NO. 20-1595

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

REPLY BRIEF FOR PETITIONERS

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August 4, 2021

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REPLY BRIEF FOR PETITIONERS

Respondent doesn't dispute that Title 22 U.S.C. Section 2778 of the Arms Export Control Act ("AECA"), the statute under which Petitioners were convicted, gives the Executive unfettered discretion to determine what constitutes a crime. Nor does it dispute that even within that broad delegation, nothing expressly accorded the Executive the authority to expand the potential penalties (or eliminate elements) for conspiracy liability, which is otherwise governed by 18 U.S.C. § 371. Accordingly, Petitioners' convictions were based on the Executive's unilateral decision to expand conspiracy liability (and the punishment for it) beyond what Congress provided.

In arguing against review, Respondent adopts a Goldilocks approach, arguing that the Court shouldn't consider the first and third questions presented because courts haven't disagreed enough, or the second question because courts have disagreed too much. But all three questions warrant review.

Respondent also misstates Petitioners' arguments and contends this is a poor vehicle for answering those questions. But the petition squarely presents the legal issues, the appellate court considered the main issue on the merits, and Petitioners' convictions cannot stand under the correct analysis.

ARGUMENT

I. The Decision Below Warrants Review

A. Contrary to the Government's Claims, Section 2778(c)'s Delegation Doesn't Satisfy the Current Tests

Respondent suggests that Petitioners concede that § 2778(c)'s delegation survives current caselaw. BIO 13-14. Not so. Petitioners do not dispute that this Court has held that, in some instances, a delegation is constitutionally sufficient if Congress delineates (1) "the general policy" to be pursued, (2) the public agency applying it, and (3) "the boundaries of th[e] delegated authority." *Mistretta v. United States*, 488 U.S. 361, 373-74 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). But Section 2778 doesn't define in any meaningful way either the general policy to pursue or the boundaries of that delegated authority. Pet. 17; 20-21.

Nevertheless, Respondent argues that Congress's policy of "further[ing] * * * world peace and the security and foreign policy of the United States" by "control[ling] the import and the export of defense articles and defense services" in Section 2778(a)(1) satisfies the requirement that Congress specify the general policy to pursue. BIO 14. But this policy guides only the President's maintenance of the United States Munitions List, not the creation of a criminal penalty with an offense to be named later by the Executive. Whether this general policy provides enough guidance to determine which defense articles should appear on that list is one thing. Whether it provides a basis for unilaterally expanding the

application of and penalties for criminal conspiracy beyond the Congressionally established ones is entirely another.

But AECA also doesn't identify the "boundaries of the delegated authority." Notably, the Government doesn't articulate any boundary for Section 2778(c)'s delegation of criminal lawmaking authority, which applies to "any person who willfully violates any provision of this section … *or any rule or regulation issued under this section* …." This unbounded delegation of criminal lawmaking authority distinguishes this case from many of those the Government cites. BIO 11 n.1. In *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019), for example, the authority delegated to the Attorney General to apply SORNA's registration requirements to pre-act offenders applied to "transition-period implementation issues, and no further." Similarly, the delegation of authority to set air-quality standards in *Whitman v. American Trucking Associations* was limited to standards "requisite to protect public health from the adverse effects of the pollutant in the ambient air." 531 U.S. 457, 473 (2001). This limitation runs parallel to *Touby,* where the authority delegated only let the Attorney General designate a drug as a controlled substance for criminal enforcement if "necessary to avoid an imminent hazard to the public safety." *Touby v. United States*, 500 U.S. 160, 166 (1991) (quoting 21 U.S.C. § 811(h)(1)); *see also Lichter v. United States*, 334 U.S. 742, 787 (1948) (authority to set standards for recovery of excessive profits from military contractors explicitly "confined to the duration of the war or to a short time thereafter"); *Am. Power & Light Co.*, 329

U.S. at 105 (noting specific "standards for new security issues," and "conditions for acquisitions of properties and securities"); *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (authority to set rules for reorganization of certain associations constrained to "a single type of enterprise" with limited "problems of insecurity and mismanagement," applying only known and established remedies). Each of these delegations was upheld in part because of the tangible boundaries mandated by Congress.

This petition is also more certworthy because the Executive misused a broad delegation of power to alter existing criminal conspiracy law. This Court has noted that "[a] discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields." *Id.* at 250. Yet, according to Respondent, Section 2778(c)'s delegation is broad enough to allow the Executive to omit one element of conspiracy liability and expand the available maximum penalties.

