

THE HIGH PRICE OF MISGUIDED LEGISLATION: NEVADA'S NEED FOR PRACTICAL SEX OFFENDER LAWS

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I. INTRODUCTION

In 1981, a stranger abducted six-year-old Adam Walsh from a department store and murdered him.¹ His parents, John and Rev Walsh, founded the National Center for Missing and Exploited Children, becoming high-profile proponents of laws protecting children from exploitation and abduction.² On July 27, 2006, twenty-five years after Adam's abduction, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act of 2006 (AWA).³ Prior to the enactment of the AWA, Congress regulated state legislation pertaining to sex offender registration and community notification under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 (commonly known as the Wetterling Act).⁴ The Wetterling Act required states to establish registries for sex offenders or risk financial penalties.⁵ Subsequently, Congress passed Megan's Law in 1996, which required states to make these registries available to the public.⁶ By enacting the AWA, Congress intended to better protect the public from sex offenders who elude registration by moving from one state to another.⁷ To accomplish this

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¹ Brittany Enniss, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 701.

² *Id.*; see also Press Release, Office of the Press Sec'y, The White House, President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html> [hereinafter White House Press Release] (describing John and Rev Walsh as "advocates for missing children . . . [who have] helped combat child abduction and exploitation across [the] country").

³ Enniss, *supra* note 1, at 702; White House Press Release, *supra* note 2.

⁴ 42 U.S.C. § 14071 (2006); see also Amy Baron-Evans, *Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act*, 20 FED. SENT'G. REP. 357, 358 (2008); Lara Geer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 475 (2008); Jacob Frumkin, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J.L. & POL'Y 313, 313 n.12 (2008).

⁵ Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, DEV. MENTAL HEALTH L., July 2008, at 33, 35-36.

⁶ *Id.* at 36.

⁷ White House Press Release, *supra* note 2; *United States v. Hinen*, 487 F. Supp. 2d 747, 752-53 (W.D. Va. 2007).

goal, the AWA provides for a national sex offender registry, including the Dru Sjodin National Sex Offender Public Website,⁸ increased federal penalties for crimes against children, task forces on Internet crimes against children, and a national child abuse registry.⁹

Title I of the AWA, the Sex Offender Registration and Notification Act (SORNA), requires states to comply “substantially” with its provisions within three years of enactment, or risk losing 10 percent of federal funding under the Byrne Justice Assistance Grant.¹⁰ This grant consists of funds usually allocated toward law enforcement and crime prevention.¹¹ The AWA established the Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) Office,¹² which is authorized to grant two one-year extensions to states requiring more time to comply with SORNA.¹³ Nearly every state has applied for both extensions because of various barriers they have encountered in implementing SORNA.¹⁴

States’ attempts to comply substantially with the provisions in SORNA have failed for a variety of reasons.¹⁵ First, SORNA is arguably unconstitutional under both federal and state constitutions because it gives the Attorney General of the United States the power to mandate the retroactive application of registration requirements to sex offenders.¹⁶ Accordingly, states have faced challenges to legislation implementing SORNA in state and federal courts. Second, SORNA requires states to use an offender classification system that hinders them from monitoring the most-dangerous offenders who have the highest risk of committing another sex offense, thus decreasing public safety and needlessly wasting limited state resources.¹⁷ Finally, the financial cost to

⁸ The website is named “in honor of 22-year-old college student Dru Sjodin of Grand Forks, North Dakota, a young woman who was kidnapped and murdered by a sex offender who crossed state lines to commit his crime.” *About the Dru Sjodin National Sex Offender Public Website*, U.S. DEP’T JUST., <http://www.nsopw.gov/Core/About.aspx> (last visited Mar. 29, 2011).

⁹ White House Press Release, *supra* note 2.

¹⁰ Baron-Evans, *supra* note 4, at 357; U.S. Dep’t of Justice, *The National Guidelines for Sex Offender Registration and Notification*, 75 Fed. Reg. 38030, 38047 (Jul. 2, 2008) [hereinafter *SORNA Guidelines*].

¹¹ 42 U.S.C. § 3750 (2006) (naming program); *see also id.* § 3751(a) (describing programs the grant may fund).

¹² *Id.* § 16945(a).

¹³ *SMART General FAQs*, OFF. SEX OFFENDER SENT’G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, http://www.ojp.usdoj.gov/smart/faq_general.htm (last visited Mar. 29, 2011); *see also About SMART*, OFF. SEX OFFENDER SENT’G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, <http://www.ojp.usdoj.gov/smart/about.htm> (last visited Mar. 29, 2011).

¹⁴ *See generally Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Barriers to Timely Compliance Hearing*].

¹⁵ *See generally id.*

¹⁶ Applicability of the Sex Offender Registration and Notification Act, 28 C.F.R. § 72.3 (2010).

¹⁷ Baron-Evans, *supra* note 4, at 357.

states of substantially implementing the provisions of SORNA is far greater than the federal funding lost by non-compliance.¹⁸

For these reasons, Nevada should abandon attempts to comply substantially with SORNA. Instead, Nevada should adopt only a few (if any) of SORNA's provisions to amend its existing sex offender registration scheme. In doing so, Nevada would forfeit some annual federal funding,¹⁹ but would ultimately save millions of dollars as well as further the goal of keeping its citizens safe from the most-predatory sex offenders with the highest risk of recidivism.

Part II of this Note discusses the historical background of the AWA. It provides an introduction to the provisions in SORNA, reviews states' approaches to compliance with SORNA and legal challenges to SORNA's provisions across the United States, and provides an overview of Nevada's attempts to comply substantially with SORNA's provisions. Part III analyzes the challenges to and benefits of states complying with SORNA, including issues of practicality and maintaining state autonomy, the modified tier classification system, the issues associated with juvenile sex offender registration and reporting requirements, and the costs associated with implementing and maintaining a national registration system. Finally, Part IV proposes a plan for future sex offender registration and community-notification legislation in Nevada.

II. HISTORICAL BACKGROUND OF THE ADAM WALSH ACT

A. *An Introduction to SORNA's Provisions*

SORNA, the part of the AWA that regulates sex offender registration and community notification, requires states to classify sex offenders into three tiers based exclusively on the type of conviction.²⁰ Currently, approximately one-half of the states, including Nevada, use a risk-assessment model—which considers other factors in addition to the conviction type to classify sex offenders into a tier-based system.²¹

Under SORNA, a Tier III sex offender is considered the highest-risk offender and is one whose offense is punishable by imprisonment for more than one year and is “comparable to or more severe” than “aggravated sexual abuse or sexual abuse,” or “abusive sexual contact . . . against a minor” who is younger than thirteen years of age.²² The offender may also be classified as a Tier III offender if the offense involved kidnapping of a minor, unless the kid-

¹⁸ JUSTICE POLICY INST., WHAT WILL IT COST STATES TO COMPLY WITH THE SEX OFFENDER REGISTRY AND NOTIFICATION ACT? 1-2 (2008), available at http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf.

¹⁹ See Baron-Evans, *supra* note 4, at 357.

²⁰ 42 U.S.C. § 16911(2)-(4) (2006).

²¹ Baron-Evans, *supra* note 4, at 357; *Nevada Sex Offender Registry: Definitions and Explanations*, NEV. DEP'T PUB. SAFETY, <http://www.nvsexoffenders.gov/Definitions.aspx> (last visited Mar. 29, 2011). Many other states “employ broad community notification, publicizing the location of all sex offenders without regard to their risk.” Jill S. Levenson & David A. D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIM. JUST. POL'Y REV. 168, 171 (2007).

