UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case No. 6:07-cr-221-Orl-31KRS**

ROBERT D. POWERS,

Defendant.
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MOTION TO DISMISS INDICTMENT
AND MEMORANDUM OF LAW[1]

COMES NOW, the Defendant, Robert D. Powers, by and through undersigned counsel and hereby moves this Honorable Court to dismiss the indictment. Mr. Powers would also humbly point the Court to and would expressly adopt and incorporate by reference the same motions to dismiss filed in the cases of *United States v. Madera*, Case No. 6:06-CR-202-ORL-18KRS (M.D. Fla 2006), Doc. 29 (Defendant's Motion to Dismiss); *United States v. Derick Mason*, Case No. 6:07-CR-52-ORL-19UAM (M.D. Fla. 2007), at Doc. 40; and *United States v. Tommy Buckius*, Case No. 6:08-CR-52-ORL-31KRS (M.D. Fla.2007), at Doc. 23 – with the additional issues and arguments raised by this motion. The government opposes and objects to this request.

[1] Undersigned anticipated the necessity of filing an amended or supplemental motion when Mr. Powers' original motion to dismiss was filed, based upon the receipt of Dr. Olander's written evaluation of Mr. Powers. *See* Doc. 24 at n.5. As a result, sections I and IV. 4. have been amended and supplemented.

I. Facts

a. The Charge

On December 19, 2007, the grand jury returned a one count indictment against Mr. Powers, charging that on or about July 25, 2007, Mr. Powers "did knowingly and unlawfully fail to register and update a registration as required by the Sex Offender Registration and Notification Act," in violation of 18 U.S.C. § 2250(a). Doc. 6. Specifically, the indictment alleges that Mr. Powers was convicted of "Assault to Commit Sex Crimes, in the State of South Carolina on November 9, 1995." *Id.* It further alleges that he subsequently "traveled in interstate commerce to the State of Florida," and thereafter failed to register. *Id.*

The criminal complaint, filed on November 15, 2007, indicates that on November 13, 1995, Mr. Powers registered as a sex offender in South Carolina.[2] Doc. 1. Later, in 2002, when Mr. Powers moved to North Carolina with his father, he again registered as a sex offender. *Id.* For the years 1996, 1998, 2000, 2001, and 2007, Mr. Powers' Florida Driver's License and Identification Cards listed his home address as 10645 Buck Road, Orlando, Florida–his mother's home.[3] *Id.* In 2006, Mr. Powers Driver's License reflected that he was living in California. *Id.*

On October 9, 2007, the Florida Department of Law Enforcement (FDLE) sent Mr. Powers a certified letter to 10645 Buck Road. *Id.* On October 17, 2007, Mr. Powers' mother, Ms. Glenavern Monroe, signed for the letter. The FDLE letter was not opened by

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[2] When Mr. Powers was living in both North and South Carolina, he resided with his father.

[3] For his entire life, Mr. Powers has always resided with his mother, his father or a significant. He has never resided alone. When his employer requires him to travel to other states, the employer makes all of the arrangements and pays for lodging.

Mrs. Monroe until after Mr. Powers was arrested on the current charge. The FDLE letter stated that Mr. Powers was required to register as a sex offender in Florida. *Id.* Mr. Powers never saw the letter because he was in Washington State working when it arrived and he remained there until his arrest on December 4, 2007. A grand jury indicted Mr. Powers on December 19, 2007. *See* Doc. 13.

b. Mr. Powers

Mr. Powers was born on August 29, 1964. During his childhood, Mr. Powers resided with his mother, Glenavern Monroe, and his siblings in Orlando, Florida. According to his mother, Mr. Powers was diagnosed with dyslexia as a child and he had trouble reading and comprehending. Because Mr. Powers was having difficulty in the public school system, Ms. Monroe placed Mr. Powers in private school, where she thought he would get some help. Nevertheless, he continued to do poorly. When Mr. Powers was fifteen, he went to live with his father in California and began drinking. Initially, he attended regular school classes, but soon was placed in special education classes and private schools.[4] Notwithstanding, Mr. Powers never completed high school. Mr. Powers has had the same two jobs for eleven years.

In January and February 2008, undersigned counsel met with Mr. Powers. Eventually, it became apparent to the undersigned that Mr. Powers was confused about his charges and was having difficulty understanding various concepts and idea. As a result, undersigned employed Jacqueline Olander, Ph.D. to perform a neuropsychological exam on Mr. Powers. That examination was begun on February 29, 2008. Following the initial testing, Dr. Olander conveyed to undersigned that Mr. Powers had severe deficits. Upon completion of her

[4] Records have been requested from the school, but have not yet been received.

evaluation and review of numerous records, Dr. Olander determined that Mr. Powers a Verbal IQ score of 68 (2nd percentile), a Performance IQ score of 74 (4th percentile), and a Full Scale IQ score of 68 (2nd percentile). Additionally, Mr. Powers has the reading level of a second grader (7 or 8 year old), placing Mr. Powers within sub-average intelligence range or possibly, the mild mental retardation range of functioning.[5] Other tests indicate that Mr. Powers is not malingering and Dr. Olander's findings are consistent with Mr. Powers' childhood education records. Finally, Dr. Olander performed an analysis of the sex offender registration forms from South Carolina, North Carolina and Florida, which were either signed by Mr. Powers or sent to him. According to the analysis, the reading levels of the three forms were at the high school and college levels.

