NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ANTHONY LYNN WOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 34 U.S.C. § 20913(d), Congress delegated to the Attorney General the power to apply the Sex Offender Registration and Notification Act to people convicted of sex offenses before SORNA's enactment. This Court upheld § 20913(d) against a nondelegation challenge in Gundy v. United States, 139 S.Ct. 2116 (2019). The case produced a four-Justice plurality with Justice Alito, who supplied the fifth vote for the result, concurring only in the judgment. Justice Kavanaugh did not participate.

The three dissenting Justices in Gundy urged a change in how this Court now decides nondelegation claims. Justice Alito said he would revisit this Court's nondelegation jurisprudence if a majority were willing to do so. As the dissent observed, although "a plurality of an eight-member Court" upheld § 20913(d), it "resolves nothing." Id. at 2131 (Gorsuch, J., dissenting). The question presented here is:

> Should this Court overrule Gundy and, if appropriate, revisit its approach to nondelegation claims, and hold that 34 U.S.C. § 20913(d) is an unconstitutional delegation of Congress's legislative power to the Executive Branch?

STATEMENT OF RELATED CASES

United States v. Wood, No. 19-cr-00196-RBJ (D. Colo. Dec. 13, 2019)

United States v. Wood, No. 19-1477 (10th Cir. July 29, 2020)

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PRAYER

Petitioner, Anthony Lynn Wood, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on July 29, 2020.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, United States v. Wood, No. 19-1477, slip op. (10th Cir. July 29, 2020), is found in the Appendix at A1. The decision of the United States District Court for the District of Colorado, denying by text entry Mr. Woods' motion to dismiss on the claim involved here, is found in the Appendix at A4.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). By order of March 19, 2020, this Court extended the deadline for the filing of

petitions for writ of certiorari to 150 days from the underlying judgment. One hundred fifty days from July 29 is Saturday, December 26, making this petition due on the next business day of Monday, December 28. S. Ct. R. 30.1. This petition, filed on December 26, is therefore timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides:

> **Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

U.S. Const. art. I, § 1.

Section 20913 of Title 34 of the United States Code provides, in relevant part:

> **(a) In general**
>
> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
>
> **(b) Initial registration**
>
> The sex offender shall initially register --

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

* * *

(d) Initial registration of sex offenders unable to comply with subsection (b)

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

34 U.S.C. § 20913(a), (b), (d).

STATEMENT OF THE CASE

In 1999, Anthony Wood was convicted in the Georgia courts of various sex offenses. Years after that, in 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA) as part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 590 (2006).

SORNA imposes registration requirements on sex offenders. 34 U.S.C. §§ 20913(a)-(c). It also has associated criminal penalties. One makes it a felony, punishable by up to ten years in prison, for a state offender who is "required to register" under SORNA to travel in interstate or foreign commerce, and thereafter "knowingly fail[] to register or update a registration as required by" the Act. 18 U.S.C. § 2250(a)(1), (3).

SORNA does not by its terms apply to those, like Mr. Wood, who were convicted of a sex offense before its passage. Instead, it leaves the coverage of such pre-Act offenders the Attorney General. It provides that "[t]he 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." 34 U.S.C. § 20913(d).

Mr. Wood was released from custody on his Georgia convictions in 2016. The house where he planned to live, which had belonged to his mother, had been condemned. Vol. 4 at 21, 37. He then went to Colorado, where his son Robert lived, id. at 34, but did not register, id. at 7.[1]

Mr. Wood was eventually charged in the United States District Court for the District of Colorado with a SORNA violation. The indictment alleged he was required to register under SORNA, and that he traveled in interstate commerce, and failed to register and to update his registration, contrary to 18 U.S.C. § 2250(a). Vol. 1 at 4.

