

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :  
 :  
 v. : Crim. No. WDQ-07-0359  
 :  
 BRIAN LEE GOULD :

**MOTION TO DISMISS INDICTMENT AND  
MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendant, Brian Lee Gould, through his counsel, James Wyda, Federal Public Defender, Sean P. Vitrano, Assistant Federal Public Defender, and Paresh S. Patel, Staff Attorney, moves this Honorable Court, pursuant to Federal Rule of Criminal Procedure 12(b)(2), to dismiss the Indictment in the above-styled case. In support of this motion, Mr. Gould states the following:

**INTRODUCTION**

The Indictment alleges that between August 21, 2006 and July 18, 2007, Mr. Gould failed to register in the District of Maryland under the Sex Offender and Registration and Notification Act (SORNA), 42 U.S.C. § 16901, *et seq.*, in violation of 18 U.S.C. § 2250(a). In particular, the Indictment alleges that Mr. Gould was required to register as a “sex offender” under SORNA because in 1985 he was convicted in the Superior Court of the District of Columbia for an assault with intent to commit sodomy while armed in violation of D.C. Code §§ 22-503 and 22-302.

Mr. Gould seeks dismissal of this Indictment on numerous grounds. *First*, the statutory terms of SORNA make clear that the Act is not applicable to Mr. Gould because Maryland has yet to implement SORNA. To punish Mr. Gould for violation of an Act that is not yet applicable to him and with which he is unable to comply violates the *Ex Post Facto* Clause and the Due Process Clause of the Constitution. *Second*, Mr. Gould had no duty to register under SORNA because the

Government failed to give him notice of any such duty as required by the statute itself and the Due Process Clause. *Third*, Congress improperly delegated the legislative function of determining the retroactivity of SORNA to the Attorney General in violation of the non-delegation doctrine. *Fourth*, the Attorney General’s regulation, 28 C.F.R. § 72.3, which purportedly applies SORNA retroactively, violates the Administrative Procedure Act (APA), 5 U.S.C. § 553, as it was promulgated absent a 30-day notice and comment period. *Fifth*, 18 U.S.C. § 2250(a)(2)(A), a jurisdictional provision of the Failure to Register Act, violates the Commerce Clause because it punishes purely local intrastate activity that does not substantially affect interstate commerce. *Sixth*, application of an alternate jurisdictional provision, 18 U.S.C. § 2250(a)(2)(B), violates the *Ex Post Facto* Clause and the Commerce Clause. Finally, *seventh*, if SORNA forces states to register “sex offenders” before states adopt the SORNA provisions voluntarily, then SORNA violates the Tenth Amendment by commandeering state officials into administering federal law.

**BACKGROUND ON THE SEX OFFENDER  
REGISTRATION NOTIFICATION ACT**

SORNA creates a national sex offender registry law, 42 U.S.C. §§ 16901-16962, and requires every local jurisdiction (state) to maintain a sex offender registry conforming to its requirements. 42 U.S.C. § 16912.

**A. Retroactive Application of SORNA**

SORNA was signed into law on July 27, 2006; however, Congress did not decide whether the provisions of the Act are applicable to (1) persons convicted before July 27, 2006, or (2) persons convicted before the Act’s implementation in a particular state. Instead, Congress specifically delegated these decisions to the Attorney General. 42 U.S.C. § 16913(d).

On February 28, 2006, the Attorney General issued an interim regulation declaring that SORNA is retroactively applicable to those convicted before the Act was passed. 28 C.F.R. § 72.3. The Attorney General issued this regulation before any period of public comment was completed. He certified that the new, sweeping rule was exempt from the APA's notice and comment requirements pursuant to § 553(b)(3)(B) of that statute, because "notice and public procedures" were "impracticable, unnecessary, or contrary to the public interest." *See* 72 Fed. Reg. at 8896.

Although the Attorney General's regulation makes SORNA retroactive to sex offenders convicted prior to its enactment, no regulation makes the Act retroactively applicable to persons convicted before SORNA's implementation in a particular state.

**B. Period for Implementation**

SORNA requires the Attorney General to develop software to assist states in implementing the law. In particular, the software should "enable jurisdictions to establish and operate uniform sex offender registries and Internet sites." 42 U.S.C. § 16923. The Attorney General has until July 27, 2008 to make this software available to the states. States are only required to implement SORNA the later of July 27, 2009 or one year after the software is made available. 42 U.S.C. § 16923. If states have not implemented SORNA by this deadline, they will lose a percentage of their federal funding. 42 U.S.C. § 16925(a).

On May 30, 2007, the Attorney General issued the proposed Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART") Guidelines for the purpose of providing "guidance and assistance" to jurisdictions in implementing SORNA. 72 Fed. Reg. at 30210. These Guidelines provide that a jurisdiction has not implemented SORNA until it has "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and

the SMART Office of the Department of Justice has determined that it has done so. 72 Fed. Reg. at 30213-14.

Maryland has not yet passed any legislation to comply with SORNA's requirements. Moreover, Maryland currently has no procedure in place to collect, maintain, and disseminate information as required under SORNA.

