No. 10-6549

In The Supreme Court of the United States

BILLY JOE REYNOLDS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The text of the Sex Offender Registration and Notification Act ("SORNA") resolves the issue before the Court. The statute provides: "The Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before enactment of this chapter or its implementation in a particular jurisdiction[.]" 42 U.S.C. § 16913(d). As the government concedes, the plain language of the statute delegates to the Attorney General the authority to decide whether or not to apply SORNA to pre-enactment sex offenders. (Gov. Br. 21.) This delegation is consonant with Congress' purpose to establish "a comprehensive national system for the registration" of sex offenders, 42 U.S.C. § 16901, and it is consistent with Congress' clear intent to implement SORNA carefully and over time.

The Attorney General exercised his authority under § 16913(d) by issuing an Interim Rule and regulations applying SORNA to pre-enactment offenders. Reading the statute as written, petitioner has a personal stake in the validity of the Interim Rule and all the regulations that make him subject to SORNA's reach. He therefore has standing to challenge the Interim Rule.

I. THE GOVERNMENT OFFERS NO VALID REASON TO REJECT THE PLAIN LANGUAGE OF THE STATUTORY TEXT.

The government agrees that an analysis of whether a sex offender is required to register under SORNA

begins with the statute, but the words "plain meaning" appear nowhere in its brief. And, although the government concedes that "[r]ead naturally . . . the first clause of Subsection (d) delegates to the Attorney General the authority to 'specify' *whether or not* SORNA's registration requirements apply to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction" (Gov. Br. 21 (emphasis added)), it nevertheless insists that the "clear and unqualified" registration requirements set forth in 42 U.S.C. §§ 16913(a)-(c) applied to Mr. Reynolds and other pre-enactment offenders upon SORNA's enactment. (Gov. Br. 16.) The government's argument cannot be squared with the statutory text of § 16913. Not only does the express and unequivocal language of § 16913(d) demonstrate that none of the registration requirements in subsections (a)-(c) applied to Mr. Reynolds unless and until the Attorney General exercised the authority granted in subsection (d), those requirements are facially inapplicable to Mr. Reynolds.

Even under the government's alternative interpretation of subsection (d), which gives the Attorney General the power to "require some but not all" pre-enactment offenders to register under SORNA (Gov. Br. 24), Mr. Reynolds still has standing to challenge the validity of the Interim Rule because the Attorney General did exercise his authority under subsection (d) and chose to require pre-enactment offenders to comply with SORNA.

A. The Government's Reasons for Rejecting the Text of § 16913(d) Are Neither Logical Nor Convincing.

In explaining its view of SORNA's meaning, the government makes a surprising concession: "Read naturally, therefore, the first clause of Subsection (d) delegates to the Attorney General the authority to 'specify' *whether or not* SORNA's registration requirements apply to sex offenders convicted before SORNA's enactment or implementation in a particular jurisdiction." (Gov. Br. 21 (emphasis added).) Although the government contends that this statement does not "linguistically or logically" support petitioner's argument (Gov. Br. 21), it plainly does. Petitioner has argued throughout that the text of § 16913(d) directs the Attorney General to specify whether or not the registration requirements apply to pre-enactment offenders like himself. (See, e.g., Pet. Br. 23-25, 27-29, 41-48.) The Attorney General made that specification in the Interim Rule, and petitioner has standing to challenge it.

The government tries to avoid the obvious consequences of its concession by arguing that, by its terms, SORNA applied to all sex offenders, unless and until the Attorney General "specified" otherwise. (Gov. Br. 16-25.) In the government's view, subsection (d) "does not negate the broad scope of SORNA's express, unqualified registration requirements and it does not implicitly exempt any sex offenders from their reach." (Gov. Br. 20.)