Mr. Wood moved to dismiss the indictment. Id. at 7-13. He argued SORNA's grant of power to the Attorney General to determine the Act's applicability to pre-Act offenders violated the nondelegation doctrine. That is, he insisted, Congress unconstitutionally gave the legislative power reserved to it in Article I, section 1 of the Constitution to the Attorney General. Mr. Wood acknowledged this argument was foreclosed by the Tenth Circuit's decision in United States v. Nichols, 775 F.3d 1225 (10th Cir.

[1] Citations to the record on appeal in the Tenth Circuit are provided for the Court's convenience, in the event this Court deems it necessary to review the record to resolve this petition. Sup. Ct. R. 12.7.

2014), and by this Court's decision in Gundy v. United States, 139 S.Ct. 2116 (2019). He raised the claim to preserve it for further review.

In doing so, Mr. Wood noted that Gundy was decided by only eight Justices, as Justice Kavanaugh did not participate, and there was reason to think the Court might soon revisit the issue. Vol. 1 at 10-11 . The plurality opinion garnered the vote of four Justices. Gundy, 139 S.Ct. at 2120. Justice Gorsuch, joined by the Chief Justice and Justice Thomas, would have held that vesting the decision to determine SORNA's applicability to pre-Act offenders in the Attorney General was an unconstitutional delegation of Congress's legislative power. Id. at 2131-48 (Gorsuch, J., dissenting). Justice Alito, who concurred in the judgment, provided the decisive vote. He declared that "[i]f a majority of th[e] Court were willing to reconsider" the Court's nondelegation approach he "would support that effort." Id. at 2131 (Alito, J., concurring in the judgment). But as there were not four other Justices of the eight Justices hearing the case who were willing to do so, and as he thought SORNA did not run afoul of the Court's existing approach to delegation, which allows agencies "to adopt important rules pursuant to

extraordinarily capacious standards," id. at 2130-31, he voted to affirm, id. at 2131.

The district court, in a text entry, denied the motion to dismiss without explanation. App. at 4. Mr. Wood then entered a conditional guilty plea to the indictment, reserving the right to appeal the nondelegation claim raised in his motion to dismiss. Vol. 1 at 15-16; see Fed. R. Crim. P. 11(a)(2).

Mr. Wood appealed the nondelegation claim to the Tenth Circuit, again acknowledging that it was foreclosed by that court's decision in Nichols and this Court's decision in Gundy. In July of this year, the Tenth Circuit affirmed. It agreed it was bound to follow Gundy. A2-3.

REASONS FOR GRANTING THE WRIT

With the Court now at full strength, it should directly confront the important issue that fractured the eight Justices who decided Gundy.

The Court in Gundy did not conclusively resolve either the statutory question of what SORNA delegated to the Attorney General as to pre-Act offenders or the proper approach for deciding nondelegation issues. The four Justices in the plurality and the three Justices in the dissent differed sharply on both points. And Justice Alito, who supplied the fifth vote for the result, did not join the plurality in either regard. Gundy, 139 S.Ct. at 2130-31 (Alito, J., concurring in the judgment). His opinion "indicate[s] instead that he remains willing, in a future case with a full Court, to revisit these matters." Id. at 2131 (Gorsuch, J., dissenting).

Under the view of the nondelegation doctrine articulated by the dissent in Gundy, even the plurality's narrow conception of 34 U.S.C. § 20913(d) may be an unconstitutional delegation of the legislative power. And if § 20913(d) is the broad delegation the dissent concluded it to be, a proper approach to nondelegation claims assuredly requires the conclusion that the delegation here is unconstitutional.

The question of the constitutionality of the delegation in SORNA, which affects hundreds of thousand of pre-Act offenders, is important in its own right. Whether this Court should revisit its approach to nondelegation claims in deciding the propriety of that delegation is even more consequential. A change in that approach would bear on how and to what extent Congress can delegate power to the Executive Branch in countless areas. Because the eight-Justice Court in Gundy "resolve[d] nothing," Gundy, 139 S.Ct. at 2131 (Gorsuch, J. dissenting), the full Court should decide whether the delegation in § 20913(d) violates Article I, Section 1 of the Constitution, which allows only Congress to exercise legislative power.

