No. 17-6086

In the

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether SORNA's delegation of Authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issues in this case that the legislative powers delegated to the national government are vested in a Congress elected by the people, not in an unelected bureaucracy. Center scholarship on this issue includes John C. Eastman, *The President's Pen and the Bureaucrat's Fiefdom*, 40 Harv. J.L. & Pub. Pol'y 639 (2017); John C. Eastman, *Did Congress Really Give the Secretary of Homeland Security Unfettered Discretion Back in 1986 to Confer Legal Immigrant Status on Whomever He Wishes?*, 15 Engage 27 (2014); John A. Marini, *The Politics of Budget Control: Congress, the Presidency, and the Growth of the Administrative State* (1992); Charles R. Kesler, *Separation of Powers and the Administrative State, in The Imperial Congress: Crisis in the Separation of Powers* (Gordon S. Jones & John A. Marini eds. 1989)*; see also R.J. Pestritto, The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, Soc. Phil. & Pol'y, Jan. 2007, at 16. The Center has previously participated in a number of cases before this Court addressing related issues, including *Markle Interests, LLC v.*

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[1] Pursuant to Rule 37.3 have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici made a monetary contribution to fund the preparation and submission of this brief.

U.S. Fish & Wildlife Service, Nos. 17-74 and 17-71; *U.S. Dep't of Trans. v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); and *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014).

SUMMARY OF ARGUMENT

In *Reynolds v. United States*, 565 U.S. 432 (2012), this Court considered the applicability of the federal Sex Offender Register and Notification Act (SORNA) to individuals convicted of a covered offense whose conviction occurred before the effective date of the federal law. The statute at issue, 42 U.S.C. §16913(d) (since renumbered 34 U.S.C. §20913(d)) provides that "'*The Attorney General shall have the authority to specify the applicability* of the [registration] requirements ... to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction… .'" *Reynolds*, 565 U.S. at 436 (emphasis in original). This Court ruled that the statutory language did not mean that the Attorney General had authority to create exemptions from registration for those convicted prior to the effective date of the act. Instead, it meant that those individuals convicted before the effective date of SORNA were not required to register "until the Attorney General so specifies" under subparagraph (d). Justice Scalia, joined by Justice Ginsburg, dissented, noting

> Indeed, it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That

> seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable.

Id. at 450 (Scalia, J., dissenting). The question raised by Justices Scalia and Ginsburg is presented in this case.

This Court has long-noted that Congress may not delegate its power to make law granted by Article I, section 1 of the Constitution. *Wayman v. Southard*, 23 U.S. 1, 42 (1825); *Panama Refining v. Ryan*, 293 U.S. 388, 421 (1935). This "nondelegation" doctrine is rooted in both the plain text of the Constitution and the separation of powers design of the Constitution. *Loving v. United States*, 517 U.S. 748, 757 (1996); *Yakus v. United States*, 321 U.S. 414, 425 (1944).

Separation of powers is the key to the Constitution's protection of individual liberty. To protect the liberty of the people, the Framers of the Constitution divided power among the three branches of the federal government. Embedded in this structure is the idea that the government may not transfer power amongst themselves whenever they desire. "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions with which it is vested." *Panama Refining,* 293 U.S. at 421.

To police the line between a lawful conferral of authority and an unconstitutional delegation of legislative power, this Court has required Congress to set forth an "intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton. Jr., & Co. v. United States*, 276 U.S. 394,

409 (1928). As Justice Thomas has pointed out, however, "the Constitution does not speak of 'intelligible principles.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

Amicus urges this Court to reconsider the "intelligible principle" doctrine and to replace it with a requirement for judicially manageable standards to ensure executive agencies and officials are acting within the scope of the authority delegated by Congress. This Court has already ruled that the judiciary cannot defer to an administrative agency construction of a vague statute in order to locate an "intelligible principle." *Id.* at 472. But a vague or general statement of principle, combined with *Chevron* deference, effectively grants legislative power to the executive. It authorizes the agency to decide what the law shall be rather than simply conferring authority to decide how the law will be executed. *See Field v. Clark*, 143 U.S. 649, 693-94 (1892).

ARGUMENT

I. Separation of Powers Is the Key Structural Protection of Individual Liberty in the Federal Constitution

The Framers and Ratifiers of the Constitution believed that separation of powers was necessary to protect individual liberty, and they enshrined that principle in the structure of government. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. See e.g. Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz

Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997). This Court has repeatedly recognized this important purpose behind the structural separation of powers. *E.g.*, *N.L.R.B. v. Noel Canning*, 134 S.Ct. 2550, 2559 (2014); *Boumediene v. Bush*, 553 U.S. 723, 742-43 (2008); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *Loving*, 517 U.S. at 757-58; *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

The warnings of Montesquieu and others against consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003); James Madison, Federalist 47, supra at 298-99; Alexander Hamilton, Federalist 9, supra at 67; see also Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches; vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in this Supreme Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

That design of separation is furthered, in the case of Congress, with restrictions on how the power can be exercised. The Framers and Ratifiers recognized that the legislative branch of government was vested with the most significant power. *Id*. at 949. To further protect individual liberty, the Constitu-

tion specifies the mode for the exercise of the legislative power vested in Congress. Legislation must be approved by both the House and the Senate (bicameralism) and presented to the President for approval (presentment). *Id.* at 952. Were Congress permitted to delegate its power to legislate, this careful scheme of bicameralism and presentment would be thwarted.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Id.* at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The same is true if one branch of government attempts to delegate its powers to another branch.

