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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 **(HONORABLE BARRY TED MOSKOWITZ)**

11 UNITED STATES OF AMERICA,)	CASE NO. 07CR1254-BTM.
12 Plaintiff,)	
13 v.)	
14 GLEN W. TERWILLIGER,)	STATEMENT OF FACTS
15 Defendant.)	MEMORANDUM OF POINTS AND
16)	AUTHORITIES IN SUPPORT OF
17)	MR. TERWILLIGER'S MOTIONS

18 **I.**
19 **STATEMENT OF FACTS**
20

21 Mr. Glen Terwilliger was arrested on May 17, 2007 at 3030 Broadway, # 4 in San
22 Diego where he had obtained housing through IMPACT, an organization which assists
23 mentally-disabled individuals find shelter and obtain federal and state benefits. Mr.
24 Terwilliger was arrested as he has been accused of violating a federal statute signed into law
25 on July 27, 2006, the Sex Offender Registry & Notification Act ("SORNA"). Mr. Terwilliger
26 is charged in a superseding indictment returned on June 6, 2007, with failing to register as
27 an individual convicted of a "sex offense," specifically, a June 1991 conviction for "Unlawful
28 Sexual Contact, under Colorado Revised Statutes 18-3-404 in 1991 in violation of 18 U.S.C.

1 §2250(a). *See* Indictment, Exhibit A. The indictment also alleges that between August 20,
2 2006 and May 11, 2007, Mr. Terwilliger, an individual required to register under SORNA
3 due to this prior conviction, traveled in interstate commerce (after suffering the prior
4 conviction) and knowingly failed to register and update his registration as required by
5 SORNA. *Id.*

6 Mr. Terwilliger was, according to documents the undersigned attaches to this motion,
7 convicted of a misdemeanor sexual assault in Colorado in 1991, 15 years before SORNA was
8 enacted. Mr. Terwilliger was never advised of his requirement to register as a sex offender
9 under a statute which had yet to be enacted. In addition, under existing law in Colorado at
10 the time that he entered a guilty plea, he did not have to register as a sex offender. In terms
11 of its registration requirements in June 1991 when Mr. Terwilliger entered his guilty plea and
12 was sentenced, Colorado law provided. In addition, under the law existing in Colorado at
13 the time that he entered his guilty plea, Mr. Terwilliger did not have to register as a sex
14 offender. Colorado registration law provided:

15 **§ 18-3-412.5. Sex offenders against children--duty to register--penalties**

16 (1) On and after July 1, 1991, any person who is convicted in the state of
17 Colorado of an unlawful sexual offense as defined in section 18-3-411(1), or
18 the offense described in section 18-3-305, and any person who has been
19 convicted, on and after July 1, 1991, in any other state of an offense which, if
20 committed in the state of Colorado, would constitute an unlawful sexual
21 offense as defined in section 18-3-411(1), or would constitute the offense
22 described in section 18-3-305, or any person who is released from the custody
of the department of corrections having completed serving a sentence for an
unlawful sexual offense as defined in section 18-3-411(1), or the offense
described in section 18-3-305, shall be required to register in the manner
prescribed in subsection (2) of this section.

23 Colorado law defines "an unlawful sexual offense" as:

24 **§ 18-3-411. Sex offenses against children--unlawful sexual offense defined-- limitation
for commencing proceedings--evidence--statutory privilege**

25 (1) As used in this section, "unlawful sexual offense" means sexual assault in
26 the first degree, as defined in section 18-3-402, when the victim at the time of
the commission of the act is a child less than fifteen years of age; sexual
27 assault in the second degree, as defined in section 18-3-403(1)(a), (1)(b),
(1)(c), (1)(d), (1)(g), or (1)(h), when the victim at the time of the commission
of the act is a child less than fifteen years of age, or as defined in section 18-3-
28 403(1)(e), when the victim is less than fifteen years of age and the actor is at
least four years older than the victim; sexual assault in the third degree, as

1 defined in section 18-3-404(1)(a), (1)(b), (1)(c), (1)(d), (1)(f), or (1)(g), when
2 the victim at the time of the commission of the act is a child less than fifteen
years of age¹

3 Mr. Terwilliger, as is noted in the attached documents, *see* Exhibit B, was convicted under
4 Colorado statute §18-3-404, misdemeanor sexual assault. It is clear from the judicially-
5 noticeable documents that neither the charging document nor the judgment and conviction
6 document make reference to the age of the victim of the misdemeanor offense. Thus,
7 according to the governing Colorado law at the time he entered his guilty plea and was
8 sentenced, Mr. Terwilliger did not have to register as a sex offender. Mr. Terwilliger's
9 attorney specifically negotiated this particular plea bargain so that Mr. Terwilliger would not
10 have to register.²

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12 ¹ The remainder of the statute is inapplicable but it reads:

13 sexual assault on a child, as defined in section 18-3-405; sexual assault on a child
14 by one in a position of trust, as defined in section 18-3-405.3; aggravated incest, as
15 defined in section 18-6-302; trafficking in children, as defined in section 18-6-402;
16 sexual exploitation of a child, as defined in section 18-6-403; procurement of a child
17 for sexual exploitation, as defined in section 18-6-404; soliciting for child
18 prostitution, as defined in section 18-7-402; pandering of a child, as defined in
19 section 18-7-403; procurement of a child, as defined in section 18-7-403.5; keeping
20 a place of child prostitution, as defined in section 18-7- 404; pimping of a child, as
21 defined in section 18-7-405; inducement of child prostitution, as defined in section
22 18-7-405.5; patronizing a prostituted child, as defined in section 18-7-406; or
23 criminal attempt, conspiracy, or solicitation to commit any of the acts specified in
24 this subsection (1).

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26 ² Declarations will be submitted attesting to these facts. Although the Colorado law relating
27 to registration requirements was amended numerous times, it may be the case that in 1994, Colorado
28 statute § 18-3-412.5 was repealed and re-enacted under the title "Sex Offenders -- Duty to Register --
Penalties." It provided: "on and after July 1, 1994, any person who is convicted in the state of
Colorado of an offense involving unlawful sexual behavior as described in this part 4 or the offense
described in section 18-3-305 . . . or any person who is released from the custody of the department
of corrections having completed serving a sentence for an offense involving unlawful sexual
behavior as described in this part 4" was required to register. CRSA § 18-3-412.5 In this way, the
Colorado legislature expanded the pool of offenses which triggered the registration requirement to
include sexual assault in the third degree, as defined in section 18-3-404. CRSA § 18-3-412.5
(1994). However, since Mr. Terwilliger only received a sentence of two years for the misdemeanor
sexual assault and had served already 110 days when he convicted in 1991, he would have been
"released" from that conviction and serving the sentence on the other crimes in July 1994, thus, this

1 According to the government's representations made at the previous motion hearing,
2 its theory of criminal liability against Mr. Terwilliger is that he should have registered in
3 California after he traveled into the state.³ According to California law, Mr. Terwilliger's
4 misdemeanor unlawful sexual contact conviction would only be a registerable offense if he
5 "would be required to register while residing in the state of conviction for a sex offense
6 committed in that state." Cal. Pen. Code § 290(a)(2)(D)(iii). As stated, when convicted,
7 Mr. Terwilliger did not have to register in Colorado.

8 To date, there is no registration system in place under SORNA itself, though SORNA
9 requires that states institute a nationwide system of registering individuals who have been
10 convicted of a number of enumerated crimes, which SORNA defines as "sex offenses."
11 States have until July 27, 2009 to implement this registration system. 42 U.S.C. § 16924.
12 The list of these enumerated offenses is contained at 42 U.S.C.A. §16911.

13 Under 42 U.S.C. §16913(a), SORNA requires that:

14 A sex offender shall register, and keep the registration current, in each
15 jurisdiction where the offender resides, where the offender is an employee, and
16 where the offender is a student. For initial registration purposes only, a sex
17 offender shall also register in the jurisdiction in which convicted if such
18 jurisdiction is different from the jurisdiction of residence.

19 42 U.S.C. § 16913(a). Regarding the initial registration, the law provides that:

20 The sex offender shall initially register--

- 21 (1) before completing a sentence of imprisonment with respect to the offense
22 giving rise to the registration requirement; or
23 (2) not later than 3 business days after being sentenced for that offense, if the
24 sex offender is not sentenced to a term of imprisonment.

25 *Id.* at § 16913(b). SORNA includes a requirement that the sex offender keep the
26 registration current by registering:

27 not later than 3 business days after each change of name, residence,
28 employment, or student status, appear in person in at least 1 jurisdiction
involved pursuant to subsection (a) of this section and inform that

new statute would not apply to him. It is his position that absent express specification that the statute
was to be applied retroactively, as set forth in argument, it does not so apply.

³ Based upon this representation, Mr. Terwilliger is not filing a motion seeking a bill of
particulars as to which jurisdiction is implicated by the indictment.

1 jurisdiction of all changes in the information required for that offender in the
2 sex offender registry. That jurisdiction shall immediately provide that
3 information to all other jurisdictions in which the offender is required to
4 register.

4 *Id.* at 16913(c).

5 Congress provided specifically under subsection (d) of the Act, relating to
6 the "Initial registration of sex offenders unable to comply with subsection (b) of this
7 section," that:

8 The Attorney General shall have the authority to specify the applicability of
9 the requirements of this subchapter to sex offenders convicted before July
10 27, 2006 or its implementation in a particular jurisdiction, and to prescribe
11 rules for the registration of any such sex offenders and for other categories
12 of sex offenders who are unable to comply with subsection (b) of this
13 section.

12 *Id.* at 16913(d).

13 On February 28, 2007, the Attorney General promulgated the following "interim"
14 regulation, absent notice and comment procedures, stating that "[t]he requirements of the
15 Sex Offender Registration and Notification Act apply to all sex offenders, including sex
16 offenders convicted of the offense for which registration is required prior to the enactment
17 of that Act." 28 C.F.R. § 72.3.⁴

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20 ⁴ The regulation contained the following two examples:

21 Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. § 2241
22 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the
23 requirements of the Sex Offender Registration and Notification Act and could be held criminally
24 liable under 18 U.S.C. § 2250 for failing to register or keep the registration current in any jurisdiction
25 in which the sex offender resides, is an employee, or is a student.

26 Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is
27 released following imprisonment in 2000. The sex offender initially registers as required, but
28 disappears after a couple of years and does not register in any other jurisdiction. Following the
enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be
living in another state and is arrested there. The sex offender has violated the requirement under the
Sex Offender Registration and Notification Act to register in each state in which he resides, and
could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in
interstate commerce.

1 SORNA defines a "sex offender" as "an individual who was convicted of a sex
2 offense." 42 U.S.C. § 16911(1). A "sex offense" is: (I) a criminal offense that has an
3 element involving a sexual act or sexual contact with another. 42 U.S.C. § 16911(5)(A)(I).

4 SORNA requires each state to maintain a sex offender registry that complies with
5 the rigid specifications of the statute. 42 U.S.C. § 16912. States are directed to make it a
6 felony offense for an offender to fail to comply with the registration requirements of
7 SORNA. 42 U.S.C. § 16913(e). SORNA gives states three years from its effective date
8 to implement its requirements. 42 U.S.C. § 16924. A state that fails to comply with the
9 requirements of SORNA faces a reduction in federal funding. 42 U.S.C. § 16925. To date,
10 neither Colorado nor California has enacted regulations in response to SORNA.

11 Individuals are required to register where they were convicted and where they
12 reside, and are required to update such registration if they move. 42 U.S.C. §14611(13).

