No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

MARK STEVEN ELK SHOULDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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SUBMITTED: March 16, 2020

QUESTIONS PRESENTED

Whether SORNA can be applied, retroactively, through the Wetterling Act, to a defendant whose underlying sex offense conviction was prosecuted under the limited jurisdiction of the Major Crimes Act, who was no longer in a "special relationship" with the federal government at the time of his SORNA violations, and whose SORNA violation did not otherwise implicate any other basis for federal jurisdiction, e.g., interstate commerce?

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

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Mark Steven Elk Shoulder ("Mr. Elk Shoulder") petitions for a Writ of Certiorari to grant certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

The court of appeals issued its opinion denying Mr. Elk Shoulder's request for appellate relief on December 17, 2019. *United States v. Elk Shoulder (Elk Shoulder III)*, 788 Fed. Appx. 488 (9th Cir. 2019), Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Elk Shoulder (Elk Shoulder III)*, 788 Fed. Appx. 488 (9th Cir. 2019). Appendix A. The Ninth Circuit's previous opinion concerning the same issues arising from a prior prosecution is reported at *United States v. Elk Shoulder (Elk Shoulder II)*, 738 F.3d 948 (9th Cir. 2013). Appendix B.

LEGAL PROVISIONS INVOLVED

This case involves Article I, §1 of the United States Constitution; the Major Crimes Act, 18 U.S.C. § 1153; 18 U.S.C. § 2250; 34 U.S.C. § 20913, and 28 C.F.R. § 72.3. Appendices C, D, E, F, and G.

STATEMENT OF THE CASE

Mr. Elk Shoulder argues that the Wetterling Act, the predecessor to SORNA, was not retroactive and does not apply to him, especially because original criminal jurisdiction arose from the Major Crimes Act; without Wetterling Act jurisdiction,

SORNA does not apply to Mr. Elk Shoulder.

Next, Mr. Elk Shoulder argues that Congress's delegation to the Attorney General of the decision to make SORNA retroactive violates the nondelegation doctrine. This Court previously ruled that SORNA does not violate the nondelegation doctrine. *Gundy v. United States*, 139 S.Ct. 2116, 2121 (2019).

PRIOR PROCEEDINGS

Mr. Elk Shoulder's previous proceedings

On January 17, 1992, pursuant to Major Crimes Act jurisdiction and Mr. Elk Shoulder's Northern Cheyenne tribal membership and his political status as an "Indian," 18 U.S.C. § 1153, Mr. Elk Shoulder was convicted of aggravated sexual abuse with children in violation of 18 U.S.C. § 2241(c), and sentenced to 172 months imprisonment followed by five years of supervised release. *United States v. Mark Steven Elk Shoulder*, CR 91-36-BLG-JDS.

Mr. Elk Shoulder was released from prison on November 21, 2003.

On February 11, 2004, Mr. Elk Shoulder's supervised release was revoked, and he was sentenced to 30 months of imprisonment followed by 30 months of supervision. He was released from prison on March 24, 2006.

On August 10, 2006, Mr. Elk Shoulder was arrested for a violation of his supervised release, and on August 30, 2006, his supervised release was revoked and

he received a sentence of 24 months imprisonment, with no further supervision to follow.

Mr. Elk Shoulder was released from prison in May 2008.

Mr. Elk Shoulder's first SORNA prosecution

On February 23, 2009, a federal grand jury indicted Mr. Elk Shoulder for failure to register as a sexual offender in violation of 18 U.S.C. § 2250(a). *United States v. Mark Steven Elk Shoulder*, CR 09-23-BLG-JDS. He filed a motion to dismiss, which the court denied. Mr. Elk Shoulder was found guilty following a bench trial and was sentenced to 30 months imprisonment to be followed by 5 years of supervised release on March 3, 2010. His supervised release was revoked on July 8, 2011, and he was sentenced to ten months imprisonment. His supervised release was revoked again on May 3, 2012, and he was sentenced to eleven months imprisonment. His supervised release was revoked for the last time on May 29, 2013, and he was sentenced to 24 months imprisonment with no supervised release to follow.

