No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LEEFATINIE COLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should revisit nondelegation doctrine precedent and, in doing so, overrule *Gundy* and hold that 34 U.S.C. § 20913(d) is an unconstitutional delegation of legislative authority to the Executive Branch?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Leefatinie Cole, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The October 1, 2020 unpublished opinion of the United States Court of Appeals for the Eleventh Circuit in this case is included as Appendix A.

JURISDICTION

The Eleventh Circuit entered its judgment on October 1, 2020. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254(1), which permits review of criminal cases in the courts of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the U.S. Constitution

Article I, Section 1 of the U.S. Constitution provides:

> **Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States.

18 U.S.C. § 2250

18 U.S.C. § 2250 provides in relevant part:

> (a) In general.--Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian

tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

34 U.S.C. § 20913

34 U.S.C. § 20913 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).

28 C.F.R. § 72.3

28 C.F.R. § 72.3 provides:

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18

U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

STATEMENT OF THE CASE

In 34 U.S.C. § 20913(d), Congress delegated to the Attorney General the power to apply the Sex Offender Registration and Notification Act ("SORNA") to individuals convicted of sex offenses prior to SORNA's enactment in 2006. This Court granted

certiorari in *Gundy v. United States*, 139 S. Ct. 2116 (2019), to resolve whether 34 U.S.C. § 20913(d) is an unconstitutional delegation of legislative authority to the Executive Branch. The Court issued a plurality opinion without the participation of Justice Kavanaugh that "resolves nothing." *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). Indeed, the *Gundy* decision left open the possibility that this Court could reconsider the issue in the future with Justice Alito's concurrence noting that it is time for the Court to revisit the nondelegation doctrine with a full court. *Id*. at 2130-2131 (Alito, J., concurring). Since then, pre-Act offenders like Mr. Cole have continued to challenge their prosecutions and petition this Court for review. This Court should now revisit its approach to the nondelegation doctrine and enforce the separation of powers enshrined in the Constitution. Based on the facts of Mr. Cole's case, this case is an ideal vehicle for the Court to revisit this important issue.

A. Statutory and Legal Background

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act ("Adam Walsh Act"). Pub.L. 109–248, July 27, 2006, 120 Stat. 587. One of the Act's provisions made it a violation of federal law to travel in interstate commerce and fail to register as a sex offender. The Act did not address individuals like Mr. Cole who had convictions requiring registration prior to its enactment. Instead, Congress left that decision, which impacts over 500,000 people, to the Attorney General. *See* 34 U.S.C. § 20913(d). Specifically, 34 U.S.C. § 20913(d) states that

> 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).

Over the next five years, the Attorney General addressed this issue in administrative rulings. *See* 28 C.F.R. 72.3; 73 Fed. Reg. 38030; 28 C.F.R § 72.3; 76 Fed. Reg. 1630, 1639. The Attorney General ultimately decided that a person required to resister under state law before the Adam Walsh Act was now required to register under federal law.

However, that requirement is unconstitutional because giving the Attorney General the authority to make that determination violated the nondelegation doctrine. The Constitution established a system of government that separates power among three branches. All legislative powers are vested in Congress. Article I, § 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The Executive Branch enforces the laws that Congress passes. *See* U.S. Const., art. II; *see also Ex Parte United States*, 287 U.S. 241, 251 (1932). The nondelegation doctrine prohibits Congress from delegating its legislative powers to the Executive Branch. *Mistretta v. United States*, 488 U.S. 361, 371-372 (1989).

Therefore, the delegation of authority to the Attorney General that resulted in Mr. Cole and over 500,000 other people being subject to prosecution under 18 U.S.C. § 2250(a) violates the nondelegation doctrine. The question presented here seeks to resolve that issue and asks whether 34 U.S.C. § 20913(d)'s delegation violated the constitutional separation of powers embodied in the nondelegation doctrine. Justice Alito has signaled his willingness to reconsider this issue. *Gundy*, 139 S. Ct. at 2131

(Alito, J., concurring). Justice Kavanaugh could not participate in the *Gundy* decision because he was not yet seated on the Court at the time of the oral argument, and Justice Barrett was not yet seated on the Court either. However, when this Court denied certiorari in *Paul v. United States*, Justice Kavanaugh agreed with the denial but wrote separately to note that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." 140 S. Ct. 342, 342 (2019). This Court should now give the nondelegation doctrine further consideration and grant review in this case.

B. Factual Background and Proceedings Below

Mr. Cole was charged in a single count indictment alleging that he did not abide by the requirements of SORNA in violation of 18 U.S.C. § 2250(a). The charge stemmed from a conviction in 2000 that required Mr. Cole to register in California. At that time, Mr. Cole had no federal reporting obligations under SORNA because SORNA was not enacted until 2006. *See* Adam Walsh Act. At some point after SORNA was enacted and prior to January 2016, Mr. Cole came to Georgia but failed to register. In February 2019, a grand jury in the Northern District of Georgia indicted Mr. Cole, alleging that he violated the registration requirements established through the Adam Walsh Act by traveling to Georgia from another state and failing to register in Georgia.

