NO. 20-_____

In the
Supreme Court of the United States

NAUM MORGOVSKY and IRINA MORGOVSKY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Arms Export Control Act ("AECA"), 22 U.S.C. § 2778, is a criminal statute with severe penalties that, in the government's own words, "delegates" to the President the power to "*define* the violations of [it]." App.47. Naum and Irina Morgovsky were indicted for conspiring to violate regulations promulgated under the AECA. They pled guilty to avoid decades in prison. On appeal, they raised both constitutional and non-constitutional challenges, which the Ninth Circuit rejected, concluding that: (1) Congress had set forth a sufficiently "intelligible principle" for the Executive to follow; and (2) both of the Morgovskys had waived other challenges to the statute. The questions presented are:

1. Whether the Executive had the authority to issue the regulations under which the Morgovskys were convicted; if so, whether those regulations and the AECA violate the separation of powers doctrine, and whether the "intelligible principle" test is the correct analysis to apply in answering this question.

2. Whether a failure to raise a challenge under Federal Rule of Criminal Procedure 12(b)(3) constitutes forfeiture, and is subject to plain error review, or waiver, and not subject to any review absent a showing of good cause. *See United States v. Guerrero*, 921 F.3d 895, 897 (9th Cir. 2019) (recognizing a split).

3. Whether despite *Class v. United States*, 138 S. Ct. 798, 805 (2018), a general appellate waiver can bar a challenge to the statute of conviction where that challenge implicates the court's constitutional power to impose judgment.

RELATED PROCEEDINGS

This case arises from the following proceedings in the Ninth Circuit Court of Appeals and the Northern District of California District Court, listed here in reverse chronological order:

- *United States v. Naum & Irina Morgovsky*, Nos. 18-10486, 18-10448 (9th Cir. Dec. 14, 2020), included as Appendix B;
- *United States v. Naum & Irina Morgovsky*, Nos. 18-10486, 18-10448 (9th Cir. Sept. 22, 2020), included as Appendix A and reported at 827 F. App'x 701;
- *United States v. Naum Morgovsky*, No. 16-cr-00411-001 VC (N.D. Cal. Dec. 13, 2018), included as Appendix C;
- *United States v. Irina Morgovsky*, No. 16-cr-00411-003 VC (N.D. Cal. Nov. 5, 2018), included as Appendix C.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Naum and Irina Morgovsky were convicted and punished based on a prohibition that Congress itself never enacted. The Arms Export Control Act ("AECA"), the statute under which they were convicted, provided the punishment, but it was up to the Executive's largely unfettered discretion to determine what would constitute the crime. 22 U.S.C. § 2778. But that sort of choose-your-own-adventure approach to criminal law is inconsistent with separation of powers. Congress must do more than provide a fill-in-the-blank form for the Executive to complete as it wishes.

As "[t]his Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Accordingly, the Framers assigned the Legislative Branch the power to make laws, and the Executive Branch the power to enforce them. Consistent with that allocation of powers, the nondelegation doctrine has long "mandate[d] that Congress generally cannot delegate its legislative power to another Branch." *Id.* at 372; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). At the same time, this Court has also held that a statutory delegation is constitutional if Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated

authority is directed to conform." *Mistretta*, 488 U.S. at 372 (cleaned up).

The Ninth Circuit's decision rejecting the Morgovskys' challenges underscores that the "intelligible principle" test has "taken a life of its own," and has "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." *Gundy v. United States*, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting, joined by Robert, J., and Thomas, J.). The Ninth Circuit upheld the Morgovskys' convictions in part because it concluded, based on its earlier case law, that the AECA satisfied that test. But in doing so, the court did not consider this Court's open question of whether the nondelegation doctrine requires greater specificity in the criminal context. *Touby v. United States,* 500 U.S. 160, 165-66 (1991).

The time to decide that question is now. Several members of this Court have recognized the need to revisit this test to make clear that "[w]hile Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the [Executive] the power to write his own criminal code." *Gundy,* 139 S. Ct. at 2148; *see also id.* at 2130-31 (Alito, J., concurring in the judgment and noting his willingness to reconsider the delegation doctrine in a future case); *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari). Indeed, some Justices would go so far as to reconsider the test in *all* contexts. *E.g.*, *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring) ("Although the Court may never have intended the

boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power").

This case is an excellent vehicle to reconsider the intelligible principle test. Indeed, the Court could also take this case to resolve a ripe circuit split concerning whether a challenge to the statute of conviction can be waived (and thus not subject to plain error review), or is instead forfeited for failure to raise it in Federal Rule of Criminal Procedure 12 motions (and thus reviewable only on a showing of good cause). *See United States v. Ramamoorthy*, 949 F.3d 955, 962 n.3 (6th Cir. 2020) (recognizing a deep split on this issue). This Court should also grant certiorari to address a conflict between its case law and the Ninth Circuit's holding that Irina's general appellate waiver encompassed her challenges to the underlying statute of conviction.