**C. Who Is a “Sex Offender” Subject to SORNA?**

A person is a “sex offender” who must register under SORNA if he “was convicted of a sex offense.” 42 U.S.C. § 16911(1). “Sex offense” is defined to include various offenses against minors as well as a “criminal offense that has an element involving a sexual act or sexual contact with another.” 42 U.S.C. § 16911(5)(A)(I). SORNA classifies “sex offenders” into three tiers, depending on the seriousness of the offense. 42 U.S.C. § 16911. An offender’s tier level determines the duration of his registration period, which ranges from 15 years to life. 42 U.S.C. § 16915.

**D. How Does a “Sex Offender” Register and Update Changed Information?**

A sex offender must register and keep his registration current in each state in which he resides, is employed, and/or is a student. *See* 42 U.S.C. §§ 16911 (11), (12), (13), 16913(a). He must appear in person in each state where he is required to be registered and allow a photograph to be taken. The frequency of these appearances depends on the offender’s tier level. *See* 42 U.S.C. § 16916.

Additionally, no more than three days after any change of name, residence, employment or status, a sex offender must inform at least one of the jurisdictions where he or she resides, is employed, or is a student of the change – in person. 42 U.S.C. § 16913©.

**E. The Government Must Notify a Sex Offender of his Obligation to Register**

SORNA explicitly provides that an appropriate Government official must notify a sex offender of his duty to register under SORNA. 42 U.S.C. § 16917. For individuals who are in custody or awaiting sentencing for an offense giving rise to the duty to register under SORNA, the Government must notify them of their SORNA obligations immediately after they are released from custody or immediately after sentencing. 42 U.S.C. § 16917(a). Specifically, the Government must (1) “inform the sex offender of the duties of a sex offender under [SORNA] and explain those duties,” (2) “require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement,” and (3) “ensure that the sex offender is registered.” *Id.*

For those sex offenders, like Mr. Gould, who have already served their sentences for an offense committed before SORNA’s enactment, the Act directs the Attorney General to prescribe specific rules for notification. 42 U.S.C. § 16917(b). To date, the Attorney General has not issued such rules. However, in the proposed SMART Guidelines, the Attorney General provides that for those offenders “with pre-SORNA or pre-SORNA-implementation convictions [like Mr. Gould] who remain in the prisoner, supervision, or registered sex offender populations at the time of implementation,” jurisdictions must “fully instruct[] them about the SORNA requirements, [and] obtain[] signed acknowledgments of such instructions.” 72 Fed. Reg. at 30228. No Government official notified Mr. Gould of his duty to register or explained the registration requirements prior to his incarceration on the current offense.

**F. What Information Is Made Available to the Public?**

**1. *State Websites***

Under SORNA each state must maintain a website that makes available at least the following information:

- a. The name and any aliases of the sex offender;
- b. The address of the sex offender;
- c. The license plate number of any vehicle owned or operated by the sex offender;
- d. A physical description of the sex offender;
- e. A current photograph of the sex offender;
- f. The text of the particular law under which the offender was convicted;
- g. The sex offender's criminal history, including the dates of all convictions; the status of parole, probation or supervised release; registration status; and the existence of any outstanding arrest warrants;
- h. A photocopy of the sex offender's driver's license or ID card; and
- I. Any other information required by the Attorney General.

42 U.S.C. §§ 16914(a) and (b), 16918.

**2. *National Website***

SORNA also establishes the Dru Sjodin National Sex Offender Public Website to be maintained by the Attorney General, which will include "relevant information for each sex offender and other person listed on the jurisdiction's website," and make "relevant information" publicly accessible. 42 U.S.C. § 16920. Each state must include in the design of its own website all field search capabilities needed for full participation in the Dru Sjodin Website and "shall participate in that website as provided by the Attorney General." 42 U.S.C. § 16918.

### 3. *Community Notification*

SORNA establishes a Community Notification Program, which requires an “appropriate official” in the state, immediately after an offender registers or updates information, to provide “information in the registry” to:

- a. the Attorney General, who shall include it in the National Sex Offender Registry or other appropriate databases;
- b. appropriate law enforcement agencies, including probation agencies, and *each* school and public housing agency, in *each* area where the offender resides, is an employee, or is a student;
- c. each jurisdiction where the offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment or student status occurs;
- d. any agency responsible for conducting employer-related background checks under 42 U.S.C. § 5119(a);
- e. child welfare social service entities;
- f. volunteer organizations in which contact with minors and “other vulnerable individuals” might occur; and
- g. “[a]ny organization, company, or individual who requests *such notification* pursuant to procedures established by the jurisdiction.”

42 U.S.C. § 16921 (emphasis added).

#### **G. New Crime and Penalties - 18 U.S.C. § 2250(a)**

The Adam Walsh Act creates the new federal offense of failure to register under SORNA, 18 U.S.C. § 2250(a). Generally, a person violates 18 U.S.C. § 2250(a) when he has a duty to register under SORNA, he knowingly fails to register, and he travels in interstate commerce. However, under 18 U.S.C. § 2250(a)(2)(A), if the prior conviction triggering the duty to register involved a violation of *Federal* law (including the law of the District of Columbia), as alleged here, then the Government need not prove that the defendant traveled in interstate commerce. Instead, the defendant’s knowing failure to register under SORNA alone is sufficient to sustain a conviction.

