No. 19-1774

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANGEL LUIS THOMAS, Sr.,

Appellant,

v.

Col. TYREE C. BLOCKER, et al.,

Appellees.

On Appeal from the Order of March 20, 2019, of the
United States District Court for the Middle District of Pennsylvania
denying a Preliminary Injunction

BRIEF FOR APPELLANT

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I. JURISDICTION

Angel Luis Thomas appeals the denial of preliminary injunctive relief by order of the United States District Court for the Middle District of Pennsylvania on March 20, 2019. The appeal was timely noticed on April 4, 2019. J.A. 9. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review denial of injunctive relief. The district court had jurisdiction under 28 U.S.C. § 1331 and § 1343(a)(3) & (4) for claims under federal law.

II. ISSUES PRESENTED FOR REVIEW

This is a matter of first impression as to the relation of state and federal SORNA statutes. "SORNA" refers to any sex offender registration act, sometimes called "Megan's Law." Federal SORNA is codified at 34 U.S.C. §§ 20911-32. Pennsylvania's SORNA is codified at 42 Pa.C.S. §§ 9799.10 to 9799.75. The Order under appeal adopted a Report and Recommendation of a magistrate judge. That R&R raised the issues now appealed. J.A. 15-37. Thomas, as plaintiff below, addressed the issues in his Objections to that R&R and in his Reply to defendants' opposition to those objections. ECF Nos. 46 and 57. The Order ruled on them. J.A. 12-13. Thomas then moved the district court to reconsider its Order. ECF No. 66. He addressed the issues again in his Brief in Support of Motion for Reconsideration of Order of March 20, 2019. ECF No. 67. Reconsideration was denied. J.A. 121-24.

A. Does federal SORNA impose obligations directly upon individuals?

Raised: J.A. 25, 28, 35 (Thomas required to register).

Objected to: ECF No. 46 at 1, 2-13, 22; ECF No. 57 at 2, 3-6; ECF No. 67 at 3-10.

Ruled upon: J.A. 12-13.

B. If federal SORNA imposes obligations upon individuals, then does it exempt those who remain within state borders?

Raised: J.A. 25 (Thomas required to register).

Objected to: ECF No. 46 at 1, 2, 13-17, 22; ECF No. 57 at 3-6; ECF No. 67 at 3-10.

Ruled upon: J.A. 12-13.

C. Does federal SORNA oblige state agents to compel an individual to register when he is exempted from registration by the state SORNA?

Raised: J.A. 25, 27, 27 n.9 (declining to decide whether state SORNA exempts Thomas); J.A. 32, 35 n.15 (rejecting Thomas's invocation of anticommandeering doctrine, declining to decide).

Objected to: ECF No. 46 at 17-22; ECF No. 57 at 3-6; ECF No. 67 at 4-8.

Ruled upon: J.A. 12-13.

D. Was it error to deny injunctive relief on the premise that federal SORNA obliged Thomas to register even if the state SORNA did not?

Raised: J.A. 15, 25, 28, 36-37 (denying preliminary injunction because Thomas deemed unlikely to succeed on merits as to registration obligation); J.A. 21 n.5 (denying temporary restraining order without hearing); J.A. 36 n.16 (declining to consider other factors, declining to strike prejudicial documents that predate 1991 trial).

Objected to: ECF No. 46 *generally*; ECF No. 57 at 2, 10-13 (improper consideration of 1991 documents); i*d.* at 8-10 (misplacing burden of proof); ECF No. 67 at 3, 3 n. 1 (Thomas's objections misconstrued); *id.* at 10-11 (objections accorded no review de novo); *id.* at 11-12 (standards met for preliminary injunction). *See also* ECF No. 32 at 6-14 (factors favoring PI); ECF No. 37 at 6-8 (constitutionality of state SORNA not relevant); *id.* at 3, 11-14 (impropriety of filing 1991 documents).

Ruled upon: J.A. 12-13; J.A. 121-22 (denying reconsideration).

III. RELATED CASES

This case has not been before this Court previously. Undersigned counsel is aware of no other case or proceeding that is related to this case. However, the United States Supreme Court currently is reviewing a tangential issue, that is, the retroactivity of federal SORNA. *See United States v. Gundy*, 695 Fed. App'x 639 (2d Cir. 2017) (unpublished), *cert. granted in part*, 138 S. Ct. 1260 (2018). Oral argument was heard October 2, 2018, but no decision has issued. The Pennsylvania state SORNA is under review in numerous cases in the state courts as to its constitutionality. Decisions in those cases will have no effect here, since the state SORNA defines its scope to exclude individuals in the circumstances of the Appellant here, Mr. Thomas.

IV. STATEMENT OF THE CASE

In 1991, Thomas was convicted of a sexually violent crime in Pennsylvania. He was committed to the custody of the state, and he remained in the same prison in Huntingdon, Pennsylvania until he completed his sentence on January 11, 2018 (except for a few months when the state sent him to a Michigan prison to relieve overcrowding). Shortly before his release, employees of the Pennsylvania Department of Corrections (DOC) compelled Thomas to undergo registration as a sex offender. DOC transmitted Thomas's photograph and other information about him to the Pennsylvania State Police

(PSP), where they were uploaded to a registry of sex offenders and displayed online. Thomas has reported to PSP every few months to renew the registration in person, under threat that PSP would return him to prison otherwise.

