No. 08-1301

In the Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief is remarkable in one respect: Although this case is one of statutory construction, the government dismisses outright the statutory text. It thus insists that Congress's choice of verb tense is "not very revealing" (U.S. Br. 17); that "travels" should be read to mean "previously traveled" (*id*. at 25); and that "is required to register under [SORNA]" really means "was convicted of a sex offense" (*id*. at 19-20). These linguistic transmutations, upon which the government hinges its case, should not prevail. The declaration that "[w]hen *I* use a word * * * it means just what I choose it to mean—neither more nor less" was difficult enough to credit when it came from Humpty Dumpty in casual conversation (Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking-Glass* 186 (Hugh Haughton ed., Penguin Classics 1998) (1865)); it is not a plausible basis for the interpretation of a statute.

The government engages in a similarly exhausting set of verbal gymnastics while trying to save SORNA from unconstitutionality under the Ex Post Facto Clause. It thus maintains that a defendant's failure to register in conformity with the *existing* requirements of the Wetterling Act is punishable as a *new* offense subject to SORNA's greatly enhanced penalties. And it candidly acknowledges that SORNA *is* unconstitutional unless the Court reads into the statute a "reasonable time to comply" limitation (U.S. Br. 40) that appears nowhere in the statutory text—and that the Attorney General could have established by regulation, but did not. The government thus urges the Court to engage in the very sort of judicial lawmaking that it has long eschewed. Here,

the correct approach to SORNA is the easy one: The Court should read the statute to mean what Congress plainly wrote, an outcome that avoids both unconstitutionality and the need for creative judicial tinkering.

A. Section 2250(a)(2)(B) Applies Only To Persons Who Travel In Interstate Commerce After The Enactment Of SORNA.

It is enough to resolve this case that the government has no answer to our argument from SORNA's plain language. To begin with, the government does not, and surely could not, deny that the ordinary meaning of the verb "travels" encompasses travel occurring now or in the future, and not long-completed travel that occurred in the past. See Pet. Br. 17-21. The government thus does not cite, and presumably is unaware of, *any* decision of *any* court (other than the holding below in this case) interpreting a criminal statute's use of a present-tense verb to reach pre-enactment, completed conduct. The government does assert more generally that Congress's choice of verb tense says very little about the temporal reach of the statute in which the verb appears, but the Court has already rejected that improbable proposition: Use of the present tense is "[o]ne of the most striking indicia of [a statute's] prospective orientation." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987).[1]

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[1] The government dismisses decisions like *Gwaltney* on the ground that they interpreted laws in which present-tense verbs were used in relation to "another act mentioned in the statute." U.S. Br. 18 n.5. But even if that were so, we note below that § 2250(a)(2) itself uses "travels" in relation to the present requirement to register under SORNA.

The government nevertheless attempts to escape from this ordinary usage by observing that statutory words must be read in context. U.S. Br. 17. But while that surely is true, we doubt that "context" can ever justify reading "up" to mean "down," or "travels" as "traveled long ago." And even if it could, we showed in our opening brief that the statutory context confirms our reading: *Every* verb in § 2250(a)(2)(B), and in § 2250(a) more generally, is written in the present tense so as to be forward looking. Pet. Br. 22-23. It is nonsensical to read at least some of these verbs as referring to past conduct; for example, we noted in our opening brief that "resides in Indian country" simply cannot be taken to mean "resided for many years in Indian country but left, never to return." Pet. Br. 23. So if, as the government says, "words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (U.S. Br. 17-18 (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)), the government cannot prevail here.

That is especially so because other provisions of the Adam Walsh Act, in notable contrast to § 2250(a)(2)(B), revised the definitions of crimes that *are* written in the past tense. Section 206 of the Adam Walsh Act, amending 18 U.S.C. § 2252(a)(2), punishes any person who "knowingly receives, or distributes, any visual depiction * * * that *has been mailed*, or *has been shipped* or *transported* in or affecting interstate or foreign commerce" (emphasis added). Section 2252A(a)(2), amended by the same section of the Walsh Act, similarly punishes any person who "knowingly receives or distributes any child pornography that *has been mailed* * * * or any material that contains child pornography that *has been mailed*" (emphasis added). And SORNA's own af-

firmative defense specifies past conduct as a trigger, referring to circumstances that "prevented" an individual from complying with SORNA when that individual "complied as soon as such circumstances ceased to exist." 18 U.S.C. § 2250(b)(1), (3). Congress accordingly knew very well how to reach past conduct and chose not to do so in § 2250(a)(2)(B). The Court should honor that choice. See, *e.g.*, *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066 (2009).[2]

