No. 20-7427

IN THE
Supreme Court of the United States

LEEFATINIE TIROSH COLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The opinion in *Gundy v. United States*, a fractured decision from an incomplete Court, left half a million people subject to the whims of the country's chief prosecutor. That is not all. The opinion has sowed confusion about the lawfulness of delegations of legislative authority elsewhere in federal law, far beyond SORNA. The Court should intervene here not only to overrule *Gundy*, but to stop the drift of nondelegation precedent away from its historical and constitutional origins.

A. By defending *Gundy*, the government claims to honor the principle of *stare decisis*, but instead it betrays it.

The government throws up its hands at our proposal that the Court discard a precedent that is merely two years old. How bold, it suggests. By wielding the cudgel of *stare decisis*, the government treats this issue like any other run-of-the-mill legal question. But it is not. The government implies, by use of this tool, that *Gundy*, like most of this Court's declarations, brought peace and finality to the land. It did not. *Stare decisis* ought to have little impact here, of all places, because *Gundy* was a 4-1-3 opinion, yet one of the four is no longer on the Court, and two new justices have since taken the bench. This jumble demands a fresh look.

We know that this Court does not overturn its precedents lightly. "*Stare decisis*, we have stated, 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles,

fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). Yet stare decisis is "not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). "[T]his Court has always held that 'any departure' from the doctrine 'demands special justification,' *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), but this is just such an occasion.

The government contends that revisiting *Gundy* would poorly serve the interests of stability and predictability. *Brief in Opposition* at 22. On the contrary. That tortured decision "resolves nothing" and in fact undermines those principles. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

A majority of the Court has expressed interest in revisiting the law of legislative delegation, sowing uncertainty about the doctrine. In addition to the three dissenting justices in *Gundy*, Justice Alito "would support" reconsidering the Court's approach to delegation questions since it last invalidated a law on that ground seventy-five years ago. 139 S. Ct. at 2131 (Alito, J., concurring in the judgment). Since then, Justice Kavanaugh has written that the dissent's arguments "may warrant further consideration." *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari). And, of course, Justice Barrett has arrived on the Court since *Gundy*.

The government, perhaps unwittingly, highlights the confusion caused by this state of affairs, unable to discern whether Justice Alito's vote rested on statutory or constitutional grounds. *See Brief in Opposition* at 24 ("And

Justice Alito's concurrence in the judgment . . . reflects either his agreement with the plurality's interpretation [of the statute] or else a view that, even if Section 20913(d) sweeps more broadly, it nevertheless comports with this Court's nondelegation precedent.").

Meanwhile, litigants will continue to raise challenges based on the *Gundy* dissent, lower courts will have to referee those challenges, and Congress and the executive branch will fumble in the dark. Lower courts addressing delegation arguments believe and acknowledge that a *Gundy* (or nondelegation) course correction is not a matter of if, but when. *See, e.g.*, *Big Time Vapes, Inc. v. Food & Drug Admin.*, 963 F.3d 436, 447 (5th Cir. 2020), *cert. denied sub nom. Big Time Vapes, Inc. v. FDA*, No. 20-850, 2021 WL 2302098 (U.S. June 7, 2021) ("The Court might well decide—perhaps soon—to reexamine or revive the nondelegation doctrine."); *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 Fed. Appx. 982, 990 (Fed. Cir. 2020) (unpublished), *cert. denied*, 141 S. Ct. 133 (2020) ("Five members of the Court have recently expressed interest in at least exploring a reconsideration of [the nondelegation] standard. But such expressions give us neither a license to disregard the currently governing precedent nor a substitute standard to apply.").

While this uncertainty reigns, lawmakers will draft statutes and the executive will exercise grants of authority uncertain (or careless) of their lawfulness. Stable and predictable indeed.

B. The intelligible principle test forsakes its historical and constitutional origins and should be discarded.

The "intelligible principle misadventure," illustrated by *Gundy*, represents a departure from the history, structure, and text of the Constitution. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting). What is at issue here—allowing the Attorney General to write criminal laws—is especially offensive to the concerns animating the separation of powers. The Court should grant review to write the final word on this controversial topic.

Isolating legislative from executive powers was fundamental to the Constitution's architecture. The requirements of bicameralism and presentment promoted deliberateness and accountability, while leaving legislating to the legislators "protect[ed the people's] liberties, minority rights, fair notice, and the rule of law." *Id.* at 2135. Although "policing the separation of powers is a subject of delicate and difficult inquiry. . . . the framers took this responsibility seriously and offered us important guiding principles." *Id.* at 2135-36.