Nevertheless, the government cannot escape the plain meaning of the statutory text, which delegates to the Attorney General the authority to specify the scope and timing of the applicability of SORNA with respect to pre-enactment and pre-implementation offenders – a delegation that expressly pertains to every provision of SORNA (i.e., "this subchapter"). *See* 42 U.S.C. § 16913(d). Whether Congress delegated to the Attorney General the authority to apply SORNA to a class of offenders – as Mr. Reynolds contends – or to "require some but not all to register," – as the government posits (Gov. Br. 24) – the Attorney General exercised the authority granted in subsection (d) and issued the Interim Rule and made SORNA applicable to pre-enactment offenders. Because the Attorney General could have opted not to apply SORNA to pre-enactment offenders, but chose instead to make it applicable, Mr. Reynolds has standing to challenge whether that exercise of authority was proper and whether the Attorney General's specification was valid.

In any event, Mr. Reynolds agrees that Congress did not intend § 16913(d) to implicitly or explicitly "exempt" sex offenders from registration requirements or operate as a "carve out." (Gov. Br. 21.) As the government notes, Congress provided for a "carve out" or "exemption" in other areas of SORNA. (Gov. Br. 14, 21.) This strongly suggests that Congress, understanding the difference between an exemption and a delegation of authority to act in the future, chose the

latter in drafting § 16913(d). *See Russello v. United States*, 104 S.Ct. 296, 300 (1983).

To "exempt" from is "to take out," "to free from rule or obligation which applies to others," "excuse," "release." *Webster's New World College Dictionary*, 497 (4th ed. 2001). Subsection (d) does not "take out," "excuse" or "release" offenders whose convictions precede enactment or implementation of SORNA from its requirements. Rather, subsection (d) delegates to the Attorney General – the head of the federal agency responsible for nearly all of SORNA's provisions – the authority to determine whether, when and how to apply SORNA to those offenders. Subsection (d) provides a means to apply SORNA to offenders with pre-enactment and pre-implementation convictions.[1]

Where, as here, "the statutory language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms[.]" *Carr v. United States*, 130 S.Ct. 2229, 2241-2242 (2010) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). It was hardly absurd for Congress to delegate a legally problematic area to the Attorney General: such as the retroactive application of a criminal statute. (See Pet. Br. 47, n.24 (quoting *United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011) ("[G]iving the Attorney General authority to determine the statute's application to pre-enactment

[1] *Webster's New World College Dictionary*, at 69, defines "apply" as "to attach to."

offenders would allow an agency that is an expert in criminal law to negotiate the details of retroactivity and the interactions between the pre-existing state systems.").)[2]

Congress emphasized the establishment of a functioning, national system that coordinates and accommodates the mosaic of practices among jurisdictions. *See* 42 U.S.C. §§ 16901, 16912, 16919, 16923. The delegation to the Attorney General in subsection (d) is wholly consistent with Congress' goal of a comprehensive system for the registration of sex offenders, and it contributes to that system by providing a mechanism for SORNA's application to all offenders over time in a manner consistent with the future deadlines contained in SORNA's provisions. *See* 42 U.S.C. § 16924(a); SORNA, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600 (2006).

The government acknowledges the obvious problems of applying subsection (b)'s initial registration

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[2] As the *Johnson* court noted, "[a]t the time of [SORNA's] enactment, Congress would have had reason to be concerned that the registration requirements fit the category of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.'" *Johnson*, 632 F.3d at 927 n.78 (internal citations omitted). *See also Carr*, 130 S.Ct. at 2237 n.6 (citing *Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Given the well-established presumption against retroactivity and, in the criminal context, the constitutional bar on *ex post facto* laws, it cannot be the case that a statutory prohibition set forth in the present tense applies by default to acts completed before the statute's enactment.").

requirement to pre-enactment and pre-implementation offenders in light of the statutory text. (Gov. Br. 26-28 & n.12; 37 n.15.) It argues that, "[r]ecognizing this, Congress expressly delegated authority to the Attorney General in the second clause of Subsection (d) to set forth alternative timing requirements." (Gov. Br. 37 n.15.) The government's acknowledgement that, in drafting § 16913, Congress understood that compliance with plain text of subsection (b) would be an impossibility for pre-enactment or pre-implementation offenders who either have completed a sentence of imprisonment or, having not been sentenced to prison, are beyond the three business days permitted for initial registration in subsection (b)(2), further supports Mr. Reynolds' plain meaning interpretation. (Id.) Insofar as the second clause of subsection (d) reveals Congressional understanding that the precise registration requirements set forth in §§ 16913(a)-(c) were inapplicable to a certain class of offenders, *i.e.*, could not be applied to many pre-enactment and pre-implementation offenders absent alternative timing requirements, it reasonably follows that the delegation in the first clause of subsection (d) "to specify the applicability" means to determine the applicability of SORNA in the first instance.

