No. _____

In The Supreme Court of the United States

MICHAEL LEDET

Petitioner,

v.

LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2006, Congress passed the Sex Offender Registry and Notification Act (SORNA) to make the federal and state systems more uniform and effective. SORNA addresses uniformity in evaluation of convictions between jurisdictions by requiring tier classification based on a comparison the elements of the offenses of the respective jurisdictions. The approach used to compare the elements is a function of due process.

The questions presented are:

1. Are the constitutional due process requirements that apply to a federal agency or federal court comparing the elements of state and federal offenses equally applicable to a state agency or court comparing the elements of state and federal offenses for purposes of sex offender registration, or does "due process of law" mean one thing under the Fifth Amendment but another under the Fourteenth?

2. When the age element of a federal sex offense is broader than the age element of a state offense and the age of the victim is unknown, can a state deem the age element not applicable under the categorical approach and declare the state offense comparable without violating due process rights?

3. When comparing age elements for purposes of SORNA tier classification, which approach is proper: the categorical approach, the modified categorical approach, or the circumstance-specific approach?

PARTIES TO THE PROCEEDINGS

Michael Ledet is the Petitioner and was the Appellant in the proceedings below. The Louisiana Department of Public Safety and Corrections is the Respondent and was the Appellee in the proceedings below.

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Prepared Testimony before the House Judiciary Subcommittee onCrime, Terrorism, and Homeland Security, The Adam Walsh Child Protection & Safety Act's Sex Offender Registration and Notification Act (SORNA), 3/10/2009, Emma Devillier, Assistant Attorney General, Chief – Sexual Predator Unit

OPINIONS BELOW

The Louisiana Supreme Court's denial of Petitioner's Application for Writ of Certiorari is unpublished. The Louisiana First Circuit's Decision has not been published. The 19th Judicial District Court in the exercise of its appellate jurisdiction ruled from the bench and issued no written reasons for its decision. The decision of the Administrative Law Judge on Reconsideration and his original Decision and Order are unpublished.

JURISDICTION

On September 24, 2018, the Louisiana First Circuit Court of Appeal issued its decision on the merits of Petitioner Michael Ledet's appeal in this matter. Mr. Ledet timely filed an Application for Writ of Certiorari with the Louisiana Supreme Court. The decree of the Louisiana Supreme Court denying the writ application and refusing to exercise its discretionary authority over the decision of the Louisiana First Circuit Court of appeal was issued on January 28, 2019. This Court's jurisdiction is invoked under Article III, Section 2 of the United States Constitution, and 28 U.S.C. 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the United States Constitution, U.S. Const. Amendment XIV, §1, provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. 2252(a)(4)(B)-

> (a) Any person who—
>
> (4) either—
>
> (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

18 U.S.C. 2256(1), (2), (8)(B)

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of years;

(2)(B) For purposes of subsection 8(B) of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a

minor engaging in sexually explicit conduct; or
(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

34 U.S.C. 20913

(a) In general
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.

LSA-R.S. 14:81.1 Pornography involving juveniles

A.(1) It shall be unlawful for a person to produce, distribute, possess, or possess with the intent to distribute pornography involving juveniles.
B. (5) "Pornography involving juveniles" is any photograph, videotape, film, or other reproduction, whether electronic or otherwise, of any sexual performance involving a child under the age of seventeen.
D(1) Lack of knowledge of the juvenile's age shall not be a defense.

LSA-R.S. 15:541

For the purposes of this Chapter, the definitions of terms in this Section shall apply:

(25) "Sexual offense against a victim who is a minor" means a conviction for the perpetration or attempted perpetration of, or conspiracy to commit, any of the following:
(n) Any conviction for an offense under the laws of another state, or military, territorial, foreign, tribal, or federal law which is equivalent to the offenses listed in Subparagraphs (a) through (m) of this Paragraph. -

LSA-R.S. 15:544

A. Except as provided for in Subsection B of this Section, a person required to register and provide notification pursuant to the provisions of this Chapter shall comply with the requirement for a period of fifteen years from the date of the initial registration in Louisiana, or the duration of the lifetime of the offender as provided in Subsection E of this Section, unless the underlying conviction is reversed, set aside, or vacated, except for those convictions that were reversed, set aside, or vacated pursuant to Code of Criminal Procedure Article 893 or 894, or a similar provision of federal law or law from another state or military jurisdiction. The requirement to register shall apply to an offender who receives a pardon as a first-time offender pursuant to Article IV, Section 5(E)(1) of the Constitution of Louisiana and R.S. 15:572(B)(1).

B.(1) A person required to register pursuant to this Chapter who was convicted of a sexual offense against a victim who is a minor as

> defined in R.S. 15:541 shall register and maintain his registration and provide community notification pursuant to the provisions of this Chapter for a period of twenty-five years from the date of initial registration in Louisiana, or the duration of the lifetime of the offender as provided in Subsection E of this Section, unless the underlying conviction is reversed, set aside, or vacated, except for those convictions that were reversed, set aside, or vacated pursuant to Code of Criminal Procedure Article 893 or 894, or a similar provision of federal law or law from another state or military jurisdiction.

LSA-R.S. 15:542.1.3

> B.(2)(a) Except as provided in Subparagraph (c) of this Paragraph, within sixty days of receiving the certified copies of court records from the offender as required by the provisions of Subsection A of this Section, the bureau shall determine which time period of registration under the provisions of R.S. 15:544 and the frequency of in-person periodic renewals under the provisions of R.S. 15:542.1 is applicable to the offender while residing in Louisiana. This determination shall be based on a comparison of the elements of the offense of conviction or adjudication with the elements of the most comparable Louisiana offense. The bureau shall post this official notification on the state sex offender and child predator registry within the ninety-day period provided in this Paragraph. If the most comparable Louisiana

offense is carnal knowledge of a juvenile, the bureau shall indicate so and give notice to the offender that he may qualify for relief from registration pursuant to the provisions of R.S. 15:542(F)(2) or (3) if the offender's age and the age of the victim are within the limitations provided by R.S. 15:542.

