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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-6086, Gundy versus the United States.

Ms. Baumgartel.

ORAL ARGUMENT OF SARAH BAUMGARTEL  
ON BEHALF OF THE PETITIONER

MS. BAUMGARTEL: Mr. Chief Justice, and may it please the Court:

SORNA's delegation provision grants unguided power to the nation's top prosecutor to expand the scope of criminal laws and to impose burdensome, sometimes lifetime registration requirements on hundreds of thousands of individuals. It combines criminal law-making and executive power in precisely the way that the Constitution was designed to prohibit.

This delegation is unconstitutional. This delegation can be distinguished from every delegation that has previously been upheld by this Court due to a combination of its total lack of standard and the nature and power -- nature and significance of the delegated power.

1           Unlike other delegations that this  
2 Court has approved, SORNA has no standard to  
3 guide the Attorney General's exercise of  
4 discretion.

5           CHIEF JUSTICE ROBERTS: Well, the  
6 government says that they do have a standard  
7 and it's the -- apply the prohibition or the  
8 requirements in the law to the maximum extent  
9 feasible.

10           MS. BAUMGARTEL: Your Honor, that  
11 language does not appear anywhere in the  
12 statutory text, nor can it be derived from the  
13 sources that the government cites.

14           JUSTICE GINSBURG: What about the list  
15 that's contained in, what is it, 20901, the --  
16 the list of past offenders? On your view, none  
17 of those people would be required to register?

18           MS. BAUMGARTEL: That's not correct.  
19 So one important thing about this case is that  
20 every -- every state had an existing sex  
21 offender registration system prior to SORNA's  
22 enactment, and those registration systems would  
23 remain in effect regardless of whether SORNA  
24 existed or not. And so, for example,  
25 Petitioner was required to register under

1 existing Maryland law, and so would the vast  
2 majority of sex offenders who were also then  
3 required to reregister under SORNA.

4           These state registration systems had  
5 been in existence, many of them, since the  
6 early '90s, but since 1996, every state had its  
7 own registration system.

8           JUSTICE GINSBURG: But they would  
9 be -- they would not come under the federal  
10 registration system, which was the purpose of  
11 SORNA to create. None of those examples would  
12 be covered by the federal registration  
13 requirement.

14           MS. BAUMGARTEL: Well, as -- as this  
15 Court held in Reynolds, the Congress left it to  
16 the Attorney General to determine whether SORNA  
17 would apply retroactively at all. And so  
18 Congress declined to make the initial decision  
19 as to whether any pre-Act offender should be  
20 required to register. This was consistent with  
21 how Congress had approached registration  
22 schemes in the past.

23           Congress had previously enacted  
24 registration legislation that conditioned state  
25 funding on requiring certain things from sex

1 offender registries, and in each of those prior  
2 cases, Congress had not made the law  
3 retroactive. And so there's -- there's nothing  
4 strange about Congress doing this.

5 As the Court held in Reynolds, it then  
6 gave the Attorney General full authority to  
7 decide whether the law should be applied  
8 retroactively, so the initial on/off  
9 determination, but then as well how it should  
10 apply, which offenders should be included, if  
11 it should extend all the way back to 20, 30, 40  
12 years. There was absolutely no guidance  
13 provided to the Attorney General in making --

14 JUSTICE ALITO: Well, suppose the --  
15 the statute said that the Attorney General  
16 shall have the authority to determine the  
17 application of this subchapter to pre-enactment  
18 offenders as public safety and fairness  
19 requires. Would that be a -- a violation of  
20 the Non-Delegation Doctrine?

21 MS. BAUMGARTEL: Yes, Your Honor.  
22 Given the subject matter of this delegation,  
23 Congress needs to provide more guidance than  
24 something along the lines of "in the public  
25 interest." And --

1           JUSTICE BREYER:  What about the most  
2 famous regulation, that I think people in this  
3 room would imagine, Rule 10b-5?  I mean, Rule  
4 10b-5 is promulgated under a statute that says  
5 the SEC can forbid the use of any manipulative  
6 device -- that's like the sex offender part --  
7 in contravention of such rules as are  
8 appropriate in the public interest.

9           MS. BAUMGARTEL:  So there are -- there  
10 are a few distinctions.  One is that the SEC,  
11 obviously, is a different body than the  
12 Attorney General, and so this is a point where  
13 the Court's due process and delegation concerns  
14 converge.  And it's important from the  
15 Constitution to have a separation between the  
16 body that is the regulatory lawmaker and the  
17 body that is the prosecutor.

18           JUSTICE BREYER:  Is it only the  
19 Attorney General who falls within the rule that  
20 -- falls within your argument?

21           MS. BAUMGARTEL:  That's something that  
22 exacerbates this delegation.

23           JUSTICE BREYER:  No, but -- but I'm --  
24 look, the SEC has a rule such as we know,  
25 10b-5, the word is the public interest.  The



1 Consumer Product Safety Commission has another  
2 one very similar. And we're told in one of the  
3 briefs that there are 300,000 such regulations.  
4 That may be an exaggeration, I don't know.

5 So which, in fact, fall, as you said,  
6 within your specially harsh rule? All of the  
7 300,000? We'll be busy in this Court for quite  
8 a while.

9 MS. BAUMGARTEL: Your Honor, it's not  
10 an especially harsh rule. What it would  
11 require is some more --

12 JUSTICE BREYER: Your especially  
13 strict rule.

14 MS. BAUMGARTEL: -- some more specific  
15 congressional guidance when this power is  
16 delegated. And a few things to say. First --

17 JUSTICE SOTOMAYOR: Sorry, you're  
18 answering Justice Breyer yes, that all 300,000  
19 of those -- whatever the number is, of those  
20 delegations are wrong?

21 MS. BAUMGARTEL: No, that's absolutely  
22 not our position.

23 JUSTICE SOTOMAYOR: So what  
24 distinguishes those -- that delegation or those  
25 delegations from the example that Justice Alito

1 gave you?

2 MS. BAUMGARTEL: So, in each of the  
3 prior delegations that this Court has upheld,  
4 there has actually been some standard in the  
5 delegation provision, even if it was what the  
6 Court might consider to be a broad standard.

7 JUSTICE GINSBURG: But there are  
8 standards here. I mean, it's not the Attorney  
9 General, it's the Congress that defines what  
10 crimes will require registration, where, and  
11 when the individual is required to register, of  
12 what information is necessary, and the  
13 penalties for failure to register. All that is  
14 specified by Congress. The Attorney General  
15 doesn't -- is not at liberty to prescribe when,  
16 where, how, what crimes. All that is done by  
17 Congress.

18 MS. BAUMGARTEL: But none of those  
19 very detailed provisions of SORNA that Congress  
20 set forth apply to pre-Act offenders. The  
21 Attorney General was given the power both to  
22 decide whether the law applied to pre-Act  
23 offenders and then how it should apply.

24 JUSTICE KAGAN: Well, that gets back  
25 to the question that the Chief Justice started

1 with, because it seems that there is some  
2 language in the statute that supports the  
3 government's reading, that this is a statute  
4 that basically says register all pre-Act  
5 offenders as far as possible, with some  
6 understanding that there are feasibility  
7 considerations that may make immediate  
8 registration of everybody impossible. So  
9 comprehensiveness but moderated with a  
10 feasibility understanding.

11 And I think you would point to three  
12 things. You would point to the preamble, which  
13 talks about a comprehensive national system. I  
14 think you would point then to the definition,  
15 which says that the term "sex offender" means  
16 an individual, any individual, an individual  
17 who was convicted of a sex -- sex offense. And  
18 I think, to get in the idea of feasibility, you  
19 might look to the -- the delegation provision  
20 itself, which talks about categories of sex  
21 offenders who are unable to comply with  
22 subsection (b).