Notably, the only action taken by the Attorney General pursuant to the authority granted in subsection (d) was the issuance of the Interim Rule, which stated, in its entirety, that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration

is required prior to the enactment of that Act." 72 Fed. Reg. 8894, 8896, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72) ("Interim Rule"). The summary introduction to the rule announced that "[t]he Department of Justice is publishing this interim rule to specify that the requirements of [SORNA] apply to sex offenders convicted . . . prior to the enactment of that Act." *Id.* at 8894.

As the government notes, the Attorney General thereafter issued guidelines, pursuant to the authority granted in the second clause of § 16913(d), which provide for the registration of some pre-enactment and pre-implementation offenders, *i.e.*, those "who remain in the system as prisoners, supervisees, or registrants, or who reenter the system because of a subsequent felony conviction."[3] (Gov. Br. 27-28 n.12 (citing 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-36.).)

The government claims, however, that subsection (d) merely delegates "discretionary authority on the Attorney General to modify or confirm the facially applicable registration requirements," and that it "does not negate the broad scope of SORNA's express, unqualified registration requirements [or] it does not

[3] Significantly, these guidelines call for the registration of "registrants," *i.e.*, sex offenders who already registered under state law – further proof that offenders, like Mr. Reynolds, who registered under state law prior to SORNA's enactment, had not complied with SORNA, as the government has argued. (Gov. Br. 37-38 n.15.)

implicitly exempt any sex offenders from their reach." (Gov. Br. 20.) The government's argument fails because its premise – that SORNA applied on its own terms to all sex offenders upon enactment because §§ 16913(a)-(c) are "clear and unqualified [and] do not distinguish between offenders convicted before or after" SORNA's enactment or implementation – is also flawed.[4] (Gov. Br. 16-17.)

The government is correct that subsection (d) does not negate SORNA's registration requirements. But, subsection (d) does expressly delegate to the Attorney General the authority to determine whether SORNA would apply to a certain class of sex offenders and prescribe rules for their registration – which plainly demonstrates that the requirements set forth in subsections (a)-(c) did not apply on their own terms. Indeed, if the requirements did apply on their own terms upon enactment to sex offenders with pre-enactment and pre-implementation convictions, subsection (d) would be superfluous. As it has in the past, this Court should maintain its "hesitan[cy] to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313,

[4] The government fails to explain why Congress would delegate to the Attorney General the authority to "confirm" the applicability of SORNA's registration requirements to pre-enactment offenders if the requirements "applied of their own force," as the government insists. (Gov. Br. 12.)

2330 (2011) (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)).

Subsection (d) was necessary to ensure SORNA's application to pre-enactment and pre-implementation offenders. Although the registration requirements set forth in §§ 16913(a)-(c) are "clear and unqualified" (Gov. Br. 16), they do not apply on their own terms to Mr. Reynolds. 42 U.S.C. § 16913(d).

Subsection (a) contains the general registration rule:

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

42 U.S.C. § 16913(a).

Although the government repeatedly cites only subsection (a) as the provision that requires sex offenders to register under SORNA (see Gov. Br. 5, 13, 16, 26, 31, 36, 45), it is subsections (b) and (c), however, that provide the specific registration requirements and define the duty to register under SORNA. It is well-settled that "a specific provision" (here subsections (b) and (c)) "controls one of more general application" (here subsection (a)). *Bloate v. United States*, 130 S.Ct. 1345, 1354 (2010) (quoting *Gozlon-Peretz v.*

