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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Government defends a version of SORNA that Congress never enacted. Nothing in 34 U.S.C. § 20913(d)—or anywhere else in SORNA—directs the Attorney General to make the Act's requirements, including its criminal sanctions, applicable to pre-Act offenders "to the maximum extent feasible," as the Government claims. Brief for the United States ("Gov't Br.") 24. Instead, Congress gave the Attorney General unconstrained "authority to specify" whether and how SORNA applies to those offenders. 34 U.S.C. § 20913(d).

Congress's choice was deliberate. SORNA's application to pre-Act offenders presented Congress with significant and politically sensitive questions. Among other things, retroactive application raised concerns about fairness (since extending the law's reach to pre-Act offenders would impose new burdens based on past convictions); federalism (since the bulk of SORNA's administrative cost would fall on states, many of which objected to wholesale retroactivity); and politics (given the public controversy over sex-offender registration schemes generally).

But instead of making the hard choices for itself, as the Constitution requires, Congress passed them to the Attorney General. Unlike other delegations upheld by this Court, Section 20913(d) does not set forth any standard, criterion, or policy to constrain the Attorney General's decisions. Instead, it allows him to determine, in his discretion, if hundreds of thousands of people will be subject to lifelong registration obligations, backed by criminal punishments. Section 20913(d) therefore violates the Constitution.

* * *

The Government's effort to rescue Section 20913(d) founders at every step.

First, this Court's precedents foreclose the Government's efforts to dilute the intelligible-principle test and to plumb sources external to Section 20913(d) for some unstated intelligible principle that Congress itself did not provide.

Second, even if the Court could consider the Government's sources, they do not show that Congress "intended" or "expected"—much less required—the Attorney General to expand the Act to cover pre-Act offenders "to the maximum extent feasible."

Finally, because Section 20913(d)'s delegation implicates a unique constellation of separation-of-powers concerns, Congress must provide clear and meaningful guidance to constrain the Attorney General. Its failure to do so in Section 20913(d) renders this provision unconstitutional.

ARGUMENT

I. The Court cannot engraft an intelligible principle onto Section 20913(d)'s unambiguously standardless text.

The Government does not dispute that Section 20913(d) contains no explicit directive, policy, standards, or guidance. But it argues that the Court can intuit a purported intelligible principle—an idea of what Congress "wanted" or "expected" the Attorney General to do about pre-Act offenders, Gov't Br. 25, 38—from SORNA's introductory statement of purpose, 34 U.S.C. § 20901; the statute's legislative history; its definition of a "sex offender," 34 U.S.C. § 20911; and language from *Reynolds v. United States*, 565 U.S. 432

(2012). The Government's argument misconceives separation-of-powers requirements and disregards basic principles of statutory interpretation.

A. Congress must state more than a precatory "general policy" to satisfy the intelligible-principle test.

Relying on a passage from *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), the Government contends that the "only question" for the Court is whether SORNA suggests a "general policy" the Attorney General "should pursue" regarding pre-Act offenders. Gov't Br. 13. The Government is wrong. A "general policy"—precatory and untethered to the delegation—is not enough to state an intelligible principle.

The intelligible-principle test is intended to ensure that Congress has done the "legislative" work—that it has made the critical choices in a law and has left only implementation to the Executive. *See* Brief for Petitioner ("Pet. Br.") 26–27. To that end, (1) Congress itself must "lay down" the guiding principle as a concrete expression of its will, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)—it cannot be supplied by the Executive or the Judiciary, *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); (2) the principle must be expressed in the "legislative act," *J.W. Hampton, Jr.*, 276 U.S. at 409, not lurking dormant in the minds of legislators; (3) the principle must be binding, not merely precatory: the delegate must be "directed to conform" to it, *id.*; and (4) the principle must be sufficiently clear to enable courts "to ascertain whether the will of Congress has been obeyed," *Yakus v. United States*, 321 U.S. 414, 425 (1944).