STATEMENT OF THE CASE

The petition of Michael Ledet seeks review of the Louisiana Department of Public Safety and Corrections' determination to change his classification for purposes of registration from a Tier 1 offender to a Tier 2 offender, pursuant to the federal Sexual Offender Registration and Notification Act (SORNA). After Mr. Ledet spent over seven years on the registry classified as a Tier 1 offender, the Department changed his classification from Tier 1 to Tier 2 shortly before he would have become eligible for removal from the registry. Tier 1 requires fifteen-year registration, with opportunity for removal at ten years. Tier 2 requires twenty-five-year registration. Absent the Department's reclassification in violation of his constitutional due process rights, Mr. Ledet would now be eligible to be removed from the registry by operation of law. Instead, he faced fifteen more years on the registry.

On March 23, 2005, the United States Attorney for the Eastern District of Louisiana issued a "Bill of Information for Possession of Materials Involving the Sexual Exploitation of Minors," charging Appellant Michael Ledet with possession of child pornography. The Bill of Information alleged that Mr. Ledet possessed at least one matter that "involved the use of a minor engaging in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2). . ."

A "minor" is defined under the federal statute as "any person under the age of eighteen years." 18

U.S.C. §2256(1). "Child pornography" is defined to include images of both actual minors and computer-generated images of minors. 18 U.S.C. §2256(8)(B). Neither the bill of information nor the plea document establishes the age of the victim, and there was no determination or finding of fact as to whether the image was an image of an actual person or computer generated.

Mr. Ledet reached a plea agreement with the United States Attorney, and a guilty plea was entered on April 27, 2005, to one count of possession of materials involving the sexual exploitation of minors. A judgment was entered on July 28, 2005, sentencing Mr. Ledet to 24 months in federal prison. Mr. Ledet was released from federal incarceration on June 12, 2007, and immediately registered as required.

When Mr. Ledet appeared for his periodic renewal on June 9, 2009, his registration form from the Department's registry indicated that he was classified as a Tier 1 offender. Each subsequent year when Mr. Ledet appeared for his periodic renewal, the registration form indicated a Tier 1 classification. When he appeared for his periodic renewal on June 6, 2014, he was listed as a Tier 1 on the Department's form, and the form indicated his next registration date was June 5, 2015. However, Mr. Ledet was informed at that time by the Deputy completing his annual registration that she believed his Tier level did not "match," and she asked him to provide a copy of the court minutes and the Bill of Information for his federal conviction. On June 1, 2014, she changed his classification in the registry to Tier 2.

Subsequently, after being informed that Mr. Ledet intended to engage an attorney to challenge the Tier classification, the Department created documentation to support a Tier 2 classification. The analyst completed a "Tier Classification Summary Sheet," on which she answered that "Victim Age" was not applicable, the "Victim Age Included in Bill of information" was not applicable, the "Victim Age Included in Charging Instrument" was not applicable, and "Victim Age in Police Report" was not applicable, and lined-through the checklist boxes for those items.

In the "Conclusion" section of that sheet, the analyst specifically stated that both the federal and state offenses had the element of "sexual performance involving a child of ***seventeen***." However, Louisiana's child pornography offense applies to juvenile victims, defined specifically as those ***sixteen and under***. LSA-R.S. 14:81.1. The federal child pornography offense is broader, containing an age element of ***under eighteen***. 18 U.S.C. §2256(1).

Based on the analyst's testimony in the administrative proceeding, this was a knowing misrepresentation. She testified that when she did the tier classification worksheet, she knew the federal and state statutes had different age elements.

The Department sent Mr. Ledet notice of the change in classification and notice of his right to appeal. Mr. Ledet availed himself of that right, and an administrative hearing was conducted on October 14, 2015. On December 4, 2015, the Administrative Law Judge issued his decision "affirming" the

Department's action.

It is undisputed that the federal offense of Mr. Ledet's conviction, 18 U.S.C. 2252(a)(4)(B), is broader than the state offense the Department determined to be "most comparable." 18 U.S.C. 2252(a)(4)(B) applies to victims under the age of eighteen. The Louisiana offense, LSA-R.S. 14:81.1, applies only to victims sixteen and under. 18 U.S.C. 2252(a)(4)(B) encompasses not only actual images, but computer-generated images. (*See 18 U.S.C. 2256(8)*, which defines "child pornography" to include depictions that are "computer-generated image(s) or picture(s) . . . made or produced by electronic, mechanical, or other means. . .., " "computer-generated image[s] that [are] indistinguishable from that of a minor," and visual depictions that have "been created, adapted, or modified" to appear to be a person under the age of eighteen.) LSA-R.S. 14:81.1, by contrast, covers only images of actual people 16 years of age or younger. Despite the difference in the age elements, the Department decided LSA-R.S. 14:81.1 was a comparable offense.

Following the administrative hearing and post-hearing briefing, the ALJ issued his decision affirming the Tier 2 classification. In the decision, the ALJ found that the age elements did not match and acknowledged that the evidence did not establish Mr. Ledet had committed any offense under state law. However, he concluded the age element of the offenses was irrelevant because Mr. Ledet failed to prove that the victim was ***not*** over the age of sixteen, and because Louisiana law only requires that the statutes

be "close" to be considered "comparable."

The Louisiana First Circuit also found the age element to be irrelevant to the comparison of elements because both the federal law and Louisiana law have a "common legislative purpose" of protecting society from sex offenders.

The Louisiana Supreme Court denied Mr. Ledet's writ application, refusing to exercise supervisory jurisdiction.

The actions of the Department and the tribunals below violated Mr. Ledet's constitutional due process rights. Deeming the age element irrelevant created what amounts to a *de facto* presumption that the age element was met, despite there being no factual determination or admission to satisfy the age element. Absent that, Mr. Ledet would have remained classified as a Tier 1 offender no matter which approach had been applied, and he would have become eligible for removal from the registry almost two years ago.

Under either the "categorical approach" or "modified categorical approach" Mr. Ledet would be classified as s Tier 1 offender. If the categorical approach is applied in the manner prescribed by this Court, LSA-R.S. 14:81.1 would not be considered comparable because the elements of 18 U.S.C. 2252(a)(4)(B) sweep more broadly. If the modified categorical approach is applied, there are no facts established in the plea and conviction that establish the age element of LSA-R.S. 14:81.1. The inescapable

conclusion is that the Department was only able to reclassify Mr. Ledet as a Tier 2 offender through a deprivation of his due process rights.