13 SORNA also contains a criminal provision that provides:

14 Whoever

15 (1) is required to register under the Sex Offender Registration and
16 Notification Act;

17 (2)(a) is a sex offender as defined for the purposes of the Sex Offender
18 Registration and Notification Act by Reason of a conviction under Federal
19 law (including the Uniform Code of Military Justice), the law of the District
of Columbia, Indian tribal law, or the law of any territory or possession of
the United States; or

20 (b) travels in interstate or foreign commerce, or enters or leaves, or resides
in, Indian country; and

21 (3) knowingly fails to register or update a registration as required by the Sex
22 Offender Registration and Notification Act;

23 shall be fined under this title or imprisoned not more than 10 years, or both.

24 18 U.S.C. § 2250(a). Mr. Terwilliger is charged with violating this provision of SORNA.
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II.

PRELIMINARY STATEMENT

The Indictment must be dismissed for a number of reasons. First, Congress lacks the power under the Commerce Clause to force citizens who have been convicted of purely local offenses under state law to register as sex offenders. The Registration Requirements, contained in 42 U.S.C. §§ 16913-16916, are therefore unconstitutional. Section 2250, the statute under which Mr. Terwilliger is charged, only applies to defendants who are “required to register under the Sex Offender Registration and Notification Act.” 18 U.S.C. § 2250(a)(1). Since Congress lacks the power to require Mr. Terwilliger to register in the first place, this element of section 2250 cannot be met and the Indictment must be dismissed.

Even if Congress has the authority to enact the Registration Requirements, section 2250 itself violates the Commerce Clause because Congress lacks the power to federally criminalize a local sex offender’s failure to register in a state-run registry. Although section 2250, unlike the Registration Requirements, contains a supposed jurisdictional element – the defendant must travel in interstate commerce – Congress failed to require that the purpose of the travel relate in any way to the failure to register. Therefore, the jurisdictional element is insufficient to bring the statute within any of the acceptable categories of Commerce Clause legislation. Since Mr. Terwilliger is being prosecuted under an unconstitutional statute, the Indictment must be dismissed.

Second, section 2250(a) on its face cannot be applied to Mr. Terwilliger because it only criminalizes failures to register on behalf of individuals convicted under Federal, Indian, tribal and laws of any U.S. territory or possession. *See* 18 U.S.C. § 2250(a)(2)(A). Mr. Terwilliger has a conviction out of the State of Colorado and within the language of the statute States are distinct from territories or possessions of the United States. Thus, section 2250(a), as a matter of law, does not apply to Mr. Terwilliger.

Third, the criminal statutory section under which Mr. Terwilliger is charged was not made retroactive under well-established principles of statutory construction. Even if it was,

1 Mr. Terwilliger's alleged conduct took place prior to SORNA's enactment on July 27, 2006
2 and under the Colorado law in effect on the date of Mr. Terwilliger's guilty plea and
3 sentencing, he was not required to register in Colorado. Since failure to register is not a
4 continuing offense, his prosecution under section 2250 violates the Ex Post Facto Clause
5 and violates principles against retroactive application of laws. In addition, the regulation
6 promulgated by the Attorney General which purports to make section 2250(a) apply
7 retroactively to Mr. Terwilliger is invalid as it promulgated absent notice and comment.

8 Fourth, SORNA violates the non-delegation doctrine contained in Article I §§ 1, 8 of
9 the Constitution by delegating to the Attorney General the power to determine the
10 retroactivity of the Registration Requirements. This is an unconstitutional delegation of
11 legislative authority to the executive branch. The statute is therefore unconstitutional and
12 the Indictment must be dismissed.

13 Fifth, the Indictment must be dismissed because the prosecution of Mr. Terwilliger
14 under section 2250 violates his right to due process. Mr. Terwilliger had no notice of
15 SORNA's requirements when his alleged misconduct occurred, because the statute had not
16 yet been enacted. In addition, neither Colorado nor California has created SORNA-
17 compliant registries, making it impossible for Mr. Terwilliger to comply with the
18 Registration Requirements. Since Mr. Terwilliger had no notice of the Registration
19 Requirements, and it would have been impossible for him to comply with them, his
20 prosecution is barred on due process grounds.

21 Sixth, section 2250 is an unconstitutional exercise of federal power over the states and
22 therefore violates the Tenth Amendment. SORNA forces state officials to enforce a federal
23 regulatory scheme, which is prohibited by the Tenth Amendment and the principles of
24 federalism. The statute is therefore unconstitutional and the Indictment must be dismissed.

25 Seventh, SORNA, as applied, impermissibly infringes upon Mr. Terwilliger's
26 constitutional right to interstate travel, thus, the indictment must be dismissed.
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III.

SORNA'S REGISTRATION REQUIREMENTS & 18 U.S.C. § 2250(a) IS AN IMPERMISSIBLE EXERCISE OF CONGRESS' AUTHORITY AND CANNOT BE JUSTIFIED UNDER THE SUPREME COURT'S COMMERCE CLAUSE CASES.

Both the registration requirements set forth in SORNA which apply to purely local conduct and the criminal statute at issue here, 18 U.S.C. § 2250(a), are unlawful and unauthorized exercises of Congress' power.

A. The Registration Requirements Are Impermissible & Are Not Authorized Under Commerce Clause Caselaw.

In order to violate section 2250 a defendant must first be “required to register under the Sex Offender Registration and Notification Act.” 18 U.S.C. § 2250(a)(1). However, as explained below, Congress lacks the authority to direct individuals convicted of purely State offenses to register as sex offenders. Therefore Congress could not constitutionally require Mr. Terwilliger, who was convicted of a purely state-law offense, to register under SORNA, and the first element of section 2250 cannot be met.

SORNA creates affirmative requirements for “sex offenders” to register with their local jurisdiction. 42 U.S.C. §§ 16913-16916. As described above, SORNA’s definition of “sex offender” includes citizens who have been convicted solely under state criminal laws, even if their offense has no relation to interstate activity or commerce. 42 U.S.C. § 16911. The Registration Requirements are not directed to the states, but to individuals. For example, 42 U.S.C. §§ 16913(a) requires a sex offender to “register and keep the registration current, in each jurisdiction where the offender resides.”

The Constitution creates a federal government of limited enumerated powers. U.S. Const. Art. I, § 8; *see also Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824) (observing that “[t]he enumeration presupposes something not enumerated”). The Commerce Clause, one of the enumerated powers, allows 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. The Constitution thus withholds from Congress a plenary police power that would authorize enactment of any type of legislation, leaving the States with the primary obligation to ferret

1 out crime. *United States v. Lopez*, 514 U.S. 549, 560 (1995). *See also United States v.*
2 *Morrison*, 529 U.S. 598, 618 (2000) (reiterating that “[t]he regulation and punishment of
3 intrastate violence that is not directed at the instrumentalities, channels, or goods involved
4 in interstate commerce has always been the province of the States”).

5 The Supreme Court has identified three categories of activity that Congress may
6 regulate under its commerce power. It may regulate the use of the “channels of interstate
7 commerce”; the instrumentalities of interstate commerce or persons or things in interstate
8 commerce; or those activities having “a substantial relation to interstate commerce” (*i.e.*,
9 those purely local activities that substantially affect interstate commerce). *Lopez*, 514 U.S.
10 at 558-559. *See also United States v. Robertson*, 514 U.S. 669 (1995) (*per curiam*)
11 (observing that “[t]he ‘affecting commerce’ test was developed in our jurisprudence to
12 define the extent of Congress’ power over purely **intrastate** commercial activities that
13 nonetheless have substantial **interstate** effects”) (emphasis in original); *Maryland v. Wirtz*,
14 392 U.S. 183, 196, n.27 (1968) (observing that the Court has never declared that “Congress
15 may use a relatively trivial impact on commerce as an excuse for broad general regulation
16 of state or private activities”). If the regulated activity fails to fall within one of these three
17 categories, then the statute exceeds Congress’ authority under the Commerce Clause, and
18 it must be declared unconstitutional. *Lopez*, 514 U.S. at 558-59.

19 Congress may only enact legislation pursuant to the powers specifically delegated to
20 it by the Constitution. *Lopez*, 514 U.S. at 552. SORNA does not itself explain under what
21 authority Congress imposes the Registration Requirements, but the only power through
22 which Congress could conceivably enact them is its through its power “[t]o regulate
23 Commerce with foreign Nations, and among the several States, and with Indian Tribes.”
24 U.S. Const. Art. I § 8, cl. 3. However, under modern Commerce Clause jurisprudence, as
25 articulated in *Lopez*, 514 U.S. 549, *Morrison*, 529 U.S. 598, and *Jones v. United States*, 529
26 U.S. 848 (2000), it is clear that Congress does not have the power to impose Registration
27 Requirements on individual citizens convicted of purely intrastate offenses of which there
28 is no economic character.

1 In *Morrison*, the Court stated that “modern Commerce Clause jurisprudence has
2 ‘identified three broad categories of activity that Congress may regulate under its
3 commerce power.’” 529 U.S. at 608-609 (quoting *Lopez*, 514 U.S. at 558). First, Congress
4 may regulate the use of and channels of interstate commerce, such as interstate highways,
5 the mail or air traffic routes. *Id.* Second, Congress can regulate and protect the
6 instrumentalities of interstate commerce or persons or things in interstate commerce. *Id.*
7 Finally, Congress can regulate those activities that have a substantial effect on interstate
8 commerce. *Id.*

9 The Registration Requirements have nothing to do with the channels of interstate
10 commerce, thus, Congress has no power to require that they be implemented by the States.
11 Further, the Registration Requirements are imposed on individuals who are not in interstate
12 commerce nor have any connection to interstate commerce. Thus, the second *Lopez*
13 category, protecting the instrumentalities of, or things in interstate commerce, cannot apply.
14 The Registration Requirements can therefore only be upheld if they regulate “those
15 activities that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 558-59.

16 Congress’ power over activity that “affects commerce” permits regulation of purely
17 intrastate economic activity, if that activity, taken in the aggregate, would have a substantial
18 effect on interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). *Accord*
19 *Gonzales v. Raich*, 545 U.S. 1 (2005). However, the holding of *Wickard* is limited: it only
20 applies the substitution principle to the regulation of fungible goods, and it only authorizes
21 the aggregation of purely intrastate activity if that conduct is economic or commercial in
22 nature. *Id.* See also *Morrison*, 529 U.S. at 617 (rejecting the application of the aggregation
23 principle to intrastate non-economic activity). Moreover, the Supreme Court made clear
24 in *Lopez* that the *Wickard* aggregation principle

25 may not be extended so as to embrace effects upon interstate commerce so
26 indirect and remote that to embrace them, in view of our complex society, would
27 effectually obliterate the distinction between what is national and what is local
28 and create a completely centralized government.

1 *Lopez*, 514 U.S. at 556-57 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37
2 (1937)). This is because “States possess primary authority for defining and enforcing the
3 criminal law.” *Id.* at 560 n.3 (internal quotations omitted). *Lopez* therefore struck down 18
4 U.S.C. § 922(q), which proscribed possession of a firearm in a school zone because the
5 statute was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any
6 sort of economic enterprise, however broadly one might define those terms.” 514 U.S. at
7 560. *See also Morrison*, 529 U.S. at 614 (observing that the cases upholding federal
8 regulation of intrastate activity have done so “only where that activity is economic in
9 nature”); *United States v. Gomez*, 87 F.3d 1093, 1095 (9th Cir. 1996) (observing that *Lopez*
10 distinguished “statutes that regulate intrastate economic or commercial activity, from those
11 that regulate non-economic activity”); *United States v. Kallestad*, 236 F.3d 225, 231 (5th
12 Cir. 2001) (Jolly, J., dissenting) (quoting *Lopez*, 514 U.S. at 567) (noting that “*United*
13 *States v. Lopez* at least stands for the proposition that purely intrastate, non-commercial
14 possession of a non-fungible good ‘is in no sense an economic activity that might, through
15 repetition elsewhere, substantially affect any sort of interstate commerce’”). In short, the
16 Supreme Court has expressly “reject[ed] the argument that Congress may regulate
17 non-economic, violent criminal conduct based solely on that conduct’s aggregate effect on
18 interstate commerce.” *Morrison*, 529 U.S. at 617.

