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)

Amicus Curiae Brief of Texas Voices for Reason and Justice, Inc.,

In Support of Plaintiff-Appellant

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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: Richard Gladden

Pursuant to 6th Cir. R. 26.1, Texas Voices for Reason and Justice, Inc.
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/ Richard Gladden
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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.

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INTEREST OF AMICUS

Amicus Curiae, Texas Voices for Reason and Justice, Inc. ("TVRJ" or "Amicus") is, and has been since 2009, a domestic, nonprofit organization duly incorporated under the laws of Texas. For more than a decade, in accordance with its primary purpose to advocate "common sense" sex offender registration, TVRJ has taken a particular interest in the accurate legal interpretation and uniformity of Federal and State decisional law which applies the Sex Offender Registration and Notification Act, 34 U.S. 20911, *et seq*. ("SORNA"). TVRJ currently has affiliated chapters which meet monthly in Austin, Dallas, Fort Worth, Houston and San Antonio, Texas. TVRJ's membership includes persons who have a prior sex offense conviction under Texas law but who *do not* have a duty to register under Texas law, and who *would have* an intrastate "federal duty" to register while residing in Texas were SORNA interpreted in the manner which it has been by the U.S. District Court in this case. Similarly, TVRJ's membership includes persons who *would have* an intrastate "federal duty" to register in Michigan should they establish a residence, gain employment or enroll as students in Michigan, were SORNA to be interpreted as it has been by the U.S. District Court in this case.

In accordance with Rule 29 of the Federal Rules of Appellate Procedure, undersigned counsel certifies that all parties to this appeal have received timely notice of amicus's intent to file this brief and consent has been given. Further, no

counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

SUMMARY OF ARGUMENT

In its judgment and opinion granting the motion to dismiss below the U.S. District Court, relying on this Court's unpublished decision in *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), ruled that "*all*" persons who have a prior conviction for a sex offense have a "federal duty" to register as sex offenders directly under SORNA. According to the District Court this "federal duty" is independent of any State law requirement. Furthermore, according to the District Court, this "federal duty" applies to "*all*" such offenders regardless of whether they have engaged in interstate commerce, regardless of whether they have a prior conviction for any offense under federal law, and regardless of whether they are only "State-law offenders" who are not required to register under the laws of the State in which they reside.[1]

The relevant question before the District Court was not whether the federal duty to register under SORNA is "dependent" on the existence of a duty to register under State law, nor is that question relevant to this appeal. Rather, the relevant

[1] 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# 562)(E.D. Mich. Oct. 1, 2019), quoting *United States v. Paul*, *supra,* 718 Fed. Appx. at 363-364 (emphasis in original).

question presented by Plaintiff was (and is) whether a "federal" registration requirement in SORNA *applies to Plaintiff at all*.

The District Court's legal premise that a federal duty to register under SORNA applies to "all individuals" convicted of a State-law sex offense, including Plaintiff, directly conflicts with: 1) decisional law of the U.S. Supreme Court in cases arising under SORNA; 2) decisional law of other U.S. Courts of Appeals; 3) SORNA's legislative history; and, 4) regulations published by the Attorney General of the United States in accordance with authority delegated to him by Congress under SORNA. For these reasons Amicus respectfully submits the District Court's decision in this case should not be affirmed on the basis of its legal conclusion that the federal duty to register under SORNA applies to "all individuals" convicted of a State-law sex offense.

I.

ARGUMENT

The Plaintiff is a resident of Michigan and was convicted of a sex offense under Michigan law on November 2, 1993.[2] In *Does#1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, --- U.S. ---, 138 S. Ct. 55 (2017), this Court declared retroactive application of Michigan's sex offender registration statute, as amended

[2] Plaintiff's Original Complaint, 2 ¶ 2, and 7 ¶ 21 (RE 1, Page ID# 4; RE 1, Page ID# 9)(filed Feb. 5, 2019).

in 2006 and 2011, unconstitutional.[3] The Michigan legislature since the decision in *Does#1-5*, *supra*, has not enacted a new registration statute; and the U.S. District Court for the Eastern District of Michigan has entered an order which will enjoin enforcement of Michigan's invalidated statute.[4] While Plaintiff in the present case may or may not ultimately be required to register as a sex offender under Michigan law (depending on future legislation or judicial abrogation of the District Court's decision to enjoin enforcement of Michigan's statute), the argument contained in this brief will endure regardless of those contingencies. This brief does not depend on the validity of any state law; rather, it concerns a matter of purely federal law, i.e., whether Plaintiff is subject to an independent, and intrastate, "federal" duty to register under SORNA.