²² 42 U.S.C. § 16911(4)(A).

napper is a parent or guardian, or if the offense occurred after the offender became a Tier II offender.²³

A Tier II sex offender is defined as:

[One] whose offense is punishable by imprisonment for more than 1 year and—

- (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
 - (i) sex trafficking (as described in section 1591 of title 18);
 - (ii) coercion and enticement (as described in section 2422 (b) of Title 18);
 - (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423 (a) of Title 18);
 - (iv) abusive sexual contact (as described in section 2244 of Title 18);
- (B) involves—
 - (i) use of a minor in a sexual performance;
 - (ii) solicitation of a minor to practice prostitution; or
 - (iii) production or distribution of child pornography; or
- (C) occurs after the offender becomes a tier I sex offender.²⁴

A Tier I sex offender is one who is not classified as a Tier II or Tier III offender.²⁵ According to U.S. Department of Justice's Final Guidelines for SORNA, Tier I offenders include those who (1) commit offenses "not punishable by imprisonment for more than one year," (2) "whose . . . offense is the receipt or possession of child pornography," or (3) commit sexual assault against an adult involving "sexual contact but not a completed or attempted sexual act."²⁶

States must list on their sex offender registry websites Tier I sex offenders who have committed specified crimes against minors.²⁷ Additionally, SORNA requires offenders to provide the states with more information to list in the national registry and on the registry websites.²⁸ Such information includes the name and address of any employer for whom the offender works, any school in which the offender enrolls, and a description of the offender's vehicle and license plate number.²⁹ However, states do maintain some discretion over which information is exempt from disclosure on the registry website. For instance, a state can choose not to post the name of the offender's employer or school, or information about a Tier I offender as long as the offender did not commit a specific crime against a minor.³⁰ Moreover, SORNA requires the offender to provide his social security number, a DNA sample, and finger-

²³ *Id.* § 16911(4)(B)-(C).

²⁴ *Id.* § 16911(3).

²⁵ *Id.* § 16911(2).

²⁶ SORNA Guidelines, *supra* note 10, at 38047.

²⁷ 42 U.S.C. §16917(a)(3) (requiring states to register sex offenders); *id.* § 16918(a), (c)(1) (requiring jurisdictions to post their registries online, with the option to exclude Tier I offenders whose offense was not against a minor).

²⁸ *Id.* § 16918(a).

²⁹ *Id.* § 16914(a) (requiring the offender to provide more information for the registry); *id.* § 16918(a) (requiring the state to post some of that information on the Internet); *see also Nevada Sex Offender Registry*, *supra* note 21.

³⁰ 42 U.S.C. § 16918(c)(1)-(3).

prints.³¹ The state, however, must not post an offender's social security number on its sex offender registry website under any circumstances.³²

SORNA also changes the time periods for sex offender registration.³³ On February 28, 2007, the United States Attorney General issued an interim order mandating that SORNA apply to "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]."³⁴ Under this legislation, Tier I offenders must register for a period of fifteen years, which the state can reduce by five years if the offender meets the "clean record" requirements for a period of ten years.³⁵ An offender maintains a "clean record" by:

- (A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;
- (B) not being convicted of any sex offense;
- (C) successfully completing any periods of supervised release, probation, and parole; and
- (D) successfully completing of [sic] an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.³⁶

Tier II offenders must register for twenty-five years.³⁷ Tier III offenders, as well as Tier II offenders who commit sex offenses punishable by imprisonment for more than one year during their registration period, must register for life.³⁸ A Tier III offender who was adjudicated delinquent is also eligible for a reduction in the registration period if he maintains a clean record for twenty-five years.³⁹

SORNA requires offenders to register in person periodically, depending on the offender's tier.⁴⁰ Tier I sex offenders must appear in person to verify their information with the registration office and to allow the jurisdiction to take a new photograph of them every year.⁴¹ Tier II offenders must verify their information in person every six months, and Tier III offenders must verify their information in person every three months.⁴² Jurisdictions must also take photographs of Tier II and Tier III offenders during in-person verification.⁴³ SORNA also applies to juvenile sex offenders who are older than fourteen years of age and have committed an offense "comparable to or more severe than aggravated sexual abuse," or "was an attempt or conspiracy to commit

³¹ *Id.* § 16914(a)(2), (b)(5)-(6).

³² *Id.* § 16918(b)(2).

³³ *Id.* § 16915(a).

³⁴ Applicability of the Sex Offender Registration and Notification Act, 28 C.F.R. § 72.3 (2010).

³⁵ 42 U.S.C. § 16915(a)(1), (b)(2)(A), (b)(3)(A).

³⁶ *Id.* § 16915(b)(1).

³⁷ *Id.* § 16915(a)(2).

³⁸ *Id.* § 16915(a)(3); *see also id.* § 16911(4)(C) (defining a Tier III offender as "a sex offender whose offense is punishable by imprisonment for more than 1 year and . . . occurs after the offender becomes a Tier II sex offender").

³⁹ *Id.* § 16915(b)(2)(B), (b)(3)(B).

⁴⁰ *Id.* § 16916.

⁴¹ *Id.* § 16916(1).

⁴² *Id.* § 16916(2)-(3).

⁴³ *Id.*

such an offense.”⁴⁴ These juvenile sex offenders must comply with the same registration and reporting requirements as adult offenders.⁴⁵

B. Congress's Power to Pass the Adam Walsh Act

Although enacting and regulating criminal acts in violation of state law is within the scope of the states' powers, Congress has repeatedly used its powers under the Commerce Clause to enact sex offender registration and notification laws that are applicable to the states.⁴⁶ After Congress enacted Megan's Law, which amended the Wetterling Act and required states to use stricter sex offender registration standards or lose federal funding, all states chose to adopt a form of Megan's Law.⁴⁷ Congress also used its Commerce Clause powers to enact the AWA in 2006.⁴⁸

SORNA has faced constitutional challenges in which petitioners have argued that such legislation is not within Congress's powers under the Commerce Clause.⁴⁹ The courts' responses to these legal challenges have varied, although the most decisions have upheld SORNA's constitutionality.⁵⁰ For example, in *United States v. Akers*, the United States District Court for the Northern District of Indiana held that SORNA was not an unconstitutional exercise of the Commerce Clause powers because, the court reasoned, regulating interstate travel of sex offenders is rationally related to the goal of protecting the public from these offenders.⁵¹

Even decisions holding SORNA unconstitutional have been overturned. Both the United States District Courts for the Middle District of Florida⁵² and

⁴⁴ 42 U.S.C. § 16911(8).

⁴⁵ Ennis, *supra* note 1, at 703; 42 U.S.C. § 16911(8).

⁴⁶ Anne Marie Atkinson, *The Sex Offender Registration and Notification Act (SORNA): An Unconstitutional Infringement of States' Rights Under the Commerce Clause*, 3 CHARLESTON L. REV. 573, 574 (2009). Under the Commerce Clause, Congress has the power “to regulate Commerce . . . among the several States . . .” U.S. CONST. art I, § 8, cl. 3.

⁴⁷ Atkinson, *supra* note 46, at 574.

⁴⁸ *Id.* at 575; Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 88 (2008).

⁴⁹ See Atkinson, *supra* note 46, at 586-87.

⁵⁰ *Id.*

⁵¹ *Id.* at 587-88. The court in *Akers* relied on the decision in *United States v. Dixon*, and concluded that “SORNA is substantially related to the public's protection from sex offenders whose interstate travel may frustrate any one State's ability to monitor.” *United States v. Akers*, No. 3:07-CR-00086(01) RM, 2008 WL 914493, at *3 (N.D. Ind. Apr. 3, 2008) (citing *United States v. Dixon*, No. 3:07-CR-72(01) RM, 2007 WL 4553720, at *5 (N.D. Ind. Dec. 18, 2007)).

⁵² *United States v. Powers*, 544 F. Supp. 2d 1331, 1336 (M.D. Fla. 2008). The court specifically held:

If an individual's mere unrelated travel in interstate commerce is sufficient to establish a Commerce Clause nexus with purely local conduct, then virtually all criminal activity would be subject to the power of the federal government. Surely our founding fathers did not contemplate such a broad view of federalism. Accordingly, the Court finds that the adoption of the statute under which Defendant is charged violates Congress' power under the Commerce Clause and is, therefore, unconstitutional.

