

No. 18-4547

**United States Court of Appeals
for the Fourth Circuit**

UNITED STATES OF AMERICA,
Appellant,

v.

EDWARD JAY WASS,
Appellee.

*On Appeal from the United States District Court
for the Eastern District of North Carolina*

OPENING BRIEF OF THE UNITED STATES

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Jurisdiction	1
Statement of Issues.....	2
Statement of Facts.....	3
Summary of Argument.....	5
Argument	7
I. The Supreme Court in Gundy Resolved that SORNA Does Not Violate the Nondelegation Doctrine.	
A. Standard of Review.....	7
B. Discussion of Issue.	7
II. SORNA Does Not Violate the Ex Post Facto Clause.	
A. Standard of Review.....	8
B. Discussion of Issue.	8
Conclusion	12
Certificates of Compliance and Service	

TABLE OF AUTHORITIES

Cases

<u>Gundy v. United States</u> , 139 S. Ct. 2116 (2019)	5, 7
<u>Carr v. United States</u> , 560 U.S. 438 (2010)	4, 10
<u>Mistretta v. United States</u> , 488 U.S. 361 (1989)	7
<u>Smith v. Doe</u> , 538 U.S. 84 (2003).....	5, 11
<u>United States v. Atkins</u> , 498 F. App'x 276 (4th Cir. 2012) (unpublished).....	9
<u>United States v. Burns</u> , 418 F. App'x 209 (4th Cir. 2011) (unpublished).....	9
<u>United States v. Felts</u> , 674 F.3d 599 (6th Cir. 2012)	11
<u>United States v. Good</u> , 326 F.3d 589 (4th Cir. 2003).....	7
<u>United States v. Gould</u> , 568 F.3d 459 (4th Cir. 2009).....	passim
<u>United States v. Lawrance</u> , 548 F.3d 1329 (10th Cir. 2008).....	5, 11
<u>United States v. Mitchell</u> , 498 F. App'x 258 (4th Cir. 2012) (unpublished).....	9
<u>United States v. Parks</u> , 698 F.3d 1 (1st Cir. 2012)	11
<u>United States v. Sampsell</u> , 541 F. App'x 258 (4th Cir. 2013) (unpublished).....	9
<u>United States v. Shoulder</u> , 738 F.3d 948 (9th Cir. 2013).....	9
<u>United States v. Young</u> , 585 F.3d 199 (5th Cir. 2009)	10
<u>Weaver v. Graham</u> , 450 U.S. 24 (1981).....	8

Statutes

18 U.S.C. § 2250(a).....	3, 10
18 U.S.C. § 3231	1
18 U.S.C. § 3742(a).....	1
28 U.S.C. § 1291	1
34 U.S.C. § 20913(d).....	7
75 Fed. Reg. 81850	8

STATEMENT OF JURISDICTION

The United States of America appeals the district court's order granting Defendant's motion to dismiss the indictment. Jurisdiction to the district court was established by 18 U.S.C. § 3231.

Jurisdiction to this Court is provided by 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The judgment was entered on July 6, 2018, and the United States filed a timely notice of appeal on August 2, 2018.

STATEMENT OF ISSUES

1. Whether the district court erred in determining that the Sex Offender Registration and Notification Act (SORNA) violates the non-delegation doctrine in granting the Attorney General the authority to determine whether the Act's restrictions apply to pre-Act offenders.

2. Whether the district court erred in determining that SORNA's application to pre-Act offenders violates the Ex Post Facto Clause of the United States Constitution.

STATEMENT OF FACTS

On September 7, 1995, the defendant, Edward Wass, was convicted in Escambia County, Florida, of one count of sexual battery custodial authority 12 to 18 years of age and one count of lewd & lascivious child under 16. (J.A. 19). He was sentenced to one year of imprisonment, one year of community control, and seven years of probation, concurrent on each count. (J.A. 19).

On March 6, 2018, a grand jury returned an indictment against the defendant, alleging that at least by September 2016, and until February 27, 2018, he had traveled in interstate commerce without registering under the Sex Offender Registration and Notification Act (SORNA), in violation of 18 U.S.C. § 2250(a). (J.A. 19).

On May 14, 2018, the defendant moved to dismiss the indictment, contending that SORNA violated the non-delegation doctrine by granting the Attorney General the authority to determine under what conditions the Act applied to pre-enactment offenders. (J.A. 7-14). The government responded in opposition on May 25, 2018. (J.A. 15-18).

On July 6, 2019, the district court granted the defendant's motion on two grounds. First, regarding nondelegation, it concluded that Congress "has not passed a law [in SORNA] that contains an intelligible principle, and so it has impermissibly delegated its authority." (J.A. 24). The court noted but did not discuss the Fourth Circuit's unpublished opinions to the contrary. (J.A. 23 n.1).

