No. _____

IN THE

Supreme Court of the United States

ALLEN DODSON, BRYAN SIX, KENDAL RAY WILLIAMS, KENNETH ROY GIBSON, ERIC RONALD BOLDUAN, AND MONTY ENGLEHART,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 34 U.S.C. § 20913(d), Congress delegated to the Attorney General the power to apply the Sex Offender Registration and Notification Act (SORNA) to individuals convicted of sex offenses prior to SORNA's enactment. In *Gundy v. United States*, 139 S.Ct. 2116 (2019), a four-Justice plurality held that this delegation did not violate the nondelegation doctrine. Three Justices dissented. Justice Kavanaugh did not participate. Justice Alito concurred only in the judgment, noting his willingness to reconsider this Court's nondelegation jurisprudence.

Gundy's 4-1-3 fractured decision "resolves nothing." *Gundy*, 139 S.Ct. at 2131 (Gorsuch, J., dissenting). Until the full Court revisits *Gundy*, pre-Act offenders (like petitioners here) will continue to bring nondelegation-doctrine challenges to their prosecutions. The sooner the Court revisits *Gundy*, the better. It is time that this Court reconsider the approach it has taken to resolve nondelegation challenges. The question presented here is:

> Whether this Court should revisit its nondelegation doctrine precedent and, in doing so, overrule *Gundy* and hold that 34 U.S.C. § 20913(d) is an unconstitutional delegation of legislative authority to the Executive Branch.

RELATED PROCEEDINGS

United States v. Dodson, Case No. 2:18-cr-20048-DDC (D. Kan. Dec. 31, 2018)
United States v. Dodson, Case No. 19-3098 (10th Cir. Aug. 14, 2019)
United States v. Six, Case No. 1:18-cr-00136-WYD (D. Colo. June 28, 2018)
United States v. Six, Case No. 19-1023 (10th Cir. Aug. 14, 2019)
United States v. Williams, Case No. 1:17-cr-00239-SWS (D. Wyo. May 11, 2018)
United States v. Williams, Case No. 18-8053 (10th Cir. Aug. 16, 2019)
United States v. Gibson, Case No. 2:18-cr-00070-NDF (D. Wyo. July 9, 2018)
United States v. Gibson, Case No. 18-8083 (10th Cir. Aug. 16, 2019)
United States v. Bolduan, No. 1:17-cr-00384-CMA) (D. Colo. March 14, 2019)
United States v. Bolduan, No. 19-1050 (10th Cir. Aug. 21, 2019)
United States v. Englehart, No. 2:12-cr-00026-ABJ (D. Wyo. Oct. 16, 2018)
United States v. Englehart, No. 19-8006 (10th Cir. June 25, 2019)

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PETITION FOR WRIT OF CERTIORARI

Petitioners Allen Dodson, Bryan Six, Kendal Ray Williams, Kenneth Roy Gibson, Eric Ronald Bolduan, and Monty Englehart respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished order in Mr. Dodson's appeal is available at 775 Fed. Appx. 442, and is included as Appendix A. The district court's unpublished order denying Mr. Dodson's motion to dismiss is available at 2018 WL 6839661, and is included as Appendix B.

The Tenth Circuit's unpublished order in Mr. Six's appeal is available at 775 Fed. Appx. 443, and is included as Appendix C. The district court's unpublished order denying Mr. Six's motion to dismiss is not available on a commercial legal database but is included as Appendix D.

The Tenth Circuit's unpublished order in Mr. Williams's appeal is available at 775 Fed. Appx. 449, and is included as Appendix E. The district court's unpublished order denying Mr. Williams's motion to dismiss is not available on a commercial legal database but is included as Appendix F.

The Tenth Circuit's unpublished order in Mr. Gibson's appeal is available at 775 Fed. Appx. 446, and is included as Appendix G. The district court's unpublished order denying Mr. Gibson's motion to dismiss is available at 2018 WL 9371677, and is included as Appendix H.

The Tenth Circuit's unpublished order in Mr. Bolduan's appeal is available at 775

Fed. Appx. 455, and is included as Appendix I. The district court's oral ruling rejecting Mr. Bolduan's nondelegation challenge is included as Appendix J.

The Tenth Circuit's unpublished order in Mr. Englehart's appeal is available at 772 Fed. Appx. 722, and is included as Appendix K. The Tenth Circuit's order denying panel rehearing is included as Appendix L. The district court's unpublished order denying Mr. Englehart's motion to dismiss is not available on a commercial legal database but is included as Appendix M.

JURISDICTION

The district courts had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit affirmed Mr. Dodson's conviction and Mr. Six's conviction on August 14, 2019. The Tenth Circuit affirmed Mr. Williams's conviction and Mr. Gibson's conviction on August 16, 2019. The Tenth Circuit affirmed the district court's ruling imposing a registration requirement as a condition of Mr. Bolduan's supervised release on August 21, 2019. The Tenth Circuit affirmed Mr. Englehart's conviction on June 25, 2019, and denied Mr. Englehart's petition for rehearing on July 23, 2019. Justice Sotomayor has extended the time for Mr. Englehart to petition for certiorari to December 26, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Article I, Section 1 of the U.S. Constitution provides:

> **Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States.

U.S. Const. art. I, § 1.

18 U.S.C. § 2250 provides in relevant part:

(a) In general.--Whoever—

> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

34 U.S.C. § 20913 provides in relevant part:

> **(a) In general**
>
> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
>
> **(b) Initial registration**
>
> The sex offender shall initially register—
>
> > (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
> >
> > (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.
>
> . . .
>
> **(d) Initial registration of sex offenders unable to comply with subsection (b)**

> 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 and for other categories of sex offenders who are unable to comply with subsection (b).

28 C.F.R. § 72.3 provides:

> The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.
>
> Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.
>
> Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

STATEMENT OF THE CASE

Last term, this Court granted certiorari in *Gundy v. United States*, 139 S.Ct. 2116 (2019), to resolve whether 34 U.S.C. § 20913(d) is an unconstitutional delegation of legislative authority to the Executive Branch. This Court (without Justice Kavanaugh's participation) fractured in *Gundy*. As the three-Justice dissent noted, the four-Justice plurality opinion "resolves nothing." 139 S.Ct. at 2131 (Gorsuch, J., dissenting). The petitioner in *Gundy* has petitioned for rehearing. *Gundy v. United States*, No. 16-1829 (July 11, 2019). The petition is still pending. This Court should

grant the petition for rehearing in *Gundy* and hold this petition pending *Gundy*'s disposition on rehearing. Two other petitions have also been relisted, *Paul v. United States*, 17-8830 & *Caldwell v. United States*, 18-6852. If this Court grants either of those petitions, it should hold this petition pending that case's disposition. Otherwise, this Court should grant this petition to reconsider the question presented (but not resolved) in *Gundy*.

As Justice Alito remarked in his concurrence in *Gundy*, it is also time for this Court to revisit the nondelegation doctrine. 139 S.Ct. at 2131. As it exists now, the doctrine is ineffective. If the Court does not grant the petition for rehearing in *Gundy*, it should use this petition to adopt an approach to the nondelegation doctrine that actually enforces the Constitution's separation of powers. Under a meaningful approach to legislative delegations, § 20913(d)'s delegation to the Executive Branch would not pass constitutional muster.

A. Statutory and Legal Background

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"), Pub. L. No. 109-248, Tit. L, 120 Stat. 587 (2006), to establish a comprehensive national registration system for sex offenders. 34 U.S.C. § 20901, *et seq*. The Sex Offender Registration and Notification Act ("SORNA") comprises a significant portion of the Adam Walsh Act. *See* 34 U.S.C. §§ 20901-20929. SORNA requires certain sex offenders to register in jurisdictions where they reside, work, or attend school. 34 U.S.C. §§ 20911(5), 20913(a); *see also* 34 U.S.C. § 20911(1) (defining a "sex offender" as "an individual who was convicted of a sex offense"). SORNA requires these offenders to report periodically in person, and to provide additional

information, including school and employment locations, DNA, finger and palm prints, vehicle descriptions, and Internet identifiers. 34 U.S.C. §§ 20914, 20916, 20918. SORNA also makes it a federal felony for a sex offender who is required to register under SORNA to travel in interstate or foreign commerce and to thereafter knowingly fail to register or update a sex-offender registration. 18 U.S.C. § 2250(a).

Congress did not decide when or how SORNA's registration requirements, and its related criminal penalties, apply to the more than 500,000 people convicted of a sex offense before the law's July 27, 2006 enactment.[1] Instead, Congress delegated to the Attorney General the power to decide SORNA's retrospective application to these pre-Act offenders. Section 20913(d) provides, *intra alia*: "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 . . . and to prescribe rules for the registration of any such sex offenders . . . ." 34 U.S.C. § 20913(d).[2] The question presented here is whether § 20913(d)'s delegation violates the constitutional separation of powers, as embodied in the nondelegation doctrine.

The Constitution establishes a tripartite system of government that separates

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[1] It is our position that Congress also did not decide *whether* SORNA's registration requirements, and its related criminal penalties, apply to pre-Act offenders. We address this issue in Section II, *infra*, as it has divided this Court and is in need of resolution.

[2] It was not until six months after SORNA's enactment that the Attorney General issued guidance on SORNA's applicability to pre-Act offenders. This interim rule stated that SORNA requires registration of "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act." 28 C.F.R. § 72.3; Applicability of the Sex Offender Registration and Notification Act, 72 F.3d. Reg. 8894 (Feb. 28, 2007). The four-Justice plurality in *Gundy* concluded that this "rule has remained in force ever since." 139 S.Ct. at 2128. In Section II, *infra*, we dispute that point in light of additional rules promulgated by subsequent Attorneys General. *See* 139 S.Ct. at 2132 (Gorsuch, J., dissenting).

power among the three federal branches. All legislative powers are vested in Congress. U.S. Const. art. I, § 1. Laws must be made according to "a single, finely wrought and exhaustively considered, procedure," including bicameralism and presentment. *INS v. Chadha*, 462 U.S. 919, 951 (1983). In contrast, the Executive Branch enforces the laws passed by Congress. *Ex Parte United States*, 287 U.S. 241, 251 (1932).

The nondelegation doctrine prohibits Congress from delegating its legislative powers to the Executive. *See*, *e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371-372 (1989). "If Congress could pass off its legislative power to the executive branch, . . . the entire structure of the Constitution would make no sense." *Gundy*, 139 S.Ct. at 2134-2135 (Gorsuch, J., dissenting) (cleaned up).

