IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** **vs.** **MARK STEVEN ELK SHOULDER,** **Defendant-Appellant.**	 **C.A. 10-30072** **D.C. No.: CR-09-23-BLG-JDS**

SUPPLEMENTAL BRIEF OF APPELLEE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MICHAEL W. COTTER
United States Attorney

J. BISHOP GREWELL
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 1478
Billings, MT 59103
2929 Third Ave. North, Suite 400
Billings, MT 59101
Phone: (406) 657-6101

ATTORNEYS FOR APPELLEE
United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Statutes Page

Other Authorities Page

STATEMENT OF THE ISSUES

This Court ordered supplemental briefing on the effect that vacating *United States v. George*, 625 F.3d 1124 (9th Cir. 2010), has on the parties' arguments that the Sex Offender Registration and Notification Act (SORNA) is unconstitutional.[1] Elk Shoulder raised three constitutional challenges to SORNA in his opening brief: (1) an ex post facto challenge, (2) a due process challenge, and (3) a challenge to Congress' authority to enact SORNA's enforcement provision. The parties' arguments over the first two challenges are unaffected, since *George* did not figure prominently in either of those arguments.

But the United States did rely on *George* to foreclose Elk Shoulder's third challenge. And Elk Shoulder's supplemental briefing raises a new challenge that was previously foreclosed by *George* regarding the constitutionality of SORNA's registration requirements.

For those reasons, this brief addresses two issues:

[1] The United States incorporates the Statement of Jurisdiction and Statement of Facts from its opening brief here.

1. Is SORNA's criminal enforcement provision (18 U.S.C. § 2250(a)) a constitutional exercise of congressional authority under the Necessary and Proper Clause of the Constitution?

2. If Elk Shoulder did not forfeit the issue by excluding it from his opening brief, are SORNA's registration requirements (42 U.S.C. § 16913) a constitutional exercise of congressional authority under the Necessary and Proper Clause of the Constitution?

CIRCUIT RULE 28-2.7 STATEMENT

The pertinent statutory provisions are included in an addendum at the end of this brief.

SUMMARY OF ARGUMENT

The decision to vacate *George* does not affect the parties' arguments regarding Elk Shoulder's ex post facto and due process challenges to SORNA. It does affect the parties' arguments regarding the constitutionality of 18 U.S.C. § 2250(a).

SORNA's criminal enforcement provision —18 U.S.C. § 2250(a)— is rationally related to enforcing the registration requirements it imposes upon sex offenders in 42 U.S.C. § 16913. Assuming those registration requirements are a constitutionally-valid enactment, the

criminal enforcement provision is a necessary and proper enactment of congressional power. Because Elk Shoulder forfeited any constitutional challenge to the registration requirements, his challenge to § 2250(a) must fail. *United States v. Yelloweagle*, 643 F.3d 1275, 1284, 1288 (10th Cir. 2011).

If Elk Shoulder's challenge to SORNA's registration requirements has not been forfeited, the constitutionality of those requirements should be upheld under the Necessary and Proper Clause of the Constitution. They are necessary and proper under Congress' authority to regulate federal prisoners after their release from custody and under the commerce power to track the *intra*-state changes of address by defendants who might seek to travel in *inter*-state commerce.

ARGUMENT

I. This Court's decision to vacate *George* does not affect the parties' ex post facto or due process arguments.

Standard of Review: A district court's denial of a motion to dismiss an indictment on constitutional grounds is reviewed de novo. *United States v. Latu*, 479 F.3d 1153, 1155 (9th Cir. 2007).

Argument: In his opening brief, Elk Shoulder raised ex post facto and due process challenges to SORNA. He does not assert that these arguments were changed by this Court's decision to vacate *United States v. George*, 625 F.3d 1124 (9th Cir. 2010), in *United States v. George*, No. 08-30339, 2012 WL 718297 (9th Cir. Mar. 7, 2012). The government did not rely on *George* for its ex post facto response. But it did cite *George* in responding to Elk Shoulder's due process argument. Gov't Br. at 18-19.

As "no state has passed legislation conforming their sex offense registries with SORNA's requirements," Elk Shoulder argued that it violated due process to prosecute him because it was impossible for him to register. Br. at 18. The government referenced *George* in response, but also cited other still-valid Ninth Circuit precedent rejecting this same argument. Gov't Br. at 18 (citing *United States v. Begay*, 622 F.3d 1187, 1198-99 (9th Cir. 2010)). The decision vacating *George* does not then affect Elk Shoulder's due process argument or the

government's response to it. And every Circuit to address Elk Shoulder's argument on this point has rejected it.[2]

II. The criminal enforcement provision of 18 U.S.C. § 2250(a) is a proper exercise of congressional authority under the Necessary and Proper Clause.

