

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v.

Case No. 6:07-cr-221-Orl-31KRS

ROBERT D. POWERS

**GOVERNMENT'S RESPONSE OPPOSING DEFENDANT'S
MOTION TO DISMISS INDICTMENT**

The United States of America, by and through the undersigned Assistant United States Attorney, files this response opposing the defendant's Motion to Dismiss Indictment. (Doc. 24). In support of the response, the United States submits the following Memorandum of Law.

MEMORANDUM OF LAW

I. **FACTS**

Powers was convicted of Assault to Commit Sex Crimes in the State of South Carolina on November 9, 1995. Doc. 6 at ¶ 1; Doc. 1 at ¶ 3. He was sentenced to 10 years custody, but the sentence was later suspended with credit for time served plus five years probation. Doc. 1 at ¶ 3. On November 13, 1995, Powers registered as a sex offender in South Carolina. *Id.* On May 5, 1997, Powers was arrested in South Carolina for assault and battery and violation of probation. *Id.* at ¶ 4. Prior to his release from prison, Powers was notified that he was required to register as a sex offender within 24 hours of his release. *Id.* at ¶ 4. Powers was released from prison on July 18, 1997 and failed to register as a sex offender. Thereafter, a warrant was issued for his arrest in South Carolina and the warrant is still outstanding. *Id.*

On August 9, 2002, Powers registered as a sex offender in North Carolina. Id. at ¶ 5. In August 2005, he failed to update his registration in North Carolina and a warrant was issued for his arrest. Id. at ¶ 5. On March 14, 2006, Powers obtained a California driver's license and listed his address as 36210 Tonto Lane, Temecula, California. Id. at ¶ 7. On July 25, 2007, Powers obtained a new Florida driver's license and listed his home address as 10645 Buck Road, Orlando, Florida. Id. In addition, Powers was employed in the State of Florida for the first two quarters of 2007. Id. at ¶ 9. On October 18, 2007, a check of the Florida Department of Law Enforcement Sexual Offenders and Predators database showed no registration for Powers. Id. at ¶ 10. On December 19, 2007, a federal grand jury returned an indictment against Powers charging him with failing to register as required by the Sex Offender Registration and Notification Act (SORNA), in violation of 18 U.S.C. § 2250(a).

II. STATUTORY BACKGROUND

Sex offender registration laws are not new. Before SORNA's passage, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was in place, codified at 42 U.S.C. § 14071, *et seq.*, which was initially signed in law on September 13, 1994. This Act (the Wetterling Act) provided federal funding to states which enacted sex offender registration laws commonly referred to as "Megan's Laws." Smith v. Doe, 538 U.S. 84, 89-90 (2003). The Wetterling Act, as amended, directed the Attorney General to establish guidelines for state Megan's Laws, 41 U.S.C. § 14071(a)(1). While the Wetterling Act was primarily regulatory in nature, the Wetterling Act also provided criminal penalties of up to one year for a first offense and up to ten years for subsequent offenses for sex offenders who failed to register as a sex offender

in any state they resided, worked or were a student. See 42 U.S.C. § 14072(i).

According to its principal author, the purpose of the Wetterling Act was to “prod all States to enact [Megan’s] laws and to provide for a national registration system to handle offenders who move from one State to another.” 139 Cong. Rec. H10321 (1993). By 1996, every state, the District of Columbia and the federal government enacted some variation of Megan’s Law. Smith, 538 U.S. at 90.

The Supreme Court upheld the constitutionality of conforming state Megan’s Laws in two cases on the same day. In Smith v. Doe, 538 U.S. 84 (2003), the Supreme Court upheld Alaska’s Megan’s Law against an ex post facto challenge. Similarly, in Conn. Dept. of Pub. Safety v. Doe, 538 U.S. 1 (2003), the Court upheld Connecticut’s Megan’s Law against a due process challenge.

Despite several amendments to the Wetterling Act, an estimated 100,000 out of 500,000 sex offenders in the United States remained “unregistered and their locations unknown to the public and law enforcement,” 152 Cong. Rec. H5722 (2006) and “there [was] a 200,000 person difference between all of the state registries and the federal National Sex Offender Register,” id. at H5726.

SORNA sought to close these gaps with “a comprehensive revision of the national standards for sex offender registration and notification.” 72 Fed. Reg. 8894, 8895. On July 27, 2006, the Adam Walsh Child Protection and Safety Act (Walsh Act) became effective and created: (1) a comprehensive national system and set of requirements for sex offender registration and notification entitled the “Sex Offender Registration and Notification Act” (SORNA); and (2) a federal criminal offense codified at 18 U.S.C. § 2250 for failing to register or update a registration as required by

SORNA.¹ The purpose of SORNA was “to protect the public from sex offenders and offenders against children” and to establish a “comprehensive national system for the registration of those offenders.” 42 U.S.C. § 16901.