23 So both comprehensiveness as moderated  
24 by some flexibility -- some -- some feasibility  
25 constraint seems in the statute as long as

1 you're taking the statute as a whole.

2 MS. BAUMGARTEL: So there -- there are  
3 a few problems with reading it that way. To  
4 start with the fact that in J.W. Hampton, the  
5 Court emphasized that the intelligible  
6 principle had to be clear from the legislative  
7 act itself. And so, to the extent that the  
8 Court is looking through other provisions --

9 JUSTICE KAGAN: From the legislative  
10 act itself meaning only from the delegation  
11 provision?

12 MS. BAUMGARTEL: From -- so from the  
13 legislative act. And so to start --

14 JUSTICE KAGAN: Well, this is the  
15 legislative act. These are all parts of the  
16 statute.

17 MS. BAUMGARTEL: That's right. And in  
18 Panama Refining, the Court rejected the idea  
19 that if there was a narrow delegation provision  
20 that did not contain any standards, that that  
21 could then be governed and given content by the  
22 general preamble to the Act, which is exactly  
23 the argument that the government is making  
24 here.

25 JUSTICE KAGAN: Well, but when we are

1 thinking about non-delegation, it's essentially  
2 a statutory interpretation question, which it  
3 seems should be governed by the same rules of  
4 statutory interpretation that we use elsewhere.

5 And we never look only to one  
6 provision. We look to one provision in a  
7 context of other provisions, including purpose  
8 provisions.

9 So we've -- if you look at Justice  
10 Scalia's -- Justice Scalia was a pretty  
11 committed textualist -- if you look at his  
12 separate opinion in Reynolds, he clearly is  
13 looking to the purpose provision of this Act  
14 and saying it demands comprehensiveness.

15 MS. BAUMGARTEL: So, Your Honor, I --  
16 I agree 100 percent with you that this could be  
17 a statutory interpretation issue, but we would  
18 prevail under that.

19 The problem with the government's  
20 statutory interpretation argument is that the  
21 delegation provision here is not ambiguous. It  
22 gives plenary authority to the Attorney  
23 General. When the Court looks to, say, the  
24 statutory context or legislative history,  
25 things to interpret that statute, that's

1 generally when the text itself is ambiguous and  
2 provides for two different plausible readings,  
3 but here that's not the situation.

4 I just note Justice Scalia was  
5 dissenting, of course, in Reynolds because --

6 JUSTICE KAGAN: He -- he was  
7 dissenting, but nine Justices in Reynolds all  
8 had the same view of this statute, which is  
9 that this statute demanded comprehensiveness in  
10 the registration of pre-Act sex offenders.

11 In other words, both in the majority  
12 and in the dissent, this was the one point in  
13 common, that they said this statute was  
14 designed for something and this statute did  
15 something, that it insisted that "sex offender"  
16 should be read broadly to include any  
17 individual who was convicted of a sex offense  
18 and that all those people should be registered,  
19 you know, with some feasibility recognition.

20 MS. BAUMGARTEL: So I'd like to  
21 address both comprehensiveness and the  
22 definition of "sex offender" while also noting  
23 that, of course, if Congress had actually  
24 wanted that construction, it would have been  
25 very easy for it to simply say that. The --

1 JUSTICE KAGAN: Well, but nine of us  
2 said it.

3 MS. BAUMGARTEL: The preamble --

4 JUSTICE KAGAN: Were we all wrong,  
5 every single one of us?

6 MS. BAUMGARTEL: Your Honor, I -- I  
7 don't believe that's what Reynolds says, but  
8 just with respect, because comprehensive is  
9 coming up so many times, the preamble states  
10 that it is a comprehensive national  
11 registration system.

12 In the same way that the National  
13 Gallery is a comprehensive art museum, that  
14 doesn't mean that it has every painting that  
15 has ever been made. Comprehensive can have  
16 different meanings.

17 In this context, SORNA is a  
18 40-something provision statute that addresses  
19 every aspect of sex offender registration, not  
20 just who should register but information  
21 sharing among jurisdictions, the Internet  
22 design of websites for public registration,  
23 civil commitment of sex offenders, the use of  
24 federal law enforcement resources to assist  
25 with state registration systems.

1           These various provisions comprise the  
2           comprehensive national registration system, and  
3           there's no indication that that general  
4           preamble meant that every pre-Act offender had  
5           to be registered.

6           There was a House bill that was  
7           rejected that was pending at the same time that  
8           would have both made it explicitly retroactive  
9           and that included a definition of "sex  
10          offender" that explicitly said offenders  
11          convicted either before or after the enactment  
12          of this Act.

13           JUSTICE KAGAN: I guess I have --

14           JUSTICE GORSUCH: I guess -- I'm --

15           JUSTICE KAGAN: -- two quick -- I'm  
16          sorry.

17           JUSTICE GORSUCH: Well, I guess where  
18          I get stuck on -- on the preamble argument is  
19          that normally we -- we, when we're doing  
20          statutory interpretation, prefer the more  
21          specific statutory provision over the more  
22          general. And the specific statutory section  
23          dealing with pre-enactment offenders says  
24          unambiguously that the Attorney General decides  
25          whether, how, when, and who, even who. So you



1 don't even know if you're going to be subject  
2 to this law.

3 MS. BAUMGARTEL: Yes.

4 JUSTICE GORSUCH: How -- how do people  
5 even know who is going to be included in this  
6 class until they hear from the Attorney  
7 General? And I -- I'm having trouble thinking  
8 of another delegation in which this Court has  
9 ever allowed the chief prosecutor of the United  
10 States to write the criminal law for those he's  
11 going to prosecute.

12 We say that vague criminal laws must  
13 be stricken. We've just repeated that last  
14 term. What's vaguer than a blank check to the  
15 Attorney General of the United States to  
16 determine who he's going to prosecute?

17 MS. BAUMGARTEL: Yes --

18 JUSTICE GINSBURG: That's your  
19 argument stated very, very concisely.

20 MS. BAUMGARTEL: I'll cede my time.

21 (Laughter.)

22 JUSTICE KAGAN: Well, then I'll take  
23 back my time.

24 (Laughter.)

25 JUSTICE ALITO: Well, suppose what

1 this was -- what was at stake here was civil  
2 liability rather than -- suppose what was at  
3 stake here was civil liability rather than  
4 criminal liability. Would you make the same  
5 argument?

6 MS. BAUMGARTEL: That would -- that  
7 would certainly be a much closer case. Our  
8 argument is that -- that SORNA would still be  
9 unconstitutional simply because of the total  
10 lack of standard.

11 Even in cases like NBC or American  
12 Power & Light where the Court has upheld  
13 arguably very broad delegations, there has been  
14 some standard in the law that, even if  
15 seemingly broad as written, drew upon an  
16 existing body of established law.

17 So, for example, in NBC, the public  
18 interest, convenience, and necessity  
19 certification for licensing was an established  
20 body of law, that it was a certification that  
21 states had made to public service industries  
22 since roughly the 1870s.

23 There's no existing body of law to  
24 give context --

25 JUSTICE ALITO: So -- so if you

1 compare what we have before us with the statute  
2 that says -- gives -- authorizes the Attorney  
3 General to devise a rule to protect public  
4 safety, feasibility, and consideration of  
5 individual rights, that that's the difference  
6 between a improper delegation and a proper  
7 delegation?