II. Brief Overview of the Adam Walsh Act, P.L. 109-248 (July 27, 2006) and SORNA

On July 27, 2006, President George W. Bush signed the Adam Walsh Child Protection Act of 2006, H.R. 4472, 109th Cong. (2d Sess. 2006) (the Act) into law. Title I of the Act, entitled the Sex Offender Registration and Notification Act (SORNA), creates a federally-mandated, national sex offender registry law. *See* 42 U.S.C. §§ 16901-16962. SORNA requires, *inter alia*, individuals who are "sex offenders" to register and maintain current information in each jurisdiction: (a) where the sex offender was convicted, (b) where the sex offender resides, (c) where the sex offender is employed and where the sex offender attends school, and (d) requires that the individual register prior to his release from prison, or no later

[5] A person with mild mental retardation is often able to maintain minimal employment and function in society with the help of family to assist with aspects of daily living such as bill payment and banking. *See* Diagnostic and Statistical Manual of Mental Disorders "DSM-IV-TR", at 43 (Rev. 4th ed. 2000). A person with moderate mental retardation normally requires supervision, while someone with severe retardation requires specialized nursing or other care. *See id.* at 43-44.

than three (3) business days after any change in residence, employment or student status. *See* 42 U.S.C. §§ 16911(1), 16913(a)-(c). SORNA further requires that every state establish an internet website, publishing information about sex offenders registered in their registry. *See* 42 U.S.C. § 16918.

SORNA also establishes a "National Sex Offender Public Website" to be maintained by the Attorney General, which shall include "relevant information for each sex offender and other person listed on a jurisdiction's website," and make "relevant information" publicly accessible. *See* 42 U.S.C. § 16920. It also requires that each jurisdiction include in the design of its own website all field search capabilities need for full participation in the National Sex Offender Public Website and "shall participate in that website as provided by the Attorney General." 42 U.S.C. § 16918.

SORNA further establishes a three-tier classifications system for sex offenders. *See generally* 42 U.S.C. § 16911. Tier I sex offenders are, among myriad other factors, those whose offense is punishable by one year or less imprisonment or whose offense was an assault against an adult that involves sexual contact but not a completed sexual act.[6] *See* 42 U.S.C. § 16911(2). Tier II sex offenders are, again among myriad other factors, are those individuals whose offense is punishable by more than one year imprisonment and committed that offense against a minor. *See* 42 U.S.C. § 16911(3). Tier III classifications, the most severe of the classification tiers, include individuals whose offense is punishable by imprisonment of more than one year and involve, *inter alia*, aggravated sexual abuse of an adult or minor and

[6] Tier I offenders are required to register for 15 years from the date of their release from incarceration. 42 U.S.C. § 16913(b); 42 U.S.C. § 16916(a). However, the time for registration can be reduced to ten years if the person maintains a clean record. 42 U.S.C. § 16916(b). Mr. Powers 1995 crime appears to be a Tier I offense.

occurred after that individual became a Tier II sex offender. *See* 42 U.S.C. § 16911(4). Congress did not provide a procedural mechanism for challenging a tier classification.

Lastly, and perhaps most applicable to facts and circumstances of this case, the Act further creates new federal crimes for those individuals who, among other things, are required to register under SORNA but nonetheless fail to do so. *See* 18 U.S.C. § 2250 (entitled "Failure to Register").

Interestingly, Congress delegated to the Attorney General the authority "to specify the applicability" of SORNA to "sex offenders" who are "convicted **before**" July 27, 2006, as well as those who are "convicted before . . . its implementation in a particular jurisdiction." 42 U.S.C. §§ 16912(b), 16913(b), 16913(d), 16917(a)–(b) (emphasis supplied). As such, Congress explicitly did not decide whether SORNA would apply retroactively to persons, such as Mr. Powers, who were convicted before July 27, 2006, but instead authorized the Attorney General to make that crucial decision. *See* 42 U.S.C. § 16913(d).

III. The Elements of the 18 U.S.C. § 2250(a) Offense

The Act amended Title 18 of the criminal code, creating the new federal criminal offense of "failure to register." *See* 18 U.S.C. § 2250. That new criminal offense provides the following in relevant part:

> (a) In general.--Whoever–
>
> (1) is required to register under the Sex Offender Registration and Notification Act; [and]
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) 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).

Subsection (a) of the statute provides a statutory maximum of 10-years' imprisonment for anyone convicted of failure to register. *See* 18 U.S.C. § 2250(a)(B)(3). If the individual charged with failure to register "commits a crime of violence," then that individual has a mandatory minimum sentence of five years' imprisonment, and a statutory maximum of 30 years' imprisonment, which "shall be in addition and consecutive to the punishment provided for the violation in subsection (a)." 18 U.S.C. § 2250(c)(1).

Stated simply, the Act specifies that it is crime for an individual (1) who is required to register under SORNA (such as an individual with a prior sexual offense–as defined by SORNA), (2) travels in interstate commerce to a different state to reside or work, and (3) then subsequently fails to register as a sex offender in that state. *See* 18 U.S.C. § 2250(a).

IV. SORNA's Registration Requirements, as well as 18 U.S.C. § 2250, Are Unconstitutional

Both the registration components of SORNA, as well as the new offense of "failure to register" set forth in 18 U.S.C. § 2250, are unconstitutional for myriad reasons. The Act violates the following provisions of the United States Constitution: (1) the Commerce Clause, Art. I, § 8; (2) *Ex post Facto* Clause, Art. I, § 9, (3) Due Process Clause (both procedural and substantive) of the Fifth Amendment, (4) the Non-Delegation Doctrine, Art. I, § 1; and (5) the Tenth Amendment. Mr. Powers will address each of these constitutional challenges in turn.

