No. 22-

In the Supreme Court of the United States

COLE LUSBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether this Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and its progeny enable defendants to raise facial vagueness challenges to criminal statutes.

2) Whether 18 U.S.C. § 2250(a)—which addresses registration requirements under the Sex Offender Registration and Notification Act ("SORNA")—is unconstitutionally vague because it fails to prescribe a *mens rea* for the travel element, and fails to connect the interstate travel to the failure to register.

3) Whether 18 U.S.C. § 2250(a) is unconstitutional under the Commerce Clause because it allows the federal government to prosecute wholly intrastate activity by requiring no nexus between the interstate travel and the failure to register.

INTERESTED PARTIES

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

RELATED PROCEEDINGS

United States v. Lusby, Case No. 21-10333 (9th Cir. November 2, 2022)

United States v. Lusby, 2:18-cr-00136-APG (United State District Court, Nevada)

United States v. Lusby, 972 F.3d 1032, 1041-42 (9th Cir. 2020) ("*Lusby I*")

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PETITION FOR A WRIT OF CERTIORARI

Cole Lusby petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in *United States v. Lusby*, No. 21-10333 (9th Cir. November 2, 2022).

OPINIONS BELOW

A copy of the decision is contained in the Appendix A. Denial of Petition for Rehearing En Banc is contained in Appendix B.

JURISDICTION

The decision of the Ninth U.S. Circuit Court of Appeals was entered on November 2, 2022. The Ninth Circuit denied a petition for panel rehearing on January 9, 2023, and the mandate issued on January 17, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

"No person shall be . . . deprived of life, liberty, or property without due process of law." U.S. Const. Amend. V.

The Commerce Clause provides, in relevant part:

"The Congress shall have power to . . . regulate Commerce with foreign nations, and among the several states[.]" U.S. Const. Art. I, Section 8, Clause 3.

18 U.S.C. § 2250(a) provides:

> Whoever . . . is required to register under the Sex Offender Registration and Notification Act; . . . travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and . . . knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a).

STATEMENT

The events giving rise to this unconstitutional prosecution date back to 2009, when Cole Lusby was convicted of sex-offense charges stemming from his relationship, at age 22, with his then-17-year-old girlfriend. After that conviction, he served his time and registered as a sex offender in Oregon. He subsequently relocated to Nevada and established domicile there but did not separately register as a sex offender in his new state.

In November of 2015, Mr. Lusby was arrested on charges that he failed to register as a sex offender, in violation of 18 U.S.C. § 2250(a). In June of 2016, he pled guilty to one count of the charged offense. He was sentenced to 24 months and 1 week

of imprisonment, followed by 8 years of supervised release. Mr. Lusby served his sentence at a federal facility in Arizona.

Prior to Mr. Lusby's transfer to custody, he *completed registration paperwork with a Nevada address*, and he indicated that he intended to permanently reside in Nevada. ER-031-032,036; ECF 66 at 20- 21, Exhibit A. After serving his sentence, Mr. Lusby was released from custody at Tucson USP, in January of 2018. The government transferred Mr. Lusby, unaccompanied, back to Nevada by Greyhound bus that same day. The Bureau of Prisons notified the Nevada Sex Offender Registry and other officials that Mr. Lusby was being released to the State of Nevada, where he had previously been registered. ER-052-054; ECF 66, Exhibit E at 42-43.

In April of 2018, Mr. Lusby was arrested and charged, once again, with failing to register as a sex offender, in violation of 18 U.S.C. § 2250(a). ER-060; ECF No. 1. Mr. Lusby moved to dismiss the indictment, arguing that there was no federal jurisdiction over the alleged offense because he had not "traveled" in interstate commerce; the federal government had involuntarily transported to and from Arizona. ER-064-073; ECF No. 30 at 2-3. In a supplement to his motion to dismiss, after the government superseded the indictment, Mr. Lusby added vagueness and commerce clause challenges. ER-020-023; ECF No. 66 at 9-12. The district court held a series of hearings, and then concluded that the government needed to prove that Mr. Lusby's travel

was not physically or legally compelled. ER-075-078; ECF No. 74 at 2. The government conceded that it could not disprove legal compulsion and the district court dismissed the superseding indictment at the government's request. ER-079-082; ECF No. 77, 78. The government appealed.