SORNA, like its predecessors, 72 Fed. Reg. 30210, 30211, directs the Attorney General to establish guidelines for state Megan’s Laws and requires every jurisdiction to maintain a sex offender registry that conforms to certain statutory requirements. 42 U.S.C. § 16912. SORNA provides how and when a sex offender should initially register and sets forth the sex offender’s continuing obligation to keep the registration current. 42 U.S.C. § 16913. Specifically, SORNA requires a person convicted of a sex offense to register, and keep the registration current, in each jurisdiction where the offender resides, works or is a student. 42 U.S.C. § 16193(a). SORNA provides that a sex offender must initially register before completing a term of imprisonment for the underlying sex offense or not later than three business days after being sentenced for the offense if a term of imprisonment was not imposed. 42 U.S.C. § 16193(b). Thereafter, SORNA requires a sex offender to, not later than three business days after each change of name, residence, employment, or student status, appear in person in at least one jurisdiction where the offender resides, is an employee or is a student and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

Powers’ motion focuses on two sections of SORNA: 42 U.S.C. § 16913 and 18 U.S.C. § 2250. Section 16913 states the registry requirements for sex offenders to

¹ Public Law 109-248, §§ 1-155, 120 Stat. 587, 590-611 (2006).

which states must conform their Megan's Laws, 42 U.S.C. § 16912(a). Section 2250 created the new federal crime of which Powers has been charged. Title 18, United States Code, Section 2250(a), imposes criminal penalties of up to ten years imprisonment on individuals who are required to register as sex offenders,² who have been convicted of qualifying federal sex offenses or who travel in interstate commerce, and who knowingly fail to register or update their registration. 18 U.S.C. § 2250.

Powers challenges enforcement of section 2250 against him because he committed the sex offense that triggered the registration requirement before SORNA's enactment. He also challenges enforcement of section 2250 on more general bases. For the reasons set forth below, this Court should reject all of Powers' arguments. See United States v. Madera, 474 F. Supp. 2d 1257 (M.D. Fla. 2007); United States v. Mason, 2007 WL 1521515 (M.D. Fla. May 22, 2007).

III. ARGUMENT

A. CONGRESS DID NOT UNCONSTITUTIONALLY DELEGATE CERTAIN RULEMAKING AUTHORITY TO THE ATTORNEY GENERAL

Powers argues that Congress in 42 U.S.C. § 16913(d) unconstitutionally delegated its legislative authority to the Attorney General by giving the Attorney General exclusive authority to decide whether SORNA applies to existing sex offenders. Congress did not give the Attorney General the exclusive authority to decide whether SORNA applies to existing sex offenders, and even if it did, such delegation is not unconstitutional. Moreover, section 16193(d) concerns itself only with offenders, unlike Powers, who are unable to register initially in accordance with subsection 16913(b).

² "Sex offender" is defined under 42 U.S.C. § 16911(1).

See United States v. Roberts, 2007 WL 2155750, at * 2 (W.D. Va. July 27, 2007) (unpublished) (“Because subsection (d) concerns a population of which Defendant is not a member, he lacks standing to pursue his Constitutional claim of excessive delegation of legislative authority.”). Thus, Powers lacks standing to raise this argument since subsection (d) regarding sex offenders who were unable to initially register is inapplicable to him.

The doctrine of separation of powers is fundamental to our system of government, but the Constitution does not prevent Congress from seeking the assistance of the executive branch. Mistretta v. United States, 488 U.S. 361, 372 (1989). Indeed, “[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function.” Id. at 372 (internal quotation marks and quoted authority omitted).

With instructions to use a “common sense” approach that recognizes that Congress cannot do its job in our “increasingly complex society” without an “ability to delegate under broad directives,” the Court has set forth the “intelligible principle” test: “So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power.” Id. at 372 (internal quotation marks and quoted authority omitted). The first and last time that the Supreme Court concluded that Congress unconstitutionally delegated its legislative power was in 1935 when it struck down two New Deal statutes. Id. at 373 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935)). Since then, the Supreme Court has upheld “without

deviation, Congress' ability to delegate power under broad standards," Mistretta, 488 U.S. at 373. "In recent years, [the Court's] application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." Id. at 373, n.7.

In this case, there has been no impermissible delegation of legislative authority to the executive branch, because Congress clearly defined what is proscribed. 42 U.S.C. § 16913(d); United States v. Mason, 2007 WL 1521515, at *3 (M.D. Fla. May 22, 2007) ("Congress has clearly and explicitly set forth the purpose of SORNA in [section 16901]."); See Madera, 474 F. Supp. 2d at 1260-61 ("Congress is not abrogating its legislative authority, in violation of the Constitution, through this statute."); United States v. Gonzales, 2007 WL 2298004 (N.D. Fla. August 9, 2007); United States v. Howell, 2007 WL 3302547 (N.D. La. November 8, 2007); United States v. Pitts, 2007 WL 3353423 (M.D. La. November 7, 2007); United States v. Ambert, 2007 WL 2949476, at *7 (N.D. Fla. October 10, 2007). As explained above, Congress sought "to protect the public from sex offenders and offenders against children" with the establishment of a "comprehensive national system for the registration of those offenders," 42 U.S.C. § 16901, that would close the gaps between the number of sex offenders and the number who were registered and between the number of sex offenders in the state registries and the number in the federal registry. 152 Cong. Rec. H5722, H5726. Certainly, the closures could be effected only by making SORNA applicable to existing sex offenders. See Roberts, 2007 WL 2155750, at *2 ("The intent of SORNA was to improve the registration and tracking of existing known sex offenders, not merely those who might

be convicted after the effective date.”); United States v. Hinen, 487 F. Supp. 2d 747, 753 (W.D. Va. 2007)(“It would be illogical for members of Congress to express concern that thousands of sex offenders who were required to register under state law were evading those registration requirements and then exempt those same offenders from SORNA.”).

