United States v. Navarro, 54 F.4th 268 (5th Cir. 2022)

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Issue & Answer 1. Does SORNA (federal law directing sex offenders to register with state registration databases) create an independent obligation to register where the underlying offense is a registration offense under SORNA but not the laws of the state maintaining the database in which the defendant must register? **Yes.**

Issue & Answer 2. SORNA Tier II offenses require a 25-year registration period. If a person is convicted of a state offense comparable to a SORNA Tier II federal offense, they fall within the requirements of the Tier II registration period. The federal offense criminalizing sexual conduct with minors appears under SORNA's Tier II registration requirements. Colorado law criminalizes sexual conduct with minors slightly more broadly than the federal statute does. Is the more expansive Colorado law sufficiently comparable to the SORNA offense to trigger the SORNA Tier II registration period? **No.**

Facts. In 1999 the defendant pleaded guilty to attempted sexual assault in the State of Colorado. In 2013 he moved to Texas and did not register. Texas law did not require him to register. In 2019 law enforcement discovered the defendant living unregistered in Texas and brought the instant prosecution under 18 USC § 2250(a) (Sex Offender Registration and Notification Act "SORNA").

Analysis 1. The parties agree that SORNA is inapplicable when an offense is classified as a registration offense under SORNA but is not classified as a registration offense in the state maintaining the relevant registration database. Notwithstanding this agreement, the Court must interpret the law. The parties' agreement has no basis in the law. SORNA creates independent bases to register regardless of whether the federal registration offense also qualifies as a state registration offense. It is true that SORNA tells offenders in which state to register, but this aspect of SORNA does not delegate to the states authority to define whether a person has an obligation to register under SORNA.

Analysis 2. SORNA creates three tiers of sex offenders: (1) 15-year registrants, (2) 25-year registrants, and (3) lifetime registrants. All offenders who are not Tier II or Tier III are Tier I by default. Here, the district court treated the defendant as a Tier II offender and determined his registration obligation to last until 2026. A Tier II state-level offense is one "committed against a minor" and "is comparable to or more severe than" a list of federal crimes, including "abusive sexual contact" (a term that includes engaging in sexual acts with minors). However, the court must not compare the actual conduct underlying the offense. Instead, the court must use a "categorical approach" focusing solely on the elements of the state and federal statutes. Here the two offenses are not comparable. The federal statute splits sexual conduct with minors into two distinct offenses: (1) sexual conduct with minors between 12 and 16, and (2) sexual conduct with minors under the age of 12. The relevant Colorado statute does not make the same distinctions, it criminalizes sexual conduct in a broad category of minors: those under the age of 15. Moreover, the closest comparable crime under SORNA's Tier II requires as an element of the offense proof of a four-year age differential between the offender and the victim. Simply put, the Colorado statute criminalizes conduct that the federal statutes do

not. Under the categorical approach, they are not comparable. The defendant thus defaults to Tier I and needed to register only until 2019.

Comment. I really thought the opinion would dig into the fact that the defendant pled guilty to *attempted* sexual assault. In Texas, criminal attempt is its own offense, regardless of the underlying offense the defendant attempted to commit. Perhaps there would be an entirely different analysis reaching the same result if the underlying offense had been a Texas offense.