No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF WILLIAM D. ARAIZA AND 14 OTHER CONSTITUTIONAL, CRIMINAL, AND ADMINISTRATIVE LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

Andrew D. Silverman
Counsel of Record
Benjamin Chagnon
Alison M. Kilmartin
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
asilverman@orrick.com
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici are professors of constitutional, criminal, and administrative law. Many of these amici have written on the issues this case implicates and have devoted significant attention to studying the nondelegation doctrine. They therefore have professional interests in the correct application of nondelegation principles in a criminal case. Amici are troubled by the Sex Offender Registration and Notification Act's exceptionally broad delegation of crime-declaring power to the nation's chief prosecutor. To explain their views on the proper outcome of this case, they respectfully submit this brief as amici curiae. A list of amici appears in Appendix A, reproduced at 1a-4a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sex Offender Registration and Notification Act (hereinafter "SORNA"), Pub. L. No. 109-248, 120 Stat. 590 (2006), 34 U.S.C. § 20901 *et seq*. (formerly codified at 42 U.S.C. § 16901 *et seq*.), imposes a detailed set of requirements governing the registration and reporting obligations of sex offenders convicted after SORNA's enactment date. It also authorizes the imposition of registration and reporting obligations on offenders convicted *before* that date (persons this

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

brief refers to as "pre-Act offenders"). However, it provides no guidance for determining under what circumstances or even whether any of the obligations imposed on post-Act offenders should also be imposed on pre-Act offenders. Instead, it simply states as follows: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders." § 20913(d).

Simply put, this provision lacks any principle—let alone an intelligible one—that would guide the Attorney General's creation of registration and reporting requirements for sex offenders convicted before SORNA's enactment date. So understood, this provision constitutes a rare violation of the nondelegation doctrine. It violates the undemanding requirement that any congressional delegation of authority to an executive branch official must be accompanied by an "intelligible principle" to guide the executive's implementation. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). This unusually broad delegation is not required by the realities of the regulatory problem—here, the need to harmonize disparate state law registration and reporting schemes. Rather, as other parts of SORNA demonstrate, Congress knew well how to provide detailed guidance to the Attorney General when it seeks to accomplish that regulatory goal.

Should this Court conclude that this case does not constitute a rare violation of the Court's long-standing approach to nondelegation issues, it should rule,

narrowly, that the criminal and retroactive nature of the liability the Attorney General is authorized to create justifies more searching nondelegation review of this provision. Amici respectfully suggest that this provision cannot withstand any formulation of such heightened review.

ARGUMENT

This is an exceptional case concerning an exceptional statute. Section 20913(d)—what this brief will refer to as the "pre-Act offender provision"—provides that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter … and to prescribe rules for the registration of any such sex offenders." That provision thus authorizes the Attorney General—the nation's chief criminal prosecutor—to define a crime, based on past conduct, without even a hint from Congress about the criteria he must employ to do so. It "hand[s] off the job of lawmaking" to a prosecutor who is "free to 'condem[n] all that [he] personally disapprove[s] and for no better reason than [he] disapprove[s] it.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (second alteration in original) (quoting *Jordan v. De George*, 341 U.S. 223, 232, 242 (1951) (Jackson, J., dissenting)). One need not impugn the motives of the Attorney General in wielding this power to recognize its extraordinary breadth.

Even though it is exceptional—indeed, *because* it is exceptional—this case does not require the Court to

make new law in the area of the nondelegation doctrine. The statute in this case fails the long-standing requirement that any federal grant of power to an administrative agency must feature an "intelligible principle." *J.W. Hampton*, 276 U.S. at 409. The pre-Act offender provision contains no principle, let alone an intelligible one, to guide the Attorney General's exercise of delegated power. That alone is enough to render the statute unconstitutional.

