No. 20-7427

IN THE SUPREME COURT OF THE UNITED STATES

LEEFATINIE TIROSH COLE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation of authority to the Attorney General to issue regulations under 34 U.S.C. 20913(d) violates the nondelegation doctrine.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ga.):

United States v. Cole, No. 19-cr-69 (Mar. 4, 2020)

United States Court of Appeals (11th Cir.):

United States v. Cole, No. 20-11010 (Oct. 1, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 823 Fed. Appx. 911. The order of the district court is not published in the Federal Supplement but is available at 2019 WL 4166698. The report and recommendation of the magistrate judge is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment,

order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on March 1, 2021 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of failing to register as a sex offender after traveling in interstate commerce, in violation of 18 U.S.C 2250(a). Judgment 1. Petitioner was sentenced to 17 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-2.

1. This Court has observed that "[s]ex offenders are a serious threat in this Nation," largely because their victims "are most often juveniles" and because sex offenders "are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." McKune v. Lile, 536 U.S. 24, 32-33 (2002) (plurality opinion); see Smith v. Doe, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). Seeking to address those concerns, Congress has repeatedly enacted legislation to encourage and assist States in tracking sex offenders' addresses and "inform[ing] the public" about them "for its own safety." Smith, 538 U.S. at 99; see Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (plurality opinion).

a. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071 et seq.). The Wetterling Act encouraged States to adopt sex-offender registration laws that met certain minimum standards, by making the adoption of such laws a condition of receiving certain federal funding. Smith, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. Id. at 90. In 1996, Congress bolstered the minimum federal standards by adding a mandatory community-notification provision to the Wetterling Act. Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e)). Congress also strengthened the national effort to ensure sex-offender registration by directing the FBI to create a national sex-offender database; requiring lifetime registration for certain offenders; and making the failure of certain persons to register a federal crime, subject to penalties including imprisonment. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

b. Despite those efforts, "Congress came to realize that the[] 'loopholes and deficiencies'" in varied state statutes "had allowed over 100,000 sex offenders (about 20% of the total) to escape registration." Gundy, 139 S. Ct. at 2121 (plurality opinion) (quoting H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20 (2005)). In 2006, to address those concerns, Congress

enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (34 U.S.C. 20901 et seq.).[1]

i. Congress enacted SORNA to "make[] 'more uniform and effective' the prior 'patchwork' of sex-offender registration systems." Gundy, 139 S. Ct. at 2121 (plurality opinion) (quoting Reynolds v. United States, 565 U.S. 432, 435 (2012)). The text of SORNA states that the statute's "purpose" is to "protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for the registration of those offenders." 34 U.S.C. 20901 (emphasis omitted). To that end, SORNA "repeal[ed] several earlier federal laws that also (but less effectively) sought uniformity," and in their place it established new "comprehensive registration system standards" and made certain "federal funding contingent on States' bringing their systems into compliance with those standards." Reynolds, 565 U.S. at 435. Congress authorized the Attorney General to promulgate regulations implementing SORNA generally, 34 U.S.C. 20912(b), including by "determin[ing]" whether a particular jurisdiction receiving federal funding has "fail[ed]

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[1] Prior to September 1, 2017, SORNA's provisions were codified at 42 U.S.C. 16901 et seq.; SORNA's text was not changed. Office of the Law Revision Counsel, U.S. House of Representatives, Editorial Reclassification: Title 34, United States Code, https://uscode.house.gov/editorialreclassification/t34/index.html.

* * * to substantially implement" SORNA's requirements, 34 U.S.C. 20927(a) and (d).