2. The government also draws support from what it terms its "sequential reading" of § 2250(a)'s elements, under which a sex offender may be convicted of SORNA's failure-to-register offense only if he or she, in order, (1) is required to register under SORNA, (2) travels in interstate commerce, and (3) then knowingly fails to register under SORNA. U.S. Br. 18-21. This understanding of the statute is perfectly plausible, if not compelled by the statutory language, and we do not now dispute it. But here, too, the government's reading confirms our understanding of SORNA.

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[2] The Dictionary Act, 1 U.S.C. § 1, which allows for consideration of the surrounding statutory text or related statutory provisions as an aid to construction (see *Rowland* v. *Cal. Men's Colony*, 506 U.S. 194, 199-200 (1993)), therefore supports our reading. In arguing to the contrary, the government points to the contrast between SORNA and a 1962 statute that requires registration by a person who receives a gambling device "knowing that it has been transported in interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962." U.S. Br. 21 n.8 (citing 15 U.S.C. § 1173(a)(3)). But that statute proves our point: It is written in the past-perfect form ("has been transported"), and it is only to restrict the law's retrospective scope that Congress added the "after the effective date" limitation.

The first of these elements, which appears in § 2250(a)(1)—the element the government maintains must occur first in time—is that the defendant "is required to register under the Sex Offender Registration and Notification Act." And on the face of it, under any ordinary understanding of this language, one "is" required to register "under" SORNA only *after* SORNA's enactment. The government gamely disagrees, asserting that the statutory requirement of an obligation to register "under [SORNA]" actually "is a shorthand way of identifying those persons who have a conviction in the classes identified by SORNA." U.S. Br. 19-20. But that very simply is not what the statute says, and the Court is "not free to rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005).[3]

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[3] Reading "under [SORNA]" in § 2250(a)(1) to mean "committed a sex offense in the past" has further ramifications. Section 141 of the Adam Walsh Act not only created 18 U.S.C. § 2250, but also amended 18 U.S.C. § 3583(k) to provide: "If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under [various sex offense chapters], the court shall revoke" supervised release and impose five years' further imprisonment. This provision's "required to register under [SORNA]" language mirrors § 2250(a)(1), and its present-tense "commits any criminal offense" is analogous to the present-tense "travels" in § 2250(a)(2)(B). One accordingly would expect a similar reading of the analogous provisions in §§ 2250(a)(1)-(2) and 3583(k). But reading § 3583(k) as the government reads § 2250(a) would mean that someone who had been convicted of a sex offense and then committed one of the enumerated criminal offenses pre-SORNA would, upon SORNA's enactment, be subject to five years further imprisonment. Even apart from the ex post facto problems in such a construction, it is a most improbable reading of Congress's intent.

And although it should not be necessary to gild this lily, the extent of the government's departure from SORNA's plain meaning is again confirmed by additional statutory context. Congress in fact used a formulation that comes close to the government's reading of § 2250(a)(1)—but it did so in § 2250(a)(2)(A), the portion of SORNA's *second* element that is directed to federal sex offenders, where it made the statute applicable to a person who "is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law."[4] In notable contrast to this formula, however, § 2250(a)(1) refers not to a person who "is a sex offender," but to one who "is required to register under [SORNA]." This must refer to the registration requirement that came into being only after SORNA's enactment.

Indeed, the government itself recognizes that the third element of SORNA's criminal offense, appearing in § 2250(a)(3)—which refers to a person who "knowingly fails to register or update a registration as required by [SORNA]"—"plainly requires conduct that occurs after SORNA applies: a failure to comply with its registration requirements." U.S. Br. 20. Yet the language of the first element ("is required to register under [SORNA]") is virtually identical to that of the third ("fails to register * * * as required by [SORNA]").[5] The first element, like the third, there-

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[4] Actually, even this language does not get quite as far into the past as the government would like; "is a sex offender as defined for purposes of [SORNA]" is a present-tense formulation that focuses on the offender's current legal status.