But the pre-Act offender provision's delegation is all the more troubling because it grants crime-declaring power to the nation's chief criminal prosecutor and allows him to do so retroactively. This runs afoul of the foundational requirements that, within the federal government, only Congress may declare certain conduct criminal and only Congress may declare when a law will have retroactive effect. These features of the pre-Act offender provision require, at a minimum, that this Court faithfully apply its existing nondelegation precedent. Should the Court believe, however, that this case requires deciding whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," *Touby v. United States*, 500 U.S. 160, 165-66 (1991), or regulations with retroactive effect, it should recognize that, whatever additional specificity is required in those narrow circumstances, such specificity does not exist in this case.

I. This Case Can Be Resolved Under Existing Nondelegation Jurisprudence.

For ninety years, this Court has decided nondelegation claims by asking whether the statute in question contains an "intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton*, 276 U.S. at 409; *see also*, *e.g.*, *Touby*, 500 U.S. at 165 (noting plaintiff's concession that in the statute in question "Congress has set forth … an 'intelligible principle' to constrain the Attorney General's discretion to schedule controlled substances on a temporary basis"). The intelligible principle test reflects "common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton*, 276 U.S. at 406. It "does not demand the impossible or the impracticable." *Yakus v. United States*, 321 U.S. 414, 424 (1944). All that the Constitution requires is that the "essentials of the legislative function"—"the determination of … legislative policy and its formulation and promulgation"—be left to Congress. *Id.* The proper division of labor between Congress and the Executive branch is preserved "when Congress … specifie[s] the basic conditions of fact upon whose existence or occurrence … it directs that its statutory command shall be effective," even if it is up to a given "administrative agency" to "ascertain[] from relevant data" when that fact has occurred. *Id.* at 424-25.

To be sure, the Court has found the nondelegation doctrine difficult to apply in practice. There is an admittedly hazy boundary between, on the one hand, delegations that adequately state "an intelligible

principle," *J.W. Hampton*, 276 U.S. at 409, "determin[e] … legislative policy," *Yakus*, 321 U.S. at 424, or require the agency merely to "fill up the details," *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)), and, on the other hand, unconstitutional delegations of legislative power. *See*, *e.g.*, *Grimaud*, 220 U.S. at 517 ("It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations."); *Printz v. United States*, 521 U.S. 898, 927 (1997) ("This Court has not been notably successful in describing the … line" separating constitutional grants of authority to agencies from unconstitutional delegations of legislative power).

Although this Court has determined that Congress is almost always on the right side of that boundary, here Congress overstepped the bounds of permissible delegation under any understanding of what the "intelligible principle" test requires. Section 20913(d) clearly lacks "an intelligible principle," *J.W. Hampton*, 276 U.S. at 409, fails to "determin[e] … legislative policy," *Yakus*, 321 U.S. at 424, and in no way can be understood as simply requiring the agency to "fill up the details," *Grimaud*, 220 U.S. at 517 (citation omitted). When looked at in isolation or when compared against other provisions in SORNA, it is readily apparent that the pre-Act offender provision contains no principle to guide the Attorney General. *See infra* § I.A. This lack of any guiding principle in SORNA's pre-Act offender provision distinguishes it from the laws this Court has upheld against nondelegation challenges. *See infra* § I.B. If the nondelegation

doctrine is to retain any meaning, this provision must be struck down.

A. SORNA's pre-Act offender provision lacks any standards.

SORNA's pre-Act offender provision states that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter … and to prescribe rules for the registration of any such sex offenders." § 20913(d). As construed in *Reynolds v. United States*, 565 U.S. 432 (2012), SORNA's pre-Act offender provision grants exceptional discretion to the Attorney General. The Court's reading of the pre-Act offender provision "leave[s] 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." *Id.* at 450 (Scalia, J., dissenting).

