**No. _____**

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 2020**

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**GARNETT LLOYD, Petitioner**

**v.**

**UNITED STATES OF AMERICA, Respondent.**

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**On Petition for a Writ of Certiorari**
**to the United States Court of Appeals**
**for the Eleventh Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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**Carlos A. Williams**
**Executive Director**

**Kristen Gartman Rogers***
**Assistant Federal Defender**
**Southern District of Alabama**
**Federal Defenders Organization**
**11 North Water Street, Suite 11290**
**Mobile, AL 36602**
**kristen_rogers@fd.org**
**251-433-0910**
**Counsel of Record for Petitioner*

## QUESTIONS PRESENTED

For a criminal offense to require registration under the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.*, it must fit the definition of "sex offense" in 34 U.S.C. § 20911(5)(A). A "sex offense" is a federal offense listed in 34 U.S.C.§ 20911(5)(A)(iii), a military offense listed in 34 U.S.C. § 20911(5)(A)(iv), "a criminal offense that has an element involving a sexual act or sexual contact with another," 34 U.S.C. § 20911(5)(A)(i), or "a criminal offense that is a specified offense against a minor," 34 U.S.C. § 20911(5)(A)(ii). A "criminal offense" is, in turn, a "[s]tate, local, tribal, foreign, . . . military, . . . or other criminal offense." 34 U.S.C. § 20911(6). The Petitioner was convicted of cyberstalking in violation of 18 U.S.C. § 2261A(2)(B), which is <u>not</u> one of the federal offenses listed in 34 U.S.C. § 20911(5)(A)(iii). Nevertheless he was ordered to register as a sex offender under SORNA because the lower courts, applying a non-categorical, circumstance-specific approach to interpret the statutory text, concluded that his offense is "a criminal offense that is a specified offense against a minor." The questions presented are:

I. Whether the definition of "sex offense" in 34 U.S.C. § 20911(5)(A) includes federal offenses other than those listed in 34 U.S.C. § 20911(5)(A)(iii).

II. Whether courts must apply a categorical approach or circumstance-specific approach to determine if an offense is "a specified offense against a minor" under 34 U.S.C. § 20911(5)(A)(ii) and 34 U.S.C. § 20911(7).

III. In answering the second question, whether courts must afford deference under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Attorney General's interpretation of the statute in the National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030 (July 2, 2008), otherwise known as the SMART Guidelines.

## INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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## PETITION FOR A WRIT OF CERTIORARI

Garnett Lloyd respectfully petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit, which affirmed the sex offender registration condition of Mr. Lloyd's s supervised release term on the basis of the court's earlier decision in *United States v. Dodge*, 597 F.3d 1347 (11th Cir.)(*en banc*), *cert. denied*, 2010 U.S. LEXIS 8031 (2010).

## OPINIONS BELOW

The unpublished panel decision of the Court of Appeals is reported at *United States v. Lloyd*, 809 F. App'x 750, 754 (11th Cir. 2020) and is included in the Appendix. The unpublished and unreported decision of the district court is included in the Appendix.

## STATEMENT OF JURISDICTION

The district court had original jurisdiction under 18 U.S.C. § 3231, which gives district courts original jurisdiction over all offenses against the laws of the United States. The Court of Appeals had appellate jurisdiction under 18 U.S.C. § 3742, which gives federal courts of appeal jurisdiction over criminal sentences imposed by district court, and 28 U.S.C. § 1291, which gives federal courts of appeal jurisdiction over all final decisions of district courts. That court issued its opinion on April 2, 2020. This petition is being filed within 150 days of that date, so it is timely under Rules 13.1 and 13.3 and this Court's March 19, 2020, order relating to petitions filed during the

COVID-19 public health emergency. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

TITLE 18, U.S. CODE, CRIMES AND CRIMINAL PROCEDURE–PART I. CRIMES–CHAPTER 110A. DOMESTIC VIOLENCE AND STALKING

***

§ 2261A. Stalking

Whoever—

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that—

> (A) places that person in reasonable fear of the death of, or serious bodily injury to—
>
> > (i) that person;
> >
> > (ii) an immediate family member (as defined in section 115 [18 USCS § 115]) of that person;
> >
> > (iii) a spouse or intimate partner of that person; or
> >
> > (iv) the pet, service animal, emotional support animal, or horse of that person; or
>
> (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic

communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

> (A) places that person in reasonable fear of the death of or serious bodily injury to a person, a pet, a service animal, an emotional support animal, or a horse described in clause (i), (ii), (iii), or (iv) of paragraph (1)(A); or
>
> (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title [18 USCS § 2261(b)].

TITLE 34, U.S. CODE, CHAPTER 209–CHILD PROTECTION AND SAFETY–SEX OFFENDER REGISTRATION AND NOTIFICATION
***
Part A–Sex Offender Registration and Notification
***
§ 20911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender. The term "sex offender" means an individual who was convicted of a sex offense.
***
(5) Amie Zyla expansion of sex offense definition.

