No. 11-5237

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

DAVID WAYNE FELTS
Defendant -Appellant

On Appeal from the United States District Court
Middle District of Tennessee, Nashville Division
Todd J. Campbell, Chief District Judge; Case No. 2:10-00002

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT REGARDING ORAL ARGUMENT. vii

STATEMENT OF SUBJECT MATTER JURISDICTION. 1

STATEMENT OF THE ISSUES ON APPEAL. 2

STATEMENT OF THE CASE. 3

STATEMENT OF THE FACTS. 5

SUMMARY OF THE ARGUMENT. 13

ARGUMENT.. 14

I. The lower court was correct in denying Defendant's motion to dismiss because assuming *arguendo* that the State of Tennessee has not yet implemented the provisions of SORNA, such failure to implement does not render the registration provisions of the Act inapplicable to Defendant. 14

II. The lower court was correct in denying Defendant's motion to dismiss because subjecting Defendant to SORNA's criminal penalties does not violate the Ex Post Facto Clause, and SORNA's provision allowing the Attorney General to make the Act retroactive does not violate the Nondelegation Doctrine. 20

A. Retroactive application of SORNA does not violate the Ex Post Facto Clause. 21

B. Granting the Attorney General the power to make SORNA apply retroactively does not violate the Nondelegation Doctrine. 26

III. The lower court was correct in denying Defendant's motion to dismiss because Defendant lacks standing to assert SORNA's alleged violation of the Tenth Amendment. 31

CONCLUSION. 35

CERTIFICATE OF COMPLIANCE.. 36

CERTIFICATE OF SERVICE. 36

ADDENDUM: APPELLEE'S DESIGNATION
OF RELEVANT DISTRICT COURT DOCUMENTS. 37

TABLE OF AUTHORITIES

FEDERAL CASES **Page(s)**

Buttfield v. Stranahan, 192 U.S. 470 (1904).. . . . . 29, 30

Collins v. Youngblood, 497 U.S. 37 (1990). 22

Gonzales v. Raich, 545 U.S. 1 (2005). 31

Panama Refining Company v. Amazon Petroleum Corporation,
293 U.S. 388 (1935). 29, 30

Printz v. United States, 521 U.S. 898 (1997). 32, 33

Schechter Poultry Corporation v. United States,
295 U.S. 495 (1935). 27, 29, 30, 31

South Dakota v. Dole, 483 U.S. 203 (1987). 33

Tennessee Elec. Power Company v. Tennessee Valley Authority,
306 U.S. 118 (1939). 32

United States v. Ambert, 561 F.3d 1202 (11th Cir. 2009). 22

United States v. Brown, 586 F.3d 1342 (11th Cir. 2009). 18, 19

United States v. Cain, 583 F.3d 408 (6th Cir. 2009). 7, 11

United States v. DiTomasso, 621 F.3d 17 (1st Cir. 2010). 22

United States v. Dixon, 551 F.3d 578 (7th Cir. 2008). 18, 19

United States v. George, 625 F.3d 1124 (9th Cir. 2010). 16, 22

United States v. Gould, 568 F.3d 459 (4th Cir. 2009). 16, 19, 20, 22

FEDERAL CASES (Cont.) **Page(s)**

United States v. Grimaud, 220 U.S. 506 (1911). 30

United States v. Guzman, 591 F.3d 83 (2d Cir. 2010). 22, 28

United States v. Hacker, 565 F.3d 522 (8th Cir. 2009). 33

United States v. Hann, 574 F.Supp.2d 827 (M.D. Tenn. 2008). . . . . *passim*

United States v. Hart, 635 F.3d 850 (6th Cir. 2011).. 14

United States v. Hinckley, 550 F.3d 926 (10th Cir. 2008). 18, 19, 22

United States v. Johnson, 632 F.3d 912 (5th Cir. 2011).. 23

United States v. May, 535 F.3d 912 (8th Cir. 2008). 19, 22

United States v. Pendleton, 636 F.3d 78 (3rd Cir. 2011). 18

United States v. Shenandoah, 595 F.3d 151 (3rd Cir. 2010). 18, 22, 33

United States v. Utesch, 596 F.3d 302 (6th Cir. 2010). 7, 19, 28, 33

United States v. Whaley, 577 F.3d 254 (5th Cir. 2009). 19

United States v. Young, 585 F.3d 199 (5th Cir. 2009). 22

United States v. Zuniga, 579 F.3d 845 (8th Cir. 2008).. 33

FEDERAL STATUTES

18 U.S.C. § 2250. . . . . 9, 23

18 U.S.C. § 2250(a). 3, 7

21 U.S.C. § 811. 31

28 U.S.C. § 1291. 1

42 U.S.C. § 16911. . . . . 8, 9

42 U.S.C. § 16911(1).. 8

42 U.S.C. § 16911(10).. 7

42 U.S.C. § 16911(5)(A). 8

42 U.S.C. § 16913. 7

42 U.S.C. § 16913(a). 9, 15

42 U.S.C. § 16913(b).. 30

42 U.S.C. § 16913(c). 9

42 U.S.C. § 16913(d).. . . . . 27, 30

42 U.S.C. § 16917. 9

42 U.S.C. § 16924. 8

42 U.S.C. § 16925. 8

42 U.S.C. § 61913(a). 16

<u>FEDERAL RULES</u> (Cont.)

6th Cir. R. 28(c). 38

6th Cir. R. 30(b). 38

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that the facts and legal arguments are adequately presented in the brief and that oral argument is not necessary. However, the defense has requested oral argument in its brief.