Those guiding principles are nowhere to be found in the intelligible principle test. Instead, the test permits the executive to make legislative decisions under "extraordinarily capacious standards." *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment). The SORNA statute offers a perfect example of the harm done. Section 20913(d) says merely that "[t]he Attorney General shall have the authority to specify the applicability" of SORNA to large populations of people like Mr. Cole, those convicted

of sex offenses before the law's enactment, all on pain of ten years in federal prison. 34 U.S.C. § 20913(d).

The intelligible principle test is just not up to the task of protecting the separation of powers. We must instead return to the more robust guidelines it replaced. And once we do so, we see that this extraordinary SORNA delegation fits within none of the original delegation categories in effect before the intelligible principle test supplanted them. First, with "the government itself admitt[ing] in *Reynolds*" that Section 20913(d) allows the executive to decide whether SORNA even applies to people like Mr. Cole, "it's hard to see how [it] could be described as leaving the Attorney General with only details to dispatch." *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting) (citing *Reynolds v. United States*, 565 U.S. 432 (2012)). Second, "[n]or can SORNA be described as an example of conditional legislation subject to executive fact-finding." *Id.* Finally, the writing of criminal laws is not a "non-legislative responsibilit[y]" like foreign affairs that falls squarely within the executive's purview. *Id.* at 2137.

Both the framers and this Court have told us why the power grant here is so out of step with traditional delegation principles. James Madison warned of the danger of leaving the "details" of criminal law to the executive: "Details, to a certain degree, are essential to the nature and character of a law; and on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law." James Madison, *The Report of 1800*, 17 THE PAPERS OF JAMES MADISON 303, 324 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991). Yet the discretion here is so vast—as the

government acknowledged in *Reynolds*, before changing tack in *Gundy*—that it encompasses whether to apply SORNA *at all* to pre-SORNA offenders.

It is true that when fact-finding is required of the executive branch, this Court has approved of setting criminal penalties through delegation. *See United States v. Touby*, 500 U.S. 160, 166 (1991) (applying intelligible principle test for delegations touching on criminal penalties, but only because of the fact-finding duties imposed on the executive). But SORNA, Section 20913(d), requires no such fact-finding, though "Congress could have easily written this law in that way." *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting).

In the end, the drafting of criminal laws is a quintessentially legislative responsibility, not one associated with the executive. "[D]efining crimes" is a "legislative" function. *United States v. Evans*, 33 U.S. 483, 486 (1948). Naming what conduct "should be punished as crimes" is an "inherently legislative task." *United States v. Kozminski*, 487 U.S. 931, 949 (1988). The government claims "Section 20913(d) does not empower the Attorney General to 'create[] crimes.'" *Brief in Opposition* at 20. But the statute does precisely that. SORNA "purports to endow the nation's chief prosecutor with the power to write his own criminal code . . ." *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

The unfettered discretion SORNA grants the Attorney General shows just how far the intelligible principle test has strayed from the framers' constitutional design. The Court should discard it. "If the separation of powers means anything, it must mean that Congress cannot give the

executive branch a blank check to write a code of conduct governing private conduct for a half-million people." *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

C. This case is an ideal vehicle to reevaluate the Court's approach to nondelegation principles.

By its silence, the government concedes that this case is a strong vehicle to resolve this separation of powers puzzle. It acknowledges that Mr. Cole pressed the same argument he raises here in the district court and before the Eleventh Circuit. *Brief in Opposition* at 13-14. Indeed that issue was the sole basis for the court of appeals' decision.

Moreover, the government's citation of recent (and disputed) post-*Gundy* scholarship on delegation in the Founding Era is a tacit acknowledgement that the question presented continues to befuddle scholars and jurists alike. *See Brief in Opposition* at 15 (citing 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 (2021)); *see also* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1550-56 (2021) (disputing Parrillo's conclusions and advocating for a focus on an "important subjects" theory of nondelegation over a "private conduct" theory); W. Mike Jayne, *As Far As Reasonably Practicable: Reimagining the Role of Congress in Agency Rulemaking*, 21 FEDERALIST SOCIETY REV. 84, 87 (2020) ("A revival of the nondelegation doctrine now appears imminent.").

Whether the government admits it or not, the nondelegation issue is far from settled and, indeed, in the

wake of *Gundy*, it grows less settled by the day. This case will allow the Court to speak, at last, with one voice.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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