORNA] because he traveled in interstate

³ The 30-month term of imprisonment was at the bottom of the advisory Guidelines range, as computed in the PSR on the basis of a total offense level of 12 and a criminal history category of VI. See PSR ¶ 100.

commerce before [SORNA] was passed.” *Id.* at 4a; cf. *id.* at 12a (stating that “the only ground of [petitioner’s] appeal [was] that his conviction violated the ex post facto clause”).

b. The court of appeals rejected petitioner’s ex-post-facto claim and affirmed his conviction. Pet. App. 12a-13a. The court explained that the Ex Post Facto Clause is not violated “as long as at least one of the acts” that is “required for punishment” occurs after “the criminal statute punishing the acts takes effect.” *Id.* at 8a-9a. The court found that that standard was satisfied in petitioner’s case because petitioner had no obligation to register under SORNA until February 28, 2007—the date on which the Attorney General’s rule was issued and seven months after SORNA had taken effect.⁴ *Id.* at

⁴ The courts of appeals are divided on whether SORNA’s registration requirements apply by the statute’s own terms to persons with sex-offense convictions that preceded SORNA’s enactment or whether Congress intended for the Attorney General to decide that question. Compare *United States v. Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (former view), cert. denied, 129 S. Ct. 2383 (2009), and *United States v. May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (same), cert. denied, 129 S. Ct. 2431 (2009), with *United States v. Cain*, 583 F.3d 408, 414-419 (6th Cir. 2009), pet. for reh’g pending, No. 07-4535 (filed Dec. 7, 2009) (latter view), *United States v. Hatcher*, 560 F.3d 222, 226-229 (4th Cir. 2009) (same), Pet. App. 3a, 9a-10a (7th Cir.) (same), and *United States v. Madera*, 528 F.3d 852, 857-859 (11th Cir. 2008) (same). This Court has denied two petitions for writs of certiorari seeking review of the question whether SORNA’s registration requirements became applicable to such persons in July 2006 or February 2007, see *May v. United States*, 129 S. Ct. 2431 (2009) (No. 08-7997); *Hinckley v. United States*, 129 S. Ct. 2383 (2009) (No. 08-8696), and that question is not before the Court in this case. In any event, the question of when SORNA’s registration requirements first became applicable to sex offenders whose convictions predated the Act is immaterial here because the court of appeals applied the standard that is more favorable to petitioner.

12a. It also concluded that he was allowed “a reasonable time after” the Attorney General’s regulation to register, *id.* at 11a, but that petitioner “d[id] not and c[ould] not complain that he was not given enough time to register in Indiana in order to avoid violating [SORNA].” *Id.* at 12a. To the contrary, petitioner “admitt[ed] that he had still failed to [register] * * * almost five months after” his duty to register was made clear by the Attorney General’s rule. *Ibid.* The court of appeals thus rejected petitioner’s ex-post-facto claim because “his violation was not complete when [SORNA] became applicable to him.” *Id.* at 13a.

c. In contrast, the court of appeals reversed Dixon’s conviction for violating SORNA and remanded with instructions to enter a judgment of acquittal. Pet. App. 3a-12a, 13a.

The court of appeals first rejected Dixon’s argument that, as a matter of statutory construction, SORNA is inapplicable to a person whose interstate travel predated the statute’s enactment. Pet. App. 4a-6a. The court concluded that SORNA does not “require[] that the conviction of the sex offense that triggers the registration requirement postdate” the statute. *Id.* at 4a. The court also stated that “[t]he evil at which [SORNA] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected,” and it noted that this “concern is as acute in a case in which the offender moved before [SORNA] was passed as in one in which he moved afterward.” *Ibid.* (citing *House Report 23-24, 26*). The court of appeals drew an analogy between SORNA and the federal law that prohibits convicted felons from possessing firearms that have traveled in interstate commerce, and it noted that, under that law,

there is no requirement that the firearm have moved in interstate commerce after the law was enacted. *Ibid.* (citing *Scarborough v. United States*, 431 U.S. 563 (1977)).

The court of appeals noted that the Tenth Circuit had reached a different conclusion, holding that, as a matter of statutory construction, SORNA “punishes only convicted sex offenders who travel in interstate commerce after [SORNA] was passed.” Pet. App. 5a (citing *United States v. Husted*, 545 F.3d 1240 (2008)). Nevertheless, it expressly “disagree[d] with the Tenth Circuit’s interpretation” and concluded that Section 2250(a)(2)(B) “is designed to establish a constitutional predicate for [SORNA’s criminal provision] * * * rather than to create a temporal requirement.” *Id.* at 6a.

Having rejected Dixon’s claim about the timing of interstate travel, the court of appeals nevertheless determined that, consistent with the Ex Post Facto Clause and concerns for “fair notice,” the statute should be construed as allowing a reasonable time for compliance after it became applicable. Pet. App. 8a-12a. As it had determined with respect to petitioner, the court concluded that SORNA became applicable to Dixon on February 28, 2007, the date on which the Attorney General promulgated his rule. *Id.* at 9a-10a. The court noted that the indictment charged Dixon with failing to register “from on or about February 28, 2007 to on or about April 5, 2007.” *Id.* at 10a. The court viewed SORNA as “requir[ing] registration not on the day [SORNA] went into effect or a regulation by the Attorney General made [SORNA] applicable to a defendant, but within a reasonable time after that,” *id.* at 10a-11a, and it held that the period between February 28, 2007, and April 5, 2007, was too short to permit a criminal prosecution under

Section 2250 of Dixon for failure to register, *id.* at 10a-12a.

SUMMARY OF ARGUMENT

SORNA's criminal prohibition for failure to register as a sex offender was validly applied to petitioner in light of his pre-SORNA conviction for a sex offense, his pre-SORNA interstate travel, and his post-SORNA failure to register. That application of the statute does not violate the Ex Post Facto Clause.

I. A. The interstate-travel element of Section 2250(a), read in its statutory context, is not limited to travel that occurs after SORNA. The statute's elements need to be satisfied in sequence, culminating in a post-SORNA failure to register. Thus, as relevant here, someone must first have a conviction for a sex offense (which can precede SORNA), must then travel in interstate commerce, and then (after SORNA becomes applicable) must knowingly fail to register as it requires. Nothing in the statute imposes an additional requirement that the travel precede SORNA's enactment.

The statute's structure supports that conclusion. If Section 2250(a)(2)(B) could not apply to pre-SORNA travel, it would give rise to an anomalous difference in treatment between the two classes of sex offenders that SORNA covers. Persons who were sex offenders by virtue of federal convictions would be covered without any post-SORNA conduct except the failure to register, whereas persons who have state or foreign convictions but fall within Congress's Commerce Clause jurisdiction would be covered only if they traveled post-SORNA. Congress could not have wished to create such an unjustifiable disparity.

