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IN THE SUPREME COURT OF THE UNITED STATES

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BILLY JOE REYNOLDS, :

Petitioner : No. 10-6549

v. :

UNITED STATES. :

- - - - -x

Washington, D.C.

Monday, October 3, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

CANDACE CAIN, ESQ., Assistant Federal Public Defender, Pittsburgh, Pennsylvania; for Petitioner.

MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-6549, Reynolds v. United States.

Ms. Cain.

ORAL ARGUMENT OF CANDACE CAIN

ON BEHALF OF THE PETITIONER

MS. CAIN: Mr. Chief Justice, and may it please the Court:

Recognizing that certain offenders convicted before enactment or an implementation of SORNA would be unable to comply with SORNA's initial registration requirement, Congress included section 16913(d) delegating to the Attorney General the authority to determine whether and how to apply SORNA's registration requirements to those offenders.

Mr. Reynolds is one of those offenders because he was convicted, sentenced, and released from prison a year before SORNA was enacted. But for a valid exercise of the Attorney General's authority under subsection (d), Mr. Reynolds had no obligation to register under SORNA, could not initially register under SORNA, and, therefore, was not subject to SORNA's criminal penalties. Action by the Attorney General was needed to bring offenders like Mr. Reynolds into the new

1 system.

2 And because both implementing SORNA and
3 determining whether and how SORNA would be applied to
4 pre-enactment offenders would require time and
5 consideration, Congress left the Wetterling Act
6 registration law in place for 3 years to ensure that all
7 offenders would be covered under the old law. And
8 until --

9 CHIEF JUSTICE ROBERTS: Was the -- is the
10 Wetterling Act retroactive?

11 MS. CAIN: The Wetterling Act, Your Honor,
12 was remaining in place for 3 years and had a sort of a
13 sunset provision under --

14 CHIEF JUSTICE ROBERTS: No, no, I know.
15 That's going forward. But was the requirement to
16 register under the Wetterling Act -- did that apply as
17 of the enactment date or did that reach back?

18 MS. CAIN: Your Honor, actually the
19 Wetterling Act was not effective for a year into the
20 future.

21 CHIEF JUSTICE ROBERTS: So, you think it
22 only applied to that year?

23 MS. CAIN: No, I'm sorry. The Wetterling
24 Act was enacted in -- in 1996.

25 CHIEF JUSTICE ROBERTS: So, if the offense

1 were committed in 1994, did that person have to register
2 under the Wetterling Act?

3 MS. CAIN: They had to register, but there
4 were no criminal penalties. At that point, it was a
5 1994 law called Wetterling, and then 2 years later under
6 the Lychner Act, criminal penalties were added.

7 Our reading better accords with the text and
8 congressional intent --

9 JUSTICE SOTOMAYOR: Could you clarify that
10 answer? The -- are you admitting that there were no
11 criminal enforcement options for the Attorney General
12 under the Wetterling Act for acts committed prior to
13 1996? Is that what you're saying?

14 MS. CAIN: Your Honor, the Wetterling Act,
15 as it was enacted in 1994, was a registration
16 requirement without criminal penalties. In 1996, the
17 Lychner Act was enacted amending Wetterling and added
18 the criminal penalty, the Federal criminal penalty of
19 1-year punishment for failure to register.

20 JUSTICE SOTOMAYOR: And that included all
21 individuals who had -- who had been convicted of -- of
22 sex abuse acts before 1996?

23 MS. CAIN: I don't know.

24 Our reading better accords with the text of
25 SORNA and congressional intent, but the Government

1 reading is simply not reasonable. If SORNA were to
2 apply to all pre-enactment and pre-implementation
3 offenders on day one, and the Attorney General could
4 then modify in the future, which would in fact -- in
5 effect repeal SORNA as to some offenders, then you could
6 have a situation where someone was convicted of an
7 offense and then have to be covered under SORNA, and
8 then later the AG could decide that that group was
9 not required to register.

10 JUSTICE GINSBURG: Well, maybe -- maybe the
11 Attorney General doesn't have that power. But your
12 position is that whether this behavior, not registering,
13 is criminal or not is left up to the Attorney General,
14 is left up to the executive. Do we have other examples
15 where Congress says, well, we don't know whether this
16 should be a criminal offense; so, we're going to leave
17 it to the Attorney General?

18 It's quite different to say the Attorney
19 General will implement it in the technical details, but
20 to say that whether it's a criminal offense or not is up
21 to the Attorney General -- is there any other instance
22 where that's so?

23 MS. CAIN: Your Honor, I'm not aware of any,
24 but we don't -- this is not what the Attorney General is
25 doing. This is -- SORNA is a civil registration

1 requirement, and the Attorney General is deciding
2 whether someone has to register. In order for a
3 criminal indictment to be brought, a person would have
4 to travel and then fail to register. So, it's really
5 not actually deciding whether someone would be guilty of
6 a crime or convicted of a crime or exposed to a crime.

7 JUSTICE KENNEDY: I -- maybe I just don't
8 grasp the core of the case then. I thought this was a
9 criminal conviction and that you were arguing that it's
10 a criminal conviction because the conduct that's
11 prohibited by the statute was conduct that covered this
12 class of people by order of the Attorney General under
13 the interim regs. I mean, is that wrong?

14 MS. CAIN: Your Honor, actually what we are
15 seeking is the ability to contest the Attorney General's
16 rule. We're saying --

17 JUSTICE KENNEDY: I'm asking, isn't this is
18 criminal conviction that resulted from the fact that
19 your client was within the class of persons covered by
20 the statute? The Government says they're covered
21 anyway. You say they're covered only because the
22 Attorney General acted, but then you say it's a criminal
23 -- it's a civil provision? I -- I --

24 MS. CAIN: Well, Your Honor, it is --
25 failure to register and then travel -- I mean, travel

1 and then fail to register after you are obligated under
2 SORNA to register is a crime, yes.

3 JUSTICE SCALIA: Well, I -- you know, my
4 problem is that's very strange. I find it very strange
5 to leave it up to the Attorney General whether something
6 will be a crime or not. It will be a crime if the
7 Attorney General says so, and it won't be a crime if he
8 doesn't. I mean, especially leave it up to the Attorney
9 General, for Pete's sake; he's the prosecutor. You
10 know, it will be a crime if the prosecutor thinks it is,
11 and it won't be a crime if the prosecutor thinks it
12 isn't. I don't -- I don't know of any parallel, and --
13 and I -- I think it's sailing close to the edge of
14 unconstitutionality; whereas, what the other side claims
15 is simply it's a crime to begin with, but the Attorney
16 General can make it not a crime. That -- that's sort of
17 like prosecutorial discretion. In -- in his -- in his
18 judgment, if it shouldn't be a crime, you know -- I have
19 trouble with that, too. But it's a lot --

20 (Laughter.)

21 JUSTICE SCALIA: But it's a lot closer to
22 prosecutorial discretion than -- than what you're asking
23 us to accept, that something is a crime only if the
24 Attorney General says it's a crime. That seems to me
25 very strange.

1 MS. CAIN: Well, Your Honor, that's really
2 what the text says, and our reading --

3 JUSTICE GINSBURG: But are you -- now -- now
4 we do -- the Attorney General has spoken. The first
5 time, you say it was ineffective because there was no
6 notice and comment. But from -- what is it -- August of
7 1908, we have a rule, a final rule, that did go through
8 notice and comment. So, are we talking about, is this
9 case simply about the period from February 1907 to
10 August 1908, and that's -- that's all that's involved in
11 this case, only those people? Or are you contesting
12 that after August 1908, you still have some kind of
13 claim?