In August of 2020, a panel of the Ninth Circuit reversed the district court and held that the plain language of § 2250 does not require the government to prove that a defendant's interstate travel was not legally compelled. *United States v. Lusby*, 972 F.3d 1032, 1041-42 (9th Cir. 2020).

On remand, Mr. Lusby again moved to dismiss the superseding indictment, raising Commerce Clause and vagueness challenges. The district court denied the motion to dismiss. ER-004-004; ECF No. 125. In February 2021, Mr. Lusby entered into a conditional plea agreement, which the district court accepted. ER 108-126; ECF No. 131. The district court sentenced Mr. Lusby to a five-year term of probation, and the district court entered final judgment on November 1, 2021. Mr. Lusby timely appealed, Case No. 21-10333.

On appeal to the Ninth Circuit, Mr. Lusby argued: First, that 18 U.S.C. § 2250(a) violates the Commerce Clause by encroaching on the state's right and ability to enforce its own registration requirements. Without any language in the statute linking the travel in any way to the failure to register, the statute allows for federal prosecution of wholly intrastate activity. Second, Mr. Lusby argued that the text of

§ 2250 was unconstitutionally vague because it fails to provide adequate notice, definition or scope regarding "travel"; that is, could a defendant who, say, swims across Lake Tahoe into California territorial waters—and happens to have forgotten to update his intrastate change in address from Reno to Carson City— be subjected to federal prosecution? Of course he can, is the decision of the Ninth Circuit.

Mr. Lusby also argued that the statute is unconstitutionally vague as applied to him. *See* D.E. 20 at 6, 15 (arguing that the statute does not put a person of ordinary intelligence on notice that if they move from one Nevada address to another, they are subject to federal prosecution simply because the BOP sent them to a facility in Arizona for an intervening period and asserting that "the statute is therefore unconstitutional as applied to Mr. Lusby"). It matters not, is the import of the decision below.

On November 1, 2022, the panel rejected Mr. Lusby's appeal in a Memorandum Opinion. D.E. 32-1; Appendix A. It held, without analysis, that § 2250(a) was a lawful exercise of Congressional authority under the Commerce Clause. To support this holding, it cited *United States v. George*, 625 F.3d 1124, 1130 (9th Cir. 2010) and *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1129-30 (9th Cir. 2014), declaring—in conclusory fashion—that those precedents bound it on the question presented by Mr. Lusby's case. The Ninth Circuit so held even though neither of those cases contemplated the circumstances presented here, where a defendant does not move from one state to another but rather simply changes addresses within the same state.

With respect to the vagueness claim, the Ninth Circuit held that "a defendant who cannot sustain an as-applied vagueness challenge to a statute cannot be the one to make a facial vagueness challenge to the statute." D.E. 32-1 at 3; Appendix A at 3 (citing *Kashem v. Barr*, 941 F.3d 358, 375 (9th Cir. 2019)). The Ninth Circuit reached this conclusion notwithstanding recent decisions from this Court which make clear that facial vagueness challenges are indeed available outside of the First Amendment. The panel then declared that Mr. Lusby's conduct—again, being sent to Arizona to serve a sentence and failing to update a Nevada-to-Nevada change in address after he returned to Nevada—is "plainly proscribed by section 2250(a)." D.E. 32-1 at 3; Appendix A at 3. It rejected Mr. Lusby's constitutional challenges on that basis.

The Ninth Circuit denied Mr. Lusby's petition for panel rehearing on January 9, 2023. Order Denying Petition, Appendix B. Mr. Lusby filed a timely petition to this Court.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari. First, since this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the circuits have applied inconsistent standards to vagueness challenges, creating split decisions, regarding the review of vague-

ness challenges. This creates a lack of clarity over whether facial vagueness challenges are available outside of the First Amendment context. Second, the decision below was wrong on both the due process question and on the Commerce Clause question. With respect to the Commerce Clause issue, the Ninth Circuit ignored this Court's admonition in *Carr v. United States* that there must be a "nexus between a defendant's interstate travel and his failure to register." 560 U.S. 438, 446 (2010).