United States, 498 U.S. 395, 407 (1991) (noting that "a specific provision controls one of more general application")). *See also Jicarilla Apache Nation*, 131 S.Ct. at 2330 ("When Congress provides specific statutory obligations, we will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated.").[5]

Subsection (b), entitled "Initial registration," provides that a "sex offender shall initially register (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the offender is not sentenced to a term of imprisonment." 42 U.S.C. § 16913(b). Subsection (c), entitled "Keeping *the* registration current," plainly refers back to the initial registration described in subsection (b) and requires

[5] The government criticizes Mr. Reynolds' reliance on this rule of statutory construction in arguing that subsection (d) "controls" subsections (a)-(c) because "[s]ubsection (d) is not directed at sex offenders and it therefore does not prescribe any sex offender's registration requirements . . . [,]" (Gov. Br. 22 n.9), but this Court's iteration of the principle in *Bloate* best makes Mr. Reynolds' point: "general language of a statutory provision, although broad enough to include it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Bloate*, 130 S.Ct. at 1354 (quoting *D. Ginsburg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). Although subsection (a) deals generally with the registration of all sex offenders, subsection (d) deals specifically with the registration of a particular class of sex offenders and therefore controls any determination of what was required of that class of offenders.

that an offender "appear in person" in a jurisdiction "involved pursuant to subsection (a)" to report "all changes in the information" in the registry "not later than 3 business days after each change of name, residence, employment, or student status." 42 U.S.C. § 16913(c) (emphasis added).

By their terms, subsections (b) and (c) do not apply to Mr. Reynolds. Subsection (b) expressly requires an offender to initially register prior to release from imprisonment or within three days of being sentenced – neither of which Mr. Reynolds could have done following SORNA's enactment, because he was released from prison in 2005. (J.A. 15.) Insofar as subsection (c) requires an offender to keep current the initial registration described in subsection (b), subsection (c) likewise does not apply to Mr. Reynolds. Absent action by the Attorney General under the authority granted in subsection (d), the requirements in §§ 16913(a)-(c) did not and could not have been applied to Mr. Reynolds and, therefore, gave rise to no specific duty to register under SORNA.

Seeking refuge from this conclusion, the government argues that compliance with state registration laws constitutes compliance with SORNA's registration requirements. (Gov. Br. 36.) Even if this were the case – which it is not – pre-enactment compliance with state registration laws (or with the Wetterling Act), though in some instances may be sufficient to satisfy SORNA's requirements, does not give rise to a statutory duty to register under SORNA. SORNA's

registration provisions alone define the duty to register thereunder.[6]

The government relies on *United States v. Dixon*, 551 F.3d 578, 585 (7th Cir. 2008), rev'd on other grounds, *sub nom. Carr*, 130 S.Ct. 2229 (2010), for the proposition that the duty to register under SORNA for "sex offenders who cannot comply with the timing requirements in Subsection (b) [is] simply [ ] to

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[6] Although the government maintains that Mr. Reynolds was able to comply with SORNA's registration requirements because he registered under state law prior to SORNA's enactment (Gov. Br. 37-38 n.15), as argued in the Brief for the Petitioner, a sex offender could not have been able "to comply with subsection (b) of [§ 16913]" until § 16913(b) became the law. (Pet. Br. 36.) To adopt a construction of the phrase "unable to comply with subsection (b)" as "unable to register, prior to SORNA, in the jurisdiction where convicted," would require the Court to accept what it rejected in *Carr* – that Congress cross-referenced subsection (b) for no reason and that the precise statutory text is "merely 'a shorthand way of identifying'" offenders who could not register in their respective jurisdictions. *See Carr*, 130 S.Ct. at 2235.