> (A) Generally. Except as limited by subparagraph (B) or (C), the term "sex offense"means—
>
> > (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
> >
> > (ii) a criminal offense that is a specified offense against a minor;
> >
> > (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18, United States Code [18 USCS § 1152 or 1153]) under section 1591 [18 USCS § 1591], or chapter 109A [18 USCS §§

2241 et seq.], 110 [18 USCS §§ 2251 et seq.] (other than section 2257, 2257A, or 2258 [18 USCS § 2257, 227A, or 2258]), or 117 [18 USCS §§ 2421 et seq.], of title 18, United States Code;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions. A foreign conviction is not a sex offense for the purposes of this title if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 112 [34 USCS § 20912].

(C) Offenses involving consensual sexual conduct. An offense involving consensual sexual conduct is not a sex offense for the purposes of this title if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense. The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators. The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D)Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F)Video voyeurism as described in section 1801 of title 18, United States Code 18 USCS § 1801].

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

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73 FED. REG. 38030-38031–THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION

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Summary of Comments on the Proposed Guidelines

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*Offense of conviction versus underlying conduct:* Some commenters raised questions or provided recommendations as to whether the application of SORNA's requirements depends on the elements of the offense for which the sex offender is convicted or the underlying offense conduct. The answer to this question may affect whether registration is required by SORNA at all, and may affect the "tier" classification of offenders under the SORNA standards. The general answer is that jurisdictions are not required by SORNA to look beyond the elements of the offense of conviction in determining registration requirements, except with respect to victim age. The discussion of the tier classifications has been edited in the final guidelines to make this point more clearly.

## STATEMENT OF THE CASE

A. The SORNA Statutory & Regulatory Framework

Under SORNA,[1] a "sex offender" must register and keep his registration current

[1] SORNA was previously codified at 42 U.S.C. § 16901 *et seq*. To avoid confusion, references to the previous code provisions in cases construing those provisions have been changed to the current code provisions throughout this

in each jurisdiction where he lives, works, or studies. 34 U.S.C. § 20913(a).[2] A "sex offender" is "an individual who was convicted of a sex offense." 34 U.S.C. § 20911(1). With two exceptions not relevant here,[3] a "sex offense" is:

> (i) a criminal offense that has an element involving a sexual act or sexual conduct with another;
>
> (ii) a criminal offense that is a specified offense against a minor;
>
> (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18, United States Code) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117 of title 18, United States Code;
>
> (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119; or
>
> (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

34 U.S.C. § 20911(5)(A)(i)-(v).

The term "sex offense against a minor" is defined in 34 U.S.C. § 20911(7), which states:

> Expansion of definition of "specified offense against a minor" to include all offenses by child predators. The term "specified offense

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petition. The text of the relevant provisions has not changed.

[2] For purposes of initial registration only, an offender must also register in the jurisdiction of conviction if that jurisdiction differs the jurisdiction where the offender resides. *Id.*

[3] *See* 34 U.S.C. § 20911(5)(B)(pertaining to certain foreign convictions) and 34 U.S.C. § 20911(5)(C)(pertaining to certain consensual sexual offenses).

against a minor" means an offense against a minor that involves any of the following:

> (A) An offense (unless committed by a parent or guardian) involving kidnapping.
> (B) An offense (unless committed by a parent or guardian) involving false imprisonment.
> (C) Solicitation to engage in sexual conduct.
> (D) Use in a sexual performance.
> (E) Solicitation to practice prostitution.
> (F) Video voyeurism as described in [18 U.S.C. §] 1801.
> (G) Possession, production, or distribution of child pornography.
> (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
> (I) Any conduct that by its nature is a sex offense against a minor.

A "criminal offense" is "a State, local, tribal, foreign, or military offense . . . or other criminal offense." 34 U.S.C. § 20911(6). A "minor" is "an individual who has not attained the age of 18 years." 34 U.S.C. § 20911(14).

Congress ordered the Attorney General to "issue guidelines and regulations to interpret and implement" SORNA's registration provisions, including 34 U.S.C. § 20911. 34 U.S.C. § 20912(b). In response, the Department of Justice issued the National Guidelines for Sex Offender Registration and Notification, otherwise known as the SMART Guidelines. 73 Fed. Reg. 38,030 (July 2, 2008). These regulations "provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements into their sex offender registration and notification programs." *Id.*

To determine whether an offense requires registration under SORNA, the

Attorney General concluded that SORNA does not require states and other implementing jurisdictions to examine the facts underlying an offender's conviction. Except as to the age of the victim under most subsections of SORNA, the Attorney General concluded that jurisdictions may employ a categorical approach.