STATEMENT OF SUBJECT MATTER JURISDICTION

The district court's judgment was entered on February 28, 2011. (R. 29: Judgment). Defendant's notice of appeal was timely filed on March 1, 2011. (R. 31: Notice of Appeal). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. WHETHER THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT ("SORNA") APPLIES TO SEX OFFENDERS WHO FAIL TO REGISTER IN THE STATE OF TENNESSEE WHEN TENNESSEE HAS NOT YET IMPLEMENTED ALL OF THE REQUIREMENTS OF SORNA.

II. WHETHER APPLICATION OF SORNA VIOLATES THE EX POST FACTO CLAUSE BY CREATING PUNISHMENT FOR FAILING TO REGISTER WHEN SORNA WAS ENACTED AFTER DEFENDANT'S ORIGINAL CONVICTION BUT BEFORE THE SEPARATE VIOLATION OF FAILURE TO REGISTER, AND WHETHER CONGRESS IMPROPERLY DELEGATED ITS LEGISLATIVE POWERS BY GIVING THE ATTORNEY GENERAL THE RIGHT TO DETERMINE THE APPLICATION OF SORNA.

III. WHETHER SORNA VIOLATES THE TENTH AMENDMENT WHEN THE DEFENDANT, AN *INDIVIDUAL* RATHER THAN A STATE, CHALLENGES THE CONSTITUTIONALITY OF THE ACT.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's denial of Defendant's motion to dismiss the indictment against him, which stated that he failed to register under SORNA. Defendant argued that the statute was either (1) inapplicable to him because Tennessee had not yet 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 to dismiss. Defendant then pled guilty for failing to register and is currently serving a sentence of twenty-four (24) months in prison.

B. Course of Proceedings Below

On February 3, 2010, Defendant 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, Defendant filed a motion to dismiss the indictment, challenging SORNA as unconstitutional and inapplicable in Tennessee. (R. 17: Motion to Dismiss). On June 9, 2010, the district court denied the motion to dismiss (R. 21: Order Denying Motion). On November 15, 2010, Defendant pled guilty to the offense, and the district court accepted his plea. (R. 23: Order Accepting Plea Petition). In a February 28, 2011 hearing, the district court sentenced Defendant to

twenty-four (24) months imprisonment. (R. 29: Judgment). Defendant filed a notice of appeal on March 1, 2011. (R. 31: Notice of Appeal).

STATEMENT OF FACTS

On August 30, 1994, Defendant was convicted of Rape of a Child (a twelve-year-old female victim on November 30, 1993) and Aggravated Sexual Battery (a different twelve-year-old victim on October 26, 1993). (R. 32: Presentence Investigation Report at 5 ¶ 3). For these crimes, Defendant served a combined sentence of fifteen (15) years in prison. (R. 32: Presentence Investigation Report at 5 ¶ 3).

Upon release from prison in December 2008, Defendant was required to register as a sex offender on the Tennessee Sexual Offender/Violent Sexual Offender Registration, Verification and Tracking System (hereinafter referred to as "SOR"). (*Id.* at ¶ 4). Offenders on the SOR must register in person with the designated law enforcement agency within forty-eight (48) hours of establishing or changing a primary or secondary residence, establishing a physical residence at a particular location, or becoming employed. *See* Tennessee Sexual Offender/Violent Sexual Offender Registration/Verification/Tracking Form. Additionally, registered sex offenders are not allowed to reside in the same location as a minor. *Id*. Since his release from prison, Defendant has been arrested three (3) times for violating his conditions for registering with the SOR. (*See* R.32: Presentence Investigation Report, at 10).

On January 19, 2010, Defendant, his girlfriend, Owen, and Owen's six-year-old daughter, Faith, flew on one-way tickets from Miami, Florida to San Juan, Puerto Rico. *Id.* at 5 ¶ 7. Defendant failed to update his Tennessee sex offender registration even though he changed his residence, living in a hotel for two (2) weeks in Florida and then renting an apartment with Owen and her minor daughter in Puerto Rico. *Id.* at 5-6 ¶ 7. At the time he flew to Puerto Rico, Defendant was wanted by the Putnam County Sheriff's Office on two (2) failure to appear warrants, in which he was originally charged for sex offender registry violations, and by Metro Nashville Police Department on three (3) warrants for violating the conditions set forth in the sex offender registry. *Id.* at 10.

After Defendant relocated to Puerto Rico with Owen and her young daughter, the Grand Jury for the Middle District of Tennessee returned a single count indictment against him. (R.1: Indictment). The indictment charged that on or about January 19, 2010, in the Middle District of Tennessee and elsewhere, Defendant, a sex offender required to register under the Sex Offender Registration and Notification Act, 42 U.S.C. § 16901, traveled in interstate commerce from Tennessee to Puerto Rico and knowingly failed to register in Tennessee as required, a violation of 18 U.S.C. § 2250(a). *Id.*

Background on SORNA:

Congress passed the Sex Offender Registration and Notification Act (SORNA) on July 27, 2006 for the purpose of "creat[ing] a national system for the registration of sex offenders." *United States v. Utesch*, 596 F.3d 302, 306 (6th Cir. 2010) (citing 42 U.S.C. § 16901). On the day that SORNA was passed, the Act did not apply retroactively to offenders who had been convicted of a predicate sexual offense prior to the date of its enactment. *United States v. Cain*, 583 F.3d 408, 419 (6th Cir. 2009). Pursuant to 42 U.S.C. § 16913, the decision to apply SORNA retroactively vested with the Attorney General. *Id*. Effective on August 1, 2008, the Attorney General's comprehensive guidelines for SORNA (commonly referred to as the "SMART" guidelines because of their creation by the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking) made the provisions of the Act applicable to sex offenders, like Defendant, who were convicted sex offenders prior to SORNA's enactment. *Utesch*, 596 F.3d at 311.

