

No. 19-2405

In the United States Court of Appeals

for the Sixth Circuit

M. S. WILLMAN

Plaintiff-Appellant,

-vs-

U. S. ATTORNEY GENERAL,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
No. 19-cv-10360-GAD-MKM
(Hon. Gershwin A. Drain, J., Presiding)

***Amici Curiae Allied State Organizations for Federalism under SORNA,
Brief in Support of Plaintiff-Appellant***

Adele D. Nicholas
5707 W. Goodman Street
Chicago, IL 60630
847/361-3869 (voice)
adele@civilrightschicago.com (email)
*Counsel of Record for Amici Curiae
Allied State Organizations for
Federalism under SORNA**

*Co-Counsel for Individual *Amici Curiae* are listed on the following page.

***CO-COUNSEL FOR INDIVIDUAL AMICI CURIAE (listed alphabetically by State):**

Janice M. Bellucci, Esq.
Law Office of Janice M. Bellucci
1215 K Street, Ste. 17
Sacramento, CA 95814-3954
805/896-7854 (voice)
jmbellucci@aol.com (email)
Co-Counsel for Amicus Curiae Alliance for Constitutional Sex Offender Laws (of California)

Valerie Jonas, Esq.
Weitzner and Jonas, P.A.
40 NW 3rd Street, Suite 200
Miami, FL 33128-1839
305/527-6465 (voice)
valeriejonas77@gmail.com (email)
Co-Counsel for Amicus Curiae Florida Action Committee

Mark G. Weinberg, Esq.
Law Office of Mark G. Weinberg
3612 N. Tripp Avenue
Chicago, IL 60641-3037
773/283-3913 (voice)
mweinberg@sbcglobal.net (email)
Co-Counsel for Amicus Curiae Illinois Voices for Reform

Nancy S. Forster, Esq.
Forster & LeCompte
210 Allegheny Avenue, Suite 100
Towson, MD 21204
443/790-1741 (voice)
nsforster@gmail.com (email)
Co-Counsel for Amicus Curiae Families Advocating Intelligent Registries (of Maryland)

Matt Fry, Esq.
Rosenblum Schwartz & Fry
120 South Central Avenue, Ste. 130
St. Louis, MO 63105
314/680-2420 (voice)
mfry@rsflawfirm.com (email)
Co-Counsel for Amicus Curiae Women Against the Registry (of Missouri)

John M. Dunn, Esq.
Law Offices of John M. Dunn, P.L.L.C.
616 S. Main Street, Suite 206
Tulsa, OK 74119
918/526-8000 (voice)
johnmdunn@johndunnlaw.com (email)
Co-Counsel for Amicus Curiae OK Voices (of Oklahoma)

Lea T. Bickerton, Esq.
Law Office of Lea T. Bickerton
P.O. Box 11136
Pittsburgh, PA 15237
412/398-5507 (voice)
service@bickertonlegal.com (email)
*Co-Counsel for Amicus Curiae Pennsylvania Association for Rational Sexual
Offense Laws*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 19-2405

Case Name: M. S. Willman v. U.S. Attorney General

Name of counsel: Adele D. Nicholas

Pursuant to 6th Cir. R. 26.1, Amici Allied State Organizations for Federalism under SORNA
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on February 25, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Adele D. Nicholas

5707 W. Goodman Street

Chicago, IL 60630

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Index of Authorities.....	i
Interest of <i>Amici Curiae</i>	1
Summary of Argument.....	1
Argument:	
Legal Status of Certain Persons with Prior Sex Offense Convictions under State Laws	2
Conclusion.....	9
Certificate of Compliance.....	10
Certificate of Service.....	10

INDEX OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Commonwealth v. Baker</i> , 295 S.W.3d 437 (Ky. 2009).....	3
<i>Commonwealth v. Muniz</i> , 164 A.3d 1189 (Pa. 2017).....	4
<i>Dept. of Pub. Safety & Corr. Servs. v. Doe</i> , 94 A.3d 791 (Md. 2014)...	5, 6
<i>Doe v. Dept. of Pub. Safety & Corr. Servs.</i> , 62 A.3d 123 (Md. 2013)...	4
<i>Doe v. Phillips</i> , 194 S.W.3d 833 (Mo. banc 2006).....	4
<i>Doe v. State</i> , 189 P.3d 999 (Alaska 2008).....	4