Mr. Ledet raised the due process issues at every level of the state proceedings below.

Mr. Ledet raised the due process issues relating to the comparison of elements in during the administrative adjudication process. Due to jurisdictional provisions of the Louisiana Constitution, the manner in which constitutional issues can be raised in an administrative proceeding is limited. The district courts in Louisiana have original jurisdiction over issues of constitutionality of statutes. A Louisiana administrative tribunal cannot rule on the constitutionality of a statute; that is, it has no jurisdiction to entertain an argument that a statute is unconstitutional on its face.

As such, the constitutionality of a statute cannot be raised on appeal to the district court from an administrative adjudication. In those instances, the district court is acting under its appellate jurisdiction. Its authority to address the constitutionality of a statute is under its original jurisdiction, which cannot be involved in a judicial review proceeding.

Constitutional issues can be raised before Louisiana administrative tribunals in the context of the tribunal's conclusions of law. Jurisprudence and the rules of statutory construction applicable to the courts apply equally to administrative tribunals when determining the proper construction of a statute. This

includes the well-established principle of law and construction that statutes must construed to avoid constitutional problems unless such a construction is plainly contrary to the intent of the legislative enactment. *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). *Accord*, *Burns v. United States*, 501 U.S. 129, 138 (1991); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991). *See also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (J. Brandeis, concurring- "if a case can be decided upon two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")

Mr. Ledet raised the due process issues in that context; that is, that the agency's interpretation and application of the statute creates constitutional issues, and that in deciding the matter, the administrative tribunal cannot give the statute a construction that would create a constitutional problem. The normal procedure in administrate adjudication of Sex Offender Registry cases is to allow comprehensive post-hearing briefing by all parties. Mr. Ledet addressed the due process issues raised in this petition extensively in his post-hearing brief. *Ledet's Post Hearing Brief*, pp. 9-24; R. pp.432-447.

Mr. Ledet addressed the due process issues in his briefs to the district court on appeal as well. Petition for Judicial Review, pp 4, 6-7; *Michael Ledet's Original Brief on Judicial Review,* pp. 1, 21, 30-32; *Michael Ledet's Reply Brief*, pp. 7, 9-11. As discussed

infra, however, the district court refused to provide Mr. Ledet a meaningful opportunity to present oral argument.

Mr. Ledet likewise addressed the due process issue extensively in his briefing to the Louisiana First Circuit in both his briefs and in oral argument. *Appellant's Original Brief*, pp. 10-13, 16, 24-26; *Appellant's Reply Brief*, pp. 4, 7-9.

Mr. Ledet addressed the due process issue in his application to the Louisiana Supreme Court for a writ of Certiorari. *Application for Writ of Certiorari*, pp. 6, 12, 14, 18, 23-24.

Despite Mr. Ledet raising the issue in detail at every level, none of the tribunals directly addressed the due process issue either in oral argument or in their decisions. The phrase "due process" does not appear in any of the decisions from any of the tribunals that considered the matter. The only way the tribunals below could be said to have "passed" on the issue is indirectly. By deeming the age element irrelevant, the tribunals essentially deemed the "due process" argument irrelevant. As a matter of law, the courts' silence on the constitutional due process argument is deemed to be a rejection of the argument.

In addressing this matter before the courts, Mr. Ledet made it absolutely clear that the issue of whether he was a sex offender or whether he was required to register as a sex offender was not before the court. The issue was the change in Tier classification.

34 U.S.C. §20913 clearly required Mr. Ledet to register as a sex offender in Louisiana upon his release from federal custody in 2007. When Mr. Ledet was released, Louisiana had not yet instituted its tier process. Upon instituting its tier classification system in 2009, the Department listed Petitioner as a Tier 1 offender on the registry. The Department has no documentation of the basis for Mr. Ledet's original Tier 1 classification. However, the Tier 1 classification was consistent with the federal tier classification, and was also consistent with the Louisiana Attorney General's opinion that when age is an element of the offense and the age of the victim was not factually established in a court of law, having a "bureaucrat" attempt to establish the age of the victim for purposes of classifying an offender as anything but Tier 1 would violate due process.[1]

After being reclassified to the Tier 2 status, Mr. Ledet requested an administrative hearing. Mr. Ledet contended, *inter alia*, that under either the modified categorical approach or the categorical approach, constitutional due process required that he be classified as a Tier 1 offender. At each successive level in the state proceedings, the differences in the

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[1] http://judiciary.house.gov/_files/hearings/pdf/Devillier090310.pdf *Prepared Testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, The Adam Walsh Child Protection & Safety Act's Sex Offender Registration and Notification Act (SORNA),* 3/10/2009, Emma Devillier, Assistant Attorney General, Chief – Sexual Predator Unit., p. 3

age elements, as well as the differences in the elements relating to the types of images, were deemed to be irrelevant

The Administrative Hearing

The Administrative Law Judge found that the elements of the two offenses were not equivalent because the age elements were different, and because the federal offense includes computer generated images, but the state offense does not. Additionally, the ALJ concluded that "possession of material depicting sexual activity of a seventeen-year-old victim could have been what [Mr. Ledet] was convicted of" and that if so, his conduct "would not be a violation under La. R.S. 14:81.1."

Despite finding that the elements were not equivalent and that there was no evidence establishing Mr. Ledet had committed a Louisiana offense, the ALJ "affirmed" the Department's Tier 2 reclassification. The ALJ concluded that for Mr. Ledet to establish that the offenses were not comparable, the burden was on him to prove the person depicted in the image that was the subject of his plea was over the age of sixteen, or that the image was computer-generated.

Then, contradicting himself regarding his conclusion that it was Mr. Ledet's burden to establish the underlying *facts* of the conviction, the ALJ held that the underlying facts were irrelevant. He concluded that "it is the elements of the offense of conviction the Department must compare to the most comparable Louisiana offense under La. R.S.

