RECORD NO. _____

IN THE
Supreme Court of the United States

THOMAS ABDUL HOLCOMBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the Court must resolve splits among and within the circuits because across the country there is no uniformity of prosecution of alleged SORNA violations on the issue of venue?
2. Whether SORNA violates the non-delegation doctrine in the grant to the Attorney General unconstrained discretion to decide to whom SORNA applies without an "intelligible principle" to guide this discretion?
3. Whether SORNA Violates Petitioner's right to travel, a right which is identified in this Court's precedent in *Saenz v. Roe*, 526 U.S. 489, 500 (1999)?
4. Whether the Court of Appeals' failure to remedy the ex post facto violation is in conflict with this Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), as application of SORNA to Petitioner's circumstances resulted in an increased penalty?

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America
Thomas Abdul Holcombe

STATEMENT PURSUANT TO RULE 14(1)(b)(iii)

United States v. Holcombe., 7:15-cr-304-1, is the trial court docket in the Southern District of New York, from which this case originates.

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October Term, 2019

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Opinion Below

The Opinion of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A. 1).

Jurisdictional Statement

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued an Opinion affirming Petitioner's conviction on February 23, 2019. On August 29, 2019, the Court of Appeals denied Petitioner's Petition for panel rehearing, hearing en banc.

Constitutional and Statutory Provisions Involved

The Constitutional provisions involved are the protections of the Sixth Amendment, Article I of the United States Constitution, and the Due Process Clause of the Fifth Amendment.

The statutory provisions involved are 18 U.S.C. § 2250, 34 U.S.C. § 20913, and 34 U.S.C. §§ 20912, 20913, 20917.

STATEMENT OF THE CASE

Petitioner, who was subject to the requirements of the Sex Offender Registration and Notification Act ("SORNA"), as a result of his conviction of a sex offense in 1992, was convicted after a bench trial in the United States District Court for the Southern District of New York of failing to update his registration when he moved from New York to Maryland.

Panel Opinion

A panel of the Second Circuit Court of Appeals analyzed Petitioner's claim that venue was improper in the Southern District of New York ("SDNY"), the state Petitioner had left, rather than a district court in Maryland, the state where Petitioner failed to register. The court stated that it agreed with the majority of its sister circuits that have held that a SORNA offense begins under 18 U.S.C. § 3237(a) in the district that the defendant leaves, not in the district where the defendant's interstate travel ends. *United States v. Holcombe,* 883 F.3d 12, 15-16 (2d Cir. 2018)(citing *United States v. Kopp*, 778 F.3d 986, 988–89 (11th Cir. 2015); *United States v. Lewis*, 768 F.3d 1086, 1092–94 (10th Cir. 2014); *United States v. Howell*, 552 F.3d 709, 717–18 (8th Cir. 2009). The court went on to state that the offense begins where the interstate journey begins because interstate travel is an essential element of a SORNA offense and petitioner's interstate journey began in the SDNY because his address when he was released from jail was in the SDNY. *Id.* The court rejected Petitioner's analysis of *Lunsford*, in stating that it did not deal with venue but instead resolved whether the defendant's departure state remained

a "jurisdiction involved." *Id.* at 16. Disagreeing with the ruling in in *United States v. Haslage*, 853 F.3d 331 (7th Cir. 2017) and *Nichols v. United States*, 136 S. Ct. 1113 (2016), the court stated that interstate travel *is* an element of a SORNA offense, that *Nichols* did not address venue, and the defendant in *Nichols* was a federal sex offender, who unlike a state sex offender did not need to travel interstate to violate SORNA. *Id.* In *Nichols*, this Court decided that SORNA, which makes it a federal crime for certain sex offenders to knowingly fail to register and requires sex offenders who move to another state to, "no later than 3 business days after each change of name, residence, employment, or student status," inform in person at least one jurisdiction "where the offender resides, . . . is an employee, and . . . is a student," did not require the defendant to update his registration in Kansas once he left the state and moved to the Philippines. *Nichols*, 136 S. Ct. 1117-1118.