[5] That Congress used the word "under" as a substitute for "as required by" in the first but not the third element plainly is a consequence of its *already* having used the word "required" elsewhere in the first element; it would have been very awk-

fore also could not be satisfied until after SORNA's enactment. See *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301 (2009) (interpreting similar structure in adjacent provisions similarly). And because the government posits that the relevant interstate travel must have occurred *after* the first element of the crime (attachment of the SORNA registration requirement), a SORNA conviction must be premised on post-SORNA travel.[6]

3. The government also maintains that our reading of SORNA creates an "anomaly" because it would permit prosecution of all unregistered sex offenders who were convicted under federal or tribal law, but only those unregistered sex offenders convicted under state or foreign law who "traveled in interstate or foreign commerce after SORNA's enactment." U.S. Br. 21-22. But this argument proves too much. SORNA requires most sex offenders to register whether convicted under state or federal law, but

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ward for paragraph (a)(1) to say "is *required* to register as *required* by the Sex Offender Registration and Notification Act."

[6] The government reprises our example of the sex offender who crossed state lines as an infant, suggesting that prosecution of such an offender is allowed by our but not its reading of SORNA. U.S. Br. 27. That is not so; we have no quarrel with the government's "sequential reading" of SORNA's elements. (The government had not committed itself to such a reading before the filing of its brief in this Court.) But because the government starts the sequence with events occurring before SORNA's enactment, its approach still leads to very peculiar results. For example, under its reading a person who committed a sex offense in 1950 and crossed state lines once to see his dentist in 1956 is subject to prosecution for failure to register under SORNA. It is not at all clear why Congress would have regarded interstate travel taking place fifty years before SORNA's enactment as a logical trigger for criminal liability under SORNA.

under any reading of the statute it allows for federal prosecution only of a subset of those who fail to register. The government's own approach, for example, draws distinctions that might be thought arbitrary. Its "sequential" reading does not allow for federal prosecution under SORNA of offenders who crossed state lines before committing their offenses (even if they crossed state lines *to* commit the offense), or who never crossed state lines at all—meaning that an offender who moves from Kansas City, Missouri, to Kansas City, Kansas is subject to federal prosecution, but one who moves from Montauk to Buffalo is not. Such statutory line drawing is unavoidable. See, *e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977).

It may be added that distinguishing between federal and state offenders in a federal criminal statute, as Congress expressly did in SORNA, is not anomalous at all. The government itself has recently explained why Congress would have given the United States greater responsibility to police the activities of federal than of state sex offenders: "[A]s a result of the federal government's incarceration of [sexually dangerous] persons, Congress could reasonably conclude that the government has a special responsibility to protect the public from the dangers that could ensue from the government's own release of them." Brief for the United States at 20, *United States* v. *Comstock*, No. 08-1224 (2009) (defending the civil commitment provisions of the Adam Walsh Act). "Moreover, the federal government often has a continuing relationship with prisoners who are released from federal prison * * * as a result of provisions for supervised release." *Ibid.* And in addition to these custodial considerations, Congress might have thought that offenders with federal-law convictions "are the people who are most likely to violate Federal

laws based on the Commerce Clause in the future * * *." Transcript of Oral Argument at 24:6-8, *United States* v. *Comstock*, No. 08-1224 (Jan. 12, 2010) (argument of Solicitor General Kagan). It therefore is not surprising that SORNA's criminal provision applies universally to federal, but not to state, offenders who fail to register.

4. The government resorts finally to what it describes as the purpose of SORNA. Relying almost exclusively on a House Judiciary Committee report, the government contends that in enacting SORNA Congress was most concerned with "the problem of 'missing' sex offenders," which "typically" occurs when offenders move from one State to another. U.S. Br. 23 (citation omitted). From this, the government concludes that Congress intended to subject to SORNA criminal prosecution sex offenders who traveled in interstate commerce before SORNA's enactment. *Id.* at 22-25. But this argument founders for an obvious reason: "[V]ague notions of a statute's 'basic purpose' are * * * inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993). Even a clear expression in the legislative history could not overcome the wholly unambiguous present-tense text that Congress chose to place in SORNA—let alone a vague snippet of history that says nothing at all about SORNA's criminal provision in general or the question of pre-SORNA travel in particular.