A violation of 18 U.S.C. § 2250 carries a penalty of up to *ten* years in prison for a first-time offense. An offender who commits a crime of violence during a period when he also fails to register is subject to a mandatory minimum punishment of five years, and a potential maximum of thirty years *in addition to* and *consecutive* to the penalty he receives for his failure to register. 18 U.S.C. § 2250©. An offender who commits a felony offense involving a minor during a period he fails to register is subject to a *consecutive* mandatory sentence of ten years. 18 U.S.C. § 2260A.

## ARGUMENT

### **I. SORNA IS NOT APPLICABLE TO MR. GOULD BECAUSE MARYLAND HAS NOT YET IMPLEMENTED THE LAW**

#### **A. The Attorney General Has Not Promulgated Regulations Making the Act Retroactive to Persons Convicted Before its Implementation in a Particular State**

Although SORNA was signed into law on July 26, 2006, Congress did not name a precise date upon which the sex offender provisions are to be effective, other than to state a deadline of July 27, 2009 for implementation of the Act by all jurisdictions. Instead, Congress delegated to the Attorney General the authority to specify the retroactive applicability of SORNA to both (a) those who were “convicted before July 27, 2006,” and (b) those who were “convicted before . . . its implementation in a particular jurisdiction.” 42 U.S.C. §§ 16913(d).

The Attorney General has now issued a regulation providing that SORNA is applicable to those convicted before July 27, 2006. 27 C.F.R. § 72.3. But the Attorney General has not issued a regulation declaring that SORNA applies to those convicted before the Act is implemented in a particular state. Thus, no authority exists making SORNA retroactive in jurisdictions that have yet to do what the Act requires. Moreover, the Attorney General’s SMART Guidelines affirmatively

indicate that SORNA is not effective in pre-implementation jurisdictions. The following language makes plain that sex offenders with “pre-SORNA implementation convictions,” like Mr. Gould, have a duty to register *only after* the jurisdiction implements the federal law:

With respect to sex offenders with pre-SORNA or pre-SORNA implementation convictions who remain in the prisoner, supervision, or registered sex offender populations **at the time of implementation** . . . jurisdictions should endeavor to register them with SORNA quickly as possible.

72 Fed. Reg. at 30228 (emphasis added).

That Maryland has not implemented SORNA is indisputable. As noted by the Attorney General in the SMART Guidelines, a jurisdiction has not implemented SORNA until it has (1) “carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines,” and (2) the SMART Office has determined that it has done so. 72 Fed. Reg. at 30213-30214. Neither mandate has been met here.

Maryland currently has no procedure in place to collect, maintain, and disseminate the detailed information as required under SORNA. Critical differences exist between the current Maryland sex offender law and the more onerous SORNA. For example, SORNA requires the registration of a much broader group of offenders for far less serious offenses than does current Maryland law. *Compare* 42 U.S.C. § 16911 *with* Md. Code, Crim. Proc. § 11-704. SORNA requires that authorities notify a much larger group of community organizations about a registrant’s sex offender status than does the Maryland law. *Compare* 42 U.S.C. §16921 *with* Md. Code, Crim. Proc. § 11-709. SORNA requires authorities to post more detailed information in the public on-line registry than does the Maryland law. *Compare* 42 U.S.C. § 16918 *with* Md. Code, Crim. Proc. § 11-717. SORNA requires reporting that is more frequent and of longer duration than that under the

Maryland law. Compare 42 U.S.C. § 16913, 16915, 16916 with Md. Code, Crim. Proc. § 11-705, 11-707. These differences illustrate that Maryland has no system in place to carry out SORNA’s registration and notification requirements.

Because Maryland has not yet complied with SORNA, the SMART Office is unable to certify Maryland’s compliance. And if Maryland has failed to implement SORNA, how possibly can Mr. Gould be subject to the Act’s constraints?

**B. To Punish Mr. Gould for a Law that Is Not Yet Applicable to Him Would Violate the *Ex Post Facto* Clause**

Punishing Mr. Gould for failing to register under SORNA – a law not yet applicable to him – would violate the *Ex Post Facto* Clause of the Constitution. See U.S. Const., art. I, § 9, cl. 3. In *Weaver v. Graham*, 450 U.S. 24 (1981), the United States Supreme Court explained that the *Ex Post Facto* Clause prohibits punishment of a defendant “for an act which was not punishable at the time it was committed.” 450 U.S. 24, 28. The Supreme Court reasoned: “Critical to relief under the *Ex post Facto* Clause is not an individual’s right to less punishment, but the lack of fair notice and governmental restraint when . . . punishment [is increased] beyond what was prescribed when the crime was consummated.” *Id.* at 30-31. Criminally punishing Mr. Gould for failure to register under SORNA when he had no such duty to register directly violates this principle.<sup>1</sup>

