No. _____

In The
Supreme Court of the United States

ANGEL LUIS THOMAS, SR.,

Petitioner,

v.

COL. TYREE C. BLOCKER, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

MARIANNE SAWICKI
Counsel of Record
LAW OFFICE OF MARIANNE SAWICKI LLC
2530 South Blair Avenue
Huntingdon, Pennsylvania 16652
(814) 506-2636
MarianneSawicki@verizon.net

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The federal Sex Offender Registration and Notification Act (SORNA) requires the states and other territories to establish their own registries or risk loss of federal funding. In certain circumstances, SORNA imposes criminal penalties on individuals who fail to register in the jurisdiction where they reside. There is no federal registry of sex offenders.

1. Does the Commerce Clause empower Congress to impose "Registry requirements for sex offenders," 34 U.S.C. § 20913, directly upon an individual convicted under state law who does not cross state lines and who is exempt from his state's own, punitive registration requirements?

2. Did the Third Circuit overstep constitutional limits when it held that federal law authorizes state actors to enroll an individual into a state sex-offender registry, against his will, even though the state itself exempts him from registration?

PARTIES TO THE PROCEEDING AT THE COURT OF APPEALS

Angel Luis Thomas, Sr., Appellant.

Col. Tyree C. Blocker, Jr., Sgt. O.E. Rowles, Capt. Maurice A. Tomlinson, Tpr. David Howanitz, Kevin Kauffman, Nicole Pittman, Kim Hawn, Capt. Brian Harris, Phillip Chamberlain, Adam Ross, Jamey Luther, Michele James, James Rievel, and Brian Urban, Appellees.

RELATED PROCEEDINGS

Angel Luis Thomas, Sr., Norman E. Gregory, and Glenn Morris v. Col. Tyree C. Blocker, et al., No. 4:18-cv-00812-MWB, U.S. District Court for the Middle District of Pennsylvania. Preliminary injunction denied March 20, 2019.

Angel Luis Thomas, Sr., *et al. v. Col. Tyree C. Blocker*, *et al.*, No. 19-1774, U.S. Court of Appeals for the Third Circuit. Opinion entered Jan. 29, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Angel Luis Thomas, Sr., respectfully asks this Court to issue a writ of certiorari to review the decision of the U.S. Court of Appeals for the Third Circuit, entered in this case on January 29, 2020.

OPINIONS BELOW

The January 29, 2020 opinion of the U.S. Court of Appeals for the Third Circuit is reported at *Thomas v. Blocker*, 19-1774, 2020 WL 468866 (3d Cir. Jan. 29, 2020). App. 1-8. The March 20, 2019 order of the U.S. District Court for the Middle District of Pennsylvania is reported at *Thomas v. Blocker*, 4:18-CV-00812, 2019 WL 1275076 (M.D. Pa. March 20, 2019). App. 9-12. The order adopts the Nov. 26, 2018 Report and Recommendation, reported at *Thomas v. Blocker*, 4:18-CV-00812, 2018 WL 8578007 (M.D. Pa. Nov. 26, 2018). App. 13-35.

JURISDICTION

The Third Circuit Court of Appeals entered its final judgment on January 29, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Spending Clause of the Constitution of the United States provides, in pertinent part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

U.S. CONST. art. I, § 8, cl. 1.

The Commerce Clause of the Constitution of the United States provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. I, § 8, cl. 3.

The Military Regulation Clause of the Constitution of the United States provides:

> The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

U.S. CONST. art. I, § 8, cl. 14.

The Necessary and Proper Clause of the Constitution of the United States provides:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this

> Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8, cl. 18.

The Tenth Amendment of the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

The Fourteenth Amendment of the Constitution of the United States provides, in pertinent part:

> 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.

U.S. CONST. amend. XIV, § 1.

Relevant portions of federal and state statutes for registration of sex offenders are printed in the Appendix, including: Pennsylvania's Act 10 of 2018, § 20, Act of Feb. 21, 2018, Pub. L. 27, No. 10; Pennsylvania's Act 29 of 2018, § 21, Act of June 12, 2018, Pub. L. 140, No. 29; 42 Pa.C.S. §§ 9799.54 and 9799.55; 18 U.S.C. § 2250; and 34 U.S.C. §§ 20911-20914, 20919, 20924, 20927. App. 36-62.

STATEMENT OF THE CASE

Agents of the Commonwealth of Pennsylvania compelled Petitioner to register as a sex offender upon release from prison, even though Pennsylvania's registration statute exempts him. Petitioner sued for deprivation of liberty interests without due process, and he immediately moved for injunctive relief to delete his name from the registry. A preliminary injunction was denied on a finding that a federal statute obliges Petitioner to register, hence he likely could not prevail on the merits of his underlying claims. A panel of the Third Circuit affirmed, and review of that finding is now sought.

1. In 1991, Petitioner was convicted of a sexually violent crime in Pennsylvania. He was committed to the custody of the state, and he remained in the same prison in Huntingdon, Pennsylvania until he completed his 27-year sentence on January 11, 2018. Shortly before his release, employees of the Pennsylvania Department of Corrections (DOC) compelled Petitioner to undergo registration as a sex offender. DOC transmitted Petitioner's photograph and other information about him to the Pennsylvania State Police (PSP), where the data was uploaded to a registry of sex offenders and displayed online. Petitioner must report to PSP every few months to renew the registration in person, under threat that PSP would return him to prison otherwise.

