No. 12-418

In the Supreme Court of the United States

October Term, 2012

UNITED STATES OF AMERICA, PETITIONER,

v.

ANTHONY JAMES KEBODEAUX

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

KEBODEAUX'S BRIEF IN OPPOSITION

G. PATRICK BLACK
Acting Federal Public Defender
Western District of Texas

M. CAROLYN FUENTES *
Assistant Federal Public Defender
**COUNSEL OF RECORD*
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
(210) 472-6700
Carolyn_Fuentes@fd.org

QUESTIONS PRESENTED

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), which imposes registration requirements on those convicted of sex offenses under state or federal law. Both classes of offenders are subject to criminal penalties if they cross state lines to avoid registration. A federal offender, however, may be punished even without interstate travel. Kebodeaux is a federal offender by virtue of his 1999 military conviction for having consensual sex with a 15-year-old girl. In 2008, he was convicted under SORNA for a registration violation that occurred within the state of Texas—no interstate travel was involved. The Fifth Circuit ruled that the application of SORNA to Kebodeaux, through a regulation promulgated by the Attorney General, was impermissible. The questions presented by the Government are:

1. Whether the court of appeals erred in conducting its constitutional analysis on the premise that Kebodeaux was not under a federal registration obligation until 2006, when SORNA was enacted.[1]

2. Whether the court of appeals correctly concluded that SORNA, as applied through 28 C.F.R. § 72.3 to a person who completed his federal criminal sentence before SORNA's enactment, exceeded Congress's Article I authority.

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1. The Government's first question presented misstates the premise of the *Kebodeaux* decision. *Kebodeaux* is based on this Court's analysis in *United States v. Comstock*, 130 S. Ct. 1949 (2010), as well as this Court's Commerce Clause precedent. The short history of pre-SORNA sex offender registration laws was but one factor of the *Comstock* analysis—it was not the premise of the court's ruling.

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BRIEF IN OPPOSITION

Anthony James Kebodeaux respectfully asks this Court to deny the Government's petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Commerce Clause, the Military Clause, and the Necessary and Proper Clause, quoted in the Government's petition for certiorari, Pet. at 2, Kebodeaux's case involves the Tenth Amendment to the U.S. Constitution. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

FEDERAL REGULATION INVOLVED

The Attorney General's regulation, 28 C.F.R. § 72.3, provides:

> 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.

STATEMENT

In 1999, when Kebodeaux was a 21-year-old airman in the United States Air Force, he had a consensual sexual relationship with a 15-year-old girl. Pet. App. A at 2a. Based on that relationship, a military court found him guilty of carnal knowledge involving a female under the age of 16, in violation of Article

120 of the Uniform Code of Military Justice. The court sentenced Kebodeaux to three months' confinement and a bad conduct discharge for this offense and for violating the lawful orders of his superiors. Kebodeaux fully served that sentence and returned to his home in Texas in 1999.[2]

Nearly 10 years later, Kebodeaux was convicted under SORNA for failing to update his sex-offender registration, after the Attorney General promulgated a regulation making SORNA applicable to those who committed offenses before its 2006 enactment. The Fifth Circuit Court of Appeals reversed Kebodeaux's conviction "on narrow grounds." Pet. App. A at 3a. The court concluded that, "under the unusual circumstances" of Kebodeaux's case, *id.* at 7a, as well as "the specific and limited facts" presented, Kebodeaux's 1999 federal crime was "an insufficient basis for Congress to assert unending criminal authority over him" through SORNA, *id.* at 2a.

a. *SORNA.*

Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act of 2006 (AWA). *See* Pub. L. 109-248, § 1, tit. I, 120 Stat. 587, 590–611. Among other things, that legislation imposed registration requirements on sex offenders, SORNA § 113, 120 Stat. at 593–94 (codified at 42 U.S.C. § 16913), and created a criminal offense to punish those who violate

2. Military records show that Kebodeaux's three-month sentence was adjudged on May 17, 1999, and that he had returned to Texas by September 18, 1999, when his bad conduct discharge was executed.

the registration requirements, SORNA § 141, 120 Stat. at 602 (codified at 18 U.S.C. § 2250). The criminal punishment provision states:

> § 2250. Failure to register
>
> (a) In general.—Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

Section 2250(a)(1) applies to those "required to register" under SORNA. Those required to register are sex offenders. 42 U.S.C. § 16913(a). A "sex offender" is anyone who has been "convicted of a sex offense[,]" 42 U.S.C. § 16911(1), under state, local, tribal, federal, military, and some foreign law provisions. *Id*. § 16911(1), (5)(A), (5)(B), (6).

Congress delegated to the Attorney General the authority to determine whether and when SORNA would apply retroactively to sex offenders convicted before SORNA's passage. 42 U.S.C. § 16913(d); *Reynolds v. United States*, 132 S. Ct. 975 (2012). The Attorney General did so, issuing a regulation making

SORNA applicable to all sex offenders, including those convicted before SORNA's 2006 enactment. *See* 28 C.F.R. § 72.3.[3]

b. *Kebodeaux's SORNA conviction.*

In August 2007, Kebodeaux updated his registration as a sex offender pursuant to Texas law, when he moved from San Antonio, Texas, to El Paso, Texas. *See* Pet. App. F at 166a–69a. He returned to San Antonio shortly afterwards. *Id*. at 168a–69a. Kebodeaux did not inform the El Paso Police Department that he was leaving, and he did not register with San Antonio authorities upon his return. *Id*.

A federal grand jury indicted Kebodeaux for failing to register and update his sex offender registration, as required by SORNA. The indictment alleged his prior military conviction; it did not charge that he crossed state lines. His motion to dismiss the indictment on constitutional grounds was denied. A district court convicted Kebodeaux of failing to register, as required by SORNA, and sentenced him to one year and one day of confinement. Pet. App. A at 2a–3a; App. F.

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3. Under Fifth Circuit law addressing the regulation, SORNA applied retroactively to Kebodeaux, whose failure-to-register offense occurred in August 2007. *See United States v. Johnson*, 632 F.3d 912, 930–33 (5th Cir.) (applying SORNA to pre-enactment offenders whose failure to register occurred after March 30, 2007), *cert. denied*, 132 S. Ct. 135 (2011). The circuits are divided, however, about what date triggers SORNA's application to pre-enactment offenders like Kebodeaux—an issue not yet decided by this Court. *See*, *e.g.*, *United States v. Stevenson*, 676 F.3d 557, 562 (6th Cir.) (SORNA applicable to pre-enactment offenders as of August 1, 2008), *cert. denied*, 133 S. Ct. 168 (2012).

c. *Kebodeaux's Appeal to the Fifth Circuit.*

Kebodeaux appealed, challenging the constitutionality of his conviction. After a panel of the Fifth Circuit Court of Appeals rejected that challenge, the court decided to hear the case en banc. Pet. App. B at 74a. Kebodeaux argued that neither the Constitution's Military Clause, nor the Commerce Clause, nor the Necessary and Proper Clause justified the application of SORNA to his intrastate failure to update his registration. Kebodeaux's Supplemental Brief on Rehearing En Banc at 10–36, *United States v. Kebodeaux*, No. 08-51185 (5th Cir. Aug. 16, 2011). The Government contended that SORNA's application was justified as necessary and proper to its "authority to enact laws for the responsible operation of a federal penal system[,[" and under the Commerce Clause. En Banc Brief of the United States at 13–14, *Kebodeaux*, No. 08-51185 (5th Cir. Sept. 7, 2011).