This lack of a governing standard is made all the more apparent when measured against other provisions in SORNA, which are quite detailed. Among many other things, SORNA provides detailed rules governing registration requirements. It provides criteria for placing sex offenders into particular offense level categories, § 20911, sets forth the jurisdictions in which they are required to register, § 20913(a), (c), provides the information the offender and the jurisdiction are required to place in the sex offender registry, § 20914(a)-(b), and sets forth the process by which sex offenders are notified of their obligation to register, § 20919. *See also Reynolds*, 565 U.S. at 435

(SORNA "set[s] forth comprehensive registration-system standards"). This level of detail proves that Congress understood how to provide such "comprehensive … standards" for sex offenders required to register. *Id.*

None of these requirements applies, as a matter of the statute's mandate, to sex offenders convicted before SORNA's enactment date. Nor is the Attorney General provided *any* guidance on how or even whether to impose analogous requirements on such individuals. Instead, under the pre-Act offender provision, the sitting Attorney General enjoys absolute discretion to apply all, none, or some combination of these requirements to pre-Act offenders, without any guidance or constraint from Congress. § 20913(d).[2] *See Reynolds*, 565 U.S. at 440 (Section 20913(d) "is more naturally read as conferring the authority to *apply* [SORNA's registration requirements to pre-Act offenders], not the authority to make exceptions" to requirements that otherwise automatically apply); *id.* at 444-45 (rejecting as "unrealistic" the fear that reading the statute so as to not require pre-Act offenders to register immediately would raise the specter of the Attorney General failing to apply SORNA's registration requirements to those offenders); *id.* at 449 (Scalia, J., dissenting) (dissenting from the majority's

[2] Indeed, it is arguable that the pre-Act offender provision allows the Attorney General to impose a completely separate registration regime on pre-Act offenders. *See Reynolds*, 565 U.S. at 440-41 ("[P]ractical problems arising when the Act sought to apply the new registration requirements to pre-Act offenders … might have warranted different federal registration treatment of different categories of pre-Act offenders.").

interpretation, on the ground that the effect of such a reading "is to read the statute as leaving it up to the Attorney General whether the registration requirement would *ever* apply to pre-Act offenders").

To be sure, crafting standards relating to nationwide registration of offenders convicted before SORNA's enactment date raises practical problems given the need to harmonize "a patchwork" of state law registration requirements. *See id.* at 440-41 (recognizing these problems). In light of those difficulties, it might have been understandable for Congress to think that delegating those problems to the Attorney General for resolution might be more efficient than for Congress to resolve them itself. *See id.*

But when Congress encountered this harmonization problem elsewhere in SORNA, it was able to provide the very guidance lacking here. Most notably, when Congress encountered this harmonization problem in the context of evaluating whether a jurisdiction, such as a state, has complied with SORNA, it provided the Attorney General with a detailed substantive and procedural roadmap to follow as he sought to resolve it. When making that evaluation, he is required to determine whether such compliance would violate that jurisdiction's constitution. § 20927(b)(1). In making that determination, he is in turn required to consult with that jurisdiction's chief executive and chief legal officer. § 20927(b)(2). If he determines that such compliance is indeed blocked by the jurisdiction's constitution, he may find the jurisdiction in compliance nevertheless, if that jurisdiction is implementing "reasonable alternative procedures or accommodations." § 20927(b)(3). This level of detail

proves that Congress understood not only how to provide such "comprehensive … standards" for sex offender registration but also how to guide the Attorney General's discretion in creating the set of harmonized national standards it desired. *See Reynolds*, 565 U.S. at 435 (recognizing the Act's harmonization goal).

Thus, there simply is no excuse for the lack of an analogous roadmap for the executive branch to follow when addressing pre-Act offender concerns. Given Congress's provision of ample guidance in the post-Act offender registration and state compliance contexts, it cannot be said that the pre-Act offender provision's lack of standards is a concession to "common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton*, 276 U.S. at 406. Indeed, the post-Act offender provisions provide the very criteria and standards that presumably would assist the Attorney General in making analogous determinations for pre-Act offenders. *See*, *e.g.*, §§ 20911, 20913(a)-(c), 20914(a)-(b), 20915(a) (specifying registration requirements for post-Act offenders based on their offense levels, and specifying the jurisdictions in which registration is required and the content of the registration information). To demand standards for pre-Act offenders analogous to those applied to post-Act offenders is not to "demand the impossible or the impracticable." *Yakus*, 321 U.S. at 424.