SORNA sets national standards for sex offender registration systems for all states and the District of Columbia. 42 U.S.C. § 16911(10) (2006). SORNA does not require that any state adopt such standards, and it also does not create a federally-mandated national sex offender registry. *See* 42 U.S.C. § 16911. To the contrary, SORNA explicitly disavows such a mandate in favor of encouraging states to

implement its standards by conditioning the receipt of ten percent (10%) of the federal funds the state would otherwise receive during the fiscal year, pursuant to Chapter 46 of Title 42 of the United States Code, on the state's substantial compliance with those standards. *See* 42 U.S.C. § 16925. The Attorney General originally provided a deadline of July 2009 for states to implement SORNA's standards. *See* 42 U.S.C. § 16924. However, the Attorney General has accommodated states by extending the deadline for substantial implementation of SORNA to July 27, 2011. U.S. Dept. of Justice, SMART Office "Newsroom," *available at* http://www.ojp.usdoj.gov/smart/newsroom.htm (last visited May 23, 2011).

One of the fundamental standards that SORNA encourages states to incorporate into their registration system is the requirement that all "sex offenders" register. 42 U.S.C. § 16911(1). A "sex offense" is defined under SORNA as a "criminal offense [federal, state, local, tribal, military, or foreign] that has an element involving a sexual act or sexual contact with another." 42 U.S.C. § 16911(5)(A). A second fundamental standard that SORNA encourages states to incorporate into their registration systems involves notification to sex offenders of their registration obligations. To substantially comply with SORNA, a state must explain those obligations to sex offenders and ensure that sex offenders sign a form acknowledging their registration

obligations. 42 U.S.C. § 16917. Under SORNA, the notification of sex offender obligations should occur, if possible, prior to a sex offender's release from prison or immediately after sentencing for the commission of a sex offense that does not result in incarceration. *Id*.

SORNA only directly imposes federal registration obligations on convicted state sex offenders who travel in interstate commerce. *See* 18 U.S.C. § 2250 (2006). In order to create a more uniform system of registration for the protection of United States citizens, SORNA simply sets national standards for states by encouraging them to require such convicted sex offenders to register. *See* 42 U.S.C. § 16911. SORNA imposes an obligation on a sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). Pursuant to SORNA, a sex offender is also required, "not later than 3 business days after each change of name, residence, employment, or student status, to appear in person" and update his or her registration information. 42 U.S.C. § 16913(c).

SORNA contains a federal law enforcement provision, codified at 18 U.S.C. § 2250, that seeks to assist jurisdictions by regulating the interstate migration of non-compliant sex offenders. Section 2250 targets convicted state sex offenders who travel in interstate commerce and fail to register or fail to update their registration

information. Section 2250 provides, in relevant part, the following:

(a) In general. – Whoever–

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law, . . . 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 commerce 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.

To convict a state sex offender, like Defendant, for violation of section 2250, the United States must prove the following three elements: first, Defendant was required to register under SORNA (i.e., Defendant was convicted of a "sex offense"); second, Defendant traveled in interstate commerce; and third, Defendant knowingly failed to register. *Cain*, 583 F.3d at 412.

SUMMARY OF THE ARGUMENT

Defendant's contention that SORNA is inapplicable to him because of the lack of implementation by the state of Tennessee is without merit. Defendant's argument relies on the incorrect assumption that an individual is not obligated to comply with SORNA until the state where the individual resides implements SORNA. In Title 42 of the United States Code, Section 16913(a) imposes the requirement for a sex offender to register or update a registration. Courts have consistently held that a state's failure to fully implement SORNA does not result in an excuse for an individual sex offender to knowingly violate the requirements of the Act. Further, a defendant's due process rights are not violated when he or she receives notice of the duty to register. Here, Defendant knowingly failed to register, as required by SORNA, when he fled with Owen and her young daughter, Faith, to Florida and then to Puerto Rico. For this reason, Defendant is liable for failing to register under SORNA when he traveled in interstate commerce.

SORNA's criminal penalties do not violate the Ex Post Facto Clause, and SORNA's provision allowing the Attorney General to make the Act retroactive does not violate the Nondelegation Doctrine. Defendant's original convictions occurred in 1994, and SORNA was enacted in 2006. Defendant improperly attempts to confuse the issue by arguing that he is being punished twice when in actuality, he is

currently being charged for failure to register as required by SORNA. The Ex Post Facto Clause is not violated by imposing punishment on Defendant for failure to register when his original punishment was for Rape of a Child and Aggravated Sexual Battery. The Nondelegation Doctrine is also not violated when the provision of SORNA does not give the Attorney General unfettered discretion to begin enacting laws that carry out any related goal of protecting the public from the risk of sex offenders. The subsection of the Act merely gives the Attorney General the ability to create an interim rule that aids in effectuating Congress's original intent in enacting the statute.

Defendant's argument that SORNA violates the Tenth Amendment fails because Defendant lacks standing to assert a Tenth Amendment challenge. Even if Defendant had standing to assert a Tenth Amendment challenge, states are not forced to implement the SORNA registration system but are merely encouraged to do so by Congress. Therefore, the Tenth Amendment is not violated.

Accordingly, the lower court did not err in denying Defendant's motion to dismiss. The applicability of SORNA is not conditioned on a state's implementation of the Act, and none of the provisions of SORNA are unconstitutional. Defendant's arguments fail, and this Court should affirm the lower court's denial of Defendant's motion to dismiss.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's purely legal determinations, including determinations regarding statutory construction and the constitutionalityof a federal statute. *United States v. Hart*, 635 F.3d 850, 856 (6th Cir. 2011). Because Defendant raises only legal errors, all issues before this Court have a *de novo* standard of review.