SORNA does not provide that compliance with a jurisdiction's existing registry or with the Wetterling Act (42 U.S.C. §§ 14071-14072) will constitute compliance with its registration requirements. In fact, SORNA was enacted to fill perceived gaps in existing state registries by requiring, *inter alia*, the uniform collection of information about sex offenders beyond that required under the Wetterling Act. Additionally, as noted in footnote 3, *supra*, the SMART guidelines, issued pursuant to the Attorney General's authority under the second clause of subsection (d), to provide for the registration of offenders unable to comply with subsection (b), call for the registration of offenders who already had been registered under state law. *See* 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-1636.

initially register within a reasonable time." (Gov. Br. 37-38 n.15.) However, "[t]here is no federal general common law." *O'Melveny & Myers v. FDIC Corp.*, 512 U.S. 79, 83 (1994) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). "Federal Courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Ill.*, 451 U.S. 304, 312 (1981) (citing *Erie*, 304 U.S. at 78). Accordingly, the government's reliance on the *Dixon* court's "analogy to contract offers that do not specify a deadline for acceptance," and the court's assumption based thereon that sex offenders unable to comply with SORNA "would have to register within a reasonable time," *Dixon*, 551 F.3d at 585, have no proper place in determining whether the statutory duty to register under SORNA applied to Mr. Reynolds and others to whom the specific registration requirements could not be applied.

B. The Definition of "Sex Offender" in 42 U.S.C. § 16911(1) Does Not Support the Government's Interpretation of § 16913(d).

The government also relies on § 16911(1)'s definition of the term "sex offender" as "an individual who *was* convicted of a sex offense," *see* 42 U.S.C. § 16911(1) (emphasis added), to support its claim that the term "sex offender" in §§ 16913(a)-(c) expressly refers to those convicted before SORNA's enactment. (Gov. Br. 17-19.) This definition does not support the

government's interpretation of § 16913 and has little significance in determining whether SORNA applies to pre-enactment offenders without specification by the Attorney General, because all sex offenders – even those convicted *after* SORNA's enactment – are individuals whose sex offense occurred in the past. As it did in *Carr*, the government argues here that the definition of "sex offender" as someone who "was convicted of a sex offense," § 16911(1), transforms otherwise plain statutory text to produce its desired interpretation. *See Carr*, 130 S.Ct. at 2236. As the Court recognized in *Carr*, the government's argument requires "contortions" and does not comport with the statute's actual text. *Id.*

The government's illustrations from predecessor legislation do not further its argument that the use of the word "was" in SORNA's definition of sex offender means that SORNA was intended to apply to pre-enactment offenders and, in fact, support Mr. Reynolds' argument. For example, the government points out that H.R. 4472, which was passed by the House prior to SORNA's enactment, defined "sex offender" as "an individual who, *either before or after the enactment of this Act*, was convicted . . . of a sex offense." (Gov. Br. 17 n.7 (emphasis added).) However, Congress did not include the phrase emphasized above in the final version of SORNA. The deletion reflects Congress' intent to exclude those convicted before enactment of SORNA in the definition of "sex offender" from the final version of SORNA.

Likewise, the government's reference to S. 1086, another predecessor to SORNA, supports Mr. Reynolds' argument. (Gov. Br. 17 n.7.) The government also attempts to use the language of S. 1086, which defined a "covered individual" as one who "has been convicted of a covered offense[,]" together with this Court's statement in *Carr* that "numerous federal statutes use the past-perfect tense to describe one or more elements of a criminal offense when coverage of pre-enactment events is intended," to demonstrate that Congress intended SORNA to apply to offenders with pre-enactment convictions. (Gov. Br. 17 n.7 (quoting *Carr*, 130 S.Ct. at 2237).) However, the fact that Congress chose not to use the past-perfect tense in SORNA, "provides powerful evidence" that SORNA's registration requirements were prospective at enactment. *Carr*, 130 S.Ct. at 2237.

C. The Government Incorrectly Suggests That Mr. Reynolds' Interpretation of § 16913 Rests on a Negative Inference or Implication.