Here, Congress already made SORNA applicable to existing sex offenders and empowered the Attorney General to publish implementing regulations regarding the applicability of the Act to those individuals unable to initially register before July 27, 2006. 42 U.S.C. § 16913(d). Section 16913, entitled, “**Registry Requirements for sex offenders**,” is divided into five subsections. Subsection (a), entitled, “**In general**,” states 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.” Subsection (b), entitled, “**Initial registration**,” states the time periods for an offender to register initially: an offender must register initially either before he completes his imprisonment for his sex offense or, if he was not sentenced to imprisonment for his sex offense, within three business days of his sentence. Subsection (c), entitled, “**Keeping the registration current**,” states that an offender “shall” report a change in residence, employment, or student status to at least one jurisdiction “involved” within three business days and that the receiving jurisdiction must share the new information with other jurisdictions in which the offender is required to register. Subsection (d), entitled, “**Initial registration of sex offenders unable to comply with subsection (b) of this section**,” states that the Attorney General “shall

have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.” Subsection (e), entitled, “**State penalty for failure to comply**,” states each jurisdiction (other than an Indian tribe) “shall provide” a criminal penalty punishable by a maximum term of imprisonment that is greater than one year for an offender’s failure to comply with the registry requirements.

Thus, contrary to the defendant’s argument, Congress did not delegate the authority to the Attorney General to determine retroactive application of the registration requirements of the statute in subsection 16913(d). Congress already provided in SORNA that “A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides ...” without regard to when the defendant was convicted of the qualifying sex offense. 42 U.S.C. § 16913(a),(c); United States v. Cardenas, 2007 WL 4245913, at *5-7 (S.D. Fla. November 29, 2007) (Under principles of statutory construction, Congress intended SORNA’s registration requirements to apply to sex offenders convicted before its enactment). Congress then delegated to the Attorney General “the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.” 42 U.S.C. § 16913(d). In this regard, Congress’

delegation in subsection(d) is sufficiently specific and detailed to meet constitutional requirements.

Moreover, contrary to defendant's argument, Congress did not empower the Attorney General to apply the Act's criminal sanctions retroactively to a defendant. As discussed below, section 2250 only punishes a defendant for failing to initially register or update a registration under SORNA after passage of the Act on July 27, 2006.

Finally, defendant lacks standing to raise this non-delegation issue. The plain language of the Walsh Act makes clear that defendant, a sex offender pursuant to the definition of SORNA, is required to register without regard to any construction of the statute by the Attorney General. Defendant initially registered as a sex offender in South Carolina and re-registered in North Carolina. Having already initially registered, SORNA requires the defendant to keep his registration current. 42 U.S.C. § 16913(a), (c). Since the Attorney General provision at issue in this case, 42 U.S.C. § 16913(d), concerns initial registration, and the defendant has already initially registered into a state sex offender registry, the provision does not affect him. Thus he lacks standing to raise this non-delegation issue. Cardenas, 2007 WL 425913, at *8.

B. CONGRESS DID NOT EXCEED ITS COMMERCE CLAUSE POWER IN ENACTING SORNA

Powers concedes that 18 U.S.C. § 2250 includes an express jurisdictional element that requires travel in interstate commerce, but argues that Congress exceeded its Commerce Clause power in enacting section 2250 because it allegedly fails to establish a constitutionally sufficient relationship to the regulation of interstate commerce. However, section 2250 is a valid exercise of Congress's power under the

Commerce Clause because it is substantially related to the protection of the public from sex offenders who travel interstate and may re-offend and it regulates through section 2250 instrumentalities of interstate commerce.

The Commerce Clause, U.S. Const., art. I, § 8, cl. 3, gives Congress the broad power to regulate instrumentalities of interstate commerce. Gonzales v. Raich, 545 U.S. 1, 16-17 (2005); United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005). Congress's power to regulate instrumentalities of commerce "includes the power to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature." Id.

The Commerce Clause also gives Congress the broad power to regulate those activities substantially related to interstate commerce. Raich, 545 U.S. at 17; United States v. Lopez, 514 U.S. 549, 558-59 (1995). This power enables Congress to reach even wholly intrastate conduct when that conduct is substantially related to interstate commerce. Id. Indeed, even if an individual's activity is local and "may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." Raich, at 17.

In deciding whether Congress acted within its power to regulate activities that are substantially related to interstate commerce, a court does not need to determine whether the regulated activity "taken in the aggregate, substantially affect[s] interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Id. at 22; see, e.g., United States v. Smith, 459 F.3d 1276, 1284-85 (11th Cir. 2006)(Congress could rationally conclude that cumulative effect of intrastate possession and production of child pornography substantially affects interstate commerce), cert. denied, 127 S. Ct.

