No. 11-5237

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee

vs.

DAVID WAYNE FELTS,

Defendant - Appellant

BRIEF OF APPELLANT

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant hereby requests that the Court set this case for oral argument. The appellant submits that the case raises novel legal issues regarding the scope and constitutionality of an important federal statute, and oral argument will assist the Court in determining these issues.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction under 18 U.S.C. § 3231, which provides it with jurisdiction over all federal crimes. This Court has jurisdiction under 28 U.S.C. § 1291, which provides it with jurisdiction over appeals from final orders of the district courts. This appeal is taken from the district court's final judgment and conviction entered on February 28, 2011. (R.29, Judgment.) Mr. Felts filed a timely notice of appeal on March 1, 2011. (R.31, Not. of Appeal.)

ISSUES PRESENTED

I.

Do the criminal penalties imposed by the Sex Offender Registration and Notification Act ("SORNA") apply to defendants who fail to register in the State of Tennessee, when Tennessee has not yet implemented the rigid registration requirements of SORNA, and criminal liability under SORNA is exclusively premised on having failed to register "as required by [SORNA]"?

II.

Does retroactive application of SORNA violate the Ex Post Facto Clause by increasing punishment for prior convictions, and did Congress improperly delegate its legislative powers by giving the Attorney General the right to determine whether SORNA applies retroactively without providing the Attorney General with any policies or standards by which to make such a determination?

III.

Does SORNA violate the Tenth Amendment when it effectively mandates that even those States that have not voluntarily implemented SORNA must register sex offenders under a complex regulatory scheme?

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's denial of Mr. Felts's motion to dismiss the indictment against him, which alleged that he failed to register under SORNA. Mr. Felts argued that the statute was either (1) inapplicable to him because Tennessee—the State in which he purportedly failed to register—had not implemented SORNA, or (2) unconstitutional because it violated the Ex Post Facto Clause, the nondelegation doctrine, and the Tenth Amendment. The district court denied the motion, Mr. Felts pled guilty, and he now serves twenty-four (24) months in prison.

B. Course of the Proceedings Below

On February 3, 2010, Mr. Felts was indicted on one (1) charge of failing to register under SORNA in violation of 18 U.S.C. § 2250(a). (R.1, Indictment.) On May 27, 2010, Mr. Felts filed a motion to dismiss the indictment, challenging SORNA as unconstitutional and inapplicable in Tennessee. (R.17, Mot. to Dismiss.) On June 9, 2010, the district court denied the motion to dismiss. (R.21, Order Denying Mot.) On November 15, 2010, Mr. Felts pled guilty to the offense, and the district court accepted his plea. (R.23, Order Accepting Plea Pet.) In his plea petition, Mr. Felts expressly retained the right to appeal the denial of his motion to

dismiss. (*Id.* at 3, ¶ 13.) In a February 28, 2011 sentencing hearing, the district court sentenced Mr. Felts to 24 months' imprisonment. (R.29, Judgment.) Mr. Felts filed a timely notice of appeal on March 1, 2011. (R.31, Not. of Appeal.)

STATEMENT OF FACTS

In 1994, Mr. Felts was convicted of aggravated sexual batter and child rape, for which he served a combined sentence of fifteen (15) years in prison. (R.32, Presentence Investigation Report, at 5 ¶ 3.) On December 8, 2008, he registered as a sex offender in the State of Tennessee, which required him to update his registration any time that he changed address. (*Id.* ¶ 4.) In January 2010, Mr. Felts flew to Puerto Rico, where he rented an apartment. (*Id.* at 5-6 ¶ 7.) Mr. Felts was arrested in Puerto Rico for his failure to register, (*id.*), and on February 3, 2010, Mr. Felts was indicted on one (1) charge of failing to register under SORNA in violation of 18 U.S.C. § 2250(a). (R.1, Indictment.)

On May 27, 2010, Mr. Felts filed a motion to dismiss the indictment, challenging SORNA as unconstitutional and inapplicable in his case. (R.17, Mot. to Dismiss.) The motion was based on four claims: (1) SORNA is not applicable because Tennessee has not yet implemented it; (2) imposing SORNA's criminal penalties would violate the Ex Post Facto Clause as well as due process; (3) Section 16913(d), which allows the Attorney General to make the Act retroactive, violates the nondelegation doctrine; and (4) SORNA violates the Tenth Amendment to the extent it forces State officials to register sex offenders before the States have an opportunity to comply with the law. (*Id.* at 1.)

On June 9, 2010, the district court conducted a hearing on the motion to dismiss. (R.33, Tr. of Mot. Hr'g.) At the hearing, all parties agreed that the issues raised in Mr. Felts's motion were identical to those raised in another case that is currently pending before the same court, the case of *United States v. Daniel G. Carr*, No. 2:09-00010 (M.D. Tenn.). (*Id.* at 3-5.) The district court denied Mr. Felts's motion, stating:

> I am going to deny the motion for the reasons I stated in the *Daniel Carr* case. And by denying it, I am not suggesting that this is any way frivolous . . . . These are serious issues to be seriously determined. But I have addressed the issues in the *Daniel Carr* case in Case Number 2:9-10, . . . [and] I am denying the motions for those reasons stated in that memorandum that's at Docket Number 33. But they are preserved for the record, and no doubt the Sixth Circuit Court of Appeals and perhaps the U.S. Supreme Court will have the final say on these issues.

(*Id.* at 5-6.) The district court's order denying Mr. Felts's motion to dismiss further stated:

> The Court recently addressed the same issues of law raised by the Defendant's Motion in a Memorandum and Order denying a similar motion raised by the defendant in *United States v. Daniel G. Carr*. . . . The facts and law presented by the defendant are not materially distinguishable from those presented to the Court in resolving the *Carr* case, and the reasoning of the Court is equally applicable to this case.

(R.21, Order Denying Mot., at 2.)