> *Offense of conviction versus underlying conduct:* Some commenters raised questions or provided recommendations as to whether the application of SORNA's requirements depends on the elements of the offense for which the sex offender is convicted or the underlying offense conduct. The answer to this question may affect whether registration is required by SORNA at all, and may affect the "tier" classification of offenders under the SORNA standards. The general answer is that jurisdictions are not required by SORNA to look beyond the elements of the offense of conviction in determining registration requirements, except with respect to victim age [under some but not all subsections].

*Id.* at 38031.

B. The Eleventh Circuit's *en banc* decision in *Dodge*

In *Dodge*, the Eleventh Circuit, sitting *en banc*, held that the list of federal offenses in 34 U.S.C. § 20911(5)(A)(iii) is not exclusive and that an unlisted federal offense may qualify as a "sex offense" under other subsections of § 20911(5)(A). 597 F.3d at 1353. The Court further held that a circumstance-specific analysis applies to the question whether an offense qualifies as "a criminal offense that is a specified offense against a minor" under 34 U.S.C. § 20911(5)(A)(ii) and § 20911(7). 597 F.3d at 1354-55 ("SORNA permits examination of the defendant's underlying conduct – and not just the elements of the conviction statute – in determining what constitutes a

'specified offense against a minor.'").

The criminal offense at issue in *Dodge* was transfer of obscene material to a minor, a violation of 18 U.S.C. § 1470. The defendant had sent naked images of himself and images of himself masturbating to a girl he believed to be 13 years old. The court concluded that the offense was both "criminal sexual conduct involving a minor" under what is now 34 U.S.C. § 20911(7)(H) and an offense that "by its nature is a sex offense against a minor" under what is now subsection 34 U.S.C. § 20911(7)(I). 597 F.3d at 1355. The Court found it important that Dodge's conduct closely resembled the conduct proscribed by 18 U.S.C. § 2252B(b)(using misleading domain names on the Internet with the intent to deceive a minor into viewing harmful material), which is one of the enumerated federal offenses under SORNA. 597 F.3d at 1355 n.9 & 1356.

The *Dodge* decision did not discuss or cite the SMART Guidelines even though it was argued in the *en banc* briefing that the court should defer to those guidelines under *Chevron*.

C. Offense Conduct

Using a false identity on a Facebook messaging service, Mr. Lloyd made contact with two teenage girls in Mobile, AL. ECF 53 at 12-14[4]; Sealed ECF 37 at ¶¶ 5-26.

[4] The record citations are to the district court's electronic case filing system. "ECF 53 at 12-14," for example, refers to pages 12-14 in document 53 on the

The girls' parents were suspicious of these contacts and alerted the local U.S. Attorney's Office. *Id.* An FBI agent took over one of the girl's Facebook profiles and began communicating with Mr. Lloyd in an undercover capacity. *Id.* Over the course of the next two weeks, the FBI investigated Mr. Lloyd while the undercover agent exchanged messages with him. *Id.* In those messages, Mr. Lloyd requested photographs of the girl in specific poses. *Id.* Some of the requested photos were sexually suggestive but did not qualify as child pornography. *Id.*; ECF 56 at 16-17. When the undercover agent balked at providing some of the requested photos, Mr. Lloyd threatened to send the earlier photos to her parents and school friends to damage her reputation. ECF 53 at 12-14; Sealed ECF 37 at ¶¶ 5-26. Mr. Lloyd was subsequently arrested at his home in North Carolina and transferred to the Southern District of Alabama for prosecution. *Id.*

D. Proceedings in the District Court

Mr. Lloyd pled guilty without a plea agreement to a violation of the federal cyberstalking statute, 18 U.S.C. § 2261A(2)(B). ECF 53. The statute appears in a chapter of Title 18 of the United States Code (Chapter 110A) applicable to domestic violence and stalking offenses. As charged in this case, the statute prohibits someone who has the intent to harass or intimidate another person from engaging in a course

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electronic docket sheet.

of conduct on the Internet that causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to that person.[5] § 2261A(2)(B). The cyberstalking statute authorizes imprisonment of up to 5 years for Mr. Lloyd's conduct, which is the lowest statutory penalty applicable to stalking offenses.[6] 18 U.S.C. § 2261(b)(5). The offense, a class D felony, also carries a maximum supervised release term of three years and a maximum fine of $250,000. 18 U.S.C. § 3583(b)(2); 18 U.S.C. § 3571(b).

The presentence report proposed a sex offender registration condition as a special condition of Mr. Lloyd's supervised release term. Sealed ECF 37 at Part F, ¶ m. In a presentence pleading, the government requested that Mr. Lloyd "be required to register as a sex offender as required by state law." ECF 36 at 1-2. At sentencing, the government asked the court to order Mr. Lloyd to register as a sex offender under SORNA after applying the reasoning of *Dodge*. ECF 56. The court imposed a 3-year supervised release term with, over Mr. Lloyd's objection, a registration condition,

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[5] The indictment alleged that Lloyd "with the intent to harass and intimidate another person[,] used an interactive computer service and electronic communication service and a facility of interstate commerce to engage in a course of conduct to cause, attempt to cause and would be reasonably expected to cause substantial emotional distress to that person." ECF 5.

