No. _____

IN THE

Supreme Court of the United States

TODD LEE GLENN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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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 the petitioner 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.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Todd Lee Glenn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's unpublished order in Mr. Glenn's appeal is available at 786 Fed. Appx. 410 (4th Cir. Dec. 5, 2019), and is included as Appendix A.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. The Fourth Circuit affirmed Mr. Glenn's conviction on December 5, 2019. Justice Roberts has extended the time for Mr. Glenn to petition for certiorari to May 3, 2020. 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). 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. This Court 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-

[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.

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 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

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[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*, Mr. Glenn disputes that point in light of additional rules promulgated by subsequent Attorneys General. *See* 139 S.Ct. at 2132 (Gorsuch, J., dissenting).

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

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

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).

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, a certiorari grant is warranted here.

B. Proceedings Below

In 2003, prior to SORNA's enactment, Todd Glenn was convicted of second degree rape in the Circuit Court for Baltimore County. As a result of this conviction, Mr. Glenn registered as a sex offender in Maryland. But in 2015, Mr. Glenn moved to Pennsylvania. Upon moving there, he updated his registration. In 2017, he moved to Delaware. Once again, he updated his registration. However, in August or September of 2017, Mr. Glenn moved back to Maryland, but he failed to update his

registration. Based on these facts, in 2018, a federal grand jury in Maryland charged Mr. Glenn with failure to register as a sex offender under 18 U.S.C. § 2250(a). Mr. Glenn moved to dismiss the indictment on nondelegation grounds. He argued that Congress's delegation to the Attorney General to determine the applicability of SORNA to pre-Act offenders violated the nondelegation doctrine. The district court denied the motion, and the Fourth Circuit summarily affirmed in light of the plurality opinion in *Gundy*. *Glenn*, 786 Fed. Appx. 410.

This timely 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 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*. Thus, 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 grant certiorari here. 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*. Therefore, this Court should grant this petition to resolve this issue.

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 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.

1. 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. Therefore, this Court should resolve the issue, with Justice Kavanaugh participating, 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. This case is an excellent vehicle.

This petition is an excellent vehicle to resolve the issue left unresolved in *Gundy*. Mr. Glenn was convicted of a sex offense prior to SORNA's enactment. He moved to dismiss the federal failure-to-register charge, 18 U.S.C. § 2250(a), via a pretrial motion to dismiss. He thereafter appealed the denial of his motion to dismiss to the Fourth Circuit, who affirmed the conviction on the merits. The issue was fully preserved. 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 this petition.

Respectfully submitted,

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APPENDIX