No. 09-940

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUVENILE MALE

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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QUESTION PRESENTED

Whether application of the registration and notification provisions of the Sex Offender Registration and Notification Act (SORNA) to a juvenile who was adjudicated delinquent under the Federal Juvenile Delinquency Act before SORNA's enactment violates the Ex Post Facto Clause of the Constitution.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 590 F.3d 924. The original opinion of the court of appeals is reported at 581 F.3d 977.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2009, and the opinion was amended on January 5, 2010. On December 2, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 8, 2010. On

January 4, 2010, Justice Kennedy further extended the time to February 7, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 3 of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

The relevant statutory provisions are reprinted in an appendix to this petition. App., *infra*, 42a-64a.

STATEMENT

In *Smith* v. *Doe*, 538 U.S. 84 (2003) (*Smith*), this Court held that a state sex offender registration law, which required sex offenders to register as such and then made much of the information public, did not constitute retroactive punishment prohibited by the Ex Post Facto Clause as applied to a person whose conviction preceded enactment of the law. In this case, the Ninth Circuit distinguished *Smith* and held that the retroactive application of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, violated the Ex Post Facto Clause as applied to a federal adjudication of juvenile delinquency before SORNA's enactment. The court of appeals therefore overturned a condition of supervision that required respondent to register as a sex offender, holding that respondent "may not constitutionally be obligated to register as a sex offender under SORNA." App., *infra*, 36a.

1. Congress initially enacted national standards for sex offender registration in 1994 in the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act). 42 U.S.C. 14071. By

1996, every State had enacted some version of a sex offender registration and notification law. See *Smith*, 538 U.S. at 89-90. On July 27, 2006, Congress enacted SORNA, which was "generally designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public," as well as "to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations." Office of the Attorney Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8895 (2007). To achieve those ends, SORNA "establishe[d] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. 16901. Like the Wetterling Act before it, SORNA encourages the States to conform their sex offender registration programs to minimum national standards by providing for a reduction of certain federal funding for states that fail to do so. 42 U.S.C. 16912, 16925.

A sex offender must "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." 42 U.S.C. 16913(a). Initial registration must occur "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," or within three business days after sentencing for that offense. 42 U.S.C. 16913(b). Within three business days of any change of name, residence, employment, or student status, qualifying offenders must appear in person in the relevant jurisdiction to provide the updated information. 42 U.S.C. 16913(c). SORNA specifies, among other things, the kinds of infor-

mation that the States must collect as part of registration (42 U.S.C. 16914), as well as community notification requirements (42 U.S.C. 16918, 16921).[1]

Unlike its predecessor statute, SORNA covers juveniles who have been adjudicated delinquent for certain serious sex offenses. See 42 U.S.C. 16911(8). A juvenile is "convicted" of a sex offense under the statute, and thus required to register, if he was "14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in Section 2241 of title 18), or was an attempt or conspiracy to commit such an offense." *Ibid.* Section 2241, in turn, makes it a crime to engage in a sexual act (a) by using force or threatening death, serious bodily injury or kidnapping; (b) by rendering the victim unconscious or involuntarily drugging the victim; or (c) with a child under the age of 12. 18 U.S.C. 2241(a)-(c) (2006 & Supp. I 2007).

In explaining why it expanded coverage to include certain juvenile sex offenders, the House Judiciary Committee stated that juveniles "commit a significant number of sexual abuse crimes," and that "all too often, juvenile sex offenders have exploited current limitations," such as confidentiality provisions, "that permit them to escape notification requirements to commit sexual offenses." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 25 (2005) (*2005 House Report*); see *ibid.* (citing Federal Bureau of Investigation (FBI) crime data indicating that

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[1] States may adopt sex-offender-registration requirements that exceed the minimum standards specified by SORNA. See Office of the Attorney Gen., U.S. Dep't of Justice, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,032-38,035, 38,044, 38,046 (2008).

juveniles account for 34% of forcible rape arrests and commit 42% of all other sexual offenses). Thus,

> [w]hile the Committee recognizes that States typically protect the identity of a juvenile who commits criminal acts, in the case of sexual offenses, the balance needs to change; no longer should the rights of the juvenile offender outweigh the rights of the community and victims to be free from additional sexual crimes. For victims, whether the offender is an adult or a juvenile has no bearing on the impact of that sexual offense on the life of the victim. [SORNA] strikes the balance in favor of protecting victims, rather than protecting the identity of juvenile sex offenders.

Ibid.; see 152 Cong. Rec. S8027 (daily ed. July 20, 2006) (bill "appropriately requires the States to include the most egregious juvenile offenders, who do represent a threat to others, on their sex offender registries") (statement of Sen. Leahy).

SORNA classifies sex offenders into three tiers based on the severity of their offenses. 42 U.S.C. 16911 (2)-(4). Those convicted of offenses comparable to aggravated sexual abuse are classified as Tier III sex offenders, and are required to register for life and to appear in person every three months to update and verify their registry information. See 42 U.S.C. 16911(4)(A)(I), 16915(a)(3), 16916(3). Because juvenile offenders are required to register under SORNA only if they were adjudicated delinquent for conduct that constitutes aggravated sexual abuse, 42 U.S.C. 16911(8), they are classified under Tier III. A juvenile Tier III sex offender may have the registration period reduced to 25 years if he maintains a "clean record" free of felony and sex offense convictions. 42 U.S.C. 16915(b)(2)(B) and (3)(B).

Pursuant to 42 U.S.C. 16913(d), the Attorney General has "the authority to specify the applicability" of SORNA's registration requirements "to sex offenders convicted before the enactment of this chapter" and to "prescribe rules for the registration of any such sex offenders." On February 28, 2007, the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. In the preamble to that rule, the Attorney General explained that "[c]onsidered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA." 72 Fed. Reg. at 8896. The interim rule, however, served the purpose of "confirming SORNA's applicability" to "sex offenders with predicate convictions predating SORNA." *Ibid.*[2]

[2] The courts of appeals are divided on whether SORNA's registration requirements apply of the statute's own force to persons with sex-offense convictions that preceded SORNA's enactment or whether Congress intended for the Attorney General to decide that question. Compare *United States* v. *Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (former view), cert. denied, 129 S. Ct. 2383 (2009), and *United States* v. *May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (same), cert. denied, 129 S. Ct. 2431 (2009), with *United States* v. *Cain,* 583 F.3d 408, 414-419 (6th Cir. 2009), petition for reh'g pending, No. 07-4535 (filed Dec. 7, 2009) (latter view), *United States* v. *Hatcher*, 560 F.3d 222, 226-229 (4th Cir. 2009) (same), *United States* v. *Dixon*, 551 F.3d 578, 582, 585 (7th Cir. 2008), cert. granted, 130 S. Ct. 47 (2009) (same), and *United States* v. *Madera*, 528 F.3d 852, 857-859 (11th Cir. 2008) (same). Because the district court order requiring respondent to register was

On July 2, 2008, the Attorney General issued final guidelines to the States interpreting and implementing SORNA. See 73 Fed. Reg. 38,030-38,091. Under those guidelines, a jurisdiction is deemed to have substantially implemented SORNA's requirements if, with regard to juvenile offenders, it requires registration of those adjudicated delinquent of crimes comparable to the most severe forms of aggravated sexual abuse under 18 U.S.C. 2241 (2006 & Supp. I 2007)—*i.e.*, engaging in a sexual act with another by "force or the threat of serious violence" or "by rendering unconscious or involuntarily drugging the victim." 73 Fed. Reg. at 38,050; see *id.* at 38,030 ("it is sufficient for substantial implementation * * * to require registration for (roughly speaking) juveniles at least age 14 who are adjudicated delinquent for offenses equivalent to rape or attempted rape, but not for those adjudicated delinquent for lesser sexual assaults or non-violent sexual conduct"); see also 42 U.S.C. 16925 (loss of federal funds occurs only for "a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter").

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issued after the interim rule became effective, see pp. 9-10, *infra*, that conflict is not implicated here.

A panel of the Sixth Circuit has held that the interim rule declaring SORNA retroactive failed to comply with the Administrative Procedure Act's (APA), notice and comment requirements, 5 U.S.C. 553, and that the Attorney General did not have good cause for failing to comply. See *Cain*, 583 F.3d at 419-424. That decision conflicts with at least one other court of appeals decision, see *United States* v. *Gould*, 568 F.3d 459, 469 (4th Cir. 2009), petition for cert. pending, No. 09-6742 (filed Sept. 25, 2009), and the government has filed for rehearing en banc in *Cain*, No. 07-4535 (filed Dec. 7, 2009). The validity of the interim rule under the APA was not raised below and was not discussed or decided by the court of appeals. It is not at issue here. See *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001).

Failure to register is a criminal offense under SORNA. 18 U.S.C. 2250(a). A sex offender "by reason of a conviction under," *inter alia*, "Federal law," or who "travels in interstate or foreign commerce," and "knowingly fails to register or update a registration as required" under the Act is subject to a penalty of up to ten years of imprisonment. *Ibid.* Registration is also a mandatory condition of probation for federal offenses. See 18 U.S.C. 3563(a)(8); 18 U.S.C. 5037(d)(3) ("The provisions dealing with probation set forth in sections 3563 and 3564 are applicable to an order placing a juvenile on delinquent supervision."); see also 18 U.S.C. 3583(d) (mandatory condition of federal supervised release).

2. In 2000, when he was approximately 12, respondent began sexually abusing a ten-year-old boy (W.J.H.) on the Fort Belknap Indian Reservation in Montana. The abuse continued for a period of two or three years and included acts of sodomy, oral sex, and masturbation. See Presentence Report 5-6 (PSR). Respondent admitted that he forced W.J.H. to perform those sexual acts. *Id.* ¶¶ 18, 22. Because of the abuse, W.J.H. began to hurt himself by cutting his arms with razors and glass. *Id.* ¶ 16.

In 2005, respondent was charged in a juvenile information in the United States District Court for the District of Montana with juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. 5031 *et seq.*, for knowingly engaging in forcible sexual acts against W.J.H. that would have been a crime under 18 U.S.C. 2241(a)(1) and 1153(a) if committed by an adult. C.A. E.R. 44-45. Respondent thereafter pleaded "true" to a superseding information charging him with juvenile delinquency by knowingly engaging in sexual

acts with W.J.H., who was under 12-years-old, that would have been a crime under 18 U.S.C. 2241(c) and 1153(a) if committed by an adult. *Id.* at 40-41. The government agreed to dismiss the original information. See 5/17/05 Plea Agreement para. 12.

On June 9, 2005, the district court accepted the plea agreement and the findings of fact in the PSR and adjudged respondent delinquent. C.A. E.R. 36-39. The court sentenced respondent to two years of official detention, to be followed by juvenile delinquent supervision until his 21st birthday on May 2, 2008. *Id.* at 36-37. For the first six months of supervision, respondent was ordered to reside in a prerelease center and to abide by all conditions of the facility's residency. *Id*. at 37.

Respondent failed to comply with the requirements of the prerelease program and was terminated from the program. C.A. E.R. 12. On July 26, 2007, the district court revoked respondent's supervised release and sentenced him to an additional six-month term of official detention to be followed by continued supervision until his 21st birthday. *Id.* at 24-26; see App., *infra*, 38a. The government argued that under SORNA (enacted the previous year but after respondent's adjudication), respondent should be required to register as a sex offender "at least until the time that he hits age 21 and is released from supervised release." C.A. E.R. 20. Respondent objected, claiming that requiring him to register under SORNA would constitute an ex post facto violation. *Id*. at 21. As a "special condition[]" of his supervision, the court ordered respondent to "register in person as a sex offender with local/tribal/county law enforcement in the jurisdiction in which he resides, is employed, or is a student, within three (3) business days of Juvenile's arrival

in that jurisdiction," and to appear in person in the relevant jurisdiction should he have a change of name, residence, employment, or student status. App., *infra*, 39a; see C.A. E.R. 27. The court also ordered that, "[i]f required to register as a sex offender under [SORNA]," respondent shall submit to warrantless searches, *inter alia*, of his person, property, vehicle and computer. App., *infra*, 39a; see C.A. E.R. 27-28.

3. On September 10, 2009, the court of appeals vacated in part and remanded, holding that SORNA's "juvenile registration provision may not be applied retroactively to individuals adjudicated under the Federal Juvenile Delinquency Act." App., *infra*, 7a, 36a.[3] While noting that SORNA also requires qualifying state offenders to register, see 42 U.S.C. 16911(6), the court "d[id] not express any opinion" about the constitutionality of applying the registration requirements to state juvenile offenders and "limit[ed] [its] discussion to individuals adjudicated delinquent in the federal system." App., *infra*, 8a n.4.