Thomas, through counsel, sued several employees of PSP and DOC on April 15, 2018 for violation of constitutional rights, inasmuch as the state SORNA explicitly excluded him from any obligation to register. J.A. 38-59. Thomas immediately applied for a temporary restraining order to have his name and photograph removed from the PSP's online registry. ECF No. 4. (Although the ECF docket identifies this as a "motion," Thomas filed an "application" under Rule 65 of the Federal Rules of Civil Procedure.) The Court immediately denied the application. ECF No. 5. On June 6, 2018, Thomas filed another application for a TRO. J.A. 60-74. The district court took no action. More than three months later, after a telephonic conference with the magistrate judge, on September 21, 2018 the parties were instructed to brief the TRO application as if it were a motion for a preliminary injunction. ECF No. 31. They did so. ECF Nos. 32, 35, 37.

On November 26, 2018, the magistrate judge filed a Report and Recommendation urging the Court not to grant Thomas a preliminary injunction. J.A. 15-37. Thomas filed substantive Objections to the R&R on

December 4, 2018. ECF No. 46. Defendants opposed those objections on December 31, 2018. ECF No. 55. Plaintiff replied on January 7, 2019. ECF No. 57. On March 20, 2019, the Court adopted the R&R and denied preliminary injunctive relief. J.A. 11-14. Thomas moved for reconsideration on March 24, 2019 and filed a supporting brief. ECF Nos. 66, 67. The district court denied reconsideration on April 4, 2019. J.A. 121-24. Thomas filed a Notice of Appeal on the same day. J.A. 9-10. The district court subsequently summoned the parties to a conference in chambers on May 6, 2019, and a transcript of the conference was docketed. J.A. 126-164.

The ruling presented for review is the Order of March 20, 2019. J.A. 11-14. That ruling is reiterated in the Order of April 4, 2019. J.A. 121-24.

V. SUMMARY OF ARGUMENT

Circuit precedent upholds enforcement of the criminal penalties of federal SORNA only against individuals who cross state borders without complying with registration requirements of the applicable state SORNAs. *United States v. Pendleton*, 636 F.3d 78 (3d Cir. 2011); *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010), *abrogated on another point by Reynolds v. United States*, 565 U.S. 432 (2012). That precedent does not apply to individuals who remain within their home jurisdiction, like Thomas. Circuit precedent is silent as to whether federal SORNA compels an

individual to register as a sex offender when the state SORNA does not, and whether federal SORNA compels or even allows a state employee to impose involuntary registration on such an individual.

In the Order under appeal here, the district court denied the preliminary injunction solely because the magistrate judge construed circuit precedent to require much more that it actually does. The district court overruled Thomas's objections without conducting de novo review. Consequently, it held that Thomas had no chance to succeed on the merits of his underlying case just because – as the district court erroneously found – federal SORNA obliged Thomas to register even though the state SORNA did not. J.A. 15, 25, 27-36.

The issues before this Court on appeal may require the Court to revisit the precedential rulings in *Shenandoah* and *Pendleton*. Nevertheless, these issues appear to be matters of first impression for this circuit: whether federal SORNA imposes registration requirements on an individual; whether the statute applies to an individual who remains within his home jurisdiction; and whether it allows state employees to compel an individual to register as a sex offender when the applicable state SORNA does not require him to do so.

The Order of March 20, 2019 should be vacated. Thomas's application for injunctive relief should be remanded for consideration of the equitable criteria stated in *Holland v. Rosen*, 895 F.3d 272, 285-86 (3d Cir. 2018).

VI. ARGUMENT

A. Federal SORNA incentivizes the states to impose certain registration requirements but does not impose those requirements directly on individuals.

1. Standard of review.

Review is plenary, because Thomas contends that the district court misapplied the federal statute to require registration when state law did not.

2. Congress directed SORNA's requirements to state and territorial legislatures.

The Sex Offender Registration and Notification Act is Subtitle A of Title I of the Adam Walsh Child Protection and Safety Act of 2006. Pub. L. No. 109-248, July 27, 2006, 120 Stat. 587. SORNA, as slightly amended in 2008, is codified at 34 U.S.C. §§ 20911-20932. SORNA enforces itself by imposing sanctions on *jurisdictions* that decline to comply with its requirements, while allowing certain exceptions. *Id.* § 20927. One of the requirements of SORNA is that "[a]n appropriate official" must "ensure" registration of a sex offender before release from prison. *Id.* § 20919. The information that the jurisdiction must collect from the registrant is listed in §§ 20913 & 20914. However, SORNA does not enforce compliance by the registrant. *United States v. Pendleton*, 636 F.3d 78, 83 (3d Cir. 2011) (noting that § 20913 "does not have an enforcement provision"). Instead, it requires that each *state* "shall provide a criminal penalty that includes a maximum term

of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter." 34 U.S.C. § 20913(e).

3. Each provision of SORNA advances the overall statutory scheme as enacted by Congress under its Commerce Clause powers.