The memorandum and order in the *Carr* case addressed almost exclusively legal questions. (*See generally* Carr Memorandum and Order, No. 2:00010 D.E. 33

(M.D. Tenn. May 13, 2010) ("Carr Memorandum"), attached hereto as Addendum 1.) The one exception was its treatment of an arguably factual issue raised by Mr. Carr regarding whether Tennessee officials properly notified him of the duty to register. (*Id.* at 7.) In Mr. Felts's plea hearing, all parties agreed that this issue was not before the district court, and that the district court was addressing Mr. Felts's purely legal arguments. (R.33, Tr. of Mot. Hr'g, at 2-3.)

On November 15, 2010, Mr. Felts pled guilty to the offense, and the district court accepted his plea. (R.23, Order Accepting Plea Pet.) In a February 28, 2011 sentencing hearing, the district court sentenced Mr. Felts to twenty-four (24) months' imprisonment. (R.29, Judgment.)

SUMMARY OF THE ARGUMENT

The district court erred in failing to dismiss the indictment against Mr. Felts because SORNA is both inapplicable to him and unconstitutional.

Mr. Felts is not criminally liable under SORNA, because the State in which he allegedly failed to register has not implemented SORNA. SORNA creates rigid registration requirements that States must follow. Tennessee, like almost all other States, has thus far failed to implement SORNA. SORNA's criminal penalties, which punish defendants who have failed to provide registration "as required by [SORNA]," cannot be read—as the district court interpreted it—as simply requiring a sex offender to register under his own State registration system, because many of the registration requirements are incompatible or more stringent than State requirements.

Applying SORNA retroactively to punish Mr. Felts for crimes he committed decades ago also violates the Ex Post Facto Clause by adding additional punishment for prior convictions. Further, Congress improperly delegated its legislative responsibilities to the Executive branch by granting the Attorney General the right to determine whether SORNA should apply retroactively, without giving the Attorney General any policies or standards by which to make such a determination.

Finally, SORNA violates the Tenth Amendment inasmuch as it requires those

States that have not voluntarily complied with its registration regime nevertheless to procure and accept registrations for a federally mandated sex offender program.

For these reasons, the district court should have granted Mr. Felts's motion and dismissed the indictment against him.

ARGUMENT

I. STANDARD OF REVIEW AND BACKGROUND ON SORNA

A. Because Mr. Felts Raises Purely Legal Arguments, this Court Reviews the District Court's Legal Conclusions *De Novo.*

This Court reviews *de novo* a district court's purely legal determinations, including determinations regarding statutory construction and the constitutionality of a federal statute. *United States v. Hart*, — F.3d —, 2011 WL 1119611 at *5 (6th Cir. March 29, 2011). Because Mr. Felts raises only legal errors, all issues before this Court have a *de novo* standard of review.

B. SORNA Creates a Rigid Regulatory Scheme—With Which the States Have Largely Failed to Comply—Along With Harsh Criminal Penalties.

On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act ("SORNA"). 42 U.S.C. §§ 16901, *et seq.* SORNA "provides a new comprehensive set of minimum standards for sex offender registration." Dept. of Justice, Nat'l Guidelines for Sex Offender Registration and Notification [hereinafter "SMART Guidelines"], 73 Fed. Reg. 38030, 38044 (July 2, 2008).[1] SORNA requires "extensive registration information" and rigorously requires a

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[1]"SMART" is an acronym for the Office of "Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking." That federal office is responsible for providing guidance and assistance to States implementing SORNA.

sex offender (as that term is defined by the statute) to keep his or her registration information current. *Id.* at 38045. The act States that qualifying offenders must submit seven categories of personal data (in addition to "[a]ny other information required by the Attorney General"), and must give updates to residence, employment, and school attendance for the most minor of changes. *See* 42 U.S.C. § 16914; SMART Guidelines 73 Fed. Reg. at 38055-58. For example, according to the SMART Guidelines, an offender must report—possibly for the rest of his life—where he will be whenever he leaves his primary residence for a trip within the United States lasting more than a week. SMART Guidelines, 73 Fed. Reg. at 38056. Moreover, the States themselves must ensure that seven (7) additional categories of information—including the offender's photograph, DNA sample, and fingerprints—are included in each offender's registry.

Despite these substantial reporting obligations, there is no federal agency in charge of procuring registrations from State sex offenders. There is no federal agency that will notify State sex offenders of the SORNA requirements. And there is no federal agency that will accept State sex offenders' updates to their registration information. Rather than creating a federal agency to implement SORNA, Congress has directed the States to do so. SORNA requires States to implement SORNA or else lose ten percent (10%) of certain federal funds that

they would normally receive under the Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. §§ 16924, 16925(a).

The original deadline for States to implement SORNA was effectively July 27, 2009. *See* 42 U.S.C. § 16923(c); 16924(a)(1)-(2). Since the passage of SORNA, the Attorney General has issued several extensions of that deadline, and the current deadline appears to be July 27, 2011. U.S. Dept. of Justice, SMART Office "Newsroom," http://www.ojp.usdoj.gov/smart/newsroom.htm (last visited Apr. 30, 2010). As of April 30, 2011, only four (4) States (Delaware, Florida, Ohio, and South Dakota) have implemented SORNA, along with the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, and the U.S. Territory of Guam. *Id.*

Thus far, the State of Tennessee is one of forty-six (46) States that have either declined to substantially implement SORNA, or have not yet managed to do so. Though Tennessee's own sex registration form includes notification of the federal duty to register and alerts registrants to possible federal criminal penalties of "up to 10 years imprisonment," Tennessee has not yet taken the additional steps required to achieve substantial implementation. Despite anticipating an implementation decision and period, SORNA issues commands to State officials as if implementation were already achieved. *See, e.g.*, 42 U.S.C. § 16917(a) ("An

appropriate official *shall* . . . inform the sex offender of the duties" under SORNA (emphasis added)).