The Court of Appeals further rejected Petitioner's claim that SORNA's registration requirements violate his constitutional right to travel. Using this Court's standard, the Second Circuit explained that where a statute implicates the right to travel, it will only be upheld if it is necessary to promote a compelling government interest. *Id.* at 17 (citing *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The court stated that nothing in the SORNA requirements implicate the fundamental right to travel because while it may be inconvenient, nothing in SORNA stops a sex offender from "enter[ing] [or] leav[ing] another state" if the offender chooses to permanently relocate. Even assuming SORNA's requirements implicate the right to travel, explained the court, "the burdens imposed by the

registration scheme narrowly served the government's compelling interest in addressing 'the deficiencies in prior law that had enabled sex offenders to slip through the cracks.'" *Id.* (citing *Carr v. United States*, 560 U.S. 438, 455 (2010). The court concluded that SORNA's registration requirement does not violate Petitioner's right to travel. *Id.*

The Court of Appeals concluded that Petitioner's claims based on the non-delegation doctrine, the Ex Post Facto Clause, the Commerce Clause, the Tenth Amendment and his argument that SORNA did not apply to him because New York had not yet implemented the statute were all foreclosed by *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010) and that his remaining arguments were without merit. *Id.*

Reasons for the Granting of the Writ

Point I

The Court Must Resolve Splits Among and Within the Circuits Because Across the Country there is no Uniformity in the Prosecution of Alleged SORNA Violations on the Issue of Venue.

The Sixth Amendment guarantees a defendant the right to trial by "an impartial jury of the state and district wherein the crime shall have been committed." Reflecting this constitutional command, the Federal Rules of Criminal Procedure also state that "the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18.

In *Nichols v. United States*, 136 S. Ct. 1113 (2016), this Court analyzed "whether federal law required Nichols to update his registration in Kansas to reflect

his departure from the State." 136 S.Ct. at 1115. This Court observed that an earlier version of the federal sex offender registration statute had imposed the duty to report a change of address to the responsible agency in the state from which the offender was leaving. The prior statute directed States to require a sex offender to "report the change of address to the responsible agency in the State the person is leaving, and [to] comply with any registration requirement in the new State of residence." 42 U.S.C. § 14071(b)(5)(2000ed.)(emphasis added). *Id*. At 1116.

SORNA repealed the part of the law that required the offender to report the change of address to the responsible agency i*n the State the person is leaving* and replaced it with the following language:

> "A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry."

34 U.S.C. § 20913(c)(emphasis added). The reference to one jurisdiction involved refers to any one jurisdiction in which the offender works, lives or is a student. Once the offender notifies that one jurisdiction, then that jurisdiction would notify a list of interested parties, including other jurisdictions. 34 U.S.C. §§ 20923(b)(1)-(7)(A sex offender is required to notify only one "jurisdiction involved"; that jurisdiction must then notify a list of interested parties, including the other jurisdictions).

This Court in *Nichols* stressed the fact that 34 U.S.C. § 20913(a)(the identical predecessor to 34 U.S.C. § 20923), identifies "involved" jurisdictions, uses the

present tense: "resides," "is an employee," and "is a student." It pointed out that a person (such as Nichols) who moves from Leavenworth, Kansas, to Manila, in the Philippines, no longer "resides" (present tense) in Kansas. It follows, this Court said, "that once Nichols moved to Manila, he was no longer required to appear in person in Kansas to update his registration, for Kansas was no longer a 'jurisdiction involved' pursuant to subsection (c) of 20913." *Id*. At 1117. This Court found further support for its conclusion in the fact that an offender who moves to a new place has three business days after each change of residence to register in the new place. "SORNA's plain text therefore did not require Nichols to update his registration in Kansas once he no longer resided there." *Id*. At 1118.

