16-1429

To Be Argued By:
WON SHIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 16-1429

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS ABDUL HOLCOMBE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

JOON H. KIM,
Acting United States Attorney for the Southern District of New York,
Attorney for the United States of America.
One St. Andrew's Plaza
New York, New York 10007
(212) 637-2200

WON SHIN,
MARGARET GARNETT,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 16-1429

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS ABDUL HOLCOMBE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Thomas Abdul Holcombe appeals from a judgment of conviction entered on May 2, 2016, in the United States District Court for the Southern District of New York, following a bench trial on stipulated facts before the Honorable Vincent L. Briccetti, United States District Judge.

Indictment 15 Cr. 304 (VB) was filed on May 20, 2015. The Indictment's sole count charged Holcombe with knowingly failing to register and update a registration as a sex offender as required by the Sex Offender Registration and Notification Act ("SORNA"),

in violation of Title 18, United States Code, Section 2250.

On August 28, 2015, as supplemented on November 3, 2015, Holcombe moved to dismiss the Indictment, asserting that SORNA is unconstitutional on numerous grounds and that venue was improper in the Southern District of New York. On November 13, 2015, in an oral ruling from the bench, Judge Briccetti denied the motion to dismiss, rejecting all of Holcombe's constitutional and venue arguments.

On January 19, 2016, Holcombe waived his right to a jury and proceeded to trial before the District Court on stipulated facts. That same day, Judge Briccetti found Holcombe guilty on the sole count of the Indictment.

On April 27, 2016, Judge Briccetti sentenced Holcombe principally to twenty-six months' imprisonment, to be followed by five years' supervised release.

According to the Bureau of Prisons, Holcombe completed his term of imprisonment on March 14, 2017.

Statement of Facts

A. The Offense Conduct

Holcombe pleaded guilty on or about September 28, 1992, in the New York County Court for Westchester County, to attempted rape in the first degree by forcible compulsion, in violation of New York Penal Law

Sections 110.00 and 130.35(1). (PSR ¶ 7; A. 59).[1] An attempt to commit rape in the first degree under New York law qualifies as a sex offense under SORNA. (A. 59). SORNA's registration requirements became applicable to individuals like the defendant, who were convicted of sex offenses prior to SORNA's enactment, no later than August 1, 2008. (PSR ¶ 8; A. 60).

On or about June 13, 1996, Holcombe registered as a sex offender in New York by completing and signing a New York State Sex Offender Registration Form. On the form, Holcombe indicated that he would be residing at an address in Peekskill, New York. (PSR ¶ 8; A. 60). The form set forth Holcombe's registration obligations under New York law. In particular, Holcombe's signature appears on the form directly below the following statement: "I understand that I must annually verify my address with [the New York State Division of Criminal Justice Services ("DCJS")] and notify DCJS in writing if my address changes from that listed above." (PSR ¶ 9; A. 60). The form further provided that: "You must notify your local law enforcement agency and DCJS in writing of any change of

---

[1] "PSR" or "Presentence Report" refers to the Presentence Investigation Report prepared by the United States Probation Office in connection with Holcombe's sentencing; "Br." refers to Holcombe's brief on appeal; "A." refers to the appendix filed with that brief; and "Tr." refers to the transcript of the November 23, 2015 conference, available at Docket Entry 23 of the District Court's electronic docket.

home address within 10 days before you move." (PSR ¶ 9; A. 60).

On multiple occasions after Holcombe's initial registration in 1996, he verified his residence address by completing and signing a New York State Sex Offender Registry Address Verification Form and updated his residence address by completing and signing a New York State Sex Offender Change of Address Form. (PSR ¶ 14; A. 60).