19 The Supreme Court, in *Lopez* and *Morrison*, set forth several factors that indicate
20 whether a regulation can be upheld as an activity that substantially affects interstate
21 commerce. As an initial matter, it is relevant whether the activity regulated has an
22 economic character. *Morrison*, 529 U.S. at 611 (“*Lopez*’s review of Commerce Clause
23 case law demonstrates that in those cases where we have sustained federal regulation of
24 intrastate activity based upon the activity’s substantial effects on interstate commerce, the
25 activity in question has been some sort of economic endeavor”). In *Lopez*, the Gun-Free
26 School Zones Act was struck down in large part because “neither the actors nor their
27 conduct ha[d] a commercial character, and neither the purposes nor the design of the statute
28 ha[d] an evident commercial nexus.” 210 at U.S. 559-60. Similarly, the Registration

1 Requirements have no commercial character, nor any relation to economic activity of any
2 kind. The stated purpose of SORNA is “to protect the public from sex offenders and
3 offenders against children.” 42 U.S.C. § 16901. These purposes have no economic
4 character.

5 The second factor examined in *Lopez* and *Morrison* is whether the statute contained
6 a “jurisdictional element” such as a requirement of travel across state lines for the purposes
7 of committing the regulated act. *Morrison*, 529 U.S. at 611-12. Although section 2250,
8 SORNA’s criminal provision, requires a sex offender to “travel in interstate commerce” in
9 order to qualify him for federal prosecution, the Registration Requirements contain no such
10 jurisdictional element. 42 U.S.C. §§ 16913-16916. The Registration Requirements apply
11 to citizens whose criminal activities are purely intrastate, and who never travel in interstate
12 commerce.

13 Third, the existence of congressional findings that indicate that the statute is a valid
14 exercise of Congress’ Commerce Clause power will at least enable a court “to evaluate the
15 legislative judgment that the activity in question substantially affect[s] interstate
16 commerce.” *Lopez*, 514 U.S. at 563. SORNA is a subchapter of the Adam Walsh Child
17 Protection Act of 2006, H.R. 4472, 109th Cong. (2nd Sess. 2006), (“Adam Walsh Act”),
18 which enacts a wide range of legislation in addition to SORNA. Although Congress
19 included findings in other sections of the Adam Walsh Act, For example, Title V of the
20 Adam Walsh Act, entitled “Child Pornography Prevention,” contains findings that
21 “intrastate incidents of production, transportation, distribution, receipt, advertising, and
22 possession of child pornography, as well as the transfer of custody of children for the
23 production of child pornography, have a substantial and direct effect upon interstate
24 commerce...” H.R. 4472, Sec. 501. SORNA contains no such findings. Like the Gun Free
25 School Zone Act, SORNA is unsupported by legislative findings indicating that purely
26 local sex crimes have any link with interstate commerce. Even the existence of legislative
27 findings does not guarantee that the statute will be upheld as a valid exercise of
28 Congressional power. The Violence Against Women Act, at issue in *Morrison*, was

1 accompanied by “numerous findings regarding the serious impact that gender-motivated
2 violence has on victims and their families.” *Morrison*, 529 U.S. at 614. The Court still
3 struck down the statute, holding that “the existence of congressional findings is not
4 sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.” *Id.*
5 Rather, the Court held that the determination of whether an activity sufficiently affects
6 interstate commerce is for the judiciary. *Id.*

7 Finally, the Court will examine the extent of the relationship between the regulated
8 activity and its effects on commerce. *Morrison*, 529 U.S. at 612. There is no indication
9 in the statute, or anywhere else, that the activities sought to be regulated by SORNA have
10 any effect on commerce at all, not even an attenuated one. Nor can such an effect can be
11 hypothesized by the aggregate economic effects that sex crimes and sex offenders inflict
12 upon society. The Supreme Court has flatly rejected the notion that the aggregate effect
13 on interstate commerce of local criminal activity can be used to justify the invocation of
14 Congress’ Commerce Clause power. *Morrison*, 529 U.S. at 617. Nor can the costs of
15 crime control or the effects of crime on “national productivity” support the use of the
16 Commerce Clause to regulate intrastate criminal activity. *Lopez*, 514 U.S. at 564;
17 *Morrison*, 529 U.S. at 598, 612-13.

18 Each of the above four factors indicates that the Registration Requirements are
19 unconstitutional. First, the regulated activity has no economic character. Second, the
20 Registration Requirements contain no jurisdictional element. Third, the statute contains
21 no congressional findings indicating a link with interstate commerce. Finally, the regulated
22 activities have an insufficient effect on interstate commerce to support an exercise of
23 Commerce Clause power. For all of these reasons, the Court must hold the Registration
24 Requirements unconstitutional and dismiss the Indictment against Mr. Terwilliger.

25 In *Morrison*, after applying all of these factors, the Court ruled that “[g]ender
26 motivated crimes of violence are not, in any sense of the phrase, economic activity,” and
27 struck down the Violence Against Women Act as an impermissible use of Congress’ power
28 under the Commerce Clause. *Id.* at 613. Similarly, in *Lopez*, the Court held that the Gun

1 Free School Zones Act, “is a criminal statute that by its terms has nothing to do with
2 ‘commerce’ or any sort of economic enterprise, however broadly one might define those
3 terms.” *Lopez*, 514 U.S. at 561. Purely local sex offenses are similarly non-economic and,
4 while validly regulated by the states, are not subject to regulation by Congress under the
5 Commerce Clause.

6 Nor is this analysis in any way affected by the Supreme Court’s most recent
7 Commerce Clause case, *Raich*, 545 U.S. 1. In *Raich*, the Supreme Court addressed
8 whether the Commerce Clause permitted Congress to regulate, by way of the CSA, “the
9 intrastate, noncommercial cultivation and possession of cannabis for personal medical
10 purposes as recommended by a patient’s physician pursuant to valid California state law.”
11 *Raich*, 545 U.S. at 8-9 (quoting *Raich v. Ashcroft*, 352 F.3d 1222, 1228 (9th Cir. 2003)).
12 In *Raich*, the Court held that the application of Controlled Substances Act (“CSA”)
13 provision criminalizing the distribution and possession of medical marijuana was legally
14 enacted under the Commerce Clause, even if the marijuana was locally grown, consumed
15 locally, and never traveled in interstate commerce. The Court held that because marijuana
16 is a commodity that has an interstate market, the CSA is connected to “economic” activity
17 and is therefore a valid exercise of Congress’ Commerce Clause powers:

18 [u]nlike those at issue in *Lopez* and *Morrison* the activities regulated by the CSA
19 are quintessentially economic. “Economics” refers to “the production,
20 distribution, and consumption of commodities.” Webster’s Third New
21 International Dictionary 720 (1966). The CSA is a statute that regulates the
22 production, distribution, and consumption of commodities for which there is an
established, and lucrative, interstate market. Prohibiting the intrastate
possession or manufacture of an article of commerce is a rational (and
commonly utilized) means of regulating commerce in that product.

23 *Raich*, 545 U.S. at 25-26. *Raich* noted that “even if appellee’s activity be local and though
24 it may not be regarded as commerce, it may still, whatever its nature, be reached by
25 Congress if it exerts a substantial influence on interstate commerce.” *Id.* (quoting *Wickard*,
26 317 U.S. at 125). The existence of such “a substantial influence” is crucial to the
27 constitutionality of a regulatory scheme that purports to regulate intrastate conduct: “when
28 ‘a general regulatory statute bears a substantial relation to commerce, the *de minimis*

1 character of individual instances arising under that statute is of no consequence.'" *Id.* at 23
2 (quoting *Lopez*, 514 U.S. at 558).

3 A recurring theme in *Raich* is the necessity that Congress make a determination of that
4 "substantial influence." Thus, it noted that "[w]hen Congress decides that the 'total
5 incidence' of a practice poses a threat to a national market, it may regulate the entire class."
6 *Id.* (emphasis added). "*Wickard* thus establishes that Congress can regulate purely
7 intrastate activity that is not itself 'commercial,' in that it is not produced for sale, *if it*
8 *concludes* that failure to regulate that class of activity would undercut the regulation of the
9 interstate market in that commodity." *Id.* (emphasis added); accord *United States v.*
10 *Stewart*, 451 F.3d 1071, 1077 (9th Cir. 2006) (allowing Congress to regulate possession of
11 homemade machine guns because their possession could bleed into and affect the interstate
12 market for this economic commodity).

13 The Congressional determination in *Wickard* was subject to review because "the
14 record in the *Wickard* case itself established the causal connection between the production
15 [of wheat] for local use and the national market." *Id.* at 19-20. In *Raich*, the Court noted
16 that "we have before us findings by Congress to the same effect." *Id.* at 20. Thus, *Raich*
17 ultimately concluded that *Wickard* controlled due to the Congressional findings set forth
18 in 21 U.S.C. §§ 801(1)-(6).⁵ See *id.* Accord *id.*, at 52 (O'Connor, J., dissenting) (agreeing
19 that the majority relied on Congressional findings rather than the "real numbers" available
20 to the *Wickard* court, but disagreeing as to whether those Congressional findings were
21 persuasive).

22 The statute at issue here, 18 U.S.C. § 2250(a), was not accompanied by the findings
23 similar to those in support of the CSA⁶. In fact, there is little support for the notion that
24

25 ⁵ *Raich* set out those findings in the margin. See 125 S. Ct. at 2203 n.20.

26 ⁶ It is true that *Raich* rejected Ms. Raich's argument that Congress never found that simple
27 intrastate possession of marijuana pursuant to a state regulatory scheme had a substantial effect on
28 interstate commerce, stating "we have never required Congress to make particularized findings in
order to legislate." See *Raich*, 545 U.S. at 21. The reason that is true is that "[w]hen Congress
decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the

1 Congress concluded that imposing registration requirements and criminalizing failures to
2 register had a substantial influence on interstate commerce. *See generally United States*
3 *v. McCoy*, 323 F.3d 1114, 1121 (9th Cir. 2004) (observing "that Congress could have
4 reasoned that purely intrastate possession will ultimately have a substantial effect on
5 interstate commerce," but also noting that "it chose not to make any such findings or
6 declarations"). *See also id.* ("Hypothetical reasons should be used with great
7 circumspection, for they can easily create justifications that Congress may not have
8 intended.") (citing *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

9 Clearly this reasoning has no application to SORNA, which in no way regulates
10 anything resembling economic activity. SORNA, whose stated purpose is "to protect the
11 public from sex offenders and offenders against children," 42 U.S.C. § 16901, far more
12 closely resembles the statutes struck down in *Lopez* and *Morrison* than the CSA or the
13 machinegun statute upheld in *Stewart*.

14 For the reasons stated above, the Registration Requirements of SORNA are
15 unconstitutional. As it is necessary for a defendant to be "required to register under the Sex
16 Offender Registration and Notification Act" in order to violate section 2250, the Indictment
17 against him must be dismissed.

18 **B. Section 2250(a) Is Also An Impermissible Attempt To Exercise Police Power**

19 Just as the Registration Requirements are unconstitutional, SORNA's criminal
20 provision, section 2250 is also invalid under the commerce clause jurisprudence. As
21 discussed above, section 2250 does not fall in any of the "three broad categories of activity
22 that Congress may regulate under its commerce power." *See Morrison*, 529 U.S. 608-609
23 (quoting *Lopez*, 514 U.S. at 558). It does not regulate the use of and channels of interstate
24 commerce, it does not regulate and protect the instrumentalities of interstate commerce or
25 persons or things in interstate commerce, and it does not regulate those activities that have
26

27 entire class." *Id.* (emphasis added). Thus, once Congress makes its "total incidence" determination,
28 as it did with respect to the CSA, there is no need to make "particularized findings" as to individual
acts.