B. Applying Section 2250(a)(2)(B) to pre-SORNA travel also furthers the statutory purpose. As the legislative history indicates, the Congress that enacted SORNA believed that “[t]he most significant enforcement issue in the sex offender program” was “missing” sex offenders who had “not complied with sex offender registration requirements,” “typically” because they had “move[d] from one State to another.” H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 26 (2005) (*House Report*). Petitioner is a paradigmatic example of that problem, and the purpose of re-registering such missing sex offenders is better served by making Section 2250 immediately applicable to them in their new States of residence than by waiting for them to travel in interstate commerce and fail to register yet again.

C. No canons or presumptions of statutory construction require or justify limiting Section 2250(a)(2)(B) to post-SORNA travel. Although petitioner contends that the statute would violate the Ex Post Facto Clause if construed as applying to pre-SORNA travel, that constitutional claim fails on the merits, and does not raise a serious issue to be avoided, because the course of conduct proscribed by Section 2250(a) cannot be completed until after SORNA becomes applicable. Nor does the government’s reading raise any concerns under the Commerce Clause (as one of petitioner’s amici suggests). The extent of Congress’s powers under the Commerce Clause depends on the connection between Congress’s regulation and interstate commerce, not on the timing of an event relative to the statute’s enactment. Indeed, the government’s reading of the statute, by requiring interstate travel to come only after a sex-offense conviction, ensures a closer connection between the regulation and

Congress's Commerce Clause powers than would petitioner's post-SORNA-travel limitation.

The rule of lenity does not apply in this case because no "grievous ambiguity" exists once the Court has construed Section 2250 in light of its text, context, structure, and purpose. *Muscarello v. United States*, 524 U.S. 125, 138-139 (1998).

II. Reliance on pre-SORNA travel to establish the interstate-travel element of Section 2250(a) does not violate the Ex Post Facto Clause, because the remaining element—the knowing failure to register as required by SORNA—occurs only after SORNA has become applicable.

A. While SORNA's requirement to register as a sex offender is a regulatory, nonpunitive measure, there is no dispute that criminal punishment under Section 2250 implicates the Ex Post Facto Clause. Retroactive effects under the Ex Post Facto Clause, however, exist only when a statute imposes new punishments on "crimes that have already been committed," or acts that were completed, "consummated," or done before the statute became effective. See, e.g., *California Dep't of Corr. v. Morales*, 514 U.S. 499, 505 (1995) (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)). A prosecution for a course of conduct that straddles the effective date of a statute is permissible as long as at least one act constituting the offense took place after the statute took effect. Thus, this Court has held that a statute does not violate the Ex Post Facto Clause when it penalizes a party's post-enactment failure to take action to terminate a condition that resulted from pre-enactment conduct that was lawful when engaged in. See *Samuels v. McCurdy*, 267 U.S. 188 (1925); *Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67 (1915).

B. Petitioner’s relevant course of conduct was not in fact completed, consummated, or done before SORNA became applicable to him. Section 2250 does not punish a violation of the registration requirement provided by an earlier statute, but rather a new violation of the registration requirement imposed by SORNA. Although Congress cannot criminalize a previously lawful course of conduct so that a defendant is unable to avoid liability by altering his conduct, no such concerns exist in petitioner’s case. The court of appeals properly construed the statute “as allowing * * * a reasonable time” to come into compliance with its new requirements, *Tranbarger*, 238 U.S. at 74, and the statute’s affirmative defense for “uncontrollable conditions” that prevent compliance (18 U.S.C. 2250(b)(1)) allows for the requisite minimum grace period. In this case, petitioner had at least five months after SORNA became applicable to him to satisfy its registration requirements, which was an ample period of time—especially in the context of a statutory framework that typically allows a sex offender only three business days after a qualifying event occurs to register or update a registration.

ARGUMENT

I. THE ELEMENTS OF SECTION 2250(a) CAN BE SATISFIED BY A PRE-SORNA CONVICTION FOR A SEX OFFENSE, FOLLOWED BY PRE-SORNA TRAVEL IN INTERSTATE COMMERCE AND A POST-SORNA FAILURE TO REGISTER

Petitioner contends (Br. 16-35) that, as a matter of statutory construction, the criminal provision enforcing SORNA’s registration requirements, 18 U.S.C. 2250(a), does not apply to a person whose interstate travel preceded SORNA’s enactment. That argument is mistaken.

In light of the statutory language, context, and structure, Section 2250(a) requires its three elements to be satisfied in sequence: first, an individual must be convicted of an offense that requires registration; second, he must travel in interstate commerce; and third, he must fail to comply with registration obligations under SORNA. Nothing in the statute imposes an additional requirement that the interstate travel occur after SORNA's enactment. The government's reading is consistent with the text of the statute, is necessary to avoid creating an unjustified asymmetry between the two jurisdictional provisions located in Section 2250(a)(2), advances the statutory purpose of locating missing sex offenders, and minimizes petitioner's concerns about broader readings of the jurisdictional link to interstate commerce.

A. Section 2250(a)(2)(B)'s Context And Structure Clarify Its Applicability To Pre-SORNA Travel

1. Petitioner's textual argument rests almost entirely on the observation (Br. 17-23) that all three of the relevant elements of Section 2250(a) include verbs in the present tense: (1) "*is* required to register," (2) "*travels* in interstate * * * commerce," and (3) "*knowingly fails* to register." 18 U.S.C. 2250(a)(1), (2)(B) and (3) (emphases added). But those present-tense verbs are, in fact, not very revealing, because they must be evaluated in light of the context and structure of Section 2250 and the other provisions of SORNA with which it interacts. 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.”)⁵ Similarly, petitioner invokes (Br. 20) the Dictionary Act in support of the proposition that “words used in the present tense include the future as well as the present.” 1 U.S.C. 1. But that provision expressly authorizes exceptions when “the context indicates otherwise.” *Ibid.*; see also *Rowland v. California Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 200-201 (1993) (explaining that “syllogistic force” is not required for context to “indicate[] otherwise” for purposes of the Dictionary Act).

2. In context, the interstate-travel element of Section 2250(a) should not be limited to acts that occur after SORNA. Instead, Section 2250(a) requires only that the knowing failure to register as required by SORNA must occur after enactment.

⁵ Petitioner relies (Br. 17-18) upon cases in which this Court interpreted the present tense of a verb to refer to an act or status at a particular point in time. But none of the statutes at issue in those cases is sufficiently analogous to Section 2250(a) to support petitioner’s construction of “travels.” The cases he cites concluded that an act or status described in the present tense must be judged as of the same time as another act mentioned in the statute, but petitioner does not suggest that, under Section 2250(a), travel must be co-incident with some other element mentioned in the statute. See *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) (reference in a removal statute to an entity that “is owned by a foreign state” is to be judged as of the time suit was filed); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers’ Comp. Programs*, 519 U.S. 248 (1997) (reference to a “person entitled to compensation * * * [who] enters into a settlement with a third person” requires the entitlement to compensation to exist at the time of settlement); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987) (authorization of a citizen suit against any person “alleged to be in violation of” conditions of a federal or state pollution discharge permit requires that the violation be ongoing at the time of suit).

As the Fourth Circuit has explained:

[The statute] requires * * * a specific sequence. To satisfy the commerce component of § 2250(a), a sex offender must have been convicted of a qualifying sex offense and, after conviction, traveled to another State and failed to register or maintain his registration. There must be a conviction that gives rise to the registration requirement, subsequent interstate travel, and a failure to register.

