Kansas Federal Public Defender

www.ks.fd.org

Federal Public Defender Melody Brannon
First Assistant Federal Public Defender Kirk Redmond

Kansas City Division Attorneys
Tom Bartee, Branch Chief
Daniel Hansmeier, Appellate Chief
Tim Burdick
David Magariel
Chekasha Ramsey
Laquisha Ross
David Magariel

October 13, 2020

David J. Karp
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
Washington, DC 20530

Via electronic submission

Re: Proposed rule on Registration Requirements Under the Sex Offender Registration and Notification Act, 85 Fed. Reg. 49332 (Document No. 2020-15804; RIN No. 1105-AB52)

Dear Mr. Karp:

The Department of Justice (the "Department") should reconsider its proposed rule on the registration requirements under the Sex Offender Registration and Notification Act (SORNA) for two overarching reasons. First, much of the proposed rule conflicts with SORNA's unambiguous text (as well as SORNA's history and purpose). Second, Congress's delegations within SORNA violate the nondelegation doctrine.

I. Much of the proposed rule conflicts with SORNA's text and purpose.

As the Department knows, it cannot impose its own construction of unambiguous statutory text. When "Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The Department must follow the statute's "commands as written"; it cannot "supplant those commands with others it may prefer." *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1355 (2018). And this is particularly true in the criminal context. *See*, *e.g.*, *Abramski v. United States*, 134 S.Ct. 2259, 2274 (2014) (rejecting agency interpretation of criminal statute as irrelevant because "criminal laws are for courts, not the Government, to construe"); *United States v. Apel*, 134 S.Ct. 1144, 1151 (2014) ("We have never held that the Government's reading of a criminal statute is entitled to any deference"). Thus, although Congress delegated to the Attorney General the authority to, *inter alia*, "issue guidelines and regulations to interpret and implement" SORNA, 34 U.S.C. § 20912(b), any such guidelines or

Kansas City Division
500 State Ave, Room 201
Kansas City, Kansas 66101
Tel 913.551.6712
Fax 913.551.6562

Topeka Division
117 SW 6th Ave, Ste 200
Topeka, Kansas 66603
Tel 785.232.9828
Fax 785.232.9886

Wichita Division
301 N Main, Ste 850
Wichita, Kansas 67202
Tel 316.269.6445
Fax 316.269.6175

regulations must not conflict with SORNA's text. The proposed regulations do just that. In four ways, they purport to define crimes Congress never envisioned, punishing sex offenders[1] in non-SORNA-compliant jurisdictions for the jurisdiction's noncompliance, and otherwise permitting the prosecution of sex offenders who are in full compliance with SORNA's registration requirements.

First, **proposed § 72.3 is inconsistent with 34 U.S.C. §§ 20919, 20924, and 20927.** Proposed § 72.3 includes language requiring sex offenders to comply with SORNA in jurisdictions where compliance is impossible ("All sex offenders must comply with all requirements . . . regardless of whether a jurisdiction in which registration is required has substantially implemented that Act's requirements or has implemented any particular requirement of that Act"). According to the proposed rule, "sex offenders can be held [criminally] liable for violating any requirement stated in this rule, regardless of when they were convicted, and regardless of whether the jurisdiction in which the violation occurs has adopted the requirement in its own law." 85 Fed. Reg. 49336.

But SORNA itself makes clear that Congress did not intend to hold **sex offenders** criminally liable in such circumstances. Rather, if a jurisdiction fails to comply with SORNA, Congress **punishes the jurisdiction** by withholding 10 percent of appropriated funds. 34 U.S.C. § 20927(a). There is no similar provision within SORNA **punishing a sex offender for a jurisdiction's failure to comply with SORNA**.