Because the pre-Act offender provision itself lacks any standard, there may be some temptation to locate a standard by reading limits into the statute. There is no basis for doing so. First, this Court's decision in *Reynolds* precludes an attempt to read any standards into § 20913(d). To be sure, many decisions upholding

a grant of authority proceed to the nondelegation analysis only after the Court had interpreted the relevant statutory provision so as to provide sufficiently determinate guidance to the agency to satisfy nondelegation review. *See*, *e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("We agree with the Solicitor General that the text of § 109(b)(1) of the [Clean Air Act] at a minimum requires that [f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air. Requisite, in turn, 'mean[s] sufficient, but not more than necessary.' These limits on the EPA's discretion are strikingly similar to the ones we approved in [*Touby*, 500 U.S. 160].") (internal citations omitted). In this way, the nondelegation doctrine has often served more as a canon of statutory interpretation rather than as a basis for striking down a statute. *See also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) ("A construction of the statute that avoids this kind of open-ended grant should certainly be favored.").

In this case, however, *Reynolds* removed the possibility of such a constraining interpretation—for example, one that made SORNA's provisions automatically applicable to pre-Act offenders unless and until the Attorney General acted, or one that made the Attorney General's specification authority applicable "only to those pre-Act sex offenders unable to comply with the statute's 'initial registration' requirements." 565 U.S. at 445 (rejecting both of these alternatives). What remains is a pure, unadorned

grant of standardless discretion to the Attorney General immune to curing by a limiting interpretation. *Cf. id.* at 448, 450 (Scalia, J., dissenting) (observing that the majority's interpretation of § 20913(d) is "sailing close to the wind with regard to the principle that legislative powers are nondelegable").

Second, while it may be tempting, the Court should decline any invitation to find the required standards by "rummag[ing]" around in SORNA's preamble. *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir.) (Gorsuch, J., dissenting from denial of rehearing en banc), *cert. granted in part,* 136 S. Ct. 445 (2015). That provision merely explains that SORNA "establishes a comprehensive national system" to "protect the public from sex offenders and offenders against children." § 20901. It is thus of no help in determining how the Attorney General should proceed in "establish[ing]" such "a comprehensive … system" to "protect the public." *Id.* More generally, such "rummag[ing]" should be disfavored. Even when statements in statutory preambles point in a single direction, they are not always a reliable guide for what Congress intended or what the statute actually does. "Legislation is the art of compromise and few (if any) statutes pursue a single preambulatory purpose without condition, subtlety, or exception." *Nichols*, 784 F.3d at 675 (Gorsuch, J., dissenting from denial of rehearing *en banc*) (quoting *Rodriguez v. United States,* 480 U.S. 522, 526 (1987)). Of course, when such statements expressly embrace conflicting goals, they provide no meaningful constraint. *Compare Panama Refining Co. v. Ryan*, 293 U.S. 388, 418 (1935) ("Among the numerous and diverse objectives broadly

stated [in the National Industrial Recovery Act's 'Declaration of Policy'], the President was not required to choose."); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (noting the "scope" of the "broad declaration" of the policy behind the National Industrial Recovery Act as relevant to the Court's conclusion that the statute gave the President "virtually unfettered" discretion). It is thus unsurprising that the Court has privileged more focused statements of legislative intent over broader, aspirational ones. *See*, *e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Such broader, aspirational goals cannot be used as salves of constitutional stature for statutes that otherwise lack any standards at all.

B. The lack of any standard in SORNA's pre-Act offender provision is fatal under existing precedent.

The lack of standards governing the implementation of § 20913(d) dooms this provision under any approach to nondelegation. Simply put, in the modern era the Court has not confronted a statutory grant of any power to an agency, let alone a grant of power to define crimes, without the shadow of a standard governing how that power is to be wielded.[3] Even the delegation often thought to be among the broadest in the