14 MS. CAIN: Well, Your Honor, our -- our case
15 does not involve the time period after August of 2008.

16 JUSTICE GINSBURG: So, it's -- so, this
17 whole case is about what happens between February '07
18 and August '08, and that's the limit of it.

19 MS. CAIN: Right.

20 JUSTICE GINSBURG: Because there was no rule
21 at all before February '07, and there was a rule August
22 '08. So, it's just that period this case is about.

23 MS. CAIN: Yes. Our client traveled in '07.
24 And --

25 JUSTICE ALITO: It's the period from the

1 enactment of SORNA until the adoption of the SMART
2 guidelines, right? That's what we're talking about?

3 MS. CAIN: Well, Your Honor, if the SMART
4 guidelines are deemed valid, yes. But that was -- in
5 2008. Our client traveled in 2007. And so, the
6 Attorney General's interim rule is the rule that would
7 subject him to criminal liability.

8 JUSTICE SOTOMAYOR: Excuse me. I'm -- let
9 me go back to that question, counselor -- to that
10 answer. Let's assume we accepted the Solicitor
11 General's understanding of the rule, that it was illegal
12 to travel -- that you had to be -- had to register from
13 the start of SORNA. What challenge do you have left
14 either to the interim rule in 2007 or to the final rules
15 in 2008? What -- what challenge could you conceivably
16 make?

17 MS. CAIN: Your Honor, if the -- if the
18 statute applies from day one, we would still contest the
19 interim rule for -- the Attorney General took action but
20 did not exclude our client. The Attorney General did
21 what he was authorized to do in subsection (d).

22 JUSTICE SOTOMAYOR: What would be the basis
23 of that challenge?

24 MS. CAIN: Pardon me.

25 JUSTICE SOTOMAYOR: What would have

1 obligated him to take your client out of SORNA?

2 MS. CAIN: The exercise of his discretion to
3 not take him out --

4 JUSTICE SOTOMAYOR: Could you -- could you
5 tell me why?

6 MS. CAIN: Because --

7 JUSTICE SOTOMAYOR: What would be an abuse
8 of his discretion if he didn't take your client out?

9 MS. CAIN: He had exercised his discretion
10 under subsection (d) and decided not to exclude our
11 client from the --

12 JUSTICE SOTOMAYOR: That -- we're in a
13 circular argument.

14 MS. CAIN: -- statute.

15 JUSTICE SOTOMAYOR: What would have
16 commanded him to take your client out?

17 MS. CAIN: It would be his discretion.

18 JUSTICE SOTOMAYOR: You -- you would have to
19 bring some sort of suit that said he abused his
20 discretion. On what basis would he have -- what would
21 be your claim of abuse other than I really want my
22 client out?

23 MS. CAIN: Well, that he would have
24 standing. That's what we're trying to -- we're trying
25 to get standing to contest the interim rule.

1 JUSTICE SOTOMAYOR: But what impact would
2 the interim rules have had on you?

3 MS. CAIN: If the statute applies from day
4 one without the interim rule, we still would -- that is
5 what the standing issue is about. We're saying that the
6 interim rule is the only rule that gave -- gave the
7 government the ability to include Mr. Reynolds in the
8 prosecution.

9 CHIEF JUSTICE ROBERTS: You have --

10 MS. CAIN: This is --

11 CHIEF JUSTICE ROBERTS: You have a notice --
12 notice and comment claim, right?

13 MS. CAIN: Yes. Yes, Your Honor, we do.

14 JUSTICE GINSBURG: But what -- but what
15 you're challenging is interim rule, because there was no
16 notice and comment. So, you would have had no
17 challenge, not from the date of SORNA's enactment, but
18 from the date of the rule that you're challenging -- and
19 that rule was February '07. Your challenge is to the
20 invalidity of the interim rule, right?

21 MS. CAIN: That's right.

22 JUSTICE GINSBURG: Okay. So -- but before
23 there was an interim rule, you would have no such
24 challenge.

25 MS. CAIN: No, but the -- SORNA would not

1 apply to Mr. Reynolds before then.

2 JUSTICE GINSBURG: You might have some other
3 case, but this case is about a challenge to a rule as
4 invalid. Is that -- that's as I understand it. So,
5 there had to be the rule for you to make the challenge.

6 MS. CAIN: I'm sorry. I missed the last
7 part.

8 JUSTICE GINSBURG: You are challenging the
9 Attorney General's first rule as invalid, the
10 February '07 rule.

11 MS. CAIN: That's right.

12 JUSTICE GINSBURG: You say it's invalid
13 because there was no notice and comment. You have no
14 challenge -- your challenge doesn't reach before that,
15 because there was no rule before that so that you can --
16 the earliest point is when the rule was adopted, you're
17 saying, the rule was invalid. So, that's why I said the
18 brackets are from when there was an allegedly invalid
19 rule, which was in February '07, until when there's a
20 valid rule, which is in August of '08.

21 MS. CAIN: That's right, Your Honor. I
22 mean, that --

23 CHIEF JUSTICE ROBERTS: No, that's not --
24 no. Your argument, as I understand it, is there was no
25 notice and comment when he issued the interim rule.

1 MS. CAIN: Right.

2 CHIEF JUSTICE ROBERTS: If there had been
3 notice and comment, you would have jumped in with
4 comments that would have convinced the Attorney General
5 not to apply the rule to your client.

6 MS. CAIN: That's right.

7 CHIEF JUSTICE ROBERTS: Okay.

8 MS. CAIN: That's right.

9 JUSTICE SCALIA: And your argument is
10 further that without the rule, SORNA doesn't exist,
11 right?

12 MS. CAIN: For our client. He is --

13 JUSTICE SCALIA: Right.

14 MS. CAIN: He is unable to comply with the
15 initial registration provision under (b) because he was
16 released from prison a year before SORNA was enacted.
17 So, he could not meet either one of the descriptions of
18 initial registration.

19 JUSTICE BREYER: That doesn't mean -- that
20 doesn't mean SORNA doesn't apply; it means 2250 doesn't
21 apply.

22 MS. CAIN: That's right.

23 JUSTICE BREYER: Is that right?

24 MS. CAIN: Well --

25 JUSTICE BREYER: I mean, it might be a

1 metaphysical, but it may be that Congress intended the
2 statute to apply to people like your client, but the
3 question is when the initial registration has to take
4 place. And I took you as saying until the Attorney
5 General acts, we don't know. So, 2250 doesn't --
6 doesn't criminalize a failure until he can know when
7 he's supposed to register.

8 MS. CAIN: Register under SORNA. That's
9 right.

10 JUSTICE BREYER: That's right. Okay.

11 MS. CAIN: The problem is here that the
12 prosecution -- the Attorney General's office is
13 substituting a State registration for the initial
14 registration under SORNA, and that's just not what the
15 text says.

16 JUSTICE KAGAN: Ms. Cain, why do you think
17 Congress would have written the statute in this way? I
18 mean, in your brief, you say it was all very complicated
19 and Congress was worried about certain problems, the way
20 different registrations overlapped on each other. But
21 exactly what was so complicated? Why couldn't Congress
22 just have applied the statute to people in
23 Mr. Reynolds's situation itself?