SORNA also imposed requirements directly on "both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current)," backed by new criminal sanctions. Reynolds, 565 U.S. at 435; see 34 U.S.C. 20913(a)-(c); 18 U.S.C. 2250(a). Section 20913 provides that every "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." 34 U.S.C. 20913(a). A "sex offender" is defined as "an individual who was convicted of" any one of various enumerated "sex offense[s]," including sex crimes involving minors. 34 U.S.C. 20911(1); see 34 U.S.C. 20911(5)-(7). That "broad[ ]" definition of sex offender "reflects [Congress's] purpose" in enacting SORNA, Reynolds, 565 U.S. at 442 -- namely, "'the establishment of a comprehensive national system for the registration of sex offenders' that includes offenders who committed their offenses before the Act became law." Gundy, 139 S. Ct. at 2124 (plurality opinion) (quoting Reynolds, 565 U.S. at 442 (brackets omitted)).

Section 20913 establishes deadlines by which sex offenders must register and update their registration. 34 U.S.C. 20913(b) and (c). A sex offender "shall initially register * * * before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 34 U.S.C.

20913(b)(1). "[I]f the sex offender is not sentenced to a term of imprisonment," then he "shall initially register * * * not later than 3 business days after being sentenced for that offense." 34 U.S.C. 20913(b)(2). Thereafter, "[a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction" where the offender resides, is an employee, or is a student, and shall "inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 34 U.S.C. 20913(c).

To enforce those registration requirements, Congress "creat[ed] federal criminal sanctions applicable to those who violate" them. Reynolds, 565 U.S. at 435; 18 U.S.C. 2250(a). Section 2250(a) provides that a person who "is required to register under [SORNA]" based on a state conviction for a sex offense, who "travels in interstate or foreign commerce," and who then "knowingly fails to register or update a registration as required by [SORNA] shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. 2250(a)(1), (2)(B), and (3). "For a defendant to violate [Section 2250(a)], * * * the statute's three elements must be satisfied in sequence," i.e., the offender must first "become[] subject to SORNA's registration requirements," he "must then travel in interstate commerce," and he must "thereafter fail to register." Carr v. United States,

560 U.S. 438, 446 (2010) (citation and internal quotation marks omitted).[2]

ii. One issue of particular concern to Congress was registration of offenders who had committed covered sex offenses before SORNA's enactment -- tens of thousands of whom were believed to be "missing from the system" in existing databases. Reynolds, 565 U.S. at 443; see id. at 442 (SORNA's "history * * * reveals that many of its supporters placed considerable importance upon the registration of pre-Act offenders"). Consistent with that concern and the "basic statutory purpose" of creating a "comprehensive national system for the registration of sex offenders," this Court has observed that, "in general, [SORNA's] criminal provisions apply to any pre-Act offender required to register under the Act who later travels interstate and fails to register." Id. at 442 (brackets and citation omitted).

Congress also recognized, however, that "'instantaneous registration' of pre-Act offenders 'might not prove feasible.'" Gundy, 139 S. Ct. at 2124 (plurality opinion) (quoting Reynolds, 565 U.S. at 440-441, 443); see Reynolds, 565 U.S. at 440-441 (explaining that "[a]t least Congress might well have so thought" in light of "what Congress may well have thought were practical

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[2] The requirement to travel in interstate or foreign commerce does not apply to offenders who are subject to SORNA based on a conviction under federal, District of Columbia, tribal, or territorial law. See 18 U.S.C. 2250(a)(2)(A).

problems" with applying SORNA to pre-Act offenders). For example, one concern was how SORNA's registration deadlines would apply to pre-Act offenders "who [we]re unable to comply with" them. 34 U.S.C. 20913(d). For offenders who had completed their prison sentences before SORNA's enactment, Section 20913(b)'s registration deadline already would have passed; that could have created "uncertainties" about when they needed to register. Reynolds, 565 U.S. at 442. In addition, SORNA's goal of "mak[ing] more uniform a patchwork of pre-existing state [registration] systems" required changing some States' registration rules, including "newly registering or reregistering 'a large number' of pre-Act offenders." Id. at 440.