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<sup>1</sup> A retroactive application of SORNA to Mr. Gould would also violate the *Ex Post Facto* clause by increasing Mr. Gould’s punishment for an offense committed over two decades ago. In *Smith v. Doe*, 538 U.S. 84 (2003), a divided Supreme Court narrowly held that the retroactive application of the Alaska sex offender registration statute did not violate the *Ex Post Facto* Clause because it was not punitive, but instead was civil in nature. However, the Alaska statute that was at issue in *Smith* is different in many critical ways from SORNA. SORNA’s penalties are much more burdensome, onerous, and expansive than those of the Alaska statute. The Alaska statute was much more limited than SORNA in that it created a single sex offender registry that did not require dissemination of sex offender information through the Internet, did not establish a community notification program, did not establish in person reporting

**C. To Punish Mr. Gould for a Law with Which He Is Unable to Comply Violates the Due Process Clause**

SORNA explicitly provides that one is “unable” to register in a jurisdiction where the Act has yet to be implemented. 42 U.S.C. § 16913(d). In doing so, the statute recognizes that where a state, like Maryland, has not passed legislation conforming its sex offender registry with SORNA’s requirements, it is impossible for a sex offender in that jurisdiction to register under SORNA. Simply put, no state apparatus exists through which the offender can come into compliance with SORNA. Criminalizing the failure to do something that is impossible to do violates the Due Process Clause’s guarantee of fundamental fairness. *See United States v. Dalton*, 960 F.2d 121, 124 (10<sup>th</sup> Cir. 1992) (it is a violation of fundamental fairness to hold someone liable for a crime when an essential element of the crime is his failure to perform an act that he is incapable of performing). Because it was (and remains) impossible for Mr. Gould to comply with SORNA in Maryland, punishing him for failing to register under that statute violates his due process rights.

**II. MR. GOULD HAD NO DUTY TO REGISTER UNDER SORNA BECAUSE THE GOVERNMENT FAILED TO NOTIFY HIM OF THE ACT’S REQUIREMENTS**

18 U.S.C. § 2250(a)(3) provides that a defendant must *knowingly* fail to register in order to violate the statute. The plain language of 42 U.S.C. § 16917 (“Duty to notify sex offenders of registration requirements and to register”) requires the Government affirmatively to inform offenders of SORNA before any duty to register under the Act arises. For offenders, such as Mr. Gould, whose sex offenses pre-dated SORNA, and who are no longer in custody or awaiting sentencing on those

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requirements, and did not establish felony criminal penalties. *Id.* at 90-91 (summarizing provisions of Alaska statute). These differences make it evident that unlike the Alaska statute, SORNA is indeed punitive, and therefore, its retroactive application violates the *Ex Post Facto* Clause.

offenses, SORNA explicitly directs the Attorney General to prescribe regulations to notify them of the duty to register. *See* 42 U.S.C. § 16917(b); *United States v. Barnes*, 2007 WL 2119895, at \*4 (S.D.N.Y. July 23, 2007) (SORNA “provides that the Attorney General has the duty to notify sex offenders of their registration requirements”); *United States v. Smith*, 2007 WL 1725329, at \*3-5 (S.D.W.Va. June 13, 2007) (holding that SORNA creates an affirmative duty to notify sex offenders of registration requirements).

Although the Attorney General has issued no such regulations, the SMART Guidelines set out specific instructions for officials to follow when notifying sex offenders like Mr. Gould who remain in the criminal justice system or on parole supervision. *See* 72 Fed. Reg. at 30228. As the district court articulated in *Smith*, “The Guidelines state that to register these sex offenders in conformance with SORNA, they need to be fully instructed about SORNA’s requirements, obtain signed acknowledgments of such instructions, and enter into the system all information required under SORNA.” 2007 WL 1725329, at \*4. In *Smith*, the district court granted the defendant’s motion to dismiss a failure to register indictment where the Government failed to notify the defendant in conformity with these Guidelines. The Court held that without this notice, the defendant could not have *knowingly* failed to register. *Id.* Likewise, this Court should also dismiss Mr. Gould’s indictment where the Government failed to instruct Mr. Gould in accordance with the SMART Guidelines, in violation of SORNA.

In the absence of the required notice, prosecuting Mr. Gould for failing to register violates his due process rights. The Supreme Court’s decision in *Lambert v. California*, 355 U.S. 225 (1958) illustrates this point well. In that case, the Court invalidated under the Due Process Clause a prosecution for failing to register as a felon, as required by a Los Angeles city ordinance. In finding

a due process violation, the Court held that when “wholly passive” conduct such as the “mere failure to register” is criminalized, notice is essential:

Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that a citizen has the chance to defend charges. ... Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. ... [T]he principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

*Id.* at 228. As in *Lambert*, Mr. Gould is being prosecuted for wholly passive conduct – failing to register – when he had no notice that a federal statute required him to do so. Applying 18 U.S.C. § 2250 to Mr. Gould thus violates due process.<sup>2</sup>

Moreover, any obligation that Mr. Gould had to register under Maryland state law does not diminish this argument. Notice of Maryland’s requirements does not substitute for notice under SORNA.<sup>3</sup> As pointed out above, SORNA’s registration requirements are different from and stricter than Maryland’s provisions. Moreover, the penalty for failing to register under SORNA is far greater

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<sup>2</sup> Some district courts have summarily concluded that a due process violation does not occur even when a sex offender is not on notice of his duty to register under SORNA because “ignorance of the law is no excuse.” See *United States v. Mitchell*, 2007 WL 2609784, at \*2 (W.D. Ark. Sept. 6, 2007); *United States v. Manning*, 2007 WL 624037, at \*2 (W.D. Ark. Feb. 23, 2007). However, the Supreme Court in *Lambert* specifically rejected this argument. 355 U.S. at 228. The Court emphasized that because failure to register is a “wholly passive” act, it requires notice under due process. *Id.* Because the district courts’ opinions in *Mitchell* and *Manning* ignore this Supreme Court precedent, the opinions have no precedential value here.

