NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Ricky Lynn Thomas - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Whether this Court should revisit its broad 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.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

United States v. Thomas, 1:18-cr-00010 (N.D. Iowa) (criminal proceedings), judgment entered October 11, 2018.

United States v. Thomas, 18-3275 (8th Cir.) (direct criminal appeal), judgment entered October 31, 2019.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other

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The petitioner, Ricky Thomas, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 18-3275, entered on October 31, 2019.

OPINION BELOW

On October 31, 2019, a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is unpublished and available at 782 F. App'x 518.

JURISDICTION

The Court of Appeals entered its judgment on October 31, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

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] 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).

B. Procedural History of Mr. Thomas's Case.

[1] It is Mr. Thomas's position that Congress also did not decide whether SORNA's registration requirements, and its related criminal penalties, apply to pre-Act offenders. The petition addresses this issue, as it has divided this Court and is in need of resolution.

[2] The four-Justice plurality in *Gundy* concluded that this "rule has remained in force ever since." 139 S. Ct. at 2128. Mr. Thomas disputes that point in light of additional rules promulgated by subsequent Attorneys General. *See* 139 S. Ct. at 2132 (Gorsuch, J., dissenting).

In 1993, pre-SORNA, Mr. Thomas was convicted of criminal sexual conduct, second degree in Minnesota state court. (PSR ¶ 4).[3] Due to this conviction, Mr. Thomas was required to register under SORNA. (PSR ¶ 4). Between March 2017 and January 2018, Mr. Thomas lived in Marion, Iowa, but failed to register as a sex offender. (PSR ¶ 6),

Mr. Thomas was indicted in the Northern District of Iowa with failure to register as a sex offender, in violation of 18 U.S.C. § 2250. (DCD 2). Mr. Thomas filed a motion requesting permission to file a late motion to dismiss. (DCD 16). In support of the motion, defense counsel noted he had just learned of the cert grant in *Gundy v. United States*, 17-6086, which could affect well-settled Eighth Circuit case law. (DCD 16). Defense counsel asserted this established good cause for the late filing. (DCD 16). The government resisted. (DCD 16). Ultimately, the district court granted defense counsel permission to file a late motion to dismiss. (DCD 17).

Mr. Thomas filed a motion to dismiss. (DCD 18). He asserted that 34 U.S.C. § 20913 is unconstitutional because it violates the nondelegation doctrine of the U.S. Constitution. (DCD 18). Mr. Thomas acknowledged that this argument was foreclosed by controlling Eighth Circuit case law, but noted that he hoped to preserve the issue for appeal, pending the decision in *Gundy*. (DCD 18). The government

[3] In this brief, "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. "DCD" refers to the criminal docket in Northern District of Iowa Case No. 1:18-cr-00010, and is followed by the docket entry number.

resisted the motion. (DCD 19). The district court denied Mr. Thomas's motion to dismiss. (DCD 25).

Mr. Thomas pled guilty to the sole count, pursuant to a conditional plea agreement. (DCD 21). The plea agreement allowed Mr. Thomas to appeal the denial of the motion to dismiss. (DCD 21). The case proceeded to sentencing. Ultimately, the court sentenced Mr. Thomas to 24 months of imprisonment, to be followed by a 5-year term of supervised release. (DCD 38).

Mr. Thomas appealed to the Eighth Circuit, maintaining his nondelegation doctrine challenge. While his appeal was pending, this Court rejected the defendant's argument in *Gundy*, in a fractured opinion. Based upon *Gundy*, the Eighth Circuit rejected Mr. Thomas's argument.

REASONS FOR GRANTING THE WRIT

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 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).

In reviewing nondelegation doctrine challenges, this Court currently employs the "intelligible principle" test. Under this 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, 27*6 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., 28*7 U.S. 77, 85 (1932). The doctrine is at its least utility in areas of "less interest" and "relatively minor matters." *Whitman*, 531 U.S. at 475; *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.

Last term, 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. But soon after, Justice Kavanaugh signaled his willingness to reevaluate the Court's nondelegation doctrine precedent. *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement on the denial of the petition for writ of certiorari). In light of this history, this Court, with a full Court, should review the nondelegation doctrine in Mr. Thomas's case.

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 2123-29; and (2) this delegation passed constitutional muster under the intelligible principle test, *id.* at 2129-30. 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 15 (Gorsuch, J., dissenting). In fact, the plurality opinion "resolves nothing." *Id.* 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.

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.

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.*

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) and *Carr*, 560 U.S. at 466 (Alito, J., dissenting). Only Justice Kavanaugh can break this tie. This Court must revisit the issue in *Gundy*, with Justice Kavanaugh participating.

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.

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*.

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 reconsider *Gundy*. Like other unconstitutional delegations, § 20913(d) does not provide a "clear congressional authorization" to require registration of pre-Act offenders. See *U.S. Telecom Ass'n 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*. Therefore, this Court should grant this petition.

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.

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 grant this petition to reconsider, and ultimately overrule, the intelligible principle test.

Further, the four Justice majority analysis on the statutory interpretation must be reversed. 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 2123-24. 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 2124-26. 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 2126-29. 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 2147-48 (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 reconsider its decision in *Gundy*, with Justice Kavanaugh participating, to resolve the issue.

In conclusion, 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.

CONCLUSION

For the foregoing reasons, Mr. Thomas respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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