On or about April 17, 2013, shortly after his release from a term of incarceration in Westchester County Jail, Holcombe completed and signed a New York State Sex Offender Change of Address Form stating that he had moved on April 12, 2013, and updating his address from the Westchester County Jail in Valhalla, New York, to 1000 Main Street in Peekskill, New York. (PSR ¶ 14; A. 61). Holcombe did not in fact reside at 1000 Main Street in Peekskill, New York, at any time on or after April 12, 2013. (A. 61). Accordingly, Holcombe was required under SORNA to update his New York State sex offender registration with an accurate residence address. (A. 61).

Between on or about April 17, 2013, and on or about July 10, 2013, Holcombe traveled from New York to Baltimore, Maryland, where he resided until after his arrest on or about January 28, 2015. (A. 61). On that date, Holcombe was arrested in Baltimore, Maryland, pursuant to a warrant issued by the Peekskill City Court for failing to comply with sex offender registration requirements under New York law. (PSR ¶ 18; A. 61). Because his residence changed from the State of New York to the State of Maryland, Holcombe was

required under SORNA to register as a sex offender or update his sex offender registration in either the State of New York or the State of Maryland. (A. 61).

After April 17, 2013, Holcombe did not update his New York State sex offender registration until on or about February 11, 2015, and he did not register as a sex offender or update his sex offender registration in the State of Maryland. (PSR ¶¶ 15, 20; A. 62).

B. The Indictment

On May 20, 2015, a grand jury in the Southern District of New York returned the Indictment. (A. 11-12). The Indictment's sole count charged Holcombe with knowingly failing to register and update a registration as a sex offender as required by SORNA. (A. 11).

C. The Motion to Dismiss

On August 28, 2015, Holcombe moved to dismiss the Indictment. Holcombe principally argued that SORNA is unconstitutional on numerous grounds. Specifically, Holcombe contended that SORNA (i) unconstitutionally delegates legislative authority to the Attorney General, (ii) violates the Ex Post Facto Clause, (iii) violates the Commerce Clause, (iv) violates the Tenth Amendment, (v) cannot be applied to him because the State of New York has not yet implemented the statute, and (vi) is void for vagueness. Holcombe also argued that venue was improper in the Southern District of New York. On November 3, 2015, Holcombe raised an additional constitutional objection, arguing that SORNA violates the right to travel.

On November 13, 2015, in an oral ruling from the bench, Judge Briccetti denied the motion to dismiss. Judge Briccetti first rejected Holcombe's non-delegation, ex post facto, Commerce Clause, Tenth Amendment, and non-implementation claims, concluding that those arguments were foreclosed by this Court's decision in *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010). (Tr. 3-4). Judge Briccetti further held that SORNA's use of the term "resides" does not render the statute unconstitutionally vague. (Tr. 4-6). Judge Briccetti also concluded that SORNA does not violate the right to travel because registering or updating a registration is "a modest burden" that "is certainly rationally related to a legitimate government interest in protecting others from future sex offenses." (Tr. 13). Finally, Judge Briccetti held that under 18 U.S.C. § 3237(a), venue in this case was proper in either the Southern District of New York, where the SORNA offense began, or the District of Maryland, where the SORNA offense was completed. (Tr. 6).

D. The Trial on Stipulated Facts

Holcombe waived his right to a jury trial and agreed to proceed to trial before the District Court on stipulated facts. (A. 41-46). At the conclusion of the bench trial, Judge Briccetti found Holcombe guilty of knowingly failing to register and update a registration as a sex offender as required by SORNA. (A. 51-52).

E. The Sentencing

On April 27, 2016, Judge Briccetti sentenced Holcombe to twenty-six months' imprisonment, to be followed by five years' supervised release, and imposed

a mandatory $100 special assessment. (A. 147-48, 150). Holcombe does not challenge any aspect of his sentencing on appeal.

ARGUMENT

POINT I

Venue in the Southern District of New York Is Proper

Holcombe argues that venue in the Southern District of New York is not proper because "[n]o offense conduct occurred in" this District. (Br. 11). To the contrary, the SORNA violation began in this District when Holcombe commenced his interstate travel from Westchester County to Maryland and subsequently failed to register or update his registration. Because a SORNA violation is a continuing offense, venue is proper in this District—the "district in which such offense was begun." 18 U.S.C. § 3237(a).