2. Petitioner, through counsel, sued several employees of PSP and DOC on April 15, 2018 for violation

of Constitutional rights, inasmuch as the state SORNA explicitly excludes him from any obligation to register. Jurisdiction was proper in the U.S. District Court for the Middle District of Pennsylvania under 28 U.S.C. §§ 1331, 1343(a)(3) and (4). Petitioner then applied for a temporary restraining order to have his name and photograph removed from the PSP's online registry. The district court immediately denied the application without a hearing. On June 6, 2018, Petitioner filed another application for a TRO. Some three months later, the parties were instructed to brief the TRO application as if it were a motion for a preliminary injunction. They did so, with reference to Pennsylvania's sex-offender registration and notification statutes, 42 Pa.C.S. §§ 9799.10-75 ("state SORNA").

3. On November 26, 2018, the magistrate judge filed a Report and Recommendation urging the Court to deny the preliminary injunction. App. 13-35. The R&R declined to decide the issue that had been briefed by the parties, that is, whether *state* SORNA facially exempts Petitioner. Instead, the R&R looked to the *federal* Sex Offender Registration and Notification Act ("federal SORNA"). App. 25-27 (citing 34 U.S.C. § 20913). The R&R found that Petitioner was unlikely to prevail in the underlying litigation because, on the magistrate judge's reading of Section 20913[1] and of

[1] The statute recently underwent renumbering and was moved from Chapter 42 to Chapter 34 of the United States Code. *See* the table of correlation of numbers. App. 45. Herein, section numbers are cited as currently codified, except that quotations of authority retain the number used by the court.

precedent for sex offenders who had crossed state lines, federal SORNA would directly oblige Petitioner to register even though he remains within the borders of Pennsylvania.

4. Petitioner duly filed Objections to that finding. The briefing of the Objections was the first briefing of federal SORNA requirements to the district court. On March 20, 2019, the district judge denied injunctive relief. He adopted the R&R without adverting to the discrepancies between the federal and the state SORNA and their different intent.

5. The district judge mistakenly believed that the magistrate judge had already considered Petitioner's arguments against extending circuit precedent for federal SORNA. The district judge continued to assert that mistaken belief during a conference in chambers subsequently. Yet, those arguments had not been before the magistrate judge when she decided, *sua sponte*, to apply federal SORNA instead of state SORNA. App. 23-26. Petitioner moved for reconsideration of the district court's order. That motion was denied on April 4, 2019.

6. Appeal was taken to the Third Circuit. The appellate panel found that the district court had followed circuit precedent, and it affirmed. However, the panel did not address the question whether precedent had been extended impermissibly to apply Section 20913 beyond the scope of Congress's powers under

the Commerce Clause. *See* App. 1-8. Certiorari of that finding is now requested.

REASONS TO GRANT THE PETITION

This case invites the Court to reconcile inconsistencies in its Commerce Clause jurisprudence as applied across disparate areas of law. Courts of appeals recognize that, as this Court has taught, Congress enacted various provisions of SORNA through powers granted by either the Spending Clause, the Commerce Clause, or the Military Regulation Clause, as each may be enhanced through the Necessary and Proper Clause. That general rule emerges piecemeal from this Court's decisions over the last decade, in view of SORNA's two enforcement provisions: one against non-compliant states, the other against non-compliant individuals. *See* 34 U.S.C. § 20927 (reducing funding when state fails to enact registry requirements of § 20912 and § 20913) and 18 U.S.C. § 2250 (imposing criminal penalty on unregistered offender if: (A) convicted under federal law or (B) crossing state line).

Consistent with this Court's precedent, Congress cannot impose the obligation to register directly upon an individual sex offender who has neither crossed a state line nor incurred a conviction under federal law. That would be an exercise of police power, which Congress does not have. Nevertheless, several courts of appeals override that constitutional bar. They rely instead on the Necessary and Proper Clause along with certain

canons of statutory interpretation espoused by concurrences or dissents in this Court's SORNA decisions. This has generated a line of cases that are out of step with the non-SORNA decisions in which this Court and appellate courts have probed Congress's powers under the Commerce Clause.

Petitioner here presents a case where the contradictions come to a head. None of the recognized federal jurisdictional hooks is present: Petitioner was convicted of a sex offense under state law, and he remains in his home state. The registration regime enacted in his state, though harsher than required by SORNA, actually exempts him because his offense occurred so long ago. Nevertheless, state employees registered him anyway, on their own initiative and involuntarily before releasing him from prison. When he brought a civil suit, the Third Circuit denied injunctive relief on the problematic premise that SORNA directly required him to register.

Yet, SORNA does not authorize individual state agents to force someone to register. Instead, Congress used its Spending Power to persuade the states themselves to enact conforming legislation that would command state officers to undertake enforcement. This case arises because the registration regime enacted by Petitioner's home state, Pennsylvania, is not completely commensurate with the template set forth in SORNA.

Certiorari should be granted to clarify the requirements of SORNA as they have bearing on individuals,

like Petitioner, who are swept up into a state registration regime from which they are exempt. This is an opportunity to reaffirm federalism, iron out inconsistencies in the appellate courts' appropriations of this Court's Commerce Clause jurisprudence, and prune the unforeseen effects of their dicta.