The en banc court ruled that SORNA, "interpreted by the Attorney General" to apply to pre-enactment offenders, was unconstitutional as applied to Kebodeaux, "under the specific and limited facts of his case[.]" Pet. App. A at 2a. Those facts were that Kebodeaux had "served his sentence and . . . been unconditionally released from prison and the military" in 1999. *Id*. at 2a–3a. In such circumstances, Congress lacked a "jurisdictional hook" to subject Kebodeaux to SORNA's provisions governing the failure to register after intrastate travel. *Id*. at 3a. Accordingly, the court's "finding of

unconstitutionality . . . does not affect the registration requirements for . . . any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or . . . any federal sex offender convicted since then." *Id.* at 4a. Neither does it affect any offender—state or federal—who crosses state lines and then fails to register. *See id.* at 42a (former federal offenders may still be "regulated just as state sex offenders currently are [regulated] under federal law").

The Fifth Circuit relied on *United States v. Comstock*, 130 S. Ct. 1949 (2010), to reach these conclusions. *See* Pet. App. A at 6a–24a. *Comstock* upheld the constitutionality of 18 U.S.C. § 4248, which permits the civil commitment of inmates "currently 'in the custody of the [Federal] Bureau of Prisons,'" beyond the date they would otherwise be released, if they are mentally ill and sexually dangerous. 130 S. Ct. at 1954. Unlike the federal inmates in *Comstock*, Kebodeaux's federal sentence had expired, and he had been "unconditionally released" from federal custody. Pet. App. A at 6a. By "unconditionally released," the court meant that Kebodeaux was not "in prison or on supervised release[,]" *id.* at 4a; nor was he subject to federal sex-offender registration requirements as "a condition of [his] release from prison," *id.* at 11a. In these circumstances, the court ruled, the federal government lacks authority to "reassert jurisdiction over someone it had long ago unconditionally released from custody just because he once committed a federal crime." *Id.* at 11a; *see*

also id. at 16a n.28 (noting Government's concession in *Comstock* that it lacks power to commit a person who has been "'released from prison and whose period of supervised release is also completed'").

The court of appeals also rejected the Government's "alternative argument" that SORNA's registration and penalty provisions are "necessary and proper to effect Congress's Commerce Clause power." *Id.* at 24a–25a. The Government's theory was that Congress has the authority to impose sex-offender registration requirements on Kebodeaux as "part of its broader regulation of interstate commerce[,]" and to punish him for failing to comply, whether or not he traveled in interstate commerce. Gov't En Banc Br. at 29. Because Congress has the power to punish those who travel in interstate commerce to avoid sex-offender registration, the Government reasoned, it also has the power to punish those who avoid registration, but do not travel across state lines to do so. *Id.* at 29–44.

The Fifth Circuit disagreed that criminal activity occurring within a state—and not involving interstate commerce—is subject to federal prosecution. Pet. App. A at 24a–41a. Congress, the court acknowledged, has the authority to regulate the use of the channels of interstate commerce so that "those channels will not become the means of promoting or spreading evil[.]" *Id.* at 26a (quoting *N. Am. Co. v. SEC*, 327 U.S. 686, 705 (1946)). But that does not mean that "Congress's 'police power' over those who use the channels of interstate commerce" can be extended "to punish those who are not presently using them

but might do so." Pet. App. A at 30a. Kebodeaux did not use the channels of interstate commerce to avoid sex-offender registration requirements. As applied to Kebodeaux, SORNA punished one who was not using the channels of interstate commerce, "but might do so." *Id*. To permit federal jurisdiction to rest on this basis would permit the "federal government [to] regulate anyone . . . who might someday travel interstate." *Id*. at 31a. That, the court ruled, "would violate basic tenets of federalism." *Id*. at 34a.

The court of appeals also rejected the Government's theory that Congress's Commerce-Clause "power to regulate instrumentalities of interstate commerce or persons or things in interstate commerce" provided authority to apply SORNA to Kebodeaux's intrastate failure to register. Gov't En Banc Br. at 30–31. "[T]hough Congress may protect the instrumentalities of, and persons and things in, interstate commerce from intrastate threats, those threats must be 'directed at' the instrumentalities of, or persons or things in, interstate commerce[.]" Pet. App. A at 36a (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000)). The threats "cannot just be a general threat to society of the sort that sex offenders pose." Pet. App. A at 36a. Addressing those sorts of threats is "the province of the States." *Id*. at 36a (quoting *Morrison*, 529 U.S. at 618).

The court rejected the Government's additional theory that SORNA, as applied to Kebodeaux, could be considered legislation that regulates activities

that substantially affect interstate commerce. *See* Gov't En Banc Br. at 39–41. SORNA "regulates non-economic, intrastate conduct that is not 'an essential part of a larger regulation of economic activity.'" Pet. App. A at 38a (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). "It is a criminal statute that 'by its terms has nothing to do with "commerce" or any sort of economic enterprise[.]'" *Id.* at 38a–39a (quoting *Morrison*, 529 U.S. at 610). For those reasons, the court concluded that, to uphold Kebodeaux's conviction under "a non-commercial statute regulating purely intrastate conduct constitutional would read the word 'commerce' out of the Commerce Clause." *Id*. at 39a.

In sum, the Fifth Circuit held that SORNA's "registration requirements" and its "criminal penalties for failing to register after intrastate location are unconstitutional solely as they apply to former federal sex offenders who had been unconditionally released from federal custody before SORNA's passage in 2006." *Id.* at 41a. As to these offenders, SORNA is "an unlawful expansion of federal power at the expense of the well-recognized police power of the state." *Id*. at 42a.

REASONS FOR DENYING THE PETITION

The Government asks this Court to review *Kebodeaux* "[n]otwithstanding the potentially limited practical effect" of that decision. Pet. at 31. *Kebodeaux*'s limited effect is one reason to deny the petition. Another is that this case is a poor vehicle for deciding the questions presented. It does not clearly or cleanly

present the issues the Government's petition claims. Finally, the Fifth Circuit's decision is correct on the merits and should not be disturbed.