A. Applicable Law

The proper forum for a criminal prosecution is the district in which the crime was committed. U.S. Const. art. III, § 2; *id.*, amend. VI; Fed. R. Crim. P. 18. Although determining a single venue for "point in time" crimes—crimes in which "the unitary character of the acts constituting the crime renders its locus delicti obvious," *United States v. Saavedra*, 223 F.3d 85, 88-89 (2d Cir. 2000)—is often straightforward, in "some cases the acts constituting a crime extend over a period of time, and occur in widely different localities." *Id.* at

89. Where "the acts constituting the crime and the nature of the crime charged implicate more than one location," the Constitution "does not command a single exclusive venue." *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985). That is, acts constituting a crime, or the nature of a crime, may implicate more than one district. *See United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005).

Accordingly, a defendant charged with a "continuing" offense may be tried in any district in which some part of the offense occurred. *See, e.g.*, *United States v. Payne*, 591 F.3d 46, 69 (2d Cir. 2010); *see generally United States v. Johnson*, 323 U.S. 273, 275 (1944) (continuing offense doctrine applies "over the whole area through which force propelled by an offender operates"); *United States v. Rowe*, 414 F.3d 271, 278-79 (2d Cir. 2005) (reaffirming *Johnson*'s "propelled force" test). In this regard, any offense "committed in more than one district" may be "prosecuted in any district in which such offense was begun, continued or completed." 18 U.S.C. § 3237(a). Put another way, "[b]ecause an offense consisted of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." *United States v. Brennan*, 183 F.3d 139, 145 (2d Cir. 1999) (quotation marks omitted).

The denial of Holcombe's motion to dismiss for lack of venue is reviewed de novo. *See United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012) ("The sufficiency of an indictment and the interpretation of a federal statute are both matters of law that we review de novo."); *United States v. Kopp*, 778 F.3d 986, 988 (11th

Cir. 2015) (reviewing de novo the denial of a motion to dismiss a SORNA charge for lack of venue).

B. Discussion

As Judge Briccetti correctly found, venue in this case is proper in the Southern District of New York "because [Holcombe's] interstate journey started there." *United States v. Kopp*, 778 F.3d at 988. With respect to any offense "begun in one district and completed in another, or committed in more than one district," venue is proper "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). SORNA creates criminal penalties for, among other things, any person who (1) "is required to register under [SORNA]," and then (2) "travels in interstate or foreign commerce," to then (3) "knowingly fail[ ] to register or update a registration as required by [SORNA]." 18 U.S.C. § 2250(a); *United States v. Gundy*, 804 F.3d 140, 141 (2d Cir. 2015). Thus, interstate (or foreign) travel is an essential element of the SORNA offense. *See Carr v. United States*, 560 U.S. 438, 454 (2010) ("The act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also . . . the very conduct at which Congress took aim.").

Accordingly, Section 3237(a) applies to SORNA prosecutions, and venue is proper in the departure district—as every Circuit to address the question has concluded. *See Kopp*, 778 F.3d at 988-89 ("Because the crime consists of both traveling and failing to register, Kopp began his crime in Georgia and consummated it in Florida. Like our sister circuits that have addressed

the issue, we hold that section 3237 applies, and venue lies in Georgia."); *United States v. Lewis*, 768 F.3d 1086, 1093 (10th Cir. 2014) ("[T]his act of interstate travel creates two (or possibly more) venues in which the crime could be prosecuted. . . . It is unsurprising, then, that every circuit to address the application of § 3237 to the criminal component of SORNA has found that venue is proper in the departure district of the offender who travels in interstate commerce."); *United States v. Leach*, 639 F.3d 769, 772 (7th Cir. 2011) ("Venue was proper in Indiana [the departure state], as it would have been in South Carolina [the arrival state] if the government had opted to prosecute there."); *United States v. Howell*, 552 F.3d 709, 718 (8th Cir. 2009) ("Howell's failure to register his move and inform Iowa of his new Texas residence was a material part of the § 2250 violation, and venue is proper in the Northern District of Iowa.").[2] Because Holcombe was required to register under SORNA; moved from Westchester County, New York to Baltimore, Maryland; and knowingly failed to register or update a registration, venue in this District is proper.