15:542.1.3(B)(2)(a), and not the facts."

The ALJ rejected Mr. Ledet's argument that because the federal statute of conviction was broader than LSA R.S. 14:81.1, LSA R.S. 14:81.1 was not comparable and he must be classified as a Tier 1 offender. The Tier 1 category encompasses any sex offense not specifically enumerated as Tier 2 or Tier 3 and includes any sex offense that has no comparable Louisiana offense.

Mr. Ledet also argued that the phrase "most comparable" in the Louisiana statute first and foremost required that the offenses be "comparable." The word "most" addresses instances when more than one offense is "comparable," In those instances the Department chooses the *most* comparable. The ALJ rejected that argument, concluding that "most comparable" means the offenses need only be similar or close.

Judicial Review by the District Court

The Louisiana Constitution grants the district courts appellate jurisdiction "as provided by law." The Louisiana Administrative Procedure Act provides that appeals of agency adjudications ae subject to judicial review by the district courts under their appellate jurisdiction. Mr. Ledet appealed the ALJ's decision to the district court.

In the exercise of appellate jurisdiction reviewing an administrative adjudication, the courts are required to make their own determination and

conclusions of fact by a preponderance of evidence *based upon its own evaluation of the record reviewed in its entirety upon judicial review*. LSA-R.S. 49:964(G)(6). The district court's review of the ALJ's conclusions of law is *de novo*. The court is *required* to hear oral argument and receive written briefs if requested. LSA-R.S. 49:964(F).

The district court set the appeal for oral argument on a "rule" day. The court then failed to provide Mr. Ledet a meaningful opportunity for oral argument, giving him less than 5 minutes to present his case. The court ruled from the bench that the ALJ's decision was not "arbitrary and capricious," rather than perform its statutorily mandated duty to make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety. The district court did not provide reasons for its decision.

Appellate Review by the Louisiana First Circuit Court of Appeal

On appeal to the Louisiana First Circuit Court of Appeal, the Court affirmed the ALJ's decision on the basis that it was not "arbitrary and capricious." The First Circuit's rationale for its decision was that LSA-R.S. 14:81.1(D)(1) provides that "[l]ack of knowledge of the juvenile's age shall not be a defense," and that the age element was irrelevant because the "general purpose" of both the federal and state legislation was to protect the public from sex offenders.

It is unclear how the First Circuit determined that

the "lack of knowledge of age" provision supported a conclusion that the age element of the statutes is irrelevant. "Lack of knowledge of age" does not mean the defendant has no defense based on age if the age is not known. Regardless of whether there was some rational basis for the First Circuit's logic, however, it's reliance on LSA-R.S. 14:81.1(D)(1) was in error as a matter of law because the Louisiana Supreme Court long ago ruled that provision unconstitutional.

Notably, one of the First Circuit judges questioned the Department regarding the propriety of the ALJ placing the burden on Mr. Ledet in the administrative hearing. The Department conceded that the burden was supposed to be on the Department and the ALJ erroneously placed it on Mr. Ledet. Despite that admission, the First Circuit inexplicably concluded there "was no irregularity in the conduct of the administrative proceeding."

The same standard of review is applicable to the appellate court reviewing an administrative decision. The court is required to make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety. The First Circuit quoted this statutory provision in its decision, but then stated:

> The manifest error test is used in reviewing the facts as found by the ALJ, but the arbitrary and capricious test is used in reviewing the ALJ's conclusions and its exercise of discretion.

The "manifestly erroneous" standard was replaced in 1997 with the current standard in LSA-R.S. 49:964(G). It is difficult to understand how the First Circuit quoted LSA-R.S. 49:964(G) correctly, then two sentences later apply the version that existed twenty years earlier.

The First Circuit affirmed on the basis that the ALJ's decision and the Department's classification "was not manifestly erroneous nor arbitrary and capricious." The Court's decision was internally inconsistent with its own determination that it was required to conduct an independent, *de novo* review of the facts, conclusions based on the facts, and conclusions of law.

Petition for Writ of Certiorari to the Louisiana Supreme Court

Mr. Ledet applied to the Louisiana Supreme Court for a Writ of Certiorari, seeking the Court's exercise of supervisory jurisdiction over the First Circuit's adverse decision. Petitioner addressed the due process implications in his application and addressed the fact that the decisions below conflicted with decisions of this Court and every federal circuit court of appeal that has decided the issue. The Louisiana Supreme Court denied certiorari by a vote of 6-1, without providing reasons.

Although raised and stressed at each level, ***none*** of the tribunals acknowledged or addressed the due process issues of presuming an age or applying a statute with an age element without an age having

been established.

REASONS FOR GRANTING THE PETITION

> *"To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." – Justice Felix Frankfurter*

In *Descamps v. United States*, 570 U.S. 254 (2013), this Court addressed the proper approach for comparing elements to determine whether state criminal offenses trigger consequences under federal law. The Court held that unless a statute is divisible, the fact finder must use the "categorical" approach when comparing offenses. The Court cannot go beyond the language in the statute to determine whether the statute meets the required definition under federal law. *Descamps* rolled back the erosion of the categorical approach and clarified the limits of the "modified" categorical approach, settling a split in the United States Courts of Appeals.

Traditionally, the modified categorical approach applied to "divisible statutes" listing several different types of conduct or offenses in the alternative or having multiple subsections. See *Shepard v. United States*, 544 U.S. 13 (2005). In the case of a divisible statute, the modified categorical approach can be used to determine which section of the statute the defendant had been convicted under by looking at the record of conviction. The record of conviction includes the charging document, the plea agreement, plea

colloquy, and jury instructions. In subsequent years, certain courts of appeal began broadening the circumstances in which the modified categorical approach could be used to include situations without a divisible statute.

In *Descamps*, the Court rejected the expansion of the modified categorical approach and held that approach does not apply to statutes that contain a single, indivisible set of elements. Although *Descamps* did not specifically address an elements comparison under SORNA, because the due process considerations of elements comparison are identical, the United States Courts of Appeals have frequently looked to decisions related to the ACCA for guidance in applying SORNA.

