COMMENTS OF THE ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, INC.

AND AFFILIATED SCHOLARS AND PRACTITIONERS

IN RESPONSE TO PROPOSED RULEMAKING – Docket No. OAG 157

October 12, 2020

Comment to Proposed Rule entitled
"Registration Requirements Under the Sex Offender
Registration Notification Act," (SORNA)
34 U.S.C. § 20901 and 18 U.S.C. § 2250.
Docket No. OAG 157; AG Order No. 4759–2020
Agency: U.S. Department of Justice
Document No. 2020-15804
RIN 1105-AB52
85 F.R. 49332-49355

On August 13, 2020, the U.S. Department of Justice ("Department") issued its Notice of Proposed Rulemaking, Docket No. OAG 157, for the purpose of amending regulations implementing the Sex Offender Registration and Notification Act (SORNA), P.L. 109–248, 34 U.S.C. § 20901 *et seq.* and 18 U.S.C. § 2250 (the "Proposed Rule").

The Alliance for Constitutional Sex Offense Laws, Inc. (ACSOL), a national non-profit organization, as well as the affiliated practitioners and scholars identified below, thank the Department for its work on the Proposed Rule, including its detailed Section-by-Section Analysis. In these comments, ACSOL respectfully requests that the Department reconsider or revise specific provisions of the Proposed Rule for the reasons summarized below.

INTRODUCTION

SORNA contains two distinct mandates serving two distinct federal purposes: (1) to induce states to adopt federal standards for sex offender registries, and (2) to prevent individual registrants from evading state registration laws by traveling to another state. We believe the Proposed Rule often conflates these two purposes. As a result, the Proposed Rule fails to achieve the clarity that is the Department's purpose in proposing it. *See* 85 F.R. 49333 (The Proposed Rule seeks to "provide[] a concise and comprehensive statement of what sex offenders [herein, "registrants"] must do to comply with SORNA's requirements.").

Since SORNA's adoption the Department has appropriately focused federal prosecutions for failure to register on absconding registrants. This traditional policy was consistent with the Congressional purpose in enacting the portion of SORNA creating the federal registration offense. The traditional policy also sensibly focused federal prosecutorial resources on cases that posed the greatest difficulty for state-level enforcement, and also insulated federal prosecutions from plausible claims that they exceeded the federal jurisdiction allowed under both SORNA and the Constitution. The Proposed Rule needlessly suggests a change in prosecutorial policy that would, if followed, undermine all of the advantages of the Department's traditional practice.

In the comments that follow this introduction, we highlight the particular instances in which this needless conflation of SORNA's mandates arises, and suggest how the Proposed Rule can be recast to avoid it. In this introduction we provide a background understanding of SORNA that informs all of our comments. Finally, our comments also address several other difficulties with the Proposed Rule.

Notably, the Proposed Rule does not directly address SORNA's first mandate, which is set forth in Subdivision (a) of 34 U.S.C. § 20912. That mandate requires states to "maintain jurisdiction-wide sex offender registr[ies] conforming to the requirements of this title." Although the federal government may not "commandeer" state resources to pursue federal policies, it can, under the Spending Clause, condition grants of federal funds on compliance with them. *United States v. Richardson*, 754 F.3d 1143 (9th Cir. 2014). The Office of Sex Offender Sentencing, Monitoring, Apprehending, and Tracking (SMART Office) within the DOJ administers the federal standards. It finds just 18 states are currently in substantial compliance with them. *See* https://smart.ojp.gov/sorna/substantially-implemented. Noncompliant states may be penalized by a ten percent reduction in the funds they would otherwise be allocated under the Edward Byrne Memorial Justice Assistance Grant Program, 42 U.S.C. § 20927.

The Proposed Rule addresses SORNA's second mandate, set forth in 34 U.S.C. § 20913. That mandate requires an individual convicted of a sex offense to register, and keep his registration current, in each state in which the individual resides, is employed, or is a student. 34 U.S.C. § 20914 sets out the information that each registrant shall provide to the registering agency, and authorizes the Attorney General to supplement this statutory list with "any other information" he chooses to require. It also authorizes the Attorney General to specify the "time and manner" in which individual registrants provide and update the required information. Finally, knowingly failing to register as required in these sections is a federal crime under 18 U.S.C. § 2250 for an individual convicted of federal or tribal sexual offenses, and for a state offense if the individual "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country."

As explained in *Carr v. United States*, 560 U.S. 438, 446 (2010), an individual whose registration obligation is based upon a state conviction does not violate 18 U.S.C. § 2250 unless the three elements of the offense occur in the required sequence: the individual first becomes a person required to register under 34 U.S.C. § 20913, then travels in interstate commerce, and then fails register or update the registration. If that sequence were not required, a state offender who failed to register in the state of conviction could be prosecuted under § 2250 even though he had not left the state after his conviction, "an illogical result given the absence of any obvious federal interest in punishing such state offenders." *Id*. Congress, the Court concluded, clearly did not intend "to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under § 2250." *Id*. at 452.

Carr's understanding of the limited reach of § 2250 is consistent with the Congressional motivation in enacting it, as evidenced by its legislative history (detailed below in Comment I(B)(3)). That is, SORNA's goal was not to replace state-level enforcement of sex offender registries with federal prosecutions, as federal registration laws have "expressly relied on state-

level enforcement" since their inception. *Id*. The goal was much narrower: to fill a gap that state laws alone could not achieve—to catch individuals who seek to evade their registration obligations by leaving their state of conviction and not registering at their destination. "The act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also . . . the very conduct at which Congress took aim." *Carr*, 560 U.S. at 454.

As this passage from *Carr* suggests, this understanding of the purpose of the federal registration obligation reflects the federal government's limited jurisdictional authority over state-level offenders. The federal government does not have general police powers, *United States v. Lopez*, 514 U.S. 549, 566 (1995), and may not criminalize conduct in the absence of a specific constitutionally recognized federal interest in reaching that conduct. The Commerce Clause power to regulate conduct with a multistate impact on commercial activity does not "obliterate the Constitution's distinction between national and local authority." *United States v. Morrison*, 529 U.S. 598, 615 (2000). The Court in *Morrison* therefore rejected the claim that Congress may regulate noneconomic, violent criminal conduct just because it has some effect on interstate commerce "in the aggregate." Reiterating that the Constitution requires "a distinction between what is truly national and what is truly local," the Court observed that it could "think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id*. at 617-618. The federal power can extend to violent crime only when there is a clear nexus in the particular case between the crime and the interstate component required for federal jurisdiction. *Lopez*, 514 U.S. at 561.

The Constitutional limits on federal power are thus aligned with the Congressional purpose in enacting 18 U.S.C. § 2250: to provide an added tool with which to punish and therefore deter registrants from absconding to another state to evade their registration obligations. A registrant who moves to another state and does not register falls within both the Congressional purpose and the Congressional power. His move to a second state is, as *Carr* observed, "the very conduct at which Congress took aim." The required nexus between the criminal conduct and the interstate travel is clear.

In contrast is the registrant who travels from New Jersey to New York for the afternoon to visit his mother, but then a year later fails to renew his New Jersey registration. In the latter case, there is no nexus between the interstate travel and the failure to register, and thus no federal jurisdiction. Nor is there any reason for federal involvement. New Jersey's authority and ability to police this individual's failure to register is entirely unaffected by the registrant's afternoon trip a year earlier. This is not the kind of case to which Congress ever intended to apply federal resources. There is nevertheless confusion about this point. The Proposed Rule could and should end this confusion, but as written the Proposed Rule exacerbates it.

In the pages that follow we identify particular examples of this confusion and offer suggestions for revising the Proposed Rule to eliminate it. We first offer, however, two observations that apply generally to this question.

First, the mistaken conflation of SORNA's two distinct purposes (*i.e.*, to encourage states to adopt federal registry standards, and to deal with absconding registrants) accounts for much of the confusion. The federal crime created to serve the second purpose cannot be employed in service of the first. Hundreds of thousands of registrants live in one of the 32 states that are not compliant with federal standards. Their home state may place registrants in different tiers than called for under the federal standards, or they may relieve some registrants of their registration obligation earlier than the federal standards allow. State registration schemes may not require registrants to report every item the federal standards require (*e.g.*, many state registration schemes do not require the disclosure of remote-communication identifiers), and may not require registrants to update their registration information as frequently as do the federal standards. The federal government may condition a state's receipt of federal funds on its conforming to the federal standards, but it cannot prosecute individual registrants who comply with the relevant state laws for failing to meet federal registration standards their state has chosen to reject. For a person whose registration obligation is based upon a state law conviction, there is no nexus between interstate activity and their noncompliance with federal rules. The matter is less certain for those whose registration obligation is based upon a federal conviction. The federal government may require their registration, but it remains problematic to prosecute such registrants for failing to comply with federal standards their state has not adopted. The regulations do recognize an "impossibility" defense that may apply in some such cases, but as explained in Comment IV, the examples provided are both confusing and too narrow. It would be far simpler, and certainly clearer, for Department to adopt a unitary policy declining to prosecute in such cases. More importantly, such a policy would be consistent with the Congressional purpose in enacting Section 2250: to deter evasion of the registration obligation through interstate travel.

Second, although we do not have access to the data that would speak directly to the question, it appears that Department has in fact followed such a policy in the past. The TracFed database maintained by Syracuse University shows for the eleven months thus far reported for fiscal year 2020, there have been a total of 428 convictions nationwide under § 2250. That is 18 percent fewer than the number last year, 23 percent fewer than five years ago, and 46 percent fewer than ten years ago. Federal prosecutions are rare and becoming more so, given that nearly one million Americans are currently required to register. A small sample of the press releases issued by U.S. Attorney's offices in connection with § 2250 prosecutions suggests that every case involved a registrant who had moved across state lines and failed to register at his or her new residence. Our impression is therefore that DOJ has, for the most part, in fact followed the very policy that our comments urge should be made explicit in the regulations. We cannot exclude the possibility of particular instances in particular U.S. Attorney's offices in which prosecutions were brought against individuals who were compliant with state law registration laws applicable to them, or who, while not fully compliant, had not traveled interstate to evade their registration obligation. But the existence of a few such prosecutions in selected U.S. Attorney's offices only adds to the need for Department to adopt an explicit policy excluding them. In his comments last month at Hillsdale College, Attorney General Barr recently emphasized the importance of the Department ensuring a consistent national policy, especially in the exercise of prosecutorial discretion. "It

does not serve the ends of justice to advocate for fuzzy and manipulable criminal prohibitions that maximize our options as prosecutors. Preventing that sort of pro-prosecutor uncertainty is what the ancient rule of lenity is all about. That rule should likewise inform how we at the Justice Department think about the criminal law."