More than that, though, the government's reading of the history is wrong on its own terms. As the government acknowledges (U.S. Br. 24 n.9), when the House report upon which it relies was written the House bill expressly did *not* reach pre-SORNA interstate travel. Instead, it allowed for prosecution

of a person who "receives a notice from an official that such person is required to register under [SORNA] and— * * * thereafter travels in interstate * * * commerce." H.R. Rep. No. 109-218, pt. 1 (2005), at 9. As this language unambiguously refers to post-SORNA conduct—even the government appears to agree that notification of the SORNA registration requirement could occur only after SORNA's enactment, with the necessary travel to occur after that—the one thing we know for certain is that the authors of that report did *not* believe that the problem of "missing" offenders it described should be addressed through prosecution of persons who traveled in interstate commerce before the SORNA registration requirement attached. The government therefore is manifestly wrong in declaring that a sex offender who traveled in interstate commerce prior to SORNA's enactment has "engaged in the very conduct that motivated congressional action" (*id.* at 25) and that petitioner himself "is a paradigmatic example" of the problem addressed in the House report (*id.* at 23). If the government were correct, the authors of that report surely would not have expressly excluded persons like petitioner from the scope of the bill.

The government does halfheartedly suggest that tweaks to this language in subsequent versions of SORNA support the inference "that Congress concluded it could more effectively reach missing sex offenders by making the statute applicable to pre-SORNA travel." U.S. Br. 24 n.9. But this proposition, too, is wrong. The initial bill stated, in relevant part, that "[w]hoever receives a notice from an official that such person is required to register under [SORNA] and * * * thereafter travels in interstate or foreign commerce" commits an offense. H.R. 3132, 109th

Cong. § 151 (as reported by H. Comm. on the Judiciary, Sept. 9, 2005). A subsequent House version simplified this language to state: "Whoever is required to register under [SORNA] and * * * thereafter travels in interstate or foreign commerce" commits an offense. H.R. 3132, 109th Cong. § 151 (as passed by House, Sept. 14, 2005). That bill died in the Senate, but was reintroduced in the House still containing "thereafter." H.R. 4472, 109th Cong. § 151 (as introduced in House, Dec. 8, 2005). After neither committee markups nor hearings, the bill was introduced on the floor with "thereafter" deleted, whereupon it promptly passed on March 8, 2006, without further amendment. 152 Cong. Rec. H662, H677 (daily ed. Mar. 7, 2006).[7] Section 2250(a)(1) and (a)(2)(B) remained unchanged in the enacted statute.

Against this background, it evidently is the government's suggestion that the move from (1) "receives a notice from an official that such person is required to register" to (2) "is required to register" was intended to work a fundamental change in the temporal reach of the statute, even though that change did *not* necessitate removal of "thereafter" from "thereafter travels." On the face of it, this is a most improbable proposition. The far more likely explanation is that Congress sought to remove the actual-notice dimension of the first element and then, much later, simply dropped the "thereafter" language

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[7] Deletion of the "thereafter travels" language was not a substantive amendment, as the government implicitly concedes in adopting its "sequential" reading of SORNA. Indeed, all of the amendments made at the same time were nonsubstantive. Compare H. 4472, 109th Cong. (as introduced in House, Dec. 8, 2005) with H. 4472, 109th Cong. § 151 (as passed by House, March 8, 2006).

for stylistic reasons as superfluous—as it in fact was, given the statute's use of the present-tense "travels." *United States* v. *Husted*, 545 F.3d 1240, 1247 (10th Cir. 2008).[8]