OPINIONS BELOW

The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit appears at 827 F. App'x 701 and is reproduced at App.1-10. The orders of judgment and commitment of the United States District Court for the Northern District of California are unpublished and reproduced at App.13-45.

JURISDICTION

The Ninth Circuit issued its memorandum disposition affirming the Morgovskys' convictions and sentences on September 22, 2020. The Ninth Circuit subsequently issued an order denying the Morgovskys' timely petition for rehearing on December 14, 2020.

This petition is timely under this Court's March 2020 order extending the time to file any petition for certiorari to 150 days from the date of any order, inter alia, denying a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions appear in the Appendix at App.48-75.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

22 U.S.C. § 2778 delegates to the President the authority "to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services." Under the AECA, the President has delegated his authority to the Secretary of State, *see* Exec. Order No. 11958, 42 Fed. Reg. 4311 (Jan. 24, 1977). In response to this directive, the State Department promulgated the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. § 120-130, which contain the United States Munitions List ("USML") and which criminalize attempts and conspiracies to export, import, and reexport defense articles on the USML. While the statute provides some criteria to apply in determining whether an export *license* should issue for articles on that list, 22 U.S.C. § 2778(a)(2), it provides none to apply *in determining whether an item should be on the list in the first place*. As for the supporting regulations, the Executive is simply told that it can "promulgate

regulations for the import and export of such articles and services." *Id.* § 2778(a)(1).

The Executive's determinations in putting together that list are not subject to judicial review. 22 U.S.C. § 2778(h). And while the statute requires the Executive to carry out a periodic review to determine whether items no longer warrant export controls, it does not specify how frequently that review must take place, what criteria the Executive should use in conducting such a review, or how the Executive should determine what the list should include in the first place.

The statute also makes any willful violation of those regulations a felony, subject to a fine of up to $1,000,000 and up to 20 years' imprisonment. 22 U.S.C. § 2778(c). As the government acknowledged in the district court, the statute thus sets forth the criminal penalties for any violation of the Executive's ensuing regulations, but empowers the Executive with virtually unfettered discretion to fill in what constitutes such a violation and what can constitute a basis for that criminal liability.

Making matters worse, the regulations the Executive has promulgated go beyond even the bounds of that broad delegation. Nothing in AECA delegates to the Executive the authority to expand the potential penalties (or reduce the elements the government must prove) for conspiracy liability,[1] which is

[1] Congress knows how to include conspiracy liability when it wants to. Take, for example, the Export Administration Amendments Act, which it amended to add "conspires to or attempts to violate." *See* Pub. L. No. 99-64, § 112(a), 90 Stat. 120, 146 (1985); 50 U.S.C. App. § 2410(a).

otherwise governed by Congress's general conspiracy statute. The general conspiracy statute requires an overt act and imposes a maximum five-year sentence. 18 U.S.C. § 371. However, 22 C.F.R. § 127.1 makes it unlawful to "conspire to" export or import defense articles or services, which under AECA carries a possible 20-year statutory maximum sentence and a million dollar fine. And unlike Congress's general conspiracy statute, the regulation does not contain an overt act requirement.

B. Factual Background

In 1979, Naum and Irina Morgovsky arrived in the United States as refugees fleeing the Soviet Union. SER 151-52 ¶ 2.[2] Although Naum and Irina each had the equivalent of a master's degree in engineering from institutes in the Soviet Union, Naum supported his family at first by washing dishes in a Chinese restaurant. SER 151-52 ¶¶ 2, 3.

In 1993, Naum founded an optics company, Hitek International. SER 151-52 ¶¶ 2, 3. Hitek International primarily worked with customers to design night vision, thermal vision, and other optics devices for domestic consumption, as well as exporting some products to customers abroad. SER 151-52 ¶¶ 2, 3. In addition to design work, Hitek purchased bulk orders of lenses, image intensifier tubes and other components to assemble completed devices and re-sold components of optical devices.

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[2] References to "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record filed in Ninth Circuit case numbers 18-10446 and 18-10448.

The optics industry is subject to a complicated regulatory scheme under the AECA. Certain night and thermal vision devices and components may be freely exported, while others may not. More specifically, while some are designated as "defense articles" on the USML and their export is regulated by the ITAR, others are not. The inconsistencies between these designations are not necessarily explained by the item having an apparent military purpose.

In April 2017, the Government issued a Superseding Indictment charging Naum and Irina, as relevant here, with conspiracy to export image intensifier tubes, lenses and lens assemblies in violation of ITAR, specifically 22 C.F.R. § 127.1(a)(4) (rather than the general federal conspiracy statute at 18 U.S.C. § 371) (Count 9). ER 1386-87 ¶ 40 (Superseding Indictment). Counts Ten and Eleven of the Superseding Indictment charged Naum with receiving and transferring money in connection with the export of defense articles without a license, based on the conduct alleged in Count 9.[3] ER 1387-88 ¶¶ 42-44 (Superseding Indictment).