990 (2007). When a statute contains an express jurisdictional element, however, this Court may uphold that statute against a facial challenge without independently making a rational basis determination. United States v. McAllister, 77 F.3d 387, 390 (11th Cir. 1996)(statute “makes it unlawful for a felon to possess in or affecting commerce, any firearm or ammunition ... [t]his jurisdictional element defeats [defendant's] facial challenge to the constitutionality of” statute)(emphasis in original); United States v. Moghadam, 175 F.3d 1269, 1275-76 (11th Cir. 1999)(absence of jurisdictional element means court must make independent determination). This is so because “[w]hen a statute expressly requires that the proscribed conduct have an appropriate nexus with interstate commerce, courts can ensure, through case-by-case inquiry, that each application of the statute is constitutional, and thus the statute should not be struck down as being facially unconstitutional.” Ballinger, 395 F.3d at 1228, n.5.

SORNA includes an express jurisdictional element, 18 U.S.C. § 2250(a)(2)(B). The offender either: (a) is required to register based on a federal conviction, (b) has traveled in interstate commerce, or (c) has entered, left, or resided in Indian country. 18 U.S.C. § 2250(a)(2)(B). See Templeton, 2007 WL 445481, at *4. Indeed, in this case, the indictment alleges that Powers traveled in interstate commerce after he was convicted of a qualifying sex offense. Ballinger, 395 F.3d at 1228, n.5; see also 72 Fed. Reg. 8894, 8895 (“Because circumstances supporting federal jurisdiction - such as ...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.”).

In any event, Congress acted within its Commerce Clause power to regulate through section 2250 instrumentalities of interstate commerce (i.e., sex offenders) and activities that are substantially related to interstate commerce (i.e. travel in interstate commerce and failure to keep registration current upon establishing residency in a new state). Congress had a rational basis for deciding that a law that penalizes sex offenders who travel between states and fail to register substantially affects interstate commerce in the aggregate. “Courts have consistently recognized that federal statutes enacted to help states address problems that defy a local solution constitute an appropriate exercise of Congress’s Commerce Clause power, because this power includes the authority to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.” United States v. Reynard, 473 F.3d 1008, 1023-24 (9th Cir.), petition for cert. filed, (U.S. July 5, 2007)(No. 07-5195). SORNA helps states address a problem that defies local solution by providing a comprehensive registry system and corresponding national database of sex offenders to protect the public from sex offenders who move in interstate commerce.

Powers does not cite any authority for his argument that the express jurisdictional element in section 2250 must also include a requirement that the defendant undertake his travel in furtherance of or with the specific intent to commit a crime. This is no surprise; travel in interstate commerce alone, regardless of a defendant’s motivation for travel or intentions while en route, has an inherent substantial affect on interstate commerce. It is sufficient that the exercise of Commerce Clause authority be rationally related to the tracking and identification of sex offenders who travel from state to state. See Madera, 474 F. Supp. 2d at 1265 (“Congress’s purpose in passing the Act was to

protect the public from sex offenders. See 42 U.S.C. § 16913. The ability to track sex offenders as they move from state to state, and continue to identify these sex offenders in their new residences, is enough to fall under the veil of the Commerce Clause.”).

Powers cites only three cases in which the Supreme Court has held that Congress exceeded its Commerce Clause power in enacting certain statutes. Powers’s motion at 9-13 (citing United States v. Jones, 529 U.S. 848, 859 (2000), United States v. Morrison, 529 U.S. 598, 619 (2000), United States v. Lopez, 514 U.S. 549, 551 (1995)). These cases, however, do not support Powers’s argument. Jones did not question the facial validity of a statute and instead addressed whether a private residence came within the ambit of a firebombing statute as a building used in any activity affecting interstate commerce. Jones, 529 U.S. at 850-51. Morrison and Lopez addressed statutes that, unlike section 2250, did not contain jurisdictional elements. Morrison, 529 U.S. at 613; Lopez, 514 U.S. at 561. Thus, these cases are inapposite. See Ballinger, 395 F.3d at 1228, n.5.

Accordingly, Congress acted within its Commerce Clause power to regulate through section 2250 instrumentalities of interstate commerce and activities that are substantially related to interstate commerce. Moreover, this statute is rationally related to congressional authority to protect and inform the public by tracking and identifying sex offenders who travel from state to state. In summary, Powers’s claim of a violation of the Commerce Clause lacks merit and affords him no relief.

C. SORNA'S APPLICATION TO POWERS DOES NOT VIOLATE THE EX POST FACTO CLAUSE

Powers argues that SORNA is a prohibited ex post facto law, because the sex offense he committed occurred before the enactment of SORNA. This Court should reject Powers's argument because SORNA does not criminalize or increase the penalties for a defendant's acts that occurred before its passage, i.e., his past federal sex offense conviction. Rather, it criminalizes conduct that occurred after its passage, i.e., the failure to register or update a registration. In addition, Congress enacted SORNA to continue nonpunitive regulatory measures for the protection of the public and not to punish sex offenders for their past sex offenses. Thus, SORNA may be applied retroactively on the basis of sex offenses committed at an earlier time, without violating the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3. See Smith v. Doe, 538 U.S. 84, 92 (2003).