To decide whether the retroactive application of SORNA's juvenile registration and notification provisions is punitive, and thus violative of the constitutional prohibition against ex post facto laws, the court applied the test in *Smith*, which asks whether a law intended to be a civil regulatory measure is "so punitive either in

[3] The district court's imposition of the registration condition accords with SORNA's requirement that a mandatory condition of supervision be, "for a person required to register under [SORNA], that the person comply with the requirements of that Act." 18 U.S.C. 3563(a)(8) (made applicable to juvenile proceedings by 18 U.S.C. 5037(d)(3)). The court of appeals approached the case as raising a direct ex post facto challenge to SORNA's registration and notification provisions and decided the case on that basis.

purpose or effect as to negate [the State's] intention to deem it civil." App., *infra*, 11a (quoting *Smith*, 538 U.S. at 92) (internal quotation marks omitted). The court first assumed, without deciding, that SORNA is a civil regulatory scheme and was not "passed with a punitive purpose." *Id.* at 11a-12a; see *id.* at 11a (Respondent "has properly not disputed that in enacting SORNA, Congress intended to establish a civil regulatory scheme rather than a criminal one."); *id.* at 12a (Respondent "conceded at oral argument that Congress's intent was not punitive."). Looking to whether SORNA was nevertheless punitive in effect, the court concluded that this Court's decision in *Smith*, which rejected a similar ex post facto challenge to the Alaska Sex Offender Registration Act, did not control because it did not involve a juvenile sex offender. *Id.* at 14a-17a. Applying several of the factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), the court concluded that, when applied retroactively to juvenile offenders, "the *effect* of SORNA's * * * registration provision is punitive." App., *infra*, 12a.

First, the court found that "by far the most compelling" consideration is that the registration and notification requirements impose an "affirmative disability or restraint" by making public "severely damaging" information that, under the juvenile justice system, has largely been kept confidential. App., *infra*, 18a; see *id.* at 21a. The court reasoned that, unlike in *Smith* where the adult offender's conviction was already a matter of public record, the disclosure of a juvenile offense flows from "SORNA alone." *Id.* at 22a; see *id.* at 21a-22a (noting that prior offenders will be subject to "public humiliation and ignominy for the first time" and that their abil-

ity to obtain employment, housing, and education will be "seriously jeopardize[d]"). The court also noted that SORNA, unlike the Alaska statute in *Smith*, requires all offenders (adults and juveniles) to appear in person to verify their information, see 42 U.S.C. 16916, a burden which is neither "minor" nor "indirect." App., *infra*, 23a-24a (suggesting that "[e]very three months, the former juvenile offender will be required to be absent from work, appear before public officials, and publicly reaffirm that they are guilty of misdeeds that were previously protected from disclosure").

Second, in examining the historical treatment of juvenile sex offender registration requirements, the court again emphasized the traditional confidentiality afforded to juvenile proceedings, in contrast to adult criminal proceedings where "[f]ull disclosure of the offense and the offender is an integral part of our punitive system." App., *infra*, 25a. In the end, however, the court concluded that the "historical treatment" factor did not weigh in favor of holding the juvenile registration and notification provisions punitive. *Id.* at 27a.

Third, the court evaluated whether SORNA "promotes the traditional aims of punishment" and, particularly, the "aim of retribution." App., *infra*, 27a. Although it had declined to hold that SORNA had a punitive intent, the court nevertheless found, based on a floor statement by Senator Grassley, and a statement in SORNA's preamble (that SORNA was enacted, *inter alia*, "in response to the vicious attacks by violent predators against" a list of named victims, see 42 U.S.C. 16901), that "a retributive aim contributed to" SORNA's passage. App., *infra*, 28a-29a (suggesting that while

SORNA's aim was "principally regulatory," it was "also in some measure punitive").

Finally, the court acknowledged that if a "statute is reasonably related to a non-punitive purpose," it is "not usually considered punitive." App., *infra*, 29a (citing *Bell* v. *Wolfish*, 441 U.S. 520, 538 (1978)). The court found, however, that SORNA's juvenile registration requirements "appear[ed] excessive" in relation to its non-punitive purpose of improving public safety, in light of studies indicating that juvenile sex offenders have relatively low recidivism rates and, again, the confidentiality traditionally afforded juvenile offenders. *Id.* at 31a-33a. The court was particularly troubled by the imposition of registration requirements on law-abiding adults who had committed their offenses many years earlier. *Id.* at 33a. In the end, however, the court did "not give much weight either way to this factor." *Id.* at 34a (finding question of statute's excessiveness under the circumstances to be "close and difficult").

The court concluded that, taken together, the factors it considered provided "the clearest proof" that the retroactive application of SORNA's juvenile registration and notification requirements is punitive. App., *infra*, 35a (quoting *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997)). The court thus vacated "the part of the judgment order that pertains to registration and reporting as a sex offender, and h[e]ld that [respondent] may not constitutionally be obligated to register as a sex offender under SORNA." *Id.* at 36a.[4]

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[4] Respondent's juvenile supervision expired upon his 21st birthday (May 2, 2008), after oral argument in the court of appeals and before the court's issuance of its opinion on September 10, 2009. Before he turned 21 and while under district court supervision, however, respon-

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that SORNA cannot constitutionally be applied to juvenile sex offenders adjudicated delinquent under the FJDA before the statute's enactment. The court of appeals' partial invalidation of that Act of Congress is erroneous and undermines Congress's legitimate and compelling interest in protecting the safety of the community from sex offenders. It is also inconsistent with this Court's decision in *Smith* v. *Doe*, 538 U.S. 84 (2003), which rejected a similar ex post facto challenge to a state sex offender registration and notification statute. This Court has never invalidated a state or federal law under the Ex Post Facto Clause on the ground that, despite the law's declared regulatory purpose, its actual effects reveal a punitive character—and the court of appeals was wrong to do so here.

Although plenary consideration of the merits is warranted, a threshold question of mootness should be resolved before this Court undertakes that review. The condition of supervision that respondent attacked on appeal expired when he turned 21, before the court of appeals issued its decision. Whether this case presents a live controversy turns on whether respondent could benefit from a holding in his favor by the court of appeals, which itself turns on whether such a holding would affect his registration as a sex offender in the State of Montana. At present, the record in this case does not sufficiently illuminate that question. Accordingly, the Court may

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dent did register as a sex offender with the State of Montana. And, as of the filing of this petition for a writ of certiorari, respondent's registration information is still available online and was last updated on December 15, 2009.

wish to grant the petition, vacate the judgment, and remand for further proceedings on the issue of mootness.

A. The Ninth Circuit Erred In Declaring SORNA's Juvenile Registration And Notification Requirements Unconstitutional Under The Ex Post Facto Clause

The Constitution prohibits both the States and the Federal Government from passing any "ex post facto Law." U.S. Const. Art. I, §§ 9-10. The Ex Post Facto Clause does not forbid the adoption of civil, regulatory measures with retroactive operation; it prohibits only passage of laws that retroactively impose criminal "punishment." See *Smith*, 538 U.S. at 92; *Carmell* v. *Texas*, 529 U.S. 513, 522 (2000); *Kansas* v. *Hendricks*, 521 U.S. 346, 361-362 (1997). When a regulatory scheme is denominated civil by the legislature, a court may reject that manifest intent only upon "the clearest proof" that "the statutory scheme is so punitive either in purpose or effect as to negate [the legislature's] intention." *Smith*, 538 U.S. at 92 (internal quotation marks and citations omitted); see *Hendricks*, 521 U.S. at 361 (party bears a "heavy burden" when attempting to override legislature's nonpunitive intent); *Flemming* v. *Nestor*, 363 U.S. 603, 619 (1960) (evidence of punitive purpose must be "unmistakable").

1. In *Smith, supra*, this Court reversed a decision by the Ninth Circuit that had found Alaska's sex offender registration and notification law to violate the Ex Post Facto Clause as applied to a person whose conviction preceded enactment of the law. 538 U.S. at 106. The Court concluded that the Alaska legislature intended to create a civil, nonpunitive regime aimed at protecting public safety and that the law's effects did not negate that intent. *Id.* at 93-105. In holding that Alaska's stat-

ute was not "in effect" punitive, the Court explained that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id.* at 98-99. Thus, the Court noted, while widespread publicity of a criminal conviction "may cause adverse consequences for the convicted defendant" and "subject[] the offender to public shame," that does not make a sex offender registration and internet notification scheme punitive. *Id.* at 99; see *ibid.* ("Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation."). The Court held that the respondents failed to show, "much less by the clearest proof," that any effects of the Alaska law negated the legislature's intent to create a civil regulatory scheme. *Id.* at 105.

SORNA is remarkably similar to the Alaska statute in purpose and in effect. As the court of appeals assumed (App., *infra*, 11a-12a), and as respondent conceded (*ibid.*), Congress enacted SORNA's registration and notification provisions as a civil regulatory scheme to protect public safety. Like the Alaska statute at issue in *Smith*, SORNA is not intended to punish sex offenders for past acts, but to protect the public against future harm. See 42 U.S.C. 16901 (Congress sought to "establish[] a comprehensive national system for the registration of [sex] offenders" in order "to protect the public from sex offenders and offenders against children."); 72 Fed. Reg. at 8895 (SORNA was "generally designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public."). And "[t]here is no doubt that preventing danger to the

community is a legitimate regulatory goal." *United States* v. *Salerno*, 481 U.S. 739, 747 (1987).

The court of appeals erred in finding the "clearest proof" that, despite their civil character and nonpunitive purpose, SORNA's registration and notification provisions were nevertheless punitive "in effect," as applied retroactively to juvenile sex offenders adjudicated delinquent under the FJDA. App., *infra*, 12a, 35a. In so holding, the court of appeals distinguished this Court's decision in *Smith* on several grounds. None withstands scrutiny.

2. a. The court of appeals relied primarily on the purported distinction between adult sex offenders, whose convictions are already a matter of public record, and juvenile sex offenders, whose convictions would otherwise remain confidential. In equating the disclosure of private, confidential information with punishment, and in concluding that such disclosure "imposes" an "affirmative disability or restraint," App., *infra*, 19a, the court of appeals misread *Smith* and ignored this Court's other ex post facto precedents.[5]

As an initial matter, the *Smith* Court did not rely solely, or even primarily, on the public nature of the criminal justice system to conclude that sex offender registration and notification does not impose an affirmative disability or restraint. The Court instead relied on several attributes of the Alaska statute that SORNA shares. As in *Smith*, SORNA's registration and notification re-

[5] The court of appeals also relied on that distinction in examining whether the registration requirement for juveniles had historically been regarded as punishment, but ultimately concluded that this factor did not "weigh[] in favor of holding the juvenile registration and notification provisions to be punitive in nature." App., *infra*, 27a.

quirements "impose[] no physical restraint, and so do[] not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." 538 U.S. at 100; see *Hudson* v. *United States*, 522 U.S. 93, 104 (1997) (asking whether sanctions resemble "the 'infamous punishment' of imprisonment") (internal citation omitted). As in *Smith*, SORNA "does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." 538 U.S. at 100. And, as in *Smith*, sex offenders under SORNA are able "to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 101.

The Court in *Smith* did observe that while the public dissemination of prior sex offense convictions may "have a lasting and painful impact on the convicted sex offender," those "consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." 538 U.S. at 101; see *id.* at 100 (noting that information about prior convictions were "already in the public domain"). But the general confidentiality of juvenile adjudications under the FJDA does not convert SORNA's policy of "dissemination of truthful information in furtherance of a legitimate governmental objective," *id.* at 98, 101, into an affirmative disability or restraint. SORNA may draw attention to juvenile criminal conduct that the law previously allowed a sex offender to conceal. But that change in legal policy does not implicate the Ex Post Facto Clause unless the disclosure of truthful facts counts as punishment, which no decision of this Court supports. See *Hudson*, 522 U.S. at 104 ("We have long recognized that 'revocation of a privilege voluntarily granted * * * is characteristically free of the punitive criminal ele-

ment.'") (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 399 & n.2 (1938)).