As we explained in our opening brief (at 31-33), Congress would have seen no reason to distinguish between unregistered offenders who had traveled in interstate commerce prior to SORNA's enactment and those who had not traveled interstate at all. The government disagrees, asserting that Congress acted out of concern about pre-SORNA interstate travel. U.S. Br. 25. But as the House report excerpt quoted by the government itself suggests, enactment of SORNA was motivated by the *fact* of nonregistration, however accomplished. Congress responded to this problem by using SORNA to close registration "loopholes" through the creation of uniform registration standards that facilitate cooperation between the States in the tracking of sex offenders. See Pet. Br. 29-31. *Post*-SORNA travel could allow evasion of

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[8] The government does point to one substantive amendment to SORNA: The version of the bill introduced in the House included a longer maximum penalty than the version Congress ultimately passed. U.S. Br. at 24 n.9. But this change occurred in the Senate after the House passed a version of SORNA that did not include the word "thereafter." Compare H.R. 4472, 109th Cong. § 151 (as received by Senate, March 9, 2006) (providing for maximum twenty year penalty) with H.R. 4772, 109th Cong. § 151 (as passed by Senate, July 20, 2006). The substantive amendment to which the government points—which, after all, *diminished* the extent of criminal liability—thus occurred in a different house and at a different stage in the legislative process from the deletion of "thereafter." It lends no support to the government's claim that the prior deletion of "thereafter" was something other than a stylistic change intended to avoid redundancy.

these new standards and therefore was made the trigger for SORNA prosecution. The government makes no response to this point.

5. Finally, although the clarity of the statutory text makes resort to canons of construction unnecessary, the ordinary rules of statutory interpretation in fact favor our reading. The government's insistence that the presumption against retroactivity is wholly subsumed in the criminal context by the Ex Post Facto Clause simply ignores *Johnson* v. *United States*, 529 U.S. 694, 701 (2000), where the Court stated that the retroactivity presumption and the constitutional rule are "[q]uite independent" of one another. And because neither the statutory language (which even the government does not contend actually *favors* its reading) nor the legislative history (which says nothing specific about the question in this case at all) tips the matter in the government's direction, lenity principles require that any doubt be resolved in favor of petitioner.[9]

[9] The government's seeming suggestion that the rule of lenity applies only when the defendant's conduct was innocuous (U.S. Br. 29) is wrong. See, *e.g.*, *Williams* v. *United States*, 458 U.S. 279 (1982) (applying the rule of lenity to a check kiting scheme). And the "wrongfulness" of petitioner's conduct is in any event hardly "incontestable," as the government would have it (U.S. Br. 30); civil registration requirements for sex offenders, let alone criminal penalties for failure to register, were virtually unknown until recent years.

B. The Ex Post Facto Clause Precludes Prosecution Under SORNA Of A Person Whose Travel In Interstate Commerce Predated SORNA's Enactment.

We are in agreement with the government on the basic ex post facto principles that apply here. We recognize, as the government maintains, that the Ex Post Facto Clause does not bar prosecution when conviction requires proof of an element occurring after enactment of the statute creating the offense. And the government agrees with us that the Ex Post Facto Clause *is* violated when "a defendant is literally unable to avoid liability by altering his conduct." U.S. Br. 38. The government, however, cannot reconcile its application of SORNA with these principles.

1. In our opening brief, we showed that the prosecution of petitioner was constitutionally dubious in one of two respects: either he was convicted under SORNA for a past failure to comply with the Wetterling Act, an outcome that improperly inflicted a greater punishment "than the law annexed to the crime, when committed" (*Johnson*, 529 U.S. at 699 (citation omitted)); or he was given no opportunity to comply with the new SORNA requirement. See Pet. Br. 36-37. In its brief, the government appears to have placed its chips on the theory giving rise to the second of these problems, declaring that "Section 2250(a) does not punish a violation of the registration requirement provided by the Wetterling Act, but rather a violation of the new registration requirement imposed by SORNA." U.S. Br. 37.

On examination, however, the government's basis for prosecuting SORNA cases—and its understanding of SORNA's requirements—is considerably less clear. It agrees with us "that defendants are not

liable under Section 2250 for failing to comply with [SORNA's] heightened [registration] requirements 'during the interval when States are not [yet] compliant with SORNA.'" U.S. Br. 37. It therefore declares that, "[t]o the extent that SORNA requires a sex offender to register in a way that the Wetterling Act did not, but the relevant State has not yet come into compliance with SORNA's enhanced registration requirements, a sex offender could invoke the affirmative defense in Section 2250(b)." *Id*. at 37-38. It continues, however, that "when a defendant fails to avail himself of an existing state registration system, he has violated SORNA's requirements, as applicable to him." *Id*. at 38. "And that conduct," the government concludes, "is not simply a Wetterling Act violation." *Ibid*.