Standard of Review: A district court's denial of a motion to dismiss an indictment on constitutional grounds is reviewed de novo. *United States v. Latu*, 479 F.3d 1153, 1155 (9th Cir. 2007).

Argument: The criminal enforcement provision of SORNA punishes two categories of people for failing to register as sex offenders. 18 U.S.C. § 2250(a); *Carr v. United States*, 130 S. Ct. 2229, 2238 (2010). Subsection 2250(a)(2)(A) enforces registration by those previously

---

[2] *United States v. DiTomasso*, 621 F.3d 17, 27-28 (1st Cir. 2010), abrogated on other grounds in *Reynolds v. United States*, 132 S.Ct. 975, 980 (2012); *United States v. Guzman*, 591 F.3d 83, 92-93 (2d Cir. 2010); *United States v. Shenandoah*, 595 F.3d 151, 157-58 (3d Cir. 2010), abrogated on other grounds in *Reynolds*, 132 S.Ct. at 980; *United States v. Gould,* 568 F.3d 459, 463-66 (4th Cir. 2009); *United States v. Heth*, 596 F.3d 255 (5th Cir. 2010); *United States v. Trent*, 654 F.3d 574, 591 (6th Cir. 2011); *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008), overruled on other grounds in *Carr v. United States*, 130 S.Ct. 2229 (2010); *United States v. Kueker*, 352 Fed. Appx. 242, 245-46 (10th Cir. 2009); *United States v. Brown*, 586 F.3d 1342, 1347-49 (11th Cir. 2009); *United States v. Cotton*, 760 F.Supp.2d 116, 134-135 (D.C. Cir. 2011).

convicted as a sex offender under federal law. Its counterpart, § 2250(a)(2)(A), enforces registration by any sex offender who travels in interstate or foreign commerce, or enter/leaves/resides in Indian country. Elk Shoulder was convicted under the first category for failing to register as a federal sex offender.

In his initial briefing, Elk Shoulder claimed that without an interstate travel requirement, Congress lacked constitutional authority to impose a criminal penalty on him to enforce SORNA's registration requirements. Br. at 19-21. This argument was previously foreclosed by *George,* but is now an open question in the Circuit.

But as Elk Shoulder challenged only the congressional authority to enact the criminal provision of 18 U.S.C. § 2250 in his opening brief —and not the registration requirements of 42 U.S.C. § 16913— he cannot now challenge Congress' authority to enact the registration requirements of § 16913 in his supplemental brief. See *United States v. Yelloweagle*, 643 F.3d 1275, 1284 (10th Cir. 2011); *Cerezo v. Mukasey*

512 F.3d 1163, 1165 (9th Cir. 2008) (issue raised in supplemental brief, but not opening brief, waived).[3]

The defendant in *Yelloweagle* forfeited his challenge to Congress' authority to enact § 16913 by not raising it in his opening brief. 643 F.3d at 1284. The Tenth Circuit then had little difficulty finding congressional authority to enact the provision challenged by Elk Shoulder, 18 U.S.C. § 2250(a)(2)(A), under the Necessary and Proper Clause of the Constitution. Because the court could assume the constitutionality of § 16913's requirement that all sex offenders register, "including federal sex offenders who only travel intrastate," it followed that Congress could "enact criminal statutes calculated to enforce that registration scheme" such as § 2250. *Id.* at 1286.

So long as a statute's means are "rationally related to the implementation of a constitutionally enumerated power," a congressional enactment can be upheld under the Necessary and Proper Clause. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010).

---

[3] Nor is his forfeiture of this issue excused simply because *George* foreclosed the issue at the time of initial briefing, as Elk Shoulder preserved other issues in his opening brief that were foreclosed by *George* at the time.

Section 2250(a)(2)(A) is the means of enforcing SORNA's registration requirements. It is "beyond peradventure" that § 2250(a)'s enforcement provision is "rationally related" to effectuating the registration scheme. *Yelloweagle*, 643 F.3d at 1288. Section 2250 is part of SORNA's "broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." *Carr*, 130 S. Ct. at 2240. With Elk Shoulder failing "to challenge the government's authority to require him to register," Congress' means for enforcing that registration requirement are a constitutionally valid exercise of power. 643 F.3d at 1284.