The questions presented here are thus important, as the decision below both allows for—indeed, encourages—arbitrary and discriminatory prosecution. It also encroaches upon a state's authority to enforce violations of its laws even though there is no federal nexus. Indeed, import of the panel decision here allows a federal prosecutor to define "travel." These are problems of grave importance, and this case presents the vehicle for this Court to answer the questions presented.

I. This Court should grant certiorari because the decision below contributes to circuit inconsistencies and splits.

Since this Court's decision in *Johnson*, the Circuits have split on the question whether facial vagueness challenges to criminal statutes are now available outside of the First Amendment context. The Fourth Circuit, and some lower federal courts, have held that *Johnson*—and, later, *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct 2319 (2019)—marked a seismic shift in the void-for-

vagueness doctrine as it applies to criminal statutes. *See, e.g., United States v. Larson*, 747 Fed. App'x 927, 929 (4th Cir. 2018). The Fifth and Seventh Circuits have taken the same view in opinions since vacated on other grounds. *See also United States v. Gonzalez-Longoria*, 813 F.3d 225, 229 (5th Cir.), on *reh'g en banc*, 831 F.3d 570 (5th Cir. 2016), *cert granted judgment vacated on other grounds*, 201 L. Ed. 2d 1047, 138 S. Ct. 2668 (2018); *United States v. Cook*, 914 F.3d 545, 553 (7th Cir. 2019), *vacated on other grounds*, 205 L. Ed. 2d 4, 140 S. Ct. 41 (2019). A district court decision out of the Tenth Circuit, *United States v. Morales-Lopez*, 2022 WL 2355920 (D. Utah 2022) (appeal pending in the Tenth Circuit, 22-4074), discussed the quandry but turned to *Davis* in holding that "unlawful drug user" was void for vagueness.

Meanwhile, the Second Circuit, Eleventh Circuit, and now the Ninth Circuit, have taken a different view and held that facial vagueness challenges generally remain unavailable post-*Johnson, Dimaya*, and *Davis*. *See United States v. Requena*, 980 F.3d 30, 41-42 (2nd Cir. 2020); *United States v. Jones*, 2022 WL 1763403, at *2 (11th June 1, 2022).

In *United States v. Larson*, the Fourth Circuit held that *Johnson* and its progeny rewrote the longstanding rule that "[f]acial vagueness challenges to criminal statutes are allowed only when the statute implicates First Amendment rights." *Larson*, 747 Fed. App'x at 929. The court in *Larson* reasoned: "After *Johnson*, at least, we know

that a statute that doesn't raise First Amendment problems may nonetheless be impermissibly vague on due process grounds." *Id.* at 930.

The First Circuit has yet to confront this question, but the District of New Hampshire, in a thorough and well-reasoned opinion, has joined the view of the Seventh and Ninth Circuits and found that *Johnson* and its progeny "heralded a more meaningful shift in the void-for-vagueness doctrine," such that the "vague in all applications" standard is no longer applicable. *Loc. 8027, AFT-N.H., AFL-CIO v. Edelbut*, No. 21-cv-1077-PB, 2023 WL 171392, at *10 (D.N.H. Jan. 12, 2023).

The Seventh Circuit and the Fifth Circuit have taken the same view in opinions since vacated on other grounds. The Seventh Circuit previously found that "[i]t is true that *Johnson* puts to rest the notion—found in any number of pre-*Johnson* cases—that a litigant must show that the statute is vague in *all* of its applications in order to successfully mount a facial challenge." *United States v. Cook*, 914 F.3d at 553, *vacated on other grounds*, 205 L. Ed. 2d 4, 140 S. Ct. 41 (2019). Further, the Seventh Circuit found that *Johnson* rejected "the notion that simply because one can point to *some* conduct that the statute undoubtedly would reach is alone sufficient to save it from a vagueness challenge. *Id. See also United States v. Gonzalez-Longoria*, 813 F.3d at 229 (a defendant need not "show that a statute is vague as applied to him as a predicate to any further argument of facial vagueness").