The Morgovskys faced the prospect of spending decades in prison well in their golden years. They both entered guilty pleas to Count Nine of the Superseding Indictment, and Naum entered guilty pleas as to Counts Ten and Eleven. ER 303, 332-33. The district court accepted those pleas without reading the elements of the offense. *See generally* ER 301-39 (plea hearings for Naum and Irina.) Naum moved to

[3] The Government agreed to drop Count Six against Irina at the time of her sentencing hearing, as part of her plea agreement. ER 329-30. Other counts against Naum have been continued.

discharge his attorney, in part because he had failed to make certain arguments, including the separation of powers one at issue in this petition. ER 1504-10.

In October 2018, the district court held a sentencing hearing, in which it also considered Naum's arguments about his attorney. The court sentenced Irina to 18 months' imprisonment, and three years' supervised release. ER 262-63. During that hearing, Naum's counsel acknowledged a struggle with his client over strategy, including disagreement over counsel's failure to make certain constitutional arguments, and to fully argue that the AECA did not authorize regulations that imposed conspiracy liability, and the resulting sentencing disparity. ER 1504-05, 1540; *see generally* ER 1535-49. Two weeks later, the district judge sentenced Naum to 108 months' imprisonment and ordered him to pay a fine of $1 million dollars. ER 157.

C. The Appeal

The Morgovskys represented themselves pro se on appeal. They challenged, among other things, their conspiracy convictions under ITAR and the AECA, alleging that they should be vacated because Congress, when it enacted 22 U.S.C. § 2778, did not (and could not) delegate the authority to the Executive to decide whether or not to expand criminal conspiracy liability (and to increase the criminal penalties associated with it beyond those in the general conspiracy statute). They also challenged the district court's decision to accept their pleas.

D. The Ninth Circuit's Decision

The Ninth Circuit rejected the Morgovskys' challenges. As to their challenge to AECA, the court

concluded that Irina "ha[d] generally waived her appeal rights pursuant to her plea agreement," that Naum had "not raise[d] this challenge in the district court as Federal Rule of Criminal Procedure 12(b)(3) requires, and ... ha[d] not shown good cause," meaning he had waived all but a constitutional challenge to his conviction. App.6. The court rejected the constitutional challenge that "under the separation of powers, Congress had no power and thus could not validly delegate to the Executive Branch the authority to create new generic crimes, such as conspiracy, separate and distinct from those proscribed by the statute enacted by Congress." App.6-7 (cleaned up). In doing so, the court relied on its previous published decisions, in which the Ninth Circuit rejected the argument that the predecessor statute to the AECA "constitute[d] an unconstitutional congressional delegation of legislative power to the executive insofar as it empower[ed] the President to criminalize attempt conduct." App.7 (cleaned up). "It is well established," the court held, "that Congress may constitutionally provide a criminal sanction for the violation of regulations which it has empowered the President or an agency to promulgate." App.7 (quoting *United States v. Gurrola-Garcia*, 547 F.2d 1075, 1079 (9th Cir. 1976)). And while the court conceded that the district court erred by not explaining the elements of the offense to the defendants, it concluded that the error did not affect their substantial rights because both had confirmed that they understood the charges against them (without, it should be noted, explaining what that understanding was). App.9-10.

E. The Petition for Rehearing

After the Ninth Circuit rejected the Morgovskys' challenges, they filed a petition for rehearing with the assistance of counsel that challenged the court's conclusion that the AECA did not violate the non-delegation doctrine, and that the Morgovskys had waived any challenges. The Ninth Circuit denied their petition for rehearing.

REASONS FOR GRANTING THE PETITION AND SUMMARY OF ARGUMENT

I. One of the fundamental principles inherent in the separation of powers is that the Constitution's structure prohibits giving the Executive Branch the power both to define crimes and to prosecute citizens for them. The Constitution limits Congress's ability to delegate its core legislative powers to the other branches to protect citizens from prosecution for offenses that their elected representatives have never actually proscribed. Despite that constitutional limitation, the Morgovskys were prosecuted based on a penalty chosen by Congress, but a crime subsequently created by the Executive Branch.[4] That implicates two questions that this Court or members of it have recognized as important—first, whether the intelligible principle test is an appropriate one for non-delegation challenges, and second, whether, even if it may be sufficient in certain civil cases, it is not

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[4] "A federal regulation in conflict with a federal statute is *invalid* as a matter of law," *In re Watson*, 161 F.3d 593, 598 (9th Cir. 1998) (citing *Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.,* 470 U.S. 116, 126 (1985)), and agencies may not make new law in the guise of interpreting their enabling legislation. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 213-14 (1976).

sufficient in criminal ones. The Court should grant cert to address the exceptionally important question about **(A)** whether the test applies in the criminal context. **(B)** No matter how the Court answers that question, the Court should hold that the AECA and the ITAR regulations violate separation of powers.

