No. _____

In the
Supreme Court of the United States

SILAS BERNARD PETERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Question Presented

Did the Sex Offender Registration and Notification Act (SORNA) unconstitutionally delegate to the Attorney General the decision of whether and how it applied to people who were convicted of a sex offense before its enactment?

Related Proceedings

United States Court of Appeals for the Ninth Circuit

United States v. Silas Bernard Peterson, Case No. 19-50156.

Dispositive Order Entered: January 9, 2020; Mandate Entered: January 31, 2020.

United States District Court for the Central District of California

United States v. Silas Bernard Peterson, Case No. CR-18-00037-AB.

Judgment Entered: May 6, 2019.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Silas Bernard Peterson petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's dispositive order in *United States v. Peterson*, Case No. 19-50156, was not published. App. 1a.[1] The district court's order denying the motion to dismiss in *United States v. Peterson*, Case No. CR-18-00037-AB, also was not published. App. 2a.

[1] "App." refers to the attached appendix. "ER" refers to the appellant's excerpts of record electronically filed in the Ninth Circuit on October 28, 2019 (Docket No. 12). "AOB" refers to the appellant's opening brief electronically filed in the Ninth Circuit on October 28, 2019 (Docket No. 11).

Jurisdiction

The Ninth Circuit issued its memorandum decision on January 9, 2020. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).[2]

Constitutional and Statutory Provisions Involved

18 U.S.C. § 2250(a) provides:

> *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

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[2] On March 19, 2020, the Court (due to the ongoing public-health concerns relating to COVID-19) issued an order providing that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing."

(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:

(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.

(c) *Keeping the registration current*

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of

all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(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).

(e) *State penalty for failure to comply*

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

Introduction

Silas Bernard Peterson was convicted of failing to register as purportedly required by the Sex Offender Registration and Notification Act (SORNA) , Pub. L. 109-248, Title I, 120 Stat. 587 (2006). The Attorney General, exercising discretion delegated by Congress, promulgated a rule specifying that SORNA applies to people (like Peterson) who had served their sex-offense sentences before its enactment. Doing so ran afoul of the Constitution's vesting of all legislative

functions in Congress, thereby prohibiting delegation of such functions to the executive branch. In *Gundy v. United States,* the Court recently addressed this issue in a fractured decision rendered when it had only eight members. 139 S. Ct. 2116 (2019). Subsequently, Justice Kavanaugh indicated that the "scholarly analysis of the Constitution's nondelegation doctrine in [the] *Gundy* dissent may warrant further consideration in future cases." *Paul v. United States,* 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari). This case presents an excellent vehicle for the Court to confront that issue and resolve the uncertainty in this area.

Statement of the Case

In 1993, Silas Bernard Peterson was convicted of a purported sex offense in a California state court. ER 16-17. More than a decade later, in 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. 109-248, Title I, 120 Stat. 587 (2006). Among other things, it created 18 U.S.C. § 2250(a), a new federal crime for failing to register as required by the Act after traveling in interstate commerce. SORNA included a provision allowing the Attorney General to specify its applicability to people (like Peterson) who were convicted of sex crimes before its enactment. 34 U.S.C. § 20913(d).[3] The Attorney General subsequently specified that SORNA does apply to such offenders, promulgating an interim rule

[3] Until September 2017, the bulk of SORNA was set forth at 42 U.S.C. § 16911 et seq. Those provisions are now at 34 U.S.C. § 20901 et seq.

to that effect in 2007 and a final rule in 2010. 72 Fed. Reg. 8894-97 (Feb. 28, 2007); 75 Fed. Reg. 81849-53 (Dec. 29, 2010); 28 C.F.R. § 72.3.

Peterson did register as a sex offender in California, last doing so in 2005. ER 17. But after that, he traveled between California and Georgia without updating his registration. ER 17. In 2018, the government charged Peterson with violating § 2250(a). ER 1-2.

Peterson filed a motion to dismiss the case on the grounds that Congress unconstitutionally delegated to the Attorney General the decision of whether and how to apply SORNA to pre-Act offenders like him. ER 3-8; *see also* ER 9-10 (government's opposition). He noted that the Court was considering that issue in the then-pending case of *Gundy v. United States*, Case No. 17-6086. ER 7. The district court denied the motion. App. 2a.

Thereafter, Peterson pleaded guilty to the SORNA charge pursuant to a plea agreement. ER 12-25. That plea was conditional in that it preserved his right to appeal the denial of his motion to dismiss. ER 13, 19. Accordingly, after the district court entered a judgment sentencing him to a three-year term of probation, Peterson appealed. ER 26-31.

