No. 10-6549

IN THE SUPREME COURT OF THE UNITED STATES

BILLY JOE REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

J. CAMPBELL BARKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2250(a), which imposes criminal penalties on a sex offender who is required to register under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 et seq., travels in interstate commerce, and knowingly fails to register, is applicable to petitioner.

2. Whether 18 U.S.C. 2250(a) constitutes a valid exercise of Congress's power under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3.

3. Whether the Ex Post Facto Clause precludes prosecution under 18 U.S.C. 2250(a) of a person whose travel in interstate commerce occurred after SORNA was enacted and after the Attorney General issued an interim rule confirming that SORNA applies to all sex offenders.

4. Whether petitioner's conviction violates the Due Process Clause on the ground that it was impossible for petitioner to register in Pennsylvania, and because petitioner did not receive specific notice of a duty under SORNA to register as a sex offender and update his registration.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a, at 1-3) is not published in the Federal Reporter but is reprinted in 380 Fed. Appx. 125.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2010. A petition for rehearing was denied on June 16, 2010 (Pet. App. 2a, at 1-2). The petition for a writ of certiorari was filed on September 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of failing to register and update his registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a, at 1-3; C.A. App. 4-6, 142-143.

1. On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 et seq., which "establishe[d] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. 16901. Since at least 1996, all 50 States have had sex-offender-registration laws, see Smith v. Doe, 538 U.S. 84, 90 (2003), and SORNA requires, as a matter of federal law, every sex offender to "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). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7).

SORNA's registration requirements are divided into two categories. First, SORNA requires a sex offender to initially register following conviction:

> 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.

42 U.S.C. 16913(b). Second, SORNA requires a sex offender who has already registered to keep his registration current by updating it within three business days of any change in his "name, residence, employment, or student status." 42 U.S.C. 16913(c).

SORNA delegates to the Attorney General the authority to promulgate further registration requirements in certain situations:

> Initial registration of sex offenders unable to comply with subsection (b) of this section
>
> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before [July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

42 U.S.C. 16913(d).

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 the rule, the Attorney General explained that "[c]onsidered fa-

cially, 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. 8896 (2007). The interim rule, however, served the purpose of "confirming SORNA's applicability" to "sex offenders with predicate convictions predating SORNA." Ibid.

In order to enforce SORNA's registration requirements, Congress also created a federal criminal offense penalizing non-registration. Under 18 U.S.C. 2250(a), a convicted sex offender who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and then "knowingly fails to register or update a registration as required by [SORNA]" may be punished by up to ten years of imprisonment. See Carr v. United States, 130 S. Ct. 2229, 2234-2235 (2010).

2. In 2001, petitioner was convicted in Missouri of statutory sodomy in the second degree. C.A. App. 60, 135. In 2005, petitioner was released from prison and, pursuant to Missouri law, petitioner registered as a sex offender in Missouri. Id. at 60. In doing so, petitioner signed sex offender forms notifying him of his duty to update his registration in Missouri and his duty to register as a sex offender in any State to which he might move. Id. at 60, 111-112. In September 2007, while still on parole,

petitioner moved to Pennsylvania and knowingly failed to register as a sex offender there. Id. at 61, 134-135.

In November 2007, a federal grand jury in the Western District of Pennsylvania returned an indictment charging petitioner with failing to register and update a registration as a sex offender, in violation of 18 U.S.C. 2250(a). C.A. App. 20. Petitioner moved to dismiss the indictment, raising several constitutional and statutory claims. Id. at 21-23. The district court denied the motion, id. at 1-3, and petitioner thereafter entered a conditional guilty plea reserving his right to appeal the denial of his motion to dismiss, id. at 119-145. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. Id. at 5-6.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a, at 1-3. The court first rejected petitioner's claims that SORNA violates (a) the Commerce Clause because of an insufficient nexus between the registration requirements and interstate commerce; (b) the Ex Post Facto Clause because SORNA's penalty provision allegedly punishes only pre-SORNA conduct; and (c) the Due Process Clause because the State of Pennsylvania had not implemented SORNA, and because petitioner was not specifically notified of his duty to register under SORNA (even though he was notified of his state-law duty to register). Id. at 2. The court explained that each of petitioner's claims was foreclosed by the

court's prior decision in United States v. Shenandoah, 595 F.3d 151 (3d Cir.), cert. denied, 130 S. Ct. 3433 (2010). Pet. App. 1a, at 2.