Prior to *Descamps* the courts of appeal that have dealt with the issue in the context of SORNA tended to apply the "modified categorical approach" to offenses containing an age element. *See, e.g., United States v. Mi Kyung Byun*, 539 F.3d 982, 992 (9th Cir. 2008); *United States v. Berry*, 814 F.3d 192, 197-98 (4th Cir. 2016).

Since *Descamps*, the courts of appeal that have addressed the issue have almost uniformly applied the categorical approach strictly, finding that if law of the jurisdiction covering the crime of conviction covers any more conduct than the offense in the jurisdiction it is being compared to, the crimes are not comparable. *See*. *United States v. Morales*, *United States v. Backus*, 550 Fed. App'x 260 (6th Cir. 2014); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2013);

United States v. Forster, 549 Fed. App'x 757 (10th Cir. 2013); *United States v. Barcus*, 892 F. 3d 228 (6th Cir. 2018).

One exception is the Fifth Circuit's decision in *United States v. Nazario Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014), *writ denied* 135 S.Ct. 1529 (Mem) (2015). In *Nazario Gonzalez-Medina,* the Fifth Circuit concluded that applying a non-categorical approach regarding age is most consistent with SORNA's broad purpose, and that strict application of the categorical approach to an age-differential determination would frustrate SORNA's broad purpose and restrict SORNA's reach.

Gonzalez-Medina's Petition for Writ of Certiorari to this Court was denied. Although no reason for the denial was stated, facts and circumstances of the case seem to indicate that case did not provide an appropriate vehicle for addressing element comparison issues related to SORNA and tier classification.

Gonzalez–Medina was born in Mexico and is a Mexican citizen. In 2005, he was charged in Wisconsin state court with having sexual intercourse with a child age sixteen or older in violation of Wisconsin law. He pleaded no contest to the charge. He subsequently returned to Mexico

In 2012, federal authorities found Gonzalez–Medina in a city jail in San Benito, Texas, and discovered he had returned to the United States and had been living in Texas for over a year without

having ever updated his sex offender registration. As a result, a federal grand jury indicted Gonzalez–Medina for failure to register as a sex offender in violation of 18 U.S.C. § 2250(a), and illegal reentry in violation of 8 U.S.C. § 1326(a).

Gonzalez–Medina moved to dismiss the failure-to-register charge on the ground that his prior Wisconsin conviction did not qualify as a "sex offense." SORNA defines a "sex offense" as, *inter alia*, "a criminal offense that has an element involving a sexual act or sexual contact with another." SORNA includes an exception to its definition of "sex offense" for "[a]n offense involving consensual sexual conduct if the victim was at least 13 years old and the offender was not more than 4 years older than the victim."

Gonzalez–Medina argued that the court should apply the categorical approach to the age-differential determination in the exception. He further argued that the Wisconsin statute is not a "sex offense" under the categorical approach because it does not include a four-year age differential as an element.

In short, Gonzalez-Medina's argued that because the statute of conviction did not contain the age-differential *exception* SORNA did, the categorical approach required a conclusion that the offenses were not comparable; therefore, he was not required to register as a sex-offender. The Court rejected that argument. The Court held that the SORNA age differential exception did not apply *because there was a factual determination of the victim's age in the Wisconsin case* and, based on that age determination,

he did not meet the exception.

The issues and arguments raised in Gonzalez–Medina were quite different than in this case. Gonzalez-Medina was seeking a determination that he was not a sex offender and seeking to avoid registration. Mr. Ledet is not. In Gonzalez-Meduina, there was a factual determination of age that was dispositive of the applicability of the statute. In Mr. Ledet's case, there is no such factual determination. Mr. Ledet's case provides an appropriate vehicle for resolving outstanding issues related to the proper method for comparing elements under SORNA for purposes of tier classification and registration.

SORNA—"Categorical" approach, "modified categorical" approach, or limited extension of the "modified categorical" approach?

Mr. Ledet does not contend that he is not required to register as a sex offender. As a federal offender, federal law requires him to register. Mr. Ledet contested the Department reclassifying him from Tier 1 to Tier 2 more than seven years after his release from custody, thereby increasing his registration period by ten to fifteen years. The reclassification changed his registration period from fifteen years with the right to be removed after ten years if he met certain requirements, which he does meet, to twenty-five years. Based on the prevailing jurisprudence at the time of Mr. Ledet's administrative hearing, he argued that the "modified categorical method" applied, and that under the modified categorical approach he properly falls in the Tier 1 "catch-all"

classification.

The Department argued that the "categorical approach" applies, and the ALJ agreed. However, the Department and the ALJ misapplied the categorical approach. The Department contends that it is proper for it to classify a federal offender based on a state offense where the age element of the state offense does not match the age elements of the federal offense. Additionally, the federal offense encompasses computer generated images, and the Louisiana offense does not. The state offense the Department now says is "most comparable" has a lower age element (16 or under) than the federal offense of conviction (under 18), and a longer registration period (25 years as opposed to 10-15 years).

The Department contends that the state and federal offenses need only be "close," or *almost* comparable. That interpretation, however, is inconsistent with due process requirements applicable to comparing the elements of offenses as addressed by this Court. Mr. Ledet also argued that if the categorical method applies, constitutional due process requirements dictate that he be classified in the Tier I "catch-all" category under the "categorical method," because the elements of the federal offense under SORNA were broader than the Louisiana Tier 2 offense, and LSA-R.S. 14:81.1 was therefore not "comparable."

Absent the Department's violation of Mr. Ledet's due process and equal protection rights, Mr. Ledet would be classified as a Tier 1 offender under

both the categorical approach and the modified categorical approach.

The Department and the Administrative Law Judge justified the "almost comparable" interpretation and application of Louisiana's law on the explanation in SORNA guidelines that a state may implement registration requirements more stringent than those in the SORNA guidelines and still be considered in "substantial compliance" with the guidelines. The Louisiana First Circuit agreed that is the proper interpretation of the Louisiana's laws requiring comparison of federal and state offenses for registration purposes. The Court likewise ruled that the age element of the federal offense being broader than the state offense was irrelevant, even if it were proven that the victim was older than the age element of the Louisiana statute.

