No. 18-4547

IN THE

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

RESPONSE BRIEF FOR APPELLEE

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the criminal prosecution under 18 U.S.C. §§ 2250(a), 3231. The district court issued a final judgment dismissing the indictment against Mr. Wass on July 6, 2018. The United States timely appealed 27 days later. This Court has jurisdiction under 28 U.S.C. § 1291 over this timely appeal from a final order.

STATEMENT OF ISSUE

May the United States prosecute someone for failing to register under SORNA if the only prior offenses requiring registration occurred before Congress enacted SORNA?

STATEMENT OF THE CASE

This appeal raises an issue of pure law. The relevant facts are simple and undisputed.

Around 25 years ago, Mr. Wass was convicted of two sexual offenses in Escambia County, Florida. (J.A. 19). He has committed no sexual offenses since that time. (J.A. 19). Around 13 years ago, Congress enacted the Sex Offender Registration and Notification Act ("SORNA"), which requires people with certain qualifying prior offenses to register as sex offenders. (J.A. 20). No one disputes that Mr. Wass's 1995 Florida convictions are of the type that would require him to register.

Congress refused to decide whether SORNA's registration requirements applied to people like Mr. Wass whose only qualifying offenses occurred before

SORNA's enactment. It instead left that decision to the Attorney General. 34 U.S.C. § 20913(d). The Attorney General decided that "[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3.

In 2018, a grand jury sitting in the Eastern District of North Carolina indicted Mr. Wass, alleging that (1) he was required to register under SORNA; (2) he traveled in interstate commerce; and (3) he did not register under SORNA, in violation of 18 U.S.C. § 2250(a). (J.A. 6, 19). Mr. Wass moved to dismiss the indictment. (J.A. 7). The district court agreed with Mr. Wass and issued an order holding that (1) SORNA's application to pre-enactment offenders violated the nondelgation doctrine by delegating a legislative decision to the executive branch, and (2) SORNA's application to pre-enactment offenders violates the constitutional prohibition on ex post facto lawmaking. (J.A. 19-28). The district court thus dismissed the indictment. (J.A. 28). The government timely appealed. (J.A. 29).

SUMMARY OF ARGUMENT

The government's four-and-a-half page argument section belies the complex and evolving nature of the question presented by this appeal. SORNA's 2006 enactment raised an obvious and important question: Should SORNA's registration requirements and associated criminal penalties apply to individuals if the only

convictions requiring registration pre-date SORNA? Congress expressly refused to answer this question, choosing instead to "pass[] the potato to the Attorney General." *Gundy v. United States* 139 S. Ct. 2116, 2143 (2019)(Gorsuch, J. dissenting).

The Attorney General eventually decided to apply SORNA to pre-enactment offenders, immediately raising two related constitutional issues: (1) Did Congress properly delegate that decision to the executive branch in the first place; and (2) does it violate the constitutional prohibition on ex post facto law making to punish people for violating a law when part of the conduct necessary to obtain a conviction (the prior sex offense) happened before Congress enacted the law authorizing the punishment?

As the government's brief notes, the Supreme Court sort-of answered the first question in *Gundy v. United States*, rejecting a non-delegation doctrine challenge to SORNA. 139 S. Ct. 2116 (2019). *Gundy*, however, split an 8 member Supreme Court 4-1-3 with no binding holding. And at least one Justice has speculated that a majority of the Court may soon be ready to revisit this question and hold that the Constitution bars the delegation here. *Id.* at 2131 (Gorsuch, J. dissenting). The government correctly notes that *Gundy* reached a certain result; but the legal question raised by the delegation here is still unsettled.

Even if the delegation to the Attorney General were proper, the district court still correctly dismissed the indictment because applying SORNA to pre-enactment

offenders violates the Ex Post Facto Clause for two reasons. First, the prior sex offense that requires one to register under SORNA is an element of the crime of failure to register. Thus, any interpretation of SORNA that allows the government to punish someone for pre-enactment offenses allows the government to punish them for conduct in which they engaged before Congress enacted the law making that conduct an element of a crime. Such an interpretation violates the core of the prohibition on ex post facto rulemaking.

Second, the registration scheme itself is so punitive that it constitutes punishment. Unlike a sex offender registration system that the Supreme Court held did not constitute punishment, SORNA contains harsh criminal penalties and involves continuing invasive intrusion into a registree's life beyond simple registration. Because the SORNA registry is punishment, the government cannot inflict it on someone based on what they did before Congress passed it.