1. Congress Impermissibly Delegated to the Attorney General the Decision of Whether SORNA Would Apply Retroactively to Persons, Such as Mr. Powers, Convicted Prior to the July 27, 2006 Enactment of the Act.

As an initial matter, Mr. Powers asserts that Congress impermissibly delegated the crucial decision of whether the Act should be applied retroactively. *See* 42 U.S.C. § 16913(d). Retroactive laws are highly disfavored because, among other things, they fail to give individuals proper notice and upset settled expectations. *See, e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S. Ct. 1483, 1497 (1994). The Supreme Court has made clear that "Congress is manifestly not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested." *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 55 S. Ct. 241, 248 (1935). Instead, the *Ryan* Court made clear that Congress may only leave to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." 293 U.S. at 421, 55 S. Ct. at 248 (holding that Congress had unconstitutionally delegated the Executive Branch the authority to prohibit transportation of excess petroleum, which would be subject to fine or imprisonment); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550, 55 S. Ct. 837, 852 (1935) (holding that Congress had unconstitutionally authorized the Executive Branch to prescribe codes of fair competition, the violation of which would be a misdemeanor offense).

Mr. Powers asserts that this is exactly what Congress did in the Act. It placed the crucial prosecutorial decision (*i.e.*, whether or not to retroactively expose individuals to criminal liability) in the hands of the Executive Branch via the Attorney General.

For the reasons stated, Mr. Powers argues that Congress' delegation to the Attorney

General of the important decision of whether the Act applies retroactively was an impermissible delegation of constitutionally-prescribed, legislature authority. *See Panama Refining Co.*,295 U.S. at 550, 55 S. Ct. at 852; *A.L.A. Schechter Poultry Corp.*, 294 U.S. at 550, 55 S. Ct. at 852.

2. Congress Lacks the Power to Force Individuals Convicted of Purely Local Sex Offenses to Register as Sex Offenders–SORNA Violates the Commerce Clause

Section 2250 is unconstitutional on its face and as applied to Mr. Powers, as it violates the Commerce Clause. In order to violate 18 U.S.C. § 2250 a defendant must first be "required to register under the [SORNA]." 18 U.S.C. § 2250(a)(1)**.** However, Congress lacks the authority to direct individuals convicted of purely local offenses to register as state sex offenders. Therefore, Congress could not constitutionally require Mr. Powers, who was convicted of a purely local offense, to register under SORNA. Thus, first element of SORNA cannot be met.

SORNA creates affirmative requirements for "sex offenders" to register with their local jurisdiction. 42 U.S.C. §§ 16913-16916. As described above, SORNA's definition of "sex offender" includes citizens who have been convicted solely under state criminal laws, even if their offense has no relation to interstate activity or commerce. 42 U.S.C. § 16911. The Registration Requirements are not directed to the states, but to individuals. For example, 42 U.S.C. § 16913(a) requires a sex offender to "register and keep the registration current, in each jurisdiction where the offender resides."

Congress may only enact legislation pursuant to the powers specifically delegated to it by the Constitution. *United States v. Lopez*, 514 U.S. 549, 552 (1995). SORNA does not

itself explain under what authority Congress imposes the Registration Requirements, but the only power through which Congress could conceivably enact them is its power "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. Art. I § 8, cl. 3. However, under modern Commerce Clause jurisprudence, as articulated in *Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Jones*, 529 U.S. 848 (2000), it is clear that Congress does not have the power to impose Registration Requirements on individual citizens convicted of purely intrastate offenses.

As the Court articulated in *Morrison*, "modern Commerce Clause jurisprudence has 'identified three broad categories of activity that Congress may regulate under its commerce power.'" 529 U.S. at 608-09 (quoting *Lopez*, 514 U.S. at 558). First, Congress may regulate the use of and channels of interstate commerce, such as interstate highways, the mail or air traffic routes. *Id.* Second, Congress can regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce. *Id.* Finally, Congress can regulate those activities that have a substantial effect on interstate commerce. *Id.*

The Registration Requirements have nothing to do with the channels of interstate commerce. Hence, the Registration Requirements cannot be supported by Congress' power to regulate them. Further, the Registration Requirements are imposed on individuals who are not in interstate commerce or have any connection to interstate commerce. Thus, the second *Lopez* category, protecting the instrumentalities of, or things in interstate commerce, cannot apply. The Registration Requirements can therefore only be upheld if they regulate "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S., at 558-59.

Lopez and *Morrison*, the Court set forth several factors that indicate whether a regulation can be upheld as an activity that substantially affects interstate commerce. As an initial matter, it is relevant whether the activity regulated has an economic character. *Morrison*, 529 U.S. at 611 ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor"). In *Lopez*, the Gun-Free School Zones Act was struck down in large part because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus." 210 U.S. at 559-60. Similarly, the Registration Requirements have no commercial character, or any relation to economic activity of any kind. The stated purpose of SORNA is "to protect the public from sex offenders and offenders against children." 42 U.S.C. § 16901. These purposes have no economic character.

The second factor examined in *Lopez* and *Morrison* is whether the statute contained a "jurisdictional element" such as a requirement of travel across state lines for the purposes of committing the regulated act. *Morrison*, 529 U.S. at 611-612. Although SORNA's criminal provision requires a sex offender to "travel in interstate commerce" in order to qualify him for federal prosecution, the Registration Requirements contain no such jurisdictional element. 42 U.S.C. §§ 16913-16916. The Registration Requirements apply to citizens whose criminal activities are purely intrastate, and who never travel in interstate commerce.