There is no better example of the need to follow this approach than in Department's policy for choosing cases in which to bring charges under § 2250. We believe the Proposed Rule should be revised to make clear and overt the Department's traditional but silent policy of reserving such prosecutions for cases in which the defendant has traveled across state lines for the purpose of evading his registration obligation.

In light of the above, as well as additional concerns regarding the Proposed Rule, we urge the Department to revise the Proposed Rule consistent with the following comments.

SUMMARY OF INDIVIDUAL COMMENTS

Comments I and II (pp. 8-1) discuss the issues mentioned above. To reduce misunderstanding, the Proposed Rule should state clearly that a registrant's duty to act under SORNA is triggered solely by interstate travel or other "circumstance supporting federal jurisdiction" and that Congress and the Department lack Commerce Clause authority to require registrants to do anything without that jurisdictional prerequisite. The Department should also clarify that it does not seek to impose liability where there is no nexus between interstate travel and a particular reporting requirement. Critically, if the Department contends that registrants have a duty to comply with SORNA's mandates when circumstances supporting federal jurisdiction are absent, the Proposed Rule will exceed the Department's authority under SORNA by regulating purely intrastate affairs.

Comment III (pp. 20-23) recommends that the Department withdraw § 72.7(d), which mandates reporting of intended "departure from" or "termination of" residence in a state prior to interstate travel or other basis for federal jurisdiction, because § 72.7(d) exceeds the scope of Congress' authority under SORNA for the reasons articulated in *Nichols v. U.S.*, 136 S.Ct. 1113 (2016).

Comment IV (pp. 23-27) addresses the Department's attempt to explain in the commentary to § 72.7(g) how the Proposed Rule would work when the jurisdiction's registration law differs from proposed federal requirements. The explanations offered in the commentary are not nearly adequate to resolve the confusion. This is a serious issue affecting hundreds of thousands of people. The Department acknowledges that a registrant's compliance with SORNA is a "two-party transaction" that depends upon his state's "acceptance" of the information provided by the Registrant. 85 F.R. 49336-37. However, the content of § 72.7(g) ignores this reality—as well as the Department's own historic practices—by suggesting that a registrant can still be prosecuted under SORNA when his or her state does not accept information required under SORNA. We are not certain the Department has the authority to do this. But if it does, the Proposed Rule should clarify, consistent with the Department's traditional practice, that a registrant who

complies with his state's registration requirements and has not traveled interstate to evade registration will not be prosecuted.

Comment V (pp. 27-29) explains why the Department's interpretation of the affirmative Defense of 18 U.S.C. § 2250(c), as expressed in § 72.7(g) and 72.8 of the Proposed Rule, violates the Due Process Clause of the Fifth Amendment by relieving prosecutors of their duty to prove a "knowing" SORNA violation.

Comment VI (pp. 29-31) urges the Department to substantially revise § 72.6(b), which requires the reporting of "remote communication identifiers," to narrow its scope, define vague terms, and restrict public access to the registrant's identifiers. As presently proposed, the section violates the First Amendment for the reasons articulated in *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014) and other cases.

Section VII (p. 31) observes that § 72.8 omits SORNA's express requirement that liability under 18 U.S.C. § 2250(a)(2)(B) requires proof of "travel in interstate or foreign commerce, or enter or leave, or reside in, Indian country," and requests the inclusion of this element.

Comment VIII (pp. 32-33) addresses § 72.6 of the Proposed Rule. Several parts of this section use vague and imprecise language that, while perhaps appropriate when defining "minimum national standards" for states in connection with SORNA's first purpose, is untenable in guidelines for individual registrants in connection with SORNA's second purpose. An example of vagueness and imprecision is found in § 72.6(c)(1) which requires registrants to report unspecified "information . . . with whatever definiteness is possible under the circumstances." The Department should review this section to be sure that the proposed requirements are understandable to an ordinary person and provide fair notice to registrants of the conduct that may trigger criminal prosecution.

Comment IX (p. 33-34) urges revising § 72.5(c) to clarify that the reduction in the duration of the registration obligation SORNA adopts for tiers 1 and 3 is automatic under the circumstances specified by the statutory language.

Section X (pp. 34-36) argues that the Proposed Rule should be revised to include a federalism assessment and other requirements imposed by executive order 13132 and the Unfunded Mandates Reform Act.

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COMMENTS TO PROPOSED RULE

ACSOL respectfully requests that the Department revise the Proposed Rule as outlined in the following 10 comments:

I. The Proposed Rule Fails to Distinguish Between Duties Imposed Upon *States* Consistent with the Spending Clause, and the More Limited Duties that May Be Imposed Upon *Individual Registrants* Consistent with the Commerce Clause

In crafting the Proposed Rule, the Department sought to "provide[] a concise and comprehensive statement of what sex offenders must do to comply with SORNA's requirements." 85 F.R. 49333. The Department also stated that, "[b]y providing a comprehensive articulation of SORNA's registration requirements in regulations addressed to sex offenders," the Proposed Rule "will provide a more secure basis for prosecution of sex offenders who engage in knowing violations of any of SORNA's requirements." 85 F.R. 49334.

However, the Proposed Rule undermines both goals by failing to clarify individual registrants' precise duties under SORNA. The Proposed Rule creates confusion regarding the particular acts or omissions that create liability under SORNA. This confusion stems principally from the Proposed Rule's failure to distinguish between two separate jurisdictional spheres: (1) the duties that SORNA and the Department have imposed upon states and other non-federal jurisdictions pursuant to the Spending Clause, and (2) the separate (and more limited) set of duties that may lawfully be imposed upon individual registrants under the Commerce Clause. In fact, the Proposed Rule seems to conflate the requirements imposed upon states with those imposed upon registrants, leaving the impression that registrants may be prosecuted if they do not provide all of the information that SORNA desires states to collect as a condition, under the Spending Clause, of that state's SORNA compliance. This impression, whether intended or accidental, will cause many registrants (and perhaps prosecutors) to erroneously believe that registrants are subject to the myriad individual requirements expressed in the Proposed Rule, when the Department lacks authority, under the Commerce Clause, to impose such requirements upon registrants.

A. The requirements that SORNA imposes upon states are distinct from those imposed upon registrants because of the distinct jurisdictional grounds for each set of requirements

As acknowledged in the "Overview" to the Proposed Rule,

> SORNA has a dual character, **[1]** imposing registration obligations on sex offenders as a matter of Federal law that are federally enforceable under circumstances supporting federal jurisdiction, *see* 18 U.S.C. 2250, *and [2]* providing minimum national standards that non-federal jurisdictions are expected to incorporate in their sex offender registration and notification programs, subject to a reduction of federal funding for those that fail to do so, *see* 34 U.S.C. 20912(a), 20926-27.

85 F.R. 49333 (emphasis added).

Consistent with SORNA's "dual character," the Department promulgated guidelines in 2008 that apply only to states, which prescribe the "minimum national standards" that those states must adopt in order to become SORNA compliant and avoid a loss of federal funding. *See* 73 F.R. 38044 ("These Guidelines are issued to provide guidance and assistance to covered jurisdictions—the 50 States, the District of Columbia, the principal U.S. territories, and Indian tribal governments—in implementing the SORNA standards in their registration and notification programs.") (hereinafter, the "2008 SORNA Guidelines").

Because the 2008 SORNA Guidelines impose no duties directly upon individual registrants, individual registrants cannot be federally liable under 18 U.S.C. § 2250 for failing to provide their jurisdictions with information required by the 2008 SORNA Guidelines. *U.S. v. Belaire*, 480 Fed. Appx. 284, 287-88 (5th Cir. 2012); *U.S. v. Ward*, 2014 U.S. Dist. LEXIS 160392, at *20-*21 (N.D. Fla. Nov. 14, 2014).

ACSOL understands that the present Proposed Rule—issued 12 years after the 2008 SORNA Guidelines—is the Department's effort to define and prescribe the requirements to be imposed directly upon individual registrants. However, the basis for imposing requirements upon individual registrants is not and cannot be the same as the basis for the requirements imposed upon states. This limitation upon the Department's regulatory authority over individual registrants is reflected in the 2008 SORNA Guidelines themselves, which state the following under the heading "Enforcement of Registration Requirements":

> SORNA enacted 18 U.S.C. 2250, a new federal failure-to-register offense, which provides federal criminal penalties . . . for sex offenders required to register under SORNA who knowingly fail to register or update a registration as required *where circumstances supporting federal jurisdiction exist, such as interstate or international travel by a sex offender, or conviction of a federal sex offense for which registration is required.*

73 F.R. 38069 (emphasis added). In other words, an individual registrant cannot be subject to regulation under SORNA absent "circumstances supporting federal jurisdiction," such as a federal sex offense conviction or, for registrants with state or foreign convictions, "interstate or international travel"—a clear reference to the limits of Congressional and regulatory authority under the Commerce Clause.

The limited federal jurisdiction under the Commerce Clause is a critical consideration in the discussion of the Proposed Rule because, without a proper basis for jurisdiction under the Commerce Clause, the Department may not require anything of an individual registrant. As the Fifth Circuit observed in connection with registrants convicted under state law,

> [W]ithout § 2250, [§ 20913] lacks federal criminal enforcement, and without [§ 20913], § 2250 has no substance….[because] neither [§ 20913] nor any other provision of SORNA creates any federal penalty for failing to register while

> remaining within a state: *a sex offender who does not travel in interstate commerce may ignore SORNA's registration requirements without fear of federal criminal consequences.*"

U.S. v. Whaley, 577 F.3d 254, 259–60 (5th Cir. 2009) (emphasis added).

B. Neither Congress nor the Department may regulate individual registrants absent "circumstances supporting federal jurisdiction," such as interstate travel, consistent with the Commerce Clause

The Fifth Circuit's ruling reflects the constitutional limits on Congressional and regulatory authority over individual registrants under SORNA. Specifically, the Commerce Clause requires not only interstate travel as a condition of SORNA liability, but also that the alleged SORNA violation have a "nexus" to that interstate travel. As explained below, the requirements for interstate travel and a "nexus" to the SORNA violation are confirmed by the plain text of SORNA, the Supreme Court's interpretations of SORNA, the Department's prior regulations implementing SORNA, and the basics of Commerce Clause jurisprudence.