Publicity in criminal justice generally is not regarded as punitive—even if it produces social stigma or results in ostracism or hardship for defendants. The Constitution guarantees public trials explicitly in the Sixth Amendment, and it recognizes the right of press and public access to criminal trials in the First Amendment. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (plurality opinion) (*Richmond Newspapers*). The purpose of a public trial is not punitive. Rather, a public trial serves many nonpunitive purposes: it promotes fairness to the defendant by operating as a check on judges and prosecutors, *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984); *In re Oliver*, 333 U.S. 257, 270 (1948); safeguards the integrity of the factfinding process, *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606 (1982); maintains public confidence in the criminal justice system, *ibid.*; gives society an emotional outlet so as to minimize "vengeful 'self-help,'" *Richmond Newspapers*, 448 U.S. at 571; and encourages witnesses to come forward and discourages perjury, *Waller*, 467 U.S. at 46. See *Smith*, 538 U.S. at 99 ("Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused."). Although public disclosure of a juvenile sex offender's prior convictions serves different purposes under SORNA, the public tradition of criminal justice demonstrates that, in our society, the dissemination of truthful information about criminal cases is not punishment.

Moreover, the "collateral consequences" that could flow from disclosure under SORNA, *Smith*, 538 U.S. at 99, pale in comparison to the sanctions this Court has

previously found nonpunitive in light of a valid regulatory goal. The results of disclosure, for example, are far "less harsh than the sanctions of occupational debarment, which [this Court has] held to be nonpunitive." *Id.* at 100 (citing *Hudson*, 522 U.S. at 104) (debarment from banking industry not an "affirmative disability or restraint" for purposes of the Double Jeopardy Clause); see *Flemming*, 363 U.S. at 617 (retroactive termination of accrued government benefits not "affirmative disability or restraint"). Indeed, the Court has long-held that while deportation "may be burdensome and severe for the alien," it "is not a punishment." *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924); see *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594-595 (1952). And while the indefinite civil commitment of mentally-ill sex offenders is clearly an affirmative restraint, the Court still found it nonpunitive for ex post facto purposes. *Hendricks*, 521 U.S. at 361-363; see also, *e.g.*, *Hawker* v. *New York*, 170 U.S. 189, 196 (1898) (retroactive revocation of medical license); *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960) (retroactively barring felon from working as union official) (plurality opinion).

b. The court of appeals also overstated the extent to which juvenile records and proceedings are kept confidential—and, more importantly, the extent to which juvenile offenders can reasonably rely on such confidentiality as an inviolate and vested right.

The FJDA and similar statutes strike a balance between the rehabilitative goals associated with confidentiality and the public's interest in learning about juvenile offenses. Generally, "the [juvenile] records shall be safeguarded from disclosure to unauthorized persons." 18 U.S.C. 5038(a); see 18 U.S.C. 5038(c) and (e); *United*

States v. *Three Juveniles*, 61 F.3d 86, 92 (1st Cir. 1995) (noting tradition of confidentiality suggesting that closure of juvenile proceedings is the norm), cert. denied, 517 U.S. 1166 (1996). But that policy judgment is not absolute. The FJDA itself includes a non-exhaustive list of specific authorized "persons who have a right to obtain juvenile records upon request," *Three Juveniles*, 61 F.3d at 91, including other courts, law enforcement agencies, certain potential government employers, and victims of the juvenile's delinquency. See 18 U.S.C. 5038(a)(1)-(6); *United States* v. *A.D.*, 28 F.3d 1353, 1359-1360 (3d Cir. 1994) (noting that Section 5038(a) "implicitly recognizes that there are situations other than those described in Paragraphs (a)(1) through (6) and its concluding Paragraph in which access could be authorized"); see also 18 U.S.C. 5038(f) (requiring the release of juvenile records to the FBI if the juvenile was older than 13 and had been adjudicated delinquent for certain particularly violent or serious offenses, such as aggravated sexual abuse if a firearm was involved). Further, a district court may, in its discretion, provide broader access to juvenile records, and may open juvenile proceedings to the public if in a given case the public's interest in knowing about the offense outweighs a juvenile's privacy interests. See *United States* v. *Eric B.*, 86 F.3d 869, 879 (9th Cir. 1996); *Three Juveniles*, 61 F.3d at 90-91; *A.D.*, 28 F.3d at 1359-1362; cf. *In re Gault*, 387 U.S. 1, 24 (1967) ("Disclosure of court records is discretionary with the judge in most jurisdictions.").

This Court too has recognized that a juvenile offender's interest in maintaining anonymity must sometimes yield to competing interests—including interests that arise after the juvenile has been adjudged delin-

quent. In *Davis* v. *Alaska*, 415 U.S. 308, 319-320 (1974), for example, the Court held that a State's policy interest in protecting the confidentiality of a juvenile offender's record must give way to a defendant's Sixth Amendment right to impeach a witness on the basis of his juvenile record. In *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104-106 (1979), the Court held that a State could not punish a newspaper's truthful publication of a juvenile murder suspect's name that it had lawfully obtained. In both cases, the Court concluded that the constitutional rights outweighed the State's interest in maintaining the confidentiality of a juvenile offender's identity and offense.[6]

SORNA reflects Congress's policy judgment that, in the case of serious juvenile sex offenders, the general confidentiality afforded juveniles under the FJDA should give way to public safety. Cf. *2005 House Report* 25 ("While the Committee recognizes that States typically protect the identity of a juvenile who commits criminal acts, in the case of sexual offenses, the balance needs to change; no longer should the rights of the juvenile offender outweigh the rights of the community and victims to be free from additional sexual crimes."). Especially given the many ways in which the juvenile's interest in confidentially has historically been qualified, the policy judgment that Congress made in SORNA to enhance the safety of the community through disclosure of a juvenile

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[6] A jurisdiction's policy judgment that confidentiality should be afforded to juvenile records and proceedings is just that; juvenile offenders have no constitutional right to nondisclosure. See *Eric B.*, 86 F.3d at 879 (juvenile has no constitutional right to nondisclosure of his criminal records).

sex offense cannot be understood as having a punitive effect.

c. The court of appeals also concluded that SORNA's effect on juvenile offenders was excessive in relation to the statute's nonpunitive purpose, although it ultimately placed little weight on that factor. App., *infra*, 29a-34a. To distinguish *Smith*, in which this Court found the statute's rational connection to its nonpunitive purpose to be the "'most significant' factor," the court relied on the purportedly lower rate of recidivism among juvenile offenders. That distinction fails for several reasons.

First, the studies referenced by the court (App., *infra*, 32a) include all juvenile sex offenders, not just the most serious offenders actually covered by SORNA. Second, this Court rejected a similar argument in *Smith*, explaining that "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." 538 U.S. at 103-104; see *De Veau*, 363 U.S. at 158 ("Duly mindful as we are of the promising record of rehabilitation by ex-felons * * * it is not for this Court to substitute its judgment for that of [the legislature] regarding the social surgery required" to protect the public interest.). And, third, to the extent the court of appeals was most concerned about "adults who are forced to register *solely* because they committed an offense as a juvenile, but who have lived the rest of their adult lives without committing another such crime," App., *infra*, 33a, that concern is, again, for Congress to evaluate. The legislature is not required to wait for such an offender to commit a further crime as an adult, as the court suggests (*ibid.*), before acting to protect the public.

3. The court of appeals' further attempts to distinguish *Smith* based on purported differences between SORNA and the Alaska law are equally unavailing and conflict with the decisions of other courts of appeals.

First, the court observed that SORNA, unlike the Alaska statute, requires in-person verification. App., *infra*, 23a-24a. As an initial matter, and contrary to the court of appeals' assertion (*ibid.*), SORNA does not "require[]" former offenders to be "absent from work, appear before public officials, and publicly reaffirm that they are guilty of misdeeds." It simply requires sex offenders to "appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry." 42 U.S.C. 16916; see 73 Fed. Reg. at 38,067 (noting that jurisdictions may implement requirement in multiple ways and in their discretion, including arranging visits at the offender's home or other agreed-upon location). More importantly, such a requirement is reasonably related to advancing the government's public safety purposes by, for example, verifying the continued presence and identity of registered offenders and confirming the reliability of registration information. *Ibid.*

Second, the court of appeals suggested that SORNA is retributive (despite having a nonpunitive purpose) based on a statement from one Senator and a clause in the statute's preamble referring to named victims. A single floor statement from one Senator suggesting that child sex offenders are "heinous" and deserving of punishment, App., *infra*, 29a, does not demonstrate that SORNA was enacted with a retributive purpose. See *Bae* v. *Shalala*, 44 F.3d 489, 494 (7th Cir. 1995) ("[R]eliance on statements made by politicians in their efforts to persuade colleagues to enact a law is a wholly unreliable

method for determining the nature of a sanction."); *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 166 (1993); *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969).[7] And a clause in SORNA's preamble, noting "vicious attacks by violent predators" against named victims, see 42 U.S.C. 16901, also does not show that SORNA was driven by a retributive purpose. App., *infra*, 28a. As this Court recognized in *Smith*, the Alaska sex offender registration statute, like many of its counterparts in other states, was enacted in response to the sexual assault and murder of seven-year-old Megan Kanka by a neighbor who, unbeknownst to her family, had previously been convicted of sex offenses against children. See 538 U.S. at 89-90. A regulatory measure informed by past experience, and designed to protect other children from sex crimes, is not meant to punish anyone.

Both purported distinctions also apply equally to adult sex offenders required to register under SORNA. Yet, every court of appeals that has considered an ex post facto challenge to SORNA's registration and notification requirements, with the exception of the court below, has rejected such distinctions and concluded that the effect of SORNA, like that of the Alaska law at issue in *Smith*, is not so punitive as to overcome its clearly regulatory purpose. See *United States* v. *Young*, 585 F.3d 199, 204-206 (5th Cir. 2009); *United States* v. *Hinckley*, 550 F.3d 926, 936-938 (10th Cir. 2008); *United States* v.

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[7] Further, the statement quoted by the court generally refers not to SORNA's registration requirements, but to a separate set of provisions the Senator had sponsored that increased the penalties for certain federal sex offenses. See 152 Cong. Rec. at S8021.

May, 535 F.3d 912, 919 (8th Cir. 2008); *United States* v. *Dixon*, 551 F.3d 578, 584 (7th Cir. 2008).[8]

B. The Court Of Appeals' Decision Warrants This Court's Review Because It Partially Invalidates An Act Of Congress

The decision of the court of appeals partially invalidates an Act of Congress and that alone warrants this Court's review. And, despite the court's claims, the effect of that invalidation is not limited. The court purported to confine its holding to juvenile offenders adjudicated delinquent in the federal system under the FJDA (App., *infra*, 8a n.4), but its faulty reasoning may well have a broader impact. SORNA's registration and notification requirements apply not just to federal juvenile offenses but to state juvenile offenses as well. And while a number of States required some form of registration and community notification for juvenile sex offenders before passage of SORNA, others either exempted juveniles from such requirements, expressed no clear judgment on the matter, or granted the judiciary discretion to decide whether a juvenile must register. The court of appeals' decision casts a cloud over the constitutionality

[8] A different ex post facto question is presented in *Carr* v. *United States*, 129 S. Ct. 47 (2009): whether SORNA's criminal penalty in 18 U.S.C. 2250(a) can be applied to sex offenders who traveled interstate before SORNA's enactment. That question is not implicated in this case, which only involves the retroactive application of SORNA's registration and notification requirements to juvenile offenders. *Smith*, 538 U.S. at 101-102 ("A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the * * * original offense" that made the registration requirements applicable to him.).

of SORNA's juvenile registration provisions based on pre-SORNA adjudications in many of those jurisdictions as well. The decision thus seriously undermines Congress's specific intent to expand registration and notification to juvenile offenders who "[a]ll too often, * * * have exploited current limitations," such as confidentiality provisions, "that permit them to escape notification requirements to commit sexual offenses." *2005 House Report* 25.

Review is also warranted because the decision below conflicts with the reasoning in this Court's decision in *Smith*, which reversed a similar decision from the Ninth Circuit. The Court has never invalidated a state or federal law under the Ex Post Facto Clause on the ground that, despite its declared regulatory purpose, its actual effects reveal a punitive character—and the court of appeals was wrong to do so here.

C. The Court Should Consider Remanding The Case For Further Proceedings On The Question Of Mootness

Consistent with Article III of the Constitution, "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citation omitted). "[T]hroughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). The completion of a criminal defendant's sentence will not normally moot an appeal challenging his conviction because criminal convictions are presumed to have "continuing collateral con-

sequences" (or, as the Court has said, the Court has "accept[ed] the remote possibility of collateral consequences as adequate to satisfy Article III"). *Spencer*, 523 U.S. at 8, 10, 12; see *Sibron* v. *New York*, 392 U.S. 40, 57-58 (1968).