Under SORNA, federal law imposes on the several States a duty to enact sex offender registration programs as a condition to their receipt of certain federally allocated funds. One provision under SORNA, Title 34 U.S.C. Section 20913(a)("Section 20913(a)"), requires States which receive certain federal funds to enact State laws which, at a minimum, provide that "[a] sex offender shall 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."

[3] Id., 834 F.3d at 706.
[4] *See*, *Does#1-6 v. Snyder*, No. 2:16-cv-13137-RHC-DRG, RE 84, Page ID# 1777 (Order Granting Injunctive Relief)(Feb. 14, 2020).

Under Title 18 U.S.C. Section 2250(a)("Section 2250(a)"), Congress, pursuant to its Commerce Clause powers, also created a federal duty (and a corresponding criminal penalty for its breach) applicable to certain persons who engage in interstate commerce. This federal duty requires a person defined as a "sex offender" by SORNA to register within three business days after arrival in a State other than their State of residence, if or when their activities involve "interstate commerce" (establishment of new residence, employment, or enrollment as a student). *See*, Sections 20913(a) and 20913(c).

As a factual matter, there is no support in the record to suggest Plaintiff has a prior conviction for violation of any federal law, including the Uniform Code of Military Justice, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States. Similarly, there is no suggestion in the record that Plaintiff, after his conviction for commission of an enumerated sex offense *under Michigan law*, is or has ever been engaged in interstate commerce. Under these circumstances Plaintiff is not subject to criminal enforcement of any federal duty to register, as provided by Section 2250(a), unless or until he engages in interstate commerce, notwithstanding his prior conviction for a "sex offense" under Michigan law.

As applied to Plaintiff, then, the first question that arises is whether, and to what extent, Congress intended Plaintiff to have a "federal" duty to register under

Section 20913(a). The second question presented, if it is determined Congress intended Plaintiff to be subjected to a federal duty to register under Section 20913(a), is whether, as a constitutional matter, the federal duty to register under Section 20913(a), *as applied to a person who has not traveled in interstate commerce*, is authorized by an enumerated power within the U.S. Constitution. The third question presented is whether, as a constitutional matter, the federal registration requirement imposed under Section 20913(a), *as applied to a person who has not traveled in interstate commerce*, is constitutionally authorized by the Necessary and Proper Clause of the U.S. Constitution.

A) ***As a Matter of Statutory Interpretation, SORNA does not impose a Federal Duty to Register Absent Interstate Commerce.***

Section 20913(a), as applied to Plaintiff, does not impose a federal duty to register *in the absence of his travel in interstate commerce*. This legal conclusion is reinforced by decisional law of the U.S. Supreme Court in cases arising under SORNA; decisional law of other U.S. Courts of Appeals; SORNA's legislative history; and regulations published by the Attorney General of the United States in accordance with authority delegated to him by Congress under SORNA.

1) ***Relevant Statutory Provisions***.

Several federal statutory provisions within SORNA are relevant to this appeal. These include:

- Title 34 U.S.C. Section 20913(a), which provides "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides...."; and
- Title 34 U.S.C. Section 20911(1), which states "[t]he term 'sex offender' means an individual who was convicted of a sex offense."

Lastly, as a federal enforcement mechanism, Section 2250(a) delineates the federal offense which accompanies a person's breach of duty under Section 20913(a). Section 2250 provides federal punishment for the breach of that duty as follows:

> "(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 the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; *or*
>
> (B) *travels in interstate* or foreign *commerce*, or enters or leaves, or resides in, Indian country; *and*
>
> (3) *knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act*;
>
> shall be fined under this title or imprisoned not more than 10 years, or both." (emphasis added)

2) ***Relevant U.S. Supreme Court Decisional Law.***

The Supreme Court has cast doubt on the notion that, in the absence of interstate travel by a person convicted for a sex offense under State law, SORNA imposes an "intrastate" federal duty to register. In *Carr v. United States*, 560 U.S. 438 (2010), for example, the Court was presented with the question whether Section 2250 applies to sex offenders whose interstate travel occurred prior to the effective date of SORNA in 2006. Id., 560 U.S. at 441. While the defendant in *Carr v. United States* had engaged in interstate travel prior to 2006, the Court nonetheless took the occasion to more broadly express its views concerning the scope of the federal duty to register imposed by SORNA. In this connection, the Court observed that Section 2250 has "three elements" and that "the statute's three elements must be satisfied in sequence." Id., 560 U.S. at 446. As the basis for this conclusion the Court further stated:

> "A sequential reading…helps to ensure a nexus between a defendant's interstate travel and his failure to register as a sex offender. Persons convicted of sex offenses under state law who fail to register in their State of conviction would otherwise be subject to federal prosecution under § 2250 *even if they had not left the State after being convicted--an illogical result given the absence of any obvious federal interest in punishing such state offenders*."
>
> Id., 560 U.S. at 441 (emphasis added).

Thus, under the Supreme Court's interpretation of Section 2250 in *Carr v. United States*, *supra*, Congress intended Section 2250 to apply only to "persons

required to register under SORNA over whom the Federal Government has a direct supervisory interest," or to persons "who threaten the efficacy of [SORNA's] statutory scheme *by traveling in interstate commerce*." Id., 560 U.S. at 453 (emphasis added). The Supreme Court subsequently echoed this interpretation of Section 2250(a) in *Reynolds v. United States*, 565 U.S. 432 (2012), wherein the Court interpreted the phrase "whoever… is required to register under [SORNA]," as it appears in Section 2250(a), to be limited to "federal sex offender[s]" or "nonfederal sex offender[s] *who trave[l] in interstate commerce*." Id., 565 U.S. at 435 (emphasis added).

In *United States v. Kebodeaux*, 560 U.S. 387 (2013), the Court observed that "as far as [it][could] tell, while SORNA punishes violations of its requirements (instead of violations of state law), the Federal Government has prosecuted a sex offender for violating SORNA only when that offender also violated state-registration requirements." Id., 560 U.S. at 398. The explanation for this absence of federal prosecutions, as stated, is that Section 2250 applies only when the breach of *a state-law duty to register* has occurred. Thus, in *Nichols v. United States*, 578 U.S. --- , 136 S. Ct. 1113 (2016), the Court ruled SORNA does not require a person, who moves from one State to another, to notify the State *from which he is moving* of his change of address. Rather, a person to which SORNA applies is only required to notify the State *in which he establishes a new residence*, *after his move*,

of his change of address. Id., 136 S. Ct. at 1117-1118.[5] The same limitation would apply to such a person's employment or enrollment as a student in a destination State.

3) ***Decisional law of the U.S. Courts of Appeals.***

Several U.S. Courts of Appeals have concluded *as a matter of statutory interpretation* that "a sex offender whose underlying conviction was obtained pursuant to *state* law and who never crosses state lines, international borders, or the boundaries of Indian country, cannot be criminally liable for failure to comply with SORNA." *United States v. Guzman*, 591 F.3d 83, 90 (2nd Cir. 2010)(emphasis added); *United States v. Thompson*, 811 F.3d 717, 722 (5th Cir. 2016)(same); *see also*, *United States v. Husted*, 545 F.3d 1240, 1243 and n. 3 (10th Cir. 2008)(ruling Section 2250(a)(2)(B) is an express "jurisdictional element" necessary for conviction under Section 2250). In an unpublished decision however, the Sixth Circuit appears to have categorically held, as a matter of statutory interpretation, that the duty to register under SORNA "bind[s] all individuals 'convicted' of sex

[5] As further noted in *Nichols*, *supra*, 136 S. Ct. at 1116, the statutory predecessor to SORNA, i.e., Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103, 108 Stat. 2038 (1994)("Jacob Wetterling Act"), only required offenders to register in the State to which they moved "if the new State ha[d] a registration requirement." Id, 136 S.Ct. at 1116, *quoting* 42 U.S.C. § 14071(b)(5) (1994 ed.). The substance of that provision was not retained in SORNA, but an affirmative "uncontrollable circumstance" defense was included in SORNA, under Section 2250(c), which presumably would prevail when raised by persons who are accused of violating Section 2250(a) after having moved to a State which does not have a registration requirement.

offenses, not just those with corresponding state obligations." *United State v. Paul*, *supra,* 718 Fed. Appx. at 364-365. The Sixth Circuit's unqualified adherence to the broad legal conclusion reached in *United States v. Paul*, i.e., that SORNA categorically requires "all individuals" convicted of a sex offense to register regardless of whether they are "federal sex offender[s]" or "nonfederal sex offender[s] who trave[l] in interstate commerce," *Reynolds v. United States*, *supra*, 565 U.S. Id., 565 U.S. at 435, would generate, if not further aggravate, an inter-circuit split between the Sixth Circuit, and the Second, Fifth and Tenth Circuits.