At its core, the nondelegation doctrine protects individual liberty. *Mistretta*, 488 U.S. at 380; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). The Framers understood that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see also Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."). The people, via the Constitution, vested "the power to prescribe rules limiting their liberties in Congress alone." *Gundy*, 139 S.Ct. at 2133 (Gorsuch, J., dissenting).

The nondelegation doctrine also promotes democratic accountability. "Article I's

precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberate lawmaking." *Loving v. United States*, 517 U.S. 748, 757-758 (1996). Both deliberation and responsiveness are key: the Constitution's specific, structured lawmaking process promotes the regularity and stability that the rule of law requires, while Congress's representative nature ensures broad participation in lawmaking. *Gundy*, 139 S.Ct. at 2134 (Gorsuch, J., dissenting). Precluding Congress from delegating its lawmaking function also ensures that citizens can readily identify the source of laws, thereby preventing government actors from "wield[ing] power without owning up to the consequences." *DOT v. Ass'n of Am. R.R.*, 135 S.Ct. 1225, 1234 (2015) (Alito, J., concurring). The "lines of accountability" are clear; the "sovereign people know, without ambiguity, whom to hold accountable for the laws they have to follow." *Gundy*, 139 S.Ct. at 2134 (Gorsuch, J., dissenting) (cleaned up).

Finally, the nondelegation doctrine preserves federalism. Within our constitutional framework, states maintain their sovereign interests, in part, through their representative's participation in the federal legislature, particularly the Senate. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-551 (1985). "[T]he structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).

This Court has enforced the nondelegation doctrine most rigorously in the criminal context. *See*, *e.g.*, *Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1327 (2016) (noting that Congress may single out parties to a civil suit, whereas the Bill of

Attainder Clause, Art. I, § 9, as an implementation of separation of powers, prevents Congress from singling out persons for criminal punishment); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (permitting retroactive civil liability, whereas the Ex Post Facto Clause, in order to uphold separation of powers principles, prohibits retroactive criminal punishment). This Court has made clear that "defining crimes" is a "legislative" function, *United States v. Evans*, 333 U.S. 483, 486 (1948), and that Congress cannot delegate "the inherently legislative task" of determining what conduct "should be punished as crimes," *United States v. Kozminski*, 487 U.S. 931, 949 (1988). To "unite the legislative and executive powers in the same person would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands." *Gundy*, 139 S.Ct. at 2144-2145 (Gorsuch, J., dissenting) (cleaned up).

The void-for-vagueness doctrine reflects this special prohibition on congressional delegation of criminal lawmaking power. Vague criminal statutes are prohibited both because individuals are entitled to sufficient notice as to what constitutes a crime and to prevent legislatures from "abdicat[ing] their responsibilities for setting the standards of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 574-575 (1974). The void-for-vagueness doctrine is thus "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what it not." *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018).

Because the Constitution forbids the legislature from transferring power to define

crimes, the Court has also withheld *Chevron*[3] deference for agencies' interpretations of criminal statutes. The Court's refusal to grant *Chevron* deference in the criminal context reflects the Court's repeated admonition that Congress, not the Executive, must specify the terms of criminal laws. *See*, *e.g.*, *Abramski v. United States*, 134 S.Ct. 2259, 2274 (2014) (rejecting agency interpretation of criminal statute as irrelevant because "criminal laws are for courts, not the Government, to construe"); *United States v. Apel*, 134 S.Ct. 1144, 1151 (2014) ("we have never held that the Government's reading of a criminal statute is entitled to any deference").

There was a time when this Court enforced the nondelegation doctrine in the criminal context. *See*, *e.g.*, *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 542-543 (1935) (holding that Congress could not delegate to the Executive the power to approve codes of fair competition promulgated by trade associations, when the "[v]iolations of the provisions of the codes are punishable as crimes"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding, with respect to legislation providing for criminal sanctions, that Congress unconstitutionally delegated its legislative power to the Executive Branch); *United States v. George*, 228 U.S. 14, 20-22 (1913) (rejecting government's argument that federal agency could promulgate regulations creating a federal crime to fail to abide by agency requirements). But that is no longer true (and has not been true for the last 84 years). *Gundy*, 139 S.Ct. at 2131 (Alito, J., concurring).

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[3] *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).

Under the "intelligible principle" test, if "Congress shall lay down by legislative act an intelligible principle to which the person or body [to whom power is delegated] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). With respect to the Executive Branch, this test has required little more than that Congress "fix[] a primary standard," leaving the Executive "to fill up the details." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932). The doctrine is at its least utility in areas of "less interest" and "relatively minor matters." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001); *Wayman v. Southard*, 23 U.S. 1, 43 (1825). And while this Court has sometimes commented that the doctrine requires "substantial guidance," *Whitman*, 531 U.S. at 475, when delegations affect "important subjects," *Wayman*, 23 U.S. at 43, at no point during the last 84 years has this Court applied the doctrine to strike down a legislative delegation as unconstitutional.

The four-Justice plurality in *Gundy* upheld § 20913(d)'s delegation under the intelligible principle test. 139 S.Ct. at 2130. The three dissenters criticized the intelligible principle test as a "mutated version" of prior precedent with "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." 139 S.Ct. at 2139 (Gorsuch, J., dissenting). Justice Alito signaled his willingness to reconsider the test. 139 S.Ct. at 2131 (Alito, J., concurring). Justice Kavanaugh took no part in *Gundy* because he was not yet on the Court. In light of this history, we can discern no good reason for this Court not to grant rehearing in *Gundy*. But if not, review is appropriate here.

B. Proceedings Below

1. In 1995, prior to SORNA's enactment, Allen Dodson was convicted in Missouri of statutory rape under Mo. Stat. § 566.030. In 2016, Mr. Dodson moved to Kansas, but failed to register as a sex offender in Kansas. In 2018, a federal grand jury in Kansas charged Mr. Dodson with failure to register as a sex offender under 18 U.S.C. § 2250(a). Pet. App. 3a. Mr. Dodson moved to dismiss the indictment on nondelegation grounds. Pet. App. 4a. He argued that Congress's delegation to the Attorney General to determine the applicability of SORNA to pre-Act offenders violated the nondelegation doctrine. Pet. App. 4a. The district court denied the motion in light of binding Tenth Circuit precedent. Pet. App. 5a (citing *United States v. Nichols*, 775 F.3d 1225 (10th Cir. 2014), *rev'd on other grounds*, 136 S.Ct. 1113 (2016)). The Tenth Circuit summarily affirmed in light of *Nichols* and the plurality opinion in *Gundy*. Pet. App. 2a.

2. In February 2006, prior to SORNA's enactment, Bryan Six was convicted in Minnesota of attempted second-degree criminal sexual conduct under Minn. Stat. § 609.343. Pet. App. 10a. Mr. Six later moved to Colorado but did not register as a sex offender there. Mr. Six was indicted in Colorado for failure to register under § 2250(a), and he moved to dismiss the indictment on the grounds that SORNA's delegation to the Attorney General of the power to decide the statute's retroactive application violated the constitutional nondelegation doctrine. Pet. App. 10a. The district court denied the motion under *Nichols*. Pet. App. 10a-11a. The Tenth Circuit summarily affirmed based on *Nichols* and the *Gundy* plurality opinion. Pet. App. 7a-9a.

3. Mr. Kendal Ray Williams was charged in Wyoming with failure to register

under § 2250(a). Pet. App. 15a. Like Mr. Dodson and Mr. Six, Mr. Williams was required to register because of a conviction that pre-dated SORNA's enactment. Pet. App. 15a. He moved to dismiss the indictment on the grounds that SORNA's delegation to the Attorney General of the power to decide the statute's retroactive application violated the constitutional nondelegation doctrine. Pet. App. 15a-16a. The district court denied the motion under *Nichols*, Pet. App. 16a. The Tenth Circuit affirmed under *Nichols* and the *Gundy* plurality opinion. Pet. App. 13a-14a.

4. Mr. Kenneth Roy Gibson was also charged in Wyoming with failure to register under § 2250(a) based on a conviction that pre-dated SORNA's enactment. Pet. App. 21a. He also moved to dismiss the indictment on nondelegation grounds. Pet. App. 23a. The district court denied the motion under *Nichols*. Pet. App. 23a-24a. The Tenth Circuit affirmed under Nichols and the *Gundy* plurality opinion. Pet. App. 18a-20a.

5. In 1993, before SORNA's enactment, Mr. Eric Ronald Bolduan was convicted in Minnesota of attempted criminal sexual assault. Pet. App. 29a-30a. He was required to register as a predatory offender in Minnesota. *Id.* In January 2019, Mr. Bolduan was convicted in a federal district court in Colorado of transmitting threats by interstate communications and stalking by electronic means. Pet. App. 30a. Before sentencing, Mr. Bolduan objected to the imposition of a mandatory condition of supervised release requiring that he register under SORNA. Pet. App. 33a-34a. Mr. Bolduan argued that his offenses of conviction were not qualifying sex offenses under SORNA and that his 1993 Minnesota offense—which predated SORNA's enactment by almost thirteen years—could not serve as a basis for the SORNA registration requirement. *Id.* Specifically, Mr. Bolduan argued that SORNA's delegation to the

Attorney General of the power to decide the statute's retroactivity violated the constitutional nondelegation doctrine. Pet. App. 30a-31a. The district court disagreed and imposed the supervised release condition. Pet. App. 35a. The Tenth Circuit affirmed under the plurality opinion in *Gundy*. Pet. App. 31a.

6. In 1997, prior to SORNA's enactment, Mr. Englehart was convicted in Illinois of aggravated criminal sexual abuse. Pet. App. 38a. Mr. Englehart thereafter moved to Wyoming, but he did not register there. In 2012, a federal grand jury in Wyoming indicted Mr. Englehart for, *inter alia*, failure to register as a sex offender, 18 U.S.C. § 2250(a). Pet. App. 38a. He, too, moved to dismiss the indictment on nondelegation grounds. Pet. App. 38a. The district court denied the motion under *Nichols*, and the Tenth Circuit affirmed under the *Gundy* plurality opinion. Pet. App. 39a. Mr. Englehart petitioned for panel rehearing in light of the fractured decision in *Gundy* and the petition for rehearing filed in *Gundy*. Pet. App. 40a. The Tenth Circuit denied the petition for rehearing. Pet. App. 40a.

This timely joint petition follows.