1 a substantial effect on interstate commerce. It does not regulate anything of any economic
2 character. Congress therefore lacks the authority to enact section 2250, and the Indictment
3 must be dismissed.

4 The Government might argue that because section 2250 requires that a defendant
5 “travel in interstate or foreign commerce,” it falls into the second *Lopez* category, which
6 permits legislation regulating “people or things in interstate commerce.” This reasoning
7 must be rejected. Unlike other, similar statutes, such as the Travel Act, 18 U.S.C. § 1952,
8 which requires a defendant to travel in interstate commerce with the intent to commit
9 certain prohibited acts, the travel element of section 2250 does not require that the travel
10 occur in connection to a defendant’s failure to register or avoidance of registration. Thus,
11 if a defendant is convicted of a sex offense in one state and fails to register in another state,
12 and then travel back to his original state, he violates section 2250 even though his failure
13 to register has no interstate character whatsoever and the travel has no criminal association.

14 Further, the statute does not specify when the travel must have occurred. If a
15 defendant traveled out of state ten years before he was required to register, he would still
16 have “traveled in interstate or foreign commerce” under section 2250. Upholding section
17 2250 based on its travel requirement would allow Congress to federalize every local
18 criminal offense simply by making it a crime for someone who committed a local offense
19 to travel in interstate commerce at some point in his life. Clearly, some nexus must exist
20 between the criminal activity and the interstate travel in order to satisfy the Commerce
21 Clause. Because section 2250 contains no such nexus, it cannot be said to regulate “people
22 in interstate commerce.”

23 Nor can section 2250 be upheld as a regulation of an activity that “substantially affects
24 interstate commerce” under the Court’s third category of valid Commerce Clause
25 legislation. The analysis applied in Point I above to SORNA’s registration requirements
26 under *Morrison* and *Lopez* also applies to section 2250, which seeks to regulate the same
27 activities. As noted above, to determine if an activity “substantially affects interstate
28 commerce” a court must examine 1) whether the activity has an economic character,

1 *Morrison*, 529 U.S. at 611-12) whether the statute contains a “jurisdictional element” such
2 as a requirement to travel across state lines for the purposes of committing the regulated
3 act, *Id.* at 611-13) whether there are congressional findings indicating the statute is a valid
4 exercise of Congress’ Commerce Clause power, *Lopez*, 514 U.S. at 563, and 4) the extent
5 of the attenuation between the regulated activity and its affects on commerce. *Morrison*,
6 529 U.S. at 612. First, like the Registration Requirements, discussed in Point I, Section 2250
7 regulates activity that is non-economic in nature. Thus, it does not “substantially affect
8 interstate commerce.” *See Morrison*, 529 U.S. at 611; *Lopez*, 210 U.S. at 559-60.

9 Second, although section 2250 has a “jurisdictional statement” that requires a
10 defendant to have “traveled in interstate or foreign commerce,” this is insufficient by itself
11 to make the statute a legitimate exercise of Commerce Clause authority. The presence of
12 a jurisdictional element is not dispositive, but rather only “may establish that the enactment
13 is in pursuance of Congress’ regulation of interstate commerce.” *Morrison*, 529 U.S. at
14 612 (emphasis added). Section 2250's jurisdictional element is insufficient for a court to
15 declare that the statute has an effect on interstate commerce because there is no nexus
16 between the travel and the defendant’s failure to register, which is a purely local act.
17 Accordingly, the jurisdictional element of section 2250 cannot bring the statute into the
18 third category of acceptable Commerce Clause legislation.

19 Third, as mentioned above, SORNA contains no congressional findings that support
20 the conclusion that section 2250 has an effect on interstate commerce.

21 Finally, just like the Registration Requirements, there is no economic effect that this
22 statute purports to regulate and the Court's commerce clause require at a minimum that the
23 statute regulate some economic activity. Even if there were some possible economic effect
24 of regulating sex offenders who travel between states, it is too attenuated to bring the
25 statute within the authority of the Commerce Clause. The potential aggregated economic
26 effects of sex offenders’ failure to register are insufficient to sustain the statute under both
27 *Lopez* and *Morrison*. *See Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 617.
28

1 Although several district courts have held that section 2250 was validly enacted under
2 the Commerce Clause, neither court examined the constitutionality of the Registration
3 Requirements, detailed in Part I above. In addition, their opinions concerning the
4 constitutionality of section 2250 are not binding and contain only a cursory and
5 uninformative analysis of the complex Commerce Clause problems inherent in the statute.
6 For example, in *United States v. Madera*, 474 F.Supp.2d 1257 (M.D.Fl. Jan. 16, 2007), the
7 Court held that “the ability to track sex offenders as they move from state to state” was an
8 activity that “substantially affects interstate commerce.” But, the Court did not examine
9 any of the factors articulated in *Lopez* and *Morrison* that determine whether an activity
10 “substantially affects interstate commerce,” and ignored the Supreme Court’s direction that
11 a court examine the economic impact of the activity regulated, rather than whether it might
12 have non-economic interstate implications. *Morrison*, 529 U.S. at 611 (“*Lopez*’s review
13 of Commerce Clause case law demonstrates that in those cases where we have sustained
14 federal regulation of intrastate activity based upon the activity’s substantial effects on
15 interstate commerce, the activity in question has been some sort of economic endeavor”).
16 The analysis of the *Lopez* and *Morrison* factors, detailed above, demonstrates that the
17 activity regulated by section 2250, which is the failure to register in a state sex offense
18 registry, does not “substantially affect interstate commerce,” and thus the *Madera*’s
19 reasoning is just plain wrong.

20 Similarly, in *United States v. Templeton*, 2007 WL 445481 at *4 (W.D.Okla., Feb. 7,
21 2007), held that section 2250 was valid simply because “the statute includes a
22 jurisdictional nexus.” This holding is also incorrect. As explained in *Morrison*, the
23 presence or absence of a jurisdictional element is merely one factor in a larger inquiry into
24 whether a statute regulates an activity affecting interstate commerce, but is not dispositive.
25 529 U.S. at 612. Furthermore, the *Templeton* court failed to consider that the jurisdictional
26 element of section 2250 is in no way related to a defendant’s failure to register. In order
27 for a criminal statute to fall under the second category of valid Commerce Clause
28 legislation, which regulates people or things in interstate commerce, the interstate travel

1 must be in some way related to the misconduct itself. To hold otherwise would give
2 Congress a blank check to federally criminalize any local offense simply by requiring a
3 person "travel in interstate commerce" at some point in his life. Since, Madera and
4 Templeton ignore or misapply the Supreme Court's modern Commerce Clause
5 jurisprudence, those decisions should not be followed here.

6 Section 2250 does not fall within any of the categories of activities that Congress may
7 regulate through the exercise of its power under the Commerce Clause. The statute is
8 therefore unconstitutional and the Indictment must be dismissed.

9 **IV.**

10 **THE INDICTMENT CHARGES A VIOLATION OF SORNA BY VIRTUE OF A**
11 **STATE COURT CONVICTION & SORNA DOES NOT CRIMINALIZE**
12 **FAILURES TO REGISTER BY INDIVIDUALS CONVICTED IN STATE**
13 **COURTS.**

14 The statute which Mr. Terwilliger is alleged to have violated criminalizes failures to
15 register under SORNA by individuals who are considered "sex offenders" "by Reason of
16 a conviction under Federal law (including the Uniform Code of Military Justice), the law
17 of the District of Columbia, Indian tribal law, or the law of any territory or possession of
18 the United States." 18 U.S.C. § 2250(a). The statute does not mention state court
19 convictions nor does it mention the word "state." *See id.* The Indictment purports to charge
20 a violation of SORNA by virtue of a state court conviction. *See* Exhibit A, indictment.
21 It does not allege that this is a conviction under Federal law, D.C. law, Indian tribal law or
22 the law of a U.S. territory or possession, nor could it since a Colorado conviction is none
23 of the above. Therefore, the Indictment must be dismissed. under Federal Rule of Criminal
24 Procedure 12(a)(3) as there is a defect in prosecution apparent from the face of the
25 indictment.

26 First and foremost, principles of statutory construction require that the Court interpret
27 the plain language of the statute. *See Moreno-Morante v. Gonzales*, __ F.3d __, 2007
28 WL1775209 (9th Cir. June 21, 2007). The "starting point for any issue of statutory
construction is the plain language of the statute." *Id.* at * 2 (citation omitted). If the plain

1 language has "an unambiguous meaning," judicial inquiry ends there. *Id.* The plain
2 meaning of a statute typically governs unless it would lead to absurd results. *United States*
3 *v. Romero-Bustamonte*, 337 F.3d 1104, 1109 (9th Cir. 2003). Here, the plain language of
4 the statute only refers to convictions under Federal law, D.C. law, military law, tribal law
5 or the law of a U.S. territory or possession. *See* 18 U.S.C. § 2250(a). The only arguable
6 applicable basis for concluding that a Colorado state law conviction falls within section
7 2250(a) if a State is a territory or possession of the United States. Territories or possessions
8 of the United States are entities such as Guam, the Virgin Islands, Puerto Rico, Samoa, the
9 Mariana Islands and have never been considered States. While it is true that territories and
10 possessions of the United States are considered to be within the United States, they are
11 distinct from states themselves. *See* 28 U.S.C. § 1738C (listing States, territories and
12 possessions of the U.S. as distinct entities under full faith and credit act); 42 U.S.C. §
13 9601(27) (defining the United States to include "the several states, the District of
14 Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, [the U.S.] Virgin
15 Islands, the Commonwealth of the Northern Marianas and any other territory or possession
16 over which the United States has jurisdiction"); 18 U.S.C. § 2243(a) (distinguishing
17 between interstate transportation and transportation to U.S. territories or possessions); 47
18 U.S.C. § 301 (distinguishing between States & U.S. territories and possessions); *see also*
19 *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) (addressing the issue of whether
20 bringing drugs from California to Guam constituted an importation into the U.S.). While
21 some federal statutes have explicitly defined the word "State" which was included in the
22 statute to include U.S. territories or possessions, *see., e.g.*, 47 U.S.C. § 224 (a) ("The term
23 'State' means any State, territory or possession of the United States . . . "); 2 U.S.C. § 431
24 ("The term 'State' means a State of the United States, the District of Columbia, the
25 Commonwealth of Puerto Rico, or a territory or possession of the United States."); *accord*,
26 18 U.S.C. § 1955; 18 U.S.C. § 666, the undersigned has not found any statute which
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28

1 defines a U.S. territory or possession to include States.⁷ Similarly, U.S. territories or
2 possessions have not been interpreted to include Indian tribes where the statute did not so
3 specify. *See Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).⁸

4 On the other hand, when Congress wanted to ensure that a statute captured every
5 conceivable conviction out of every court, it so specified. *See, e.g.*, 18 U.S.C. § 922(g)
6 (criminalizing possession of firearms by a person "convicted in any court . . ."); 924(e)(1)
7 (providing enhanced penalties for anyone "convicted in any court").

8 Anticipating the government's argument that this construction would lead to absurd
9 results, Mr. Terwilliger submits that such is not the case. In fact, in light of Congress'
10 directive to the states to create the SORNA registries, 42 U.S.C. § 16912, and its directive
11 that states are make it a felony offense for an offender to fail to comply with the registration
12 requirements of SORNA. 42 U.S.C. § 16913(e), section 2250(a) is superfluous because
13 Congress has already ensured that the States will punish SORNA violations and punish
14 them more severely and more uniformly in SORNA itself. *See* 42 U.S.C. § 14613(e)
15 Section 2250(a) is required for individuals with convictions under federal law, tribal law
16 and the like, not for individuals with state court convictions who will be punished under
17 the laws of the State. *See* 42 U.S.C. § 14613(e).