---

[3] *Compare*, *e.g.*, *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 104 (1946) (upholding against a nondelegation challenge § 11(b)(2) of the Public Utility Holding Company Act of 1935, which gave the Securities and Exchange Commission the authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute

post-*Schechter*/*Panama Refining* era—the delegation to the Federal Communications Commission to regulate radio airwaves in "the public interest, convenience, or necessity"[4]—was held to incorporate some standard governing the agency's exercise of power. There the Court found within the "public interest" mandate "the interest of the listening public in the larger and more effective use of radio," and on that basis upheld the statute against a nondelegation challenge. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216, 226 (1943) (internal quotation omitted); *see also Nichols*, 784 F.3d at 675 (Gorsuch, J., dissenting from

---

voting power among security holders"); *Yakus,* 321 U.S. at 420, 423-26 (upholding a wartime conferral of power to an agency to fix the prices of commodities at a level that "will be generally fair and equitable and will effectuate the purposes of th[e] Act."); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding a grant of power to the Federal Communications Commission to regulate radio broadcasting in the "public interest"); *New York Cent. Sec. Corp. v. United States,* 287 U.S. 12, 24-25 (1932) (upholding the power of the Interstate Commerce Commission to approve railroad consolidations pursuant to the same "public interest" standard); *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (upholding delegation to military department secretaries to renegotiate contracts to recover "excessive profits"); *see also Fed. Energy Admin. v. Algonquin SNG*, *Inc.*, 426 U.S. 548, 558-61 (1976) (finding adequate for nondelegation requirements a mandate that, if the Secretary of the Treasury found that importation of a good in particular quantities under particular conditions threatened the national security, the President was authorized to "adjust" the imports of such article so as to remove the threat, and thus declining to read that mandate narrowly to avoid a nondelegation issue).

[4] *See*, *e.g.*, A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 Mo. L. Rev. 441, 455 (2017) (describing this delegation as "especially broad").

denial of rehearing *en banc*) (describing *Nat'l Broad. Co.* as "perhaps one of the most ambitious uses of the intelligible principle test"). Similarly, the Court has described many post-*Schechter* and post-*Panama Refining* cases as providing analogous levels of guidance that, while broad, still meaningfully constrain the agency's discretion. *See Whitman*, 531 U.S. at 474 (citing examples); *Mistretta v. United States*, 488 U.S. 361, 372-374 (1989). And at times, the Court has been able to interpret an ambiguous provision to provide limiting standards so as to avoid an unconstitutional delegation, *see Am. Petroleum Inst.*, 448 U.S. at 646; *see also supra* § I.A.

In stark contrast, the delegation of authority here plainly lacks any guiding principle—much less an intelligible one—that cabins the Attorney General's exercise of delegated authority. Nor can one be read into the statute. The completely standardless delegation found in SORNA's pre-Act offender provision thus fails any possible articulation of the nondelegation doctrine. If that doctrine "is to retain any force," *Armour v. City of Indianapolis*, 566 U.S. 673, 688, 693 (2012) (Roberts, C.J., dissenting), beyond a mere canon of statutory construction, this Court must find a violation here.

To be sure, unconstitutional delegations have been rare in this nation's history. *See Mistretta*, 488 U.S. at 373. But the fact that such challenges usually fail does not mean the doctrine lacks all force. To put the matter slightly differently, just because the Court's "precedents do not ask for much from government in this area," *see Armour*, 566 U.S. at 693 (Roberts, C.J., dissenting), does not mean they ask for

nothing at all. The Chief Justice made that observation in the analogous context of an Equal Protection Clause challenge arguing that a statutory classification did not bear at least a rational relationship to a legitimate government interest. The subject area of this case—the nondelegation doctrine—is analogous. In both contexts the Court has been hesitant, for the last two generations, to second-guess legislative determinations, whether about the connection between a classification and a legitimate government interest or about the amount of discretion appropriately granted to an executive branch official. But in both cases, the integrity of the underlying legal rule—each of which is fundamental to American constitutionalism—requires that it be enforced in the face of a plain violation.

Likewise, striking down this statute so Congress can supply the required guidance "do[es] not ask for much." *Id.* As then-Judge Gorsuch recognized, Congress could easily have provided such a standard here. *Nichols*, 784 F.3d at 667, 676 (dissenting from denial of rehearing *en banc*). To uphold the statute in the face of this impermissible delegation would mark a departure from the weight of the Court's nondelegation jurisprudence, and it would serve as a statement that there is no longer any limit on Congress's ability to delegate away its legislative power.