Moreover, these opinions are flawed because they fail to address the plain language of SORNA and the SMART Guidelines, which direct Government officials to affirmatively notify sex offenders of their obligation to register. 42 U.S.C. § 16917; 72 Fed. Reg. at 30228.

<sup>3</sup> It is not clear here whether Mr. Gould received notice to register under Maryland state law.

than the penalty in Maryland. The maximum sentence for a first-time failure to register offense under SORNA is ten years, whereas the maximum sentence for a first-time failure-to-register offense in Maryland is three years. *Compare* 18 U.S.C. § 2250(a)(3) *with* Md. Code, Crim. Proc. § 11-721. As the district court noted in *Barnes*, “Having notice under a state law which provides for the dramatically lesser penalty . . . is not the same as having notice of a federal law which provides for up to ten years of incarceration.” 2007 WL 2119895, at \*3 (finding due process violation where defendant received no affirmative notice under SORNA even though defendant had notice to register under New York and New Jersey law). “The Constitutional mandate that defendants be given adequate notice and fair warning applies not only to what conduct is criminal but to the punishment which may be imposed.” *Id.* at \* 5. Because the Government here never notified Mr. Gould of his duty to register under SORNA and the attendant penalties that a violation might carry, his due process rights were violated.<sup>4</sup>

### **III. 42 U.S.C. § 16913(d), ALLOWING THE ATTORNEY GENERAL TO MAKE THE ACT RETROACTIVE, VIOLATES THE NONDELEGATION DOCTRINE**

Even if Mr. Gould was subject to SORNA and had a duty to register under the terms of the Act, the Act is unconstitutional. By delegating to the Attorney General the broad authority to specify SORNA’s applicability to offenders convicted before the passage of the Act and before SORNA’s implementation, Congress violated the nondelegation doctrine. *See* 42 U.S.C. § 16913(d).

“Congress is manifestly not permitted to abdicate or transfer to others the legislative

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<sup>4</sup> Contrary to the district court’s opinion in *Barnes*, some district courts have treated notice of a state registration requirement as sufficient notice of SORNA requirements. *See United States v. Hinen*, 487 F. Supp.2d 747, 754 (W. D. Va. 2007); *Mitchell*, 2007 WL 2609784 at \*2; *Manning*, 2007 WL 624037, at \*2. These opinions are flawed because they fail to acknowledge or analyze the significant differences between SORNA and state law.

functions with which it is [constitutionally] vested.” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). This “nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.” *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Although the nondelegation doctrine does not prevent Congress from obtaining the assistance of its coordinate Branches, it can do so only if Congress gives clear guidance to the executive branch as to the intent of the legislation. *Id.* at 372-73. This means that Congress must “clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Id.* at 372-73 (citation and quotation omitted).<sup>5</sup> In both *Panama Refining Co.*, 293 U.S. 421, and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court held that Congress had unconstitutionally authorized the Executive to make laws because “Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress delegated power.” *Mistretta*, 488 U.S. at 374, n.7; *see Panama Refining Co.*, 293 U.S. at 421 (Congress unconstitutionally, without any guidance, authorized the Executive to prohibit the transportation of excess petroleum, subject to fine and imprisonment); *Schechter*, 295 U.S. at 495 (Congress unconstitutionally authorized the Executive to prescribe codes of fair competition, the violation of which would be a misdemeanor).

Similarly, in SORNA, Congress failed to articulate any policy to guide the Attorney General on the retroactivity of the Act. Congress gave no guidance to the Attorney General as to whether all individuals who were convicted of sex offenses prior to the Act should be subject to SORNA,

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<sup>5</sup> In *Mistretta*, unlike that here, Congress gave the Sentencing Commission very specific and detailed guidance on how to promulgate the Sentencing Guidelines. *Id.* at 374. Thus, the Supreme Court found that Congress did not delegate its legislative duties to the Executive. *Id.*