REASONS FOR GRANTING THE WRIT

I. The fractured decision in *Gundy* resolved nothing.

The four-Justice plurality in *Gundy* held two things: (1) Congress delegated to the Executive Branch only *when and how to implement* SORNA against pre-Act offenders, not *whether to apply* SORNA to pre-Act offenders, 139 S.Ct. at 2123-2129; and (2) this delegation passed constitutional muster under the intelligible principle test, *id.* at 2129-2130. Despite the plurality opinion, as the dissent noted, there is no good reason to think that *Gundy* resolved either of these issues. 139 S.Ct. at 2131

(Gorsuch, J., dissenting). In fact, the plurality opinion "resolves nothing." *Id.*

1a. On the first issue, four Justices concluded that § 20913(d) requires the Attorney General to apply SORNA to all pre-Act offenders. *Gundy*, 139 S.Ct. at 2123. According to these four Justices, § 20913(d) only delegates to the Attorney General the task of applying SORNA to these pre-Act offenders "as soon as feasible." *Id.* The plurality concluded that this delegation "falls well within constitutional bounds." *Id.* at 2130.

b. The three-Justice dissent took the opposite view. *Gundy*, 139 S.Ct. at 2145-2148. According to the dissent, § 20913(d) invests "the Attorney General with sole power to decide whether and when to apply SORNA's requirements to pre-Act offenders." *Id.* at 2148. The dissent concluded that this delegation was plainly unconstitutional ("delegation running riot"). *Id.* at 2148.

c. Justice Alito concurred only in the judgment. *Id.* at 2130-2131. Justice Alito's four-sentence concurrence focused solely on the nondelegation doctrine (and his willingness to reconsider the intelligible principle test) and said nothing whatsoever as to the scope of SORNA's delegation to the Attorney General. *Id.*; *see also id.* at 2131 (Gorsuch, J., dissenting) ("Justice ALITO . . . does not join . . . the plurality's . . . statutory analysis").

Justice Alito answered that question, however, in his dissent in *Carr v. United States*, 560 U.S. 438 (2010). And his answer is on all fours with the three-Justice dissent in *Gundy*. "Congress elected not to decide for itself *whether* [SORNA's] registration requirements—and thus § 2250(a)'s criminal penalties—would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect.

Instead, Congress delegated to the Attorney General the authority to decide that question." *Carr*, 560 U.S. at 466 (Alito, J., dissenting) (emphasis added). In reaching this conclusion, Justice Alito studied at least six lower court decisions on this issue. *Id.* at 466 n.6. Justice Alito found that the "clear negative implication of th[e] delegation [was] that, without such a determination by the Attorney General, the Act would not apply to those with pre-SORNA sex-offense convictions." *Id.*

d. As it currently stands, four Justices believe that § 20913(d) does not delegate to the Attorney General the power to apply (or not) SORNA to pre-Act offenders (just when and how to do so feasibly), whereas four Justices believe that § 20913(d) in fact delegates to the Attorney General the power to apply (or not) SORNA to pre-Act offenders. *Compare Gundy*, 139 S.Ct. at 2123-219 (plurality), *with Gundy*, 139 S.Ct. at 2145-2148 (dissent) & *Carr*, 560 U.S. at 466 (Alito, J., dissenting). Only Justice Kavanaugh can break this tie. This Court must rehear *Gundy*, with Justice Kavanaugh participating. If not, this Court should grant this petition so that a full nine-member Court can actually resolve this important issue.

e. Resolution is particularly important because the four-Justice plurality acknowledged that, if § 20913(d) delegated to the Attorney General the power to determine SORNA's applicability to pre-Act Offenders ("to require them to register, or not, as she sees fit, and to change her policy for any reason at any time"), as the three *Gundy* dissenters and Justice Alito have concluded, then the Court "would face a nondelegation question." *Gundy*, 139 S.Ct. at 2123. In other words, if the delegation includes whether to apply SORNA to pre-Act offenders, then it is likely that at least seven Justices (the four in the plurality and the three in dissent) would find the

delegation unconstitutional.

As we see it, the better reading of Justice Alito's concurrence in *Gundy*, when combined with his dissent in *Carr*, is that Justice Alito would find that this broader type of delegation (delegating whether SORNA applies at all) passes constitutional muster under the intelligible principle test (as currently understood). *Gundy*, 139 S.Ct. at 2131 (Alito, J., concurring). This is significant in two respects. First, it indicates just how weak the intelligible principle test is (and the need to be rid of it). And second, it confirms that Justice Alito's concurrence should not be treated as a logical subset of the plurality opinion. Whereas the plurality found a more limited delegation constitutional under the intelligible principle test without questioning that test, Justice Alito found an expansive delegation constitutional under the intelligible principle test, yet indicated his willingness to abandon that test. There is no consistency between the two. This Court was hopelessly fractured in *Gundy*. Again, this Court (with Justice Kavanaugh) should rehear *Gundy*. If not, this Court should grant this petition.

2a. The calculus is the same with respect to the constitutional nondelegation issue. The four-Justice plurality did not indicate any concern with the nondelegation doctrine's intelligible principle test. *Gundy*, 139 S.Ct. at 2130. But the three-Justice dissent did, noting that the doctrine "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." *Id.* at 2139 (Gorsuch, J., dissenting). The dissent also noted the doctrine's abuse: "where some have claimed to see intelligible principles many less discerning readers have been able only to find gibberish." *Id.* at 2140 (cleaned up). Justice Alito also indicated

his willingness to reconsider the intelligible principle test. 139 S.Ct. at 2131 (Alito, J., concurring).

With a 4-to-4 Justice split on this exceptionally important issue, there is no reason why a full 9-member Court should not rehear *Gundy*. Like other unconstitutional delegations, § 20913(d) does not provide a "clear congressional authorization" to require registration of pre-Act offenders. *See USTA v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). If we expect Congress to speak clearly when delegating "decisions of vast economic and political significance" to agencies, then so to when Congress delegates authority to the Executive Branch to define the (civil and criminal) reach of a national sex offender registry. *See id.* It is one thing for the Executive to "act unilaterally to protect liberty." Brett Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1931 (2014). "[B]ut with limited exceptions, the President cannot act, except pursuant to statute, to infringe liberty and imprison a citizen." *Id.* Whether § 20913(d) is just such a statute is an issue that this Court failed to resolve in *Gundy*. This Court should rehear *Gundy*. If not, this Court should grant this petition.

II. This issue is extremely important.

1. Review is also necessary because this issue is extremely important. There are some 500,000 pre-Act offenders. *Gundy*, 139 S.Ct. at 2131 (Gorsuch, J., dissenting). Whether SORNA applies to a half-million people is obviously a question of exceptional importance. We know this because of the grant of certiorari in *Gundy* itself. This Court would not have granted certiorari in *Gundy* if the issue is

unimportant. Because the fractured decision in *Gundy* failed to resolve anything, review is necessary again.

2. It is also critically important that this Court revisit the nondelegation doctrine's intelligible principle test. It is a test that was born from historical accident and that "has no basis in the original meaning of the Constitution." *Gundy*, 139 S.Ct. at 2139 (Gorsuch, J., dissenting). It is a test condemned by judges and scholars "representing a wide and diverse range of views" "as resting on misunderstood historical foundations" *Id.* at 2139-2140 (cleaned up). It is a test that "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional." *Id.* at 2140. It is a test that allows even the broadest delegations – delegations to the executive to define the reach of a crime – to pass constitutional muster. 139 S.Ct. at 2131 (Alito, J., dissenting). It is a test that considers "small-bore" broad legislative delegations that affect the liberty of hundreds of thousands of individuals. 139 S.Ct. at 2130. Its ineffectiveness is stratospheric. This Court should rehear *Gundy*. If not, this Court should grant this petition to reconsider, and ultimately overrule, the intelligible principle test.

III. The *Gundy* plurality's statutory analysis is not a fair reading of SORNA's text.

Section 20913(d) delegates to the Attorney General "the authority to specify the applicability of the [registration] requirements . . . to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders." The *Gundy* plurality found that this language requires the Attorney General to apply SORNA to all pre-Act offenders; the "Attorney General's

discretion extends only to considering and addressing feasibility issues." 139 S.Ct. at 2123-2124. The plurality found that this Court had already effectively decided that issue in *Reynolds v. United States*, 565 U.S. 432 (2012). *Gundy*, 139 S.Ct. at 2124-2126. The plurality further relied on SORNA's stated purpose (to establish a "comprehensive national" sex offender registry), 34 U.S.C. § 20901, its past-tense definition of sex offender ("an individual who **was** convicted of a sex offense"), 34 U.S.C. § 20911(1) (emphasis added), and its legislative history, *Gundy*, 139 S.Ct. at 2126-2129. Finally, the four-Justice plurality concluded that no Attorney General had ever excluded pre-Act offenders from SORNA's reach. *Id.* at 2128 n.3.

The three-Justice dissent rightfully disagreed with all of this. 139 S.Ct. at 2145-2148 (Gorsuch, J., dissenting). As has Justice Alito. *Carr*, 560 U.S. at 466 n.6. To begin, *Reynolds* held that SORNA's registration requirements "do not apply to pre-Act offenders until the Attorney General specifies that they do." 565 U.S. at 435. That holding must mean that it is the Attorney General who decides whether SORNA applies to pre-Act offenders. "*Reynolds* plainly understood the statute itself as investing the Attorney General with sole power to decide whether and when to apply SORNA's requirements to pre-Act offenders." *Gundy*, 139 S.Ct. at 2148 (Gorsuch, J., dissenting).

SORNA's purpose – to establish a comprehensive national registry, 34 U.S.C. § 20901 – does not mention feasibility and does not attempt to guide the Attorney General's discretion at all. *Gundy*, 139 S.Ct. at 2146 (Gorsuch, J., dissenting). And "comprehensive" does not mean "coverage to the maximum extent feasible." *Id.* We know this because SORNA exempts a wide cast of sex offenders from its registration

requirements. *Id.* at 2146 n.97 (citing, *intra alia*, 34 U.S.C. § 20915 (setting a less-than-life duration registration requirement for the majority of sex offenders)); *Nichols v. United States*, 136 S.Ct. 1113, 1118-19 (2016) (rejecting Government's argument that SORNA's purpose means it must be interpreted to cover offenders who move abroad); *Reynolds*, 565 U.S. at 442 (rejecting Government's argument that SORNA's purpose means the statute must be construed to cover pre-Act offenders of its own force); *Carr*, 560 U.S. at 443, 454-57 (rejecting Government's argument that SORNA's purpose requires construing its criminal provision to cover offenders who traveled interstate before the Act's effective date).