8 MS. BAUMGARTEL: Perhaps. Certainly  
9 --

10 JUSTICE ALITO: In the civil context.  
11 Let's start there.

12 MS. BAUMGARTEL: Certainly, the  
13 Congressional guidance is the difference. And  
14 this just comes back to the purpose of the test  
15 itself. The idea of the intelligible principle  
16 test is that it's not a delegation of  
17 legislative authority because Congress itself  
18 has made the key legislative decisions.

19 Here, with respect to pre-Act  
20 offenders, Congress has not made any of the  
21 decisions, despite the extremely detailed  
22 framework that there is for post-Act  
23 registration.

24 JUSTICE GINSBURG: Do you think the  
25 Attorney General could, in that retroactivity,

1 have a different set of offenders than the text  
2 of FORNA -- SORNA itself, have different  
3 requirements for where and when the  
4 registration is to occur?

5 MS. BAUMGARTEL: Yes. I -- and this  
6 is something the Court contemplated in  
7 Reynolds, where it noted that 20913(d), the  
8 delegation provision, essentially gave the  
9 Attorney General three different spheres of  
10 authority. He could decide whether the Act  
11 applied to pre-Act offenders, whether it  
12 applied to pre-implementation offenders, and  
13 then how it applied to those offenders.

14 And the Court recognized that he  
15 might, for example, want to set different  
16 registration rules for different classes of  
17 pre-Act offenders, and that was contemplated  
18 and permitted by the broad plenary grant of  
19 authority.

20 CHIEF JUSTICE ROBERTS: What -- what  
21 if the Act said that it applies to pre-Act  
22 offenders and there was a provision saying the  
23 Attorney General may waive the requirements of  
24 this Act when he determines that it's not  
25 feasible to apply them?

1 MS. BAUMGARTEL: Yeah --

2 CHIEF JUSTICE ROBERTS: And the  
3 Attorney General says, you know, I don't think  
4 it's feasible to apply this to pre-Act  
5 offenders, so I waive the Act with respect to  
6 pre-Act offenders. Is that okay?

7 MS. BAUMGARTEL: So if -- if the Act  
8 said this -- Congress determines that this  
9 should apply to pre-Act offenders and then gave  
10 the Attorney General a limited power to grant  
11 exemptions, something which is basically the  
12 opposite of what this as written does, that  
13 would likely be constitutional, particularly if  
14 the -- if Congress provided some guidance  
15 around where --

16 CHIEF JUSTICE ROBERTS: Even though  
17 the consequences are the same -- the  
18 consequences are the same with respect to  
19 whether or -- who's making the decision about  
20 whether the criminal laws should apply to whom?

21 MS. BAUMGARTEL: Respectfully, the --  
22 the consequences are not the same. In the  
23 first instance, Congress has made the decision.  
24 And then they have afforded the Attorney  
25 General a power that is in -- first, if there

1 is guidance provided with respect to the  
2 granting of exemptions, then it's still --

3 CHIEF JUSTICE ROBERTS: Well, let's  
4 say it isn't. The Attorney General may issue  
5 exemptions to this Act with respect to  
6 particular categories of offenders.

7 MS. BAUMGARTEL: Even -- even if, that  
8 would still be much closer to being  
9 constitutional because Congress has made the  
10 initial decision and has afforded the Attorney  
11 General a power that is something more akin to  
12 traditional prosecutorial discretion.

13 It's not the same, but this was the  
14 point that Justice Scalia, joined by Justice  
15 Ginsburg, made in dissent in Reynolds, which is  
16 that that is much -- that seems closer to being  
17 constitutional because the power that the  
18 Attorney General has is closer to a traditional  
19 clemency or prosecutorial discretion power.

20 In this case, however, the -- the  
21 statute is truly worded in the opposite  
22 fashion. It does not apply of its own force to  
23 any pre-Act offenders. And the question of  
24 whether it should apply is left to the sole  
25 discretion of the Attorney General, with --

1 JUSTICE SOTOMAYOR: Do we routinely  
2 read into statute limitations in order to save  
3 its constitutionality?

4 MS. BAUMGARTEL: Yes.

5 JUSTICE SOTOMAYOR: We do do that  
6 routinely. And we have read into delegation  
7 cases limits. So why is the reading in a  
8 feasibility here so unusual, given the three  
9 contextual signals that Justice Kagan listed  
10 previously?

11 MS. BAUMGARTEL: So there are three  
12 reasons. One is that that is essentially the  
13 interpretation that the Court rejected in  
14 Reynolds. That -- that was squarely the  
15 government's argument in Reynolds, and the  
16 Court said no, that's not a plausible  
17 construction of this statute.

18 The second reason is that, in the  
19 context of the intelligible principle, it is  
20 essential that Congress itself state the  
21 intelligible principle. The Court addressed  
22 this in American Trucking v. Whitman, where  
23 there the agency itself had tried to propose a  
24 limiting construction to the delegation. And  
25 the Court rejected that and said that the

1 imposition of that limiting construction would  
2 be the exercise of the constitutional -- the  
3 legislative power itself. And so the  
4 imposition of that limiting construction would  
5 be unconstitutional because it's exercising the  
6 legislative power.

7 JUSTICE SOTOMAYOR: Can we go back to  
8 -- mention your third. But on the first folded  
9 in, in Reynolds, we said that it would have  
10 been strange, indeed, for anyone to imagine  
11 that Congress intended the AG -- I'm trying to  
12 put it into a positive -- that Congress  
13 intended the AG to -- to apply the Act  
14 retroactively. It would have been strange for  
15 them to imagine that he or she wouldn't, that  
16 there might have been limitations because of  
17 some feasibility difficulties, but no one  
18 imagined the AG would exempt everyone.

19 MS. BAUMGARTEL: The intelligible  
20 principle cannot be the Court's speculation  
21 about what Congress thinks the Attorney General  
22 might do.

23 JUSTICE SOTOMAYOR: But we're  
24 speculating from the Act itself.

25 JUSTICE KAGAN: It's not speculating.



1 It's interpreting. So if the -- if the best  
2 interpretation -- and I realize you don't agree  
3 with this, but -- so I'm posing it as a  
4 hypothetical. If the best interpretation of  
5 the Act is the SG's interpretation, do you  
6 agree that that would not pose a delegation  
7 problem?

8 MS. BAUMGARTEL: No, I don't agree.  
9 And so if the -- my friend uses different  
10 formulations of their interpretation.  
11 Sometimes it's to the maximum extent feasible.  
12 Sometimes it's to the extent feasible.  
13 Sometimes it's to the extent practicable.

14 And I would argue that there is --  
15 there are differences there.

16 JUSTICE KAGAN: Let's -- let's call  
17 it, which is, I think, consistent with what  
18 Reynolds said, to the maximum extent feasible.  
19 In other words, what the Act is telling the AG  
20 is go register pre-Act offenders, except if you  
21 find it unfeasible.

22 MS. BAUMGARTEL: I -- again, that's --  
23 that's nowhere in the statute, and --

24 JUSTICE KAGAN: Yeah, I -- I  
25 understand that you think that. But if the

1 statute -- if -- if -- if that is the best  
2 interpretation of the statute, would it pose a  
3 delegation problem?

4 MS. BAUMGARTEL: That likely would be  
5 constitutional if you could read into the  
6 statute a command to the Attorney General to  
7 register pre-Act offenders to the maximum  
8 extent feasible, although, you know, as Justice  
9 Rehnquist articulated in Industrial Union, the  
10 benzene case, there is still a question about  
11 what feasibility means.