III. SORNA's registration requirements are a valid exercise of congressional authority under the Necessary and Proper Clause.

Standard of Review: A district court's denial of a motion to dismiss an indictment on constitutional grounds is reviewed de novo. *Latu*, 479 F.3d at 1155.

Argument: While Elk Shoulder forfeited his attack on Congress' authority to enact the registration requirements of § 16913 in his opening brief, he spends the majority of his supplemental brief on this argument. Supplemental Br. at 7-13. If this Court addresses Elk

Shoulder's newly raised challenge to the registration requirements of § 16913, it should uphold the provision's constitutionality.

Every circuit to address the issue has held that § 16913 is a proper congressional exercise of commerce power.[4] With an offender like Elk Shoulder, who is only required to register due to his status as a federal sex offender, the constitutionality of § 16913 has likewise been upheld by the two circuit decisions other than *George* to address the issue. *United States v. Kebodeaux*, 647 F.3d 137, 146 (5th Cir. 2011) (en banc opinion pending); *United States v. Carel*, 668 F.3d 1211, 1214 n.2 (10th Cir. 2011).[5]

---

[4] *DiTomasso*, 621 F.3d at 26, n.8; *Guzman*, 591 F.3d at 91; *United States v. Pendleton,* 636 F.3d 78, 86-88 (3d Cir. 2011); *accord Gould,* 568 F.3d at 472-75; *United States v. Whaley*, 577 F.3d 254, 260-61 (5th Cir. 2009); *United States v. Vasquez,* 611 F.3d 325, 329-31 (7th Cir. 2010); *United States v. Howell*, 552 F.3d 709, 717 (8th Cir. 2009); *United States v. Hinkley*, 550 F.3d 926, 940 (10th Cir. 2008), *abrogated on other grounds in Reynolds*, 132 S.Ct. at 980; *United States v. Ambert*, 561 F.3d 1202, 1211-12 (11th Cir. 2009); *Cotton*, 760 F. Supp. 2d at 140.

[5] *Kebodeaux* was argued en banc on September 20, 2011. The pending en banc decision provides another reason to find Elk Shoulder forfeited his challenge to the registration requirements as it allows this Court to benefit from a sister circuit's en banc analysis when the issue is properly raised in the future.

And while *George* has been vacated, its reasoning remains strong.[6] Since *George* was first decided, arguments in support of its reasoning have been more thoroughly developed and vetted by the decisions above and found sound. This Court should adopt *George*'s reasoning again.

The registration requirements of § 16913 are a constitutional exercise of congressional authority under the Necessary and Proper Clause for two reasons. Either one is sufficient to uphold the statute.

A. Section 16913 is a valid exercise under the Necessary and Proper Clause of Congress' power to regulate federal prisoners after their release.

Statutes are presumed constitutional. *United States v. Morrison*, 529 U.S. 598, 607 (2000). A congressional enactment will only be invalidated on a plain showing that Congress exceeded its authority under the Constitution. *Id.* No standing decision from any circuit court has held any part of SORNA unconstitutional. *Kebodeaux*, 647 F.3d at 140. This Court need not be the first.

---

[6] *George* was vacated because the defendant traveled before SORNA became effective, as later decided by *United States v. Valverde*, 628 F.3d 1159 (9th Cir. 2010). *George*, 2012 WL 718297 at *1. It was not vacated due to faulty reasoning.

Despite reaching intrastate activity, § 16913 validly exercises congressional power under the Necessary and Proper Clause. *See* U.S. Const. Art. I, § 8, cl. 18. Elk Shoulder has to register as a sex offender by virtue of his conviction in 1991 for aggravated sexual abuse with children in violation of 18 U.S.C. § 2241(c).[7] Doc. 59 at 2, PSR ¶ 45. Congress' authority to regulate the territories of the United States is expressly granted by the Constitution in Article IV, § 3 cl.2. That is why Elk Shoulder does not (and cannot) claim that the enactment of § 2241(c) or its exercise of criminal authority over him for his original conviction was an unconstitutional exercise of power. Because his original conviction was a valid exercise of Congress' authority, *Comstock* and *Carr* suggest that SORNA's imposition of a registration requirement for that conviction is necessary and proper as part of Congress' "power to regulate [federal] prisoners' behavior even after

---

[7] In 1991, 18 U.S.C. § 2241(c) read:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal Prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

their release." *Kebodeaux*, 647 F.3d at 144-45. "Congress . . . has the power to impose nonpunitive civil sanctions on individuals convicted of violating a validly enacted federal criminal statute." *Carel*, 668 F.3d at 1222.[8]

"[I]t is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." *Carr*, 130 S.Ct. at 2238. These are the sex offenders "over whom the Federal Government has a direct supervisory interest." *Id.* at 2239.