On appeal, Peterson argued again that Congress unconstitutionally delegated to the Attorney General the decision of whether and how to apply SORNA to pre-Act offenders, noting that the Court had recently issued a fractured decision rejecting that argument in *Gundy v. United States*, 139 S. Ct. 2116 (2019). AOB 5-10. Over Peterson's objection, the Ninth Circuit issued a dispositive order granting the government's motion to summarily affirm the judgment based on *Gundy* and prior circuit precedent on the issue. App. 1a.

Reasons for Granting the Writ

The Court should grant review to resolve uncertainty about the nondelegation doctrine in general and the applicability of that doctrine to the Sex Offender Registration and Notification Act (SORNA) in particular.

The Constitution vests all legislative powers in Congress. U.S. Const., Art. I § 1. Congress exercised that power when it passed the Sex Offender Registration and Notification Act (SORNA), Pub. L. 109-248, Title I, 120 Stat. 587 (2006). That Act established registration requirements for those convicted of certain sex offenses, *see* 34 U.S.C. § 20901 et seq., and made failure to comply a crime, *see* 18 U.S.C. § 2250(a). Generally, under 34 U.S.C. § 20913(b), such an offender must register before completing his prison sentence, or within three days of receiving a non-prison sentence, for the qualifying offense. As for offenders who had already served their sentences, § 20913(d) delegated that issue to the Attorney General:

> 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 and for other categories of sex offenders who are unable to comply with [the general rule].

Silas Bernard Peterson was such a "pre-Act offender" because he sustained the conviction that purportedly required registration in 1993, long before SORNA was enacted in 2006. ER 1-2, 16-

17. The Attorney General eventually promulgated rules specifying that SORNA nevertheless applies to pre-Act offenders like Peterson. 72 Fed. Reg. 8894-97 (Feb. 28, 2007); 75 Fed. Reg. 81849-53 (Dec. 29, 2010); 28 C.F.R. § 72.3 ("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."). Pursuant to that decision, Peterson was convicted for failing to register in accordance with SORNA. ER 1-2, 12-30. The question presented here is whether Congress properly delegated to the Attorney General the decision about applying SORNA to pre-Act offenders. The Court recently addressed that issue in *Gundy v. United States*, 139 S. Ct. 2116 (2019). But it did so when it had only eight members, and Justice Kavanaugh has since expressed support for the *Gundy* dissent, thereby creating uncertainty about the future of the nondelegation doctrine in general and the applicability of that doctrine to SORNA in particular. The Court should therefore grant review to address these issues.

1. In *Gundy*, Justice Kagan wrote on behalf of herself and Justices Ginsberg, Breyer, and Sotomayor. 139 S. Ct at 2120. That plurality decision rested on the doctrine that "a statutory delegation is constitutional as long as Congress lays down by legislative act an *intelligible principle* to which the person or body authorized to exercise the delegated authority is directed to conform." *Id*. at 2123 (emphasis added) (quotation marks omitted). Thus, the plurality defined the issue as whether the canons of statutory construction establish that Congress supplied the requisite intelligible principle. *Id*. at 2123-24. After considering such canons, the plurality concluded that SORNA required the Attorney General to apply its provisions to pre-Act

offenders and delegated only decisions about how to practically implement that requirement as soon as feasible; in other words, Congress did not give the Attorney General discretion to decide *whether* to apply SORNA to such people but only *how* to apply it to them. *Id*. at 2124-29. As so interpreted, the plurality found that the delegation was constitutional under the intelligible-principle doctrine. *Id*. at 2129-30.

2. Justice Alito reluctantly provided the crucial fifth vote to find § 20913(d) constitutional. *Gundy*, 139 S. Ct. at 2130-31 (Alito, J., concurring in judgment). He criticized the authority on which the plurality relied as allowing "agencies to adopt important rules pursuant to extraordinarily capacious standards." *Id*. And he advised that he would support an effort to reconsider that approach when a majority of the Court is willing to do so. *Id*. at 2131. There was no such majority among the eight justices deciding *Gundy*, so Justice Alito felt he had to vote with the plurality because "it would be freakish to single out the provision at issue here for special treatment." *Id*.

3. Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, "would not wait" to address the problem raised by Justice Alito. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). Contrary to the plurality's interpretation of § 20913(d), the dissent concluded that the "breadth of the authority Congress granted to the Attorney General in" that provision "can only be described as vast." *Id*. at 2132. In fact, in the years following SORNA's enactment, different Attorneys General exercised that discretion differently. *Id*. After examining the foundation of the Constitution's prohibition against Congress delegating legislative functions to the executive branch, the dissent turned to the appropriate test and noted some general guiding principles. *Id*.

at 2133-37. The dissent criticized the plurality-invoked intelligible-principle standard, which is rooted in a line of authority beginning in the 1940s but "has no basis in the original meaning of the Constitution." *Id*. at 2137-42. The dissent then concluded that § 20913(d), properly interpreted, delegated more discretion to the Attorney General than the Constitution allows. *Id*. at 2143-48.

4. Justice Kavanaugh did not participate in *Gundy*. 139 S. Ct. at 2130. And four of the eight other justices emphasized that they were ready to reconsider the intelligible-principle doctrine on which the plurality relied. *See Gundy*, 139 S.Ct. at 2130-31 (Alito, J., concurring in judgment); *Id.* at 2131-48 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting). As the dissent put it:

> In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That is delegation running riot.

Id. at 2148 (quotation marks omitted). Subsequently, Justice Kavanaugh wrote in another case that the "scholarly analysis of the Constitution's nondelegation doctrine in [the] *Gundy* dissent may warrant further consideration in future cases." *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari). Thus, a majority of the Court is inclined to reconsider the nondelegation-doctrine authority on which *Gundy*'s holding was based.

5. The fractured decision in *Gundy* and Justice Kavanaugh's expression of support for the *Gundy* dissent has created uncertainty about the future of the nondelegation doctrine, and not only as it applies to SORNA. *See, e.g.*, *American Institute for International Steel, Inc. v. United States*, __ Fed.Appx. __, 2020 WL 967925, *7 (Fed. Cir. Feb. 28, 2020) ("We will not project an overruling of the delegation-doctrine standard stated in *Hampton* on which *Algonquin* rested. Five members of the Court have recently expressed interest in at least exploring a reconsideration of that standard. [Citing *Gundy* and *Paul*.] But such expressions give us neither a license to disregard the currently governing precedent nor a substitute standard to apply."), *cert. petition filed*, No. 19-1177 (Mar. 25, 2020);[4] *see also* W. Mike Jayne, *As Far As Reasonably Practicable: Reimagining the Role of Congress in Agency Rulemaking*, 21 Federalist Society Rev. 84, 87 (2020) ("A revival of the nondelegation doctrine now appears imminent."). Until that uncertainty is resolved, litigants in any area where the nondelegation doctrine applies will be compelled raised objections based on the *Gundy* dissent (both in the district court and on appeal) simply to preserve such issues to account for the possibility that the Court might soon change course. That will not only burden the parties in criminal and civil cases; it will require devoting limited judicial resources to potentially unnecessary motions and appeals. A prompt

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[4] The petition in *American Institute for International Steele* presents the following question: "Is [19 U.S.C. § 1862] facially unconstitutional on the ground that it lacks any boundaries that confine the President's discretion to impose tariffs on imported goods and, therefore, constitutes an improper delegation of legislative authority and a violation of the principle of separation of powers established by the Constitution?" The Court has not yet ruled on this petition.

ruling addressing and resolving the nondelegation-doctrine conflict reflected in *Gundy* is therefore essential. And this case presents an excellent vehicle to do that given that the nondelegation-doctrine issue is squarely presented and case dispositive. The Court should therefore grant review.

6. At a minimum, if the Court grants review to reconsider the nondelegation doctrine in any other case, or if it is considering doing so, it should hold this petition pending disposition of that case and then grant the petition, vacate the judgment, and remand for reconsideration in light of that decision. "A GVR is appropriate when intervening developments"—like a new opinion from this Court—"reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam) (citing *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)) (quotation marks omitted). "This practice has some virtues. In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before [it] rules on the merits, and alleviates the potential for unequal treatment that is inherent in [its] inability to grant plenary review of all pending cases raising similar issues[.]" *Lawrence*, 516 U.S. at 167 (quotation marks omitted). This flexible approach "can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance

does not merit [the Court's] plenary review." *Id*. at 168. Here, "the equities of the case" support a GVR order if the Court reconsiders the nondelegation doctrine in any context. *Id*. at 167-68. As reflected in *Gundy*'s various opinions, the result in that case rested entirely on the proper application of that doctrine. Therefore, if the Court ends up adopting an approach to the nondelegation doctrine that is consistent with the *Gundy* dissent, that will necessarily undermine the holding of *Gundy*, even if the Court's new decision applies that doctrine to a different statute. A GVR would therefore "assist[]" the Ninth Circuit "by flagging a particular issue" that it has not "fully considered[.]" *Id.* at 167.

Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

June 1, 2020

Respectfully submitted,

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