SORNA is not an easy statute to interpret. The parts take their meaning from the whole. The statutory scheme reflects the intent of Congress: "[T]he purpose of title I is for Congress to create a comprehensive national system for the registration of sex offenders." H.R. Rep. No. 109-218, pt. 1, at 11 (2005). The statute itself declares that intent: "Congress in this chapter establishes a comprehensive national system for the registration of [sex] offenders." 34 U.S.C. § 20901. SORNA was designed to standardize and coordinate the registration regimes already operating in the several states:

> Since 1994, federal law has required States, as a condition for the receipt of certain law enforcement funds, to maintain federally compliant systems for sex-offender registration and community notification. In an effort to make these state schemes more comprehensive, uniform, and effective, Congress in 2006 enacted the Sex Offender Registration and Notification Act.

Carr v. United States, 560 U.S. 438, 441 (2010). See also *Reynolds v. United States*, 565 U.S. 432, 435 (2012).

Each component of the statute is to be understood within "SORNA's overall structure" and "broader statutory scheme." *Carr*, 560 U.S. at 455-56. *Cf. Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S. Ct.

1291, 1301 (2000) (observing "fundamental canon" that words of statute be read in context of overall regulatory scheme). Accordingly, section 113, "Registry requirements for sex offenders," and section 114, "Information required at registration," are best interpreted as specifications of the preceding section, "Registry requirements for jurisdictions." SORNA § 112; see §§ 20912 to 20914 of Title 34. SORNA's enforcement provision targets the state legislature, not the individual non-compliant registrant. 34 U.S.C. § 20927 (reducing federal funding by 10% if jurisdiction fails "to substantially implement this subchapter"). Individuals must register through their local jurisdictions; those jurisdictions are instructed to impose criminal penalties for non-compliance. Id. § 20913(e).

Congress enacted SORNA as an exercise of its powers under the Commerce Clause. *United States v. Guzman*, 591 F.3d 83, 89-90 (2d Cir. 2010); *accord Pendleton*, 636 F.3d at 87–88. The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. While that power has been invoked to support federal incursions into policing crime, the focus remains economic. In *Lopez*, Justice Kennedy rejected reliance on the Commerce Clause to regulate "an activity beyond the realm of commerce in the ordinary and usual sense of that term" because it

would prevent "the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). In the same case, Justice Thomas insisted that "we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power. . . . The Federal Government has nothing approaching a police power." *Id.* at 584-85 (Thomas, J., concurring) (emphasis original).

4. SORNA does not grant police power to the federal government.

There is an exception that proves the rule that Justice Thomas underscored in *Lopez*. Federal SORNA imposes its registration requirement directly on an individual who has already come under federal jurisdiction by committing a federal sex crime. In *United States v. Kebodeaux*, the defendant had been convicted of a sex offence under the Uniform Code of Military Justice while serving in the Air Force, and he had served his sentence in a federal prison. *United States v. Kebodeaux*, 570 U.S. 387 (2013). After release, Mr. Kebodeaux at first complied with Texas state registrations requirements but then failed to update his listing when he moved to another address in Texas. The federal government prosecuted him under SORNA for that lapse. 570 U.S. at 389-90. The conviction was upheld because SORNA

and its predecessor statute "fall within the scope Congress' authority under the Military Regulation and Necessary and Proper Clauses" of the United States Constitution. 570 U.S. at 399. *See also id.* at 394 (listing federal criminal enforcement powers, citing *United States v. Comstock*, 560 U.S. 126, 136-37 (2010)). The *Kebedeaux* opinion adds, in dicta:

> And as far as we can 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*.

570 U.S. at 398 (emphasis added).

Kebodeaux was a 5/4 split decision with Concurrences and Dissents discussing the limits of federal police power. Justice Thomas, joined by Justice Scalia, insisted that

> the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it. The power to protect society from sex offenders is part of the general police power that the Framers reserved to the States or the people.

Kebodeaux, 570 U.S. at 413 (Thomas, J. dissenting) (citing Tenth Amendment; other cites and internal quotes omitted). Justice Thomas then listed dozens of state SORNAs in the margin. *Id.* He went on to remind the Court of its diffidence toward state prerogatives in *Comstock*, where:

> The Solicitor General even conceded at oral argument that "the Federal Government would not have ... the power to commit a person who ... has been released from prison and whose period of

> supervised release is also completed" because "*at that point the State police power over a person has been fully reestablished*."

Kebodeaux, 570 U.S. at 419-20 (Thomas, J. dissenting) (citing Tr. of Oral Arg. in *Comstock*, O.T. 2009, No. 08–1224, p. 9) (emphasis added).

In the case under appeal here, Angel Luis Thomas has done nothing that would bring him under federal jurisdiction to enforce the registration requirements of SORNA.

5. Courts defer to the understanding of the agency that administers a federal statute.

The United States Department of Justice implements SORNA in cooperation with the states and other local jurisdictions. When a statutory text is capable of variant interpretations, federal courts defer to the understanding of the statute that its administering agency embraces. *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 135 (1944). *See, e.g.*, *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281 (3d Cir. 2015) (applying *Chevron* deference to determine meaning of disputed term in Clean Water Act); *Haberle v. Troxell*, 885 F.3d 170, 185 n.3 (3d Cir. 2018) (Greenaway, J., concurring) (crediting "guidance" from Department of Justice on Americans With Disabilities Act under *Skidmore*); *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 621 (3d Cir. 2015) (according *Skidmore* deference to Department of Education,

rejecting literal sense of statutory text to resolve apparent discrepancy between two provisions of Individuals with Disabilities Education Act).