Finally, SORNA creates new federal criminal offenses. For example, the federal offense charged here is a violation of 18 U.S.C. § 2250(a), which provides in relevant part that a person commits the offense whenever he or she:

> (1) is required to register under [SORNA]
>
> . . .
>
> (2)(B) travels in interstate or foreign commerce, . . . and,
>
> (3) knowingly fails to register or update a registration as required by [SORNA].

18 U.S.C. § 2250(a). This new offense is punishable by ten (10) years in prison. *Id.* Mr. Felts pled guilty to failing to register or update his Tennessee sex-offender registration. (R.1, Indictment.)

II. SORNA IS NOT APPLICABLE TO MR. FELTS BECAUSE TENNESSEE HAS NOT YET IMPLEMENTED THE LAW.

SORNA subjects sex offenders to a ten (10) year penalty only if the offender fails to provide registration information "as required by [SORNA]." 18 U.S.C. § 2250(a). This "as required by SORNA" clause should be read to refer to the sex offender requirements imposed by the state implementing SORNA. This construction is both (1) true to the plain language and structure of SORNA, and

(2) constitutionally sound.

A. The Plain Language of SORNA Indicates That its Criminal Provisions Should Only Apply in States That Have Implemented SORNA.

The plain language of SORNA indicates that its criminal provisions should only apply to persons failing to register in States that have implemented SORNA. These provisions make it a crime to "knowingly fail[] to register or update a registration as required by the Sex Offender Registration and Notification Act." 18 U.S.C. § 2250(a)(3). A person convicted of a State sex offense looking to this federal criminal statute for guidance might reasonably look to the SORNA statute to determine what sort of registration was required. The SORNA statute, however, is a complex regulatory scheme almost all of which is dedicated to requiring *States* to implement a federal program. *See generally* 42 U.S.C. §§ 16911-29. SORNA, therefore, appears to require that persons register under its provisions only when States actually implement SORNA's regulatory scheme.

The district court, however, relied on several opinions from other circuit courts holding to the contrary. (*Carr* Memorandum, App. 1, at 5.) The district court quoted extensively from *United States v. Brown*, 586 F.3d 1342 (11th Cir. 2009), which stated: "[E]very state and the District of Columbia had a sex offender registration law prior to 2006. An individual may therefore comply with

SORNA's registration requirements by registering through the state's sex offender registry, even if that jurisdiction has not implemented SORNA's administrative procedures." (*Carr* Memorandum, App. 1, at 5 (citing *Brown*, 586 F.3d at 1349 (internal citations omitted)).) This entirely conclusory language merely begs the question.

Indeed, the cases on which the district court relied largely base their holdings on the language of 42 U.S.C. § 16913, the main provision of SORNA that is applicable to *individuals* as opposed to States. That section generally requires that "[a] sex offender . . . register, and keep the registration current, in each jurisdiction where the offender resides." 42 U.S.C. § 16913(a). Under the district court's logic, because a person in a non-implementing State can still register *somewhere*—i.e., under his or her State system—the statute's registration requirement is sufficiently clear as to a defendant's obligations. Notably, however, SORNA does not define the term "register," *see generally* 42 U.S.C. § 16911, so it is unclear how a person goes about "registering" and whether that registration could include simply registering under a non-implementing State's system.

The district court's logic is further belied by the other provisions of SORNA that apply to individuals as opposed to States. These provisions make it clear that

one *cannot* comply with SORNA by registering in a non-implementing State. For example, § 16914 requires individuals to provide seven categories of information, including the open-ended category of "[a]ny other information required by the Attorney General." 42 § U.S.C. 16914(a)(7). A defendant in a State that has not implemented SORNA and does not require that its sex offenders provide all of the listed categories (including "[a]ny other information required by the Attorney General") would naturally assume that "registration" meant providing more information than the State required or even permitted. How then could one comply with SORNA if the State had not implemented SORNA?

Likewise, § 16915(a) requires a sex offender to keep the "registration" current for certain registration periods based on the severity of the offense. It would therefore be impossible for a sex offender to comply with SORNA in a non-implementing State if that State provides for a different registration period.[2] The same is true of § 16916, which requires a sex offender to appear in person every

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[2]Section 16915(b) then reduces the required period of registration for sex offenders who have a "clean record." 42 U.S.C. § 16915(b). Does this mean that the federal system requires non-implementing States to reduce the State's registration period for a sex offender's "clean record" even if that State provides for no such reduction? If this statute can be read to allow compliance simply by following State law, it would appear to offer leniency beyond what States promise. The logical conclusion, therefore, is that these provisions apply only to implementing States, not non-implementing States.

three (3) months, in certain cases, and have a photograph taken. What if a non-implementing State does not require or even permit such a drop-in? Can a sex offender force a State to take his photograph? Must he, in order to comply with SORNA? Notably, these provisions use the same command language as § 16913—i.e., "A sex offender shall"—suggesting that they are every bit as mandatory for a successful "registration" as § 16913, and yet such provisions would be impossible to comply with if a State had different registration requirements from the federal scheme.

These absurd results demonstrate that the plain language of SORNA precludes a sex offender from complying with the federal scheme by simply registering under the State protocol. Accordingly, a person seeking to understand his or her potential criminal liability under 18 U.S.C. § 2250(a)—which criminalizes failure "to *register* or update a registration as required by [SORNA]"—would naturally read the SORNA statute as only applying to those States that have implemented SORNA, i.e., those States in which it is *possible* to "register" under SORNA. Thus, because 18 U.S.C. § 2250(a) simply cannot be read to require an individual to register in a non-implementing State, that statute does not criminalize Mr. Felts's conduct, and the district court should have granted his motion to dismiss.

B. Interpreting SORNA's Criminal Provisions as only Applying in States That Have Implemented SORNA Avoids Constitutional Infirmities.

The above plain-language reading of SORNA is bolstered by the fact that such a reading avoids potential constitutional infirmities that arise from adopting the district court's view.