The court of appeals also held that petitioner lacked standing to raise his other arguments, including his claim that the Attorney General's interim rule confirming that SORNA applies to pre-SORNA convictions violates the Administrative Procedure Act (APA), 5 U.S.C. 553. Pet. App. 1a, at 2-3. The court explained that it had already held in Shenandoah, 595 F.3d at 163-164, that the Attorney General did not need to promulgate any regulation for SORNA's requirements to be applicable to sex offenders, like petitioner, who had already initially registered with a State. Pet. App. 1a, at 3. Because the interim rule did not apply to petitioner, the court of appeals concluded that he lacked standing to challenge it on APA grounds. Ibid.

ARGUMENT

1. Petitioner first argues (Pet. 13-19) that the court of appeals erred in concluding that petitioner lacks standing to challenge the Attorney General's interim rule confirming that SORNA applies to all sex offenders. Petitioner contends that SORNA's registration and penalty provisions did not of their own force apply to him at the time of his interstate travel because his predicate sex-offense conviction was entered before the enactment of SORNA; that SORNA delegates authority to the Attorney General to

prescribe rules for offenders convicted of a predicate sex offense before SORNA's enactment; and that petitioner is therefore subject to the Attorney General's interim rule and has standing to challenge it. That claim lacks merit and does not warrant this Court's review.

a. SORNA was enacted and became effective on July 27, 2006, and its registration requirements are unqualified: "A sex offender shall register, and keep the registration current, in each jurisdiction in which the offender" lives, works, or is a student. 42 U.S.C. 16913(a). SORNA defines a "sex offender" as anyone who "was convicted" of a sex offense, without further qualification. 42 U.S.C. 16911(1). On its face, therefore, SORNA requires all sex offenders to comply with its registration requirements. That broad scope reflects Congress's primary purpose in enacting the statute, which was to establish a "comprehensive national system for the registration of [sex] offenders," in order to prevent evasion of state registration systems and to better protect the public. 42 U.S.C. 16901.

The court of appeals (Pet. App. 1a, at 3) correctly concluded that petitioner lacks standing to challenge the Attorney General's interim rule because SORNA applies of its own force to sex offenders, like petitioner, who were required to initially register as a sex offender with a State prior to SORNA's enactment. See, e.g., United States v. DiTomasso, 621 F.3d 17, 19-25 (1st Cir.

2010) (holding that "SORNA applied to previously convicted sex offenders as of the date of its enactment"); United States v. Shenandoah, 595 F.3d 151, 158, 163-164 (3d Cir.) (same), cert. denied, 130 S. Ct. 3433 (2010); United States v. Hinckley, 550 F.3d 926, 930-935 (10th Cir. 2008) (same), cert. denied, 129 S. Ct. 2383 (2009); United States v. May, 535 F.3d 912, 918-919 (8th Cir. 2008) (same), cert. denied, 129 S. Ct. 2431 (2009). As this Court noted in Carr v. United States, 130 S. Ct. 2229, 2234 n.2 (2010), there is disagreement among the courts of appeals on whether SORNA's registration requirements apply of the statute's own force to persons with sex-offense convictions that predate SORNA's enactment or whether Congress intended for the Attorney General to decide that question in the first instance. Carr did not address that issue. Ibid. That conflict, however, is not directly implicated here because petitioner's interstate travel and failure to register occurred between September and October 2007, seven months after the Attorney General issued the interim rule. C.A. App. 20.

b. Even if the court of appeals incorrectly concluded that petitioner lacked standing to challenge the interim rule, petitioner would not be entitled to any relief unless the interim rule was itself invalid. To the extent the petition could be read as arguing that the interim rule was issued in violation of the

notice, comment, and publication requirements of the APA, that claim lacks merit.[1]