Finally, this Court need not reach these complicated and evolving ex post facto issues because, under the doctrine of constitutional avoidance, this Court should interpret SORNA to not apply to pre-enactment offenders. Such an interpretation would not prevent SORNA from protecting the community because SORNA would still apply to any individual whose registration-requiring offense occurred after SORNA's enactment. And, of course, such an interpretation avoids any ex post facto and nondelegation issues.

Interpreting SORNA to apply only to post-enactment offenders also does not conflict with Congressional intent. Indeed, Congress expressly left the question open, revealing its belief that SORNA can operate well and accomplish its goals even if it applies to pre-enactment offenders. And the Attorney General's regulation to the contrary does not alter this result. Even if Congress properly delegated the question to the Attorney General, the Supreme Court has held several times that courts should interpret statutes in a way that avoids constitutional infirmity, even in the face of executive actions or regulations saying otherwise.

This Court can interpret SORNA in a way that raises serious constitutional concerns or in a way that avoids those concerns. Interpreting it in a way that avoids those concerns does nothing to thwart Congressional intent because Congress has expressed no preference on this question. Thus, this Court should interpret SORNA to apply only to post-enactment offenders. Under that interpretation, the district court correctly dismissed the indictment against Mr. Wass. This Court should affirm that dismissal.

ARGUMENT

THE UNITED STATES MAY NOT PROSECUTE SOMEONE FOR FAILING TO REGISTER UNDER SORNA IF THE ONLY PRIOR OFFENSES REQUIRING REGISTRATION OCCURRED BEFORE CONGRESS ENACTED SORNA.

Standard of review

This Court reviews de novo whether to dismiss an indictment on purely legal grounds. *United States v. Hatcher*, 560 F.3d 222, 224 (4th Cir. 2009).

Argument

A. The Constitution forbids Congress from delegating to the executive branch the power to decide what conduct is criminal without providing sufficient guidance to cabin that power.

1. Legal Framework

SORNA makes any person convicted of a "sex offense" register in each jurisdiction where he resides, works, or is a student. 34 U.S.C. §§ 20911(5), 20913(a). SORNA also makes it a crime for someone who "is required to register under [SORNA]," to "travel[] in interstate or foreign commerce," and then "knowingly fail[] to register or update a registration as required" by SORNA. 18 U.S.C. § 2250(a).

Congress did not decide whether, when, or how SORNA's registration requirements and related criminal penalties apply to individuals like Mr. Wass whose triggering "sex offense" occurred before law's July 27, 2006 enactment. Instead, Congress delegated to the Attorney General the power to decide all issues about SORNA's retrospective application to these so-called pre-Act offenders. 34 U.S.C.

§ 20913(d). The Attorney General decided that "[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3.

2. SORNA unconstitutionally delegates law-making power to the executive branch.

The Constitution establishes a tripartite system of government that separates power among the three federal branches. Article I dictates that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. It prescribes that the government make laws according to "a single, finely wrought and exhaustively considered, procedure," including bicameralism and presentment. *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (invalidating Line Item Veto Act because President cannot change or "effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7").

For pre-enactment offenders like Mr. Wass, Congress rejected that "finely wrought" procedure and instead "passed the potato to the Attorney General." *Gundy* 139 S. Ct. at 2143 (2019)(Gorsuch, J. dissenting). This passing was an unconstitutional delegation of its duty. "[I] t's hard to see how giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices

might be permissible." *Id.* (Gorsuch, J. dissenting). "[I]t's hard to see how Congress may give the Attorney General the discretion to apply or not apply any or all of SORNA's requirements to pre-Act offenders, and then change his mind at any time. If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people" *Id.* (Gorsuch, J. dissenting).

Thus, because Mr. Spivey was a pre-enactment offender, SORNA should not have required him to register. The regulation that required him to register resulted from an unconstitutional delegation of power to the executive branch. The district court erred in not dismissing the indictment against him.

3. ***Gundy* does not resolve this question.**

The United States correctly notes that the Supreme Court recently affirmed a Second Circuit opinion rejecting this nondelegation argument. *Gundy v. United States*, 139 S. Ct. 2116 (2019). But neither *Gundy* nor this Court's precedents settle this issue. This Court has issued multiple unpublished decisions rejecting this nondelegation argument, but has never addressed it in a published decision. *See United States v. Sampsell*, 541 Fed. Appx. 258, 259-60 (4th Cir. 2013)(unpublished)(collecting cases).

And *Gundy* does not compel this Court to reach any particular result because it resulted in a non-precedential 4-1-3 split with one Justice recused. *See Gundy*, 139 S. Ct. at 2116. At least one Justice has suggested that a majority of the Court may be

willing to revisit this question and hold that the Constitution bars the delegation here. *Id.* at 2131 (Gorsuch, J. dissenting). Thus, *Gundy* is an important chapter in the SORNA nondelegation story, but it is not the last chapter.