This point is reinforced by 34 U.S.C. § 20924 (entitled, "Actions to be taken when sex offender fails to comply"). In that provision, Congress provided that an "appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with **the requirements of a registry and revise the jurisdiction's registry** to reflect the nature of that failure." This provision requires the appropriate official to report violations of the "jurisdiction's registry" requirements (not violations of SORNA). If a jurisdiction is not in compliance with SORNA, a violation of SORNA might not violate the "jurisdiction's registry" requirements. And if not, the appropriate official need not notify the Attorney General or law enforcement of the sex offender's noncompliance with SORNA. This provision thus reinforces Congress's sensible conclusion that a sex offender should not be punished for a jurisdiction's failure to comply with SORNA. Indeed, if it were Congress's intent to punish sex offenders for a failure to comply with SORNA in non-SORNA-compliant jurisdictions, Congress could have used language like "the requirements of this subchapter," rather than "a registry," in § 20924. After all, Congress used the former language in other SORNA provisions. *See* 34 U.S.C. § 20912(a); 34 U.S.C. § 20913(e); 34 U.S.C. § 20925(b)(3); 34 U.S.C. § 20927(b)(2). "Congress generally acts intentionally

1 We use the term "sex offender" because Congress used that term to define individuals with prior sex offense convictions who are subject to SORNA. 34 U.S.C. § 20911(1). But a more accurate phrase would be individuals with *prior* sex offense convictions. These individuals are often "persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system." *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017). Many are individuals who "seek to reform and to pursue lawful and rewarding lives." *Id.* They might have once offended, but they are not current offenders of any laws.

when it uses particular language in one section of a statute but omits it in another." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019).

Section 20919 (entitled, "Duty to notify sex offenders of registration requirements and to register") drives home the point. That section places an initial "duty" on the government ("an appropriate official") to: (1) inform the sex offender of his duties under SORNA and explain those duties; (2) require the sex offender to sign a form acknowledging that he understands the registration requirement; and (3) "ensure that the sex offender is registered." With this provision, Congress placed the initial burden on the government not only to inform a sex offender of his obligation to register, but to ensure that the sex offender registers. If a sex offender in a non-SORNA-compliant jurisdiction cannot register, the "appropriate official" cannot "ensure that the sex offender is registered." The "appropriate official" cannot meet his "duty to notify" under § 20919. To permit a federal prosecution under such circumstances could not possibly be what Congress intended. Congress expected sex offenders to receive notice of SORNA's requirements and to have assistance in fulfilling those requirements. Congress could not have intended for sex offenders to be prosecuted in federal court in circumstances where § 20919's duty to notify is impossible.

Congress understood that § 20919 could not be implemented in some cases. In § 20919(b), it delegated to the Attorney General the authority "to prescribe rules **for the notification of sex offenders** who cannot be registered in accordance with subsection (a)." The Attorney General prescribed such rules in July 2008. 73 Fed. Reg. at 38062-38064. Those rules make clear that the burden is on the government to notify the sex offender of SORNA's registration requirements, and that the sex offender is not required to comply with SORNA until he receives such notification. *Id.* The rules instruct the jurisdictions "to phase in SORNA registration for such sex offenders," and that such sex offenders "must be registered by the jurisdiction when it implements the SORNA requirements in its system within a year for sex offenders who satisfy the tier I criteria, within six months for sex offenders who satisfy the tier II criteria, and within three months for sex offenders who satisfy the tier III criteria." *Id.* at 38063-38064. The proposed rule does not indicate an intent to rescind the July 2008 guidelines. Nor does it purport to be based on § 20919(b)'s delegation (that provision is not cited in the proposed rule). And § 20919(b) only permits the Attorney General to issue rules for the "notification of sex offenders." It does not permit the Attorney General to direct the prosecution of sex offenders when it is impossible for the government to meet its notification obligations. Yet, that is what proposed § 72.3 does.

It is clear that the Department understands all of this. The Department acknowledges the unfairness in holding sex offenders accountable for noncompliance where compliance is impossible. 85 Fed. Reg. 49336. Its solution is to propose that a defendant charged with an offense under 18 U.S.C. § 2250 may defend the charge either by claiming that he did not know of the requirement, or that circumstances beyond his control precluded his compliance with SORNA (citing 18 U.S.C. § 2250(c). *Id.* While this proposal might be reasonable for sex offenders in SORNA-compliant jurisdictions, it is not reasonable for sex offenders who cannot comply with SORNA because of a

jurisdiction's noncompliance with SORNA. Those sex offenders necessarily cannot receive proper notification under § 20919. And the fault lies not with the sex offender, but with the non-compliant jurisdiction. To permit the government to indict an offender in this circumstance, requiring the defendant to roll the dice at a jury trial – where the offender must convince a jury of his lack of knowledge or of circumstances beyond his control -- is to subject the sex offender to potential punishment and imprisonment for the jurisdiction's noncompliance. That is not a proper reading of SORNA as a whole.