I. THE VERY LIMITED EFFECT OF THE DECISION IN *KEBODEAUX* MAKES THE QUESTIONS PRESENTED UNWORTHY OF THIS COURT'S REVIEW.

This Court exercises its power to grant certiorari "sparingly." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 (2011) (quoting *Forsyth v. Hammond*, 166 U.S. 506, 514 (1897)). Review generally will be granted "only when the circumstances of the case satisfy [the Court] that the importance of the question involved, [or] the necessity of avoiding conflict [in the lower courts] . . . demands" the exercise of the power to grant certiorari. *Id*. (quoting *Forsyth*, 166 U.S. at 514–15) (first brackets added).

The Fifth Circuit Court of Appeals decided *Kebodeaux* on "narrow grounds," based on Kebodeaux's "unusual circumstances," as well as "the specific and limited facts" presented by his case. Pet. App. A at 2a, 3a, 7a. For that reason, the case will have limited practical effect, as the Government concedes. Pet. at 31. Accordingly, the questions presented in Kebodeaux's case are not of sufficient importance to warrant this Court's review. Nor does the case embody a conflict among the lower courts, or present a matter affecting the interests of the nation.

A. Kebodeaux's Case Is Not of Sufficient Importance to Warrant This Court's Review.

The Government asks this Court to grant review because the Fifth Circuit "invalidated certain applications of [SORNA,] an important Act of Congress." Pet. at 28. The court did not, however, invalidate any of SORNA's statutory language. That is because SORNA applied to Kebodeaux only by virtue of a regulation promulgated by the Attorney General. *See* Pet. App. A at 2a n.1 ("Because Kebodeaux committed his offense before SORNA's passage, his duty to register comes from the Attorney General's regulation rather than the statute itself.") Invalidating that regulatory application of SORNA to Kebodeaux leaves SORNA's statutory language intact, making the Fifth Circuit's decision less important than it otherwise might have been.

Congress did not make SORNA applicable to offenders, like Kebodeaux, whose sex offense occurred before SORNA's 2006 enactment. Instead, it delegated to the Attorney General the authority to apply SORNA's registration requirements to pre-Act offenders. *See* 42 U.S.C. § 16913(d) ("The Attorney General shall have the authority to specify the applicability of the [registration] requirements . . . to sex offenders convicted before the enactment" of SORNA); *Reynolds v. United States*, 132 S. Ct. 975, 979 (2012) (SORNA's "registration requirements do not apply to pre-Act offenders until the Attorney General specifies that they do apply").

The Attorney General did so by promulgating a regulation that provides: "The 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 [SORNA]." 28 C.F.R. § 72.3. Because SORNA's applicability to Kebodeaux rested on this regulation, the Fifth Circuit ruled that SORNA, "interpreted by the Attorney General" to apply to pre-Act offenders like Kebodeaux, was unconstitutional as applied to him. Pet. App. A at 2a.

Because SORNA applies to Kebodeaux by virtue of a federal regulation, the Fifth Circuit's ruling does not invalidate SORNA's statutory language. By its terms, SORNA imposes an initial registration requirement on federal offenders who were in custody, or being sentenced at the time of SORNA's passage. *See* 42 U.S.C. § 16913(b)(1), (2) (initial registration required "before completing a sentence of imprisonment" for a sex offense, or "not later than 3 business days after being sentenced for that offense, if . . . not sentenced to a term of imprisonment"). These initial registration requirements, which did not apply to Kebodeaux because he satisfied his federal sentence in 1999, remain intact.

SORNA's general registration requirements, as well as its requirement to keep registration current, also remain intact. *See* 42 U.S.C. § 16913(a), (c). *Kebodeaux* invalidated the application of those provisions only as to certain pre-Act federal offenders who are subject to SORNA under the Attorney General's regulation. *Kebodeaux* accordingly "does not affect the registration

requirements for (1) any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or (2) any federal sex offender convicted since then." Pet. App. A at 4a. Nor does it exclude from SORNA's coverage those federal offenders whose "release from custody" is conditioned upon their compliance with sex offender registration requirements. *Id*. at 3a. Most important, federal offenders like Kebodeaux are still subject to SORNA's requirements if they cross state lines to avoid registration, regardless whether their convictions predated SORNA's 2006 passage. *See id*. at 5a (federal offenders like Kebodeaux may be regulated "exactly as all state sex offenders already are [regulated] under federal law"). This last limitation on the court's ruling is especially significant, considering that "the great majority of [SORNA] prosecutions that the government has brought" are based on allegations of interstate travel, and do not depend solely on the existence of a pre-Act federal conviction. Pet. at 30.

The punishment provisions in 18 U.S.C. § 2250 are similarly unaffected by *Kebodeaux*. Those provisions apply to one who "is required to register under [SORNA.]" 18 U.S.C. § 2250(a)(1). The persons required to register are defined by 42 U.S.C. § 16913. As that registration provision remains intact, so does § 2250, which relies on it.

Kebodeaux did not invalidate SORNA as unconstitutional—it invalidated only the Attorney General's application of SORNA to specific pre-Act federal

offenders. The Attorney General has already once modified the regulation governing SORNA's application to pre-Act offenders to avoid any inconsistency with this Court's decision in *Carr v. United States*, 130 S. Ct. 2229 (2010). *See* APPLICABILITY OF THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT, 75 Fed. Reg. 81,849, 81,852–53 (Dec. 29, 2010) (making "clarifying change in the interim rule[,]" 28 C.F.R. 72.3, ex. 2, to avoid inconsistency with *Carr*). A similar modification could be undertaken to avoid inconsistency with *Kebodeaux*, thus obviating the issues urged by the Government here. Because regulations can be so easily changed, cases that invalidate a regulation, as opposed to a statute, generally pose less significant questions. *Cf. Kickapoo Traditional Tribe v. Texas*, 555 U.S. 811 (2008) (denying certiorari in case that invalidated regulations issued under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.); *Shalala v. Health Ins. Ass'n of America*, 513 U.S. 1147 (1995) (denying certiorari in case that invalidated Medicare regulations).

In any event, cases involving the narrow class of offenders affected by *Kebodeaux* arise too infrequently to warrant this Court's review. Indeed, prosecutions like Kebodeaux's should diminish even more, over time, as more offenders become subject to SORNA by virtue of their conditional release from custody or commission of a sex offense after 2006.

For all these reasons, *Kebodeaux* has "limited practical effect[,]" as the Government's concedes. Pet. at 31. The decision is not of sufficient importance to warrant this Court's review.