ARGUMENT

I. The lower court was correct in denying Defendant's motion to dismiss because assuming *arguendo* that the State of Tennessee has not yet implemented the provisions of SORNA, such failure to implement does not render the registration provisions of the Act inapplicable to Defendant.

Defendant's contention that SORNA is inapplicable to him because of the lack of implementation by the State of Tennessee is without merit. Defendant's argument relies on the incorrect assumption that an individual is not obligated to comply with SORNA until the state where the individual resides implements SORNA. In Title 42 of the United States Code, Section 16913(a) imposes the requirement for a sex offender to register or update a registration. In order to show a violation of the Act, the United States need only prove the following three (3) elements: first, Defendant was required to register under 42 U.S.C. § 16913(a) as a sex offender residing in Tennessee; second, Defendant traveled in interstate commerce; and third, Defendant knowingly failed to register as required by section 16913(a). Here, the United States has shown that (1) Defendant is a violent sex offender as a result of his Tennessee convictions of Rape of a Child and Aggravated Sexual Battery; (2) Defendant traveled in interstate commerce between December 21, 2009 and January 19, 2009 from Tennessee to Hialeah, Florida, where he resided for two (2) weeks; (3) Defendant, Owen, and Faith flew from Florida to Puerto Rico on January 19, 2009;

and (4) Between December 21 and January 19, Defendant failed to register as a sex offender with the State of Tennessee, the State of Florida, or any other jurisdiction, as required by SORNA.

The plain language of SORNA does not condition an individual's obligation to abide by the registration requirements in the statute on a particular state's implementation of the statute. *See, e.g.*, *United States v. George*, 625 F.3d 1124, 1128 (9th Cir. 2010); *United States v. Gould*, 568 F.3d 459, 463-66 (4th Cir. 2009); *United States v. Carr*, No. 2:09-00010 (M.D. Tenn. filed May 13, 2010). The court in *Gould* concluded that the registration requirements under SORNA applied to a Maryland sex offender prior to Maryland's implementation of SORNA. *Gould*, 568 F.3d at 463-66. In its discussion, the court provided three (3) clarifications regarding SORNA. *Id*. First, the court held that 42 U.S.C. § 61913(a)'s "requirements to register and maintain registration are not expressly conditioned on a State's implementation of the Act, which is consistent with SORNA's purpose 'to strengthen and increase the effectiveness of [preexisting] sex offender registration and notification.'" *Id*. at 464 (citation omitted). Second, the court expressly stated 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 register and standards as mandated by the Act." *Id*. Further, the Court cited the Attorney

General's National Guidelines for SORNA, noting that "'[s]ome of the provisions in SORNA are formulated as *directions to sex offenders* . . . . [while] other SORNA provisions are cast as *directions to jurisdictions* . . . .'" *Id.* (quoting National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38030, 38048) (July 2, 2008)) (emphasis added). "Thus, even though state implementation must [have been] accomplished by July 27, 2009, three years after SORNA's enactment, the registration requirement of SORNA . . . was imposed *immediately* on sex offenders on July 27, 2006, the date of SORNA's enactment." *Id*. (emphasis added). Third, the court concluded that the Attorney General's "SMART" guidelines made SORNA applicable to the Maryland sex offender who, like Defendant, had been convicted of a sex offense prior to the enactment of SORNA. *Id.* at 465. In reaching this conclusion, the court found that the requirement under SORNA imposed on individuals to register is independent of the requirement imposed on the states to implement the enhanced registration and notification standards of SORNA. *Id*. "SORNA's requirement that a sex offender register applies whether registration would be accomplished through pre-SORNA registration facilities or under SORNA-compliant programs." *Id.* at 465-66.

Courts have consistently interpreted the applicability of SORNA to an individual as not being conditioned on a state's implementation of the Act. *See, e.g.*,

United States v. Pendleton, 636 F.3d 78, 85 (3rd Cir. 2011); *United States v. Shenandoah*, 595 F.3d 151, 157 (3rd Cir. 2010); *United States v. Brown*, 586 F.3d 1342, 1349 (11th 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); *Carr*, No. 2:09-00010 at 6. In *United States v. Shenandoah*, the defendant argued that the registration requirements under SORNA did not apply to him because New York and Pennsylvania, the two states in which the defendant was required to register, had not yet implemented SORNA. *Shenandoah*, 595 F.3d at 157. The court rejected this argument and concluded that "an independent and federally enforceable duty is placed on sex offenders to register." *Id*. Even though New York and Pennsylvania had not fully implemented SORNA, the states' failure to implement SORNA did not give the defendant an excuse to bypass his federal obligations by failing to update his state registration. *Id*.

Yet another court that has expressly recognized that SORNA's applicability to a defendant is not contingent on a state's implementation of the Act is the Eleventh Circuit in *Brown*, 586 F.3d at 1342. The *Brown* court held that the defendant was subject to SORNA when he relocated to Alabama, notwithstanding the fact that the State of Alabama had not yet implemented SORNA. *Id.* at 1348. The court noted that "[t]he final regulations in the National Guidelines . . . provide that SORNA

applies to sex offenders regardless of whether the relevant jurisdiction has incorporated SORNA's requirements." *Id.* at 1349 (citing 73 Fed.Reg. at 38063). Further, the court recognized that the National Guidelines state that "SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA *or prior to particular jurisdictions' incorporation of the SORNA requirements into their programs*." *Id*. (emphasis added). The court also emphasized that a state's failure to fully implement SORNA results in only a loss of federal funds, "'not in an excuse for an offender who has failed to register.'" *Id.* (quoting *Hinckley*, 550 F.3d at 939).