The Government ignores these requirements and instead propounds a watered-down version of the intelligible-principle test under which Congress need only state a "general policy" for the legislation as a whole, unconnected to the delegation. *See* Gov't Br. 19 (citing *American Power & Light*, 329 U.S. at 105). But the government reads the passage from *American Power & Light* out of context. *American Power & Light* did not offer the cited "general policy" passage as a freestanding sufficient test for a permissible delegation. Rather, after examining the specific guidance provided in that delegation, the Court commented: "Necessity … fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it *then* becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." 329 U.S. at 105 (emphasis added).

Read properly, the passage applies only when Congress has already supplied a basic intelligible principle, and "[n]ecessity" has fixed a point where it is "unreasonable and impracticable" to require Congress to provide additional "detailed rules." That is why the Court has not adopted this passage as its generally applicable intelligible-principle test. *See, e.g.*, *Whitman*, 531 U.S. at 473–77 (nowhere citing the "general policy" language); *Loving v. United States*, 517 U.S. 748 (1996) (same); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (same).

In any event, Section 20913(d) does not even contain a "general policy." And engrafting one onto that unambiguous provision would be improper, as we now show.

B. Searching beyond Section 20913(d) for an intelligible principle is improper because that provision is unambiguously standardless.

The Government accuses petitioner of ignoring rules of statutory construction by considering Section 20913(d) "in a vacuum." Gov't Br. 31. On the contrary: the Government disregards those rules by seeking to override the plain text of Section 20913(d).

Two rules of construction control. The first is the Court's "cardinal canon": "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted). "When the words of a statute are unambiguous … this first canon is also the last: judicial inquiry is complete." *Id.* (citations omitted). The second rule is that "[a] specific provision controls one of a more general application." *Gozlon–Peretz v. United States*, 498 U.S. 395, 407 (1991) (citation omitted). This is "particularly" true "when the two [provisions] are interrelated and closely positioned, both in fact being parts [of the same statutory scheme]." *HCSC–Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (citation omitted).

These rules prohibit roaming beyond Section 20913(d) for an intelligible principle because, first, that provision is unambiguous, and, second, it is the specific provision of SORNA that addresses the Attorney General's authority over pre-Act offenders. *See Reynolds*, 565 U.S. at 439–40 (recognizing that Section 20913(d) "specifically deals with a subset (pre-Act offenders)" and "therefore should control the Act's application to that subset") (citations omitted).

Section 20913(d)'s relevant language is plain: "The Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to [pre-Act] sex offenders …, and to prescribe rules for the registration of any such sex offenders." 34 U.S.C. § 20913(d). Thus, as the Court held in *Reynolds*, this provision is "naturally read" to permit—but not require—the Attorney General to make SORNA applicable to pre-Act offenders. 565 U.S. at 440.

As a threshold matter, the Government's proffered "feasibility" standard is not in the text. Congress knows how to direct the Executive to take action "to the extent feasible" when that is what it intends. It has done so in countless other statutory provisions. *See, e.g.*, 42 U.S.C. § 1310 (directing Commissioner of Social Security to take certain actions "to the extent feasible and appropriate"); 42 U.S.C. § 1383b(e)(2)(B) (same "to the extent feasible"); 20 U.S.C. § 3509 (directing Secretary of Health and Human Services to coordinate certain programs "to the maximum extent feasible"); 49 U.S.C. § 24201(a)(1) (directing Secretary of Transportation to apply certain project development procedures "to the greatest extent feasible"). No basis therefore exists to read the omitted language into SORNA. *See, e.g.*, *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013) (Congress's "use of explicit language in other statutes cautions against inferring" it when omitted).

Next, the Government concedes that Section 20913(d) is unambiguous. Gov't Br. 51–52. That provision is also unambiguously standardless: it does not inform the Attorney General whether, or when, he should exercise his authority, what action he should take, or what factors to consider. It plainly gives him authority without qualification or guidance. Nor is the

authority simply an "on/off" switch. As the Government and this Court have acknowledged, the provision allows the Attorney General to treat different groups of pre-Act offenders differently and to specify which registration requirements apply. *See* Brief for the United States 24–25, *Reynolds* (No. 10–6549); *Reynolds*, 565 U.S. at 440.