regardless of the remoteness of their offenses, regardless of when they completed their sentences, and regardless of the nature of the offenses. Instead, Congress gave the Attorney General sole discretion to determine who should be subject to SORNA and who should not. In unbridled fashion, Congress handed the Attorney General the awesome power of legislating the breadth of the Act. This is no small delegation because a retroactive sex offender law can ruin families, subject persons to job loss, harassment, homelessness, violence, and even murder. It can threaten public safety by destabilizing the lives of those posted on the Internet, creating a risk of recidivism in those who would not otherwise recidivate, and making it more difficult for authorities to keep track of and supervise those who would. *See, e.g.,* Richard Roesler, *Sex offenders without addresses throw notification system for a loop*, Spokesman Review, The (Spokane), September 6, 2005. *See also* NACDL, Sex Offender Resources, available at <http://www.nacdl.org/85256BE4005CB ECB.nsf/0/DBD8F2CC2BD6E899852570D6005223A7?Open>; Hanson, R. Karl and Morton-Bourgon, Kelly, *Predictors of Sexual Recidivism: An Updated Meta-Analysis* (2004); Association for the Treatment of Sex Offenders, *The Registration and Community Notification of the Adult Sex Offender* at 3 (2005); Tewksbury, Richard, *Collateral Consequences of Sex Offender Registration*, *Journal of Contemporary Criminal Justice* (2005), available at <http://ccj.sagepub.com>; Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (2007), available at <http://hrw.org/reports/2007/us0907>. If Congress intends any law, particularly one like this, to have retroactive effect, it must follow the path charted in the Constitution. Here, Congress explicitly handed this quintessentially legislative function to an official in the Executive branch.

Congress's delegation of this legislative function is particularly offensive here because the Department of Justice is not a regulatory agency, but rather a law enforcement agency. Although

some delegation of legislative functions is essential in a government with large agencies having specialized expertise in various areas such as food and drugs, firearms, labor relations, education, and health, the Department of Justice is not a scientific agency with expertise in criminology and sex offenses, but rather a police agency whose chief function is the arrest and prosecution of lawbreakers. For Congress to give away its authority to the Attorney General to decide what the law is, to whom it applies, and how it must be complied with, is an abdication of its proper role and violates the separation of powers.

#### **IV. THE ATTORNEY GENERAL'S REGULATION RETROACTIVELY APPLYING SORNA VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BECAUSE IT WAS PROMULGATED WITHOUT NOTICE AND COMMENT**

As discussed above, on February 28, 2007, the Attorney General issued a regulation retroactively applying SORNA to all persons convicted of a sex offense prior to July 27, 2006 – the date Congress enacted SORNA. *See* 28 C.F.R. § 72.3. This regulation does not make SORNA applicable to Mr. Gould because Maryland has yet to implement the Act. Nonetheless, even if the regulation makes SORNA applicable to Mr. Gould, the Attorney General issued this regulation in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 533, by failing to provide public notice and a comment period.

The APA normally requires agencies to publish a proposed rule in the Federal Register and give interested parties the opportunity to submit comments and other relevant material before the rule becomes effective. 5 U.S.C. § 553(d). Generally, a substantive rule must be published in the Federal Register at least 30 days before it becomes effective. 5 U.S.C. § 553(d).

However, the APA permits agencies to enact rules without a notice and comment period for “good cause” where it is “impractical, unnecessary, or contrary to the public interest.” 5 U.S.C. §

553(b). The “good cause” exception is to be narrowly construed and only reluctantly countenanced. The exception is not an escape clause; its use should be limited to emergency situations.” *Utility Solid Waste Activities Group v. Environmental Protection Agency*, 236 F.3d 749, 754 (D.C. Cir. 2001) (omitting citations and quotations).

Here, the Attorney General erroneously relied upon the “good cause” exception in foregoing the public notice and comment period. The Attorney General claimed that notice and comment was “impractical, unnecessary, and contrary to public interest.” 72 Fed. Reg. at 8896. In support of his assertion, the Attorney General stated that the “immediate effectiveness of the rule is necessary to eliminate any possible uncertainty about the applicability of the Act’s requirements.” 72 Fed. Reg. at 8896. Moreover, the Attorney General explained that “[d]elay in the implementation of [the] rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders through prosecution and the imposition of criminal sanctions.” 72 Fed. Reg. at 8896. However, these assertions have no basis even when evaluated against the Attorney General’s own manual interpreting the “good cause” exception under the APA.

According to the Attorney General’s Manual, a 30-day public notice and comment period is “impracticable” under the APA when “an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in [§ 553].” *Utility Solid Waste Activities Group*, 236 F.3d at 754 (citing Attorney General’s Manual on the Administrative Procedure Act (1947) at 30-31). Here, a 30-day waiting period could not have delayed registrations or impeded the functioning of law enforcement agencies: the states are not obligated to comply with SORNA until at least July 2009. *See* 42 U.S.C. § 16924. More than a year after SORNA’s enactment, states – including Maryland – have no mechanism in place to register sex offenders under SORNA. And the

Attorney General’s regulation provides no guidance on how states are to register sex offenders prior to implementation. Foregoing the 30-day waiting period did nothing to change this reality. Accordingly, a notice and comment period was not “impracticable.”

Likewise, a notice and comment period was not “contrary to the public interest.” The Attorney General’s Manual provides that this ground is satisfied when “the interest of the public would be defeated by any requirement of advance notice.” *Utility Solid Waste Activities Group*, 236 F.3d at 754 (citing Attorney General’s Manual at 31). For the same reasons noted in the above-paragraph, a waiting period would not have compromised the purported public interest here (expediting registrations), since the Attorney General’s regulation plainly fails to achieve this result.