4) ***Legislative History.***

The legislative history that preceded adoption of SORNA, as well as the literal text of SORNA itself, discloses that Congress sought to secure intrastate registration on the basis of a State-imposed duty on offenders which was incentivized by its "Spending Clause" powers.[6] The duty to register, as originally enacted in 1994 under the Jacob Wetterling Act, *imposed only a duty to register under State law*; and, pursuant to its Spending Clause powers, Congress provided that enforcement of the State-law duty to register would be confined exclusively to

[6] *United States v. Kebodeaux*, *supra,* 560 U.S. at 398 (Noting Congress in SORNA "used Spending Clause grants to encourage States to adopt its uniform definitions and requirements").

State-court jurisdiction.[7] With regard to the subsequent "federal" duty to register under SORNA as enacted in 2006, and imposition of a federal criminal penalty for breach of that federal duty, legislative history reveals Congress' purpose was to close a perceived "loophole" which permitted persons convicted of sex offenses under State law to go "missing" by relocating their residences from one State to another. Evidence of this latter Congressional intent includes, but is not limited to, the legislative statements which follow:

- Representative Brown-Waite of Florida, a sponsor in the U.S. House of legislation which became SORNA, argued that "Congress has a duty to act and to protect our children nationwide, because these predators move from state to state";[8]

- Representative Coble of North Carolina voiced concern that there was "little to no infrastructure needed to ensure registration when sex offenders move from one State to another or when a sex offender enters another State to go to work or to enroll in a school";[9]

[7] Title 42 U.S.C. §14071(c)("PENALTY. A person required to register under a State program established pursuant to this section…shall be subject to criminal penalties in any State in which the person has so failed [to register]"); Pub. L. No. 103, 108 Stat. 2041 (1994).

[8] House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797, Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (June 9, 2005), page 13.

[9] House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797, Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (June 9, 2005), page 2.

- Representative Sensenbrenner of Wisconsin, Chairman of the House Judiciary Committee, and a principal co-author of what became SORNA, explained that "[i]n order to address the problem of missing sex offenders, that is those who fail to comply with moving from one State to another, sex offenders will now face Federal prosecution."[10]

In addition to the foregoing statements by Members of Congress, on March 8, 2006, during debate on the floor of the House, a letter expressing the views of the United States Judicial Conference was entered into the record. With regard to what would later become Section 2250, the Judicial Conference noted:

> "Another section would make it a federal crime for a person to knowingly fail to register as required under the Sex Offender Registration and Notification Act if the person is either a sex offender based upon a federal conviction *or is a sex offender based on a state conviction who thereafter travels in interstate or foreign commerce,* or enters or leaves, or resides in, Indian country. Because the requirement to register under that act would include convictions in state courts, this has the potential to expand federal jurisdiction over large numbers of persons whose conduct would previously have been subject to supervision solely by the state courts."[11]

5) ***Relevant Federal Regulations***.

For purposes of aiding interpretation and implementation of SORNA, Congress delegated authority to the Attorney General of the United States to issue federal guidelines and regulations. *See*, 34 U.S.C. Section 20912(b)(Pub. L. 109-248, title I, §112, July 27, 2006, 120 Stat. 593)("The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter."). In at least

[10] 151 Cong. Rec. 20,207 (debate on Children's Safety Act of 2005, H.R. 3132)(Sept. 14, 2005).
[11] 152 Cong. Rec. 2254, 2983 (March 8, 2006)(emphasis added).

four publications issued under the foregoing authority the Attorney General has continuously stated, in substantially similar form, that:

> "SORNA directly imposes registration obligations on sex offenders as a matter of federal law and provides for federal enforcement of these obligations *under circumstances supporting federal jurisdiction*. These obligations include registration, and keeping the registration current, in each jurisdiction in which a sex offender resides, is an employee, or is a student, with related provisions concerning such matters as the time for registration, the information to be provided by the registrant, and keeping the information up to date.
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> ****
>
> "Because circumstances supporting federal jurisdiction—such as conviction for a federal sex offense as the basis for registration, or interstate travel by *a state sex offender who then fails to register in the destination state—are required predicates for federal enforcement of the SORNA registration requirements*, creation of these requirements for sex offenders is within the constitutional authority of the Federal Government."[12]