Id.

the District of Montana⁵³ held that SORNA is unconstitutional under the Commerce Clause.⁵⁴ The courts reasoned that SORNA's provisions regulating interstate travel of sex offenders do not "substantially affect" interstate commerce, and that the connections Congress attempted to make between sex offender travel and interstate commerce were tenuous at best.⁵⁵ However, the Ninth and the Eleventh Circuits overturned the district court decisions from their respective jurisdictions, ultimately holding that Congress did not unconstitutionally abuse its Commerce Clause powers by enacting SORNA.⁵⁶

Furthermore, some sex offenders have argued that Congress's enactment of SORNA violates the states' reservation of powers under the Tenth Amendment of the Constitution.⁵⁷ In *United States v. Burkey*, the petitioner argued that SORNA violates the Tenth Amendment because it amounts to Congress commandeering state officials.⁵⁸ Although states are not forced to comply substantially with SORNA, but rather are given financial incentives to do so, they are still required to register those sex offenders who are obligated to do so since SORNA's enactment. In other words, those sex offenders who move between states are still required to register under SORNA even if the state itself has not substantially complied.⁵⁹ The United States District Court for the District of Nevada ultimately held that SORNA does not violate the states' reservation of powers under the Tenth Amendment.⁶⁰ Judge Jones reasoned that the statute "does not compel *states* to adopt registration systems in compliance with SORNA, but only requires *sex offenders* to register and update their registration when they travel in interstate commerce."⁶¹ Because the Adam Walsh Act only provides *financial incentives* to compel states to comply with SORNA, it does not violate the Tenth Amendment.⁶²

⁵³ *United States v. Waybright*, 561 F. Supp. 2d 1154, 1157 (D. Mont. 2008) ("I agree with Waybright's claim that enactment of 42 U.S.C. § 16913, which requires all sex offenders to register regardless of whether they travel in interstate commerce, is not a valid exercise of Congress' power under the Constitution. I therefore declare 42 U.S.C. § 16913 unconstitutional.").

⁵⁴ Atkinson, *supra* note 46, at 591-94.

⁵⁵ *Id.* at 592, 594.

⁵⁶ *United States v. George*, 579 F.3d 962, 966-67 (9th Cir. 2009). The Eleventh Circuit, in *United States v. Powers*, 562 F.3d 1342, 1344 (11th Cir. 2009), relied upon one of its earlier decisions, where the Court stated: "SORNA does no more than employ Congress' lawful commerce power to prohibit the use of channels or instrumentalities of commerce for harmful purposes." *United States v. Ambert*, 561 F.3d 1202, 1211 (11th Cir. 2009).

⁵⁷ *See, e.g., United States v. Burkey*, No. 2:08-cr-00145-RJC-PAL, 2009 WL 1616564, at *27 (D. Nev. June 8, 2009). The Tenth Amendment dictates that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

⁵⁸ *Burkey*, 2009 WL 1616564, at *27.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* For another example of Congress applying financial pressures to encourage state compliance with federal law, see *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987), where the Supreme Court held that Congress did not violate the Tenth Amendment by withholding 5 percent of federal highway funds if states did not comply with the National Minimum Drinking Age Amendment.

C. *States' Attempts to Comply with SORNA*

Thus far, Ohio, Delaware, Florida, and South Dakota, are the only states to meet the standard of substantial compliance with SORNA.⁶³ Ohio passed Senate Bill 10 and Senate Bill 97 in June 2007, and the Ohio Attorney General's Office announced in September 2009 that Ohio had become the first state to reach substantial compliance with SORNA.⁶⁴ In a press release, Ohio Attorney General Richard Corday stated his belief in the need for a national registration system: "Taking deliberate steps to provide a common foundation for all the registration systems throughout the United States allows our families to make the most effective use of the information those systems provide."⁶⁵

However, since the implementation of SORNA guidelines, the Ohio federal and state courts have faced several legal challenges to the bills.⁶⁶ Two county judges ruled that Senate Bill 10 violated the Ohio Constitution because it applies to sex offenders retroactively, but the Fifth District Court of Appeals later overturned the decisions.⁶⁷ In *State v. Bodyke*, three Ohio sex offenders contested their recent re-classification as Tier III offenders, after having been classified differently by the courts at the time of conviction.⁶⁸ Attorneys argued to the Ohio Supreme Court that Senate Bill 10 would violate the constitutional rights of 26,000 Ohioans because of its retroactive application.⁶⁹ On June 3, 2010, the Ohio Supreme Court ruled that the re-classification of sex offenders under SORNA's new tier system by the state attorney general violated the separation of powers doctrine, because the courts had already classified the offenders through final judgments.⁷⁰ One Richland County assistant

⁶³ Ohio was the first state to comply with SORNA. Press Release, Office of Justice Programs, U.S. Dep't of Justice, Justice Department Announces First Two Jurisdictions to Implement Sex Offender Registration and Notification Act (Sept. 23, 2009), <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm> [hereinafter Ohio Press Release] (announcing Ohio and the Confederated Tribes of the Umatilla Indian Reservation as the first two *jurisdictions* to comply). On May 6, 2010, Delaware became the second state to substantially comply. Press Release, Office of Justice Programs, U.S. Dep't of Justice, Justice Department Announces Fourth Jurisdiction to Implement Sex Offender Registration and Notification Act (May 6, 2010), <http://www.ojp.usdoj.gov/newsroom/pressreleases/2010/SMART10065.htm>. On May 18, 2010, Florida became the third state to substantially comply. Press Release, Office of Justice Programs, U.S. Dep't of Justice, Justice Department Announces Fifth Jurisdiction to Implement Sex Offender Registration and Notification Act (May 18, 2010), <http://www.ojp.usdoj.gov/newsroom/pressreleases/2010/SMART10072.htm>. On September 10, 2010, South Dakota became the fourth state to substantially comply. Press Release, Office of Justice Programs, U.S. Dep't of Justice, Justice Department Announces Sixth Jurisdiction to Implement Sex Offender Registration and Notification Act (Sept. 10, 2010), <http://www.ojp.usdoj.gov/newsroom/pressreleases/2010/SMART10120.htm> [hereinafter South Dakota Press Release].

⁶⁴ Ohio Press Release, *supra* note 63.

⁶⁵ *Id.*

⁶⁶ See James Nash, *Lawyers Fight Law on Sex Offenders*, COLUMBUS DISPATCH (Ohio), Nov. 5, 2009, at 1B.

⁶⁷ *Area News Briefs: 2 Sex Offender Cases to be Reviewed*, MANSFIELD NEWS J. (Ohio), Dec. 17, 2009, at A3.

⁶⁸ *State v. Bodyke*, 933 N.E.2d 753, 756, 756 n.1 (Ohio 2010).

⁶⁹ Nash, *supra* note 66.

⁷⁰ *Bodyke*, 933 N.E.2d at 768.

prosecutor opined that Ohio state courts will likely continue to receive these types of challenges to the newly amended sex offender registration scheme.⁷¹

Other states, including Nevada, that have attempted to meet the federal guidelines have faced major barriers to complying with SORNA. Some of these challenges include the costs associated with implementation, the need for substantial revision of existing state laws, disagreement with the tier classification system, and expensive legal challenges.⁷² In April 2009, SEARCH, The National Consortium for Justice Information and Statistics (SEARCH) conducted a survey of forty-seven states to determine each state's plans for SORNA compliance.⁷³ Although not a single state that responded to the survey was in a position to comply with SORNA by the July 2009 deadline, nearly all of the states had already asked or planned to ask for an extension for compliance from the SMART office.⁷⁴ Aside from Ohio, Florida, and Delaware, all other forty-seven states applied for and received extensions that will expire on July 27, 2011.⁷⁵

It appears that states are still attempting to comply substantially with SORNA despite the numerous barriers they face.⁷⁶ Among the many concerns about implementing SORNA's provisions are: (1) its treatment of juvenile sex offenders, perceived by many as overly punitive, and (2) constitutional challenges, including potential violations of the Ex Post Facto clause and procedural due process.

1. Juvenile Sex Offenders

The SEARCH survey found that the most common complaint from states about compliance with the SORNA guidelines is the reporting and registration requirements applicable to juvenile offenders, a concern that twenty-three out of the forty-seven surveyed states cited.⁷⁷ Recently, in *United States v. Juvenile Male*, the United States Court of Appeals for the Ninth Circuit held SORNA's application to juveniles unconstitutional.⁷⁸ There, a thirteen-year-old defendant had "engaged in non-consensual sexual acts with a ten-year-old child" for a period of two years.⁷⁹ The court sentenced the defendant to two years in a detention center in 2005, "followed by supervised release until his

⁷¹ *Area News Briefs*, *supra* note 67.