1. The plain text of SORNA

For registrants whose offenses arise under state or foreign law, SORNA itself requires interstate travel as a condition for liability under SORNA. *See* 18 U.S.C. § 2250(a)(2)(B) ("Whoever . . . is required to register under [SORNA]; . . . *travels in interstate or foreign commerce*, or enters or leaves, or resides in, Indian country; and . . . knowingly fails to register or update a registration as required by [SORNA]; shall be fined under this title or imprisoned not more than 10 years, or both.") (emphasis added).

2. Supreme Court Interpretations of SORNA

Consistent with the statutory text, the Supreme Court has declared that there is no "federal interest" in prosecuting registrants absent "a nexus between a defendant's interstate travel and his failure to register as a sex offender." *Carr v. U.S.*, 560 U.S. 438, 446 (2010) (emphasis added). The Supreme Court has also declared that such a prosecution would be "illogical." *Id.*

Specifically, in *Carr v. United States*, the Court observed that § 2250 has "three elements," and that "the statute's three elements must be satisfied in sequence." This "sequential reading" of § 2250

> helps to ensure a nexus between a defendant's interstate travel and his failure to register as a sex offender. Persons convicted of sex offenses under state law who fail to register in their State of conviction would otherwise be subject to federal prosecution under § 2250 even if they had not left the State after being convicted —an illogical result given the absence of any obvious federal interest in punishing such state offenders.

Id. at 446 (emphasis added). Thus, under the Supreme Court's interpretation of § 2250 in *Carr*, Congress intended § 2250 to apply only to "persons required to register under SORNA over whom the Federal Government has a direct supervisory interest," or to persons "who threaten the efficacy of [SORNA's] statutory scheme by traveling in interstate commerce." Notably, the Supreme Court echoed this interpretation of § 2250(a) in *Reynolds v. United States*, 565 U.S. 432 (2012), wherein the Court interpreted the phrase "whoever… is required to register under [SORNA]," as stated in § 2250(a), to be limited to "federal sex offender[s]" or "nonfederal sex offender[s] who trave[l] in interstate commerce." *Id.* at 435.

3. SORNA's Legislative History and the Department's Prior Rulemaking

SORNA's legislative history, as well as the Department's prior rulemaking, confirm that "interstate travel by a state sex offender" is a "predicate[]for federal enforcement of the SORNA registration requirements." 72 F.R. at 8895. These sources further confirm that Congress attempted to secure *intrastate* registration of registrants only indirectly, through a *state-imposed* duty on registrants incentivized by its Spending Clause powers, because it cannot directly regulate registrants under the Commerce Clause.

The duty to register, as originally enacted in 1994 under the Jacob Wetterling Act, imposed upon registrants only a duty to register under state law. Pursuant to its Spending Clause powers, Congress provided that enforcement of the state-law duty to register was confined exclusively to state-court jurisdiction. 42 U.S.C. §14071(c). With regard to the subsequent enactment of SORNA in 2006, legislative history reveals Congress' purpose was to close a perceived "loophole" which permitted persons convicted of a sex offense under state law to go "missing" by relocating from one state to another by traveling in interstate commerce. Evidence of this latter Congressional intent includes, but is not limited to, the legislative statements which follow:

- Representative Brown-Waite of Florida, a U.S. House sponsor of legislation which became SORNA, argued that "Congress has a duty to act and to protect our children nationwide, because these predators move from state to state."[1]
- Representative Coble of North Carolina voiced concern that there was "little to no infrastructure … to ensure registration when sex offenders move from one State to another or when a sex offender enters another State to go to work or to enroll in a school."[2]

[1] House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797, Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (June 9, 2005), page 13.

[2] House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797, Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (June 9, 2005), page 2.

- Representative Sensenbrenner of Wisconsin, Chairman of the House Judiciary Committee, and a principal co-author of what became SORNA, explained that "[i]n order to address the problem of missing sex offenders, that is those who fail to comply with moving from one State to another, sex offenders will now face Federal prosecution."[3]

In addition to the foregoing statements by Members of Congress, on March 8, 2006, during debate on the floor of the House, a letter expressing the views of the United States Judicial Conference was entered into the record. With regard to what would later become § 2250, the Judicial Conference noted:

> Another section would make it a federal crime for a person to knowingly fail to register as required under the Sex Offender Registration and Notification Act if the person is either a sex offender based upon a federal conviction or is a sex offender based on a state conviction who thereafter travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.[4]

4. The Department's Prior Regulations Under SORNA

In at least four publications issued under the Department's regulatory authority to implement SORNA, the Department has consistently stated, in substantially similar form, that:

> SORNA directly imposes registration obligations on sex offenders as a matter of federal law and provides for federal enforcement of these obligations under circumstances supporting federal jurisdiction. These obligations include registration, and keeping the registration current, in each jurisdiction in which a sex offender resides, is an employee, or is a student, with related provisions concerning such matters as the time for registration, the information to be provided by the registrant, and keeping the information up to date.
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> Because circumstances supporting federal jurisdiction—such as conviction for a federal sex offense as the basis for registration, or interstate travel by a state sex offender who then fails to register in the destination state—are required predicates for federal enforcement of the SORNA registration requirements, creation of these requirements for sex offenders is within the constitutional authority of the Federal Government.

72 F.R. 8894, 8895 (Interim Rule).[5]

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[3] 151 Cong. Rec. 20,207 (debate on Children's Safety Act of 2005, H.R. 3132) (Sept. 14, 2005).

[4] 152 Cong. Rec. 2254, 2983 (March 8, 2006).

[5] *See also National Guidelines for Sex Offender Registration and Notification*, 73 F.R. 38030, 38069 (July 2, 2008) (Final Guidelines) (limiting enforcement of Section 2250 to "circumstances

5. The Commerce Clause

The above-described limitations on the Department's authority to regulate registrants directly stems from the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which likewise precludes Congress and the Department from regulating activity where federal jurisdiction is absent. The Supreme Court has placed into three categories the circumstances which permit a valid exercise of Commerce Clause powers by Congress:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

United States v. Lopez, 514 U.S. 549, 558 (1995) (internal citations omitted).

The status of a person who has been convicted of a sex offense in violation of state law, even when the state's laws define a "sex offense" in the same manner as does SORNA, does not involve "the use of the channels of interstate commerce" or "regulation or protection" of any "instrumentalities of interstate commerce."[6]

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supporting federal jurisdiction… such as interstate or international travel by a sex offender, or conviction of a federal sex offense for which registration is required"); *Applicability of the Sex Offender Registration and Notification Act*, 75 F.R. 81849, 81850 (Dec. 29, 2010) (Final Rule); and *Supplemental Guidelines for Sex Offender Registration and Notification*, 76 F. R. 1630, 1638 (Jan. 11, 2011) (Final Guidelines).

[6] While the Supreme Court has ruled Congress may constitutionally "anticipate the effects on commerce of an economic activity," see, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012) (Roberts, C.J.), the Court has "never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce." *Ibid*. In other words, Congress has the "power to regulate 'class[es] of activities,' not classes of individuals, apart from any activity in which they are engaged." *Id.* at 556. A person's status as a registrant, of course, does not alone establish that the person is engaged (or will engage) in interstate commerce. Just as "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," *United States v. Lopez*, 514 U.S. 549, 567 (1995), a person's mere status as a state sex offender "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." For this reason, as a matter of statutory interpretation, it must be presumed Congress did not intend to impose on registrants with convictions under state law an "intrastate" federal duty to comply with SORNA in the absence of interstate commerce. *See also Gonzales v. Raich*, 545 U.S. 1, 23 (2005).

Under these circumstances the only valid federal interest which could plausibly support federal regulation under the Commerce Clause would be a claim under the third category described above. That is, imposition of the duty upon registrants to comply with SORNA would be authorized under the Commerce Clause only if the registrant's "intrastate" activities "threaten the efficacy" of a valid regulation of interstate commerce. In *United States v. Morrison*, the Supreme Court clarified the legal framework for analyzing assertions of Congressional power under the "third category" of powers under the Commerce Clause, *i.e.*, activities which are entirely "intrastate," but which nonetheless "substantially affect interstate commerce." In this context, the Court directed consideration of the following inquiries:

1) Whether the activity sought to be regulated involves "economic" activity;

2) Whether the statute seeking to regulate an intrastate activity contains an "express jurisdictional element" which limits the statute's reach to a discrete set of activities that additionally have an explicit connection with or effect on interstate commerce;

3) Whether the literal, textual terms of the statute which seeks to regulate an intrastate activity, or the statute's legislative history, contains "an express congressional finding" regarding the effects of the intrastate activity upon interstate commerce; and

4) Whether the linkage, if any, between the intrastate activity sought to be regulated, and the activity's "substantial effect on interstate commerce," is attenuated.

United States v. Morrison, 529 U.S. 598, 610-12 (2000).

The federal regulation of individual registrants under § 20913(a), unconstrained by § 2250(a)'s interstate travel requirement, would fail to satisfy any of the four criteria stated above. First, a person's status acquired by having previously been convicted of a sex offense in violation of state law does not qualify as an "activity," much less an "economic" activity, within the meaning of the Commerce Clause. Second, unlike § 2250(a), § 20913(a) does not contain an "express jurisdictional element" which limits its reach to a discrete set of activities that additionally have an explicit connection with or effect upon interstate commerce. Third, neither the plain language of § 20913(a) nor its legislative history contain "an express congressional finding" regarding the adverse commercial effects which would result if persons with only a prior state-law conviction for a sex offense remain unregulated by an intrastate federal duty to register under § 20913(a). Fourth, while a person remains within a state there is no "linkage" between that person's status as a registrant under state law, and any "substantial effect on interstate commerce."

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C. The Proposed Rule—and each discrete requirement therein—should be revised to qualify that registrants need only comply when "circumstances supporting federal jurisdiction" are present

Despite the above-described, acknowledged limits on federal jurisdiction over individual registrants, the Proposed Rule omits any mention of the fact that "circumstances supporting federal jurisdiction" are a prerequisite to any lawful federal regulation of individual registrants, consistent with the Commerce Clause. That is, although the Department's introduction to the Proposed Rule states that "circumstances supporting federal jurisdiction" are a prerequisite to "enforcement" of, and "liability" under, SORNA, *see, e.g.*, 85 F.R. 49333, 49336, 49350, the federal jurisdictional prerequisite is nowhere mentioned in the text of the Proposed Rule itself as a condition of the Department's authority to regulate individual registrants, nor is the prerequisite acknowledged as a condition of an individual registrant's duty to act in response to federal authority.