Second, the court sua sponte took up the “larger question” of “whether SORNA’s registration requirements generally are punitive enough to merit consideration under the Ex Post Facto clause.” (J.A. 6 (citation omitted)). The district court acknowledged that the Fourth Circuit had already rejected the Ex Post Facto challenge in United States v. Gould, 568 F.3d 459 (4th Cir. 2009), on the basis that the criminal act was not the requirement to register but rather the person’s failure to maintain a registration once required. (J.A. 24). The district court nonetheless decided that the Supreme Court had implicitly rejected Gould by identifying the criminal act as interstate travel, not failure to register. (J.A.24 (citing Carr v. United States, 560 U.S. 438 (2010))). The court did not explain why this made a difference. Finding itself unbound by Gould, the district court concluded that “SORNA’s registration scheme is punitive” and therefore violated the Ex Post Facto Clause. (J.A. 27).

SUMMARY OF ARGUMENT

1. The district court erred when it granted the defendant's motion to dismiss the indictment after finding that SORNA's application to pre-Act offenders violated the nondelegation doctrine. With its recent decision in Gundy v. United States, the Supreme Court confirmed what all eleven circuits to have considered the issue had already concluded: that SORNA's delegation of this authority to the Attorney General "easily passes constitutional muster." 139 S. Ct. 2116, 2121, 2129 (2019). SORNA does not violate the nondelegation doctrine.

2. The district court further erred by concluding that SORNA violated the Ex Post Facto Clause of the United States Constitution. Binding circuit precedent establishes that a failure-to-register prosecution under SORNA does not violate the Ex Post Facto Clause because the relevant criminal act post-dates SORNA's enactment. United States v. Gould, 568 F.3d 459 (4th Cir. 2009). Even if one could set aside the relevant criminal act and consider SORNA's initial registration requirements, as the district court did here, SORNA still would not violate the Ex Post Facto Clause. Circuit Courts have "consistently" found SORNA to be comparable to the registration scheme the Supreme Court approved against an Ex Post Facto challenge in Smith v. Doe, 538 U.S. 84 (2003). United States v. Lawrance, 548 F.3d 1329, 1333 (10th Cir. 2008). Because SORNA has a civil intent and a nonpunitive purpose, it does not violate the Ex Post Facto Clause. Lawrance, 548 F.3d at 1333.

Accordingly, the district court erred, its final order dismissing the indictment should be reversed, and the indictment reinstated in full.

ARGUMENT

I. The Supreme Court in Gundy Resolved that SORNA Does Not Violate the Nondelegation Doctrine.

A. Standard of Review.

The Court reviews a district court’s decision to grant a motion to dismiss an indictment de novo. United States v. Good, 326 F.3d 589, 591 (4th Cir. 2003).

B. Discussion of Issue.

The district court erred as a matter of law when it dismissed the indictment because it found that SORNA violated the nondelegation doctrine.

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. Gundy v. United States, 139 S. Ct. 2116, 2121 (2019). Congress is permitted, however, to ‘obtain[] the assistance of its coordinate Branches’—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws.” Gundy, 139 S. Ct. at 2123 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)). “The constitutional question is whether Congress has supplied an intelligible principle to guide the delegatee’s use of discretion.” Id. at 2123.

With SORNA, Congress delegated to the Attorney General “the authority to specify the applicability of [registration requirements] to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders.” 34 U.S.C. § 20913(d). Under that delegated authority, the Attorney General issued a final rule in 2010 confirming that

SORNA's registration requirements apply in full to offenders with pre-enactment convictions. Gundy, 139 S. Ct. at 2122 (citing 75 Fed. Reg. 81850). This included the defendant Edward Wass.

The Supreme Court in Gundy considered and rejected the argument that this delegation within SORNA violated the non-delegation doctrine. Id. at 2121. The delegation of authority focused on "feasibility issues" regarding the registration of pre-Act offenders, and therefore was "administrative" and "transitional." Id. at 2129. The Supreme Court therefore concluded that "the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found)." Id. at 2129 (internal citation omitted). The district court erred in holding otherwise.

II. SORNA Does Not Violate the Ex Post Facto Clause.

A. Standard of Review.

The Court reviews a district court's decision to grant a motion to dismiss an indictment de novo. United States v. Good, 326 F.3d 589, 591 (4th Cir. 2003).

B. Discussion of Issue.

The district court also erred when it found that SORNA's registration requirements violate the Ex Post Facto Clause, which prohibits punishment of a defendant "for an act which was not punishable at the time it was committed." See Weaver v. Graham, 450 U.S. 24, 28 (1981).