ARGUMENT

I. The Constitutional Limits Of The Federal Legislative Power Define The Reach Of SORNA.

The Necessary and Proper Clause amplifies the enumerated powers of Congress. But the extent of augmentation and the principles that guide it remain unsettled. Although this Court has addressed the issue in its sex-offender cases, those cases have generated dissents, concurrences, and plurality opinions that seem to point in different directions.[2] Unanimity has generally eluded the Court in other Commerce Clause cases as well.[3] Consequently, the courts of appeals, when ruling on the various state regimes for registration of sex

[2] Recent decisions of this Court relevant to sex offenders are: *United States v. Comstock*, 560 U.S. 126 (2010); *Carr v. United States*, 560 U.S. 438 (2010); *Reynolds v. United States*, 565 U.S. 432 (2012); *United States v. Kebodeaux*, 570 U.S. 387 (2013); and *Gundy v. United States*, 139 S. Ct. 2116 (2019), *reh'g den'd*, 17-6086, 2019 WL 6257579 (Nov. 25, 2019). *See* discussion *infra*.

[3] The Court's Commerce Clause jurisprudence includes the split decisions in: *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005); and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). *See* discussion *infra*.

offenders within their respective jurisdictions, have drawn the line between state and federal power at different points.[4]

There is no federal registry of sex offenders. Although SORNA sets forth standards, it merely offers states and other jurisdictions a monetary incentive to comply with them by legislating local registration regimes. 34 U.S.C. § 20927. This comports with the non-commandeering principles inherent in the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). For individuals, however, SORNA compels compliance through a criminal penalty in certain circumstances that create federal jurisdiction independently. 18 U.S.C. § 2250(a).

Subsection 2250(a) has given this Court grounds to find the statute constitutional where it is "necessary and proper" to Congress's exercise of certain of its Article I powers: that is, its power to regulate the military, in Section 2250(a)(2)(A) (offenders convicted under federal law) and its power to regulate commerce, in Section 2250(a)(2)(B) (offenders who travel interstate). No Justice has yet opined on application of SORNA to an offender who, like Petitioner, is in neither category and simply stays home. His case brings the issue into

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[4] Illustrative are recent rulings of the Second, Fifth, Eighth, Ninth, and Tenth Circuits cited in notes 5 and 6 *infra*.

the sharpest possible focus. Under *Sebelius*, inactivity cannot be regulated through Commerce Clause powers. 567 U.S. at 552 (Roberts, C.J.). However, several circuits discount the Commerce Clause discussion in *Sebelius* where the opinion of the Chief Justice was not joined by other Justices.[5] Every court of appeals that has applied SORNA to an offender who travels only intrastate has done so on the basis of another jurisdictional factor.[6]

A. In *Carr v. United States*, This Court Found SORNA To Be Constitutional When An Independent Basis For Federal Jurisdiction Exists.

Regulation of sex offenders has prompted the Court to probe the extent of Congressional power while articulating principles to limit it.

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[5] *See United States v. White*, 782 F.3d 1118, 1124-25 (10th Cir. 2015); *United States v. Robbins*, 729 F.3d 131, 135 (2d Cir. 2013), *cert. den'd*, 571 U.S. 1152 (2014); *United States v. Anderson*, 771 F.3d 1064, 1068 n.2 (8th Cir. 2014), *cert. den'd*, 575 U.S. 924 (2015).

[6] *See United States v. Thompson*, 811 F.3d 717, 722 (5th Cir. 2016), *cert. den'd*, 136 S. Ct. 2398 (2016) (underlying sex offense was federal); *United States v. Brune*, 767 F.3d 1009 (10th Cir. 2014), *cert. den'd*, 135 S. Ct. 1469 (2015) (same). *Cf. United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014), *cert. den'd*, 574 U.S. 850 (2014) (rejecting challenge to intrastate application of SORNA by offender who lacked standing to raise it); *United States v. Hyman*, 665 F. App'x 44 (2d Cir. 2016) (non precedential) (rejecting challenge to intrastate application of SORNA by offender who had waived it and then failed to raise it below).

In *United States v. Comstock*, the Court in 2010 upheld a statute that permitted the federal government to civilly commit a sex offender and confine him indefinitely after the expiration of a federal sentence. 560 U.S. at 129-30. The majority applied a five-factor test to determine that Congress, when enacting the challenged statute, had used its enumerated powers within the scope of the Necessary and Proper Clause. However, Justice Kennedy and Justice Alito, in separate concurrences, sounded notes of caution. The chain of inferences between the enumerated power and the means devised as "necessary and proper" to exercise it must be limited, and "the Constitution *does* require the invalidation of congressional attempts to extend federal powers in some instances." 560 U.S. at 150-51 (Kennedy, J., concurring) (emphasis added). This Court is obliged to ensure that there is an appropriate link between an enumerated power and the law that Congress enacts; Congress does not have "*carte blanche*." 560 U.S. at 158 (Alito, J., concurring) (citations omitted). A vigorous dissent was filed by Justice Thomas, joined largely by Justice Scalia. 560 U.S. at 158-80 (Thomas, J., dissenting). The dissent rejects the majority's five-factor test and insists on the basic principle that Congress must not take over functions that are proper to the states, such as the care of the mentally ill. *Id.* at 164-66.

In the same term, the Court decided a SORNA case through principles of textual interpretation without needing to reach the question of Congress's powers or other constitutional issues. The majority and the

dissent in *Carr v. United States* agree that the federal government has no interest in regulating the behavior of an individual who has been convicted of a sex offense under state law, unless and until the offender leaves the state.