It may be the case that striking down the pre-Act offender provision as an unconstitutional delegation will carry some cost because this Court has already determined this provision "efficiently resolves what Congress may well have thought were practical problems arising when the Act sought to apply the new

[sex offender] registration requirements to pre-Act offenders." *Reynolds*, 565 U.S. at 440. But "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *INS v. Chadha*, 462 U.S. 919, 944 (1983). Rather, as Justice Gorsuch very recently recognized, "[u]nder the Constitution, the adoption of new laws restricting liberty is supposed to be a *hard* business, the product of an open and public debate among a large and diverse number of elected representatives." *Dimaya*, 138 S. Ct. at 1228 (concurring in part and concurring in the judgment) (emphasis added). Given this fundamental truth, the proper course is to strike down the statute.

This case presents the Court with a rare invitation to reaffirm a fundamental, liberty-reinforcing principle of American constitutional law that is otherwise difficult to apply. And it presents an opportunity to do so in a context that does not require this Court to make new nondelegation law and will therefore do exceedingly little to hamstring congressional power or unsettle the Court's acceptance of broad congressional delegations of authority to administrative agencies. The Court should accept that invitation.

II. The Criminal Nature Of The Pre-Act Offender Authority SORNA Grants Renders Its Lack Of Standards Particularly Problematic.

Should this Court conclude that the pre-Act offender provision satisfies the traditional version of the intelligible principle standard, it will necessarily confront the question, avoided in *Touby*, whether certain delegations require more searching review than the traditional "intelligible principle" test.

This Court has recognized that it might be appropriate for a more searching standard to apply in some circumstances. In particular, the Court previously reserved the question whether a more searching standard is required when the authority Congress grants is the power to define crimes. *See Touby*, 500 U.S. at 165-66 (reserving that question).[5] In *Touby*, this

[5] This question remains unanswered despite the Court upholding the President's power to prescribe aggravating factors for purposes of a military court's decision whether to impose the death penalty. *Loving v. United States*, 517 U.S. 748 (1996). The *Loving* Court relied heavily on the fact that the President possessed significant Article II-based authority in this area through his commander-in-chief power. *See id.* at 772 ("The President's duties as Commander in Chief … require him to take responsible and continuing action to superintend the military, including the courts-martial. The delegated duty [to prescribe aggravating factors in death penalty cases], then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter.") (internal quotation marks omitted); *see also id.* at 777-78 (Thomas, J., con-

Court encountered an argument that the unique—and uniquely fraught—authority to deem conduct a crime necessarily means that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *Id.* The *Touby* Court expressly reserved that question, as it concluded that the statute in question—which authorizes the Attorney General to place drugs on a schedule of banned substances on a temporary basis—"passes muster *even if* greater congressional specificity is required in the criminal context." *Id.* at 166 (emphasis added).

The Court need not resolve the question whether more searching review is required here because the pre-Act offender provision would not withstand scrutiny under even the traditional "intelligible principle" test. *See supra* § I. But if it concludes that traditional nondelegation doctrine is not sufficient to rule for Petitioner, it should rule for Petitioner on the basis that SORNA involves a uniquely-problematic delegation that cannot survive more searching review.

More searching review is appropriate because, as in *Touby*, the pre-Act offender provision grants the

---

curring in the judgment) ("There is abundant authority for according Congress and the President sufficient deference in the regulation of military affairs to uphold the delegation here, and I see no need to resort to our nonmilitary separation-of-powers and 'delegation doctrine' cases in reaching this conclusion. I write separately to explain that by concurring in the judgment in this case, I take no position with respect to Congress' power to delegate authority or otherwise alter the traditional separation of powers outside the military context.").

authority to declare crime. § 20913(d). But the Court can adopt more searching nondelegation review in this case without holding that all delegations in the criminal context are subject to heightened review. The pre-Act offender provision goes beyond a mere grant of power to the nation's chief criminal prosecutor to declare crimes, § 20913(d), because it also authorizes him to base those crimes on conduct that has already occurred. *Id.* Thus, more searching review can be adopted without drawing the fine line that the Court avoided in *Touby*.