The statute does not, however, require that the sex offender travel in interstate

commerce in furtherance of a crime that affects interstate commerce. *See id.* Thus, it is evident that the statute requires *no jurisdiction nexus* between interstate travel and any crime or any effect on commerce. On its face and as applied to Mr. Powers, therefore, there is an insufficient nexus between Mr. Powers (or anyone for that matter) traveling from New York to Florida, and how that travel affected interstate commerce. Because the statute fails to require that the individual traveled in interstate commerce with intent to commit a specified crime, it does not meet the requisite jurisdictional nexus to affect commerce. As such, the law is unconstitutional on its face and as applied to Mr. Powers.

Third, the existence of congressional findings that indicate that the statute is a valid exercise of Congress' Commerce Clause power will at least enable a court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 563. Although Congress included findings in other sections of the Adam Walsh Act,[7] SORNA contains no such findings. Like the Gun Free School Zone Act, SORNA is unsupported by legislative findings indicating that purely local sex crimes have any link with interstate commerce.[8]

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[7] For example, Title V of the Act, entitled "Child Pornography Prevention," contains findings that "intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce..." H.R.4472, § 501.

[8] Even the existence of legislative findings does not guarantee that the statute will be upheld as a valid exercise of Congressional power. The Violence Against Women Act, at issue in *Morrison*, was accompanied by "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." 529 U.S. at 614. The Court still struck down the statute, holding that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Id.* Rather, the Court held that the determination of whether an activity sufficiently affects interstate commerce is for the judiciary. *Id.*

Finally, under *Morrison*, courts must examine the extent of the relationship between the regulated activity and its effects on commerce. 529 U.S. at 612. There is no indication in the statute, or anywhere else, that the activities sought to be regulated by SORNA have any effect on commerce at all, not even an attenuated one. Nor can such an effect can be hypothesized by the aggregate economic effects that sex crimes and sex offenders inflict upon society. The Supreme Court has flatly rejected the notion that the aggregate effect on interstate commerce of local criminal activity can be used to justify the invocation of Congress' Commerce Clause power. *Morrison*, 529 U.S. at 617. Nor can the costs of crime control or the effects of crime on "national productivity" support the use of the Commerce Clause to regulate intrastate criminal activity. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 598, 612-13.

Moreover, this analysis is not affected by the Supreme Court's most recent Commerce Clause case, *United States v. Raich*, 545 U.S. 1 (2005). In *Raich*, the Court held that the application of Controlled Substances Act ("CSA") provision criminalizing the distribution and possession of medical marijuana was legally enacted under the Commerce Clause, even if the marijuana was locally grown, consumed locally, and never traveled in interstate commerce. The Court held that because marijuana is a commodity that has an interstate market, the CSA is connected to "economic" activity and is therefore a valid exercise of Congress' Commerce Clause powers:

> [u]nlike those at issue in *Lopez* and *Morrison* the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate

> possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.

Raich, 545 U.S. at 25-26.

Clearly this reasoning has no application to SORNA, which in no way regulates anything resembling economic activity. SORNA, whose stated purpose is "to protect the public from sex offenders and offenders against children," 42 U.S.C. § 16901, far more closely resembles the statutes struck down in *Lopez* and *Morrison*.

Each of these four factors indicates that the Registration Requirements are unconstitutional. First, the regulated activity has no economic character. Second, the Registration Requirements contain no jurisdictional element. Third, the statute contains no congressional findings indicating a link with interstate commerce. Finally, the regulated activities have an insufficient effect on interstate commerce to support an exercise of Commerce Clause power. For all of these reasons, the Court must hold the Registration Requirements unconstitutional and dismiss the Indictment against Mr. Powers.[9]

For the reasons stated above, the Registration Requirements of SORNA are unconstitutional. Because it is necessary for a defendant to be "required to register under the Sex Offender Registration and Notification Act" in order to violate § 2250, and Mr. Powers cannot

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[9] In *Morrison*, after applying all of these factors, the Court ruled that "[g]ender motivated crimes of violence are not, in any sense of the phrase, economic activity," and struck down the Violence Against Women Act as an impermissible use of Congress' power under the Commerce Clause. 529 U.S. at 613. Similarly, in *Lopez*, the Court held that the Gun Free School Zones Act, "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Purely local sex offenses are similarly non-economic and, while validly regulated by the states, are not subject to regulation by Congress under the Commerce Clause.

be required to register under SORNA because the Registration Requirements are unconstitutional, the Indictment against him must be dismissed.

3. The Act Violates the *Ex Post Facto* Clause

The crime alleged in the indictment purports to punish Mr. Powers for acts committed prior to the passage of the Adam Walsh Act, which is a violation of the *Ex Post Facto* Clause of the Constitution. *See* U.S. CONST., ART. I, § 9.

According to allegations contained in the indictment and sworn complaint, Mr. Powers's qualifying sex offense conviction occurred in 1995, and he subsequently traveled to Florida. Mr. Powers has been therefore charged with an offense arising from conduct that occurred prior to Congress' passage of the crimes (July 27, 2006) set forth in 18 U.S.C. § 2250(a).