Indeed, pre-SORNA law actually exposed to federal criminal liability offenders in non-SORNA-complaint jurisdictions, requiring them to register with the FBI. *Carr v. United States*, 560 U.S. 438, 453 n.7 (2010) (citing 42 U.S.C. §§ 14072(c), (g)(2), (i)). But Congress eliminated those provisions in SORNA, returning more control to the states to enforce their own state registry laws. *Carr*, 560 U.S. at 453 n.7. The proposed rule upsets this Congressionally-authorized balance of power between the states and the federal government.

Finally, we cannot lose sight of what the sex offender would have to do under the proposed rule to comply with SORNA in non-SORNA-compliant jurisdictions. What are the offender's options? Must he move to a SORNA-compliant jurisdiction to avoid prosecution? Must he demand that his local officials register him? Does he do this daily? Weekly? The proposed rule effectively turns a sex offender into SORNA's compliance officer. That is not Congress's intent. It is the various jurisdictions that implement SORNA. When those jurisdictions refuse, the Congressional remedy is to withhold funds, not to enlist sex offenders to implement SORNA in the jurisdictions' stead.

Second, **proposed § 72.7(d) conflicts with § 20913.** Proposed § 72.7(d) requires a sex offender to inform a jurisdiction "if the sex offender will be commencing residence, employment, or school attendance in another jurisdiction or outside of the United States." This proposed rule also requires a sex offender to "inform the jurisdiction in which he is residing prior to any termination of residence in that jurisdiction and prior to commencing residence, employment, or school attendance in another jurisdiction or outside of the United States." In other words, proposed § 72.7(d) interprets SORNA as a "departure" notification scheme. Before a sex offender moves to another jurisdiction (or before a sex offender obtains employment in another jurisdiction or begins schooling in another jurisdiction), he must report that change prior to the change.

This proposed rule runs directly contrary to § 20913. A sex offender must register and keep his registration current only in jurisdictions where "the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. § 20913(a). If an offender changes his residence, employment, or student status, he has three business days "after each change" to "appear in person in at least 1 jurisdiction involved" and to report changes in this information. 34 U.S.C. § 20913(a), (c). A "jurisdiction involved" is one where the offender "resides," works, or attends school. 34 U.S.C. § 20913(c) (cross-referencing 34 U.S.C. § 20913(a)). Because this provision uses the present tense, and instructs offenders to update the information "after each change," a

jurisdiction where a defendant once lived is no longer a "jurisdiction involved pursuant to subsection (a)." And because it is no longer a "jurisdiction involved," an offender need not give pre-departure notification to the former jurisdiction. Instead, when an offender updates his registration in his new jurisdiction, it is that jurisdiction, and not the offender, that is required to provide the updated information to a number of entities, including all other jurisdictions in which the offender is required to register, 34 U.S.C. § 20913(c), and "each jurisdiction from or to which a change of residence, employment, or student status occurs," 34 U.S.C. § 20923(b) (3).

This interpretation of § 20913 is not up for debate. It is the interpretation adopted by the Supreme Court in *Nichols v. United States*, 136 S.Ct. 1113, 1117-1119 (2016). As *Nichols* recognizes, *id.* at 1118, SORNA's predecessor, the amended Wetterling Act, directed state registries to require a sex offender who moves to a different state to report the change of residence not only to the new state but also to the state "the person is leaving" (i.e., a "departure notification" requirement). Pub. L. 105-119, Title I, § 115(a)(1), 111 Stat. 2461 (42 U.S.C. § 14071(b)(5)) (1997). Moreover, most states include departure notification provisions within their own sex-offender registry laws. *Nichols*, 136 S.Ct. at 1118. SORNA "could have easily" included a similar departure notification provision, but it did not. *Id.* The Department has no authority to add a departure notification provision to SORNA, where none exists.