Given those practical concerns, in Section 20913(d) Congress directed "the Department of Justice, charged with responsibility for implementation, to examine th[o]se" and other "pre-Act offender problems and to apply the new registration requirements accordingly." Reynolds, 565 U.S. at 441. Section 20913(d) is captioned "Initial registration of sex offenders unable to comply with" Section 20913(b), which sets SORNA's initial-registration deadlines. 34 U.S.C. 20913(d) (emphasis omitted). Section 20913(d) states that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before [SORNA's] enactment" in 2006 "or its implementation in a particular jurisdiction." Ibid. Section 20913(d) additionally authorizes the Attorney General "to

prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [Section 20913(b)]." Ibid.

On February 28, 2007, pursuant to Section 20913(d), the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8897 (28 C.F.R. 72.3 (2008)). In 2010, the Attorney General promulgated a final regulation that "finaliz[ed] [the] interim rule." 75 Fed. Reg. 81,849 (Dec. 29, 2010). The regulations' operative text making the registration requirement applicable to all pre-Act offenders has not changed.[3] The Attorney General has additionally issued guidance confirming SORNA's

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[3] In August 2020, the Attorney General promulgated a notice of proposed rulemaking that proposed to amend 28 C.F.R. 72.3 to further clarify its application by providing:

> The requirements of SORNA apply to all sex offenders. All sex offenders must comply with all requirements of that Act, regardless of when the conviction of the offense for which registration is required occurred (including if the conviction occurred before the enactment of that Act), regardless of whether a jurisdiction in which registration is required has substantially implemented that Act's requirements or has implemented any particular requirement of that Act, and regardless of whether any particular requirement or class of sex offenders is mentioned in examples in this regulation or in other regulations or guidelines issued by the Attorney General.

85 Fed. Reg. 49,332, 49,353 (Aug. 13, 2020).

application to all sex offenders and providing guidance addressing how jurisdictions should address timing and other logistical issues in registering various categories of pre-Act offenders. See generally 76 Fed. Reg. 1630 (Jan. 11, 2011); 73 Fed. Reg. 38,030 (July 2, 2008).

c. In 2019, this Court decided Gundy v. United States, supra, in which a majority of the Court rejected a contention that 34 U.S.C. 20913(d) violates the nondelegation doctrine. See 139 S. Ct. at 2121-2130 (plurality opinion); id. at 2130-2131 (Alito, J., concurring in the judgment). Writing for the plurality, Justice Kagan determined that Reynolds's interpretation of SORNA "effectively resolved" the case. Id. at 2124. The plurality reasoned that Reynolds had recognized that "Congress meant for SORNA's registration requirements to apply to pre-Act offenders," and Section 20913(d) "enabled the Attorney General only to address (as appropriate) the 'practical problems' involving pre-Act offenders before requiring them to register." Id. at 2125 (quoting Reynolds, 565 U.S. at 440). Relying on text, context, purpose, and history, the plurality "read the statute in the same way" as the Court did in Reynolds: "to contain a standard * * * that the Attorney General should apply SORNA to pre-Act offenders as soon as feasible." Id. at 2125-2126; see id. at 2126-2128.

Concurring in the judgment in Gundy, Justice Alito determined that SORNA does not "lack[] a discernable standard" and thus complied with "the approach [the Court] ha[s] taken for the past

84 years" in assessing nondelegation arguments. 139 S. Ct. at 2131 (Alito, J., concurring in the judgment). Although he expressed willingness to "reconsider th[at] approach," he noted that "a majority" of the Court "[wa]s not willing to do" so, and he stated that it "would be freakish to single out [Section 20913(d)] for special treatment." Ibid.

Justice Gorsuch, joined by the Chief Justice and Justice Thomas, dissented in Gundy. 139 S. Ct. at 2131-2148. The dissenters believed that Section 20913(d) granted the Attorney General "vast" authority to impose registration requirements on pre-Act offenders or to refrain from requiring registration. Id. at 2132.

The petitioner in Gundy filed a petition for rehearing, which contended that the Court should reconsider its decision because it had been rendered by only eight Justices, having been argued before Justice Kavanaugh joined the Court. Pet. for Reh'g at 1-4, Gundy, supra, No. 17-6086 (July 11, 2019). The Court denied the petition. 140 S. Ct. 579 (2019).