The Court concluded:

> Under the federal law, a minor is any person under the age of 18 years (18 USCA 2256(1)), whereas under the Louisiana pornography involving juveniles statute, the victim is any person under the age of 17 years (La. R.S. 14:81.l(B)(8)). Mr. Ledet suggests that because the federal bill of information charging him with one count of possession of child pornography does not establish the age of the victim, his guilty plea does not equate to the Louisiana law concerning pornography involving juveniles. However, considering that both

> the federal law and Louisiana law have a common legislative purpose of protecting against the exploitation of children and the protection of minors from criminal sexual conduct that has been visually depicted, we find no merit to Mr. Ledet's argument that the statutes are not comparable.[2]

The Louisiana First Circuit's conclusion is essentially that when a *state* compares elements of federal and state offenses, a finding of "common legislative purpose" outweighs not only the plain language of the law, but also the due process this Court has held to be applicable when a *federal* agency or Court compares the elements of state and federal offenses. In short, according to the Louisiana First Circuit, "due process of law" means one thing in the Fifth Amendment and another in the Fourteenth, *particularly as applied to those convicted of a sex offense*.

The Constitution does not support that conclusion. As stated by Justice Frankfurter in his concurring opinion in *Malinski v. New York*, 324 U.S. 401, 415 (1945), "[t]o suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate

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[2] This "logic" based on "common purpose" fails when subjected to scrutiny, as there is no commonality in the State insisting on reclassifying Mr. Ledet as a Tier 2 for an offense that SORNA classifies as Tier 1.

rejection."

As to the Louisiana First Circuit's justification for the "common legislative purpose" of protecting society from sex offenders outweighing due process concerns, this Court has rejected such limitations on due process. Although recognizing a state's autonomy in establishing its own procedures under the due process requirements of the Fourteenth Amendment, ". . . in the discharge of that duty, we must give no ear to the loose talk about society's being 'at war with the criminal' if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people." *Id.* at 418.

To conclude that the age element is irrelevant is to conclude that due process is irrelevant.

"How [can] you hold the offender accountable for a fact that has not been established in a court of law?"[3]—Emma Devillier, Chief—Louisiana Attorney General's Sexual Predator Unit.

Mr. Ledet is not seeking to avoid registration. He has registered dutifully, without fail, for almost twelve years. Mr. Ledet is challenging the

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[3] http://judiciary.house.gov/_files/hearings/pdf/Devillier090310.pdf *Prepared Testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, The Adam Walsh Child Protection & Safety Act's Sex Offender Registration and Notification Act (SORNA),* 3/10/2009, Emma Devillier, Assistant Attorney General, Chief – Sexual Predator Unit

Department's reclassifying him to a higher tier with a much longer registration period based on an element of a criminal offense that has not been established or admitted to, violating his constitutional right to due process. Keeping that in mind, the Louisiana Attorney General's office provided what may be the most compelling argument for granting this petition.

Testifying before the United States House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security in 2009, the Chief of the Louisiana Attorney General's Office Sexual Predator Unit, Emma Devillier, took the same position Mr. Ledet urges this Court to take. She adamantly characterized that position as "not just an arbitrary suggestion" but rather "an informed and educated analysis developed over time." She testified that:

> The final guidelines indicate that all state sex offenses must be tiered by comparing the state sex offense to the described federal offense to determine if the state sex offense is comparable to or more severe than the federal offense. This is fairly consistent with the [Adam Walsh Act]. However, the problem comes in the interpretation of how that comparison is performed. The problem in trying to compare our offenses to the federal offenses is that the federal offenses differentiate seriousness based on facts not necessarily made elements in the State definition of the crime.

> To understand the problem you will first have to understand that the Federal statutes to which the state statutes are to be compared are distinguished between sexual acts and sexual contact and require categorization based on the method used (physical force/drugs) to complete the sexual act or contact *and the age of the victim*. [Emphasis supplied]

Impressing upon the House Judiciary Subcommittee that the age of the victim is often a controlling factor in the classification of sexual offenses, Ms. Devillier addressed the obvious due process issues that arise from attempting to force a tier classification when age is an element but there are no adjudicated facts or admissions with regard to age:

> If the age of the victim is not in the bill of information how will you hold the offender accountable for a fact that has not been established in a court of law? The guidelines state that you will have to look at the underlying facts of the offense to determine the age of the victim. How does this possibly afford due process? Basically, the guidelines seem to be stating that we must allow some bureaucrat to determine what the underlying facts of a conviction were and then apply the appropriate tier offense based on the determination of this bureaucrat. *We are essentially basing an offender's future legal obligation to register on facts that have not been established in a*

> *court of law.* [Emphasis in original]
>
> *Registration is supposed to be a product of conviction. In order to maintain prosecutorial discretion, which is essential for the administration of justice, if registration is to be offense based, it must be based on the facts as alleged in the bill of information. If the facts in the bill of information leave doubt as to the specific act involved or the specific age of the victim which would establish that the offender's actions were of the type described as a tier II or tier III offense,* ***then the offense should be categorized in tier 1.***[4] [*Italics* emphasis in original- ***bold*** emphasis supplied].

The Attorney General's position is based on SORNA Guideline directions to use the modified categorical approach with regard to age when comparing offenses. If due process does not allow a "bureaucrat" to determine the underlying facts of a conviction for purposes of tier classification under the "modified" categorical approach, how can applying what amounts to an "*almost* comparable" standard

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[4] http://judiciary.house.gov/_files/hearings/pdf/Devillier090310.pdf *Prepared Testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, The Adam Walsh Child Protection & Safety Act's Sex Offender Registration and Notification Act (SORNA),* 3/10/2009, Emma Devillier, Assistant Attorney General, Chief – Sexual Predator Unit., p. 3

satisfy due process under the "categorical" approach when age is not established satisfy due process? It cannot.

When comparing elements of criminal offenses, "most comparable" does not mean "almost comparable."

La. R.S. 15:542.1.3.B(2)(a) requires that the registration period be determined "based on a comparison of the elements of the offense of conviction or adjudication with the elements of the most comparable Louisiana offense."