B. Interpreting Section 2250(a) to apply to pre-enactment offenders violates the Ex Post Facto Clause.

The Constitution prohibits Congress from passing an ex post facto law that punishes someone for conduct that occurred before Congress passed the law. U.S. Const. Art. I, § 9, Cl. 3. "The ex post facto prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (internal citations and quotations omitted).

Interpreting Section 2250(a) to apply to pre-enactment offenders violates the ex post facto prohibition in two ways. First, it imposes additional punishment for an act which was not subject to that punishment when it was committed—the qualifying sex offense. In the alternative, SORNA's registration scheme itself is so punitive that it constitutes criminal punishment and thus cannot constitutionally be imposed on anyone whose qualifying conviction precedes SORNA's enactment.

1. Having committed the qualifying sex offense is an element of a prosecution under Section 2250(a). Thus, this Court cannot, consistent with the Ex Post Facto Clause, interpret Section 2250(a) to punish that conduct if it occurred prior to SORNA's enactment.

The government naturally cites *United States v. Gould* for the proposition that interpreting SORNA to apply to pre-enactment offenders does not violate the Ex Post Facto Clause. 568 F.3d 459 (4th Cir. 2009). *Gould*, however, rests on a legal premise that the Supreme Court later rejected. *Gould* held that applying Section 2250(a) to pre-enactment offenders did not violate the Ex Post Facto Clause because the only criminal conduct punished by the statute was "failing to register" after SORNA's enactment, so the statute did not impose punishment for any pre-enactment conduct. *Id.* at 466.

Section 2250(a), however, punishes more than mere failure to register. The statute says that

> Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2) . . .
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a).

In *Carr v. United States*, decided after this Court's *Gould* decision, the Supreme Court examined Section 2250(a) and held that all three of its statutory sections were "elements" that "must be satisfied" to convict someone under the statute. 560 U.S. 438, 446 (2010) (internal quotation omitted). The government in *Carr* argued that Section 2250(a)(1)'s requirement that someone needs to register under SORNA "is merely 'a shorthand way of identifying those persons who have a sex-offense conviction in the classes identified by SORNA." *Id.* at 447 (quoting Government Brief). The Supreme Court rejected that argument and clarified that all three sections of Section 2250(a)—the requirement to register; the travel in interstate commerce; and the failure to register—are elements that the government must prove beyond a reasonable doubt to secure a conviction. *Id.* at 447-48.

Thus, *Gould* is simply incorrect (or at least incomplete) when it holds that Section 2250(a) punishes only the failure to register.[1] Instead, it punishes all the activities enumerated in the statute. Mr. Wass committed one of those activities (the qualifying sex offense requiring registration) a decade before SORNA's enactment; he committed the two others (the interstate travel and failure to register) after SORNA's

[1] The cases from other circuits that the government cites in its brief suffer from the same problem as *Gould*—they either pre-date *Carr* or do not cite or address it. Gov't Br. at 9-10. Thus, they do not properly address the ex post facto question post-*Carr*.

enactment. Which then raises the question—does the Ex Post Facto Clause prevent Congress from punishing someone when some, but not all, of the activity punished predates the statute's enactment? It does.

"A law is retrospective if it changes the legal consequences of acts completed before its effective date." *United States v. Lominac*, 144 F.3d 308, 312 (4th Cir. 1998) (internal quotations omitted). Thus, the Ex Post Facto Clause forbids the government from imposing another term of supervised release on someone, even for acts they committed *after* the enactment of the statute authorizing the additional punishment, as long as the original term of supervised release was imposed *before* the change in law. *Id.* at 312-13. Similarly, a statute that mandates incarceration for someone who possesses drugs while on supervised release violates the Ex Post Facto Clause if the court applies it to individuals who were already on supervised release *before* Congress passed the statute, even if the drug possession happened *after* Congress passed the statute. *United States v. Parriett*, 974 F.2d 523, 525 (4th Cir. 1992).

The same result applies here. Mr. Wass committed an act—a SORNA qualifying sex offense—before Congress enacted SORNA. Section 2250(a) "change[d] the legal consequence" of that act by making it an element of a crime. That Mr. Wass committed other acts that constitute elements of that crime (travel and failure to register) *after* Congress passed Section 2250(a) does not cure the ex post facto problem. Section 2250(a) punishes Mr. Wass for something he did before

Section 2250(a) existed. That violates the Ex Post Facto Clause, and the district court rightly dismissed the indictment on those grounds.

2. In the alternative, the SORNA registration scheme itself constitutes criminal punishment, so this Court should not interpret the statute in a way that imposes that punishment on people whose only qualifying sex offenses pre-date SORNA's enactment.