The Supreme Court has noted that the *Ex Post Facto* Clause applies "only to penal statues which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S. Ct. 2715, 2718 (1990)(discussing origins of the prohibitions of *Ex Post Facto* laws). Indeed, the *Ex Post Facto* Clause law applies if the legislation's intent was to impose punishment. *See id.* Additionally, the Court has stated that if "the intention of the legislature was to enact a regulatory scheme that is civil and non-punitive, [the Court] must further examine whether the statutory scheme is so punitive in purpose or effect as to negate [Congress'] intention to deem it civil." *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1147 (2003). If the reviewing court therefore determines that the legislature had intended to establish civil proceedings, it must them examine whether that challenged statutory scheme is indeed "so punitive in purpose or effect," and the *Ex Post Facto* Clause applies. *Id.*

The *Ex Post Facto* Clause also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 58-29, 101 S. Ct. 960, 964

(1981). The genesis of this restriction is the 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*, 511 U.S. at 266, 114 S. Ct. at 1497. It cannot be disputed that political pressure has made sex offenders a very unpopular group in our country.[10]

Mr. Powers contends that the Act is criminal and punitive in nature. Alternatively, even if the Act is civil and non-punitive, Mr. Powers asserts that the statutory scheme of the Act was "so punitive in purpose or effect as to negate [Congress'] intention to deem it civil." *Smith*, 538 U.S. at 92, 123 S.Ct. at 1147.

Although the Supreme Court has recently upheld the State of Alaska's sex offender statute, there are significant differences between Alaska's statute and the one at issue here. *See Smith v. Doe*, 538 U.S. 84, 105-06 123 S. Ct. 1140, 1154 (2003) (upholding constitutionality of the Alaska sex offender registry law because the law was not punitive in nature and therefore did not trigger the protections of the *ex post facto* clause).

Unlike the Alaska sex offender statute addressed by the *Smith* Court, SORNA was intended by Congress to be punitive in nature. *See Smith*, 538 U.S. at 93-96, 123 S. Ct. at 1147-49 (finding that the Alaska legislature intended to create a civil, non-punitive regulatory scheme). For example, the Act: (1) broadens the class of offenders subject to registration, *see* 42 U.S.C. § 16911; (2) lengthens the duration of registration, *see* 42 U.S.C. § 16915; (3) creates classes of offenders, *see* 42 U.S.C. § 16911; (4) reduces the time frame for the affected individual to advise

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[10] *See generally* 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").

officials of any changed to his registration information, *see* 42 U.S.C. § 16913; and (5) increases the penalties for violating any of its registrations requirements, *see* 42 U.S.C. § 2250.[11]

Furthermore, unlike the Alaska law, Congress' stated purpose of SORNA was to "protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below." *Compare* Pub. L. 109-248, § 102 *with Smith*, 538 U.S. at 93, 123 S. Ct. at 1147. Congress stated this purpose without, also *unlike* Alaska's law upheld in *Smith*, finding that sex offenders indeed have a high risk of recidivism or that public notification would promote public safety, as was the case when Alaska's legislature enacted its sex offender registration law. *Smith*, 538 U.S. at 93, 123 S. Ct. at 1147.

As further evidence of Congress' punitive intent, it placed the crime for failing to register in Title 18 (a criminal part) of the United States Code. *See* 18 U.S.C. § 2250(a); *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147. The previous misdemeanor offense for failure to register that was repealed by the Act is set forth in Title 42 of the United States Code, entitled "Public Health and Welfare." *See* 42 U.S.C. § 14072(i).

For the foregoing reasons, prosecution of Mr. Powers would violate the *Ex Post Facto* Clause of the Constitution. *See United States v. Smith*, 481 F. Supp. 2d 846, 851 (S.D. Mich. 2007); *United States v. Barnes*, No. 7 Cr. 187, 2007 WL 2119895, at *5 (S.D. N.Y. July 23, 2007)(rejecting the government's position that "knowledge of the state law requiring registration is equivalent to knowledge of 'SORNA's' requirements"; and noting, "The Constitutional

[11] Interestingly, prior to the passage of the Act, it was only a misdemeanor for an individual to fail to register as a sex offender. *Compare* 42 U.S.C. § 14072(i) with 18 U.S.C. § 2250 (making failure to register a felony punishable by up to ten years in prison). Congress has repealed this misdemeanor provision. *See* P.L. 109-248, Title I, § 129.

mandate that defendants be given adequate notice and fair warning applies not only to what conduct is criminal but to the punishment which may be imposed.")(unpub.).

4. SORNA Violates Mr. Powers's Procedural and Substantive Due Process

SORNA violates Mr. Powers due process rights for several reasons. First, it provides no mechanism to challenge the registration or designation process, or have a hearing. Second, Mr. Powers did not receive any notice of SORNA or its requirements. Third, SORNA has not been implemented by any state, including Florida.

a. SORNA violates the Due Process clause because there is no mechanism to challenge registration or designation

Mr. Powers asserts that, because SORNA neither provides for a hearing or even a petition process prior to publishing his name on the sex offender internet registries *or* being compelled to comply with other reporting conditions, SORNA violates both the procedural and substantive components of the Due Process Clause of the Fifth Amendment to the Constitution.[12]

SORNA imposes, *inter alia*, automatic sex offender status, public notification on the Internet, and tier-level risk classifications. *See* Pub. L. 109-249, § 637 (requiring the Attorney General to assemble a task force to study the risk-based systems and report back within 18 months). It imposes such without a hearing to assess risk of recidivism or current dangerousness of the affected individual. *But see Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160 (2003) (finding no procedural due process violation in Alaska's SORNA statute by not requiring a sex offender a hearing to determine his current dangerousness prior to his name being published as a sex offender on the Internet).