This omission could erroneously imply, and thereby falsely communicate to registrants and prosecutors, that the Proposed Rule requires individual registrants to comply with each discrete requirement of the Proposed Rule—including those that mirror the requirements for jurisdictions per the 2008 SORNA Guidelines—even when no "circumstance supporting federal jurisdiction" is present. Indeed, the Proposed Rule seems to suggest that the Department may have intentionally confused the scope of its authority over individual registrants in an effort to achieve voluntary compliance with registration requirements that the Department has no statutory or constitutional authority to impose. Attorney General Barr recently cautioned the Department against such overreach, noting:

> In exercising our prosecutorial discretion, one area in which I think the Department of Justice has some work to do is recalibrating how we interpret criminal statutes. In recent years, the Justice Department has sometimes acted more like a trade association for federal prosecutors than the administrator of a fair system of justice based on clear and sensible legal rules. In case after case, we have advanced and defended hyper-aggressive extensions of the criminal law. This is wrong and we must stop doing it.
>
> The rule of law requires that the law be clear, that it be communicated to the public, and that we respect its limits. We are the Department of Justice, not the Department of Prosecution.
>
> We should want a fair system with clear rules that the people can understand. It does not serve the ends of justice to advocate for fuzzy and manipulable criminal prohibitions that maximize our options as prosecutors. Preventing that sort of pro-prosecutor uncertainty is what the ancient rule of lenity is all about. That rule

> should likewise inform how we at the Justice Department think about the criminal law.[7]

Accordingly, in order to avoid ambiguity or illegality, the Proposed Rule should plainly disclaim any attempt to regulate intrastate activity, or any activity that lacks a nexus to interstate travel. Several of the comments that follow are directed to achieving this clarification.

II. The Proposed Rule Lacks a Clear Statement that a Registrant's Duty to Act Under SORNA Arises Only When the Registrant Travels Interstate and that Travel Has a 'Nexus' to the Alleged SORNA Violation

The authorities discussed above demonstrate that SORNA imposes no duty upon individual registrants unless they travel interstate and there is a nexus between that travel and the SORNA requirement at issue. *Carr*, 560 U.S. at 446. The nexus requirement is reflected in SORNA's statutory purpose. That is, in enacting SORNA, Congress did not intend to dictate the information that each individual registrant throughout the country must report to each state, under threat of federal prosecution, irrespective of federal jurisdiction limitations. Instead, Congress had a much narrower focus and target, namely absconders who "move to another state, fail to register there, [] thus leav[ing] the public unprotected." *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008), *citing* H.R. Rep. No. 218, 109th Cong., 1st Sess. 23-24, 26 (2005), *rev'd on other grounds by Carr v. U.S.*, 560 U.S. 438 (2010).

As currently written, however, the Proposed Rule creates ambiguity regarding the critical questions of (1) whether a registrant has a duty to act under SORNA before interstate travel occurs, and (2) what can be required of registrants who travel interstate. The necessity of this clarification in the Proposed Rule is illustrated by the following factual scenarios involving hypothetical registrants. The failure to provide clarity will confuse registrants and invite selective and groundless prosecutions—the opposite of the stated objective of the Proposed Rule.

A. Factual scenarios common to registrants illustrate the need to clarify when the federal duty to act under SORNA arises

Consider the following four factual scenario involving registrants:

- **Registrant A** changes his residence from California to Nevada and fails to register in Nevada, his new state of residence. Registrant A is alleged to have violated SORNA by failing to register in Nevada.

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[7] Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event, Sept. 16, 2020, available at https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event

- **Registrant B** resides in California. In 2021, he visits his mother for 2 days in Nevada, and returns to California. In 2022, Registrant B neglects to renew his registration in California. Registrant B is alleged to have violated SORNA by failing to renew his registration in California in 2022.

- **Registrant C** resides in New Jersey, but works at various locations in New York and Connecticut and travels among those three states weekly. Registrant D is alleged to have violated SORNA by failing to report all of the information required by the Proposed Rule in each of those three states.

- **Registrant D** resides in California. In 2021, he neglects to properly update his registration in California as required by California law. In 2022, Registrant C visits his mother for 2 days in Nevada, and returns to California. Registrant C is alleged to have violated SORNA by failing to update his registration in California in 2021.

- **Registrant E** resides in California and does not travel interstate. In 2021, he neglects to register his boat with his local registering agency. The boat is kept at home. Registrant E is alleged to have violated SORNA by failing to report information regarding his boat as required by § 72.6(f) of the Proposed Rule.

In the case of **Registrant A**, the violation of SORNA is evident. As explained above, Registrant A's scenario is the scenario targeted by SORNA's authors. A circumstance supporting federal jurisdiction (*i.e.*, interstate travel) is present. Also present is a nexus between that interstate travel and the alleged violation of SORNA. Finally, the interstate travel preceded the SORNA violation.

In contrast, the circumstances of **Registrations B, C, D, and E** represent distinct, yet commonplace, situations in which there should be no liability under SORNA, but which the Proposed Rule fails to clarify.

Registrant B traveled interstate prior to the alleged SORNA violation, but there is no nexus between the travel and the alleged SORNA violation. Without clarification that a duty to comply with SORNA arises only when interstate travel occurs and there is a nexus between that travel and the provision of SORNA at issue, registrants such as Registrant B who travel across state lines will wrongly believe that their incidental interstate travel triggers a duty to comply with all of the Proposed Rule's reporting requirements indefinitely, even if the requirements have no nexus to the interstate travel.

Registrant C travels interstate each week for work, because he resides in New Jersey but works in New York and Connecticut. Registrant C is representative of thousands of registrants who live in regions of the country where interstate travel is common. However, divorcing the prerequisite of interstate travel from a requirement that such interstate travel have a nexus to the alleged SORNA violation will produce confusion and fear, and chill these registrants' basic life activities, because they will wrongly believe that merely traveling across state lines will subject

them to federal prosecution in multiple states for failing to report all of the information required by the Proposed Rule in each of those states.

Registrant D traveled interstate only after the alleged SORNA violation, and that travel had no nexus to the SORNA violation. Under a proper interpretation of the Commerce Clause, Registrant D should not be liable under SORNA, because any duty he had to comply with SORNA did not arise until after he crossed a state line. Thus, Registrant C's SORNA violation predated his interstate travel, and thus did not trigger any duty under SORNA. Absent clarification in the Proposed Rule, registrants will wrongly believe that interstate travel will permit the Department to reach back years into the past and bring federal charges under SORNA for any failure to comply with state law, and/or the Proposed Rule, prior to that interstate travel.

Finally, **Registrant E** did not travel interstate, and there is no other basis for federal jurisdiction in connection with the alleged SORNA violation. The alleged SORNA violation is for strictly intrastate activity. Yet, because the Proposed Rule fails to clarify that individual registrants are not subject to a duty to act under SORNA unless and until they travel interstate, registrants such as Registrant E will wrongly believe they are immediately and forever in violation of all of the Proposed Rule's reporting requirements that their state does not facilitate, even when they have taken no action that subjects them to federal jurisdiction.

In sum, the Department should clarify that the Proposed Rule's target is the same as Congress': absconders who attempt to evade a registration requirement by moving from one state to another in interstate commerce, like Registrant A, above. Further, consistent with the jurisdictional limits on Congress and the Department, the Proposed Rule should clarify that it does not seek to impose liability in the cases of Registrants B, C, D, or E, where there is no nexus between interstate travel and a particular reporting requirement of the Proposed Rule.

B. A lack of clarity in the Proposed Rule threatens arbitrary and selective enforcement

The consequences of the Proposed Rule's ambiguity regarding when a federal duty under SORNA arises are dire because the ambiguity will invite selective and arbitrary enforcement. For example, prosecutors may erroneously believe that the Proposed Rule, if formally issued, provides a basis for liability even in the absence of interstate travel or a nexus to the alleged SORNA violation. Prosecutors made a similar error in connection with the 2008 SORNA Guidelines when they prosecuted individual registrants for their failure to follow those Guidelines, even though the 2008 SORNA Guidelines were written exclusively for states. Some prosecutions were successful in the District Court, and later reversed on appeal. In the interim, the affected registrants' lives were often devasted. *Cf. U.S. v. Belaire*, 480 Fed. Appx. 284, 287-88 (5th Cir. 2012) (reversing conviction under 2008 SORNA Guidelines); *U.S. v. Ward*, 2014 U.S. Dist. LEXIS 160392, at *20-*21 (N.D. Fla. Nov. 14, 2014) (dismissing indictment under 2008 SORNA Guidelines).

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In addition, in light of the relative rarity of federal failure-to-register prosecutions, the Proposed Rule will exacerbate the risk of selective and inconsistent enforcement with little benefit to public safety. According to the U.S. Sentencing Commission, the Attorney General has obtained only 4,582 convictions for SORNA violations nationwide during the 13-year period between FY 2007 and FY 2019. Yet, of this total, 97.5% (4,466) of those convicted of failure to register committed no new sex offense "while in failure to register status," confirming that the risk to the public of persons in violation of SORNA's requirement is low. Given that the Proposed Rule treats major and minor SORNA violations alike, maintaining ambiguity regarding the Department's authority to impose the myriad information reporting requirements of the Proposed Rule will invite a waste of federal resources.

The threatened waste of resources is exacerbated by the fact that prosecutions under SORNA are already selective and inconsistent, as demonstrated by the Sentencing Commission data. For example, in FY 2019, only 5 people were convicted of SORNA violations in California, the state with the largest registry, whereas 46 were convicted in Texas.

Attorney General Barr recently cautioned that:

> The essence of the rule of law is that whatever rule you apply in one case must be the same rule you would apply to similar cases. Treating each person equally before the law includes how the Department enforces the law.
> ….
>
> We must strive for consistency. And that is yet another reason why centralized senior leadership exists—to harmonize the disparate views of our many prosecutors into a consistent policy for the Department. As Justice Jackson explained, "we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law."[8]

Absent confirmation that federal jurisdiction is a prerequisite to any duty under SORNA, the Proposed Rule will provide even greater incentives for arbitrary and selective prosecution, providing the opposite of "a concise and comprehensive statement of what sex offenders must do to comply with SORNA's requirements," or a [] secure basis for prosecution of sex offenders who engage in knowing violations of any of SORNA's requirements." 85 F.R. 49333-34.