Mr. Elk Shoulder was released from prison in December 2014.

Mr. Elk Shoulder appealed his criminal conviction to the Ninth Circuit Court of Appeals. His appeal was denied in *United States v. Elk Shoulder*, 696 F.3d 922

(9th Cir. 2012) (*Elk Shoulder I*), and in a superseding opinion. *United States v. Elk Shoulder*, 738 F.3d 948 (9th Cir. 2013) (*Elk Shoulder II*), Appendix B.

Mr. Elk Shoulder filed a petition for rehearing en banc. The petition was denied.

Mr. Elk Shoulder filed a petition for writ of certiorari to this Court. The petition was denied.

Mr. Elk Shoulder's second SORNA prosecution (the basis for this petition).

On April 20, 2017, a grand jury indicted Mr. Elk Shoulder for one count of failure to register as required under the Sex Offender Registration and Notification Act pursuant to 18 U.S.C. § 2250(a).

On April 27, 2017, Mr. Elk Shoulder was arraigned in Billings and pled not guilty.

On July 7, 2017, Mr. Elk Shoulder filed a motion to dismiss in the district court. The district court denied the motion on July 31, 2017.

On August 14, 2017, Mr. Elk Shoulder filed a motion to change plea. The plea agreement was filed on August 28, 2017, and reserved Mr. Elk Shoulder's right to appeal the denial of his motion to dismiss.

Mr. Elk Shoulder's change of plea hearing occurred on August 29, 2017.

The presentence report calculated a Total Offense Level of 13 and a Criminal

History Category of IV, yielding a Guidelines sentencing range of 24-to-30 months.

On January 10, 2018, the district court imposed a sentence of twelve months, to be followed by five years supervised release. The sentence was ordered to run concurrent to a pending State of Montana prosecution in Yellowstone County. The district court endorsed Mr. Elk Shoulder's appeal of the denial of his motion to dismiss.

Mr. Elk Shoulder appealed on January 12, 2018. (His "felony appeal.") Following briefing, on July 2, 2018, Mr. Elk Shoulder filed a motion to stay appellate proceedings pending this Court's decision in *Gundy*. The motion was granted and proceedings were stayed.

Mr. Elk Shoulder pled guilty in his State of Montana prosecution on November 14, 2018, and was sentenced to time-served. His federal term of supervised release commenced that day upon his release from state custody.

On November 21, 2018, a petition to revoke Mr. Elk Shoulder's supervised release was filed. On December 12, 2018, Mr. Elk Shoulder's supervised release was revoked and he was sentenced to six months imprisonment, followed by thirty months supervised release. He raised the jurisdictional challenges detailed herein.

Mr. Elk Shoulder appealed on December 21, 2018. (His "revocation appeal.") On April 17, 2019, after Mr. Elk Shoulder and the government filed their initial

briefs, the parties filed a joint motion to stay appellate proceedings pending this Court's decision in *Gundy*. The motion was granted and proceedings were stayed.

This Court issued its opinion in *Gundy* on June 20, 2019. 139 S.Ct. 2116. Following that decision, Mr. Elk Shoulder informed the Ninth Circuit Court of Appeals of the *Gundy* opinion, and on July 2, 2019, the stays in both appeals were lifted.

On October 11, 2019, Mr. Elk Shoulder informed the Ninth Circuit Court of Appeals that the *Gundy* petitioner had requested rehearing before this Court. On November 18, 2019, the Ninth Circuit held both appeals in abeyance "pending the Supreme Court's final resolution" of *Gundy*.

On November 25, 2019, Mr. Elk Shoulder informed the Ninth Circuit that this Court had denied Gundy's petition for rehearing.

On December 17, 2019, the Ninth Circuit Court of Appeals issued an unpublished decision, combining both of Mr. Elk Shoulder's appeals and affirming the district court decisions.

This petition follows.