This Court has held that there are no due process violations when a particular state has not implemented SORNA but a defendant is held liable for violating SORNA. In *United States v. Samuels*, this Court followed the precedent set in other circuit courts and held that the Due Process Clause is not violated when a defendant receives notice of a duty to register under state law. 319 Fed.Appx. 389, 393 (6th Cir. 2009), *overruled on other grounds by United States v. Utesch*, 596 F.3d 302 (6th Cir. 2010); *see Brown*, 586 F.3d at 1351; *United States v. Whaley*, 577 F.3d 254, 262 (5th Cir. 2009); *Gould*, 568 F.3d at 468-69; *Dixon*, 551 F.3d at 582; *Hinckley*, 550 F.3d at 938; *United States v. May*, 535 F.3d 912, 921 (8th Cir. 2008). Also, the district court for the Middle District of Tennessee rejected a similar due process claim against

SORNA in *United States v. Hann*, 574 F.Supp.2d 827, 836-37 (M.D. Tenn. 2008). The *Hann* court held "that defendant's notice of his duty to register under state law carried over to his duty to register under SORNA, and thus there was no Due Process violation." *Id.* at 827.

Here, Defendant's argument is without merit because Defendant was a convicted felon who knowingly failed to register in the State of Tennessee prior to traveling in interstate commerce. Just as the defendant in *Gould* violated SORNA in Maryland, a state that had not yet implemented the requirements of SORNA, Defendant violated SORNA by failing to register in Tennessee even though Tennessee has not yet fully implemented SORNA's requirements. Like the Fourth Circuit properly recognized in *Gould*, the "SMART" guidelines indicate that an individual has a separate duty to register, which is independent of a state's duty to implement the requirements of the Act. Defendant incorrectly argues that the duty of a state to implement SORNA goes hand in hand with his duty to register under SORNA. Because the requirements to register and maintain registration are not conditioned on a state's implementation of the Act, Defendant violated the requirements of SORNA when he failed to register in the State of Tennessee and maintained a residence in Florida and later Puerto Rico. Further, just as the *Shenandoah* court concluded that the defendant was not exempt from registration

under SORNA when the States of New York and Pennsylvania had not substantially implemented SORNA, Defendant is not exempt from registering in the State of Tennessee even though the state has not fully implemented the requirements of SORNA.

Based on the consistent decisions of other sister circuit courts, Defendant's argument fails because Tennessee's failure to implement SORNA does not serve as an excuse to allow Defendant to bypass the registration requirements of SORNA. The *Brown* court made it clear that a state's lack of implementation of SORNA causes a state to lose federal funds– it does not cause a defendant to have the opportunity to get around the requirements of the Act, especially when, as in this case, the defendant has been notified of the requirements on multiple occasions. Just as this Court and other sister circuits have recognized, Defendant's due process argument also fails because Defendant received notice on multiple occasions of his requirement to register and maintain his registry under Tennessee law.

II. The lower court was correct in denying Defendant's motion to dismiss because subjecting Defendant to SORNA's criminal penalties does not violate the Ex Post Facto Clause, and SORNA's provision allowing the Attorney General to make the Act retroactive does not violate the Nondelegation Doctrine.

This Court should affirm the lower court's denial of Defendant's motion to dismiss. Defendant's arguments fail because SORNA's criminal penalties do not

violate the Ex Post Facto Clause, and SORNA's provision allowing the Attorney General to make the Act retroactive does not violate the Nondelegation Doctrine.

A. Retroactive application of SORNA does not violate the Ex Post Facto Clause.

The lower court was correct in denying Defendant's motion to dismiss because retroactive application of SORNA to the Defendant does not violate the Ex Post Facto Clause of the Constitution. Circuit courts have consistently held that SORNA does not violate the Ex Post Facto Clause. *See, e.g.*, *United States v. DiTomasso*, 621 F.3d 17, 25 (1st Cir. 2010); *United States v. Guzman*, 591 F.3d 83, 94 (2d Cir. 2010); *Shenandoah*, 595 F.3d at 158-59; *United States v. George*, 625 F.3d 1124, 1131 (9th Cir. 2010); *Gould*, 568 F.3d at 466; *United States v. Young*, 585 F.3d 199, 203-06 (5th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1207 (11th Cir. 2009); *May*, 535 F.3d 912, 919-20 (8th Cir. 2008); *Hinckley*, 550 F.3d 926, 936 (10th Cir. 2008). The Ex Post Facto Clause prohibits punishment of a defendant for conduct after it has already occurred and prohibits increasing the punishment for a crime after it has been committed. *See Collins v. Youngblood*, 497 U.S. 37, 41 (1990). Additionally, the prohibitions apply "only to penal statutes which disadvantage the offender affected by them." *Id.* at 41. Contrary to Defendant's contention, SORNA provides for a conviction for failing to register when traveling in interstate commerce– not for an

increase in punishment for past convictions. *See* 18 U.S.C. § 2250.