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[8] Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event, Sept. 16, 2020, available at https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event

III. Sections 72.7(d) and (g) of the Proposed Rule, Containing Requirements to Report a 'Departure from a Jurisdiction' and 'Termination' of Residence, Exceed the Scope of Legislative Authority Conferred by Congress under 34 U.S.C. § 20914(a) and (c)

Section 72.7(d) of the Proposed Rule exceeds the scope of authority under SORNA as confirmed by the U.S. Supreme Court in *Nichols v. U.S.* That is, Section 72.7(d) will unconstitutionally add additional reporting requirements neither found in nor authorized by SORNA.

A. The Supreme Court has already ruled that SORNA does not require 'departure' or 'termination' information such as that required by § 72.7(d)

Section 72.7(d) provides:

> (1) A sex offender residing in a jurisdiction must inform that jurisdiction (by whatever means the jurisdiction allows) if the sex offender will be commencing residence, employment, or school attendance in another jurisdiction or outside of the United States. The sex offender must so inform the jurisdiction in which he is residing prior to any termination of residence in that jurisdiction and prior to commencing residence, employment, or school attendance in the other jurisdiction or outside of the United States[; and that].
>
> (2) A sex offender who will be terminating residence, employment, or school attendance in a jurisdiction must so inform that jurisdiction (by whatever means the jurisdiction allows) prior to the termination of residence, employment, or school attendance in the jurisdiction.

Yet, the Department admits that the information required by proposed § 72.7(d) is not required by SORNA, *see* 85 F.R. 49346, 49347, and further acknowledges that § 72.7(d) is in tension with the U.S. Supreme Court's decision in *Nichols v. United States*, 136 S. Ct. 1113 (2016) to the extent that §72.7(d) would be applied to intended travel in interstate commerce. Specifically, the Department observes "§72.7(d) [would] resolv[e] certain potential problems in the operation of SORNA's registration system following the Supreme Court's decision in *Nichols v. United States*." In other words, the statutory limits on the Department's authority articulated in *Nichols* are a "problem," that the Proposed Rule intends to solve by proposing a basis for the federal regulation of Registrants—despite confirmation in *Nichols* that no such basis for regulation exists.

Nichols involved an inquiry into the intent of Congress when it enacted 34 U.S.C. § 20913(c). The text of § 20913(c) provided then, as it does now, that:

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

> That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

In *Nichols* the Supreme Court ruled that under SORNA "the State a sex offender leaves—that is, the State where he formerly resided" does not "qualif[y] as an 'involved' jurisdiction" under former § 16913 (currently codified as 34 U.S.C.§ 20913). The Court also observed that SORNA's immediate statutory predecessor, the Jacob Wetterling Act as amended in 1998, directed states to require registrants to "report the change of address to the responsible agency *in the state the person is leaving*" (emphasis in original), but that this provision of the Wetterling Act was repealed by SORNA in 2006 and replaced by § 20913(c) as quoted above.

The Court also noted that, a short time before its decision in *Nichols*, Congress enacted a statute known as "International Megan's Law" ("IML"). The IML for the first time required registrants to report information to U.S. authorities prior to their departure to a foreign country. Similar to its conclusion that Congress "could have chosen" but did not choose "to retain the language in the amended Wetterling Act" in SORNA and thereby require registrants to report their intention to depart to another state prior to departure, the Court's reference to the IML in *Nichols* indicates a conclusion by the Court, at least implicitly, that when Congress enacted SORNA it consciously chose to omit the requirement now proposed by the Department in § 72.7(d) and enforced by §72.7(g).

On the basis of each of the foregoing observations, the Court in *Nichols* ruled that "SORNA's plain text—in particular, § [20]913(a)'s consistent use of the present tense—therefore did not require Nichols to update his registration" in the state from which he departed "once he no longer resided there." Since the Supreme Court rendered its decision in *Nichols*, Congress has not legislatively abrogated the Supreme Court's interpretation of SORNA in this respect.

Notably, the Department, in its interim rule of 2007, determined a "State sex offender" commits an offense under § 2250(a) or breaches his "federal" duty to register under SORNA, only if, after interstate travel, he "then fails to register in the destination state"—not after he has failed to register in the state from whence he traveled. In other words, "travel in interstate commerce" is a "predicate" for "federal enforcement of the SORNA registration requirements." If § 20913(a) and § 2250(a) are read *in pari materia*, the federal regulation of individual registrants under § 20913(a), rendered enforceable by § 2250(a), must be construed to mean § 20913(a), to the extent it concerns a "federal" duty, only imposes a duty on a "state offender" who, after interstate travel, fails to register in the state of his "destination."

Section 72.7(d) of the Proposed Rule, and its enforcement provision, §72.7 (g), contradict the sound reasoning of the 2007 interim rule, as well as the ruling in *Nichols*, by imposing a new federal duty on persons who have a sex offense conviction to "update" their registration information while still residing in a state from which they intend to depart. Among other things, the practical effect of § 72.7 (d) and (g) would be that, for the first, time registrants would be subjected to federal prosecution under 18 U.S.C. §2250(a) immediately upon crossing a state border and engaging in commerce, due to a failure to "update" their registration information

while still residing in the state from which they departed. This new federal duty would apply regardless of whether, as required by § 20913(c), a sex offender: (1) "appear[ed] in person" in "at least 1 jurisdiction involved pursuant to subsection (a)"; and (2) did so "not later than 3 business days after" his interstate travel; and then (3) timely informed the "involved jurisdiction" (the state of his destination), as defined by *Nichols*, of "all changes in the information required" by "the sex offender registry" after his interstate travel.

Because both § 72.7 (d) and (g) would exceed the scope of legislative authority delegated to the Department by Congress under § 20914(a) and (c), and because Congress is not vested with an enumerated power under the U.S. Constitution to impose upon a registrant the intrastate federal duties that § 72.7 (d) and (g) seeks to require, both § 72.7 (d) and (g) cannot lawfully or constitutionally be adopted by the Attorney General.

B. The Department's proposed basis for issuing § 72.7(d) was rejected by the U.S. Supreme Court in the *Nichols* and *Gundy* cases

The Department claims authority to promulgate § 72.7 (d) and (g) on three grounds: (1) the requirement that registrants report addresses where they "will reside;" (2) the requirement to report "any other information required by the Attorney General;" and (3) the requirement to provide information "in conformity with any time and manner requirements prescribed by the Attorney General." 85 F.R. 49345-48. However, these arguments are based on a contention that was presented to, and squarely rejected by, the Supreme Court in *Nichols*. In *Nichols*, the Court observed:

> [T]he Government points out that among the pieces of information a sex offender must provide as part of his registration is "[t]he address of each residence at which the sex offender resides or will reside." § [20]914(a)(3). The use of the future tense, says the Government, shows that SORNA contemplates the possibility of an offender's updating his registration before actually moving. But § [20]914(a) merely lists the pieces of information that a sex offender must provide if and when he updates his registration; it says nothing about whether the offender has an obligation to update his registration in the first place.

Nichols, 136 S. Ct. at 1118.

As in *Nichols*, determination of whether the Department's final approval of § 72.7(d) and (g) would exceed the scope of the authority delegated by Congress depends primarily on a recognized legal distinction that exists between (1) "whether" a requirement should apply, and (2) "how" a requirement should be applied. As explained below, the former delegation of authority, if exercised by the Department, would be unconstitutional, while the second delegation of authority would not.

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For example, in *Gundy v. United States*, 139 S. Ct. 2116 (2019), the petitioner contended 34 U.S.C. §20913(d) unconstitutionally delegated legislative authority in a manner that allowed the Attorney General "to do whatever he wants." When sustaining §20913(d) against this challenge, the Court in *Gundy*, as a matter of statutory interpretation, narrowly interpreted the phrase "specify the applicability" in §20913(d) to mean the Attorney General had only been empowered to determine "how" a requirement imposed by Congress would be applied. Consistent with the "constitutional avoidance" doctrine of statutory interpretation, the Court further ruled that §20913(d) did not empower the Attorney General to determine "whether" to impose a requirement. It was by this means that the Court avoided what otherwise would have presented a "grave" constitutional question. *Gundy*, 139 S. Ct. at 2141,

Section 72.7(d), as proposed, answers the "whether" question already decided by the U.S. Supreme Court in *Nichols* (*i.e.*, Congress did not intend to impose an intrastate pre-departure requirement in SORNA), and it transparently decides, contrary to the Supreme Court's decision in *Nichols*, that the Department retains authority to impose a new federal duty because, in its view, Congress erred as a matter of policy when it consciously chose not to close what the Department considers unsatisfactory "loopholes" within SORNA. Section 72.7(d) thus is not a regulatory act which merely specifies "how" a requirement otherwise imposed by Congress will be applied by the Attorney General. Rather, § 72.7(d) constitutes an unlawful and unconstitutional attempt to assume legislative authority that has never been delegated to the Department by Congress or by the U.S. Constitution. For these reasons, § 72.7(d) and its enforcement provision, § 72.7(g), are an *ultra vires* act and should be withdrawn from the Proposed Rule.

IV. The Proposed Rule Should Clarify that § 72.7(g) is a Safe Harbor that Absolves Registrants of a Duty to Report Information Required by SORNA When State Law or the Local Agency Does Not Require that Information

Section 72.7(g) addresses circumstances in which a particular registrant's state law registration requirements differ from the requirements of SORNA in one or more of the following ways: (1) the state no longer requires that person to register; (2) the state does not require, or collect, the information called for by SORNA; or (3) the state has more lenient time and manner requirements for reporting than SORNA. Section 72.7(g) is, presumably, an attempt to incorporate the affirmative defense of § 2250(c) into the discrete reporting requirements set forth in § 72.7(a)-(f). Yet, as currently written, § 72.7(g) creates unnecessary confusion regarding the nature of a registrant's duty under SORNA in these commonplace situations and should be clarified to confirm that registrants will not be prosecuted under SORNA when the state in which they reside does not facilitate compliance with SORNA's mandates.

Since SORNA's enactment, federal courts have consistently found that an individual registrant's compliance with state registration requirements satisfies SORNA's federal requirements. *E.g.*, *U.S. v. Paul*, 718 Fed. Appx. 360, 363 (6th Cir. 2017) ("In practice, sex offenders register according to the requirements of their state of residence; that registration also satisfies

SORNA."); *U.S. v. Heth*, 2008 U.S. Dist. LEXIS 108437, at *20-21 (W.D. Tex. Sept. 30, 2008) ("When a sex offender 'knowingly' fails to register or update registration 'as required by [SORNA]' it simply means the sex offender failed 'to comply with the requirements of a [State's] registry.'").