---

[2] The Fourth Circuit has repeatedly reached the same conclusion in a series of unpublished decisions. *See United States v. Snyder*, 611 F. App'x 770, 771-72 (4th Cir. 2015); *United States v. Bailey*, 592 F. App'x 206, 206 (4th Cir. 2015); *United States v. Atkins*, 498 F. App'x 276, 277 (4th Cir. 2012); *United States v. Stewart*, 461 F. App'x 349, 351-52 (4th Cir. 2012); *United States v. Burns*, 418 F. App'x 209, 213 (4th Cir. 2011).

None of the cases cited by Holcombe alters this analysis. First, *United States v. Bailey*, 2014 WL 534193, at *3 (S.D. W. Va. Feb. 10, 2014), actually held that venue in the departure district was proper—and the Fourth Circuit affirmed that ruling on appeal. *United States v. Bailey*, 592 F. App'x 206, 206 (4th Cir. 2015). Second, venue was not at issue in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013). The Eighth Circuit instead addressed whether SORNA required a sex offender to update his registration in the departure district when he moved out of the country. *Id.* at 860. In fact, the decision expressly acknowledged that venue was a separate question—and that circuit precedent already established that venue was proper in the departure district. *Id.* at 863 (citing *Howell*, cited above).[3]

Finally, while *United States v. Miller*, 2011 WL 711090 (S.D. Ohio Feb. 22, 2011), does in fact hold that venue does not lie in the departure district, its flawed analysis should be rejected. The *Miller* court reasoned that "[t]he criminal act itself takes place entirely

---

[3] Other Circuits have recognized that *Lunsford* does not address venue. *See Bailey*, 592 F. App'x at 207 (*Lunsford* "does not address the issue of venue and is based on inapposite facts"); *United States v. Lewis*, 768 F.3d at 1092 ("[O]n the venue issue, the *Lunsford* court did not dispute circuit precedent previously holding that a sex offender who departs from one SORNA jurisdiction to another without updating his registration in either jurisdiction may be prosecuted—that is, venue is proper—in the departure jurisdiction.").

within the district where the offender had a duty to register and failed to do so" and thus "is not a crime 'begun in one district and completed in another.'" *Id.* at *5 (quoting 18 U.S.C. § 3237(a)). But the Supreme Court has explicitly instructed that a sex offender's interstate travel (which, by its nature, must begin in one place and end in another) is "the very conduct at which Congress took aim." *Carr v. United States*, 560 U.S. at 454. Therefore, other courts have uniformly declined to follow *Miller*. *See Kopp*, 778 F.3d at 989 (rejecting *Miller* "[b]ecause the crime consists of both traveling and failing to register"); *Lewis*, 768 F.3d at 1094 n.5 (rejecting *Miller* because it "goes against the weight of authority" and "otherwise disagree[ing] with its interpretation of the effect of § 3237"); *see also United States v. Dugger*, 2011 WL 4528314, at *3-*4 (D.S.D. Aug. 23, 2011).