That same presumption does not apply when a defendant challenges only his sentence. When a criminal defendant challenges his sentence, and that sentence subsequently expires, the defendant bears the burden of demonstrating that the action continues to raise "collateral consequences adequate to meet Article III's injury-in-fact requirement." *Spencer*, 523 U.S. at 14 (applying that principle to challenges to revocation of parole after the revocation sentence was served). Further, the defendant must show that the ongoing consequences are "traceable" to the challenged action and that they are "likely to be redressed by a favorable judicial decision." *Id.* at 7 (citation omitted).

Respondent's appeal did not challenge the underlying judgment adjudicating him delinquent for a crime that, if committed by an adult, would have been aggravated sexual abuse. Rather, in the Ninth Circuit, he challenged only the conditions of his juvenile supervision requiring him to register as a sex offender, and he asked the court of appeals to "reverse the portion of his sentence requiring Sex Offender Registration and remand with instructions that the district court amend the Judgment striking Sex Offender Registration as a condition of juvenile supervision." Resp. C.A. Br. 25. But respondent was no longer subject to supervision by the district court by the time the Ninth Circuit issued its decision. As a consequence, the case was moot in the Ninth Circuit unless respondent could show that a favorable court decision

would serve to redress collateral consequences of the supervision conditions. By the time of the court of appeals' decision, respondent had become registered as a sex offender in Montana, where he continues to be registered today. The question, then, is whether a favorable decision by the court of appeals would have made it "likely" (*Spencer*, 523 U.S. at 7) that he could remove his name and identifying information from the Montana sex offender registry.

That question cannot readily be answered on the current record. Montana is not a party to the federal juvenile proceeding. Montana therefore would not be directly bound by any appellate order requiring the district court to eliminate the sex offender registration conditions from its now-expired sentence. Nor is Montana bound to accept the Ninth Circuit's views on the scope of the Ex Post Facto Clause. "The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation." *Lockhart* v. *Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); see *Arizonans for Official English*, 520 U.S. at 58 n.11. Thus, a state "trial court is bound by th[e] [Supreme] Court's * * * interpretation of federal law, but if it follows [a federal court of appeals'] interpretation of federal law, it does so only because it chooses to and not because it must." *Lockhart*, 506 U.S. at 376 (Thomas, J., concurring).[9]

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[9] Montana would, of course, be bound if this Court were to hold that the registration of respondent under SORNA violates the Ex Post Facto Clause. But whether the case became moot in the court below —that is, whether respondent's collateral injury (registration as a sex

In addition, Montana's own sex offender registration provisions would appear to figure prominently in whether the Ninth Circuit's decision to vacate the supervision conditions would redress respondent's continued registration as a sex offender. That issue would turn on matters of state law and practice, such as whether respondent was required to register in the State of Montana independent of the federal juvenile court judgment and whether, if the district court's order were vacated, the State would take steps to remove him from its registry. Only if it is "likely" (*Spencer*, 523 U.S. at 7) that the State would take such action as a result of a favorable appellate decision by the Ninth Circuit would respondent be relieved of the collateral consequences of the district court order.

Neither party raised the issue of mootness for the Ninth Circuit's consideration, and the court of appeals did not address the question *sua sponte*. Thus, respondent has had no opportunity to develop a record demonstrating that collateral consequences exist and a favorable decision "likely" would redress them—and no court has considered that issue. The government's research into Montana law and practice has not, as yet, yielded a conclusive answer.[10] In other cases in which facts came

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offender in Montana) was redressable by a favorable appellate decision —should be judged by the circumstances before the court of appeals once respondent completed his juvenile sentence. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 570 n.4 (1992) (evaluation of redressability for purposes of Article III standing must take place when suit is commenced, not when it reaches this Court).

[10] Before May 2007, it appears that Montana law generally did not require juvenile sex offenders to register. See Mont. Code Ann. § 46-23-502(7) (West 2005) (defining a sexual offender as "a person who has been convicted of a sexual * * * offense"); *State* v. *Hastings*, 171

to light that raised a question of mootness that this Court could not readily resolve, the Court has granted certiorari, vacated the judgment, and remanded for consideration of mootness. See, *e.g.*, *United States* v. *US West, Inc.* and *United States* v. *Pacific Telesis Group*, 516 U.S.

P.3d 726, 728 (Mont. 2007) (explaining that the state sex offender statutes "require a 'conviction' before [state] registration requirements may be imposed" and a "youth court adjudication did not constitute a 'conviction' as contemplated in § 46-23-502(7), MCA"). Registration, however, was required if a youth court so ordered. See Mont. Code Ann. § 41-5-1513(1)(c) (West 2005) ("the youth court may * * * require a youth found to be a delinquent youth, as the result of the commission of an offense that would be a sexual offense * * * as defined in 46-23-502, if committed by an adult, to register as a sexual * * * offender"); *Hastings*, 171 P.3d at 729 (youth court has "discretion to impose a [sex offender] registration requirement in an appropriate case"); *State* v. *Villanueva*, 118 P.3d 179, 181 (Mont. 2005) (same). Registration was also required if the juvenile had been required to register in another jurisdiction. See Mont. Code Ann. § 46-23-502(6)(b) (West 2005) (defining "sexual offense" and including "any violation of a law of another state or the federal government that is reasonably equivalent to a [listed violation] or for which the offender was required to register as a sex offender after conviction"); *Villanueva*, 118 P.3d at 181-182 (affirming that juvenile required to register in Washington for sexual offense was also required to register in Montana). State law now imposes registration requirements on persons "found to have committed or been adjudicated for" a qualifying sexual offense "in youth court." Mont. Code Ann. § 46-23-502(10) (2009). The May 11, 2007, amendment applies retroactively to "sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989," 2007 Mont. Laws Ch. 483; Montana authorities have represented to us that the State has not relied on the 2007 retroactivity clause to apply the duty to register retroactively to juvenile adjudications. These provisions, taken collectively, may afford respondent grounds to be removed from the registry on the basis of a new court order vacating the conditions on supervision.

1155 (1996); *Vitek* v. *Jones*, 436 U.S. 407, 410 (1978) (per curiam); see also Eugene Gressman et al., *Supreme Court Practice* § 5.13, at 357 (9th ed. 2007) (collecting cases illustrating that "when there is doubt about the continuing nature of a controversy, the Court may remand the case to the lower court for consideration of the possibility of mootness").

That course may be warranted here, absent further clarification of the facts and Montana law. If this case is moot, the Court should not adjudicate the constitutional question presented, and the United States should not be bound in the Ninth Circuit by a ruling that never should have been issued invalidating an Act of Congress. Rather, in the event of mootness, the Court should vacate the judgment of the court of appeals, "clear[ing] the path" for relitigation of the important issues presented here and "eliminat[ing] a judgment, review of which was prevented through happenstance." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950); cf. *Claiborne* v. *United States*, 551 U.S. 87 (2007) (entering a *Munsingwear* order in a criminal case and vacating the judgment below because the petitioner died after oral argument but before decision).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to vacate the judgment below and remand the case for consideration of mootness.

Respectfully submitted.

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FEBRUARY 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-30290
D.C. No. CR-05-00054-SEH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JUVENILE MALE, DEFENDANT-APPELLANT

Filed: Sept. 10, 2009
Amended: Jan. 5, 2010

ORDER AND AMENDED OPINION

Before: STEPHEN REINHARDT, A. WALLACE TASHIMA, and M. MARGARET MCKEOWN, Circuit Judges.

The clerk is directed to hold the mandate pending further order of the court.

The opinion filed September 10, 2009, slip op. 13109, and appearing at 581 F.3d 977 (9th Cir. 2009), is hereby amended as follows:

1. Slip op. at 13124, line 21: after <offenders.> and before <We are>, insert the following footnote:

> Our reasons for distinguishing *Doe* apply as well to *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997)

and *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004). *Russell* and *Hatton* rejected Ex Post Facto challenges to sex offender registration requirements for those convicted of sex offenses *as adults*. Neither discussed whether the registration requirements would be punitive if imposed on those adjudicated delinquent in the juvenile justice system, nor did they address the contrasting approaches to privacy/publicity in the juvenile and adult systems. In fact, the *Russell* court specifically recognized that "[t]he information collected and disseminated by the Washington statute is already fully available to the public . . . ." *Russell,* 124 F.3d at 1094 (rejecting offenders' contention that the registration and notification requirements violated their right to privacy).

2. Slip op. at 13140-41, replace the text of footnote 16 with the following:

United States v. George, 579 F.3d 962 (9th Cir. 2009), addressed an ex post facto challenge to SORNA's criminal provisions from an adult defendant who was convicted of a sex offense prior to SORNA and then convicted under SORNA for failure to register. *Smith v. Doe* had already established that under SORNA adults may be constitutionally required to register as sex offenders based on pre-SORNA convictions, 538 U.S. 84 (2003), and *George* did not consider the separate issue we decide here, whether juvenile offenders may be constitutionally required to register based on pre-SORNA adjudications. In any event, George was lawfully required to register as a sex offender as a condition of his pre-SORNA plea agreement. George argued that his failure to register was a one-time event that took place before SORNA took effect, and therefore his conviction

for violating SORNA amounted to an unconstitutional retrospective application of a criminal law. We held otherwise, stating, *inter alia*, that George, whose initial requirement to register was lawful, violated the law not only when he failed to comply but as long thereafter as he continued to fail to do so. In short, we held that when there is a lawful obligation to register, that obligation is a continuing one. George's offense of not registering continued from SORNA's passage on, and SORNA's imposition of criminal liability for the post-SORNA conduct raised no ex post facto issue. *George* does not affect our decision here. Because Juvenile Male (S.E.) could not lawfully be required to register on the basis of his pre-SORNA conduct, and that was the only improper sexual conduct with which he was charged, he did not, under our decision here, violate any lawful requirement of SORNA. As there was no obligation on S.E.'s part to register, there was, of course, no continuing obligation to do so.

OPINION

REINHARDT, Circuit Judge:

As a society, we generally refuse to punish our nation's youth as harshly as we do our fellow adults, or to hold them to the same level of culpability as people who are older, wiser, and more mature. The avowed priority of our juvenile justice system (in theory if not always in practice) has, historically, been rehabilitation rather than retribution. Juvenile proceedings by and large take place away from the public eye, and delinquency adjudications do not become part of a young person's permanent criminal record. Rather, young offenders,

except those whose conduct a court deems deserving of treatment as adults, are classified as juvenile delinquents and placed in juvenile detention centers. Historically, an essential aspect of the juvenile justice system has been to maintain the privacy of the young offender and, contrary to our criminal law system, to shield him from the "dissemination of truthful information" and "[t]ransparency" that characterizes the punitive system in which we try adults. *Compare* 18 U.S.C. § 5038(e) ("[N]either the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.") *with Smith v. Doe*, 538 U.S. 84, 99 (2003) ("[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence.").

In a surge of national concern, however, over the commission of sex offenses, particularly those against children, Congress in 2006 enacted the Sex Offender Registration and Notification Act ("SORNA" or "the Act") and applied its registration and reporting requirements not only to adults but also to juveniles who commit certain serious sex offenses at the age of fourteen years or older. The Attorney General, exercising authority delegated by Congress, determined that SORNA would apply retroactively to all sex offenders convicted of qualifying offenses before its enactment, including juvenile delinquents. 28 C.F.R. § 72.3 (2007).

The retroactive application of SORNA's juvenile registration provision affects people of all ages—not only juveniles. As we are still close in time to SORNA's passage, some, like S.E., were adjudicated delinquent relatively recently and are still minors or young adults. The vast majority of persons affected, however, were adjudicated delinquent years or even decades before SORNA's

enactment and quite obviously are no longer juveniles. Indeed, the brunt of SORNA's retroactive application to juvenile offenders is felt mainly by *adults* who committed offenses long ago as teenagers—many of whom have built families, homes, and careers notwithstanding their history of juvenile delinquency, which before SORNA's enactment was not a matter of public record. For these adults, sex offender registration and reporting threatens to disrupt the stability of their lives and to ostracize them from their communities by drawing attention to decades-old sex offenses committed as juveniles that have, until now, remained sealed. Although from this point forward no new individuals will be affected by the retroactivity provision, its effects will be felt by numerous individuals for the rest of their adult lives.[1]

We must decide as a matter of first impression—in our court and in any other circuit court—whether the retroactive application of SORNA's provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses before SORNA's passage violates the Ex Post Facto Clause of the United States Constitution. In light of the pervasive and severe new and additional disadvantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law enforcement authorities every 90 days for 25 years, and in light of the confidentiality that has historically attached to juvenile proceedings, we conclude that the retroactive application of

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[1] For ease of reference, we will refer in this opinion to the individuals affected by the retroactivity provision as "former juvenile offenders."