In *Hann*, the defendant traveled from New York to Tennessee in the spring of 2008 and failed to update his sex offender registry, as required by SORNA. *Hann*, 574 F.Supp.2d at 836. The defendant argued that the relevant date for purposes of the Ex Post Facto Clause was not the date when SORNA was passed but the date on which the relevant state had enacted SORNA. *Id*. The defendant also argued that because neither New York nor Tennessee had enacted SORNA at the time of his arrest, the Ex Post Facto Clause applied and prohibited the criminalization of his actions. *Id*. In recognizing that the defendant's failure to register was a separate offense from the original sex offense (the original offense occurred prior to SORNA's enactment, but the failure to register occurred after SORNA's enactment), the court held that SORNA did not criminalize or increase the punishment for the defendant's action after it occurred. *Id*.; *see also United States v. Lowe*, No. 10-1400, 2011 WL 1743879, at *1 (8th Cir. 2011) (holding that SORNA is not violative of the Ex Post Facto Clause because the Eighth Circuit has consistently dismissed this constitutional challenge for defendants who failed to register after SORNA's enactment); *United States v. Burns*, No. 09-4909, 2011 WL 970644, at *3 (4th Cir. 2011) (noting that the defendant's failure-to-register conviction stemmed from post-SORNA-enactment conduct); *United States v. Johnson*, 632 F.3d 912, 917-18 (5th Cir. 2011) (holding

that the application of SORNA does not violate the Ex Post Facto Clause).

Further, under the Supreme Court's ruling in *Smith v. Doe*, SORNA does not violate the Ex Post Facto Clause because it is not penal in nature. 538 U.S. 84, 90-91 (2003). The *Smith* court analyzed whether an Alaska sex offender registration law violated the Ex Post Facto Clause. *Id*. The act in *Smith*, like SORNA, subjected sex offenders to criminal prosecution for failing to register under the requirements of the Alaska statute. *Id*. The *Smith* court applied the following two-part test to determine whether the statute was penal in nature: first, whether the legislature's intent was to create a civil, nonpunitive regulatory scheme, and second, whether, if so, the effects of the statute were so punitive as to negate that intent. *Id.* at 94-95. The court determined that the purpose of the statute was not to impose punishment on a sex offender but to "enact a regulatory scheme that is civil and nonpunitive." *Id.* at 92. The court next held that the effect of the statute did not negate the original, nonpunitive intent of the legislature in enacting the statute because the statute had a rational connection to the nonpunitive purpose of alerting the public to the risk of sex offenders. *Id.* at 94-95.

In *United States v. Leach*, the Seventh Circuit rejected a challenge to SORNA based on the Ex Post Facto Clause. No. 10-1786, 2011 WL 1642854, at *3 (7th Cir. 2011). The defendant in *Leach* was indicted for traveling in interstate commerce

between January 6, 2009 and February 20, 2009 without registering under SORNA. *Id*. at *1. Because SORNA was enacted on July 27, 2006, the defendant's requirement to register existed at the time of the defendant's crime of failing to register. *Id*. Thus, the court held that the application of SORNA to the defendant did not violate the Ex Post Facto Clause. *Id*. at *3. The court also noted that SORNA is not penal in nature, and therefore, the Ex Post Facto Clause was not violated for this reason, as well. *Id*. The *Leach* court agreed with the court in *Hann*, 574 F.Supp.2d at 836, that SORNA is similar to the Alaska sex offender registry statute that was upheld in *Smith v. Doe*, 538 U.S. at 90-91. *Id*. SORNA is not punitive for purposes of the Ex Post Facto Clause because Congress clearly intended SORNA to be a civil, nonpunitive, regulatory regime, and the registration requirements under SORNA do not negate Congress's original intent in enacting the statute. *Hann*, 574 F.Supp.2d at 837 (holding that the defendant traveled in interstate commerce and knowingly failed to register, as required by SORNA).

Here, like the defendants in *Hann* and *Leach*, Defendant traveled in interstate commerce after being deemed a sex offender and after the enactment of SORNA. Defendant's Ex Post Facto argument fails because it rests upon his inaccurate contention that SORNA increases his punishment for his original conviction of Rape of a Child and Aggravated Sexual Battery. Because Defendant's separate crime of

failing to update his sex offender registry occurred *after* the enactment of SORNA, Defendant cannot use the Ex Post Facto Clause to shield himself from liability for violating SORNA. Defendant received notice of his duty to register as required by SORNA, and the Defendant is not being punished for a crime in which he was previously punished. Defendant's current indictment by the Middle District of Tennessee is for the crime of failing to register, as required by SORNA, when he fled to Puerto Rico on or about January 19, 2010– not for the original conviction of Rape of a Child and Aggravated Sexual Battery. Given that the indictment in this case clearly states the date of Defendant's alleged criminal conduct to be a date occurring after the registration requirements under SORNA became applicable to sex offenders like Defendant, it logically follows that Defendant's contention that his prosecution violates the Ex Post Facto Clause is without merit.

Further, Defendant's argument that SORNA is inapplicable as a violation of the Ex Post Facto Clause fails for a second reason because the statute is not penal in nature. For the first prong of the two-part analysis applied in *Smith*, Congress clearly intended SORNA to be a civil, nonpunitive, regulatory scheme. The purpose of SORNA was "to protect the public from sex offenders and offenders against children." 42 U.S.C. § 16901. For the second prong of the *Smith* analysis, the requirements under SORNA do not subject offenders to affirmative disability or

restraint and do not promote the traditional aims of punishment. SORNA also has a rational connection to its purpose of protecting children and the general public from sex offenders. For these reasons, the Ex Post Facto Clause does not prohibit the applicability of SORNA to the Defendant.

B. Granting the Attorney General the power to make SORNA apply retroactively does not violate the Nondelegation Doctrine.