The government describes Mr. Reynolds' argument to be that the first clause of subsection (d) "implicitly negated" the applicability of the registration requirements set forth in §§ 16913(a)-(c) for pre-enactment offenders (Gov. Br. 19-20, 21), and argues that the Court cannot rely on a "mere negative inference . . . to establish a disposition that has no basis in the [] text, and that does obvious violence to the [] structural features." (Gov. Br. 33 (citing *Wal-Mart*

Stores, Inc. v. Dukes, 131 S.Ct. 2511, 2546 (2011) and *Corley v. United States*, 129 S.Ct. 1558, 1573 (2009)).) The rule from *Dukes* and *Corley* that the government seeks to employ simply does not apply here, because Mr. Reynolds relies on the *positive* effect of subsection (d). He does not argue that subsection (d)'s inverse transforms the meaning of subsection (a). Subsection (a) makes a general, positive pronouncement, and subsection (d), by its terms, limits the applicability of subsection (a) to pre-enactment and pre-implementation offenders.

The fact that the proper interpretation of subsection (d) has negative implications, as Justice Alito indicated in his dissenting opinion in *Carr*, 130 S.Ct. at 2246 n.6 (Alito, J., dissenting) ("[t]he clear negative implication of [the delegation in 16913(d)] is that, without such a determination by the Attorney General, the Act would not apply to those with pre-SORNA sex-offense convictions"), does not necessarily mean that the provision's language "implicitly negate[s]" the requirements of other subsections of § 16913. Indeed, as Justice Alito also stated in *Carr*, the grant of authority to the Attorney General in § 16913(d) is "SORNA's *explicit* grant of authority." *Id.* (emphasis added). "When SORNA was enacted, Congress elected not to decide for itself whether the Act's registration requirements – and thus § 2250(a)'s criminal penalties – would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that

question." *Carr*, 130 S.Ct. at 2246 (Alito, J., dissenting).

In any event, Mr. Reynolds' interpretation of § 16913 does not rely on a negative implication or inference; rather, he urges the Court to give effect to subsection (d)'s explicit and unequivocal delegation of authority to the Attorney General to determine whether to apply SORNA to pre-enactment and pre-implementation offenders. 42 U.S.C. § 16913(d).

In sum, when the statutory structure and text of § 16913 are viewed as a whole, as they must be, *see generally Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989), it is clear that action by the Attorney General under the delegation in subsection (d) was needed to make SORNA applicable to sex offenders, like Mr. Reynolds, who were convicted prior to SORNA's enactment and who could not initially register in compliance with § 16913(b) – not only because the plain text of the first clause of subsection (d) so provides, but because the registration requirements set forth in §§ 16913(a)-(c) did not, on their own terms, apply to such offenders and, therefore, did not independently give rise to a duty to register under SORNA.

II. THE DELEGATION OF AUTHORITY TO THE ATTORNEY GENERAL TO SPECIFY THE APPLICABILITY OF ALL OF SORNA'S REQUIREMENTS TO PRE-ENACTMENT OFFENDERS SERVES THE PURPOSE OF THE STATUTE AND THE GOVERNMENT OFFERS NO REASONABLE BASIS TO REJECT THE PLAIN MEANING OF § 16913(d).

The government asks the Court to reject the plain meaning of § 16913(d) because, if petitioner's interpretation is correct, then (1) SORNA would not have been applicable upon enactment to any existing sex offenders, or to any new sex offenders prior to SORNA's implementation, until the Attorney General acted; and (2) the Attorney General could have declined to act at all, likewise leaving pre-enactment and pre-implementation offenders beyond SORNA's reach.[7] (Gov. Br. 23.) In the government's view, "it is unreasonable to think that Congress overhauled federal registration law" only to leave these offenders uncovered unless and until the Attorney General exercised the authority granted in the first clause of subsection (d). (Gov. Br. 32.) However, the purpose of, and impetus for, SORNA was to create, over time, a system that was comprehensive and national – not to

[7] Significantly, the government's hypothetical is just that because the Attorney General did act when he issued an Interim Rule specifying SORNA's applicability to pre-enactment offenders on February 28, 2007, and issued the Final Rule effective January 28, 2011, codified at 28 C.F.R. § 72.3.

create a system that would necessarily be immediately applicable to all offenders.[8]