In March 2019, Mr. Cole filed a motion to dismiss the indictment arguing that SORNA's application to a pre-Act offender like him violated the nondelegation doctrine. At the time, this issue was pending before this Court in *Gundy v. United States*. In June 2019, this Court affirmed the decision in *Gundy* holding that the

delegation of authority in 34 U.S.C. § 20913(d) did not violate the nondelegation doctrine. After that, Mr. Cole filed a perfected motion to dismiss acknowledging that the decision in *Gundy* required the district court to deny his motion but preserving the issue for appeal. The district court then issued an order denying Mr. Cole's motion to dismiss. Mr. Cole subsequently entered a guilty plea. Mr. Cole timely filed notice of appeal. Based on binding precedent and this Court's plurality opinion in *Gundy*, the Eleventh Circuit affirmed the decision. Pet. App. A.

REASONS FOR GRANTING THE WRIT

I. The decision in *Gundy* did not resolve the important questions raised or outline the proper approach for resolving nondelegation questions and rather "resolves nothing."

The Court in *Gundy* did not resolve the statutory question raised through SORNA's delegation of authority to the Attorney General nor did the opinion answer what exactly SORNA delegated to the Attorney General with regard to pre-Act offenders. The plurality and the dissent disagreed sharply on this point, and Justice Alito, who supplied the fifth vote for the plurality, did not join the plurality in its statutory or constitutional analysis and only concurred with the judgment. *Gundy*, 139 S. Ct. at 2130-2131 (Alito, J., concurring). This Court needs to resolve this question because the issue raised in *Gundy* impacts over 500,000 people, which makes the question of great importance on its own. In addition, the decision would have wide-ranging implications for nondelegation doctrine challenges that will continue to come before the Court and question the "intelligible principle test" that the Court has used to deny such challenges for decades. Because the *Gundy* plurality

opinion "resolves nothing," the full Court should revisit this question and provide an answer to SORNA's 500,000 plus pre-Act offenders and to all caught in the crosshairs of nondelegation doctrine quandaries in the wake of *Gundy's* fractured analysis that raised more questions than it answered. *Id.* at 2131 (Gorsuch, J., dissenting).

A. The plurality opinion in *Gundy* did not answer whether SORNA should apply to pre-Act offenders.

The split decision in *Gundy* did not answer whether SORNA should apply to pre-Act offenders such as Mr. Cole, so the full Court needs to revisit this issue. Now that the Court has a full panel of Justices, the time is right to revisit the issue. The Court needs to answer this important question for the over 500,000 pre-Act offenders who will continue to challenge their prosecutions.

The four Justices in the plurality concluded that § 20913(d) required the Attorney General to apply SORNA to all pre-Act offenders and only delegated to the Attorney General the decision of when to apply SORNA to pre-Act offenders and how. *Id.* at 2123-2129. According to these Justices, that limited delegation under their narrow view of § 20913(d) "falls well within constitutional bounds." *Id.* at 2130. The dissent argued, however, that § 20913(d) gave the Attorney General the power to decide whether to apply SORNA to pre-Act offenders in the first place. *Id.* at 2148. The dissent concluded that broad delegation of power to the Attorney General was unconstitutional. *Id*. Because Justice Alito concurred only in the judgment, his concurrence did not provide any opinion on the scope of SORNA's delegation of authority to the Attorney General. Instead, Justice Alito focused almost his entire concurrence on explaining that he was open to reconsidering the Court's

nondelegation doctrine jurisprudence with a full panel of the Court. *Id.* at 2130-2131. Importantly, this Court's prior decision in *Carr v. United States*, 560 U.S. 438 (2010), reveals what Justice Alito's opinion would be if and when the Court reconsiders this question. In his dissent in *Carr*, Justice Alito stated "Congress elected not to decide for itself whether [SORNA's] registration requirements – and thus § 2250(a)'s criminal penalties – would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that question." 560 U.S. at 466 (Alito, J., dissenting).

Given the recent changes in the makeup of the Court, now only three Justices believe that § 20913(d) already required application to pre-Act offenders and only gave the Attorney General the power to decide when and how to apply SORNA to those offenders. In contrast, four Justices believe that § 20913(d) gave the Attorney General the authority to decide whether SORNA applies to pre-Act offenders at all. This Court should, therefore, reconsider this issue with a full Court and let Justice Kavanaugh and Justice Barrett weigh in and resolve this important issue.

This issue is of great importance because it impacts over 500,000 pre-Act offenders. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). This Court, of course, agreed that this issue was of great importance when it granted certiorari in *Gundy*. The importance of this issue has not diminished since the Court's fractured decision in *Gundy*. Rather, the importance and need to address this issue has only grown and will continue to grow until this Court answers the questions raised in *Gundy* and many more cases to come.

B. The plurality opinion did not provide guidance on deciding nondelegation questions in future cases based on the flawed intelligible principle test.