In the alternative, interpreting Section 2250(a) to apply to pre-enactment offenders violates the Ex Post Facto Clause because SORNA's registration scheme itself is punishment. *Accord United States v. Leach*, 639 F.3d 769, 772 (7th Cir. 2011)(noting that SORNA could violate the Ex Post Facto Clause either if "the criminal penalties under [Section] 2250(a) are retroactive, or [if] the registration requirements under 42 U.S.C. § 16913 constitute punishment"). SORNA's registration scheme is punishment because it imposes significant restraints and obligations on him.

Congress intended SORNA's registration scheme to be regulatory and not punishment. But that does not end this Court's inquiry. "If, [a legislature intends to] enact a regulatory scheme that is civil and nonpunitive, [courts] must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the . . . intention' to deem it civil." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation omitted). Because a court will "ordinarily defer to a legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been

denominated as a civil remedy into criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997) (internal quotation omitted).

In *Smith v. Doe*, the Supreme Court applied this test to the Alaska Sex Offender Registration Act and held that it was a regulatory, not punitive, scheme. 538 U.S. at 105-06. In so holding, the Court focused in part on the fact that people on the registry did not have to appear in person to update their registration, reducing the actual affirmative restraint of the registry. *Id.* at 101. In contrast, SORNA places significant affirmative obligations individuals on the registry. They must appear in person at a local police station at least once a year (and up to once every three months) for verification of his identity, the location of his home, school or employment. 34 U.S.C. § 20918. This obligation will last for a minimum of fifteen years and can be for as long as life. 34 U.S.C. § 20915(a).

Thus, SORNA differs from the registration scheme upheld in *Doe*. It crosses the line into criminal punishment. As a result, interpreting the statute to apply to individuals whose conduct predates SORNA's enactment violates the Ex Post Facto Clause. The district court properly dismissed the indictment on those grounds.

C. This Court should interpret Section 2250(a) so that it avoids serious constitutional questions.

"When the constitutionality of a statute is challenged, [the courts] first ascertain[] whether the statute can be reasonably construed to avoid the constitutional

difficulty." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984). Under this doctrine of constitutional avoidance, this Court must construe statutes to avoid raising constitutional problems. *United States v. Simms*, 914 F.3d 229, 251 (4th Cir. 2019)(en banc).

Of course, courts cannot re-write statutes to save them, so this Court can use constitutional avoidance only when the "ordinary textual analysis" of a statute allows this Court to place "more than one plausible construction" on statutory language. *Id.* (internal quotations omitted). But when a statute does allow for several interpretations, and some of them raise serious constitutional questions, then this Court should avoid those interpretations, applying "the reasonable presumption that Congress did not intend [an interpretation] which raises serious constitutional doubts." *Clark v. Suarez Martinez*, 543 U.S. 371, 381 (2005).

Applying this doctrine, this Court should interpret Section 2250(a) to apply only to post-enactment offenders. This interpretation will avoid having to reach the questions about nondelegation and ex post facto raised above. And such an interpretation cannot conflict with Congressional intent because, as discussed above, *Congress did not have any intent regarding this question.* Instead, it expressly declined to answer it.

Congress has revealed that the SORNA registration scheme and its associated criminal penalties will work just fine whether it applies to pre-enactment offenders or

not. Limiting SORNA's application to post-enactment offenders will not handicap SORNA or otherwise thwart Congress's intention to establish a nationwide registration system for people who have committed a sex offense. Thus, this Court should not hesitate to interpret the statute in a way that avoids "serious constitutional questions" while preserving Congress's intention.

Finally, the fact that the executive branch has issued a regulation in the face of Congress's buck-passing does not change this analysis. This Court's obligation to interpret statutes in a way that avoids constitutional problems eclipses any executive branch regulations or actions saying otherwise. *See Solid Waste Agency v. United States Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001) ("reject[ing] . . . administrative deference" for a regulation in order to "avoid the significant constitutional and federalism questions raised" by the regulation's interpretation of a statute)*; NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979)(refusing to "construe the [National Labor Relations] Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" even in the face of executive agency action construing the Act in that way).

CONCLUSION

This Court should affirm the district court's order dismissing the indictment.

REQUEST FOR ORAL ARGUMENT

This case raises constitutional issues that would benefit from oral argument. Mr. Wass requests that argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains no more than 5,000 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and

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CERTIFICATE OF MIXED SERVICE

I certify that today, August 30, 2019, I electronically filed this by CM/ECF, which will send notice to all counsel of record.

I also certify that today, August 30, 2019, I had this brief hand-delivered to

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