POINT II

Holcombe's Non-Delegation, Ex Post Facto, Commerce Clause, Tenth Amendment, and Non-Implementation Claims Are Foreclosed by Circuit Precedent

As Holcombe concedes, and Judge Briccetti correctly found, his constitutional challenges to SORNA based on the non-delegation doctrine, the Ex Post Facto Clause, the Commerce Clause, the Tenth Amendment, and the non-implementation doctrine all are squarely foreclosed by this Court's decision in *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010). (Br. 23-26, 28, 38, 40, 46). The Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of [this] Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). Indeed, this Court has rejected these constitutional claims again[4] and

---

[4] This Court rejected non-delegation claims in *United States v. Lott*, 750 F.3d 214, 220 (2d Cir. 2014); *United States v. Cruz*, 446 F. App'x 344, 345 (2d Cir. 2011); *United States v. Fuller*, 627 F.3d 499, 508 (2d Cir. 2010); *United States v. Romeo*, 385 F. App'x 45, 48 (2d Cir. 2010); *United States v. Van Buren*, 599 F.3d 170, 172 (2d Cir. 2010); and *United States v. Guzman*, 591 F.3d at 91-93.

again[5] and again[6] and again[7] and again.[8]

Holcombe suggests that *Guzman*'s Commerce Clause holding has been abrogated by the Supreme Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). (Br. 36). This Court "recently held, however, that the constitutionality of SORNA, as applied to an interstate traveler such as

---

[5] This Court rejected ex post facto claims in *United States v. Riddle*, 601 F. App'x 36, 37 (2d Cir. 2015); *United States v. Kimble*, 563 F. App'x 850, 851 (2d Cir. 2014); *United States v. Lott*, 750 F.3d at 220; *United States v. Brunner*, 726 F.3d 299, 304 (2d Cir. 2013); *United States v. Caraway*, 431 F. App'x 49, 50 (2d Cir. 2011), *vacated on other grounds*, 566 U.S. 931 (2012); *United States v. Fuller*, 627 F.3d at 508; and *Guzman*, 591 F.3d at 94.

[6] This Court rejected Commerce Clause claims in *United States v. Kimble*, 563 F. App'x at 851; *Lott*, 750 F.3d at 220; *United States v. Cruz*, 446 F. App'x at 345; *Fuller*, 627 F.3d at 508; *United States v. Romeo*, 385 F. App'x at 48; *United States v. Van Buren*, 599 F.3d at 172; and *Guzman*, 591 F.3d at 89-91.

[7] This Court rejected Tenth Amendment claims in *Kimble*, 563 F. App'x at 851; *Lott*, 750 F.3d at 220; and *Guzman*, 591 F.3d at 94.

[8] This Court rejected non-implementation claims in *Cruz*, 446 F. App'x at 345; *Fuller*, 627 F.3d at 508; *Romeo*, 385 F. App'x at 48; *Van Buren*, 599 F.3d at 172; *Guzman*, 591 F.3d at 93-94; and *United States v. Hester*, 589 F.3d 86, 92 (2d Cir. 2009).

[the defendant], 'remains unaffected by any limitations on Congress's Commerce Clause power that may be found in *NFIB*.'" *United States v. Lott*, 750 F.3d 214, 220 (2d Cir. 2014) (quoting *United States v. Robbins*, 729 F.3d 131, 132 (2d Cir. 2013)); *accord United States v. Hyman*, 665 F. App'x 44, 47-48 (2d Cir. 2016).

POINT III

SORNA's Definition of "Resides" Is Not Unconstitutionally Vague

Holcombe next contends that SORNA is void for vagueness because the statute's use of the word "resides" fails to provide notice of precisely how long after he moved to Maryland he was required to register or update his registration. (Br. 41-44). But Holcombe was required to update his registration before he ever set foot in Maryland, *i.e.*, when he falsely reported to New York authorities that he lived at an address in Peekskill, New York, where he did not in fact live. Furthermore, Holcombe cannot claim that SORNA is vague as applied to him, because there can be no doubt that Holcombe "resided" in Maryland for purposes of SORNA at some point during the eighteen or more months he lived in Baltimore.

A. Applicable Law

"[T]he void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." *Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010). To determine whether a statute is unconstitutionally vague, the Supreme Court has established a two-part test that "requires

that a penal statute define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *accord United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007). To meet these requirements, the statute need not define the offense with "mathematical certainty," *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), but must provide only "minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. at 358 (internal quotation marks omitted). "[D]ue process does not require impossible standards of clarity.' *Id.* at 361 (internal quotation marks omitted); *see also Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010) (a law need only "provide explicit standards" and "need not achieve meticulous specificity, which would come at the cost of flexibility and reasonable breadth" (internal quotation marks omitted)).