II. That isn't the only cert-worth issue raised by this petition. Although the Ninth Circuit considered Naum's constitutional challenge on the merits, it refused to consider his statutory challenges to the AECA, deeming it waived for failure to show good cause. But the Ninth Circuit is on one side of an entrenched Circuit split over whether such claims are waived (and thus not subject to review) or forfeited (and thus subject to plain error review). The Court should grant cert to resolve this deep split.

III. Moreover, the Ninth Circuit's conclusion that Irina's challenge to the statute of conviction was waived by virtue of her plea agreement cannot be squared with this Court's cases like *United States v. Class*. This Court should grant the petition and reverse on that ground too.

IV. That the Ninth Circuit's decision was unpublished weighs in favor, and not against, certiorari here. Appellate courts' increasing reliance on unpublished dispositions has created a second tier of decisions, less susceptible to review, and disproportionately affecting the most vulnerable litigants, including those, like the Morgovksys, who represent themselves. Because this case raises questions of exceptional importance over which there is at least one Circuit split, this Court should grant certiorari to consider both the Morgovksys' claims.

I. This Court Should Grant Certiorari To Consider Whether The Intelligible Principle Test Should Apply

A. The Intelligible Principle Test Should Not Apply to Non-Delegation Separation of Powers Challenges, Particularly in the Criminal Law Context

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta*, 488 U.S. at 371. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. (That use of the word "all" with respect to the legislative power contrasts with "the" executive and judicial powers accorded the other branches.) "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (per curiam) (cleaned up). In particular, "*defining* crimes and fixing penalties are legislative … functions." *United States v. Evans*, 333 U.S. 483, 486 (1948) (emphasis added); *see also Gundy,* 139 S. Ct. at 2131 (Gorsuch, J., dissenting) ("The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty"). As Chief Justice Marshall explained, Congress may not "delegate ... powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). That's because the Framers "believed the new federal government's most dangerous power was the

power to enact laws restricting the people's liberty." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J. dissenting) (citing The Federalist No. 48, at 309-12 (James Madison) (C. Rossiter ed., 1961). They therefore made enacting laws a deliberately arduous process.

Allowing the Executive to both make (criminal) laws and enforce them lies at the heart of the Framers' separation of powers concerns. As James Madison explained, "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." *See, e.g.,* The Federalist No. 47, at 303 (quotation marks omitted); *see also* 1 William Blackstone, Commentaries on the Laws of England 146 (1765) (when "the right of both *making* and of *enforcing* the laws ... are united together, there can be no public liberty"). Accordingly, separation of powers plays a crucial role in protecting liberty; and "in the context of criminal law, no other mechanism provides a substitute." Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1031 (2006).

1. While the nondelegation doctrine does not prevent Congress from seeking assistance from a coordinate Branch, there are constitutional limits. Gary Lawson, *Delegation and Original Meaning,* 88 Va. L. Rev. 327, 340 (2002) ("The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense" without such limits). Accordingly, to sustain such a delegation against a constitutional challenge, this Court has required Congress to, at a minimum, articulate an "intelligible principle" to which the person or body authorized to act is directed to conform. *See, e.g., J.W. Hampton, Jr. & Co. v. United States*,

276 U.S. 394, 409 (1928); *Touby*, 500 U.S. at 160. An act of Congress that fails to do so is an unconstitutional delegation of legislative authority. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

But several Justices have acknowledged that the intelligible principle test may not be the right one—at least not in its current formulation. *See Gundy*, 139 S. Ct. at 2131-48 (Gorsuch, J., dissenting, joined by Justices Roberts and Thomas); *id.* at 2130-31 (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting) ("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"); *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., dissenting from the denial of cert.). That test, which was first used in 1928 in *J.W. Hampton*, 276 U.S. at 409, has "take[n] on a life of its own." *Gundy,* 139 S. Ct. at 2139 (Gorsuch, J., dissenting). From concluding that a directive to preserve "fair competition" failed that test, *A.L.A. Schechter,* 295 U.S. at 522-23, the Court has since found an intelligible principle from a grant of authority to regulate "in the public interest." *Whitman,* 531 U.S. at 474 (quotation marks omitted). That watered-down incarnation "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

What the test *should* ask, but doesn't, is whether the statute assigns to the Executive only the

responsibility to make factual findings, whether it sets forth the facts that the Executive must consider and the criteria against which to measure the facts, and most importantly, whether Congress, and not the Executive Branch, made the policy judgments. *Id.* at 2131. Applying that more comprehensive and appropriate test, AECA fails.[5] Indeed, it does not articulate any specific criteria by which the Executive is to make its decisions regarding the list, and worse yet, it insulates that list from any judicial review. *See infra* Section I.B.