24 MS. CAIN: Well, even the Government agrees,
25 in their brief, that there are complications.

1 JUSTICE KAGAN: I was going to ask the
2 Government the same question. What are the
3 complications --

4 MS. CAIN: Well --

5 JUSTICE KAGAN: -- that Congress was so
6 worried about?

7 MS. CAIN: Some sex offenders, you know,
8 from the various States -- there were State laws that
9 were varied amongst each other. There was the Federal
10 Wetterling Act that had its own different periods of
11 registration and different requirements.

12 And I think that one of the permutations --
13 some of them are that some sex offenders never had to
14 register in some States; some had been convicted before
15 and had served out their time and no longer had to
16 register; and some were released from prison, you know,
17 before the enactment or implementation of -- of SORNA.

18 And an example of a permutation that
19 was going to take some thought and some consideration is
20 the one that sort of is an example in a different
21 context, in the Federal Register and in the Government's
22 brief, which is that certain people who had served their
23 time and were completely out of the system, if they got
24 re-arrested for a misdemeanor, the Attorney General
25 decided that those individuals did not have to register

1 for a State to be deemed substantially implemented with
2 respect to SORNA. And so, that's an example of a type
3 of decision, a complication that the Attorney General
4 was particularly well-suited to deciding and making that
5 determination.

6 JUSTICE SOTOMAYOR: Arrested for a
7 misdemeanor to do what?

8 MS. CAIN: Any arrest for a misdemeanor that
9 would bring a previous offender back in the system -- if
10 that person was just convicted of a misdemeanor, they
11 would not -- the State would not have to re-register
12 them in order to be deemed substantially compliant with
13 SORNA and get the Byrne grant money.

14 JUSTICE SOTOMAYOR: I thought Justice
15 Kagan's question was, what would have stopped Congress
16 from just saying you have to register on the day of
17 passage? There was nothing to stop Congress from doing
18 that, correct?

19 MS. CAIN: They could have done that, but
20 they were concerned about how you get the older
21 conviction, the older pre-enactment people into the new
22 system.

23 JUSTICE SOTOMAYOR: That's your reason for
24 why they didn't do that. They didn't make it automatic,
25 correct? That's your argument?

1 MS. CAIN: Right. They wanted to have a new
2 registration, a new system that would start from a
3 certain point that would bring in new requirements. And
4 the problem is how to get the people with the older
5 convictions and the older registrations into the system.
6 And that would be done with initial registration. But
7 Mr. Reynolds --

8 JUSTICE KAGAN: Well, why is --

9 MS CAIN: -- can't register.

10 JUSTICE KAGAN: Why is it easier for the
11 Attorney General to do that by regulation than for
12 Congress simply to do it by the statute itself? What
13 did they expect to happen in the regulatory process that
14 would solve these problems for them?

15 MS. CAIN: Well, I think that it's more
16 flexible to have a regulation and takes perhaps less
17 time than legislation to think of all the different
18 permutations. They don't know every State's laws and
19 every State's capabilities. And so, it was more
20 flexible, and -- and they could respond more quickly to
21 changes.

22 JUSTICE GINSBURG: Well, take this case.
23 What would compliance entail other than simply telling
24 the Missouri authority -- I mean, he had to register,
25 was registered in Missouri -- telling the Missouri

1 authority that he was moving to another State? That's
2 all he had to do, right, to comply?

3 MS. CAIN: Comply with Missouri's law? The
4 State law?

5 JUSTICE GINSBURG: To comply with the -- the
6 SORNA requirement, that he'd have to tell the Missouri
7 authority that he was moving to another State. And then
8 Missouri would have an obligation to tell that other
9 State he's there.

10 MS. CAIN: Well, Your Honor, that -- your
11 question assumes that State registration would suffice
12 for SORNA. And, respectfully, the -- SORNA was not
13 enacted until --

14 JUSTICE GINSBURG: But I'm talking about
15 SORNA has been enacted, and now he's moving after SORNA
16 is enacted, right?

17 MS. CAIN: Right. Well, that's --

18 JUSTICE GINSBURG: Okay. So -- so, SORNA is
19 on the books. He's registered in Missouri. He's
20 leaving the State. To comply with SORNA, what does he
21 have to do other than tell the original State, I'm
22 moving to another State?

23 MS. CAIN: Well, he would have to comply
24 with the requirements of initial registration under
25 SORNA. Those contain more requirements than under the

1 Missouri --

2 JUSTICE GINSBURG: But he can't -- he can't
3 comply with the initial registration because he
4 committed this crime even before SORNA was enacted.

5 MS. CAIN: Under --

6 JUSTICE GINSBURG: But now, what would he
7 have to do to be in compliance?

8 MS. CAIN: With Missouri law, with State
9 law, would be, to comply with Missouri law, tell
10 Missouri he is leaving and then go to Pennsylvania and
11 comply with Pennsylvania law, perhaps. And that's also
12 not a SORNA registration; that is a registration under
13 State law.

14 We know from Carr that SORNA is -- doesn't
15 create an obligation until the statute's effective date.
16 And the statute's effective date is after a valid
17 Attorney General regulation for purposes of people like
18 Mr. Reynolds.

19 JUSTICE KAGAN: Could you tell me, Ms.
20 Cain -- you may have said this, and I may just have
21 missed it. But under the new regulations, a man who's
22 in the position of your client and who cannot initially
23 register under (b) -- (b) just doesn't fit his
24 circumstances -- does he now have to initially register
25 again, or does his initial registration stick and he

1 just has to update it when he moves?

2 MS. CAIN: The initial registration under
3 SORNA could be updated. The State registration that he
4 may have already done in the past is not a SORNA
5 registration. He would have to register initially
6 again, and that is a new registration. And that would
7 be what Congress intended, because their goal was to not
8 have a patchwork of regulations and rules. So, it would
9 be a new registration, but an update of a SORNA
10 registration is certainly possible, yes.

11 JUSTICE GINSBURG: Under the current
12 regulation, under the 19 -- I mean, the '08 regulations,
13 would it be enough to comply -- for somebody in his
14 situation, to comply simply by telling his parole
15 officer, I'm moving to the other State? Under the
16 regulation that says how this is implemented?

17 MS. CAIN: Actually, Your Honor, no. We
18 actually don't know the answer to that question, because
19 the Attorney General has not issued regulations
20 instructing offenders what to do. They have simply
21 issued guidelines telling the States what they can do to
22 substantially implement SORNA. So, we don't really know
23 the answer to that question.

24 The point is that the requirement to
25 initially register under SORNA was not effective until

1 the Attorney General -- could not be effective until the
2 Attorney General said so. And that's what the statute
3 says under (d). And that if you look at how the
4 Government is reading the statute, you apply it from day
5 one, but yet they have the ability to modify SORNA,
6 which in effect means to repeal SORNA's effect as to
7 some people in the future. That also would cause a lot
8 of complications, especially in the context I mentioned
9 where someone with a misdemeanor, you know, may be part
10 of the group that doesn't have to register in the
11 future, but they had to at some point, and --

12 JUSTICE SOTOMAYOR: Counsel, let's -- is
13 there anything -- if I understand the Solicitor
14 General's position, all your client had to do after
15 SORNA was passed was, after a reasonable amount of time
16 or upon his travel, to tell Missouri, which was his
17 State of conviction, that he was moving. Correct?