	<u>Page</u>
<i>Does#1-5 v. Snyder</i> , 834 F.3d 696 (6 th Cir. 2016), <i>cert. denied</i> , --- U.S. ---, 138 S. Ct. 55 (2017).	4
<i>Fonseca Consolidated Rail Corp.</i> , 246 F.3d 585 (6 th Cir. 2001).....	2
<i>Graiser v. Visionworks of America, Inc.</i> , 819 F.3d 277 (6 th Cir. 2016)..	2
<i>Millard v. Rankin</i> , 265 F.Supp.3d 1211 (D. Colo. 2017), <i>appeal pending</i> (10 th Cir., No. 17-1333).	4
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	8, 9
<i>Smith v. Doe</i> , 538 U. S. 84 (2003).....	3
<i>Starkey v. Oklahoma Dept. of Corrections</i> , 305 P.3d 1004 (Okla. 2013).	3
<i>State v. Letalien</i> , 985 A.2d 4 (Me. 2009).....	4
<i>United States v. Kebodeaux</i> , 560 U.S. 387 (2013).....	4
<i>Wallace v. State</i> , 905 N.E. 2d 371 (Ind. 2009).....	4
<i>United States v. Paul</i> , 718 Fed. Appx. 360 (6 th Cir., Dec. 11, 2017), <i>cert. denied</i> , 589 U.S. --- (U.S., Nov. 25, 2019)(No. 17-8830).	2
<i>Willman v. Office of U.S. Attorney General</i> , No. 2:19-cv-10360-GAD-MKM, 2019 WL 4809592 (E.D. Mich. Oct. 1, 2019).	<i>passim</i>
<u>Statutes, Codes, Rules, and Constitutional Provisions:</u>	
Sex Offender Registration and Notification Act, 34 U.S. 20911, <i>et seq.</i> (“SORNA”).	<i>passim</i>

	<u>Page</u>
18 U.S.C. Section 2250.....	7, 8
34 U.S.C. Section 20913.....	1, 9
34 U.S.C. Section 20922.....	5
34 U.S.C. Section 20927.....	5
Rule 25, Federal Rules of Appellate Procedure.....	10
Rule 29, Federal Rules of Appellate Procedure.....	1, 10
Rule 32, Federal Rules of Appellate Procedure.....	10

Other Sources:

National Center for Missing and Exploited Children, <i>Records and Access Unit Annual Report</i> (May 30, 2018).	3
Steven Yoder, <i>Why Sex Offender Registries Keep Growing Even as Sexual Violence Rates Fall</i> , in <i>The Appeal</i> (July 3, 2018).	3

INTEREST OF AMICI CURIAE

Amici curiae which have joined this brief, Alliance for Constitutional Sex Offender Laws (of California)(“ACSOL”), Florida Action Committee (“FAC”), Illinois Voices for Reform (“IVR”); Families Advocating Intelligent Registries (of Maryland)(“FAIR”), Women Against the Registry (of Missouri)(“WAR”), OK Voices (of Oklahoma)(“OKV”), and Pennsylvania Association for Rational Sexual Offense Laws)(“PARSOL”), collectively known as *Allied State Organizations for Federalism under SORNA* (“*Amici*”), are nonprofit organizations which advocate for fair and legal application of federal and state laws pertaining to sex offender registration. In the view of *Amici*, the Court of Appeals’ decision in the present case may affect the individual federal and state constitutional rights of members of their respective organizations, and the content of this brief will aid the Court’s deliberations and decision.¹

SUMMARY OF ARGUMENT

When granting Appellee’s motion to dismiss the District Court concluded 34 U.S.C. Section 20913(a)(“Section 20913”) of the Sex Offender Registration and Notification Act, 34 U.S. 20911, *et seq.* (“SORNA”), “impose[s] duties on *all* sex

¹ Pursuant to Fed. R. App. P. 29, undersigned counsel certifies that all parties to this appeal were timely notified by *Amici* that this brief would be filed and all parties have consented to the filing of this brief. No counsel for any party participated in the preparation or filing of this brief, and no person or entity, other than *Amici*, funded its preparation or submission.

offenders, irrespective of what they may be obligated to do under state law.”² This brief has two purposes. First, this brief is intended to alert the Court of Appeals to the fact that the District Court’s ruling on this point, if affirmed in a published decision entitled to precedential weight, would be inconsistent with the intent of Congress when it enacted SORNA.³ Second, the District Court’s ruling, as stated above, if affirmed by the Court of Appeals, would result in absurd consequences when applied to certain individuals residing in states wherein registration requirements under state law have been invalidated on the basis of state constitutional provisions interpreted by state courts of last resort.