The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. The Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, supra at 319; see also John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn*, 103 U.S., at 199. This is a case that calls for intervention of the Court to enforce the separation of powers structure that lies at the core of our Constitution.

At one time, this Court was especially sensitive to the problem of delegations of legislative authority. *Panama Refining*, 293 U.S. at 421; *A.L.A Schechter Poultry Corp.*, 295 U.S. 495, 529-30 (1935). Recognizing that the details of execution must be left to the executive, however, this Court determined that delegations of authority to executive agencies were permissible so long as controlled by an "intelligible principle." *J.W. Hampton*, 276 U.S. at 409. In practice, however, this doctrine has proved neither intelligible nor principled, especially when broad delegations supported by only the vaguest of "intelligible principles" are coupled with *Chevron* deference that let the agency decide what the statute means.

II. The 'Intelligible Principle" Doctrine Has Failed To Limit Delegations of Legislative Power

In *J.W. Hampton*, this Court ruled that delegation does not violate the separation of powers when "Congress lays down [...] an intelligible principle that guides the exercise of authority or discretion." *J.W. Hampton,* 276 U.S. at 406. Under this standard, Congress may delegate its legislative power to an executive agency if, and only if, there is an intelligible principle that guides the exercise of authority or discretion. *J.W. Hampton*, 276 U.S. 394 at 406. This standard, at least at its inception, appeared to have some teeth.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), this Court noted that the intelligible principle doctrine "cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." In *Panama*, the Court struck down a provision of the National

Industrial Recovery Act that authorized the President to prohibit interstate and foreign transportation of petroleum produced that exceeded state production quotas. *Panama Refining*, 293 U.S. at 405-06. Like the law at issue here, the Act did not say how the President was to make the decision authorized by the Act. Rather, it gave "to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment." *Id.*

Similarly, in *A.L.A. Schechter*, the Court struck down the law authorizing the President to approve "codes of fair competition" for trades and industries. The statute granted the President authority to "impose his own conditions, adding to or taking away from what is proposed as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act." *A.L.A. Schechter Poultry*, 295 U.S. at 538-39. This Court ruled that the authority conferred on the President was an unconstitutional delegation of legislative power because it delegated to the President "virtually unfettered" authority. *Id.* at 541-42.

The schemes struck down in *Panama* and *A.L.A. Schechter Poultry* are little different from the power delegations upheld by the modern Court. Sweeping delegations of power tethered to so-called intelligible principles as vague as "the public interest," "fair and equitable," or "unduly and unnecessarily complicated." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475-76. This Court admitted in *Whitman* that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or apply-

ing the law." *Id.* This abandons the Court's role, however, to enforce the structural separation of powers. *See Dept. of Trans. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment).

Justice Thomas notes this "approach runs the risk of compromising our constitutional structure." *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment). That constitutional structure is one upon which we rely as a structural protection of individual liberty. *Dept. of Trans.*, 135 S.Ct. at 1237 (Alito, J., concurring).

But this deference to Congress is compounded by a further deference to the executive agency that is the beneficiary of the delegation. Exceedingly broad delegations of power (such as regulation in the "public interest") have been upheld by the Court as a means of deferring to Congress' decision on the degree of policy judgment to be left to the agency. The Court then defers to the executive agency to decide what the "public interest" happens to be in any particular situation. *See F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) ("Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference"); *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-94 (1978). There is no pretense that the agency is implementing a law enacted by Congress. *See Dept. of Trans.*, 135 S.Ct. at 1250 (Thomas, J., concurring in the judgment). Instead the executive is exercising legislative power delegated by Congress. Law is made by the executive, not Congress. *Id.* at

1251. The restrictions of bicameralism and present are avoided, and the constitutional scheme is simply discarded. *See id.* at 1241.

The "intelligible principle" doctrine has failed if it was meant as a check against an unconstitutional delegation of legislative power to the executive. This failure is compounded by a further deference to the executive on the meaning and scope of the legislative delegation. This Court should instead require Congress to enact judicially manageable guidelines to govern the scope of any delegations of authority. Only then can this Court once again take up its responsibility to enforce the prohibition on delegation of legislative power to executive agencies. *See id.* at 1246.

CONCLUSION

This Court should return to the original understanding of the Constitution's structural separation of powers and enforce the prohibition on the delegation of legislative powers. It can start on this task by requiring Congress to supply judicially manageable guidelines on the exercise of delegated authority.

DATED: June, 2018.

Respectfully submitted,

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