12 And in this context particularly,  
13 because these are not -- this is not a  
14 technical scientific area. This is not a  
15 question of how much air particle, at what cost  
16 can be taken from the environment. This is  
17 really the fundamental weighing of liberty  
18 versus security interests, the sorts of  
19 decisions that the people's legislative body is  
20 supposed to make and not supposed to delegate  
21 to the chief prosecutor.

22 JUSTICE BREYER: Are we supposed to do  
23 that -- are we supposed to, in your opinion,  
24 start distinguishing among the 300,000 and say,  
25 well, you have a weak standard if all that's at

1 interest is the cost of pollution or something,  
2 but you have to have a strong standard where,  
3 in fact, it's what you said, liberty and so on,  
4 and a medium standard perhaps for the SEC? I  
5 don't -- I don't know what we do about the SEC.

6 And there are 300,000, approximately.  
7 Maybe there are only 200,000. But is that what  
8 you're suggesting we ought to do? Yes? No?

9 MS. BAUMGARTEL: Yes, and the -- the  
10 Court in American --

11 JUSTICE BREYER: Yes, all right,  
12 300,000.

13 MS. BAUMGARTEL: I should -- Your  
14 Honor, I should -- I'm not conceding the  
15 300,000.

16 JUSTICE BREYER: No, I wouldn't  
17 either.

18 (Laughter.)

19 MS. BAUMGARTEL: But this is -- this  
20 is what the Court said in American Trucking v.  
21 Whitman, that the amount of guidance required  
22 depends on the scope of the delegated power.

23 JUSTICE BREYER: Okay. So, if we're  
24 supposed to go through the 200,000 or 100,000  
25 or whatever they are, what are the different

1 categories where it's tough, not so tough, in  
2 your opinion?

3 MS. BAUMGARTEL: Your Honor, the  
4 question is not a matter of tough versus --

5 JUSTICE BREYER: No, you -- you see  
6 what I mean, categories where Congress can  
7 delegate with an SEC-type standard or the  
8 standard here in categories where Congress has  
9 to be more specific.

10 MS. BAUMGARTEL: The --

11 JUSTICE BREYER: What -- what in your  
12 opinion are the right categories?

13 MS. BAUMGARTEL: The -- so the factors  
14 about SORNA that are critical include the fact  
15 that it contemplates criminal sanctions. In  
16 Touby, this Court recognized that its  
17 precedents supported requiring greater guidance  
18 for the promulgation of regulations that  
19 contemplate criminal sanctions.

20 JUSTICE KAGAN: But aren't -- isn't  
21 that all over the place we have confronted  
22 delegation challenges to civil regulations  
23 whose violation will result in criminal  
24 sanctions? So, I mean, there are numerous of  
25 those cases, but I'll just give you three:

1 Kollock is like that, Grimaud is like that,  
2 Avent is like that.

3 So these are all places where the  
4 delegation is to a civil regulation, as it is  
5 here, but if you violate that regulation that  
6 some secretary or attorney general or whatever  
7 has written, you're going to face criminal  
8 sanctions.

9 So what's the difference between this  
10 case and all those other cases where we said  
11 that's -- you know, that's -- criminal  
12 sanctions is not what matters?

13 MS. BAUMGARTEL: Well, Kollock is the  
14 perfect example because this is very different  
15 than oleomargarine label. This is not a  
16 question of Congress --

17 JUSTICE KAGAN: You know, you can say  
18 that, and it's easy to make fun of  
19 oleomargarine labels, but the person who  
20 violated that provision was going to go to  
21 prison in the same way that the person who  
22 violates this provision is going to go to  
23 prison.

24 MS. BAUMGARTEL: It's not making fun,  
25 Your Honor. It's that there are certain

1 fundamental choices about a statutory scheme  
2 that Congress itself must make. And so  
3 Congress can say that there needs to be  
4 particular packaging and a label, and then it  
5 can delegate or assign to an agency the power  
6 to design that label.

7 JUSTICE KAGAN: The point I was making  
8 is that all of these are civil regulations.  
9 The delegation is to say you write the -- we're  
10 going to give you some degree of discretion to  
11 write the civil regulation, understanding that  
12 if somebody violates that, that person is going  
13 to jail.

14 MS. BAUMGARTEL: Your Honor, may I  
15 answer your question and then reserve the  
16 remainder of my time?

17 Just the -- the question is always the  
18 nature and significance of the delegated power,  
19 and it -- it is perfectly fine for Congress to  
20 permit agencies to fill in the details or  
21 otherwise implement statutes, but not to make  
22 these sorts of fundamental policy choices.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Mr. Wall.

2 ORAL ARGUMENT OF JEFFREY B. WALL

3 ON BEHALF OF THE RESPONDENT

4 MR. WALL: Mr. Chief Justice, and may  
5 it please the Court:

6 I wanted to start this morning where  
7 Justices Ginsburg and Kagan did, with the text  
8 of the Act, because I do think it is best  
9 interpreted in the way that we have said. It  
10 starts in the first section -- this is at 3a of  
11 the appendix of the government's brief -- with  
12 findings about existing sex victims and their  
13 offenders. It then says, "we want a  
14 comprehensive national system" to address the  
15 offenders. It broadly defines "sex offender"  
16 and the registration requirement. That's at  
17 pages 5a and 11a. And then it says -- in the  
18 913(d), it says, look, we know that translating  
19 the system that we've just crafted for  
20 offenders going forward is going to create some  
21 real practical problems.

22 For one, it's literally impossible for  
23 them to comply with the timing requirement.  
24 Unable to comply. Those are the words in the  
25 title and text of 913(d). So we are going to

1 give to the Attorney General the authority to  
2 take this scheme and implement it with respect  
3 to pre-Act offenders, recognizing that there  
4 are going to be some transitional issues.

5 That kind of implementation is a  
6 classic executive function. It is what  
7 statutes give to the executive branch all the  
8 time. And Petitioner has conceded, I think,  
9 just now, that if the statute is best read in  
10 the way I'm positing, that it's -- it's  
11 perfectly permissible under this Court's cases.

12 CHIEF JUSTICE ROBERTS: Well, let's  
13 take one of the items you just mentioned,  
14 comprehensive. The Act says that it's  
15 comprehensive -- that doesn't mean that it  
16 covers everything. It means that it has a  
17 scheme that it thinks addresses the waterfront.

18 And part of the way it -- it does that  
19 is to say we're not going to decide this  
20 significant category of cases.

21 MR. WALL: Oh --

22 CHIEF JUSTICE ROBERTS: It's  
23 comprehensive. They've told you what's going  
24 to happen there, and what they've said is the  
25 Attorney General gets to decide.



1           MR. WALL: Oh, it -- it's certainly  
2 true that Congress made certain legislative  
3 judgments about what sex offenses would  
4 qualify, how long people would have to register  
5 for. They didn't say every offense that  
6 relates to sex means you've got to register for  
7 a lifetime. That is -- that is certainly true.

8           But, once they've defined the bounds  
9 of the people they want into the system going  
10 forward, then they said to the Attorney  
11 General: Your job is to get as many of the  
12 existing offenders who fall into that universe  
13 into the registries as you can, recognizing  
14 there are going to be some practical barriers.  
15 You're going to have to specify the  
16 applicability of the requirements in a way --

17           JUSTICE GORSUCH: But, Mr. Wall --

18           MR. WALL: -- to get them in. That's  
19 very narrow language.

20           JUSTICE GORSUCH: -- you didn't -- the  
21 government didn't make that argument in  
22 Reynolds. The government made the opposite  
23 argument in Reynolds. The government said that  
24 (d) is the more specific provision and the  
25 nature of the comprehensiveness, as the Chief

1 Justice indicated, for purposes of  
2 pre-enactment offenders was that the Attorney  
3 General gets to decide, and the Attorney  
4 General could decide to do nothing, the  
5 government said, the Attorney General could  
6 decide to include some offenders, none of the  
7 offenders, or all of the pre-enactment  
8 offenders.