[6] Higher statutory penalties apply under other circumstances, including circumstances that "would constitute an offense under chapter 109A," which is the chapter relating to sexual abuse offenses. 18 U.S.C. § 2261(b)(1)-(4), (6).

finding:

> [O]ver your counsel's objection, I'm going to order as part of your supervised release that you be subjected to sex offender registration.
>
> And I find, for the reasons also stated by the Government in its presentation, that your conduct in this case constituted an attempted production of child pornography. And it is a specified offense under 34 USC 20911(7)(G), to include an attempt to possess child pornography. So I think the sex offender registration provision applies in your case. And the objection to that is overruled and will be imposed as part of the condition – a condition of supervised release.

ECF 56 at 38. At the request of the government's attorney, the court further concluded that the offense was a "sexual and predatory offense against a minor and, therefore, fit in under the discussion of *Dodge*[.]" ECF 56 at 39. As a result, the judgment contains the following special condition of supervised release: "The defendant shall register with the state sex offender registration agency in any state where he resides, is employed, carries on a vocation, or is a student, pursuant to the provisions of Tier I, II or III (to be determined), as outlined in the Sex Offender Registration and Notification Act (SORNA)." ECF 44 at 3.

E. Proceedings in the Court of Appeals

Mr. Lloyd challenged the sex offender registration condition on direct appeal, arguing that he is not a "sex offender," as that term is defined in 34 U.S.C. § 20911(1), because he was not "convicted" of a "sex offense," as that term is defined in 34 U.S.C. § 20911(5)(A). Specifically, Mr. Lloyd argued that *Dodge* wrongly concludes (1) that SORNA's definition of "sex offense" in § 20911(5)(A) includes

unlisted federal offenses and (2) that courts must apply a circumstance-specific approach when determining if an offense is a "specified offense against a minor" under § 20911(5)(A)(ii) and § 20911(7). He argued that the court of appeals should have resolved ambiguities in the SORNA statute by affording deference under *Chevron* to the Attorney General's reasonable construction of the statute in the SMART Guidelines, which adopted a categorical approach. 73 Fed. Reg. at 38,031. Mr. Lloyd demonstrated that, when the categorical approach is applied, his offense does not qualify as a "sex offense."

The Eleventh Circuit rejected these arguments, stating:

> [T]he district court did not abuse its discretion by requiring Lloyd to register as a sex offender pursuant to SORNA. Lloyd's argument hinges on his claim that our *en banc* decision in *Dodge* was wrongly decided and that it overlooked certain aspects of the relevant statute and relevant Attorney General guidelines when determining to apply the conduct-based approach to the definitions of § 20911(5)(A)(ii) and § 20911(7). However, a panel of this Court is not at liberty to disregard *Dodge*; our prior-panel-precedent rule requires us to abide by *Dodge* until overruled by the Supreme Court or by this Court *en banc*. There is no exception to this rule based upon an overlooked reason or a perceived defect in the prior decision's reasoning or analysis of the law in existence at the time.

*United States v. Lloyd*, 809 F. App'x 750, 754 (11th Cir. 2020). Mr. Lloyd now seeks this Court's review of the lower court rulings in his case.

## REASONS FOR GRANTING THE WRIT

This case squarely presents important questions of statutory interpretation relating

to SORNA's definition of "sex offense" in 34 U.S.C. § 20911(5). The preliminary question is whether federal offenses not listed in § 20911(5)(A)(iii) are included in the definition at all. If the answer to that question is yes, the second question is whether the court of appeals applied the correct approach when determining that Mr. Lloyd's federal cyberstalking offense qualifies as a "sex offense" because it is a "specified offense against a minor" under § 20911(5)(A)(ii) and § 20911(7).

The circuits have identified three possible approaches for determining whether a conviction qualifies as a sex offense under § 20911(5)(A)(ii) and § 20911(7) – a strictly categorical approach, a strictly circumstance-specific approach, and a hybrid approach in which the elements of the offense are examined first and the underlying facts are only examined to determine the age of the victim. Mr. Lloyd believes the Eleventh Circuit, in adopting a circumstance-specific approach, has misinterpreted this Court's prior law with respect to the approach that should be used in determining whether a conviction is a sex offense. His suggested approach, a categorical approach, is consistent with the approach adopted by the Attorney General in the SMART Guidelines.

Because the SMART Guidelines have adopted a categorical approach that is contrary to the circumstance-specific approach adopted by a majority of circuits, a third question arises: Whether the courts should afford *Chevron* deference to the Attorney General's interpretation of the relevant statutory text in those Guidelines.

This issue is important, as a decision from this Court is needed to avoid inconsistent application of SORNA across multiple jurisdictions, and timely, as it naturally follows the Court's recent decision in *Gundy v. United States*, 139 S. Ct. 2116 (2019), which involved application of the non-delegation doctrine to the Attorney General's rulemaking authority under SORNA.