18 Even if the Court were to believe that the statutory language is ambiguous, other
19 significant principles of statutory construction require that it be read narrowly to not
20 include what is not so stated. The Rule of Lenity requires that when a criminal statute is
21 ambiguous, it is interpreted in favor of the defendant. *United States v. Wyatt*, 408 F.3d
22

24 ⁷ Possessions of the United States have included leased military bases overseas. *See*
25 *Vermilya Brown Co. v. Connell*, 335 U.S. 377, 390(1948).

26 ⁸ Thus, if section 2250(a) specified State convictions, it might be logical in light of the
27 extensive legislation expressly defining state to include territories or possessions that they would be
28 included, the converse inference, that the words "territories or possessions" also means States finds
no support in any statute that the undersigned has located to date. The caselaw also suggests a narrow
approach absent express statutory directive to construing territories or possessions. *See Wilson*, 127
F.3d 805.

1 1257, 1252 (9th Cir. 2005). Similarly, in construing criminal statutes, principles of
2 statutory construction compel a narrow reading. "A criminal law is not to be read
3 expansively to include what is not plainly embraced within the language of the statute."
4 *Kordel v. United States*, 335 U.S. 345, 348-49, 69 S.Ct. 106, 93 L.Ed. 52 (1948). This
5 means that the word "state" cannot be read into section 2250(a).

6 Under the plain meaning of the statute and the face of the indictment which alleges
7 a June 1991 state law conviction, the indictment does not state an offense under SORNA
8 and must be dismissed under Fed. R. Crim. P. 12(a)(3) (requiring pretrial motions alleging
9 defects in prosecution to be filed before trial).

10 **V.**

11 **THE INDICTMENT MUST BE DISMISSED BECAUSE SECTION 2250(a) IS**
12 **NOT INTENDED TO APPLY RETROACTIVELY AND IF IT IS, IT VIOLATES**
13 **THE EX POST FACTO CLAUSE AND CONSTITUTES A RETROACTIVE**
APPLICATION OF LAW.

14 First, section 2250(a), the criminal statute enacted as part of SORNA, should not be
15 construed to apply retroactively. This is because Congress' instruction regarding retroactive
16 application of SORNA is contained only under the "initial registration" sections and under
17 principles and If Congress' limited instruction regarding retroactivity were to apply to
18 section 2250(a), the statute's retroactive application to Mr. Terwilliger would violate
19 Article I, Section 9, of the United States Constitution which prohibits Congress from
20 passing any ex post facto law. Its application to Mr. Terwilliger would also constitute an
21 impermissible retroactive application of law.

22 **A. Section 2250(a) Was Not Expressly Made Retroactive.**

23 SORNA contains an effective date of July 27, 2006. 42 U.S.C. § 16913. In section
24 16913(a)-(c), Congress set forth registration requirements in general, for initial registration,
25 and for keeping registration current. *Id.* at 16913(a)-(c). Immediately after these sections,
26 under section 16913(d), Congress set forth a provision labelled "Initial registration of sex
27 offenders unable to comply with subsection (b) of this section." *Id.* at 16913(d). This is
28

1 the only place in the entire statute where there is any reference to any possible retroactive
2 application and it provides:

3 The Attorney General shall have the authority to specify the applicability of the
4 requirements of this subchapter to sex offenders convicted before July 27, 2006
5 or its implementation in a particular jurisdiction, and to prescribe rules for the
6 registration of any such sex offenders and for other categories of sex offenders
7 who are unable to comply with subsection (b) of this section.

8 *Id.* at § 16913(d). Immediately following that section, there is a penalty provision requiring
9 that the States provide felony penalties for failure to comply with SORNA's registration
10 requirements.⁹ Thus, Congress delegated (whether permissibly is a question addressed
11 subsequently) to the Attorney General the authority to specify the applicability of only
12 SORNA's requirements and only the requirements dealing with initial registration to
13 individuals with convictions which pre-date SORNA's July 27, 2006 effective date. *See*
14 *id.* This reading is compelled by the plain language of SORNA and principles which
15 require anti-retroactive and constitutional construction of statutes. *See Hamdan v.*
16 *Rumsfeld*, 126 S.Ct 2749, 2765 (2006); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).
17 First, well-established legal doctrine carries a presumption that absent an express mandate
18 from Congress itself, laws only have prospective not retroactive application. Under
19 *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), if an official directive contains a clear
20 expression that it is to be applied retroactively, such directive would be considered
21 "retroactive." Courts do not permit retroactive application of new directives absent an
22 explicit retroactive directive. In order to be considered an explicit retroactive directive, the
23 language [of a statute, regulation or rule] "must be so clear that it could sustain only one

24 ⁹ It is entitled: "(e) State penalty for failure to comply" and provides:

25 Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a
26 criminal penalty that includes a maximum term of imprisonment that is greater than
27 1 year for the failure of a sex offender to comply with the requirements of this
28 subchapter.

42 U.S.C. § 16913(e).

1 interpretation.” See *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001); *United States v. Gonzalez*,
2 429 F.3d 1252 (9th Cir. 2005) (quoting this language from *St. Cyr*). In order for the entire
3 statute to have retroactive effect, the mandate for retroactive application must be express
4 throughout the statute. *Bowen v. Georgetown University Hospital* , 488 U.S. 204, 208
5 (1988). That is not the case with this language. In order to meet that standard, SORNA
6 would have to provide that not just the initial registration requirements but the criminal
7 provision set forth not in the CFR but in title 18 was also to be retroactively applied to
8 individuals who already been convicted prior to SORNA. Only then could it expressly
9 cover individuals in Mr. Terwilliger's circumstances.

10 In *Hamdan*, the Supreme Court was called upon to decide whether or not Congress
11 intended to strip habeas jurisdiction by enacting a clause in the Detainee Treatment Act
12 (“DTA”), entitled “Judicial Review of Detention of Enemy Combatants,” which amended
13 28 U.S.C. § 2241 by adding: clauses removing federal court habeas corpus jurisdiction over
14 petitions filed by Guantanamo detainees who had been labeled “enemy combatants” by the
15 U.S. government with jurisdiction over limited claims to remain in the D.C. Circuit Court
16 only. See DTA § 1005(e); *Hamdan*, 126 S. Ct. at 2762-2763. This same section of the
17 DTA, section 1005 contained a provision which the government claimed removed federal
18 court jurisdiction over all petitioners claims and only allowed the limited review process.
19 See *id.* This particular clause of the DTA read as follows: “ Review of Combatant Status
20 Tribunal and Military Commission Decisions.-Paragraphs (2) and (3) of subsection (e) shall
21 apply with respect to any claim whose review is governed by one of such paragraphs and
22 that is pending on or after the date of the enactment of this Act.” *id.*, at 2743-44. In
23 interpreting what portions of the DTA could have retroactive effect, the Supreme Court
24 first applied the “traditional presumption . . . that [a statute which appears to have
25 retroactive reach] does not govern absent clear congressional intent favoring such a result.”
26 *Id.* at 2765-66 (citing *Landgraf*, 511 U.S. at 280). The Court next applied the principle of
27 negative implication to conclude that because Congress had only specified certain that
28 section (2) and (3) were to be applied to cases pending on or after its effective date, that no

1 other aspects of the Act had retroactive application. *Id.* at 2765-66 (citation omitted) ("A
2 familiar principle of statutory construction . . . is that a negative inference may be drawn
3 from the exclusion of language from one statutory provision that is included in other
4 provisions of the same statute"); *see also, e.g., Russello v. United States*, 464 U.S. 16, 23
5 (1983) (" [W]here Congress includes particular language in one section of a statute but
6 omits it in another section of the same Act, it is generally presumed that Congress acts
7 intentionally and purposely in the disparate inclusion or exclusion' "). Similarly, that the
8 DTA stated that it was effective on the date enacted did not give it retroactive reach. *Id.*
9 at 2766 ("a 'statement that a statute will become effective on a certain date does not even
10 arguably suggest that it has any application to conduct that occurred at an earlier date.' ")
11 (quoting *INS v. St. Cyr*, 533 U.S. 289, 317 (2001) (quoting *Landgraf v. USI Film Products*,
12 511 U.S. 244, 257 (1994)). By applying these standards of statutory construction, the Court
13 noted that it could avoid the serious constitutional questions posed by retroactively
14 applying this statute stripping habeas jurisdiction. *See id.* at 2769 n.15 (discussing the
15 "canon of constitutional avoidance" which requires construction of a statute in a manner
16 so as to avoid "substantial constitutional questions" (citing and quoting *St. Cyr*, 533 U.S.,
17 at 300)

18 Here, *Landgraf*, *St. Cyr* and *Hamdan*, require a similar and limited reading of any
19 retroactive reach of SORN A. According to the plain language of the statute, the Attorney
20 General is only to specify the retroactive reach of the registration requirements and to
21 prescribe rules for those individuals who could not initially register. 42 U.S.C. § 14613(d).
22 It does not delegate (nor could it constitutionally) the ability to specify penalties nor does
23 section 14613(d) refer to any criminal penalties or to section 2250(a) in its discussion of
24 the Attorney General's responsibilities. *See id.* *Hamdan* compels application of the
25 principles of negative implication which indicates that only this particular section of
26 SORNA can be subject to the Attorney General's regulations and it also compels
27

1 application of the presumption against retroactivity and in favor of constitutional
2 avoidance. *See Hamdan*, 126 S. Ct. at 2765-69 & n.15.¹⁰

3 **B. If An Ex Post Facto Analysis Is Required, This Statute Violates The Ex Post**
4 **Facto Clause**

5 The ex post facto prohibition forbids Congress and the States from enacting any law
6 that imposes a punishment for an act that was not punishable at the time it was committed,
7 or that imposes a punishment in addition to that which was originally prescribed at the time
8 of the criminal conduct. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (“To fall within the *ex*
9 *post facto* prohibition, a law must be retrospective—that is, it must apply to events occurring
10 before its enactment—and it must disadvantage the offender affected by it, by altering the
11 definition of criminal conduct or increasing the punishment for the crime”) (internal
12 quotations and citation omitted); *see also Weaver v. Graham*, 450 U.S. 24, 29 (1981) (“[A]
13 law need not impair a ‘vested right’ to violate the *ex post facto* prohibition.”). The issue
14 is whether the “practical implementation” of the “retroactive application will result in a
15 longer period of incarceration than under the earlier rule.” *Garner v. Jones*, 529 U.S. 244,
16 255 (2000); *see also Johnson v. United States*, 529 U.S. 694, 699 (2000) (Petitioner must
17 show that retroactive law “raises the penalty from whatever the law provided when he
18 acted.”).

19 The Indictment alleges that Mr. Terwilliger was required to register "as a result of
20 being convicted . . . in June 1991" *See* Exhibit A, Indictment. In fact, in June 1991,
21 Mr. Terwilliger never had to register under Colorado law nor did he have to register under
22 SORNA which did not exist. Even aside from the fact that he never had to register in
23 Colorado, since this conduct took place before SORNA came into effect, the prosecution
24 of Mr. Terwilliger for these acts is barred on ex post facto grounds.¹¹

25
26 ¹⁰ This reading avoids all thorny Ex Post Facto and Anti-Delegation doctrine questions.

27 ¹¹ If this Court were to conclude that SORNA could be applied retroactively, the Court will
28 then have to decide whether or not Colorado's revised registration requirements can be applied
retroactively to Mr. Terwilliger absent an explicit directive that they were to be so applied. *See*
Landgraf, 511 U.S. at 280.