In ruling that the categorical approach applied, the ALJ concluded:

> La. R.S. 15:542.1.3(B)(2)(a) requires the Bureau determine an out-of-state or federal offender's time period of registration and frequency of in-person periodic renewals. This determination "shall be based on a comparison of the elements of the offense of conviction or adjudication with the elements of the most comparable Louisiana offense." The Bureau is not required to find a Louisiana statute with elements equivalent to Respondent's federal conviction. It must identify a statute "***most comparable***."

The Department, the ALJ, and the Louisiana First Circuit all reached conclusions that are based on interpreting "most comparable" to mean "close," or

"almost comparable," or "close to comparable."

Words have meaning, however. In English language usage, "most" is a superlative adjective. A superlative adjective describes one person or thing as having *more* of a quality than all other people or things *in a group,* the group here being "comparable" offenses. By the plain meaning of the statute, the Louisiana offenses considered in the evaluation must be determined to be comparable *first.* If there is more than one statute that is comparable, the Department then must choose the *most* comparable among them.

Mr. Ledet's "plain language" argument was rejected in the proceedings below. This Court, however, recently applied the same statutory analysis in *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, 586 U.S._____ (2018). In *Weyerhaeuser*, the United States Fish and Wildlife Service (USFWS) attempted to expand the definition of "critical habitat" to include land that would be suitable habitat for a species but was currently unoccupied by that species. Like the Louisiana First Circuit's interpretation, the USFWS based its position on what it contended was consistent with the statute's purpose. This Court rejected that argument, holding:

> According to the ordinary understanding of how adjectives work, "critical habitat" must also be "habitat." Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that "critical habitat" is the subset of "habitat" that is "critical" to the

> conservation of an endangered species . . . Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species.

Likewise, as argued by Mr. Ledet, for a statute to be "most comparable," it must first be "comparable." Neither LSA-R.S.15:542.1.3.B(2)(a) nor constitutional due process requirements authorize the Department to designate a state offense as the "most" comparable offense unless it is also a comparable offense. This interpretation is also consistent with this Court's clarification as to when the "modified categorical approach" can be used.

The tribunals below erroneously treated the words "equivalent" and "comparable" as contradictory, concluding that the phrase "most comparable" negated the term "equivalent" in the definitions of Tier 2 offenses, which defines a federal offense as a Tier 2 offense when it is "equivalent" to any of the enumerated Tier 2 offenses. LSA-R.S. 15:541(25). The terms "comparable" and "equivalent" are in fact complimentary. "Equivalent" is defined in its common meaning as "equal in value, amount, function, meaning, etc." *English Oxford Living Dictionary.* Its legal definition is "equal in value, force, amount, effect, or significance. Corresponding in effect or function; nearly equal; virtually identical." *Black's Law Dictionary, (8th ed.2004).* The phrase "equivalent to" is defined as "having the same or similar effect as." *Id.* "Comparable" is defined as "of equivalent quality, worthy of comparison," and "able

to be likened to another." *Id.* "Equivalent" is listed as a synonym to "comparable." *Id.*

Giving "equivalent" and "comparable" their meanings as established by their definitions, neither means the elements must be the same in the sense of being "word-for-word." But both mean that when statutes are compared, the essential elements have to be close enough so as to be equal in effect, or to be of equivalent quality. Therefore, if age of the victim is an essential element of one or both offenses being compared, age is clearly relevant to the comparison.

Further, even if "equivalent" and "comparable" have two different meanings as the Department, the ALJ, and the Louisiana First Circuit concluded, the rules of statutory construction relating to general vs. specific statutes supports Mr. Ledet's position. LSA-R.S. 15:542.1.3 provides the general procedure for determining which statute among comparable statutes applies. LSA-R.S. 15:544, however, provides the specific provisions for *tiering*. Subparagraph (B)(1) is the specific statute that addresses twenty-five-year registration, which is commonly referred to as "Tier 2." That subparagraph requires Tier 2 registration for anyone "who was convicted of a sexual offense against a victim who is a minor *as defined in R.S. 15:541*." (Emphasis supplied). Pursuant to LSA-R.S. 15:541(25)(n), to be defined as a "sexual offense against a victim who is a minor," a federal or out of state conviction must be equivalent to a Louisiana offense listed as such an offense. Therefore, if Petitioner's offense is not "equivalent" to LSA-R.S. 14:81.1, it does not meet the definition of a "sexual

offense against a victim who is a minor" *as defined by LSA-R.S. 15:541* and does not fall under Tier 2.

If the categorical approach does apply to SORNA offence comparison for purposes of registration as the ALJ concluded, it was improperly applied. The categorical approach does not allow going outside the elements of the offense when making a comparison. In *Mathis v. United States*, 579 U.S. ____ (2016), this Court defined "elements" as follows:

> "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." Black's Law Dictionary 634 (10th ed. 2014) At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, see *Richardson* v. *United States*, 526 U. S. 813, 817 (1999); and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. see *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969).

By defining and addressing "elements" in that manner, this Court made it clear that, when comparing elements, a question must be asked and answered for each identified element in the statutes being compared. If the matter went to trial, the question is "did the jury find this element beyond a reasonable doubt?" In a plea agreement, the question is "did the defendant necessarily admit to this when he pleaded guilty? If the answer is "yes" for one statute but "no" for the other, those elements are not

comparable.

Mr. Ledet was charged with violating 18 U.S.C. 2252(a)(4)(B), which apples to "minors." Minors are defined as being under eighteen. 18 U.S.C. 2256. There is not victim age in the bill of information that he pleaded to. Regarding the age element, therefore, Mr. Ledet's plea "admits" only that the victim was under eighteen.

LSA-R.S. 14:81.1, the statute the Department determined is comparable, applies to a child under the age of seventeen. The answer to the question "did Mr. Ledet admit that the victim was under seventeen" is "no." Therefore, the age element is not comparable, and LSA-R.S. 14:81.1 is not a comparable statute for the purpose of classifying Mr. Ledet as a Tier 2 offender. Under the categorical approach, Mr. Ledet belongs in the Tier1 "catch-all" category.