United States v. Gould, 568 F.3d 459, 471 (2009), petition for cert. pending, No. 09-6742 (filed Sept. 25, 2009). That sequence not only honors the structure of Section 2250(a), by treating Paragraphs (1), (2), and (3) as being triggered in the same order they are listed. It also comports with the substance of, and the logical relationship among, those three elements and SORNA’s registration provisions.⁶

The first element refers to a person who “is required to register under [SORNA].” 18 U.S.C. 2250(a)(1). In order to be “required to register under” SORNA, a person must be a “sex offender,” 42 U.S.C. 16913(a)-(c), which is in turn defined as “an individual who *was* convicted of a sex offense.” 42 U.S.C. 16911(1) (emphasis added). Thus, the first element—that a person “is required to register under [SORNA]”—is a shorthand way

⁶ Petitioner agrees (Br. 24) that an offense under Section 2250(a) comprises three elements. His law professor amici, however, contend (at 23 & n.7) that Section 2250(a) contains two elements rather than three, because they say Paragraph (1) “is best read as the corresponding duty for” the failure to register under Paragraph (3). That contention is based on their conclusion (*ibid.*) that “the only possible location for the duty [to register] * * * is [Paragraph (1)].” But the statutory text contains a more logical location for the duty to register under SORNA—in 42 U.S.C. 16913.

of identifying those persons who have a conviction in the classes identified by SORNA (and remain within the applicable registration period under 42 U.S.C. 16915). Petitioner does not dispute that SORNA's registration requirement applies to a person who was convicted of such an offense before SORNA. See Pet. Br. 24.⁷

The second element, as relevant here, refers to a person who “travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.” 18 U.S.C. 2250(a)(2)(B). Thus, in combination, the first two elements apply to any person who “was convicted of a sex offense” and “travels” in interstate commerce. That defines the category of persons who are then in a position to satisfy the third element, which begins with the mens rea. That element is satisfied when a person “knowingly fails to register or update a registration as required by [SORNA].” 18 U.S.C. 2250(a)(3). Unlike the first element, which can be triggered by a pre-SORNA event (a conviction for a sex offense), the third element plainly requires conduct that occurs after SORNA applies: a failure to comply with its registration requirements.

⁷ Upon its effective date, SORNA itself imposed registration obligations on persons who had previously been convicted of sex offenses. See 42 U.S.C. 16911(1), 16913(a) and (d). The statute's general applicability to pre-SORNA convictions is acknowledged by 42 U.S.C. 16913(d), which delegates to the Attorney General “the authority to *specify* the applicability of the requirements of this subchapter to sex offenders convicted before [the date of SORNA's enactment].” *Ibid.* (emphasis added); see, e.g., *United States v. Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008), cert. denied, 129 S. Ct. 2383 (2009). As explained above (pp. 6-7, *supra*), on February 28, 2007, the Attorney General promulgated a regulation confirming that SORNA applied to those who were sex offenders by virtue of criminal convictions that preceded SORNA's enactment. 28 C.F.R. 72.3.

Thus, in context, the definition of the offense contemplates a sequence: the offender is convicted of a sex offense, then he travels in interstate commerce, and then he fails to register or update a registration as required by SORNA. He does not commit the offense if his interstate travel precedes his conviction for a sex offense; nor does he commit the offense if his interstate travel occurs only *after* his knowing failure to register. But nothing in the statute demands that the travel come after SORNA’s applicability.⁸

3. The government’s sequential reading of Section 2250(a) is reinforced by the statute’s structure. The reading not only conforms to the ordering of the elements within Section 2250, but also ensures that the jurisdictional reach of Section 2250(a)(2) has a comparable breadth as applied to both federal and state sex offenders.

Section 2250(a)(2) reaches two categories of sex offenders: those whose underlying sex offenses were criminalized by virtue of federal or tribal authority (*i.e.*, those with “a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States,” 18 U.S.C. 2250(a)(2)(A)), and all other sex offenders whose actions directly implicated Congress’s Commerce Clause au-

⁸ In addition, Congress has shown, in the context of a registration statute, that it knows how to invoke its jurisdiction to regulate movement in interstate commerce so as not to reach pre-enactment events. See, *e.g.*, 15 U.S.C. 1173(a)(3) (requiring manufacturers and dealers in gambling devices to register with the Attorney General before buying or receiving a gambling device “knowing that it has been transported in interstate or foreign commerce *after the effective date of the Gambling Devices Act of 1962*”) (emphasis added).

thority as a result of “travel[ing] in interstate or foreign commerce, or enter[ing] or leav[ing], or resid[ing] in, Indian country,” 18 U.S.C. 2250(a)(2)(B). Thus, Section 2250(a) relies on two alternate sources of power to achieve Congress’s aim of broadly registering sex offenders. Cf. 42 U.S.C. 16901 (stating that the purpose of SORNA was to “establish[] a comprehensive national system for the registration of [sex] offenders”). There is every reason to conclude that Congress intended an equally broad sweep to those jurisdictional provisions. But petitioner’s interpretation would fail to produce that result. Under that interpretation, the statute would cover *all* sex offenders previously convicted under federal-government (or tribal) law, but not sex offenders previously convicted under state or foreign law unless they traveled in interstate or foreign commerce after SORNA’s enactment. The statute should be construed to avoid that anomaly.

B. Applying Section 2250(a)(2)(B) To Pre-SORNA Travel Better Effectuates The Statutory Purpose

The government’s reading of Section 2250 not only follows from the statute’s context and structure but also furthers a key purpose of SORNA: to locate sex offenders who had evaded their registration obligations by traveling from State to State.

1. As discussed above (see pp. 2-4, *supra*), Congress enacted multiple laws in the dozen years before SORNA that were intended to provide for sex-offender registration and community notification. Despite those many laws, by 2006, an estimated 100,000 out of 500,000 sex offenders in the United States remained “unregistered and their locations unknown to the public and law enforcement.” 152 Cong. Rec. H5722 (daily ed. July 25,

2006) (statement of Rep. Sensenbrenner). The House Judiciary Committee stressed the problem of “missing” sex offenders and expressly connected that problem with interstate travel:

The most significant enforcement issue in the sex offender program is that over 100,000 sex offenders, or nearly one-fifth in the Nation, are “missing,” meaning that they have not complied with sex offender registration requirements. *This typically occurs when the sex offender moves from one State to another.* When a sex offender fails to register in a State in which he or she resides, there is no effective system by which the States can notify each other about the change in a sex offender[']s status. H.R. 3132 will address this problem in several ways.

House Report 26 (emphasis added).