2. These concerns are particularly pronounced in the criminal law context. This Court has often emphasized the importance of the Legislature's role in defining what constitutes a crime. *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Only the people's elected representatives in the legislature are authorized to 'make an act a crime'" (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812))); *Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case

[5] Notably, the cases that have rejected separation of powers challenges to AECA or similar statutes have *not* asked such searching questions. *See, e.g., United States v. Henry,* 888 F.3d 589, 597 (2d Cir. 2018) (intelligible principle sufficient if a general policy is clearly delineated, the agency applying it is identified, and the outer boundaries of the authority are articulated); *United States v. Hsu,* 364 F.3d 192, 204-05 (4th Cir. 2004); *Gurrola-Garcia*, 547 F.2d at 1078; *Samora v. United States,* 406 F.2d 1095, 1098 (5th Cir. 1969). At a constitutional minimum, courts should require Congress to have made every meaningful policy choice underlying a criminal statute.

of federal crimes, which are solely creatures of statute").

Accordingly, this case implicates another open question—whether the intelligible principle test is sufficient to satisfy separation of powers concerns in the criminal context. In *Touby v. United States*, this Court considered whether the 1984 amendment to the Controlled Substances Act was unconstitutional because it created an expedited procedure for the Attorney General to place "designer drugs" and other substances on the controlled substance schedules. 500 U.S. at 162-63. Petitioners argued that the amendment unconstitutionally delegated legislative power to the Attorney General. *Id.* at 164. Although conceding that the 1984 Amendment contained an "intelligible principle," they argued that the Constitution required a higher standard when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions. *Id.* at 165-66. This Court acknowledged that its precedent was not entirely clear as to whether more specific guidance is required when imposing criminal liability, but determined that the amendment was detailed enough to satisfy even a more demanding test of greater congressional specificity, and left the question of what standard was required open. *Id.* at 166. Certainly, in the context of a void-for-vagueness challenge, this Court has recognized that the degree of specificity required of Congress is greater for criminal statutes. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). There is no reason to reach a different conclusion where non-delegation concerns are raised.

This Court should grant review to clarify that Congress cannot delegate its legislative power to allow the Executive Branch to make unguided policy choices about which conduct should be subject to criminal sanction. The significance of that issue extends far beyond this case. Thirty years ago, more than 300,000 regulations were enforceable under criminal law, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991), and that number has only grown with time. But administrative authority is intentionally exercised differently from administration to administration. While that flexibility may be desirable for civil administration, it isn't in the context of criminal law. Accordingly, this Court should grant certiorari to clarify that, at the very least, a more stringent standard applies in the criminal context.

B. Even if the Intelligible Principle Test Does Apply in Its Current Form, AECA's Fill-in-the-Blank Approach Cannot Satisfy It

The criminal penalty in 22 U.S.C. § 2778(c) is an unconstitutional delegation of power because the statute does not contain, and Congress did not provide, any intelligible principle directing the Executive on how to enforce the penalty in conformance with the goals of Congress. 22 U.S.C. § 2778(c) ("any person who willfully violates any provision of this section *** or any rule or regulation issued under this section *** shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than 20 years, or both"). That

distinguishes it from delegations upheld in other cases, which contained clear instructions and criteria from Congress for enforcement by the Executive. Even under the existing test, the criminal penalty reflected in § 2778(c) is an unconstitutional delegation of legislative power.

1. A plurality of this Court has held that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta*, 488 U.S. at 372 (cleaned up); *see also Gundy*, 139 S. Ct. at 2123 (plurality) (the "constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion"). Put another way, a delegation is permissible if Congress has made clear to the delegee "the general policy" he must pursue and the "boundaries of [his] authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). Conversely, a delegation is unconstitutional if Congress fails to articulate "any policy or standard" to confine discretion of enforcement. *Mistretta*, 488 U.S. at 373 n.7; *see A.L.A. Schechter*, 295 U.S. at 537; *Panama Refining Co.*, 293 U.S. at 430. Thus, in *Gundy,* a plurality of an 8-member Court upheld SORNA against constitutional challenge because the delegated "discretion extends only to considering and addressing feasibility issues" but acknowledged that if the statute had instead given the Attorney General broader power to actually determine SORNA's applicability to pre-Act offenders, "we would face a nondelegation question." *See Gundy,* 139 S. Ct. at 2123 (plurality).

2. This Court's holdings establish that, even under the current intelligible principle test, a delegation in the criminal context must contain sufficiently clear instructions.