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[12] SORNA provides for a hearing in very narrow set of circumstances, none of which are applicable to facts and circumstances of this case.

Despite the *Doe* decision, Mr. Powers asserts that the lack of a hearing violates his procedural due process rights, as there is no procedural method for Mr. Powers to challenge the validity of a prior conviction prior to his name being published on the internet registries (both state and federal registries required under SORNA).

This, in turn, can lead to a violation of his substantive due process rights because he (or any other individual) may be deprived of liberty when his name is listed on the state and federal registries and is compelled to comply with the other reporting/registration portions of the Act, even if he had not actually been convicted of an offense that Congress listed as a qualifying "sex offense" in SORNA.[13]

Indeed, the Eleventh Circuit has held that the classification of a prisoner as a sex offender, as well as the requirement that he complete sex offender treatment as a precondition for parole eligibility, implicated a liberty interest under the Due Process Clause. *See Kirby v. Siegelman*, 195 F.3d 1285, 1292 (11th Cir. 1999); *see also Coleman v. Dretke*, 395 F.3d 216, 223-24 (5th Cir. 2005) (holding that Texas statute violated procedural due process rights of an individual who was required to register as a sex offender without first being afforded a hearing); *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997) (holding that a state must provide a hearing before classifying a prisoner as a sex offender and requiring the prisoner to complete a treatment program as a condition to parole eligibility).[14]

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[13] This may occur, among other avenues, when a prior conviction is overturned or expunged, or the person is pardoned. There is no avenue in SORNA to challenge the publication of an individual's name on the registry.

[14] Although the *Doe* Court, found Connecticut's SORNA law to be constitutional, the Supreme Court merely addressed the procedural aspect of due process, and expressly chose not to decide whether Connecticut's law violated substantive due process. *Doe*, 538 U.S. at 8, 123 S. Ct. at 1164-65.

b. SORNA has not been implemented and thus there is no duty to register

Additionally, this instant prosecution for violation of SORNA violates Mr. Powers' due process rights because he had no actual notice of the Act or its registration requirements. SORNA explicitly provides that an appropriate government official must notify a sex offender of his duty to register under SORNA. 42 U.S.C. § 16917. For individuals in custody or awaiting sentencing for an offense giving rise to the duty to register under SORNA, the Government must notify them of their SORNA obligations immediately after they are released from custody or immediately after sentencing. 42 U.S.C. § 16917(a). Specifically, the Government must (1) "inform the sex offender of the duties of a sex offender under [SORNA] and explain those duties," (2) "require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement," and, (3) "ensure that the sex offender is registered." *Id.*

For those sex offenders, who have already served their sentences for an offense committed before SORNA's enactment, the Act directs the Attorney General to prescribe specific rules for notification. 42 U.S.C. § 16917(b). In the SMART Guidelines, the Attorney General provides that for those offenders "with pre-SORNA or pre-SORNA-implementation convictions who remain in the prisoner, supervision, or registered sex offender populations at the time of implementation," jurisdictions must "fully instruct[] them about the SORNA requirements, [and] obtain[] signed acknowledgments of such instructions." 72 Fed. Reg. at 30228.

The Attorney General has not promulgated any regulation making SORNA retroactively applicable to persons (1) convicted before SORNA's implementation in a particular state, or (2)

"unable" to initially register under Section 16913(b) of SORNA. The Attorney General's proposed SMART Guidelines, however, explicitly provide that the Act becomes applicable to these two groups of offenders only *"when* [a state] *implements* the SORNA requirements in its system." 72 Fed. Reg. at 30228 (emphasis added). States are required to implement SORNA the later of July 27, 2009 or one year after the Attorney General provides the states software to "enable jurisdictions to establish and operate uniform sex offender registries and Internet sites." 42 U.S.C. §§ 16923, 16924. The SMART Guidelines provide that a jurisdiction has not *implemented* SORNA until it has "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and the SMART Office of the Department of Justice has determined that it has done so. 72 Fed. Reg. at 30213-14. Persons with "pre-SORNA implementation convictions," like Mr. Powers, have a duty to register *only after* the jurisdiction implements the federal law.

> With respect to sex offenders with pre-SORNA or pre-SORNA-implementation convictions who remain in the prisoner, supervision, or registered sex offender populations **at the time of implementation** . . . jurisdictions should endeavor to register them with SORNA as quickly as possible. . . In other words, sex offenders in these populations must be registered by the jurisdiction **when it implements** the SORNA requirements in its system.

72 Fed. Reg. at 30228 (emphasis added).

Florida has not implemented SORNA. As noted by the Attorney General in the SMART Guidelines, a jurisdiction has not implemented SORNA until it has (1) "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and (2) the SMART Office has determined that it has done so. 72 Fed. Reg. at 30213-30214. Florida currently has no procedure in place to collect, maintain, and disseminate the detailed information as required

under SORNA. Florida law does not conform with SORNA's registration and notification requirements. Because Florida has failed to implement SORNA, Mr. Powers cannot possibly be subject to the Act's constraints.