2. Petitioner does not dispute SORNA’s purpose. See Br. 29 (“in crafting the new sex offender registration system, Congress was particularly concerned that sex offenders were able to evade then-existing registration requirements by moving between jurisdictions”). Nevertheless, he claims (Br. 30) that “[e]ffectuating this purpose dictated an emphasis on *post*-SORNA travel.” But exactly the opposite is true. Petitioner—with his pre-SORNA travel—is a paradigmatic example of the problem of “missing” sex offenders who had registered in one State and failed to keep their registration current after moving to another State. The purpose of re-registering such missing sex offenders is surely better served by making Section 2250 applicable to them in their new States of residence immediately than by waiting for

them to travel in interstate commerce and fail to register yet again.⁹

3. Petitioner suggests that Congress had “no need” to provide new federal criminal liability for the population of missing sex offenders because they would “be subject to state prosecution pursuant to the new statutes, carrying enhanced penalties, that SORNA directs the States to enact.” Br. 31; see 42 U.S.C. 16913(e). But that suggestion founders for multiple reasons. SORNA gives States a period of years to enact such new statutes, see 42 U.S.C. 16924, and that delay would occur during the very period (soon after SORNA’s enactment) in which the ability to reach pre-SORNA travel would have the greatest impact. In addition, some States might choose to forgo federal funding rather than comply with Congress’s request to create an enhanced penalty for failure to satisfy registration requirements. See 42 U.S.C. 16925. Moreover, if Congress had believed that *state* criminal penalties would be sufficient to en-

⁹ When the Judiciary Committee wrote its report, the relevant section of the bill it was considering would not have reached pre-enactment interstate travel; instead, its criminal penalty for failure to register would have applied to a person who “receives a notice from an official that such person is required to register under [SORNA] and— * * * (2) thereafter travels in interstate * * * commerce * * * ; and knowingly fails to register as required.” *House Report* 9. It would also have imposed higher minimum and maximum sentences. *Ibid.* (a term of imprisonment “not less than 5 years nor more than 20 years”). Although the legislative history does not explain the reasons for the later revisions to Section 2250, the enacted text omitted the language that would have required a sex offender to receive post-SORNA notification of his registration requirement and “thereafter” travel in interstate commerce. It is reasonable to infer that Congress concluded it could more effectively reach missing sex offenders by making the statute applicable to pre-SORNA travel.

sure adequate enforcement of SORNA’s registration requirements, it would have relied upon those penalties for sex offenders who failed to register after their *post*-SORNA interstate travel. Congress’s enactment of Section 2250(a)(2)(B) demonstrates that it believed that federal criminal punishment would play an important role in supplementing state enforcement, and that conclusion does not vary with the time of travel.

Petitioner further claims (Br. 32) that “[a]n unregistered sex offender who has previously traveled in interstate commerce is no different from an unregistered sex offender who has not.” But that is simply not true. The missing sex offender who previously traveled in interstate commerce has already engaged in the very conduct that motivated congressional action. See *House Report 26* (noting that the “typical[]” case of a missing sex offender “occurs when the sex offender moves from one State to another”). By contrast, the unregistered sex offender who never traveled had not evaded detection by using the channels of interstate commerce.¹⁰

¹⁰ Petitioner attempts (Br. 33-34) to rebut the court of appeals’ reliance on *Scarborough v. United States*, 431 U.S. 563 (1977), by claiming that—unlike the predecessor to 18 U.S.C. 922(g) involved in that case, which generally precluded convicted felons and others from possessing firearms “in commerce or affecting commerce”—Section 2250(a)(2)(B) reflects a decision by Congress to cabin the use of its Commerce Clause powers. See 18 U.S.C. 2250(a)(2)(B) (relying on interstate travel rather than actions “in or affecting commerce”). But the interstate-travel element in Section 2250 does not show that Congress was willing to go only halfway. To the contrary, in the context of sex-offender registration, Congress’s power to regulate the movement of persons in interstate commerce is more tractable than its power to regulate actions “affecting commerce,” and interstate travel is more obviously tied to the underlying concern about missing sex offenders. Moreover, Congress was surely aware that the inclusion of a case-

C. No Canon Of Statutory Construction Or Other Presumption Requires Petitioner’s Reading Of Section 2250

1. No constitutional doubts would be avoided by adopting petitioner’s reading

Petitioner argues (Br. 44-48) that the canon of constitutional avoidance favors his statutory interpretation. That canon applies only when a reading of a statute raises “serious constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 380-382 (2005). In this case, however, applying Section 2250(a)(2)(B) to pre-SORNA travel does not raise any such doubts.

a. Petitioner contends (Br. 44-48) that Section 2250 would violate the Ex Post Facto Clause if “travels” were construed as including an act that occurred before SORNA’s applicability. Yet, as discussed below on the merits (see pp. 30-41, *infra*), petitioner’s ex-post-facto argument raises no serious constitutional question and thus provides no basis for adopting his reading of the statute.

b. The amicus brief of the National Association of Criminal Defense Lawyers (NACDL) (at 14-18) contends that application of Section 2250 to interstate travel that preceded SORNA would “raise[] serious concerns that the Act exceeds Congress’s authority under the Commerce Clause.” Petitioner himself does not invoke that constitutional concern, and it is easy to see why not: the timing of interstate travel relative to the date of the statute has nothing to do with the extent of Congress’s Commerce Clause powers. Any Commerce

specific jurisdictional element of interstate travel would most readily answer Commerce Clause objections. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 (1995); *Gonzales v. Raich*, 545 U.S. 1, 33-34 (2005) (Scalia, J., concurring in the judgment).

Clause challenge to SORNA would presumably be based on a claim that the sex offender's failure to register and his interstate travel were insufficiently connected—not that one of these elements occurred before, and the other occurred after, the statute's enactment. Requiring both the interstate travel and the failure to register to occur after SORNA's enactment would not change the logical connection between the two elements. Nor would it necessarily alter, in the way the amicus brief suggests, the chronological connection, given that the length of the gap between the interstate travel and the failure to register is unrelated to whether the travel occurred before or after SORNA. Thus, adopting petitioner's reading of Section 2250(a)(2)(B) could not avoid any constitutional concern based on imposing criminal liability for a sex offender's failure to register "years or decades" after he traveled in interstate commerce. NACDL Amicus Br. 17.

Indeed, the government's reading of Section 2250 creates a closer nexus than petitioner's does between interstate travel and a failure to register. By temporally sequencing the sex-offense conviction, the interstate travel, and the failure to register, the government's reading avoids the concern (Pet. Br. 35) that the statute could be applied to a defendant who "crossed a state line on the way home from the hospital as an infant and * * * committed a sex offense forty years later." Because petitioner's own reading would appear to permit that result so long as the infant crossed state lines after SORNA's enactment, any concerns about "absurd result[s]" (*ibid.*) on that score counsel in favor of the government's construction.

2. No presumption against retroactivity applies

Petitioner invokes (Br. 26-28) the general presumption against retroactivity in an attempt to influence the interpretation of the interstate-travel element of Section 2250(a). But no such presumption would give petitioner further aid in that regard than the Ex Post Facto Clause itself, which “flatly prohibits retroactive application of penal legislation.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Although this Court has noted that “deciding when a statute operates ‘retroactively’ is not always a simple or mechanical task,” *id.* at 268, it has never suggested that the definition of retroactive effect is broader in the context of construing statutes than of applying the Ex Post Facto Clause. Moreover, this Court has explained that “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law.” *Id.* at 269 (citation omitted); see also *id.* at 270 n.24 (“[A] statute is not made retroactive merely because it draws upon antecedent facts for its operation.”) (internal quotation marks omitted).

