1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - -x

3   BILLY JOE REYNOLDS,   :

4   Petitioner   :   No. 10-6549

5   v.   :

6   UNITED STATES.   :

7   - - - - - - - - - - - - - - - - - -x

8   Washington, D.C.

9   Monday, October 3, 2011

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:06 a.m.

14   APPEARANCES:

15   CANDACE CAIN, ESQ., Assistant Federal Public Defender,

16   Pittsburgh, Pennsylvania; for Petitioner.

17   MELISSA ARBUS SHERRY, ESQ., Assistant to the Solicitor

18   General, Department of Justice, Washington,

19   D.C.; for Respondent.

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C O N T E N T S

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1   P R O C E E D I N G S

2   (11:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next in Case 10-6549, Reynolds v. United States.

5   Ms. Cain.

6   ORAL ARGUMENT OF CANDACE CAIN

7   ON BEHALF OF THE PETITIONER

8   MS. CAIN: Mr. Chief Justice, and may it

9   please the Court:

10   Recognizing that certain offenders convicted

11   before enactment or an implementation of SORNA would be

12   unable to comply with SORNA's initial registration

13   requirement, Congress included section 16913(d)

14   delegating to the Attorney General the authority to

15   determine whether and how to apply SORNA's registration

16   requirements to those offenders.

17   Mr. Reynolds is one of those offenders

18   because he was convicted, sentenced, and released from

19   prison a year before SORNA was enacted. But for a valid

20   exercise of the Attorney General's authority under

21   subsection (d), Mr. Reynolds had no obligation to

22   register under SORNA, could not initially register under

23   SORNA, and, therefore, was not subject to SORNA's

24   criminal penalties. Action by the Attorney General was

25   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 statue, 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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