The proposed rule acknowledges *Nichols*, but claims that *Nichols* is beside the point because "§ 72.7(d) is grounded in the requirement[s] of" § 20914(a) and (c), and not § 20913(c). 85 Fed. Reg. at 49337. But *Nichols* rejected the government's claim that § 20914 includes a departure notification provision. 136 S.Ct. at 1118. "§ 16914(a) merely lists the pieces of information that a sex offender must provide if and when he updates his registration; it says nothing about whether the offender has an obligation to update his registration in the first place." *Id.* The offender's obligation to update his residence, employment, and schooling is expressly provided for in § 20913(c). It is § 20913(c)'s unambiguous text that limits the Attorney General's authority to specify time and manner requirements for residence, employment, and schooling changes (as opposed to other changes). It is that specific provision that governs here, not the more general provisions within § 20914. And again, the Department cannot write a rule that directly conflicts with a statutory provision.

Nor is it enough that § 20914 includes the phrases "will reside," will be an employee," and "will be a student." 34 U.S.C. § 20914(a)(3), (4), (5). That language refers to the requirement that an offender provide future information during initial registration prior to release from imprisonment, when the offender "is not yet residing in the place or location to which he or she expects to go following release." 73 Fed. Reg. 38030-01 at 38055 (explaining § 20914(a)(3)'s requirement to report the address where the offender "resides or will reside"); 34 U.S.C. § 20913(a). Prior guidelines confirm this point. 73 Fed. Reg. 38030-01 at 38055 (providing examples only where the offender "is not yet residing in the place or location to which he or she expects to go following release"); *see also* 34 U.S.C. §§ 20913(b)(1) (requiring registration while in prison), 20919(a)(3) (requiring law enforcement to ensure that offenders register in prison), 20923(b)(3) (requiring law enforcement to provide

information to a jurisdiction "to which" a change of residence occurs); 18 U.S.C. § 4042(c) (requiring the Bureau of Prisons to notify officials in the jurisdiction "in which the person will reside" of the defendant's release from custody, parole, probation, or supervised release).

And even if the terms "will reside," "will be an employee," and "will be a student" in § 20914(a) could be applied more broadly, those terms do not mean "will no longer reside," "will no longer be an employee," or "will no longer be a student." By its plain terms, the proposed rule requires an offender to give "departure and termination information" to the departure jurisdiction, and not future residence information to the arrival jurisdiction. But Congress expects sex offenders to give "current" information about their residence, employment, and schooling, with an instruction to the jurisdiction to "immediately provide" this current information to other jurisdictions. § 20913(c) (entitled, "Keeping the registration current"). Because the proposed rule requires a sex offender to report a future residence, not a current residence, it is inconsistent with § 16913(c)'s text.

For these reasons, and because the rule is entirely unnecessary (again, every state has a departure notification provision, and § 20913(c) requires jurisdictions to share information with each other), the Department should not adopt this rule. If a sex offender updates his residence, employment, and schooling information as Congress has instructed in § 20913, that sex offender should not face criminal prosecution simply because he did not repeat that information to other non-"involved jurisdictions." Such a prosecution would do nothing more than punish a sex offender who has complied with the law.

Proposed § 72.6(c) also includes impermissible departure-notification requirements (requiring a sex offender to report future residence, employment, and schooling information). This language should not be adopted for the reasons just stated. Additionally, proposed § 72.7(f) provides that a sex offender must report intended travel outside the United States "if the sex offender is terminating his residence in the jurisdiction, prior to his termination of residence in the jurisdiction." This latter language is unnecessary and should be stricken. Federal law now requires a sex offender to report intended travel to a foreign country. 34 U.S.C. § 20914(a)(7). This provision covers all intended international travel (which would include travel where the offender does not intend to return). For this reason, there is no need for this additional phrase. And § 20913(c) still governs a sex offender's "change of . . . residence." Thus, while § 20914(a)(7) requires a sex offender to report the intended international **travel**, the sex offender still has "3 business days after [the] change of . . . residence" to report a change of **residence**. If the intended international travel is related to a change of residence, it is not an additional violation of SORNA to fail to report this change of residence, as proposed § 72.7(f) provides. The offender would violate SORNA just once – when he fails to give notice of the intended international travel. *See Nichols*, 136 S.Ct. 1117-1119.