As explained below (see pp. 30-41, *infra*), under this Court’s Ex Post Facto Clause cases, construing Section 2250(a)(2)(B) as applying to pre-SORNA travel would not render it “retroactive,” leaving petitioner nothing to gain from a presumption against retroactivity.¹¹

¹¹ Petitioner suggests (Br. 28) that a “clear statement” of congressional intent is needed for a criminal statute to apply retroactively. It is difficult to see how such a clear-statement rule could provide any benefit to a criminal defendant beyond that given by the Ex Post Facto Clause (which forbids retroactive penal laws) and the rule of lenity (which would require a grievous ambiguity to be resolved in a criminal defendant’s favor).

3. *The rule of lenity does not apply*

Petitioner’s rule of lenity argument (Br. 24-26) also fails. As he correctly notes, the rule applies only when, “‘after seizing everything from which aid can be derived,’ the Court can make ‘no more than a guess as to what Congress intended.’” Br. 25 (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997)). Such a situation exists only when there is a “grievous ambiguity,” *Muscarello v. United States*, 524 U.S. 125, 138-139 (1998), such that “the equipoise of competing reasons cannot otherwise be resolved,” *Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000).

Here, once the Court has seized aid from the context, structure, and purpose discussed above, there is no such grievous ambiguity or equipoise. See, e.g., *United States v. Hayes*, 129 S. Ct. 1079, 1089 (2009) (rejecting application of the rule of lenity after considering “text, context, purpose, and * * * drafting history”); *Caron v. United States*, 524 U.S. 308, 316 (1998) (rejecting application of the rule of lenity where the defendant’s reading “is an implausible reading of the congressional purpose”); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (rule of lenity applies only after Court has reviewed “the language and structure, legislative history, and motivating policies of the statute”) (internal quotation marks omitted).

The rule of lenity has been invoked when the underlying conduct, absent the defendant’s construction, is thought to be innocent or innocuous, thus triggering fair warning concerns. See, e.g., *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-704 (2005) (discussing the situation in which “the act underlying the conviction * * * is by itself innocuous” and “not inherently malign”); see also *Hayes*, 129 S. Ct. at 1093 (Roberts, C.J.,

dissenting). But no such situation is present here. To the contrary, the wrongfulness of the conduct punished by Section 2250(a)(3)—a sex offender’s knowing post-SORNA failure to register as required by SORNA—is incontestable. The timing of interstate movement has no bearing on the culpability of that conduct. Indeed, in the case of persons with prior sex-offense convictions under federal, District of Columbia, tribal, or territorial law, such a failure to register is the sole *actus reus* under Section 2250.

Accordingly, the rule of lenity does not counsel in favor of petitioner’s reading.

II. RELIANCE ON PRE-SORNA TRAVEL TO SATISFY THE INTERSTATE-TRAVEL ELEMENT OF SECTION 2250(a) DOES NOT VIOLATE THE EX POST FACTO CLAUSE BECAUSE THE KNOWING FAILURE TO REGISTER OCCURS ONLY AFTER SORNA BECOMES APPLICABLE

Petitioner argues (Br. 35-48) that, if Section 2250 is construed as applying to an individual whose interstate travel preceded SORNA, then the provision violates the United States Constitution’s prohibition on Congress’s “pass[ing]” any “ex post facto Law.” Art. I, § 9, Cl. 3. Petitioner’s claim must fail because the course of conduct that Section 2250(a) criminalizes—the knowing failure to register or update a registration as required under SORNA by a person who was convicted of a sex offense and travels in interstate commerce—could not be completed until after SORNA had been enacted. Accordingly, the provision does not impermissibly penalize pre-SORNA conduct.

**A. A Law Is Retrospective Under The Ex Post Facto Clause
Only If It Applies To Conduct That Was Completed Be-
fore The Law’s Enactment**

This Court has long held that the Ex Post Facto Clause applies only to “a criminal or penal law,” *Weaver v. Graham*, 450 U.S. 24, 29 (1981), and not to nonpunitive, regulatory provisions. See, e.g., *Bankers Trust Co. v. Blodgett*, 260 U.S. 647, 652 (1923). SORNA’s underlying requirement to register in 42 U.S.C. 16913 is a nonpunitive, regulatory provision, see generally *Smith v. Doe*, *supra*, but there is no dispute that the criminal offense defined by Section 2250 implicates the Ex Post Facto Clause.¹²

“The heart of the Ex Post Facto Clause * * * bars application of a law ‘that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed[.]’” *Johnson*, 529 U.S. at 699 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.)) (emphasis omitted). Thus,

¹² The court of appeals did not, as petitioner’s law professor amici suggest (at 29), decide that the criminal prohibition in Section 2250 “was not intended to be punitive.” Instead, the court correctly explained that “the registration requirement itself * * * is regulatory rather than punitive.” Pet. App. 8a. The court’s distinction between the registration requirement and the criminal enforcement provision follows directly from this Court’s decision in *Smith*—which held that Alaska’s sex-offender-registration law was not punitive, even though the registration “scheme [was] enforced by criminal penalties,” because “[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive” for purposes of ex-post-facto analysis. 538 U.S. at 96; see also *id.* at 101-102 (recognizing that “[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the * * * original offense” that made the registration requirements applicable to him).

in order to prevail on an ex-post-facto claim, a defendant “must show both [1] that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and [2] that it raises the penalty from whatever the law provided when he acted.” *Ibid.*¹³ In this case, although Section 2250 defined a new criminal offense—which carried a greater potential punishment than the preexisting federal offense for a sex offender’s failure to register under the Wetterling Act, see 42 U.S.C. 14072(i)—petitioner is still obliged to establish that Section 2250 “operates retroactively” in the sense that it applies to conduct that was “*completed* before its enactment.” *Johnson*, 529 U.S. at 699 (emphasis added).

It is not sufficient for a defendant to show that some portion of his conduct occurred before enactment of a new criminal punishment. When characterizing the retroactivity inquiry under the Ex Post Facto Clause, this Court has repeatedly spoken of the imposition of new punishments on “crimes that have already been committed,” or acts that were “completed,” or “consummated,” or “done” before the statute became effective. See, e.g., *California Dep’t of Corr. v. Morales*, 514 U.S. 499, 505 (1995) (“a legislature may not stiffen the ‘standard of punishment’ applicable to crimes that have already been

¹³ Petitioner quotes this Court’s similar statement in *Weaver* that an ex-post-facto claim requires proof that a criminal or penal law is “retrospective” and that it “disadvantage[s] the offender affected by it.” Br. 35-36 (quoting *Weaver*, 450 U.S. at 29). Although the Court has since distanced itself from an “ambiguous” query into the existence of a “disadvantage,” *California Dep’t of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995), that portion of the two-prong test is not relevant to this case, because petitioner cannot establish that Section 2250 operates retroactively.

committed”) (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *ibid.* (“[T]he Constitution ‘forbids the application of any new punitive measure to a crime already consummated.’”) (quoting *Lindsey*, 301 U.S. at 401); *Collins v. Youngblood*, 497 U.S. 37, 49 (1990) (“A law that abolishes an affirmative defense of justification or excuse contravenes [the Ex Post Facto Clause applicable to States] because it expands the scope of a criminal prohibition after the act is done.”); *Miller v. Florida*, 482 U.S. 423, 430 (1987) (“A law is retrospective if it ‘changes the legal consequences of acts completed before its effective date.’”) (quoting *Weaver*, 450 U.S. at 31).