Improper Venue

When Petitioner changed his residence from New York to Maryland, there was no obligation under SORNA for Petitioner to update his registration in New York, his former residence. The situs of the criminal conduct (failure to register) would be Maryland. In a long line of cases, this Court has made it very clear that where a charged crime is the failure to perform a legally required act, venue lies only in the district where the act should have been performed. In *Travis v. United States*, 364 U.S. 631 (1961), the defendant was indicted in Colorado for making and executing in Colorado and filing in Washington D.C., false affidavits. *Id*. at 633. He was tried and convicted in Colorado. *Id*. This Court held that venue should lie only in the District of Columbia, where regulations required the affidavits to be "on file with the Board." *Id*. at 637. In *Travis*, this Court cited its own decision in

United States v. Lombardo, 241 U.S. 73, 76-78 (1916), where it stated, "when a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place…" *Travis*, at 636.

Additionally, in *Johnston v. United States*, 351 U.S. 215, 220 (1956), where registrants were ordered to report for civilian work at state hospitals in judicial districts other than those in which they resided, this Court held that the venue for the registrants' trials was in the judicial districts where the civilian work was to be performed, not in the judicial districts in which they resided and where their orders were issued. *Id*. This Court reasoned that it was "led to this conclusion by the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." *Id*.

Similarly, in *United States v. Anderson*, 328 U.S. 699, 705 (1946), where the defendant was indicted following his refusal to submit to induction into the armed forces at Fort Lewis in Washington, this Court held that under such a prosecution, venue is properly laid in the judicial district where the act of refusal occurred, rather than in the district where the draft board which issued the order is located. *Id*. at 699-700.

Again and again, over decades, this Court has held that venue is only appropriate in the place in which a defendant's obligation arose or is only conferred when the criminal act occurs. Hence, in the case at hand, the only jurisdiction in which venue is appropriate is the state of Maryland, where Petitioner failed to

register, making New York or any jurisdiction other than Maryland inappropriate for venue purposes.

Petitioner's case is not the only one to ignore this Court's long line of cases. The Second, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits found that venue is proper in the "departure" state because that is where the crime begins, not in the state where the offender's travel ends and where they fail to register.[1] *United States v. Howell*, 552 F.3d 709, 717–18 (8th Cir. 2009); *United States v. Leach*, 639 F.3d 769, 771-72 (7th Cir. 2011); *United States v. Atkins*, 498 F. App'x 276, 277 (4th Cir. 2012); *United States v. Stewart*, 461 F. App'x 349, 352 (4th Cir. 2012); *United States v. Lewis*, 768 F.3d 1086, 1092-94 (10th Cir. 2014);*United States v. Kopp*, 778 F.3d 986, 989 (11th Cir. 2015); *United States v. Lewallyn*, 737 F. App'x 471, 475 (11th Cir. 2018); *United States v. Holcombe*, 883 F.3d 12, 16 (2d Cir. 2018). In *Kopp*, the Eleventh Circuit held that "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for [§] 2250, but it is also . . . the very conduct at which Congress took aim." *Id*. (quoting *Carr v. United States*, 560 U.S. 438, 454 (2010). Because the crime consists of both traveling and failing to register, Kopp began his crime in the "departure" state; i.e., the state he moved his residence from (Georgia) and consummated it in Florida, held the Eleventh Circuit. These cases ignore this Court's long line of cases only conferring jurisdiction in the state in which the law required performance of an act, in order to assure SORNA prosecutions remain intact. *Lombardo*, 241 U.S. at 76-78; *Anderson*, 328 U.S. at 705, *Johnston*, 351 U.S. at 220, *Travis*, 364 U.S. at 636.

[1]The Seventh and Eighth Circuits have also held the opposite. Creating inter-circuit splits.

To further add to the confusion and overwhelming circuit split, which requires this Court's attention, there is also inter-circuit splits within the Seventh and Eighth Circuits. While the Seventh Circuit in 2011 in *United States v. Leach*[2] held that venue was proper in the departure state, 639 F.3d 769, 771-72 (7th Cir. 2011), another panel of the Seventh Circuit, in 2017, in *United States v. Haslage*, decided that venue was improper in the departure state. 853 F.3d 331, 334 (7th Cir. 2017). And, while the Eighth Circuit court in 2009 in *United States v. Howell* found that venue in the departure state was proper, 552 F.3d 709, 717-18 (8th Cir. 2009), another panel of the Eighth Circuit in 2013 in *United States v. Lunsford* determined that venue was improper in the departure state. 725 F.3d 859, 861-862 (8th Cir. 2013).