Although Justice Kavanaugh did not participate in the Court's decision on the merits in Gundy, 139 S. Ct. at 2130, or in the consideration or disposition of the petition for rehearing, Gundy, 140 S. Ct. at 579, he issued a statement respecting the Court's contemporaneous denial of certiorari in another case involving a nondelegation challenge to Section 20913(d). Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari). Justice Kavanaugh stated

that, although the dissent in Gundy "raised important points that may warrant further consideration in future cases," he "agree[d] with the denial of certiorari" in Paul because it "ultimately raise[d] the same statutory interpretation issue that the Court resolved * * * in Gundy." Ibid.

2. In 1999, petitioner sexually assaulted his 10-year-old cousin at their grandmother's house while he was babysitting her. Presentence Investigation Report (PSR) ¶¶ 10, 40. Petitioner pleaded guilty in California state court to lewd and lascivious acts with a child under 14, and he was sentenced to 217 days of imprisonment and five years of probation. PSR ¶¶ 11, 40. In 2004, petitioner's probation was revoked, and he was ordered to serve three years in prison. PSR ¶ 11.

In 2007, petitioner was released from custody. At the time of his release, he signed a form acknowledging his obligation to register as a sex offender for life. PSR ¶ 12. Petitioner did not comply with that obligation, and in 2012 he was convicted in California state court of failing to register as a felony sex offender. PSR ¶¶ 13, 43. Petitioner was sentenced to one year of imprisonment and was released from prison in 2013. PSR ¶ 43.

Following his release from prison, petitioner initially complied with his registration obligations. PSR ¶¶ 14, 16. Several years after his release, however, petitioner ceased compliance. PSR ¶¶ 14-16. The last registration document petitioner filed, in March 2015, stated that he resided in San

Jose, California. PSR ¶ 16. By January 2016, he had moved to Vancouver, Washington, and by May 2017, he had moved to Atlanta, Georgia, without updating his sex-offender registration. PSR ¶¶ 17-20. In 2019, petitioner was arrested in Georgia for failing to register. PSR ¶¶ 22-23.

3. A federal grand jury in the Northern District of Georgia returned an indictment charging petitioner with failing to register as a sex offender following interstate travel, in violation of 18 U.S.C. 2250(a). Indictment 1-2. Petitioner moved to dismiss the indictment, contending that the application of SORNA to pre-Act offenders under the Attorney General's regulations violates the nondelegation doctrine. D. Ct. Doc. 27, at 1 (July 23, 2019). Following this Court's decision in Gundy, a magistrate judge recommended denying petitioner's motion based on that decision. Id. at 2-3. The district court adopted that recommendation over petitioner's objections. D. Ct. Doc. 31, at 1-4. The court noted petitioner's "acknowledg[ment] that, in light of [this] Court's decision in Gundy, the government c[ould] proceed in prosecuting him for a SORNA violation." Id. at 2-3.

Petitioner then pleaded guilty to the indictment without a plea agreement. D. Ct. Docs. 38, 39 (Nov. 15, 2019); 11/15/19 Tr. 2; Judgment 1. The district court sentenced petitioner to 17 months of imprisonment. Judgment 2. The Bureau of Prisons' public records indicate that petitioner was released from prison on

December 31, 2020. Petitioner is currently serving a five-year term of supervised release that the court imposed. Judgment 3.

4. The court of appeals affirmed the denial of petitioner's motion to dismiss in an unpublished, per curiam opinion. Pet. App. 1-2. The court determined that Gundy foreclosed petitioner's nondelegation challenge to Section 20913(d) of SORNA. Id. at 2.