Mr. Lloyd's case is a good vehicle for resolving these questions because his conviction does not qualify as a sex offense when a categorical approach is applied. Mr. Lloyd's statute of conviction makes it unlawful for someone with the intent to harass or intimidate another person from engaging in a course of conduct on the Internet that causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to that person. § 2261A(2)(B). Because the statute does not contain a sexual component, and because it does not necessarily involve a minor victim, a violation of this statute does not categorically constitute a "specified offense against a minor," and does not meet any of SORNA's alternate definitions of "sex offense." In other words, there is no version of the crime of which Mr. Lloyd was convicted that can be considered to be a sex offense based solely upon an examination of the elements of the statute.

## I. The Court should grant review to decide whether SORNA's definition of "sex offense" includes federal offenses not listed in § 20911(5)(A)(iii) and should conclude that it does not.

The court below decided that federal cyberstalking can qualify as a "sex offense"

under § 20911(5)(A)(ii) even though the stalking statute, § 2261A, is not one of the federal statutes listed in § 20911(5)(A)(iii). The court's decision is incorrect. The offenses listed in § 20911(5)(A)(iii) are the only federal offenses that require registration under SORNA.

When the legislature expresses things through a list, as Congress did in § 20911(5)(A)(iii), it is assumed in accordance with the interpretive canon *expressio unius est exclusio alterius* that what is not listed is excluded. *See Chevron U.S.A., v. Echazabal,* 536 U.S. 73, 81 (2002)("The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.").

Moreover, the word "federal" is omitted from the list of jurisdictions in the definition of "criminal offense" that appears in § 20911(6). Statutes should be read so as to give effect to every word and no word should be read as surplusage. *See Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985)("[W]e must give effect to every word that Congress used in the statute."). Reading the phrase "or other criminal offense" in that subsection to include § 2261A and other unlisted federal offenses turns the language "State, local, tribal, foreign, or [specified] military offense" into meaningless surplusage. It also turns the list of federal offenses in § 20911(5)(A)(iii) and the military offenses referenced in 34 U.S.C. § 20911(5)(A)(iv) into meaningless

surplusage. If Congress intended § 20911(7) to be all-encompassing, it is hard to see why it needed to list any federal or military offenses at all. *Cf. Begay v. United States*, 128 S. Ct. 1581, 1585 (2008)("If Congress meant the latter, *i.e.*, if it meant the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all.").

Congress's treatment of military offenses in § 20911 and the legislative history of the statute provide further support for the conclusion that the federal offenses in § 20911(5)(A)(iii) are a closed set. In the current version of the statute, specific military offenses are referenced in § 20911(5)(A)(iv), but military offenses are more generally captured in the definition of "criminal offense" in § 20911(6), subjecting them to the "specified offense against a minor" provision. Federal offenses did not receive the same treatment in the final version of the statute, although they had been so treated in earlier versions. In the original House version of the statute, a "sex offender" was defined as "an individual who, either before or after enactment of this Act, was convicted of, or adjudicated a juvenile delinquent for, an offense [] whether Federal, State, local, tribal, foreign [], military, juvenile or other, that is: (A) a specified offense against a minor; (B) a serious sex offense; (C) a misdemeanor sex offense against a minor." 151 Cong. Rec. H. 7887 (Sept. 14, 2005). In the original Senate version of the statute, the term "covered offense against a minor" was defined as "an offense (whether under the law of a State actor or tribal actor, Federal law, military law, or the

law of a foreign country) that is comparable to or more severe than" a list of offense categories. 152 Cong. Rec. S. 4079 (May 4, 2006). The second House version of the statute defined "sex offense" as "a State, local, tribal, foreign, or other criminal offense that has an element involving a sexual act or sexual contact with another . . .," "a State, local, tribal, foreign, or other specified offense against a minor," an enumerated federal offense or "any other Federal offense designated by the Attorney General," or a military offense. 152 Cong. Rec. H. 657 (March 8, 2006). In the final version of the statute passed by both houses, the word "federal" was omitted from the list of jurisdictions whose laws are subject to the "specified offense against a minor" definition, and the provision allowing the Attorney General to designate additional federal offenses subject to the Act was removed.

In the court below, the government invoked the broad purpose and scope of SORNA in support of its argument that the "or other criminal offense" language in § 20911(6) should be read to encompass the stalking statute. *See* 34 U.S.C. § 20901("Declaration of Purpose"); 34 U.S.C. § 20911(7)("Expansion of definition of 'sex offense against a minor' to include all offenses by child predators."). Using Congressional intent in this way, to fill in the text of a statute, is "incompatible with democratic government, or indeed, even with fair government." Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (Princeton University Press 1997)("[I]t is simply incompatible with democratic government, or indeed, even with

fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated."). In the SMART Guidelines, the Department of Justice adopted a narrower view of SORNA's purpose. 73 Fed. Reg. 38,045 ("[T]he term 'sex offense' is not used to refer to any and all crimes of a sexual nature, but rather to those covered by the definition of 'sex offense' appearing in SORNA § [20911(5)], and the term 'sex offender' has the meaning stated in SORNA § [20911(1)].").