Protecting communities from sex offenders through registration requirements "is a legitimate legislative purpose." *United States v. Juvenile Male*, 670 F.3d 999, 1009-10, 1012 (9th Cir. 2012). "The risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith v.*

---

[8] The *Carel* court did not have to address the constitutionality of SORNA's registration provisions to someone like Elk Shoulder who was "not in federal custody or on federal supervised release" when he failed to register, but did note that "Congress could reasonably have concluded that federally adjudicated sex offenders would pose an especially high danger to the public *if released from custody,* or permitted to remain in the public on supervised release, without being required to register as a sex offender." 668 F.2d at 1222-23 (emphasis added)

Doe, 538 U.S. 84, 103 (2003) (citation omitted). Because of the high risk of recidivism, Congress could enact the registration requirements as a "necessary and proper means of exercising the federal authority that permits Congress to . . . maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others." *Comstock*, 130 S.Ct. at 1965.

In *Comstock*, the Supreme Court addressed whether Congress had the constitutional authority to detain individuals in federal custody beyond their term of incarceration if they had engaged in violent sex crimes or child molestation and suffered from a serious mental illness that made them "sexually dangerous to others." 130 S.Ct. at 1954. Five considerations led the Court to uphold that statutory power under the necessary and proper clause:

(1) the breadth of the Necessary and Proper Clause,

(2) the long history of federal involvement in this arena,

(3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody,

(4) the statute's accommodation of state interests, and

(5) the statute's narrow scope.

Id. at 1965.

These five considerations were not factors to be balanced, but rather different reasons supporting the Court's conclusion that the statute was constitutional. *Kebodeaux*, 647 F.3d at 142. So it is not necessary for every one of the considerations to be met to uphold a statute. *Id.* But each of the considerations argues for upholding the registration requirements here.

1. The Necessary and Proper Clause is broad.

The Supreme Court's first consideration in *Comstock* was the breadth of the Necessary and Proper Clause in granting Congress authority to enact federal legislation. 130 S. Ct. at 1956. The "necessary" part of the clause does not mean "absolutely necessary." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-15 (1819). Grants of specific legislative power to Congress "are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock*, 130 S. Ct. at 1956. The Clause thus ensures Congress' ability to legislate on a "vast mass of incidental powers." *McCulloch*, 17 U.S. at 421.

The question is whether a statute provides a "means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. The "choice of means" has been relegated "primarily . . . to the judgment of Congress." *Id.* at 1957. Here, like in *Comstock*, the registration of federal sex offenders is rationally related to Congress' authority to enact laws to ensure the safety of the surrounding community from federal offenders and to enact laws governing federal offenders' behavior during and after the custodial portion of a sentence. *Id.* at 1958, 1964.

Congress has enacted laws creating a federal prison system, creating supervised release and probation to monitor the post-release behavior of federal offenders, and creating a duty for prison and court personnel to notify local authorities of the impending release or change of residence of federal offenders convicted of certain crimes. See 18 U.S.C. § 3621; *id.* at §§ 3561-3566, 3583, & *id.* at 4042. None of those powers is explicit in the Constitution but —no more so than the registration requirements here— all are necessary and proper to Congress' authority to criminalize certain conduct.

2. The federal government has a long history of regulating post-release conduct.

The Supreme Court noted in *Comstock* that a history of federal involvement in an area can be "helpful" in reviewing the substance of a statute. 130 S. Ct. at 1958. Federal sex-offender-registration statutes are relatively recent developments. Congress first enacted a federal criminal penalty for failure to register by sex offenders when it passed the Lychner Act in 1996. Lychner Act § 2(a), 110 Stat. at 3096 (42 U.S.C. § 14072(i)).

But Congress has long provided for post-release regulation of the conduct of federal offenders. The federal system of supervised release and probation, which do just that, date back to 1984 in their modern form. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987. And the prior system of parole, which achieves the same function, dates to at least 1910. See Act of June 25, 1910, ch. 387, 36 Stat. 819. Although the history of federal involvement in this area is not essential to legislative authority under the Necessary and Proper Clause, Congress' historical exercise of legislative authority in post-release regulation confirms the statute's constitutional grounding.