B. Kebodeaux's Case Does Not Involve a Circuit Split.

The Government acknowledges that the *Kebodeaux* decision "is the first from a court of appeals to address the constitutionality" of SORNA, as it applies to former federal offenders through the Attorney General's regulation. Pet. at 29. But it urges the Court to review *Kebodeaux* "even in the absence of a circuit split." *Id*. at 28. This is reason to deny the Government's petition—not to grant it. *See Greene*, 131 S. Ct. at 2033 (certiorari granted "sparingly," as when necessary to avoid conflict among the courts of appeals).

After the Government filed its petition for certiorari, the Ninth Circuit decided *United States v. Elk Shoulder*, 696 F.3d 922 (9th Cir. 2012). In that case, a panel of the court of appeals rejected a constitutional challenge to SORNA, noting its disagreement with the reasoning in *Kebodeaux*. *Id*. at 931–32. The Ninth Circuit's criticism of *Kebodeaux* does not create a circuit split, however—the disagreement was *dicta*, as the court acknowledged that "*Kebodeaux*'s specific holding is not applicable" in Elk Shoulder's case *Id*. at 931 n.10.

Kebodeaux was not applicable in *Elk Shoulder* because the Fifth Circuit's holding "does not affect the registration requirements for . . . any federal sex

offender who was in prison or on supervised release when the statute was enacted in 2006[.]" Pet. App. A at 4a. Elk Shoulder was on supervised release in July 2006, and imprisoned for a violation of that release in August 2006. *Elk Shoulder*, 696 F.3d at 924. Accordingly, he was on supervised release when SORNA was enacted, and imprisoned after SORNA's passage—both circumstances that exclude him from the small class of offenders affected by *Kebodeaux*.

In upholding SORNA's application to Elk Shoulder, the Ninth Circuit said that it joined the Tenth Circuit in finding SORNA's registration and punishment provisions constitutional. *Elk Shoulder*, 696 F.3d at 931 (citing *United States v. Yelloweagle*, 643 F.3d 1275 (10th Cir. 2011), *cert. denied* 132 S. Ct. 1969 (2012); *United States v. Carel*, 668 F.3d 1211 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 2122 (2012)). Like Elk Shoulder, the defendants in *Yelloweagle*[4] and *Carel*[5] were on supervised release when SORNA was enacted, thus distinguishing those cases from *Kebodeaux*. Accordingly, there is no split of circuit authority on the issue whether SORNA's federal offender provisions

4. 643 F.3d at 1278. *Yelloweagle* proceeded on the assumption that the registration requirement was constitutional, another factor that distinguishes it from *Kebodeaux*. *See* Pet. App. A at 30a n.44 (distinguishing *Yelloweagle*).

5. 668 F.3d at 1212, 1215 ("we hold that as applied to Mr. Carel—a federal sex offender on supervised release—§ 16913 is a constitutional exercise of Congress's authority").

apply to one who served his sentence and was unconditionally released from federal custody before July 27, 2006—SORNA's enactment date.

There is a final factor to consider about *Elk Shoulder*. New counsel has been appointed for Elk Shoulder's appeal, and the Ninth Circuit has *sua sponte* extended the date for filing a petition for rehearing or for rehearing en banc until January 4, 2013. *See* Order, *United States v. Elk Shoulder*, No. 10-30072 (9th Cir. Nov. 7, 2012), ECF No. 44. Reconsideration of that opinion thus may soon be underway in the Ninth Circuit.

II. KEBODEAUX'S CASE IS A POOR VEHICLE FOR DECIDING THE QUESTIONS PRESENTED.

Four factors make Kebodeaux's case a poor vehicle for reviewing the questions presented by the Government: (1) the Government's first question presented rests on an incorrect premise—the Fifth Circuit did not, as the Government claims, base its constitutional analysis on a mistaken understanding of pre-SORNA sex offender registration law; (2) the Government relies on statutory and constitutional provisions that were either not raised at all, or were inadequately litigated below; (3) the issues raised by the Government are not ripe for this Court's review; and (4) there is an adequate alternative basis for affirming the Fifth Circuit's decision that pretermits consideration of the issues raised by the Government.

1. The Government's first question presented incorrectly identifies the basis of the Fifth Circuit's decision in *Kebodeaux*. The Government's first question presented asserts that the Fifth Circuit erred by conducting its constitutional analysis on the premise that Kebodeaux was not subject to a federal registration obligation until SORNA was enacted in 2006. Pet. at (I). This, the Government claims, was the "linchpin" of the court's decision. Pet. at 22. The Government is wrong.

Pre-SORNA sex offender registration law was not the linchpin of the Fifth Circuit's analysis. Instead, the court based its constitutional analysis on the factors set out in this Court's decision in *United States v. Comstock*, 130 S. Ct. 1949 (2010), as well as the Court's Commerce Clause jurisprudence.[6] One of the factors considered in *Comstock* is the history of federal involvement in the area of the law under review. In *Comstock*, it was the history of mental health treatment for federal prisoners. 130 S. Ct. at 1958–61. In *Kebodeaux*, it was the history of sex offender registration laws. As part of the Fifth Circuit's review of that history, the court noted that "SORNA's sex-offender-registration requirements have a short history: They have existed only since 2006, and federal law relating to sex-offender registration only since 1994." Pet. App. A

6. *Comstock* is cited, at the beginning of the court's legal analysis, as being the "most analogous Supreme Court decision" addressing the issues presented by Kebodeaux's case. Pet. App. A at 6a. The discussion of *Comstock* spans another 18 pages, until the court begins its Commerce-Clause analysis. *See id*. at 6a–24a.

at 10a. Accordingly, the court's view of pre-SORNA sex-offender-registration law was but one factor it considered—not the linchpin of its analysis.

As part of the *Comstock* analysis, the Fifth Circuit also considered the fact that Kebodeaux had already been "unconditionally released from prison and the military" when SORNA was enacted in 2006. *Id.* at 3a. By "unconditionally released," the court meant that Kebodeaux was no longer "in prison or on supervised release[,]" *id.* at 4a; nor was he required to register as a sex offender as a "condition[ ]" of his "release from custody[.]" *Id.* at 3a.[7] The Government, however, attributes a different meaning to the court's use of the term "unconditional release." In the Government's view, unconditional release means release free from any federal sex-offender-registration requirement. *See* Pet. at 17–18 (equating "unconditionally released" with absence of federal registration requirement).