Because Section 20913(d) is unambiguous, engrafting the government's "to the maximum extent feasible" constraint onto that provision would be improper—the Court "cannot supply what Congress has studiously omitted." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959); *see also Dodd v. United States,* 545 U.S. 353, 359 (2005) (Court is not "free to rewrite the statute that Congress has enacted"); *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) (Court will not "read an absent word into the statute"); *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993) (Court is "not free to engraft" a different "policy choice onto the statute that Congress passed").

An example drives home just how misguided the Government's position is. Suppose the next Attorney General were to promulgate a rule declaring that SORNA does not apply to pre-Act offenders whose convictions predate SORNA's enactment by more than ten years. Suppose further that a party with standing files an action challenging the new rule, arguing that the Attorney General abused his discretion, because it is "feasible" for him to require this group of offenders to register. Such a claim would fail based on the plain terms of Section 20913(d)'s unqualified grant of power to the Attorney General.

C. The delegations previously sanctioned by this Court included explicit textual standards to bind the delegate.

Despite Section 20913(d)'s clear language, the Government asks the Court to rummage elsewhere for an intelligible principle. The Government notes that the Court in other cases has looked to a statute's general purpose, neighboring provisions, or legislative history to determine whether a delegation was constrained by a sufficiently intelligible principle. *See* Gov't Br. at 19–20, 24, 31–32.

The Government overlooks that all of those cases involved a statute in which Congress explicitly provided *some* standard, however general, in the delegation provision itself to guide and cabin the delegate's power. Thus, for example:

- In *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943), the statute directed the FCC to regulate broadcast licensing "as public convenience, interest, or necessity requires."
- In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944), the statute directed the Federal Power Commission to determine "just and reasonable" rates for natural gas sales.
- In *Yakus*, 321 U.S. at 420, the statute directed the Price Administrator to fix commodity prices that would be "fair and equitable" and would "effectuate the purposes" of the statute.
- In *American Power & Light*, 329 U.S. at 105, the statute directed the SEC to prevent corporate structures that were "unduly or unnecessarily complicate[d]" or that "unfairly or inequitably

distribute[d] voting power among security holders."

- In *Fahey v. Mallonee*, 332 U.S. 245, 247, 249 (1947), the statute directed the Federal Home Loan Bank Board to "require an equitable readjustment of the capital structure" of savings and loan institutions.
- In *Lichter v. United States*, 334 U.S. 742, 775–76 (1948), the statute directed the Secretaries of War and Navy to take corrective measures upon determining that "excessive profits" had been realized or were likely to be realized from any contract.

Accordingly, in those cases it was appropriate for the Court to look to other sources to determine whether the generally worded standard—provided expressly by Congress in the delegation provision itself—had a sufficiently intelligible meaning to constrain the delegate.

Section 20913(d) is different. It provides no standard at all for the Attorney General to follow. It contains no criteria, objective, or term of art for the Court to construe. Rather, Section 20913(d), like the provision struck down in *Panama Refining Co. v. Ryan,* 293 U.S. 388, 415 (1935), is "brief and unambiguous": it delegates broad rule-making power to the Executive but "does not state whether or in what circumstances or under what conditions" the Executive is to act. *Id.* The provision literally "fail[s] to articulate *any* policy or standard" to guide or confine the Executive's discretion. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (emphasis added) (describing statutes invalidated in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining*). And neither the Act's general

purposes nor its other provisions "can be deemed to relate to the subject" specifically addressed by Section 20913(d)—the Attorney General's treatment of pre-Act offenders. *Panama Refining Co.*, 293 U.S. at 416. *See also Bloate v. United States*, 559 U.S. 196, 207 (2010) ("[G]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (citation omitted).

"Where there is no ambiguity in the words, there is no room for construction." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95–96 (1820). Thus, because Section 20913(d) plainly gives the Attorney General plenary authority over SORNA's application to pre-Act offenders, it fails even the most permissive formulation of the intelligible-principle test and unconstitutionally delegates legislative power to the Executive.

II. The Government's sources do not reveal any "feasibility" standard in Section 20913(d).

Even if this Court were to stray beyond the unambiguous text of Section 20913(d), the sources relied upon by the Government—this Court's opinion in *Reynolds*, SORNA's preamble, SORNA's definition of a "sex offender," and SORNA's legislative history, Gov't Br. 23–27—do not contain the principle the Government proposes.