Postscript – Mr. Elk Shoulder's current federal criminal prosecution

On March 21, 2019, Mr. Elk Shoulder was indicted on one count of failure to register as a sex offender, pursuant to 18 U.S.C. § 2250. *United States v. Mark Elkshoulder*, CR 19-29-BLG-SPW. Mr. Elk Shoulder filed a motion to dismiss his case, which was denied by the district court on October 22, 2019; a second motion to dismiss was denied on December 16, 2019. On January 9, 2020, Mr. Elk Shoulder appeared before the district court to change his plea to guilty. He is scheduled to be sentenced on May 13, 2020.

FACTUAL BACKGROUND

Mr. Elk Shoulder filed a motion to dismiss his case before the district court, relying on four principal arguments: that the Wetterling Act was not retroactive, especially because original criminal jurisdiction arose from the Major Crimes Act, and thus SORNA did not apply to Mr. Elk Shoulder; that the Sex Offender Registration and Notification Act ("SORNA") violates the Ex Post Facto Clause of the Constitution; that Congress's decision to delegate the retroactivity of SORNA to the Attorney General violates the Nondelegation Doctrine (the issue presented in *Gundy*); and that SORNA regulates inactivity in violation of the Constitution.

The district court responded in a two page order:

> Before the Court is Defendant Mark Steven Elk Shoulder's motion to dismiss the indictment. (Doc. 19). Elk Shoulder raises four arguments, all of which have been rejected by the Ninth Circuit: (1) the Wetterling Act is not retroactive (rejected in *United States v. Elk Shoulder*, 738 F.3d 948 (9th Cir. 2013)); (2) SORNA violates the Ex Post Facto Clause (rejected in *Elk Shoulder*, 738 F.3d 948)); (3) SORNA violates the Nondelegation Doctrine (rejected in *United States v. Richardson*, 754 F.3d 1143 (9th Cir. 2014)); and (4) SORNA unconstitutionally regulates inactivity in violation of *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (rejected in *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014)).
>
> Elk Shoulder acknowledges the Ninth Circuit has rejected all of his arguments, but argues those cases were wrongly decided. Even if the Court agreed with Elk Shoulder, it is bound by circuit authority and has no choice but to follow it. *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001). Elk Shoulder's motion to dismiss (Doc. 19) is therefore DENIED.

Mr. Elk Shoulder pled guilty to the indictment. In his plea agreement, Mr. Elk Shoulder retained his right to appeal the district court's order denying his motion to dismiss.

Mr. Elk Shoulder asks this Court to grant his petition to consider whether SORNA jurisdiction extends to Mr. Elk Shoulder, where the underlying, Major Crimes Act, sex offense conviction triggering the registration requirement predates SORNA, and predates the Wetterling Act, SORNA's predecessor; and/or reconsider the nondelegation doctrine resolution in *Gundy*.

REASONS FOR GRANTING THE PETITION

A. Unlike the defendant in *Kebodeaux*, Mr. Elk Shoulder was not in a special relationship with the federal government when, deeming the Wetterling Act retroactive, it retroactively applied SORNA to him.

The court of appeals based its holding denying Mr. Elk Shoulder's first appeal on *United States v. Kebodeaux*, 570 U.S. 387 (2013), where the "Court concluded that Congress could constitutionally apply SORNA's requirements to an individual like Kebodeaux who had been continuously subject to valid federal registration requirements after his release from prison." *Elk Shoulder II*, 738 F.3d at 956 (citation omitted).

Kebodeaux was convicted of a sex offense by military court-martial in 1999. *Kebodeaux*, 570 U.S at 389. The Wetterling Act applied to Kebodeaux at the time of his offense and conviction. *Id*. at 392. The Court detailed that his offense of conviction had been expressly designated as subject to the Wetterling Act before Kebodeaux's offense. *Id*.

The Court thus concluded Congress had Article I power to apply the Wetterling Act to Kebodeaux, since it was enacted prior to his offense and conviction as a valid exercise of the Military Regulation Clause and the Necessary and Proper Clause. *Id*. at 393.

The original Major Crimes Act jurisdiction distinguishes this case from *Kebodeaux*. It takes jurisdiction "outside the scope of the Necessary and Proper Clause." *Id*.