Using Congressional intent to fill in the text of a statute also violates the rule of lenity, *see United States v. Santos*, 128 S. Ct. 2020, 2028 (2008)("We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."), which should apply notwithstanding the conclusion in *Smith v. Doe*, 538 U.S. 84 (2003), that sex offender registration schemes, such as the Alaska Sex Offender Registration Act at issue in *Smith*, are non-punitive. The registration condition imposed on Mr. Lloyd's supervised release term is a component of his criminal sentence. He faces criminal sanction in the form of revocation and re-imprisonment for violating the condition. Also, § 20911 is SORNA's general definition section. The Court's construction of the language in § 20911 applies both in the context of initial registrations and in the context of criminal prosecutions under the statute's criminal provisions. *See United States v. Gillette*, 553 F. Supp. 2d 524, 528-29 (D. Virgin Islands 2008)("*Smith* precludes any *ex post facto* attack upon SORNA's registration and notification requirements . . .

[However,] the structure of the Walsh Act, unlike [the Alaska statute at issue in *Smith*], tends to show that Congress intended for portions of the Act to be civil and for others to be criminal."); Eric French, *Dodging Due Process: How United States v. Dodge Pushes the Limits of Civil Regulation*, 52, B.C. L. Rev. E-Supplement 161, 171 (2011)(arguing that "there is ample evidence to suggest that registration laws meet the intent-effects test [of *Smith*]").

## II. The Court should grant review to decide whether courts should apply a categorical or circumstance-specific approach to determine if an offense is "a specified offense against a minor" and should conclude that a categorical approach should apply.

After concluding that SORNA's definition of "sex offense" includes federal offenses not listed in § 20911(5)(A)(iii), the court below determined that a non-categorical, circumstance-specific approach should be applied in determining whether Mr. Lloyd's federal cyberstalking conviction is a "specified offense against a minor" under § 20911(5)(A)(ii) and (7). In doing so, the court relied on its earlier *en banc* decision in *Dodge*, where the court concluded that "[a]ll signs" in § 20911(7) "point to" the conclusion that the facts underlying the conviction may be examined. 597 F.3d at 1354-55.

The Fourth, Fifth, and Eighth Circuits have joined the Eleventh Circuit in determining that an entirely circumstance-specific approach should be applied to this question, *see United States v. Price*, 777 F.3d 700 (4th Cir. 2015), *United States v. Hill*, 820

F.3d 1003, 1006 (8th Cir. 2016), *United States v. Schofield*, 802 F.3d 722, 730 (5th Cir. 2015). The Ninth Circuit has taken a slightly different approach, holding that only "*as to the age of the victim*, the underlying facts of a defendant's offense are pertinent in determining whether she has committed a 'specified offense against a minor' and is thus a sex offender." *United States v. Mi Kyung Byun*, 539 F.3d 982, 993-94 (9th Cir. 2008)(emphasis added);[7] *United States v. Dailey*, 941 F.3d 1183, 1192 (9th Cir. 2019).

The Eleventh Circuit's adoption of a circumstance-specific approach was based on the absence of the words "element" and "convictions," and the presence of the words "conduct," "include," "involves," "involving," and "by its nature," in § 20911(7). *Dodge*, 597 F.3d at 1354. However, the Eleventh Circuit ignored the first layer of analysis under § 20911, which is whether the defendant was "*convicted* of a sex offense" under § 20911(1). (Emphasis added). This emphasis on *conviction* of a criminal offense suggests that a categorical approach should be applied. *See Taylor v. United States*, 495 U.S. 575, 600 (1990)(use of the word "convicted" rather than "committed" indicates that courts should apply a categorical approach).

Use of the word "element" in § 20911(5)(A)(i) and the lists of specific offenses in § 20911(5)(A)(iii)-(iv) also suggest that a categorical approach is required. *See Taylor*,

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[7] The Ninth Circuit later referred to the approach adopted in *Mi Kyung Byun* as a "modified categorical approach," as opposed to a purely circumstance-specific approach. *United States v. Becker*, 682 F.3d 1210, 1212 (9th Circ. 2012).

495 U.S. at 600-02 (looking at the statute as a whole, particularly the word "element" in the statutory subsection immediately preceding the subsection at issue, to determine if the categorical approach was required).

The Eleventh Circuit's decision to adopt a circumstance-specific approach is contrary to this Court's cases applying a categorical approach to the residual clause of the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), before the clause was held to be unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See James v. United States*, 550 U.S. 192, 201-02 (2007); *Chambers v. United States*, 555 U.S. 122 (2009); *Nijhawan v. Holder*, 557 U.S. 29 (2009). Under the ACCA's residual clause, a prior conviction would qualify as a "violent felony" if it "otherwise *involves conduct* that presents a serious potential risk of physical injury to another." *James*, 550 U.S. at 201-02 (emphasis added). Accordingly, the fact that § 20911(7) uses similar "involves conduct" language does not necessitate a circumstance-specific approach.