⁷² NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, SEARCH SURVEY ON STATE COMPLIANCE WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) 2 (2009), available at <http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf>; Greg Bluestein, *Most States Have Not Compiled with Sex Offender Rules*, DESERET MORNING NEWS (Salt Lake City), Dec. 2, 2009, at A7.

⁷³ NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, *supra* note 72, at 1.

⁷⁴ *Id.*

⁷⁵ See OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, & TRACKING, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SORNA EXTENSIONS GRANTED 1 (2010) [hereinafter SMART], http://www.ojp.usdoj.gov/smart/pdfs/SORNA_Extensions_Granted.pdf. South Dakota applied for the extension but had substantially complied by September 10, 2010. South Dakota Press Release, *supra* note 63.

⁷⁶ See SMART, *supra* note 75, at 1; Bluestein, *supra* note 72.

⁷⁷ NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, *supra* note 72, at 2.

⁷⁸ *United States v. Juvenile Male*, 590 F.3d 924, 942 (9th Cir. 2010).

⁷⁹ *Id.* at 927.

twenty-first birthday.”⁸⁰ After the defendant had completed the two years of detention and following the passage of the AWA, a court ordered the defendant to register as a sex offender as a “special condition” of his supervision.⁸¹ Under SORNA, the defendant would have to register as a sex offender because, if convicted as an adult, his acts would have amounted to aggravated sexual assault.⁸² Judge Reinhardt held that the new requirements under SORNA result in disadvantages to juvenile offenders that are “pervasive and severe . . . and in light of the confidentiality that has historically attached to juvenile proceedings . . . the retroactive application of SORNA’s provisions to former juvenile offenders is punitive and, therefore, unconstitutional.”⁸³

Ohio has attempted to implement some safeguards in response to concerns about unfairness to juvenile offenders.⁸⁴ Under Ohio’s new registration scheme, juveniles have a right to a lawyer and a jury trial before the state enters their names into the sex offender registry.⁸⁵ Furthermore, juveniles are allowed to ask a judge for declassification as a sex offender after three years.⁸⁶ However, some Ohio attorneys are skeptical of these supposed protective measures for juveniles.⁸⁷ An attorney representing juvenile offenders argued that classifying juveniles as sex offenders and forcing them to register “disincentivize[s] children from doing well in treatment.”⁸⁸

2. Other Constitutional Challenges

The AWA has the potential to affect adversely an enormous number of sex offenders, who have already raised a variety of challenges, often alleging specifically that the controversial provisions of SORNA violate individual state constitutions as well as the United States Constitution.⁸⁹ These challenges include violations of the Ex Post Facto Clause, procedural and substantive due process, the Double Jeopardy Clause, the non-delegation doctrine, the Equal Protection Clause, individuals’ rights to privacy, and prohibitions against cruel and unusual punishment.⁹⁰ The national judicial response to states’ attempts to comply with SORNA has varied widely since the passage of the AWA.⁹¹

Several courts have upheld the constitutionality of SORNA.⁹² For instance, the United States District Court for the Middle District of Florida in *United States v. Mason* held that SORNA did not violate the Ex Post Facto

⁸⁰ *Id.* at 928.

⁸¹ *Id.*

⁸² *Id.* at 927, 927 n.3.

⁸³ *Id.* at 927.

⁸⁴ Nash, *supra* note 66.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Frumkin, *supra* note 4, at 317; Rhiannon K. Thoreson, *Sex Offender Residency Restrictions Are Not “OK”: Why Oklahoma Needs to Amend the Sex Offenders Registration Act*, 44 TULSA L. REV. 617, 626 (2009).

⁹⁰ Frumkin, *supra* note 4, at 317; Thoreson, *supra* note 89, at 626.

⁹¹ See Frumkin, *supra* note 4, at 317.

⁹² *Id.*

Clause, reasoning that SORNA is a civil scheme—not a criminal penalty.⁹³ Similarly, in *Smith v. Doe*, the United States Supreme Court upheld Alaska’s version of SORNA as constitutional because it did not impose “punitive” sanctions on offenders.⁹⁴ The Court reasoned that the Alaska legislature did not intend to impose criminal punishment, and thus the statute did not violate the Ex Post Facto Clause.⁹⁵ However, Justices Stevens, Ginsburg, and Breyer dissented, opining that the civil registration scheme and the resulting penalties were punitive “in effect,” regardless of whether the intent of the legislature was to the contrary.⁹⁶

Offenders have also alleged that SORNA violates procedural due process.⁹⁷ In *United States v. Lovejoy*, the United States District Court for the District of North Dakota held that SORNA did not violate a defendant’s procedural due process rights, even though the defendant did not have specific notice of the new federal registration requirements under the AWA.⁹⁸ The court found that the defendant had sufficient time to learn of the laws and already had knowledge that he was required to register as a sex offender under state law.⁹⁹ In *United States v. Hinen*, the United States District Court for the Western District of Virginia held that the defendant had sufficient notice that failing to register was against the law, even though he claimed to be unaware of the new federal registration requirements under SORNA.¹⁰⁰

However, the Fourth Circuit later reversed *Hinen* in *United States v. Hatcher*.¹⁰¹ There, the court held that the federal registration requirements did not apply to offenders at the time of the alleged crimes, because the Attorney General of the United States had not yet entered the order declaring that the AWA provisions applied retroactively.¹⁰² Thus, the court avoided the issue of whether SORNA’s registration requirements violated the appellants’ procedural due process rights.¹⁰³

The Eighth Circuit explored the issue of procedural due process in *United States v. Aldrich*.¹⁰⁴ There, the court held that SORNA violated a defendant’s due process rights because the defendant had no knowledge of the federal registration requirements or the increased criminal penalty for violations.¹⁰⁵ The court reasoned that the statute requires a mens rea; in order to face criminal sanctions for failure to register, the offender must “knowingly fail[] to register

⁹³ *United States v. Mason*, 510 F. Supp. 2d 923, 930 (M.D. Fla. 2007).

⁹⁴ *Smith v. Doe*, 538 U.S. 84, 105-06 (2003).

⁹⁵ *Id.*

⁹⁶ *Id.* at 112-14 (Stevens, J., dissenting); *id.* at 115 (Ginsburg, J., dissenting).

⁹⁷ Tracy Bateman Farrell, Annotation, *Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA)*, 42 U.S.C.A. §16901 et seq., *Its Enforcement Provision*, 18 U.S.C.A. § 2250, and *Associated Regulations*, 30 A.L.R. FED. 2d 213, §§ 13-15, at 240-45 (2008).

⁹⁸ *United States v. Lovejoy*, 516 F. Supp. 2d 1032, 1037 (D. N.D. 2007).

⁹⁹ *Id.*

¹⁰⁰ *United States v. Hinen*, 487 F. Supp. 2d 747, 754 (W.D. Va. 2007).

¹⁰¹ *United States v. Hinen*, 560 F.3d 222, 229 (4th Cir. 2009).

¹⁰² *Id.* at 223-24.

¹⁰³ *Id.*

¹⁰⁴ *United States v. Aldrich*, No. 8:07CR158, 2008 WL 427483, at *5 (D. Neb. Feb. 14, 2008).

¹⁰⁵ *Id.*

or update a registration as required by the Sex Offender Registration and Notification Act."¹⁰⁶ Because the defendant did not have the requisite mens rea due to a lack of notice, imposing a criminal sanction against him for failing to register would violate his constitutional due process rights.¹⁰⁷

On September 30, 2009, the Supreme Court granted certiorari to hear *Carr v. United States*, on appeal from the Seventh Circuit.¹⁰⁸ The case raised questions involving SORNA's retroactivity and criminal penalties relating to a sex offender's travel in interstate commerce.¹⁰⁹ In a six-to-three vote, the Supreme Court ruled on June 1, 2010, that a sex offender is not subject to SORNA's criminal penalties for failure to register unless the offender traveled between states (and subsequently failed to register) *after* SORNA was enacted.¹¹⁰ However, the Court expressly declined to consider whether SORNA's provisions violate the Ex Post Facto Clause and whether a person who committed an offense prior to SORNA's enactment is subject to its provisions.¹¹¹ Because these questions have troubled lower courts across the nation, they are unlikely to be answered consistently until the Supreme Court decides to consider them.