Applying a more searching standard—or at least continuing to apply the intelligible principle test meaningfully—in the narrow context of a delegation with criminal and retroactive consequences is consistent with this Court's cases and basic separation of powers principles.

The power to declare crimes is particularly fraught and features prominently in this Court's nondelegation jurisprudence. *See*, *e.g.*, *Fahey v. Mallonee,* 332 U.S. 245, 249 (1947) (explaining that in both *Panama Refining*, 293 U.S. 388 and *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495, Chief Justice Hughes "emphasized" the fact that those cases "dealt with delegation of a power to make federal crimes of acts that never had been such before"); *Mistretta*, 488 U.S. at 373 n.7 (citing *Fahey*'s discussion); *United States v. Robel*, 389 U.S. 258, 269, 275 (1967) (Brennan, J., concurring in the result) ("The area of permissible indefiniteness [in congressional delegations] narrows … when the regulation invokes criminal sanctions and potentially affects fundamental

rights … because the numerous deficiencies connected with vague legislative directives … are far more serious when liberty and the exercise of fundamental rights are at stake."); *cf. Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974) (recognizing the nondelegation problems that would arise if a statute was construed as delegating to an agency the power to impose a tax, and for that reason construing an administrative levy as a fee instead). The "awesome and dangerous power[]," *Ginzburg v. United States*, 383 U.S. 463, 477 (1966) (Black, J., dissenting), to impose criminal punishment cannot be triggered without sufficient legislative guidance about whether the particular conduct merits such punishment.

Unfettered discretion for the Executive to declare criminal liability also offends basic notions of separation of powers. Since the beginning of the Republic, the separation of powers has been understood as a critical guarantor of individual liberty. *See*, *e.g. The Federalist No. 47* at 313 (Madison) (Modern Library, 1941) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny."); *Clinton v. City of New York*, 524 U.S. 417, 449, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); Rachael E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 990 (2006) ("It is a familiar premise that the Constitution separates legislative, executive, and judicial power to prevent tyranny and protect liberty.").

That liberty is most at stake in the context of criminal prosecution. *See*, *e.g.*, Rebecca L. Brown, *Caging the Wolf: Seeking a Constitutional Home for the Independent Counsel*, 83 Minn. L. Rev. 1269, 1274 (1999) ("The combination of legislative power with enforcement power constitutes a very grave affront to the separation of powers, and if carried out in the prosecution of a criminal case, presents the even stronger constitutional objection of threatening individual liberty under procedures that themselves are in contravention of constitutional norms."). It is well-recognized in this Court's jurisprudence that the power of criminal law enforcement is a fraught one that requires careful adherence to constitutional safeguards—not just those reflected in the Bill of Rights, but also the overarching protections provided by the insistence on separating governmental powers. *See Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("It would be a grave mistake … to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance."); *see also Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in part and concurring in the judgment) ("Under the Constitution, the adoption of new laws restricting liberty is supposed to be a *hard* business, the product of an open and public debate among a large and diverse number of elected representatives." (emphasis added)); *Robel*, 389 U.S. at 275 (Brennan, J., concurring in the result). Thus, and as important as the separation of powers is in all contexts of government action, it bears repeating that this is a case whose criminal nature renders that insistence all the more urgent. *See*, *e.g.*, *United States v. Ward*, 448 U.S. 242, 248 (1980) ("The distinction

between a civil penalty and a criminal penalty is of some constitutional import.").

The intrusion on liberty caused by a regulation with criminal consequences—and the particular separation of powers concerns such intrusions raise—might alone reinforce the need for meaningful nondelegation review. But the need for meaningful review is all the more present here given the retroactive nature of the pre-Act offender provision. Determining a statute's retroactive scope is principally the domain of Congress, such that *Congress* is required to speak clearly when a law is to have retroactive effect. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988). This ensures that "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. Such careful weighing cannot be guaranteed when Congress delegates that authority to an administrative agency without any guidance about the "statute's proper [retroactive] reach." *See id.* at 280; *Bowen*, 488 U.S at 208-09 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). In circumstances such as these, a regulation is given retroactive reach without any assurance that such reach was what Congress intended.