The government's assertion of SORNA jurisdiction over Mr. Elk Shoulder reeks of irony. First, the government informed this Court that the Wetterling Act is not retroactive. Brief of the United States, *Reynolds v. United States*, No. 10-6549, 2011 WL 253308 at *17, n.7.

The government maintained this position during its oral argument before this Court:

> If I could start by answering your question, Your Honor, about the Wetterling Act, it was not retroactive. It did not apply to pre-enactment conduct. . . . And so when Congress enacted SORNA, it switched from "is convicted" to "was convicted" in order to include pre-enactment offenders.

Reynolds v. United States, No. 10-6549, Transcript of Oral Argument, 2011 WL 4543505, *23-24.

Yet, now, the government relies on retroactively applying the Wetterling Act to Mr. Elk Shoulder to then retroactively assert SORNA jurisdiction over him. And, all the while, the government's original sex offense jurisdiction over Mr. Elk Shoulder, a Northern Cheyenne Indian, arose from the Major Crimes Act, which the government characterized to this Court as "a carefully limited intrusion of federal

power into the otherwise exclusive jurisdictions of the of the Indian tribes to punish Indians for crimes committed on Indian lands." *Keeble v. United States*, 412 U.S. 205, 209 (1973).

1. The Wetterling Act is not retroactive.

Congress enacted the Wetterling Act in 1994. Pub. L. No. 103-322, Sec 170101, 108 Stat. 2038 (September 13, 1994). Pursuant to the Major Crimes Act, 18 U.S.C. § 1153, the government convicted Mr. Elk Shoulder of aggravated sexual abuse in 1992, before enactment of the Wetterling Act. Unlike SORNA, the Wetterling Act does not define a sex offender who must register to include pre-Act offenders. *Contrast Reynolds v. United States*, 565 U.S. 432, 436-37 (2012) (citing 42 U.S.C. § 16911(1); *Carr v. United States*, 560 U.S. 438 (2010)).

Reynolds and *Carr* scrutinized SORNA's language. *Reynolds* examined whether SORNA "requires pre-Act offenders to register before the Attorney General validly specifies that the Act's registration provisions apply to them." 565 U.S. at 439 (citing 42 U.S.C. § 16913(d) (Attorney General decides retroactivity)).

The government argued a "natural reading" of this section 1) inhibited the statutory purpose of SORNA, 2) led to the absurd result that implementation of SORNA could be delayed by up to five years at the discretion of the Attorney General, and 3) the language of subsection (d) only grants the Attorney General "the

authority to specify" the retroactive applicability of SORNA; it does not require that the Attorney General exercise that authority before SORNA can require registration of pre-SORNA sex offenders. *Reynolds*, 565 U.S. at 442-44.

The Court rejected these arguments, holding that SORNA did require the Attorney General to exercise his authority in specifying the retroactive application of SORNA to pre-SORNA sex offenders. *Id*. at 439. Pre-SORNA sex offenders such as Reynolds could not be subjected to the registration requirements of SORNA, or the attendant criminal penalties, until the Attorney General authorized the application of SORNA requirements to pre-SORNA sex offenders. *Id*. at 446-47.

The Court in *Carr* examined Congress' verb choice to conclude that SORNA liability "cannot be predicated on pre-SORNA travel." 560 U.S. at 441. SORNA liability applies to whoever "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." 18 U.S.C. § 2250(2)(B).

In Mr. Elk Shoulder's first appeal, in *Elk Shoulder II*, the court of appeals explained away the verb choice predicament in two ways. In part, it invoked a non-existent fact – that Mr. Elk Shoulder "spent significant amounts of time in another state."

> The Wetterling Act provision applicable to Elk Shoulder, § 14072(i)(2), imposed federal registration requirements on offenders who had an

> ongoing obligation to register under state law, but spent significant amounts of time in another state.