Through SORNA, Congress did not actually create a federal sex-offender registry for State sex offenders. It did not directly impose on those offenders any clear and definitive registration requirements. Indeed, it wanted to avoid directly imposing such requirements in order to avoid creating a clearly punitive statute that could easily run afoul of the Ex Post Facto Clause. Instead, Congress required the States to create those requirements as part of a nominally regulatory regime. Therefore, when Congress makes it a federal crime to fail to provide the registration information "as required by [SORNA]," it makes it a federal crime to provide the information required by the pertinent State in its implementation of that federal regulatory scheme. 18 U.S.C. § 2250(a)(3).

As discussed further below, this construction gives § 2250(a)(3) some protection from Ex Post Facto challenges because it minimizes the punitive effect of § 2250(a). Under this construction, § 2250(a) functions in aid of an independent and nominally regulatory regime. This construction also makes §

2250(a) redundant of a State criminal penalty for failure to comply under the State regime. Section 2250(a) is, consequently, merely an instance of the federal government providing federal law-enforcement mechanisms in aid of the State regulatory system.

This construction also gives § 2250(a)(3) protection from Due Process challenges regarding lack of notice. Once a State has implemented SORNA, a State will have clearly and definitively created the SORNA-mandated requirements (insofar as consistent with the State constitution) and will have given actual notice to offenders. Thus, this construction ensures that, before offenders are subjected to the federal ten (10) year criminal penalty, they have received actual notice of the clear and definitive registration requirements. Indeed, as the Supreme Court recognized in *Smith v. Doe*, 538 U.S. 84 (2003), it is only "logical to provide those persons subject to [a regulatory scheme] with a clear and unambiguous notice of the requirements and the penalties for noncompliance." *Id.* at 96.

Similarly, to punish Mr. Felts for violating a law with which he was unable to comply would violate the Due Process Clause. As discussed above, the plain language of the statute reveals many ways in which it may be impossible to comply with SORNA in a non-implementation State. Simply put, no State

apparatus exists in such States through which the offender can come into compliance with SORNA. Criminalizing the failure to do something that is impossible to do violates the Due Process Clause's guarantee of fundamental fairness. *See United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992) (finding a violation of fundamental fairness to hold someone liable for a crime when an essential element of the crime is his failure to perform an act that he is incapable of performing). Because it was, and remains, impossible for Mr. Felts to comply with SORNA in Tennessee, punishing him for failing to register under SORNA violates his due process rights.

In short, this Court should adopt the most logical construction of the "as required by [SORNA]" clause that refers to the sex offender requirements imposed by States that have actually implemented SORNA. Under this reading, when a State has not yet implemented SORNA, these requirements are not yet in effect; therefore, criminal penalties would not yet have attached. Accordingly, a defendant can only be held criminally liable for failing to register under State law "as required by [SORNA]" when and if Tennessee implements SORNA.

III. SUBJECTING MR. FELTS TO SORNA'S CRIMINAL PENALTIES VIOLATES THE EX POST FACTO CLAUSE, AND SORNA'S PROVISION ALLOWING THE ATTORNEY GENERAL TO MAKE THE ACT RETROACTIVE VIOLATES THE NONDELEGATION DOCTRINE.

A. Retroactive Application of SORNA Violates the Ex Post Facto Clause.

The Ex Post Facto Clause prohibits Congress and the States from enacting laws that impose additional punishment for a crime after it has been committed. *Weaver v. Graham*, 450 U.S. 24, 28 (1981). As the Supreme Court noted in *Weaver*:

> [O]ur decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. . . . Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Id. at 29-30.

The district court's retroactive application of SORNA to Mr. Felts violated the Ex Post Facto Clause by increasing Mr. Felts's punishment for an offense

committed over a decade ago.[3] In *Smith v. Doe*, 538 U.S. 84 (2003), a divided Supreme Court narrowly held that the retroactive application of the Alaska sex offender registration statute did not violate the Ex Post Facto Clause because it was not punitive, but instead was civil in nature. In the *Carr* Memorandum, which the district court used to explain its denial of Mr. Felts's motion to dismiss, the district court ruled that "SORNA resembles the Alaska sex offender registry statute that was upheld by the Supreme Court to an Ex Post Facto challenge in [*Smith*]," and accordingly found that SORNA "does not violate the Ex Post Facto Clause." (*Carr* Memorandum, Add. 1, at 7.)

The district court ignored, however, that the Alaska statute at issue in *Smith* is different in many critical ways from SORNA. Importantly, SORNA's penalties are much more burdensome and expansive than those of the Alaska Statute. That statute only created a single sex offender registry that did not require dissemination of sex offender information through the Internet, did not establish a community notification program, did not require in-person reporting, and *did not*

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[3]To be clear, there is no dispute that Mr. Felts pled guilty to his SORNA offense after August 1, 2008, the date on which the Attorney General's regulation purporting to make SORNA retroactive went into effect. *See United States v. Utesch*, 596 F.3d 302, 311 (6th Cir. 2010). Accordingly, this case is not governed by *Utesch* or *United States v. Cain*, 583 F.3d 408 (6th Cir. 2009), in which the defendants were convicted before that date.

establish federal felony criminal penalties. *Id.* at 90-91 (summarizing provisions of Alaska statute). Indeed, it would be difficult to credibly assert that SORNA's rigid regime and criminal penalties are not "more onerous than the law in effect" when Felts was convicted more than a decade go. *See Weaver*, 450 U.S. at 30. These differences make it evident that, unlike the Alaska statute, SORNA is indeed punitive, and therefore its retroactive application violates the Ex Post Facto Clause.