Take *Mistretta*, for example, where this Court considered whether the Legislature's delegation of the power to promulgate sentencing guidelines for every federal offense to an independent sentencing commission was unconstitutional. *Mistretta*, 488 U.S. at 371. Applying the intelligible principle test, this Court determined that Congress's delegation of authority to the Sentencing Commission was sufficiently specific and detailed to meet constitutional requirements. *Id.* at 374. In so holding, this Court emphasized that Congress charged the commission with three articulable goals: ensuring certainty and fairness in sentencing, avoiding unwarranted disparities, and maintaining flexibility to permit individualized sentences. *Id.* Moreover, Congress specified several specific sentencing purposes that the commission had to follow in carrying out its mandate: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed ... correctional treatment." *Id.* (quoting 18 U.S.C. § 3553(a)(2)). Congress also prescribed the system the commission should employ, including, among other things, outlining a maximum penalty that could not exceed the minimum penalty by the greater of 25 percent or six months, unless the sentence range was 30 years or more, setting forth *seven* specific factors to guide sentencing, and

directing the commission to consider these factors. *Id.* at 375-76. Congress also provided more detailed guidance about specific sentencing requirements for certain categories of offenses and offender characteristics. *Id.* The Court determined that these constraints were more than sufficient to satisfy an "intelligible principle" standard, because the statute outlined the policies which prompted establishment of the commission, explained what the commission should do and how it should do it, and set out specific directives to govern particular situations. *Id.* at 379.

Consider, too, the statute in *Touby,* which was far more intelligible in its delegation than the one here. In upholding the statute, the Court relied in part on the fact that it meaningfully constrained the Attorney General's conduct by empowering him to add or remove substances from the Controlled Substances Act only when "necessary to avoid an imminent hazard" to public safety; "required" the Attorney General to consider an enumerated list of three factors[6]; and also required the Attorney General to publish a 30-day notice of the proposed scheduling before it would take effect, among other things. *Id.* at 167. Based on these "multiple specific restrictions" on the Attorney General's discretion, the Court reasoned that the Act satisfied the constitutional requirements of the nondelegation doctrine. *Id.*

No such restrictions or guidance exist here. All the statute does is identify the subject matter for

[6] Those factors are also concrete and include the drug's history and current pattern of abuse, the scope, duration, and significance of that abuse, and what, if any, risk there is to the public health.

delegated (criminal) lawmaking and give the Executive complete discretion to determine what conduct to criminalize, how and to what degree, and including whether the statute can on its own criminalize conspiracy (that looks nothing like generic conspiracy requiring an overt act). That is not constitutionally sufficient guidance. Such a delegation cannot survive the "intelligible principle" analysis even in its current form.

II. The Court Should Grant Certiorari To Resolve The Circuit Split Over Whether Rule 12(b)(3) Challenges Can Be Forfeited, And Thus Subject To Plain Error Review, Or Waived, And Thus Not Subject To Review At All

The Ninth Circuit erroneously held that Naum waived the argument that, as a matter of statutory interpretation, his conspiracy convictions under ITAR and the AECA should be vacated and his sentence overturned because Congress "did not delegate to the Executive Branch its legislative authority ... to create a separate crime of conspiracy." App.6 n.2 (quotation marks omitted). The court reasoned that Naum's failure to raise this argument in the district court by pre-trial motion waived it pursuant to Federal Rule of Criminal Procedure 12(b)(3),[7] and that absent a showing of good cause, no review was available.

[7] That conclusion also misstates the nature of Naum's statutory challenge, which was to both the conviction itself *and to his sentence*. The latter part of that challenge was raised before sentencing and is not subject to waiver. Moreover, Naum's constitutional and statutory challenges are so intertwined that it makes little sense to consider the former and not the latter.

See id. The Ninth Circuit's reasoning is inconsistent with this Court's holding in *United States v. Cotton,* and conflicts with precedent of the Fifth, Sixth, and Eleventh Circuits.

Indeed, there is a deep split among the Circuits regarding how to interpret the 2014 Amendments to Federal Rules of Criminal Procedure 12(b)(3) and 12(c)(3). That split means that challenges by defendants in some circuits are reviewed, while those of defendants in other circuits are not, and that fundamental discrepancy substantially affects the rights of criminal defendants across the country. The Ninth Circuit's holding is also unduly harsh given the consequence of finding an argument waived versus forfeited and is out of step with the principle repeatedly emphasized by this Court that waiver should be a last resort. Thus, this Court should grant review to resolve this split and clarify that untimely Rule 12(b)(3) challenges are forfeited, and subject to plain error review—not waived.

Three of the 2014 amendments to the Federal Rules of Criminal Procedure are relevant to the split. *First*, Rule 12(b)(2), which pertains to "Motions That May Be Made at Any Time," states that, "[a] motion that the court lacks jurisdiction may be made *at any time* while the case is pending." (emphasis added). *Second*, Rule 12(b)(3), which pertains to "Motions That Must Be Made Before Trial," states that "[t]he following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." The section then lists a series of the bases for such a motion, the

fifth being the "failure to state an offense." Rule 12(b)(3)(v). *Third*, Rule 12(c)(3), which pertains to the "Consequences of Not Making a Timely Motion Under Rule 12(b)(3)," states, "[i]f a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is *untimely*. But a court may consider the defense, objection, or request if the party shows good cause." (emphasis added). (This section was specifically amended to replace the language of waiver with the term "untimely.")