18 MS. CAIN: If you -- they say that he was
19 not part of the people that could register within a
20 normal -- I mean, a reasonable amount of time because of
21 the State registration.

22 JUSTICE SOTOMAYOR: Right.

23 MS. CAIN: But assuming that that wasn't the
24 case, assuming he was, you know, just --

25 JUSTICE SOTOMAYOR: No, I'm not assuming

1 that.

2 MS. CAIN: Okay.

3 JUSTICE SOTOMAYOR: Would he have been in
4 compliance with SORNA under the final rules today, the
5 interim rules when they were passed, or on the date that
6 he left if he had when he traveled, or a reasonable time
7 thereafter, told his State of conviction that he had
8 moved? Would that have been enough?

9 MS. CAIN: No, Your Honor.

10 JUSTICE SOTOMAYOR: What does he have to do
11 in addition to that, under the interim or final rules?

12 MS. CAIN: We don't know. Because, again,
13 the Attorney General has not issued regulations or
14 guidelines telling offenders what to do. They have only
15 issued guidelines telling jurisdictions how they can
16 substantially implement SORNA. So, it's not as
17 though -- he cannot register under SORNA until the
18 Attorney General specifies that he --

19 JUSTICE GINSBURG: That was the answer that
20 you gave to my question, which was the same thing: Why
21 isn't it sufficient now for him simply to tell his
22 parole officer he's moving?

23 MS. CAIN: Oh, I'm sorry. Yes. That was --
24 it would not be sufficient. I mean, it's -- he has to
25 initially register to register under SORNA. And he

1 can't do that until the Attorney General issued a valid
2 rule, which -- we are contesting that the 2007 rule is
3 not valid. We're saying that our client has standing to
4 make that challenge. We were denied the ability to do
5 that below.

6 And I would like to reserve my time if
7 there's no further questions.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Ms. Sherry.

10 ORAL ARGUMENT OF MELISSA ARBUS SHERRY

11 ON BEHALF OF THE RESPONDENT

12 MS. ARBUS SHERRY: Mr. Chief Justice, and
13 may it please the Court:

14 If I could start by answering your question,
15 Your Honor, about the Wetterling Act, it was not
16 retroactive. It didn't apply to pre-enactment conduct.
17 It defined a sex offender, unlike SORNA, as somebody who
18 is convicted of a sex offense, and in guidelines issued
19 after Wetterling and after several subsequent amendments
20 to the Wetterling Act, the Attorney General interpreted
21 it as only requiring States to register offenders that
22 are convicted not only post-enactment but
23 post-implementation by the States. And one such cite
24 is 61 --

25 JUSTICE SCALIA: Post- what?

1 MS. ARBUS SHERRY: Post-implementation by
2 the States. And so, 61 Federal Register cite 15,112 is
3 just one example of that type of regulation. And so,
4 when Congress enacted SORNA, it switched from "is
5 convicted" to "was convicted" in order to include
6 pre-enactment offenders.

7 Justice Kagan, to get to your question about
8 why is it all so complicated, our answer is that it
9 really is not. There's no reason why it couldn't have
10 applied on day one to all pre-enactment and
11 pre-implementation offenders. And to start off, when
12 you look about all pre-enactment and pre-implementation,
13 this is an incredibly large class. This is all existing
14 sex offenders on day one and all existing sex offenders
15 from many months and years going forward while the
16 States proceed towards implementation.

17 JUSTICE BREYER: So, why --

18 JUSTICE KAGAN: But then, as I indicated,
19 why would Congress have given you the authority to
20 exempt people? It seems to me that the -- the burden is
21 on you in the exact same way it's on Ms. Cain.

22 MS. SHERRY: In our view, what subsection
23 (d) was, essentially, was a safety valve. It wasn't
24 something that Congress thought the Attorney General was
25 going to need to use, but it was something that was

1 there for the Attorney General, should problems arise in
2 the course of implementation.

3 JUSTICE ALITO: What would happen in -- in
4 this situation: Someone is convicted of a sex offense
5 before SORNA is enacted; then shortly after the statute
6 is enacted, the person moves to a new State, does not
7 register; then after that, the Attorney General,
8 exercising the authority that you say he has under --
9 exercising -- excuse me, exercising the authority under
10 subsection (d), determines that SORNA shouldn't apply to
11 people who were convicted of offenses before its
12 enactment? Would that person have committed a criminal
13 offense?

14 MS. ARBUS SHERRY: I think at the -- at the
15 time he acted, yes. I suppose the Attorney General
16 could decide whether or not he was going to apply his
17 regulation prospectively or retrospectively. But I
18 think the important point is the same result is reached
19 under Petitioner's view.

20 On Petitioner's view, the Attorney General
21 has full and complete control of the light switch.
22 Congress didn't do anything and simply left it for the
23 Attorney General to turn the lights on. We don't think
24 that's right for a number of different reasons, one of
25 which is the way that Congress delegated authority to

1 Attorney General in subsection (d). If --

2 JUSTICE ALITO: Well, if Congress wasn't
3 sure whether it wanted -- whether it was appropriate to
4 apply SORNA retroactively, then I just -- and,
5 therefore, was willing to leave that to the Attorney
6 General, then I don't understand why it would have made
7 the Act applicable immediately upon enactment --

8 MS. ARBUS SHERRY: Our --

9 JUSTICE ALITO: -- pending a determination
10 by the Attorney General.

11 MS. ARBUS SHERRY: Our understanding is that
12 Congress did know that it wanted to include as a general
13 matter all pre-enactment -- and again, not just
14 pre-enactment but pre-implementation offenders as --
15 offenders as well. And I think we know that because
16 when you look to the provisions that actually speak to
17 what a sex offender was required to do under the Act --
18 and there are six such provisions -- they all start the
19 same way. They say that the sex offender shall do
20 something. And it defines the sex offender as somebody
21 who was convicted.

22 When you look at all six of those provisions
23 on their face, they apply to all sex offenders so
24 defined without any qualification. And Petitioner's
25 view is that despite that clear language, despite the

1 lack of any qualification within those provisions, by
2 virtue of subsection (d) what Congress is really saying
3 is that nobody has to register until the Attorney
4 General says otherwise.

5 JUSTICE BREYER: So --

6 JUSTICE SOTOMAYOR: So, how do they know
7 where to register? Do you agree with your adversary
8 that -- that they have to register under SORNA?

9 MS. ARBUS SHERRY: No, I -- they don't have
10 to register under SORNA --

11 JUSTICE SOTOMAYOR: So, how were they
12 supposed to know when or how they would register until
13 the Attorney General acted?

14 MS. ARBUS SHERRY: Sure. If I could break
15 it up into a few classes. Again, we are talking about
16 pretty much -- actually, we are talking about everybody
17 on day one. And so, for a number of pre-enactment and
18 pre-implementation offenders, they're still going to be
19 in prison on the day that SORNA was enacted.