SORNA's definition of "sex offender" as an individual who "was convicted of a sex offense" is also not enough to command the registration of all sex offenders, as there are individuals who meet the definition of a "sex offender," yet still are not required to register under SORNA. *See*, *e.g.*, 34 U.S.C. § 20915 (durational requirements that permit the majority of sex offenders to time out of any registration requirements); *Gundy*, 139 S.Ct. at 2147. At most, this definition confirms that Congress wanted the Attorney General to have the option of covering pre-Act offenders.

The plurality's use of committee reports and statements by individual legislators is also not persuasive evidence of the meaning of a statute. *Gundy*, 139 S.Ct. at 2147-2148 (Gorsuch, J., dissenting). "[E]ven taken on their own terms, these statements do no more than confirm that some members of Congress hoped and wished that the Attorney General would exercise his discretion to register at least some pre-Act offenders." *Id.* at 2148. The statutory history of SORNA actually undermines the plurality's opinion. While a House of Representatives bill would have made the law

applicable to pre-Act offenders, H.R. 4472, 109th Congr. § 111(3) (as passed by House Mar. 8, 2006), a Senate bill left the retroactivity question to the Attorney General, S. 1086, 109th Cong. § 104(a)(8) (as passed by Senate, May 4, 2006). Congress ultimately enacted a final version similar to the Senate bill. *Carr*, 560 U.S. at 466 (Alito, J., dissenting).

SORNA's history undermines the plurality's view in another respect. According to the *Gundy* plurality, the Attorney General's initial interim rule applying SORNA to pre-Act offenders was never altered by subsequent Attorneys General. 139 S.Ct. at 2128 n.3. As the dissent noted, however, "different Attorneys General have exercised their discretion in different ways." 139 S.Ct. at 2132. Attorney General Mukasey, for instance, issued guidelines "directing States to register some but not all past offenders." *Id.* These differing guidelines confirm that § 20913(d) delegates to the Attorney General *whether* (not just how and when) to apply SORNA to pre-Act offenders.

In any event, as mentioned above, the Court is currently split 4-to-4 on this issue. It should rehear *Gundy*, with Justice Kavanaugh participating, to resolve the issue. If not, it should resolve the issue via this petition.

IV. The Court should revisit, and overrule, the nondelegation doctrine's intelligible principle test.

The intelligible principle test should have never come about. Its application has been a "misadventure" with no basis in the original meaning of the Constitution. *Gundy*, 139 S.Ct. at 2139, 2141 (Gorsuch, J., dissenting). This Court should reconsider the nondelegation doctrine and adopt a different approach. *Gundy*, 139

S.Ct. at 2131 (Alito, J., concurring).

1. Under an originalist interpretation of the Constitution, the legislative nature of § 20913(d)'s delegated powers ends the inquiry and requires this Court to invalidate the delegation. *See*, *e.g.*, *DOT*, 135 S.Ct. at 1246 (Thomas, J., concurring) ("[T]he original understanding of the federal legislative power . . . require[s] that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."); *Gundy*, 139 S.Ct. at 2131 (Alito, J., concurring) ("The Constitution confers on Congress certain 'legislative [p]owers,' Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government."). "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 602 (1892). This "bright-line rule approach [] requires each branch to exercise only a certain type of power and to follow all of the constitutional procedures associated with the exercise of that power." Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1035 (2006).

Under this test, this is an easy case. It is up to Congress, not the Executive, to determine whether, when, and how SORNA, and its concomitant criminal penalties, apply to pre-Act offenders. *Wayman*, 23 U.S. at 42-43 ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative. . . . [Those powers] must be entirely regulated by the legislature itself."). "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty." *Gundy*, 139 S.Ct. at 2131 (Gorsuch, J., dissenting).

The Framers understood "that it would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* (quotations omitted). "Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement." *Id.*; *see also DOT*, 135 S.Ct. at 1237 (Alito, J., concurring) ("Congress, vested with enumerated 'legislative Powers,' Art. I, § 1, cannot delegate its 'exclusively legislative' authority at all.").

Yet, § 20913(d) "purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens." *Gundy*, 139 S.Ct. at 2131 (Gorsuch, J., dissenting). In doing so, gone is the need to "win approval of two Houses of Congress" and to secure "the President's approval or obtain enough support to override his veto." *Id.* at 2134. Gone is the separation of powers. *Id.* ("If Congress could pass off its legislative power to the executive branch, the vesting clauses, and indeed the entire structure of the Constitution, would make no sense.") (cleaned up).

> [E]nforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law. So when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed. Indeed, the framers afforded us independence from the political branches in large part to encourage exactly this kind of fortitude to do our duty as faithful guardians of the Constitution.

Id. (cleaned up). This Court should strike § 20913(d) as an unlawful delegation of legislative authority to the Executive Branch.

2. This Court might also adopt a nondelegation doctrine similar to the one used prior to the intelligible principle test. *Gundy*, 139 S.Ct. at 2135-2138 (Gorsuch, J., dissenting). This Court could ask: (1) despite the delegation, is Congress still required to make all underlying policy decisions; (2) has Congress made the application of its rule dependent on executive fact-finding; (3) does the delegation at issue overlap with authority the Constitution vests separately in another branch; and (4) has Congress offered meaningful guidance with respect to its delegation. *Id.* at 2136-2137. When this Court has asked these questions, it has readily (and rightfully) struck down statutes under the nondelegation doctrine. *Id.* at 2137-2138 (discussing *A.L.A. Schechter Poultry*, 295 U.S. 495, and *Panama Refining Co.*, 293 U.S. 388); *see also Evans*, 333 U.S. 483 (refusing to read a penalty provision into a criminal statute where the statute itself did not provide the necessary penalties).

Under this test, § 20913(d) is easily an unconstitutional delegation of legislative authority. The statute provides no meaningful guidance to the Attorney General. It does not simply leave "the Attorney General with only details to dispatch," but instead delegates all of the relevant policy decisions to the Executive Branch. *Gundy*, 139 S.Ct. at 2143 (Gorsuch, J., dissenting). "As the government itself admitted in *Reynolds*, SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them." *Id.* "In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak . . . ." *Id.* "Because members of Congress could not reach

consensus" on this issue, this was "one of those situations where they found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge." *Id.*

SORNA is also not "an example of conditional legislation subject to executive fact-finding." *Id.* "Instead, it gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders." *Id.* SORNA also "does not involve an area of overlapping authority with the executive." *Id.* "If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people." *Id.* at 2144.

3. At a minimum, this Court should forego the intelligible principle test in this criminal case. "[D]efining crimes" is a "legislative" function. *Evans*, 333 U.S. at 486. Congress cannot delegate "the inherently legislative task" of determining what conduct "should be punished as crimes." *Kozminski*, 487 U.S. at 949. Nor can Congress leave to another branch the authority to adopt criminal penalties. *Evans*, 333 U.S. at 495. To "unite the legislative and executive powers in the same person would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands." *Gundy*, 139 S.Ct. at 2144-2145 (Gorsuch, J., dissenting) (cleaned up).

This Court has left unresolved whether more specific guidance is needed "when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *Touby v. United States*, 500 U.S. 160, 165-166 (1991). At a

minimum, this Court should revisit the nondelegation doctrine to require more guidance in the criminal context. *See*, *e.g.*, Barkow, 58 Stan. L. Rev. at 990 (advocating for a "more stringent enforcement of the separation of powers in criminal cases, where it is most needed"). The power to punish is constitutionally distinct, as reflected in the Bill of Rights (and, specifically, the Fourth, Fifth, Sixth, and Eighth Amendments). It is reflected in a range of doctrines, from the rule of lenity to void-for-vagueness principles. And it is manifest in the Constitution's prohibitions against criminal ex post facto laws and bills of attainder.

Under a heightened standard, § 20913(d) is unconstitutional. "[I]t's hard to see how giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices might be permissible." *Gundy*, 139 S.Ct. at 2144 (Gorsuch, J., dissenting). It is also "hard to see how Congress may give the Attorney General the discretion to apply or not apply any or all of SORNA's requirements to pre-Act offenders, and then change his mind at any time." *Id.* "If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people."

The question presented here has broad implications. As Justice Gorsuch sounded in dissent, it is not "hard to imagine how the power at issue in this case—the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties—could be abused in other settings." 139 S.Ct. at 2144.

> To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to 'unite the legislative and executive powers in

> the same person—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.

Id. at 2144-2145 (cleaned up). Whatever else the nondelegation doctrine might protect against, it must protect against this. Because the intelligible principle test falls short even in this regard, this Court should revisit that test and replace it with a more meaningful one.

V. These cases are excellent vehicles.

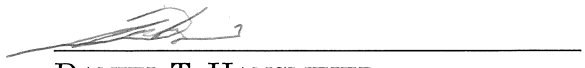
If this Court declines to rehear *Gundy*, this joint petition is an excellent vehicle to resolve the issue left unresolved in *Gundy*. Each petitioner was convicted of a sex offense prior to SORNA's enactment. Pet. App. 3a, 7a, 15a, 21a, 29a-30a, 38a. Each petitioner moved to dismiss the federal failure-to-register charge, 18 U.S.C. § 2250(a), via a pretrial motion to dismiss (or objected to a condition requiring registration as a sex offender). Pet. App. 3a, 10a, 15a, 21a, 30a, 33a, 38a. Each petitioner thereafter appealed the denial of his motion to dismiss to the Tenth Circuit (or the imposition of a sex-offender-registration condition), who affirmed each conviction (and sentence) on the merits. Pet. App. 1a-2a, 7a-9a, 13a-14a, 18s-20a, 31a, 37a-39a. The issue was preserved in every case. There are no vehicle problems that would preclude this Court from resolving, on the merits, the issue left unresolved in *Gundy*.

CONCLUSION

This Court should grant rehearing in *Gundy*. If not, this Court should grant this petition.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender



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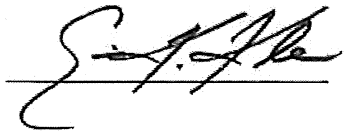

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FILED
United States Court of Appeals
Tenth Circuit

August 14, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALLEN DODSON,

Defendant - Appellant.

No. 19-3098
(D.C. No. 2:18-CR-20048-DDC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

This panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This matter comes on for consideration of the parties' *Joint Motion for Summary Disposition*. Upon consideration thereof, the motion is granted and the district court's judgment is affirmed.