The Second Circuit has limited the *Johnson* line of cases to their "exceptional" facts. *See United States v. Requena*, 980 F.3d at 41-42. In *Requena*, the Second Circuit held that "vague in all applications" continues to be the default rule in facial vagueness cases except in three limited circumstances: the First Amendment context; criminal laws lacking a scienter requirement; and cases like *Johnson* where the statute calls for a categorical approach. *Id.* at 39-40. To be sure, the Second Circuit would still deem facial challenges applicable to statutes like the one Mr. Lusby challenges on this appeal—the problematic part of § 2250(a) has no *mens rea* requirement

The Eleventh Circuit still applies the old rule requiring as-applied challenges to criminal statutes, but it does so only with citation to pre-*Johnson* case law. *See United States v. Jones*, 2022 WL 1763403, at *2 (11th Cir. June 1, 2022) (citing a civil case which in turn cited *Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982)). The Eleventh Circuit has not directly confronted the question whether *Johnson* and its progeny changed the old rule requiring all vagueness challenges, other than those asserting First Amendment rights, to be as-applied challenges.

In *Mumad v. Garland*, 11 F.4th 834, 840 (8th Cir. 2021), the Eighth Circuit, applying *Davis* to the facial challenge of an immigration statute, held that the statute's text, "while ambiguous, does more than apply to a crime's imagined, ordinary case.

Cf. *Davis*, 139 S. Ct. at 2326. Because its text imposes standards that must reference underlying facts, the statute stands."

As mentioned above, in *United States v. Moralez-Lopez*, 2022 WL 23559 (D. Utah 2022), the court observed: "If a criminal defendant must bring a successful as-applied challenge to a statute before asserting a facial one, it is unclear how one could ever bring a facial challenge. If a court finds the statute unconstitutional as applied to the defendant's facts, the facial vagueness challenge becomes moot." *Id.* at *3. Turning to the twin pillars analysis of *Davis*, the district court declined to follow cases pre-*Johnson* and held that the "unlawful drug user" violation under 18 U.S.C. § 922(g)(3) was void for vagueness. *Id.*

Here, the Ninth Circuit has taken a puzzling view. According to the Ninth Circuit, "litigants whose conduct is 'clearly prohibited' by a statute may only bring an as-applied vagueness challenge, subject to two exceptions: where the statute is vague 'even as applied' or where the challenged provisions have 'exceptional circumstances.'" *United States v. Lusby*, No. 21-10333, 2022 WL 16570816, at *1 (9th Cir. Nov. 1, 2022). Though the Ninth Circuit had previously asserted that *Johnson* and *Dimaya* changed this longstanding rule with respect to vagueness challenges, *see, e.g., Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018), it undermines that holding with the decision below. By requiring that a defendant prevail on an as-applied

challenge, the Ninth effectively prohibits purely facial challenges—except in "exceptional circumstances," which is reminiscent of the test the Second Circuit has developed. Unlike the Second Circuit, however, the Ninth Circuit does not have a carveout for criminal laws that lack a scienter requirement, like the one Mr. Lusby challenges here.

The Fourth Circuit has the correct view. "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson*, 135 S. Ct. at 2556. In *Johnson*, followed by *Sessions v. Dimaya*, 103 S. Ct. 1855 (2018), and then *Davis*, 139 S. Ct. at 2324, this Court has made clear that facial vagueness challenges are available outside of the First Amendment. Indeed, that was a key point of disagreement between the majority and the dissenting Justices in *Johnson*. *See, e.g., Johnson*, 576 U.S. at 636 (criticizing the majority for contravening the rule that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined on an as-applied basis") (Alito, J., dissenting) (citations omitted); *United States v. Taylor*, 142 S.Ct. 2015, 2031-2031 (2022) (Thomas, J. dissenting and recommending that the Court overturn *Davis*). Though that minority view did not carry this Court's majority in *Johnson*, it is nonetheless the rule that the Ninth Circuit applied here.

This Court should grant certiorari to correct this decision, as well as to correct other Circuits that have not recognized the change in the doctrine established by *Johnson*.

II. This Court should grant certiorari because the decision below was wrong.

This Court should grant certiorari because the decision below was wrong on multiple questions of constitutional significance. The decision below was wrong in finding that 18 U.S.C. § 2250(a) is not unconstitutionally vague. And the decision below was wrong in finding that the statute is a permissible exercise of Congressional authority under the Commerce Clause.