20 JUSTICE SOTOMAYOR: I'm not talking about
21 those people.

22 MS. ARBUS SHERRY: Okay. So --

23 JUSTICE SOTOMAYOR: Not the people who can
24 comply with (b).

25 MS. ARBUS SHERRY: Okay.

1 JUSTICE SOTOMAYOR: I'm talking about the --

2 MS. ARBUS SHERRY: So, people -- and then
3 the second group I was going to talk about are offenders
4 like Reynolds, who have already registered before SORNA
5 was enacted. They're already initially registered.
6 It's the very same State registry system that
7 pre-existed SORNA. There is no creation of any SORNA
8 registry, and the statute itself doesn't talk about a
9 SORNA-compliant registry. To the contrary, it defines a
10 sex offender registry in 16911, subsection (9). And
11 it's on page 10a of our brief. It defines a sex
12 offender registry as a registry of sex offenders
13 maintained by a jurisdiction.

14 So, these are the same registries that have
15 been in existence in all 50 States for the last decade.
16 So, offenders like Reynolds don't have to do anything
17 under (b); (b) simply doesn't apply to them. They do,
18 however, as pointed out, have to comply with the other
19 provisions. They do have to do what (c) requires, which
20 is when Reynolds moved from Missouri to Pennsylvania, he
21 had to tell somebody. That is what (c) requires; it's
22 what he was required to do even before SORNA was
23 enacted. And what Congress did with respect to the
24 subset of sex offenders that haven't already registered
25 before SORNA but that need to get on the registry rolls

1 afterwards because, for example, their sex offense
2 wasn't covered before SORNA --

3 CHIEF JUSTICE ROBERTS: So, your -- your
4 argument is that "requirements" in the heading for 42
5 U.S.C. 16913, Registration requirements for sex
6 offenders, means something different than "requirements"
7 in subsection (d), which the Attorney General can issue
8 rules about, because you're saying, although there is
9 the requirement that they register and comply with (c)
10 and all those other things, when it says that the
11 Attorney General can issue regulations specifying the
12 applicability of the requirements of this subchapter,
13 that only meant the administration, you know,
14 provisions, not the general requirement that you
15 register and keep current and all that.

16 MS. ARBUS SHERRY: No, I don't think that
17 that is what we are saying. What we view (d) as,
18 essentially, is a safety valve. It does give the
19 Attorney General that authority with respect to the
20 requirements, but going forward. Congress has set the
21 baseline; Congress has set the default rule.

22 CHIEF JUSTICE ROBERTS: It's a safety valve
23 to release what?

24 MS. ARBUS SHERRY: To release sex offenders
25 if needed to -- to perhaps suspend certain registration

1 requirements. And let me give a couple of examples.

2 CHIEF JUSTICE ROBERTS: Well, you are
3 talking about sort of in the weeds, the little details,
4 not the underlying requirement of registration, right?

5 MS. ARBUS SHERRY: No, I think it -- I think
6 arguably it could be both. Again, I don't think this is
7 something that Congress thought the Attorney General was
8 necessarily going to have to exercise. And, in fact,
9 the Attorney General has not done so.

10 JUSTICE KAGAN: But does that mean, Ms.
11 Sherry, that -- that the Attorney General could, if he
12 wanted to, for whatever reason, could exempt all
13 pre-enactment offenders from SORNA?

14 MS. ARBUS SHERRY: I think as a theoretical
15 matter, on its face, the delegation of authority in (d)
16 is -- is quite broad and plenary. But I think as --

17 JUSTICE KAGAN: And would allow that. So,
18 when you say it gave the Attorney General the ability to
19 confirm or modify the requirement in section (a), you
20 mean he could, if he wanted to, exempt all pre-enactment
21 offenders.

22 MS. ARBUS SHERRY: And, again, I say in
23 theory because I think, like all delegations of
24 authority, the Attorney General is certainly limited to
25 acting in furtherance of the purpose of Congress, and

1 here we know what was its purpose.

2 JUSTICE SCALIA: Well, we had a case
3 involving the meaning of "modify," and it doesn't --
4 doesn't mean "repeal." So, he presumably couldn't
5 suspend the whole thing.

6 MS. ARBUS SHERRY: I -- I do know what case
7 you are talking about, and I have read it, and that's
8 certainly true.

9 JUSTICE KAGAN: But to confirm --

10 CHIEF JUSTICE ROBERTS: You want to share it
11 with the rest of us?

12 MS. ARBUS SHERRY: I'm not saying I
13 definitely remember the name. I think it was MCI, but
14 -- but I do know the case you are talking about. I
15 mean, here the word is "specify" as opposed to "modify."
16 And I guess there could be an argument --

17 JUSTICE SCALIA: It authorized the FCC to
18 modify the requirement to post rates, and the FCC simply
19 eliminated the requirement to post rates, and we said
20 that that was no good.

21 MS. ARBUS SHERRY: And -- and I -- I suppose
22 a similar argument could be made with respect to
23 "specify." I don't think it necessarily has to be --

24 JUSTICE BREYER: Leaving the language aside,
25 I'd like to go back to what Justice Sotomayor was

1 asking. We are talking, it seems to me, about section
2 2250. He was convicted of violating, criminally, that
3 section. So, I have no problem about the statute
4 applying to all these people; it's a question of how it
5 applies.

6 All right. Imagine with me that we have an
7 individual who was convicted a year ago and sentenced to
8 a 5-year term. Does the statute apply to him?

9 MS. ARBUS SHERRY: He was convicted a year
10 ago --

11 JUSTICE BREYER: Yes, correct.

12 MS. ARBUS SHERRY: -- of a sex offense?

13 JUSTICE BREYER: Yes, correct.

14 MS. ARBUS SHERRY: In our view, the statute
15 does apply.

16 JUSTICE BREYER: Of course, it does. Of
17 course, it does.

18 Now, he hasn't registered yet. He's in jail
19 for 4 more years. So, has he violated 2250 so far?

20 MS. ARBUS SHERRY: He has not.

21 JUSTICE BREYER: Not? Thank you.

22 So, a person who has recently -- recently --
23 committed the crime, is in prison, is under an
24 obligation to register, is yet not in violation because
25 the time for initially registration -- registering has

1 not yet expired. Now let's go back to a person who is
2 far less certain how it applies. He committed the crime
3 10 or 15 years ago. He has long since been released
4 from prison.

5 There are, as you point out, several
6 categories. One is a person who has to -- who should,
7 under Michigan State law, register, but he didn't.
8 Another is a person who did and moved. You know, there
9 are several categories.

10 Now, is he in violation of 2250? Your point
11 is he is immediately, even though it was much less clear
12 that it applied to him, much less clear. And much less
13 clear -- in fact, it doesn't say when he is supposed to
14 register, but still 2250 applies to him.

15 I just wonder how that could be,
16 particularly when we have three sentences, indeed, which
17 seem to me to tell the Attorney General, certainly,
18 please deal with that kind of a case.

19 MS. ARBUS SHERRY: If I could start with
20 2250 and then go back to subsection (d), that is not our
21 position. 2250 is the criminal provision. What we're
22 actually looking at here are the registration --

23 JUSTICE BREYER: I thought he was convicted
24 of a crime.

25 MS. ARBUS SHERRY: -- requirements.

1 JUSTICE BREYER: I thought he was convicted
2 of a crime under 2250. That's why I asked the question.
3 And his lawyer said, in response to my question, that
4 one of the things she wants to argue is that he cannot
5 be convicted under 2250 until he is under a legal
6 obligation to register, and that initial registration is
7 not a legal obligation until the Attorney General makes
8 his rules. I thought that was the argument.