At a minimum, these separation of powers considerations mean that this Court should think twice before abandoning its existing restrictions on legislative delegations and reducing its separation of powers

foundations to mere "parchment barriers." *The Federalist No. 48* at 321 (Madison) (Modern Library, 1941). Indeed, to the extent that it might ever make sense to abandon that jurisprudence, it would make bad sense to do so in the context that was of central concern to those Courts originally constructing it. *See Fahey*, 332 U.S. at 249. This case presents a clear violation of a structural safeguard of liberty, and thus a strong argument against the Court using it as the occasion to renege on that promise.

But even if that is not enough, the criminal context of this delegation, infused as it is with retroactive effect, justifies subjecting this delegation to a more searching standard than the traditional rule requires. This Court has not yet had occasion to address what more searching review would look like, *see Touby,* 500 U.S. at 166-67, and there is no need to define the additional limitations that a more meaningful nondelegation review would entail. The utterly barebones nature of the pre-Act offender provision could not survive *any* review that is more searching than the traditional intelligible principle test. Thus, even if this Court determines that the challenged provision somehow survives the intelligible principle test, it should conclude that it must be struck down under the more searching analysis required of delegations of this type.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Andrew D. Silverman
Counsel of Record
Benjamin Chagnon
Alison M. Kilmartin
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
asilverman@orrick.com

Date June 1, 2018

Appendix A*

1. William D. Araiza
   Professor of Law
   Brooklyn Law School
   250 Joralemon Street
   Brooklyn, NY 11201

2. Miriam Baer
   Professor of Law
   Brooklyn Law School
   250 Joralemon Street
   Brooklyn, NY 11201

3. Marshall J. Breger
   Professor of Law
   The Catholic University of America
   Columbus School of Law
   3600 John McCormack Road, N.E.
   Washington, DC 20064

4. Joshua Dressler
   Distinguished University Professor Emeritus
   Frank R. Strong Chair in Law Emeritus
   The Ohio State University
   Moritz College of Law
   55 West 12th Avenue
   Columbus, OH 43210

* Institutions are listed for affiliation purposes only. All signatories are participating in their individual capacities and not on behalf of their institutions.

5. Cynthia Godsoe
Associate Professor of Law
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201

6. Dr. Melissa Hamilton
Senior Lecturer in Law and Criminal Justice
University of Surrey
Guildford, Surrey GU2 7XH, United Kingdom

7. Babe Howell
Professor
CUNY School of Law
2 Court Square
Long Island City, NY 11101

8. Linda Jellum
Ellison Capers Palmer Sr. Professor of Law
Mercer University School of Law
1021 Georgia Avenue
Macon, GA 31207

9. Karl M. Manheim
Professor in Residence
Loyola Law School
919 Albany Street
Los Angeles, CA 90015

10. Michael J.Z. Mannheimer
Professor of Law
Associate Dean for Faculty Development
Chase College of Law
Northern Kentucky University
518 Nunn Hall
Highland Heights, KY 41099

11. Andrew F. Popper
Ann Loeb Bronfman Distinguished Professor of Law and Government
American University
Washington College of Law
4300 Nebraska Avenue N.W.
Washington, DC 20016

12. Richard C. Reuben
James Lewis Parks Professor of Law
University of Missouri School of Law
203 Hulston Hall
Columbia, MO 65211

13. Edward P. Richards
Clarence W. Edwards Professor of Law
Director, Climate Change Law and Policy Project
Louisiana State University
Herbert Law Center
1 East Campus Drive
Baton Rouge, LA 70803

14. Ric Simmons
Chief Justice Thomas J. Moyer Professor for
the Administration of Justice and Rule of Law
The Ohio State University
Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210

15. Evan C. Zoldan
Associate Professor of Law
University of Toledo College of Law
1825 West Rocket Drive
Toledo, OH 43606