Where, as here, "the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' *i.e.*, 'in light of the specific facts of the case at hand and not with regard to the statute's facial validity."' *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (*en banc*) (quoting *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993)). That means that "one whose conduct is clearly proscribed" by a law may not challenge the law on the ground of vagueness. *United States v. Strauss*, 999 F.2d 692, 698 (2d Cir. 1993); *accord, e.g.*, *Mannix v. Phillips*, 619 F.3d at 197; *United States v. Amer*, 110 F.3d 873, 878-79 (2d Cir. 1997).

The denial of Holcombe's motion to dismiss the indictment on the ground that SORNA is unconstitutionally vague is reviewed de novo. *See United States v. Farhane*, 634 F.3d 127, 134 (2d Cir. 2011); *United States v. Bruffy*, 466 F. App'x 239, 241 (4th Cir. 2012) (reviewing de novo a vagueness challenge to SORNA).

B. Discussion

SORNA requires 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) (emphasis added). "The term 'resides' means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives." *Id.* § 16911(13). Holcombe claims that the term "resides" is vague as applied to him because it "fails to provide [him] with reasonable notice regarding how long a stay in Maryland would trigger the SORNA registration requirement." (Br. 42). This argument should be rejected for two independent reasons.

First, the premise of Holcombe's claim is flawed because he was required to update his registration before he ever set foot in Maryland. This Court has squarely held that SORNA "requires a convicted sex offender to update his registration information in person upon terminating his current residence with no intention of returning, even if the sex offender has not yet established a new residence." *United States v. Van Buren*, 599 F.3d 170, 175 (2d Cir. 2010). Here, Holcombe reported to New York State authorities that he moved to

1000 Main Street in Peekskill, New York, but he did not in fact reside there. (PSR ¶ 14; A. 61). Because SORNA's effectiveness depends on "accurate registration information," Holcombe was required to "update his registration information," which "no longer conform[ed] to the information that he earlier provided to the registry." *United States v. Van Buren*, 599 F.3d at 175. As this Court said repeatedly in *Van Buren*, it is "clear" from SORNA's text that a registration must be updated when a sex offender does not live at his reported residence, even if he has not yet established a new residence. *Id.* at 174, 175. Given *Van Buren*'s holding that SORNA's text is clear in this regard, the statute is not void for vagueness on this theory. *See United States v. Bruffy*, 466 F. App'x at 243 (relying on *Van Buren* to reject claim that SORNA is vague "as applied to transient offenders who have vacated one residence but have not yet established a new residence in a different state"); *United States v. Kimble*, 905 F. Supp. 2d 465, 473-74 (W.D.N.Y. 2012) (relying on *Van Buren* and *Bruffy* to reach the same conclusion), *aff'd*, 563 F. App'x 850 (2d Cir. 2014); *United States v. Lott*, No. 11 Cr. 97, 2012 WL 2048218, at *2-*3 (D. Vt. June 6, 2012) (same), *aff'd*, 750 F.3d 214 (2d Cir. 2014).

Second, even if Holcombe were correct that he was only required to update his registration after he had established a new residence in Maryland, his claim would still fail. The Attorney General's National Guidelines for Sex Offender Registration and Notification provide that a sex offender "habitually lives"—and thus "resides"—in a jurisdiction if he "lives in the jurisdiction for at least 30 days." 73 Fed. Reg. 38030, 38062 (July 2, 2008). Here, between April 17, 2013 and