Notably, the U.S. Attorney General in his initial interim rule, *Applicability of the Sex Offender Registration and Notification Act*, *supra,* 72 Fed. Reg. at 8895,

[12] Office of the Attorney General, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007)(Interim Rule)(emphasis added); see also, *National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030, 38069 (July 2, 2008)(Final Guidelines)(limiting enforcement of Section 2250 to "circumstances supporting federal jurisdiction… such as interstate or international travel by a sex offender, or conviction of a federal sex offense for which registration is required"); Office of the Attorney General, *Applicability of the Sex Offender Registration and Notification Act*, 75 Fed. Reg. 81849, 81850 (Dec. 29, 2010)(Final Rule); and, Office of the Attorney General, *Supplemental Guidelines for Sex Offender Registration and Notification*, 76 Fed. Reg. 1630, 1638 (Jan. 11, 2011)(Final Guidelines).

determined a "State sex offender" commits an offense under Section 2250(a), or breaches his "federal" duty to register under SORNA, only if, after interstate travel, he *"then fails to register in the destination state*" --- not after he has failed to register in the State from whence he traveled. In other words, "travel in interstate commerce" is a "predicate" for "*federal enforcement of the SORNA registration requirements*." Id., 72 Fed. Reg. at 8895. If Section 20913(a) and Section 2250(a) are read *in para materia*, the federal duty to register under Section 20913(a), like the same duty under Section 2250(a), must be construed to mean Section 20913(a), to the extent it concerns a "federal" duty, only imposes a duty on a "State offender" who, after interstate travel, fails to register in the State of his "destination."

6) ***The Plaintiff's Conduct within the State of his Residence is too Tenuous to Affect any Sort of Interstate Commerce.***

A common canon of statutory interpretation provides that Courts must "presume that legislatures act in a constitutional manner." *Illinois v. Krull*, 480 U.S. 340, 351 (1987). In view of what has been set out above, it is apparent that Section 20913(a) and Section 2250(a), as a matter of statutory interpretation, would apply to Plaintiff only if his intrastate conduct or status in the State of Michigan could be classified as "interstate commerce."

While the Supreme Court has ruled Congress may constitutionally "anticipate the *effects* on commerce of an economic activity," *see, Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012)(Opinion per Roberts, C.J.)(emphasis in original); the Court has "never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce." Ibid. It therefore must be presumed that Congress, in order to avoid constitutionally invalid applications of Sections 201913(a) and 2250(a), intended the federal duty to register under SORNA to be applicable only to "State sex offenders" whose *present conduct* has "a predictable impact on future commercial activity." *Gonzales v. Raich*, 545 U.S. 1, 23 (2005).

Moreover, Supreme Court precedents "recognize Congress's power to regulate 'class [es] of *activities*,' not classes of *individuals,* apart from any activity in which they are engaged." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, *supra*, 567 U.S. at 556 (Opinion per Roberts, C.J.)(emphasis in original). The Plaintiff's status as a person previously convicted of a sex offense under Michigan law, of course, does not alone qualify Plaintiff as a person engaged in interstate commerce. Just as "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," *United States v. Lopez*, 514 U.S. 549, 567 (1995); Plaintiff's mere status as a State sex offender "is in no sense an economic activity that might,

through repetition elsewhere, substantially affect any sort of interstate commerce." Ibid. For this reason, as a matter of statutory interpretation, the Court should presume Congress did not intend to impose an "intrastate" federal duty to register upon Plaintiff under SORNA.

As previously stated, Plaintiff appears to have no prior criminal history of violating any federal law, including the Uniform Code of Military Justice, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States. Furthermore, it appears Plaintiff has at no time traveled in interstate or foreign commerce, or entered, departed from, or resided in, Indian country. Thus, because Plaintiff is not among the category of "persons required to register under SORNA over whom the Federal Government has a direct supervisory interest," and is not a person "who threaten[s] the efficacy of [SORNA's] statutory scheme *by traveling in interstate commerce*," *Carr v. United States*, *supra*, 560 U.S. at 453 (emphasis added), Plaintiff has no intrastate federal duty to register under SORNA.