Elk Shoulder II, 738 F.3d at 957. Section 14072(i)(2) requires a fact absent here — specified activity in another state. It provides that a person who is:

> required to register under a sexual offender registration program in the person's State of residence and knowingly fails to register in any other State in which the person is employed, carries on a vocation, or is a student;

42 U.S.C. § 14072(i)(2) (2008).

As quoted above, the Court also relied on Montana's registration obligation. It discounted that the federal directive regarding registration to the states in the Wetterling Act is prospective. *See* 42 U.S.C. § 14071(a)(1) (2008).

The government has repeatedly acknowledged the Wetterling Act's non-retroactivity. *See* Brief of the United States, *Reynolds v. United States*, No. 10-6549, 2011 WL 253308 at *17, n.7.

Congress did not authorize retroactivity. The government thus conceded Wetterling's non-retroactivity in *Reynolds*.

> If I could start by answering your question, Your Honor, about the Wetterling Act, it was not retroactive. It did not apply to pre-enactment conduct. . . . And so when Congress enacted SORNA, it switched from "is convicted" to "was convicted" in order to include pre-enactment offenders.

Reynolds v. United States, No. 10-6549, Transcript of Oral Argument, 2011 WL 4543505, *23-24..

In May 2008, the federal government unconditionally released Mr. Elk Shoulder. *Kebodeaux*, 133 S.Ct. at 2501 ("unconditional" means after defendant's release "he was not in 'any . . . special relationship with the federal government'"). By the time SORNA could apply to him on August 1, 2008, *United States v. Valverde*, 628 F.3d 1159, 1169 (9th Cir. 2010), Mr. Elk Shoulder was no longer in a special relationship with the federal government. Because the Wetterling Act was not retroactive, it cannot be used to create that special relationship on which to bootstrap SORNA jurisdiction.

2. Because the federal government's original jurisdiction over Mr. Elk Shoulder applied under the Major Crimes Act, SORNA cannot be constitutionally applied to him.

Kebodeaux, *Carr*, and *Reynolds* establish the lack of jurisdiction here, absent creating a federal police power. Extending SORNA jurisdiction intemperately extends and exploits the original Major Crimes Act jurisdiction over Mr. Elk-Shoulder. It is not a necessary and proper implementation of an enumerated power, such as military regulation.

The Court relied on the Military Regulation and Necessary and Proper Clauses to apply SORNA in *Kebodeaux*. *Kebodeaux*, 570 U.S. 387, 399 (Roberts, C.J.,

concurring). The Chief Justice stressed precision in understanding *Kebodeaux* to avoid improvidently accepting the majority's policy observations (i.e. why monitoring sex offenders is a good thing) as law.

> Ordinarily such surplusage might not warrant a separate writing. Here, however, I worry that incautious readers will think they have found in the majority opinion something they would not find in either the Constitution or any prior decision of ours: a federal police power.
>
> * * *
>
> I write separately to stress not only that a federal police power is immaterial to the result in this case, but also that such a power could not be material to the result in this case — because it does not exist.

Id. at 401-02 (Roberts, C.J., concurring).

At the time of his underlying offense, Kebodeaux was subject to the Wetterling Act, because its application to him was necessary and proper to implement the Military Regulation Clause, an enumerated power. Subjecting Kebodeaux to that jurisdiction extended SORNA to him.

Here, Mr. Elk Shoulder's underlying offense predated the Wetterling Act, he was unconditionally released prior to SORNA's application to him, the Military Regulation Clause is inapplicable, and jurisdiction under the Major Crimes Act, as a limited intrusion on tribal sovereignty and the police power inherent therein, must be narrowly construed.

It is not necessary and proper to implement the Major Crimes Act by subjecting him to SORNA. "The Major Crimes Act must be construed narrowly, in favor of limited incursion on Native American sovereignty." *United States v. Other Medicine*, 596 F.3d 677, 680 (9th Cir. 2010) (citation omitted); *see also United States v. Errol D.,Jr.*, 292 F.3d 1159, 1163-64 (9th Cir. 2002).

Most especially in this context, "[t]he fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's purely intrastate conduct." *Kebodeaux*, 133 S.Ct. at 2507 (Roberts, C.J., concurring).