"The ex post facto prohibition forbids Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or it imposes additional punishment to that then prescribed." Weaver v. Graham, 450 U.S. 24, 28 (1981). The central concern of this prohibition is affording the defendant "fair warning" of the punishment for his offense. United States v. Bailey, 123 F.3d 1381, 1406 (11th Cir. 1997).

"The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." Martin v. Hadix, 527 U.S. 343, 357-58 (1999). The judgment whether a particular statute is ex post facto "should

be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.” Id. at 358.

SORNA’s application to Powers does not violate the Ex Post Facto Clause for the simple reasons that it does not punish an offender for his failure to register or keep his registration current before its enactment; it punishes an offender for his failure to register or keep his registration current after its enactment. See 18 U.S.C. § 2250; 42 U.S.C. § 16913(a). The Ex Post Facto Clause is implicated only when all of the elements of an offense have been completed before a statute’s effective date. Section 2250(a) does not make a defendant’s past federal conviction for a sex offense a crime; it makes the defendant’s failure to register under SORNA a crime. Offenders, including Powers, thus had “fair warning” that if they fail to register or keep their registration current after SORNA’s enactment, they will be subject to the new offense of failure to register proscribed by 18 U.S.C. § 2250. Bailey, 123 F.3d at 1406. In this regard, SORNA’s offense of failure to register is comparable to the federal offense of failure to pay child support that this Court upheld against an ex post facto challenge. See United States v. Muench, 153 F.3d 1298, 1305 (11th Cir. 1998)(defendant “did not violate the [statute] by failing to make regular payments prior to [statute’s effective date]; he violated the statute by not making payments after the law’s enactment.”).³

³Importantly, that one element of a crime is committed before a law’s enactment does not cause application of the law to violate the Ex Post Fact Clause. E.g., United States v. Reynolds, 215 F.3d 1210, 1213 (11th Cir. 2000)(use of predicate felonies committed before Armed Career Criminal Act does not violate ex post facto prohibition); United States v. Alkins, 925 F.2d 541, 549 (2d Cir. 1991)(“Since appellants permitted the final element of the crime to occur after the effective date of the statute, their mail fraud convictions did not violate the ex post facto clause.”); United States v. Woods, 696 F.2d 566, 571-72 (8th Cir. 1982)(law prohibiting felon-in-possession not ex post facto by

Section 2250(a) requires proof of three elements: (1) the sex offender was required to register under SORNA; (2) he travelled in interstate commerce; and (3) he knowingly failed to register under SORNA. Thus, the offense is not completed until the sex offender knowingly fails to register under SORNA. Under the statutory scheme, a sex offender can knowingly fail to register under SORNA only after SORNA went into effect, i.e., after July 27, 2006. Consequently, because the conduct required to complete the offense must necessarily occur after the Walsh Act's effective date in every case, the application of Section 2250(a) is not retrospective and therefore does not violate the Ex Post Facto Clause. See Miller v. Florida, 482 U.S. 427, 430, 107 S. Ct. 2446, 2451 (1987) ("A law is retrospective if it 'changes the legal consequences of acts *completed before* its effective date.'" (emphasis added)). See United States v. Manning, 2007 WL 624037, at *1 (W.D. Ark.) (no ex post facto violation in charging defendant who traveled in interstate commerce after the effective date of SORNA); United States v. Markel, 2007 WL 1100416, at *3, n.1 (W.D. Ark.) (court was not persuaded by reasoning in United States v. Smith, 2007 WL 735001 (E.D. Mich.)). Indeed, Powers is not charged with failing to register before July 27, 2006. Rather, the indictment plainly charges the defendant with failing to register or update his registration in or about July 2007. Doc. 6.

SORNA's application to Powers does not violate the Ex Post Facto Clause, moreover, because the registry requirements themselves can be given retroactive effect (i.e. based on a previous sex offense) as nonpunitive regulatory measures. The well-

fact that firearm traveled in interstate commerce before law's enactment; essence of criminal act is defendant's possession after enactment).

established law is that the Ex Post Facto Clause of the United States Constitution is inapplicable to civil, nonpunitive regulatory schemes. Collins v. Youngblood, 497 U.S. 37, 41 (1990). The United States Supreme Court has held that sex offender registration requirements are nonpunitive regulatory measures and may be applied retroactively without violating the Ex Post Facto Clause. See Smith v. Doe, 538 U.S. 84, 92 (2003) (Alaska sex offender registration laws did not violate Ex Post Facto Clause). SORNA continued nonpunitive regulatory measures that are rationally related to a nonpunitive purpose, *i.e.*, the protection of the public from sex offenders. United States v. Madera, 474 F. Supp. 2d 1257, 1263 (M.D. Fla. 2007) (SORNA has a rational connection to a non-punitive purpose, *i.e.*, public safety); United States v. Mason, 2007 WL 1521515, at *4 (M.D. Fla.); United States v. Templeton, 2007 WL 445481, at *5 (W.D. Okla.).