The petitioner in *Carr* was convicted under 18 U.S.C. § 2250(a). He challenged his conviction on grounds that his interstate travel was completed before Congress enacted that provision. Writing for the Court, Justice Kagan speculated about possible meanings of the statutory language where it distinguishes the two categories of offenders targeted by subsections 2250(a)(1)(A) and (B), respectively:

> Congress . . . chose to handle federal and state sex offenders differently. . . . [I]t is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision. It is similarly reasonable for Congress to have given the States primary responsibility for supervising and ensuring compliance among *state* sex offenders and to have subjected such offenders to federal criminal liability *only* when, after SORNA's enactment, they use the channels of interstate commerce in evading a State's reach.

Carr, 560 U.S. at 452 (emphasis added). There must be "a nexus between a defendant's interstate travel and

his failure to register as a sex offender." *Id.* 446. Otherwise:

> Persons convicted of sex offenses under state law who fail to register in their State of conviction would . . . be subject to federal prosecution under § 2250 even if they had not left the State after being convicted—an illogical result given the absence of any obvious federal interest in punishing such *state* offenders.

Id. (emphasis added). Accordingly, an unregistered sex offender did not become subject to SORNA unless and until he crossed a state line after the date when SORNA was enacted. Interstate travel is what subjects the offender to SORNA. The criminal penalty is "embedded in a broader statutory scheme" that tasks the states with maintaining a registry with certain specified information. *Id.* 455-56.

The majority's attention to the statutory scheme of SORNA evoked a concurrence and a dissent in *Carr*. In his concurrence, Justice Scalia insisted that 18 U.S.C. § 2250(a) is plain and unambiguous in its "text, context, and structure," so one need not consult the legislative history or "preenactment materials." *Id.* 458-59 (Scalia, J., concurring).

But, the dissent maintained the opposite. Justice Alito, joined by Justices Thomas and Ginsburg, contested the majority's analysis of the tense of the verb "travels" and then delved into the statute's purpose itself. *Id.* 458-72 (Alito, J., dissenting). SORNA's meaning

emerges from the express purpose for which it was drafted, according to the dissent. The "principal problem" that Congress sought to solve "was that sex offenders commonly moved from one State to another and then failed to register in their new State of residence." *Id.* 471 (citing H.R.Rep. No. 109–218, pt. 1, p. 26 (2005)).

The Court revisited the effective date of SORNA in *Reynolds v. United States*. The sex offense of the petitioner in *Reynolds* occurred prior to the passage of SORNA. The Court agreed with his contention that the Act did not apply to him for travel before the Attorney General made determinations about retroactivity as provided in 34 U.S.C. § 20913(d). Of relevance here are dicta in both the majority opinion and the dissent of *Reynolds* which seem to expand the meaning of § 20913. On one hand, writing for the majority, Justice Breyer characterizes the provisions of that section as mere "standards." "The Act . . . set[s] forth comprehensive registration-system standards [and] mak[es] federal funding contingent on States' bringing their systems into compliance with those standards." 565 U.S. at 435. *See* 34 U.S.C. §§ 20912-20914. Only two categories of persons are identified as being directly obliged to register by SORNA: "a federal sex offender or a nonfederal sex offender who travels in interstate commerce." 565 U.S. at 435. Yet, on the other hand, the majority nevertheless remarks that SORNA "requir[es] both state and federal sex offenders to register." *Id.* This suggestion of a direct imposition of obligation upon individuals by the federal statute is

dicta, and it may be inadvertent, for it is inconsistent with the majority's view that the registry requirements of § 20913 are "standards" to guide state legislators. However, the suggestion of direct obligation is reinforced in a dissent by Justice Scalia, joined by Justice Ginsburg. The dissent asserts that "the registration requirements . . . apply of their own force, without action by the Attorney General." *Id.* 448 (Scalia, J., dissenting) (citations omitted).

B. Uncertainty About The Jurisdictional Hook For The Registration Obligation Persists After *United States v. Kebodeaux.*

The courts of appeals apply *Comstock* and *Carr* to resolve challenges to the constitutionality of SORNA. In *United States v. Kebodeaux*, the appellant had been convicted of a sex offense under federal military law, and he completed his sentence before enactment of SORNA. Subsequently, he failed to register after changing his residence within the state of Texas, and he was convicted of a SORNA violation. The Fifth Circuit initially found that the federal-offender provision, 18 U.S.C. § 2250(a)(2)(A), was a valid exercise of legislative power under the Necessary and Proper Clause. *United States v. Kebodeaux*, 647 F.3d 137, 139 (5th Cir. 2011), *on reh'g en banc*, 687 F.3d 232 (5th Cir. 2012), *rev'd and remanded*, 570 U.S. 387 (2013). However, the panel could not agree about *which* enumerated power was exercised by this necessary and proper means. Two members of the Fifth Circuit panel held it to be regulation of the military, while the concurring

member argued that it must be the commerce power, which justifies the statute in its entire unified legislative scheme. Both opinions, from their different perspectives, stoutly expounded this Court's recent teachings on the Necessary and Proper Clause. *Id.* 142-46; *cf. id.* 148-53 (Dennis, J., concurring). The concurrence also invoked "Justice Scalia's Commerce Clause analysis in *Raich*" as the consensus of this Court. *Id.* 156. *See Gonzales v. Raich*, 545 U.S. 1, 33-42 (2005) (Scalia, J., concurring). Rehearing *en banc* was granted.