B. The President's Traditional Authority Over Foreign Affairs Doesn't Extend to Rewriting Criminal Conspiracy Law

The Government relies on the recent dissent in *Gundy* for the proposition that a delegation of broad discretion doesn't create a separation of powers issue if it falls within the scope of an established executive power, like foreign affairs. BIO 18 (citing *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting)). Leaving aside the oddity of Respondent relying on three Justices' call to

reconsider the intelligible principle test to argue that this Court *shouldn't* reconsider it, that argument misconstrues both the nature of Petitioners' challenge and what Section 2778(c) does here.[1]

Article II of the Constitution gives the Executive substantial discretion over foreign affairs. But that authority encompasses the ability to define defense articles and promulgate the United States Munitions list, not to (re)define criminal offenses. Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." But here, Section 2778(c) presents the Executive with a fill-in-the-blank mechanism to make an act a crime, a role reserved solely to Congress. *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019). This gives the President unlimited authority to

[1] That dissent proposed the following test: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments?" *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting). A regulation like the one here that makes policy judgments that contradict existing criminal law cannot stand. Congress made a policy judgment to impose a penalty of "not more than five years" for conspiracy, but the regulations here expand that to 20 years. 18 U.S.C. § 371; 22 U.S.C. § 2778(c). And Section 371 requires an overt act, while the regulation here does not. Finally, while the Government relies on the criteria set forth in Section 2778(a)(2)—like "whether the export of an article would * * * support international terrorism" or "increase the possibility of outbreak or escalation of conflict," 22 U.S.C. § 2778(a)(2)—those go to whether to grant a license, not whether the Executive can or should weaken the requirements for conspiratorial liability while increasing the associated penalties. BIO 14.

"prescrib[e] the rules by which the duties and rights" of citizens are determined, a quintessentially legislative power. The Federalist No. 78, at 465 (Clinton Roissiter ed., 1961) (Alexander Hamilton); *Gundy,* 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

Respondent also misreads *Loving v. United States*, 517 U.S. 748, 772 (1996), for the proposition that congressional guidance and restrictions are not necessary for delegations within the Executive's "traditional authority"—here, foreign affairs and national security. BIO 15. But *Loving* doesn't actually support that rule. First, as *Loving* emphasized, the delegation there was "set within boundaries the President may not exceed." *Id.* at 772. Second, the delegation was "made to the President in his role as Commander in Chief," which "require[s] him to take responsible and continuing action to superintend the military, including the courts-martial." *Id.*

Respondent also fails to acknowledge that even *Loving* expressly noted that delegations that call for discretion *beyond* the President's traditional authority may be subject to higher scrutiny. *Id.* Here, Petitioners have never challenged the President's authority to promulgate the United States munitions list, define items as defense articles, or regulate their international commerce, just his ability to rewrite by regulation statutory criminal law. That power falls far outside the President's traditional authority.

United States v. Chi Tong Kuok, 671 F.3d 931, 934-35 (9th Cir. 2012) doesn't help Respondent for similar reasons. Petitioners do not dispute *Chi Tong Kuok*'s holding that Section 2778(a)(1) contained an

intelligible principle with respect to the President's authority to designate defense articles and services and maintain the United States Munitions List. Rather, Petitioners dispute that the Executive has the authority to create a conspiracy charge without one of the statutory elements, and with four times the statutory maximum established by Congress. 18 U.S.C. § 371. *Chi Tong Kuok* didn't consider that issue.

C. This Question Is Cert-Worthy

Respondent doesn't dispute that *how* the non-delegation doctrine applies in criminal cases is unsettled. *Touby,* 500 U.S. at 165-66. Its focus on a lack of circuit split ignores the improbability of one developing because lower courts will rely intelligible principle test until the Court revisits it. Indeed, that only a handful of statutes have been struck down does not evidence a lack of cert-worthiness, but underscores that the "intelligible principle" test has "taken a life of its own," and provides no meaningful check upon excessive delegation. *Gundy*, 139 S. Ct. at 2131-48 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting). Respondent ignores how several members of this Court have recognized the need to revisit this test to clarify 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 (Gorsuch, J., dissenting); *see also id.* at 2130-31 (Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari).

The Government nevertheless cites a petition to argue that the Court should deny review here too. BIO 8-9. But unlike the Petitioners here, the petitioner in *Henry v. United States*, 139 S. Ct. 2615 (2019) (mem.), was validly charged with one count of conspiracy under 18 U.S.C. § 371 (in addition to attempting to violate AECA). The petition did not ask the Court to reconsider the intelligible principle test, and so did not address the first issue here.

D. This Is an Appropriate Vehicle to Revise the "Mutated" Intelligible Principle Doctrine

Finally, this is an appropriate case in which to (re)consider the intelligible principle test in the criminal context. Contrary to Respondent's assertion, the issue was raised, albeit before sentencing, in the district court, ER0595; the appellate court considered it on the merits; and the question is one of law. Nor would the result be the same under the *Gundy* dissenters' test. *See supra* note 2. If the delegation is so broad as to allow the Executive Branch to unilaterally rewrite criminal statutes to eliminate an element and augment the penalties, that delegation cannot stand. And if it is *not* broad enough, then a regulation that does both those things also cannot stand because it exceeds the scope of delegation. Either way, this Court should grant review.