SORNA's provisions to former juvenile offenders is punitive and, therefore, unconstitutional.[2]

I.

At the age of thirteen, defendant-appellant S.E. engaged in non-consensual sexual acts with a ten-year-old child of the same sex. The sexual activity continued until S.E. was fifteen years old and the younger child was twelve. S.E. pled "true" to the commission of acts that, had they been committed by an adult, would constitute aggravated sexual abuse under 18 U.S.C. § 1153 and § 2241(c), because the younger child was, during the period of the charges, under twelve. As a result, S.E. was adjudicated delinquent under 18 U.S.C. § 5031, *et seq*.[3]

In 2005, a year before SORNA was adopted, the district court sentenced S.E. to two years of detention at a juvenile facility followed by supervised release until his

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[2] Because we reverse the district court's imposition of the registration requirement and hold that in light of the Ex Post Facto Clause, S.E. is not required to register as a sex offender under SORNA, we do not consider his additional arguments that the retroactive application of SORNA violates procedural due process, substantive due process, and the nondelegation doctrine.

[3] Due to the age of the victim, any sexual act is deemed non- consensual and criminal. Without specifying any requisite degree of force, or any age differential between the perpetrator and the victim, 18 U.S.C. § 2241(c) defines "knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years" as aggravated sexual abuse. Additionally, under SORNA,"[a]n offense involving consensual sexual conduct is not a sex offense for the purposes of [SORNA] . . . if the victim was at least 13 years old and the offender was not more than 4 years older than the victim." 42 U.S.C. § 16911(5)(C). Consensual conduct involving a child *younger* than 13 is, therefore, a sex offense, regardless of the age of the individual accused of wrongdoing.

twenty-first birthday. He was not at this point, of course, ordered to register as a sex offender. S.E. completed his two-year confinement and moved to a pre-release center where, pursuant to the terms of his sentence, he was to reside for six months. When S.E. failed to engage in a required job search, center officials deemed him a program failure and requested his removal. In 2007, a year after the enactment of SORNA, the district court revoked S.E.'s supervised release due to his failure to reside at the center as required by his conditions of supervision, and ordered an additional six months of confinement and continued supervision until S.E.'s twenty-first birthday. The judge also imposed a "special condition" mandating that S.E. register as a sex offender. S.E. objected to the imposition of the registration requirement and timely filed a notice of appeal. The government argues that the special condition is valid because S.E. is required to register by SORNA. S.E. responds that the Ex Post Facto Clause of the United States Constitution bars the retroactive application of the registration provision of SORNA to persons who prior to its passage were designated as juvenile offenders.

Reviewing all questions at issue here de novo, *see Beeman v. TDI Managed Care Services*, 449 F.3d 1035, 1038 (9th Cir. 2006) (questions of statutory interpretation); *Hunter v. Ayers*, 336 F.3d 1007, 1011 (9th Cir. 2003) (violations of the Ex Post Facto Clause), we hold that SORNA's juvenile registration provision may not be applied retroactively to individuals adjudicate delinquent under the Federal Juvenile Delinquency Act, and

we reverse the directive that S.E. must register under the Act.[4]

II.

A. Federal Juvenile Delinquency Act ("FJDA")

The Federal Juvenile Delinquency Act ("FJDA") sets forth the procedures governing federal juvenile adjudications. 18 U.S.C. § 5031 *et seq*. "The purpose of the FJDA is to 'remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.'" *United States v. Doe*, 94 F.3d 532, 536 (9th Cir. 1996) (internal citation omitted); *see also In re Sealed Case* (*Juvenile Transfer*), 893 F.2d 363, 367 (D.C. Cir. 1990) (noting that the FJDA's "underlying purpose is to rehabilitate, not to punish, so as 'to assist youths in becoming productive members of our society'") (quoting S. Rep. No. 1011, 93d Cong., 2d Sess. 22 U.S. Code Cong. & Admin. News 1974 p. 1267 (1974)). The FJDA, accordingly, provides that information about juvenile delinquency proceedings "shall be safeguarded from disclosure to unauthorized persons." 18 U.S.C. § 5038(a). This ensures that "a juvenile delinquent for whom there is some hope of rehabilitation [does] not

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[4] SORNA also requires all individuals convicted of qualifying offenses under state law to register as sex offenders. *See* 42 U.S.C. § 16911(6). The effect of this requirement upon former juvenile offenders varies state by state, in light of preexisting law. Because this appeal concerns the effects of SORNA upon an individual adjudicated delinquent under the FJDA, we limit our discussion to individuals adjudicated delinquent in the federal system. We do not express any opinion regarding the constitutionality of SORNA's registration requirements vis-a-vis individuals adjudicated delinquent in any particular state juvenile proceedings.

receive the stigma of a criminal record that would attach to him throughout his life." *United States v. Three Juveniles*, 61 F.3d 86, 88 (1st Cir. 1995) (quoting S. Rep. No. 1989, 75th Cong., 3d Sess. 1 (1938)). "The confidentiality provisions of the Act are therefore quite essential to the Act's statutory scheme and overarching rehabilitative purpose." *Three Juveniles*, 61 F.3d at 88. Such provisions include, among other things, the mandate that "neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." 18 U.S.C. § 5038. Although the FJDA specifies limited circumstances in which records about juvenile delinquency proceedings may be released to certain officials for law enforcement, judicial, or treatment purposes, it mandates that information from delinquency proceedings "may not be released when the request for information is related to an application for employment . . . or any civil right or privilege." *Id.*

B. Sex Offender Registration and Notification Act ("SORNA")

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act, 42 U.S.C. § 16901 *et seq.*, which includes the Sex Offender Registration and Notification Act ("SORNA"). SORNA was enacted "[i]n order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators" against seventeen named victims of sex crimes. 42 U.S.C. § 16901. SORNA "establishes a comprehensive national system for the registration of [sex] offenders," *id.*, and requires anyone convicted of specified crimes, including aggravated sexual abuse, to register with the national sex offender registry. 42 U.S.C. § 16911(4)(A)(i). SORNA defines convic-

tions to include juvenile delinquency adjudications of aggravated sexual abuse if the offender is fourteen years of age or older at the time of the offense. 42 U.S.C. § 16911(8).

Congress delegated to the Attorney General the decision whether SORNA should apply retroactively to sex offenders who were convicted before the statute's effective date. 42 U.S.C. § 16913(d). Congress gave the Attorney General no instruction regarding whether SORNA should apply retroactively or not, and certainly gave no indication to the Attorney General that if applied retroactively to adults, it should be so applied to juveniles as well. Exercising the delegated authority, the Attorney General promulgated a regulation that renders SORNA applicable to "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3 (2007). The regulation went into effect immediately as an interim rule, without providing for a notice and comment period in advance of SORNA's retroactive application. Office of the Attorney General, Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894-01, 8896-97 (Feb. 28, 2007). The regulation contains no exception for persons adjudged juvenile delinquents, and it does not appear that the Attorney General considered any such exception. Indeed, there is no indication that the Attorney General, in determining the scope of SORNA's retroactivity, gave any consideration at all to the special circumstances of juveniles who had been adjudicated delinquent under a different—and largely confidential—judicial system, or to the societal costs versus benefits of applying SORNA's juvenile registration requirement retroactively. *See generally* 72 Fed. Reg. 8894-01.

III.

A statute or regulation that imposes retroactive punishment violates the constitutional prohibition on the passage of ex post facto laws. U.S. Const. Art. I § 9, cl. 3; *Doe*, 538 U.S. at 92. The application of SORNA, enacted in 2006, to S.E., who was found delinquent in 2005, is clearly retroactive. *See* 28 C.F.R. § 72.3 (applying SORNA "to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act").

The question we must answer then is whether the application of SORNA's juvenile registration provision is punitive.

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [Congress's] intention to deem it 'civil.'

Doe, 538 U.S. at 92 (internal citations and quotation marks omitted). S.E. has properly not disputed that in enacting SORNA, Congress intended to establish a civil regulatory scheme rather than a criminal one. We must then inquire whether SORNA's juvenile registration provision is nevertheless punitive because (a) its purpose is to punish or (b) its effect is clearly shown to be punitive. *Doe*, 538 U.S. at 92-93. Whether SORNA was passed with a punitive purpose, or whether the Attorney General applied SORNA retroactively in order to punish

past conduct, has not been answered in our circuit.[5] Because, however, we need not answer that question and because S.E. conceded at oral argument that Congress's intent was not punitive, despite arguing to the contrary in his briefs, we will assume for the purposes of this case, without deciding the issue, that the answer is no.

Congressional intent, and even the Attorney General's, notwithstanding, we will find an ex post facto violation if the *effect* of SORNA's juvenile registration provision is punitive. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The Supreme Court has explained that, "[b]ecause we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty . . . . " *Doe*, 538 U.S. at 92 (citation and quotation marks omitted). The requirement of "clearest proof" is not, however, a requirement that the petitioner present evidence in the record regarding the effects of the statute *as applied to him*. "Instead, courts must evaluate the question [whether a statute is punitive] by reference to a variety of factors considered *in relation to the statute on its face*." *Seling v. Young*, 531 U.S. 250, 262 (2001) (quotation and quotation marks omitted) (emphasis added).

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[5] *Doe* does not foreclose the argument that SORNA was enacted with a punitive legislative intent, as that case considered an Alaska state law with a different legislative history. We are not, of course, bound by district court rulings that SORNA is regulatory and not punitive. *See, e.g., United States v. LeTourneau*, 534 F. Supp. 2d 718, 721 (S.D. Tex. 2008) (finding no ex post facto violation and citing other district court cases coming to the same result).

Indeed, when an individual challenges a new law, such as SORNA was at the time this case began, it would appear to be impossible for him to develop a record which contains the "clearest proof" of the punitive effects that the law will have upon him or indeed upon others. Certainly, we would not require S.E. to suffer and then document the ill effects of SORNA's juvenile registration provision before permitting a challenge to its retroactive application. We interpret the "clearest proof" requirement in the only way that is sensible: that the terms of the statute, the legal obligations it imposes, the practical and predictable consequences of those obligations, our societal experience in general, and the application of our own reason and logic, establish conclusively that the statute has a punitive effect.

In considering whether the statute has a punitive effect, we refer to the factors first set forth in *Kennedy v. Mendoza-Martinez*:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of a scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (internal citations omitted). These factors, while helpful, are "neither exhaustive nor dispositive, but are

useful guideposts." *Doe*, 538 U.S. at 97 (internal citations and quotation marks omitted). Here, as in *Doe*,

> [t]he factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Id.[6]

Before applying this legal framework, we consider the extent to which the Supreme Court's decision in *Doe* controls the outcome of the present case. The Supreme Court in *Doe* applied the *Mendoza-Martinez* factors and concluded that the retroactive application of Alaska's Sex Offender Registration Act ("the Alaska statute") to adult sex offenders did not have a punitive effect, and therefore did not violate the Ex Post Facto Clause. It would be tempting to conclude, without looking carefully at the special circumstances of former juvenile offenders, that in light of *Doe*, sex offender registration by its nature does not constitute punishment. *Doe* does not,

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[6] Here, as in *Doe*,

> The two remaining *Mendoza-Martine*z factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case. The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

Id. at 105.

however, mandate that result, and the case before us presents substantially different facts and issues that significantly affect our analysis, and which govern our understanding of how the Constitution must be applied. For both similar and different reasons, *Doe* is not dispositive of the reporting provisions.

Historically, our country has had two separate systems of justice, one for adults and the other for juveniles. The criminal justice system that applies to adults is fundamentally a public one. We view its public nature as an essential protection for the rights of both the defendant and society at large. As *Doe* explains, "[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Id*. at 99. Our requirement of "*public* indictment, *public* trial, and *public* imposition of sentence," *id.* (emphasis added), is central to our vision of a punitive system that is fair and just.