Furthermore, because Mr. Powers was "unable" to initially register under § 169139(b) of SORNA and Florida has not implemented SORNA, he cannot comply with SORNA. No process exists by which he can bring himself in compliance with the Act. Criminalizing the failure to do something that is impossible to do violates the Due Process Clause's guarantee of fundamental fairness. *See United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992) (it is a violation of fundamental fairness to hold someone liable for a crime when an essential element of the crime is his failure to perform an act that he is incapable of performing). Because it was (and remains) impossible for Mr. Powers to comply with SORNA in Florida, punishing him for failing to register under that statute violates his due process rights.

c. Mr. Powers never received actual notice of his duty to register and therefore did not knowingly fail to register

Finally, Title 18, U.S.C. § 2250(a)(3) provides that a defendant must *knowingly* fail to register in order to violate the statute. The plain language of 42 U.S.C. § 16917 ("Duty to notify sex offenders of registration requirements and to register") requires the government affirmatively to inform offenders of SORNA before any duty to register under the Act arises. *See* 42 U.S.C. § 16917(b); *United States v. Barnes*, 2007 WL 2119895, at *4 (S.D.N.Y. July 23, 2007) (SORNA "provides that the Attorney General has the duty to notify sex offenders of their registration requirements"); *United States v. Smith*, 2007 WL 1725329, at *3-5 (S.D.W.Va. June 13, 2007) (holding that SORNA creates an affirmative duty to notify sex offenders of registration requirements).

Mr. Powers was never told he had to register under SORNA. Also, Mr. Powers never received the letter sent to him by FDLE in October 2007, telling him that he had to register in Florida. The letter was received and signed for by his mother, while Mr. Powers was working in Washington State. And, importantly, the letter was opened by Mr. Powers' mother after Mr. Powers was incarcerated on this charge. Thus, Mr. Powers had no actual notice of his need to register in Florida or under SORNA. Without actual notice, Mr. Powers could not have *knowingly* failed to register. *See Smith*, 2007 WL 1725329, at *4 (granting the defendant's motion to dismiss a failure to register indictment where the government failed to notify the defendant in conformity with the SORNA's guidelines).

Moreover, even if this Court considers the South Carolina registration forms and/or the North Carolina registration form to provide notice to Mr. Powers that he had to register, it is legally not sufficient notice. Any notice to register that Mr. Powers may have received under state law cannot substitute for notice under SORNA. Indeed, the SMART Guidelines include an example that clarifies that notice to register under an existing state sex offender law does not serve as notice under SORNA:

> Example 2: A sex offender is required to register for life by a jurisdiction based on a rape conviction in 1995 for which he was released from imprisonment in 2005. The sex offender was initially registered prior to his release from imprisonment on the basis of the jurisdiction's existing law, but the information concerning registration duties he was given at the time of release did not include telling him that he would have to appear periodically in person to verify and update the registration information (as required by SORNA § 116) because the jurisdiction did not have such requirement at the time. ***So the sex offender . . . will have to be given new instructions about that as a part of the jurisdiction's implementation of SORNA.***

72 Fed. Reg. 30228 (emphasis added).

Furthermore, Mr. Powers cannot read these forms. Thus, he did not have any actual notice by virtue of state notification.

In the absence of the required notice, prosecuting Mr. Powers for failing to register violates his due process rights. The Supreme Court's decision in *Lambert v. California*, 355 U.S. 225 (1958) illustrates this point well. In that case, the Court invalidated under the Due Process Clause a prosecution for failing to register as a felon, as required by a Los Angeles city ordinance. *Id.* In finding a due process violation, the Court held that when "wholly passive" conduct such as the "mere failure to register" is criminalized, notice is essential:

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that a citizen has the chance to defend charges.... Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.... [T]he principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

Id. at 228. As in *Lambert*, Mr. Powers is being prosecuted for wholly passive conduct – failing to register – when he had no notice that a federal statute required him to do so. Applying 18 U.S.C. § 2250 to Mr. Powers thus violates due process.[15]

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[15] Some district courts have summarily concluded that a due process violation does not occur even when a sex offender is not on notice of his duty to register under SORNA because "ignorance of the law is no excuse." *See United States v. Mitchell*, 2007 WL 2609784, at *2 (W.D. Ark. Sept. 6, 2007); *United States v. Manning*, 2007 WL 624037, at *2 (W.D. Ark. Feb. 23, 2007). However, the Supreme Court in *Lambert* specifically rejected this argument. 355 U.S. at 228. The Court emphasized that because failure to register is a "wholly passive" act, it requires notice under due process. *Id.* Because the district courts' opinions in *Mitchell* and *Manning* ignore this Supreme Court precedent, the opinions have no precedential value here.

Moreover, these opinions are flawed because they fail to address the plain language of SORNA and the SMART Guidelines, which direct Government officials to affirmatively notify sex offenders of their obligation to register. 42 U.S.C. § 16917; 72 Fed. Reg. at 30228.

Accordingly, for all of these reasons, Mr. Powers' prosecution for failure to register violates his right to due process of law, as well as the *Ex Post Facto* clause.[16]

5. The Attorney General's Regulation Retroactively Applying SORNA Violates the Administrative Procedures Act

The Attorney General's Regulation, 28 C.F.R. § 72.3, which purportedly applies SORNA retroactively, violated the Administrative Procedures Act (APA), codified at 5 U.S.C. § 553, because it was promulgated absent a 30-day notice and comment period. As discussed above, on February 28, 2007, the Attorney General issued a regulation retroactively applying SORNA to all persons convicted of a sex offense prior to July 27, 2006–the date Congress enacted SORNA. *See* 28 C.F.R. § 72.3.

