

"SORNA"– Sorely in Need of Improvement

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At first glance, a case recently granted certiorari by the Supreme Court, *Carr v. United States*,[1] does not look like it has much to do with state and local government. The case has its roots in 2004, when Carr pled guilty to first-degree sexual abuse. He received credit for time served and was released shortly after sentencing. Upon release, Carr registered with the State of Alabama as a convicted sex offender, as required by state law, and later moved from Alabama to Indiana.

In 2006, Congress passed the Sex Offender Registration and Notification Act (SORNA), included as Title I in the Adam Walsh Child Protection and Safety Act of 2006.[2] SORNA creates a national database of people convicted of sex offenses, and essentially preempts state laws governing sex offender registration and notification. States are required to comply with the SORNA requirements, which include new registration requirements, upgrading and implementing software, certifying new treatment programs, and sharing registry information[3] with federal, state and local entities. The costs associated with implementing SORNA's requirements are not small: the State of Virginia, for example, has determined that the first year SORNA implementation costs for the State and localities would exceed $12 million.[4]

Congress delegated to the Attorney General the decision whether SORNA should apply retroactively to sex offenders who were convicted before the enactment of SORNA. In 2007, the U.S. Department of Justice released interim guidelines[5] on SORNA, which interpreted the law as requiring that all sex offenders, including those convicted prior to the enactment of SORNA, be required to follow SORNA registration and notification requirements.[6] For states and the localities, the entities charged with implementing SORNA, this is an enormous administrative burden.

To return to Mr. Carr, shortly after the interim guidelines were released, he was arrested in Indiana for an offense unrelated to his prior conviction. He had not complied with SORNA's requirements and registered as a sex offender in Indiana, and as a result, was indicted under SORNA and was sentenced to serve 37 months in prison. Carr appealed his conviction to the U.S. Court of Appeals for the Seventh Circuit on the ground that SORNA's retroactive application violated the Ex Post Facto Clause of the Constitution. The Seventh Circuit rejected Carr's argument and upheld his sentence.

The Seventh Circuit's viewpoint is not necessarily the one adopted by other circuits. The U.S. Court of Appeals for the Ninth Circuit has ruled that SORNA's retroactivity is unconstitutional with regards to juvenile sex offenders.[7] As the Ninth Circuit states, "…pervasive and severe new and additional disadvantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law enforcement authorities every 90 days for 25 years, and in light of the confidentiality that has historically attached to juvenile proceedings, we conclude that the retroactive application of SORNA's provisions to former juvenile offenders is punitive and, therefore, unconstitutional."[8] Some circuits have held that SORNA's retroactive registration requirements do not apply to offenders who committed the offense between the enactment of SORNA and the release of the Attorney General's guidelines.[9] The various decisions by the circuit courts are defeating the purpose of SORNA, which is to create comprehensive and uniform standards for sex offender notification and registration. States and localities, the ones responsible for conforming with SORNA, are now in a position where a state within one federal circuit will have a separate administrative and enforcement process than a state in another federal circuit.

This case is important to states and localities because of the principle of federalism. While states and localities may not want to side with Carr because of the heinous acts he has committed, the truth is that the law imposes an unfunded mandate in the form of financial and administrative costs associated with implementation. The police power of protecting the health, morals and safety of citizens is a power reserved to the states. Many states already had effective registration and notification requirements in place before the enactment of SORNA, and now, these states must fall in line with the new federal requirements. In addition, states that have not substantially implemented SORNA by July 2009 are subject to a mandatory ten-percent reduction in funding under the Byrne Justice Assistance Grant.[10]

The U.S. Supreme Court, in granting certiorari, has presented the following questions: (1) Whether a person may be criminally prosecuted under [SORNA] for failure to register when the defendant's underlying offense and travel in interstate commerce both predated SORNA's enactment; and (2) Whether the Ex Post Facto Clause precludes prosecution under [SORNA] of a person whose underlying offense and travel in interstate commerce both predated SORNA's enactment. IMLA, in conjunction with the State and Local Legal Center, will be submitting an *amicus* brief to bring to the Court's attention the perspective from the