Even on a second reading, this account leaves in some doubt exactly what conduct the government believes is currently required by SORNA. As we understand it, though, in the government's view (1) prosecution for failure to comply with the registration requirements actually created by SORNA currently is precluded by the impossibility of complying with those requirements (in every State of the Union but Ohio); but (2) a defendant nevertheless may be prosecuted *under SORNA*—and subjected to SORNA's greatly enhanced penalties—for failure to register after SORNA's enactment pursuant to the *pre-SORNA Wetterling Act's registration procedures*. For reasons both statutory and constitutional, this reading of SORNA's criminal provision is problematic.

First, the government's reading distorts the statutory language beyond recognition. The SORNA crime includes the elements of being required to, and

knowingly failing to, register "under" and "as required by" SORNA. SORNA details both the content of the information to be provided by a SORNA registrant and the means by which registration is to be accomplished (see 42 U.S.C. §§ 16914, 16916)—differing in both respects from the pre-existing Wetterling Act regime.[10] See Pet. Br. 4-6. Yet nothing in SORNA's language or structure suggests that, when registration "as required by [SORNA]" is impossible, Congress intended to substitute "as required by the Wetterling Act," attaching the new ten-year penalty to a failure to comply with the pre-SORNA requirements. The statutory language nowhere provides for such an outcome; and even if SORNA's terms could be stretched that far, they do not provide constitutionally adequate notice that failure to register as required by Wetterling is subject to the new SORNA penalty. *Cf. Smith* v. *Goguen*, 415 U.S. 566, 575-576 (1974) (impermissible vagueness in defining prohibited conduct); *Lambert* v. *California*, 355 U.S. 225, 229-230 (1957) (inadequate notice of crime's scope).

Second, the government's approach fails to vitiate the ex post facto problem in this case. Its position appears to be that pre-SORNA compliance with the Wetterling Act is sufficient to avoid SORNA liability

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[10] As noted in the opening brief (Pet. Br. 9), prosecution under the Wetterling Act remains possible. See SORNA §§ 129, 124, 120 Stat. at 600, 598 (codified in part at 42 U.S.C. § 16924) (tying the repeal of the Wetterling Act to the deadline for States to implement SORNA); Att'y Gen. Order No. 3081-2009, available at http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf (giving States a one-year extension, until July 26, 2010, to implement SORNA). The government offers no reason to believe that is not true, although it contends otherwise. See U.S. Br. 37 n.17 (failing to cite the one-year extension).

(U.S. Br. 37-38); the government thus is not, so far as we are aware, prosecuting Wetterling-compliant individuals for failure to re-register, post-SORNA, in the same pre-SORNA Wetterling registries. Had petitioner complied with the Wetterling requirements prior to SORNA's enactment, he therefore would not now be subject to prosecution under SORNA. The practical reality accordingly is that petitioner's *pre-SORNA* failure to register is what subjects him to prosecution under SORNA now. And that, of course, is the very definition of an Ex Post Facto Clause violation. In these circumstances, where pre-SORNA compliance with the Wetterling Act would preclude prosecution, it is not a sufficient answer for the government to assert without support that petitioner is being punished for his post-SORNA unregistered status.

2. In any event, even if SORNA is thought to punish post-enactment failure to comply with a new registration requirement, the government recognizes that a statute violates the Ex Post Facto Clause if the defendant is unable to avoid criminal liability by altering his or her conduct after the statute took effect. The government therefore concedes that SORNA, which appears to create immediate criminal liability and contains no express grace period within which offenders may register, cannot be enforced as written. U.S. Br. 38-39. For several reasons, SORNA cannot be saved from this defect by the government's proposal of a judicial revision to interpolate a "reasonable" grace period into the statute.