Further, the Department's own discussion of the Proposed Rule acknowledges the "two-party" nature of registration, and specifically acknowledges that compliance with SORNA is contingent upon an individual state's "acceptance" of any information offered by a registrant. 85 F.R. 49336-37. In other words, a registrant cannot comply with SORNA unless his local registering agency "accepts" the information required by SORNA. Consistent with this reality, the Department has generally brought prosecutions for failure to register under § 2250(a) only when the registrant has crossed a state line in an attempt to avoid registering in his state of residence. The Department has not prosecuted registrants who are properly registered with their local agency because those registrants did not also provide all of the information that SORNA requires on the timeline that SORNA requires it. To prosecute a registrant under the latter scenario would be to saddle registrants with obligations that belong to state and local government.

Section 72.7 of the Proposed Rule, however, is not consistent on with this reality, or with the Department's history of prosecution under SORNA. On the one hand, § 72.7(g)(1) provides that a registrant does not violate SORNA when his jurisdiction does not facilitate all of SORNA's reporting requirements, provided that he comes into compliance with SORNA if his jurisdiction later does facilitate SORNA's reporting requirements and the registrant receives due notice of that change. Yet, on the other hand, § 72.7(g)(2) implies that a registrant can still be prosecuted for violating SORNA when his jurisdiction does not facilitate all of SORNA's reporting requirements. Section 72.7(g)(2) further implies that a registrant can escape liability under SORNA only by proving that it was impossible for him to force his jurisdiction to facilitate SORNA's reporting requirements. In addition, the commentary to the Proposed Rule appears to contemplate that a Registrant's duty to comply with SORNA endures even if his state does not accept the information required by SORNA, or does not require the same information that SORNA requires. The Department's commentary states "Notwithstanding the absence of a parallel state law, the registration authorities in the state may be willing to register the sex offender because Federal law (*i.e.*, SORNA) requires him to register. If the state registration authorities are willing to register the sex offender, he is not relieved of the duty to register merely because state law does not track the Federal law registration requirement." 85 F.R. 49336 (internal citation omitted).

This contradictory mandate is not consistent with the nature of federal jurisdiction or the realities of the registration process that the Department acknowledges.

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A. The Proposed Rule contains no guidance regarding how a registering agency's 'willingness' to accept SORNA's registration information is to be ascertained

The Proposed Rule provides no guidance about how a local agency's "willingness" to facilitate SORNA compliance is to be ascertained, consistent with the defense articulated by the Department in § 72.7(g). Registrants cannot by expected to query and cajole registering agencies, or individual registration officials within those agencies, regarding their "willingness" to accept the dozens of discrete informational disclosures required by the Proposed Rule, within the strict time and manner parameters of the Proposed Rule.

For example, consider a registrant who resides in California, where the deadline to register a new residence is five working days, *i.e.*, two working days longer than SORNA's 3-day deadline. Registration in California is frequently done by appointments that are either negotiated with, or dictated by, the registration official. Is a California registrant who registers four working days after changing his residence subject to liability under SORNA unless he proves that he attempted to ascertain his local registration agent's "willingness" to make an earlier appointment? Must the registrant appear at his local registering agency within three business days and demand to be registered on a shorter time frame than state law allows the local agency to observe? Similarly, must a registrant attempt to force his local registering agency to accept information that state law does not require, may possess no means to collect, and may not wish to have, such as information regarding vacations lasting more than 7 days (§ 72.6(c)(2)), or the registrant's usernames and passwords for perhaps dozens of online retailers, social media sites, news websites, and other online services (§ 72.6(b))? To require registrants to prove that they attempted all of these acts, and to further prove the "unwillingness" of their local registering agency to accept them, is equivalent to impressing individual registrants into the service of the Department's effort to secure universal SORNA compliance by state and local government, which SORNA does not require of registrants.

B. Section 72.7(g) is particularly unworkable for registrants who have been relieved of any duty to register under their state's law

As noted above, the inability of registrants to control the states in which they reside and their local registering agencies is particularly acute when the state has affirmatively relived that registrant of a duty to register under state law, whether through the expiration of tier-defined registration periods or through post-conviction relief. In these situations, state law provides no legal basis for processing that person's registration or performing the necessary second "step" of "accepting" the information required in SORNA's scheme.

Consider the example of registrants residing in the states of Indiana or Maryland. Courts in both jurisdictions have held that their respective state constitutions prohibit the registration of certain persons. *See Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Dep't of Pub. Safety & Corr. Servs. v. Doe*, 439 Md. 201, 94 A.3d 791 (Md. 2013). In addition, courts in Indiana and Maryland have held that their respective state registration agencies are prohibited from accepting the registrations of such persons, *even if SORNA requires their continued registration as a matter of*

federal law. In fact, the Maryland Court of Appeals (the court of highest jurisdiction in Maryland) expressly ruled that, "[a]lthough . . . SORNA creates a direct obligation on sex offender to register in their home state, independent of that state's implementation of SORNA, *the state need not accept the registration if doing so would be contrary to state law*." *Doe*, 439 Md. at 232, 94 A.2d 809 (emphasis added). *See also Andrews v. State*, 978 N.E.2d 494 (Ind. Ct. App. 2012), *transfer denied*, 985 N.E.2d 339 (Ind. 2013); *State v. Hough*, 978 N.E.2d 505 (Ind. Ct. App. 2012). The Proposed Rule should make clear that registrants in Indiana or Maryland (or in other states with similar rules, whether judicial, administrative or legislative) can rely upon these rules and are not required to make repeated fruitless attempts to register with their local registering agency.

A related issue arises whenever state law allows registrants a path off the registry that is not recognized by SORNA. ACSOL estimates that there are hundreds of thousands of persons who have been removed from their state's registries through means such as the expiration of a tiered registration period shorter than that required for SORNA compliance, or through a post-conviction relief process such as a Certificate of Rehabilitation. In California, the number of registrants eligible for removal from the registry will increase dramatically in 2021 when the state shifts to a tiered registry from the current lifetime registration system. *See* Cal. Pen. Code § 290(d), eff. July 1, 2021. Thousands of California registrants placed in Tier 1 or Tier 2 for old convictions will become eligible for removal from the registry because they are now beyond the minimal registration period imposed for that tier; yet, some of these registrants would still be required to register if California's new system met SORNA requirements—*i.e.*, California requires a twenty-year registration period for those placed in Tier 2, while SORNA requires 25 years. 34 U.S.C. § 20915(a)(2). Others will fall into a higher tier under SORNA than under California law. Registrants who have consistently complied with the registration rules of California and successfully petition for removal from the registry under California's new law may nonetheless be put in fear of a federal prosecution because California has chosen a tiering system different than SORNA's.[9]

The prosecution of such individuals would, however, be inconsistent with the Congressional purpose in creating the federal crime of failure to register, which was to target individuals who travel interstate in order to evade their registration obligations. Indeed, as discussed above, it is likely, under the Court's analysis of federal criminal jurisdiction in *Morrison*, 529 U.S. 598

[9] A discrete example in California is the large proportion of registrants convicted under the "broad and amorphous" provisions of section 288(a) of the Penal Code. *See People v. Martinez* 11 Cal. 4th 434, 442-44 (1995). Because the conduct covered by Section 288(a) can differ in severity, California's tiered registry law assigns persons convicted of this offense to Tier 2, with a minimum 20-year registration term, and an annual update requirement. Yet, according to the latest "Implementation Review" from the Department's SMART Office, California will be SORNA compliant only if it assigns Section 288(a) to Tier 3, and imposes both a lifetime registration obligation with a quarterly update requirement upon registrants with that conviction. U.S. Dept. of Justice, Office of Justice Programs, SMART Office, *SORNA Substantial Implementation Review of State of Cal*., at p. 19 (Jan. 2016).

(2000), that the Commerce Clause would not support federal jurisdiction where there is no nexus between the interstate travel and the technical registration violation. Perhaps for that reason, as well as a rational allocation of prosecutorial resources, federal prosecutions for failure to register have to date focused exclusively on persons who move interstate and do not register in their destination, and whose travel is plausibly seen as having the purpose of evading the registration requirements.

The Proposed Rule should recognize this policy explicitly, so that individuals who have always complied with their state's registration requirements wherever they have lived or worked are not put in fear of federal prosecution unless they repeatedly attempt to persuade their local authorities to accept registrations those authorities do not require and may not accept.

V. The Department's Interpretation of the Affirmative Defense of § 2250(c) Violates the Due Process Clause of the Fifth Amendment

The Department's interpretation of the affirmative defense of 18 U.S.C. § 2250(a), as reflected in its commentary to § 72.7(g) and 72.8, suggests that the Proposed Rule intends to maximize the potential liability of registrants by absolving the government of its obligation to prove the registrant's knowledge of the SORNA registration requirement. In turn, the Proposed Rule effectively places upon individual registrants a duty to prove their lack of knowledge, which is inconsistent with the basic requirements of criminal liability.

The comments to the Proposed Rule state that criminal liability under § 2250(a) does not require proof of a registrant's "knowledge" that a registration requirement "is imposed by SORNA" itself. 85 F.R. 49332, 49350. Those comments acknowledge, however, that criminal liability may not be established under §2250(a) unless the person is factually "aware of an obligation" to register "from some source." *Id.* Under the Proposed Rule, the factual "knowledge" element of an offense which violates §2250(a), which necessarily must be proven for conviction, could be satisfied when a federal prosecutor proves the registrant was notified by authorities in the state in which he resides that he was required to register under "state law." *Id.* Similarly, the "knowledge" element could be satisfied if a federal prosecutor proves at trial that the registrant was notified by authorities that he was required by "federal law" to provide notice prior to his departure from a state.

All states have adopted laws which require registration, and many states have adopted laws that contain some, but not all, of the reporting requirements set forth in the Proposed Rule. However, a "state-law" reporting requirement is inadequate and ineffective to prove, as a matter of fact, that a registrant has received notice of a "federal duty" sufficient to impose liability under § 2250(a). For example, notice of a state-law duty would rarely, if ever, be given to a registrant by state authorities when the state will not (or legally cannot) register that individual. Notice of a state-law duty to register also will not provide a registrant with notice of the particular reporting requirements contained in the Proposed Rule when the state's own reporting requirements differ from those in the Proposed Rule, or contain no parallel reporting requirement at all.