The Adam Walsh Act created an agency within the Department of Justice to implement SORNA: that is, the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tacking, or "SMART Office," which administers standards for registration and notification and "cooperate[s] with and provide[s] technical assistance to the states." 34 U.S.C. § 20945. SMART publishes its documents on its website, https://smart.gov/. One such document explains:

> Registration is a Local Activity
>
> In the United States, *sex offender registration is conducted at the local level*. Generally, sex offenders in the United States are required to register with law enforcement in each state, locality, territory or tribe where they reside, work or attend school. Every U.S. state, the District of Columbia, the five principal U.S. territories and over 125 federally recognized Indian tribes have their own sex offender registration and notification systems. Every one of these systems has its own nuances and distinct features. Every jurisdiction (state, territory and tribe) *makes its own determinations about who is required to register, what information offenders must provide, which offenders are posted* on the jurisdiction's public registry website, and so forth. . . .
>
> Congress has enacted various measures setting "minimum standards" *for jurisdictions to implement* in their sex offender registration or notification systems. . . .
>
> Federal databases are utilized by law enforcement across the country to access accurate information about registered sex offenders. *Registering agencies and other law enforcement entities submit the information necessary to populate these databases.*

Current Case Law and Issues, March 2018 (emphasis added) (available for download at https://smart.gov/caselaw/1-Case-Law-Update-2018-Residency-Overview.pdf.) Thus, offenders register locally with one of 200-plus different agencies, which then upload the data to federal databases.

The SMART Office document further asserts: "Federal courts have interpreted SORNA as directly imposing a duty on a person to attempt to register if they meet the federal definition of 'sex offender'." *Id.* (citing *Carr* as example of prosecution under 18 U.S.C. § 2250). However, in every such case reviewed by the undersigned, the crime was to cross a border without proper registration. That is why the SMART Office document can go on to assert, without seeming to contradict itself:

> In practice, a jurisdiction generally will not register an offender unless **that jurisdiction's laws** require that the offender be registered.

Id. (emphasis original). A footnote clarifies:

> [T]here will be situations where SORNA imposes a registration requirement directly on an offender, but the jurisdiction where that offender lives, works or attends school refuses to register him, because the jurisdiction's laws do not require registration for the offense of conviction. *See Dep't of Pub. Safety v. Doe*, 94 A.3d [7]91 (Md. 2014).

Id. n.28. Thus, in the estimation of the implementing agency, the registration command in SORNA § 113 cannot be construed absolutely to impose an obligation on every individual offender. *See* 34 U.S.C. § 20913.

As the online information and activities of the SMART Office confirm, the agency that administers SORNA neither compels offenders to register nor accepts their registrations individually. Its role is to exchange information with the states, to monitor each state's degree of compliance with SORNA, and to certify the compliance so that the states can receive federal funding.

6. SORNA uses financial incentives to encourage the states to comply, in accord with principles of federalism.

Sections 112 to 117 of SORNA, taken together, tell the states what information to gather and upload to the federal database. 34 U.S.C. §§ 20912 to 20915, 20918, & 20919. The Final Guidelines published by the Department of Justice support this reading. "[E]ach jurisdiction must incorporate in the laws and rules governing its registration and notification program the requirements that SORNA imposes on sex offenders" in those sections of SORNA that "are formulated as directions to sex offenders, including those appearing in sections 113(a)–(b), 113(c) (first sentence), 114(a), 115(a), and 116." *See* 73 Fed. Reg. 38,030, 38,048 (July 2, 2008) (referring to sections codified as §§ 20913, 20914, 20915, and 20918 of Title 34).

> Section 114 . . . is divided into two lists. The first list, set forth in subsection (a) of section 114, describes information that the *registrant* will normally be in a position to provide. The second list, set forth in subsection (b), describes information that is likely to require some affirmative action by the *jurisdiction* to obtain, beyond asking the sex offender for the information.

Id. at 38,054 (emphasis added). "Under sections 113(b) and 117(a) of SORNA [§§ 20913(b) & 20919(a) of Title 34], *jurisdictions* must normally require that sex offenders be initially registered before release from imprisonment." *Id.* at 38,062 (emphasis added). *See also id.* at 38,067 ("Jurisdictions must require" sex offenders to appear as specified in Section 116, i.e., § 20918 of Title 34.). Thus, even though some fragments of SORNA are formulated as instructions for offenders, the overall intent of the statute is to instruct states and other jurisdictions to incorporate those instructions into their own legislation.

This construction of the statute is supported by the federalism canon and the principle of constitutional avoidance. *See Farm Bureau*, 792 F.3d at 301-07 (applying canons to support a reading of the Clean Water Act that does not usurp state prerogatives). As the Third Circuit remarked, the federalism canon starts from the premise that Congress would not intend a statute "to alter the traditional federal-state balance." *Id.* at 302. The Supreme Court recently reformulated this canon for criminal cases as follows:

> Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.

Bond v. United States, 572 U.S. 844, 848 (2014). With SORNA, there is no such indication of intent to override state prerogatives.