In Smith, the Supreme Court rejected the claim of two sex offenders (and the wife of one of them) that Alaska's Megan's Law violated the ex post facto prohibition by requiring the offenders to register and update their registrations (or face criminal penalties) based on sex offenses that they had committed before the law's enactment. 538 U.S. at 91, 105-06. Noting that the Alaska legislature intended the law to establish civil proceedings for the protection of the public as opposed to criminal punishment of sex offenders for their past sex offenses, *id.* at 93-96, and the law was not so punitive, either in purpose or effect, as to negate such intention, the Court concluded that the statute could be applied retroactively without violating the Ex Post Facto Clause of the Constitution.

Like the regulatory scheme in Smith, Congress created SORNA as a civil, regulatory scheme to protect the public. See 42 U.S.C. § 16901; United States v.

Madera, 474 F. Supp. 2d 1257, 1263 (M.D. Fla. 2007) (SORNA has a rational connection to a non-punitive purpose, i.e., public safety); United States v. Hinen, 487 F. Supp. 2d 747, 755 (W.D. Va. 2007)(SORNA's "statutory scheme evidence[s] no desire by Congress to simply exact punishment against sex offenders. Rather, Congress described this law as a public safety measure."). In SORNA, Congress made clear its purpose to create a regulatory system for tracking and notifying the public about sex offenders "in order to protect the public from sex offenders," in light of the danger this class of offenders poses to others. See 42 U.S.C. § 16901. As the Court emphasized in Smith, "considerable deference must be accorded to the intent as the legislature has stated it." 538 U.S. at 93. Indeed, Congress's placement of most of SORNA, including the registry requirements, in title 42 ("The Public Health and Welfare") indicates that Congress intended to establish civil proceedings for the protection of the public as opposed to additional punishment for sex offenders. See Smith, 538 U.S. at 94-95 (analyzing where Alaska legislature put Megan's Law).

Contrary to defendant's claims, SORNA's requirements do not differ in any constitutionally significant way from the requirements of the Alaska registration system considered in Smith. Powers mistakenly argues that Congress must have intended for SORNA to be punitive because SORNA expanded the class of sex offenders subject to registry requirements, lengthened the duration of the registry requirements, created classes of offenders, reduced the time frame for offenders to report changes, and increased penalties for registry violations. Powers's motion at 16. These changes, however, evince only an intent to eliminate the gaps in the existing laws for the protection of the public and not to inflict punishment on offenders. See statutory

background, supra; 72 Fed. Reg. 30210, 30210-11 (summarizing changes and stating that they were made to “close potential gaps and loopholes under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs” and to strengthen federal support of state programs).

Powers also argues that Congress did not support its stated purpose of protecting the public with express findings that sex offenders have a high risk of recidivism or that public notification would promote public safety. Powers motion at 16. Such express findings, however, are unnecessary; the Supreme Court has recognized: [G]rave concerns [exist] over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is “frightening and high.” Smith, 538 U.S. at 103 (quoting McKine v. Lile, 536 U.S. 24, 34 (2002)). Indeed, the legislative history demonstrates that Congress had these established concerns in mind. E.g. 152 Cong. Rec. S8017 (2006)(“Nearly three-quarters of the violent sex offenders are going to repeat that offense when released from prison. We know that from statistics. Do we have an obligation to protect our children? The answer is, you bet we do, and it is long past the time. That is why this legislation is so important.”).

Finally, Powers argues that Congress’s placement of section 2250 in title 18 evinces an intent to punish. Powers’s motion at 16. Such placement, however, is even less evidence of an intent to punish than in Smith, where the Supreme Court observed that the Alaska legislature codified all of the registry requirements in its criminal procedure code, but deemed such placement “not dispositive”; [t]he location and labels

of a statutory provision do not by themselves transform a civil remedy into a criminal one.” Smith, 538 U.S. at 94.

Accordingly, SORNA’s application to Powers does not violate the Ex Post Facto Clause because it penalizes his failure to register and keep his registration current after SORNA’s enactment rather than penalizing acts that occurred before its enactment. Moreover, the registry requirements themselves can validly be given retroactive effect because they are nonpunitive regulatory measures intended to protect the public the public and not to increase punishment for past sex offenses.

D. SORNA’S APPLICATION TO POWERS DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Powers also argues that application of SORNA to him violates his procedural and substantive due process rights by placing his name on internet sex offender registries and imposing registration requirements on him without providing procedures to assess his dangerousness or challenge the validity of his sex offense. Powers’s motion at 17-19. Powers lacks standing to raise this argument, and, in any event, neither procedural nor substantive due process requires the procedures that Powers now requests.