A. As the opinions of four Justices in Gundy show, there is an urgent need for this Court to reexamine its approach to claims that Congress has improperly delegated its legislative power.

Article I, section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." The proper approach in deciding whether Congress has improperly delegated its legislative power is ripe for reexamination.

"If Congress could pass off its legislative power to the executive branch . . . 'the entire structure of the Constitution' would 'make no sense.'" Gundy, 139 S.Ct. at 2134-35 (Gorsuch, J., dissenting) (quotation omitted; ellipses added). The approach this Court has used for decades to ensure this does not happen, commonly called the "intelligible principle" doctrine, id. at 2138 (Gorsuch, J., dissenting), is deeply flawed and not up to the task. It allows Congress to give executive agencies the power "to adopt important rules pursuant to extraordinarily capacious standards." Id. at 2130-31 (Alito, J., concurring in the judgment). And the pervasiveness of such congressional delegations makes how to assess nondelegation claims a question of surpassing importance.

As the intelligible principle doctrine has developed, it "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." Id. at 2139 (Gorsuch, J., dissenting). "Judges and scholars representing a wide and diverse range of views have condemned it as resting on 'misunderst[ood] historical foundations.'" Id. at 2139-40 (quotation omitted; brackets by the dissent in Gundy). It also has led to the upholding of delegations that were likely unconstitutional

because "where some have claimed to see 'intelligible principles' many 'less discerning readers [have been able only to] find gibberish.'" Id. (quotation omitted; brackets by the dissent in Gundy).

To remedy these problems, the three dissenters in Gundy advocated a return to an approach that they considered to be true to the framers' guidance, the constitutional design and the early decisions of this Court. Id. at 2133-37. They would ask three questions to decide whether there has been a valid delegation, so as to ensure that the executive's role is circumscribed and that Congress does not cede its legislative power, as it may often find it politically expedient to do:

> 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?

Id. at 2141.

That now is the time for reconsidering this Court's much-criticized, nondelegation jurisprudence is evident not just from the fact that three Justices wish to do so. A fourth Justice does too. Justice Alito declared in Gundy that "if a majority of this Court were willing to reconsider the

approach [it has] taken for the past 84 years," he "would support that effort." Id. at 2131 (Alito, J., concurring in the judgment). Only one more Justice -- either Justice Kavanauh (who did not participate in Gundy) or Justice Barrett (who was not then on the Court) -- could make such a majority. That would allow this Court to ensure that it directly, and properly, polices the separation of powers between the legislative and executive branches.

B. As the dissent in Gundy indicated, a change in this Court's jurisprudence on nondelegation claims could alter the outcome of the claim here even on the plurality's narrow reading of SORNA's delegation.

The delegation question here looks very different if § 20913(d) means what the plurality in Gundy concluded it does, or instead what the dissent concluded it does. The plurality thought the delegation was both narrow and limited to the transition period that followed SORNA's enactment. The Attorney General, it decided, was to apply SORNA to all pre-Act offenders as soon as feasible. Id. at 2125-26, 2128-29 (plurality opinion).

The dissent, on the other hand, determined that § 20913(d) leaves "unbounded policy choices" to the Attorney General. Id. at 2133 (Gorsuch,

J., dissenting). It considered Congress to have delegated to the Attorney General the power to decide whether to cover all, some or no pre-Act offenders; the power to decide whether to subject those he did choose to cover to all, or only some, of SORNA's requirements; and the right to change course at any time. Id. at 2132; see also id. at 2143. On this view, the Attorney General has "free rein to write the rules" for hundreds of thousands of pre-Act offenders. Id. at 2132.

