To: William Barr, Attorney General of The United States

Re. Docket No. OAG 157 Proposed Rule United States Department of Justice to revise 28 CFR Part 72 (08/13/2020): Public Law 109-248, 34 U.S.C. 20901 *et seq.*

Summary:

Oregon Voices is an organization devoted to support and advocacy for individuals and families affected by the sex offender registry. We support all victims of abuse, and believe victims have the right to seek justice in a system that is objective and supportive.

We believe that evidence-based practices promote public safety. Sex offender registries should be used on a case-by-case basis depending on risk assessment. Sex offender registries often needlessly put law abiding former offenders and their families in harm's way, and act as lasting barriers to societal reintegration. Bloated conviction-based public sex offender registries are no longer able to do the job they were intended to do.

In short, if *everyone* is a risk, then *no one* is.

We wish to comment on the proposed rule changes regarding SORNA. The expansions they describe are not warranted by the evidence, and they will cause chaos in the majority of states who have not fully implemented SORNA.

There are well founded reasons that SORNA has been avoided by the majority of jurisdictions. Thirty-one (31) out of 50 states have made the conscious decision to avoid the pitfalls that come with SORNA. Included among these is that the provisions of SORNA are overbroad, expensive to implement and maintain, and fail to achieve desired safety objectives. Furthermore, there are aspects of SORNA that raise a variety of Constitutional questions, which are by no means settled.

The rule-making states that it "is not innovative in terms of policy."[1] However, statements throughout the document appear to contain novel ideas that appear to have a potentially great impact on the sovereignty of the various states. We ask for clarification and revision of statements reiterated throughout the document—specifically in relationship to the following claims:

> The requirements of SORNA apply to all sex offenders. All sex offenders must comply with all requirements of that Act, regardless of when the conviction of the offense for which registration is required occurred (including if the conviction occurred before the enactment of that Act), regardless of whether a jurisdiction in which registration is required has substantially implemented that Act's requirements or has implemented any particular requirement of that Act, and regardless of whether any particular requirement or class of sex offenders is mentioned in examples in this regulation or in other regulations or guidelines issued by the Attorney General . . . .[2]

This rulemaking should be reconsidered and revised in several parts:

[1] https://www.federalregister.gov/d/2020-15804/p-18

[2] https://www.federalregister.gov/d/2020-15804/p-177

1. We request revision and clarification of statements that imply that persons convicted of sexual offenses *must* register within their respective states as SORNA requires, even when the state has made the decision to avoid substantial SORNA compliance in favor of evidence-based registration and monitoring systems.

2. The policies and laws of the states of the United States should be respected. Therefore, persons previously convicted of sexual offenses should be excluded from SORNA compliance, both interstate and intrastate, when the jurisdiction in which that person resides is found to be under any of the following conditions:

a) where state courts have ruled that SORNA cannot be applied to pre-enactment offenders such as for reasons of prohibition on retroactive punishment or due process violation; or
b) where the offense is not registerable under that state's laws; or
c) when a term of registration has been completed under state law; or
d) when the person previously registered has been relieved of the duty to register under state law.

3. There should be no influence exercised over or enforcement of intrastate registration when the jurisdiction has made the decision not to comply or participate in SORNA as iterated in 34 U.S.C. 20911(2)-(4), 20913, 20914(a)(1)-(7), 20915, 20918.

In each of these cases, the sovereignty of the individual states to conduct their own justice system is of paramount importance. Ample law exists in each of the 50 states and territories to require re-registration under the laws and procedures of the state when traveling into that state even if the individual registrant is not required to register in the state of conviction.

In most cases where registrants have been released from the registry due to retroactive punishment issues, the person committed the offense long ago and has not committed any subsequent offense (committing a new offense would pull that person back into the current registry scheme). Re-capturing individuals with ages-old convictions into 25-year or lifetime SORNA registration serves no public safety purpose.[3]

There is no evidence to support any claim that SORNA is a superior system to what is used by states. In fact, there is a much greater body of evidence to show that SORNA is a detriment to successful reintegration through its destabilizing impacts.

Particularly in cases where individuals have been deemed by their jurisdiction to be of insignificant risk, or had long ago convictions, a new focus on pulling them into the SORNA scheme serves no public safety purpose, creates confusing double-standards, and places law-abiding persons at serious risk of prosecution while conducting innocuous activities such as traveling on business or vacation.

[3] Hanson, R. Karl, Andrew Harris, Elizabeth LeTourneau, L. Maaike Helmus, and David Thornton, "Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender" (2018) *Psychology, Public Policy and Law*. https://www.apa.org/pubs/journals/features/law-law0000135.pdf

Indeed, pulling individuals back into an invasive and arduous sex offender registration scheme creates the real risk of destabilizing individuals who have developed prosocial lifestyles that have a correlation to reduction in recidivism (Hanson, 2018, p.58).

The rulemaking repeatedly indicates a premise that individuals deemed by the Federal Government to be subject to SORNA must comply *regardless* of whether the jurisdiction in which he/she resides has chosen to become compliant or is otherwise released from duty to register. Thus, the implication is that individuals who cannot register in their respective states are subject to arrest by the federal government but may have an affirmative defense under 18 U.S.C. 2250, subsection (c) of section 2250 that they were unable to register.[4] Such a standard of exposing an individual to prosecution is inherently unfair and destructive to persons who will face prosecution for innocent activities and later need to prove their innocence. By the time this can be done, damage to an individual's life, reputation and stability has already been done.

The vast majority of states have opted not to implement substantial compliance with SORNA for logical reasons. The heavily burdensome requirements of SORNA are tied to the crime of conviction, and there is no evidence whatsoever that this approach has resulted in any increase in public safety.

SORNA and Public Safety:

Federal SORNA was a reaction to a handful of sex offenders moving across state lines and committing heinous acts. The popular attitude at the time of SORNA drafting was that recidivism was 'frightening and high' and that sex offenders would travel widely to seek victims and to avoid detection.

Claims of high recidivism, later proven false, were extracted from a popular consumer psychology magazine article and ended up being written into a Supreme Court decision in 2003.[5] This "urban myth" about high recidivism was perpetuated and was later used to justify SORNA in 2006.[6]

The early premises of high recidivism have been proven inaccurate through DOJ's own statistical analysis and every major study conducted using empirical data. In fact, persons convicted of sexual offenses are among the least likely to recidivate. Longitudinal studies have proven that a relatively small cohort of individuals was likely to commit new offenses, and generally did so fairly quickly after release from custody. The same study showed that the individual's SORNA tier status was not a significant predictor of sexual or general recidivism.[7]

There is no nexus to the SORNA crime-based tier levels and actual or present risk. The SMART office seeks to place persons previously convicted of sexual offenses in the

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[4] https://www.federalregister.gov/d/2020-15804/p-49

[5] Smith v. Doe, 538 U.S. 84.

[6] Ellman, Ira Mark and Ellman, Tara, "Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics" (2015). *Constitutional Commentary*, 419. https://scholarship.law.umn.edu/concomm/419

[7] Tewksbury, Richard, Wesley Jennings, and Kristen Zgoba, "A longitudinal examination of sex offender recidivism prior to and following the implementation of SORN" (April 2012). *Behavioral Sciences & the Law* 30(3):308-28.

worst light possible. Having observed that long-term recidivism statistics do not support lifetime registration, SMART initiated a campaign to sow doubt that the statistics are valid, speculating sex crimes must be underreported, and, therefore, the recidivism rate must be drastically higher. However, such pseudo-scientific speculation has no basis in fact. Even the DOJ's SMART office has recognized that "different types of sex offenders have different rates of recidivism"[8] It should be noted that SORNA makes no allowance for these different 'types' of offenses (i.e. rape vs. viewing pornography vs. molesting).

Researchers do recognize that unreported crimes are not reflected in recidivism rates. But there is no evidence that such crime is dramatically under-reported. Certainly, any under-reporting that exists is not relevant to the fact that recidivism declines over time to desistance levels (Hanson, 2018, p.49).

Even when SMART statistics are used, more than 75 percent will *not* recidivate after 15 years in the community. This represents more than 500,000 SORNA offenders who remain on 25-year or lifetime registration, though posing little, if any risk in the community. Objective analyses place sexual crime recidivism at much lower rate. A recent long-term validated study of more than 7,000 individuals showed that recidivism was most prevalent in the first five years after release (9.1%). Recidivism rates declined rapidly thereafter. For example, at 15 to 20 years, 2% of the cohort recidivated and only 0.3% from 20 to 25 years. Only one individual out of 7,225 was found to recidivate after 20 years offense free (Hanson, 2018, p.53). Indeed, low-risk individuals (as determined through risk-assessment tools such as the Static-99R) who remain offense free in the community will become statistically no more likely to commit a new sexual crime than persons who have never been convicted of an non-sexual crime (Hanson, 2018, p.57).

The DOJ analysis above exposes flaws in the crime-based tier approach–which makes no distinction among these different 'types' of offenders. Without further analysis of the characteristics of individual risk using scientifically valid data, serious gaps are created in public safety, and due process issues arise when applying draconian registration measures to individuals who may pose little to no present risk. Present risk is entirely unrelated to the Federal SORNA Tier levels and has more to do with a variety of risk factors that, when properly evaluated, lead to focus on those deemed to pose current risk and to require a greater level of monitoring and public notification

Therefore, SORNA and its progeny such as International Megan's Law are anachronistic approaches given what is known today about recidivism. The State of Oregon, for example, has adopted a risk-targeted approach to registration per ORS Chapter 163A — Sex Offender Reporting and Classification.[9]

The approach of SORNA and that of the State of Oregon Sex Offender Level system are irreconcilable. That is because the Oregon system relies on risk-assessment and is designed to increase public safety by directing resources toward the registration and notification of individuals deemed more likely to re-offend through validated risk assessment tools.

Registration systems that analyze the risk level of individuals allow states to devote scarce resources to keeping track of higher risk individuals and provide the public useful

[8] https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism#ld5ors

[9] https://www.oregonlegislature.gov/bills_laws/ors/ors163A.html

information on those who pose a high statistical risk, rather merely that a person was at some point in the (often distant) past convicted of a certain offense.

Ironically, evidence-based practices are no longer a novel concept in Federal criminal justice policy. The *First Step Act of 2018* signed into law by President Donald J. Trump directed the Bureau of Prisons to establish risk and recidivism assessment systems to stem growth of the Federal prison system.[10] Given the movement toward evidence-based policy, as opposed to brute-force strategies, now is not the time for the executive branch on its own accord to be expanding the reach and breadth of SORNA.

Indeed, the Federal SORNA only remains intact due to the popularity of punitive measures against persons convicted of sexual offenses and the persistent yet incorrect belief that there is a direct correlation between a past conviction and high future risk.

However, where Federal interests are not directly implicated (example: person convicted in a state court of past sexual offense traveled across state lines to commit an offense), SORNA is not implicated, and any attempt to make it so exceeds Congressional authorization.

SORNA Possesses Interstate, Not Intrastate Jurisdiction:

When an individual was convicted in neither federal or tribal court, and where out of state travel/commerce is not implicated, the Federal Government does not have authority to prosecute in-state under SORNA regulations.

It is requested that the proposed rulemaking language be modified to clearly state the inherent jurisdictional limitations.

Without further clarification, the rulemaking appears to indicate that the previously convicted offender could be prosecuted federally for failing to register (even if not required) within his/her own jurisdiction. It could be construed from the language of the rule-making that non-compliant states will be compelled to implement the aspects of SORNA that they are in disagreement with or be faced with a chaotic situation of simultaneous dual registration requirements.

> Sex offenders can be held liable for violating any requirement stated in this rule, regardless of when they were convicted, and regardless of whether the jurisdiction in which the violation occurs has adopted the requirement in its own law.[11]

It is requested that the rulemaking be modified to acknowledge the limitations of Federal powers under SORNA:

> Section 2250 permits conviction on the basis of any of three jurisdictional elements: a prior conviction of one of the federal qualifying offenses; residence in, or travel to or from, Indian country; or travel in interstate or foreign commerce.[12]

[10] https://fas.org/sgp/crs/misc/R45558.pdf
[11] https://www.federalregister.gov/d/2020-15804/p-45
[12] Doyle, Charles, *SORNA: A Legal Analysis of 18 U.S.C. §2250* (2017), p.10

That power to levy criminal penalties is limited to issues that involve interstate or foreign commerce. Just as federal authorities have no power to determine what criminal penalties states impose for state crimes, they also cannot intrude upon state sovereignty to determine how states decide to implement registry regulations that follow from those crimes.

It has been established that SORNA clearly has authority over the registration duty of an individual due to that individual's having been convicted in Federal court.[13] However, even the reach of the federal SORNA on covered Federal offenders is on shaky ground when only intrastate conduct is implicated. Chief Justice Roberts in his Kebodeaux concurrence asserted that, "[t]he fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's purely intrastate conduct."[14]

Therefore, the authority of Congress via SORNA to step into purely intrastate conduct is virtually nil. There appears to be a consistent theme pervading the document that registrants must comply with SORNA, regardless of where they are, what they are doing, and their current status under individual state law.

Congress cannot itself, nor can it delegate authority to compel the states to register individuals under SORNA because state legislatures are not subject to federal direction. The registration mechanism is purely a state system, and thus the state cannot be compelled to perform the related tasks of complying with SORNA when the state has not explicitly agreed to do so.[15]

SORNA Is Not Immune to State and Federal Constitutional Challenges:

The rulemaking promulgates the premise that the registration requirements and retroactive applications involved in SORNA are Constitutionally sound because of an earlier U.S. Supreme Court decision.[16]

The information collected under the Alaska law when looking at *Smith* was significantly less onerous, invasive, and time-consuming than that required to be collected under SORNA. While it is not the intent of this response to speculate as to if or when *Smith* may be revisited, it is noted herein that several state courts have found the retroactive application of SORNA within their own jurisdictions to be impermissible.

While federal courts have thus far rejected ex post facto challenges to SORNA itself, the same cannot be said of state supreme courts. Several state courts, notably Ohio and Pennsylvania, found the enactment of federal SORNA to be punitive in reference to individuals convicted before enactment.[17] [18]

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[13] United States v. Kebodeaux, 133 S. Ct. 2496 (2013)

[14] Kebodeaux, 133 S. Ct. at 2507 (Roberts, Ch.J., concurring); Justice Alito also concurred only in the judgment, id. at 2508 (Alito, J., concurring)

[15] *Printz v. United States*, 521 U.S. 898 (1997) https://supreme.justia.com/cases/federal/us/521/898/

[16] Smith v. Doe, 538 U.S. 84 (2003).

[17] *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2018)

[18] *State v. Williams,* 129 Ohio.St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108 (Oh 2011)

It is sufficient to recognize that several states have made this finding and are therefore unable to register certain individuals that this rulemaking seeks to pull back into SORNA.

In the event of a push for SORNA compliance in the 31 states that have chosen to avoid SORNA implementation, it is almost a certainty that 'substantial compliance' will spark additional legal filings within state court systems. Given the strength of individual state Constitutions, at least some of these jurisdictions will likely continue to refuse to register persons under certain circumstances.

At some point, should SORNA be forced upon individual state registration systems, the matter will be presented to various state supreme courts, as occurred in Pennsylvania, Ohio, and several other states. It is likely that a rather large contingent of individuals will subsequently be removed from their respective state registries due to findings such as *ex post facto* punishment or due process violation. Any request for 'cooperation' as suggested by this rulemaking under this circumstance would become moot. A state cannot engage in a program that violates its own rule of law and its constitution.

It is apparent from the rulemaking that one of the major objectives is to pull pre-enactment offenders and others no longer required to register into the SORNA scheme. It is also designed to increase the frequency of reporting and the amount of information to be disclosed by current registrants in many jurisdictions.

As state-based, state-funded registration programs are apparently being called upon to draw these individuals into the SORNA scheme, it should be realized that this may destabilize and potentially undo carefully crafted registration polices that previously passed constitutional muster in the various states. The ensuing chaos would undermine the Attorney General's goals in the long run.

An example of this might be an individual who now registers once per year with address, car registration information, and employer. But when the same individual becomes subject to multiple annual in-person appearances, disclosure of email and internet identifiers, detailed accounts of short-term travel plans, and various other frequent information collection, this could very well be challenged in state court and determined to be a form of punishment. In this case, the individuals affected may no longer be required to register.

It is better to let states have the registration system that suits their respective constitutional requirements than to risk dismantling that system when a punitive system is foisted upon them. It is better to let the states employ what methods they and the research deem appropriate for public safety in keeping with their own laws and policies.

In reference to the introduction of a mandated nationwide seven-day travel notification,[19] we question whether the Attorney General legitimately possesses the authority to enact such a novel provision in the absence of legislative authority (regardless of any delegation previously authorized).

The constitutional implications of creating barriers to freedom of travel throughout the various states are serious. American citizens, including registrants, travel for a wide

[19] https://www.federalregister.gov/d/2020-15804/p-79

variety of reasons. An individual may not know in advance where he/she will be traveling and for how long. To create such a notification requirement will surely present a serious barrier to travel and will face constitutional challenges at both state and federal levels. All states currently require individuals entering their state to register within a prescribed time-period. Consequently, the newly proposed federal rule is both unnecessary and overbroad.

Unfunded Mandates Reform Act:

Should the Federal government continue to assert that SORNA supersedes state registration schemes, this proposal would require states to register individuals who are no longer required to register, to register others at more frequent intervals, and to gather vast quantities of constantly changing data (such as travel plans, email addresses, and internet identifiers).

In most states, including Oregon, the collection of that data would become dramatically more labor intensive. This would require large increases in budgets to deal with the massive increase in registration requirements.

Several years ago, the Justice Policy Institute reviewed how much it would cost to implement SORNA in relationship to how much the state would gain in the additional Byrne grant money that is allotted for compliance. More than a decade ago, it was estimated that compliance with SORNA would cost Oregon more than $6 million a year in new costs, while the Byrne funding would only cover around $225,000 of those costs.[20] As registries have burgeoned in the intervening years, the costs would certainly be significantly higher today.

This is merely the cost of registering compelled individuals. Nowhere does this proposal contemplate the heavy costs of incarcerating the many registrants who will fail to adequately navigate the maze of new requirements, thereby running afoul of the law and being subjected to long terms of incarceration for technical violations.

Any agency of the Federal Government passing such heavy burdens onto the states may not do so without a thorough analysis explaining the cost-benefit analysis and many other factors under the Unfunded Mandates Reform Act 2 USC §1501 et seq. (1995).[21]

In short, in addition to the Federal Government being prohibited from forcing states to implement laws such as SORNA, it certainly cannot do so without analyzing the massive costs of a significantly expanded registration system which it has no intention or means to fully fund. An objective cost-benefit analysis will reveal that SORNA's objectives are unobtainable with it's brute-force registration scheme, when compared to a nuanced and evidence-based approach such as that employed in the State of Oregon.

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[20] What will it cost states to comply with the Sex Offender Registration and Notification Act? (2008) http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf

[21] https://www.govinfo.gov/content/pkg/PLAW-104publ4/pdf/PLAW-104publ4.pdf