Third, **proposed § 72.7(c) is inconsistent with § 20913(c)**. Under § 20913(c), a sex offender need only update his registration in "at least 1 jurisdiction involved," not in one or more specific jurisdictions. Section 20913(c) is explicit: an offender complies with SORNA so long as he

"appear[s] in person in at least 1 jurisdiction involved . . . and inform[s] that jurisdiction of *all changes* in the information required for that offender in the sex offender registry." As explained above, when an offender updates his registration in an "involved jurisdiction," that jurisdiction is statutorily required to provide the updated information to a number of entities, including all other involved jurisdictions (i.e,. jurisdictions where the offender is required to register), 34 U.S.C. § 20913(c), and "each jurisdiction from or to which a change of residence, employment, or student status occurs," 34 U.S.C. § 20923(b) (3). *See Nichols*, 136 S.Ct. at 1116 ("A sex offender is required to notify only one 'jurisdiction involved'; that jurisdiction must then notify a list of interested parties, including the other jurisdictions.").

Yet, proposed § 72.7(c) requires a sex offender to update the registration in a specific jurisdiction – "the jurisdictions in which [the changes] occur." 85 Fed. Reg. at 49345. If enforced, this proposed rule would criminalize lawful conduct. Under § 20913(c), a sex offender who appears in person in an involved jurisdiction, and reports "all changes" to the registration, has complied with SORNA. Congress does not care what "involved jurisdiction" the offender chooses because that jurisdiction is then required to inform all other "involved jurisdictions" (among others) of "all changes." SORNA's purpose – to establish "a comprehensive national system of the registration of" sex offenders, 34 U.S.C. § 20901 – is fulfilled. Proposed § 72.7(c) is unnecessary and not something that Congress would have intended. Indeed, Congress could have crafted a registration system like the one proposed § 727(c) envisions. But it did not. And the Attorney General cannot adopt regulations at odds with SORNA's plain text. A sex offender who updates his registration in compliance with SORNA's plain text should not (indeed, could not) be prosecuted because he appears in person in an "involved jurisdiction" different that the one the Department thinks best.

When combined with proposed § 72.7(d), the proposed rule is yet another example of the Department's attempt to enlist sex offenders as SORNA compliance officers. While Congress requires the various jurisdictions to inform each other of changes to an offender's registration, the Department wants to require sex offenders to do this task instead. We do not understand why. Sex offender registration is already a burden. The more burdensome it is made, the less likely offenders will be able to comply. There is no point in requiring sex offenders to travel from jurisdiction to jurisdiction updating information piecemeal when they can simply report "all changes" to one "involved jurisdiction," and that jurisdiction can then relay the changes to other jurisdictions (and the federal government). 34 U.S.C. § 20913(c). Congress wants a "comprehensive national system for the registration of" sex offenders. 34 U.S.C. § 20901. It is impossible to believe that Congress thought it best to rely on the offenders themselves to see this done. Yet, that is effectively what the Department has proposed in § 72.7(c) and § 72.7(d).

Fourth, **proposed §§ 72.7(e) and 72.7(f) should be amended to permit the sex offender to inform any involved jurisdiction of changes in information or intended international travel.** As just explained, Congress made clear its intent to require sex offenders to update their registrations in any "involved jurisdiction," not a specific jurisdiction. Although Congress delegated

to the Attorney General the authority to set "time and manner requirements" for information provided under § 20914(a) (rather than § 20913(c)), there is no reason for the Attorney General to adopt more stringent time and manner requirements for this information than Congress requires for residence, employment, and schooling information under § 20913(c). Again, a sex offender who updates his registration should not be prosecuted because he updated that registration in one involved jurisdiction instead of another involved jurisdiction. The point is that the sex offender updated the information within the registration. Congress does not require anything more. The Department should not either.

One example: an offender who works long hours at a job in State A, but lives in State B. It could be nearly impossible for that offender to update the registration in State B because the offender is in State A during normal business hours. There is no reason to require the offender to miss work, for instance, to update a registration in State B, where the offender could simply update the registration in State A, and State A would promptly inform State B of the updated information. This is the minimum registration scheme adopted by Congress in SORNA. There is no reason to make it more complex, especially where there is no benefit whatsoever in doing so. Sex offender registration should not become a trap to punish compliant offenders over immaterial technicalities. Congress would not have intended it, and SORNA's plain text precludes it. The proposed rule will spawn more litigation than it will benefits to the registration and notification scheme. For all of the above-stated reasons, the Department should reconsider the rule.