In the months following SORNA's enactment, the Attorney General observed that sex offenders whose offenses occurred before SORNA's enactment were "attempting to devise arguments that SORNA is inapplicable to them, e.g., because a rule confirming SORNA's applicability has not been issued." 72 Fed. Reg. at 8896. Sex offenders raising such claims relied on 42 U.S.C. 16913(d), which delegates to the Attorney General the authority to specify SORNA's applicability to certain sex offenders. Although that provision exists to ensure "a means to resolve issues about the scope of SORNA's applicability * * * and a means to fill any gaps there may be concerning registration procedures or requirements," 72 Fed. Reg. at 8896, sex offenders argued that Section 16913(d) negated the unequivocal language in Section 16913(a) and indicated that SORNA does not, of its own force, apply to all sex offenders. The Attorney General issued an interim rule to "foreclose[] such claims by making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted." Ibid. Thus, the interim rule states that "[t]he requirements of [SORNA] apply to all sex offenders, including sex

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[1] As discussed, the court of appeals did not decide this APA claim, concluding instead that petitioner lacked standing to raise the claim because petitioner was required to register upon SORNA's enactment. See Pet. App. 1a, at 3.

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offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 28 C.F.R. 72.3.

The APA requires "notice of proposed rule making" and an "opportunity to participate in the rule making through submission" of comments, 5 U.S.C. 553(b) and (c), unless "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. 553(b)(B). The APA also requires publication of "a substantive rule * * * not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d). A reviewing court asks whether an agency's findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

In promulgating the interim rule confirming that SORNA's registration requirements apply to all sex offenders, the Attorney General explained that "[t]he immediate effectiveness of this rule is necessary" because postponing the rule's implementation could delay the registration of "virtually the entire existing sex offender population" and would thereby risk "the commission of additional sexual assaults and child sexual abuse or exploitation offenses * * * that could have been prevented had local authorities and the community been aware of the[] presence" of unregis-

tered sex offenders. 72 Fed. Reg. at 8896-8897. Delay in the registration of sex offenders would also create "greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA." Id. at 8897. The Attorney General found that those consequences "would thwart the legislative objective of 'protect[ing] the public from sex offenders and offenders against children' by establishing 'a comprehensive national system for the registration of those offenders,'" ibid. (quoting 42 U.S.C. 16901), because "a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule," ibid. The Attorney General therefore determined that it would be "contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d)." Ibid.

The Attorney General complied with the APA's good-cause provisions in dispensing with the notice, comment, and publication requirements of that Act. The commission of additional sexual assaults and child sexual abuse and exploitation by recidivist sex offenders is undoubtedly contrary to the public interest. And, as this Court has noted, "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" Smith v. Doe, 538 U.S. 84, 103 (2003) (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)

(plurality opinion)). As other courts have correctly held, "[d]elaying implementation of the regulation to accommodate notice and comment could reasonably be found to put the public safety at greater risk" by depriving local authorities and members of the public of awareness of sex offenders in their community. United States v. Gould, 568 F.3d 459, 470 (4th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010); see, e.g., United States v. Dean, 604 F.3d 1275, 1281 (11th Cir. 2010) (holding that "public safety" concerns provided "good cause for bypassing the notice and comment period" because "[i]n practical terms, the retroactive rule reduced the risk of additional sexual assaults and sexual abuse by sex offenders by allowing federal authorities to apprehend and prosecute them"), petition for cert. pending, No. 10-5632 (filed July 27, 2010). Indeed, because awareness of sex offenders in the community so directly relates to the ability to prevent further sex crimes, the Seventh Circuit dismissed the good-cause argument presented here as "frivolous." United States v. Dixon, 551 F.3d 578, 583 (2008), rev'd on other grounds sub nom. Carr v. United States, 130 S. Ct. 2229 (2010).

c. Every court of appeals to have decided the issue has held that SORNA applies to sex offenders who were convicted of a predicate offense before SORNA's enactment. See United States v. George, No. 08-30339, 2010 WL 4291497, at *4 n.3 (9th Cir. Nov. 2, 2010); DiTomasso, 621 F.3d at 19-25 (1st Cir.); Dean, 604 F.3d at

1278-1282 (11th Cir.); United States v. Utesch, 596 F.3d 302, 308, 311 (6th Cir. 2010); Shenandoah, 595 F.3d at 163-164 (3d Cir.); Gould, 568 F.3d at 462-466 (4th Cir.); Dixon, 551 F.3d at 582 (7th Cir.); Hinckley, 550 F.3d at 929-935 (10th Cir.); May, 535 F.3d at 915-919 (8th Cir.).