Finally, the notice and comment period was not “unnecessary.” The Attorney General’s manual explains that this term refers to “the issuance of a minor rule in which the public is not particularly interested.” *Id.* (citing Attorney General’s Manual at 31); *see also South Carolina v. Block*, 558 F. Supp. 1004, 1016 (D.S.C. 1983) (“unnecessary” exception is “confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.”). Certainly, an all-encompassing rule that purports to make SORNA retroactive to all offenders who ever committed a sex offense fails to meet this definition of “unnecessary.”

For all the reasons noted above, the Attorney General had no “good cause” to excuse the APA’s notice and comment period. Thus, the rule should be invalidated. *See Nat’l Org. Of Veterans’ Advocates, Inc. v. Sec’y. of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (“Failure to allow notice and comment, where required, is grounds for invalidating the rule.”) (citing *Auer v. Robbins*, 519 U.S. 452, 459 (1997)).

**V. 18 U.S.C. § 2250(a)(2)(A) VIOLATES THE COMMERCE CLAUSE BY PUNISHING PURELY LOCAL INTRASTATE ACTIVITY THAT DOES NOT SUBSTANTIALLY AFFECT INTERSTATE COMMERCE**

To the extent that the Indictment relies upon the jurisdictional provision contained in 18 U.S.C. § 2250(a)(2)(A), *i.e.*, that Mr. Gould is a sex offender required to register under SORNA because of his prior conviction under the law of the District of Columbia, dismissal is warranted. Section 2250(a)(2)(A), which regulates a purely intrastate activity – failure to register – that does not substantially affect interstate commerce, violates the Commerce Clause.

The Supreme Court’s decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000) provide critical guidance on this issue. First, in *Lopez*, the defendant challenged his conviction under the Gun-Free School Zones Act, 18 U.S.C. § 922(q). That section of the U.S. Code made it unlawful for any individual to knowingly possess a firearm in a school zone. The Court held that the statute exceeded Congress’s power to legislate under the Commerce Clause. *Id.* at 567. The Court began its analysis by holding that Congress only has authority to regulate an action that occurs purely within the state when the activity substantially affects interstate commerce. *Id.* at 558, 560. Applying this holding to the facts of *Lopez*, the Supreme Court held that possession of a gun in a school zone was purely intrastate activity that “had nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms.” *Id.* at 561.

In reaching this conclusion, the Court in *Lopez* rejected the Government’s arguments that possession of a firearm in a school zone affects interstate commerce by increasing violent crime which, in turn, results in substantial financial costs to society. *Id.* at 563-64. First, the Government argued that violent crime stemming from handgun possession increases the cost of medical insurance

for the general population. *Id.* Second, the Government argued that “violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe.” *Id.* Third, the Government argued that “the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment; [a] handicapped educational process, in turn, will result in a less productive citizenry.” *Id.*

The Court refused to accept these arguments after emphasizing the far-reaching implications of such assertions. Specifically, the Court explained ,

[U]nder [the Government’s] “costs of crime” reasoning . . . Congress [ ] could regulate not only all violent crimes, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. . . . Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

*Id.* at 564. The Court concluded that “the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567.

In *Morrison*, 529 U.S. 598, the Court again disapproved Congress’s use of the Commerce Clause as a basis for federal jurisdiction over purely intrastate criminal activity. There, the Court struck down a portion of the Violence Against Women Act, 42 U.S.C. § 13981, because the activity being regulated, gender-motivated violence, was an intrastate activity that did not substantially affect interstate commerce. 529 U.S. at 613-617. In doing so, the Court rejected the same arguments the Government made in *Lopez* regarding the financial costs of violent crime (*e.g.*, the activity affects commerce by deterring travel, by diminishing national productivity, and resulting in medical costs

imposed on the greater population). *Id.* at 615. The Court again warned that the Government’s reasoning would allow “Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.” It refused to endorse Congress’s tenuous approach:

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.

*Id.* at 617-618.

In light of *Lopez* and *Morrison*, Congress’s attempt to sanction persons convicted under Federal or D.C. law for the mere failure to register under SORNA also violates the Commerce Clause. Failure to register is a purely local intrastate action that does not affect interstate commerce in any fashion – let alone *substantially* affect interstate commerce. It has no commercial character, nor any relation to economic activity of any kind. Moreover, *Lopez* and *Morrison* preclude the Government from arguing that § 2250(a)(2)(A) falls within the confines of the Commerce Clause because the failure to register somehow may lead to financial burdens on society.<sup>6</sup>

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<sup>6</sup> Although separate and apart from the Commerce Clause, Congress may regulate any conduct within the District of Columbia and United States Territories under United States Constitution art. I, § 8, cl. 17 and art. IV, § 3, cl. 2, the conduct that Congress seeks to regulate here under 2250(a) – Mr. Gould’s failure to register – took place in Maryland. Articles I and IV of the Constitution give Congress no such power to regulate conduct within the *states*. Although under these Articles, Congress had the power to punish Mr. Gould for his sex offense that occurred in D.C., Congress does not have the power to punish Mr. Gould for the failure to register as a sex offender – an action that the indictment alleges occurred in Maryland. Accordingly, the Government cannot rely on Articles I or IV as an alternative to the Commerce Clause to establish jurisdiction here.