But even if the delegation is as the plurality determined it to be, the approach to deciding the nondelegation issue here may still matter. The government proposed in Gundy a reading of the delegation that was similar, if indeed not identical to, to the plurality's. The government maintained that SORNA "compell[ed] the Attorney General to register pre-Act offenders 'to the maximum extent feasible.'" Id. at 2145. The dissent said that even if this were in fact the extent of the delegation, whether it was an unconstitutional delegation of the legislative power "wouldn't be free from doubt." Id. This is because what is feasible can be looked at in a variety of ways, so such a delegation still leaves important policy choices to the Attorney General:

> A statute directing an agency to regulate private conduct to the extent "feasible" can have many possible meanings. It might refer to "technological" feasibility, "economic" feasibility, "administrative" feasibility, or even "political" feasibility. Such an "evasive standard" could threaten the separation of powers if it effectively allowed the agency to make the "important policy choices" that belong to Congress while frustrating "meaningful judicial review." And that seems exactly the case here, where the Attorney General is left free to make all the important policy decisions and it is difficult to see what standard a court might later use to judge whether he exceeded the bounds of the authority given to him.

Id. (quotation omitted).

This is equally true of the "as soon as feasible" delegation that the plurality thought SORNA made. As the dissent indicated, when it wrote that the government's similar (if not identical) reading of what was delegated would not be free from constitutional doubt, such a delegation might well be improper under the test the dissent believed applied to nondelegation claims.

C. The statutory question, which informs the nondelegation inquiry, is also of great importance in its own right and also went unresolved in Gundy.

The determination of whether a statute unconstitutionally delegates the legislative powers is informed by "what task it delegates and what

instructions it provides." Gundy, 139 S.Ct. at 2123 (plurality opinion). The Court in Gundy did not definitively decide what Congress delegated to the Attorney General in § 20913(d) and with what (if any) instructions, as Justice Alito did not join the plurality's opinion on that question. Id. at 2130-31 (Alito, J., concurring in the judgment); see also id. at 2131 (Gorsuch, J., dissenting) (question not resolved).

If the statutory inquiry is resolved along the line of how the dissent read SORNA, it may lead to the conclusion that, even under this Court's present jurisprudence, Congress unconstitutionally delegated its legislative power. Even if this were to dissuade the Court from reconsidering its nondelegation jurisprudence, the question of the constitutionality of the delegation here is still consequential. This is most obviously the case for pre-Act offenders. They face "profound consequences" as a result of the conclusion in Gundy, id. at 2133 (Gorsuch, J., dissenting), as they are subject to SORNA's civil regulations and to criminal penalties for violating them. Id.

The very conclusion of an unconstitutional delegation of Congress's legislative power would also be significant. It would mark the first time

since 1935 that this Court would have struck down a statutory provision on such grounds. Id. at 2130-31 (Altio, J., concurring in the judgment), 2137-38 (Gorsuch, J., dissenting). It would at least send the signal that there are indeed delegations that this Court will reject under the nondelegation doctrine.

There is also no assurance that a majority of Justices would hold that even the delegation as the dissent saw it would violate the nondelegation doctrine. There is, of course, the lack of any delegation that has been held to flunk that test in eight-five years. And the plurality said only that if SORNA made the delegation that Mr. Gundy claimed that it "would face a nondelegation question," id. at 2123, not that the question would be answered in his favor under the doctrine as it now stands. So, this Court might well need to (or at least find it appropriate to) reconsider its nondelegation approach even if a majority agrees with the dissent's description of the delegation.

Only six Members of the present Court have decided the issue of what SORNA delegates in § 20913(d) and they are evenly split. Justice Gorsuch in his dissent gave strong rebuttal to the plurality's statutory

analysis. The dissent began by noting that § 20913(d) makes no mention of feasibility. Id. at 2146 (Gorsuch, J., dissenting). It then took on each of the reasons the plurality gave for inferring such a standard.