Based on this Court's prior cases, the text of § 20911 is ambiguous at best regarding whether a categorical or circumstance-specific approach should be applied.[8]

[8] Additional ambiguity lies in the definition of "sex offense" as a "specified offense against a minor," which in turn is defined as "conduct that by its nature is a sex offense against a minor." §§ 20911(5)(A)(ii) & (7)(I). When the nested definitions in §§ 20911(1), 20911(5)(A)(ii), and 20911(7)(I), are read together, a "sex offense" is ultimately defined tautologically as "involv[ing]" "conduct that by its nature is a sex offense against a minor." This and other courts have previously recognized that such

The statutory text does not clearly require the circumstance-specific approach as held by the Eleventh, Fourth, Fifth, and Eighth Circuits. *See Dodge*, 597 F.3d at 1354 (weakly acknowledging that use of the word "convicted" in § 20911(1) creates "a modicum of ambiguity" in the statute); *United States v. White*, 782 F.3d 1118, 1130 (10th Cir. 2015)(concluding "the term 'offense' as used in [§ 20911] is ambiguous").

**III. This Court should grant review to decide whether the Attorney General's interpretation of the statutory text is entitled to *Chevron* deference and should conclude that it is.**

The Attorney General reasonably resolved the ambiguities in the statutory text by adopting, in the SMART Guidelines, a hybrid categorical approach to determine whether a conviction is a "specified offense against a minor." 73 Fed. Reg. at 38,031 ("[J]urisdictions are not required by SORNA to look beyond the elements of the offense of conviction in determining registration requirements, except with respect to victim age."). But courts that have adopted the circumstance-specific approach have

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circular definitions are inherently ambiguous. *See United States v. Bestfoods*, 524 U.S. 51, 56 (1998)(interpreting CERCLA and stating "[t]he phrase 'owner or operator' is defined only by tautology, however, as 'any person owning or operating' a facility, § 9601(20)(A)(ii), and it is this bit of circularity that prompts our review."); *United States v. Baptiste*, 34 F. Supp. 3d 662, 677-78 (W.D. Tex. 2014)(recognizing §§ 20911(5)(A)(ii) and 20911(7)(I) to circularly define "sex offense," and deferring under *Chevron* to the SMART Guidelines as to the age of the victim under § 20911(7)(I));; *see also Fogo De Chao (Holdings) Inc. v. U.S. Dept. of Homeland Sec.*, 769 F.3d 1127, 1135-36 (D.C. Cir. 2014)(*Chevron* deference not accorded to a circularly-defined statutory term because the agency regulation "parrot[ed]" the circularity "rather than interpret[]" it).

rejected arguments that they must defer to these regulations under *Chevron*.[9] *See Price*, 777 F.3d at 709 n.9 ("To [accord *Chevron* deference to those Guidelines], we would have to decide that Congress's use of the terms 'conduct' and 'nature' of that conduct, combined with its omission of the word 'element' in subsections (5)(A)(ii) and (7), is ambiguous or silent as to the proper method of analysis. We would then have to decide that the SMART Guidelines provide a clear and reasonable interpretation of those subsections. We are unwilling to accept those propositions."); *Hill*, 820 F.3d at 1006 ("In determining that we may examine the circumstances that underlie Hill's conviction for indecent exposure, we reject Hill's contention that we should accord deference under *Chevron* . . . to the Attorney General's 'SMART Guidelines' interpreting § [20]911(7)(I), which apparently recommends a categorical approach."); *Schofield*, 802 F.3d at 730 (declining to address "whether deference to the SMART Guidelines under *Chevron*" was necessary because the court did "not find the SORNA residual clause circular or ambiguous").

They have reached this conclusion despite the fact that, in a different factual context, courts have recognized that the SMART Guidelines are legislative rules that have the force and effect of law in criminal cases. *See*, e.g., *United States v. Lott*, 750

[9] The Eleventh Circuit's rejection of the *Chevron* argument was implicit. The argument was made in the *en banc* briefing in *Dodge*, but the court did not mention the SMART Guidelines in its *en banc* opinion. In the instant case, the court acknowledged the argument in its opinion but concluded it was bound to follow *Dodge*.

F.3d 214, 217-20 (2d Cir. 2014)(upholding validity of the SMART Guidelines' retroactivity provision in an appeal of the defendant's conviction under 18 U.S.C. § 2250(a); concluding the Guidelines are substantive rules that "independently have the force of law"); *United States v. Whitlow*, 714 F.3d 41, 45-47 (1st Cir. 2013)(same); *United States v. Stevenson*, 676 F.3d 557, 563-66 (6th Cir. 2012)(same).