Juvenile adjudications, by contrast, by and large take place outside the public domain. We have historically made the decision to shield juvenile offenders from the public eye—both from the protections that public scrutiny provides against government oppression, and from the burdens that public scrutiny imposes through the stigmatization of those convicted of crimes. As Chief Justice, then Justice, Rehnquist explained, "[i]t is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the [nineteenth] century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring). Juveniles are denied

certain procedural rights afforded to adult criminal defendants, including a public trial by jury,[7] but they are, in turn, beneficiaries of an adjudicatory system designed, though not always successfully, to rehabilitate rather than punish—a system ill-suited to public exposure. There are some exceptions to confidentiality in juvenile proceedings, which we will describe further below. However, our juvenile justice system from its origins was established in order to make the child "feel that he is the object of [the state's] care and solicitude," and that he would "be treated and rehabilitated" through "clinical" procedures "rather than punitive" ones. *Gault*, 387 U.S. at 15-16. The FJDA, which governs juvenile proceedings, is for that reason designed "to 'remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.'" *United States v. Doe*, 94 F.3d at 536 (quoting *United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990) (citations omitted)). Our punitive system is public; our rehabilitative system for juveniles, quite deliberately, is not.

In light of these two different systems of justice—one public and punitive, the other largely confidential and rehabilitative—the impact of sex offender registration and reporting upon former juvenile offenders and upon convicted adults differs in ways that we cannot ignore. According *Doe* its full precedential weight, we

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[7] Due process does attach to juvenile proceedings. *In re Gault*, 387 U.S. 1, 30 (1967). However, there is no constitutional requirement "that juvenile proceedings be by indictment or jury trial." *United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir. 2000) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971)) (jury trial not constitutionally required in juvenile proceeding); *United States v. Indian Boy X*, 565 F.2d 585, 595 (9th Cir. 1977) (indictment not required in juvenile proceeding).

are nonetheless compelled to conclude here that the effect of the retroactive application of SORNA's juvenile registration and reporting requirements is different both in nature and degree than the retroactive application of Alaska's statute to adult offenders.[8] We are also compelled to conclude, for what it's worth, that it would be a breach of faith to those young persons, some of whom are now elderly, who voluntarily accepted status as a juvenile delinquent believing that their juvenile offense would not later be made known to the world at large.

A. Affirmative disability or restraint

We begin by considering whether the retroactive application of SORNA's juvenile registration provision "imposes an affirmative disability or restraint." *Doe*, 538 U.S. at 97. We look to "how the effects of [SORNA's juvenile registration provision] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 99-100. Because we conclude that the retroactive application of SORNA's juvenile registration provision imposes a dis-

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[8] Our reasons for distinguishing *Doe* apply as well to *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) and *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004). *Russell* and *Hatton* rejected Ex Post Facto challenges to sex offender registration requirements for those convicted of sex offenses *as adults*. Neither discussed whether the registration requirements would be punitive if imposed on those adjudicated delinquent in the juvenile justice system, nor did they address the contrasting approaches to privacy/publicity in the juvenile and adult systems. In fact, the *Russell* court specifically recognized that "[t]he information collected and disseminated by the Washington statute is already fully available to the public . . . ." *Russell*, 124 F.3d at 1094 (rejecting offenders' contention that the registration and notification requirements violated their right to privacy).

ability that is neither "minor" nor "indirect," but rather severely damaging to former juvenile offenders' economic, social, psychological, and physical well-being, this factor strongly supports a determination that the statute's effect is punitive.[9] In fact, given the degree of damage former juvenile offenders may suffer in their adult lives by the retroactive application of the statutory requirement, we conclude that this factor is by far the most compelling in our analysis.

We recognize, of course, that the Supreme Court in *Doe* concluded that the retroactive application of the Alaska statute did *not* impose an "affirmative disability or restraint" upon adult sex offenders sufficient to constitute punishment. The Court reasoned that "[t]he Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint," *Doe*, 538 U.S. at 100; that "[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record," *id.* at 100-01; that the statute did not impose an in-person registration requirement, *id.* at 101; and that the requirements of registration are less onerous than the conditions of probation and supervised release,

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[9] Although we conclude that SORNA imposes a severe disability, we do not agree that SORNA "redefines a juvenile adjudication and makes it a conviction," as S.E. argues. For the purposes of SORNA, certain juvenile adjudications are included within the definition of a "conviction." SORNA does not, however, in any other way convert a juvenile delinquency finding into a conviction, and individuals who have been adjudicated delinquent are not felons or convicted criminals for any non-SORNA purpose.

id. The Supreme Court's conclusion must be understood, however, in the context of the public criminal justice system. The burden of sex offender registration upon a former juvenile offender is substantially, and decisively, different.

The key word in our analysis is "impose." To *impose* a disability is to place a disability on an individual where none previously existed. In the Alaska case, the statute did not impose disadvantages "that would not have otherwise occurred." *Id.* at 100. There, the stigma and disadvantages derived "not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id*. at 101. *Doe* emphasized that it would be mere "conjecture" to conclude that the publication of sex offenders' information on the internet would impose a *new* barrier to their ability to find employment or housing, as landlords and employers could already conduct background checks and discover adult offenders' criminal history, which is public information. *Id.* at 100. The Court likened the registration and notification provisions of the Alaska statute to "a visit to an official archive of criminal records." *Id*. at 99. The Court did not dispute that "substantial occupational or housing disadvantages" would result from the public's awareness of a defendant's status as a sex offender; indeed, it noted that "the public availability of the information may have a lasting and painful impact on the convicted sex offender . . . ." *Id*. at 101. It held, however, that there was no proof that these damages "would not have otherwise occurred" as a result of the previous availability of the same information. *Id*. at 100.

Here, the precise opposite is true. SORNA's juvenile registration provision imposes all the conditions that the

Supreme Court found the Alaska statute did not impose. None of the consequences that former juvenile offenders suffer as a result of the retroactive application to them of SORNA were imposed on adult offenders by virtue of the Alaska statute. Although the information in the registry at issue in *Doe* was already public knowledge, information about federal juvenile delinquency adjudications was not. Such information is, in the case of juveniles, ordinarily confidential and may not under most circumstances be disclosed to employers, landlords, or the general public. 18 U.S.C. § 5038 ("Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an application for employment . . . or any civil right or privilege.").

Confidentiality in juvenile proceedings is not absolute, but it is generally carefully protected: The norm in juvenile delinquency adjudications is closed proceedings and sealed records.[10] Such confidentiality has historically been one of the most significant factors differentiating juvenile adjudications, which are designed to be rehabilitative, from adult criminal proceedings, which are designed to be punitive. District judges do have discretion to open juvenile proceedings and unseal portions of the record of juvenile adjudications under the FJDA, and disclosure to certain authorized persons for certain enumerated purposes is permitted. 18 U.S.C. § 5038(a). However, judges may not expose all juvenile proceedings to public scrutiny as a general practice. They are charged, rather, with "the delicate task of weighing the

[10] Indeed, the district judge stated on the record at S.E.'s revocation hearing that "this is a juvenile proceeding. Consequently, it is closed to members of the public."

interests of the juvenile and the public . . . in each case." *United States v. A.D.*, 28 F.3d 1353, 1361 (3rd Cir. 1994).[11] Moreover, the *identity* and the *image* of the juvenile may not be publicly disclosed even in cases in which the proceedings are opened or some of the documents from the case are released: The FJDA mandates that "neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." 18 U.S.C. § 5038(e). Thus, even in those cases in which the court decides to open the juvenile proceedings to those who wish to attend the trial, the juvenile defendant is not generally exposed to much more public awareness of his identity and criminal conduct than in the ordinary instance when his trial is closed. It is clear that a large-scale release of juvenile records of the magnitude authorized by SORNA, and the ensuing public display of those records on the internet, was prohibited under federal law as it existed prior to the passage of SORNA, and will have a significant and adverse life-long impact upon the individuals affected.

SORNA's juvenile registration provision, therefore, does not merely provide for further public access to information already available; it makes public information about sex offenders that would otherwise permanently remain confidential and exposes persons who were adjudicated delinquent years before to public humiliation and ignominy for the first time. It also seriously jeopardizes the ability of such individuals to obtain employ-

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[11] *See also United States v. Eric B.*, 86 F.3d 869, 879 (9th Cir. 1996) (applying the *A.D.* balancing test); *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995) (adopting the Third Circuit's approach but noting that closed juvenile proceedings are the "norm").

ment, housing, and education.[12] The registration and notification system here cannot be compared to a visit to a criminal archive, as such a visit would yield no information about juvenile adjudications. The disadvantages that flow to former juvenile offenders on account of having a public record as sex offenders must be attributed to SORNA alone.

Under SORNA, moreover, individuals who *twenty or thirty years ago* pled true to acts of juvenile delinquency —and who did so with the expectation that their adjudication would remain confidential—may, decades later, be required to publicly expose that information to friends, family, colleagues, and neighbors. Indeed, most of those affected by the retroactive application of

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[12] As Justice Souter explained, concurring in *Doe*,

> [T]here is significant evidence of onerous practical effects of being listed on a sex offender registry. See, e.g., *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997) (noting "numerous instances in which sex offenders have suffered harm in the aftermath of notification-ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson"); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) ("The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of 'vigilante justice' are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them"); Brief for Office of the Public Defender for the State of New Jersey et al. as Amici Curiae 7-21 (describing specific incidents).

Doe, 538 U.S. at 109 n.* (Souter, J., concurring).

SORNA's juvenile registration provision are not juveniles but adults. Many of these individuals have for many years led entirely law-abiding and productive lives that may be dramatically disrupted by the registration requirements. Some, had they known that they would years later be subject to registration requirements, might not have pled true to the charges at all.

Beyond these societal consequences of public registration as a sex offender, SORNA imposes additional administrative burdens in the form of "periodic in person verification." 42 U.S.C. § 16916 ("[A] sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered."). In upholding the retroactive application of Alaska's statute, the Court in *Doe* explicitly noted that the statute did not mandate in-person registration. *Id.* at 101. Every former juvenile offender subject to SORNA, by contrast, must register in person four times a year for at least 25 years.[13] This requirement for appearances every three months before law enforcement officials is neither "minor" nor "indirect." *Doe,* 538 U.S. at 99-100. Every three months, the former juvenile offenders will be required to be absent from work, appear before public officials, and publicly reaffirm that they

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[13] *See* 42 U.S.C. § 16911(8) (applying SORNA only to juvenile offenses comparable to, or more severe than, aggravated sexual assaults); § 16911(4)(A)(i) (defining aggravated sexual assaults as Tier III offenses); § 16915(a)(3) (providing that Tier III offenders must register for life); § 16915(b)(2)(B) (providing that juvenile offenders may seek a reduction of their registration requirement after 25 years, if they keep a "clean" record); § 169161(3) (requiring Tier III offenders to verify registration information, in person, every three months).

are guilty of misdeeds that were previously protected from disclosure.[14]

Because SORNA's juvenile registration provision, retroactively applied to former juvenile offenders, imposes a serious disability by making public otherwise confidential delinquency records relating to sexual offenses, and because the in-person registration requirement is substantially burdensome, SORNA's juvenile registration provision imposes an onerous "affirmative disability or restraint" on former juvenile offenders. *Mendoza-Martinez*, 372 U.S. at 168. As we have already stated, this factor weighs heavily in support of a finding that SORNA's juvenile registration requirement has a punitive effect. Given the severity of its burdens, it would be difficult to reach any other conclusion.

B. Historical treatment

We next consider whether requiring former juvenile sex offenders to register and report to law enforcement regularly is an historical means of punishment. The fact that sex offender registration and notification statutes "are of fairly recent origin," *Doe,* 538 U.S. at 97, suggests, initially, that it is not. *Doe* held that the apparent similarity between sex offender registration and early forms of shaming punishments is "misleading," *Id*. at 98, and explained that

> the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, *most of which is already public*. Our sys-

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[14] *See, e.g.*, Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* 74 (Sept. 2007), *available at* http://www.hrw.org/sites/default/files/reports/ us0907webwcover.pdf.

> tem does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, *our criminal law tradition insists on public indictment, public trial, and public imposition of sentence*. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

Id. at 98-99 (emphasis added). We are struck, once again, by the vastly different situation of adult criminal defendants from that of juvenile offenders, and of the corresponding difference in the effect of registration upon the two groups. As *Doe* recognizes, adult criminal proceedings have long been a matter of public record, and indeed the right to a public trial in all criminal prosecutions is fundamental under our Constitution. U.S. Const. Amend. VI. Full disclosure of the offense and the offender is an integral part of our punitive system. The public availability of information is *not*, however, a traditional part of the rehabilitative juvenile justice system. In fact, quite the opposite is true. A core distinguishing feature of the juvenile justice system has historically been that juveniles are, with certain exceptions, permanently shielded from the public eye. The federal juvenile justice system was designed precisely in order to "remove juveniles from the ordinary criminal process in

order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation." *Doe*, 94 F.3d at 536 (quotation marks omitted).