Based on these amendments, three circuit courts have held that untimely Rule 12(b)(3) defenses, objections, and requests raised for the first time on appeal are merely forfeited (not waived) and should be reviewed for plain error under Rule 52(b). *See United States v. Vasquez*, 899 F.3d 363, 373 (5th Cir. 2018) (finding purely legal claim forfeited not waived and thus subject to plain error); *United States v. Sperrazza,* 804 F.3d 1113, 1120-21 (11th Cir. 2015) (finding argument forfeited and not waived); *United States v. Soto*, 794 F.3d 635, 656 (6th Cir. 2015) (finding failure to file a motion to sever as a forfeiture and reviewing for plain error); *Ramamoorthy*, 949 F.3d at 962 n.3 (recognizing the split).

Other circuits, however, continue to apply a good cause standard. *United States v. Guerrero*, 921 F.3d 895, 898 (9th Cir. 2019) (per curiam) (applying good cause standard where defendant raises new theories on appeal in support of a motion to suppress); *United States v. Vance*, 893 F.3d 763, 769-70 & n.5 (10th Cir. 2018) (applying good cause and finding argument waived for no good cause shown); *United States v. Walker-Couvertier*, 860 F.3d 1, 9 & n.1 (1st Cir. 2017)

(applying good cause standard and deeming argument waived); *United States v. Fattah*, 858 F.3d 801, 807 (3d Cir. 2017) (declining to enforce waiver but also stating any failure by defendant to raise was excusable for good cause); *United States v. McMillian*, 786 F.3d 630, 636 & n.3 (7th Cir. 2015) (finding forfeiture based on lack of good cause); *United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015) (applying good cause standard and finding no good cause shown). And one circuit court has yet to take a position. *See United States v. Burroughs*, 810 F.3d 833, 838 (D.C. Cir. 2016) (acknowledging the split without choosing a side).

The Fifth, Sixth, and Eleventh Circuits have this right. Untimely Rule 12(b)(3) defenses, objections, and requests raised for the first time on appeal are forfeited (not waived) and should be reviewed for plain error. This Court made clear in *United States v. Olano* that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the *timely* assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" 507 U.S. 725, 733 (1993) (emphasis added) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.*

An untimely challenge under Rule 12(b)(3) should be considered forfeited and not waived, particularly given the significant consequences of finding a claim waived as opposed to forfeited. As this Court has repeatedly emphasized: "courts indulge every

reasonable presumption against waiver of fundamental constitutional right" and it "do[es] not presume acquiescence in the loss of fundamental rights." *Johnson*, 304 U.S. at 464 (quotation marks omitted); *see also Fairey v. Tucker*, 567 U.S. 924, 132 S. Ct. 2218, 2220 (2012) (mem.) ("a defendant's waiver of a fundamental constitutional right is not to be lightly presumed").

This approach further aligns with the Advisory Committee's notes on the 2014 Amendments and this Court's precedent in *United States v. Cotton*. In the 2014 amendments to the Federal Rules of Criminal Procedure, the Advisory Committee noted its reliance on *Cotton* in amending Rule 12(b)(3): "Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the 'indictment or information fails ... to state an offense.'" This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), '[i]nsofar as it held that a defective indictment deprives a court of jurisdiction')."

In *Cotton*, this Court held that even a non-jurisdictional failure to state an offense claim that was not raised before trial would still be reviewed for plain error under Rule 52(b). *Id.* at 631 ("Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of

Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim."). Thus, the Ninth Circuit's holding that Naum waived his Rule 12(b)(3) challenge because he failed to raise the argument in the district court by pre-trial motion also conflicts with this Court's holding in *Cotton*.

Because the Ninth Circuit's holding is inconsistent with this Court's holding in *United States v. Cotton*, further conflicts with precedent of the Fifth, Sixth, and Eleventh Circuits, and is out of step with the principle repeatedly emphasized by this Court that waiver should be a last resort, the Court should grant the petition to resolve the split in Naum's favor. No other percolation is necessary.

III. This Court Should Grant Certiorari To Clarify That A General Appeal Waiver Cannot Bar A Constitutional Challenge To The Statute Of Conviction

The Ninth Circuit erroneously held that Irina waived her challenge to the statute of conviction pursuant to the general appeal waiver in her plea agreement. App.6 & n.3. A constitutional attack on the statute of conviction cannot be waived because such an argument inherently calls into questions not just the government's ability to bring an action, but also the court's authority to impose judgment and is the type of claim that can be judged on the face of the existing record. Thus, the Court should grant review and clarify that an appeal waiver cannot bar a constitutional challenge to the statute of conviction.

Federal courts must have proper subject matter jurisdiction to adjudicate a case, provide a remedy, and enter an enforceable judgment. U.S. Const. art.

III, § 2; *Cotton*, 535 US. at 630 (subject matter jurisdiction is "the courts' statutory or constitutional *power* to adjudicate the case" (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998))). The ability to challenge a court's subject-matter jurisdiction can never be forfeited or waived. *Cotton*, 535 US. at 630-31. To the contrary, such a challenge can be raised at any time during criminal proceedings by a defendant. Fed. R. Crim. P. 12(b)(2). Indeed, "defects in subject-matter jurisdiction *require* correction regardless of whether the error was raised in district court" and therefore may be raised at any time. *Cotton*, 535 U.S. at 630 (citing *e.g., Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908)) (emphasis added).