9 MS. ARBUS SHERRY: Let me make an important
10 distinction. If we're actually talking about Reynolds
11 here, you are right, but Reynolds was not convicted and
12 was not prosecuted for failing to comply with the
13 initial registration requirements in subsection (b). He
14 was convicted and prosecuted for failing to comply with
15 the timing requirements in subsection (c), which are
16 quite clear as applied to offenders like Reynolds, who
17 have already registered or already in the system.

18 What he did was he traveled from Missouri --

19 JUSTICE BREYER: So, subsection (c) says he
20 has to, not later than 3 days --

21 JUSTICE SCALIA: Where is this? Do you want
22 to tell us where it is?

23 MS. ARBUS SHERRY: I'm sorry. This is on
24 12(a) of the Government's brief.

25 JUSTICE SCALIA: It's very helpful to know

1 what you're talking about.

2 MS. ARBUS SHERRY: Absolutely.

3 JUSTICE KAGAN: But you're suggesting, Ms.
4 Sherry, that (b) and (c) have nothing to do with each
5 other. And, in fact, one can read (a), (b), and (c) as
6 all integrally linked and referring only to
7 post-enactment offenders. So, (a) is the umbrella
8 provision. It says "a sex offender shall register, and
9 keep the registration current"; (b) says how you shall
10 register initially; and (c) says how you shall keep that
11 registration current.

12 So, all three of these refer only to
13 post-enactment offenders. And then (d) comes along and
14 says, by the way, the Attorney General can apply all of
15 this to pre-enactment offenders as well and can specify
16 how to do that.

17 MS. ARBUS SHERRY: Again, I don't think
18 that's right. And if it helps, I'd like to walk through
19 the different provisions. The one thing I would say on
20 the outset, however, is when you say that -- when you
21 read those sections, you can read them as only applying
22 to post-enactment offenders -- I don't think that's
23 right, especially because of subsection (b), because on
24 the day that SORNA was enacted, every single person in
25 prison at that time was by definition a pre-enactment

1 offender. And so, on its face when you read subsection
2 (b), it quite easily applies to quite a number of
3 pre-enactment offenders.

4 And the other point I would make along those
5 lines is the fact that subsection (d) just doesn't talk
6 about pre-enactment; it talks about pre-implementation
7 offenders. So, offenders that were convicted after
8 SORNA's enactment but before a State had implemented,
9 again, quite easily fit not only within subsection (b)
10 but within all the other subsections as well.

11 And with respect to the interrelationship
12 between them, I think subsection (a) really identifies
13 the jurisdictions in which an offender needs to
14 register. And so, the first sentence sets out three
15 jurisdictions and where an offender both needs to
16 register and to keep the information current.

17 Subsection (b) really serves a limited
18 purpose. It's an intake process. It's getting an
19 offender into the system. For offenders like Reynolds
20 who are already in the very same system, there's nothing
21 to be done under (b); (b) simply doesn't apply to them.
22 (B) is applied to people who are not already in that
23 system, and for those that can comply with the timing,
24 it gets them in before they're released to the
25 community.

1 But the inability to comply with subsection
2 (b) for the small set of offenders that cannot comply
3 with the timing requirements, it doesn't immunize them
4 from complying with all of the other registration
5 requirements.

6 JUSTICE BREYER: In other words, you're
7 reading (c) as saying, to go back to my example, the
8 person who was convicted last year and has 4 more years
9 to do his initial registration -- nonetheless, if he
10 changes his name, if he stops being a student while in
11 prison, he has to register tomorrow or the day after. I
12 would say if that's your reading of those two sections,
13 it's -- it's going to confuse everybody who is in
14 prison, as it did confuse me.

15 MS. ARBUS SHERRY: That is not my reading of
16 the statute.

17 JUSTICE BREYER: All right. Then I take it
18 your reading is he does not have to fulfill (c) until
19 after he has to have initially registered. And so,
20 we're back to the question of why you treat somebody who
21 committed the crime long ago with less clarity, with
22 less time to initially register, with more confusion
23 from one jurisdiction than another, than you would treat
24 a person who was convicted last year, is still in jail,
25 and has 4 more years to register. That's why I read (d)

1 as trying to sort that kind of thing out.

2 MS. ARBUS SHERRY: Two points on that:

3 Number one, for offenders like Reynolds that are already
4 registered, there's nothing more to be done as far as
5 registration goes. All they need to do is to keep the
6 information current and to keep it updated.

7 The other point I would make, since we're
8 talking about 2250, Congress provided other protections
9 for offenders that were unable to comply with the timing
10 requirements. Number one, it -- it provided an
11 impossibility affirmative defense in 2250(b). And the
12 other thing that Congress did is it required that any
13 failure to register, in order to be subject to criminal
14 sanctions, that it be a knowing failure to register. In
15 other words, that the offender know he has a
16 registration requirement and know that he is not
17 complying with that requirement.

18 So, the idea that there are some
19 hypothetical, or maybe even not so hypothetical, sex
20 offenders out there who can't comply with the precise
21 timing in (b) and will -- have no idea what they're
22 required to do, they're not going to be -- they're not
23 going to be criminally liable under 2250 because there
24 is an impossibility defense. And to the extent they
25 don't know that they have a registration requirement,

1 they're also not going to be criminally liable under
2 2250.

3 And so --

4 CHIEF JUSTICE ROBERTS: Why -- why isn't
5 part of your answer to Justice Breyer's question that
6 the one person who doesn't have to register for 4 years
7 is in prison already; so, presumably, he doesn't present
8 the same type of threat that led to the enactment of
9 these registration laws in the first place?

10 MS. ARBUS SHERRY: That's absolutely right.
11 I mean, the release from -- the reason the release from
12 prison is the -- is the trigger is because the concern
13 and the reason we have registration is for periods of
14 time where these offenders are released into the
15 community.

16 And that's why the timing requirement in (b)
17 is there. The notion is that, before offenders are
18 released into the community, we want to get them on the
19 registry rolls; we want to be able to track them from
20 the day that they're released.

21 JUSTICE BREYER: I see. Your view is that
22 they have to register initially when?

23 MS. ARBUS SHERRY: If they have not?

24 JUSTICE BREYER: No, no, I'm just saying
25 take my example. The person is in Michigan. Michigan

1 does have a sex registration thing, but he never
2 actually did it. So, now this Federal Act comes in, and
3 now when is he supposed to register? When's his initial
4 registration?

5 MS. ARBUS SHERRY: He is to register within
6 a reasonable time.

7 JUSTICE BREYER: Oh, reasonable time.

8 MS. ARBUS SHERRY: He can only be --

9 JUSTICE BREYER: And what is a reasonable
10 time?

11 MS. ARBUS SHERRY: Given the other timing in
12 the rest of the requirements, something probably along
13 the lines of, give or take, 3 business days. The
14 important point, however --

15 JUSTICE BREYER: In 3 business days, he's
16 supposed to go out and do that, and if he doesn't do it,
17 he has committed a Federal crime which makes no mention
18 of it, no mention at all, and he's just supposed to
19 guess that that's 3 business days because he's a lawyer;
20 is that why?

21 MS. ARBUS SHERRY: No, it's actually -- it's
22 not unique with respect to the statute. It's quite
23 common for status offenses, and let me try to give one
24 example. One of the statutes that this Court looked at
25 fairly recently, 922(g)(9), makes it unlawful to possess

1 a firearm after having a conviction for a misdemeanor
2 crime of domestic violence. That statute was passed in
3 1996, and it applied to everybody who has been convicted
4 of a domestic violence offense.