Although Congress required the states to conduct registration, the penalty that Congress set for non-compliance is just a slight reduction of federal funding for any state found to fall short of substantial compliance. 34 U.S.C. § 20927. Congress imposed no criminal penalty on non-compliant *individuals* except in cases where federal jurisdiction arises through interstate or international travel. 18 U.S.C. § 2250.

The principle of constitutional avoidance, like the federalism canon, is helpful when the meaning of a statute is in dispute. But, unlike the federalism canon, constitutional avoidance favors the meaning that would not require the court to rule on the constitutionality of the statute at all. Rather than impute to Congress an intention to draft SORNA in accord with federalism, the court itself simply elects to adopt a plausible reading of the statute that does not offend federalism – without having to research the legislative history of SORNA to ascertain whether Congress itself had affirmatively intended so narrow a reading. Accordingly, Sections 112, 113, and 114 of SORNA would be read together as instructions telling the states what data to collect if the states choose to avert the financial penalty imposed by § 125. See 34 U.S.C. §§ 20812 to 20914 & 20927.

B. Federal SORNA does not apply to offenders who remain within the borders of their home state.

1. Standard of review.

Review is plenary, because Thomas contends that the district court misapplied the federal statute to require registration in circumstances where the statute does not reach.

2. SORNA does not provide for enforcement against individuals unless they cross state lines.

Congress, in drafting SORNA, declined to authorize enforcement of registration requirements against individuals, apart from criminal penalties for crossing a border while unregistered. SORNA is civilly self-enforcing through financial incentives for the states, as discussed above. Another part of the Adam Walsh Act, that is, Subtitle B of Title I, enforces SORNA by imposing a criminal penalty upon anyone who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and "knowingly fails to register or update a registration as required by [SORNA]." *See* 18 U.S.C. § 2250.

Courts interpret this language to apply only where federal enforcement is triggered by travel. The rulings of the Third Circuit in *Pendleton* and *Shenandoah* recognize that the federal government cannot usurp the police powers of the states. The offenders in those cases crossed state lines without

registering; that is how the statute became "federally enforceable" against them. Offenders who stay put have no such duty. The holding in *Shenandoah* makes this qualification clear:

> Furthermore, the directive found in [39] U.S.C. § 16913(a) applies to sex offenders – not to states. When combined with SORNA's [criminal] enforcement provision, 18 U.S.C. § 2250(a), an independent and federally enforceable duty is placed on sex offenders to register. New York and Pennsylvania may never implement SORNA, choosing, for whatever reason, to forego [sic] a portion of their federal funding. This failure to implement a federal law, however, does not give sex offenders a reason to disregard their federal obligation to update their state registrations. *When a sex offender travels in interstate commerce and disobeys the federal command to keep his or her registration current*, as required by SORNA, he or she is subject to prosecution. 18 U.S.C. § 2250(a).

Shenandoah, 595 F.3d at 157 (emphasis added). The panel correctly found that the "federal obligation" is to refrain from interstate travel if one's state registration status falls short of the federal requirements. This qualification, which is dictated by federalism principles based in the Tenth Amendment, is carefully maintained in *Pendleton* and in the other precedential opinions in the *Shenandoah* line of cases. A panel of this Court in *Pendleton* reasoned:

> In *Shenandoah*, moreover, the defendant argued that SORNA did not apply to him because New York and Pennsylvania, the two states in which the government alleged that Shenandoah was required to register, had not yet implemented SORNA. We rejected that argument and concluded that "an independent *and federally enforceable duty* is placed on sex offenders to register." *Shenandoah*, 595 F.3d at 157. Even if New York and Pennsylvania never implemented SORNA, such "failure to implement a federal

> law ... [would] not give sex offenders a reason to disregard their federal obligation to update their state registrations." *Id.* Instead, "*[w]hen a sex offender travels in interstate commerce and disobeys the federal command to keep his or her registration current,* as required by SORNA, he or she is subject to prosecution." *Id.*

Pendleton, 636 F.3d at 85-86 (emphasis added).

No judicial authority holds that federal SORNA can or does require a sex offender to register if he stays within his home state. Absent interstate travel, there is no federal interest to protect, as the Supreme Court explains:

> For a defendant to violate this provision [§ 2250] . . . the statute's three elements must "be satisfied in sequence, culminating in a post-SORNA failure to register." 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.*

Carr, 560 U.S. at 446 (internal citations omitted) (emphasis added). *Carr* plainly stands for the principle that SORNA does not apply to an offender who remains within his home state.

As noted above, *Kebodeaux* is the exception that proves the rule. The federal government prosecuted Mr. Kebodeaux under federal SORNA for violating Texas's registration regime – even though he did not leave Texas – because federal jurisdiction arose from another source, that is, the underlying federal sex offense.

3. Registration is not compulsory under SORNA for Thomas as long as he stays in Pennsylania.

The Appellant, Angel Luis Thomas, has committed no federal offense. He resides in Lancaster County, Pennsylvania. He has not left the Commonwealth since it released him from its prison on January 11, 2018. He has no plans to travel. And, with his employment opportunities drastically limited by his wrongful listing in the state's registry of dangerous recent sex offenders, Thomas lacks the wherewithal to visit another town, let alone another state. Thomas simply has not engaged in the conduct that is criminalized in the Adam Walsh Act. *See* 18 U.S.C. § 2250.