A. The decision below was wrong on the due process question.

"In our constitutional order, a vague law is no law at all." *Davis*, 139 S. Ct. at 2323. Section 2250(a) is impermissibly vague due to its failure to define travel; its failure to prescribe a *mens rea* for the travel element; and its failure to require any kind of a nexus between interstate travel and failure to register. The Ninth Circuit was wrong to hold otherwise, and this Court should grant certiorari to correct that error because it is one with significant and immediate implications. The decision below allows for extreme government overreach by subjecting people to prosecution simply because they happened to cross state lines at some point in the past and sub-

sequently—at any point in the future—fail to comply with wholly intrastate registration obligations. This authorizes and encourages precisely the arbitrary and discriminatory enforcement that the void-for-vagueness doctrine is designed to prevent; the doctrine maintains fidelity to the twin towers of due process, as explained in *Davis*, 139 S.Ct at 2325; *see Johnson*, 576 U.S. at 595 (noting that a statute violates the Fifth Amendment where it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes" or where "it invites arbitrary enforcement").

Consider, for example, the people who could be subject to federal prosecution under § 2250(a) as the statute was written and as it was applied to Mr. Lusby. Is a convicted sex offender who takes a helicopter ride from the Las Vegas Strip to the Grand Canyon—and then goes right back to Las Vegas—subject to a federal felony crime and imprisonment simply because he had recently changed his Nevada address? Is a convicted sex offender who forgets to update his registration after moving from Rockville, Maryland, to Chevy Chase, Maryland, subject to federal prosecution simply because he gave a pal a ride to Ronald Reagan National Airport weeks earlier? Or took a recent weekend trip to Rehoboth Beach, Delaware?

Under the decision below, the answer is yes. Even someone who sails across Lake Tahoe and returns right back to his home in Reno, Nevada, is perpetually subject to prosecution if he ever moves within Nevada and forgets to update his address. Because no person of ordinary intelligence would read "travels in interstate or foreign

commerce . . . and knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act" as covering the above scenarios the statute falls far short of providing the fair notice that due process requires. 18 U.S.C. § 2250(a). Indeed, no person of ordinary intelligence would read "travel" to include legally compelled travel to an out-of-state federal prison, but that is what the Ninth Circuit interpreted it to mean.

The statute's failure to meaningfully connect interstate travel to the failure to register, or to impose any sort of *mens rea* requirement for the travel, means that the statute likewise fails to "establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). This is evidenced by the prosecution of Mr. Lusby, whose only interstate travel was being sent to Arizona to serve a federal sentence and then being sent right back to Nevada. No person of ordinary intelligence is on notice that by being forced to engage in this legally compelled travel, they are at risk of being charged with a federal felony. No person of ordinary intelligence is on notice that if the Bureau of Prisons takes them out of Nevada and then drops them off back in Nevada, they have engaged in voluntary travel, as the Ninth Circuit incorrectly found. The prosecution of Mr. Lusby illustrates that the phrase "travel" leaves "grave uncertainty" when it comes to "deciding what kind of conduct 'the ordinary case' of a crime involves." *Johnson*, 576 U.S. at 597. This Court should grant

certiorari before more people are subject to unfair, unjust, and arbitrary prosecutions like that against Mr. Lusby.

B. The decision below was wrong on the Commerce Clause question.

This Court should also grant certiorari because the decision below authorized an impermissible exercise of federal power under the Commerce Clause. It also conflicts with this Court's binding precedent interpreting § 2250(a) in the only manner that makes it constitutional.

Mr. Lusby does not dispute that Congress could permissibly regulate people who *use* interstate commerce *to* evade registration requirements, or that it can do so even in circumstances where evading registration requirements is not the purpose of the travel – so long as the travel triggers some form of interstate registration obligations. But that is not what Mr. Lusby did, and that is not the only conduct the statute prohibits. The statute allows for federal prosecution even when the travel is in no way related to, and thus does not aid in, the evading of registration requirements.

