No. ___-_____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH BENJAMIN O'DONNELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Petitioner, by his attorney, respectfully makes an application pursuant to Supreme Court Rule 13.5 and Rule 22 to extend the time by 60 days in which to file a petition for writ of certiorari from the judgment entered by the United States Court of Appeals for the Fourth Circuit. In support thereof, counsel states the following:

1. In 2005, before the Sexual Offender Registration and Notification Act (34 U.S.C. § 20913 *et. seq.*) (SORNA) was enacted, Mr. O'Donnell pled guilty to thee counts of sexual exploitation of a child for the possession of child pornography in the State of Georgia. He was sentenced to at term of 10 years probation. As a result of this guilty plea, Mr. O'Donnell registered as a sex offender in Georgia. In 2012, Mr. O'Donnell moved to Virginia. Upon moving there, he updated his registration. In 2015, Mr. O'Donnell moved to Maryland, but he did not register as a sex offender there. Based on these facts, on April 19, 2018, Mr. O'Donnell was indicted for one count of failing to register and failing to update his registration as required by SORNA in violation of 18 U.S.C. § 2250(a).

Thereafter, Mr. O'Donnell moved to dismiss the indictment upon arguing that 34 U.S.C. § 20913(d) of SORNA is unconstitutional. Specifically, § 20913(d) provides that for individuals convicted of sex offenses before SORNA's enactment ("pre-enactment offenders"), the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration." 34 U.S.C. § 20913(d). Under this delegated authority, the Attorney General issued a rule specifying that SORNA's registration requirements apply in full to pre-enactment offenders. 75 Fed. Reg. 81850.

Mr. O'Donnell argued that in giving the Attorney General this power under § 20913(d), Congress violated the non-delegation doctrine, which bars it from transferring its legislative power to another branch of Government. On May 21, 2018, the district court denied the motion upon citing to unpublished decisions in the Fourth Circuit and published decisions in other courts rejecting the non-delegation doctrine challenge to SORNA. *See e.g., United States v. Sampsell*, 541 Fed. App'x. 258, 259-60 (4th Cir. 2013); *United States v. Guzman*, 591 F.2d 83, 91-93 (2d Cir. 2010).

Subsequent to this denial, Mr. O'Donnell pled guilty to the offense charged– failing to register as required by SORNA under 18 U.S.C. § 2250. But he entered into a conditional plea, preserving his right to appeal the district court's denial of his motion to dismiss the indictment. On September 17, 2018, the district court sentenced Mr. O'Donnell to six months imprisonment. On September 26, 2018, Mr. O'Donnell filed a timely notice of appeal.

2. However, while Mr. O'Donnell's appeal was pending in the Fourth Circuit, this Court, on June 20, 2019, issued a plurality decision in *Gundy v. United States*, __ U.S. __, 139 S. Ct. 2116 (2019), ruling that § 20913(d) does not violate the non-delegation doctrine. Justice Kagan (joined by Justices Breyer, Ginsburg, and Sotomayor) reasoned that § 20913(d) does not give the Attorney General the broad

power to "specify *whether* to apply SORNA" to pre-enactment offenders. *Id.* at 2128. Rather, the provision only gives the Attorney General the limited power to "specify *how* to apply SORNA" to pre-enactment offenders "if transitional difficulties require some delay." *Id.* "In that way" SORNA "give[s] the Attorney General only time-limited latitude to excuse pre-Act offenders from the statute's requirements. Under the law he had to order their registration *as soon as feasible*." *Id.* (emphasis added). The Court then found that Congress did not "make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible." *Id.* at 2129 (emphasis added). The Court concluded, "That statutory authority, as compared to the delegations we have upheld in the past is distinctly small-bore. It falls within constitutional bounds." *Id.* at 2130.

Justice Alito concurred in judgment, but he did so with hesitation. He acknowledged that "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capricious standards." *Id.* at 2130-31 (Alito, J., concurring). However, he made clear that "[i]f a majority of [the] Court were willing to reconsider the approach [it] ha[s] taken for the past 84 years, [he] would support it." *Id.* at 2131. Nonetheless, he concluded that "because a majority is not willing to

do that, it would be freakish to single out the provision at issue here for special treatment." *Id.*

Justice Gorsuch (with whom Chief Justice Roberts and Justice Thomas joined) vigorously dissented upon reasoning that the plurality "reimagine[s] (really rewrite[s])" the terms of § 20913(d). *Id.* at 2148 (Gorsuch, J., dissenting). Specifically, Justice Gorsuch explained that "[t]he breadth of the authority Congress granted to the Attorney General in [the] few words in [§ 20913(d)] can only be described as vast"– i.e., to determine whether or not SORNA is retroactive to all, some, or none of pre-enactment offenders, *id.* at 2132:

> As the Department of Justice itself has acknowledged, SORNA "does not require the Attorney General" to impose registration requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require him to act at all." If the Attorney General does choose to act, he can require all pre-Act offenders to register, or he can "require some but not all to register." For those he requires to register, the Attorney General may impose "some but not all of [SORNA's] registration requirements," as he pleases. And he is free to change his mind on any of these matters "at any given time or over the course of different [political] administrations."

Id. at 2132 (citation omitted).

Justice Gorsuch forcefully declared that this "free reign" that "Congress [] gave to the Attorney General . . . to write the rules for virtually the entire existing sex

offender population in this country" violates the non-delegation doctrine. *Id.* "That is delegation running riot." *Id.* at 2148 (citation omitted).

Finally, it is important to note that Justice Kavanaugh did not participate in *Gundy* because the case was argued before he took the bench. In light of this fact and Justice Alito's willingness to reconsider the non-delegation issue with a supporting majority, Justice Gorsuch suggested that the issue may be before the Court again: "Justice Alito supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case, with a full Court, to revisit these matters." *Id.* at 2131.

3. In light of this Court's willingness to revisit the issue, Mr. O'Donnell preserved the non-delegation doctrine challenge on appeal. However, on November 25, 2019, the Fourth Circuit rejected Mr. O'Donnell's argument, holding that it was bound by this Court's decision in *Gundy*, 139 S. Ct. at 2129-31 that § 20913(d) did not violate the nondelegation doctrine. *See United States v. O'Donnell,* 785 Fed. Appx. 182 (4th Cir. Nov. 25, 2019); Exhibit 1.

4. Mr. O'Donnell now plans to file a petition for certiorari on this critical issue in light of this Court's indication in *Gundy* that it is willing to re-visit the non-delegation challenge to SORNA. However, undersigned counsel needs more time to adequately prepare the petition.

Since the date of the Fourth Circuit's decision in this case, undersigned counsel has been busy with several appellate and district court assignments. In particular, counsel has been handling more than 100 28 U.S.C. § 2255 petitions seeking retroactive habeas relief under *Davis v. United States*, ___ U.S.___, 139 S. Ct. 2319 (2019). Additionally, counsel is currently working on several appeals in the Fourth Circuit. Finally, counsel is responsible for supervising the appellate attorneys in the federal public defender's office in Maryland as well as pro bono attorneys who work with the office on criminal matters.

5. In light of undersigned counsel's workload, he respectfully requests an extension of 60 days, from February 23, 2020 (the current due date) until April 23, 2020, on which to file the petition for writ of certiorari on Mr. O'Donnell's behalf. This case presents an important recurring issue that impacts federal criminal cases on a daily basis. Additional time will allow counsel to adequately research this matter and prepare an effective petition for certiorari.

Wherefore, Petitioner prays that this application be granted.

Respectfully submitted,

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