The government claims, however, that Congress' "primary interest" in enacting SORNA was "in locating and registering the approximately 100,000 'lost' sex offenders, all of whom were (by definition) pre-enactment offenders." (Gov. Br. 14.) Elsewhere, the government acknowledges the difficulties of registering many pre-enactment offenders under SORNA and that the steps taken by the Attorney General to date (now nearly five years since SORNA's enactment) only provide for the registration of *some* pre-enactment offenders, *i.e.*, those "who remain in the system as prisoners, supervisees, or registrants, or who reenter the system because of a subsequent felony conviction." (Gov. Br. 27-28 n.12 (citing 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-36).) Under the circumstances, it would be unreasonable to adopt the government's interpretation here and ignore the statutory language of § 16913(d) simply because giving it its plain meaning would mean that SORNA could not be used upon enactment to locate

[8] Indeed, if Congress had envisioned immediacy, it would not have provided for the Wetterling Act to remain in effect for several years after SORNA's enactment. Although implementation by each of the jurisdictions has proceeded more slowly than Congress may have anticipated, it is through the delegation in subsection (d) that the Attorney General is able to help accomplish SORNA's purpose. *See*, *e.g.*, 73 Fed. Reg. at 38,046, 38,063-38,064; 76 Fed. Reg. at 1635-1636.

and register the approximately 100,000 "lost" sex offenders.

The fact that the Attorney General could have declined to act at all, or could have exercised the authority granted in subsection (d) to specify that SORNA did not apply to pre-enactment and pre-implementation, also fails to provide a reasonable basis for rejecting the plain meaning of subsection (d). The government criticizes Mr. Reynolds' interpretation of § 16913(d) because it conditions criminal liability for pre-enactment and pre-implementation offenders upon action by the Attorney General. (Gov. Br. 21-23.) A significant flaw in the government's critique, however, is that its own alternative interpretation of § 16913(d) also gives the Attorney General the unfettered authority to determine the scope of SORNA's applicability and of criminal liability under SORNA:

> Under his delegated authority in Subsection (d), the Attorney General could reaffirm the statutory requirement that every sex offender convicted before SORNA's enactment or its implementation in a particular jurisdiction register; *he could require some but not all to register* (or comply with some but not all of the registration requirements); he could do nothing at all or wait several years before acting; or he could change his mind at any given time or over the course of different administrations.

(Gov. Br. 24 (emphasis added).)

As the above-emphasized language demonstrates, even under the government's interpretation of subsection (d), the Attorney General also has the power to determine the scope of SORNA's applicability for pre-enactment and pre-implementation offenders. Therefore, although the government criticizes petitioner's interpretation as an implausible expression of congressional faith in the Attorney General, its own interpretation involves a similar leap of faith *vis à vis* the Attorney General. (Gov. Br. 21-23.) Under both Mr. Reynolds' and the government's interpretation of subsection (d), the Attorney General could choose not to apply SORNA's requirements to all sex pre-enactment and pre-implementation offenders.

As noted in the Brief for the Petitioner, Congress delegated authority in subsection (d) to the Attorney General, who ultimately is responsible for SORNA's implementation and effectiveness. (See Pet. Br. 43-47; App. A, App. 1-25.) The Attorney General is also an institutional partner in law enforcement, who regularly communicates and works with Congress in developing legislation and is "the central agency for enforcement of federal laws" in order to register "all" sex offenders.[9] U.S. Dep't of Justice, *About DOJ*,

[9] The Attorney General's Office has within it an Office of Legislative Affairs ("OLA"), which works with Congress on developing legislation and handles "Congressional affairs, including requests for information." Office of Legislative Affairs, U.S. Dep't of Justice, *Congressional Affairs*, http://www.justice.gov/open/congress.html (last visited July 24, 2011). The OLA "articulates the Department's position on legislation proposed by Congress"

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http://www.justice.gov/02organizations/about.html (last visited July 22, 2011). In sum, the Attorney General works closely with Congress in developing and ensuring the enforcement of federal criminal laws and, under the circumstances, Congress reasonably decided to delegate to the Attorney General the authority to determine whether and how SORNA would be applied to pre-enactment offenders.[10]