II. SORNA's delegations to the Attorney General violate the nondelegation doctrine.

Congress cannot delegate to the Executive Branch the power to define crimes. *United States v. Kozminski*, 487 U.S. 931, 949 (1988). But that is what the proposed rules do. As explained above, the proposed rules punish conduct that is not otherwise punishable under SORNA's plain text. If Congress intended such a delegation, that delegation is unconstitutional. Moreover, it is not at all clear whether Congress can delegate to the Attorney General the authority to apply SORNA to pre-Act offenders. Until that question is settled, the Department should hold off on the enactment of any additional regulations.

The Supreme Court recently addressed whether 34 U.S.C. § 20913(d) is an unconstitutional delegation of legislative authority to the Executive Branch in *Gundy v. United States*, 139 S.Ct. 2116 (2019). A four-Justice plurality (which included Justice Ginsburg) held two things: (1) Congress delegated to the Executive Branch only when and how to implement SORNA against pre-Act offenders, not whether to apply SORNA to pre-Act offenders, 139 S.Ct. at 2123-2129; and (2) this delegation passed constitutional muster under the intelligible principle test, *id.* at 2129-2130. Despite the plurality opinion, as the three-Justice dissent noted, there is no good reason to think that *Gundy* resolved either of these issues. 139 S.Ct. at 2131 (Gorsuch, J., dissenting). In fact, the plurality opinion "resolves nothing." *Id.*

On the first issue, the four-Justice plurality concluded that § 20913(d) requires the Attorney General to apply SORNA to all pre-Act offenders. *Gundy*, 139 S.Ct. at 2123. According to these four Justices, § 20913(d) only delegates to the Attorney General the task of applying SORNA to these pre-Act offenders "as soon as feasible." *Id.* The plurality concluded that this delegation "falls well within constitutional bounds." *Id.* at 2130. The three-Justice dissent took the opposite view. *Gundy*, 139 S.Ct. at 2145-2148. According to the dissent, § 20913(d) invests "the Attorney General with sole power to decide whether and when to apply SORNA's requirements to pre-Act offenders." *Id.* at 2148. The dissent concluded that this delegation was plainly unconstitutional ("delegation running riot"). *Id.* at 2148.

Justice Alito concurred only in the judgment. *Id.* at 2130-2131. Justice Alito's four-sentence concurrence focused solely on the nondelegation doctrine (and his willingness to reconsider the intelligible principle test) and said nothing whatsoever as to the scope of SORNA's delegation to the Attorney General. *Id.*; *see also id.* at 2131 (Gorsuch, J., dissenting) ("Justice ALITO . . . does not join . . . the plurality's . . . statutory analysis"). Justice Alito answered that question, however, in his dissent in *Carr v. United States*, 560 U.S. 438 (2010). And his answer is on all fours with the three-Justice dissent in *Gundy*. "Congress elected not to decide for itself *whether* [SORNA's] registration requirements—and thus § 2250(a)'s criminal penalties—would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that question." *Carr*, 560 U.S. at 466 (Alito, J., dissenting) (emphasis added). In reaching this conclusion, Justice Alito studied at least six lower court decisions on this issue. *Id.* at 466 n.6. Justice Alito found that the "clear negative implication of th[e] delegation [was] that, without such a determination by the Attorney General, the Act would not apply to those with pre-SORNA sex-offense convictions." *Id.*

As it currently stands, with Justice Ginsburg no longer on the Court, three Justices believe that § 20913(d) does not delegate to the Attorney General the power to apply (or not) SORNA to pre-Act offenders (just when and how to do so feasibly), and four Justices believe that § 20913(d) in fact delegates to the Attorney General the power to apply (or not) SORNA to pre-Act offenders. *Compare Gundy*, 139 S.Ct. at 2123-219 (plurality), *with Gundy*, 139 S.Ct. at 2145-2148 (dissent) & *Carr*, 560 U.S. at 466 (Alito, J., dissenting). If we are counting future votes, the plurality view in *Gundy* is better viewed as the dissent. Indeed, even the *Gundy* plurality acknowledged that, if § 20913(d) delegated to the Attorney General the power to determine SORNA's applicability to pre-Act Offenders ("to require them to register, or not, as she sees fit, and to change her policy for any reason at any time"), as the three *Gundy* dissenters and Justice Alito have concluded, then the Court "would face a nondelegation question." *Gundy*, 139 S.Ct. at 2123. In other words, if the delegation includes whether to apply SORNA to pre-Act offenders, then it is likely that at least six Justices (the three in the plurality and the three in dissent) would find the delegation unconstitutional. For these reasons, it is a particularly inappropriate time for the Attorney General to adopt the proposed regulations.