Powers lacks standing to raise his procedural and substantive due process argument because Powers never sought and therefore never was denied process to assess his dangerousness or to challenge the validity of his South Carolina sex offense, and Powers has never claimed that process would somehow result in an assessment that he is not dangerous or that his South Carolina sex offense was invalid. See United States v. Gonzales, 2007 WL 2298004, at *11 (N.D. Fla. Aug. 9, 2007) (unpublished) (defendant did not have standing to raise due process challenge because he did not

aver that he was denied right to challenge sex offense conviction). Thus, Powers has not established any injury traceable to SORNA's asserted due process deficiencies. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-71 (1992)(party must show injury and redressibility to establish standing).

In any event, the Supreme Court's decision in Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003), forecloses Powers's argument that due process requires procedures to assess his dangerousness prior to classifying him as a sex offender and including his name on a sex offender registry. In Conn. Dept., the Supreme Court held that due process did not require Connecticut's Megan's Law to include procedures to assess a sex offender's dangerousness because the registry requirements were based on the fact of an offender previous conviction for a sex offense, not the fact of his current dangerousness. Id. at 4, 7. "[D]ue process does not require the opportunity to prove a fact (that one is not dangerous) that is not material to the [] statutory scheme." Id. at 4; United States v. Mason, 2007 WL 1521515, at *5. In this case, all sex offenders are required to register under SORNA; therefore, the Act does not violate procedural due process. Madera, 474 F. Supp. 2d, at 1264. Powers appears to concede as much by acknowledging but not attempting to distinguish Conn. Dept. Powers's motion at 17-18.

Similarly, the Court of Appeals for the Eleventh Circuit's decision in Doe v. Moore, 410 F.3d 1337 (11th Cir.), cert. denied, 546 U.S. 1003 (2005), forecloses Powers's argument that without procedures to test the validity of his sex offense, his right to substantive due process is violated. Powers's motion at 18. In Moore, a class of sex offenders claimed that publication of their names pursuant to Florida's Megan's

Law violated their substantive due process rights. Moore, 410 F.3d at 1342. Observing that substantive due process “protects fundamental rights that are so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed,” the Eleventh Circuit held that the right of a sex offender to refuse to register and prevent publication of identifying information on a government website is not a fundamental constitutional right for substantive due process purposes. Moore, 410 F.3d at 1344-45; United States v. Mason, 2007 WL 1521515, at *6. See also Doe v. Tandeske, 361 F.3d 594, 597 (9th Cir. 2004); Gunderson v. Hvass, 339 F.3d 639, 643 (8th Cir. 2003). The court also held that Florida had a rational basis for its Megan’s Law; specifically, “the interest of the government to protect its citizens from criminal activity.” Id. at 1345-46.

Moore compels rejection of Powers’s argument that without procedures to test the validity of his sex offense, his right to substantive due process is violated because he has not identified any fundamental right at stake. Whether based on standing or Conn. Dept. and Moore, Powers is not entitled to relief on his argument that SORNA violates his substantive and procedural due process rights.

Powers also argues that his procedural due process rights were violated because he had no actual notice of SORNA’s registration requirements that if he moved to another state he would have to register there. In effect, Powers argues that procedural due process requires his receipt of personalized federal notice of his registration requirements.

Although Powers argues that he did not have notice that he had to register in Florida upon becoming a resident there, Powers in fact received such notice from the

following sources: (1) SORNA provided notice to Powers that he must keep his registration current where he resides, 42 U.S.C. § 16193(a); (2) the Lyncher Act provided notice to Powers that if he changed residences from one state to another, he must register his information with his new state; see 42 U.S.C. § 14072(g)(3); and (3) Florida provided notice to Powers that he must register in Florida upon becoming a resident there. Fla. Stat. § 943.0435(2). Certainly, as a matter of procedural fairness, Powers was given more than sufficient notice that he had to register upon establishing residency in Florida.

In addition to this notice, Powers should be keenly aware that, as a sex offender, he is subject to registration requirements and that he therefore should keep abreast of any changes in the registry law. One district court explained:

Owners of firearms, doctors who prescribe narcotics, and purchasers of dyed diesel are all expected to keep ... themselves abreast of changes in the law which affect them, especially because such people are on notice that their activities are subject to regulation ... Sex offenders are no different; they must comply with the law even when it changes suddenly and without notice, and they are well advised to periodically check for changes because they are particularly subject to regulation.

United States v. Lovejoy, 2007 WL 2812681, at *5 (D.N.D. Sept. 28, 2007).

Powers incorrectly contends that ignorance of the law excuses non-compliance and that anyone lacking a personal explanation of the law need not follow it. “The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes.” Cheek v. United States, 489 U.S. 192 (1991). In short,

Powers, as a sex offender who registered in South Carolina and North Carolina, had notice of his duty to register in Florida upon establishing residency there and procedural due process does not require that Powers be given personalized federal notice of SORNA's registration requirements.

E. THE ATTORNEY GENERAL'S IMPLEMENTING REGULATIONS WERE NOT ISSUED IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

Powers also argues that the Attorney General's regulation, 28 C.F.R. § 72.3, purportedly retroactively applying SORNA to him, is invalid because it was created absent notice and comment required by the Administrative Procedures Act (APA), 5 U.S.C. § 553(d).⁴ Without citing any authority, Powers claims that the government's alleged violation of the APA entitles him to relief in the form of dismissal of the indictment in this case.