These realities impose serious impediments to any finding of liability for failure to comply with the reporting requirements of the Proposed Rule. The factual "knowledge" of "a duty to register," which forms a statutory element that must be proven for conviction under §2250(a), requires knowledge by an accused of a fact that is true. This elemental requirement for criminal liability under §2250(a) is independent of, and as an evidentiary matter would ordinarily be raised at trial prior to, an accused registrant's presentation of evidence to support the affirmative defense recognized under §2250(c). However, as misconstrued by the Department's commentary, the affirmative defense recognized in §2250(c) would nonetheless categorically shift the burden to an accused to prove that "uncontrollable circumstances" existed which shielded him from criminal liability, regardless of the cause or nature of the "uncontrollable circumstance." Unlike other circumstances wherein the affirmative defense could plausibly be raised, when an "uncontrollable circumstance" is caused by the refusal or legal inability of state officials to register a person under state law, the procedural effect of shifting the burden to the accused to prove he had "knowledge" of the fact that he was not required or allowed to register (or provide information) would be constitutionally problematic. The proof necessary to establish the affirmative defense in these circumstances would unavoidably involve elements that prosecutors must prove—*i.e.*, whether the accused person had "knowledge" of the "fact" of a duty to comply with SORNA.

By shifting the burden of proof to an accused in this way, the affirmative defense under §2250(c) would unconstitutionally relieve a federal prosecutor of his burden to prove a fact necessary for conviction (*i.e.*, that the defendant "knew" he was required to register under SORNA). In other words, under these circumstances, the Proposed Rule would unconstitutionally require an accused registrant to "negate" an element of the crime which the government must prove in order to convict. Thus, an accused registrant's criminal liability, and not merely mitigation of an offense otherwise proven by the prosecution, would depend on the person's ability to disprove his factual "knowledge" of the federal duty to comply with SORNA. This burden-shifting would violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *Smith v. United States*, 568 U.S. 106, 110 (2013) (The government "is foreclosed from shifting the burden of proof to the defendant…when an affirmative defense does negate an element of the crime.").[10]

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[10] The interpretation of §2250(c) adopted by the proposed rule would also depart from a principle that has traditionally justified shifting to an accused the burden of proving an affirmative defense. Whether "uncontrollable circumstances" existed at the time of an accused person's alleged offense, based on the fact that a state's authorities would not (or legally could not) under state law impose SORNA's requirements, is not information that would be "peculiarly" in the possession of the person. 2 J. Strong, MCCORMICK ON EVIDENCE §337, p. 415 (5th ed. 1999) ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue"). Rather, the fact that such "uncontrollable circumstances" existed at the time of a person's alleged offense would be equally available to any federal prosecutor before the person's arrest or indictment. And, given this publicly available knowledge, which would fairly be imputed to federal law enforcement authorities, probable

To remedy this constitutional defect in the Proposed Rule, §§ 72.7(g) and 72.8, as well as the Department's comments thereto, should expressly state that in a prosecution under § 2250(a), no "affirmative defense" need be asserted by a defendant unless and until the prosecutor first establishes a prima facie case that the defendant had "knowledge" of an actual (and not a speculative) duty to register in the destination state.

VI. Section 72.6(b), Concerning 'Remote Communication Identifiers,' Violates the First Amendment

Section 72.6(b) of the Proposed Rule, requiring the reporting of "Remote Communication Identifiers," requires significant revision and limitation lest it run afoul of the First Amendment for reasons of (1) ambiguity, and (2) infringement of the right to anonymous speech, as articulated in *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014) and other cases.

Section 72.6(b) of the Proposed Rule requires the reporting of "All designations the sex offender uses for purposes of routing or self-identification in internet or telephonic communications or postings, including email addresses and telephone numbers." Any new information must be provided to the registering agency within "3 business days." § 72.7(e). Critically, § 72.7(b) neither defines any of its terms, nor limits the use to which the reported information may be put, or the persons to whom it may be disclosed.

The U.S. Supreme Court has recognized the right of registrants to participate in social media and other Internet activities on the same terms as non-registrants. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-37 (2017) (striking down statute proscribing registrants' participation in social media forums because "social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought."). *See also Harris*, 772 F.3d at 570 ("[S]peech by sex offenders who have completed their terms of probation or parole enjoys the full protection of the First Amendment.") Accordingly, in *Doe v. Harris*, the Ninth Circuit enjoined a California statute that required registrants to report "internet identifiers," defined as "an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication." *Id*. at 568-69. As explained immediately below, the First Amendment grounds upon which the Ninth Circuit enjoined the California statute apply with equal if not greater force to § 72.6(b) of the Proposed Rule.

A. Ambiguities in § 72.6(b) of the Proposed Rule Unlawfully Chill Speech

In *Harris*, the Ninth Circuit ruled that the California statute's definition of "internet identifiers" contained "ambiguities" and did not "make clear what sex offenders are required to report." 772 F.3d at 578. Such ambiguities violate the First Amendment because "uncertainty surrounding what registrants must report—and the resultant potential chilling effect" "may lead registered sex

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cause to arrest or indict a person for violation of §2250(a) under these circumstances would be lacking.

offenders either to overreport their activity or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report." *Id.* at 579. Further, "uncertainty" concerning the precise nature of the internet identifiers that must be reported "undermines the likelihood that the [Act] has been carefully tailored to the [State's] goal of protecting minors and other victims," as the First Amendment requires. *Id.*, *quoting Reno v. ACLU*, 521 U.S. 844, 871 (1997).

Notably, Section 72.6(b) of the Proposed Rule is even more vague and ambiguous than the statute enjoined in *Harris*, and therefore chills more speech. For example, § 72.6(b) of the Proposed Rule employs the vague terms "designations," "routing" and "self-identification," and fails to provide examples of such information. Registrants cannot reasonably be expected to know the definition of "routing," or when their online identifiers are implicated in "routing" communications. As in *Harris*, this ambiguity "may lead registered sex offenders either to overreport their activity or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report." *Harris*, 772 F.3d at 579.

In addition, the statute enjoined in *Harris* required only the reporting of communications *used in conversational contexts*, *i.e.*, "identifier[s] used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication." The examples provided were "electronic mail address, username, screen name, or similar identifier." In contrast, § 72.6(b) of the Proposed Rule is not limited to particular Internet communications, or to Internet communications in conversational contexts, but instead broadly encompasses all "communications" over the Internet. The Proposed Rule is therefore overbroad in that it encompasses Internet communications which have no possibility of facilitating contact with potential victims, such as those with online retailers or IT help desks. Such overbreadth serves no public safety purpose and is insufficiently tailored to withstand First Amendment scrutiny. *Harris*, 772 F.3d at 579; *White v. Baker*, 696 F. Supp. 2d 1289 1310 (N.D.Ga. 2010) (enjoining state's internet identifier requirement where "the scope of the internet identifying information required to be reported is not limited to identifiers used in the type of internet communications that enable sexual predators to entice children.").

B. The Proposed Rule Lacks the Required Safeguards on Public Disclosure of 'Remote Communications Identifiers'

Separately, the proposed rule also violates registrants' right to communicate and participate anonymously on the Internet. The First Amendment protects "an author's decision to remain anonymous." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). This right is burdened, and anonymous speech "chilled," when a reporting requirement "too freely allows law enforcement to disclose sex offenders' Internet identifying information to the public." *Harris*, 772 F.3d at 579-80. For this reason, internet reporting requirements must contain "[]sufficient safeguards preventing the public release of the information sex offenders do report." *Id*. at 578-79. The absence of such safeguards "burdens registered sex offenders' ability to engage in anonymous online speech." *Id*.

The Ninth Circuit in *Harris* enjoined a statute that contained a single, inadequate limitation on the disclosure of a registrant's internet identifiers, *i.e.*, the disclosure must be "necessary to ensure the public safety." The Ninth Circuit ruled that "'Public safety'—like 'public interest'—is much too broad a concept to serve as an effective constraint on law enforcement decisions that may infringe First Amendment rights." *Harris*, 772 F.3d 580. Therefore, to withstand First Amendment scrutiny, a reporting requirement must contain guidelines sufficient to "constrain" public disclosure of the information, and avoid burdening or chilling anonymous speech. *Id.* at 580-81. *See also White v. Baker*, 696 F. Supp. 2d 1289, 1311 (N.D.Ga. 2010) (allowing public disclosure of registrants' internet identifiers "to protect the public" insufficiently protected anonymous speech because "a person in law enforcement might determine that Internet Identifiers for offenders ought to be released so that the public can search for and monitor communications which an offender intends to be anonymous."). *Cf. Doe v. Shurtleff*, 628 F.3d 1217, 1224 (10th Cir. 2010) (internet identifier reporting statute did not chill speech because authorized disclosure was "for limited law-enforcement purposes" and otherwise subject to safeguards)

Section 72.6(b) of the Proposed Rule violates this First Amendment standard because it contains no guidelines or limitations regarding the use to which a registrant's "remote communication identifiers" may be put, or the persons to whom they may be disclosed. The risk that a registrant's remote communications identifiers could be disclosed is compounded by the fact that registrants are directed to report the information to local law enforcement for inclusion in state and federal databases. This reporting process necessarily involves multiple law enforcement agencies, each of which could independently distribute that information publicly. Disturbingly, the 2008 SORNA Guidelines affirmatively "encourages" states to make remote communication identifiers public, and failed to discuss any First Amendment limitations on such public disclosure. *See* 73 F.R. 38059-60 ("Jurisdictions are accordingly permitted and encouraged to provide public access to remote communication address information included in the sex offender registries, in the form described above, *i.e.*, a function that allows checking whether specified addresses are included in the registries as the addresses of sex offenders.") Section 72.6(b) therefore prevents an even greater threat to the anonymous speech rights of registrants than the statute enjoined in *Harris*, and must be revised to include the guidelines and limitations necessary to avoid chilling anonymous and other protected speech.

VII. Section 72.8 Omits SORNA's Express Requirement that Liability Under SORNA Requires the Government to Prove a Basis for Federal Jurisdiction

For registrants with convictions under state or foreign law, 18 U.S.C. § 2250(a)(2)(B) contains, as an element of liability for a violation of SORNA, that the registrant "travel in interstate or foreign commerce, or enter or leave, or reside in, Indian country." Yet, § 72.8 of the Proposed Rule contains no such requirement, thereby failing to conform with the statute and perpetuating the Proposed Rule's untenable ambiguity regarding when a registrant's federal duty under SORNA arises (*see* Comment II, above), as well as the registrant's liability for violations of

SORNA. Accordingly, § 72.8 should be revised to include this mandatory jurisdictional predicate for liability under SORNA.