On rehearing at the Fifth Circuit, the majority took a different tack. It found that "unconditional" release from federal custody at the conclusion of the sentence for the sex offense must put an end to the interests of the federal government, hence Subsection 2250(a) would be unconstitutional as applied to Mr. Kebodeaux. On that basis, the five *Comstock* factors yielded a different result: "The statute is an unlawful expansion of federal power at the expense of the traditional and well-recognized police power of the state." *United States v. Kebodeaux*, 687 F.3d 232, 253-54 (5th Cir. 2012), *rev'd and remanded*, 570 U.S. 387 (2013). A concurrence and two dissents reprised the appellate court's contentious analyses of Congress's powers. *Id.* 254-69. In dicta, however, the Fifth Circuit rejected the prophylactic use of the Necessary and Proper Clause that it perceived in Judge Dennis's initial panel concurrence:

> Neither this court nor the Supreme Court . . . has ever extended Congress's "police power" over those who use the channels of interstate

> commerce to punish those who are not presently using them but might do so. . . . Because every person is mobile, anyone might someday travel interstate. Thus, by the reasoning of the concurrence, the federal government could regulate anyone on that ground who might someday travel interstate. Myriad, longstanding federal statutes, both economic and non-economic, that have as a jurisdictional nexus the movement of a person across state lines would suddenly no longer need that nexus.
>
> [A] person who only *might* cross state lines is not engaging "in interstate commerce," because he has not yet engaged in interstate activity.

Id. 248 & 250. Judge Dennis, in dissent, replied that the reasoning of the *en banc* majority "hobbles Congress." *Id.* 256-63 (Dennis, J., dissenting).

But, the argument that would prove decisive for this Court was advanced in the other dissent: the "jurisdictional hook" was supplied by a statute prior to SORNA that was in effect at the time of Mr. Kebodeaux's release. *Id.* 263-69 (Haynes, J., dissenting). This Court reversed the Fifth Circuit because it rejected the finding that the release from federal custody had been "unconditional." Although the release occurred prior to SORNA, an earlier sex-registration statute was in effect at that time, the Wetterling Act, and SORNA merely modified its provisions. Writing for the majority, Justice Breyer observed that Congress "used the federal spending power to encourage States

to adopt sex offender registration laws" to enact both SORNA and the Wetterling Act of 1994, with similar reach. *Kebodeaux*, 570 U.S. at 391; *see also id.* 398. The majority held that both the Wetterling Act and SORNA were within the Article I powers of Congress. Based on settled doctrine, this Court "conclude[d] that the SORNA changes as applied to Kebodeaux fall within the scope Congress's authority under the Military Regulation and Necessary and Proper Clauses." *Id.* 399.

Like the majority opinion of this Court in *Kebodeaux*, the concurrences and dissents explore constitutional justifications for applying SORNA where no interstate travel has occurred. Chief Justice Roberts insists that concerns about public safety are irrelevant; the Court does not endorse a federal police power, and "incautious readers" should not infer otherwise. *Id.* 399, 401-02 (Roberts, C.J., concurring). "The fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's *purely intrastate* conduct." *Id.* 403 (emphasis added). Subsection 2250(a)(2)(A) merely does what a state cannot do, for it compels registration by an offender who may leave federal custody without ever having come under state control. "When a servicemember is convicted by a military tribunal . . . the State has no authority to require that tribunal to notify the state registry." *Id.* 405 (Alito, J., concurring).

However, dissents by Justice Thomas and Justice Scalia sound the alarm. Their reviews of the Court's precedents warn of a breach of the rightful limits of the

Necessary and Proper Clause. *Id.* 406 (Scalia, J., dissenting); *id.* 406-20 (Thomas, J., dissenting). "The power to protect society from sex offenders is part of the general police power that the Framers reserved to the States or the people." *Id.* 413 (citing U.S. CONST. amend. X). "All 50 States have used their general police powers to enact sex offender registration laws," which Justice Thomas duly cites in the margin. *Id.* n.2.

The Court's most recent ruling on SORNA, *Gundy v. United States*, is another split decision that probes the limits of Congress's powers. The challenge to SORNA in *Gundy* was whether Congress could delegate the Attorney General to specify how SORNA would apply where, although the offender traveled interstate without registering, the sex offense itself occurred prior to the enactment of SORNA. Four of the eight Justices who took part in *Gundy* found that delegation was proper because the statute supplied the requisite "intelligible principle" to guide the Attorney General. 139 S. Ct. at 2123 (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)); *cf. id.* 2130-31 (Alito, J., concurring). To reach that finding, the plurality opinion elected to examine legislative history and to conduct interpretation of the statutory text itself, as the Court had done in *Reynolds*. 139 S. Ct. at 2126-28. This approach "understand[s] statutory interpretation as a 'holistic endeavor' which determines meaning by looking not to isolated words, but to text in context, along with purpose and history." *Id.* 2126 (citing *United Sav. Assn. of Tex. v. Timbers of Inwood Forest*

Associates, Ltd., 484 U.S. 365, 371 (1988)). The plurality opinion in *Gundy* explains:

> This Court has long refused to construe words "in a vacuum." . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. Reasonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole. And beyond context and structure, the Court often looks to history and purpose to divine the meaning of language. That non-blinkered brand of interpretation holds good for delegations, just as for other statutory provisions. To define the scope of delegated authority, we have looked to the text in context and in light of the statutory purpose. In keeping with that method, we again do so today.

Id. (citations, internal quotes, and internal alterations omitted).

The approach of the plurality in *Gundy* is vigorously contested by Justice Gorsuch in a dissent in which Chief Justice Roberts and Justice Thomas join. *Id.* 2131-48 (Gorsuch, J., dissenting). The dissenters see the plurality as "[w]orking from an understanding of the Constitution at war with its text and history." *Id.* 2131. Sex offenders are "a politically unpopular minority," as Justice Gorsuch observes. *Id.* 2144. His dissent continues:

> It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from giving the executive *carte blanche* to write laws for sex offenders is the same rule that protects everyone else. Nor is it hard to imagine how the power at issue in this case—the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties—could be abused in other settings. To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to "'unit[e]'" the "'legislative and executive powers . . . in the same person'"—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.