As the Seventh Circuit held in *Haslage,* that the act of leaving one's home in State A and traveling to State B is not a separable part of the offense defined in section 2250 for purposes of criminal venue. 853 F.3d at 334. Indeed, in countless cases the act of traveling from State A to State B will not be the predicate for any offense at all. SORNA does not prohibit all interstate travel; it does not require registration by an offender who travels from Chicago to Hammond, Indiana, to attend a Saturday wedding; and it places no obligation on the offender to do anything in the state of origin. *Haslage*, at 334.

[2] But see *United States v. Hill*, 224 F. Supp. 3d 657, 660–61 (C.D. Ill. 2016), where the court decided that *Nichols v. United States*, 136 S. Ct. 1113 (2016) either "impliedly overruled *Leach* or vitiated the basis of Leach's holding…" and held that venue was improper in the "departure" state.

If the drafters of SORNA had intended that registrants (de)register in the departure jurisdiction, they could easily have said so; indeed, that is exactly what the prior amended Wetterling Act had required. 42 U.S.C. §14071(b)(5) (2000 ed.) ("report the change of address to the responsible agency in the State the person is leaving"). Congress could have chosen to retain the language in the amended Wetterling Act, but did not.

In fact, SORNA repealed the part of the law that required the offender to report the change of address to the responsible agency i*n the State the person is leaving* and replaced it with the following language:

> "A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry."

This issue was addressed correctly by the Eighth Circuit in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013). In Lunsford, the defendant sustained pre-SORNA state convictions, which made him subject to federal sex offender registration when SORNA was enacted. Lunsford, who lived and was registered at an address in Kansas City, Missouri, booked a flight to the Philippines and left the jurisdiction without updating his Missouri registration. He was arrested in the Philippines and returned to the United States to face prosecution under SORNA

based on the theory that he did not update his Missouri registration to indicate a change in residence. *Id*. at 860.

As noted in *Lunsford*: SORNA requires a sex offender to "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." Id (citing 34 U.S.C. § 20913(a). To "keep the registration current," an offender must, "not later than 3 business days after each change of . . .residence . . . appear in person in at least one jurisdiction involved pursuant to [34 U.S.C. § 20913(a)] and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." Id. §20913(c).

The offender must supply, among other things, the address of "each residence at which the sex offender resides or will reside." Id. § 20914(a)(3). A sex offender violates 18 U.S.C. § 2250(a) if he travels in interstate or foreign commerce and knowingly fails to register or update a registration as required by SORNA.

Lunsford changed his residence when he moved to the Philippines. A change of residence triggers an obligation on the part of an offender to update a "jurisdiction involved" with the address of his new residence. 34 U.S.C. § 20913(c); 20914(a)(3). *Id*. at 861. SORNA's definition of "jurisdiction" excludes foreign countries, id. § 20911(10), so Lunsford was not required to register in the Philippines. The government's theory was that Lunsford violated SORNA when he did not supply information about his change of residence to the Missouri registry. *Id*. He was required to do so, however, only if Missouri was a "jurisdiction involved,"

within the meaning of SORNA, when he changed his residence. A "jurisdiction involved" is a jurisdiction where the offender resides, is an employee, or is a student. Id. § 20913(a), (c). The government did not argue that Lunsford was an employee or a student in Missouri at the relevant time, but contended that Missouri was a "jurisdiction involved" because it was the "jurisdiction where the offender reside[d]." Id. § 20913(a). SORNA defines "resides" to mean, "with respect to an individual, the location of the individual's home or other place where the individual habitually lives." *Id*. § 20911(13).

In *Lunsford*, the Eight Circuit noted further; the government did not contend, for example, that Lunsford established a new residence in Missouri after he abandoned his residence in Missouri and before he boarded his flight to the Philippines. The plea agreement reflected the understanding of the parties that Lunsford did not change his residence and trigger a reporting obligation until after he left the United States. But after Lunsford left the country, Missouri was not the location of his home or a place where he habitually lived, so Lunsford did not "reside" in Missouri when he changed his residence. 725 F.3d at 861; see, 34 U.S.C. § 20911(13).