The decision below not only illustrates the breadth of the plain text of the statute and the ways in which it is impermissible under the Commerce Clause. It also disregards this Court's clear statements interpreting SORNA and instructing that "the evil at which [The Act] is aimed is that convicted sex offenders registered in one state might ***move to another state***, fail to register there, and thus leave the

public unprotected." *Carr v. United States*, 560 U.S. at 443. Indeed, as this Court made clear in *Carr*, "Congress intended § 2250 to do exactly what it says: to subject to federal prosecution sex offenders who elude SORNA's registration requirements ***by*** traveling in interstate commerce." *Carr*, 560 U.S. at 456 (emphasis added). And all of the Justices in *Carr* agreed that there must be a "nexus between a defendant's interstate travel and his failure to register." *Id.* at 446. *Cf. id.* at 469 (Alito, J., dissenting) (agreeing with the majority that there is a good argument that § 2250 does not apply "where there is little if any connection between the offender's prior interstate movement and his subsequent failure to register").

Indeed, this Court has recognized the importance of "ensur[ing] a nexus between a defendant's interstate travel and his failure to register as a sex offender." *Id.* at 446. Such a nexus, after all, is required for Congress to permissibly intrude on the states' police power. *See United States v. Lopez*, 514 U.S. 549 (1995).

III. Mr. Lusby's case should prompt this Court to answer these important questions.

Certiorari is further warranted because the questions presented are important, and this case presents a good vehicle for this Court to answer them. As for vagueness, Mr. Lusby not only has a strong facial challenge; he has a strong as-applied challenge as well. Vagueness challenges to criminal statutes arise frequently among the lower courts and will continue to arise frequently, creating a rabbit hole

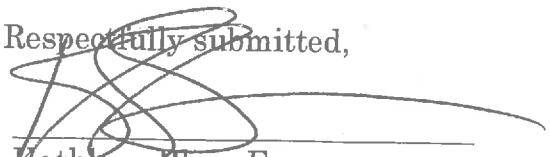
of confusion, especially for an ordinary person seeking fair notice of conduct punishable by the federal government. Yet this Court's analysis of vague criminal statutes is clear. Since *Johnson*, the Circuits have splintered on how to apply the vagueness doctrine to criminal statutes. Allowing this question to percolate further will not aid this Court in deciding the ultimate question; rather, it will only sow confusion. With respect to the commerce clause issue, the lack of the nexus in § 2250(a) is deeply troubling.

As with vagueness, allowing it to percolate further will only lead to more uncertainty in the lower courts—and, worse, it will allow line prosecutors across the country to launch arbitrary, discriminatory, and even vindictive prosecutions. This should be prevented, and this case presents a clean vehicle for this Court to do so. The time for clarity on both of these constitutional questions is now.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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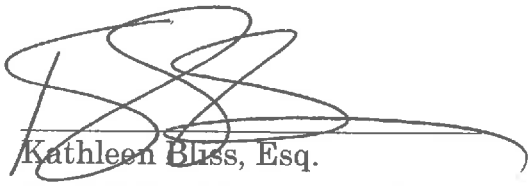
CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 5122 words in total, in compliance with Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 4, 2023, in Henderson, Nevada.



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PROOF OF SERVICE

I, Kathleen Bliss, do swear or declare that on this date, April 4, 2023, as required by Supreme Court Rule 29, I served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (by and through appoint) and PETITION FOR A WRIT OF CERTIORARI upon the Clerk of the Court for the United States Supreme Court by mailing, by first-class, postage prepaid, an original and 10 copies of the Petition and Motion to the Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543.

I further certify that I served, on each party to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid:

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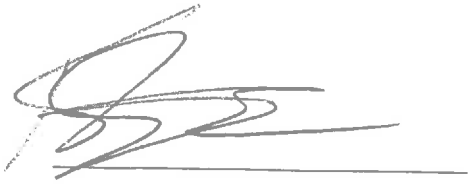

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APPENDIX A

NOT FOR PUBLICATION

FILED

NOV 1 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. COLE LUSBY, Defendant-Appellant.	No. 21-10333 D.C. No. 2:18-cr-00136-APG-PAL-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted October 19, 2022
San Francisco, California

Before: WALLACE and FRIEDLAND, Circuit Judges, and LASNIK,** District Judge.

