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

REPLY BRIEF OF APPELLANT

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As fully articulated in Mr. Felts's principal brief, interpreting SORNA's registration requirements as requiring those defendants who reside in states that have not implemented SORNA simply to register under any available state registration law strains the plain language of the statute to the breaking point and raises critical constitutional questions. Rather, the statute should be read consistent with its statutory purpose: to create a consistent and comprehensive system of sex-offense registration through Congress's authority under the Spending Clause by conditioning states' receipt of federal funds on states' implementation of this consistent and comprehensive system. Under this holistic reading of the statute, SORNA's registration requirements take effect upon a state's implementation of SORNA.

In response, the government has argued something extraordinary: that *one* subsection of one section of the broader SORNA statute—i.e., subsection (a) of 42 U.S.C. § 16913—should be read as a requirement by Congress that certain citizens must simply comply with preexisting state laws that may or may not have anything to do with SORNA. This interpretation is radical because (1) it cannot be supported by the plain language of the SORNA statute and the context in which that subsection appears and (2) it would read the statute in the most

constitutionally troubling manner possible by divorcing this purported independent registration requirement from Congress's spending power and, presumably, relying on the Commerce Clause to require individuals to do something entirely unrelated to interstate commerce.[1]

I. THE PLAIN LANGUAGE AND CONTEXT OF SORNA'S REGISTRATION REQUIREMENT INDICATE THAT THE REQUIREMENT CANNOT BE READ AS INDEPENDENT OF SORNA'S STATE-IMPLEMENTATION PROVISIONS.

SORNA's section 16913(a) requires that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, ad where the offender is a student. 42 U.S.C. § 16913(a). The government asserts that this language should be interpreted as requiring a state sex offender to comply with *any* applicable state's sex offender registry regardless of whether that state has implemented SORNA, because that section's language "does not condition an individual's [registration] obligation . . . on a particular state's implementation of the statute." (Appellee's Brief at 15.)

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[1]Mr. Felts's principal brief raises several issues aside from the issue addressed herein, including issues related to the ex post facto clause, the non-delegation doctrine, and the Tenth Amendment. In the interest of brevity, Mr. Felts respectfully submits that those issues are adequately briefed by both parties and here addresses the most important and contentious issue before this Court.

The government also cites to several circuit court cases agreeing with that interpretation. (*Id.* at 15-17.) The interpretation is wrong.

Although it is true that § 16913(a) requires a sex offender to "register," the key question—as explained in Mr. Felts's principal brief and not addressed by the government—is what it means to "register" under SORNA. The entirety of the SORNA statute makes clear what "registration" means, and the government's theory is only possible by reading that section in strict isolation from SORNA's other provisions. Placed in the context of the entire statute, however, it is clear that "registration" is fundamentally tied to a state's implementation of SORNA.

A. "Registration" Under SORNA Explicitly Requires More than Mere Compliance with Preexisting Statutes, and Such Registration Is Impossible in a Non-Implementing State.

First, the mandatory language SORNA uses indicates that the statute's registration requirement is tied to state implementation. Section 16913(a) uses the mandatory language of "A sex offender shall . . . ." Far from standing in isolation, this language appears throughout SORNA in identical form. *See* §§ 16913(b)-(c), 16914(a), 16915(a), 16916. The consistent use of this language indicates that *all* provisions using such language are mandatory registration requirements, and this consistency itself belies the government's theory that § 16913(a) somehow stands alone as the sole requirement that sex offenders must meet.

It is necessary for the government to argue this, however, because a sex offender *cannot* adequately accomplish any of these mandatory requirements in states that have not implemented SORNA. For example, §§ 16914(a)(1)-(7) provide seven categories of information that a sex offender *shall* provide, one of which is "[a]ny other information required by the Attorney General." Of course, this presumes that a state has implemented the federal statute. Likewise,§ 16916 requires sex offenders to verify their information periodically and allow a state to take their photograph. Compliance with this requirement—and others like it—is entirely contingent on a state's own requirements that sex offenders comport with these provisions, i.e., on a state's having implemented SORNA's requirements.

If this mandatory language—identical in every respect to that contained in § 16913—is not tied to a state's implementation of SORNA, "registration" under SORNA would absurdly require sex offenders to provide information that their states of residence do not accept, and even insist that states take their photographs when those states make no provision for such photographs.

B. When SORNA Uses the Phrase "A Sex Offender Shall," It Is a Dual Mandate to Both Sex Offenders and the States, and Thus Is Fundamentally Tied to a State's Implementation of SORNA.