1 SORNA also violates the Ex Post Facto Clause because it increases the punishment
2 for failing to register from a misdemeanor to a felony which carries a 10 year statutory
3 maximum. *See* 18 U.S.C. § 2250(a). Even assuming that Mr. Terwilliger had to register,
4 failing to register as a sex offender when convicted of a misdemeanor sex offense is only
5 a misdemeanor in Colorado. *See* C.R.S.A. 18-3-412.5(3)(a) ((3)(a) (Failure to register as
6 a sex offender is a class 1 misdemeanor if the person was convicted of misdemeanor
7 unlawful sexual behavior"). It is also a misdemeanor to fail to register in California. *See*
8 Cal. Pen.Code § 290(g)(1) ("Any person who is required to register under this section based
9 on a misdemeanor conviction . . . who willfully violates . . . this section is guilty of a
10 misdemeanor"). The Indictment must therefore be dismissed on ex post facto grounds.

11 The Government might argue that failing to register as a sex offender is a continuing
12 offense, and therefore that Mr. Terwilliger continued to fail to register after July 27, 2006,
13 when SORNA came into effect. This argument has no merit. SORNA requires a sex
14 offender to notify a jurisdiction in which he is registered of any change of address within
15 three business days of the change. *See* 42 U.S.C. § 16913(c). If a sex offender changes
16 his address and does not notify his jurisdiction, he is in violation of this registration
17 requirement after the three days have run. This violation does not "continue" indefinitely.
18 In *Toussie v. United States*, 397 U.S. 112 (1970), the Supreme Court held that failing to
19 register for the draft is not a "continuing offense," but rather, it is committed when a person
20 fails to register five days after turning eighteen. Noting that "the doctrine of continuing
21 offenses should be applied in only limited circumstances," the Court held, "[t]here is []
22 nothing inherent in the act of registration itself which makes failure to do so a continuing
23 crime. Failing to register is not like a conspiracy which the Court has held continues as
24 long as the conspirators engage in overt acts in furtherance of their plot." The Court ruled
25 that the registration requirements did not create a continuing violation even though a
26 regulation passed under the act expressly stated "(t)he duty of every person subject to
27 registration shall continue at all times, and if for any reason any such person is not
28 registered on the day or one of the days fixed for his registration he shall immediately

1 present himself for and submit to registration.” *Toussie*, 397 U.S. at 115-16; *see also id.*
2 at 122. This holding clearly governs here. Indeed, the only court to address this issue has
3 held that a violation of section 2250 is not a continuing offense, but rather occurs on the
4 day when the registration deadline passes. *United States v. Smith*, 481 F. Supp. 2d 846,
5 852 (E.D. Mich. 2007).

6 In *Smith*, that Court also rejected the government's efforts to argue that SORNA was
7 merely a "regulatory" regime, thus, not punitive in nature. *Id.* As the *Smith* district court
8 aptly notes, the Supreme Court's ruling in *Smith v. Doe*, 538 U.S. 84 (2003), does not
9 change the ex post facto analysis here. *Id.* In the Supreme Court *Smith*, the Court ruled
10 that an Alaska statute that required sex offenders to register was not a violation of the Ex
11 Post Facto Clause, even though the registration requirements applied to those convicted of
12 sex offenses before the statute went into effect. There, the law was civil in nature, not
13 punitive, and thus did not implicate the Ex Post Facto Clause. *Id.* at 105-06. Section 2250,
14 on the other hand, is a criminal statute that both subjects individuals to federal prosecution
15 based on conduct that was not formerly a federal crime at all, and increases the penalty for
16 conduct from one year to ten years. Thus, section 2250 cannot be applied to conduct that
17 occurred before the statute was enacted. *Id.*; *see also Smith*, 481 F. Supp. 2d at 852-53
18 (holding that unlike the legislature in *Smith v. Doe*, here Congress labeled and proceeded
19 with section 2250 as a criminal statute, the ex post facto rule applies to its application).
20 *Smith* noted that: "the ex post facto effect of a law cannot be evaded by giving a civil form
21 to that which is essentially criminal." 481 F. Supp. 2d at 853.¹²

22 The Ex Post Facto Clause of the Constitution forbids criminalizing conduct after that
23 conduct occurred and forbids increasing the punishment for conduct that has already
24

25
26 ¹² In the *Bobby Smith* case, both the failure to register and the travel occurred before the
27 effective date of SORNA 481 F.Supp. 2d at 854. However, that does not alter the analysis here
28 because SORNA still imposed additional punishment upon Mr. Terwilliger by virtue of his failure
to register alone -- the penalty increased from a misdemeanor to a felony. In addition, it is highly
questionable whether he ever had to register in the first place, thus, his penalty arguably increased
from no criminal liability to a felony punishable by 10 years. *See* 18 U.S.C. § 2250(a).

1 occurred. Section 2250 creates a new federal criminal offense to fail to register, and
2 increases the penalties of a failure to register. It cannot be applied to Mr. Terwilliger's
3 failure to register, first because he never had to register when convicted and even if he had,
4 under SORNA, he can now be convicted of a felony rather than a misdemeanor.
5 Therefore, the Indictment must be dismissed.

6 It has already been noted that this Court must apply the anti-retroactivity presumption
7 that absent an express mandate from Congress itself, laws only have prospective not
8 retroactive application. *See, e.g., Landgraf*, 511 U.S. 288; *St. Cyr*, 533 U.S. at 316-17. If
9 this Court were to conclude that all of SORNA, including the criminal provision set forth
10 in title 18, is to have retroactive effect, it must proceed to the next step of the *Landgraf*
11 analysis: determining whether the new policy has an impermissible retroactive effect under
12 the Due Process Clause. *See Landgraf*, 511 U.S. at 280.¹³ Clearly, it does since Mr.
13 Terwilliger now can suffer felony criminal penalties for failing to register when previously
14 he never had to register or at worst, could be convicted of a misdemeanor.

15 According to *St. Cyr*, "[a] [regulation] has retroactive effect when it 'takes away or
16 impairs vested rights acquired under existing laws, or creates a new obligation, imposes a
17 new duty, or attaches a new disability, in respect to transactions or considerations already
18 past.'" 533 U.S. at 321 (citations omitted). "[T]he judgment whether a particular statute
19 acts retroactively 'should be informed and guided by "familiar considerations of fair notice,
20 reasonable reliance, and settled expectations." ' " *Id.* (quotation omitted). Under this
21 analysis, SORNA "attaches a new disability in respect to transactions or consideration
22 already past." *See id.* In *St. Cyr*, the Supreme Court found that it would violate the Due
23 Process Clause to remove the eligibility for discretionary relief from deportation from
24 individuals who had negotiated guilty pleas in reliance upon the settled state of the law
25 which retained their right to seek this relief. *Id.*
26
27
28

1 Here, it violates the Due Process Clause of the Fifth Amendment to subject Mr.
2 Terwilliger to SORNA's reporting requirements and criminalize his failure to report when
3 at the time he entered his guilty plea, he did not have to register under Colorado law. Mr.
4 Terwilliger specifically negotiated a guilty plea to a misdemeanor where neither the
5 charging document nor the judgment specified the age of the victim in order to avoid
6 reporting requirements. Under *St. Cyr*, he is entitled to rely upon the state of the law when
7 he entered his guilty plea and cannot now be subject to greater penalties. *See* 533 U.S. at
8 321-22.

9 **C. The Regulation Which Purports to Apply SORNA Retroactively Violates The**
10 **APA As It Was Promulgated Absent Notice and Comment**

11 As discussed above, under SORNA, Congress delegated authority to the Attorney
12 General to establish rules for the applicability of SORNA's registration requirements to
13 individuals convicted before July 27, 2006 42 U.S.C. § 16913(d).

14 On February 28, 2007, the Attorney General promulgated the following "interim"
15 regulation absent notice and comment procedures, stating that "[t]he requirements of the
16 Sex Offender Registration and Notification Act apply to all sex offenders, including sex
17 offenders convicted of the offense for which registration is required prior to the enactment
18 of that Act. 28 C.F.R. § 72.3.

19 Assuming arguendo that Congress effectively and lawfully delegated its authority to
20 decide when a law should be retroactively applied to the entity responsible for prosecuting
21 individuals under that law, the Attorney General should have complied with the notice and
22 comment provisions attendant to promulgating legislative rule such as this one. *See* 5
23 U.S.C. § 553; *see also Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995) (dicta
24 stating that APA rule-making would be required if a policy statement "adopted a position
25 inconsistent with any of the Secretary [of Health and Human Services'] existing
26 regulations"); *Fairfax Nursing Ctr., Inc. v. Califano*, 590 F.2d 1297, 1301 (4th Cir.1979)
27 ("The Secretary is not free to promulgate regulations and then change their meaning by
28 'clarifications' or 'interpretations' issued without formal notice and comment. To do so

1 would frustrate the policies of fair notice and comment in the Administrative Procedure
2 Act.").

3 Even though the Attorney General claims to have invoked good cause to excuse its
4 notice and comment failure, no good cause exists as the interim regulation serves no
5 pressing public purpose aside from facilitating the prosecution of individuals. Indeed, the
6 regulation simply deems SORNA retroactive to anyone convicted of an offense listed in
7 SORNA at any time, but declines to provide any procedures for notice and registration of
8 such persons. See Rules and Regulations, Department of Justice, 28 C.F.R. Part 72,
9 February 28, 2007, 72 FR 8894-01, 2007 WL 594891 (F.R.). Thus, the purpose of the
10 interim rule is *not* to provide notice and ensure registration of people for whom it is not
11 possible to register as required by SORNA, and therefore is *not* about public safety, thus
12 it does not address" the statutory directive "to prescribe rules for the registration of [sex
13 offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction]
14 and for other categories of sex offenders who are unable to comply with subsection (b) of
15 this section," 42 U.S.C. § 16913(d). *Id.* at 8896. The purpose of the rule is to ensure that
16 the Attorney General can prosecute people who do not have notice and for whom it is not
17 possible to register as required by SORNA. This does not constitute "good cause."
18 According to the regulation itself, its purpose is to "serve[] the narrower, immediately
19 necessary purpose of foreclosing any dispute as to whether SORNA is applicable where
20 the conviction for the predicate offense occurred prior to the enactment of SORNA." *Id.*
21 at 8896.

22 It is ironic that the Attorney General's effort to ensure prosecution of individuals who
23 never had notice of SORNA was also done without notice of the ordinarily required notice
24 and comment protections afforded in agency rulemaking. None of the exceptions to notice
25 and comment apply to this situation because prospective notice and comment was neither
26 "impracticable, unnecessary, or contrary to the public interest," under section 553(b)(B),
27 nor did the changes in the regulation and program statement confer a benefit to excuse
28 delaying implementation of the rule under section 533(d).

1 In *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), the Ninth Circuit applied the
2 APA's notice and comment provisions to a Bureau of Prisons' rule which eliminated a
3 sentencing benefit to individuals, finding that depriving petitioners and the public of a
4 notice and comment period violated the APA. See *id*; see also *Nat'l Org. of Veterans'*
5 *Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) ("Failure
6 to allow notice and comment, where required, is grounds for invalidating the rule.") (citing
7 *Auer v. Robbins*, 519 U.S. 452, 459 (1997)). Here, the regulation which purports to apply
8 SORNA retroactively should be invalidated under the APA because it was promulgated
9 absent notice and comment.

10 VI.

11 **THE STATUTE MUST BE DISMISSED BECAUSE SORNA VIOLATES THE** 12 **NON-DELEGATION DOCTRINE.**

13 SORNA delegates to the Attorney General "the authority to specify the applicability
14 of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or
15 its implementation in a particular jurisdiction, and to prescribe rules for the registration of
16 any such sex offenders and for other categories of sex offenders who are unable to comply
17 with subsection (b) of this section." 42 U.S.C. §16913. In addition, section 16917
18 delegates to the Attorney General the authority to "prescribe rules for the notification of sex
19 offenders who cannot be registered in accordance with subsection (a) of this section." 42
20 U.S.C. §16917(b).