July 10, 2013, Holcombe moved from New York to Baltimore, Maryland, where he resided until his arrest on January 28, 2015. (A. 61 ¶ 5). Therefore, Holcombe lived in Maryland for at least eighteen, and up to twenty-one, months. Clearly, remaining and being domiciled in a state voluntarily for over eighteen months falls comfortably within any common meaning of "resides," such that "ordinary people can understand what conduct is prohibited." *Kolender*, 461 U.S. at 357. Moreover, Holcombe's conduct clearly fits within the definition of "resides," as explained by the Attorney General's Guidelines. *See United States v. Walker*, 552 F. App'x 646, 648 (9th Cir. 2014) (relying on Attorney General's Guidelines to reject vagueness challenge where the defendant lived in a residence for more than thirty days over the course of seven months); *United States v. Lott*, 2012 WL 2048218, at *2-*4 (relying on Attorney General's Guidelines to reject vagueness challenge where the defendant lived intermittently in the state for several months). SORNA's use of "resides" is, at a minimum, not unconstitutionally vague as applied to Holcombe.

POINT IV

SORNA Does Not Violate the Right to Travel

Finally, Holcombe claims that SORNA violates his constitutional right to travel. (Br. 47-48). To the contrary, SORNA's registration requirements do not implicate the right to travel, because they apply equally to those who move between states and those who move within a state. And while SORNA's criminal penalties attach, as relevant here, only if a sex offender fails to

register or update a registration after having traveled in interstate or foreign commerce, those penalties are constitutional because they are necessary to promote the compelling governmental interest of preventing the commission of future sex offenses by convicted sex offenders. Judge Briccetti properly rejected this argument, and this Court should as well.

A. Applicable Law

The constitutional right to travel has three "components": "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). A law that "ha[s] the effect of imposing a penalty on the exercise of the right to travel" will be upheld if it is " 'necessary to promote a compelling governmental interest.' " *Id.* at 499 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)) (emphasis removed); *accord United States v. Van Buren*, No. 08 Cr. 198, 2008 WL 3414012, at *16-*17 (N.D.N.Y. Aug. 8, 2008) (applying strict scrutiny in rejecting right-to-travel challenge to SORNA), *aff'd*, 599 F.3d 170 (2d Cir. 2010).

The denial of Holcombe's motion to dismiss the indictment on the ground that SORNA violates the constitutional right to travel raises purely legal questions that are reviewed de novo. *See United States v. Gundy*, 804 F.3d at 145 (reviewing de novo questions of law raised by dismissal of SORNA indictment); *United*

States v. Shenandoah, 595 F.3d 151, 156 (3d Cir. 2010) (reviewing de novo the district court's legal conclusions in denying a motion to dismiss an indictment, including the conclusion that SORNA does not violate the right to travel), *abrogated on other grounds by Reynolds v. United States*, 132 S. Ct. 975 (2012); *United States v. Ambert*, 561 F.3d 1202, 1205 (11th Cir. 2009) (reviewing do novo "issues concerning statutory interpretation and constitutional law" raised in motion to dismiss an indictment, including whether SORNA violates the right to travel).

B. Discussion

SORNA does not unconstitutionally burden the right to travel. As an initial matter, SORNA does not implicate the first component of the right to travel—the right to physically "cross state borders"—at all, because the statute "impose[s] no obstacle to [a sex offender's] entry into" or exit out of a State, and thus "does not directly impair the exercise of the right to free interstate movement." *Saenz v. Roe*, 526 U.S. at 500-01.

Nor do SORNA's registration requirements (as distinct from its criminal penalties) implicate the right to travel. SORNA requires sex offenders to make an initial registration that includes the offender's residence, employment, and student status. 42 U.S.C. § 16913(a). SORNA also mandates that sex offenders keep their registrations current by reporting changes in name, residence, employment, and student status—irrespective of whether the change involves a move within a State or between States. *See id.* § 16913(c). Thus, for

example, a sex offender who changes his residence from New York to Maryland (as Holcombe did here) must update his registration—but so does a sex offender who changes his residence within Maryland. *See United States v. Shenandoah*, 595 F.3d at 162-63 ("[M]oving from one jurisdiction to another entails many registration requirements required by law which may cause some inconvenience, but which do not unduly infringe upon any one's right to travel.").