II. Respondent Doesn't Dispute Is The Existence Of A Circuit Split On The Second Question Presented

Respondent primarily argues that the second question presented does not warrant review despite the existence of a deep Circuit split because, inter alia,

this Court has declined to resolve that split previously. But the petitions Respondent relies on (BIO 9) are all distinguishable, and each was a poor vehicle. For example, in those cases, petitioners' convictions were supported by inevitable discovery of the relevant, legally obtained evidence (BIO 17, *Cain v. United States*, 141 S. Ct. 1082 (2021) (No. 20-5639)), overwhelming corroborating evidence of guilt (BIO 25, *Galindo-Serrano v. United States*, 140 S. Ct. 2646 (2020) (No. 19-7112)), a valid decision to bring a second indictment based on newly discovered evidence (BIO 23, *Bowline v. United States*, 140 S. Ct. 1129 (2020) (No. 19-5563)), or a straightforward, eye-witness account in support of a finding of reasonable suspicion (BIO 20-21, *Guerrero v. United States*, 140 S. Ct. 1300 (2020) (No. 19-6825)). But this petition raises a constitutional challenge to the charging statute and regulation going to the heart of whether the Morgovskys were legally brought into court at all and what penalties could be imposed,[2] and application of the correct standard would lead to a different result. This Court should grant review, resolve the split, and remand for the Ninth Circuit to apply the correct standard.

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[2] While the Ninth Circuit considered Naum's constitutional challenge to his conviction on the merits, it declined to consider his other arguments. *But see United States v. Soto*, 794 F.3d 635, 655 (6th Cir. 2015) (noting that "the rulemaking history clarifies that Rule 12 is generally directed at the district courts, not the appellate courts" and that the Rule's "good-cause standard may be difficult to apply on appeal if the issue was not first raised at the district court because review for good cause often requires developing and analyzing facts to determine whether a defendant has shown good cause for the late filing").

III. Irina's Challenge Wasn't Waived

Finally, the Government argues, without citing any authority, that Irina's plea agreement waiver automatically precludes her constitutional challenge to the statute of conviction, notwithstanding *Class v. United States*. BIO 29; 138 S. Ct. 798, 803 (2018) (holding 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"). Application of this rule would eviscerate this Court's holding in *Class*, and the rationale of the *Menna-Blackledge* doctrine—which the Court applied in *Class*. *See id.* at 803-04 (citing *Menna v. New York*, 423 U.S. 61, 63 & n.2 (1975) (per curiam); *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)). Under that doctrine, "a guilty plea does not bar a claim on appeal where on the face of the record the court had no power to enter the conviction or impose the sentence." *Class*, 138 S. Ct. at 804 (cleaned up). Roughly 95% of felony cases are resolved by guilty pleas[3], and many necessarily involve negotiated exchanges. The Government's interpretation would deprive many defendants of their right to challenge an unconstitutional statute, contravening *Class*. *Id.*

The Government claims that no case supports a different interpretation that would allow defendants to raise such challenges despite an appellate waiver, but that's wrong (and an issue over which both before

[3] *See* USSC, Overview of Federal Criminal Cases Fiscal Year 2016, at 4 (2017); Sean Rosenmerkel, Matthew Durose, & Donald Farole, Jr., Dep't of Justice, Bureau of Justice Statistics, NCJ 226846, Felony Sentences in State Courts, 2006 - Statistical Tables, at 1 (rev. Nov. 22, 2010).

and after *Class*, circuits have disagreed). *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016) ("A waiver of appellate rights will also not apply if a defendant's sentence is 'illegal,' which includes a sentence that 'violates the Constitution.'" (quoting *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007), *as amended* (July 19, 2007))); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (express knowing waiver will not bar certain constitutional challenges to a sentence) *with United States v. Joseph*, 811 F. App'x 595, 597-98 (11th Cir. 2020) (per curiam) (an appeal waiver in a plea agreement is enforceable even against a constitutional challenge to the statute of conviction); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (appellate waiver applies to constitutional challenges). And some courts (though not all) have concluded that an appellate waiver will not bar challenges where failing to consider the claim results in a miscarriage of justice." *See, e.g., United States v. Snelson*, 555 F.3d 681, 685 (8th Cir. 2009); *United States v. Khattak*, 273 F.3d 557, 562-63 (3d Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001). The Court should grant cert to resolve this split of authority.

Nor has the Court denied a grant related to this question before. *Cf.* BIO 9. The question in *Haynes* concerned whether an appellate waiver implicitly waives a collateral attack on a conviction. *Haynes Timberland, Inc. v. United States*, 139 S. Ct. 288 (2018) (mem.). The question in *Lowman* asked whether an appeal waiver can be enforced when a sentence is based on "unreliable facts in violation of the defendant's due process rights." Neither petition asked whether an appellate waiver bars a

constitutional challenge to the statute of conviction itself. *Ex parte Siebold*, 100 U.S. 371, 376-77 (1880) ("[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."). That question should be resolved in this case.

CONCLUSION

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

Respectfully submitted,

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