The only relevant difference of opinion among the courts of appeals concerns the precise date on which SORNA became applicable to pre-SORNA sex offenders. Of the circuits to have considered this question, all but one has held that SORNA became applicable to pre-SORNA sex offenders no later than February 28, 2007, the date of the Attorney General's interim rule. The Sixth Circuit alone has held that SORNA did not become applicable to pre-SORNA sex offenders until August 1, 2008 -- 30 days after publication of the final SORNA guidelines, which issued after notice and comment and which affirmed that SORNA applies to such offenders. See Utesch, 596 F.3d at 311. That ruling rested in part on the Sixth Circuit's prior decision in United States v. Cain, 583 F.3d 408, 419-424 (2009), in which the court held that the February 2007 interim rule was issued in violation of the APA's notice, comment, and publication requirements. Other courts have rejected the Sixth Circuit's APA analysis. See Dean, 604 F.3d at 1278-1282 (11th Cir.); Gould, 568 F.3d at 469-470 (4th Cir.); Dixon, 551 F.3d at 583 (7th Cir.). This Court noted in Carr that courts have divided "on whether § 72.3 was properly promulgated," and it "express[ed] no view" on

that question. 130 S. Ct. at 2234 n.2 (citing cases).

That disagreement, however, does not warrant this Court's review because it is narrow, transitory, and of diminishing importance. The Court's resolution of precisely when SORNA became applicable to pre-SORNA sex offenders would affect only those defendants who both were convicted of their predicate sex crimes before SORNA's enactment and violated SORNA before August 1, 2008. The number of defendants who fall into that category is limited. And the likelihood that any defendant will be prosecuted in the future for registration failures that occurred before August 1, 2008 -- a date that is now more than two years in the past -- is small and rapidly diminishing. This Court's review would thus affect only a handful of defendants and would have little if any prospective significance. This Court has already denied at least two petitions for a writ of certiorari seeking review of this issue. See Foster v. United States, No. 09-9247, 2010 WL 677665 (Oct. 4, 2010); Gould v. United States, 130 S. Ct. 1686 (2010) (No. 09-6742). The same result is warranted here.

2. Petitioner next argues (Pet. 21-26) that SORNA's registration and penalty provisions exceed Congress's power under the Commerce Clause. For the reasons set forth in the government's brief in opposition in Foster, supra (at 28-33), a copy of which has been served on counsel for petitioner, that claim lacks merit. This Court has previously denied at least nine petitions for a writ

of certiorari raising the same Commerce Clause claim. See Foster, supra (No. 09-9247); Griffey v. United States, 130 S. Ct. 3290 (2010) (No. 09-9676); Brown v. United States, 130 S. Ct. 2403 (2010) (No. 09-8833); Letourneau v. United States, 130 S. Ct. 1736 (2010) (No. 09-7368); Gould, supra (No. 09-6742); Myers v. United States, 130 S. Ct. 1559 (2010) (No. 09-8524); Hacker v. United States, 130 S. Ct. 302 (2009) (No. 09-5656); Howell v. United States, 129 S. Ct. 2812 (2009) (No. 08-10364); May v. United States, 129 S. Ct. 2431 (2009) (No. 08-7997). The same result is warranted here.

Every court of appeals to consider a Commerce Clause challenge to SORNA has rejected it. See George, 2010 WL 4291497, at *3-*4 (9th Cir.); DiTomasso, 621 F.3d at 26 (1st Cir.); United States v. Vasquez, 611 F.3d 325, 329-331 (7th Cir. 2010); Shenandoah, 595 F.3d at 160-161 (3d Cir.); United States v. Guzman, 591 F.3d 83, 89-91 (2d Cir.), cert. denied, 130 S. Ct. 3487 (2010); United States v. Whaley, 577 F.3d 254, 258-261 (5th Cir. 2009); Gould, 568 F.3d at 470-475 (4th Cir.); United States v. Ambert, 561 F.3d 1202, 1210-1212 (11th Cir. 2009); United States v. Howell, 552 F.3d 709, 717 (8th Cir.), cert. denied, 129 S. Ct. 2812 (2009); Hinckley, 550 F.3d at 939-940 (10th Cir.). Because the ruling of the court of appeals was correct and because there is no division in the circuits, further review of petitioner's Commerce Clause challenge is unwarranted.