The Eighth Circuit held that "resides," is a present-tense verb, and "the present tense generally does not include the past" under 34 U.S.C. § 20913(a). *Id* (citing *Carr v. United States*, 560 U.S. 438 (2010)(citing the Dictionary Act, 1 U.S.C. § 1). There was thus no textual basis for requiring an offender to update his registration in a jurisdiction where he formerly "resided," and where he is not

currently an employee or a student. Missouri was not a "jurisdiction involved" after Lunsford changed his residence to somewhere in the Philippines, so Lunsford was not required by the federal statute to update the Missouri registry. 725 F.3d at 861-862. This interpretation makes sense because a person may be very likely to leave a state without the intention to no longer live there, but a visit to another state may easily turn into residency. To require the defendant to register in the departure state ignores this common occurrence.

Furthermore, as it is the legislature's role to define what constitutes a crime, circuit courts that decide a SORNA violation crime begins when an offender leaves one state and is completed when they reside in another state, conflict with the separation of powers. As this Court has stated, "the hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983). There is no such element listed in 18 U.S.C. § 2250 as the legislature only listed traveling in interstate commerce as an element. Therefore, it is not the role of the judiciary to elaborate on or extend elements of crimes, including defining a failure to register SORNA violation as beginning in one state and ending upon residing in another state. Such extensions result in unfairly expanding liability to offenders and also undermines the authority of the legislative branch to establish what constitutes an offense.

No federal crime was committed in the Southern District of New York in Holcombe's case because no crime was committed until Petitioner resided in

Maryland for three days without registering. The split in authority in the Circuits regarding this issue, where the Seventh and Eighth Circuits have inter circuit splits, and both hold that it is not required for an offender to update his registration in a jurisdiction where he formerly "resided," and also have older cases which agree with the Second, Fourth, Tenth and Eleventh Circuits that venue is proper in the "departure" state because that is where the crime begins, not in the state where the offender's travel ends and where they fail to register, suggests the issue of venue is entrenched and compels this Court to intervene resolve the issue as a means of ending the lower court debates. In the absence of this Court's intervention, offenders may be left to fend for themselves among improper venues and the challenges to venue will become a never-ending cycle. Only review by this Court can resolve which of the interpretations surrounding the venue issue is correct by the grant of certiorari.

POINT II

The Indictment Should Have Been Dismissed Because SORNA Violates the Non-Delegation Doctrine and While this Issue Has Been Decided by This Court in *Gundy v. United States*, 139 S.Ct. 2116 (2019), It Conflicts With Controlling Decisions of This Court.

SORNA delegated to the Attorney General the authority to "specify the applicability" of the Act to "sex offenders "who are "convicted before" July 27, 2006, as well as those who are "convicted before . . . its implementation in a particular jurisdiction." 34 U.S.C. §§ 20912(b), 20913(b), 20913(d), 20917(a)(b). *See Reynolds v.*

United States, 132 S. Ct. 975, 984 (2012)(holding that SORNA's registration requirements do not apply to pre-SORNA offenders until the Attorney General so specifies). On February 28, 2007, the Attorney General published an Interim Rule, ostensibly making SORNA applicable to Petitioner despite the fact that his sex offense pre-dates the passage of the Act. Specifically, in 28 C.F.R. § 72.3, the Attorney General stated that SORNA's requirements "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3.

The effect of this delegation of authority was to permit the Attorney General to legislate the scope of the Act's retrospective reach. The authority to legislate or make law, however, is entrusted solely to Congress. U.S. Const., Art. I, § § 1, 8. This authority carries with it a corresponding limitation: Congress cannot delegate its legislative authority to another branch of the government. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (explaining that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 432 (1935) (observing that "[i]f the citizen is to be punished for the crime of violating a legislative order of an executive officer... due process of law requires that it shall appear that the order is within the authority of the officer.").