A. The Court's decision in *Reynolds*

Contrary to the Government's assertion, *Reynolds* does not "make clear" that SORNA contains an unspoken directive to the Attorney General to register pre-Act offenders "to the maximum extent feasible." Gov't Br. 13. The sole issue in *Reynolds* was whether SORNA's registration requirements applied to pre-Act

offenders before the Attorney General decided that they would. 565 U.S. at 434. The Court said no. *Id.* at 435. In so holding, the Court rejected the Government's argument that SORNA had to be read unnaturally to cover pre-Act offenders of its own force in order to further Congress's purpose of creating "a comprehensive national registration system." *Id.* at 442–45. The Court further rejected the Government's argument that Congress could not have intended to grant the Attorney General authority to leave pre-Act offenders uncovered, as Section 20913(d) plainly allows. *Id.*

The Government here ignores the holding of *Reynolds*. Instead, it seizes upon language in *Reynolds* positing various factors Congress "might" have reasonably considered in deciding to leave the treatment of pre-Act offenders to the Attorney General. The Government's reliance on those remarks fails for at least two reasons.

First, the remarks, by their own terms, are speculative, not descriptive. Each remark is prefaced with a modal verb—"might," "may," or "could"—expressing possibility. *See Reynolds,* 565 U.S. at 440 ("Congress *may well have*" believed that the delegation "resolve[d] … [certain] practical problems"); *id.* at 440–41 (noting that certain "considerations *might have* warranted different federal registration treatment of pre-Act offenders"); *id.* at 441 ("At least Congress *might well have* so thought."); *id.* ("Congress *might well have* looked for a solution.") (all emphases added). *Reynolds'*s consistent use of these tentative terms proves that the Court was hypothesizing about Congress's possible motivation in enacting Section 20913(d), not offering a definitive reading of the statute or even its legislative history. *E.g.*, W. Strunk

& E. White (with M. Kalman), *The Elements of Style (Illustrated)* 37 (Penguin Press 2005) ("[*C*]*ould*, *may*, [and] *might*" are auxiliary verbs used "for situations involving real uncertainty.").

Second and relatedly, none of these possible motivations are included in the provision or anywhere else in SORNA. As *Whitman* makes clear, an intelligible principle must be set forth in the statute itself: it would be "an exercise of the forbidden legislative authority" to supply "the standard that Congress ha[s] omitted." 531 U.S. 457, 473. Accordingly, the Court's hypotheses about *why* Congress could have thought it desirable to delegate its power, even if accurate, cannot supply the intelligible principle Congress failed to enact into law.

The Government also erroneously relies on the *Reynolds* dissent to claim that Section 20913(d), as written, "is no different for nondelegation purposes" than if Congress had "expressly imposed SORNA's registration requirement on all pre-Act offenders and empowered the Attorney General to make exceptions," except that "such a statute would have established a different default rule . . . ." Gov't Br. 30.

In fact, the *Reynolds* dissent opined that there was a pivotal constitutional difference between these two formulations. Justice Scalia wrote that he would interpret Section 20913(d) "as conferring on the Attorney General an authority to make exceptions to the otherwise applicable registration requirements," in contrast to the Court's interpretation, which empowered the Attorney General to decide if the requirements "would *ever* apply to pre-Act offenders." 565 U.S. at 449 (Scalia, J., joined by Ginsburg, J., dissenting). In the dissent's opinion, the former

interpretation posed no constitutional issue because it was akin to prosecutorial discretion.[1] In contrast, the Court's reading raised constitutional concerns because it permitted 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.*

In any event, had Congress written Section 20913(d) completely differently, as the Government suggests it "could" have, Gov't Br. 30—in a way, for example, that clearly expressed a legislative will that all pre-Act offenders be required to register—that would be a different case. But this Court must rule on the constitutionality of the statute Congress actually enacted, not an imaginary one.