Where a defendant challenges the constitutionality of the statute of conviction, they challenge "[t]he very initiation of the proceedings against," them, *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974), and "thereby call into question the Government's power to 'constitutionally prosecute' [them]." *Class v. United States*, 138 S. Ct. 798, 805 (2018) (quoting *United States v. Broce*, 488 U.S. 563, 575 (1989)). This kind of argument constitutes a jurisdictional defense that cannot be waived even by an unconditional plea. *Id.* This is because "[a] conviction under [an unconstitutional law] is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment .... [and] if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." *Ex parte Siebold*, 100 U.S. 371, 376-77 (1880); *see also Montgomery v. Louisiana*, 577 U.S. 190, 202-03 (2016), *as revised* (Jan. 27, 2016). This is also why this Court

recently reaffirmed that a guilty plea does not by itself bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. *Class*, 138 S. Ct. at 803 (reaffirming rulings in *Blackledge*, 417 U.S. 21; *Menna v. New York*, 423 U.S. 61 (1975) (per curiam)).

The Ninth Circuit's opinion is in tension with the Court's reaffirmation of these principles in *Class* and illustrates that further clarification is necessary. Here, Irina brings a separation of powers challenge to the AECA, contending, in particular, that its conspiracy provision constitutes an unconstitutional delegation of power by Congress to the Executive. Her challenge thus implicates "the very power of the State" to prosecute her at all. *Class*, 138 S. Ct. at 803 (citing *Blackledge*, 417 U.S. at 30). Thus, the Ninth Circuit erred in holding that Irina could not raise this challenge at any time.

IV. The Fact That This Decision Was Unpublished Should Not Deter Review

The fact that the Ninth Circuit's decision was unpublished (even though it rejected a novel challenge to the AECA) is a reason to grant review, not to deny it. Although "cases without published opinions are less likely to be reviewed by the Supreme Court," Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U.L. Rev. 757, 785 (1995), the truth is that other courts nonetheless rely on those decisions, even though they may have been decided and drafted with less care than a published opinion. Moreover, some courts may use unpublished

opinions to sweep troublesome issues under the rug. *See Nat'l Classification Comm. v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (separate statement of Wald, J.) (unpublished decisions "increase the risk of nonuniformity" and "allow difficult issues to be swept under the carpet"); *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari) (criticizing court of appeals for not publishing decision "to avoid creating binding law"). Nevertheless, because unpublished decisions are viewed as less significant and incapable of creating an actual conflict in the law, they are less likely to be reviewed either by an en banc court or by this Court. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1203 (1978) (explaining reasons why unpublished opinions evade review by courts and commentators alike).

That means that the bulk of appellate court decisions never get any meaningful scrutiny. Federal courts of appeals have relied more and more on unpublished, nonprecedential decisions—even as their caseloads have declined. Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 Mich. L. Rev. 533, 551-54, 561 (2020). Take one example from one circuit: During the first week in October 2016, the U.S. Court of Appeals for the Fourth Circuit issued 104 decisions in pending appeals, 102 of which were "unpublished" dispositions. *Id.* at 534. Today, 87% of all federal appellate decisions are unpublished.

Admin. Office of the U.S. Courts, U.S. Court of Appeals Judicial Business tbl. B-12 (2019).[8]

The effects of this system do not affect all litigants equally either. The courts of appeal disproportionately use unpublished decisions to reject the claims of immigrants, prisoners, and other litigants who can't afford sophisticated counsel. McAlister, *"Downright Indifference,"* 118 Mich. L. Rev. at 548. As a result, pro se litigants like the Morgovskys before the Ninth Circuit too often receive "second-class treatment" through "lightly reasoned unpublished decisions." *Id.* at 538. This in turn creates "a two-tier system of appellate justice, which benefits the haves at the sake of the have-nots," Merritt E. McAlister, *Missing Decisions*, 169 U. Pa. L. Rev. (forthcoming 2021) (Univ. of Fla. Levin College of Law Legal Studies Research Paper No. 20-44 at 66-67 (2020)[9]), and allows circuit splits and errors to propagate without correction. This Court should grant certiorari to consider the issues raised here because they center on questions of broad importance, regardless of the fact that the Ninth Circuit chose to dispose of this particular case through an unpublished disposition.

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[8] *Available at* https://www.uscourts.gov/statistics/table/b-12/judicial-business/2019/09/30. The courts of appeals disproportionately use unpublished decisions to reject the claims of immigrants, prisoners, and other litigants who can't afford sophisticated counsel. McAlister, *"Downright Indifference,"* 118 Mich. L. Rev. at 548.

[9] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3652566.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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