Having created this false equivalence, the Government argues that the Fifth Circuit erred in finding that Kebodeaux had been unconditionally released from federal custody in 1999, because Kebodeaux had, in fact, been subject to a pre-SORNA federal registration requirement. Pet. at 17–24. On this point too, the Government is incorrect. Kebodeaux was not under a federal sex offender

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7. Under SORNA, federal sex offenders are required to serve a minimum term of five years' supervised release after their imprisonment term is complete. 18 U.S.C. § 3583(k). By law, those subject to supervised release must "comply with the requirements of" SORNA. 18 U.S.C. § 3583(d).

registration requirement when he was released from custody in 1999. *See infra* Part II. 2. a.

Whether or not such a federal registration requirement existed, however, the outcome in *Kebodeaux* would have been the same. Indeed, the Fifth Circuit addressed the absence of a pre-SORNA federal registration requirement only in a footnote in its opinion—signaling its lack of importance to the court's decision. *See* Pet. App. A at 4a n.4. And the court mentioned that alleged requirement only to address dissenting judges' view of pre-SORNA registration law—a point of more importance to those judges than to the majority. *See id.*

The Fifth Circuit's focus was on Kebodeaux's unconditional release from imprisonment in 1999: "We do not call into question Congress's ability to impose conditions on a prisoner's release from custody, including requirements that sex offenders register . . . . *After* the federal Government has *unconditionally* let a person free, however," his prior commission of a federal offense does not give the Government perpetual jurisdiction over him. *Id.* at 3a–4a. Kebodeaux was unconditionally released from federal custody in 1999. He was not conditionally released on supervised release, nor was his release conditioned on his compliance with a sex offender registration requirement. Under the principles set forth in *Comstock*, this factor, combined with others, showed that the Attorney General improperly extended SORNA's provisions to those like

Kebodeaux, who had already been unconditionally released from federal custody when SORNA was enacted in 2006.

For these reasons, the Government's first question presented is not actually presented by this case. The court of appeals did not premise its constitutional analysis on a misunderstanding of pre-SORNA registration law.

2. The Government relies on statutory and constitutional provisions that were either not raised at all, or were inadequately litigated below. The focus of the Government's first question presented— pre-SORNA registration law—raises issues that were neither cleanly raised nor adequately argued below. As for its second question presented, that too raises a new issue in this Court: the Spending Clause as a source of congressional authority for SORNA. The Government did not raise the Spending Clause argument at all in the court below. Both these factors make Kebodeaux's case a poor vehicle for deciding the questions presented by the Government.

a. *Pre-SORNA sex-offender-registration law.* The Government's en banc brief asserted, in a footnote, that pre-SORNA federal law required Kebodeaux to register as a sex offender in 1999. Gov't En Banc Br. at 24, n.5 (citing 42 U.S.C. § 14072(i)(3)). Some dissenting judges agreed with this assertion. Pet. App. A at 66a–70a (Haynes, J., dissenting). A concurring judge cited a different statutory provision, 42 U.S.C. § 14072(i)(4), Pet. App. A at 42a–44a (Owen, J., concurring), which the Government now relies on, conceding

that it "did not rely on . . . in the court of appeals[.]" Pet. at 19–20 & n.7. The majority opinion in *Kebodeaux* rejected the Government's footnoted argument in a footnote of its own—signaling both its lack of importance to the court's decision, as well as the absence of adequate litigation of an issue that the Government now submits as the premise of its first question presented. Pet. at (I), 17–24. This is far too thorny and fact-bound a question to be litigated for the first time in this Court.

For example, the pre-SORNA law that the Government now relies upon, 42 U.S.C. §§ 14072(i)(3) and (i)(4), did not actually impose federal *registration* requirements. *See* Pet. at 18–22. Instead, the law prescribed federal penalties for an offender who failed to register as required by state law. Section 14072(i), entitled "Penalty," provided imprisonment terms under subsections (3) and (4) for certain persons who "knowingly fail[ ] to register *in any State*" in which they reside, work, or attend school. 42 U.S.C. § 14072(i)(3), (4) (emphasis added). The states were required to maintain sex offender registries compliant with federal guidelines as a condition of federal funding. 42 U.S.C. § 14071(g)(2)(A). But there was no free-standing federal registration requirement, as there is in SORNA. *See* 42 U.S.C. § 16913(a) ("A sex offender shall register . . . in each jurisdiction where the offender resides," works, or is a student).

Indeed, the Government concedes as much by carefully crafting its argument to say that the Fifth Circuit "Erroneously Concluded That Respondent

Was Not Already Subject to A *Federal Penalty* . . . When He Completed The Sentence Imposed For His Federal Sex Offense[.]" Pet. at 17 (emphasis added).[8] To maintain its contention that pre-SORNA "federal *registration* requirements" were "imposed . . . by virtue of 42 U.S.C. 14072(i)(3) and (i)(4) (2006)[,]" the Government is forced to argue that "the criminal provisions for failure to register constituted 'federal registration requirements.'" Pet. at 21 (emphasis added). Accordingly, the Government's argument is that the existence of a penalty for failing to register according to state law was equivalent to a separate federal registration requirement. This loses sight of the argument that the Government began with: the Fifth Circuit erred in concluding that Kebodeaux was not subject to a federal registration obligation under pre-SORNA law. Pet. at (I). The reality is that Kebodeaux was not under such an obligation because that obligation did not exist—only by saying that a federal penalty is equivalent to a federal registration requirement can the Government support the premise of its first question presented.

Even if sections 14072(i)(3) and (i)(4) could be construed to have imposed a registration requirement—and Kebodeaux contends they cannot—neither provision applied to Kebodeaux at the time he completed his sentence and was discharged from the military in 1999. By its terms, § 14072(i)(3) did not apply

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8. In fact, the Fifth Circuit concluded that Kebodeaux "was not subject to federal *registration* requirements." Pet. App. A at 5a n.4 (emphasis added).

to persons, like Kebodeaux, who were in military custody. It applied to "[a] person who is . . . described in section 4042(c)(4) of title 18[.]" 42 U.S.C. § 14072(i)(3). Title 18, United States Code, § 4042 is captioned "Duties of Bureau of Prisons," and addresses, among other things, the Bureau of Prisons' (BOP) obligation to notify state and local authorities when it releases prisoners from BOP custody. Accordingly, the persons "described in section 4042(c)(4)" were those in BOP custody, not those in the custody of military authorities. Indeed, 18 U.S.C. § 4042(d) expressly states that "[t]his section shall not apply to military or naval penal or correctional institutions or the persons confined therein." Kebodeaux was confined in military custody. He was not a person described in 18 U.S.C. § 4042(c)(4) because he was not in BOP custody.[9] Therefore, Kebodeaux was not subject to § 14072(i)(3)—whether the Government chooses to call it a registration requirement, or to recognize it for what it is, a penalty provision.