The doctrine prohibiting Congress from delegating its authority to another branch is a necessary component of the separation of powers that underlies our tripartite system of government and the checks and balances inherent in our

constitutional framework. *See Mistretta v. United States*, 488 U.S. 361, 380-81 (1989)(describing the separation of powers as essential to the preservation of liberty). In *Panama Refining Co*., this Court invalidated a delegation of authority to the executive branch under the National Industrial Recovery Act ("NIRA") to prohibit the interstate transport of petroleum produced or withdrawn in violation of state law. *Panama Refining Co*., 293 U.S. at 406, 432. This Court emphasized that the statute did not declare any policy with respect to the transportation of excess production, did not qualify the President's authority, did not establish any criteria governing the President's course, and treated disobedience as a crime. *Id.* at 415.

Although this Court has recently addressed this issue, the Court was divided and failed to issue a majority opinion. *Gundy v. United States*, 139 S.Ct. 2116 (2019). While four Justices decided that SORNA did not violate the nondelegation doctrine, *Gundy*, 139 S. Ct. at 2121, in dissent, Justice Gorsuch, joined by the Chief Justice and Justice Thomas, found that SORNA's delegation was in fact unconstitutional. *Gundy*, 139 S. Ct. at 2144-47 (Gorsuch J., dissenting). In addition, these three Justices further promoted a more rigorous application of the separation of powers principles and the nondelegation doctrine, expressing that the "mutated version" of the "intelligible principle" test that has developed "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked" and that [j]udges and scholars representing a wide and diverse range of views have condemned it as resting on 'misunderst[ood] historical foundations.'" See *id.* at 2139-40.

Gundy goes against *A.L.A. Schechter Poultry*, where this Court addressed another provision of NIRA, which authorized the President to approve codes of fair competition from industry groups or prescribe such codes. *A.L.A. Schechter Poultry*, 295 U.S. at 521-22. A violation of a code was a crime, with each day of the violation constituting a separate offense. *Id.* at 523. As in *Panama Refining Co.*, this Court focused on the absence of standards and restrictions in connection with the broad grant of authority. *Id.* at 542. Such concerns are particularly significant where, as in Petitioner's case, the delegation involves criminal liability. *See Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947).

In this case, the delegation extended to the chief law enforcement officer of the United States is the power to determine the retrospective scope of a criminal statute. In other words, it enabled the executive branch to legislate the reach of a criminal statute with no limits on the Attorney General's exercise of his discretion. He was free to decide how far back the registration requirements should be extended, no matter how arbitrary his decision might be. This delegation is particularly troubling because retrospective legislation is disfavored and, in those limited circumstances where it is permitted, a legislative policy judgment must be manifest. In *I.N.S. v. St. Cyr*, 533 U.S. 289, 299, 316 (2001), this Court stated: [a] statute may not be applied retroactively ... absent a clear indication from Congress that it intended such a result. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

"Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *Id*. at 316 (citing *Martin v. Hadix,* 527 U.S. 343, 352 (1999). *See also Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994) (discussing the presumption against retroactive effect and emphasizing the need for clear language requiring retroactivity). In the case of SORNA, there is no indication that Congress made such a judgment. Rather, it improperly abdicated that legislative responsibility to the executive branch. As noted by Justice Scalia in his dissenting opinion in *Reynolds v. United States*, 132 S.Ct at 986-87 (2012): "[I]t is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide - with no statutory standard whatever governing his discretion - whether a criminal statute will or will not apply to certain individuals. That seems to be sailing close to the wind with regard to the principle that legislative powers are nondelegable..." *Id.*

Congress may, of course, obtain assistance from other branches of government, provided that the legislative act sets forth an intelligible principle that directs and fixes the discretion delegated to the agency or person. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citing *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

In *United States v. Guzman*, 591 F.3d 83, 92-93 (2d Cir. 2010), the Second Circuit held that a delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the

boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S. Ct. 133, 91 L. Ed. 103 (1946). In other words, Congress needs to provide the delegated authority's recipient an "intelligible principle" to guide it. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 72 L. Ed. 624, Treas. Dec. 42706 (1928); *see also Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). *Guzman*, 591 F.3d at 92-93. In this case, Congress did not provide instructions as to how the Attorney General should implement the delegated authority with regard to SORNA. This lack of an "intelligible principle" has left justices questioning whether Congress could appropriately make such a delegation as questioned by Justice Scalia in his dissenting opinion in *Reynolds v. United States*, where he noted that this "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable." 132 S. Ct. 975, 986 (2012).