Cole Lusby appeals from the district court's denial of his motion to dismiss the superseding indictment. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

We review Lusby's constitutional challenges to 18 U.S.C. § 2250(a) de novo. *See United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011); *United States v. Zhi Yong Guo*, 634 F.3d 1119, 1121 (9th Cir. 2011). The government contends that these challenges are foreclosed by our prior opinion in *United States v. Lusby*, 972 F.3d 1032 (9th Cir. 2020). However, we previously addressed only Lusby's statutory arguments, not any constitutional objections to section 2250(a). *See id.* at 1043. For this reason, Lusby's present constitutional challenges are not barred under the law-of-the-case doctrine. *See Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993). We now turn to Lusby's constitutional arguments.

First, Lusby's challenge to section 2250(a) under the Commerce Clause fails. Our court has repeatedly upheld section 2250(a) as a lawful exercise of Congress's authority under the Commerce Clause. *See United States v. George*, 625 F.3d 1124, 1130 (9th Cir. 2010) ("Congress had the power under its broad commerce clause authority to enact the SORNA [Sex Offender Registration and Notification Act]."), *vacated on other grounds*, 672 F.3d 1126 (9th Cir. 2012); *see also United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1129–30 (9th Cir. 2014) (reaffirming *George*'s Commerce Clause analysis). We are bound by these precedents.

Second, Lusby brings a vagueness challenge. The Due Process Clause forbids the enforcement of a statute that "fails to give ordinary people fair notice of

the conduct it punishes" or that "invites arbitrary" application. *Johnson v. United States*, 576 U.S. 591, 595 (2015). Vagueness challenges may arise as either facial or as-applied objections—the former charges that the law is "invalid *in toto*" and in all applications and the latter argues that the law is impermissibly vague under the "facts of the case at hand." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494–95, 494 n.5, 495 n.7 (1982) (internal quotation marks omitted).

Lusby contends that he may bring a facial vagueness challenge to section 2250(a), citing our court's decision in *Henry v. Spearman*, 899 F.3d 703 (9th Cir. 2018). However, as we recently clarified, *Henry* did not alter the "general rule" that "a defendant who cannot sustain an as-applied vagueness challenge to a statute cannot be the one to make a facial vagueness challenge to the statute." *Kashem v. Barr*, 941 F.3d 358, 375 (9th Cir. 2019). Surveying *Henry* and recent Supreme Court precedent, we held in *Kashem* that litigants whose conduct is "clearly prohibited" by a statute may only bring an as-applied vagueness challenge, subject to two exceptions: where the statute is vague "even as applied" or where the challenged provisions have "exceptional circumstances." *Id.* at 375–77, *discussing Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 & n.3 (2018) and *Johnson*, 576 U.S. at 597–602.

Lusby's conduct is plainly proscribed by section 2250(a), and therefore his

as-applied challenge fails.[1] Section 2250(a) subjects federal prosecution to: (1) convicted sex offenders (2) who travel in interstate commerce and (3) then knowingly fail to comply with their SORNA registration obligations. *See Carr v. United States*, 560 U.S. 438, 446–47 (2010). Lusby is a convicted sex offender who travelled from Arizona to Las Vegas, where he planned to live after completing his prison term in Arizona,[2] and, about three months later, had still failed to comply with his registration obligations in Nevada. For these reasons, Lusby's vagueness challenge fails. *See United States v. Szabo*, 760 F.3d 997, 1003 (9th Cir. 2014) ("So long as the challenged terms 'are clear in their application to [the defendant's] conduct, [the] vagueness challenge must fail.'"), *quoting Holder v. Humanitarian L. Project*, 561 U.S. 1, 21 (2010).

AFFIRMED.

[1] Lusby did not argue that the exceptions identified in *Kashem* apply.
[2] We previously held that the defendant's interstate travel need not be voluntary in the sense of being free of legal compulsion. *Lusby*, 972 F.3d at 1034–35.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. COLE LUSBY, Defendant-Appellant.	No. 21-10333 D.C. No. 2:18-cr-00136-APG-PAL-1 District of Nevada, Las Vegas ORDER

Before: WALLACE and FRIEDLAND, Circuit Judges, and LASNIK,* District Judge.

Judge Friedland has voted to deny the petition for rehearing en banc, and Judge Wallace and Judge Lasnik so recommend. The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**.

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.