VIII. Many Provisions of § 72.6 Suffer from Vagueness that Will Prevent Compliance, Limit Liability, and Encourage Arbitrary and Selective Enforcement

Many provisions of Proposed Rule § 72.6 suffer from vagueness that will prevent compliance, foreclose liability if prosecutions are attempted, and encourage arbitrary and selective enforcement.

Under the Due Process clause, statutes are facially unconstitutional and "void for vagueness" when they either "fail to provide the kind of notice that will enable ordinary people to understand what conduct [they] prohibit," or they "authorize and even encourage arbitrary and discriminatory enforcement." *E.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Skilling v. U.S.*, 561 U.S. 358, 402 (2010). In the case of SORNA, "[the] vagueness review is even more exacting" because "[the] statute subjects transgressors to criminal penalties." *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000). The following examples from the Proposed Rule suffer from unconstitutional vagueness:

Section 72.6(b), requiring the reporting of "remote communication identifiers." The rule mandates the reporting of all "designations" used for the purpose of "routing or self-identification in internet or telephonic communications or postings, including email addresses and telephone numbers." As discussed more fully in Comment VI, above, the vagueness of the terms "designations," "routing," and "self-identification" is exacerbated by the fact that this list is demonstrative rather than definite, preventing individual registrants from knowing what they must report.

Section 72.6(c)(1), (c)(3). In the case of registrants with no present or expected residence address, subdivision (c)(1) mandates the reporting of "information regarding where the sex offender resides or will reside with whatever definiteness is possible under the circumstances." A similar requirement under subdivision (c)(3) applies to employment information for registrants who have "no fixed place of employment." In addition to failing to specify the "information" required under these provisions, the additional requirement that such "information" be as definite as "possible under the circumstances" appears to require the consideration of an individual registrant's particular life circumstances at the time, and/or the particular practices of the individual law enforcement agency. A registrant cannot possibly tailor his reporting to the contextually dependent standard of "possible under the circumstances." *Cf. Forbes*, 236 F.3d at 1013 (dearth of notice and guidelines for distinguishing between "routine" and "experimental" medical treatment was void for vagueness). In fact, such vagueness provides no objective measure at all, thereby inviting arbitrary enforcement in violation of the Due Process Clause. *Cf. Kolender v. Lawson*, 461 U.S. 352, 356-60 (1983) (loitering statute containing exception for individuals who provide "credible and reliable" identification to law enforcement was unconstitutionally vague); *Morales*, 527 U.S. at 61-64 (ordinance that forbade loitering with "no apparent purpose" was unconstitutionally vague because it contained no

standards for enforcement and allowed law enforcement to pick and choose opportunities for enforcement).

Section 72.6(c)(2) requires the reporting of "information" concerning any "place" the registrant "is staying when away from his residence for seven or more days, including the identity of the place and the period of time the sex offender is staying there." In addition to failing to specify the "information" required under this provision, the imprecise word "staying" could imply places at which the registrant does not spend the night, as well as any place the registrants spends significant amounts of time, again failing to provide fair notice of what is required to comply. *Morales*, 527 U.S. at 56. Further, § 72.6(c)(2) provides no guidance for registrants who return sooner than seven days, such as whether and to whom this must be reported.

Section 72.5(c) provides for the automatic reduction in the duration of the registration requirement for certain registrants in Tiers 1 and 3 of SORNA who maintain a "clean record," pursuant to 34 U.S.C. § 20915(c). Yet, the Proposed Rule does not specify what constitutes a "clean record." Registrants are entitled to a clear statement in the Proposed Rule regarding the "clean record" that entitles them to the automatic reduction in the registration period, so they may conduct themselves accordingly, know when their registration term ends, and avoid clogging the federal courts with actions seeking clarification of their rights under 34 U.S.C. § 20915(c).

In sum, these vague provisions, as well as others in the Proposed Rule, confound the stated objective of "providing a concise and comprehensive statement of what sex offenders must do to comply with SORNA's requirements." 85 F.R. 49333. In fact, these vague provisions illustrate the fundamental deficiency in the Proposed Rule articulated in Comment I, above, which is the apparent grafting of language and concepts from the 2008 SORNA Guidelines intended for states into the present Proposed Rule, which is intended for individual registrants. While vague criteria such as "information," "under the circumstances," or "clean record" may be appropriate in a set of "minimum national standards" intended for states (which have discretion to fill in the gaps left by the federal guidelines), such vague criteria are not appropriate in a set of guidelines purporting to establish the parameters of criminal liability for individual registrants. Accordingly, these and other vague provisions of the Proposed Rule should be revised to provide constitutionally sufficient specificity and notice to individual registrants.

IX. Section 72.5(c) of the Proposed Rule Should Clarify That the Reduction in SORNA Tiers 1 and 3 is Automatic

Section 72.5(c) of the Proposed Rule does not expressly state what action, if any, individual registrants must take in order to avail themselves of the "clean record" reduction described in 34 USC 20915(b), whereby the registration period for certain Tier 1 registrants is reduced from 15 to 10 years, and the registration period for certain Tier 3 registrants is reduced from lifetime to 25 years. As a result, § 72.5(c) will confuse registrants and courts regarding the operation of this provision. *See, e.g.*, *United States v. Templin*, 354 F. Supp. 3d 1181 (D. Mont. 2019) (federal

district court granting defendant's request to avail themselves of the clean record reduction) and *United States v. Klemovitch-Rhoads*, No. 1:05-cr-00027-LMB (E.D. Va. 2019) (holding that the court lacked jurisdiction to address the defendant's request to avail themselves of the clean record reduction).

Again, the Proposed Rule seems to be using language intended for state guidelines and misapplying that language directly to registrants who must conform their conduct to the rule under threat of prosecution. To avoid ambiguity, and because the language in both the statute and the Proposed Rule is mandatory, § 72.5(c) should operate automatically as opposed to requiring any action on the part of the individual registrant. Indeed, there is no action by the registrant that could be required under the statute. Automatic operation of this provision pursuant to the Proposed Rule would also work to the benefit of judicial economy, as otherwise already overtaxed federal court dockets would be burdened by people seeking to avail themselves of a provision that could otherwise operate automatically.

X. The Proposed Rule Should be Revised to Include a Federalism Assessment and Other Requirements Imposed by Executive Order 13132 and the Unfunded Mandates Reform Act (UMRA)

The Proposed Rule concludes that it "does not have sufficient federalism implications to warrant the preparation of a federalism assessment" as required by Section 6 of Executive Order 13132 ("E.O. 13132"). 85 F.R. 49352. This conclusory finding is not supported by E.O. 13132, the Fundamental Federalism Principles articulated in Section 2 thereof, or the practical impact of the requirements that this rule imposes on state and local governments.

E.O. 13132 prohibits the DOJ from issuing any rule "**[1]** that has federalism implications, **[2]** that imposes substantial direct compliance costs on state and local governments, and **[3]** that is not required by statute," unless the agency issues a federalism assessment in connection with the rules, or funds the costs incurred by the state. E.O. 13132 § 6(b). The Proposed Rule satisfies none of these three criteria:

[1] A rule "has federalism implications" when it "has substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." *Id.* § 1(a). E.O. 13132, Section 2, articulates several "Fundamental Federalism Principles" that, when implicated by a proposed rule, reveal "federalism implications." As explained below, the following "Fundamental Federalism Principles" are implicated by the proposed rule:

- "issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people";
- "One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems";

- "Acts of the national government . . . that exceed the enumerated powers of that government under the Constitution violate the principle of federalism"; and
- "The national government should be deferential to the State when taking action that affects the policymaking discretion of the states . . . ."

First, sex offender registration is a local issue that is not national in scope. As the Proposed Rule's Overview acknowledges, there is no federal registry; in fact, all registration happens at the state and local levels. Further, the vast majority of registrable sex offenses are state offenses, and even persons convicted of federal, military, or foreign offenses register with state and local governments rather than federal authorities. Significantly, the people intended to be protected by the registries live within the state, and therefore the state governments are the closest to such people and their concerns.

Second, the rule imposes a one-size-fits-all solution on all registrants in the nation. In fact, that is the acknowledged purpose of the rule. What's more, the rule effectively usurps states' prerogative concerning the registration of sex offenders within their jurisdictions by imposing a mandate on individual registrants that can vastly exceed any mandate imposed by their state governments, but can only be fulfilled by the participation of their state and local governments.

Third, as articulated elsewhere in these Comments, the Proposed Rule exceeds Congress's authority under the Commerce Clause by purporting to regulate registrants with state convictions, and by regulating registrants in connection with activities that have no substantial impact on interstate commerce.

Fourth, the Proposed Rule imposes myriad costly requirements upon states in a roundabout way. That is, although the rule does not explicitly impose any express requirements upon states, it nevertheless accomplishes the same by impressing individual registrants to act as agents of the federal government who, in order to avoid federal prosecution, must demand that their states adopt SORNA-compliant registration standards. For example, a registrant on Tier 3 of SORNA must update his registration in person every 3 months, even when many states, such as California, require only annual updates. Nevertheless, in order to facilitate his or her compliance with the rule, the registrant must visit his local registering agency four times more often than state law requires. The local registering agency must collect the information and report the same to the state's department of justice. The registrant must likewise tap state and local resources to accomplish perhaps dozens of additional requirements expressed in the rule, even when state law does not require the same.

[2] The Proposed Rule imposes substantial direct costs upon state and local governments for these same reasons, implicating both E.O. 13132 and the UMRA. That is, state and local governments must allocate substantial resources to facilitate individual registrants' attempts to comply with SORNA, which in some cases will be many times the amount needed to facilitate a registrant's compliance with state law. These factors likewise mean that the Proposed Rule are likely to impose costs upon state and local governments in the aggregate of $100 million or

more, as well as uniquely affect small governments, such as the local registering agencies who will suffer the influx of registrants who seek to comply with the mandates of this Proposed Rule.

[3] The requirements imposed by the Proposed Rule upon states are not required by statute, because SORNA does not expressly require the states to collect any information. SORNA merely conditions the receipt of certain federal funds on states' voluntarily becoming compliant. Yet, the Proposed Rule makes state and local governments' cooperation part of an individual registrant's requirements, under threat of federal prosecution, thereby effectively requiring states to comply with the rule in order to protect their residents.

Accordingly, as required by both E.O. 13132 and the UMRA, the Proposed Rule should be revised and recirculated for public comment with the required federalism assessment and other action under the UMRA.

CONCLUSION

Once again, ACSOL thanks the Department for its work on the Proposed Rule, and hopes that the Department will consider and accept these comments in a subsequent revision to the Proposed Rule.

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