The Ninth Circuit justified the retroactive application of the Wetterling Act based on Mr. Elk Shoulder's "knowingly fail[ing] to register in any other State in which the person is employed, carries on a vocation, or is a student," *Elk Shoulder II*, 738 F.3d at 957, without any evidence of such facts. There is no evidence Mr. Elk Shoulder was employed, carried on a vocation or was a student in another state. The court repeatedly asserted this jurisdictional basis. *Id*. at 950, 957, and 958.

The court also opined the Wetterling Act "potentially applied to Elk Shoulder" based on § 14072(i)(3) of the Wetterling Act. *Id*. at 957. Potential jurisdiction is not jurisdiction.

The court concluded Mr. Elk Shoulder was in a "special relationship with the federal government," "because Elk Shoulder was continuously subject to one or more of the § 14072(i) requirements in the Wetterling Act." *Id*. at 956-957. The Court asserted:

> Section 14072(i)(2) imposed penalties on "[a] person who is required to register under a sexual offender registration program in the person's State of residence and knowingly fails to register in any other State in which the person is employed, carries on a vocation, or is a student." This section applied to Elk Shoulder because, upon his release from prison, he was required to register as a sex offender under Montana law. Therefore, Elk Shoulder was subject to the federal requirement to register when he undertook specified activities in other states.

Id. at 957. The court further reasoned:

> In addition, § 14072(i)(3), which was relied upon in *Kebodeaux*, imposed criminal penalties upon a person described in 18 U.S.C. § 4042(c)(4) who "knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation." *Kebodeaux*, 133 S. Ct. at 2501. Because § 4042(c)(4) described Elk Shoulder's crime of conviction (as it described Kebodeaux's), § 14072(i)(3) potentially applied to Elk Shoulder. Accordingly, under the reasoning in *Kebodeaux*, Elk Shoulder was subject to the Wetterling Act upon his release from prison in May 2008 through August 1, 2008, when SORNA became applicable to him. His release from federal custody in May 2008 was therefore not "unconditional."

Id.

Again, two assumptions stand out. First, the court reasoned Mr. "Elk Shoulder was subject to the federal requirement to register when he undertook specified

activities in other states." *Id*. The Court fails to cite to any such activities. Nothing in the record documents Mr. Elk Shoulder's employment, vocation, or studies in another state. Jurisdiction under § 14072(i)(2) requires "knowingly fail[ing] to register in any other State in which the person is employed, carries on a vocation, or is a student." There are no such facts.

The court speculates that "§ 14072(i)(3) potentially applied to Elk Shoulder." *Id*. "Potential" jurisdiction is not actual jurisdiction. Moreover, the Court failed to address the government's representations to this Court that the Wetterling Act "did not apply to pre-enactment conduct. . . ." *Reynolds v. United States*, 2011 U.S. Trans. LEXIS 43, *20-21. Mr. Elk Shoulder's underlying conviction dates to 1992; the non-retroactive Wetterling Act took effect in 1994. Yet, the court of appeals decided Mr. Elk Shoulder was subject to the Wetterling Act.

SORNA's jurisdiction here — erroneously premised on the Wetterling Act's retroactivity, a factual assumption absent from the record, "potential" jurisdiction, and a federal conviction seemingly without beginning or end in defiance of the Major Crimes Act's limited jurisdiction — is the very police power rejected by the Constitution.

3. The Ninth Circuit erroneously ruled the federal government's original Major Crimes Act jurisdiction extended the jurisdiction to "the implied power to impose SORNA requirements" on Mr. Elk Shoulder.

The Ninth Circuit footnoted:

> For the first time in his petition for rehearing, Elk Shoulder contends that the federal government had jurisdiction to prosecute him under 18 U.S.C. § 2241(c) solely by virtue of the Major Crimes Act, 18 U.S.C. § 1153, which "permits the federal government to prosecute Native Americans in federal courts for a limited number of enumerated offenses committed in Indian country that might otherwise go unpunished under tribal criminal justice systems." *United States v. Other Medicine*, 596 F.3d 677, 680 (9th Cir.2010). Based on this assertion, Elk Shoulder argues that Congress lacked the authority to impose SORNA registration requirements on him because the Major Crimes Act "must be construed narrowly, in favor of limited incursion on Native American sovereignty." *Id.*

Elk Shoulder II, 738 F.3d at 959, n. 8.