The government's reading of the mandatory language of § 16913(a) as creating a registration requirement independent of a state's implementation of

SORNA is also undermined by the fact that the "[a] sex offender shall" language of that section *must* be read as a requirement to the states. In other words, every time Congress used this language, it intended it as a *dual mandate* to both the sex offender and the implementing states, not simply to the sex offender.

As an example, § 16914(a) and § 16914(b) both describe different information that must be provided for SORNA's sex offender registry, but the former dictates seven categories of information that *sex offenders* must provide, while the latter dictates eight categories of information the *states* "shall ensure" is "included in the registry for that sex offender." What is remarkable about the two categories is that there is no overlap between them, such that, for example, a sex offender must provide a social security number, § 16914(a)(2), but an implementing jurisdiction is seemingly not required to ensure that the sex offender do so under § 16914(b). This interpretation, however, would be nonsensical and would defeat SORNA's underlying purpose. The better interpretation is that, in order to implement SORNA, a state *must* create a system in which it requires all of the information that sex offenders are required to provide under § 16914(a), such as name, address, place of employment, etc.

By the same logic, substantial implementation of SORNA must surely *require* states to implement the "duration of registration requirements" of

§ 16915(a), even though those requirements are phrased as requirements of the offender, not the jurisdictions. The same is true of the periodic in-person verification requirements of § 16916, which are strictly phrased as requirements of the offender, but must logically be required of the states in order to achieve substantial implementation.

The clear implication of this dual mandate is that, where SORNA uses the language "[a] sex offender shall," it is a mandate not only to the sex offender, but also to states that wish to achieve substantial implementation. Indeed, the SMART Guidelines explicitly recognize this dual mandate, noting that in order to achieve substantial implementation, "each jurisdiction must incorporate in the laws and rules governing its registration and notification program the requirements that SORNA imposes on sex offenders, as well as those that are addressed directly to jurisdictions and their officials." SMART Guidelines, 73 Fed. Reg 38030, 38048 (July 2, 2008). Thus, where § 16913(a) requires sex offenders to register in the states in which they reside, work, or study, it is necessarily a requirement that implementing states mandate such registration of the sex offenders.

Under this reading, the registration requirement is intimately tied to the states' implementation requirements. This intimate connection belies the assertion by the government and certain circuit courts that "'the structure of SORNA's

requirements indicates a separateness of the sex offender's individual duty to register and the State's duty to enhance its registries and standards as mandated by the Act.'" (Appellee's Brief at 15 (quoting *United States v. Gould*, 568 F.3d 459, 464 (4th Cir. 2009)).) Rather, they are the *same* requirement, and this connection indicates that Congress intended to require state implementation of SORNA before a sex offender is required to "register under SORNA," especially in light of the fact that, as discussed above, such registration is impossible without such state implementation.

In sum, the plain language of SORNA and the context in which SORNA's registration requirement appears simply do not support the government's argument that § 16913(a) creates a registration requirement separate and apart from a state's broader implementation of SORNA. Rather, the two requirements are intimately connected, and a sex offender's "registration" under SORNA is necessarily commensurate with a state's implementation of SORNA.

II. THE GOVERNMENT'S PROPOSED INTERPRETATION WOULD RAISE NUMEROUS PROBLEMATIC CONSTITUTIONAL ISSUES, ESPECIALLY WITH REGARD TO CONGRESS'S LIMITED AUTHORITY TO REGULATE NON-COMMERCIAL ACTIVITY.

"[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that

which will save the Act." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (citing *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). As discussed in Mr. Felts's principal brief, interpreting SORNA as applying in non-implementing states raises a host of constitutional problems, including Tenth Amendment concerns and simple Due Process concerns in light of the incredible vagueness of the SORNA statute under that interpretation.

The position advanced in the government's Appellee's Brief, however, takes these constitutional concerns a step further. By asserting that § 16913(a) should be interpreted as an entirely separate congressional mandate that individual sex offenders must register under any available state law—which state laws need not be related to the larger SORNA scheme—the government has divorced that provision from SORNA's valid constitutional base, the Spending Clause. Absent that constitutional base, Congress does not have any independent authority to order individuals to register under their state laws. Because the government's interpretation does not have any constitutional basis, Mr. Felts likewise may not be held criminally liable for failing to register under 18 U.S.C. § 2250(a).