Guzman was decided before this Court's decision in *Reynolds v. United States*, 132 S. Ct. 975, 984 (2012), in which this Court held that SORNA's registration requirements did not apply to pre-SORNA offenders until the Attorney General so specified. Consequently, at the time that *Guzman* was decided, it was an open question whether or not or § 16913(d) authorized the Attorney General to determine SORNA's "retroactivity," or whether § 16913(d) gave the Attorney General the authority only to *implement* SORNA with respect to all sex offenders.

Nevertheless, the Second Circuit in *Guzman* held that either way, the statute was not void under the non-delegation doctrine because if § 16913(d) authorized the Attorney General to determine SORNA's "retroactivity," it did "so only with respect

to the limited class of individuals who were convicted of covered sex offenses prior to SORNA's enactment. The Second Circuit held that the Attorney General "could not do much more than simply determine whether or not SORNA applied to those individuals and how they might comply as a logistical matter." The Court held that the authority of the Attorney General under the statute was limited and that "[t]he Supreme Court had upheld much broader delegations." *Guzman*, 591 F.3d at 93 (2d Cir. 2010)(citing *Mistretta*, 488 U.S. at 372-73).

Because SORNA grants the Attorney General unconstrained discretion to decide to whom SORNA applies without an "intelligible principle" to guide this discretion, it violates the nondelegation doctrine and this Court should be compelled to grant certiorari to resolve this issue.

POINT III

The Court of Appeals' Decision Failing to Remedy Petitioner's Claim That SORNA Violates His Constitutional Right to Travel Conflicts With the Due Process Protections Of the Fifth Amendment and With This Court's Precedent in *Saenz v. Roe*, 526 U.S. 489, 500 (1999), so as to Call for an Exercise of This Court's Supervisory Power.

SORNA violates Petitioner's fundamental right to "enter and to leave another state." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment" of the United States Constitution. *Kent v. Dulles*, 357 U.S. 116, 125 (1958). In *Saenz*, this Court described the right to travel as protecting: (1) "the right of a citizen of one State to enter and to leave another State," (2) the

"right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) "the right to be treated like other citizens of that State" if one chooses to become a permanent resident. 526 U.S. at 500. Consequently, a registration requirement such as SORNA, interferes with the right to travel freely because an individual who has to register under SORNA's unclearly defined requirements may decide to avoid travel altogether for fear that a short stay would be interpreted as a relocation, necessitating registration. Statutes that unreasonably burden the right to travel will be struck down unless "necessary to promote a compelling government interest." Id. at 634. Because the individual states have their own sex offender registration acts, as in Maryland under Criminal Procedure Article §§ 11-701--11-722, and in New York's Correction Law 168, the only value of SORNA is to confer federal jurisdiction over a state violation. The duplicative restriction SORNA imposes is not strictly related to any federal purpose because it merely confers federal jurisdiction over what is already a state crime. Therefore, SORNA is not necessary as failing to register as a sex offender is already criminalized in Maryland and New York and SORNA thus unreasonably burdens the right to travel and should be struck down because it is not "necessary to promote a compelling government interest." Id. at 634; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262 (1974).

Additionally, SORNA infringes on Petitioner's right to travel because it subjects sex offenders who travel to another state to a stricter penalty than sex offenders who do not travel and remain in one state. By subjecting sex offenders

who travel, such as Petitioner, to federal prosecution, SORNA is essentially punishing these offenders for exercising their constitutional right to travel, whereas other sex offenders who choose not to travel are not penalized in the same manner.

Alternatively, in view of the fact that Petitioner's predicate sex offense conviction occurred in 1992, over 20 years ago, the registration updating requirements of SORNA as applied to Petitioner on or after 2013 constitute an unreasonable burden of his right to travel.