B) ***Imposition of a Duty to Register on Plaintiff under Section 20913(a), Absent a Legally Sufficient Federal Interest, would violate Plaintiff's Federally Protected Constitutional Right to be Secure against Federal Governmental Action in Excess of the Authority that Federalism Defines.***

Amicus does not dispute that the federal duty to register under SORNA may *constitutionally* be applied to a person "over whom the Federal Government has a direct supervisory interest," *Carr v. United States*, *supra*, 560 U.S. at 453.[13] Nor does Amicus dispute that the duty to register under SORNA may constitutionally be applied to a person who is lawfully required to register under State law provided his conduct may be deemed to "threaten the efficacy of [SORNA's] statutory scheme by traveling in interstate commerce." Id., 560 U.S. at 453. What *Amicus does contend*, however, is that *if Section 20913(a) is not* interpreted to limit the federal registration duties of "State sex offenders" to those who, after interstate travel, have failed to register in the State of their "destination," it is unconstitutional.

The *constitutional* question presented under this heading (in contrast to the earlier matter of statutory interpretation) is to what extent Congress may constitutionally impose a federal duty to register under SORNA. Every law enacted by Congress "must be based on one or more of its powers enumerated in

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[13] Several Federal Courts of Appeals have overruled challenges to SORNA's "federal duty" on the basis of the Federal Government's direct interest in regulating persons with a prior federal conviction for a sex offense. *See, e.g., United States v. Thompson*, 811 F.3d 717, 722 (5th Cir. 2016), quoting *United States v. Sanders,* 622 F.3d 779, 781–782 (7th Cir.2010)("[o]ne convicted of *federal* sex offenses is liable for his knowing failure to register or update his registration *regardless* of whether he travels in interstate or foreign commerce")(emphasis in original); *United States v. Pendleton*, 636 F.3d 78, 86 (3rd Cir. 2011).

the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000). As explained long ago by Chief Justice Marshall, "[t]he [federal] government" has been "acknowledged by all to be one of enumerated powers," and "[t]he principle, that it can exercise only the powers granted to it . . . is now universally admitted." *McCulloch v. Maryland,* 4 Wheat. 316 (1819). Because in the absence of interstate commerce there is no federal power to impose an intrastate federal duty to register on persons who do not have a prior federal offense; SORNA's registration requirement, as applied to Plaintiff, cannot be sustained as a permissible exercise of Congressional power.

1) *Congress, unlike the Several States, does not Possess General Police Powers*.

As stated by one commentator in the early 20th century, "[t]he criminal law deals with offenses after they have been committed, the police power aims *to prevent* them." E. Freund, *Police Power* §86, p. 87 (1904)(emphasis added). The States which have adopted sex offender registration regimes, independently from federal law, have relied upon their States' non-federal "police powers" aimed at

advancing "public safety."[14] Thus, in *Smith v. Doe*, 538 U.S. 84 (2003), while not expressly referring to a State's "police powers" as the basis for nonfederal adoption of such laws, the Supreme Court noted the "primary governmental interest" invoked by the State of Alaska in support of its registration statute was its aim to "protect[t] the public from sex offenders." Id., 538 U.S. at 93.

Unlike the several States that have constitutions which vest plenary "police powers" in their legislatures, the U.S. Constitution does not vest "police powers" in the U.S. Congress. To the contrary, the U.S. Constitution withholds from Congress "plenary police power," *United States v. Lopez*, *supra,* 514 U.S. at 566, including "police powers" aimed at "suppression of violent crime." *United States v. Morrison*, 529 U.S. 598, 617-618 (2000). Because the U.S. Constitution withholds "plenary police power" from Congress, the federal duties under SORNA to register and "update" or "keep the registration current" may constitutionally be sustained only if their imposition is authorized by an enumerated power under the U.S. Constitution.

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[14] *United States v. Kebodeaux*, *supra,* 560 U.S. at 413 n. 2 (Thomas, J., joined by Scalia, J., dissenting)(listing registration statutes enacted by all 50 States under their respective "police powers"); *See also, e.g., People v. Dowdy*, 802 N.W.2d 239, 252-253 (Mich. 2011)(noting declaration of the Michigan legislature that its sex offender registration statute "was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders").