B. Granting the Attorney General the Power to Make SORNA Apply Retroactively Violates the Nondelegation Doctrine.

Even if SORNA's Ex Post Facto implications were not sufficient to render it unconstitutional, the Act's grant of power to the Attorney General to *make* it retroactive is unconstitutional. SORNA specifically permits the Attorney General "the authority to specify the applicability of the [registration requirements] to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). This provision effectively delegates broad-ranging legislative powers to the Attorney General, in violation of the nondelegation doctrine.

"Congress is manifestly not permitted to abdicate or transfer to others the legislative functions with which it is [constitutionally] vested." *Panama Refining*

Co. v. Ryan, 293 U.S. 388, 421 (1935). This "nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Although the doctrine does not prevent Congress from obtaining the assistance of its coordinate branches, it can only do so if Congress "clearly delineate[s] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id.* at 372-73 (internal quotations and citations omitted). In *Panama Refining Co.* and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court held that Congress had unconstitutionally authorized the Executive branch to make laws because "Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress delegated power." *Mistretta*, 488 U.S. at 374, n.7; *see Panama Refining Co.*, 293 U.S. at 421 (Congress unconstitutionally authorized—without Congressional guidance—the Executive branch to prohibit the transportation of excess petroleum, subject to fine and imprisonment); *Scheechter*, 295 U.S. at 495 (Congress unconstitutionally authorized the Executive branch to prescribe codes of fair competition, the violation of which would be a misdemeanor).

Similarly, in SORNA, Congress failed to articulate any policy to guide the Attorney General on the retroactivity of the Act. Congress gave no guidance to

the Attorney General as to whether all individuals who were convicted of sex offenses prior to the Act should be subject to it, regardless of the remoteness of their offenses, regardless of when they completed their sentences, and regardless of the nature of the offenses. Instead, Congress gave the Attorney General sole discretion to determine who should be subject to SORNA and who should not. Congress simply delegated its legislative role and handed the Attorney General the unfettered power to legislate the breadth of the Act. This is impermissible delegation. *United States v. Aldrich*, No. 8:07-CR-158, 2008 WL 427483 at 6 n.5 (D. Neb. Feb. 14, 2008) ("[T]he Attorney General is permitted to choose who [SORNA] applies to and when it applies. . . . The court is of the opinion that this is a legislative, not an executive function, and thus is unconstitutional.").

Nor is this an inconsequential delegation, because a retroactive sex offender law—which features public disclosure of even decades-old offenses—can ruin families, subject persons to job loss, harassment, homelessness, and violence. It can threaten public safety by destabilizing the lives of those posted on the Internet, which could in turn create a risk of recidivism and make it *more* difficult for authorities to keep track of and supervise those who would recidivate. Finally, as discussed above, it allows the Attorney General to expand the scope of the law to the point at which it implicates Ex Post Facto Clause concerns. If Congress

intends any law—particularly one with severe regulatory and criminal effects—to have retroactive effect, it must follow the path charted by the Constitution. Here, Congress handed this quintessentially legislative task to an official in the Executive branch.

Congress's delegation of this legislative function is particularly offensive here because the Department of Justice is not a regulatory agency, but rather a law enforcement agency. Although some delegation of legislative functions is essential in a government that must make specialized and expert decisions in various areas such as food and drugs, labor relations, education, and health, the Department of Justice is not a scientific agency with expertise in crimonology, penology, and sex offenses, but rather a police agency whose chief function is to arrest and prosecute lawbreakers. *See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The law in question, a criminal statute, is not administered by an agency but by the courts. . . . The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.") For Congress to give away its authority to the Attorney General to decide what the law is, to whom it applies, and how it must be complied with, is

an abdication of Congress's proper role, and violates the separation of powers.

IV. TO THE EXTENT THAT SORNA FORCES STATE OFFICIALS TO REGISTER SEX OFFENDERS BEFORE THE STATES HAVE AN OPPORTUNITY TO VOLUNTARILY COMPLY WITH THE LAW, THE ACT VIOLATES THE TENTH AMENDMENT.

As previously discussed, SORNA should not be read to impose a duty upon sex offenders to register in jurisdictions where SORNA has yet to be implemented. In turn, States have no obligation to register sex offenders until they implement SORNA. However, if this Court holds that SORNA forces Tennessee officials to register sex offenders in compliance with SORNA's onerous requirements before the State of Tennessee has an opportunity to voluntarily comply with SORNA, then the Act violates the Tenth Amendment of the Constitution.

The Tenth Amendment prohibits the federal government from commandeering State officials into enacting or administering federal law. *Printz v. United States*, 521 U.S. 898, 935 (1997). Here, SORNA gives the States until July 2009 to implement SORNA, 42 U.S.C. § 16924, and the Attorney General has extended that deadline to July 2011. To be sure, although Congress has provided that those States that do not implement SORNA by this deadline will lose a percentage of federal funding, this condition does not render SORNA void under the Tenth Amendment. The Spending Clause, U.S. Const. art. I, § 8, cl. 1, permits

Congress to "condition[] receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotations omitted).

Nevertheless, if SORNA requires State officials to register sex offenders now (prior to the July 2011 deadline for implementation), then the Act forces officials in States like Tennessee to procure and accept federally required sex offender registrations before the States themselves have the opportunity to choose whether or not to implement SORNA voluntarily. As discussed above, it is impossible to read SORNA as applying to non-implementing States without assuming that the law forces such States to make non-voluntary regulatory changes, including: accepting more registration information than they otherwise require, 42 U.S.C. § 16914(a); adjusting the length of the registration periods for offenders to comply with the federal system, *id.* § 16915(a); reducing the length of the registration period for defendants with "clean records" even where those States provide for no reduction, *id.* § 16915(b); and even photographing offenders at regular intervals, *id.* § 16916.

The Supreme Court's decision in *Printz* provides guidance here. In *Printz*, the Court invalidated a law requiring local law enforcement officials to conduct background checks of prospective handgun purchasers. The Court held that "[t]he

Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz,* 521 U.S. at 935. The local officials in *Printz* are analogous to the law enforcement officials who run State sex offender registries. Just as Congress cannot compel States to conduct federally mandated background checks, it cannot compel State officers to procure and accept registrations for a federally mandated sex offender program that the State has not voluntarily implemented. "[S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* at 935.