The calculus is the same with respect to the constitutional nondelegation issue. The *Gundy* plurality did not indicate any concern with the nondelegation doctrine's intelligible principle test. *Gundy*, 139 S.Ct. at 2130. But the three-Justice dissent did, noting that the doctrine "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." *Id.* at 2139 (Gorsuch, J., dissenting). The dissent also noted the doctrine's abuse: "where some have claimed to see intelligible principles many less discerning readers have been able only to find gibberish." *Id.* at 2140 (cleaned up). Justice Alito also indicated his willingness to reconsider the intelligible principle test. 139 S.Ct. at 2131 (Alito, J., concurring). Consistent with the dissent's reasoning, Justice Kavanaugh has written that it is one thing for the Executive to "act unilaterally to protect liberty." Brett Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1931 (2014). "[B]ut with limited exceptions, the President cannot act, except pursuant to statute, to infringe liberty and imprison a citizen." *Id.* Now is not the time to propose regulations to interpret and implement SORNA that would expand the federal government's ability to prosecute offenders who either cannot comply with SORNA, or who have complied with SORNA (but just not in the precise way in which the government thinks it should have complied).

Again, Congress cannot delegate to the Executive Branch the power to define crimes. "[D]efining crimes" is a "legislative" function, *United States v. Evans*, 333 U.S. 483, 486 (1948), and Congress cannot delegate "the inherently legislative task" of determining what conduct "should be punished as crimes," *Kozminski*, 487 U.S. at 949. To "unite the legislative and executive powers in the same person would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands." *Gundy*, 139 S.Ct. at 2144-2145 (Gorsuch, J., dissenting) (cleaned up). Consistent with these principles, the Court has enforced the nondelegation doctrine most rigorously in the criminal context. *See*, *e.g.*, *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 542-543 (1935) (holding that Congress could not delegate to the Executive the power to approve codes of fair competition promulgated by trade associations, when the "[v]iolations of the provisions of the codes are punishable as crimes"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding, with respect to legislation providing for criminal sanctions, that Congress unconstitutionally delegated its legislative power to the Executive Branch*); United States v. George*, 228 U.S. 14, 20-22 (1913) (rejecting government's argument that federal agency could promulgate regulations creating a federal crime to fail to abide by agency requirements); *see also Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1327 (2016) (noting that Congress may single out parties to a civil suit, whereas the Bill of Attainder Clause, Art. I, § 9, as an implementation of separation of powers, prevents Congress from singling out persons for criminal punishment); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (permitting retroactive civil liability, whereas the Ex Post Facto Clause, in order to uphold separation of powers principles, prohibits retroactive criminal punishment).

As explained above, the proposed rule defines crimes Congress never envisioned. It seeks to punish sex offenders for a jurisdiction's non-compliance with SORNA. It seeks to punish offenders who

are plainly compliant with SORNA. The regulations do not interpret SORNA; they expand SORNA by defining lawful acts (or impossible acts) as crimes. We do not think that Congress intended this delegation. But if it did, the delegation is unconstitutional. "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 602 (1892). It is up to Congress, not the Executive, to determine whether, when, and how SORNA, and its concomitant criminal penalties, apply to offenders. *Wayman v. Southard*, 23 U.S. 1, 43-43 (1825) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative. . . . [Those powers] must be entirely regulated by the legislature itself."). "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty." *Gundy*, 139 S.Ct. at 2131 (Gorsuch, J., dissenting). The Framers understood "that it would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* (quotations omitted). "Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement." *Id.* It cannot be that SORNA "endow[s] the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens." *Gundy*, 139 S.Ct. at 2131 (Gorsuch, J., dissenting). Because the proposed rule does just that, it should be rejected.

Sincerely,

/s Daniel T. Hansmeier
DANIEL T. HANSMEIER
Appellate Chief
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: daniel_hansmeier@fd.org