3. Petitioner also argues (Pet. 26-29) that his conviction for failing to register under SORNA violates the Ex Post Facto Clause. There is no circuit conflict on this question, and this Court has already denied at least one petition for a writ of certiorari raising the same claim. See Foster, supra (No. 09-9247). There is no reason for a different result here.

Petitioner's attempts (Pet. 28-29) to distinguish SORNA from the Alaska sex-offender-registration regime that this Court sustained against an Ex Post Facto Clause challenge in Smith, supra, do not withstand scrutiny. Like SORNA, the Alaska law required prompt registration upon a change of residence, Smith, 538 U.S. at 90; it created classes of offenders and required offenders in the most dangerous class to register for an extended period of time, ibid.; and it subjected those who knowingly failed to register to criminal prosecution (including felony prosecution for repeat offenders), Alaska Stat. §§ 11.56.835, 11.56.840 (2000). In any event, Smith recognized that using the criminal process to enforce a statutory registration regime did not render the registration regime punitive for purposes of ex-post-facto analysis, 538 U.S. at 96, and that any criminal prosecution for violation of the registration requirements is "a proceeding separate from the * * * original offense" that required registration, id. at 102.

SORNA does not criminalize conduct that occurred wholly before it was enacted. To the contrary, petitioner's conviction clearly rests on post-SORNA conduct. He is being punished for his travel in interstate commerce combined with his knowing failure to register as SORNA requires -- both of which occurred after SORNA applied to him. Thus, Section 2250 does not violate the Ex Post Facto Clause because it does not "operate retroactively" in the sense of applying to conduct that was "completed before its enactment." Johnson v. United States, 529 U.S. 694, 699 (2000); see California Dep't of Corr. v. Morales, 514 U.S. 499, 505 (1995); Collins v. Youngblood, 497 U.S. 37, 49 (1990); Miller v. Florida, 482 U.S. 423, 430 (1987). Every court of appeals to have considered such an Ex Post Facto claim has rejected it. See, e.g., George, 2010 WL 4291497, at *4-*5 (9th Cir.); Shenandoah, 595 F.3d at 158-159 (3d Cir.); Guzman, 591 F.3d at 94 (2d Cir.); United States v. Young, 585 F.3d 199, 202-204 (5th Cir. 2009); Gould, 568 F.3d at 466 (4th Cir.); Hinckley, 550 F.3d at 935-938 (10th Cir.); May, 535 F.3d at 919-920 (8th Cir.).

4. Finally, petitioner contends (Pet. 30-36) that his conviction violates the Due Process Clause because SORNA has not been implemented by the State of Pennsylvania, and because he did not receive specific notice of his duty under SORNA to register as a sex offender, but rather received notice only of his duty under state law to register. Neither claim warrants review.

a. Petitioner argues (Pet. 31) that the interim rule does not declare SORNA applicable to those "convicted before SORNA's implementation in a particular state." As a threshold matter, no such regulation was needed because the statute, on its face, requires all sex offenders to register. See, e.g., DiTomasso, 621 F.3d at 27 ("Of critical importance, however, the registration requirements for sex offenders are neither conditioned on nor harnessed to state implementation of SORNA's state-directed mandates."); Guzman, 591 F.3d at 93("SORNA creates a federal duty to register with the relevant existing state registries regardless of state implementation of the specific additional requirements of SORNA."). In any event, the Attorney General's interim rule expressly states that SORNA applies "to all sex offenders." 28 C.F.R. 72.3 (emphasis added). Contrary to petitioner's contention (Pet. 31-32), the Attorney General later reaffirmed in the proposed and final SORNA guidelines that SORNA's registration requirements apply even before a particular State has implemented SORNA. See 72 Fed. Reg. 30,228 (2007) ("SORNA applies to all sex offenders, including those convicted of their registration offenses * * * prior to particular jurisdictions' incorporation of the SORNA requirements into their programs."); 73 Fed. Reg. 38,063 (2008) (same).[2]