5 And so, if an individual had a domestic
6 violence conviction in 1990, for example, and had had a
7 firearm in his house, in his possession, for the last
8 20 years, when the statute was passed in 1996 he was in
9 violation of the statute. Of course, he couldn't be
10 criminally prosecuted unless he was given some
11 reasonable period of time to get rid of the firearm.
12 But there's nothing unique with respect to that.

13 And, again, the criminal provision here,
14 2250, provides additional protections. It has an
15 affirmative defense for impossibility, and it requires
16 that there be knowledge. So, for an offender that knows
17 he is required to register, he's given a reasonable
18 amount of time to come into compliance with that
19 registration requirement.

20 Reynolds, in particular, is a good example
21 here of what Congress was trying to get at. Reynolds
22 knew he was required to tell somebody when he moved from
23 Missouri to Pennsylvania. He knew that because he
24 signed registration forms in Missouri telling him as
25 much. And those are in the joint appendix at pages

1 16 --

2 JUSTICE GINSBURG: But those were under
3 Missouri law, not under the Federal statute.

4 MS. ARBUS SHERRY: They were -- they were
5 under Missouri law, but the important point for SORNA
6 purposes is that he knew he had a registration
7 requirement. He doesn't have to know what law it arises
8 under. And, again, the sex offender registries that
9 pre-existed SORNA are the exact same sex offender
10 registries that SORNA is using.

11 SORNA was enacted in 2006. It wasn't
12 starting over; it wasn't starting from scratch. It
13 wanted to build on the previous regime. It wanted to
14 fix it and make it better and fill in gaps and fill in
15 loopholes and stitch all of the State systems --

16 CHIEF JUSTICE ROBERTS: And providing
17 criminal penalties that weren't always there.

18 MS. ARBUS SHERRY: Well, the criminal
19 penalties --

20 CHIEF JUSTICE ROBERTS: That's a big change.

21 MS. ARBUS SHERRY: The criminal penalties --
22 the Federal felony criminal penalties were not there
23 before. Wetterling did have a misdemeanor penalty, and
24 a number of States did have penalties. But, again, the
25 criminal penalty is distinct from the registration

1 requirement, which is what we actually are looking at
2 and what we're interpreting, the registration
3 requirement, violation of which can result in criminal
4 penalties in certain circumstances. But, again,
5 Congress provided additional protections for those
6 circumstances. The registration requirements themselves
7 not only apply to sex offenders and tell sex offenders
8 what they're required to do; it also tells States and
9 other jurisdictions what they're required to do if they
10 want to --

11 CHIEF JUSTICE ROBERTS: Your theory --

12 MS. ARBUS SHERRY: -- actually implement.

13 CHIEF JUSTICE ROBERTS: Your theory of what
14 the Attorney General did here, as you put in your -- I
15 forget what, the regulations or the -- was confirm the
16 applicability of SORNA, right?

17 MS. ARBUS SHERRY: Our --

18 CHIEF JUSTICE ROBERTS: That's the word you
19 used, I think, on page 12 of your brief.

20 MS. ARBUS SHERRY: We did. One of the
21 things he did was confirm. In the interim rule, the
22 Attorney General, in the preamble section, read the
23 statute exactly as --

24 CHIEF JUSTICE ROBERTS: Right.

25 MS. ARBUS SHERRY: -- as we read the

1 statute.

2 CHIEF JUSTICE ROBERTS: What is the other
3 example -- do you have any other example where an
4 Attorney General confirms the applicability of a
5 criminal law?

6 MS. ARBUS SHERRY: I don't know if I would
7 say "confirm." There certainly are other examples where
8 the Attorney General has had authority and exercised
9 authority to define certain aspects of criminal law.
10 Touby is one example of such a case. And I think --

11 CHIEF JUSTICE ROBERTS: No, that's
12 different. I mean, if you're talking about defining
13 which drugs are qualified, you know, under provisions
14 that criminalize possession, things like that. That's
15 is clarification going forward. I'm talking about
16 straightforward confirming, which is what you say
17 happened here.

18 MS. ARBUS SHERRY: Oh, well --

19 CHIEF JUSTICE ROBERTS: You know, the law
20 says this, and I -- I think it means -- I think it means
21 what -- what you say it means.

22 MS. ARBUS SHERRY: I mean, I think there are
23 a number of examples where, for example, agencies do
24 little more than restate what the statute says. I think
25 that this Court doesn't give deference in those

1 circumstances, but it's certainly within the scope of
2 the general authority of an agency or the Attorney
3 General in this case to reiterate the statute's
4 requirement.

5 The Attorney General went -- went a step
6 further in the interim rule in that what the Attorney
7 General said in the preamble is: I read the statute as
8 written. I think it applies facially to all sex
9 offenders regardless of the date of conviction, but I
10 understand the defendants are making an argument to the
11 contrary. And in an abundance of caution, to foreclose
12 that argument to the extent I need to do something under
13 subsection (d), I'm doing it now, and I'm saying that,
14 yes, it applies to all pre-enactment and
15 pre-implementation offenders. And I think --

16 CHIEF JUSTICE ROBERTS: So, I get back to my
17 question, which -- what's your best example of an
18 Attorney General doing something like that?

19 MS. ARBUS SHERRY: Confirming? I don't know
20 if I have one in a criminal context exactly, but I think
21 the point maybe that Your Honor is getting at -- you can
22 certainly correct me if I'm wrong -- might be a point
23 that you made earlier. It certainly is somewhat unusual
24 delegation of authority to the Attorney General. If
25 Congress had wanted the Attorney General to decide

1 whether or not the registration requirements at the very
2 core of this statute had any operative effect going
3 forward, presumably it would have told the Attorney
4 General that he needed to do something.

5 That's something that Congress did in many
6 other provisions of SORNA where Congress said the
7 Attorney General shall do something. In fact, more than
8 a dozen provisions -- Congress used that language to
9 direct the Attorney General to take a certain action.

10 CHIEF JUSTICE ROBERTS: Well, here it says
11 "shall." It says, "The Attorney General shall have the
12 authority to specify the applicability of the
13 requirements of this subsection."

14 MS. ARBUS SHERRY: But it says "shall have
15 the authority." And I think there's a significant
16 difference between "shall specify" and "shall have the
17 authority to specify." The latter is a passive
18 delegation of authority; it's a permissive delegation.
19 It suggests that Congress did not think that the
20 Attorney General had to do something for the statute to
21 apply as written. It suggests that the statute applied
22 on day one to all pre-enactment and pre-implementation
23 offenders as all the other subsections that set forth
24 the registration requirements suggest, but if the
25 Attorney General in the future sees a need to specify

1 the applicability going forward, then he has the
2 authority to do that. Not that he --

3 JUSTICE KAGAN: But the question --

4 JUSTICE SOTOMAYOR: You're starting from a
5 proposition, counsel, it seems to me, that Congress
6 necessarily and under all circumstances thought that it
7 had to include pre-SORNA convictions. But I don't
8 know -- yes, it wanted a uniform system, but it had
9 State systems in place; it had an imperfect Wetterling
10 Act in place. It had lots of other mechanisms in place
11 to punish non-registrants.