D. Nevada's Compliance with SORNA

In an attempt to comply with SORNA, the Nevada legislature unanimously passed Assembly Bill (A.B.) 579, which Governor Jim Gibbons signed into law in June 2007.¹¹² The statute was scheduled to go into effect on July 1, 2008, well before SORNA's three-year deadline of July 27, 2009.¹¹³ Only a few states other than Nevada had attempted substantial compliance with SORNA by January 2008.¹¹⁴

A.B. 579 made significant changes to Nevada's sex offender registration and community notification scheme, found in Chapter 179 of the Nevada Revised Statutes (N.R.S.).¹¹⁵ According to the AWA, states must classify sex offenders into tiers based exclusively on conviction type.¹¹⁶ Under the previous legislative scheme, Nevada used a risk-assessment model to classify offenders into tiers based on numerous factors intended to provide an indication of the offender's risk of recidivism and threat to the community.¹¹⁷ In deter-

¹⁰⁶ *Id.*; 18 U.S.C. § 2250(a)(3) (2006).

¹⁰⁷ *Aldrich*, 2008 WL 427483, at *5.

¹⁰⁸ *Carr v. United States*, 130 S. Ct. 47, 48 (2009).

¹⁰⁹ *Carr v. United States*, 130 S. Ct. 2229, 2232-33 (2010).

¹¹⁰ *Id.* at 2240.

¹¹¹ *Id.* at 2233, 2234 n.2.

¹¹² AB579, NEVADA LEGISLATURE, <http://www.leg.state.nv.us/74th/Reports/history.cfm?ID=1169> (last visited Mar. 29, 2011) [hereinafter AB579 Summary]; see also Assemb. 579, 2007 Leg., 74th Sess. (Nev. 2007), available at http://www.leg.state.nv.us/74th/Bills/AB/AB579_EN.pdf.

¹¹³ AB579 Summary, *supra* note 112; Assemb. 579 § 57.

¹¹⁴ Enniss, *supra* note 1, at 706.

¹¹⁵ NEV. REV. STAT. § 179D.010-.850 (2009); see also ACLU of Nev. v. Cortez Masto, 719 F. Supp. 2d 1258, 1260 (D. Nev. 2008) (noting major modifications made by A.B. 579).

¹¹⁶ 42 U.S.C. § 16911(2)-(4) (2006).

¹¹⁷ *Nevada Sex Offender Registry*, *supra* note 21; see also *Cortez Masto*, 719 F. Supp. 2d at 1260 ("Prior to the enactment of these laws, sex offenders had been individually assessed and classified based on psychological assessments focusing on whether the offenders pose a risk to society and are likely to re-offend.").

mining the offender's tier level, the risk-assessment model, like the requirement under SORNA, took into account the nature of the conviction. However, unlike the requirement under SORNA, the risk-assessment model also included a consideration of the seriousness of the offense, the number of offenses the offender committed, and whether the offense was violent in nature.¹¹⁸ Moreover, under SORNA, Nevada must now list Tier I sex offenders who have committed specified crimes against minors on the sex offender registry website, which Nevada's previous registration scheme did not require.¹¹⁹

SORNA also requires offenders to provide more information for the state to list in the national registry and on the national registry website than Nevada law had previously required.¹²⁰ Such information includes the name and address of any employer the offender works for and any school in which the offender enrolls, and a description of the offender's vehicle and license plate number.¹²¹ Prior to SORNA, Nevada did not post this specific information on the website, except for the block number of the offender's workplace or school.¹²² Finally, SORNA would change the existing sex offender legislation in Nevada by requiring sex offenders to register in person periodically.¹²³ The previous legislation in Nevada only required offenders to mail in a form to the registration office in order to verify their information.¹²⁴

Sex offenders recently challenged Nevada's A.B. 579 in United States District Court for the District of Nevada on several constitutional grounds.¹²⁵ In *American Civil Liberties Union of Nevada v. Masto*, the plaintiffs moved for summary judgment, asked the court to declare A.B. 579 and the similar Senate Bill (S.B.) 471 unconstitutional, and requested that the court issue an injunction on the bills.¹²⁶ The plaintiffs alleged violations of procedural due process rights, the ex post facto clause, double jeopardy, the contracts clause of the United States and Nevada Constitutions, separation of powers in the Nevada Constitution, and prohibitions against vague and ambiguous laws.¹²⁷

The plaintiffs argued that the Assembly and Senate Bills forced back into the system offenders "(1) whose crimes were committed in the distant past; (2) who have been determined by the state of Nevada to be unlikely to re-offend; and (3) who have complied with the law, attended counseling, and who have not committed additional crimes."¹²⁸ The court held A.B. 579 and S.B. 471 unconstitutional, reasoning that the bills essentially tack on additional punishment to an offender's original sentence, and no procedural due process protections exist for an offender under the newly enacted system.¹²⁹ Judge James C.

¹¹⁸ *Nevada Sex Offender Registry*, *supra* note 21.

¹¹⁹ Compare *id.*, with 42 U.S.C. § 16918(a).

¹²⁰ 42 U.S.C. § 16918(a)-(c).

¹²¹ *Id.* § 161914(a)(4)-(6); *id.* § 16918(a)-(c); see also *supra* notes 27-31 and accompanying text.

¹²² See *Nevada Sex Offender Registry*, *supra* note 21.

¹²³ 42 U.S.C. § 16916.

¹²⁴ NEV. REV. STAT. § 179D.260 (2009) (repealed 2007).

¹²⁵ *ACLU of Nev. v. Cortez Masto*, 719 F. Supp. 2d 1258, 1259 (D. Nev. 2008).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1260.

¹²⁹ *Id.*

Mahan granted summary judgment for the plaintiffs and issued a permanent injunction against A.B. 579 and S.B. 471.¹³⁰ At the time of writing this Note, the case was pending on appeal to the United States Court of Appeals for the Ninth Circuit.¹³¹

In response to the district court's entry of a permanent injunction, the Nevada legislature passed A.B. 85, which temporarily repealed A.B. 579 and S.B. 471.¹³² The legislature formed an advisory committee charged with studying the sex offender registration laws and proposing a solution to the contested legislation.¹³³ Pending the outcome of the Nevada Attorney General Office's appeal to the Ninth Circuit and the reconvening of the Nevada legislature in February 2011, Nevada is utilizing the sex offender registration and notification scheme in place prior to the passage of A.B. 579 and S.B. 471.¹³⁴ The SMART office granted Nevada the first of its two permissible one-year extensions to comply with SORNA, which expired on July 26, 2010.¹³⁵ Nevada again applied to the SMART office for its second one-year extension, which the SMART office granted.¹³⁶ Nevada must now substantially implement SORNA's provisions by July 27, 2011, to avoid loss of funding.¹³⁷

III. ADVANTAGES AND DISADVANTAGES OF IMPLEMENTING SORNA

A. *State Autonomy and Practicality of a National Registration System*

One potential advantage of compliance with SORNA is that states would collaborate to create a uniform national system rather than retaining individual registration systems.¹³⁸ Proponents of SORNA argue that stricter reporting and registration requirements will provide more-comprehensive supervision of sex offenders, which will result in lower recidivism rates.¹³⁹ Proponents also argue that a nationwide registry will help jurisdictions keep track of sex offenders as they move between states, preventing the offenders from being lost in the system or from moving to jurisdictions with less-strict registration laws, making it easier for them to reoffend.¹⁴⁰ Approximately one hundred thousand sex offenders nationwide are not living in the jurisdictions in which they are registered or are supposed to register, and are thus eluding their states' registration

¹³⁰ *Id.*

¹³¹ Anthony V. Salerno & Elana Goldstein, *Predators' Net*, L.A. LAW., June 2009, at 32, 34.

¹³² Assemb. 85, 2009 Leg., 75th Sess. (Nev. 2009), available at http://www.leg.state.nv.us/Session/75th2009/Bills/AB/AB85_EN.pdf.

¹³³ *Id.* §§ 5.3-5.6.

¹³⁴ Op. Nev. Att'y Gen. No. 2010-01, at 3 (Apr. 8, 2010), available at <http://ag.state.nv.us/publications/ago/2010/AGO%202010-01.pdf>.