Thus, a prosecution for a course of conduct that straddles the effective date of a statute does not violate the Ex Post Facto Clause “as long as at least one of the acts [constituting the offense] took place” after the statute took effect.¹⁴ Pet. App. 9a. As the cases cited by the

¹⁴ Petitioner does not agree with the contention of his law professor amici (at 11-14) that the Ex Post Facto Clause is violated unless every single element of a crime is proved at least in part by post-enactment conduct. See Pet. Br. 45 n.17 (characterizing a recidivism statute as constitutional “because *one element* of the offense was commission of a crime after the statute’s enactment”) (emphasis added). Indeed, the law professors concede that an element of an offense can be based on pre-enactment conduct when that element is a conviction that triggers a further duty. Amici Br. 13 n.4 (discussing a conviction under 18 U.S.C. 922(g)(9) for possession of a firearm by a person convicted of a misdemeanor crime of domestic violence). They offer no coherent explanation for why other forms of pre-enactment conduct cannot be made elements, so long as at least one essential conduct element takes place post-enactment. Here, a pre-SORNA conviction can furnish a duty to register, and pre-SORNA travel in interstate commerce makes that duty enforceable in a criminal prosecution under SORNA based on post-SORNA conduct (*i.e.*, a knowing failure to register or update a registration). There is no reason for deeming that to be an ex-post-

court of appeals show, that rationale has correctly justified, for example, the prosecution of those who “conducted an enterprise through a pattern of racketeering activity having its inception” before 18 U.S.C. 1962(c) took effect, as long as the government “established that an act of racketeering occurred *after* the section’s effective date.” *United States v. Brown*, 555 F.2d 407, 416-417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); accord *United States v. Campanale*, 518 F.2d 352, 364-365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).¹⁵

facto violation when a Section 922(g)(9) prosecution that relies on a pre-enactment conviction is not. See *United States v. Mitchell*, 209 F.3d 319, 321-323 (4th Cir.) (upholding such a conviction under Section 922(g)(9)), cert. denied, 531 U.S. 849 (2000); Law Profs. Amici Br. 13 n.4 (citing *Mitchell* with approval).

¹⁵ Petitioner’s amici suggest (Law Profs. Amici Br. 13-14; NACDL Amicus Br. 9-11) that this Court should decide whether a violation of Section 2250(a) is a “continuing offense,” in the sense that, once a sex offender has failed to register, he continues to violate the statute until he has come into compliance with its registration requirements. Whether Section 2250 does establish a continuing offense is irrelevant to the constitutional question. If it does, its consistency with the Ex Post Facto Clause would follow from cases like *Brown, supra*, and *Campanale, supra*. In arguing that Section 2250 does not create a continuing offense, amici rely principally on this Court’s decision in *Toussie v. United States*, 397 U.S. 112 (1970), which observed that “[t]here is * * * nothing inherent in the act of registration itself which makes failure to do so a continuing crime.” *Id.* at 122. But much of *Toussie*’s reasoning was specific to the kind of registration requirement at issue there—a requirement to register for a military draft. See *id.* at 116, 122 (recognizing that the draft statute “might be construed [as a continuing offense] as the Government urges,” but concluding otherwise, “in light of the history of the draft laws,” which showed that “draft registrations clearly were viewed as instantaneous events”). Here, in contrast, no history indicates that a failure to register as a sex offender is an “instantaneous event[.]” Instead, Congress’s purpose of combating the problem of unregistered sex offenders in the community, who evade

Outside the conspiracy context, this Court has similarly rejected arguments that the Ex Post Facto Clause prevents a party’s lawful pre-enactment conduct from being deemed to create a condition that a party must, upon the effectiveness of the new law, take affirmative action to terminate. For example, in *Chicago & Alton Railroad v. Tranbarger*, 238 U.S. 67 (1915), the Court sustained the constitutionality of a 1907 Missouri statute that required a railroad owner or operator “constructing any railroad in th[e] State, within three months after the completion of the same * * * , to cause to be constructed and maintained suitable openings across and through the right of way and roadbed of such railroad.” *Id.* at 71 (quoting 1907 Mo. Laws 170). The petitioner completed construction of its roadbed on “a solid embankment [*i.e.*, one without openings] at least as early as the year 1895” and claimed that the 1907 statute could not penalize it for failing to include such “openings” within three months of its 1895 construction. *Id.* at 73. The Court held that there was no ex-post-facto violation, explaining that the monetary penalty imposed by the statute was “not because of the manner in which [the petitioner] originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act of 1907, but because after that time it maintained the embankment in a manner prohibited by that act.” *Ibid.* See also *Samuels v. McCurdy*, 267 U.S. 188 (1925) (rejecting ex-post-facto challenge to Georgia statute that prohibited the post-enactment possession of

detection after interstate movement, suggests that such offenders remain a threat, and a target of the statute, so long as they remain unregistered. Of course, even if Section 2250 does not establish a continuing offense, it presents no ex-post-facto problem because, as discussed below, it requires post-SORNA conduct.

intoxicating liquor, even when the liquor in question had been lawfully acquired before the statute’s enactment).¹⁶

For the same reasons, the charge against petitioner—that he knowingly failed to register after SORNA became applicable to him—poses no retroactivity problem under the Ex Post Facto Clause.

B. Petitioner’s Failure To Register Was Not Completed Until After Section 2250 Applied To Him

Petitioner contends that Section 2250 criminalizes his pre-SORNA conduct, but the relevant course of conduct in this case was not in fact completed, consummated, or done before SORNA became applicable to petitioner. Although that course of conduct included interstate travel that preceded SORNA, it also included a “knowing[] fail[ure] to register or update a registration as required by [SORNA],” 18 U.S.C. 2250(a)(3), which did not occur until well after SORNA applied to him.

1. In his attempt to avoid the conclusion that he is being punished for a post-SORNA act, petitioner suggests first (Br. 37-40) that, if he could comply with SORNA’s registration requirement by doing the same things that would satisfy the earlier Wetterling Act, then all of the conduct relevant to an offense under Sec-

¹⁶ The law professor amici propose (at 11, 21) a line between an act and an “omission.” The Court declined the invitation to draw such a line in *Samuels*. The petitioner there attempted to distinguish *Tranbarger* by saying that Missouri’s law requiring railroads to construct outlets had “penalized the refusal” to do “an affirmative act,” while Georgia’s law providing for the confiscation of liquor that had been lawfully acquired long ago would “penalize[] mere passivity” by punishing “a condition, to-wit, a physical possession that was lawful when acquired.” *Samuels*, 267 U.S. at 189. This Court rejected the attempted distinction, declaring the question in *Samuels* to be “quite the same question as that presented in” *Tranbarger*. *Id.* at 193.

tion 2250 must have occurred before SORNA.¹⁷ See also NACDL Amicus Br. 8. That is incorrect.