When Defendants/Appellants forced Thomas to register, on December 27, 2017 while he was still in prison, they had no reason to believe that he was headed out of state upon release. They had no authorization to compel him to undergo registration. The Code of Federal Regulations is silent on this question. *See* 28 C.F.R §§ 72.1-72.3. The Final Guidelines of the Department of Justice for SORNA suggest that "a *jurisdiction* may assign responsibility for initially registering sex offenders upon their release from imprisonment to correctional personnel who are employees of the jurisdiction's government." 73 Fed. Reg. 38,048-49 (July 2, 2008) (emphasis added). Pennsylvania has not done so. The relevant state regulation, 37 Pa. Code § 56.3, was last amended in 1996, that is, prior to the enactment of federal SORNA.

The Adam Walsh Act provides no way to compel an individual to register. It imposes criminal sanctions for failure to comply with SORNA, but only if the offender leaves the jurisdiction. The Attorney General's Final Rule explains that SORNA is enforceable against individuals only under certain conditions:

> 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.

AG Order No. 3239-2010, Final Rule, 75 Fed. Reg. 81,850 (Dec. 29, 2010).

Even if Sections 113 to 117 of SORNA were deemed to apply to Mr. Thomas in theory, they cannot be enforced. Congress provided no means to compel Thomas to register as long as he remains within the Commonwealth. 18 U.S.C. § 2250. Diligent research into Third Circuit precedent by the undersigned has disclosed no case of prosecution under § 2250 where the registrant had not crossed a border between jurisdictions. *See, e.g.*, *Carr*, 560 U.S. at 44; *Pendleton*, 636 F.3d at 83; *Guzman*, 591 F.3d at 89.

C. Federal SORNA neither authorizes nor obliges state employees to compel an individual to register as a sex offender when he is exempted from such registration by the state SORNA.

1. Standard of review.

Review is plenary, because Thomas contends that the district court misapplied the federal statute to require registration when state law did not.

2. Under the anticommandeering principle, state employees do not carry out federal directives.

Monetary incentives are the only way in which the federal government can get state employees to do its bidding. *New York v. United States*, 505 U.S. 144 (1992); *accord Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014). The anticommandeering principle is inherent in the Tenth Amendment to the United States Constitution. *Galarza*, 745 F.3d at 643-44 (citing *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997)). The conduct of *state* employees in their official capacity cannot be directed or justified by *federal* rules. Federal SORNA and its enabling regulations are addressed to the state legislature, which has the option of implementing them in whole, in part, or not at all.

Here, Pennsylvania drafted its sex offender registration statute to exclude individuals like Thomas. *See* discussion *infra*. However, the district court declined to apply the anticommandeering principle. J.A. 34-35.

3. The current Pennsylvania registration statute, on its face, excludes offenses committed earlier than 1996.

The statute that currently requires sex offenders in Pennsylvania to register, commonly known as "Act 10 of 2018," is codified at Subchapter I of Title 42 of the Pennsylvania Consolidated Statutes. It does not apply to Thomas, because his conviction occurred some five years earlier than the

earliest date covered by the statute. 42 Pa.C.S. §§ 9799.51-9799.75. Section 9799.55 requires registration of offenders whose crimes were committed between April 22, 1996 and December 20, 2012. This limitation to the scope of Subchapter I is underscored in Section 20(2) of Act 10 of February 21, 2018, and again in Section 21 of Act 29 of June 12, 2018.

But, Thomas was convicted of a crime that occurred on January 4, 1991. He was sentenced on February 10, 1992. *Comm. v. Thomas*, No. CP-67-CR-0000447-1991. Mr. Thomas was incarcerated from 1991 until January 11, 2018, during which time he was not required to register because he was in prison. *See* J.A. 27 (R&R quoting concession by defendants that "the statutes did not require registration until he was released"). There is simply no provision of the Pennsylvania sex-offender registration statute that applies to Mr. Thomas.

4. The prior Pennsylvania registration statute was declared unconstitutional when applied retroactively.

Pennsylvania's prior registration statute was codified at Subchapter H of Title 42 of the Pennsylvania Consolidated Statutes, also known as SORNA. Retroactive application of that SORNA was declared unconstitutional by the state supreme court on July 19, 2017. *Cmwlth. v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017), *cert. denied sub nom. Pennsylvania v. Muniz*, 138 S. Ct. 925 (Jan. 22, 2018). The court in *Muniz* carefully analyzed the onerous conditions

of registration and concluded that they were punitive in nature. *Id.* at 1210-18. Retroactive application of state SORNA is barred as violative of the Ex Post Facto Clauses of both the federal and the state constitution. *Id.*

5. Federal SORNA can effect registration only through the various registration regimes that the states and other localities establish.

Federal SORNA operates only as its standards are embodied in state sex-offender registration regimes. A state has to be able to follow its own registration rules if it is to comply with the retroactivity mandated in 28 C.F.R. § 72.3, which implements SORNA. Therefore, Congress shielded the states from the financial effects of having a SORNA-compliant registration regime inactivated by a ruling like *Muniz*. Under SORNA § 125, a state that finds itself in that predicament can still be deemed to be in substantial compliance and receive full funding. 34 U.S.C. § 20927. This loophole effectively suspends the enforcement of SORNA whenever a state's highest court bars the implementation of that state's registration requirements.