The defendant was convicted, following the entry of a conditional guilty plea, of failure to register as a sex offender, in violation of the Sex Offender Registration

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

and Notification Act ("SORNA"), 18 U.S.C. § 2250. He was sentenced to 10 months' incarceration plus five years of supervised release.

On appeal, the only argument the defendant presents is that application of SORNA to him, a pre-act offender, violates the nondelegation doctrine. This court has rejected that argument in *United States v. Nichols*, 775 F.3d 1225, 1230-31 (10th Cir. 2014), *rev'd on other grounds sub nom. Nichols v. United States*, 136 S.Ct. 1113 (2016). *See also Gundy v. United States*, 139 S.Ct. 2116 (2019).

Accordingly, the judgment of the district court is **AFFIRMED**. The mandate shall issue forthwith.

Entered for the Court

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEN DODSON,

Defendant.

Case No. 18-20048-01-DDC

MEMORANDUM AND ORDER

This matter is before the court on defendant Allen Dodson's Motion to Dismiss Indictment (Doc. 20). Mr. Dodson asserts that the statute under which he was convicted, the Sex Offender Registration and Notification Act ("SORNA"), is unconstitutional. The government has filed a Response (Doc. 23). For reasons explained below, the court denies Mr. Dodson's Motion.

I. Background

A grand jury indicted Mr. Dodson on July 25, 2018, under 18 U.S.C. § 2250. The grand jury found that, "[f]rom on or about August 22, 2017[,] up to and including on or about July 25, 2018," Mr. Dodson was required to register under SORNA because of an earlier conviction in Morgan County, Missouri. Doc. 1 at 1. The grand jury also found that Mr. Dodson had failed to register and update his registration. *Id.*

Mr. Dodson does not challenge the substance of the Indictment against him. Rather, he challenges the constitutionality of a portion of the statute under which the grand jury indicted him. Mr. Dodson was convicted of the crime underlying his Indictment before Congress enacted SORNA. Congress delegated authority under SORNA to the United States Attorney General to

decide how to apply the statute to individuals like Mr. Dodson—defendants whose convictions predated SORNA's enactment. Mr. Dodson argues that Congress's delegation of this authority itself is unconstitutional under the nondelegation doctrine.

Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 on July 27, 2006. 34 U.S.C. § 20901 *et seq.* This statute includes SORNA, which requires states to "maintain . . . jurisdiction-wide sex offender registr[ies]," among other mandates. 34 U.S.C. § 20912. Specifically, SORNA outlines rules for offenders' initial registrations and their duty to update these registrations when they change "name, residence, employment, or student status." 34 U.S.C. § 20913(c). Mr. Dodson challenges 34 U.S.C. § 20913(d):

> 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 and for other categories of sex offenders who are unable to comply with subsection (b).

34 U.S.C. § 20913(d).

Mr. Dodson asserts that Congress, when delegating this discretion to the Attorney General, failed to "'articulate any policy or standard that would serve to confine the discretion'" of the Attorney General. Doc. 20 at 5 (quoting *Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989)). This failure, Mr. Dodson contends, renders Congress's delegation "'constitutionally invalid.'" *Id.* (quoting *Mistretta*, 488 U.S. at 374 n.7). Mr. Dodson asserts that SORNA allows the Attorney General, "without any explicit guidance[,] . . . to decide whether to apply SORNA retroactively." *Id.*

But the government argues that the Tenth Circuit and every other Circuit except the Federal Circuit all have rejected constitutionality challenges to SORNA under the nondelegation doctrine. Doc. 23 at 6. The government asserts that the Tenth Circuit in *United States v. Nichols*

explicitly identified Congress's statutory policy statement that "'convey[ed] the intelligible principles upon which the Attorney General's delegated authority must be based.'" *Id.* at 6–7 (citing *United States v. Nichols*, 775 F.3d 1225, 1231 (10th Cir. 2014), *rev'd on other grounds*, *Nichols v. United States*, 136 S. Ct. 1113 (2016)).

II. Analysis

The Tenth Circuit's rejection of a constitutionality challenge to SORNA under the nondelegation doctrine binds this court.[1] The Circuit concluded—as the government argues—that SORNA includes a clear congressional policy statement about the statute's intent: "'to protect the public from sex offenders and offenders against children' by establishing 'a comprehensive national system for the registration of those offenders.'" *Nichols*, 775 F.3d at 1231 (quoting 42 U.S.C. § 16913(d) (transferred to 34 U.S.C. § 20913(d))). Congress also plainly articulated the "boundaries of the authority it delegated to the Attorney General." *Id.* This authority comprises "a single, narrow decision: to determine SORNA's application to preenactment sex offenders." *Id.* "The Attorney General cannot do much more than simply determine whether or not SORNA applies to those individuals." *Id.* at 1231–32 (internal quotations omitted). Congress explicitly provided that the Attorney General would exercise this authority. *Id.* at 1232. And Congress specified the location, timing, method, and required information for sex offender registration under SORNA, as well as penalties for failing to register. *Id.* at 1232; *see also* 18 U.S.C. § 2250 (imposing fines and imprisonment for failing to register as SORNA requires). These additional statutory limits circumscribe the Attorney

[1] The court recognizes that an appeal based in part on a constitutional challenge to SORNA under the nondelegation doctrine currently is pending before the United States Supreme Court. *United States v. Gundy*, 695 F. App'x 639 (2d Cir. 2017), *cert. granted*, 138 S. Ct. 1260 (2018).

General's authority. *Id.* The Tenth Circuit thus held that SORNA withstands constitutional challenges based on the nondelegation doctrine. *Id.*

Here, Mr. Dodson's constitutional challenge mirrors the challenge defendant Lester Nichols brought against SORNA in *Nichols*. But, as the Circuit has concluded, SORNA does not violate the nondelegation doctrine. Instead, Congress outlined a clear policy, several boundaries, and a specific agency to enforce SORNA's retroactive application to pre-enactment sex offenders. The court thus denies Mr. Dodson's Motion to Dismiss Indictment based solely on this constitutional challenge.

IT IS THEREFORE ORDERED THAT defendant Allen Dodson's Motion to Dismiss Indictment (Doc. 20) is denied.

IT IS SO ORDERED.

Dated this 31st day of December, 2018, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

August 14, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRYAN SIX,

Defendant - Appellant.

No. 19-1023
(D.C. No. 1:18-CR-00136-WYD-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **MURPHY**, and **CARSON**, Circuit Judges.

In 2006, Defendant Bryan Six pled guilty to attempted kidnapping and attempted criminal sexual conduct in the second degree in Minnesota state court. Later in 2006, Congress enacted the Sex Offense Registration and Notification Act ("SORNA"). SORNA established a comprehensive, national sex offender registration system. In SORNA, Congress gave the Attorney General the authority to determine SORNA's retroactive reach. Exercising that authority, the Attorney General concluded that

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* After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

SORNA should apply to all pre-Act offenders—thus requiring Defendant to comply with the new registration scheme.

Defendant failed to register. A federal grand jury indicted Defendant, charging him with Failure to Register in violation of 18 U.S.C. § 2250(a)(1), 2(B), and (3). Defendant filed a motion to dismiss the indictment, asserting that Congress unconstitutionally delegated legislative power to the Attorney General when it authorized him to determine SORNA's applicability to sex offenders convicted before the enactment of the statute.

In his motion, Defendant acknowledged that Tenth Circuit precedent forecloses his argument. See United States v. Nichols, 775 F.3d 1225, 1232 n.3 (10th Cir. 2014) (concluding that the Attorney General's ability to determine SORNA's retroactive application does not violate the nondelegation doctrine), rev'd on other grounds by Nichols v. United States, 136 S. Ct. 1113 (2016). Defendant, nevertheless, preserved this argument because the United States Supreme Court granted certiorari to address this issue. The district court denied Defendant's motion to dismiss, concluding that it was bound by our decision in Nichols.

On June 20, 2019, the Supreme Court of the United States issued an opinion upholding Congress's SORNA delegation. Gundy v. United States, 139 S. Ct. 2116, 2129, 2131 (2019). Because the Supreme Court's decision in Gundy did not disturb our prior holding in Nichols that Congress did not violate the nondelegation doctrine—which Defendant concedes—Defendant's argument fails.

Accordingly, we AFFIRM.

Entered for the Court

Joel M. Carson III
Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 18-cr-00136-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. BRYAN SIX,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant Bryan Six's Motion to Dismiss the Indictment. (ECF No. 23).

On February 27, 2006, Defendant pled guilty to attempted kidnapping and attempted criminal sexual conduct in the second degree. Due to these convictions, Defendant was required to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), although SORNA was not enacted until July 27, 2006. On March 20, 2018, Defendant was indicted on a violation of 18 U.S.C. § 2250(a)(1), (2)(B), and (3) for failing to register as a sex offender. Defendant moves to dismiss that indictment, arguing that Congress violated the non-delegation doctrine when it enacted SORNA.

Defendant asserts that SORNA, specifically 34 U.S.C. § 20913(d), is an unconstitutional delegation of legislative power to the extent it authorizes the Attorney General "to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter." In other words, Defendant

challenges the Attorney General's authority to apply SORNA's requirements and penalties to predicate sex offenses which predate SORNA. Defendant contends this provision violates the non-delegation doctrine because "Congress failed to articulate any policy to guide the Attorney General in determining the law's applicability to pre-Act offenders." (ECF No. 23 at 4).

As Defendant acknowledges, the Tenth Circuit has held the Attorney General's authority to apply SORNA retroactively does not violate the non-delegation doctrine. In *United States v. Nichols*, the Tenth Circuit concluded that the Attorney General's ability to determine SORNA's retroactive application under 42 U.S.C. 16913(d), now codified as 34 U.S.C. § 20913(d), "does not violate the nondelegation doctrine" and "passes constitutional muster." 775 F.3d 1225, 1232 n. 3 (10th Cir. 2014) *rev'd on other grounds by Nichols v. United States*, 136 S.Ct. 1113 (2016). The Tenth Circuit has since reaffirmed this holding. *United States v. Cotonuts*, 633 Fed. App'x 501, 506-07 (10th Cir. 2016) ("Because we are bound by our controlling decision in *Nichols*, we conclude that [defendant's] nondelegation challenge fails.").

