No. 20-1326

In The

Supreme Court of the United States

REBECCA A. MORIELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

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The Government is unable to rebut the conclusion that Moriello's case presents a compelling vehicle to address whether the executive branch violated the nondelegation doctrine when it wrote the criminal regulation that it used to prosecute her.

As the Government correctly notes, this Court has long upheld delegations of legislative power so long as Congress has provided an "intelligible principle." *See* Opp. at 13-14. (internal citation omitted). The Government's ask, however, is for permission to continue to work around the Separation of Powers Clause when it needs a prosecutorial hook. In doing so, it asks the Court to permit a watered-down definition of what an intelligible principle is, giving the executive branch further leeway to bypass Congress and invent new crimes on its own. The Constitution requires more.

Moriello's case provides an opportunity for the Court to revisit and reinforce the Separation of Powers Doctrine, and to enforce the requirement that Congress must speak distinctly when it delegates authority to the executive branch to define criminal conduct. *See, e.g., United States v. Grimaud,* 220 U.S. 506, 519 (1911) ("If Congress intended to make it an offense for wholesale dealers to omit to keep books and render returns required by regulations of the commissioner, it would have done so distinctly.").

Her case also provides an opportunity to provide guidance on the question of whether delegations must "meaningfully constrain" the authority of the executive

branch when expanding the criminal code. *Touby v. United States,* 500 U.S. 160, 166 (1991). These issues are ripe for consideration. *See e.g., Gundy* at 2131 ("If a majority were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.") (J. Alito, concurring). If the Court desires to revisit the doctrine, it should look to Moriello's case because there is no act of Congress that comes close to suggesting that her conduct merited the imposition of criminal sanctions.

The regulatory landscape has also continued to evolve since this Court last weighed in on Congress's ability to delegate criminal law-making authority to the executive. The number of federal criminal regulations has become unknowable. *See, e.g., Van Buren v. United States*, __ U.S. __, 141 S. Ct. 1648, 1669 (2021) (J. Thomas, dissenting) ("The number of federal laws and regulations that trigger criminal penalties may be as high as several hundred thousand.") (internal citation omitted). While this uptick is troubling, Moriello does not suggest that the Court should police policy judgments of the legislative branch in writing statutes, only that the Court should ensure that "intelligible principle" does not become synonymous with the suggestion that a delegation is fine as long as it is made in "the public interest" *Whitman* v. *American Trucking Assns.*, 531 U.S. 457, 474 (2001) (citing *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225–226 (1943), and others).

Nor should Moriello's case be dismissed as easily as the Government suggests: that this is just a case of a difficult lawyer who should have obeyed the private security guard, and should have simply "resolve[d] the citation…with a civil fine of 'as little as $300.'" Opp. at 7, 21. (internal citation omitted). Her case is far more

complicated than that, and it exposes an unconstitutional delegation. Moreover, she should not be faulted for pushing back instead of paying the fine when that delegation permitted a prosecution that was not fundamentally fair to her.

The regulations here are so poorly drafted as to make them both unintelligible and subject to "arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). But of course the Government wants to defend them. They fill a gap between prosecutorial priorities and laws not enacted by Congress. These obscure regulations provide the Attorney General unchecked authority to prosecute rabble rousers whose conduct is not otherwise criminal. *See* Pet. for Cert. at 12. And, as Moriello testified, she believed she had no obligation to obey seemingly arbitrary commands from a private security guard, and had no idea that her failure to conform would constitute a criminal offense. *See* J.A. at 269.

Here, the delegation is not intelligible, meaningful, or reasonable. Moriello challenges whether the delegation was permissible, and whether the promulgation of the regulations exceeded delegated authority.[1] The Court should grant certiorari to ensure that acts of Congress, rather than agency decrees, continue to define the criminal code, thereby protecting the separation of powers. *See, e.g., United States v.*

[1] The Government suggests that the Court should apply the opposite of a meaningful constraint by piecemealing its analysis, first finding that the initial delegation was reasonable, and then that the promulgation of the regulations was based on a reasonable interpretation of the delegation. Opp. 18, FN 3. The net effect of that approach is that the Executive is able to concentrate more rule-making authority through incremental gains. The Government does not cite any support for their approach, and the Court should not entertain it. In any event, the Court must scrutinize regulations to ensure that an agency has not exceed power that was delegated to it. *United States v. Eaton,* 144 U.S. 677, 686-87 (1892) (commissioner exceeded his authority by requiring margarine dealer to maintain certain records); *United States v. Five Gambling Devices,* 346 U.S. 441, 453 (1953) (Black, J., concurring) (the attorney general exceeded delegated authority when he promulgated "clarifying regulations" relating to gambling licenses.).

Nichols, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing *en banc*) ("[i]f the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce."); 1 W. Blackstone, Commentaries on the Laws of England * 146 (1765) (describing "the supreme magistracy" as occurring when the executive possesses "the right both of making and of enforcing the laws.").

If the Court grants certiorari, it should also consider whether to articulate a meaningful constraint standard, and if so, whether Congress provided a meaningful constraint, and whether the executive abided by it.

Finally, Moriello emphasizes that she does not seek to "prevent Congress from obtaining the assistance of its coordinate Branches" or otherwise "deny[ ] to the Congress the necessary resources of flexibility and practicality . . to perform its function."). Opp. 11 (*quoting Mistretta v. United States,* 488 U.S. 361, 372 (1989) and *Yakus v. United States,* 321 U.S. 414, 425 (1944)). Nor does she contend that striking these regulations would lead to the conclusion that "most of Government is unconstitutional." *Gundy* at 2130. Instead, she contends that the executive branch violated the Separation of Powers when it promulgated the poorly-drafted regulations that it used to prosecute her. The Court should accordingly grant certiorari to review the delegation.

Respectfully submitted, this the 11th day of August, 2021.

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