¹³⁵ NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, *supra* note 72, at 40.

¹³⁶ See SMART, *supra* note 75, at 1.

¹³⁷ *Id.*

¹³⁸ *United States v. Hinen*, 487 F. Supp. 2d 747, 756, 756 n.7 (W.D. Va. 2007); Farley, *supra* note 4, at 480, 495.

¹³⁹ See Farley, *supra* note 4, at 495; Lindsay A. Wagner, Note, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL L. REV. 175, 187 (2009).

¹⁴⁰ *Hinen*, 487 F. Supp. 2d at 755-56, 756 n.7.

requirements.¹⁴¹ Additionally, the purpose of requiring states to post more-detailed information about each sex offender on the national registry website is to keep communities better informed about the offenders living in their area.¹⁴²

However, unless most states comply substantially with SORNA's requirements, the national registration system will be a failure. The full benefits of a national registration system will not exist if only a handful of states contribute to its content.¹⁴³ The result for compliant states is that they will spend extraordinary amounts of money implementing a national registration system that does not increase public safety.¹⁴⁴ For those states, the benefits of non-compliance with SORNA would far outweigh the detrimental results caused by choosing to comply with the federal scheme.¹⁴⁵

Electing not to implement SORNA's provisions allows states to create, modify, or maintain their own laws so as to avoid the constitutional problems inherent in SORNA.¹⁴⁶ It also allows states to choose between a risk-assessment model or a conviction-based model to determine which offenders the state will monitor more closely for longer periods.¹⁴⁷ Additionally, the states will be able to impose their own criminal sanctions for failure to comply with registration requirements.¹⁴⁸ This could be potentially beneficial to states that already have overcrowded correctional facilities and cannot afford an influx of sex offenders who fail to meet federal registration guidelines, but who would not face incarceration under current state law.

B. Public Safety

In response to arguments that the AWA furthers the goal of preventing recidivism and increasing public safety, critics point out that sex offenders actually have low rates of recidivism compared to other types of offenders.¹⁴⁹ Due to the moral panic¹⁵⁰ that occurred in the 1990s in response to a perceived

¹⁴¹ Bluestein, *supra* note 72.

¹⁴² See Enniss, *supra* note 1, at 713.

¹⁴³ Frumkin, *supra* note 4, at 337-38.

¹⁴⁴ JUSTICE POLICY INST., *supra* note 18, at 1; see also Antonio Planas, *New Law on Sex Offenders Poses Challenges*, LAS VEGAS REV. J., Apr. 1, 2008, at B1, available at <http://www.lvrj.com/news/17182081.html>. Maggie McLetchie of the ACLU of Nevada is concerned that, under SORNA, "The public will be endangered because law enforcement will have to track a larger bulk of offenders, taking the focus off people who are most likely to re-offend." *Id.*

¹⁴⁵ See generally Baron-Evans, *supra* note 4.

¹⁴⁶ See Farley, *supra* note 4, at 497.

¹⁴⁷ See Law & Criminal Justice Standing Comm., *2010-2011 Policies for the Jurisdiction of the Law and Criminal Justice Committee: Adam Walsh Policy*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=773&tabs=855,27,671> (last visited Mar. 29, 2011).

¹⁴⁸ *Id.*

¹⁴⁹ Baron-Evans, *supra* note 4, at 359.

¹⁵⁰ For a discussion about "moral panic" in response to the perceived increase in juvenile crime, see ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 109-17 (2008).

increase in crimes against children,¹⁵¹ politicians and the public falsely believed that sex offenders have high recidivism rates and therefore that stricter legislation was necessary.¹⁵² However, studies have estimated the recidivism rate for sex offenders to be only about 25 percent.¹⁵³ Additionally, sex offenders typically already know their victims.¹⁵⁴ Thus, increased supervision by the state and stricter residence requirements will not necessarily decrease sex offenders' access to their victims.¹⁵⁵ For example, the inability of a sex offender to live near an elementary school or a public park would not change the fact that the sex offender already knows where his potential or past victims reside, nor would it affect his access to those victims if they are close friends or family members.¹⁵⁶

Even worse, the frequent in-person registration requirements under SORNA have the potential to increase, rather than decrease, recidivism rates.¹⁵⁷ A sex offender who fails to comply with registration requirements faces the possibility of further incarceration, even if he has not committed any new sex offenses.¹⁵⁸ For many offenders, these requirements will create a serious hardship because they will be obligated to take days off work more frequently in order to report at the registration office in person, which could lead to loss of employment.¹⁵⁹ One offender from Ohio, Gary Reece, emphasized the difficulty that sex offenders will face if SORNA is implemented: "It's a tremendous burden Every 90 days you have to take off work and go register—and if you miss once, you're going back to jail."¹⁶⁰

C. *Modification of the Tier Classification System*

The risk-assessment model for classifying sex offenders into tiers is a better approach than the SORNA method of assigning tiers based purely on type of conviction.¹⁶¹ A risk-assessment model achieves the goal of keeping the

¹⁵¹ Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CALIF. L. REV. 163, 164-74 (2003).

¹⁵² Farley, *supra* note 4, at 492.

¹⁵³ *Id.*; see also Baron-Evans, *supra* note 4, at 357 ("Studies, including studies by the Department of Justice, show that the vast majority of sex offenders do not reoffend, that sex offender treatment is effective, and that community support and stability are essential to rehabilitation.").

¹⁵⁴ Thoreson, *supra* note 89, at 637.

¹⁵⁵ Frumkin, *supra* note 4, at 350 ("'[M]ore than 90 percent of child sex abuse is committed by someone the child knows and trusts[.]' and because an offender lives far from a potential victim does not mean he or she is effectively prevented from reaching that victim.") (second alteration in original).

¹⁵⁶ *Id.*

¹⁵⁷ See Bluestein, *supra* note 72.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Enniss, *supra* note 1, at 716; Farley, *supra* note 4, at 490-91; Thoreson, *supra* note 89, at 644; Kari White, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 CASE W. RES. L. REV. 161, 187 (2008).

highest-risk and most-dangerous offenders under the strictest governmental supervision.¹⁶²

A conviction-based system, on the other hand, would unnecessarily force low-risk sex offenders to register. According to Maggie McLetchie, a staff attorney with the American Civil Liberties Union of Nevada (ACLU of Nevada), under SORNA “it is clear that a huge number of people are going to go back into the system, people deemed by the state who are not likely to re-offend.”¹⁶³ If the tier classification system was implemented in Nevada, the number of Tier III offenders, who require lifetime state supervision, could rise from 127 to 2,000 in Southern Nevada alone.¹⁶⁴

Another problem is that legislation requiring the state to post more offender information on the registry websites actually hinders rather than furthers the goal of preventing recidivism. More information on the registry websites leads to increased difficulty with securing housing and employment, which, in return, reduces the chances that an offender will comply with reporting requirements.¹⁶⁵ It also unnecessarily exposes offenders (and those who live, work, or go to school with them) to potential harassment and vigilante attacks.¹⁶⁶

The ACLU of Nevada has taken on a client whose situation highlights the retroactive registration problems the provisions in SORNA create for offenders forced to re-enter the system.¹⁶⁷ The client, a reputable member of his community and a grandfather, could be “treated like a dangerous pedophile for committing statutory rape at age 17 back in 1960,” even though he has completed his sentence and his original period of registration is over.¹⁶⁸ Under the registry provisions of SORNA, he and other offenders unlikely to recidivate must provide personal information for the state to post on websites that could result in themselves and their “families fac[ing] social ostracism, losing their jobs, and even possible vigilante violence.”¹⁶⁹

As a result of these issues, approximately one-half of the states, including Nevada, continue to use a risk-assessment model to classify sex offenders into

¹⁶² Farley, *supra* note 4, at 490-91; Thoreson, *supra* note 89, at 644.

¹⁶³ Planas, *supra* note 144.

¹⁶⁴ *Id.*

¹⁶⁵ Farley, *supra* note 4, at 492, 494 (“Homelessness and joblessness not only makes the offenders more difficult for law enforcement to supervise, but also create recidivism and threaten public safety. The stigma and harassment of former offenders diminish the likelihood of a successful transition back into society.”).