Title 42, section 14072(i)(4)—never cited by the Government in the Fifth Circuit—did apply to military offenders. That provision covered "[a] person who is . . . sentenced by a court martial for conduct in a category specified by the Secretary of Defense under Section 115(a)(8)(C) of title I of Public Law 105-

9. Although arguing otherwise here, the Government implicitly acknowledged this point in its en banc brief before the Fifth Circuit: "Section 4042(c) applies directly to sex offenders released from Bureau of Prisons Facilities, *as opposed to military facilities*. 18 U.S.C. § 4042(d)." Gov't En Banc Br. at 18 n.3 (emphasis added). Other pre-SORNA provisions "provide[ ] parallel requirements regarding sex offenders released *from military custody*." *Id.* (emphasis added).

119[.]" 42 U.S.C. § 14072(i)(4). It appears, however, that § 14072(i)(4) did not apply to Kebodeaux when he was released from custody and discharged from the Air Force on September 18, 1999.[10] Section 115(a)(8)(C) of the 1998 Appropriations Act directed the Secretary of Defense to specify categories of offenses under the Uniform Code of Military Justice (UCMJ) comparable to the state offenses for which federal law obliged states to require registration; to implement procedures to notify military sex offenders of their obligation to register; and to notify state and local authorities upon the release of those offenders. 1998 Appropriations Act § 115(a)(8)(C)(i), (ii), 111 Stat. at 2466 (codified at 10 U.S.C. § 951, note). The Acting Assistant Secretary of Defense issued a "directive-type memorandum" on December 23, 1998, prescribing such procedures and specifying carnal knowledge under Article 120 of the UCMJ as an offense covered by them. Pet. App. G at 172a. But it is, at best, unclear whether those procedures were actually in effect at the time of Kebodeaux's discharge on September 18, 1999.

The Acting Assistant Secretary's memorandum provided that "[t]he Secretaries of the Military Departments shall ensure compliance with this memorandum and take reasonable and necessary steps *to fully implement* the requirements of federal law." Pet. App. G at 172a (emphasis supplied).

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10. Kebodeaux was sentenced for his offense on May 17, 1999. The three-month sentence was approved and ordered to be executed on June 14, 1999. Kebodeaux was discharged from the Air Force on September 18, 1999.

According to an article in a quarterly journal published by the Air Force Judge Advocate General School, it was not until December 17, 1999, that the list of specified UCMJ offenses was added to Department of Defense Instruction 1325.7—which concerns "Administration of Military Correctional Facilities and Clemency and Parole Authority," and includes the procedures concerning sex offender notification—as attachment 27 to that Instruction. *See The Judiciary, Caveat*, THE REPORTER, Dec. 2003, at 16, 17. Because Kebodeaux was discharged from the military on September 18, 1999—prior to the date the requirements of § 115(a)(8)(C) were fully implemented, as required by the Acting Assistant Secretary's memorandum of December 23, 1998—it appears that he was not subject to § 14072(i)(4).

As demonstrated above, whether Kebodeaux was even subject to a federal penalty for failing to register with a state in 1999 is a complicated matter.[11] Had it been important to the Government's argument, that point should have been pressed below. But perhaps it is understandable that the Government did not press this matter. As the Government acknowledged, its arguments about pre-SORNA law would be pertinent only if the Fifth Circuit "were to hold that Congress's authority to require registration by a federal sex offender, qua federal offender, depends on the existence at the time of offense of a federal

11. The Government's arguments assume that the delegations and procedures used to implement Congress's directive were themselves valid. Kebodeaux does not concede this point.

reporting requirement[.]" Gov't En Banc Br. at 24 n.5. Given *Comstock*'s multi-factor analysis, as well as the Commerce Clause arguments before the court of appeals, there was little chance that the court's decision would depend on the content of pre-SORNA law. And as it turns out, the court's decision did not depend on that point—the court's understanding of pre-SORNA federal sex-offender-registration law was not the linchpin of its constitutional analysis.

b. *The Spending Clause.* Another argument raised by the Government would also have to be litigated for the first time in this Court. That is the validity of the Spending Clause as a basis for SORNA's federal-offender provisions, as made applicable to pre-Act offenders by the Attorney General's regulation. Here too, the Government concedes that it "did not specifically invoke the Spending Clause as a source of congressional authority below[.]" Pet. at 24 n.8. The Government's failure to raise this issue—which goes to its second question presented—is another reason the petition for a writ of certiorari should be denied.

3. Cases pending in other courts of appeals may be better vehicles for considering the questions presented by the Government. The decision in *Kebodeaux* is "the first from a court of appeals to address" the application of SORNA's federal-offender provisions, as they apply to those convicted before 2006, who were neither in custody nor on some type of conditional release, such as probation or supervised release, when SORNA was

enacted. Pet. at 29. As the Government notes, "no other court of appeals has addressed the constitutional questions that the en banc court debated, let alone considered them in light of this Court's recent decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (NFIB)." Pet. at 23.

At least two other courts of appeals, however, are doing just that, and those cases are likely to be better vehicles to consider the issues involved in *Kebodeaux*—assuming those issues would warrant this Court's review at all.

In *United States v. Brunner*, the Second Circuit is considering the case of a former federal offender, like Kebodeaux, who had completed his sentence and been discharged from the military before SORNA's 2006 enactment. *See* Brief on Appeal for Defendant-Appellant Kenneth Brunner at 4, *United States v. Brunner*, No. 11-2115 (2d Cir. Oct. 11, 2011), ECF No. 14. The *Brunner* court has ordered supplemental briefing to address *NFIB* and *Kebodeaux*. See Orders, *Brunner*, No. 11-2115 (2d Cir. July 9, 2012 & July 11, 2012), ECF Nos. 51, 54. Once *Brunner* is decided, the Second Circuit will have considered issues raised by the Government's questions presented. The decision in *Brunner* will have the added benefit of providing another court of appeals's view of the reasoning in *Kebodeaux*.

In *Elk Shoulder*, the Ninth Circuit has also considered *NFIB* and some of the issues addressed in *Kebodeaux*. 696 F.3d at 928–32. By early next year, the Ninth Circuit should have decided whether that case will be reheard, and so it,

too, ultimately will be a better vehicle than *Kebodeaux* for resolving the second question presented by the Government.