A. The Government's Interpretation of § 16913(a) as a Requirement Independent of State Implementation Divests that Provision of Spending Clause Authority.

As discussed above, SORNA's various requirements—including the requirements directed toward sex offenders—delineate how states must register sex offenders in order to create a uniform, national system of registration. SORNA further conditions the states' receipt of federal funds on such implementation. Because this Congressional expenditure "is intended to serve general public purposes," "unambiguously" gives states the choice whether or not to adopt the legislation, and is related to a "particular national project[] or program[], SORNA bears all the hallmarks of a statute passed under Congress's authority pursuant to the Spending Clause. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

The government, however, has advocated an interpretation of § 16913(a) under which that provision has nothing to do with a state's implementation thereof. Under the Government's interpretation, § 16913(a), upon its enactment on July 27, 2006, imposed directly and immediately on state sex offenders a legal obligation to travel to a state facility and register (or update a registration) under *any* preexisting state registration law, regardless of whether it has anything to do with the comprehensive system mandated by SORNA. In short, the government

has interpreted this one provision as being *unrelated* to Congress's spending power. As such, because "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution," which are "defined and limited," Congress's authority must be derived from some other constitutional provision. *United States v. Morrison*, 529 U.S. 598, 607 (2000) (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).

B. The Commerce Clause Does Not Justify the Government's Interpretation of § 16913(a).

Section 16913(a) requires sex offender to "register" even if the offender never crossed a state line. *Id.* That is, under the government's view, § 16913(a) imposed registration requirements, regardless of whether a state had implemented SORNA, on individuals who were (1) convicted of State sex offenses and (2) who never traveled in interstate commerce.

That view runs directly into a considerable constitutional pitfall because Congress has no power to directly regulate such individuals in non-implementing states who, for example, have done nothing but been convicted of a state sex offense and then, for example, had a change of name or address. Divorced from Congress's spending power, the only constitutional justification for this uniquely intrusive mandate would be that it is a legitimate exercise of powers under the

Commerce Clause. U.S. Const. art. I, § 8, cl. 3. But that clause does not justify a requirement that would directly apply to individuals. The Commerce Clause gives Congress the power "[to] regulate Commerce . . . among the several States." *Id*. Under the Commerce Clause, Congress has power to regulate "three broad categories of activity:" (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995). None of these three categories are involved in requiring a state sex offender to register under 42 U.S.C. § 16913.

As for the first "broad category," 42 U.S.C. § 16913 purports to require a sex offender to register under even a non-implementing state's law (under the government's interpretation) without ever having engaged in "the use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558. There is simply no interstate travel requirement in § 16913.

The second category, whether § 16913 implicates any "instrumentalit[y] of interstate commerce" or "persons or things in interstate commerce," *Lopez*, 514 U.S. at 558, is not satisfied either. Again, the government's argument is entirely premised on the notion that § 16913(a) is separate from SORNA's broader state requirements of

creating a comprehensive national sex offender registry. This interpretation would not implicate any instrumentality of interstate commerce.

Finally, as for the third category, simply registering under a non-implementing state's pre-existing state law is not an "activit[y] that substantially affect[s] interstate commerce." *Id.* The Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000) supports this conclusion. The *Morrison* Court struck down a statute that created a federal civil remedy for victims of gender-motivated crimes of violence. *Id.* at 607-18. Like SORNA, that statute did not regulate economic activity or contain a jurisdictional element. *Id.* at 613. Although the statute was supported by express Congressional findings regarding the effects upon interstate commerce of gender-related violence, the Congressional findings were rejected as insufficient because they relied on "costs of crime" and "national productivity" rationales that were too attenuated to justify federal regulation. *Id.* at 614-15; *see also Lopez*, 514 U.S. at 563-64 (rejecting such rationales).

SORNA's registration requirement similarly regulates non0economic activity, but it presents an even clearer case than in *Morrison* because here there are also no findings whatsoever regarding interstate commerce. The Adam Walsh Act enacts a wide range of legislation in addition to SORNA, and while Congress included findings

in other sections of the Act,[2] SORNA contains no such findings. Like the Gun Free School Zone Act analyzed in *Lopez*, SORNA is unsupported by legislative findings indicating that purely local sex crimes have any link with interstate commerce.