12 So, you're starting from the proposition
13 that, by necessity, they wanted to include preconviction
14 felonies. But I guess for those of us who believe in
15 legislative history, and I know many of my colleagues
16 don't believe in it or pay attention to it, there were
17 two bills passed on SORNA, one a House bill that made it
18 very clear, explicitly clear, that it applied to
19 pre-SORNA conviction felons; and the Senate bill which
20 under the label Retroactivity had the terms that (d) now
21 has.

22 Doesn't that suggest to us that Congress
23 itself was unsure of whether it wanted to include the
24 pre-SORNA convictions or not?

25 MS. ARBUS SHERRY: I don't think so, and for

1 two reasons. First, to address the bills themselves, I
2 don't think the Senate bill, just like I don't think
3 subsection (d) means that Congress meant to apply the
4 registration requirements to all pre-enactment offenders
5 in the registration provisions and then take away that
6 application in the specify the applicability provision.

7 In the Senate bill that you're talking
8 about, it defined a sex offender as anybody who has been
9 convicted of a sex offense. And as this Court said in
10 Carr, that's the language that Congress quite often uses
11 when it intends to include pre-enactment conduct.

12 So, I think the verb choice, both in the
13 Senate bill, in the House bill, and in the bill that was
14 actually enacted, indicates that it did intend to
15 include pre-enactment offenders.

16 The other point I'd want to make is, again,
17 another point that was made in Carr, which is that the
18 registration requirements stand at the very center of
19 Congress's efforts to find and to register the 100,000
20 missing sex offenders that had fallen off the registry
21 rolls under the previous regime.

22 So, I think it is quite clear with respect
23 to SORNA that Congress did want to include pre-enactment
24 offenders. It wanted to not only find those missing sex
25 offenders; it wanted to make sure that they got back on

1 the registry rolls. And as far as the hundreds of
2 thousand offenders that were already on the registry
3 rolls when SORNA was enacted, they wanted to make sure
4 that they stayed on the registry rolls, that they kept
5 the information current, they continued to update their
6 information going forward.

7 And, again, with respect to pre-enactment
8 offenders that were in prison at the time that SORNA was
9 enacted, it wanted to make sure to get them on the
10 registry rolls before they left prison, before they
11 entered the community.

12 JUSTICE SOTOMAYOR: I guess my problem is
13 that you make an assumption, you continue to make an
14 assumption that if the Attorney General hadn't acted --
15 that the Attorney General was incapable of acting
16 quickly.

17 I mean, if the Attorney General had, within
18 a few months, done what he ultimately did a year later
19 or whatever time period after, had come out and said it
20 applies; this is what you do; briefly, you register
21 wherever you were convicted or -- et cetera, if you move
22 or change your name -- then Congress would have
23 accomplished the goal it wanted.

24 MS. ARBUS SHERRY: If the -- if Congress had
25 wanted the Attorney General to act and to act quickly,

1 presumably Congress would have told the Attorney General
2 that he had to do something. Again, that's something
3 Congress did in many other provisions of SORNA.
4 Congress wasn't shy about --

5 JUSTICE GINSBURG: Well, why did -- the
6 Attorney General did try to act very swiftly, and if the
7 Attorney General thought that SORNA applied from day
8 one, why did the Attorney General try to rush through
9 regulation that said nothing more than SORNA applies?

10 MS. ARBUS SHERRY: Because when the Attorney
11 General issued the interim rule, what he said was that
12 reading it on the face, I do think it applies to
13 everybody, but I recognize the defendants are making an
14 alternative argument. And I think it's incredibly
15 important that it apply to everybody, and that it apply
16 to everyone quickly, because we're talking about
17 protecting our communities; we're talking about
18 protecting the public and protecting our children from
19 sex offenders. And having this uncertainty out there is
20 -- is not only not good for protecting the public, but
21 it's not good for sex offenders; it's not good for
22 jurisdictions that are trying to work towards
23 substantial implementation of SORNA.

24 And so, I think you could look at it one of
25 two ways. If the idea is, well, Congress left it to the

1 Attorney General, but the Attorney General could have
2 acted very quickly, I think that suggests that there
3 probably wasn't that much for the Attorney General to do
4 in the first place, and there's little reason that
5 Congress would not have made that decision on its own.

6 To the extent you think there was a whole
7 bunch of things for the Attorney General to do, which,
8 again, we disagree with, presumably that's something
9 that would take some time. And during the interim,
10 period those 100,000 sex offenders would remain missing;
11 additional sex offenders would be added to that number;
12 and the community and the public would continue to be at
13 risk going forward.

14 If there --

15 CHIEF JUSTICE ROBERTS: What if -- what if
16 we think the reason Congress left it to the Attorney
17 General is because they just didn't want to decide? Or
18 some people were saying this is fine but not
19 retroactive, and others were saying it should be
20 retroactive. Do you see any constitutional issues with
21 Congress delegating that authority to the Attorney
22 General, the authority to make a criminal statute
23 applicable on a retroactive basis?

24 MS. ARBUS SHERRY: We don't see any
25 constitutional difficulty with it. Of course, we don't

1 think that's what Congress did. But we do -- we do
2 think that the notion that Congress would delegate such
3 a fundamental issue to the Attorney General in such
4 subtle and opaque terms that the Attorney General didn't
5 think he needed to do anything is quite significant when
6 you look to see what -- what Congress was intending.

7 JUSTICE SCALIA: Of course, it would
8 strengthen your case if you would at least acknowledge
9 that it would be constitutionally doubtful. You
10 wouldn't have to say it's bad, but if you said it's
11 doubtful --

12 MS. ARBUS SHERRY: That is --

13 JUSTICE SCALIA: -- it would strengthen your
14 case, wouldn't it?

15 MS. ARBUS SHERRY: That -- that might
16 strengthen our case here --

17 JUSTICE KAGAN: But it would also work
18 against your own interpretation, because your own
19 interpretation allows you to exempt anybody that you
20 want from the statute; isn't that right?

21 MS. ARBUS SHERRY: It does, but we do think
22 there's a different starting point, and the difference
23 in starting point is a fundamental difference, as Your
24 Honor noted. Our argument looks like a lot like
25 prosecutorial discretion; whereas, the other starting

1 point is that Congress decided nothing and left it all
2 to the Attorney General.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Ms. Cain, you have 3 minutes remaining.

5 REBUTTAL ARGUMENT OF CANDACE CAIN

6 ON BEHALF OF THE PETITIONER

7 MS. CAIN: I'd like to address one point the
8 Government made, that there's no need to re-register --
9 someone in Mr. Reynolds's position -- once they've been
10 registered under State law. They acknowledge the
11 opposite themselves in footnote 12, where they say
12 that -- that a government or a State will have been
13 deemed to substantially implement SORNA if it registers
14 pre-enactment and pre-implementation sex offenders who
15 remain in the system as registrants, as well as other
16 people. So, it's clear that the Government
17 believes that -- acknowledges that people who are
18 already registered must re-register under SORNA.

19 The most important thing is that this -- the
20 SORNA statute -- the obligation under SORNA begins with
21 initial registration and does not begin with a State
22 registration. And enactment -- Congress knew that
23 certain people would be unable to register under
24 subsection (b), and that is why they enacted subsection
25 (d).

1 We ask the Court to remand to the district
2 court and to allow Mr. Reynolds to pursue his claim.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 12:05 p.m., the case in the
6 above-entitled matter was submitted.)

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