Elk Shoulder suggests that *Comstock* is limited to exercising authority over those in custody or under supervised release at the time. Supplemental Br. at 5. But if Congress can place an offender on lifetime supervised release (see 18 U.S.C. § 3583(k)) with registration conditions, it can surely impose the lesser civil disability of lifetime registration on an offender under SORNA.[9] Any attempt to distinguish the registration of sex offenders and supervised release based on the imposition of the latter "at the time of criminal judgment" conflates the question of Congress' authority to enact the statute with the limitations imposed by the Ex Post Facto Clause. *Kebodeuax*, 647 F.3d at 144. The ex post facto argument fails for the reasons identified in the earlier briefing. Gov't Br. at 7-14.

---

[9] The government's concession in *Comstock,* 130 S. Ct. at 1965, that the government could "not commit a person" who has been released from prison and whose supervised release period has ended is quite different from the situation here. The burden on one's liberty of indefinite civil imprisonment is a far cry from the minimal burden of a post-release registration requirement. Indeed, the government's brief in *Comstock* specifically distinguished the statute at issue there and SORNA's registration requirements. Brief for the United Stats 5 n.2., *United States v. Comstock* (S. Ct. No. 08-1224) ("None of those provisions is implicated by this case.")

3. There are sound reasons for the enactment of SORNA's registration requirements.

As already noted, the Supreme Court in *Carr* recognized that the federal government's "direct supervisory interest" over former federal prisoners made it reasonable for Congress to assign "a special role" to the federal government in ensuring their registration under SORNA. *Carr*, 130 S.Ct. at 2238-39. The federal government's role as custodian of its prisoners grants it the constitutional power "to protect nearby (and other) communities from the danger federal prisoners may pose." *Comstock*, 130 S. Ct. at 1961.

Congress enacted SORNA's registration requirements to do just that. The declared purpose of SORNA is to "protect the public from sex offenders and offenders against children . . . [by] establish[ing] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. Congress found that "the patchwork of standards that resulted from the various state [registration] programs and piecemeal amendments [to federal law] had left loopholes and gaps that allowed for numerous heinous crimes." *Gould*, 568 F.3d at 473. In response, Congress determined that a new set of national standards

should be established. *Id.* By including the registration of former federal sex offenders in the mix, it furthered its goal of protecting communities from those sex offenders over which the federal government had previously acted as custodian.

In *Comstock*, the Court decided that "Congress could have reasonably concluded that federal inmates who suffer from a mental illness" making it difficult for them to refrain from sexually violent conduct "pose an especially high danger to the public if released" and that the States would not necessarily address the problem due to the inmates' status as previously a federal problem. *Id.* at 1961. The same is true here. Congress could reasonably conclude that sex offenders present a higher risk of recidivism than ordinary former inmates and thus a greater threat to the community. *Smith*, 538 U.S. at 103; *Juvenile Male*, 670 F.3d at 1009-10, 1012. Given the patchwork of state registration programs and the inmates' status as former federal prisoners, Congress could reasonably conclude that the states would not effectively address this problem.

4. SORNA's registration requirements accommodate state interests.

SORNA does not force states to register sex offenders. It expressly provides that "[t]he provisions of [SORNA] that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section." 42 U.S.C. § 16925(d). For that reason, every Circuit to decide the question has held that SORNA does not violate the Tenth Amendment by commandeering state officials into administering federal law. *Guzman*, 591 F.3d 83, 94 (2d Cir. 2010); *Kennedy v. Allera*, 612 F.3d 261, 269-70 (4th Cir. 2010); *United States v. Johnson*, 632 F.3d 912, 920 (5th Cir. 2011); *United States v. Smith*, 655 F.3d 839, 848 (8th Cir. 2011).

SORNA also accounts for the possibility that a state would decline to register sex offenders as it provides an affirmative defense in such situations under 18 U.S.C. § 2250(b). *Kennedy*, 612 F.3d at 269. Accordingly, SORNA's registration requirements for federal sex offenders do not "invade state sovereignty or otherwise improperly limit

the scope of powers that remain with the States." *Comstock*, 130 S. Ct. at 1962.

5. SORNA's registration requirements are narrow in scope.

The final consideration of the Supreme Court's decision to uphold the statute under the Necessary and Proper Clause in *Comstock* was the narrow scope of the statutory provision. The registration requirements here, like the detention in *Comstock*, does not confer on Congress "a general police power." 130 S. Ct. at 1964. The registration requirements are not imposed on the general public, but are limited to those former federal prisoners who have been convicted of a sex offense.