Historically, information from juvenile adjudications has been made public only when a juvenile's case is transferred to adult criminal court for *punitive purposes*. Beyond the exceptions to confidentiality in juvenile proceedings detailed *supra* in Part III.A, there are a select number of juveniles who are prosecuted publicly. In certain circumstances, courts transfer such cases to adult court, shifting the juvenile out of a rehabilitative system entirely and into a punitive one. Under federal law, courts evaluate several factors when determining whether a juvenile will be treated as an adult, including the prior record of the offender, his response to past treatment, and the nature of the offense. 18 U.S.C. § 5032. Courts may give special weight to "the heinous nature of the crime," *United States v. Doe*, 94 F.3d at 536-37, and must strike a balance "between providing a rehabilitative environment for young offenders as well as protecting society from violent and dangerous individuals and providing sanctions for anti-social acts." *Id.* (quoting *United States v. E.K.*, 471 F. Supp. 924, 932 (D. Oregon 1979)). A court's decision to send a juvenile to adult court is thus based in part on a prediction that rehabilitation is improbable. *See United States v. Alexander*, 695 F.2d 398, 401 (9th Cir. 1982). A decision that a juvenile is beyond rehabilitation is a decision to expose him to the punitive elements of adult court, including the publication of his criminal record.

Although SORNA does not transfer a juvenile to adult court, it does make public the record of an otherwise confidential juvenile adjudication. Creating a pub-

lic record of a federal juvenile offense is something that, historically, has been done only after the court's determination that the juvenile's case merits punishment, rather than rehabilitation. In short, the public disclosure mandated by SORNA's juvenile registration provision is historically a central feature of a punitive rather than a rehabilitative system of justice. Still, in the end, we cannot say that this factor weighs in favor of holding the juvenile registration and notification provisions to be punitive in nature.

C. Traditional aims of punishment

We turn next to whether SORNA promotes the traditional aims of punishment—in particular, the aim of retribution. *See Mendoza-Martinez*, 372 U.S. at 168-69. As stated previously, we decline to rest our holding in this case on whether SORNA was enacted with a punitive intent. Nevertheless, whether SORNA "will promote . . . retribution," *id.*, is tied to the question whether Congress enacted SORNA with the goal of retribution in mind. In this light, we will consider whether SORNA's text and history suggest that the disadvantages imposed are purely regulatory, or were designed, at least in part, in order to promote the traditional aims of punishment, and thus whether SORNA serves that purpose.

As we do so, we are aware both of the Supreme Court's decision in *Doe*, and of the inflamed public sentiment against sex offenders that served as the historical backdrop for SORNA's passage. Justice Souter, concurring in *Doe*, saw the question of Alaska's legislative intent as a close one. He explained:

> It would be naive to look no further [than to the regulatory goal of public safety], given pervasive aptitudes toward sex offenders. The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Doe, 538 U.S. at 109 (Souter, J., concurring in the judgment) (internal citations omitted). SORNA's legislative history suggests that precisely such a retributive aim contributed to its passage—and more overtly than in the "close case" of *Doe*. *See id.* at 107. Unlike Alaska's statute, which contained no legislative purpose statement and was passed pursuant to legislative findings that focused solely on public safety, SORNA's legislative purpose statement reveals an additional goal: to respond to the heinous crimes committed by sex offenders. SORNA was enacted "[i]n order 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* . . . ." 42 U.S.C. § 16901 (emphasis added). The statute subsequently lists seventeen individual victims and details the crimes that were committed against them, strongly suggesting that the motivation behind SORNA's passage was not only to protect public safety in the future but also to "revisit past crimes." *Doe*, 538 U.S. at 109 (Souter, J., concurring in the judgment). Senator Grassley's floor

statement similarly reflects a retributive sentiment that colored the legislative proceedings: "Child sex offenders are the most heinous of all criminals. I can honestly tell you that I would just as soon lock up all the child molesters and child pornography makers and murderers in this country and throw away the key." 152 Cong. Rec. S8012, S8021 (daily ed. July 20, 2006) (statement of Sen. Grassley).

The purpose of the Ex Post Facto Clause is to prevent the passage of "potentially vindictive legislation." *Doe*, 538 U.S. at 109 (Souter, J., concurring in the judgment) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)) (internal quotation marks omitted). SORNA's legislative text and history contain substantial warning signs that its aim, while principally regulatory, to be sure, is also in some measure punitive.

D. Non-punitive purpose and excessiveness

We next consider whether SORNA's juvenile registration provision has a non-punitive purpose and, if it does, whether the requirement is excessive in relation to that goal. We must determine "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell v. Wolfish*, 441 U.S. 520, 538 (1978). If the statute is reasonably related to a non-punitive purpose then the statute is not usually considered punitive. *Id*. at 539. However, it is more likely to be punitive if it "appears excessive in relation to the alternative purpose assigned." *Mendoza-Martinez*, 372 U.S. at 169.

In *Doe*, the Court held that the Alaska statute had a nonpunitive purpose: improving public safety. 538 U.S. at 102. Undeniably, SORNA, too, was enacted in order

to achieve that regulatory aim. Whether the means that it employs in order to achieve that purpose are excessive, however, is a distinct—and a close—question. Although *Doe* sets a stringent standard for excessiveness, there are valid and serious concerns both with the utility and with the extreme consequences of SORNA's juvenile offender registration requirement that warrant review.

On the one hand, Congress has extended SORNA's juvenile registration requirement to only a portion of those who were adjudicated delinquents: those who were "14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . . ." 42 U.S.C. § 16911(8). There was a debate in the Senate regarding whether SORNA should apply to juveniles at all, and if so to what extent. The result appears to have been a compromise.[15]

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[15] Ranking Judiciary Committee member Senator Leahy explained,

> This bill correctly allows the States, in many cases, to use their expertise—and they know more about these issues than we do here in Washington—to decide which juveniles should be on sex offender registries, to what extent, and for how long. It also appropriately requires the States to include the most egregious juvenile offenders, who do represent a threat to others, on their sex offender registries. I think the bill goes too far in a few cases in limiting States' discretion to determine which juveniles should be placed on registries and to allow those juvenile offenders who have lived cleanly and turned their lives around to get off of registries. But overall, this bill strikes an acceptable balance on this issue, and I am glad that those of us who were concerned about appropriate deference to the expertise of the States spoke out and were heard to some extent.

152 Cong. Rec. S8012-02, S8027 (daily ed. July 20, 2006) (statement of Sen. Leahy).

On the other hand, even compromises may be excessively harsh. Given the low risk that former juvenile sex offenders pose to public safety and the lifetime confidentiality that most former juveniles would otherwise enjoy, retroactively applying SORNA's juvenile registration provision is an exceptionally severe means of achieving the statute's nonpunitive goal.

In *Doe*, the Supreme Court held that the sex offender registration requirement was not excessive in light of its regulatory purpose, in part because sex offenders have a "high rate of recidivism," are dangerous "as a class," pose a danger to the public that is "frightening and high," and "are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." 538 U.S. at 103 (citations omitted).[16]

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[16] Justice Ginsburg strongly disagreed:

> What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose . . . . [T]he Act has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community. But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex

There is no evidence, however, that the "high rate of recidivism" at issue in *Doe* is shared by juvenile offenders. Studies cited in the legislative history of this bill indicate that the recidivism rates for juvenile offenders are significantly lower than for adult offenders. *See* 152 Cong. Rec. S8012-02, S8023 (daily ed. July 20, 2006) (statement of Sen. Kennedy) ("For juveniles, the public notification provision in this bill is harsh given their low rate of recidivism, which is less than 8 percent according to the most recent studies."); Coalition for Juvenile Justice, Comments in Opposition to Interim Rule RIN 1.105 —AB22, 3 (2007) (citing study showing 5 to 14% recidivism rate for juveniles, as compared to 40% rate of recidivism for adults); Human Rights Watch, *supra*, at 69-70 (listing studies finding low recidivism rates among juvenile sex offenders). Research suggests, moreover, that only a small portion of adult sex offenders previously committed sex offenses as juveniles. *See* Human Rights Watch at 70.

These statistics are not surprising. Juveniles are as a general matter less mature, more impulsive, and more confused about sexually appropriate behavior than adults. They do not understand their sexual drives as well or know how to deal with them. We do not, of course, excuse such conduct as mere juvenile exuberance. We simply recognize that the predictive value of an individual's conduct, especially sexual conduct, at the age of fourteen or fifteen is, under most circumstances, limited. For that reason, requiring former juvenile sex

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> offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

Doe, 538 U.S. at 116-17 (2003) (Ginsburg, J., dissenting) (citations and footnote omitted).

offenders to register as such many decades thereafter will often not only be unnecessary to secure the safety of the community but may even be counterproductive.

It is worth noting that, in practice, those who are primarily affected by SORNA's retroactive application to former juvenile offenders are not the most likely to recidivate—they are, rather, those adults who are forced to register *solely* because they committed an offense as a juvenile, but who have lived the rest of their adult lives without committing another such crime. Adults who re-offended in the past after their initial juvenile offense are required to register in any event by SORNA's retroactive application to *adult* sex offenders, and adults who re-offend in the future are required to register by SORNA's basic provisions.

In addition to the personal toll on those who are labeled as sex offenders, registration of former juvenile offenders undermines the rehabilitative goals of our juvenile justice system as a whole, and derails the historical effort to avoid permanently or publicly stigmatizing juveniles as criminals. It may also seriously affect the lives of the spouses and children of these former juvenile sexual offenders. Sacrificing confidentiality and lessening the chance of rehabilitation for former juvenile sex offenders who have not re-offended are severe measures to aid in achieving public safety, in light of the importance of the contravening interests and the relatively low risk that such offenders pose to the community. Indeed, the severity of the measures may well increase the risk of recidivism within a population that otherwise has the greatest potential for rehabilitation.

Notwithstanding all this, we recognize that "[t]he excessiveness inquiry of our *ex post facto* jurisprudence

is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective." *Doe*, 538 U.S. at 105. Whether that test has been met here is a close and difficult question. To us, SORNA's effect on former juvenile offenders does "appear[] excessive in relation to the [non-punitive] purpose assigned." *Mendoza-Martinez*, 372 U.S. at 169. Recognizing the limited nature of our inquiry, however, as well as the Supreme Court's decision in *Doe*, we will not give much weight either way to this factor in making our ultimate determination.

IV.

The retroactive application of SORNA's provision requiring registration and reporting by former juvenile offenders imposes immense burdens, not only through onerous in-person registration and reporting requirements, but, more important, through the publication and dissemination of highly prejudicial juvenile adjudication records of individuals who have committed no offenses since their adolescence—records that would otherwise remain sealed. The juvenile registration requirement, for the first time under federal law, exposes thousands of former juvenile offenders to public notoriety and subjects them to lifetime condemnation and ostracism by their community. The effects of this exposure are wide-ranging, and likely include serious housing, employment, and educational disadvantages. Unlike in *Doe*, for former juvenile offenders generally these effects are solely attributable to SORNA. The publicity that once juvenile offenders, now law abiding adults, face is, moreover, something that has traditionally attached to juvenile

offenders only if they are transferred to an adult—and punitive—system. Historically, public exposure constitutes an integral part of a punitive and not a juvenile or rehabilitative regime. Additionally, while it is indisputable that SORNA was enacted as a regulatory measure in order to promote public safety, there is evidence that this non-punitive aim was mixed to some degree with a less evident desire for retribution as well. Finally, imposing the burdens of registration upon former juvenile offenders is a harsh measure in view of the low rate of recidivism for juvenile offenders and the importance of the countervailing goal of rehabilitation; it is a close question, however, whether it is excessive in light of Congress's non-punitive objectives. All this, of course, is in addition to the onerous requirement that these former juvenile offenders report in person every three months to law enforcement authorities for a large portion of their adult lives.