B. SORNA's preamble and definition of "sex offender"

Within SORNA's text, the Government points to two provisions it claims establish Section 20913(d)'s intelligible principle: the Act's introductory declaration of purpose and its definition of "sex offender." But neither allows the Court to read into

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[1] It is not clear that an oppositely worded statute would be constitutional. Prosecutorial discretion is not the same as the power to suspend, revoke, or waive a legal obligation. The Government cites no authority for its claim that Congress can grant the Executive complete discretion to exempt groups of individuals from the law. To the contrary, constitutional nondelegation principles also govern the power to waive legal requirements. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 465 (1998) (Scalia, J. concurring in part) (noting Executive reduction of legal requirements can also "usurp[] the nondelegable function of Congress"). And the statutes cited by the Government allowing for exemptions, Gov't Br. 30, all include guidance or criteria directing the exercise of this power.

Section 20913(d) an unstated command requiring the Attorney General to extend SORNA to pre-Act offenders to the maximum extent feasible (or to exercise his discretion in any other particular way).

SORNA's declaration of purpose states that Congress wanted to establish a "comprehensive national system" for the registration of sex offenders. 34 U.S.C. § 20901. But as the Court held in *Reynolds*, SORNA as enacted does not impose a registration requirement on any pre-Act offender. Accordingly, it would be improper to extract from SORNA's general purpose an unstated intention in Section 20913(d)—let alone a binding requirement—that the Attorney General register all pre-Act offenders to the extent feasible. This Court has several times rejected the notion that the prefatory statement of the broad goal of SORNA as a whole overcomes the specific language in later sections defining how "comprehensive" the system should be. *See Nichols v. United States*, 136 S. Ct. 1113, 1118–19 (2016)*; Carr v. United States*, 560 U.S. 438, 443, 454–57 (2010); *Reynolds,* 565 U.S. at 442. Moreover, other provisions of SORNA take steps to create a comprehensive national registration system that might or might not include pre-Act offenders. *See* Pet. Br. 47. Had Congress meant by "comprehensive" that all pre-Act offenders should be required to register under SORNA to the extent feasible, it would have said so.

Similarly, it is of no moment that SORNA's definition of "sex offender" broadly includes anyone who "was convicted" of a "sex offense." This at most confirms, as Section 20913(d) states, that Congress wanted the Attorney General to have the option of covering pre-Act offenders. But this definition, like Section 20913(d), does not provide any guidance as to

whether, when, or how the Attorney General should exercise that option.

C. SORNA's legislative history

SORNA's legislative history also does not establish that the Attorney General is bound by some sort of "feasibility" standard. The Government relies on statements from some legislators expressing concern over so-called "missing" offenders. *See* Gov't Br. 6, 24. But even they did not say that the Attorney General is supposed to register the entire class of pre-Act offenders "to the maximum extent feasible."

* * *

In sum, the Government's "feasibility" standard does not come from *Reynolds*, SORNA's text, or its legislative history.

Nor does it match the intelligible principles courts of appeals have read into Section 20913(d). For example, the Eleventh Circuit held that the provision "suggest[s]" the Attorney General require pre-Act offenders "to register to the extent that he determines it would contribute to the protection of the public and the comprehensiveness of a national sex offender registry." *United States v. Ambert*, 561 F.3d 1202, 1214 (11th Cir. 2009).

The Government's "feasibility" standard does not even match the Attorney General's actions pursuant to this delegation. For his part, the Attorney General described Section 20913(d) as granting him the ability to apply SORNA to pre-Act offenders "if he determines … that the public benefits of doing so outweigh any adverse effects." 75 Fed. Reg. 81,850 (Dec. 29, 2010). His individual registration regulation, in turn, simply makes SORNA applicable to "all" pre-Act offenders, 28 C.F.R. § 72.3—it does not account in

any way for practical problems, "feasibility," or even possible costs and adverse effects of retroactivity.

Rather than deriving from any of the identified sources, the Government's "feasibility" standard appears to be invented—an effort to obscure the legislative nature of the power granted the Attorney General. The Court should reject the Government's effort to disguise what Section 20913(d)'s text makes plain: SORNA leaves the crucial policy choices regarding pre-Act offenders to the Attorney General's unbridled discretion, in violation of the Constitution.

III. Section 20913(d)'s delegation requires clear and meaningful legislative guidance because it implicates a unique combination of separation-of-powers concerns.