The "modified" categorical approach as clarified by this Court in *Descamps*, only applies when there is a statute that is "divisible." That is not the case here, so the "modified" categorical approach as recently clarified does not apply.

Because this Court did not specifically address element comparison under SORNA, however, the question remains whether there is room under *Descamps* and *Mathis* for a very limited expansion of the "modified" categorical approach; that is, whether with regard solely to the age element, one may look beyond the elements to factual findings at trial or admissions in plea agreements to determine whether

an age element has been met for purposes of tier placement and registration.

That approach is basically the approach that was almost uniformly being applied by the U.S. Circuit Courts of Appeal prior to *Descamps*. That was the approach used by the United States Fifth Circuit in Gonzalez-Medina. It was the approach Mr. Ledet argued in the administrative proceeding that the Department should have applied, based on the prevailing jurisprudence at the time. And it is the approach used by the United States Tenth Circuit post-*Descamps*, which the Tenth Circuit referred to as the "circumstance-specific" approach. *United States v. White*, 782 F.3d 1118, 1131 (10th Cir. 2015).

This approach may appear attractive to some because, as the Fifth Circuit stated in *Gonzales-Medina*, SORNA guidelines call for the age element to be a circumstance-specific determination. *Gonzalez-Medina*, 757 F.3d at 431, citing *National Guidelines for Sex Offender Registration and Notification*, 73 Fed.Reg. 38,030, 38,052–53 (July 2, 2008). That rationale, however, puts the cart before the horse.

If, as held in *Descamps*, constitutional due process requires a strict adherence to the categorical approach when a divisible statute is not at issue, any Congressional enactment or agency-promulgated rule to the contrary would be preempted by Article VI, clause 2, of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall

> be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The pre-*Descamps* split among the circuits regarding the what may be considered under the modified categorical approach has quickly been replaced with a split in the Circuits regarding the extent of *Descamps*' applicability to SORNA tier classifications. Regardless of which approach is applied, however, Mr. Ledet was properly classified as a Tier 1 offender, and his reclassification to a Tier 2 despite the age of the victim not having been established violates his constitutional rights to due process and equal protection.

Sex offender registration—remedial or punitive?

Since SORNA's enactment, there has been a great deal of debate over whether sex offender registration requirements are punitive. Initially, the consensus was that the requirements were remedial and not punitive. The legislative history seems to bear out that the intent was to be purely remedial. As registration requirements and their application have become harsher, however, that consensus is beginning to shift. Under the circumstances of this case, the intent of the reclassification is clearly punitive rather than remedial. As such, due process requires strict scrutiny of the application of the law below.

The Louisiana First Circuit cited as its basis for finding the age element irrelevant that "both the federal law and Louisiana law have a common legislative purpose of protecting against the exploitation of children and the protection of minors from criminal sexual conduct that has been visually depicted." The First Circuit also rationalized that "the terms 'sex offense' and 'sex offender' apply to all defendants convicted of one of the enumerated offenses against a victim who is a minor that require registration regardless of the age of the victim."

As discussed, *supra*, however, Mr. Ledet did not contest his status as a sex offender or his having to register. Regardless of whether Mr. Ledet committed an enumerated offense, he was required both by federal law to register as a result of his federal offense, and also by virtue of there being a Tier 1 "catch-all" registration for sex offenses not comparable to an enumerated Tier 2 or Tier 3 offense. That point was made clearly and repeatedly in every proceeding below, *especially* in the First Circuit proceeding.

Mr. Ledet's original Tier 1 classification served the "legislative purpose of protecting against the exploitation of children and the protection of minors," and imposed upon him the status of sex offender, both of which were the alleged reasons for finding the age element irrelevant. Ignoring the age element did nothing to effectuate SORNA's purpose. Mr. Ledet's original Tier 1 classification and registration period are consistent with SORNA's classification and registration requirement for his federal offense, so his Tier 1 classification clearly serves SORNA's purpose.

Further, this is not simply an issue of whether the SORNA guidelines sets a minimum requirement for the states. As discussed, *supra*, LSA-R.S. 14:81.1 does not just have a much harsher registration requirement than 18 U.S.C. §2252(a)(4) in terms of years and frequency of re-registration, *it also has a lower age element*. The legislature *lowered* the age element, with a corresponding *increase* in the Tier classification. If the Louisiana Legislature had intended its tier classification and registration requirements to be lock-step with SORNA, it would have enacted a statute that accomplished that end. Its legislative acts cannot be expanded by either executive branch (agency) action, or judicial branch action.

LSA-R.S. 15:544(B)(1) provides:

> A person required to register pursuant to this Chapter who was convicted of a sexual offense against a victim who is a minor ***as defined in R.S. 15:541*** shall register and maintain his registration and provide community notification pursuant to the provisions of this Chapter for a period of twenty-five years from the date of initial registration in Louisiana.

Unlike federal sex offenses, Louisiana's sex offender laws do not define "minor" as a specific age. The ages vary by offense. The offenses listed as "sexual offense[s] against a victim who is a minor" vary in age. For some of the listed offenses, the age requirement is an element of the statute itself. Those ages vary

widely from thirteen, to fifteen, to seventeen, to eighteen, to twenty-one years of age. Others have an age as a statutory element of the offense, but a different age for purposes of defining it as a Tier 2 offense. Under Louisiana sex offender registry laws, the term "minor" has no substantive meaning.

LSA-R.S. 15:541(25) as applied to out-of-state or federal offenders under Louisiana's jurisdiction defines as a sexual offense against a victim who is a minor "[a]ny conviction for an offense under the laws of another state, or military, territorial, foreign, tribal, or federal law ***which is equivalent to the offenses listed***. . . ." LSA-R.S. 14:81.1 is listed, and the age element is sixteen or under.

The Department, the ALJ, and the Louisiana First Circuit all agreed that the age element of LSA-R.S. 14:81.1 is not equivalent to 18 U.S.C. §2252(a)(4)(B), but have rationalized their way around the legislatures definition of a Tier 2 offense, imposing harsher registration requirements on Mr. Ledet in violation of his due process and equal protection rights.

CONCLUSION

For the reasons stated above, Mr. Ledet's Petition for a Writ of Certiorari should be granted.