Section 2250(a) does not punish a violation of the registration requirement provided by the Wetterling Act, but rather a violation of the new registration requirement imposed by SORNA. That is clear under the terms of the statute—which apply to the “knowing[] fail[ure] to register or update a registration as required by [SORNA].” 18 U.S.C. 2250(a)(3). There is thus no basis for saying that petitioner was convicted for a course of conduct that was completed or consummated before SORNA became applicable to him.

As petitioner notes (Br. 37-38), most States have not yet created registries that conform to SORNA’s heightened requirements, and it is true that defendants are not liable under Section 2250 for failing to comply with those heightened requirements “during the interval when States are not [yet] compliant with SORNA.” Pet. Br. 36. But that does not undercut the reality that Section 2250 punishes post-enactment violations of a distinct law. Although SORNA enhanced the registration requirements that previously applied to sex offenders, it also generally gave States and other implementing jurisdictions three years to implement the new system, and it authorized the Attorney General to provide up to two one-year extensions of that deadline. 42 U.S.C. 16924(a) and (b). To the extent that SORNA requires a sex offender to register in a way that the Wetterling Act did not, but the relevant State has not yet come into compliance with SORNA’s enhanced registration re-

¹⁷ The provision imposing federal criminal liability for a violation of the Wetterling Act, 42 U.S.C. 14072(i), was repealed by a provision of SORNA that took effect on July 27, 2009. See SORNA §§ 124, 129, 120 Stat. 598, 600.

quirements, a sex offender could invoke the affirmative defense in Section 2250(b). That defense applies when an individual was “prevented * * * from complying” with SORNA by “uncontrollable circumstances” that were not attributable to the individual’s “reckless disregard of the requirement to comply,” as long as “the individual complied [with SORNA] as soon as such circumstances ceased to exist.” 18 U.S.C. 2250(b)(1), (2) and (3). But when a defendant fails to avail himself of an existing state registration system, he has violated SORNA’s requirements, as applicable to him. And that conduct is not simply a Wetterling Act violation.

2. Petitioner contends in the alternative (Br. 40-44) that if an offense under SORNA is not in fact complete until after a sex offender “knowingly fails to register” as required by SORNA, it would still violate the Ex Post Facto Clause (or Due Process Clause). In particular, petitioner argues (Br. 42) that, if the first two elements of the statute can be triggered by his pre-SORNA conviction and his pre-SORNA interstate travel, that would have the effect of making him “*immediately* guilty of failing to register under SORNA at the moment the Attorney General’s retroactivity regulation took effect.”

The government recognizes, as the court of appeals held, that the Ex Post Facto Clause prevents Congress from criminalizing a previously lawful course of conduct in such a way that a defendant is literally unable to avoid liability by altering his conduct. See Pet. App. 8a (the Ex Post Facto Clause “guarantee[s] that as long as [people] avoid an act in the future they can avoid punishment for something they did in the past, which cannot be altered”). There are, however, no concerns about the impossibility of compliance in petitioner’s case. To the contrary, the court of appeals expressly (and appropri-

ately) concluded that petitioner had been afforded ample time to comply with SORNA by the time of his alleged violation in July 2007. *Id.* at 12a.

Petitioner criticizes (Br. 45-48) the court of appeals for construing the statute as giving sex offenders a “reasonable time” or “minimum grace period * * * greater than zero” (Pet. App. 10a, 12a) to come into compliance with SORNA’s new registration requirement. Petitioner portrays (Br. 46, 47) that as an unprincipled “exercise in judicial lawmaking” that “has no basis in the statutory text” and will force lower courts to “confront a series of questions with no clear answers.”

Although the court of appeals drew an analogy from contract law, Pet. App. 10a, its result was identical to this Court’s reasoning in *Tranbarger*, which construed Missouri’s statute “as allowing” railroads “some time—either three months, or *a reasonable time* more or less than that period”—to comply with the new requirement to construct outlets through their roadbeds. 238 U.S. at 74 (emphasis added); see also *United States v. Trupin*, 117 F.3d 678, 686 (2d Cir. 1997) (holding that a defendant prosecuted for possession of a stolen painting he acquired in 1980 “could have avoided conviction for possession by ceasing his possession within a reasonable time after the 1986 amendment” that made it a federal crime to “possess” stolen goods that have crossed state lines), cert. denied, 522 U.S. 1051 (1998); 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.4(b) at 142 n.53 (1st ed. 1987) (“Of course, statutes sometimes allow a grace period if considerable effort will be needed to change [a] condition [that existed before enactment], and if the statute does not expressly provide for a grace period the courts may take the view that a reasonable time to comply must be allowed.”).

It is thus a background principle of law that a defendant needs a reasonable time to comply with a statutory regime that would otherwise instantly penalize a status following entirely from then-lawful pre-enactment conduct. In Section 2250, that principle is reasonably captured in the affirmative defense for “uncontrollable circumstances” provided by Section 2250(b), which obviates any constitutional concerns that would arise from a bona fide inability to comply with the statute immediately upon its applicability.

Finally, although petitioner criticizes the court of appeals for inviting “a series of questions with no clear answers” about how to evaluate a “reasonable time,” Br. 47, petitioner’s own construction of the word “travels” in Section 2250(a)(2)(B) could not avoid that same series of grace-period questions in cases involving federal sex offenders who are prosecuted under Section 2250(a)(2)(A).

3. Assuming Section 2250(a) is construed as allowing a “reasonable time” to comply with SORNA’s new registration requirements, petitioner had sufficient time to comply.

SORNA was enacted on July 27, 2006, and the Attorney General’s regulation confirming applicability of SORNA’s registration requirements to persons who were convicted of sex offenses before that date was published in the *Federal Register* on February 28, 2007. See 72 Fed. Reg. at 8897. Even if SORNA became applicable to petitioner on the latter date—as the court of appeals held, Pet. App. 12a—petitioner still had abundant opportunity to comply with SORNA’s registration requirement. Petitioner moved from Alabama to Indi-

ana near the end of 2004.¹⁸ He was not charged until August 22, 2007, with having failed to register in Indiana. *Id.* at 14a-15a. For several months after SORNA became applicable to him, therefore, he had failed to register.

That was a more-than-reasonable grace period—especially in the context of a statutory framework that typically allows a sex offender only “3 business days” to register “after each change of name, residence, employment, or student status.” 42 U.S.C. 16913(c). The court of appeals thus correctly held that petitioner had more than ample time to come into compliance with SORNA’s registration requirements, and therefore that no constitutional concern arose from the date the statute applied to petitioner.