Id. 2144-45 (citing THE FEDERALIST No. 47, at 302).

II. Several Courts Of Appeals Depart From This Court's Teaching That The Statutory Text Must Be Construed Consistent With Recognized Limits On Congress's Powers.

This Court has not globally upheld SORNA as a proper exercise of Congress's Article I powers. Rather, it has upheld registration only where the requisite "jurisdictional hook" is present: either an initial conviction under federal law, or interstate travel. Most cases that reach appellate review are of that sort. Yet,

appellate case law exhibits a drift toward endorsing global applications of SORNA, propelled in part by dicta embedded in prior appellate rulings that otherwise follow this Court's precedent.

For example, a panel of the Tenth Circuit followed *Kebodeaux* in rejecting a challenge to SORNA under the Necessary and Proper Clause. *United States v. Brune*, 767 F.3d 1009 (10th Cir. 2014), *cert. den'd*, 135 S. Ct. 1469 (2015). Like Mr. Kebodeaux, the appellant in *Brune* was convicted of a federal sex offense. *Id.* 1013, 1017-25. Hence, the panel relied on this Court's holding "that, when affixed to Congress's power under the Military Regulation Clause, the scope of the Necessary and Proper Clause permitted Congress to enact SORNA's registration requirements." *Id.* 1015 (citing *Kebodeaux*, 133 S.Ct. at 2505). It found: "SORNA is constitutional as applied to Brune, a federal sex offender who was never unconditionally released from federal supervision." *Id.* 1017. Yet, a marginal comment expands upon that holding:

> In reaching this conclusion, we join the collection of federal appellate courts that have uniformly found that, post-*Kebodeaux*, SORNA's registration requirements cannot be constitutionally challenged under the Necessary and Proper Clause. *United States v. Reyes*, 550 F. App'x 201 (5th Cir. 2013); *United States v. Elk Shoulder*, 738 F.3d 948 (9th Cir. 2013); *United States v. Brunner*, 726 F.3d 299 (2d Cir. 2013).

Id. n.2. The three appellate cases marginally cited by the *Brune* panel all involve convictions for sex offenses under federal law, as does *Brune* itself. In no way would they bar a challenge to SORNA as applied to someone with a state-law conviction only.

The Fifth Circuit cited *Brune* when it rejected a challenge to the constitutionality of SORNA as applied to someone whose sex crime was federal but did not occur on federal land or involve military law. *United States v. Thompson*, 811 F.3d 717 (5th Cir. 2016). Inaccurately, the *Thompson* panel quotes the marginal dicta as if it were the holding of *Brune*. *Id.* 724 ("The *Brune* court ruled that 'SORNA's registration requirements cannot be constitutionally challenged under the Necessary and Proper Clause'.") (citing footnote 2 of *Brune*). Repeating that overgeneralization does not enhance its accuracy. What renders SORNA constitutional, under *Kebodeaux*, is the underlying federal conviction, although that fact is all but obscured by the *Thompson* panel's sweeping rhetoric:

> The Courts of Appeals have repeatedly upheld SORNA's registration and penalty provisions under the Necessary and Proper Clause, even when the defendant neither served in the military, nor committed an offense or lived on federal property, nor moved within interstate or foreign commerce.

Id. 723 (citing *Kebodeaux* and appellate authority). Still open to question is whether SORNA could apply—that is, be necessary and proper to exercise of any enumerated power of Congress—where there has been no

interstate travel and no underlying federal sex crime conviction.

Courts of appeals have similarly overstated the constitutional reach of the SORNA registration requirements in cases where the "jurisdictional hook" was interstate travel. For example, the appellant in a Sixth Circuit case had a state conviction, but he traveled to the Philippines and back without registering. *United States v. Paul*, 718 F. App'x 360 (6th Cir. 2017) (unpublished), *cert. den'd*, 140 S. Ct. 342 (2019) (Kanavangh, J., commenting on denial of cert.). In its opinion, the panel expansively recited the law as though SORNA imposed a duty to register directly on every person convicted of a sex offense:

> SORNA requires sex offenders to inform authorities of where they live, work, and attend school. . . . [It] subjects . . . an offender to certain registration requirements. Paul pleaded no contest in Tennessee to one count of rape, qualifying him as a "sex offender" under SORNA and subjecting him to federal registration duties. . . . SORNA obligates sex offenders to register.

Id. 362 (statutory citations omitted). More accurately under this Court's precedents, Mr. Paul was not "subjected" to SORNA until he traveled interstate without registering.

Some courts of appeals have been more careful in their diction than others. *Compare United States v. Johnson*, 632 F.3d 912, 920 (5th Cir. 2011) ("SORNA

orders sex offenders traveling interstate to register and keep their registration current.") *with United States v. Heth*, 596 F.3d 255, 257-58 (5th Cir. 2010) ("SORNA imposes a registration requirement on sex offenders. . . . [A] sex offender is required to register, and keep the registration current.") (internal cites and quotes omitted). The Fifth Circuit's 2011 formulation is more exact than its earlier one. Yet, both presume that § 113 imposes duties directly on individuals, which this Court has not determined.