2) ***The Commerce Clause, as a matter of Constitutional Law, does not Authorize Imposition of an Intrastate "Federal Duty" to Comply with Section 20913(a).***

Under the U.S. Constitution, Congress has been delegated federal power to "regulate Commerce…among the several States." U.S. Const., Art. I, § 8, cl. 3 ("Commerce Clause"). The U.S. Supreme Court has placed into three categories the circumstances which permit a valid exercise of Commerce Clause powers by Congress:

> "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially affect interstate commerce."[15]

The Plaintiff's mere status as a person who has been convicted of a sexual offense *in violation of State law* does not involve "the use of the channels of interstate commerce" or "regulation or protection" of any "instrumentalities of interstate commerce." Under these circumstances the only valid federal interest, if any, which could plausibly support federal regulation under the Commerce Clause, would be a claim under the third category described above. That is, imposition of the duty to register imposed by Section 20913(a) would be authorized under the

[15] *United States v. Lopez*, *supra,* 514 U.S. at 558 (internal citations omitted).

Commerce Clause only if Plaintiff's "intrastate" activities "threaten the efficacy" of a valid regulation of interstate commerce. *Carr v. United States*, *supra*, 560 U.S. at 453.

In *United States v. Morrison*, *supra,* the Supreme Court clarified the legal framework for analyzing assertions of Congressional power under the "third category" of powers under the Commerce Clause, i.e., activities which are entirely "intrastate," but which nonetheless "substantially affect interstate commerce." In this context, the Court directed consideration of the following inquiries:

1) Whether the activity sought to be regulated involves "economic" activity;[16]

2) Whether the statute seeking to regulate an intrastate activity contains an "express jurisdictional element" which limits the statute's reach to a discrete set activities that additionally have an explicit connection with or effect on interstate commerce;[17]

3) Whether the literal, textual terms of the statute which seeks to regulate an intrastate activity, or the statute's legislative history, contains "an express congressional finding" regarding the effects of the intrastate activity upon interstate commerce;[18] and,

4) Whether the linkage, if any, between the intrastate activity sought to be regulated, and the activity's "substantial effect on interstate commerce," is attenuated.[19]

[16] Id., 529 U.S. at 610.
[17] Id., 529 U.S. at 611-612.
[18] Id., 529 U.S. at 612.
[19] Ibid.

A federal duty to register under Section 20913(a), unconstrained by Section 2250(a)'s "register-in-State-of destination" limitation, would fail to satisfy any of the four criteria stated above. First, a person's status acquired by having previously been convicted of a sex offense in violation of State law does not qualify as an "activity," much less an "economic" activity. Second, unlike Section 2250(a), Section 20913(a) does not contain an "express jurisdictional element" which limits its reach to a discrete set of activities that additionally have an explicit connection with or effect on interstate commerce. Third, neither the literal terms of Section 20913(a), nor its legislative history, contain "an express congressional finding" regarding the adverse commercial effects which would reign should persons, with only a prior State-law conviction for a sex offense, remain unregulated by an intrastate federal duty to register under Section 20913(a). Fourth, while a person remains within a State there is no "linkage" between the person's status as an individual previously convicted of a sex offense under State law, and any "substantial effect on interstate commerce."

3) ***Imposition of an Intrastate "Federal Duty" Upon Persons to Comply with Section 20913(a) is not Constitutionally Permissible under the Spending Clause.***

The most relevant question in this case concerns identification of the constitutional source of the federal power utilized by Congress when it enacted

Section 20913(a). Congress could have intended to impose a federal duty to register under Section 20913(a) on the basis of its enumerated powers under the U.S. Constitution, or under the Necessary and Proper Clause as a means to execute an enumerated power. Or, Congress could have intended to encourage the formation of a uniform duty to register under the laws of the several States, as it did in the Jacob Wetterling Act, which would be administered by the several States, and which would result from an exercise by Congress of its "Spending Clause" powers. All available evidence discloses Congress had the latter intent when it enacted SORNA in 2006, and confirms that Congress did not seek to impose an intrastate federal duty to register independently from the exercise of its Spending Clause powers. As discussed below however, no intrastate federal duty to register can *constitutionally* be imposed on persons residing within a State on the basis of Congress' Spending Clause powers.

Under the Spending Clause, Article I, § 8, cl. 1 of the U.S. Constitution, Congress may offer funds to the States and may condition those offers on compliance with specified conditions. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 686 (1999). These offers may well induce States to adopt policies that the Federal Government itself could not impose. *South Dakota v. Dole,* 483 U.S. 203, 205–206 (1987). In the exercise of its Spending Clause powers Congress has imposed a duty upon States to implement

SORNA in its entirety, including Section 20913(a). *See*, 34 U.S.C Section 20912(a)("Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter"). As an enforcement mechanism, Congress provided that "a[ny] jurisdiction that fails, as determined by the Attorney General, to substantially implement [SORNA] shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968." *See*, 34 U.S.C. Section 20927(a).