While this Court has "never held that the Government's reading of a criminal statute is entitled to any deference," *United States v. Apel*, 571 U.S. 359, 369 (2014), SORNA is not *just* a criminal statute. It is a comprehensive regulatory scheme designed to ensure sex offenders register and keep their registration information current with authorities. SORNA has a criminal component for failure to register, *see* 18 U.S.C. § 2250(a), but also has been repeatedly held to be civil and regulatory in nature. *See*, e.g., *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013)(holding that "SORNA is a non-punitive, civil regulatory scheme, both in purpose and effect"); *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009)(citing cases from the Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits holding SORNA is a civil, regulatory regime). The particular statutory text at issue in this case appears in SORNA's general definitional section, which applies in both the criminal and civil contexts.

Further, Congress explicitly mandated that the Attorney General "issue guidelines and regulations to interpret and implement" SORNA. 34 U.S.C. § 20912(b). The

SMART Guidelines were the result of this mandate, and they became final after a notice-and-comment period. 73 Fed. Reg. 38,030. Agency regulations, like the SMART Guidelines, that are issued pursuant to statutory authority to implement a law are called legislative or substantive rules and have the "force and effect of law." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015). This Court has held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226-27 (2001). One way such delegation is shown is through notice-and-comment rulemaking. *Id.* at 227. Regulations promulgated based on such an express delegation of authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44 (citations omitted).

The Attorney General's adoption of the hybrid categorical approach is based on a permissible construction of the statute given the statutory ambiguities discussed above. *Chevron*, 467 U.S. 842-43 ("When a court reviews an agency's construction of the statute which it administers," and finds that the intent of Congress is not clear because "the statute is silent or ambiguous with respect to the specific issue," the courts are to defer to the agency's interpretation if it "is based on a permissible

construction of the statute.").

The Attorney General's adoption of a hybrid categorical approach is also respectful of policy concerns and practical problems that arise when a circumstance-specific approach is applied in the context of sex offender registration and notification under SORNA. Under the circumstance-specific approach, the actual statute of conviction becomes irrelevant. As long as the defendant is convicted of *something*, there is the potential that his related conduct could render that conviction a sex offense. This approach allows for a definition of "sex offense" that is simply too broad and has the potential to undermine guilty pleas in cases where the facts of the case or the defendant's personal characteristics justified, in the prosecutor's judgment, permitting the defendant to avoid sex offender registration by pleading guilty under a statute that is not categorically a sex offense.

Also, *Taylor* warned of the problems associated with applying a circumstance-specific approach in the context of a federal sentencing proceeding.

> [T]he Supreme Court has instructed that we also consider the practical difficulties and potential unfairness of applying a circumstance-specific approach, including the burden on the trial courts of sifting through records from prior cases, the impact of unresolved evidentiary issues, and the potential inequity of imposing consequences based on unproven factual allegations where the defendant has pleaded guilty to a lesser offense.

*White*, 782 F.3d at 1132 (citing *Taylor*, 495 U.S. at 601-02). These problems are even more pronounced in the context of sex offender registration and notification. The

SMART Guidelines recognize that courts, particularly federal courts, have little role to play in that process. Registration and notification are carried out mainly through "the individual states and other non-federal jurisdictions" and may be assigned to "correctional personnel who are employees of the jurisdiction's government," "personnel of local police departments, sheriffs' offices, or supervision agencies who are municipal employees," and "individuals who may not be governmental agencies and employees in a narrow sense, such as contractors, volunteers, and community-based organizations." 73 Fed. Reg. 38030, 38048. These officials have neither the resources nor legal expertise necessary to carry out a circumstance-specific approach, and the inevitable result will be inconsistent and unfair application of the statute.

In the court below, the government highlighted the fact that the text of the SMART Guidelines is "directed at state offender registries, not federal district courts imposing a sentence" and argued that the statute "should not be read to preclude sentencing courts from enforcing the statute more broadly, to the full extent of its terms." Appellee's Br. at 22. In other words, the government's position in the court of appeals was that SORNA's language can have different meanings in different contexts, which is neither a correct principle of law nor grammar. The meaning of a statute's terms cannot change from case to case. *See FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954)("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the

statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases."). Such context-specific statutory construction will lead to real-world problems for defendants like Mr. Lloyd, who has been ordered to register as a sex offender as a condition of his supervised release term but could find himself turned away by state registration officials when he attempts to register because his offense is not categorically a sex offense.

## CONCLUSION

Based on the foregoing arguments, Petitioner Garnett Lloyd requests that the Court grant this petition for a writ of certiorari.

Date: August 17, 2020

Respectfully submitted,

Carlos A. Williams
Executive Director

By: s/Kristen Gartman Rogers
Kristen Gartman Rogers
Assistant Federal Defender
Counsel for Petitioner
Southern District of Alabama
Federal Defenders Organization
11 North Water Street, Suite 11290
Mobile, AL 36602
kristen_rogers@fd.org
(251) 433-0910