The APA requires agencies to publish a proposed rule in the Federal Register and give interested parties the opportunity to submit comments and other relevant material before the rule becomes effective. 5 U.S.C. § 553(d). Generally, a substantive rule must be published in the Federal Register at least 30 days before it becomes effective. *See id.* However, the APA permits agencies to enact rules without a notice and comment period for "good cause" where it is "impractical, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). The "'good cause' exception is to be 'narrowly construed and only reluctantly countenanced.' The exception is not an 'escape clause'; its use 'should be limited to emergency situations.'" *Utility Solid*

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[16] In *Weaver v. Graham*, 450 U.S. 24 (1981), the Supreme Court explained that the *Ex Post Facto* Clause prohibits punishment of a defendant "for an act which was not punishable at the time it was committed." 450 U.S. 24, 28. The Court reasoned: "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when . . . punishment [is increased] beyond what was prescribed when the crime was consummated." *Id.* at 30-31. Punishing Mr. Powers for failing to register under SORNA when he had no duty to register directly violates this principle.

Waste Activities Group v. Environmental Protection Agency, 236 F.3d 749, 754 (D.C. Cir. 2001) (omitting citations and quotations).

Here, the Attorney General erroneously relied upon the "good clause" exception in foregoing the public notice and comment period. The Attorney General claimed that notice and comment was "impractical, unnecessary, and contrary to the public interest." 72 Fed. Reg. at 8896. In support of his assertion, the Attorney General stated that the "immediate effectiveness of the rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements." *Id.* Moreover, the Attorney General explained that "[d]elay in the implementation of [the] rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders through prosecution and the imposition of criminal sanctions." *Id.* However, these assertions have no basis even when evaluated against the Attorney General's own manual interpreting the "good cause" exception under the APA.

According to the Attorney General's Manual, a 30-day public notice and comment period is "impracticable" under the APA when "an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in [§ 553]." *Utility Solid Waste Activities Group*, 236 F.3d at 754 (citing Attorney's General Manual on the Administrative Procedure's Act, at 30-31(1947)). In passing the rule, the Attorney General makes little more than a bare recitation that delay would impede the protection of the public.

Finally, the notice and comment period was not "unnecessary." The Attorney General's Manual explains that this term refers to "the issuance of a minor rule in which the public is not particularly interested." *Id*. (citing Attorney's Manual at 31); *see also South Carolina v. Block*, 558 F. Supp. 1004, 1016 (D.S.C. 1983)(finding that the "unnecessary" exception is "confined

to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."). Certainly, an all-encompassing rule that purported to make SORNA retroactive to all offenders who ever committed a sex offense fails to meet this definition of "unnecessary."

For all of these reasons, the Attorney General had no "good cause" to excuse the APA's notice and comment period. Thus, the rule should be invalidated. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001)("Failure to allow notice and comment, where required, is grounds for invalidating the rule.")(citing *Auer v. Robbins*, 519 U.S. 452, 459 (1997)).

6. The Indictment Must Be Dismissed Because the Statute Impermissibly Encroaches upon State Power and Therefore Violates the Tenth Amendment

The Registration Requirements, which impose a federal obligation on offenders to register in individual state-created and state-run sex offense registries, are an unconstitutional encroachment of federal power on state sovereignty. The Registration Requirements therefore violate the Tenth Amendment and are invalid. As described above, in order to violate § 2250, a defendant must first be required to register under SORNA. Since the Registration Requirements are unconstitutional, Mr. Powers cannot be required to register under SORNA, and the Indictment must be dismissed.

The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. The Tenth Amendment has been applied to uphold the principles of federalism by limiting the power the federal government may exercise over state activities. For example, the Tenth Amendment prohibits the federal government from

commandeering state officials into enacting or administering federal law. *Printz v. United States*, 521 U.S. 898, 935 (1997). Although SORNA offers the states financial incentives to create SORNA-compliant registries, 42 U.S.C. § 16925, few states have yet created such registries. However, the federal Registration Requirements, which require individual sex offenders to register in their state of residence, are currently in effect. 42 U.S.C. §§ 16913-26; 72 FR 8894, 8895, 2007 WL 594891 (2007). The Registration Requirements, therefore, force the state officials who run the local registries to accept federally required sex offender registrations before their state chooses to adopt the SORNA provisions voluntarily.

In *Printz*, the Supreme Court struck down a law requiring local law enforcement officials to conduct background checks of prospective handgun purchasers. The Court held, "[t]he Federal Government may neither issue directives requiring the states to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." 521 U.S. at 935; *see also New York v. United States*, 505 U.S. 144 (1992) (Congress did not have the power to compel the states to enact a federal program regulating the disposal of toxic waste). The local law enforcement officials in *Printz* are analogous to the law enforcement officials who run state sex offender registries. Just as Congress has no power to compel local law enforcement to conduct federally mandated background checks, it has no power to compel local law enforcement to accept registrations from federally mandated sex offender programs. *See also United States v. Snyder*, 852 F.2d 471, 475 (9th Cir. 1988)("the federal government has no constitutional authority to interfere with a state's exercise of its police power except to the extent the state's action intrudes on any of the spheres in which the federal government itself enjoys the power to regulate"). SORNA's registration requirements are therefore invalid under the Tenth Amendment and the Indictment must be

dismissed.

V. Conclusion

The indictment must be dismissed for any and all of the reasons cited above.

WHEREFORE, the Defendant, Robert D. Powers, respectfully moves this Honorable Court to enter its Order dismissing the indictment.

I HEREBY CERTIFY that on April 9, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Karen Gable, Assistant United States Attorney.

Respectfully submitted,

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