Defendant also highlights that the United States Supreme Court has granted certiorari on the issue of "[w]hether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine." *Petition for Writ of Certiorari*, *Gundy v. United States*, 2017 WL 8132120 (U.S. Sept. 20, 2017) (17-6086); *see Gundy v. United States*, 695 Fed. App'x 639 (2nd Cir. 2017), *cert granted in part*, 86 U.S.L.W. 3438 (U.S. March. 5, 2018) (No. 17-6086). But, the "granting of certiorari does not disturb the binding nature of" *Nichols*, *United States v. Thomas*, 2018 WL 2656559, at *2 (N.D. Iowa June 4, 2018), and I am bound

by *Nichols*. *See, e.g.*, *Colo. Rail Passenger Ass'n v. Fed. Transit Admin.*, 843 F.Supp.2d 1150, 1165 n.6 (D. Colo. 2011) ("[T]his Court is bound by Tenth Circuit law and, despite Plaintiff's invitation, cannot ignore binding precedent on this issue.").

Based on the foregoing, Defendant's Motion to Dismiss the Indictment (ECF No. 23) is **DENIED**.

The parties are ordered to file a joint status report by **July 9, 2018** advising the court of the next likely steps to occur in this matter.

Dated: June 28, 2018.

BY THE COURT:

/s/ Wiley Y. Daniel
Wiley Y. Daniel
Senior United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

August 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENDAL RAY WILLIAMS,
a/k/a Kendall Ray Williams,

Defendant - Appellant.

No. 18-8053
(D.C. No. 1:17-CR-00239-SWS-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HARTZ**, Circuit Judges.

Kendal Ray Williams pleaded guilty to one count of failing to register and to update his registration as required by the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20913, in violation of 18 U.S.C. § 2250(a). He was sentenced to 15 months' imprisonment and five years' supervised release.

Mr. Williams's conditional plea allowed him to appeal from the district court's denial of his motion to dismiss the indictment. In that motion Mr. Williams had

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

argued that 34 U.S.C. § 20913(d) violates the constitutional nondelegation doctrine by allowing the Attorney General to decide whether the registration requirement applies to offenders convicted before SORNA was enacted. Mr. Williams recognized that his argument was foreclosed by this circuit's precedent. *See United States v. Nichols*, 775 F.3d 1225, 1231-32 (10th Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 1113, 1118-19 (2016). But he sought to preserve the argument in light of the Supreme Court's grant of certiorari to consider whether § 20913(d) violates the nondelegation doctrine. *See United States v. Gundy*, 695 F. App'x 639 (2d Cir. 2017), *cert. granted*, 138 S. Ct. 1260 (2018) (No. 17-6086). The district court denied the motion to dismiss, citing *Nichols*.

Mr. Williams's appeal raises only the nondelegation argument. After the parties filed their briefs, the Supreme Court held that § 20913(d) does not violate the nondelegation doctrine. *See Gundy v. United States*, 139 S. Ct. 2116, 2121, 2129 (2019). This court thus directed the parties to file supplemental memorandum briefs addressing *Gundy*'s impact on this appeal. Mr. Williams concedes his appeal was contingent on the success of the petitioner in *Gundy*, and *Gundy*'s outcome therefore precludes his appeal. The government agrees.

Because *Gundy* decided Mr. Williams's only appeal point adversely to him, the district court's judgment is affirmed.

Entered for the Court

Harris L Hartz
Circuit Judge

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. KENDAL RAY WILLIAMS, Defendant.	Case No. 17-CR-239-SWS

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT

This matter comes before the Court on the Defendant's Motion to Dismiss Indictment (ECF No. 37) and the Government's response (ECF No. 38). Having considered the parties' arguments, reviewed the record herein, and being otherwise fully advised, the Court denies the motion.

Defendant Kendal Williams is charged with two counts of failing to register as a sex offender as required by the Sex Offender Registration and Notification Act (SORNA). (ECF No. 13.) He was convicted of running an interstate prostitution ring several years before SORNA was enacted and was not ordered to register as a sex offender at the time of his sentencing. *See United States v. Williams*, 291 F.3d 1180 (9th Cir. 2002). He contends Congress violated the nondelegation doctrine at the time it passed SORNA because it improperly delegated to the United States Attorney General the determination

whether SORNA applies to individuals who, like Mr. Williams, were convicted of a sex offense before SORNA became law.

> Under the U.S. Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., art. I, § 1. From this language and based on separation of powers principles, the Supreme Court "has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States,* 500 U.S. 160, 165, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991). Nonetheless, Congress may delegate authority to a different branch, and "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States,* 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (brackets and internal quotation marks omitted). The Supreme Court has further explained that an intelligible principle exists so long as "Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority." *Id.* at 372–73, 109 S.Ct. 647.

United States v. Nichols, 775 F.3d 1225, 1230–31 (10th Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 1113 (2016).

As both Mr. Williams and the Government note in their documents, the Tenth Circuit has previously considered this argument and found no violation of the nondelegation doctrine.[1] *See id.* at 1230-32. Specifically, the Tenth Circuit found Congress clearly delineated (1) the general policy driving SORNA, (2) that the Attorney General was the agency to apply the authority, and (3) the boundaries of the authority delegated to the Attorney General. *Id.* at 1231. Consequently, Mr. Williams' argument is foreclosed in this Court by the Tenth Circuit's decision in *Nichols*. *See Dobbs v. Anthem*

[1] The Court notes that Mr. Williams' attorney was required by Rules 3.1 and 3.3 of the Wyoming Rules of Professional Conduct to disclose the *Nichols* case as controlling precedent that is directly adverse to the defense's argument, and commends him for doing so here.

Blue Cross and Blue Shield, 600 F.3d 1275, 1279 (10th Cir. 1990) ("a district court is bound by decisions made by its circuit court").

Mr. Williams presents this motion to ensure the issue is preserved for appeal because the United States Supreme Court recently granted a petition for certiorari on the exact question from a case out of the Second Circuit. *See Gundy v. United States*, No. 17-6086, 138 S. Ct. 1260 (2018) (granting writ of certiorari on the question of whether SORNA improperly delegated legislative authority to the Attorney General); Pet. Writ of Cert., 2017 WL 8132120, at *16-19 (filed Sep. 20, 2017). Because the Tenth Circuit's decision in *Nichols* is binding on this Court, Mr. Williams' motion must be denied, but the issue has been properly preserved for appeal pending the Supreme Court's decision in *Gundy*.

IT IS THEREFORE ORDERED that the Defendant's Motion to Dismiss Indictment (ECF No. 37) is hereby **DENIED**.

DATED this 11th day of May, 2018.

Scott W. Skavdahl
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

August 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH ROY GIBSON,
a/k/a John Worth,

Defendant - Appellant.

No. 18-8083
(D.C. No. 2:18-CR-00070-NDF-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HARTZ**, Circuit Judges.

Kenneth Roy Gibson pleaded guilty to one count of failing to register and to update his registration as required by the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20913, in violation of 18 U.S.C. § 2250(a). The district court sentenced him to 21 months' imprisonment and five years' supervised release.

Mr. Gibson's conditional plea allowed him to appeal from the district court's denial of his motion to dismiss the indictment. In that motion Mr. Gibson had

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

argued, among other things, that 34 U.S.C. § 20913(d) violates the constitutional nondelegation doctrine by allowing the Attorney General to decide whether the registration requirement applies to offenders convicted before SORNA was enacted. Mr. Gibson recognized that his argument was foreclosed by this circuit's precedent. *See United States v. Nichols*, 775 F.3d 1225, 1231-32 (10th Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 1113, 1118-19 (2016). But he sought to preserve the argument in light of the Supreme Court's grant of certiorari to consider whether § 20913(d) violates the nondelegation doctrine. *See United States v. Gundy*, 695 F. App'x 639 (2d Cir. 2017), *cert. granted*, 138 S. Ct. 1260 (2018) (No. 17-6086). The district court denied the motion to dismiss, citing *Nichols* and further noting that this court, on direct appeal, had "specifically rejected Gibson's argument that his prior conviction should not qualify because it predated SORNA's enactment." R. Vol. I at 54.

Mr. Gibson's appeal raises only the nondelegation argument. After the parties filed their briefs, the Supreme Court held that § 20913(d) does not violate the nondelegation doctrine. *See Gundy v. United States*, 139 S. Ct. 2116, 2121, 2129 (2019). This court thus directed the parties to file supplemental memorandum briefs addressing *Gundy*'s impact on this appeal. Mr. Gibson concedes his appeal was contingent on the success of the petitioner in *Gundy*, and *Gundy*'s outcome therefore precludes his appeal. The government agrees.

Because *Gundy* decided Mr. Gibson's only appeal point adversely to him, the district court's judgment is affirmed.

Entered for the Court

Harris L Hartz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH ROY GIBSON, Defendant.	Case No: 18-CR-70-F

ORDER DENYING MOTION TO DISMISS INDICTMENT

This matter is before the Court on Defendant Kenneth Roy Gibson's (Gibson) Motion to Dismiss Indictment. The Court has reviewed the motion, response and reply. The Court finds a hearing is not required.

DISCUSSION

Factual Background

Gibson was convicted in the State of Colorado on April 12, 1993 for Third Degree Sexual Assault. As a result of this conviction, Gibson was required to register as a sex offender. In 2008, the Government charged Gibson under 18 U.S.C § 2250 for Failure to Register as a Sex Offender, and this Court sentenced him to 37 months of imprisonment with 5 years of supervised release.

After his initial release to federal probation, Gibson violated his probation several times. Most recently in 2017, he violated conditions of his release and this Court sent him back to federal prison. Gibson served his time at USP Marion, Illinois, and was released

on December 15, 2017 with no further supervision. The BOP provided Gibson a bus ticket from Marion, Illinois to Cheyenne, Wyoming.

On March 16, 2018, the grand jury charged Gibson by Indictment with a single count of failing to register and update his registration as required by the Sex Offender Registration Notification Act (SORNA) in violation of 18 U.S.C. § 2250(a) from on or about December 20, 2017 to March 12, 2018. Gibson filed a motion to dismiss seeking dismissal of the Indictment for three reasons. First Gibson claims he did not voluntarily engage in interstate travel as required under SORNA. Second, Gibson argues that even if the Court finds the travel between Wyoming and Illinois is sufficient to meet the interstate travel element of SORNA, it should dismiss the Indictment because the Government "manufactured jurisdiction" by transporting Gibson from Wyoming to Illinois while he was in custody and then by paying for a bus ticket for him to return from Illinois to Wyoming. Finally, Gibson challenges the Constitutionality of SORNA based on Congress' improper delegation of authority to the Attorney General.