¹⁸ See note 2, *supra*. As described in the PSR (¶ 17), the sex offender registration form that petitioner signed while he was still in Alabama “advised [him] that if he intended to establish a new residence, he needed to inform the local sheriff’s office thirty (30) days prior to the move and also to inform law enforcement in the new location within ten (10) days.” Cf. Pet. App. 8a (noting that the same was true for the other appellant in the court of appeals, who signed forms in South Carolina notifying him that upon moving elsewhere, he would have to “register with the appropriate official in the new state”).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN

Solicitor General

LANNY A. BREUER

Assistant Attorney General

MICHAEL R. DREEBEN

Deputy Solicitor General

CURTIS E. GANNON

*Assistant to the Solicitor
General*

RICHARD A. FRIEDMAN

Attorney

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APPENDIX

1. 18 U.S.C. 2250 provides in relevant part:

Failure to register

(a) IN GENERAL.—Whoever—

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

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

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

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

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

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

(1) uncontrollable circumstances prevented the individual from complying;

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

(1a)

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

* * * * *

2. 42 U.S.C. 16911 provides:

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

In this subchapter the following definitions apply:

(1) Sex offender

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

(2) Tier I sex offender

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

(3) Tier II sex offender

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

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

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

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

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))¹ of Title 18;

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

(B) involves—

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

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

(iii) production or distribution of child pornography; or

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

(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

¹ So in original. The second closing parenthesis probably should follow “18”.

(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.

3. 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.

4. 42 U.S.C. 16913 provides:

Registry requirements for sex offenders

(a) In general

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

(b) Initial registration

The sex offender shall initially register—

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

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

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section 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 infor-

mation to all other jurisdictions in which the offender is required to register.

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

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

5. 42 U.S.C. 16914 provides:

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.

(b) Provided by the jurisdiction

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

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

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

6. 42 U.S.C. 16915 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) of this section. 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 maintains 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 of¹ 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;

(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.

7. 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 So in original. The word “of” probably should not appear.

- (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.

8. 42 U.S.C. 16917 provides:

Duty to notify sex offenders of registration requirements and to register

(a) In general

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

- (1) inform the sex offender of the duties of a sex offender under this subchapter and explain those duties;
- (2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and
- (3) ensure that the sex offender is registered.

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

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

9. 42 U.S.C. 16918 provides:

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.

(b) Mandatory exemptions

A jurisdiction shall exempt from disclosure—

- (1) the identity of any victim of a sex offense;
- (2) the Social Security number of the sex offender;
- (3) any reference to arrests of the sex offender that did not result in conviction; and
- (4) any other information exempted from disclosure by the Attorney General.

(c) Optional exemptions

A jurisdiction may exempt from disclosure—

- (1) any information about a tier I sex offender convicted of an offense other than a specified offense against a minor;

- (2) the name of an employer of the sex offender;
- (3) the name of an educational institution where the sex offender is a student; and
- (4) any other information exempted from disclosure by the Attorney General.

(d) Links

The site shall include, to the extent practicable, links to sex offender safety and education resources.

(e) Correction of errors

The site shall include instructions on how to seek correction of information that an individual contends is erroneous.

(f) Warning

The site shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. The warning shall note that any such action could result in civil or criminal penalties.

10. 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.

11. 42 U.S.C. 16920 provides:

Dru Sjodin National Sex Offender Public Website

(a) Establishment

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

(b) Information to be provided

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

12. 42 U.S.C. 16921 provides:

Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program

(a) Establishment of Program

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

(b) Program notification

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

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

(2) Appropriate law enforcement agencies (including probation agencies, if appropriate), and each school and public housing agency, in each area in which the individual resides, is an employee or is a student.

(3) Each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

(4) Any agency responsible for conducting employment-related background checks under section 5119a of this title.

(5) Social service entities responsible for protecting minors in the child welfare system.

(6) Volunteer organizations in which contact with minors or other vulnerable individuals might occur.

(7) Any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction.

(c) Frequency

Notwithstanding subsection (b) of this section, an organization or individual described in subsection (b)(6) or (b)(7) of this section may opt to receive the notification described in that subsection no less frequently than once every five business days.

13. 42 U.S.C. 16922 provides:

Actions to be taken when sex offender fails to comply

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

14. 42 U.S.C. 16923 provides:

Development and availability of registry management and website software

(a) Duty to develop and support

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

(b) Criteria

The software should facilitate—

- (1) immediate exchange of information among jurisdictions;
- (2) public access over the Internet to appropriate information, including the number of registered sex offenders in each jurisdiction on a current basis;
- (3) full compliance with the requirements of this subchapter; and
- (4) communication of information to community notification program participants as required under section 16921 of this title.

(c) Deadline

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

15. 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.

16. 42 U.S.C. 16925 provides:

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 part A of subchapter V of chapter 46 of this title.

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement cer-

tain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

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

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing¹ reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

(4) Funding reduction

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding

¹ So in original. Probably should be followed by a comma.

reduction as specified in subsection (a) of this section.

(c) Reallocation

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

(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.

17. 42 U.S.C. 16926 provides:

Sex Offender Management Assistance (SOMA) program

(a) In general

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

(b) Application

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

containing such information as the Attorney General may require.

(c) Bonus payments for prompt compliance

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

(1) 10 percent of the total received by the jurisdiction under the SOMA program for the preceding fiscal year, if that implementation is not later than 1 year after July 27, 2006; and

(2) 5 percent of such total, if not later than 2 years after July 27, 2006.

(d) Authorization of appropriations

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

18. 42 U.S.C. 16927 provides:

Election by Indian tribes

(a) Election

(1) In general

A federally recognized Indian tribe may, by resolution or other enactment of the tribal council or comparable governmental body—

(A) elect to carry out this part as a jurisdiction subject to its provisions; or

(B) elect to delegate its functions under this part to another jurisdiction or jurisdictions within which the territory of the tribe is located and to provide access to its territory and such other cooperation and assistance as may be needed to enable such other jurisdiction or jurisdictions to carry out and enforce the requirements of this part.

(2) Imputed election in certain cases

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

(A) it is a tribe subject to the law enforcement jurisdiction of a State under section 1162 of Title 18;

(B) the tribe does not make an election under paragraph (1) within 1 year of July 27, 2006 or rescinds an election under paragraph (1)(A); or

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

(b) Cooperation between tribal authorities and other jurisdictions

(1) Nonduplication

A tribe subject to this part is not required to duplicate functions under this part which are fully carried out by another jurisdiction or jurisdictions within which the territory of the tribe is located.

(2) Cooperative agreements

A tribe may, through cooperative agreements with such a jurisdiction or jurisdictions—

(A) arrange for the tribe to carry out any function of such a jurisdiction under this part with respect to sex offenders subject to the tribe's jurisdiction; and

(B) arrange for such a jurisdiction to carry out any function of the tribe under this part with respect to sex offenders subject to the tribe's jurisdiction.

19. 42 U.S.C. 16928 provides:

Registration of sex offenders entering the United States

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

20. 42 U.S.C. 16941 provides:

Federal assistance with respect to violations of registration requirements

(a) In general

The Attorney General shall use the resources of Federal law enforcement, including the United States Mar-

shals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements. For the purposes of section 566(e)(1)(B) of Title 28, a sex offender who violates a sex offender registration requirement shall be deemed a fugitive.

(b) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for fiscal years 2007 through 2009 to implement this section.