The APA requires advance public notice for proposed rules and publication in the Federal Register before the rule's effective date unless "good cause" is established. 5 U.S.C. § 553(d). However, the APA exempts federal agencies from this notice and comment period when the agency finds for good cause (and incorporates the finding and a brief statement of reasons in the rules issued) that the procedure is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

⁴ On February 28, 2007, the Attorney General issued an interim rule clarifying that SORNA applies to all sex offenders regardless of when they were convicted. 72 Fed. Reg. 8,894, 8,896 (codified at 28 C.F.R. § 72.3).

Here, the Department of Justice (DOJ) followed the mandates of the APA. The DOJ found for good cause that implementing the interim rule with prior notice and public comment would be contrary to the public interest. The interim rule provides:

The immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements - and related means of enforcement, including criminal liability under 18 U.S.C. § 2250 for sex offenders who knowingly fail to register as required - to sex offenders whose predicate convictions predate the enactment of SORNA. Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would thwart the legislative objective of "protect[ing] the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders," SORNA, § 102, because a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay the effectiveness of a final rule.

72 Fed. Reg. 8894, 8896-8897 (2007). Accordingly, the DOJ found that delay in implementing this rule was contrary to the public interest. As required by the APA, the DOJ incorporated its finding and a brief statement of reasons in the interim rule. "The DOJ's valid concern for public safety, legal certainty, and swift implementation of the rule was adequately justified in its interim order." Gould, 526 F. Supp. 2d at 546. The

DOJ complied with the APA and defendant's motion to dismiss on this basis should be denied.

Moreover, defendant lacks standing to raise this issue. As discussed above, the plain language of the Walsh Act makes clear that defendant, a sex offender pursuant to the definition of SORNA, is required to register without regard to any construction of the statute by the Attorney General. He has not been prosecuted pursuant to this interim rule and has suffered no injury by the failure to provide a 30-day notice period. Finally, even if Powers did fall within that rule, the remedy is to treat the rule as though it went into effect on March 30, 2007 – 30 days after its enactment. As explained above, SORNA does not violate the Ex Post Facto Clause, so, even if the retroactivity rule did not go into effect until March 30th, the United States still could prosecute Powers for his failure to register in July 2007.

F. SORNA DOES NOT VIOLATE THE TENTH AMENDMENT

Powers contends that SORNA violates the Tenth Amendment by requiring state officials to accept federally required sex offender registrations. Defendant's argument is misplaced. As discussed above, SORNA is a valid exercise of Congress's power under the Commerce Clause, and there can be no violation of the Tenth Amendment when Congress acts under one of its enumerated powers. United States v. Williams, 121 F.3d 615, 620 (11th Cir. 1997). In addition, Congress has not required states to enact SORNA's provisions; it has simply offered States financial incentives to do so.

The Tenth Amendment to the United States Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the States are reserved to the States respectively, or to the people.” U.S. Const. Amend X.

As discussed above, SORNA is a valid exercise of Congress's power under the Commerce Clause, and Congress's "valid exercise of authority does not violate the Tenth Amendment." Williams, 121 F.3d at 620 (quoting Cheffer v. Reno, 55 F.3d 1517, 1519 (11th Cir. 1995)).

Moreover, SORNA does not force state officials to do anything contrary to the Tenth Amendment. While SORNA does offer financial incentives to states to amend their existing registration laws in compliance with SORNA, see, e.g., 42 U.S.C. § 16925, it does not force or conscript the states to do anything more than what each state has already done in its passage of its own Megan's Laws. Although the Tenth Amendment prohibits federal officials from conscripting, or commandeering, state officials to administer and enforce a federal regulatory program, see Printz v. United States, 521 U.S. 898 (1997), Congress is allowed to condition federal grants to states upon fulfillment of federal statutory or administrative directives. New York v. United States, 505 U.S. 144, 171-73 (1992); South Dakota v. Dole, 483 U.S. 203, 206 (1987); United States v. Gould, 526 F. Supp. 2d 538, 549 (D. MD. 2007). While SORNA does require state officials to change offender registration procedures to comply with the federal program, Congress expressly stated that a state's failure to substantially implement SORNA by July 27, 1990, would only result in the loss of federal funding. 42 U.S.C. §§ 16925(a), 16925(d). United States v. Cardenas, 2007 WL 4245913, at *14 (S.D. Fla. Nov. 29, 2007)(unpublished); United States v. Hacker, 2008 WL 312689, at *3 (D. Neb. Feb. 1, 2008).

Accordingly, since States may chose whether to implement SORNA and SORNA is a legitimate exercise of the Congress's Commerce Clause power, SORNA does not violate the Tenth Amendment.⁵

Wherefore, for the foregoing reasons, the United States requests the Court to deny the defendant's motion to dismiss the indictment.

Respectfully submitted,

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⁵The cases cited by Powers are inapposite. In each of those cases, the Supreme Court struck down federal laws requiring states to execute federal law. SORNA does not require states to do anything more than what is in place already, but instead provides monetary incentives to amend existing laws to be in accordance with SORNA.

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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