Appellate rulings in SORNA cases premised on interstate travel sometimes include dicta seeming to extend the holding to intrastate travel as well. A divided panel of the Seventh Circuit upheld SORNA against a challenge by an offender who traveled interstate, in *United States v. Vasquez*, 611 F.3d 325 (7th Cir. 2010), *cert. den'd*, 563 U.S. 1022 (2011). The Seventh Circuit found that, as to interstate travel by sex offenders, Congress enacted SORNA using its powers under the Necessary and Proper Clause, viewed through the categories of analysis set forth in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). *Id.* 229-31. The panel added, in dicta: "To the extent that [42 U.S.C.] § 16913 regulates *solely intrastate* activity, the regulatory means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Id.* 331 (emphasis added).

The Eighth Circuit resolved a similar challenge by two sex offenders in *United States v. Howell*, 552 F.3d 709 (8th Cir. 2009), *cert. den'd*, 557 U.S. 913 (2009). Appellants in *Howell* argued that the registry requirements

of § 113 apply facially to offenders with state convictions who remain within state lines. The section does not fit any *Lopez* category; hence, they argued, it exceeds Congress's powers. *Id.* 715. The appellate court saw support for that argument in several district court opinions,[7] but rejected it nevertheless. The panel doubted that the *Lopez* factors could bring to light any jurisdictional hook for the registry requirements as applied in the absence of interstate travel. *Id.* The panel relied instead on the Scalia Concurrence in *Raich*, 545 U.S. at 35-37, to support the proposition that "Congress's commerce clause authority can reach wholly intrastate activity." *Id.* 714-15. Accordingly, the appellate panel reasoned:

> Although [42 U.S.C.] § 16913 may reach a wholly *intrastate* sex offender for registry information, [it] is a reasonable means to track those offenders if they move across state lines. . . . Covering the registration of wholly *intrastate* sex offenders is merely incidental to Congress's tracking of sex offenders in interstate commerce.

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[7] *Howell* principally cites *United States v. Waybright*, 561 F.Supp.2d 1154 (D. Mont. 2008). *Waybright* was singled out by commentator Corey Yung as an early, correct approach to judicial interpretation of SORNA. *See* Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 369, 373 (2009). Besides *Waybright*, *Howell* cites several other cases with subsequent negative history. 552 F.3d 713 n.3 and 715 n.5.

Id. 717 (emphasis added). The Second Circuit reasoned similarly in *United States v. Guzman*, 591 F.3d 83, 90–91 (2d Cir. 2010), *cert. den'd*, 561 U.S. 1019 (2010) ("Requiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines.").

The Eighth Circuit dicta in *Howell* and the Second Circuit dicta in *Guzman* lack sound legal basis. As the Fifth Circuit would later observe in *Kebodeax*: "Neither this court nor the Supreme Court . . . has ever extended Congress's 'police power' over those who use the channels of interstate commerce to punish those who are not presently using them but *might* do so." 687 F.3d at 248 (emphasis added). *See supra*. The Necessary and Proper Clause cannot empower Congress to foresee future travel by sex offenders.

A similar challenge to SORNA, by a state-convicted sex offender who had crossed state lines, was resolved more diffidently by the Third Circuit. *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010), *cert. den'd*, 560 U.S. 974 (2010), *abrogated on another point by Reynolds v. United States*, 565 U.S. 432 (2012). The Third Circuit aligns its ruling with that of *Howell*. *Id.* 160. However, the *Shendoah* panel reasons that what makes SORNA constitutionally sound under the Commerce Clause is the language of its criminal provision. SORNA "thus derives its authority from each prong of *Lopez*." *Id.* 161 (citing 18 U.S.C. § 2250(a)(2)(B)). Accordingly, where *Shenandoah* finds that the statute

imposes a registration duty upon individuals directly, it goes on to explicitly condition that duty on interstate travel:

> [T]he directive found in 42 U.S.C. § 16913(a) applies to sex offenders—not to states. *When combined with* SORNA's enforcement provision, 18 U.S.C. § 2250(a), an independent and federally enforceable duty is placed on sex offenders to register.

Id. 157 (emphasis added). The "federal obligation" arises for the state-convicted sex offender when he enters interstate commerce. *Id.*

The Third Circuit soon had opportunity to reaffirm the complementarity of the two sections of the statute. *United States v. Pendleton*, 636 F.3d 78, 87 (3d Cir. 2011), *cert. den'd*, 565 U.S. 1159 (2012) (citing *Guzman*, 591 F.3d at 90-91). The appellant in *Pendleton* was convicted in the District of Columbia, traveled in Europe, then lived as a transient in Delaware. The main contention of his unsuccessful appeal was that the jury had insufficient evidence to support a finding that he resided *anywhere*. *Id.* 80-85. Ancillary to that was a constitutional challenge under the Commerce Clause, and the Third Circuit addressed it by citing its own recent ruling in *Shenandoah* as well as authority discussed above, including *Lopez*, *Comstock*, rulings of sister circuits in *Guzman*, *Howell*, *Vasquez*, and Justice Scalia's Concurrence in *Raich*. *Id.* 86-88.

Third Circuit authority assumes, without deciding, that the language of the registry section, 34 U.S.C.

§ 20913(a)-(c), imposes duties directly upon sex offenders. Which offenders? The answer is oblique: SORNA is constitutional by virtue of the "jurisdictional hook"—or, hooks—in its criminal section, 18 U.S.C. § 2250(a), which targets two categories of offenders. Hence, those who must register are those with federal convictions and those who travel interstate.