9 The government said that it could then  
10 determine which of the Act provisions it wished  
11 to, in a Chinese menu manner, apply to these  
12 people it had chosen. The government then said  
13 the Attorney General could change his or her  
14 mind about all of this at any given time.

15 And, in fact, the Attorney General has  
16 changed his mind from time to time on these  
17 matters. So how do you square with what you've  
18 just told us with the government's prior  
19 representations in this case?

20 MR. WALL: Well, the Attorney General  
21 has never changed his or her mind with respect  
22 to the registration duty for individuals, but  
23 -- but to go squarely to the question --

24 JUSTICE GORSUCH: There -- there have  
25 been changes in --

1           MR. WALL: Only with respect to the  
2 state's obligations to go out and find  
3 offenders --

4           JUSTICE GORSUCH: All right. Fine.

5           MR. WALL: -- not with the individual  
6 duty on offenders to come forward and present  
7 themselves and register.

8           JUSTICE GORSUCH: Attorney General  
9 Holder changed the guidance provided by -- by  
10 the prior Attorney General, correct?

11          MR. WALL: He narrowed the states'  
12 obligations to give the states a little more  
13 breathing room. That's true. The individual  
14 duty to step forward and register has always  
15 been constant.

16          But, to go to your question, I really  
17 don't think that, reading our brief in  
18 Reynolds, there's any inconsistency. We came  
19 in and said as a statutory matter this says he  
20 shall have the authority to specify the  
21 applicability.

22          That clearly means, since we know that  
23 they want everybody in, that we should read  
24 that like a waiver provision. And to be sure,  
25 the Court disagreed with us on that and said

1 the default rule was different but in the  
2 process accepted exactly our argument as the  
3 premise that the default rule didn't matter  
4 because Congress wanted everybody into the  
5 system.

6 And so I think --

7 JUSTICE SOTOMAYOR: Mr. Wall --

8 MR. WALL: -- everybody was working  
9 off of that page in Reynolds.

10 JUSTICE SOTOMAYOR: -- your -- your  
11 brief in Reynolds is very important to me. If  
12 I read it the way Justice Gorsuch does, assume  
13 his hypothetical, that you, in fact, said it  
14 was an on and off button that the -- that the  
15 Attorney General could turn on and off. If  
16 that's the position you took then, what does  
17 that do to you now?

18 MR. WALL: Oh, that's -- to be clear,  
19 Justice Sotomayor, that's exactly the same  
20 position I'm taking here today. 913(d) is --

21 JUSTICE SOTOMAYOR: No, you're adding  
22 in a caveat. You're saying he can turn it on  
23 and off based only on maximum lack of  
24 feasibility.

25 MR. WALL: No. I'm addressing a

1 question that wasn't squarely before the Court  
2 in Reynolds. It is an on/off switch to the  
3 Attorney General: Specify the applicability of  
4 the requirements -- it's pretty narrow language  
5 -- and do it in such a way as to get them in.

6 I read it as the statute --

7 JUSTICE SOTOMAYOR: Now you're reading  
8 to get them in. That's --

9 MR. WALL: Well --

10 JUSTICE SOTOMAYOR: I understand  
11 Justice Gorsuch's point that you said he could  
12 turn it on and off as he decided.

13 MR. WALL: Yes. That's the Attorney  
14 General's authority as a statutory matter.  
15 That's what the statute means. I believe the  
16 statute means the same thing we said in  
17 Reynolds, though the Court disagrees in the  
18 default rule.

19 The separate question is, is there  
20 guidance provided to the Attorney General in  
21 the statute on how he should exercise that  
22 on/off switch authority? And that question,  
23 not before the Court in Reynolds and not  
24 briefed in Reynolds, the answer to that is  
25 pretty obviously yes.

1           I mean, this falls well inside a  
2 number of the delegations that the Court has  
3 looked at because, here, it's not as if there  
4 is some standard in the statute like public  
5 interest or fair and reasonable rates, where  
6 the executive is really doing the fleshing in.

7           Here, Congress set forth all the  
8 rules. It made judgments about all the  
9 requirements.

10           JUSTICE GORSUCH: What do you say --

11           MR. WALL: And all it said to the  
12 Attorney --

13           JUSTICE GORSUCH: -- about the ACLU's  
14 argument on that score that, under your view,  
15 that Congress could have simply enacted a  
16 statute with respect to post-enactment  
17 offenders that mirrored the language of (d) and  
18 said, well, it's up to the Attorney General to  
19 come up with a comprehensive and feasible  
20 registration regime in the public interest?  
21 You'd be here defending that, wouldn't you?

22           MR. WALL: Justice Gorsuch, it would  
23 be a much broader delegation. Under this  
24 Court's cases, you'd need more of a general  
25 policy. It's not at all clear why Congress

1 wouldn't apply it going forward.

2 JUSTICE GORSUCH: Why? Why? What's  
3 the difference? A half a million people are  
4 affected by this delegation.

5 MR. WALL: Yes, if Congress found  
6 there are real practical problems with applying  
7 it even going forward, here is our general  
8 policy to the Attorney General, I don't know  
9 that it would be importantly different from  
10 saying to the Attorney General in Touby which  
11 drugs will be controlled substances under the  
12 Act, or -- or in Union Bridge, which obstruct  
13 -- which bridges will we think obstruct the  
14 rivers, or in Grimaud, who will be allowed to  
15 graze on federal land?

16 JUSTICE GORSUCH: Could you answer my  
17 question? Would you be here defending a  
18 statute that mimicked (d) with respect to  
19 post-enactment offenders, and in -- in -- in  
20 which case why does Congress bother to  
21 legislate SORNA at all?

22 MR. WALL: It's very difficult to know  
23 in that situation, Justice Gorsuch, what the  
24 equivalent practical problems would be for why  
25 Congress didn't apply it.

1 JUSTICE GORSUCH: So you might defend  
2 that statute too?

3 MR. WALL: No, I -- I -- I -- what I'm  
4 saying is I -- I don't know. I don't see any  
5 practical problems that would have required  
6 Congress to legislate in that way, so it's very  
7 difficult to imagine that that statute would  
8 pass muster.

9 But if there were similar practical  
10 problems and if they supplied a general policy,  
11 it wouldn't be importantly different from  
12 Loving or Grimaud or Fahey or Kollock or Union  
13 Bridge.

14 JUSTICE GINSBURG: Mr. Wall, can you  
15 tell me how -- how this retroactivity works?  
16 So let's take somebody who was convicted of a  
17 sex offense 30 years ago. He's had a clean  
18 record ever since.

19 How do you -- first, tell me how such  
20 a person gets notice of the registration  
21 requirement.

22 MR. WALL: So he's -- he's only  
23 required to register if he's a Tier III  
24 offender, so if he's got a really grave sex  
25 offense like Petitioner --



1 JUSTICE GINSBURG: Yes, but let's say  
2 --

3 MR. WALL: But --

4 JUSTICE GINSBURG: -- he is such an  
5 offender, but it was 30 years ago.

6 MR. WALL: Yes. So I think he's on  
7 notice from the enactment of SORNA and then the  
8 Attorney General's interim rule in 2007,  
9 carried forward in the final rule in 2010, that  
10 there's an across-the-board registration  
11 requirement.