The plurality had invoked SORNA's declaration of purpose, which states that Congress "'establishes a comprehensive national system for the registration of'" sex offenders and offenders against children. Id. (quoting 34 U.S.C. § 20901). But as the dissent pointed out, that only "declares what Congress believed the *rest* of the statute's enacted provisions had already 'establishe[d],' without the need for any action by the Attorney General." Id. (emphasis in original; brackets by the dissent in Gundy). Besides, such "broad and sweeping statements" of a statute's purpose cannot override the text of a specific provision, like § 20913(d). Id.

In any event, the dissent continued, even if there were a directive to establish a comprehensive system for pre-Act offenders, the plurality read too much into "comprehensive." Id. A comprehensive system is not the same as coverage to the maximum extent possible. Id. For example, the dissent explained, "a criminal justice system may be called 'comprehensive' even though many crimes go unpursued." Id. And Congress itself claimed

it enacted a comprehensive system for post-Act offenders, even though SORNA has "all sorts of coverage exceptions" for them. Id. All of this shows that the delegation of important policy decisions to the Attorney General to decide how much to cover pre-Act offenders is consistent with a comprehensive system:

> In the same way, no reason exists why SORNA might not also claim to address pre-Act offenders 'comprehensively' even though the Attorney General is free to exercise his discretion to forego registration for some, many, or maybe all of them. The statute still "comprehensively" addresses these persons by indicating they must aide whatever rules an Attorney General may choose. In all these ways, SORNA might be said to address sex offenders past, present, and future in a way that "compris[es] or include[s] much," and that is "of large content or scope," but in a way that nevertheless delegates important policy decisions to the executive branch.

Id. at 2146-47 (quoting dictionary definitions; brackets by the dissent in Gundy).

The plurality had also found support for its reading of the delegation in the fact that SORNA defines "sex offender" as one who "'*was*'" convicted of a sex offense, and pre-Act offenders would meet that definition. Id. at 2147 (describing plurality's position) (quotation omitted; emphasis by the dissent in Gundy). But the dissent thought this to be "merely a truism,"

and that whether pre-Act offenders "are *also* subject to federal registration requirements is a different question entirely." Id. (emphasis in original). The notion that this definition settled the delegation question was also at odds with SORNA's provisions as to post-Act offenders. As the dissent put it: "If the statute's definitional section were really enough to command the registration of all sex offenders, the Act would have had no need to proceed to explain, as it does at great length, when *post*-Act sex offenders must register and when they need not." Id. (emphasis in original).

The dissent also found unconvincing the plurality's contention that reference in § 20913(d) to those "unable to comply" with the Act's initial registration requirements bespoke an expectation that the Attorney General register pre-Act offenders as soon as feasible, as the assumption was that offenders would be in prison, and many pre-Act offenders would not be. See id. at 2128 (plurality opinion), 2147 (Gorsuch, J., dissenting) (describing plurality's position). Section 20913(d)'s first clause gives the Attorney General the power to "specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter." 34 U.S.C. § 20913(d). The second clause gives the power to prescribe

registration rules for them "and for other categories of sex offenders who are unable to comply with subsection (b)," the Act's initial registration requirement. Id.; see also 34 U.S.C. § 20913(b). So, the dissent explained, the second clause is an "*additional*" authority to the power, granted in the first clause, to decide which pre-Act offenders to cover, and to what degree. Gundy, 139 S.Ct. at 2147 (emphasis in original). It thus only "underscore[s] the breadth of the Attorney General's discretion." Id.

The debate over what was delegated in § 20913(d) is a robust one. Its resolution, by a full Court, may determine whether SORNA and its associated criminal penalties apply to a very large number of pre-Act offenders. It is worthy of this Court's review even if this Court decides that it need not, or that is not appropriate to, revisit its nondelegation jurisprudence.

* * *

This Court in Gundy "resolv[ed] nothing and deferr[ed] everything." Id. at 2148. Now is the time to resolve the scope of SORNA's delegation

and the constitutionality of that delegation, and, if appropriate, to revisit this Court's nondelegation jurisprudence.

CONCLUSION

This Court should grant Mr. Wood a writ of certiorari.

Respectfully submitted,

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