First, we note that the government's approach departs in significant respects from the Seventh Cir-

cuit's construction of SORNA.[11] The government appears to disavow the contract analogy upon which the court of appeals based its ruling. See U.S. Br. 39. And although the Seventh Circuit read allowance of a reasonable time to comply into the statute as an unstated term (see Pet. App. 12a-13a), the government instead posits that "[i]n Section 2250" the need for a grace period "is reasonably captured in the affirmative defense for 'uncontrollable circumstances' provided by Section 2250(b)." U.S. Br. 40. The government thus would place the burden of establishing the appropriate "grace period" on the defendant.

Second, the SORNA affirmative defense invoked by the government does not appear to have been di-

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[11] The government did not argue before the Seventh Circuit either that the SORNA affirmative defense could apply in this case (or the companion case *Dixon*) or that SORNA includes a registration grace period. Its current position on both of these points is in some tension with its conduct in prior litigation, where it gave sex offenders little or no time to register after SORNA became applicable to them. In a number of cases, the indictment charged the defendant with failure to register from either before or immediately after he became subject to the registration requirement. See, *e.g.*, *United States* v. *Hinckle*y, 550 F.3d 926 (10th Cir. 2008) (defendant charged with failure to register from March 4, 2004 to January 24, 2007); *United States* v. *Chatterson*, No. 2:08-cr-144-FtM-99DNF, 2009 WL 804617 (M.D. Fla. Mar. 26, 2009) (defendant charged with failure to register from February 28, 2007); *United States* v. *Fuller*, No. 5:07-CR-462 (FJS), 2008 WL 4240485 (N.D.N.Y. Sept. 12, 2008) (defendant charged with failure to register from September 2006); *United States* v. *Cardena*s, No. 07-80108-CR, 2008 WL 896206 (S.D. Fla. Mar. 31, 2008) (defendant charged with failure to register from February 2007); *United States* v. *Nugent*, No. 07-5056-01-CRSW-GAF, 2008 WL 413273 (W.D. Mo. Feb. 13, 2008) (defendant charged with failure to register from March 20, 2006).

rected by Congress at circumstances like those here. By providing a defense when "uncontrollable circumstances prevented the individual from complying" with the SORNA registration requirement so long as "the individual complied as soon as such circumstances ceased to exist" (§ 2250(b)(1), (3)), the provision seems to contemplate conditions that precluded specific individuals from registering, not the creation of a generally applicable "reasonable time" tolling of SORNA's effective date. Presumably for this reason, the Attorney General's guidance on the defense focuses on SORNA's in-person registration requirement and peculiar circumstances unique to the defendant, such as hospitalization or a family emergency, that may delay registration.[12] So here, too, the government is departing from SORNA's text.

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[12] The Attorney General's discussion of impossibility was limited to the offender's personal circumstances and does not suggest recognition of a universal grace period:

> [S]ection 116 of SORNA requires periodic in-person appearances by sex offenders to verify their registration information. But in some cases this will be impossible, either temporarily (e.g., in the case of a sex offender hospitalized and unconscious because of an injury at the time of the scheduled appearance) or permanently (e.g., in the case of a sex offender who is in a persistent vegetative state). In other cases, the appearance may not be literally impossible, but there may be reasons to allow some relaxation of the requirement in light of the sex offender's personal circumstances. For example, a sex offender may unexpectedly need to deal with a family emergency at the time of a scheduled appearance, where failure to make the appearance will mean not verifying the registration information within the exact time frame specified by SORNA § 116. A jurisdiction may wish to authorize rescheduling of the appearance in such cases. Doing so would not necessarily undermine substantially the objectives of the SORNA verification require-

Third, the government invokes what it describes as the "background principle of law that a defendant needs a reasonable time to comply with a statutory regime that would otherwise instantly penalize a status." U.S. Br. 40. But this is a very thin reed upon which to construct a new statutory structure. The government cites only one decision of this Court, dating to 1915, that read such a limitation into a statute. U.S. Br. 39 (citing *Chicago & Alton R.R.* v. *Tranbarger*, 238 U.S. 67 (1915)). That case, moreover, involved an essentially regulatory state regime that imposed monetary penalties on railroads for failure to properly modify railbeds (see 238 U.S. at 71, 73), where a precise rule specifying the date of applicability was rather less important than it is under a statute providing for 10 years' imprisonment of an individual.[13] And in SORNA, Congress expressly

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ments, so long as the jurisdiction's rules or procedures require that the sex offender notify the official responsible for monitoring the sex offender of the difficulty, and that the appearance promptly be carried out once the interfering circumstance is resolved.