CONCLUSION

The district court erred in failing to dismiss the indictment against Mr. Felts. SORNA should not be interpreted as applying to Tennessee because Tennessee has not implemented it; retroactive application of SORNA violates the Ex Post Facto Clause by increasing punishment for prior convictions, and Congress improperly delegated the power to make it retroactive; and SORNA violates the Tenth Amendment by forcing States to register sex offenders before the State can comply voluntarily. Accordingly, Mr. Felts respectfully requests that the Court vacate his conviction.

Respectfully submitted,

/s/ Jude T. Lenahan

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been sent by court email to, Carrie Daughtery and Lynne Ingram, U.S. Attorney's Office, 110 9th Avenue South, Nashville, TN 37203 on this the 25th day of April, 2011.

/s/ Jude T. Lenahan
JUDE T. LENAHAN

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(b), the appellee designates the following district court documents as relevant.

Description of Entry	Date Filed in District Court	Record Number
Indictment	February 3, 2010	1
Motion to Dismiss Indictment	May 27, 2010	17
Response to Motion to Dismiss Indictment	June 7, 2010	19
Order Denying Motion to Dismiss	June 9, 2010	21
Order Accepting Plea Petition	November 15, 2010	23
Judgment on Sentencing	February 28, 2011	29
Notice of Appeal	March 1, 2011	31
Presentence Investigation Report	March 2, 2011	32
Sealed Transcript of Motion Hearing	March 9, 2011	33

CERTIFICATE OF COMPLIANCE

Comes Jude T. Lenahan, counsel for Appellant, pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, and hereby certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) in that it contains 5,781 words. In certifying the number of words in the brief I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Jude T. Lenahan
JUDE T. LENAHAN

Addendum 1 -

Memorandum & Order

United States v. Daniel G. Carr, U.S. Middle District No. 2:09-00010

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 2:09-00010
	)	JUDGE CAMPBELL
DANIEL G. CARR	)	

MEMORANDUM AND ORDER

I. Introduction

Pending before the Court is Defendant's Motion To Dismiss Indictment (Docket No. 21), the Government's Response thereto (Docket No. 24), and Defendant's Reply (Docket No. 30). The Court held a hearing on the Motion on May 10, 2010. For the reasons set forth below, the Motion is DENIED.

II. Factual/Procedural Background

The one-count Indictment in this case alleges that, on or about June 9, 2009, the Defendant was a person required to register under the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16901, et seq., and knowingly failed to register and update his registration in Tennessee, and traveled in interstate commerce from Tennessee to Mexico, in violation of 18 U.S.C. § 2250(a). (Docket No. 1).

Through the Motion and the Government's Response, the parties appear to agree on the following relevant dates and events. The Defendant was convicted of several offenses, including aggravated sexual battery, in Tennessee state court on October 13, 1999. (Docket No. 21, at 4; Docket No. 24, at 1). In September, 2006, the Defendant was released from prison to community supervision. (Id.) On November 28, 2007, the Defendant was convicted in Tennessee for violating the conditions of his community supervision, and was sentenced to an

additional term of imprisonment. (Docket No. 21, at 4; Docket No. 24, at 2). While still in custody, on January 15, 2008, the Defendant signed a three-page form, entitled "Tennessee Bureau Of Investigation - Sexual Offender/Violent Sexual Offender Instructions." (Docket No. 21, at 5; Docket No. 24, at 2; Exhibit D at Docket No. 21-4).[1] On March 27, 2009, the Defendant was released from state custody. (Id.) Defendant states that he boarded a bus in Nashville, on March 30, 2009, that carried him directly into Mexico. (Docket No. 21, at 5).

On April 21, 2009, an arrest warrant was issued in the State of Tennessee for the Defendant charging him with failure to register, in violation of Tenn. Code Ann. § 40-39-203, and with failing to report or register in violation of Tenn. Code Ann. §§ 40-39-208(1), (3), (7). (Docket No. 21, at 5; Docket No. 24, at 2-3; Exhibit E at 21-5). In June, 2009, the Defendant was arrested in Mexico, and was extradited to the Middle District of Tennessee. (Docket No. 21, at 5; Docket No. 24, at 3).

Defendant indicates that he subsequently, on June 18, 2009, signed a sex-offender registry form providing his registration information. (Docket No. 21, at 5; Exhibit F at Docket No. 21-6). The Indictment in this case was issued on September 9, 2009, and alleges that the Defendant traveled in interstate commerce, on June 9, 2009, without registering as required. (Docket No. 1).

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[1] In his brief, the Defendant states: "Shortly prior to his release, as required by Tennessee law, Carr gave state officials the requisite information to register as a sex offender under Tennessee law." (Docket No. 21, at 5). The Defendant has not filed any documentation of this event as an exhibit to his Motion, and the Government disputes that the Defendant registered prior to his release from prison. Resolution of this factual dispute, however, is not necessary to the Court's consideration of the issues raised in the Motion.

III. Analysis

Rule 12(b) of the Federal Rules of Criminal Procedure provides that any defense which is capable of determination without the trial of the general issue may be raised by motion before trial. In considering a motion made under Rule 12(b), district courts "may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder." United States v. Craft, 105 F.3d 1123, 1126 (6th Cir. 1997). See also United States v. Jones, 542 F.2d 661, 664-65 (6th Cir. 1976). In considering the arguments raised in the Defendant's Motion, the Court will rely on the facts to which the parties have agreed.

The Indictment in this case charges the Defendant with a violation of 18 U.S.C. § 2250(a), which provides:

(a) In general.--Whoever--

> (1) is required to register under the Sex Offender Registration and Notification Act ["SORNA"];
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

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

> (b) Affirmative defense.--In a prosecution for a violation under subsection (a), it is an affirmative defense that--
>
> > (1) uncontrollable circumstances prevented the individual from complying;
> >
> > (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and
> >
> > (3) the individual complied as soon as such circumstances ceased to exist.