**ARGUMENT: LEGAL STATUS OF CERTAIN PERSONS
WITH PRIOR SEX OFFENSE CONVICTIONS
UNDER STATE LAWS**

The most recent available data indicates there are more than 900,000 persons within the United States who are required to register as sex offenders under state

² Order and Opinion Granting Defendant’s Motion to Dismiss, No. 2:19-cv-10360-GAD-MKM, slip op. at 7, 2019 WL 4809592, * 2 (RE 23, Page ID# 568)(E.D. Mich. Oct. 1, 2019)(emphasis in original), quoting *United States v. Paul*, 718 Fed. Appx. 360 (6th Cir., Dec. 11, 2017), *cert. denied*, 589 U.S. --- (U.S., Nov. 25, 2019)(No. 17-8830).

³ The Court of Appeals’ prior decision in *United States v. Paul*, *supra*, being an unpublished decision, does not constitute “controlling authority” either in the District Court or in this Court. *Fonseca Consolidated Rail Corp.*, 246 F.3d 585, 591 (6th Cir. 2001); *Graiser v. Visionworks of America, Inc.*, 819 F.3d 277, 283 (6th Cir. 2016).

laws.⁴ Apart from this population there are an unknown (but no doubt significantly high) number of persons within the United States who have a prior conviction for a “sex offense,” as defined by SORNA, but who are not required to register as sex offenders under the laws of the states wherein they reside. This category of individuals is for the most part comprised of persons who reside in states in which state courts of last resort have ruled state-law sex offender registration statutes, when applied retroactively, are prohibited by state constitutional provisions. These state courts have often invalidated state registration schemes, under state constitutional law, because they include restraints or disabilities more stringent than the basic registration requirement upheld by the U.S. Supreme Court in *Smith v. Doe*, 538 U. S. 84 (2003).⁵ On the other hand, several state court decisions have more directly departed from the federal constitutional decision reached by the U.S. Supreme Court in *Smith v. Doe*, for purposes of interpreting their own state constitutions, and have invalidated “retroactive” or “retrospective” application of

⁴ National Center for Missing and Exploited Children, *Records and Access Unit Annual Report* (May 30, 2018), graphic table *reprinted* in Steven Yoder, *Why Sex Offender Registries Keep Growing Even as Sexual Violence Rates Fall*, in *The Appeal* (July 3, 2018), available online at: <https://theappeal.org/why-sex-offender-registries-keep-growing-even-as-sexual-violence-rates-fall/> (last visited Feb. 25, 2020).

⁵ *E.g.*, *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009)(invalidating on state constitutional grounds a statutory scheme which regulated where sex offenders could reside); *see also*, *Starkey v. Oklahoma Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013)(cumulative burdens under state statute, in addition to registration alone, violated state constitution).

state laws on the ground that *registration requirements, alone*, are unconstitutional.⁶ Additionally, as the result of federal constitutional decisions rendered by this Court and by the United States Courts of Appeals for the Tenth Circuit, it is uncertain whether certain offenders residing in Michigan and Colorado presently are, or will be in the future, required to register as “sex offenders” under their respective state laws.⁷

Congress enacted SORNA pursuant to its “Spending Clause” powers in 2006.⁸ When it did so, Congress contemplated some states, as the result of protections of liberty guaranteed under their own state constitutions, would

⁶ See, e.g., *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006)(registration requirement violated state constitutional provision prohibiting “retrospective” laws); *Doe v. State*, 189 P.3d 999 (Alaska 2008)(registration requirement violated state constitutional provision prohibiting “ex post facto” laws); *Wallace v. State*, 905 N.E. 2d 371 (Ind. 2009)(same); *State v. Letalien*, 985 A.2d 4 (Me. 2009)(same); *Doe v. Dept. of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013)(same); and, *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017)(same).