12 JUSTICE GINSBURG: So he's a -- he has  
13 to know what the Attorney General's regulation  
14 is? There's no notice given to these people.  
15 They can be charged with -- with failure to  
16 register, even though nobody -- no one ever  
17 gave them a notice that they had to register?

18 MR. WALL: I suppose you could try to  
19 bring an as-applied due process challenge. Of  
20 course, Petitioner's not going to be able to do  
21 that. Petitioner was informed in 2012 before  
22 he left the BOP's custody, both in writing and  
23 orally, that he needed to register when he  
24 moved to New York, and then he failed to do it.  
25 So I -- I take the point that there could be

1 as-applied notice problems, but I don't think  
2 that there's one here.

3 And to get back to -- to the -- to the  
4 colloquy I was having with Justice Gorsuch, I  
5 do think at the end of the day this is not a  
6 provision that just lays out a general standard  
7 and then requires all of the fleshing in.  
8 That, the Court has held, is permissible,  
9 provided you supply a general policy.

10 But it really is inside even that,  
11 because Congress set up a pretty reticulated  
12 scheme, made a lot of judgments along the way.

13 JUSTICE KAGAN: Do you think that if  
14 there were a new attorney general who came in  
15 and said, you know, I think that this  
16 registration stuff has just gone overboard, and  
17 I'm going to start making some exceptions with  
18 respect to pre-Act offenders, because I think  
19 it's just unfair to penalize them for the rest  
20 of their lives, could the attorney general do  
21 that?

22 MR. WALL: No, we don't think the  
23 attorney general could make judgments on the  
24 basis, other than feasibility, and disagree  
25 with Congress's policy judgments.

1           And if the Court had any doubt about  
2           that, it should construe the statute more  
3           narrowly, in the way I think is the most  
4           reasonable interpretation, so as to avoid the  
5           constitutional problem.

6           JUSTICE KAGAN: And when you say the  
7           Attorney General could -- tell me what you  
8           think the Attorney General cannot do, given the  
9           language of this statute and given the language  
10          of Reynolds.

11          MR. WALL: So I don't think the  
12          Attorney General could say: Look, I know  
13          Congress set up three tiers with registration  
14          links of 15, 25 years, and life, but I'm going  
15          to require you to register, but only for a few  
16          years.

17          It's perfectly feasible. I could  
18          require you all to register and there would be  
19          no problem on the state registries, but I just  
20          disagree with Congress's judgment that you  
21          ought to be -- you ought to register.

22          JUSTICE BREYER: Is -- is --

23          MR. WALL: I don't think the Attorney  
24          General could do that.

25          JUSTICE BREYER: I'm -- I'm trying to

1 think of -- I think Ms. Baumgartel was trying  
2 to make a point that in my mind is something  
3 like this: That the executive branch has many  
4 different functions. They do all kinds of  
5 different things.

6 One of the things they do is prosecute  
7 people. Now it's quite different from the SEC  
8 and all these other agencies because they have  
9 other things to do.

10 And, moreover, there's a safeguard  
11 going through the Department of Justice. And  
12 there is a particular danger when you combine  
13 prosecuting a person with the writing of the  
14 law under which you prosecute.

15 And the danger is captured in the bill  
16 of attainder clause, it's captured maybe in ex  
17 post facto clause, it's captured in the word  
18 liberty, and it is that particular danger that  
19 means where you have a person whose job is  
20 prosecuting, be careful, especially careful  
21 that that person cannot also write the law  
22 under which he prosecutes, because there we  
23 risk vendetta.

24 Now I think my interpretation of what  
25 she's saying is something like that. So what

1 is your response?

2 MR. WALL: So I do think that plays  
3 itself out in certain rules, like not deferring  
4 to the executive in the interpretation of  
5 criminal statutes, but the Court's considered  
6 that argument twice in the non-delegation  
7 context and rejected it both times.

8 JUSTICE BREYER: What -- which --

9 MR. WALL: In *Touby*, they made exactly  
10 the same argument. They said, look, you can't  
11 delegate to the executive branch which  
12 substances will be controlled under the Act  
13 because they're both defining what's illegal to  
14 possess and they're prosecuting you.

15 And in *Touby*, you said, no, not for  
16 non-delegation purposes. That controls from  
17 one branch to the other. Not where the power  
18 is allocated within the executive branch.

19 And even more to the point, in *Loving*,  
20 there was the availability of the death  
21 penalty. The president was just specifying  
22 aggravating factors nowhere to be found in the  
23 statute, and this Court, where you were  
24 actually -- the executive was actually defining  
25 the criminal penalty, which is not what the

1 executive has done here. This Court said we've  
2 upheld delegations whereby -- this is at page  
3 768 of Loving -- we've upheld delegations where  
4 the executive defines by regulation what  
5 conduct will be criminal, so long as Congress  
6 has created the criminal offense --

7 JUSTICE BREYER: That -- those are the  
8 standards, quite right.

9 MR. WALL: -- fixed the punishment --

10 JUSTICE BREYER: But suppose you put  
11 --

12 MR. WALL: -- and given the executive  
13 the authority.

14 JUSTICE BREYER: No, I -- I see where  
15 you're going there. But -- but what we've been  
16 arguing here is basically the Non-Delegation  
17 Doctrine, informed perhaps by the need to  
18 prevent vendettas in liberty. Suppose you  
19 reverse that. Suppose you said the problem  
20 here is a due process argument. It is a  
21 liberty-protecting argument. And in  
22 interpreting that liberty-protecting argument,  
23 we should inform our thought with  
24 non-delegation principles.

25 MR. WALL: I -- Justice Breyer, I just

1 think the non-delegation context is a very odd  
2 one in which to try to cache that out, as  
3 opposed to -- to vagueness or -- or due  
4 process, because it's asking whether Congress  
5 has made the basic policy judgments that can  
6 inform the executive's exercise of power.

7           And, boy, if -- if the executive can  
8 define the availability of the death penalty in  
9 Loving and Mistretta, here, it seems well  
10 withinside that to say, look, this is a civil  
11 requirement; yes, there are criminal penalties  
12 that could potentially attach. But that's a  
13 commonplace feature in the law. The IRS tells  
14 you what kind of tax return you've got to file.  
15 Now not filing that tax return is a criminal  
16 violation, but nobody thinks that the IRS is  
17 defining the scope of the criminal law, though  
18 in some sense it is by telling you what the  
19 civil requirement is.

20           CHIEF JUSTICE ROBERTS: Well, this  
21 is -- this is different in the sense that the  
22 Attorney General is deciding what law applies,  
23 not whether a particular act or a particular  
24 exercise in commercial activity is covered by  
25 an Act that certainly applies in a general

1 sense.

2 I mean, it's not this -- in those  
3 instances, even in -- in -- in Touby, it's --  
4 it's exercising fairly refined authority with  
5 respect to what activity is covered.

6 Here, it's just saying are you going  
7 to be -- it's not just covered by a law; does  
8 the law even apply to you?

9 MR. WALL: Well --

10 CHIEF JUSTICE ROBERTS: And it seems  
11 to me that those -- that -- that's a  
12 substantive difference.

13 MR. WALL: I don't -- I don't know,  
14 Mr. Chief Justice. I don't know why we would  
15 think that specifying whether the drug you're  
16 holding is lawful or unlawful, whether your  
17 bridge has to be taken down, whether you can  
18 graze on public land, whether your rates are  
19 unreasonable is different in kind from whether  
20 you have to register going forward and report  
21 to the federal government.