**VI. JURISDICTION BASED ON 18 U.S.C. § 2250(a)(2)(B) VIOLATES THE *EX POST FACTO* CLAUSE AND THE COMMERCE CLAUSE**

As an alternate basis for jurisdiction, the Indictment alleges that Mr. Gould traveled in interstate commerce between August 21, 2006 and July 18, 2007. Separate and apart from 18 U.S.C. § 2250(a)(2)(A), 18 U.S.C. § 2250(a)(2)(B) authorizes the prosecution of sex offenders who travel in interstate or foreign commerce and fail to register. However, the Government cannot proceed on this basis for two reasons. *First*, the Government cannot punish Mr. Gould based on his travel activities prior to February 28, 2007. It was only on this date that the Attorney General issued the regulation making SORNA retroactive to Mr. Gould. Therefore, at best, any duty to register under SORNA arose on February 28, 2007. *See United States v. Stinson*, \_\_\_ F. Supp.2d \_\_\_, 2007 WL 2580464 (S.D.W.Va. Sept. 7, 2007) (defendant found not guilty for failure to register because Government could not prove that defendant traveled in interstate commerce after Feb. 28, 2007); *United States v. Kapp*, 487 F. Supp.2d 536 (M.D. Pa. 2007) (motion to dismiss indictment granted for same reason) *State v. Heriot*, 2007 WL 2199516 (D.S.C. July 27, 2007) (same); *United States v. Muzio*, 2007 WL 2159462 (E.D. Mo. July 26, 2007) (same); *United States v. Marvin L. Smith*, 2007 WL 1725329 (S.D.W.Va. June 13, 2007) (same); *United States v. Sallee*, No. Cr-07-152-L (W.D. Okla. Aug. 13, 2007) (same). To punish Mr. Gould for any interstate travel prior to that date would violate the *Ex Post Facto* Clause. *See Stinson*, 2007 WL 2580464 (conviction for any interstate travel prior to February 28, 2007 would have violated *Ex Post Facto* Clause); *Muzio*, 2007 WL 2159462 (holding same); *Sallee* (same).

*Second*, § 2250(a)(2)(B) violates the Commerce Clause. That provision requires no nexus between the defendant's interstate travel and his failure to register, which is a purely local act.

Clearly, under the dictates of *Lopez* and *Morrison*, some nexus must exist between the criminal activity and the interstate travel in order to satisfy the Commerce Clause.

**VII. TO THE EXTENT THAT SORNA FORCES STATES TO REGISTER SEX OFFENDERS BEFORE THEY HAVE AN OPPORTUNITY TO VOLUNTARILY COMPLY WITH THE LAW, THE ACT VIOLATES THE TENTH AMENDMENT**

As previously discussed, SORNA does not impose a duty upon sex offenders to register in jurisdictions where SORNA has yet to be implemented. In turn, states have no obligation to register sex offenders until they implement SORNA. However, if this Court finds that SORNA forces Maryland to register sex offenders before it has an opportunity to voluntarily comply with SORNA, then the Act violates the Tenth Amendment of the Constitution.

It is well settled that the Tenth Amendment prohibits the federal government from commandeering state officials into enacting or administering federal law. *Printz v. United States*, 521 U.S. 898, 935 (1997). Here, SORNA gives the states until July 2009 to implement SORNA. 42 U.S.C. § 16924. Although Congress has provided that those states who do not implement SORNA by this deadline will lose a percentage of their federal spending, 42 U.S.C. § 16925(a), this contingency does not render SORNA void under the Tenth Amendment. The Spending Clause, U.S. Const. Art. I, § 8, cl. 1, permits Congress to “condition[] receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” *South Dakota v. Dole*, 483 U.S. 203 (1987) (citation and quotation omitted). Nonetheless, if SORNA requires states to register sex offenders now, then this forces states, like Maryland, to accept federally required sex offender registrations before they have an opportunity to choose to adopt the SORNA provisions voluntarily. This is exactly the type of commandeering that the Tenth Amendment prohibits.

The Supreme Court’s opinion in *Printz*, 521 U.S. 898, provides helpful guidance here. In

*Printz*, the Court invalidated a law requiring local law enforcement officials to conduct background checks of prospective handgun purchasers. The Court held that “[t]he Federal Government may neither issue directives requiring the states to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” 521 U.S. at 935. The local officials in *Printz* are analogous to the law enforcement officials who run state sex offender registries. Just as Congress cannot compel law enforcement to conduct federally mandated background checks, it cannot compel local law enforcement to accept registrations from federally mandated sex offender programs.

### **CONCLUSION**

For all of the foregoing reasons and any others that may be raised during a hearing on this motion, Mr. Gould respectfully requests that this Honorable Court dismiss the Indictment.

### **REQUEST FOR HEARING**

Pursuant to Local Rule 105.6, Mr. Gould requests a hearing on this motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of November 2007, a copy of the foregoing Motion to Dismiss Indictment and Memorandum of Law in Support Thereof was sent via interoffice delivery to the following person:

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