To be sure, SORNA's criminal penalties attach, as relevant here, only if a sex offender fails to register or update a registration after having traveled in interstate or foreign commerce. 18 U.S.C. § 2250(a). But any burdens imposed by SORNA's registration scheme and criminal penalties are necessary to promote a compelling interest: to prevent the commission of sex offenses and other violence. *See* 42 U.S.C. § 16901 (declaring Congress' purpose "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the [seventeen] victims listed below"); *Nichols v. United States*, 136 S. Ct. 1113, 1116 (2016) (describing instances of recidivism by sex offenders that led to passage of state and federal registration laws). SORNA was enacted "to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Carr*, 560 U.S. at 455. Congress was particularly concerned with "loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost," *United States v. Kebodeaux*, 133 S. Ct. 2496, 2505 (2013) (quotation marks omitted), which "typically occurr[ed] when the sex offender move[d] from one State to another," *Van*

Buren, 599 F.3d at 175 (quotation marks omitted). Congress thus intended SORNA's criminal provision, 18 U.S.C. § 2250, "to subject to federal prosecution sex offenders who elude SORNA's registration requirements by traveling in interstate commerce." *Carr*, 560 U.S. at 456.

Accordingly, as every Circuit to address the issue has held, SORNA does not violate the constitutional right to travel, and Judge Briccetti correctly denied the motion to dismiss on this basis as well. *See Bacon v. Neer*, 631 F.3d 875, 878 (8th Cir. 2011) ("Bacon is free to travel if he registers."); *Shenandoah*, 595 F.3d at 163 ("Sex offender registration requirements may be burdensome, and the consequences may interfere with a registrant's freedom. However, society, through its legislative processes, has decided again and again that it has a compelling and strong interest in preventing future sex crimes. We conclude that this interest outweighs any burden imposed."); *United States v. Ambert*, 561 F.3d at 1210 ("The requirement to update a registration under SORNA is undoubtedly burdensome; however, the government's interest in protecting others from future sexual offenses and preventing sex offenders from subverting the purpose of the statute is sufficiently weighty to overcome the burden."); *see also United States v. Byrd*, 419 F. App'x 485, 492 (5th Cir. 2011) ("SORNA does not burden, much less unreasonably burden, Byrd's fundamental right to travel as defined by the Court in *Saenz*."); *United States v. Talada*, 380 F. App'x 255, 257-58 (4th Cir. 2010) ("SORNA does not criminalize a sexual offender simply for engaging in interstate travel. Rather, Congress, motivated by a desire to prevent sex offenders from traveling among

the States to avoid state registration, used its commerce power to enact a national program mandating stronger and the more comprehensive registration system, as contained in SORNA." (quotation marks omitted)).[9]

---

[9] *See also United States v. Van Buren*, 2008 WL 3414012, at *17 ("[SORNA] does not prevent sex offenders from traveling or relocating to other states; it merely requires them to notify law enforcement when they do. Section 2250(a) also does not require states to treat sex offenders who relocate differently than sex offenders already present in a state. Rather, under SORNA, all sex offenders, whether new or long-time residents, must register."); *cf. Spiteri v. Russo*, No. 12 Civ. 2780, 2013 WL 4806960, at *36-*37 (E.D.N.Y. Sept. 7, 2013) (relying on SORNA decisions to reject right-to-travel challenge to the New York State Sex Offender Registration Act), *aff'd*, 622 F. App'x 9 (2d Cir. 2015).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: New York, New York
March 15, 2017

Respectfully submitted,

JOON H. KIM,
Acting United States Attorney for the Southern District of New York, Attorney for the United States of America.

WON SHIN,
MARGARET GARNETT,
Assistant United States Attorneys, Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 5,691 words in this brief.

JOON H. KIM,
Acting United States Attorney for the Southern District of New York

By: MARGARET GARNETT,
Assistant United States Attorney