This Court should affirm the lower court's denial of Defendant's motion to dismiss because SORNA does not violate the Nondelegation Doctrine. Defendant inaccurately contends that the provisions of 42 U.S.C. § 16913(d), which vested with the Attorney General the decision to apply the provisions of SORNA retroactively to those sex offenders who were convicted prior to SORNA's enactment, violates the Nondelegation Doctrine. Pursuant to United States Constitution, Article I, Sections 1 and 8, the sole power to legislate is vested in Congress. Under the Nondelegation Doctrine, "[C]ongress is not permitted to abdicate or transfer to others the essential legislative functions with which it is thus vested." *Hann*, 574 F.Supp.2d at 837 (quoting *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)). However, the Nondelegation Doctrine "does not keep Congress from obtaining the assistance of its coordinate branches; it merely requires Congress to provide clear guidance and delineate the boundaries of delegated authority." *Id*. (citing *United*

States v. Van Buren, No. 3:08-CR-198, 2008 WL 3414012, at *15 (N.D.N.Y. Aug. 8, 2008)) (quoting *United States v. Waybright*, No. CR 08-16-M-DWM, 2008 WL 2380946, at *14 (D. Mont. June 11, 2008)).

In *Hann*, the court found that the Attorney General was only granted limited authority under section 16913(d), which extended only to those unregistered sex offenders at the time of SORNA's enactment who were literally unable to comply with section 16913(b) due to the age of their convictions. *Hann*, 574 F.Supp.2d at 837. Further, the court in *Hann* found that such limited delegation to the Attorney General did not afford the Attorney General the authority to legislate and did not offend the principles of the Nondelegation Doctrine. *Id.*; *see Utesch*, 596 F.3d at 311-13 (finding that Congress's delegation to the Attorney General of the power to enact the "SMART" guidelines, making SORNA applicable to sex offenders who were convicted prior to SORNA's enactment, was properly promulgated); *United States v. Guzman*, 591 F.3d 83, 92 (2d Cir. 2010) (finding that the Attorney General's authority under SORNA was highly circumscribed, as SORNA included "specific provisions delineating what crimes required registration, where, when, and how an offender was required to register, and the elements and penalties for the federal crime of failure to register"). Like the other district and circuit courts, the court in *Carr* again found that SORNA is not unconstitutional on the basis of the Nondelegation

Doctrine. *Carr*, No. 2:09-00010 at 10.

Only when Congress has declared absolutely no policy or established no standard in delegating powers to another branch of government has the Supreme Court found a violation of the Nondelegation Doctrine. *See, e.g.*, *Panama Refining Co. v. Amazon Petroleum Corp.*, 293 U.S. 388, 431 (1935) (holding that section 9(c) of Title 1 of the National Industrial Recovery Act violated the Nondelegation Doctrine because the section vested in the President uncontrolled legislative power); *Schechter*, 295 U.S. at 539 (holding that the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York violated the Nondelegation Doctrine because in creating the code, Congress gave the President discretion to enact all the varieties of laws which he deemed to be beneficial in dealing with all commercial and industrial activities throughout the United States).

In *Panama Refining*, the Supreme Court explicitly stated that "Congress may . . . establish primary standards, devolving upon others the duty to carry out the declared legislative policy." 293 U.S. at 426. The court further noted that it is perfectly acceptable for Congress to fix a primary standard and then to commit to another branch "'the mere executive duty to effectuate the legislative policy declared in the statute.'" *Id.* at 427 (quoting *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904)). "From the beginning of the government, the Congress has conferred upon executive

officers the power to make regulations– 'not for the government of their departments, but for administering the laws which did govern.'" *Id.* at 428 (quoting *United States v. Grimaud*, 220 U.S. 506, 517 (1911)). The *Panama Refining* court held that section 9(c) of the statute at issue violated the Nondelegation Doctrine because Congress provided no policy or rule for carrying out the law. *Id.* at 432. The section of the statute at issue contained "no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." Similarly, the court refused to uphold the statute at issue in *Schechter* because Congress had given the President the power to create whatever codes or laws he saw fit for carrying out the goals of the Recovery Act. *Schechter*, 295 U.S. at 538.

This case is strikingly distinguishable from both *Panama Refining* and *Schechter*. Here, unlike the constitutionally-unsound statute at issue in *Panama Refining*, Congress has created a law that simply allowed the Attorney General to decide how to handle the situation of registering a sex offender who does not fall within the parameters of 42 U.S.C. § 16913(b), i.e., a sex offender who did not have the opportunity to comply with SORNA before the end of his or her sentence of imprisonment because SORNA had not yet been enacted. The language of 42 U.S.C. § 16913(d) simply states that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of [section b] to sex offenders convicted

before [SORNA's enactment]." This provision of SORNA does not give the Attorney General unfettered discretion to begin enacting laws that carry out any related goal of protecting the public from the risk of sex offenders. The subsection of the Act merely gives the Attorney General the ability to create an interim rule that aids in effectuating Congress's original intent in enacting the statute. Unlike the limitless authority given to executive decision-makers in *Panama Refining* and *Schechter*, the Attorney General's delegated task of devising a scheme for carrying out only a small portion of the statute does not violate the Nondelegation Doctrine.

In short, Congress's assignment of responsibility to the Attorney General in SORNA is typical. For example, the Controlled Substances Act, promulgated at 21 U.S.C. § 811, "provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances, to, from, or between schedules." *Gonzales v. Raich*, 545 U.S. 1, 15 (2005). As the Middle District of Tennessee found in *Carr*, the power designated to the Attorney General under SORNA is a limited, nonlegislative power that does not violate the Nondelegation Doctrine. Further, Congress's placement of power in the Attorney General is not offensive. For these reasons, Defendant's argument that SORNA violates the Nondelegation Doctrine is without merit.