SORNA

Congress passed SORNA to create a comprehensive national registry for sex offenders. 34 U.S.C. § 20901 ("In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress . . . establishes a comprehensive national system for the registration of [sex] offenders . . . ."). SORNA requires a sex offender to register in each state where he resides, is an employee, and is a student. 34 U.S.C. § 20913(a). An offender who moves across state lines and fails to register or an offender who is required

to register as a result of a federal conviction and fails to register can be charged with a federal crime. 18 U.S.C. § 2250(a).

Relevant to Gibson's motion, Congress did not decide whether sex offenders who committed offenses before SORNA took effect were required to register. 34 U.S.C. § 20913(d). Rather, Congress left this decision to the Attorney General. See 34 U.S.C. § 20913(d) ("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 . . . ."). In 2007, the Attorney General issued a rule extending SORNA's requirements "to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3. As a result, Gibson's qualifying conviction in 1993 subjects him to SORNA's registration requirements.

1. Constitutional Challenge to SONAR

For purposes of preserving the issue, Gibson claims SORNA is unconstitutional because Congress improperly delegated authority to the Attorney General to determine whether to apply SORNA retroactively. However, Gibson recognizes this argument is foreclosed by Tenth Circuit precedent. The Tenth Circuit found SORNA does not violate the nondelegation principle. *United States v. Nichols*, 775 F.3d 1225, 1231 (10th Cir. 2014), *rev'd on other grounds*, 136 S.Ct. 1113 (2016). Additionally, the Tenth Circuit has specifically rejected Gibson's argument that his prior conviction should not qualify because it predated SORNA's enactment. *United States v. Gibson*, 348 F. App'x 392, 394 (10th Cir. 2009)

While the Court recognizes this issue is currently pending before the United States Supreme Court in *Gundy v. United States*, --- S. Ct. ----, No. 17-6086, the United States Supreme Court has not issued a ruling in that case and this Court is bound by the Tenth Circuit precedent. For these reasons, the Court finds SORNA is not unconstitutional.

2. Whether the Indictment is Defective

Gibson filed his motion to dismiss, but failed to provide the Court the necessary framework for determining the motion. Gibson asserts that his motion is brought under Fed. R. Crim. P. 12(b)(2), which relates to motions for lack of jurisdiction. However, Gibson fails to provide the Court with any analysis of how the Court lacks jurisdiction in this case. The Court's jurisdiction for criminal cases is found at 18 U.S.C. § 3231 and provides "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." While Gibson challenges whether the Court can prove the offense charged in the Indictment, this does not implicate the Court's jurisdiction over this case.

Rather, it appears Gibson brings this motion under Fed. R. Crim. P. 12(b)(3)(B) for failure to state a claim. Specifically, Federal Rule of Criminal Procedure 12(b)(3)(B) allows a motion to dismiss for failure to state a claim, if the motion can be disposed of without a trial on the merits. Fed. R. Crim. P. 12(b)(3)(B). This is a challenge to the sufficiency of the Indictment. In considering the sufficiency of the indictment, the Tenth Circuit has stated:

> "An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense."

> *United States v. Dashney*, 117 F.3d 1197, 1205 (10th Cir. 1997). Challenging an indictment is not a means of testing the strength or weakness of the government's case, or the sufficiency of the government's evidence. *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir.1994). Rather, "[a]n indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *Id.* See also *United States v. Sampson*, 371 U.S. 75, 78-79, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962) (finding it irrelevant that charges had not been established by evidence, because at a motion to dismiss "the indictment must be tested by its sufficiency to charge an offense"). Courts should therefore avoid considering evidence outside the indictment when testing the indictment's legal sufficiency. *Hall*, 20 F.3d at 1087.

United States v. Todd, 446 F.3d 1062, 1067 (10th Cir. 2006).

However, in *Todd*, the Tenth Circuit also recognized that:

> In "limited circumstances," however, this Court has held that a district court may "dismiss charges at the pretrial stage . . . where the operative facts are undisputed and the government fails to object to the district court's consideration of those undisputed facts in making the determination regarding a submissible case." *Hall*, 20 F.3d at 1088. Pretrial dismissal based on undisputed facts is a determination that "as a matter of law, the government is incapable of proving its case beyond a reasonable doubt." *Id.* Dismissal in this manner is the "rare exception," not the rule. *Id.* Dismissals under this exception are not made on account of a lack of evidence to support the government's case, but because undisputed evidence shows that, as a matter of law, the Defendant could not have committed the offense for which he was indicted.

Todd, 446 F.3d at 1068.

Gibson claims the Indictment fails to state an offense under 18 U.S.C. § 2250 because his interstate travel was involuntary. Gibson asserts that his travel was compelled by the Government. Gibson argues the Government transported him out of Wyoming and housed him in Illinois. While acknowledging that Gibson was not in BOP custody when he returned to Wyoming, Gibson claims the interstate travel was not of his own volition because the Government transported him from Wyoming in the first place.

To prove a violation of 18 U.S.C. § 2250, the Government must prove Gibson: (1) was required to register under SORNA; "(2) he knowingly failed to comply with the obligation; and (3) he traveled in interstate or foreign commerce." *United States v. Forster*, 549 F. App'x 757, 760 (10th Cir. 2013). Gibson argues that the element of interstate travel includes a "voluntariness" component.

While this case could potentially fall within one of the "rare exceptions" where the Court could consider undisputed facts on a motion to dismiss, there are insufficient and unclear undisputed facts in this case. Assuming the statute requires the interstate travel to be voluntary, whether Gibson's travel was voluntary is a fact specific issue. The undisputed facts are that Gibson was transported from Wyoming to Illinois to serve a term of imprisonment. After his release he had no remaining term of supervision. The BOP provided him a bus ticket to Cheyenne, Wyoming. However, from that point there are facts in both Gibson and the Government's brief that are not clear if they are undisputed. For example, the Government asserts that Gibson requested to return to Cheyenne, Wyoming. At this stage, the Court finds that considering this issue on the merits is premature. Rather, the Court will only consider whether the allegations in the Indictment are sufficient to establish that Gibson violated SORNA.

The Indictment in this case charges that:

> Beginning on or about December 20, 2017, and continuing through on or about March 12, 2018, in the District of Wyoming, the Defendant, KENNETH ROY GIBSON, a/k/a John Worth, who is required to register under the Sex Offender Registration and Notification Act, traveled in interstate commerce and knowingly failed to register and update his registration as required by the Sex Offender Registration and Notification Act.

In violation of 18 U.S.C. § 2250(a).

(Doc. 16). In this case, the allegations in the Indictment are sufficient to establish that Gibson violated SONRA.

3. Virtual Entrapment

Gibson's claim that he was virtually entrapped is also not appropriate for a motion to dismiss. The concept of "virtual entrapment" finds its origins in *United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973). In *Archer*, the Second Circuit reversed the defendants' Travel Act convictions because the Government "manufactured" the jurisdictional interstate element. Specifically, the Second Circuit found "the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present." *Id.*

Gibson argues that he was virtually entrapped because the Government transported him out of Wyoming, then paid for his bus ticket back to Wyoming after his release from prison. Gibson claims that he never would have traveled to Illinois in the first place if it was not for the Government's intervention in transporting him to Illinois to be incarcerated.

Entrapment is an affirmative defense. *Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). Additionally, "entrapment is a relatively limited defense." *United States v. Russell*, 411 U.S. 423, 435 (1973). "The defense has two elements: first, government agents must have induced the defendant to commit the offense; and second, the defendant must not have been otherwise predisposed to commit the offense, given the opportunity." *United States v. Fadel*, 844 F.2d 1425, 1429 (10th Cir. 1988)

(citations omitted). "The defendant's lack of such predisposition is the crux of the entrapment defense." *Id*. (citations omitted).

The Court also finds this issue is not appropriate for consideration on the evidence. There are no undisputed facts regarding Gibson's predisposition for interstate travel and Gibson's facts were raised in his reply brief. In considering this argument based on the allegations in the Indictment, there is nothing to suggest the Government provoked Gibson or manufactured an interstate nexus by contriving the means for obtaining federal jurisdiction. There is nothing in the Indictment supporting a finding that the Government manufactured federal jurisdiction. As a result, the Court finds that the Motion to Dismiss is not appropriate at this time.

CONCLUSION

For all of the above stated reasons, the Court finds Gibson's Motion to Dismiss is DENIED. Gibson is asking the Court to rule on the evidence in this case, but the Court finds that such a ruling is premature at this stage. As a result, the Court will not consider the evidence, but will only review the Motion to Dismiss based on the sufficiency of the Indictment. The Indictment in this case is sufficient.

IT IS ORDERED that Defendant's Motion to Dismiss is DENIED.

Dated this 9 day of July, 2018.

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

August 21, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC RONALD BOLDUAN,

Defendant - Appellant.

No. 19-1050
(D.C. No. 1:17-CR-00384-CMA-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **MCKAY**, and **BACHARACH**, Circuit Judges.

Mr. Eric Bolduan appeals a supervised-release condition requiring him to register as a sex offender. We affirm.

The registration requirement. The registration requirement stemmed from Mr. Bolduan's 1993 conviction on a Minnesota charge of second-degree attempted sexual assault. At that time, federal law did not require

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* The parties do not request oral argument, and it would not materially help us to decide this appeal. We have thus decided the appeal based on the appellate briefs and the record on appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

sex offenders to register.[1] Roughly thirteen years later, Congress enacted the Sex Offender Registration and Notification Act, requiring registration of sex offenders. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 590 (2006); 34 U.S.C. §§ 20911(5), 20913(a). But the statute did not say whether the registration requirement would apply to sex offenders, like Mr. Bolduan, who had already completed their sentences. For these offenders, the statute authorized the Attorney General to determine the applicability of the registration requirement. 34 U.S.C. § 20913(d). The year after Congress enacted the Sex Offender Registration and Notification Act, the Attorney General exercised this authority and made the registration requirement applicable to all sex offenders, including those convicted of a sex offense prior to enactment of the Act. 28 C.F.R. § 72.3.

The imposition of a registration requirement for Mr. Bolduan. Earlier this year, Mr. Bolduan was convicted on federal charges of making threats by interstate communications and stalking through electronic means. 18 6U.S.C. §§ 875, 2261A(2)(B). At sentencing, the district court imposed supervised-release conditions, including a requirement for Mr. Bolduan to register as a sex offender. Mr. Bolduan appeals this condition, arguing that

[1] Minnesota law did require registration. Minn. Stat. Ann. § 243.166(6)(d)(1). But Minnesota's registration requirement is not involved in this appeal.

the condition was based on Congress's unconstitutional delegation of power to the Attorney General over the applicability of the registration requirement.