In 2008, the U.S. Attorney General issued interpretive final guidelines which recognized the several States, in compliance with their Spending Clause obligations under SORNA, retain discretion to determine whether offenders departing their States must update their registrations before leaving.[20] The same guidelines recognized that, under SORNA, States remain vested with discretion to determine when "transient" offenders arriving in their respective States must register.[21]

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[20] *National Guidelines for Sex Offender Registration and Notification*, *supra*, 73 Fed. Reg. at 38046 ("A jurisdiction may require that changes in registration information be reported by registrants on a more stringent basis than the SORNA minimum standards—e.g., requiring that changes of residence be reported before the sex offender moves").

[21] Id., 73 Fed. Reg. at 38061-38062 (observing States may elect to require registration of "long haul trucker[s]," and similar "transient" travelers arriving in their States, "in accordance with their own policies").

The Congressional purpose to encourage State-law registration regulations which conform to SORNA is plainly manifested by SORNA's legislative history. However, the duty that Congress imposed on States to implement Section 20913(a) under its Spending Clause powers cannot constitutionally operate to impose an intrastate federal duty to register, under Section 20913(a), upon individuals who only have a conviction for a sex offense under State law and who have not engaged in interstate commerce.

Decisional law of the Supreme Court makes clear that a valid exercise of Spending Clause powers by Congress "is in the nature of a contract" whereby "in return for federal funds" the recipients of federal funds "agree to comply with federally imposed conditions." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Persons who have only a conviction for a sex offense under State laws are not parties to any "contract" with the Federal Government; they are not beneficiaries of any federal funds they have received under SORNA; and they surely haven't voluntarily "agree[d] to comply with" any "federally imposed conditio[n]" that compels their compliance with Section 20913(a).

4) ***The Necessary and Proper Clause, as a Matter of Constitutional Law, Does Not Authorize Imposition of an Intrastate "Federal Duty" to Comply with SORNA's Registration Requirement.***

Congress has also been delegated authority to "make all Laws which shall be necessary and proper for carrying into Execution" those powers which have been expressly enumerated by the U.S. Constitution, Art. I, § 8, cl. 18 ("Necessary and Proper Clause"). Analysis of whether an intrastate duty under Section 20913(a) may constitutionally be imposed pursuant to the Necessary and Proper Clause, upon persons who have not engaged in interstate commerce, depends on whether Section 20913(a) is "necessary and proper for carrying into Execution" powers which have been expressly enumerated by the U.S. Constitution. The Necessary and Proper Clause "is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution.'" *Kinsella v. United States ex rel Singleton*, 361 U.S. 234, 247 (1960).

The Commerce Clause is an "enumerated" power under the U.S. Constitution, but it does not directly confer upon Congress the power to enact Section 20913(a) so as to impose upon persons an intrastate federal duty to register solely upon the basis of their status or non-commercial, intrastate conduct. A federally imposed intrastate duty to register, as imposed by Section 20913(a), thus cannot be sustained under the Necessary and Proper Clause unless *Section 2250(a) itself*, as applied to a person's intrastate conduct or status, is a valid exercise of Commerce Clause powers, and it is not.

Each of the four categories identified by the Supreme Court which comprise the analytical framework for defining the scope of Commerce Clause powers naturally refer to the word "commerce."[22] No Supreme Court decision has ever defined interstate "travel," unaccompanied by "commerce," to be within the regulatory powers of Congress under the Commerce Clause. In *Gibbons v. Ogden*, 9 Wheat. 1 (1824), for example, Chief Justice Marshall ruled that "navigation" among States was within the regulatory power of the Commerce Clause "so far as that navigation may be, in any manner, connected with 'commerce.'" Id., 9 Wheat. at 197; *see also*, *Scranton v. Wheeler*, 179 U.S. 141, 159 (1900)("It is commerce, and not navigation, which is the great object of constitutional care [under the Commerce Clause]… The power to regulate commerce is the basis of the power to regulate navigation").

CONCLUSION

Amicus respectfully submits the District Court's judgment below should not be affirmed on the basis of its legal conclusion that the federal duty to register under SORNA applies to "all persons" convicted of a State-law sex offense.

[22] See *ante*, this brief, at 22.

Respectfully submitted,

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/s/ Richard Gladden