The government asks the Court to ignore the plain language of § 16913(d) because, it argues, Congress could not have meant what it stated in subsection (d): that the "Attorney General shall have the

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and coordinates the Department's responses to "inquiries" from members of Congress and congressional staff. *Id.* Furthermore, the OLA uses the Department of Justice's Records Management System (RMS) "to control and track all legislative requests originating within or outside the Department and to control other related items in RMS, when appropriate for internal coordination needs," including tracking pending congressional bills. *Id.*

[10] The government has difficulty understanding that, if "the Attorney General's exercise of his delegated authority would obviously lead him to apply SORNA to [pre-enactment] offenders . . . why Congress would have enacted a provision that did nothing more than delay the Act's effectiveness for the entire existing sex offender population." (Gov. Br. 32 n.14.) As explained in the Brief for the Petitioner (Pet. Br. 40), had Congress made SORNA immediately applicable to pre-enactment offenders, it risked that its "comprehensive national system for the registration of [sex offenders]," 42 U.S.C. § 16901, would be ineffective as to these offenders. Given SORNA's objectives, the risk of implementing an ineffective system far outweighed the risk that the Attorney General would decline to act or would exercise his discretion and not apply SORNA to any pre-enactment or pre-implementation offenders.

authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). Not only is the statutory language of SORNA's delegation to the Attorney General clear, but the delegation fits with Congress' goal to establish an effective system. The effectiveness of SORNA relies upon the Attorney General for nearly all of SORNA's implementation and administration from the day of enactment forward. (See Pet. Br. App. A; App. 1-25.)

It was not surprising, therefore, that Congress delegated to the chief law enforcement officer for the United States the responsibility for determining whether, when, and how pre-enactment and pre-implementation offenders would be subject to SORNA and, consequently, to criminal prosecution. Congress' delegation to the Attorney General is in concert with the overall purpose of SORNA to create a system of tracking and monitoring the location of sex offenders. The fulfillment of SORNA's purpose is not dependent on its immediate application to all of the approximately 500,000 sex offenders upon enactment as the government would have it.

The government misperceives Congress' goal in enacting SORNA as one that was exclusively fixated on immediacy. (Gov. Br. 19 n.8, 32, 35.) Congress aimed higher, however, envisioning a comprehensive and national system and not one that necessarily provided for the registration of all pre-enactment or

pre-implementation sex offenders upon SORNA's enactment. As this Court recognized in *Carr*, "[b]y facilitating the collection of sex offender information and its dissemination among jurisdictions, [SORNA's] provisions, not § 2250, stand at the center of Congress' effort to account for missing sex offenders." *Carr*, 130 S.Ct. at 2241. The fundamental goal of SORNA, which the delegation in subsection (d) furthers, is to provide the Attorney General with the tools to establish and administer such a system.

By delegating to the Attorney General authority regarding the applicability of SORNA to offenders convicted before enactment, Congress sought to ensure the collection and dissemination of complete and uniform information about each offender. The delegation also served to ensure flexibility in responding to unforeseen problems that might arise in light of the overlapping registration laws that already existed at the state and federal levels, and obviated the need for Congress to legislate anew as problems related to retroactive application of SORNA might arise. The ability of the Attorney General to handle such problems administratively, through regulation, allowed for flexibility and faster resolution than the legislative process would allow. Simply put, Congress did not want collateral enforcement issues to interfere with the ultimate goal of a functioning national offender registry, and the delegation of authority in subsection (d) is reasonably viewed as furthering Congress' aim.

CONCLUSION

For the foregoing reasons and those stated in the Brief For The Petitioner, the Court should reverse the decision of the Court of Appeals for the Third Circuit and remand for consideration of the merits of Mr. Reynolds' challenge to the validity of the Attorney General's Interim Rule.[11]

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[11] If the Court is inclined to follow the government's suggestion to affirm on any basis, including that the Interim Rule was validly issued (Gov. Br. 46 n.21), Mr. Reynolds respectfully requests that he be permitted to file a supplemental brief specifically addressing the rule's validity.