¹⁶⁶ *Id.* at 492, 494; Frumkin, *supra* note 4, at 343-44 (“By virtue of SORNA’s permissive exemptions, sex offenders (and their places of employment and education) are currently in a worse position in terms of safety and public exposure than they were prior to AWA’s enactment.”); Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 30-31 (2008) (“[O]ne of the most disturbing trends has been the use of internet notification to find, track down, and murder registered sex offenders. Although these cases are infrequent, they nonetheless demonstrate the level of extremism society has developed toward sex offenders.”).

¹⁶⁷ Phil Hooper, *ACLU of NV Wins Permanent Injunction Against Retroactive Enforcement of New Sex Offender Laws*, ACLU NEV. (Sept. 10, 2008, 2:26 PM), <http://www.aclunv.org/aclu-nv-wins-permanent-injunction-against-retroactive-enforcement-new-sex-offender-laws>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

a tier-based system.¹⁷⁰ In fact, several states cite the requirement to switch from a risk-assessment model to a conviction-based model as one of the major barriers to compliance with SORNA.¹⁷¹ Although the jurisdictions have some discretion over certain provisions of SORNA, the tier classification system is not one of them, and failure to use this system results in the jurisdiction failing to comply substantially with SORNA.¹⁷²

D. Problems with the Juvenile Registration Requirements under SORNA

For many states, one of the major obstacles to implementation of SORNA's provisions is the requirement that juvenile offenders comply with the same registration guidelines as adult offenders.¹⁷³ Prior to SORNA, many states' registration schemes did not require juvenile offenders to register as sex offenders, and those that did often limited registration to juveniles over a certain age.¹⁷⁴ In her article that explores the effect of the SORNA requirements on juvenile offenders, Brittany Enniss notes, "For the past 100 years, American Law has treated juveniles differently from adult offenders with the idea that youth do not have fully developed mental capacities, are less blameworthy, and thus more amenable to rehabilitation than are adults."¹⁷⁵ SORNA's juvenile offender registration and reporting requirements contradict these important and long-held policies.¹⁷⁶

Under SORNA, juvenile offenders face even more severe consequences than adult offenders do.¹⁷⁷ Requiring states to post a juvenile offender's personal information and photograph on a public website opens the door to social ostracism, vigilante attacks, and predation by adult sex offenders looking to exploit minors.¹⁷⁸ According to Elizabeth Letoutneau, finding gainful employment after reaching adulthood or even graduating from school will also be substantial obstacles to juvenile sex offenders, and children unable to obtain an education or a job will be marginalized by society and therefore will be more likely to commit crime than they otherwise would have been.¹⁷⁹ Furthermore, at least one study of juvenile sex offenders shows that such offenders have low rates of committing subsequent sexual offenses.¹⁸⁰ Finally, critics of the juvenile offender registration requirement believe that parents will be less likely to report juvenile sex offenses for fear of the effects the registration requirements will have on the juvenile, ultimately precluding the opportunity for justice for

¹⁷⁰ Baron-Evans, *supra* note 4, at 357.

¹⁷¹ NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, *supra* note 72, at 2.

¹⁷² SORNA Guidelines, *supra* note 10, at 38053.

¹⁷³ NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, *supra* note 72, at 2.

¹⁷⁴ Thoreson, *supra* note 89, at 620.

¹⁷⁵ Enniss, *supra* note 1, at 707.

¹⁷⁶ *Id.* at 706-07 ("There is something in our senses that acknowledges the vulnerability and the differences between juvenile offenders and adult offenders. The glaring problem with Adam's Law is that it fails to take into account those differences.").

¹⁷⁷ *See id.* at 710.

¹⁷⁸ *Id.* at 710-11; Nancy G. Calley, *Juvenile Sex Offenders and Sex Offender Legislation: Unintended Consequences*, FED. PROBATION, Dec. 2008, at 37, 38.

¹⁷⁹ Ennis, *supra* note 2, at 710.

¹⁸⁰ Wright, *supra* note 166, at 27.

the victim of the sexual offense and for rehabilitation for the juvenile sex offender.¹⁸¹

In Nevada, it appears that some legislators were unaware that their attempted implementation of SORNA's requirements created consequences for juvenile offenders.¹⁸² Former U.S. Congresswoman Dina Titus, a Democratic State Senator from Las Vegas at the time A.B. 579 and S.B. 471 were being debated, said she does not recall discussing the implications for juveniles during Nevada Assembly hearings.¹⁸³ She admitted, however, that it "might be an unintended consequence [of implementing the provisions of SORNA]."¹⁸⁴ A clinical social worker emphasized just how severe these unintended consequences on juvenile offenders could be, saying, "These children literally stand no chance at any form of rehabilitation [The consequences] are going to destroy kids. There's going to be absconding. There's going to be suicides."¹⁸⁵

E. Financial Incentives and Costs Associated with Substantial Compliance

The detrimental effects of non-compliance to states are mostly financial in nature.¹⁸⁶ Although former director of the SMART Office, Laura L. Rogers, supports the implementation of SORNA, she admits that jurisdictions are going to need additional resources in order to achieve substantial compliance: "there is a significant hurdle to substantial implementation that can be solved by Congress: the lack of funding. Congress should provide resources to support the jurisdictions and the SMART Office in their ongoing efforts."¹⁸⁷

States have an incentive to comply with SORNA because compliance allows them not only to continue to receive federal funding under the AWA, but also to have the opportunity to receive additional funds that may be available as a result of other states' non-compliance.¹⁸⁸ There has been a national trend of states choosing not to comply with the federal guidelines and forfeiting the 10 percent annual funding.¹⁸⁹ Due to current economic hardships across the United States, many states have chosen not to implement the registration scheme under SORNA because of the high costs associated with implementation and maintenance.¹⁹⁰ Thus, states that do comply will receive a higher amount of funding due to other states' noncompliance.

The costs to comply with SORNA outweigh the federal funding a state will receive for complying. States electing non-compliance with SORNA will

¹⁸¹ Enniss, *supra* note 1, at 711; Abigail Goldman, *Young, but 'Predators' for Life: New Sex-offender Laws, Meant to Protect, May Instead Ruin Lives and Increase Risks*, LAS VEGAS SUN, Jan. 6, 2008, at 1, available at <http://lasvegassun.com/news/2008/jan/06/young-but-predators-for-life/>.

¹⁸² Goldman, *supra* note 181.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Salerno & Goldstein, *supra* note 131, at 32.

¹⁸⁷ *Barriers to Timely Compliance Hearing*, *supra* note 14, at 51.

¹⁸⁸ Farley, *supra* note 4, at 495 ("States that have complied with the AWA will receive full Byrne Grant funds and may also receive reallocated funds from non-complying states.")

¹⁸⁹ Baron-Evans, *supra* note 4, at 358.

¹⁹⁰ *Id.*

not have to expend funds for the start-up costs of implementing the national registration system, which are far greater than the federal funding states will lose by not complying.¹⁹¹ For example, it was estimated that the implementation of SORNA's registration system would cost California \$59,287,816.¹⁹² The potential federal funding that California might lose due to non-compliance with SORNA, on the other hand, is only \$2,187,682 annually.¹⁹³ At that rate, it would take California twenty-seven years before the annual federal funding would equal the costs of implementation, and that is assuming: (1) that the state would not have to spend any of the federal funds on maintenance of the new national system, and (2) that the costs to the state of maintaining the national system would be equal to or less than the current cost of maintaining the state's existing sex offender registration and notification system.¹⁹⁴

Similarly, in Nevada, the estimated cost of implementing the national system would be \$4,160,944 and the federal funding that would be lost by not complying equals only \$180,810 annually.¹⁹⁵ In the aforementioned SEARCH survey that questioned states about their plans to comply substantially with SORNA, Nevada responded with several concerns, including the cost of implementing the national registration system:

We anticipate the costs to make the changes will exceed the amount of grant funding available to us. Given our state's budget shortfall, we are unsure where we would get the funding to make up the anticipated difference between the costs of the project and the amount of our grant.¹⁹⁶

Nevada's statement highlights a major concern for states electing to comply with SORNA and continue to receive the federal funding—the annual federal funding would likely need to be allocated toward maintenance of the registration system itself, and that funding could easily fall short of the total funding the state needs to maintain the new national registration system.¹⁹⁷ Under that scenario, Nevada would be forced to use its own money, in addition to the federal funding, to maintain the system. Prior to the AWA, states generally allocated these funds to law enforcement and crime prevention; substantial compliance with SORNA would thus result in the state allocating fewer funds to these important state functions and reallocating them to maintenance of the national sex offender registry and online database.¹⁹⁸

Moreover, stricter sex offender registration laws result in increased supervision of a higher number of offenders whom the state must monitor for a

¹⁹¹ Farley, *supra* note 4, at 497; Frumkin, *supra* note 4, at 337; *see also* JUSTICE POLICY INST., *supra* note 18, at 2.