ARGUMENT

Petitioner renews his contention (Pet. 7-12) that 34 U.S.C. 20913(d) violates the nondelegation doctrine by authorizing the Attorney General to specify the application of SORNA to pre-Act offenders. This Court rejected that contention just two Terms ago in Gundy v. United States, 139 S. Ct. 2116 (2019). No intervening development casts any doubt on that decision. And the Court has since denied numerous petitions presenting the same issue. Wood v. United States, 141 S. Ct. 1432 (2021) (No. 20-6809); Zeroni v. United States, 141 S. Ct. 378 (2020) (No. 20-5004); Peterson v. United States, 141 S. Ct. 302 (2020) (No. 19-8636); Glenn v. United States, 141 S. Ct. 100 (2020) (No. 19-8422); O'Donnell v. United States, 140 S. Ct. 2837 (2020) (No. 19-8381); Shoulder v. United States, 140 S. Ct. 2702 (2020) (No. 19-8079); Reed v. United States, 140 S. Ct. 1546 (2020) (No. 19-7535); Thomas v. United States, 140 S. Ct. 1284 (2020) (No. 19-7494); Holcombe v. United States, 140 S. Ct. 820 (2020) (No. 19-6824); Dodson v. United States, 140 S. Ct. 664 (2019) (No. 19-6626). The same result is warranted here.

1. In Gundy, a majority of this Court rejected the same nondelegation challenge to Section 20913(d) that petitioner presents here. 139 S. Ct. at 2123-2130 (plurality opinion); id. at 2130-2131 (Alito, J., concurring in the judgment). That decision forecloses petitioner's challenge.

a. The plurality in Gundy analyzed Section 20913(d)'s "text, considered alongside its context, purpose, and history," and determined that the statute does not constitute an impermissible delegation of legislative authority because it "requires the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible" and confers on the Attorney General limited "discretion" that "extends only to considering and addressing feasibility issues." 139 S. Ct. at 2123-2124. So interpreted, the plurality explained, "Section 20913(d)'s delegation falls well within permissible bounds." Id. at 2124. That interpretation is sound.

Several aspects of SORNA's text and context support the Gundy plurality's interpretation of Section 20913(d). First, SORNA's "[d]eclaration of purpose" states that its aim is to create a "comprehensive national system for the registration of [sex] offenders." 34 U.S.C. 20901 (emphasis omitted). That statement "has a clear meaning -- something that is all-encompassing or sweeping." Gundy, 139 S. Ct. at 2126-2127 (plurality opinion). Second, SORNA's "definition[] [of] a 'sex offender' is an individual 'who was convicted of a sex offense,'" and "Congress's

use of the past tense * * * shows that SORNA was not merely forward-looking." Id. at 2127 (quoting 34 U.S.C. 20911(1)). Indeed, when SORNA was enacted, pre-Act offenders were the only sex offenders who could have satisfied that definition. Ibid. Third, the conferral of authority in the first half of Section 20913(d) -- to "'specify the applicability'" of SORNA to pre-Act offenders -- is informed by the text of the "second half of the same sentence," which allows the Attorney General to "'prescribe rules for the registration of * * * offenders . . . who are unable to comply with'" the timing requirements in subsection (b), id. at 2126 (quoting 34 U.S.C. 20913(d)), a narrow grant of authority to address "'practical problems'" in applying SORNA to pre-Act offenders, id. at 2128. Similarly, Section 20913(d)'s title -- "Initial registration of sex offenders unable to comply with subsection (b)" -- suggests that Congress did not intend to permit the Attorney General to allow all pre-Act offenders to never register. Id. at 2126 (emphasis omitted). And SORNA's legislative history confirms what its text and context make clear. See id. at 2127. That history, including the focus on the problem of "'missing'" offenders, "show[s] that the need to register pre-Act offenders was front and center in Congress's thinking" and that Congress would have found it "surprising" if pre-Act offenders were not included. Id. at 2127-2128 (citation omitted). Finally, if SORNA's text, context, purpose, and history left any doubt, this Court's precedent counsels in favor of construing the statute,

as the Gundy plurality did, to confer only limited discretion that avoids any nondelegation concern. See Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (explaining that the Court has avoided constitutional concerns by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional").

b. The "statutory interpretation issue that the Court resolved * * * in Gundy," Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari), also resolves any nondelegation challenge to Section 20913(d). As the Gundy plurality explained, its interpretation of Section 20913(d) as a "small-bore" delegation of limited authority to the Attorney General to specify how pre-Act offenders must register comports with any formulation of the nondelegation doctrine. See Gundy, 139 S. Ct. at 2130. Indeed, as the plurality noted, the petitioner in Gundy acknowledged that Section 20913(d), so construed, "likely would be constitutional" and addressed "all of his argument" to attempting unsuccessfully to show that the statute "means something else." 139 S. Ct. at 2130 n.4.