22 Either way, the executive branch tells  
23 you whether your conduct brings you within the  
24 scope of the law or it doesn't.

25 CHIEF JUSTICE ROBERTS: Well, but it's



1 -- the bridges, yes. I mean, the executive  
2 branch has to specify what type of bridge needs  
3 to be what height or whatever and if it's this  
4 or that. But there's another -- it's a  
5 different thing when the Attorney General says,  
6 okay, here's a law that covers bridges; you get  
7 to decide whether it governs at all in  
8 particular areas.

9 MR. WALL: I -- I understand if SORNA  
10 didn't have the kind of guidance that it had  
11 here, if it hadn't defined the criminal  
12 offense, if it hadn't fixed the punishment, if  
13 it hadn't set a reticulated scheme on the civil  
14 side. I understand that if it hadn't made all  
15 of those judgments, there could be more serious  
16 problems.

17 But to do all of that and then say  
18 but, look, we know that there's going to be  
19 some practical problems, it's not just the  
20 timing, the state -- SORNA requires a lot of  
21 things: Provide your motor vehicle  
22 information, provide your DNA, provide your  
23 photos, do periodic show-ups.

24 And there's no dispute, I think, that  
25 the state registries at the time SORNA was

1 passed were not equipped to do all of that.

2 And so Congress, looking at that, said: Look,

3 we've got hundreds of thousands of people out

4 there we want to bring into this system. We

5 know they can't all come in on day one.

6 There's going to be some transitional issues

7 that we're going to have to work out. And the

8 person to work those out is the person who for

9 the last 12 years has been dealing with exactly

10 that subject and interacting with the states.

11 And at the end of the day, that's

12 really much more about implementation than it

13 is about policy judgment. I mean, here, it

14 really is inside of the Grimaud, the Fahey, the

15 outer bound, because you've got an intelligible

16 principle that's anchored in the text of the

17 statute, not always true in some of those

18 cases, like Grimaud and Fahey, and you really

19 have what's much closer to a classic executive

20 function because it's just specifying the

21 applicability of the requirements themselves.

22 It's not even like the Attorney

23 General is providing the substance of those

24 requirements. And even that, of course, the

25 Court has said okay, but I just -- I think

1 we're --

2 JUSTICE GORSUCH: Well, Mr. Wall, I --  
3 I want to develop a little bit what Justice  
4 Breyer was after. Is there something unusual  
5 about the Attorney General's presence in this  
6 case as the chief prosecutor and kind of a  
7 conflict of interest? And what if -- what if,  
8 instead of feasibility, you were arguing just  
9 and reasonable or in the public interest, other  
10 standards that might have applied in a -- in a  
11 civil delegation context?

12 Would you think that the Attorney  
13 General of the United States could decide the  
14 applicability of a criminal law for a half a  
15 million people on the basis of his or her  
16 judgment about its public interest or whether  
17 it's just and reasonable? Or -- or would -- or  
18 do you accept the -- the suggestion of this  
19 Court in Touby that delegations in the criminal  
20 context involving the Attorney General may  
21 merit a heightened standard of review?

22 MR. WALL: Justice Gorsuch, I -- I --  
23 I don't think the Court needs to cross that  
24 bridge here.

25 JUSTICE GORSUCH: I understand that.

1 I'm asking you to answer that question, though.

2 MR. WALL: I -- and I want to -- I  
3 want to try to. I think the Court has had  
4 several cases where criminal penalties were  
5 indirectly or directly involved, from Grimaud  
6 to Yakus, to Loving, Mistretta. It's never  
7 suggested, even when faced with this exact  
8 argument in Touby, that the bar ought to be  
9 raised higher.

10 But I'll grant that in Touby, the  
11 Court said it didn't need to address that,  
12 though it had never done that in any of its  
13 previous cases, and just say, look, if this  
14 statute did that, if it did nothing more than  
15 say to the Attorney General register them, you  
16 know, as reasonable, with no requirements, no  
17 creation of the criminal offense, no fixing of  
18 the penalty --

19 JUSTICE GORSUCH: No. Just and  
20 reasonable or in the public interest. Would  
21 those be okay or not okay?

22 MR. WALL: I think, as -- as long as  
23 it's done the things it did here, it's created  
24 the crime, it's defined the elements --

25 JUSTICE GORSUCH: Those would be okay?

1           MR. WALL: -- it's fixed the penalty.  
2           And then, on the civil side, it has said, and  
3           you provided some standard like that in the  
4           statute, the Court's cases indicate that's  
5           enough. But I -- I do want to say, even if you  
6           think that's not enough, this statute does come  
7           inside of that because this is not an agency  
8           just supplying all of the real content or  
9           substance to a broad standard like public  
10          interest or just and reasonable.

11          JUSTICE SOTOMAYOR: Is it a right --

12          MR. WALL: Reading the statute,  
13          Congress made a lot of those judgments for  
14          itself and left to the Attorney General a much  
15          narrower practical problem.

16          JUSTICE SOTOMAYOR: There's a lot of  
17          discussion in our case law about the propriety  
18          of the Court reading into statute words, and I  
19          think a fundamental issue that Justice Gorsuch  
20          has been aiming at is, especially in criminal  
21          law, is it just to delegate to the Attorney  
22          General a fundamental decision about who gets  
23          covered or doesn't get covered by a statute?  
24          That seems like -- it seems like at the core of  
25          what a law is, if someone does X act, you're

1 covered or you're not.

2 And if Congress had said that, we  
3 probably wouldn't have found a retroactivity  
4 problem. But what is the essence of  
5 non-delegation that we don't let the  
6 legislature define who's a criminal? And so  
7 isn't retroactivity a definition of who's a  
8 criminal or not?

9 MR. WALL: So two separate points,  
10 Justice Sotomayor.

11 JUSTICE SOTOMAYOR: Or who might be a  
12 criminal because of their acts?

13 MR. WALL: Two separate points.  
14 First, if Congress had given the same authority  
15 to the Attorney General and not otherwise  
16 expressed any intention with respect to how  
17 that authority would be exercised, I'll grant  
18 that would be --

19 JUSTICE SOTOMAYOR: There's no plain  
20 words that add maximum feasibility --

21 MR. WALL: So --

22 JUSTICE SOTOMAYOR: -- in this  
23 statute. So you're -- you're discerning words.

24 MR. WALL: I -- I am, Justice  
25 Sotomayor. And that's my second point. I'm

1 doing exactly what the Court did in Grimaud,  
2 Fahey, Kollock, Loving. In none of those was  
3 the intelligible principle spelled out in the  
4 statute in so many words. And the Court  
5 engaged in an interpretive act. It looked at  
6 the Act as a whole, and said based on the  
7 provisions we have, would a reasonable attorney  
8 general understand or a reasonable executive  
9 official understand what policy they were meant  
10 to pursue in exercising this authority?

11 And I -- to be honest with you, I  
12 think it defies both the text of SORNA and  
13 reality to think that Congress was agnostic  
14 about whether hundreds of thousands of people  
15 who have committed very serious sex offenses,  
16 as Petitioner has, should be required to  
17 register. I think there's no way to read  
18 SORNA's text, its legislative history, and not  
19 come away with the firm and definite notion  
20 that Congress wanted as many of those offenders  
21 in the system as the Attorney General could get  
22 in --

23 JUSTICE SOTOMAYOR: If you take out --

24 MR. WALL: -- and it was just a  
25 practical problem of how to accomplish that.

1           JUSTICE SOTOMAYOR: -- if you take out  
2 legislative history and you take out policy  
3 statements, because there are some of my  
4 colleagues who don't rely on either of those  
5 two things, what's left?