Section 20913(d)'s standardless delegation would be unconstitutional even if it involved a run-of-the-mill transfer of civil rulemaking power to an administrative agency. But it does not. Nor is this a statute concerning licensing authority, national park lands, military rules, or the conduct of foreign affairs. Pet. Br. 21–22. This is a delegation involving Congress's core legislative power to make generally applicable rules of private conduct and to determine the content and scope of criminal laws. *Id.* 23–24. The delegation also raises retroactivity and federalism concerns. This delegation's unique aspects preclude upholding it based only on some unstated, precatory general policy.

A. The guidance required under the intelligible-principle test depends on the power conferred and the identity of the delegate.

This Court considers the nature and magnitude of the assigned power, along with the identity of the delegate, in determining whether Congress provided sufficient guidance regarding the exercise of that power. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001); *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975); Pet. Br. 28–30.

The Government is thus wrong to state that petitioner is proposing a "different" test that "depart[s] from the Court's precedent," Gov't Br. 38–39, by asking the Court to weigh these factors in gauging whether Congress has provided sufficient guidance here.

Loving v. United States and *Mistretta v. United States* confirm that the nature of the assigned power and its recipient's identity influence the degree of guidance this Court requires. In *Loving*, the President's and Congress's shared constitutional authority over the military lessened the need for detailed statutory guidance to the President: the Court ruled "it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority." 517 U.S. 748, 768–72 (1996).

Mistretta v. United States, 488 U.S. 361 (1989), made the same point in upholding the law that established the U.S. Sentencing Commission within the Judicial Branch and gave it power to promulgate guidelines. That measure did not violate the nondelegation doctrine both because Congress

provided extensive guidance, *id.* at 374–77, and because sentencing is "a peculiarly shared responsibility" that "has never been thought of as the exclusive constitutional province of any one Branch," *id.* at 390–91; *see also id.* at 386 (describing sentencing as "twilight area" of shared power between legislature and judiciary). The Court recognized that if Congress had instead transferred this power to the Executive, it would raise the question whether Congress "unconstitutionally had united the power to prosecute and the power to sentence …." *Id.* at 391 n.17.

Finally on this point, in *Touby v. United States*, 500 U.S. 160, 166 (1991), the Court upheld a delegation to the Attorney General to temporarily schedule controlled substances because Congress provided detailed statutory guidance that "meaningfully contrain[ed]" the Attorney General's exercise of that power. *See* Pet. Br. 35–36. And while that holding obviated the need to settle in *Touby* whether greater guidance is required when "Congress authorizes another branch to promulgate regulations that result in criminal sanctions," 500 U.S. at 165–66, "the Court has repeatedly and long suggested that in the criminal context Congress must provide more 'meaningful guidance' …," especially for a law that "leav[es] it to the nation's top prosecutor to specify whether and how a federal criminal law should be applied to a class of a half-million individuals." *United States v. Nichols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of reh'g en banc).

B. Given the nature of Section 20913(d)'s delegation, Congress must provide clear and meaningful guidance.

Section 20913(d)'s delegation implicates core separation-of-powers concerns, as petitioner's opening brief described. Pet. Br. 23–41. Because of the nature of this delegated power, Congress must clearly state specific standards that meaningfully constrain the Attorney General. Section 20913(d) does not do so and is therefore unconstitutional.

The Government mistakenly claims that Section 20913(d)'s delegation "does not implicate" criminal law, retroactivity, or federalism issues, *see* Gov't Br. at 39. It does: Section 20913(d) empowers the Attorney General to define the scope and content of both federal and state criminal laws. *See* Pet. Br. 23–25. It authorizes her to decide whether or not a pre-Act offender's failure to register, under terms the Attorney General herself sets (and can change), is a crime at all. In this way, Section 20913(d) grants the Attorney General "power to make … crimes of acts that never had been such before . . . ." *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947).