4. There is an independent and adequate basis upon which to affirm *Kebodeaux*, thus pretermiting the questions presented by the Government. In *Reynolds*, this Court ruled that SORNA's requirements do not apply to offenders with pre-SORNA convictions until "the Attorney General validly specifies that the Act's registration provisions apply to them." 132 S. Ct. at 980. The courts of appeals are divided about what date the Attorney General validly specified SORNA's application to pre-SORNA offenders. In the Fifth Circuit, that date is March 30, 2007, so that SORNA applied retroactively to Kebodeaux, whose failure-to-register offense occurred between August 2007 and March 2008. *See United States v. Johnson*, 632 F.3d 912, 930–33 (5th Cir.), *cert. denied*, 132 S. Ct. 135 (2011). In the Sixth and Ninth Circuits, however, Kebodeaux would not have been subject to prosecution under SORNA, as the effective date of the regulation in those jurisdictions is August 1, 2008. *See United States v. Stevenson*, 676 F.3d 557, 562 (6th Cir.), *cert. denied*, 133 S. Ct. 168 (2012); *United States v. Mattix*, 694 F.3d 1082, 1083–85 (9th Cir. 2012).

Should this Court decide that the Sixth and Ninth Circuits have the better view, there will be an adequate and independent basis upon which to affirm the Fifth Circuit's reversal of Kebodeaux's conviction—his failure to register occurred before the Attorney General's regulation made him subject to SORNA.

This issue, like others the Government raises, was not litigated in the Fifth Circuit. Nonetheless, Kebodeaux may defend the Fifth Circuit's judgment on any alternate ground supported by the record. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984) ("prevailing party may urge any ground in support of the judgment" regardless whether it "was relied upon or even considered by the court below"). In fairness, Kebodeaux should be permitted to raise this issue if the Government is permitted to raise issues it failed to litigate, or litigated inadequately, below.

More important, this is yet another reason that Kebodeaux's case presents a poor vehicle to consider the questions presented by the Government. There is an adequate and independent ground upon which to affirm the Fifth Circuit's reversal of his conviction.

III. THE FIFTH CIRCUIT'S DECISION IS CORRECT.

In the Fifth Circuit, the Government defended SORNA's application to pre-Act federal offenders like Kebodeaux on two grounds: (1) SORNA's penalty provision is "within Congress's Necessary and Proper Clause authority to enact laws for the responsible operation of the federal penal system[,]" Gov't En Banc Br. at 13–14; and (2) SORNA is valid legislation under the Commerce Clause "as a means to carry into effect [Congress's] power to regulate the injurious use of interstate travel to evade and defeat" registration requirements, *id.* at 14. The court of appeals correctly applied this Court's precedent in *Comstock* to reject

the first argument. *See* Pet. App. A at 6a–24a. And it correctly applied this Court's Commerce-Clause jurisprudence to reject the second. *Id*. at 24a–41a. In effect, the Government asks this Court to correct the Fifth Circuit's alleged error in applying settled precedent. This Court does not sit to correct the errors of lower courts. *See* SUP. CT. R. 10 (petition rarely granted to correct misapplication of precedent). More important, there is no error to correct in this case.

A. The Fifth Circuit Correctly Applied *Comstock*.

In *Kebodeaux*, the Government "maintain[ed] that its power to criminalize the conduct for which Kebodeaux was originally convicted includes the authority to regulate his movement even after his sentence has expired and he has been unconditionally released." Pet. App. A at 6a. That authority, it argued, was necessary and proper to effectuate its powers under the military clause. Gov't En Banc Br. at 16–18.[12] As the Fifth Circuit correctly found, these arguments were analogous to the issues addressed in *Comstock*. Pet. App. A at 6a (citing *Comstock*, 130 S. Ct. at 1954).

In *Comstock*, the Court decided that the federal Government had the authority to civilly commit inmates currently in federal custody beyond the date they would otherwise be released, if they were sexually dangerous. 130 S. Ct.

12. In this Court, the Solicitor General has added the Spending Clause as another basis for asserting federal jurisdiction over Kebodeaux. Pet. at 24.

at 1954. The Constitution's Necessary and Proper Clause, together with the enumerated powers that permitted the federal Government to define federal crimes, gave Congress the "power to act as a responsible federal custodian" for prisoners currently in federal custody. *Id*. at 1961. Based on *Comstock*'s five-factor analysis, the Fifth Circuit concluded that SORNA's registration and penalty provisions, as applied to Kebodeaux, exceeded that power. *See* Pet. App. A at 6a–24a.

The Fifth Circuit was correct. *Comstock*'s first factor, the breadth of the Necessary and Proper Clause, cannot sustain SORNA's application to Kebodeaux, who was not in federal custody, not under federal supervision, and not released on the condition that he comply with sex-offender registration requirements. *See id.* at 7a–9a, 23a–24a. As the Government acknowledged in *Comstock*, "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed." 130 S. Ct. at 1965 (quoting former Solicitor General Kagan, Transcript of Oral Argument at 9 (Jan. 12, 2010)). Once an inmate "has been released from prison and [his] period of supervised release is also completed[,]" a "transfer to State responsibility and State control has occurred, and the Federal Government would have no appropriate role." Transcript of Oral Argument at 9, *Comstock*. At that point "there is a lack of Federal power" over a former federal prisoner. *Id*.

In the Fifth Circuit and before this Court, the Government has sought to cabin its concessions in *Comstock*, arguing that the former Solicitor General's "statement related to 'the power to commit,' and not the lesser regulatory measures" under SORNA. Pet. at 27 n.9 (citation omitted); *see also* Gov't En Banc Br. at 20. But as the transcript of the *Comstock* argument makes clear, those remarks—and this Court's understanding of them—were directed at the federal Government's power to regulate a private citizen's conduct once he completed his federal sentence. They were not limited to the power to commit:

> JUSTICE KENNEDY: Could the Federal Government order a commitment of anyone who's been in Federal custody over the last 10 years?
>
> * * *
>
> GENERAL KAGAN: . . . I would say . . . that the Federal Government would not have the . . . power to commit a person who is—has been released from prison and whose period of supervised release is also completed. At that point the release has been—the transfer to State responsibility and State control has occurred, and the Federal Government would have no appropriate role.
>
> JUSTICE KENNEDY: So that must be because there is a lack of Federal power.
>
> GENERAL KAGAN: Yes, I think that that's correct, that *at that point the State police power over a person has been fully reestablished*.

Transcript of Oral Argument at 9, *Comstock* (emphasis added). Justice Kennedy's question about how far the Necessary and Proper Clause could stretch— *i.e.*, to extend federal control over anyone who had been in federal

custody within the last ten years—presaged Kebodeaux's circumstances. Kebodeaux had been released from custody nearly ten years before the federal Government prosecuted him for failing to register as a sex offender. Correctly applying *Comstock*'s first factor, the Fifth Circuit decided that the Necessary and Proper Clause was not so broad. It did not permit SORNA's application "to those, like Kebodeaux, who had already been unconditionally released from federal custody" when SORNA was enacted. Pet. App. A at 23a.