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[2] Petitioner asserts (Pet. 33, 34) that it was impossible for him to comply with his known duty to register as a sex offender in Pennsylvania. That assertion, if true, would have furnished an

The courts of appeals to have addressed this issue directly have all concluded that SORNA applies to sex offenders who (like petitioner) initially registered as a sex offender before SORNA's enactment and whose SORNA violation occurred before the State's implementation of that Act. See George, 2010 WL 4291497, at *1-*2 (9th Cir.); DiTomasso, 621 F.3d at 27 (1st Cir.); United States v. Heth, 596 F.3d 255, 258-259 (5th Cir. 2010); Shenandoah, 595 F.3d at 157-158 (3d Cir.); Guzman, 591 F.3d at 93-94 (2d Cir.); United States v. Griffey, 589 F.3d 1363, 1366 (11th Cir. 2009) per curiam), cert. denied, 130 S. Ct. 3290 (2010).[3] Further review is not warranted.

b. Petitioner also argues (Pet. 33-36) that he never received notice of his duty to register under SORNA specifically, and that his conviction therefore violates principles of fair notice. Petitioner did, however, receive express written notice of his continuing duty to update his sex-offender registration upon

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affirmative defense, see 18 U.S.C. 2250(b), but petitioner waived that defense by pleading guilty. See United States v. Brown, 586 F.3d 1342, 1349-1350 (11th Cir. 2009), cert. denied, 130 S. Ct. 2403 (2010).

[3] Although the Sixth Circuit in Cain, supra, suggested that SORNA did not, on its face, apply to "sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction," 583 F.3d at 415 (emphasis added), it vacated the defendant's conviction because he was convicted of a sex offense before the Attorney General had validly specified SORNA's applicability to sex offenders with pre-SORNA convictions. No court of appeals has vacated a conviction because the defendant's failure to register occurred before SORNA's implementation in a particular jurisdiction.

changing his address. C.A. App. 111-112. And for the reasons set forth in the government's brief in opposition in Foster, supra (at 21-24), petitioner's claim lacks merit. This Court has already denied at least five petitions for a writ of certiorari raising the due process claim presented here. See Foster, supra (No. 09-9247); Griffey, supra (No. 09-9676); Brown, supra (No. 09-8833); Letourneau, supra (No. 09-7368); Baccam v. United States, 130 S. Ct. 432 (2009) (No. 09-6386). There is no reason for a different result here.

Every court of appeals to address the question has held that notification of a state-law duty to register and keep a registration current -- the kind of notice that petitioner had here (C.A. App. 111-112, 135) -- satisfies due process. See United States v. Gagnon, 621 F.3d 30, 33 (1st Cir. 2010); Shenandoah, 595 F.3d at 160 (3d Cir.); United States v. Hester, 589 F.3d 86, 91-92 (2d Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 2137 (2010); Brown, 586 F.3d at 1351 (11th Cir.); Whaley, 577 F.3d at 262 (5th Cir.); Gould, 568 F.3d at 468-469 (4th Cir.); Hinckley, 550 F.3d at 938 (10th Cir.); May, 535 F.3d at 921 (8th Cir.); Dixon, 551 F.3d at 584 (7th Cir.). Those decisions do not conflict with any decision of this Court, and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

LANNY A. BREUER
Assistant Attorney General

J. CAMPBELL BARKER
Attorney

NOVEMBER 2010

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via e-mail and first class mail, postage prepaid, this **November 19, 2010**.

[See Attached Service List]

Neal Kumar Katyal
Acting Solicitor General
Counsel of Record

November 19, 2010

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

10-6549
REYNOLDS, BILLY JOE
USA

CANDACE CAIN
ASSISTANT FEDERAL PUBLIC DEFENDER
1500 LIBERTY CENTER
1001 LIBERTY AVENUE
PITTSBURGH, PA 15222
412-644-6565
CANDACE_CAIN@FD.ORG