The decision in Gundy. During the appellate briefing, the Supreme Court decided *Gundy v. United States*, 139 S. Ct. 2116 (2019). In *Gundy*, the Supreme Court held that Sex Offender Registration and Notification Act's delegation to the Attorney General was not an unconstitutional delegation of Congress's legislative power.[2] *See* 139 S. Ct. at 2121 (plurality op.); *id.* at 2131 (Alito, J., concurring in the judgment). Given the Supreme Court's recent decision in *Gundy*, we conclude that the district court did not err in requiring Mr. Bolduan to register as a sex offender.

Affirmed.

Entered for the Court

Robert E. Bacharach
Circuit Judge

[2] We had likewise upheld the constitutionality of this delegation to the Attorney General. *United States v. Nichols*, 775 F.3d 1225 (10th Cir. 2014), *reversed on other grounds*, 136 S. Ct. 1113 (2016).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 17-cr-00384-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC RONALD BOLDUAN,

Defendant.

REPORTER'S TRANSCRIPT
(Sentencing Hearing)

Proceedings before the HONORABLE CHRISTINE M. ARGUELLO, Judge, United States District Court, for the District of Colorado, commencing at 11:04 a.m. on the 24th day of January, 2019, Alfred A. Arraj United States Courthouse, Denver, Colorado.

A P P E A R A N C E S

FOR THE PLAINTIFF:
VALERIA N. SPENCER, Assistant U.S. Attorney, 1801 California St., Suite 1600, Denver, CO 80202

FOR THE DEFENDANT:
MATTHEW C. GOLLA, Assistant Federal Public Defender, 633 17th St., Suite 1000, Denver, CO 80202

THE DEFENDANT: The information that was submitted within the PSR report added up to that amount, so I just, in fairness, I wanted that to be accurately reflected.

THE COURT: All right. I am not going to do anything with that, I am going to award the 7,800. That is what I will award.

All right. The defendant also objects to paragraph 98. He essentially just clarifies, not really objects, that he's also taking a medicine for high blood pressure. That has been noted. So, I don't intend to do anything further with that.

Mr. Golla, do you need to make any statement with respect to that?

MR. GOLLA: No, Your Honor, thank you.

THE COURT: The defendant also objects to mandatory condition No. 6, which requires him to register as a sex offender under the *Sex Offender Registration and Notification Act*. The Court agrees with the probation office that he is required to register as a sex offender based on the 1993 conviction in Minnesota.

Do you wish to make anything further with that?

MR. GOLLA: No, Your Honor.

THE COURT: All right. 17, or the next objection regards the conditions --

MR. GOLLA: Your Honor, I am sorry, I apologize.

In that particular objection, Mr. Bolduan is indicating he never registered as a sex offender in the State of Minnesota.

THE COURT: Well, it is indicated that he registered as a sex offender as recently as January 19, 2017.

THE DEFENDANT: I have never taken any action at any point in time to do so.

THE COURT: I do believe he is required to register as a sex offender for those prior convictions. So I am going to order that in my ruling.

MR. GOLLA: Very well. I just wanted to make sure he is not registered prior to this case as a sex offender in the State of Minnesota. He wanted me to make sure the Court was aware of that.

THE COURT: All right. Regarding the conditions of supervised release, the defendant objects to, I am not sure, the conditions, because he doesn't know what will happen if he is unable to pay. The objection is noted, but that is something that is to be worked out with the probation officer. And if he can't pay, they will make arrangements.

With respect to the search condition, he indicates that this condition would circumvent the Fourth Amendment protections against warrantless searches. I have dealt

United States v. Fanfan, the United States Sentencing Commission guidelines have become advisory to this Court.

Although this Court is not bound to apply those guidelines, it has consulted them and taken them into account, along with the sentencing factors set forth at 18 United States Code Section 3553(a).

The Court makes the following findings concerning the objections to the presentence report:

The Court finds that the 2-level enhancement pursuant to United States Sentencing Guideline Section 2A6.1(b)(2)(A) does apply under Count Group 4.

The Court finds that the defendant is required to register as a sex offender based on the *Sex Offender Registration and Notification Act*. The Court finds that all special conditions of supervised release noted in the sentence recommendation, including the computer limitation and the search condition, are appropriate in this case.

The Court determines that no finding is necessary concerning the remaining objections because those controverted matters will not be taken into account in calculating the sentence, nor will they affect the sentence that this Court imposes.

Neither the Government nor the defendant has challenged any other aspect of the presentence report, therefore, the remaining factual statements and guideline

If you are not able to afford an attorney for an appeal, the Court will appoint one to represent you. And, if you request, the Clerk of the Court must immediately prepare and file a Notice of Appeal on your behalf.

Is there any other business to be brought to my attention?

MS. SPENCER: Not on behalf of the United States. Thank you, Your Honor.

MR. GOLLA: No, Your Honor.

THE COURT: Thank you to the Deputy United States Marshals for your patience with us.

Mr. Bolduan, I hereby remand you to the custody of the United States Marshal for the District of Colorado.

Court will be in recess.

(Proceedings conclude at 12:15 p.m.)

R E P O R T E R ' S C E R T I F I C A T E

I, Darlene M. Martinez, Official Certified Shorthand Reporter for the United States District Court, District of Colorado, do hereby certify that the foregoing is a true and accurate transcript of the proceedings had as taken stenographically by me at the time and place aforementioned.

Dated this 14th day of March, 2019.

_____

s/Darlene M. Martinez, RMR, CRR

FILED
United States Court of Appeals
Tenth Circuit

June 25, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTY ENGLEHART,

Defendant - Appellant.

No. 19-8006
(D.C. No. 2:12-CR-00026-ABJ-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **McKAY**, and **BACHARACH**, Circuit Judges.

Appellant Monty Englehart, a convicted sex offender, was charged with failing to register under the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.* He moved to dismiss the indictment, arguing that SORNA violated the constitutional nondelegation doctrine by improperly delegating legislative power to the Attorney General. The district court denied the motion, and Mr. Englehart appealed.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

We hold that Mr. Englehart's nondelegation argument is foreclosed by *Gundy v. United States*, No. 17-6086, 2019 WL 2527473, at *1 (U.S. June 20, 2019). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In 1997, Mr. Englehart was convicted of aggravated criminal sexual abuse. Nine years later, Congress enacted SORNA, which requires convicted sex offenders to register in a national sex offender registry. *See* 34 U.S.C. § 20913(a). Title 18 U.S.C. § 2250(a) makes it a felony for an individual "required to register under [SORNA]" to "travel[] in interstate or foreign commerce" and "knowingly fail[] to register or update a registration as required by [SORNA]."

SORNA gives the Attorney General "the authority to specify the applicability of the [registration] requirements . . . to sex offenders convicted before [SORNA's] enactment . . . and to prescribe rules for the registration of any such sex offenders." 34 U.S.C. § 20913(d). Exercising this authority, the Attorney General issued an interim rule in 2007 applying SORNA's registration requirements "to all sex offenders, including sex offenders convicted of the offense . . . prior to the enactment of [SORNA]." 72 Fed. Reg. 8894-01 (Feb. 28, 2007) (to be codified at 28 C.F.R. § 72.3). In 2010, it issued a second regulation finalizing SORNA's retroactive applicability. 28 C.F.R. § 72.3.

Mr. Englehart was charged under 18 U.S.C. § 2250(a) for failing to register as required under SORNA and the regulation. He moved to dismiss the indictment, arguing that SORNA's grant of authority to the Attorney General to specify the extent of the Act's retroactive application violated the constitutional nondelegation doctrine. Mr.

Englehart acknowledged that his argument was "currently foreclosed," ROA at 18, by *United States v. Nichols*, 775 F.3d 1225 (10th Cir. 2014), which held that SORNA does not violate the nondelegation doctrine. *Id.* at 1231-32. But because *Gundy*—a case addressing "this very issue"—was then pending before the United States Supreme Court, he "raise[d] this argument to preserve it for further review." ROA at 22.

The district court denied the motion to dismiss, and Mr. Englehart appealed, urging the same arguments.

II. **ANALYSIS**

On June 20, 2019, the Supreme Court decided *Gundy*. The Court held that Congress did not "make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders," *Gundy*, 2019 WL 2527473, at *8, and that the "delegation easily passes constitutional muster," *id.* at *2.

III. **CONCLUSION**

The Supreme Court's holding in *Gundy* forecloses Mr. Englehart's nondelegation argument. Accordingly, we affirm.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

July 29, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTY ENGLEHART,

Defendant - Appellant.

No. 19-8006

ORDER

Before **MATHESON**, **McKAY**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MONTY ENGLEHART,

Defendant.

Case No: 12-CR-26-ABJ

ORDER DENYING MOTION TO DISMISS INDICTMENT

This matter comes before the Court on Defendant's Motion to Dismiss Indictment (ECF No. 51) ("Motion") and Plaintiff's Response to Motion to Dismiss Indictment (ECF No. 56) ("Response"). Having considered the written submissions, applicable law, and being otherwise fully advised, the Court finds the Motion should be **DENIED**.

This motion seeks dismissal of the indictment on the grounds that the Sex Offender Registration and Notification Act (SORNA) is based on Congress' improper delegation of authority to the attorney general. Motion at 1. The Motion admits that this argument is precluded by current Tenth Circuit case law *United States v. Nichols*, 775 F.3d 1225 (10th Cir. 2014) but states the issue is pending before the Supreme Court in *Gundy v. United States*, 138 S. Ct. 1260 (2018). *Id.* at 1, 5. Mr. Englehart believes that *Gundy* will abrogate *Nichols* and raises the argument to preserve it for further review. *Id.* at 5. The Government notes that Mr. Englehart acknowledges that *Nichols* is controlling and requests the motion be denied. Response at 3. Because current case law resolves the issue, the Court finds the Motion should be **DENIED**.

The Court notes that this Motion is only relevant to Count One, Failure to Register as a Sex Offender, in violation of 18 U.S.C. § 2250(a). Count Two is Possession of Child Pornography, in violation of 18 U.S.C. § 2252(a)(5)(B) and (b)(2). Why this Motion is a Motion to Dismiss Indictment instead of a Motion to Dismiss Count One is unclear.

It is hereby **ORDERED** that the Motion to Dismiss Indictment (ECF No. 51) is **DENIED**.

Dated this 16th day of October, 2018.

Alan B. Johnson
United States District Judge