In addition to the over 500,000 people impacted by the decision in *Gundy*, the issue raised in *Gundy* brought up important questions about the nondelegation doctrine and the "intelligible principle" test that have implications beyond SORNA. While the plurality in *Gundy* used the intelligible principle test to uphold SORNA's delegation of authority to the Attorney General, the intelligible principle test is, in fact, flawed in itself. Accordingly, this Court needs to address the future of the nondelegation doctrine through addressing the questions left unanswered in *Gundy* and overruling the intelligible principle test.

For decades, this Court has used the intelligible principle doctrine to analyze the delegation of power from Congress to the Executive Branch. *Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting). Under the intelligible principle test, if "Congress shall lay down by legislative act an intelligible principle to which the person or body [to whom power is delegated] is directed to conform, such legislative action is not a forbidden delegation of legislative power." J.*W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). As Justice Alito explained, however, this approach has allowed Congress to give executive agencies the power "to adopt important rules pursuant to extraordinarily capacious standards." *Gundy*, 139 S. Ct at 2130-2131 (Alito, J., concurring).

Pursuant to these "capacious standards," the plurality in *Gundy* held that SORNA's delegation of authority to the Attorney General for pre-Act offenders passed

constitutional muster under the intelligible principle test. *Id.* at 2129-2130. While the plurality, which would now constitute three Justices, did not question the intelligible principle test, Justice Alito indicated his willingness to reconsider the test. *Id.* at 2131 (Alito, J., concurring). The three-Justice dissent took major concern with the intelligible principle test and stated that the test "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). The dissent advocated for a return to the original text and intent of the Constitution that drew clear lines between the three branches of government and emphasized the importance of separation of powers. *Id.* at 2133-2137. At this point, that means three Justices (Justice Breyer, Justice Kagan, and Justice Sotomayor) would likely uphold the intelligible principle test, three Justices (Justice Gorsuch, Chief Justice Roberts, and Justice Thomas) would not, and one Justice (Justice Alito) would like to reconsider the test. With the additions of Justice Barrett and Justice Kavanaugh and having the benefit of the full Court, it is now time to reconsider this flawed principle.

Reconsidering the Court's approach to the nondelegation doctrine and the intelligible principle test is critically important because this approach has allowed broad delegations of power to the Executive Branch that have unconstitutionally created crimes and stripped the liberty of hundreds of thousands of people. Even though the test has no basis in the Constitution, the test has allowed these broad delegations of power to pass constitutional muster for far too long. The result has

caused great harm and "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional." *Id.* at 2140.

Allowing pre-Act offenders to face prosecution under SORNA is but one example of the harm the intelligible principle test has caused. As Justice Gorsuch stated in his dissent, it is not "hard to imagine how the power at issue in this case – the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties – could be abused in other settings." *Id.* at 2144. Given the wide-ranging implications and lack of constitutional or historical basis for the test, this Court should now reconsider the issue raised here and in doing so, overrule the intelligible principle test.

II. This petition provides the right vehicle to address this issue.

With a full panel of the Court now seated, this petition provides the right vehicle to address this issue and resolve the many questions left unanswered after *Gundy*. Mr. Cole was convicted of a sex offense in 2000 prior to the enactment of SORNA. Mr. Cole promptly moved to dismiss his 18 U.S.C. § 2250(a) charge through a pretrial motion to dismiss and maintained his objection throughout the proceedings after this Court issued the *Gundy* decision. After sentencing, Mr. Cole appealed his case to the Eleventh Circuit. The issue raised herein was the sole issue Mr. Cole appealed to the Eleventh Circuit. The Eleventh Circuit then affirmed the decision based on *Gundy*. Given that Mr. Cole clearly raised and preserved this issue and the Eleventh Circuit ruled on this sole issue, this petition provides the perfect vehicle to address the issues left unresolved in the wake of *Gundy*.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Dated: This 1st day of March, 2021.

Respectfully submitted,

Wes Bryant for

Courtney O'Donnell
Counsel of Record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11010
Non-Argument Calendar

D.C. Docket No. 1:19-cr-00069-LMM-JKL-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEEFATINIE TIROSH COLE,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Georgia

(October 1, 2020)

Before MARTIN, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Leefatinie Cole appeals his conviction for failing to register as a sex offender in violation of the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250(a). We affirm.

On appeal, Mr. Cole argues that Congress unconstitutionally delegated authority to the Attorney General to decide whether SORNA'S registration requirements apply to individuals like himself who were convicted of sex offenses before SORNA's enactment in 2006. *See* 34 U.S.C. § 20913(d). That argument is foreclosed by the Supreme Court's decision in *Gundy v. United States*, 139 S. Ct. 2116 (2019), which rejected an identical contention. *See id*. at 2121 (plurality opinion); *id*. at 2130-31 (Alito, J., concurring in the judgment). It is also foreclosed by our decision in *United States v. Ambert*, 561 F.3d 1202, 1213-14 (11th Cir. 2009).

Given that four Justices in *Gundy* expressed doubt over the Court's current non-delegation jurisprudence, Mr. Cole seeks to preserve his constitutional argument for future review. We understand, but are bound by *Gundy* and *Ambert*.

AFFIRMED.