21 If this Court is to reject the limited reading of section 16913(d) which Mr. Terwilliger
22 urges above and instead allows a broad reading of this clause, the effect of the delegation
23 of authority described above is to permit the Attorney General to legislate the scope of the
24 Act's retrospective reach. The authority to legislate or make law, however, is entrusted
25 solely to Congress. U.S. Const. art. I, §§ 1, 8. This authority carries with it a
26 corresponding limitation: Congress cannot delegate its legislative authority to another
27 branch of the government. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S.
28 495, 529 (1935) (explaining that "Congress is not permitted to abdicate or to transfer to

1 others the essential legislative functions with which it is thus vested”); *Panama Refining*
2 *Co. v. Ryan*, 293 U.S. 388, 421, 432 (1935) (observing that “[i]f the citizen is to be
3 punished for the crime of violating a legislative order of an executive officer . . . , due
4 process of law requires that it shall appear that the order is within the authority of the
5 officer”).

6 The doctrine prohibiting Congress from delegating its authority to another branch is
7 a necessary component of the separation of powers that informs our tripartite system of
8 government and the checks and balances inherent in our constitutional framework. *See*
9 *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989) (describing the separation of
10 powers as essential to the preservation of liberty). In *Panama Refining Co.*, the Court
11 invalidated a delegation of authority under the National Industrial Recovery Act (“NIRA”)
12 to the executive branch to prohibit the interstate transport of petroleum produced or
13 withdrawn in violation of state law. 293 U.S. at 406, 432. In so doing, the Court
14 emphasized that the statute did not declare any policy respecting the transportation of
15 excess production, did not qualify the President’s authority, did not establish any criterion
16 governing the President’s course, and treated disobedience as a crime. *See id.* at 415.

17 Similarly, in *A.L.A. Schechter Poultry*, the Court addressed another provision of
18 NIRA, which authorized the president to approve codes of fair competition from industry
19 groups or prescribe such codes. 295 U.S. at 520-21. A violation of a code was a crime,
20 with each day of the violation constituting a separate offense. *See id.* at 523. As in
21 *Panama Refining Co.*, the Court focused on the absence of standards and restrictions in
22 connection with the broad grant of authority. *Id.* at 542. Such concerns are particularly
23 significant where, as here, the delegation involves criminal liability. *See Fahey v.*
24 *Mallonee*, 332 U.S. 245, 249 (1947). In the context of a delegation to criminalize certain
25 conduct, a stricter standard ought to apply. *See generally United States v. Robel*, 389 U.S.
26 258, 274, 75 (1967) (Brennan, J., concurring). *But cf. United States v. Toby*, 909 F.2d 759,
27 765 (3d Cir. 1990)(acknowledging differing authority respecting the standard applicable
28

1 in the criminal statutory context), *aff'd*, 500 U.S. 160, 166 (1991) (declining to reach the
2 issue concerning the appropriate standard).

3 In this case, the delegation extends to the chief law enforcement officer of the United
4 States the power to determine the retrospective scope of a criminal statute. In other words,
5 it enables the executive branch to legislate the reach of a criminal statute with no limits on
6 the Attorney General's exercise of his discretion. He is free to decide how far back the
7 registration requirements should be extended, now matter how arbitrary his decision might
8 be.

9 This delegation is particularly troubling since retrospective legislation is disfavored,
10 and, in those limited circumstances where it is permitted, a legislative policy judgment need
11 be manifest. *See INS v. St. Cyr.*, 533 U.S. at 315-16; *Landgraf*, 511 U.S. 244, 271
12 (discussing the presumption against retroactive effect and emphasizing the need for clear
13 language requiring retroactivity). Here, there is no indication that Congress made such a
14 judgment; rather, it improperly abdicated that legislative responsibility to the executive.

15 Congress may, of course, obtain assistance from other branches of government,
16 provided that the legislative act lays down an intelligible principle that directs and fixes the
17 discretion delegated to the agency or person. *See Mistretta*, 488 U.S. at 372 (citing *J.W.*
18 *Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)). This type of delegation is
19 evinced by the rule-making authority given to agencies charged with administering
20 significant environmental or economic mandates. *See, e.g., Whitman v. American Trucking*
21 *Ass'ns, Inc.*, 531 U.S. 457, 473-74 (2001) (approving a delegation of authority to the
22 Environmental Protection Agency to set ambient air quality standards); *Yakus v. United*
23 *States*, 321 U.S.414, 426 (1944) (concluding that the Price Administrator may fix prices
24 under the Emergency Control Act of 1942). Although delegation in the regulatory arena
25 has been generally accepted in the wake of New Deal-era legislation, there has been
26 considerable scholarly debate over the erosion of the non-delegation doctrine. *See, e.g.,*
27 Jeffrey Rosen, *The Unregulated Offensive*, N.Y. Times, Apr. 17, 2005, §6, at 42;
28 Symposium, *The Constitution in Exile: Is it Time to Bring it in from the Cold?*, 51 Duke

1 L.J. 1(2001); Douglas H. Ginsburg, Delegation Running Riot, Regulation, No. 1, 1995, at
2 85 (reviewing David Schoenbrod, Power Without Responsibility: How Congress Abuses
3 the People Through Delegation (1993)).

4 In the present matter, by contrast, the delegation is not limited to the implementation
5 of the terms of SORNA, but permits the Attorney General to determine the very individuals
6 SORNA applies to, with no standards to guide this determination. This is precisely the type
7 of delegation the Framers would have viewed as constitutionally impermissible. SORNA
8 is therefore unconstitutional under the non-delegation doctrine and the Indictment must be
9 dismissed

10 VII.

11 **THE INDICTMENT MUST BE DISMISSED BECAUSE THE STATUTE** 12 **VIOLATES DUE PROCESS.**

13 The fair notice requirements of the Due Process Clause do not permit application of
14 this criminal statute to Mr. Terwilliger. Section 2250 makes it a crime to “knowingly fail
15 to register or update a registration as required by the Sex Offender Registration and
16 Notification Act.” Mr. Terwilliger’s Colorado conviction took place in 1991, years before
17 SORNA was enacted. It was therefore impossible for him to “knowingly” fail to register
18 “as required by” SORNA. Since Mr. Terwilliger had no notice or knowledge of the
19 SORNA's Reporting Requirements, he cannot be prosecuted for violating section 2250.
20 In addition, it is impossible for him to register under SORNA because no State has
21 implemented SORNA's registration requirements.

22 The Due Process Clause of the Fifth Amendment of the United States Constitution,
23 U.S. Const. amend. V, encompasses principles of notice, fair warning and foreseeability,
24 particularly in the context of criminal penalties. *Rogers v. Tennessee*, 532 U.S. 451, 460
25 (2001). In *Lambert v. California*, 355 U.S. 225 (1958), the Supreme Court invalidated,
26 under the Due Process Clause, a prosecution for failing to register as a felon, as required
27 by a city ordinance, because the defendant had no knowledge of or notice of the statute
28 requiring registration. The Court held, “[e]ngrained in our concept of due process is the

1 requirement of notice... Notice is required in a myriad of situations where a penalty or
2 forfeiture might be suffered for mere failure to act.” *Id.* at 243. Mr. Terwilliger could not
3 have been on notice of SORNA’s requirements when he was convicted or otherwise, since
4 no State has implemented the SORNA system. SORNA directs the Attorney General to
5 prescribe rules for providing notice of SORNA’s requirements to sex offenders who were
6 sentenced or released from prison prior to SORNA’s enactment. 42 U.S.C. § 16917. To
7 this date, no such rules have been promulgated.

8 Nor is the fact that Mr. Terwilliger registered in Colorado or Las Vegas or that he was
9 convicted of failing to register there a proxy for his knowledge of the requirements of
10 SORNA. SORNA’s requirements are different than the state provisions, and much stricter.
11 As far as Mr. Terwilliger knows, he was not supposed to have to register anywhere. *See*
12 *Terwilliger Declaration*. These differences are substantial, and indicate that knowledge
13 of New York or New Jersey’s requirements cannot be equivalent to knowledge of
14 SORNA’s requirements.

15 In addition, because, neither Colorado nor California (or Las Vegas) has passed
16 legislation conforming their sex offense registries with SORNA’s requirements, it would
17 have been impossible for Mr. Terwilliger to have registered “as required by” SORNA.

18 SORNA directs each “jurisdiction” (which specifically includes both states and
19 jurisdictions other than states, 42 U.S.C. §§ 16911(9), 16912, 16927), to create a sex
20 offender registry in accordance with the requirements of the Act. 42 U.S.C. § 16912.
21 SORNA also directs the states to make it a felony offense to fail to register within the state.
22 42 U.S.C. § 16913(e). To date, no state has implemented the more detailed and onerous
23 provisions of SORNA. SORNA states “[e]ach jurisdiction shall implement this subchapter
24 before the later of – (1) 3 years after July 27, 2006; and (2) 1 year after the date on which
25 the software described in section 16923 of this title is available.” 42 U.S.C. § 16924. The
26 states must therefore implement SORNA by July 27, 2009, at the earliest. It would
27 therefore be impossible for Mr. Terwilliger to comply with the reporting requirements of
28 SORNA in Colorado or California, as there is no state apparatus that would enable him to

1 comply. Criminalizing the failure to do something that is impossible to do violates the Due
2 Process Clause’s guarantee of fundamental fairness. *See e.g., United States v. Dalton*, 960
3 F.2d 121, 124 (10th Cir. 1992) (it is a violation of fundamental fairness to hold someone
4 liable for a crime when an essential element of the crime is his failure to perform an act that
5 he is incapable of performing). As it was impossible for Mr. Terwilliger to comply with
6 SORNA, the statute violates his due process rights and must be dismissed.

7 VIII.

8 **THE INDICTMENT MUST BE DISMISSED BECAUSE THE STATUTE** 9 **IMPERMISSIBLY ENCROACHES UPON STATE POWER AND THEREFORE** 10 **VIOLATES THE TENTH AMENDMENT.**

11 The Registration Requirements, which impose a federal obligation on offenders to
12 register in individual state-created and state-run sex offense registries, are an
13 unconstitutional encroachment of federal power on state sovereignty. The Registration
14 Requirements therefore violate the Tenth Amendment and are invalid. As described above,
15 in order to violate Section 2250, a defendant must first be required to register under
16 SORNA. Since the Registration Requirements are unconstitutional, Mr. Terwilliger can
17 not be required to register under SORNA, and the Indictment must be dismissed.

18 The Tenth Amendment provides that the “powers not delegated to the United States
19 by the Constitution, nor prohibited by it to the States, are reserved to the States
20 respectively, or to the people.” U.S. Const., amend. X. The Tenth Amendment has been
21 applied to uphold the principles of federalism by limiting the power the federal government
22 may exercise over state activities. For example, the Tenth Amendment prohibits the federal
23 government from commandeering state officials into enacting or administering federal law.
24 *Printz v. United States*, 521 U.S. 898, 935 (1997). Although SORNA offers the states
25 financial incentives to create SORNA-compliant registries, 42 U.S.C. § 16925, no state has
26 yet created one. However, the federal Registration Requirements, which require individual
27 sex offenders to register in their state of residence, are currently in effect. 42 U.S.C. §§
28 16913-26. The Registration Requirements, therefore, force the state officials who run the

1 local registries to accept federally required sex offender registrations before their state
2 chooses to adopt the SORNA provisions voluntarily.

3 In *Printz*, the Supreme Court struck down a law requiring local law enforcement
4 officials to conduct background checks of prospective handgun purchasers. The Court
5 held, “[t]he Federal Government may neither issue directives requiring the states to address
6 particular problems, nor command the States’ officers, or those of their political
7 subdivisions, to administer or enforce a federal regulatory program.” 521 U.S. at 935; *see*
8 *also New York v. United States*, 505 U.S. 144 (1992) (Congress did not have the power to
9 compel the states to enact a federal program regulating the disposal of toxic waste). The
10 local law enforcement officials in *Printz* are analogous to the law enforcement officials
11 who run state sex offender registries. Just as Congress has no power to compel local law
12 enforcement to conduct federally mandated background checks, it has no power to compel
13 local law enforcement to accept registrations from federally mandated sex offender
14 programs. *See also United States v. Snyder*, 852 F.2d 471, 475 (9th Cir. 1988) (“the federal
15 government has no constitutional authority to interfere with a state’s exercise of its police
16 power except to the extent the state’s action intrudes on any of the spheres in which the
17 federal government itself enjoys the power to regulate”).