continued on page 37

Times, http://legaltimes.typepad.com/blt/2009/08/first-local-government-seeks-voting-rights-bailout-bailout-post-supreme-court-ruling.html.
25. Others echoed the prediction that the number of bailout suits would increase at the local government level. "By widening the escape hatch for localities in its extraordinary ruling, the Supreme Court may have launched a town-by-town movement that may release localities that have chafed for years under the law's strict rules; every time a covered jurisdiction wanted to move a polling place from one school to another, it needed Justice Department approval. Now, if they can show they've been adhering to the law for 10 years, they're home free." Tony Mauro, *Can the Voting Rights Act Survive Another Challenge?* National Law Journal, June 29, 2009, accessible at http://www.nlj.com.
26. 129 S. Ct. at 2512.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 2512-13.
31. *Id.* at 2512.
32. *Id.*
33. *Id.* at 2511, citing H.R.Rep. No. 109-478, p. 12 (2006).
34. *Id.*
35. *Id.* at 2512.
36. *Id.* at 2511.
37. *Id.*
38. David S. Broder, *For Obama, Court Cases that Matter*, Washington Post, July 02, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/01/AR2009070103024_pf.html.
39. 129 S. Ct. 2658 (2009).
40. Ricci v. DeStefano, 554 F. Supp.2d 142 (D. Conn. 2006).
41. 530 F.3d 87 (2d Cir. 2008).
42. 129 S.Ct. at 2664-65.
43. *Id.* at 2681.
44. *Id.* at 2664-65.
45. David S. Broder, *supra* note 38. ML

Federal

cont. from page 18

viewpoint of states and localities. The brief will argue that there is no clear statement in SORNA that Congress intended such a broad preemption of state sex offender law and administration, that SORNA imposes expensive unfunded mandates on states and localities, and that SORNA violates important federalism principles.

Notes

1. Carr v. United States, 551 F.3d 578 (7th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3610 (U.S. Sept. 30, 2009) (No. 08-1301).
2. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 249-109, 120 Stat. 590 (2006).
3. This includes, but not limited to, national databases, law enforcement, all jurisdictions where the sex offender resides or is an employee/student, any school in each area where the sex offender resides, social service entities, and any volunteer organizations in which contact with minors may occur.
4. Justice Policy Institute, *What will It Cost States to Comply with the Sex Offender Registration and Notification Act*, at http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf. *See also*, Virginia Department of Planning and Budget, 2008 Fiscal Impact Statement, (Richmond, VA: Department of Planning and Budget, 2008).
5. Office of the Attorney General, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8891 (Feb. 28, 2007).
6. The final guidelines were released in June 2008. Office of the Attorney General, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030 (July 2, 2008).
7. U.S. v. Juvenile Male, 581 F.3d 977 (9th Cir. 2009).
8. *Id.* at 979.
9. U.S. v. Cain, 583 F.3d 408 (6th Cir. 2009); U.S. v. Hatcher, 560 F.3d 222 (4th Cir. 2009).
10. Edward Byrne Memorial Justice Assistant Grant Program, 42 U.S.C. § 3750 (2006). ML

Supreme Court

cont. from page 23

absent "unusual circumstances," a sale of real property was an effective way for a public body to end its inappropriate endorsement of religion. What made it more interesting was that, according to one source, "the preserve [was] riddled with private inholdings," being an estimated 1,000 private landowners with 1,800 plots of land.

The Supreme Court agreed to hear the appeal and, apart from the issue of standing, must decide when a message ceases to be a government message, and whether the Ninth Circuit erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands. During the October 07 oral argument, the issue of whether the cross was an impermissible display on government land was not before the Court. Instead, the Court focused on the legal issues associated with the injunctions before dealing with the merits, with Chief Justice Roberts asking one of the most relevant questions: "I'm just kind of curious, why is this cross put up – you know, in the middle of nowhere?"(The answer was that the man who originally put up the cross was apparently a miner and homesteader when the land was owned by the Bureau of Land Management). Counsel for Frank Buono, the individual challenging the government action, maintained that the "totality of the circumstances," including "the government's asserted purpose to make sure that the cross remains up, the government's favoritism of the same parties," and its retention of the reversionary interest, added up to a continuing government endorsement of religion and an Establishment Clause violation.

The Court's decision is pending. ML

Inside Canada

cont. from page 28

constraints, and represented a bona fide exercise of discretion. That policy did not differentiate between sidewalks and sidewalks that had been repaired, and there was no reason to hold the City to a different standard of inspection and maintenance for just the sites that had been worked on and restored by a contractor. Even if the policy did not apply, there was no evidence that the City had been negligent. Although there was a "small difference in elevation" that may have been a "minimal hazard," "[a] municipality cannot provide a perfectly smooth surface on its sidewalks. Such a standard would be inordi-

cont. on page 38