And in sharp contrast to *Loving* and *Mistretta*, here the Constitution requires greater congressional guidance given the nature of the delegated power and the identity of the delegate. The power to decide the content and reach of criminal laws is one vested exclusively with the legislature. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018); Pet. Br. 19–21; *see also* Amicus Br. of ACLU 10–15 (detailing constitutional provisions and doctrines that render the power to define crimes "constitutionally distinctive"); Amicus Br. of Cato Institute 16–19 ("The imposition of

criminal sanction by executive fiat is one of the tyrannies the Founders most feared."). In this respect, structural separation-of-powers and due process concerns are interrelated—both protect individual liberty by requiring a division between the law maker and the prosecutor.

The Government argues that courts have upheld other assignments of the power to promulgate regulations "that in turn affect" criminal liability, *see* Gov't Br. 45–47, 52, so Section 20913(d) must be constitutional. But this Court has never upheld a delegation remotely like this: a standardless transfer of power to the Attorney General to determine the potential criminal liability of over 500,000 people, in a way that also impacts retroactivity and state sovereignty. The question whether to retroactively impose burdensome lifelong registration requirements on individuals is a far cry from the design of an oleomargarine label, *see* Gov't Br. 47.[2]

The Government next errs in claiming that SORNA "raises no retroactivity concerns," Gov't Br. 39. Whether or not Section 20913's registration requirements violate ex post facto prohibitions—an open question—the law operates retroactively with respect to pre-Act offenders by increasing the burdens on those individuals based exclusively on their past conduct. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994) (defining retroactive law as

[2] The Government is also mistaken that it is sufficient for Congress to enact a general criminal law and leave it to the Executive to fill in details of the elements of the offense. *See* Gov't Br. 47–48. This Court's void-for-vagueness decisions preclude this sort of delegation to the Executive. Pet. Br. 20–21.

one that "attaches new legal consequences to events completed before its enactment").

For example, a 15-year-old who admitted to a qualifying New York state sex offense in 2005 had no expectation that he would be required to register as a sex offender. But if the Attorney General chooses to extend SORNA to pre-Act offenders, that individual is saddled with registration and reporting requirements that could last his entire life.

Finally, Section 20913(d) implicates federalism concerns because it empowers the Attorney General to impose onerous requirements on individuals convicted of state crimes even if their own state exempts them from registration. Pet. Br. 39–40. Numerous states objected to SORNA's retroactivity, and the vast majority have declined to implement the law. *Id.* 10–12. But SORNA's individual registration mandate, 34 U.S.C. § 20913(a), applies whether or not a state implements SORNA or an offender travels in interstate commerce. In this way, the law encroaches upon the traditional state function of governing intrastate matters.

Nor is this an abstract problem: there is no direct federal registry, meaning that all offenders register with a particular state. SORNA thus forces a state to bear the costs of registering individuals that the state itself—best situated to determine the effective use of its resources—has opted not to require to register. *Cf. Printz v. United States*, 521 U.S. 898, 904 (1997) (recognizing burden on state law-enforcement officers administering federal regulatory scheme).

Congress must legislate clearly when it delegates powers affecting these constitutionally sensitive areas. *See* Pet. Br. 28–30. For this reason, even if an

implicit or merely precatory general policy could suffice as an intelligible principle for an ordinary delegation, it is insufficient to save Section 20913(d). Upholding this provision based on some unstated sentiment would contradict the very premise of the nondelegation doctrine, which requires Congress to make critical legislative decisions and be accountable for them to the public.

* * *

In enacting SORNA, Congress faced a clear, if politically contentious, choice about whether and how the Act should apply to previously convicted offenders—and it decided not to decide. "It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically divisive." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). For the reasons detailed above, the Court should hold this delegation unconstitutional.

Nor will a decision in petitioner's favor disrupt sex-offender registration, as the Government suggests, Gov't Br. 54–55. Every state has its own registration system, each of which existed before, and will continue to exist regardless of, SORNA. State offenders convicted before 2006, including petitioner, will still be required to register under these preexisting state laws. And if Congress wishes to require all or some pre-Act offenders to register under SORNA, it can pass a statute saying so.

Section 20913(d)'s complete lack of guidance, coupled with the provision's criminal, retroactive, and antifederalist effects, renders this an invalid transfer of legislative power to the Executive. This is not a case

that requires the Court to fix a precise line between legislating and merely implementing—wherever that line falls, Section 20913(d) is on the wrong side.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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