⁷ See, *Does#1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016)(ruling Michigan’s registration statute invalid under the Ex Post Facto Clause of the U.S. Constitution), *cert. denied*, --- U.S. ---, 138 S. Ct. 55 (2017); and, *Millard v. Rankin*, 265 F.Supp.3d 1211 (D. Colo. 2017)(ruling Colorado’s registration statute invalid, *inter alia*, under the Cruel and Unusual Punishment Clause of the Eighth Amendment to the of the U.S. Constitution), *appeal pending* (10th Cir., No. 17-1333).

⁸ *United States v. Kebodeaux*, 560 U.S. 387, 397 (2013)(Congress in SORNA “used Spending Clause grants to encourage States to adopt its uniform definitions and requirements”).

prohibit compliance with SORNA.⁹ Neither SORNA nor any other federal law authorizes or requires any *federal* agency to register an individual regardless of whether a duty to register arises under SORNA or otherwise. Thus, persons required to register as a result of a conviction for a sex offense, regardless of whether their conviction arises under federal or state law, can do so only with the assistance of state officials who, under SORNA, have exclusive authority and responsibility to administer sex offender registries. Consequently, so long as persons with sex offense convictions remain within a state wherein a court of last resort has ruled registration unconstitutional under state law, those persons to whom the state court decision applies “cannot be required to register as sex offenders...notwithstanding the registration requirements imposed directly on individuals by SORNA.”¹⁰

Under SORNA Congress *did establish* a federal online search engine designed to enable public access to information concerning sex offenders maintained on databases in every state and federal jurisdiction which participates in SORNA. See, 34 U.S.C. Section 20922 (the Dru Sojdin National Sex Offender Public Website). Now designated as the National Sex Offender Public Website

⁹ See, 34 U.S.C. Section 20927(3)(b)(authorizing the U.S. Attorney General to excuse noncompliance with SORNA when a state has a “demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction’s highest court”).

¹⁰ *Dept. of Pub. Safety & Corr. Servs. v. Doe*, 94 A.3d 791, 811 (Md. 2014).

(“NSOPW”), information publicly available on NSOPW “is not in fact a separate registration system, but rather is a compilation of all state registries, allowing a member of the public to search all state records in one place.” *Dept. of Pub. Safety & Corr. v. Doe, supra*, 94 A.3d at 812. Under SORNA, state authorities alone are “responsible for the accuracy, updating, and removal of this information,” and when they have been ordered to remove an offender’s registration information from a state registry, on the basis of a state court decision of constitutional dimension arising under state law, the offender’s information “as a practical matter” is removed from the federal NSOPW. *Ibid.*

The aggregate consequences that would result from the District Court’s judgment in the instant case, to the extent it has ruled SORNA “impose[s] duties on *all* sex offenders, irrespective of what they may be obligated to do under state law,”¹¹ would be ubiquitous and profound. First, individuals who are constitutionally exempted from registration under the state constitutions of their residence, due to the state court decisions cited above,¹² would be required to register under SORNA should they change the location of their residences *within* their states. A federal duty to register in this context would be impossible when state officials have been prohibited from registering person as the result of state

¹¹ Order and Opinion Granting Defendant’s Motion to Dismiss, *supra* (RE 23, Page ID# 568).

¹² See, footnote 6, *ante*.

constitutional decisions. Additionally, an independent federal obligation would be a peculiar “requirement” in the sense that the federal duty to register would depend entirely upon “self-enforcement” when a person has not engaged in interstate travel, and has not been convicted of a federal offense. In this connection, SORNA clearly provides that in the absence of a person’s travel in intrastate commerce, or the person’s prior conviction for an enumerated federal sex offense defined by federal law, such a person is not subject to criminal liability for failure to register under federal law.¹³

Second, a number of individuals constitutionally exempted from registration under the state constitutions of their residence, due to the state court decisions cited above, would be required to register under SORNA should they travel to another state or foreign jurisdiction and establish a new residence, or acquire employment or enroll as students. *As a general matter*, the “independent federal duty” to register under SORNA as found by the District Court would not be problematic; however, under some circumstances an independent federal duty would apply even when such persons have traveled to a state or foreign jurisdiction that does not authorize or permit its officials to register them. While these particular individuals would likely have a valid affirmative defense in the course of federal prosecution after their federal indictment for an alleged violation of SORNA by failing to

¹³ See, 18 U.S.C. Section 2250(a)(limiting scope of federal criminal liability).

register,¹⁴ this fact would provide them with little solace in view of the costs incurred by their legal defenses and losses of liberty.