The Supreme Court in *Comstock* upheld the statutory authority to detain *indefinitely* a prisoner convicted of a sex crime based upon a mental condition that made the prisoner dangerous to the public. *Id.* at 1954-55 (discussing statute and noting person can be held until a state assumes responsibility or until "mental condition improves to the point where [detainee] is no longer dangerous"). The statute here requires registration due to a similar concern that sex offenders have higher recidivism rates and there is a need to protect the public from them.

While the statute in *Comstock* applied to a narrower category of federal prisoners and only to those already in federal custody, *id.* at 1964, the power it exercised was far greater than the power exercised here. Even though the sex offenders required to register do not present the same risk to re-offend as those in *Comstock*, they are subject to a lesser infringement on their liberty —registration, rather than detainment— making the requirements still narrow in scope.

B. Section 16913 is a valid exercise under the Necessary and Proper Clause of Congress' commerce power.

Congress has the ability to "make all Laws which shall be necessary and proper" for the accomplishment of its Commerce Clause power. U.S. Const. Art. I, § 8, cl. 18. To meet that standard, the law "must be deemed a rational and appropriate means to further Congress's regulation of interstate commerce." *Howell*, 552 F.3d at 714. That means that so long as the means chosen to enact the law are "reasonably adapted" to the attainment of a legitimate end under the commerce power, the law will be upheld. *Gonzales v. Raich*, 545 U.S. 1, 35-37 (2005) (Scalia, J., concurring).

Section 16913 is reasonably adapted to the attainment of a legitimate end under the commerce clause: tracking offenders who move from jurisdiction to jurisdiction. *Howell*, 552 F.3d at 716. Requiring sex offenders to update their registration when they change residence, employment or school, ensures that states will more effectively be able to track offenders when they cross state lines. *Id.* Criminal enforcement gives these requirements teeth. Sections 16913 and 2250 "were enacted as part of the Adam Walsh Child Protection and Safety Act of 2006, and are complementary. Without Section 2250, Section 16913 lacks federal criminal enforcement, and without Section 16913, Section 2250 has no substance." *Whaley*, 577 F.3d at 259.

By the time of SORNA's enactment, all states, as well as the District of Columbia, had enacted a sex offender registration law. *Gould*, 568 F.3d at 464. But as noted earlier, Congress found that "the patchwork of standards that resulted from the various state programs and piecemeal amendments had left loopholes and gaps that allowed for numerous heinous crimes." *Id.* at 473. In response, Congress determined that a new set of national standards should be established. *Id.* Congress' goal was not to penalize all non-registered offenders

wherever they resided but to "establish a comprehensive national system for the registration of those offenders" so that an offender could not avoid the registration obligation by moving to another state. *See* 42 U.S.C. § 16901.

While SORNA's enforcement mechanism of § 2250 does not reach state sex offenders who do not travel, requiring those same offenders (and their federal counterparts) to update their registration due to intrastate changes of address or employment status is "a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines." *Guzman*, 591 F.3d at 91. The "means" by which §16913 may regulate intrastate activity "are 'reasonably adapted' to the attainment of a legitimate end under the commerce power and are a proper assertion of Congress's legislative powers." *Guzman*, 591 F.3d at 91; *Whaley*, 577 F.3d at 260-61; *Howell*, 552 F.3d at 714-15.

///

///

CONCLUSION

Elk Shoulder's conviction should be affirmed.

DATED this 20th day of April 2012.

MICHAEL W. COTTER
United States Attorney

/s/ J. Bishop Grewell
J. BISHOP GREWELL
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ J. Bishop Grewell__
J. BISHOP GREWELL
Assistant U.S. Attorney

STATEMENT OF RELATED CASES

There are no related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 4,620 words.

MICHAEL W. COTTER
United States Attorney

/s/ J. Bishop Grewell
J. BISHOP GREWELL
Assistant U.S. Attorney

STATUTORY APPENDIX

18 U.S.C.A. § 2250
Effective: July 27, 2006

Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 109B. Sex Offender and Crimes Against Children Registry
§ 2250. Failure to register

(a) In general.--Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(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.

(b) Affirmative defense.--In a prosecution for a violation under subsection (a), it is an affirmative defense that--

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

(c) Crime of violence.--

(1) In general.--An individual described in subsection (a) who commits a crime of violence 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 shall be imprisoned for not less than 5 years and not more than 30 years.

(2) Additional punishment.--The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).

42 U.S.C.A. § 16913
Effective: July 27, 2006

Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification
§ 16913. Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

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

immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.