18 To be sure, Congress can exercise its spending power to persuade the states to accept
19 such registration, as Congress has attempted to do in SORNA. However, no state has yet
20 accepted Congress’ invitation to change its law and instruct its own officials to comply
21 with SORNA. SORNA’s registration requirements are therefore invalid under the Tenth
22 Amendment and the Indictment must be dismissed.

23 IX.

24 **THE INDICTMENT MUST BE DISMISSED BECAUSE SORNA** 25 **IMPERMISSIBLY VIOLATES THE RIGHT TO TRAVEL**

26 The application of 18 U.S.C. § 2250(a) to Mr. Terwilliger unconstitutionally violates
27 his right to travel. Unregistered persons convicted of sex offenses who exercise their right
28 to travel not for purposes of furthering any illegality are subject to federal prosecution.

1 They are unconstitutionally disadvantaged as compared to their counterparts: persons
2 subject to the same registration requirements, but who are already residents of the State,
3 who are only subject to state standards for registration and state prosecution and penalties.
4 SORNA contains far more burdensome registration requirements and requires registration
5 of individuals who would not otherwise be required to register in their particular state, as
6 a result of its more inclusive definition of "sex offense." *See* 42 U.S.C. §§ 16911, 16913.

7 Because to date no state has implemented SORNA, (they have until July 1, 2009 to do so
8 (*See* Proposed National Guidelines for Sex Offender Registration and Notification, 72 FR
9 30210 (May 30, 2007)), individuals who do not travel out of state will not be subject to
10 SORNA, while those who exercise their constitutional right to interstate travel are so
11 subject.

12 The right to travel is a fundamental right, protected by the Constitution and
13 foundational "constitutional concepts of personal liberty." *Shapiro v. Thompson*, 394 U.S.
14 618, 629-30 (1969); *Saenz v. Roe*, 526 U.S. 489 (1999). While not expressly mentioned
15 in Constitution, it is derived from the Privileges and Immunities Clause of the Fourteenth
16 Amendment and the Due Process Clause of the Fifth Amendment. *Id.* at 631.

17 In *Shapiro*, the Court struck down a law requiring residents to have resided in a
18 particular state jurisdiction for one year before qualifying for welfare assistance. *Id.* at 622.
19 There, the Supreme Court established that strict scrutiny is the appropriate standard by
20 which to evaluate the constitutionality those laws which have the effect of discouraging
21 individuals from exercising their constitutional rights to migrate from state to state. 394
22 U.S. at 622-27. The Court held that laws which infringed upon the right to travel could not
23 do so lawfully, absent a compelling government interest. *Id.* at 627, 634.

24 The Court disapproved the express purpose of the law given by the state, which was
25 to preserve state monies. More importantly, in addition to the expressed purpose, the Court
26 further considered unjustifiable *the practical effect* on the population in question of the
27 application of the laws: "In actual operation [. . .] the three statutes enact what in effect are
28

1 nonrebuttable presumptions that every applicant for assistance in his first year of residence
2 came to the jurisdiction solely to obtain higher benefits.” *Id.* at 631¹⁴.

3 Ultimately, the *Shapiro* Court struck down the statutes in question because it did not
4 find a compelling justification for the discriminatory classifications established. *Id.* at 633,
5 642.¹⁵

6 Thirty years later, the Supreme Court again found that a state law restricting migration
7 to that state by preventing new residents of the state from obtaining welfare benefits,
8 unjustifiably discriminated between groups of residents of the state. *Saenz v. Roe*, 526 U.S.
9 489, 507 (1999). The Court reaffirmed the *Shapiro* ruling "that a classification that had the
10 effect of imposing a penalty on the exercise of the right to travel violated the Equal
11 Protection Clause 'unless shown to be necessary to promote a *compelling* governmental
12 interest' [...]." *Id.* at 499.

13 In *Saenz*, the Court took an in depth look at the right to travel. It defined three
14 components of the right to travel and grounded each of those components in certain
15 constitutional principles and provisions. *Id.* at 500-03.

16 One component of the right to travel is the right of a citizen of one state to enter and
17 to leave another state, the right to go from one place to another. *Id.* at 500. The Court
18 stated, "[t]he right of 'free ingress and regress to and from' neighboring States, [...] was
19

20 ¹⁴ The practical steps necessary for the retroactive implementation of SORNA effectively
21 create distinct classifications of sex offenders: those individuals who are particularly vulnerable to
22 detection by law enforcement, such as very-low income persons who rely on public agencies for their
23 survival, will be subject to the more burdensome requirements of SORNA and the federal penalties
24 imposed for violations of 18 U.S.C. § 2250(a). Persons convicted of sex offenses prior to 2006, who
25 are not economically and socially vulnerable will avoid detection for failing to comply with the more
26 burdensome requirements of SORNA and will not be subject to federal penalties under 18 U.S.C.
§2250(a). Mr. Terwilliger is one of those individuals who falls into the distinct sub-group of sex
offenders, because he is a homeless, mentally-ill individual who relied on social services' programs
for housing and other public benefits. *See* Statement of Facts.

27 ¹⁵ The Court's decision regarding the standard of evaluating violations of the right to travel
28 and its determination that the states did not provide compelling justifications have been preserved.
Another part of this decision, which dealt with an Eleventh Amendment issue, was later overruled
by *Edelman v. Jordan*, 415 U.S. 651 (1974).

1 expressly mentioned in the text of the Articles of Confederation." It, also, noted that this
2 right was later vindicated by the Court in *Edwards v. California*, 314 U.S. 160, and *United*
3 *States v. Guest*, 383 U.S. 745. *Id.* at 500-01.

4 Another component of the right to travel is the right to be treated as a welcome visitor
5 rather than an unfriendly alien when temporarily present in another state. *Id.* at 500. This
6 right is rooted in Privileges and Immunities Clause of Article IV of the Constitution. *Id.* at
7 501.

8 Finally, the right to travel protects the right of those who choose to become permanent
9 residents of a state to be treated like other citizens of that state, "the right of the newly
10 arrived citizen to the same privileges and immunities enjoyed by other citizens of the same
11 State." *Id.* at 502. This right is protected by the person's Fourteenth Amendment right as
12 a U.S. citizen. *Id.* at 503.

13 The Court disregarded California's argument that the discriminatory impact on
14 persons' the right to travel is only "incident" to the intentions of the statute and that the
15 immediate justification of the law was fiscal. *Id.* at 504-5. The Court concluded, again
16 relying on *Shapiro*, that any state action removing certain protections from new residents
17 is unconstitutional. *Id.* at 507.

18 Here, section 2250(a) impermissibly burdens the right to interstate travel by citizens
19 with no compelling governmental interest posited and none available in light of the
20 registration requirements of each state. Each state is required to register their own sex
21 offenders under the statute -- law enforcement agencies will have access to all requisite
22 information and can share that information with neighboring states. SORNA penalizes a
23 distinct group of sex offenders for exercising their right to travel because they are then
24 subject to federal prosecution for failing to register as a sex offenders where individuals
25 who do not travel interstate are not so penalized.

26 Additionally, the Attorney General's guidelines explaining the means by which to
27 retroactively apply SORNA to all persons ever convicted of sex offenses, incidentally make
28

1 subject to the requirements those persons who are particularly vulnerable to detection by
2 law enforcement as a result of their indigent, homeless, and/or mentally disabled status.

3 Mr. Terwilliger is the perfect example of that group; he would not have come under
4 law enforcement detection if he did not have to apply with IMPACT in order to locate
5 housing and benefits. Those persons required to register as sex offenders who are
6 financially less vulnerable, or who have alternative networks of support, will not be
7 detected by law enforcement, and will not have to register as offenders pursuant to
8 SORNA, nor will be penalized pursuant to 18 U.S.C. § 2250(a).

9 The Court in *Shapiro* and *Saenz* recognized that the state laws at issue there
10 disproportionately burdened an already vulnerable class of migrants, indigent residents who
11 relied on government benefits:

12 We do not doubt that the one-year waiting-period device is well suited to
13 discourage the influx of poor families in need of assistance. An indigent who
14 desires to migrate, resettle, find a new job, and start a new life will doubtless
15 hesitate if he knows that he must risk making the move without the possibility
16 of falling back on state welfare assistance during his first year of residence,
17 when his need may be most acute. But the purpose of inhibiting migration by
18 needy persons into the State is constitutionally impermissible.

19 *Shapiro*, 394 U.S. at 629.

20 There is not a compelling government justification for this law. As the Court stated
21 in *Saenz*, incidental effects on the right to travel of the statutory scheme must be justified
22 by strict scrutiny, just as the intended effects. *Saenz*, 526 U.S. at 504-05.

23 While no case has addressed a right to travel challenge under SORNA, the Ninth
24 Circuit recently reversed dismissal of a habeas petition where an individual challenged state
25 law revocation of his outpatient status because such revocation potentially violated his right
26 to travel. It violated the right to travel because the revocation of the outpatient status
27 subjected him to more onerous notification rules and greater penalties in other states.
28 *Cavins v. Lockyer*. 2007 WL 1302242 (slip op.) (9th Cir. May 4, 2007). Cavins habeas
petition was not moot because he "tendered evidence that the revocation of his outpatient
status may be used to place him in a category of higher-risk former offenders to whom

1 more onerous community notification rules apply in certain states and thus that his
2 constitutional right to travel has been burdened." *Id.* at * 1 (citing *Kent v. Dulles*, 357 U.S.
3 116, 125-26 (1958) (stating that the right to travel is part of the "liberty" protected by the
4 Fifth Amendment and specifically that freedom of movement within the country may be
5 necessary for a livelihood and "is basic in our scheme of values")). Thus, the Ninth Circuit
6 has indicated recent reaffirmation of the importance of right to travel and a willingness to
7 recognize claims that the collateral consequences that befell the Defendant when he
8 exercised his right to travel were potentially unconstitutional. *See Cavins v.* 2007 WL
9 1302242 at * 1.

10 Mr. Terwilliger is subject to more burdensome federal registration requirements and
11 is subject to greater federal penalties for exercising his right to travel. Because SORNA
12 impermissibly infringes this constitutional right absent a compelling governmental interest,
13 the indictment should be dismissed.

14 **X.**

15 **CONCLUSION**

16 The Indictment must be dismissed for any and all the reasons set forth above.

17
18 Respectfully submitted,

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21 DATED: July 23, 2007

22 /s/ Shereen J. Charlick
23 SHEREEN J. CHARLICK
24 Federal Defenders of San Diego, Inc.
25 Attorneys for Mr. Terwilliger
26
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28

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2 **CERTIFICATE OF SERVICE**

3 Counsel for Defendant certifies that the foregoing Notice of Appearance is true and
4 accurate to the best of her information and belief, and that a copy of the foregoing
5 document has been served this day upon:

6 **Alessandra P. Serano, Assistant U.S. Attorney -**
7 Alessandra.P.Serano@usdoj.gov; Efile.dkt.gc2@usdoj.gov

8 **Manual Notice List**

9 The following is the list of attorneys who are **not** on the list to receive e-mail notices for this
10 case (who therefore require manual noticing). You may wish to use your mouse to select and
11 copy this list into your word processing program in order to create notices or labels for these
12 recipients.

(No manual recipients)

13 Dated: July 23, 2007

14 /s/ Shereen J. Charlick
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