Although we are not bound by the *Mendoza- Martinez* factors, they prove useful to our analysis in this case. Taken together, they provide "the clearest proof," *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997), that the effect of the Attorney General's regulation that retroactively imposes SORNA's juvenile registration and reporting requirement upon former juvenile offenders who were found delinquent prior to the passage of the statute, is punitive. Of this, we are fully persuaded. The requirement serves to convert a rehabilitative judicial proceeding, sheltered from the public eye, into a punitive one, exposed for all to see, and with long-lasting substantially adverse and harsh effects. In some instances, the retroactive implementation of SORNA's provisions will most certainly wreak havoc upon the lives of those whose conduct as juveniles offended the funda-

mental values of our society but who, we hope, have been rehabilitated. For these reasons, we conclude that the retroactive application of SORNA's juvenile registration and reporting requirement violates the Ex Post Facto Clause of the United States Constitution.[17] We therefore VACATE the part of the judgment order that pertains to registration and reporting as a sex offender, and hold that S.E. may not constitutionally be obligated to register as a sex offender under SORNA.

VACATED in part and REMANDED in part.

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[17] *United States v. George*, 579 F.3d 962 (9th Cir. 2009), addressed an ex post facto challenge to SORNA's criminal provisions from an adult defendant who was convicted of a sex offense prior to SORNA and then convicted under SORNA for failure to register. *Smith v. Doe* had already established that under SORNA adults may be constitutionally required to register as sex offenders based on pre-SORNA convictions, 538 U.S. 84 (2003), and *George* did not consider the separate issue we decide here, whether juvenile offenders may be constitutionally required to register based on pre-SORNA adjudications. In any event, George was lawfully required to register as a sex offender as a condition of his pre-SORNA plea agreement. George argued that his failure to register was a one-time event that took place before SORNA took effect, and therefore his conviction for violating SORNA amounted to an unconstitutional retrospective application of a criminal law. We held otherwise, stating, *inter alia*, that George, whose initial requirement to register was lawful, violated the law not only when he failed to comply but as long thereafter as he continued to fail to do so. In short, we held that when there is a lawful obligation to register, that obligation is a continuing one. George's offense of not registering continued from SORNA's passage on, and SORNA's imposition of criminal liability for the post-SORNA conduct raised no ex post facto issue. *George* does not affect our decision here. Because Juvenile Male (S.E.) could not lawfully be required to register on the basis of his pre-SORNA conduct, and that was the only improper sexual conduct with which he was charged, he did not, under our decision here, violate any lawful requirement of SORNA. As there was no obligation on S.E.'s part to register, there was, of course, no continuing obligation to do so.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

No. CR 05-54-GF-SEH (JUV)

UNITED STATES OF AMERICA, PLAINTIFF

v.

S.E., DEFENDANT

[Filed: July 26, 2007]

ORDER

A hearing to determine whether the juvenile, S.E., violated the terms of his probation was held on July 26, 2007. The juvenile admitted violating the terms of his probation.

ORDERED:

1. The Court finds by clear and convincing evidence that the juvenile, S.E., has violated the following term of his probation:

   a. Special condition number 5 which requires that the juvenile reside in a federally-approved prerelease center.

2. In accordance with the Federal Juvenile Delinquency Act, it is adjudged that Juvenile Delinquent Supervision is revoked. Disposition is made under 18 U.S.C. § 5037 after considering the statutory provisions, the Chapter 7 Policy Statements and guideline range, and all of the circumstances of the current violations. It is the judgment of the Court that Juvenile, S.E., be committed to the custody of the United States Attorney General for a six (6) month term of official detention. It is recommended that Juvenile be placed in a facility that provides the most comprehensive array of correctional programming and rehabilitation services for juveniles. It is recommended that Juvenile have access to an accredited education program, healthcare, mental health counseling including anger management and sex offender counseling, chemical dependency counseling, moral recognition therapy, life skills development, employment training, spiritual programming sensitive to American Indian culture, visitation with family, and release/aftercare planning.

3. Following release from official detention, Juvenile shall be placed on Juvenile Delinquent Supervision until Juvenile's 21st birthday on May 2, 2008. Within 72 hours of release from custody of the Attorney General, Juvenile shall report in person to the United States Probation Office in the district to which he is released.

4. While on supervision, Juvenile shall not commit another federal, state, or local crime, shall not possess a controlled substance, and shall be prohibited from owning, using or being in constructive possession of firearms, ammunition, or other dangerous devises while on supervision and any time after the completion of the

period of supervision, unless granted relief by a delegate of the Secretary of the Treasury.

5. Further, Juvenile shall comply with the standard conditions of release as recommended by the United States Sentencing Commission, and which have been adopted by this Court. Juvenile shall also comply with the following special conditions:

a. Juvenile shall register in person as a sex offender with local/tribal/county law enforcement in the jurisdiction in which he resides, is employed, and is a student within three (3) business days of Juvenile's arrival in that jurisdiction.

b. Juvenile shall, not later than three (3) business days after each change of name, residence, employment, and/or student status, appear in person in at least one jurisdiction in which he is required to register to report such changes.

c. If required to register as a sex offender under the Adam Walsh Child Protection and Safety Act of 2006, Juvenile shall submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a conditions of probation or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

d. Juvenile shall have no contact with the victim without permission of United States Probation Office.

e. Juvenile shall not be allowed to reside in the home, residence, or be in the company of any child under

the age of 18 without prior approval of United States Probation.

f. Juvenile shall enter and complete a sex offender treatment program as directed by and until released by the United States Probation Office. Juvenile shall abide by the policies of the program. Juvenile is to pay all or part of the costs of treatment as determined by the United States Probation Officer.

g. Juvenile shall abstain from the consumption of alcohol and shall not enter establishments where alcohol is the primary item of sale. This condition supersedes standard condition number 7 with respect to alcohol consumption only.

h. Juvenile shall participate in substance abuse testing, to include not more than 104 urinalysis tests and not more than 104 breathalyzer tests annually during the period of supervision. Juvenile is to pay all or part of the costs of testing as determined by the United States Probation Officer.

i. Juvenile shall participate in and complete a program of substance abuse treatment as approved by the United States Probation Office, until Juvenile is released from the program by the probation officer. Juvenile is to pay part or all of the cost of this treatment, as determined by the United States Probation Officer.

j. Juvenile shall not possess any materials depicting sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A)(i)-(v), including visual, auditory, telephonic, or electronic media, and computer programs or services.

DATED this 26th day of July, 2007.

/s/ SAM E. HADDON

SAM E. HADDON

United States District Judge

APPENDIX C

1. 18 U.S.C. 2241 provides:

Aggravated sexual abuse

(a) BY FORCE OR THREAT.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) BY OTHER MEANS.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly—

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) WITH CHILDREN.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) STATE OF MIND PROOF REQUIREMENT.—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that

the other person engaging in the sexual act had not attained the age of 12 years.

2. 18 U.S.C. 2250 provides in pertinent part:

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.

* * * * *

3. 18 U.S.C. 3563 provides in pertinent part:

Conditions of probation

(a) MANDATORY CONDITIONS.—The court shall provide, as an explicit condition of a sentence of probation—

* * * * *

(8) for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act

* * * * *

4. 18 U.S.C. 5037 provides in pertinent part:

Dispositional hearing

* * * * *

(d)(3) The provisions dealing with probation set forth in sections 3563 and 3564 are applicable to an order placing a juvenile on juvenile delinquent supervision.

* * * * *

5. 18 U.S.C. 5038 provides in pertinent part:

Use of juvenile records

(a) Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances:

(1) inquiries received from another court of law;

(2) inquiries from an agency preparing a presentence report for another court;

(3) inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position within that agency;

(4) inquiries, in writing, from the director of a treatment agency or the director of a facility to which the juvenile has been committed by the court;

(5) inquiries from an agency considering the person for a position immediately and directly affecting the national security; and

(6) inquiries from any victim of such juvenile delinquency, or if the victim is deceased from the immediate family of such victim, related to the final disposition of such juvenile by the court in accordance with section 5037.

Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. Responses to such inquiries shall not be different from responses made about persons who have never been involved in a delinquency proceeding.

* * * * *

(c) During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or

an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section to receive juvenile records.

* * * * *

(e) Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.

(f) Whenever a juvenile has on two separate occasions been found guilty of committing an act which if committed by an adult would be a felony crime of violence or an offense described in section 401 of the Controlled Substances Act or section 1001(a), 1005, or 1009 of the Controlled Substances Import and Export Act, or whenever a juvenile has been found guilty of committing an act after his 13th birthday which if committed by an adult would be an offense described in the second sentence of the fourth paragraph of section 5032 of this title, the court shall transmit to the Federal Bureau of Investigation the information concerning the adjudications, including name, date of adjudication, court, offenses, and sentence, along with the notation that the matters were juvenile adjudications.

6. 42 U.S.C. 16901 provides:

Declaration of purpose

In order 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, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

(1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing.

(2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey.

(3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas.

(4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa.

(5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.

(6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida.

(7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida.

(8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders.

(9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona.

(10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts.

(11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California.

(12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.

(13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004.

(14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998.

(15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002.

(16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later.

(17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

7. 42 U.S.C. 16911 provides in pertinent part:

Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

* * * * *

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18);

(ii) coercion and enticement (as described in section 2422(b) of title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[1] of title 18;

(iv) abusive sexual contact (as described in section 2244 of title 18);

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[1] So in original. The second closing parenthesis probably should follow "18".

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or

(ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnaping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

* * * * *

(6) Criminal offense

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

* * * * *

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18), or was an attempt or conspiracy to commit such an offense.

8. 42 U.S.C. 16912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

9. 42 U.S.C. 16913 provides in pertinent part:

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) 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)

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).

* * * * *

10. 42 U.S.C. 16914 provides:

Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Any other information required by the Attorney General.

(b) Provided by the jurisdiction

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

11. 42 U.S.C. 16915 provides:

Duration of registration requirement

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is—

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) the life of the offender, if the offender is a tier III sex offender.

(b) Reduced period for clean record

* * * * *

(2) Period

In the case of—

* * * * *

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this title, the period during which the clean record shall be maintained is 25 years.

(3) Reduction

In the case of—

* * * * *

(B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

12. 42 U.S.C. 16916 provides:

Periodic in person verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than—

(1) each year, if the offender is a tier I sex offender;

(2) every 6 months, if the offender is a tier II sex offender; and

(3) every 3 months, if the offender is a tier III sex offender.

13. 42 U.S.C. 16918 provides:

Public access to sex offender information through the Internet

(a) In general

Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public,

all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user. The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General.

(b) Mandatory exemptions

A jurisdiction shall exempt from disclosure—

(1) the identity of any victim of a sex offense;

(2) the Social Security number of the sex offender;

(3) any reference to arrests of the sex offender that did not result in conviction; and

(4) any other information exempted from disclosure by the Attorney General.

(c) Optional exemptions

A jurisdiction may exempt from disclosure—

(1) any information about a tier I sex offender convicted of an offense other than a specified offense against a minor;

(2) the name of an employer of the sex offender;

(3) the name of an educational institution where the sex offender is a student; and

(4) any other information exempted from disclosure by the Attorney General.

(d) Links

The site shall include, to the extent practicable, links to sex offender safety and education resources.

(e) Correction of errors

The site shall include instructions on how to seek correction of information that an individual contends is erroneous.

(f) Warning

The site shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. The warning shall note that any such action could result in civil or criminal penalties.

14. 42 U.S.C. 16921 provides:

Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program

(a) Establishment of Program

There is established the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program (hereinafter in this section referred to as the "Program").

(b) Program notification

Except as provided in subsection (c), immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:

(1) The Attorney General, who shall include that information in the National Sex Offender Registry or other appropriate databases.

(2) Appropriate law enforcement agencies (including probation agencies, if appropriate), and each school and public housing agency, in each area in which the individual resides, is an employee or is a student.

(3) Each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

(4) Any agency responsible for conducting employment-related background checks under section 5119a of this title.

(5) Social service entities responsible for protecting minors in the child welfare system.

(6) Volunteer organizations in which contact with minors or other vulnerable individuals might occur.

(7) Any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction.

(c) Frequency

Notwithstanding subsection (b), an organization or individual described in subsection (b)(6)or (b)(7) may opt to receive the notification described in that subsection no less frequently than once every five business days.

15. 42 U.S.C. 16925 provides:

Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under Subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing[1] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

(4) Funding reduction

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding reduction as specified in subsection (a).

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[1] So in original. Probably should be followed by a comma.

(c) Reallocation

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

(d) Rule of construction

The provisions of this subchapter 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.

16. 28 C.F.R. 72.3 provides:

Applicability of the Sex Offender Registration and Notification Act.

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdic-

tion in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under the 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.