In United States v. Gould, this Court concluded that SORNA's application to pre-Act offenders did not violate the Ex Post Facto Clause. 568 F.3d 459 (4th Cir. 2009). While Gould's conviction requiring registration occurred prior to SORNA's enactment, the Court observed that his relevant "act" was "*failing to register* during the period *after* SORNA was enacted." Id. at 466. "Because Gould was punished for his *conduct after enactment* of the SORNA provision criminalizing the conduct, his punishment d[id] not violate the Ex Post Facto Clause." Id.

Gould remains good law, and this Court has repeatedly relied upon its holding to reject Ex Post Facto Clause challenges to SORNA. See United States v. Sampsell, 541 F. App'x 258 (4th Cir. 2013) (unpublished) ("Sampsell also challenges SORNA under the Ex Post Facto Clause. This issue is foreclosed by our decision in United States v. Gould[.]"); United States v. Atkins, 498 F. App'x 276, 278 (4th Cir. 2012) (unpublished) ("Atkins further challenges SORNA under the Ex Post Facto Clause, the Commerce Clause, and the APA. However, Atkins concedes that these issues are foreclosed by this court's decision in United States v. Gould[.]"); United States v. Mitchell, 498 F. App'x 258, 260 (4th Cir. 2012) (unpublished) (same); United States v. Burns, 418 F. App'x 209, 212 (4th Cir. 2011) (unpublished) (same).

Sister circuits have likewise concluded that SORNA does not violate the Ex Post Facto Clause. See, e.g., United States v. Shoulder, 738 F.3d 948, 954 (9th Cir. 2013) ("We thus reject Elk Shoulder's argument that application of the SORNA registration requirements to him on the basis of his earlier conviction

violates the Ex Post Facto Clause.”); United States v. Parks, 698 F.3d 1, 5–6 (1st Cir. 2012) (“[W]e join every circuit to consider the issue and reject the [Ex Post Facto Clause] claim made by Parks.”); United States v. Felts, 674 F.3d 599, 605–06 (6th Cir. 2012); United States v. Young, 585 F.3d 199, 204 (5th Cir. 2009) (“Turning to the statute at hand, we now hold—in line with all of our sister Circuits to have considered the issue—that SORNA is a civil regulation and, thus, does not run afoul of the Constitution’s ex post facto prohibitions.”); United States v. Lawrance, 548 F.3d 1329, 1333 (10th Cir. 2008).

The district court’s order mentions not one of those unanimous decisions. Nor did the district court offer a sound basis to sidestep this Court’s decision in Gould. The district court simply stated that “the Supreme Court disagreed” with Gould. (J.A. 24). The reason?: That the Supreme Court in Carr later identified the criminal act as traveling in interstate commerce, rather than failing to register, as Gould had concluded. (J.A. 24 (citing Carr v. United States, 560 U.S. 438 (2010))). But this difference has no impact on Gould’s rationale. Whether the criminal act is failure to register or interstate travel, it remains true that the defendant is “punished for his *conduct after enactment* of the SORNA provision criminalizing the conduct.” Gould, 568 F.3d 466. The punishment therefore does not violate SORNA. Id.

The district court nonetheless circumvented Gould by focusing on whether the initial registration requirements—not the criminal penalties for § 2250(a)—violated the Ex Post Facto Clause. (J.A. 24). The Supreme Court rejected such a challenge to Alaska’s similar sex-offender-registration scheme in

Smith v. Doe, 538 U.S. 84 (2003). Circuit courts have not hesitated to extend Smith's rationale to SORNA. See, e.g., Felts, 674 F.3d at 605-06 (“Relying on Smith [v. Doe, 538 U.S. 84 (2003)], circuit courts have consistently held that SORNA does not violate the Ex Post Facto Clause.”); Lawrance, 548 F.3d at 1333 (“SORNA is both civil in its stated intent and nonpunitive in its purpose, similar to the scheme in Smith, and therefore does not violate the Ex Post Facto Clause.”). As the First Circuit explained, “Alaska’s nearly identical registration requirement served to ‘make a valid regulatory program effective and [did] not impose punitive restraints in violation of the Ex Post Facto Clause.’” Parks, 698 F.3d at 6 (quoting Smith, 538 U.S. at 102). Even assuming the initial registration requirement is relevant and can be divorced from the criminal act at issue in this case, SORNA still withstands Ex Post Facto analysis.

CONCLUSION

For the foregoing reasons, the United States respectfully submits that the district court's final order dismissing the indictment should be reversed and the indictment reinstated in full.

Respectfully submitted, this 30th day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user(s):

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