"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. But neither the nondelegation doctrine specifically nor the broader separation-of-powers principle that it serves "den[ies] to the Congress the necessary resources of flexibility and practicality . . . to

perform its function." Yakus v. United States, 321 U.S. 414, 425 (1944) (citation omitted). The "extent and character of [the] assistance" Congress may seek "from another branch" in a particular context "must be fixed according to common sense and the inherent necessities of the governmental co-ordination" at issue, J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) -- matters Congress is typically best positioned to assess. See Mistretta, 488 U.S. at 372 (explaining importance of Congress's "ability to delegate" authority to address "ever changing and more technical problems"); id. at 416 (Scalia, J., dissenting) ("Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government," and "the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political.").

Consistent with that understanding, "[f]rom the beginning of the Government," Congress has enacted, and the Court has upheld, statutes "conferring upon executive officers power to make rules and regulations -- not for the government of their departments, but for administering the laws which did govern." United States v. Grimaud, 220 U.S. 506, 517 (1911). As early as the Washington Administration, Congress enacted broad delegations that do not appear to have been challenged on nondelegation grounds in this Court. For example, the First Congress delegated authority to the Executive to license and regulate trade with Indian tribes, Act of

July 22, 1790, ch. 33, 1 Stat. 137, and to regulate military-disability pay, Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119. Early Congresses also enacted a series of statutes that delegated to the President the power to impose or lift trade sanctions and tariffs. Marshall Field & Co. v. Clark, 143 U.S. 649, 683-689 (1892).

Several delegations in the founding era permitted the Executive to devise whole schemes affecting private rights and conduct based on general guidance. For example, the First Congress delegated the authority to issue patents for any "invention or discovery sufficiently useful and important." Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109. And in 1798, Congress delegated authority to establish and administer a direct tax on all real estate (apportioned amongst the states per capita). Act of July 9, 1798, ch. 70, 1 Stat. 580. That tax was the largest "nonmilitary undertaking of the Constitution's first two decades," as it involved assessing every piece of real estate in the nation. Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288, 1304 (Apr. 2021); see ibid. (noting that, in addition to the individual assessments, the Act established regional boards that could "raise or lower all assessments within [its region] by any percentage amount 'as shall appear to be just and equitable'" (quoting Act of July 9, 1798, ch. 70, § 22, 1 Stat. 589) (emphasis

omitted)). That Act garnered "no constitutional objections" and passed unanimously in the Senate. Id. at 1312.

As a majority of the Court in Gundy recognized, under "this Court's long-established law," Section 20913(d) "easily passes muster." 139 S. Ct. at 2129 (plurality opinion); see id. at 2129-2130; id. at 2131 (Alito, J., concurring in the judgment) (agreeing that Section 20913(d) does not "lack[] a discernable standard that is adequate under the approach this Court has taken for many years" and that "it would be freakish to single out the provision * * * for special treatment"). Moreover, whatever the precise scope of permissible delegations, Section 20913(d) does not approach its outer limits. Section 20913(d) permits the Attorney General merely to "fill up the details" regarding how pre-Act offenders will register. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

Contrary to petitioner's assertion (Pet. 11), Section 20913(d) does not empower the Attorney General to "create[] crimes." Congress defined "the elements of the new federal crime" of failing to register and "the penalty for violation." United States v. Ambert, 561 F.3d 1202, 1214 (11th Cir. 2009) (citing 18 U.S.C. 2250(a)). Congress also made all the other significant policy decisions in SORNA. Congress delineated which prior convictions would require registration in the first place. 34 U.S.C. 20911. Congress prescribed "where the offender must register," the default "time period" and "method" for doing so,

and "the nature of information that registrants must provide." Ambert, 561 F.3d at 1214 (citing 34 U.S.C. 20913(a)-(c), 20914(a)). Section 20913(d), as properly construed by the Gundy plurality, is not an impermissible delegation of legislative authority.