III. The lower court was correct in denying the Defendant's motion to dismiss because Defendant lacks standing to assert SORNA's alleged violation of the Tenth Amendment.

As previously discussed, SORNA imposes a duty upon individual sex offenders to register regardless of whether a particular state has implemented SORNA. Defendant incorrectly argues that SORNA requires State of Tennessee officials to register sex offenders before the State of Tennessee has an opportunity to voluntarily comply with the requirements under SORNA, and therefore, SORNA violates the Tenth Amendment. Even if SORNA did not impose a duty upon individual sex offenders to register, Defendant's contention that SORNA violates the Tenth Amendment of the Constitution is without merit because Defendant lacks standing to assert SORNA's alleged violation.

The Tenth Amendment provides 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. Under the Tenth Amendment, federal officers are prohibited from conscripting, or commandeering, state officials to administer and enforce a federal regulatory program. *Printz v. United States*, 521 U.S. 898, 935 (1997). However, because the Tenth Amendment protects state rights, private citizens lack standing to raise a Tenth Amendment claim. *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 144 (1939). Defendant attempts

to confuse the issue by arguing that this case is analogous to *Printz* when, in actuality, *Printz* is inapplicable because *Printz* involved a state official raising Tenth Amendment concerns– not an individual, like Defendant, who has no authority to act for the state and raise Tenth Amendment concerns. *Printz*, 521 U.S. at 935.

Courts have consistently found that individual defendants lack standing to challenge that SORNA violates the Tenth Amendment. *See, e.g.*, *Shenandoah*, 595 F.3d at 161-62 (stating that a "'private party does not have standing to assert that the federal government is encroaching on state sovereignty in violation of the Tenth Amendment absent the involvement of a state or its instrumentalities'") (quoting *United States v. Hacker*, 565 F.3d 522, 525-26 (8th Cir. 2009)) (holding that a defendant who challenged SORNA in his individual capacity lacked standing to raise a Tenth Amendment challenge to SORNA because the "requisite representation by the states or their officers" was notably absent); *United States v. Zuniga*, 579 F.3d 845 (8th Cir. 2008) (holding that because the defendant was a private party, he lacked standing to raise a Tenth Amendment challenge to SORNA).

Moreover, even if this Court were to assume that Defendant has standing to challenge SORNA under the Tenth Amendment, the Supreme Court has explicitly held that Congress may place conditions of compliance with federal law upon the receipt of federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987)

(stating that "Congress's power to condition the receipt of federal funds under the spending power is valid so long as (1) the spending/withholding is in the pursuit of 'the general welfare'; (2) the conditional nature is clear and unambiguous; (3) the condition is rationally related to the purpose of the federal interest, program, or funding; and (4) the conduct required to comply with the condition is not barred by the constitution itself"); *United States v. Kirsch*, No. 09-cr-0086, 2009 WL 3244748, at *5 (W.D. La. Oct. 6, 2009). Defendant's argument that SORNA violates the Tenth Amendment fails because neither Tennessee nor any other state is compelled to comply with SORNA. Rather than forcing states to implement federal legislation, SORNA encourages states to implement its standards by conditioning the receipt of ten percent (10%) of the funds the state would otherwise receive during the fiscal year on the state's substantial compliance with the standards set forth in SORNA.

Defendant's claim that SORNA requires state officials to register sex offenders before the state has implemented the act in violation of the Tenth Amendment is without merit. As previously discussed, prior to a state's implementation of SORNA, a state complies with SORNA by requiring sex offenders to register with the state's registration system currently in place. Thus, states are not forced to implement the SORNA registration system but are merely encouraged to do so by Congress. 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." *Carr*, No. 2:09-00010 at 11 (quoting *United States v. Crum*, No. CR08-255RSL, 2008 WL 4542408, at *7 (W.E. Wash. Oct. 8, 2008)). Accordingly, Defendant's argument fails because SORNA does not force a state to implement federal legislation, and even if it did, Defendant lacks standing to assert a Tenth Amendment challenge.

CONCLUSION

The lower court properly denied Defendant's motion to dismiss. Assuming *arguendo* that the State of Tennessee has not yet implemented the provisions of SORNA, such failure to implement does not render the registration provisions of the Act inapplicable to Defendant; subjecting Defendant to SORNA's criminal penalties does not violate the Ex Post Facto Clause, and SORNA's provision allowing the Attorney General to make the Act retroactive does not violate the Nondelegation Doctrine; and Defendant lacks standing to assert SORNA's alleged violation of the Tenth Amendment. For the foregoing reasons, this Court should affirm the lower court's denial of Defendant's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B)(I) of the Federal Rules of Appellate Procedure, I hereby certify that the government's final brief in this case contains 7167 words.

s/ ***Lynne T. Ingram***
LYNNE T. INGRAM, AUSA

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent, if registered, via the Court's electronic filing system or, if not registered, deposited in the United States Mail, postage prepaid, to the following:.

Jude T. Lenahan
Andrew C. Brandon
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203

on this the 6th day of June, 2011.

s/ ***Lynne T. Ingram***
LYNNE T. INGRAM, AUSA

ADDENDUM
APPELLEE'S DESIGNATION OF
RELEVANT District Court DOCUMENTS

Appellee, pursuant to 6th Cir. R. 28(c) and 6th Cir. R. 30(b), hereby designates the following relevant District Court documents in the electronic record:

Record Entry No.	Description of Document for United States v. David Wayne Felts; Case No. 2:10-00002
1	Indictment
17	Motion to Dismiss
21	Order denying Motion
23	Order Accepting Plea Petition
29	Judgment
31	Notice of Appeal
32	Presentence Investigation Report