SORNA was enacted on July 27, 2006, and establishes a "comprehensive national system" for the registration of sex offenders. 42 U.S.C. § 16901. SORNA requires sex offenders to register, and keep the registration current, in each jurisdiction where the offender resides, is an employee or is a student. 42 U.S.C. § 16913(a). To keep the registration current, SORNA requires 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) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 42 U.S.C. § 16913(c). SORNA also requires that each state maintain a sex offender registry conforming to the requirements set forth in the Act. 42 U.S.C. § 16912. Failure of a state to comply with the requirements of the Act results in a loss of certain federal funds. 42 U.S.C. § 16925.

SORNA authorized the Attorney General to determine the applicability of SORNA's provisions to sex offenders convicted prior to July 27, 2006. 42 U.S.C. § 16913(d). On July 2, 2008, the Attorney General issued final guidelines providing that SORNA's registration requirements apply to all sex offenders, including those convicted prior to the enactment of SORNA. 28 U.S.C. § 72.3. See United States v. Utesch, 596 F.3d 302, 307 (6th Cir. 2010).

Other guidelines issued by the Attorney General permit states to phase in certain SORNA registration requirements for these sex offenders. 73 Fed.Reg. 38030, 38063-64 (2008).

The Defendant challenges the Indictment in this case on four grounds: (1) SORNA does not apply to him because it has not been implemented by the State of Tennessee; (2) Application of SORNA to him violates the Ex Post Facto Clause; (3) The Defendant had no duty to register under SORNA because the Government failed to notify him of the Act's requirements; (4) Section 16913(d), which allows the Attorney General to make the Act retroactive, violates the non-delegation doctrine; and (5) To the extent that SORNA requires state officials to register sex offenders before the states have an opportunity to voluntarily comply with the law, the Act violates the Tenth Amendment.

Defendant first argues that because the State of Tennessee has not yet implemented SORNA, he could not have violated SORNA by failing to register in Tennessee. Courts in other jurisdictions that had not yet complied with SORNA requirements have rejected arguments similar to that made by the Defendant here. See, e.g., United States v. Brown, 586 F.3d 1342, 1349 (11th Cir. 2009); United States v. Gould, 568 F.3d 459, 464 (4th Cir. 2009); United States v. Hinckley, 550 F.3d 926, 939 (10th Cir. 2008); United States v. Dixon, 551 F.3d 578, 582 (7th Cir. 2008). In reaching that conclusion, the Eleventh Circuit explained:

> . . . SORNA was not enacted in a vaccuum. To the contrary, every state and the District of Columbia had a sex offender registration law prior to 2006. See Gould, 568 F.3d at 464. An individual may therefore comply with SORNA's registration requirements by registering through the state's sex offender registry, even if that jurisdiction has not implemented SORNA's administrative procedures. See id.; Dixon, 551 F.3d at 582; Hinckley, 550 F.3d at 939. Accordingly, a jurisdiction's failure to implement SORNA results in a loss of federal funds, 'not in an excuse for an offender who has failed to register.' Hinckley, 550 F.3d at 939.

Brown, 586 F.3d at 1349. See also United States v. Hann, 574 F.Supp.2d 827, 835 (M.D. Tenn. 2008)(Judge Aleta Trauger of this District observes: "The problem addressed by SORNA is not lack of registries, but coordination among registries and enforcement of registry requirements when sex offenders move across state lines.") The Court agrees with the reasoning of these courts. That the State of Tennessee has yet to fully develop the repository of information contemplated by SORNA does not excuse the Defendant from registering with the state through the currently-existing registry. To the extent the Defendant contends that the Tennessee registration system is deficient, the statute provides an affirmative defense where "uncontrollable circumstances" prevent a sex offender from registering as required. 18 U.S.C. § 2250(b).

Defendant next argues that application of SORNA to him violates the Ex Post Facto Clause of the United States Constitution. The Ex Post Facto Clause prohibits Congress and the States from enacting laws which impose a punishment for an act which was not punishable at the time it was committed, or impose additional punishment for a crime after it has been committed. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981).

SORNA was enacted on July 27, 2006, and the Indictment alleges that the Defendant traveled in interstate commerce, on June 9, 2009, without registering as required. As long as "uncontrollable circumstances" did not prevent the Defendant from registering with the sex offender registry in place in Tennessee at the time alleged in the Indictment, he was required by SORNA to register. That requirement existed at the time of the alleged crime, and therefore, application of SORNA to the Defendant does not violate the Ex Post Facto Clause. As discussed above, Defendant's duty to register is not dependent on whether Tennessee had fully

implemented the administrative requirements of SORNA at the time of the alleged crime. See United States v. Hann, 574 F.Supp.2d at 836.

To the extent the Defendant argues that applying SORNA's registration requirement to those convicted of sex offenses prior to SORNA's enactment, Judge Trauger rejected a similar argument in Hann and the Court agrees with her reasoning. Judge Trauger explained that the provisions of SORNA do not violate the Ex Post Facto Clause because they are not penal in nature, and noted that SORNA resembles the Alaska sex offender registry statute that was upheld by the Supreme Court to an Ex Post Facto challenge in Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). Hann, 574 F.Supp. 2d at 836-37 (citing United States v. Pitts, 2007 WL 3353423, at 7 (M.D. La. Nov. 7, 2007)). Thus, the Court concludes that SORNA does not violate the Ex Post Facto Clause.

Next, Defendant argues that he had no duty to comply with SORNA because the Government failed to notify him of the registration requirement. Defendant argues that both the statute and the Due Process Clause of the Constitution impose such a notification requirement. SORNA provides that "an appropriate official" shall notify sex offenders of the registration requirement before their release from custody or immediately after sentencing. 42 U.S.C. § 16917(a). For those who do not fall within these categories, the Act authorizes the Attorney General to prescribe rules for notification. 42 U.S.C. § 16917(b).