2. The court of appeals' decision rejecting petitioner's nondelegation challenge to Section 20913(d) based on Gundy does not conflict with any decision of this Court or of another court of appeals. Petitioner does not contend otherwise. Instead, he asserts (Pet. 7-12) that the Court should reconsider the nondelegation challenge to Section 20913(d) that Gundy rejected in light of subsequent changes in the Court's membership. The Court declined to entertain such a contention when it denied a petition for rehearing in Gundy that advanced a materially identical argument. See Gundy v. United States, 140 S. Ct. 579 (2019); see p. 11, supra. The Court should follow the same course here.

a. "Adherence to precedent is 'a foundation stone of the rule of law.'" Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)). Revisiting SORNA's validity just two years after the Court decided that question "would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory stare decisis aims to ensure." CSX Transp., Inc. v. McBride, 564 U.S. 685, 699 (2011) (quoting Hilton v. South Carolina Pub. Railways Comm'n, 502 U.S. 197, 202 (1991)) (emphasis omitted). Granting review on the ground petitioner urges -- based solely on

changes in the Court's composition -- would undermine another key purpose of stare decisis: upholding "the actual and perceived integrity of the judicial process." Bay Mills Indian Cmty., 572 U.S. at 798 (citation omitted).

Reconsidering Gundy would be especially unwarranted because the plurality's interpretation of Section 20913(d) resolved the nondelegation claim. See, e.g., 139 S. Ct. at 2123, 2129. As the Court has often observed, "stare decisis in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [the Court has] done.'" John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-173 (1989)) (emphasis omitted); see, e.g., Cleveland v. United States, 531 U.S. 12, 26 (2000). And the plurality's statutory analysis in Gundy rested in part on the Court's earlier interpretation of Section 20913(d) in Reynolds.

Overruling any precedent, particularly a decision interpreting a statute, generally requires a "special justification, not just an argument that the precedent was wrongly decided." Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014) (citation and internal quotation marks omitted). Petitioner identifies no such special justification here. Gundy does not conflict with any historical practices; it is consistent with this Court's prior precedent, including decisions addressing the nondelegation doctrine and the Court's interpretation of the

same statutory provision in Reynolds; and a rule permitting the Attorney General to provide timing instructions for pre-Act offenders' registration (as every Attorney General to address the issue since 2007 has done) is clear and workable.

b. Petitioner errs in asserting (Pet. 8) that stare decisis should not preclude the Court from reconsidering Section 20913(d)'s validity on the theory that "Gundy did not answer whether SORNA should apply to pre-Act offenders" and instead left the question open. See Pet. 8-9. The plurality in Gundy squarely resolved that issue. 139 S. Ct. at 2123-2129; see Paul, 140 S. Ct. at 342 (statement of Kavanaugh, J., respecting the denial of certiorari) (agreeing "with the denial of certiorari because [Paul] ultimately raise[d] the same statutory interpretation issue that the Court resolved * * * in Gundy"). And Justice Alito's concurrence in the judgment affirming the Gundy petitioner's conviction reflects either his agreement with the plurality's interpretation or else a view that, even if Section 20913(d) sweeps more broadly, it nevertheless comports with this Court's nondelegation precedent. See id. at 2130-2131 (Alito, J., concurring in the judgment). On any view of which opinion supporting the Court's judgment "sets out the holding of the case," Glossip v. Gross, 576 U.S. 863, 879 n.2 (2015) (applying Marks v. United States, 430 U.S. 188, 193 (1977)), Gundy resolves the question presented here. Because petitioner has not identified any plausible basis for overruling that decision, Gundy forecloses

petitioner's challenge to Section 20913(d). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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