Comstock's second factor was also correctly analyzed by the court. The civil commitment statute in *Comstock* had a long history—federal laws addressing mental health care for federal prisoners had existed since 1855. 130 S. Ct. at 1958–61. By contrast, "federal law relating to sex-offender registration" has existed "only since 1994." Pet. App. A at 10a. A long-standing history of federal involvement "expands the deference afforded to a statute[,]" while a short history does not. *Id*. Accordingly, the relatively recent history of federal sex-offender-registration laws weighed against SORNA's application to Kebodeaux.

Comstock's third factor addressed whether the challenged law was a reasonable extension of federal authority over certain "persons who are already in federal custody[.]" 130 S. Ct. at 1961–62. The Fifth Circuit found this factor also favored Kebodeaux, who had been "long free from federal custody or supervision." Pet. App. A at 12a. In 1999, Kebodeaux had been "unconditionally released from prison and the military[,]" *id*. at 3a—he was free

from custody, he was not on supervised release or probation, and there were no conditions placed on his release from imprisonment.

The court of appeals rejected the Government's contention that federal sex-offender registration laws were like probation or supervised release because they regulated a prisoner's post-release conduct. *Id*. at 11a–20a. Probation and supervised release are imposed as part of a criminal sentence—sex-offender-registration provisions, as applied to Kebodeaux, were not. *Id*. at 12a–13a. In addition, supervised release and probation are conditions of a prisoner's "release from (or instead of) custody[,]" *id*. at 13a—sex offender registration provisions, as applied to Kebodeaux, were not.[13] Under *Comstock*'s third factor, the federal government's supervisory authority over its prisoners could not be extended to Kebodeaux, who was neither in custody nor released on the condition that he comply with SORNA. To so extend federal authority, the court reasoned, would mean that "Congress would have never-ending jurisdiction to regulate anyone who was ever convicted of a federal crime[.]" *Id*. at 19a–20a.

Comstock's fourth factor, "whether 'the statute properly accounts for state interests[,]'" also favored Kebodeaux. *Id*. at 20a (quoting *Comstock*, 130 S. Ct. at 1962). Although some aspects of SORNA accommodate state interests, its provisions place "a much more substantial imposition on the states' traditional

13. Currently, federal law "make[s] compliance with SORNA 'an explicit condition' of a sex offender's supervised release[.]" Pet. App. A at 18a (quoting 18 U.S.C. § 3538(d)).

police-power authority" than the statute at issue in *Comstock*. *Id*. at 22a–23a. Under that statute, 18 U.S.C. § 4248, the federal government has to notify the prisoner's home state of his or her federal detention, and release the prisoner to the state if the state wants to assume custody of that prisoner. *Id*. at 21a. No similar accommodation exists under SORNA; it authorizes federal punishment regardless of state interests.

The Fifth Circuit was correct to conclude that SORNA "effect[ed] a 'change in the sensitive relation between federal and state criminal jurisdiction.'" Pet. App. A at 20a (quoting *Lopez*, 514 U.S. at 561 n.3) (additional citation omitted). SORNA's failure to adequately account for state interests interferes with the powers reserved to the states in contravention of basic federalism principles and the Tenth Amendment. "[L]aws that undermine the structure of government established by the Constitution . . . are not '*proper* [means] for carrying into Execution' Congress's enumerated powers." *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.) (brackets in original). "The federal system rests on" the premise "that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). This dual system "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond, id.* SORNA

compromises Kebodeaux's liberty because it purports to control his actions through the exercise of a general police power.

Comstock's final factor considered the links between the federal constitutional power Congress sought to exercise and the statute at issue. *See* Pet. App. A at 23a (considering attenuation between SORNA and Congress's constitutional powers). The purported jurisdictional basis for subjecting Kebodeaux to SORNA, through the Attorney General's regulation, was his commission of a military sex crime in 1999. The Fifth Circuit found this purported jurisdictional basis too attenuated. Congress's power to create federal sex crimes did not confer unending jurisdiction over one who was convicted of such a crime and had fully discharged his sentence. *Id.*

For all these reasons, the Fifth Circuit's decision in *Kebodeaux* was a correct application of this Court's precedent in *Comstock*. It presents no issue that this Court should review though its power to grant certiorari.

B. The Fifth Circuit Correctly Applied This Court's Commerce-Clause Precedent.

The Fifth Circuit correctly rejected the Government's "alternative argument" that SORNA's federal offender provisions, as applied to Kebodeaux, "are necessary and proper to effect Congress's Commerce Clause power." Pet. App. A at 24a–25a. The Government had argued that SORNA was a proper exercise of Congress's power to regulate the use of the channels of interstate

commerce, Gov't En Banc Br. at 29–39, as well its power to regulate activities that substantially affect commerce, "depending on how [that] category is understood." *Id.* at 39–41. The court correctly found that SORNA did not fit any of the "three broad categories of activity that Congress may regulate under its commerce power[,]"[14] including those activities captured through the Necessary and Proper Clause. *See* Pet. App. A at 24a–41a. Before this Court, the Government does not appear to argue otherwise. *See* Pet. at 24–28.

Indeed, the Government appears to have abandoned reliance on this Court's traditional Commerce Clause precedent. *See id.* Instead, it contends that SORNA's national system for registering federal and state sex offenders, and its provisions punishing a failure to register, were within "Congress's Article I authority to enact necessary and proper measures to effectuate its military, commerce, and spending powers." *Id.* at 24. Its main support for this proposition appears to be this Court's statement in *Carr* that "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Id.* at 26 (quoting *Carr*, 130 S. Ct. at 2238). As the Fifth Circuit correctly observed, however, "*Carr* did not address the extent of Congress's

14. *Lopez*, 514 U.S. at 558.

Article I power at all—it involved a statutory-interpretation issue[.]" *Id*. App. A at 17a.

At bottom, the Government appears to be making an argument that *Comstock*'s view of the federal government's custodial interest over federal offenders extends to those, like Kebodeaux, who have been released from prison and federal supervision. Pet. at 26 (citing *Comstock*, 130 S. Ct. at 1961). This position exceeds the limit the Government recognized in arguing *Comstock*, and far exceeds the limits *Comstock* placed on the federal custodial power. Accordingly, *Comstock* supports the correctness of the Fifth Circuit's decision in *Kebodeaux*; it does not help the Government.

CONCLUSION

FOR THESE REASONS, Kebodeaux respectfully requests that this Court deny the Government's petition for a writ of certiorari.

Respectfully submitted.

G. PATRICK BLACK
Acting Federal Public Defender
Western District of Texas
727 E. César E. Chávez Blvd., B-207
San Antonio, Texas 78206
(210) 472-6700
Fax: (210) 472-4454

M. CAROLYN FUENTES*
Assistant Federal Public Defender

**Counsel of Record for Petitioner*

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