This eventuality was foreseen by Congress. SORNA established only the minimum standards that a state must meet in order to receive its full share of federal anti-crime funding. 34 U.S.C. § 20927(a). States remain free to enact more rigorous registration regimes. "SORNA defines a floor, not a ceiling." Final Guidelines, 73 Fed. Reg. 38,030, 38,035 (July 2, 2008). *See also id.* at 38,046. On one hand, that principle protects states against

preemption of their initiatives under any of the theories surveyed in the Guidelines. *Id.* at 38,034-35. On the other hand, however, SORNA's "no ceiling" design generates a thorny legal problem. SORNA necessarily must make use of the 200-plus different local registration regimes, but 50 of them are subject to review under state constitutions, and SORNA cannot restrain them from imposing rules so severe as to infringe rights protected by the respective state constitution, risking invalidation.

Federal SORNA is drafted to be administrative, not punitive. It sets the federal "floor" low enough that its regulations can be characterized as "non-punitive regulatory measures." *See id.* at 38,036.

> The application of the SORNA standards to sex offenders whose convictions predate SORNA creates no ex post facto problem because the SORNA sex offender registration and notification requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes, and hence may validly be applied (and enforced by criminal sanctions) against sex offenders whose predicate convictions occurred prior to the creation of these requirements.

Id. at 38,046 (citing *Smith v. Doe*, 538 U.S. 84 (2003)). *See also* Final Rule, 75 Fed. Reg. 81,849, 81,851 (Dec. 29, 2010) (insisting that regulations required by SORNA are non-punitive because they resemble regulations upheld by *Smith v. Doe*).

Yet, while federal SORNA's floor may not rise to a punitive level, the registration regime of a state very well may have features that do. Examples

would include frequent check-ins, geographical restrictions on housing and employment, GPS monitoring, and a ban on use of the Internet. *See* Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741 (2016). In Pennsylvania,, the state supreme court recently barred retroactive application of Pennsylvania's registration requirements as unconstitutional under the ex post facto provisions of both the federal and state constitutions, having found those requirements to be punitive in their effect. *Muniz*, 164 A.3d at 1203-1223. The *Muniz* opinion carefully reviews *Smith v. Doe* and applies the same analysis. It reaches a different result, however, because the Pennsylvania registration regime apparently was more severe and burdensome than that of Alaska, which was upheld in *Smith*.

Muniz was decided on July 19, 2017. Similar decisions have issued in several other jurisdictions. The SMART Office reports: "Eight state supreme courts in recent years have held that the retroactive application of their sex offender registration and notification laws violate their respective state constitutions," and "the Sixth Circuit Court of Appeals held that Michigan's SORNA-implementing law is punitive and, therefore, could not be applied retroactively." Current Case Law and Issues, March 2018 (citing *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied sub nom. Snyder v. John*

Does #1-5, 138 S. Ct. 55 (2017) and various opinions of state supreme courts).

Those states will not lose funding, because they are still deemed to be "substantially compliant" under 34 U.S.C. § 20927. Nevertheless, where the state law does not compel registration – for whatever reason – federal SORNA becomes a dead letter.

D. The Order denying injunctive relief to Thomas was based on errors of law, procedural lapses, and misperceptions, so it should be vacated.

1. Standard of review.

Review is plenary as to errors of law and procedural errors. Review is for abuse of discretion to the extent that the district court had discretion to withhold equitable relief.

2. Thomas is likely to prevail in the underlying litigation.

The district court declined to enjoin the PSP Commissioner to remove Thomas from the state registry of sex offenders solely because the court held that federal SORNA compelled Thomas to register. J.A. 12-13. That holding is error, as shown above. Thomas satisfies the criteria for a preliminary injunction. J.A. 60-74 (application with affidavit). *See also* ECF No. 32 at 5-15 (brief in support).

In particular, Thomas argued that the preliminary injunction would serve the public interest. ECF No. 32 at 14-15. The district court, while not addressing that argument directly, apparently credited inadmissible hearsay in

two charging documents that purported to describe the crime for which Thomas was later charged and ultimately convicted. *See* ECF No. 35-1 (Jan. 11, 1991 criminal complaint requesting warrant); ECF No. 35-2 (Jan. 4, 1991 arresting officer's affidavit of probable cause); *see also* ECF No. 35 at 2-3 (opposition brief quoting at length from charging documents). Thomas asked the magistrate judge to strike those papers. ECF No. 37 at 11-13. The magistrate judge declined to do so, deeming them to be potentially "relevant." J.A. 36 n.16. Thomas objected that this was error. ECF No. 46 at 22-25. That objection apparently was overruled "[b]ecause neither Magistrate Judge Schwab nor this Court relied on those documents when analyzing the legal issues." J.A. 12 n.6 (order denying injunction). Yet, the content of the hearsay seems to have colored the rulings and proceedings in this matter.