The Petitioner here, Mr. Thomas, fits into neither category. The panel that decided his appeal at the Third Circuit edited their quotations from *Pendleton* to obscure its nuance. App. 7. In *Pendleton*, it was actually the appellant who had insisted that the statute directly required all sex offenders to register; that was the linchpin of his challenge under the Commerce Clause. The panel in *Pendleton* defeated that challenge by asserting the complementarity of the registration section with the criminal section, where the "jurisdictional hook" is found. *Pendleton* did not reach the question whether the registration requirement falls upon all offenders, or only those who either travel interstate or have convictions under federal law. There was no need, because the appellant in *Pendleton* himself was a traveler. Similarly, in *Whaley*, the pre-*Kebodeaux* decision of the Fifth Circuit quoted in *Pendleton*, the passing mention of stay-at-home offenders is dicta, because the appellant in *Whaley* crossed state lines as well. *See United States v. Whaley*, 577 F.3d 254, 261 (5th Cir. 2009). *Compare Pendleton* 636 F.3d at 88 (quoting *Whaley*) *with* the opinion under appeal here. App. 7.

With each iteration, the dicta loosen their moorings in fact and law, even as they balloon into pseudo precedential principles. Certiorari should be granted to correct this mistaken notion: the assumption that, in 34 U.S.C. § 20913, Congress imposed obligations directly upon state-convicted sex offenders who stay home, and that Congress did so without overstepping its Article I powers. That mistake has gone viral in the courts of appeals.

III. Constitutional Clarification Of Registry Requirements, 34 U.S.C. § 20913, Will Curb Violations Of Fourteenth Amendment Rights By State Actors.

Pennsylvania's sex-offender registration statute imposes onerous burdens. State appellate courts have held that registration imposes "hardship." *Lusik v. Pennsylvania State Police*, 405 M.D. 2017, 2018 WL 6165343 (Pa. Cmwlth. Nov. 26, 2018). The state's highest court deemed the requirements "punitive" and barred retroactive application of an earlier version of the statute. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. den'd sub nom. Pennsylvania v. Muniz*, 138 S. Ct. 925 (2018). The current statute is similar and currently is undergoing challenge in Pennsylvania appellate courts. *See, e.g.*, *Steinman v. Blocker*, 255 M.D. 2018, 2019 WL 6047568 (Pa. Cmwlth. Nov. 15, 2019) (unreported).[8] The statute requires frequent

[8] The statute challenged in *Steinman* is Pennsylvania's current registration law, known as "Act 10" and "Act 29." App. 36-45. In a related case, *Commonwealth v. Lacombe*, No. 35 MAP 2018,

appearances. 42 Pa.C.S. § 9799.15(e) and (g). *See* explanation and instructions at https://www.pameganslaw.state.pa.us (visited March 2, 2020).

Federal administrative authorities concede that the registration regimes of the states, which differ among themselves, can impose harsh and even punitive conditions.

> SORNA generally establishes minimum national standards, setting a floor, not a ceiling, for jurisdictions' sex offender registration and notification programs. Hence, jurisdictions may adopt requirements that encompass the SORNA baseline of sex offender registration and notification requirements but exceed them.

Office of the Attorney General, The National Guidelines for Sex Offender Registration and Notification, 73 FR 38030-01, 2008 WL 2594934 (July 2, 2008). The excess beyond the federal requirements may include provisions like those that Pennsylvania's Supreme Court found to violate the Ex Post Facto Clauses of both federal and state constitutions when applied retroactively, because those provisions are indeed punitive. *See Muniz*, 164 A.3d at 1222.

Pennsylvania's registration statute implicates liberty interests that a state may not take away without due process of law. *See* U.S. CONST. amend. XIV, § 1. Yet, a sex offender who resides in Pennsylvania has no

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the Supreme Court of Pennsylvania heard oral argument on Nov. 20, 2019, and a decision is expected soon.

other way to register if he wishes to travel interstate without violating the federal statute. Petitioner has not traveled interstate, nor will he, in view of the disincentive to interstate travel provided in 18 U.S.C. § 2250(a)(2)(B). Moreover, the Pennsylvania statute actually exempts him from registration altogether because his offense occurred before 1996 and no prior law ever required him to register during his 27-year incarceration. App. 23-25.

Nothing in *state* law authorized state actors to compel Petitioner to register, as they did. But, the district court declined to rule on state law because it held, incorrectly, that *federal* law required the registration anyway. App. 25-26. Even if Petitioner potentially could place himself within the reach of SORNA at some future time, perhaps by traveling into Maryland, there is still no legal provision allowing Pennsylvania officers to compel him to register involuntarily before releasing him from prison, as they did. Congress has no police power—a rule that requires reassertion in the SORNA context, in view of the appellate opinions discussed herein.

SORNA is addressed to the states and other territorial jurisdictions, with federal funding as an incentive for their compliance. It is not addressed to state agents as individuals, independently of the provisions of their own state registration regimes. Unfortunately, the Third Circuit has condoned vigilante action here, where individual actors stepped in to compel registration that was not required by their state employer. Their misguided attempt to enforce SORNA wrongfully

deprived Petitioner of liberty and property interests. Certiorari should be granted to discourage such vigilante action and reassert the limits of the federal legislative power.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted this 28th day of April, 2020,

MARIANNE SAWICKI
Counsel of Record

LAW OFFICE OF MARIANNE SAWICKI
2530 South Blair Avenue
Huntingdon, Pennsylvania 16652
(814) 506-2636
MarianneSawicki@verizon.net