Third, the decision to classify persons who are constitutionally exempted from registration under the state constitutions of their residence, as persons “required to register” under SORNA, would produce unconstitutional results. When state courts of last resort have constitutionally prohibited their state officials from requiring sex offender registration under state law, a federal requirement to administer SORNA, as applied to such state officials, would plainly qualify as an unconstitutional federal “commandeering” of those officials. The act of requiring state executive branch officials to administer the federal registration requirement of SORNA for a federal purpose (as sanctioned by the District Court) would squarely be prohibited by the U.S. Constitution. *Printz v. United States*, 521 U.S. 898, 925 (1997)(“the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs”).

Fourth, a similar unconstitutional federal “commandeering” of state officials would occur under the District Court’s reasoning when the category of individuals described above chose to establish a new residence, or acquire employment or enroll as students, in another State. When neither the state from which such persons have resided nor the destination state to which they have traveled require

¹⁴ *See*, 18 U.S.C. Section 2250(c)(providing affirmative defense of “uncontrollable circumstances”).

them to register under state law, the federal act of requiring state officials in either state to administer SORNA would also be prohibited under the U.S. Constitution. *Printz v. United States, supra*, 521 U.S. at 925.

The impact of the District Court's ruling, if affirmed by the Court of Appeals, would not be limited to persons who reside within the Sixth Circuit's federal jurisdiction. The United States is inhabited by a mobile society and it can safely be predicted that individuals who fit the description of individuals identified above will relocate their residences, or obtain employment or become students, after traveling to or from a jurisdiction within the Sixth Circuit of Court of Appeals.

CONCLUSION

Simply stated, the District Court's conclusion that Section 20913(a) of SORNA "impose[s] duties on *all* sex offenders, irrespective of what they may be obligated to do under state law"¹⁵ is unsupported by either SORNA or federal constitutional law. Furthermore, in light of the far-reaching and radical consequences that would result were the Court of Appeals to affirm the District Court's judgment on this basis, it should refrain from affirming the District Court's judgment on the aforementioned ground stated by the District Court.

¹⁵ Order and Opinion Granting Defendant's Motion to Dismiss, *supra* (RE 23, Page ID# 568).

Respectfully submitted,

/s/Adele D. Nicholas

Law Office of Adele D. Nicholas

5707 W. Goodman Street

Chicago, IL 60630

847/361-3869 (voice)

adele@civilrightschicago.com (email)

*Counsel for Allied State Organizations
for Federalism under SORNA*

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(g)(1) of the Federal Rules of Appellate Procedure, this is to certify that this document contains 2,010 words excluding matters exempted by Rule 32(f) of the Federal Rules of Appellate Procedure; that it complies with the type-volume limitation imposed by Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure as further limited for *amicus* briefs by Rule 29(5) of the Federal Rules of Appellate Procedure (one-half of 13,000 words); and, that it complies with the type-face and the type-style requirements of Rules 32(a)(5) and (6) of the Federal Rules of Appellate Procedure, respectively, because it has been prepared in proportionally spaced typeface using 14 point type and has been set in plain roman style.

/s/Adele D. Nicholas

CERTIFICATE OF SERVICE

In accordance with Rule 25(d) of the Federal Rules of Appellate Procedure, this is to certify that this document was served using the Electronic Case Filing

(“ECF”) system on the Attorney of Record for the Appellee, Ashley A. Cheung, directed to her registered email address on that system, ashley.cheung@usdoj.gov; and on the Attorney of Record for the Appellant, Daniel C. Willman, directed to his registered email address on that system, danielcwillman@aol.com; both on this 25th day of February, 2020.

/s/Adele D. Nicholas