3. Thomas incurs irreparable harm while injunctive relief is withheld.

The requested preliminary injunction is urgently needed. Wrongful posting of Thomas's name, address, and photograph on the Internet imposes dire daily risks of personal assault and destruction of property. The posting has made it difficult for Thomas to find work and housing so that he can resume his life after 27 years in prison. His attorney attested to the urgent need in the affidavits filed with the applications. ECF Nos. 4-1 and 14-2. The district court disbelieved the first affidavit, without explanation, and then

disregarded the second. *See* ECF No. 5. The district court tabled the emergency request for three months.

The public interest is not served by impeding Thomas's reintegration into civil society. Society will benefit if Thomas is able to establish himself as a productive citizen without having to resort to criminal activity to get by. However, the stigma and the real physical dangers created by the current registry display are grave impediments to Thomas as he struggles to make a new start on a life of gainful employment and wholesome relationships.

Moreover, Mr. Thomas is no threat. He does not fall into any category defined as dangerous by the Pennsylvania legislature. The offense for which he was convicted and sentenced is an event that occurred almost 30 years ago. Legislators could have written the state SORNA to cover that time frame, had there been any indication that a danger persisted over such a span of years. They chose instead to exempt persons who offended prior to 1996. There is no social benefit to keeping Mr. Thomas on the registry of sex offenders, but there are unnecessary social costs for doing so.

4. The district court adopted the R&R without conducting de novo review of Objections and then "admonished" Thomas's counsel.

The Order of March 20, 2019 adopts the R&R without considering the Objections filed by Thomas. J.A. 12-13. The Order appears to assert (albeit ambiguously, in a dangling participle) that the Objections underwent review

de novo. J.A. 13. That assertion is undercut by the same Order's one-sentence paraphrase of the Objections, which distorts their substance and cites them to the wrong document. J.A. 12. Thomas's counsel pointed to that discrepancy and requested reconsideration. ECF No. 67 at 10-11. Reconsideration was denied in the Order of April 4, 2019. J.A. 121. The April 4 Order goes on to rebut the arguments in favor of reconsideration as if they were personal attacks on the author of the Order, and then it rebukes Thomas's counsel for supposedly impugning a judge's integrity. J.A. 122-23. Yet, the April 4 Order effectively concedes that the March 20 Order relied on "the thorough and well-reasoned Report and Recommendation" alone. J.A. 124. Thomas appealed the March 20 Order. J.A. 9.

After appeal was taken on April 4, 2019 and the case was before this Court, the district court summoned the parties to a conference in chambers on May 6, 2019. ECF No. 76. The conference was transcribed. J.A. 126-55. The purpose of the conference was "to get . . . Ms. Sawicki . . . back on track with regard to this case." J.A. 127. The court indicated that the case should have gone to appellate review on a summary judgment motion, not on denial of preliminary injunctive relief. J.A. 135-36. The district court was under the mistaken impression that the outcome of this case would depend on resolution of constitutional challenges to the state SORNA statute. J.A. 136-38. *But see*

ECF No. 32 at 6-8 (showing that state SORNA facially excludes Thomas from its coverage); ECF No. 37 at 6-8 (same); ECF No. 46 at 2 and 4 n.4 (same); ECF No. 57 at 6-10 (same). *See also* J.A. 27 (R&R acknowledging that state SORNA may not apply, recommending federal SORNA as basis for denial of injunction). The district court's perceptions of the case's procedural posture also overlooked the urgency of Mr. Thomas's situation. J.A. 135-36 (reminding court of dire need for preliminary injunction).

The transcript of the conference shows that the district court repeatedly "admonished" Thomas's counsel against unspecified "disrespect" that the court perceived in a supporting brief, that is, in the brief that had exposed errors of law so as to justify reconsideration of the March 20 Order – the same Order that is now the subject of this appeal. J.A. 141-155. The district court warned: "Don't do that again with me. . . . the language you used is out of line." J.A. 146, 153. *Compare* ECF No. 67 (Brief in Support of Motion for Reconsideration). Nevertheless, the same criticisms and the same language have been incorporated into the instant appellant's brief. In any event, the transcript of the May 6 conference suggests that the district court deferred to the magistrate judge, who "did a very thorough job," and hence the court did not undertake de novo review of the Report and Recommendation on the points where Thomas had filed Objections to it. J.A. 133-34, 143-44.

Consequently, the case comes before this Court without the benefit of a memorandum opinion from the district court on the issues under appeal.

VII. CONCLUSION

For the reasons stated herein, the Order of March 20, 2019 should be vacated. Mr. Thomas's application for a preliminary injunction should be remanded to the district court for consideration of all relevant factors and circumstances.

VIII. CERTIFICATES OF ADMISSION AND COMPLIANCE

I, Marianne Sawicki, hereby certify, on this 1st day of June, 2019, that:

(1) I am admitted to the bar of this Court.

(2) This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 7,651 words as counted by the word processing software.

(3) This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it is composed in Microsoft Word 2016 using 14-point Times New Roman typeface.

(4) The electronic versions of the Brief for Appellant and the Joint Appendix are identical in content to the paper copies.

(5) The electronic versions of the Brief for Appellant and the Joint Appendix were examined by a virus detection program, and no virus was detected. The virus protection program is McAfee LiveSafe Version 14.0.

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IX. PROOF OF SERVICE

I hereby certify that the foregoing Brief for Appellant was served on this date through the electronic case filing system of the Court on the following party:

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