National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,048 (July 2, 2008).

[13] In addition, those rare instances where courts have recognized unwritten grace periods principally involve statutes that created continuous offenses; the LaFave treatise relied upon by the government (U.S. Br. 39) discusses such a grace period in the context of cases where "the offense is of a continuing nature." Wayne R. LaFave, *Criminal Law* § 2.4(b) at 115 (4th ed. 2003); see 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.4(b) at 142 n.53 (1st ed. 1987). In such a context, precision in identifying the moment liability attaches may be less important because there is no ending date for the act constituting the offense. See *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970). But the government expressly declines to argue that SORNA creates a continuing offense, declaring that "[w]hether Section 2250 does establish a continuing

delegated to the Attorney General the authority to specify how the statute would apply to persons who committed sex offenses before the date of enactment, presumably expecting the Attorney General to address compliance problems such as the one presented here. That the Attorney General neglected to do so does not give courts license to act in his place. SORNA therefore should be invalidated as applied in the circumstances here, rather than subjected to emergency judicial surgery to revive it.

3. If the Court agrees that the ex post facto concern here is a serious one, the constitutional doubt doctrine would support reversal of the decision below. See Pet. Br. 44-48. But even if it is thought that SORNA's constitutional defect *could* be cured by judicial recognition of a reasonable registration grace period, we showed in our opening brief that the interpretive difficulties spawned by such a course would themselves weigh strongly against judicial rewriting of the statute. *Id.* at 47-48.

The government makes no response to this point. It does not offer answers to any of the interpretive questions posed in our opening brief or attempt to

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offense is irrelevant to the constitutional question." U.S. Br. 34 n.15. In fact, the SORNA offense is not continuing in nature. In *Toussie*, which also involved a registration requirement, the Court explained that continuing offenses "are not to be implied except in limited circumstances," 397 U.S. at 121, and exist only when the "explicit language of the substantive criminal statute compels such a conclusion" or the "nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* at 115. Neither condition is satisfied by SORNA. See *id*. at 122 ("[T]here is * * * nothing inherent in the act of registration itself which makes failure to do so a continuing crime."); see generally Br. for Nat'l Ass'n of Crim. Def. Lawyers as *Amicus Curiae* at 10-11.

minimize the difficulty of those questions. Far from it: The reading of SORNA advanced in the government's brief itself raises additional interpretive problems. For one, if the "reasonable time" grace period is an aspect of SORNA's affirmative defense, as the government maintains, when does the statute of limitations for failure to register begin to run? For another, the government appears to accept that the five weeks allowed petitioner's co-appellant Dixon to register was insufficient (see U.S. Br. 12-13, 39-40); but if that is so, what about six weeks, or seven, or eight? Answering these questions requires "judicial lawmaking without any guidance from Congress" (*Cedar Rapids Cmty. Sch. Dist.* v. *Garrett F. by Charlene F.*, 526 U.S. 66, 77 (1999)), and that in itself is reason enough to reject the government's position.

Rather than dispute the problems that would be caused by its approach, the government contents itself with the observation that interpreting the word "travels" in § 2250(a)(2)(B) to apply only to post-SORNA travel "could not avoid that same series of grace-period questions in cases involving federal sex offenders who are prosecuted under Section 2250(a)(2)(A)." U.S. Br. 40. But that is hardly a sufficient response. Our reading would avoid those difficulties in all SORNA cases involving state offenders. As for federal offenders, they are differently situated from those convicted of state offenses; we have noted the government's recognition of its "continuing relationship with prisoners who are released from federal prison," which will tend to diminish SORNA problems of notice and *mens rea* for these offenders. See p. 8, *supra*. And however that may be, the possibility that difficult issues might (or might not) arise in a different set of future cases is no a reason for the

Court unnecessarily to start down the road of "[l]oose judicial reading" in *this* one. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 545 (1947).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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