¹⁹² JUSTICE POLICY INST., *supra* note 18, at 2.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, *supra* note 72, at 40.

¹⁹⁷ Frumkin, *supra* note 4, at 337 ("In fact, a recent study by the Justice Policy Institute focusing on cost-benefit analysis discussed that some 'states have found that implementing SORNA in their state is far more costly than the penalties for not being in compliance.' The study points to a further concern that by devoting a majority of resources to maintaining the registry, the goal of targeting serious offenders might be difficult to achieve.").

¹⁹⁸ *See* Salerno & Goldstein, *supra* note 131, at 32.

longer period of time.¹⁹⁹ For example, when Nevada was attempting to comply substantially with SORNA in July 2008, the number of Tier III offenders was expected to increase by more than 1,500 percent in southern Nevada alone.²⁰⁰ Thus, the classification requirements under SORNA would create a greater demand on state resources and funding.²⁰¹

Finally, some critics of SORNA suggest that the public would be safer and better served if the funding that the state would otherwise spend on implementing a “stricter” national sex offender registration system was instead spent on offender rehabilitation and community education about sexual offenses.²⁰²

IV. PROPOSED SOLUTION

Due to the constitutional issues, financial challenges, and risks to public safety that substantial compliance with SORNA creates, Nevada should abandon its attempt to comply substantially with the SORNA’s provisions. It should refuse to implement a conviction-based tier classification system and instead, if the legislature deems it necessary, amend the existing sex offender registration scheme under N.R.S. 179. Non-compliance would save Nevada the exorbitant costs of implementation²⁰³ and allow the state to devote its already-limited resources to monitoring only the highest-risk offenders. Furthermore, although a national registration system would likely more effectively track sex offenders who travel interstate,²⁰⁴ the success of such a system ultimately depends on cooperation among the states, an unlikely prospect in the near future considering the vast majority of states have not substantially complied with SORNA despite having had five years to do so.

There are, however, certain provisions of SORNA that Nevada could incorporate into the existing sex offender registration and notification scheme that have the potential to increase public safety while avoiding the costs of implementing a national, classification-based system. For example, the periodic in-person verification requirement under SORNA decreases the likelihood that an offender will be able to misrepresent his or her whereabouts and living arrangements.²⁰⁵ Although requiring in-person verification would necessarily increase administrative costs, it is still a viable alternative because the number of offenders required to register would remain the same, and thus the added costs would not be overwhelming, and such a provision could potentially increase public safety. Nevada currently requires verification using only a mail-in form,²⁰⁶ which creates the potential for abuse. An offender could

¹⁹⁹ Planas, *supra* note 144.

²⁰⁰ *Id.*

²⁰¹ Frumkin, *supra* note 4, at 337.

²⁰² *Id.* at 350.

²⁰³ JUSTICE POLICY INST., *supra* note 18, at 2.

²⁰⁴ *Barriers to Timely Compliance Hearing*, *supra* note 14, at 283 (statement of Evelyn Fortier, vice president for policy of the Rape, Abuse & Incest National Network).

²⁰⁵ Christina Horst, *The 2006 Sex Offender Registration and Notification Act: What Does It Mean for Your Law Enforcement Agency?*, POLICE CHIEF, Nov. 2007, at 18, 18, available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1317&issue_id=112007.

²⁰⁶ NEV. REV. STAT. § 179D.260 (2006) (repealed 2008).

represent on the form that he currently resides in Nevada, but in reality could spend all or most of his time in another state without registering in that state. By requiring periodic, in-person verification at reasonable intervals, Nevada could be more confident that the information it collects from offenders is accurate, thereby increasing the safety of the communities in which the offenders reside and preventing sex offenders from evading registration requirements. Finally, Nevada should not adopt the provisions of SORNA that require certain juvenile offenders to register.

Additionally, Nevada could collect more information about offenders, as SORNA's provisions suggest.²⁰⁷ For example, SORNA requires offenders to provide their jurisdictions with DNA samples and fingerprints.²⁰⁸ Collecting this type of information could help increase public safety by making it easier for law enforcement to identify registered sex offenders who reoffend. Furthermore, collecting this information would not pose a serious threat to sex offenders because it would not be available to the public; thus, it does not have the potential to lead to vigilante attacks or other harassment of offenders and those with whom they associate, nor would it pose a further barrier to a sex offender's employment or housing search.²⁰⁹ Similarly, Nevada could collect the social security numbers of sex offenders to keep on file as SORNA suggests, in order to keep track of their activities within the state and outside of the state. But, as required by SORNA, such information should not be published on the website registry or made available to the public in any way.²¹⁰

Nevada certainly should not adopt the provisions of SORNA relating to juvenile offender registration. Such provisions are contrary to the public policy of encouraging juvenile offenders to rehabilitate and integrate successfully into society after reaching adulthood. Furthermore, requiring juvenile registration fails to take into account that juvenile sex offenders in general have a low likelihood of committing subsequent sex offenses and that their motivations for committing sexual offenses are often very different from adult offenders' motivations.²¹¹ As the National Conference of State Legislatures has proposed, Nevada should exercise its power to define which, if any, juvenile offenders should qualify as sex offenders after reaching adulthood and determine the appropriate course of action for supervising such offenders, rather than relying on the conviction-based tier classification SORNA provides.²¹²

V. CONCLUSION

Congress's enactment of SORNA opened the door to a plethora of constitutional challenges that the judiciary must now resolve at the federal district, appellate, and Supreme Court levels.²¹³ This influx of legal challenges has led to inconsistent opinions that have confused past and current sex offenders,

²⁰⁷ 42 U.S.C. § 16918(a) (2006).

²⁰⁸ *Id.* § 16914(b)(5)-(6).

²⁰⁹ See Farley, *supra* note 4, at 492, 494.

²¹⁰ 42 U.S.C. § 16918(b)(2).

²¹¹ Enniss, *supra* note 1, at 697, 708.

²¹² Law & Criminal Justice Standing Comm., *supra* note 147.

²¹³ See *supra* Parts II.B II.C.

attorneys, and legislators alike in Nevada and in other states.²¹⁴ SORNA also requires a less-effective method for classifying offenders into tier levels,²¹⁵ which has the counter-productive effect of decreasing public safety²¹⁶ while increasing state spending.²¹⁷ The provisions of SORNA that require juvenile sex offenders to follow the similar registration guidelines as adult sex offenders and provide information for the state to post on registry websites is contrary to the policy of encouraging juvenile sex offender rehabilitation.²¹⁸ Finally, the detriment caused to states by the exorbitant cost of complying substantially with SORNA far outweighs the benefits of compliance,²¹⁹ particularly when the national trend among individual states has been non-compliance with SORNA.

Due to the current budgetary crisis in Nevada, the Nevada legislature should not attempt to comply substantially with SORNA. Rather, the legislature should amend Nevada's existing regulatory scheme to impose stricter regulation of only those offenders who pose the highest risk of committing subsequent sex offenses.

²¹⁴ See Planas, *supra* note 144 (quoting Maggie McLetchie of ACLU of Nevada: "Nobody is clear on how to apply the law.").

²¹⁵ See SORNA Guidelines, *supra* note 10, at 38052-54.

²¹⁶ See Baron-Evans, *supra* note 4, at 358; Planas, *supra* note 144.

²¹⁷ See JUSTICE POLICY INST., *supra* note 18, at 2.

²¹⁸ Enniss, *supra* note 1, at 706-07.

²¹⁹ See generally Baron-Evans, *supra* note 4. See also JUSTICE POLICY INST., *supra* note 18, at 2.