The court rejected this argument, proclaiming the Major Crimes Act implied SORNA jurisdiction. *Id*. at 959.

> Although the "canons of construction favoring Native Americans," *id*., may require a narrow construction of § 1153, it is undisputed that Elk Shoulder was validly made subject to and then convicted under § 2241(c). Under *Kebodeaux*, if Congress had the authority to promulgate and apply § 2241(c) to Elk Shoulder, then Congress had the implied power to impose SORNA requirements on Elk Shoulder to further congressional ends. 133 S. Ct. at 2505. Because Elk Shoulder raises no argument as to why the Major Crimes Act affects *Kebodeaux*'s analysis in this regard, we reject his argument.

Id. at 959, n. 8.

"[I]mplied power," *id.*, violates the federal government's Major Crimes Act jurisdiction, which "must be construed narrowly, in favor of limited intrusion on native American sovereignty." *Other Medicine*, 596 F.3d at 680. Strictly construing and limiting Major Crimes Act jurisdiction cannot result in the "implied power to impose SORNA requirements on Elk Shoulder[.]"

B. The fractured decision in *Gundy* "resolve[d] nothing."

The four-Justice plurality in *Gundy* held: (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.*

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 (Gorsuch, J., dissenting). 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 (Gorsuch, J., dissenting).

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) & *Carr*, 560 U.S. at 466 (Alito, J., dissenting).

This Court should grant this petition so that a full nine-member Court can resolve this important issue.

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) may find the delegation unconstitutional.

Mr. Elk Shoulder believes 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*. This current Court should grant this petition.

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 (internal quotations omitted). Justice Alito also indicated his willingness to reconsider the intelligible principle test. 139 S.Ct. at 2131 (Alito, J., concurring).

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 the same standard applies 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*. The Court should grant this petition.

1. This issue is extremely important.

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 fact because of the grant of certiorari in *Gundy*. 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. 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. The Court should grant this petition to reconsider, and ultimately overrule, the intelligible principle test.

2. 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 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 reasoning. 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 fact 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 (Gorsuch, J., dissenting). 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.

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

The intelligible principle test should have never been concocted. 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 Constitutional approach. *Gundy*, 139 S.Ct. at 2131 (Alito, J., concurring).

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.*, *Dept. of Transp. v. Assn. of Am. R.R.*, 575 U.S. 43, 77 (2015) (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 case is an easy one. 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 v. Southard*, 23 U.S. 1, 42-43 (1825) ("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 Dept. of Transp.*, 575 U.S. at 61 (2015) (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, it eliminates 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.

4. A Constitutional nondelegation doctrine exists.

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 v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)); *see also United States v. Evans*, 333 U.S. 483 (1948) (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 factfinding." *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 halfmillion people." *Id.* at 2144.

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." *United States v. Kozminski*, 487 U.S. 931, 949 (1988). 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) (internal quotations omitted).

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 (internal quotations). Whatever else the nondelegation doctrine might protect against, it must protect against unifying law making and law enforcement. 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.

This petition is an excellent vehicle to resolve the issue left unresolved in *Gundy*. Mr. Elk Shoulder was convicted of a sex offense prior to SORNA's enactment; indeed, he was convicted before the Wetterling Act. Mr. Elk Shoulder's legal status as an "Indian" highlights the separation of powers problems innate in this issue, first subjecting him to Major Crimes Act jurisdiction and then expanding that limited jurisdiction to "implied" criminal SORNA jurisdiction based on the decision of the Executive Branch. All issues have been properly preserved. There are no vehicle problems that would preclude this Court from resolving, on the merits, the issue left unresolved in *Gundy*.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted for consideration by this Court.

Dated this 16th day of March, 2020.

/s/ John Rhodes
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