Although the Defendant admits that he was notified of the duty to register by officials of the State of Tennessee prior to his release from custody on January 15, 2008, he contends that notice applied only to the duty to register under Tennessee law, and did not specifically mention SORNA. Several courts have considered a similar argument and have held that when a sex

offender is provided notice by state authorities of his obligation to register under state law, the lack of specific notice under Section 16917 is not a defense. See, e.g., Gould, 568 F.3d at 468-69; Hinckley, 550 F.3d at 938-39; United States v. Trent, 568 F.Supp.2d 857, 866-69 (S.D. Ohio 2008). As the Fourth Circuit explained in Gould, SORNA's criminal provision is not a specific intent law as the term "knowingly" modifies the phrase "fails to register:"

> There is no language requiring specific intent or a willful failure to register such that he must know his failure to register violated federal law. . . And as a general matter, ignorance of the law does not provide a defense, for the law presumes that every person knows the law.

568 F.3d at 468.[2]

Relying on Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957), Defendant argues that the failure to provide him with notice of his obligation to register violates the Due Process Clause. In Lambert, the Supreme Court held that held that a city ordinance that required a convicted felon to register with the police if he or she stayed in Los Angeles for at least five days violated due process. In reaching its decision, the Court explained that the defendant had no notice of his duty to register and there were no circumstances which might alert him to inquire as to the necessity of registration. 78 S.Ct. at 243. In this case, by contrast, the Defendant admits that he was notified by state authorities of his duty to register prior to his release from prison. Other courts that have considered a similar argument have held that notice

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[2] The Court is not persuaded that the cases cited by the Defendant, United States v. Barnes, 2007 WL 2119895 (S.D.N.Y. July 23, 2007) and United States v. Smith, 528 F.Supp.2d 615 (S.D.W. Va. 2007), require a different result. In both of these cases, the alleged violation occurred prior to, or on the same day as, the issuance by the Attorney General of the interim rule that SORNA applied to past offenders. The alleged violation in this case occurred on June 9, 2009, almost a year after the Attorney General issued his final guidelines regarding retroactivity (July 2, 2008), and over a year after the issuance of the interim rule (February 28, 2007).

of a duty to register under state law is sufficient to satisfy the Due Process Clause. See, e.g., United States v. Hester, 589 F.3d 86, 91-93 (2nd Cir. 2009); Brown, 586 F.3d at 1450-51; Gould, 568 F.3d at 468-69; Hinckley, 550 F.3d at 939.

The Defendant also argues that in enacting SORNA, Congress violated the non-delegation doctrine by delegating to the Attorney General the authority to decide how SORNA would be applied to past offenders. 42 U.S.C. § 16913(d). Subsection (d) of Section 16913, entitled "Initial registration of sex offenders unable to comply with subsection (b) of this section," provides:

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

Subsection (b) provides for the initial registration of sex offenders before completing a sentence of imprisonment, or three days after sentencing if the sex offender is not sentenced to a term of imprisonment.

The non-delegation doctrine prohibits Congress from abdicating or transferring to others the essential legislative functions with which it is vested by Article I of the Constitution. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). Congress is permitted, however, to obtain the assistance of the other branches of Government in the execution of legislation:

> So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'

Mistretta v. United States, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989)(quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed.2d 624 (1928)).

The courts that have considered this issue have concluded that the delegation to the Attorney General in Subsection (d) is limited in nature and does not provide the Attorney General with the authority to legislate. See, e.g., United States v. Barner, 635 F.Supp.2d 138, 151-52 (N.D.N.Y. 2009); Hann, 574 F.Supp.2d at 837; United States v. Trent, 568 F.Supp.2d at 870 (Pointing out that the Supreme Court has struck down legislation on non-delegation grounds in only two cases, and those were decided in 1935). The Court agrees with the reasoning of these courts. As the Second Circuit pointed out in United States v. Guzman, 591 F.3d 83, 91-92 (2nd Cir. 2010), whether Subsection (d) is interpreted broadly to permit the Attorney General to determine retroactivity as to past offenders, or more narrowly to permit the Attorney General only to *implement* SORNA with respect to all sex offenders, the statute does not violate the non-delegation doctrine because the Attorney General's authority in either case is "highly circumscribed." Accordingly, the Court concludes that SORNA is not unconstitutional on non-delegation grounds.

Finally, the Defendant argues that SORNA violates the Tenth Amendment by forcing Tennessee state officials to implement a sex offender registry in compliance with its requirements. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. In Printz v. United States, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), the Supreme Court applied the Tenth Amendment to strike down a law requiring local law enforcement officials to conduct background checks of prospective handgun

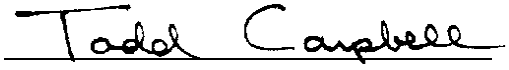
purchasers. In reaching its decision, the Court explained that the federal government "may neither issue directives requiring the states to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." 117 S.Ct. at 2384.

The courts that have considered Tenth Amendment challenges to SORNA have concluded that the statute is not unconstitutional because it does not compel any state action. See, e.g., Barner, 635 F.Supp.2d at 151; United States v. Crum, 2008 WL 4542408, at *7 (W.E. Wash. Oct. 8, 2008). As these courts point out, under SORNA, states are encouraged to adopt certain administrative changes to their sex offender registries through monetary incentives. Crum, supra. States may "either choose to amend their registration requirements under SORNA, or continue to conduct business as usual by registering sex offenders under the state registries already in place." Id. By providing that choice, SORNA does not compel the states to adopt its provisions, and does not violate the Tenth Amendment.

IV. Conclusion

For the reasons set forth above, the motion to dismiss is denied.

It is so ORDERED.



TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE