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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK ANTHONY VALVERDE,

Defendant.

NO. CR. S-08-187 LKK

O R D E R

Defendant appears before the court having been charged with one felony count for Failure to Register as a Sex Offender, in violation of 18 U.S.C. § 2250(a). He moves to dismiss the indictment on several grounds, which the government opposes. The court resolves the motion on the papers and after oral argument.

Resolution of the instant motion is difficult. First, it turns on the restriction of federal power emanating from the Commerce Clause. The clause itself, and the jurisprudence interpreting it, do not provide clear and consistent direction. Moreover, the courts are divided as to the proper application of

1 that jurisprudence to the instant issues. Third, to be frank,  
2 those subject to the law at issue have frequently committed the  
3 most heinous of crimes, making it difficult to give their claims  
4 the dispassionate analysis the law requires. Nonetheless, it is  
5 the sworn duty of judges to do so, and below I engage in that  
6 effort.

7 **I. BACKGROUND<sup>1</sup>**

8 The parties represent that defendant previously has pled  
9 guilty in California's Superior Court to various charges of sexual  
10 abuse. He received a custodial sentence of twelve years. While  
11 still in prison, he signed a form entitled "Notice of Sex Offender  
12 Registration Requirement - 290 P.C.," which set forth his  
13 registration requirements under California law as a convicted sex  
14 offender. See Gov't.'s Opp'n to Def.'s Mot. to Dismiss, Ex. A.  
15 Several months later, on January 6, 2008, he was released. Although  
16 he was instructed to report to his parole officer the next day, he  
17 never did and he was found a few weeks later in Missouri. According  
18 to the government, he had not registered as a sex offender in  
19 either California or Missouri. The indictment charges that from  
20 January 6, 2008 to January 23, 2008, defendant "travel[ed] in  
21 interstate and foreign commerce" and failed to register as a sex  
22 offender and to update his registration as required by 18 U.S.C.  
23 § 2250.

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24  
25 <sup>1</sup>The allegations underlying the charge brought against  
26 defendant are taken from the parties briefs and are assumed true  
for the purposes of this motion only. Neither party has objected  
to the other's recitation of the facts of the case.

1 On November 18, 2008, defendant moved to dismiss the  
2 indictment on the grounds that 18 U.S.C. § 2250 violates the  
3 Commerce Clause, the Tenth Amendment, the Non-Delegation Doctrine,  
4 the Administrative Procedures Act and the defendant's substantive  
5 and procedural due process rights and his right to travel.  
6 Defendant also contended that venue is not proper in this court.  
7 The government opposed and a hearing was held on January 6, 2009.

## 8 **II. STANDARD**

9 Under Federal Rule of Criminal Procedure 12(b)(3), a defendant  
10 may move to dismiss an indictment prior to trial asserting that  
11 there is a defect in the indictment or information. The court may  
12 dismiss an indictment at any time during the pendency of the case  
13 if the indictment fails to invoke the court's jurisdiction or  
14 otherwise fails to state an offense. Fed. R. Crim. P. 12(b)(3)(B).  
15 An indictment is defective if it alleges violation of an  
16 unconstitutional statute. In re. Civil Rights Cases, 109 U.S. 3,  
17 8-9 (1883).

## 18 **III. ANALYSIS**

19 Defendant challenges his indictment under 18 U.S.C. § 2250(a)  
20 on various Constitutional and other grounds. Because the court  
21 holds the statute fails because it does not conform to the  
22 requirement of the Commerce Clause. It need not reach defendant's  
23 other arguments.

### 24 **A. The Statutory Scheme**

25 In 1994, Congress passed the Jacob Wetterling Act as part of  
26 the Federal Violent Crime Control and Law Enforcement Act which,

1 among other provisions, encouraged states to create a registration  
2 program for all violent sex offenders. See 42 U.S.C. §§ 14071 et  
3 seq. In 1996, it was amended by "Megan's Law," which conditioned  
4 receipt of federal funding upon the state's compliance with the  
5 registration and community notification scheme. Id. That year,  
6 every state, the District of Columbia, and the federal government  
7 enacted some form of registration requirement. See Smith v. Doe,  
8 538 U.S. 84, 89-90 (2003).

9 In 2006, Congress passed the Adam Walsh Child Protection and  
10 Safety Act, which operated to repeal the Jacob Wetterling Act and  
11 Megan's Law. Pub. L. No. 109-248 § 129, 120 Stat. 587. The Adam  
12 Walsh Act "substantially overhauled federal registration and  
13 community notification policy." Wayne A. Logan, Criminal Justice  
14 Federalism and National Sex Offender Policy, Ohio St. J. of Crim.  
15 L. 51, 74 (2008). Included among its provisions is the Sex Offender  
16 Registration and Notification Act ("SORNA"), codified at 42 U.S.C.  
17 §§ 16901 et seq. SORNA created a "comprehensive national system for  
18 the registration" of sex offenders, for the purpose of  
19 "protect[ing] the public from sex offenders and offenders against  
20 children, and in response to the vicious attacks by violent  
21 predators against" listed victims. 42 U.S.C. § 16901. SORNA's  
22 requirements were broader than those of previous laws, expanding  
23 registration requirements to non-violent and juvenile sex offenders  
24 and those convicted of sexual offenses in tribal lands or foreign  
25 nations. 42 U.S.C. § 16911.

26 SORNA's registration requirements for sex offenders are set

1 forth in 42 U.S.C. § 16913, which provides,

2 A sex offender shall register, and keep the  
3 registration current, in each jurisdiction where the  
4 offender resides, where the offender is an employee,  
5 and where the offender is a student. For initial  
6 registration purposes only, a sex offender shall also  
7 register in the jurisdiction in which convicted if  
8 such jurisdiction is different from the jurisdiction  
9 of residence.

6 (b) Initial registration

The sex offender shall initially register--

7 (1) before completing a sentence of imprisonment with  
8 respect to the offense giving rise to the  
9 registration requirement; or

10 (2) not later than 3 business days after being  
11 sentenced for that offense, if the sex offender is  
12 not sentenced to a term of imprisonment.

13 The sex offender must also update his registration within three  
14 days of a change in his name, residence, employment or student  
15 status. 42 U.S.C. § 16913(c).

16 SORNA's enforcement provision is codified at 18 U.S.C. §  
17 2250, which makes failure to register a federal crime,  
18 providing,

19 (a) In general.--Whoever--

20 (1) is required to register under the Sex Offender  
21 Registration and Notification Act;

22 (2) (A) is a sex offender as defined for the purposes  
23 of the Sex Offender Registration and Notification Act  
24 by reason of a conviction under Federal law (including  
25 the Uniform Code of Military Justice), the law of the  
26 District of Columbia, Indian tribal law, or the law of  
any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or  
enters or leaves, or resides in, Indian country; and  
(3) knowingly fails to register or update a  
registration as required by the Sex Offender  
Registration and Notification Act;

shall be fined under this title or imprisoned not more  
than 10 years, or both.

It is this section that defendant is charged with violating.

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1 **B. The Commerce Clause**

2 The Constitution vests Congress with the authority to  
3 regulate "commercial intercourse" among the states. U.S. Const.  
4 art. I, § 8, cl. 3; Gibbons v. Ogden, 9 Wheat. 1, 189-190, 6 L.  
5 Ed. 23 (1824). The scope of this power has been understood by  
6 the courts differently at various times in our nation's  
7 history,<sup>2</sup> and presently the Commerce Clause is understood to  
8 encompass three spheres of activities that Congress can  
9 regulate. The Court in United States v. Lopez, 514 U.S. 555  
10 (1995) explained,

11 [W]e have identified three broad categories of  
12 activity that Congress may regulate under its commerce  
13 power. . . . First, Congress may regulate the use of  
14 the channels of interstate commerce. See, e.g., Darby,  
15 312 U.S. at 114; Heart of Atlanta Motel, supra, at 256  
16 ("[T]he authority of Congress to keep the channels of  
17 interstate commerce free from immoral and injurious  
18 uses has frequently been sustained, and is no longer  
19 open to question.") . . . . Second, Congress is  
20 empowered to regulate and protect the  
21 instrumentalities of interstate commerce, or persons  
22 and things in interstate commerce, even though the  
23 threat may come only from intrastate activities. See,  
24 e.g., Shreveport Rate Cases, 234 U.S. 342 (1914);  
25 Southern R. Co. v. United States, 222 U.S. 20 (1911)  
26 (upholding amendments to Safety Appliance Act as  
applied to vehicles used in interstate commerce);  
Perez, supra, at 150 ("[F]or example, the destruction  
of an aircraft (18 U.S.C. § 32), or . . . thefts from  
interstate shipments (18 U.S.C. § 659)"). Finally,  
Congress' commerce authority includes the power to  
regulate those activities having a substantial  
relation to interstate commerce, Jones & Laughlin

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24 <sup>2</sup>For instance, the courts have since departed from the  
25 concepts that the Commerce Clause permits regulation of trade but  
26 not manufacturing, see, e.g., United States v. E.C. Knight Co., 156  
U.S. 1 (1895), or regulation of activities that directly, rather  
than indirectly, affect interstate commerce. See, e.g., A.L.A  
Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

1        Steel, 301 U.S. at 37, *i.e.*, those activities that  
2        substantially affect interstate commerce, Wirtz,  
3        supra, at 196, n. 27.

4        514 U.S. at 558-59 (parallel citations omitted). The Court  
5        subsequently has reaffirmed this conception of there being  
6        three categories of activities that fall under the ambit of the  
7        Commerce Clause. *See Gonzales v. Raich*, 545 U.S. 1, 16-17  
8        (2005); *Pierce County, Washington v. Guillen*, 537 U.S. 129,  
9        146-47 (2003); *United States v. Morrison*, 529 U.S. 598, 608-609  
10       (2000).

11       The Lopez Court's description of the three categories of  
12       the Commerce power was based on the historical understanding of  
13       Congress's authority under the Commerce Clause; the Court did  
14       not perceive itself as creating new or broader bases of the  
15       Commerce power. *See Morrison*, 529 U.S. at 609-610; Lopez, 514  
16       U.S. at 558-59. To understand the meaning of these categories,  
17       then, it is helpful to consider the cases defining them.

18       The first category, the "channels of interstate commerce",  
19       includes the regulation of the waterways and byways between the  
20       states, *see, e.g., Gibbons*, 9 Wheat. at 189, as well as  
21       "prohibit[ion] [of] the interstate transportation of a  
22       commodity through" those channels. Lopez, 514 U.S. at 559. The  
23       latter definition the Lopez Court expanded on with reference to  
24       United States v. Darby, 312 U.S. 100 (1941) and Heart of  
25       Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

26       Both of those cases had held that the Commerce Clause  
permits Congress to prohibit the interstate transport of

1 "noxious articles," Darby, 312 U.S. at 113, or other use of  
2 interstate channels for "immoral or injurious uses." Heart of  
3 Atlanta Motel, 379 U.S. at 256. Both cases based their holdings  
4 on the Lottery Case, 188 U.S. 321 (1903), upholding the  
5 criminalization of the interstate transport of lottery tickets,  
6 and Hoke v. United States, 227 U.S. 308 (1913), upholding the  
7 criminalization of transporting a woman across state lines for  
8 "immoral practices" such as prostitution, among others. See  
9 also Hipolite Egg Co. v. United States, 220 U.S. 45 (1911);  
10 Reid v. Colorado, 187 U.S. 137 (1902).

11 In Heart of Atlanta Motel, the Court emphasized that  
12 Congress's power to regulate these areas derived from their  
13 commercial character and that "Congress was not restricted by  
14 the fact that the particular obstruction to interstate commerce  
15 with which it was dealing was also deemed a moral and social  
16 wrong." 379 U.S. at 257. This echoed the Court's holding in  
17 Darby, that "[t]he distinction . . . that Congressional power  
18 to prohibit interstate commerce is limited to articles which in  
19 themselves have some harmful or deleterious property . . . has  
20 long since been abandoned." 312 U.S. at 116; see also Raich,  
21 545 U.S. at 33-34 (Scalia, J., concurring) ("The first two  
22 [Lopez] categories are self-evident, since they are the  
23 ingredients of interstate commerce itself."); United States v.  
24 Rambo, 74 F.3d 948, 951-52 (9<sup>th</sup> Cir. 1996) (upholding federal  
25 criminal law of unlawful possession of a machine gun under the  
26 first Lopez factor because of the interstate commercial



1 character of the market for such guns, without reference to  
2 moral ill of machine guns). In other words, it was the innate  
3 commercial character of the subject of the regulation, not its  
4 moral effect, that gave Congress the ability to regulate it  
5 under the Commerce clause.

6 The second Lopez category includes "the instrumentalities  
7 of interstate commerce, or the persons or things in interstate  
8 commerce." Lopez, 514 U.S. at 558. In setting forth this  
9 definition, the Lopez Court cited the Shreveport Rate Cases,  
10 234 U.S. 342 (1914) and Southern R. Co. v. United States, 222  
11 U.S. 20 (1911), both of which involved regulations affecting  
12 vehicles used in interstate commerce.<sup>3</sup> After Lopez, the Court  
13 clarified that this prong includes not only the mechanisms of  
14 interstate commerce, such as vehicles, but also the items sold  
15 in interstate commerce. Reno v. Condon, 528 U.S. 141, 148-49  
16 (2000) (holding that Congress could regulate the sale of  
17 information gathered by state departments of motor vehicles  
18 because this information has historically been sold by states  
19 to a variety of industries and because it is used "for matters  
20 related to interstate motoring"); see also United States v.  
21 Reynard, 473 F.3d 1008, 1023 (9th Cir. 2007) (holding that  
22 Congress could regulate release of DNA information because that  
23 information was a "thing in interstate commerce"); United

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24  
25 <sup>3</sup>The Court also cited Perez v. United States, 402 U.S. 146,  
26 150 (1971) for this rule generally, although later discussed Perez  
as implicating the third Lopez category. Lopez, 514 U.S. at 558-59.

1 States v. Jones, 231 F.3d 508, 514 (9th Cir. 2000) (holding  
2 that criminalization of possession of a weapon that has  
3 traveled in interstate commerce is valid under Lopez's second  
4 category).<sup>4</sup>

5 The third Lopez category includes Congress' power to  
6 regulate "those activities having a substantial relation to  
7 interstate commerce." 514 U.S. at 559. The Court observed that  
8 this has included "intrastate coal mining, intrastate  
9 extortionate credit transactions, restaurants utilizing  
10 substantial interstate supplies, inns and hotels catering to  
11 interstate guests, and production and consumption of homegrown  
12 wheat." Id. at 559-60 (citations omitted). It identified  
13 Wickard v. Filburn, 317 U.S. 111 (1942) as "perhaps the most  
14 far reaching example of Commerce Clause authority over  
15 intrastate activity," where the Court had held that an  
16 individual's cultivation of wheat for his own personal use  
17 implicated interstate commerce due to its aggregate effect on

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19 <sup>4</sup>Other courts have viewed this category more restrictively,  
20 understanding it to encompass the instrumentalities of commerce and  
21 the things that those instrumentalities are moving. See Gibbs v.  
22 Babbitt, 214 F.3d 483, 491 (4th Cir. 2000) (although a wolf had  
23 been transported by the Fish and Wildlife Service across state  
24 lines, this did not permanently render the wolf a "thing in  
25 interstate commerce" sufficient to meet Lopez's second category);  
26 United States v. Rybar, 103 F.3d 596, 598 (7th Cir. 1996) (Alito,  
J., dissenting) (the second Lopez category includes the "means of  
conveying people and goods across state lines" and the "people and  
goods traveling in interstate commerce"); United States v. Patton,  
451 F.3d 615, 622 (10th Cir. 2006) ("The illustrative cases for  
this category involve things actually being moved in interstate  
commerce, not all things or persons that have ever moved across  
state lines.").

1 the national market. Lopez, 514 U.S. at 560.

2 In striking down the statute at issue in Lopez,<sup>5</sup> the Court  
3 held that this category had not been satisfied because the  
4 statute did not implicate "'commerce' or any sort of economic  
5 enterprise, however broadly one might define those terms," nor  
6 was it "an essential part of a larger regulation of economic  
7 activity, in which the regulatory scheme could be undercut  
8 unless the intrastate activity were regulated." Id. at 561; see  
9 also Morrison, 529 U.S. at 610-11 (where regulation has been  
10 upheld under Lopez's third category, "the activity in question  
11 has been some sort of economic endeavor"). Although  
12 Congressional findings were not necessary to uphold the  
13 constitutionality of a statute, there were no findings for that  
14 statute that would have aided the Court in determining to what  
15 extent the criminalized conduct would affect interstate  
16 commerce. Lopez, 514 U.S. at 563. The Court also observed that  
17 the statute had no express jurisdictional element limiting its  
18 application "to a discrete set of firearm possessions that  
19 additionally have an explicit connection with or effect on  
20 interstate commerce." Id. at 562. Finally, the Court rejected  
21 as too attenuated the government's argument that local crime  
22 affects interstate commerce by making the citizenry less  
23 productive. Id. at 563-65.

24 In Morrison, the Court struck down the civil remedies

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26 <sup>5</sup>The statute in Lopez made it a federal crime to knowingly  
possess a firearm in a school zone.

1 provisions of the Violence Against Women Act as violative of  
2 the Commerce Clause, as analyzed pursuant to Lopez's third  
3 category. 529 U.S. at 613-14. Several factors led the Court to  
4 this conclusion. First, the statute addressed violent crimes  
5 against women and, as such, was not innately economic or  
6 commercial in character. Id. Second, there was no express  
7 jurisdictional element linking the statute to interstate  
8 commerce. Id. Although there were congressional findings  
9 supporting the interstate implications of violence against  
10 women, the Court found these to resemble the general "costs of  
11 crime" justification that it had rejected as inadequate in  
12 Lopez. Id. at 615. The Court cautioned that Congress's  
13 authority did not reach local policing:

14       The Constitution requires a distinction between what  
15       is truly national and what is truly local. . . . The  
16       regulations and punishment of intrastate violence that  
17       is not directed at the instrumentalities, channels, or  
18       goods involved in interstate commerce has always been  
19       the province of the States. Indeed, we can think of no  
20       better example of the police power, which the Founders  
21       denied the National Government and reposed in the  
22       States, than the suppression of violent crime and  
23       vindication of its victims.

24 Id. at 617-18 (internal citations omitted).

25       Although some courts have had difficulty reconciling  
26 Morrison and Lopez's analysis with that of Raich, see, e.g.,  
United States v. Maxwell, 446 F.3d 1210, 1217 n. 6 (11th Cir.  
2006), the distinction seems clear. In Raich, the Court held  
that federal criminalization of marijuana cultivation,  
distribution, and possession could reach purely intrastate

1 activities. 545 U.S. at 9. Marijuana cultivation and  
2 distribution was a “quintessentially economic” activity, unlike  
3 those at issue in Lopez and Morrison, and thus Congress could  
4 regulate it through a comprehensive regulatory scheme that  
5 included purely intrastate activities. Id. at 24-26. Like the  
6 individual wheat grower in Wickard, the individual cultivating  
7 marijuana for intrastate use engages in economic activities  
8 that could rationally be viewed as having an aggregate effect  
9 on a national market and thus requiring national regulation.  
10 Id. at 17-19 (citing Wickard, 317 U.S. 111); see also United  
11 States v. Gomez, 87 F.3d 1093, 1096 (9th Cir. 1996) (third  
12 Lopez category permits Congress to criminalize arson of an  
13 apartment building because the building is a commercial  
14 establishment and as such has a substantial effect on  
15 interstate commerce). Accordingly, this court, like the Ninth  
16 Circuit, understands Raich to implicate the power of Congress  
17 to regulate innately economic activity, while Lopez and  
18 Morrison addressed the question of how to consider regulation  
19 of non-economic activity in relation to Congress’ Commerce  
20 power. See United States v. McCalla, 545 F.3d 750, 754 (9th  
21 Cir. 2008) (distinguishing Raich from Lopez and Morrison on  
22 these grounds).

23 **C. Validity of SORNA and 18 U.S.C. § 2250(a) Under the**  
24 **Commerce Clause**

25 Given this analytical framework, it appears that in  
26 enacting 42 U.S.C. § 16913 (SORNA) and its enforcement

1 provision of 18 U.S.C. § 2250(a) Congress overstepped its  
2 authority under the Commerce Clause.<sup>6</sup>

3 **1. Lopez's First Category**

4 SORNA and § 2250 cannot be sustained under Lopez's first  
5 category, which permits Congress to regulate the "channels of  
6 interstate commerce." Broadly speaking, section 2250 makes an  
7 individual criminally liable for failing to register in  
8 accordance with SORNA and traveling across state lines.  
9 Plainly, it does not regulate the literal channels or other  
10 byways among the states. See Gibbons, 9 Wheat. at 189.

11 Other courts have likened SORNA, enforced through § 2250  
12 to activity at issue in the Heart of Atlanta Motel and Darby,  
13 holding that Congress possesses the authority to regulate  
14 "immoral" or "noxious" uses of the channels of interstate  
15 commerce. See United States v. May, 535 F.3d 912, 921-22 (8th  
16 Cir. 2008); United States v Lawrence, 548 F.3d 1329, 1337 (10th  
17 Cir. 2008). Respectfully, this court must disagree with such an  
18 interpretation of the scope of Congress's authority. In Darby  
19 and Heart of Atlanta Motel, which the Court relied on in  
20 defining the first Lopez category, the Court made clear that it

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21  
22 <sup>6</sup>Other courts have analyzed only § 16913 or § 2250 or analyzed  
23 them separately. There is analytical force to the perspective that  
24 if § 16913 is unconstitutional, then § 2250 is as well, because the  
25 government cannot penalize a person for failing to comply with an  
26 unconstitutional regulation. See, e.g., United States v. Hall, 577  
F Supp. 2d 610, 622 (N.D.N.Y. 2008); United States v. Waybright,  
561 F. Supp. 2d 1154, 1168 (D. Mont. 2008). Because these two  
statutes are so closely related, the court will consider them both  
together, except where there are differences material to the  
Commerce Clause analysis.

1 was the innately economic character of the activity being  
2 regulated that gave Congress its authority to regulate or  
3 criminalize it. The immoral nature of the activity being  
4 regulated was not the feature that brought the activity within  
5 the scope of the Commerce Clause. See Raich, 545 U.S. at 33-34  
6 (Scalia, J., concurring).<sup>7</sup> There he identified this first  
7 category as being one of the "ingredients of interstate  
8 commerce itself." Id. Thus analyzed, plainly neither § 16913  
9 nor § 2250 meets Lopez's first category, as it does not  
10 proscribe any sort of economic activity. A person who fails to  
11 register per § 16913 or who violates § 2250 is not necessarily  
12 engaged in commercial transactions or participating in a market  
13 for goods or services. See Heart of Atlanta Motel, 379 U.S.  
14 241; The Lottery Case, 188 U.S. 321 (1903). Even if Congress  
15 viewed crossing state lines without registering under SORNA as  
16 an "immoral or injurious use[]" of the channels of commerce,  
17 Heart of Atlanta Motel, 379 U.S. at 256, that alone does not  
18 bring the conduct under the umbrella of Lopez's first category.

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21 <sup>7</sup>While not directly addressed by the Court since Lopez, it  
22 appears that there also is a subgroup of statutes, such as the Mann  
23 Act and the Lindbergh Law, where Congress may criminalize conduct  
24 that possesses a direct link to the interstate travel or where the  
25 travel itself is part of the harmfulness of the conduct. Even if  
26 statutes like these remain lawful after Lopez, neither SORNA nor  
§ 2250 can be sustained on this basis as the conduct that is  
criminalized in them is an offender's failure to register; the  
offender's travel across jurisdictional lines is not proscribed by  
the statutes so long as the offender registers and maintains  
updated registrations in the origin and destination jurisdictions.

1           **2.    Lopez's Second Category**

2           Many of the courts that have upheld SORNA or § 2250 under  
3 the Commerce Clause have done so on the grounds that it falls  
4 under Lopez's second prong. See, e.g., United States v.  
5 Shanandoah, 572 F. Supp. 2d 566 (M.D. Penn. 2008); United  
6 States v. Thomas, 534 F. Supp. 2d 912 (N.D. Iowa 2008); United  
7 States v. Senogles, 570 F. Supp. 2d 1134 (D. Minn. 2008);  
8 United States v. Mason, 510 F. Supp. 2d 923 (M.D. Fla. 2007);  
9 United States v. Gonzales, No. 5:07-cr-27-RS, 2007 WL 2298004  
10 (N.D. Fla. Aug. 9, 2007); United States v. Gould, 526 F. Supp.  
11 2d 538 (D. Md. 2007). Again, this court cannot agree.

12           Lopez's second prong includes the things and persons that  
13 move in interstate commerce. The Ninth Circuit interprets this  
14 fairly broadly, to permit regulation of a good that at one time  
15 in the past has passed through interstate commerce. Jones, 231  
16 F.3d at 514. Accordingly, so the reasoning of other courts  
17 goes, once a sex offender passes across state lines, he may be  
18 prosecuted for his later failure to register per SORNA's  
19 requirements.

20           This interpretation of the Commerce power as expressed in  
21 Lopez's second category appears insupportably broad. Like  
22 Lopez's first prong, the second prong encompasses innately  
23 economic goods and activities or, in other words, those goods  
24 and activities that move within a national market. These have  
25 been the only types of regulations upheld by the Supreme Court  
26 or Ninth Circuit upon invocation of the language of the second



1 category. See, e.g., Raich, 545 U.S. at 17-18 (citing Perez v.  
2 United States, 402 U.S. 146, 150 (1971)); Lopez, 514 U.S. at  
3 558 (collecting cases); Reynard, 473 F.3d at 1023; Jones, 231  
4 F.3d at 514. As one court observed, “[T]he text of Lopez . . .  
5 could never mean that once a person has traveled across state  
6 lines Congress is free to attach any regulation to him it deems  
7 fit. Such a reading would mean Congress has greater power under  
8 the second Lopez category than it does under the third.” United  
9 States v. Myers, No. 08-60064, 2008 WL 5156671 at \*33 (S.D.  
10 Fla. Dec. 9, 2008). Such an interpretation flies in the face of  
11 the High Court’s recent holdings and ignores the principle that  
12 has always guided the Court’s understanding of the Commerce  
13 Clause, which is the textual limitation that the Commerce power  
14 extends, in some way or another, to commerce.

15       Consequently, § 2250 and § 16913 cannot be valid under  
16 Lopez’s second category. The sex offenders who are implicated  
17 by these statutes have had no necessary relationship to  
18 economic activities. They are not a good that is a part of a  
19 national market. They are not engaged in transactions within a  
20 national market. Put plainly, nothing about them or the conduct  
21 proscribed by the statutes is innately economic and, hence, the  
22 statute cannot be sustained under Lopez’s second category.

### 23       **3. Lopez’s Third Category**

24       Many of the courts that have found SORNA or § 2250 a valid  
25 exercise of the Commerce power have done so under Lopez’s third  
26 category. See, e.g., United States v. Howell, No. 08-2126, 2009

1 WL 66068 (8th Cir. Jan. 13, 2009); Shanandoah, 572 F. Supp. 2d  
2 at 577-58 (collecting cases). This category does appear to hold  
3 the most promise, as it permits Congress to regulate non-  
4 economic activity under the Commerce Clause. A careful  
5 consideration of the limits of this category, however, lead the  
6 court to conclude that § 16913 and § 2250 are outside of it.

7 **a. Whether the Statutes Regulate Economic Activity**

8 First, Lopez, Morrison, and Raich identified that the  
9 third category includes intrastate economic activity that  
10 aggregates to effect a national economic market. See Raich, 545  
11 U.S. at 17; Morrison, 529 U.S. at 610; Lopez, 514 U.S. at 560-  
12 61. Wickard typifies this. See Raich, 545 U.S. at 17-19; Lopez,  
13 514 U.S. at 560. Here, as was true of the statutes at issue in  
14 Lopez and Morrison, neither § 2250 nor § 16913 address an  
15 economic activity that could affect the supply or demand of or  
16 ability to regulate a good in the national market. The fact  
17 that the conduct regulated is not innately economic militates  
18 against finding that it is encompassed by the Commerce power.  
19 See Morrison, 529 U.S. at 610-11 (explaining that “the  
20 noneconomic, criminal nature of the conduct at issue was  
21 central to [the Court’s] decision in” Lopez).

22 **b. Presence of a Jurisdictional Element**

23 Second, the Lopez Court considered whether there was an  
24 “express jurisdictional element which might limit [the  
25 statute’s] reach to a discrete set of firearm possessions that  
26 additionally have an explicit connection with or effect on

1 interstate commerce." 514 U.S. at 562. The absence of such an  
2 element in the statutes at issue in Lopez and Morrison led the  
3 Court to conclude that those statutes were not valid exercises  
4 of the Commerce power. Morrison, 529 U.S. at 613; Lopez, 514  
5 U.S. at 561. Here, there similarly is no express jurisdictional  
6 element in § 16913, which thus requires a finding that it is  
7 not valid under the Commerce Clause.

8 In contrast, § 2250 does possess a purportedly  
9 jurisdictional element, as it penalizes a person who is  
10 required to register under SORNA and knowingly fails to do so  
11 or to update his or her registration and who travels in  
12 interstate commerce. In this way, unlike the statutes  
13 considered in Lopez and Morrison, the section limits the class  
14 of those who can be penalized to only those who have traveled  
15 in interstate commerce. The problem, however, is that this  
16 jurisdictional hook still creates a class that is too broad for  
17 Commerce Clause purposes.

18 Under the statute, a person may be prosecuted for failing  
19 to register in his home state, then crossing state lines and  
20 registering in the next state.<sup>8</sup> The harm, therefore, may be  
21 entirely intrastate. Were this a sufficient jurisdictional  
22 element, there would be no limit to Congress's ability to  
23 penalize any crime whatsoever, so long as the defendant at some

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25 <sup>8</sup>Indeed, that resembles the defendant's circumstance here, as  
26 he was incarcerated in California, failed to register upon his  
release, and then traveled to Missouri. He was subsequently  
prosecuted under § 2250 in this district.

1 point in the course of his life traveled across state lines.  
2 This appears to be a plain usurpation of the state's police  
3 power; as the Court expressed in Morrison, there is "no better  
4 example of the police power, which the Founders denied the  
5 National Government and reposed in the States, than the  
6 suppression of violent crime and vindication of its victims."  
7 529 U.S. at 618. As such, the jurisdictional language in § 2250  
8 cannot alone render the statute valid under the Commerce  
9 Clause.

10 **c. Existence of Congressional Findings Identifying**  
11 **the Nexus to Interstate Commerce**

12 Next, the court considers whether there were Congressional  
13 findings explaining the link between the activity the statute  
14 regulates and interstate commerce. While Congress' findings are  
15 not dispositive, they may be helpful. Morrison, 529 U.S. at  
16 614. There were no express Congressional findings for either §  
17 16913 or § 2250 describing how sex offender registration  
18 affected interstate commerce nor any discussion by members of  
19 Congress, of which the court is aware, identifying that nexus.<sup>9</sup>  
20 See H.R. Rep. No. 109-128; 152 Cong. Rec. S8012-02 (July 20,  
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22 <sup>9</sup>In enacting the Adam Walsh Act, Congress did identify that  
23 child pornography, which is criminalized in the Act, related to  
24 interstate commerce. Pub. L. 109-248, § 501(D). These findings do  
25 not create a constitutional justification for SORNA or its  
26 enforcement through § 2250, despite these sections having been  
passed as part of the Adam Walsh Act. Cf. Morrison, 529 U.S. at  
612-14 (considering only the legislative findings of the civil  
remedies provision of VAWA, not those relating to its other  
sections).

1 2006).

2 **d. Whether the Statutes Exist in a Broader**  
3 **Regulatory Scheme That Itself Implicates**  
4 **Interstate Commerce**

5 Finally, regulation of a purely non-economic activity can  
6 be sustained under the Commerce Clause if that activity exists  
7 within a national regulatory scheme that affects interstate  
8 commerce. This court's view is that this analysis is not  
9 necessary, as an activity that is not economic under any of the  
10 other aspects of the Lopez analysis cannot be valid under the  
11 Commerce Clause simply because it may aggregate to effect  
12 interstate commerce. Although other courts analyzing SORNA have  
13 approached it in this manner, it seems that the High Court  
14 could not have been more direct when stating, "We accordingly  
15 reject the argument that Congress may regulate noneconomic,  
16 violent criminal conduct based solely on that conduct's  
17 aggregate effect on interstate commerce." Morrison, 529 U.S. at  
18 617.

19 Many other courts that have upheld § 2250 or § 16913 under  
20 this Lopez category have done so based on the conclusion that  
21 those statutes regulate intrastate conduct that has an effect  
22 on interstate commerce. See, e.g., Howell, 2009 WL 66068 at  
23 \*11-14; United States v. Madera, 474 F. Supp. 2d 1257 (M.D.  
24 Fla. 2007); United States v. Hinen, 487 F. Supp. 2d 747, 757  
25 (W.D. Va. 2007). As explained above, this seems to misapprehend  
26 the Commerce Clause jurisprudence, as the cases defining this

1 aspect of the Commerce power, particularly Wickard and Raich,  
2 dealt with intrastate regulation of economic commodities that  
3 exist as part of a national market. The principle deriving from  
4 those cases is minimally instructive when noneconomic activity  
5 is at issue.

6 Courts upholding SORNA and § 2250 have also relied on  
7 Justice Scalia's concurrence in Raich, in which he opined that  
8 Congress may, through both its Commerce power and authority  
9 under the Necessary and Proper Clause, regulate noneconomic  
10 activity that in aggregate substantially affects interstate  
11 commerce. Raich, 545 U.S. at 33-35 (Scalia, J., concurring).  
12 This line of reasoning appears unpersuasive for several  
13 reasons. First, Justice Scalia's observations were included in  
14 a concurrence on a case in which the activity at issue was  
15 economic, so his statement is simply dicta. Second, his  
16 observation cited as authority Lopez, 514 U.S. at 561. That  
17 passage of Lopez, however, holds,

18 Section 922(q) is a criminal statute that by its terms  
19 has nothing to do with "commerce" or any sort of  
20 economic enterprise, however broadly one might define  
21 those terms. Section 922(q) is not an essential part  
22 of a larger regulation of economic activity, in which  
23 the regulatory scheme could be undercut unless the  
24 intrastate activity were regulated. It cannot,  
25 therefore, be sustained under our cases upholding  
26 regulations of activities *that arise out of or are*  
*connected with a commercial transaction*, which viewed  
in the aggregate, substantially affects interstate  
commerce.

Lopez, 514 U.S. at 561 (emphasis added). It is apparent that  
the Lopez Court did not hold that noneconomic, intrastate

1 activities may be regulated when they aggregate to affect  
2 interstate commerce. Finally, to the extent that Justice  
3 Scalia's conclusion contradicts the express holding of the  
4 majority in Morrison, this court is obligated to follow the  
5 latter.

6       Nevertheless, in an abundance of caution, the court  
7 considers whether there is a basis to believe that SORNA or §  
8 2250 regulate intrastate activities that aggregate to affect  
9 interstate commerce or exist within a regulatory scheme that  
10 implicates interstate commerce. The court concludes that they  
11 do not. Neither SORNA nor the Adam Walsh Act, of which it is a  
12 part, are economic regulatory schemes. Although SORNA provides  
13 for the accumulation of sex offender information into a  
14 national database, there is nothing to indicate that there is  
15 a national market for such information that Congress was  
16 seeking through SORNA to regulate. Indeed, the express purpose  
17 of SORNA is "to protect the public from sex offenders and  
18 offenders against children." 42 U.S.C. § 16901. The  
19 Congressional record is replete with discussion of the  
20 importance of SORNA in creating uniformity among the state's  
21 registration requirements and the perceived problem of  
22 offenders failing to register after relocating to a new  
23 jurisdiction. See generally 152 Cong. Rec. S8012-02 (July 20,  
24 2006). There is no indication, however, that uniformity in  
25 registration requirements or federalizing the crime of failing  
26 to register in any way implicates a national commercial market.

1 The link to a regulatory scheme is even more attenuated for §  
2 2250, as a defendant's failure to register in one jurisdiction  
3 seems to relate only minimally, if at all, to disparate  
4 reporting requirements among the states or any other national  
5 regulatory scheme.

6 Finally, although the Adam Walsh Act contains components  
7 that arguably implicate economic goods, such as its  
8 restrictions on child pornography or use of the Internet to  
9 facilitate sexual misconduct, this alone do not render the  
10 entire Act economic in nature. As explained above, whether an  
11 Act as a whole possesses economic aspects does not suffice to  
12 render all of its provisions valid under the Commerce Clause.  
13 See Morrison, 529 U.S. at 611-15 (analyzing the provision of  
14 VAWA at issue, not VAWA as a whole).


15 Consequently, the court holds that neither 42 U.S.C. §  
16 16913 nor 18 U.S.C. § 2250(a) are valid exercises of  
17 Congressional authority under the Commerce Clause. As such, the  
18 court need not reach defendant's other challenges to the  
19 indictment.

20 **IV. CONCLUSION**

21 Defendant's motion to dismiss the indictment is GRANTED.

22 IT IS SO ORDERED.

23 DATED: February 9, 2009.

24  
25   
26 LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT



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