6           MR. WALL: I would say the findings in  
7 20901, the statement of express statutory  
8 purpose, which this Court has relied on in  
9 cases like NBC and New York Central for a  
10 comprehensive national system, the inclusive  
11 definition of "sex offender," the broad  
12 registration requirement in 2913(a), and then  
13 the text and title of 913(d), which say that  
14 this grant of authority was about addressing  
15 the inability to comply. We know on its face  
16 that what spurred this was a practical  
17 consideration, a concern by Congress about how  
18 to get these people into the system.

19           All of those things taken together, I  
20 think, far -- the -- the intelligent principle  
21 here far more anchored in the text of this  
22 statute. Then take a case like Fahey, where  
23 Justice Jackson for the Court looked at the  
24 norms of the banking industry. Or Grimaud,  
25 where the Court discerned it from a number of



1 other statutory provisions that I don't think  
2 were as definite as what it faces here.  
3 Loving, the same thing. Kollock, the same  
4 thing.

5 I think here you've got an  
6 intelligible principle, a general policy that  
7 really is anchored in the text of the Act, even  
8 apart from legislative history and policy  
9 statements and all the rest, which we -- we  
10 have not -- we have not relied on in -- in our  
11 brief.

12 JUSTICE BREYER: The part that's still  
13 gnawing at me, I mean, your basic argument is  
14 there is a standard here, that's the end of the  
15 case. All right. But, in writing it, I guess  
16 I have to think through the Non-Delegation  
17 Doctrine.

18 So I'm just interested if this strikes  
19 any thought in your mind. Let's take the  
20 Securities Act of '34. What it says is you  
21 can't use a manipulative device, that's a  
22 fraudulent device, that's the equivalent here  
23 of the sex offense. It says you cannot use  
24 them in contravention of such rules as the SEC  
25 may prescribe as appropriate in the public

1 interest.

2           Suppose instead of that word "SEC,"  
3 everything's the same, but it doesn't say SEC,  
4 it says Attorney General, so what you have is  
5 it is a crime to violate a rule, where it  
6 concerns a manipulative device, in violation of  
7 such rules as the Attorney General finds  
8 appropriate, the difference being we don't  
9 think he's an expert on securities, though the  
10 SEC is.

11           MR. WALL: Right.

12           JUSTICE BREYER: Does that matter?  
13 Should it matter? Should we suggest in the  
14 opinion that it might matter?

15           MR. WALL: So, to the extent it  
16 matters, here's what I think you could say in  
17 the opinion.

18           If the executive official, the  
19 Attorney General, were defining the elements of  
20 the offense or defining the criminal  
21 punishment, that would raise the Touby  
22 question. But where the Attorney General or  
23 the executive official is defining a civil  
24 requirement, as with the '34 Act, to which  
25 criminal consequences can possibly attach, that

1 falls squarely inside a handful of cases where  
2 the Court has proved exactly that.

3           So I think the Court can set aside the  
4 tougher case than this one where Congress  
5 hasn't defined the elements of the offense and  
6 fixed the punishment itself but left those  
7 things to the executive branch.

8           I do want to say just a word about the  
9 harms here before I sit down so that we -- we  
10 all understand what's in play. Eighteen  
11 jurisdictions have substantially implemented  
12 SORNA. Of the remaining 32 states, 26 of them  
13 have taken federal funds and are attempting to  
14 substantially implement, but they're not there  
15 yet.

16           If Petitioner prevails, I believe,  
17 though Petitioner's briefs don't say, that all  
18 of their arguments translate not just from the  
19 pre-Act offender clause but also to the  
20 pre-implementation clause. And if that's  
21 right, there will be no federal duty to  
22 register in the 32 states that haven't  
23 substantially implemented.

24           As a matter of federal law, more than  
25 half the country will be a sex offender

1 registration-free zone. Even in the remaining  
2 18 states, they will not be picking up new  
3 pre-Act offenders who come into contact with  
4 the justice system because there will no longer  
5 be a duty to register.

6 All told, our best estimate is that  
7 we'll lose a couple of thousand people out of  
8 the registries every month, and that's not even  
9 including tribal areas, where we wouldn't be  
10 able to get at non-tribal members.

11 And, of course, some substantial  
12 portion of the 4,000 convictions at issue would  
13 be in -- in -- in jeopardy of being vacated  
14 either on direct or collateral review.

15 SORNA's efficacy, if Petitioner  
16 prevails, will not just be sharply curtailed.  
17 It will arguably be thoroughly gutted as -- as  
18 a matter of how this federal law works.

19 And if it is possible, and we think it  
20 is not just possible but the most natural  
21 interpretation of the Attorney General's  
22 authority to say this is a narrow authority, to  
23 specify the applicability of requirements in an  
24 on/off way in order to get people into the  
25 system, and that interpretation avoids

1 constitutional problems, right, it's  
2 constitutional, if we read it to say do it to  
3 the extent you can, then, as Petitioner  
4 concedes, I think if that's -- if it's possible  
5 to read the statute that way, that's  
6 constitutional and that's what we would urge  
7 the Court to do.

8 If there are no further questions.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
10 Wall.

11 Ms. Baumgartel, you have four minutes  
12 remaining.

13 REBUTTAL ARGUMENT OF SARAH BAUMGARTEL  
14 ON BEHALF OF THE PETITIONER

15 MS. BAUMGARTEL: Thank you.

16 Just to pick up where my friend left  
17 off, I want to emphasize that prior to SORNA's  
18 enactment, every single state had an existing  
19 sex offender registry and those will continue  
20 to exist and to require the registration of  
21 offenders, regardless of what happens with  
22 SORNA.

23 Individuals like Petitioner were  
24 required to register under existing state law,  
25 and they will still be required to register.

1 This was a law whose retroactive application  
2 was opposed by the states, which is part of the  
3 reason why only 18 states have implemented it.  
4 States spoke out against the retroactive  
5 application of the law before the Attorney  
6 General made his determination.

7 And so states themselves, who are the  
8 experts in this area having run registration  
9 systems for years, don't want this Act to be  
10 fully retroactive.

11 My friend emphasized that this  
12 delegation was all about practicality, but the  
13 reality is, is that the Attorney General's  
14 promulgated rule does not account for  
15 practicality in any way, which is further  
16 evidence for this Court that to the extent  
17 feasible was not the standard of this  
18 delegation.

19 That is not the standard that exists  
20 in the text. It is not the intelligible  
21 principle that was found by any circuit court  
22 to consider this issue. And it was not even  
23 the intelligible principle that the Attorney  
24 General himself said that he was acting  
25 pursuant to when he issued his regulation.

1           In his final regulation, he said that  
2 Congress delegated to him, and I quote, "the  
3 discretion to apply SORNA's requirements to sex  
4 offenders to the extent that he determines that  
5 the public benefits of doing so outweigh any  
6 adverse costs."

7           So the Attorney General believed that  
8 his discretion was to essentially undertake the  
9 fundamental policy determination as to whether  
10 the costs outweigh the benefits. He did not  
11 view this as an issue of feasibility or  
12 practicality.

13           Finally, I'd just like to emphasize  
14 the special nature of this delegation. This is  
15 not licensing. This is not civil rule-making.  
16 This is the retroactive application of criminal  
17 law penalties that affect individual liberty  
18 interests in the most profound way.

19           This is the area where the  
20 Constitution specifies that there must be a  
21 division between the law-maker and between the  
22 executive. And for that reason, this  
23 delegation is unconstitutional.

24           Thank you.

25           CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 10:59 a.m., the case  
3 was submitted.)

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