On the contrary, the SMART Guidelines indicate that the Attorney General's office believed that § 16913 could *not* stand alone as a valid exercise of Congress's commerce power. Explaining the relationship between the registration requirements and 18 U.S.C. § 2250, the SMART Guidelines state that the failure-to-register offense creates a crime for sex offenders "who knowingly fail to register or update a registration as required *where circumstances supporting federal jurisdiction exist*, such as interstate or international travel by a sex offender, or conviction of a federal sex offense for which registration is required." SMART Guidelines, 73 Fed. Reg. 38030, 38068 (July 2, 2008) (emphasis added). The clear implication is that federal jurisdiction does *not* exist to regulate the simple act of registration. Again, this does not invalidate the registration requirement of SORNA. Rather, that requirement is perfectly valid when it is tied to a valid exercise of congressional authority, such as

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[2]For example, Title V of the Adam Walsh Act, entitled "Child Pornography Prevention," contains findings that "intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce..." H.R. 4472, Sec. 501, *codified at* 18 U.S.C. § 2251.

Congress's power under the Spending Clause. It only demonstrates that the government's interpretation—which is expressly premised on § 16913(a) being an independent requirement in no way tied to a State's implementation—cannot be constitutionally permissible.

Because 42 U.S.C. § 16913(a) cannot be justified under any of the three categories identified in *Lopez*, it cannot be justified as a valid exercise of power by Congress under the Commerce Clause. In at least one case, the Government has rightfully conceded this point. *United States v. Waybright*, 561 F. Supp. 2d 1154, 1164 (D. Mont. 2008) ("At oral argument on Waybright's motion to dismiss, the United States changed course and conceded § 16913 could not be upheld under the Commerce Clause alone. The concession is right.") *disapproved of by United States v. George*, 579 F.3d 962, 966 n.2 (9th Cir. 2009). As the court in *Waybright* explained: "Section 16913 has nothing to do with commerce or any sort of economic enterprise; it regulates purely local, non-economic activity." *Id.* This Court should likewise conclude that the Commerce Clause does not permit enforcement of § 16913 in a context that—as advanced by the government—is entirely divorced from Congress's authority to encourage states to implement the broader SORNA statute.

C. Because § 16913(a) is Constitutionally Infirm when Unattached to a State's Implementation Thereof, Mr. Felts Cannot Be Criminally Liable Under 18 U.S.C. § 2250(a).

This conclusion makes it impossible for the Government to sustain a conviction under 18 U.S.C. § 2250(a), regardless of whether the offender has traveled in interstate commerce. That fact is clear when one considers that the crime of violating § 2250(a) "has three elements." *United States v. Cain*, 583 F.3d 408, 412 (6th Cir. 2009). Those elements are:

1. That the defendant "is required to register under [SORNA],"

2. That the defendant "travels in interstate . . . commerce," as alleged in the indictment, and

3. the defendant "knowingly fails to register or update a registration as required by [SORNA]."

18 U.S.C. § 2250(a); *see Cain*, 583 F.3d at 412; 3-61 Modern Federal Jury Instructions – Criminal ¶ 61.10.

The first element requires the Government to prove that the defendant "is required to register under [SORNA]." 18 U.S.C. § 2250(a)(1). Appropriately enough, the Government charged this element in the indictment by alleging that Mr. Felts was "required to register under [SORNA], Title 42, United States Code, Section 16901 *et. seq.*" (R.1, Indictment.) As discussed above, however, this registration requirement purportedly imposed by § 16913(a) is invalid when divorced from a state's

implementation thereof because Congress lacked the authority to enact it as an independent requirement. This invalidity provides Mr. Felts with a complete legal defense to the offense's first element. Since the government could not establish the first element under its unconstitutional interpretation of the statute, Mr. Felts's conviction is invalid, even if the government can establish the second and third elements. In sum, because § 16913 is invalid under the interpretation advanced by the government, a charge under 18 U.S.C. § 2250(a) could not be sustained. *Waybright*, 561 F. Supp. 2d at 1168 (dismissing indictment on this ground).

CONCLUSION

For the reasons stated herein and in Mr. Felts's principal brief, the government's proposed interpretation of SORNA cannot be sustained by the language and context of the statute and would push SORNA outside of the realm of Congress's constitutional authority. The most natural, sensible, and constitutional reading—that SORNA's registration requirements are contingent on state implementation of SORNA—should prevail.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a Notice of Electronic Filing to: Carrie Daughtrey and Lynne Ingram, U.S. Attorney's Office, 110 9th Avenue South, Nashville, TN 37203 on this the 22nd day of June, 2011.

/s/ *Jude T. Lenahan*
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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 **3,354** 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*
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