In sum, SORNA unfairly interferes with the right to travel freely because an individual who has to register under SORNA's unclearly defined requirements may decide to avoid travel altogether for fear that a short stay would be interpreted as a relocation, necessitating registration and offenders who travel are subject to harsher penalties than those who remain in one state. Additionally, in view of the fact that Petitioner's predicate sex offense conviction occurred in 1992, over 20 years ago, the registration updating requirements of SORNA as applied to Petitioner on or after 2013 constitute an unreasonable burden of his right to travel. Because of the violation of Petitioner's right to travel, which conflicts with this Court's precedent in *Saenz v. Roe*, this Court should grant certiorari.

POINT IV

The Court of Appeals' Failure to Remedy the Ex Post Facto Violation is in Conflict With This Court's Decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), as Application of SORNA to Petitioner's Circumstances Resulted in an Increased Punishment.

Petitioner was convicted of a sex offense in New York in 1992, twenty-four years before SORNA was enacted in 2006. Nonetheless, the Rules prescribed by the Attorney General applying SORNA to sex offenders convicted before enactment of the federal criminal offense, subjects Petitioner to federal criminal liability for going to Maryland and not registering and reporting as a sex offender. *See* 18 U.S.C. § 2250(a) and 34 U.S.C. § 20913-20916. Such retroactive application of SORNA violates the ex post facto clause. Article I, § 9, Clause 2 of the United States Constitution prohibits the passing of an ex post facto law. See U.S. Const. Art. I, § 9, cl. 2.

This Court has interpreted the Ex Post Facto Clause to apply to laws that retroactively alter the definition of crimes and increase the punishment of criminal acts. *Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990). Application of SORNA to Petitioner's circumstances has resulted in an increase in potential punishment for his prior criminal acts by ten years. 18 U.S.C. § 2250. The Ex Post Facto Clause restricts vindictive legislation out of concern that a legislature's response to political pressures poses a risk that they may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

Currently, political pressure has made sex offenders a reviled group in our country. *See* Shiela T. Caplis, *Got Rights? Not if You're a Sex Offender in the Seventh Circuit*, 2 Seventh Cir. Rev. 115 (2006)(describing the convicted sex offender as perhaps the most despised and unsympathetic member of American society noting the general trend to strip convicted sex offenders of their rights). As noted by Justice Stevens in his dissent in *Smith v. Doe*, 538 U.S. 84, 113, 114 (2003), "... it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders and no one else, as a result of their convictions, are not part of their punishment. In Justice Stevens' opinion, "a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty, is punishment." Justice Stevens wrote that the Constitution's Double Jeopardy and Ex Post Facto Clauses prohibit the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted. *Id.* Here, SORNA pairs an independent federal obligation to register directly with punishment of up to 10 years in prison. Indeed, SORNA attached new, and as yet unidentified, legal consequences to events, specifically, Petitioner's 1992 conviction, which occurred over a decade prior to SORNA's 2006 enactment. The additional requirements imposed by SORNA are punitive in both purpose and effect. For example: SORNA broadens the class of offenders subject to registration; expands the information gathered from those required to register; lengthens the registration; creates classes of offenders; reduces the time frame in advising the officials of any changes of

required information; and substantially increases the penalties for a violation of any of the requirements. Compare 42 U.S.C. § 14072(i) (Wetterling Act (predecessor to SORNA)) with 34 U.S.C. § 20911 (SORNA, expansion of sex offender definition and expanded inclusion of child predators); § 20915 (SORNA, addressing the duration of the registration requirements); 18 U.S.C. § 2250 (SORNA, increasing the penalties for violations of the registration requirements). SORNA accordingly violates the Ex Post Facto Clause. (*But see United States v. Guzman*, 591 F.3d 83, 94 (2d Cir. 2010)(rejecting Ex Post Facto challenge to SORNA) and because this violation conflicts with this Court's decision in *Youngblood*, 497 U.S. at 42-43 by allowing an increased potential punishment in Petitioner's case, this Court should grant certiorari.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

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