No. _____

In The Supreme Court of the United States

SHAPOUR MOTAMEDI, SHAYAN MOTAMEDI, and HERIBERTO MOISES LOPEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RAPHAEL GOLDMAN*
Email: goldman@achlaw.com
TED W. CASSMAN
Email: cassman@achlaw.com
ARGUEDAS, CASSMAN, HEADLEY & GOLDMAN LLP
803 Hearst Avenue
Berkeley, CA 94710
(510) 845-3000

Counsel for Petitioner Shayan Motamedi
**Counsel of Record*

SHEPARD S. KOPP
Email: shep@shepardkopplaw.com
LAW OFFICES OF SHEPARD S. KOPP
10100 Santa Monica Blvd., Suite 1700
Los Angeles, CA 90067
(310) 914-4444

Counsel for Petitioner Heriberto Moises Lopez

ALAN S. YOCKELSON, ESQ.
Email: yockelson@appellatelaw.net
501 W. Broadway, #A-385
San Diego, CA 92101
(949) 290-6515

WYATT TIFFANY KOZINSKI
Email: wkozinski@sacfirm.com
LAW OFFICES OF STEPHENSON ACQUISTO & COLMAN
303 N. Glenoaks Blvd., #700
Burbank, CA 91502
(310) 748-5312

Counsel for Petitioner Shapour Motamedi

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether Congress, in crafting 42 U.S.C. § 1230a-7b(b) and related provisions, violated Article I, § 1 of the United States Constitution by improperly vesting the Department of Health and Human Services with virtually unlimited discretion to determine which activities would be criminalized and which would not.

2. Whether this Court should adopt—at least for legislation pursuant to which Congress delegates to an Executive agency the power to determine the scope of the criminal law—a more robust test to determine whether Congress's delegation of rulemaking authority violates the separations-of-powers principles embodied in Article I, § 1 of the United States Constitution.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties to this action.

RELATED CASES

United States v. Motamedi et al., No. 3:18-CR-00554-WHA, United States District Court for the Northern District of California. Judgment entered November 5, 2020.

United States v. Shapour Motamedi, No. 20-10364, United States Court of Appeals for the Ninth Circuit. Judgment entered January 11, 2022.

United States v. Shayan Motamedi, No. 20-10366, United States Court of Appeals for the Ninth Circuit. Judgment entered January 11, 2022.

United States v. Heriberto Moises Lopez, No. 20-10367, United States Court of Appeals for the Ninth Circuit. Judgment entered January 11, 2022.

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The decision of the United States District Court for the Northern District of California denying Petitioners' motion to dismiss the indictment against them is unofficially reported at *United States v. Motamedi*, No. CR 18-00544 WHA, 2019 U.S. Dist. LEXIS 179353, 2019 WL 5212991 (N.D. Cal. Oct. 16, 2019). The district court's judgments against the Petitioners are not reported.

The opinion of the Ninth Circuit Court of Appeals affirming Petitioners' convictions, Pet. App. 1-8, is unofficially reported at *United States v. Motamedi*, Nos. 20-10364, 20-10366, 20-10367, 2022 U.S. App. LEXIS 727, 2022 WL 101951 (9th Cir. Jan. 11, 2022). The court of appeals' order denying rehearing en banc, Pet. App. 9-10, is not reported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit affirmed Petitioners' convictions on January 11, 2022. Pet. App. 1-8. The court of appeals denied rehearing en banc on February 23, 2022. Pet. App. 9-10. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On May 11, 2022, Justice Kagan granted Petitioners leave until June 23, 2022, to file a petition for a writ of certiorari. The petition is timely.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions—Article I, § 1 of the United States Constitution, 42 U.S.C. § 1320a-7b, and 42 U.S.C. § 1320a-7d—appear in the appendix, Pet. App. 11-30, pursuant to Supreme Court Rule 14.1(f) and (i).

INTRODUCTION

Article I of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation. Congress . . . may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 588 U.S. ___, 139 S. Ct. 2116, 2123 (2019) (plurality opinion, quoting *Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1, 42-43 (1825)); *see also Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) ("'[T]he integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)). In implementing this constitutional "nondelegation" principle, this Court in recent years has imposed a standard for congressional action that the Court itself has recognized is "not demanding." *Gundy*, 139 S. Ct. at 2129; *see also Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S.

457, 474-75 (2001). Over the past several decades, the Court's nondelegation inquiry has asked only whether Congress provided the Executive branch with an "intelligible principle to guide the delegee's use of discretion." *Gundy*, 139 S. Ct. at 2123. Petitioners raise the question whether the Court should adopt a more rigorous version of the nondelegation test—such as the one suggested by Justice Gorsuch in his dissent in *Gundy*, 139 S. Ct. at 2133-42 (Gorsuch, J., dissenting)—at least where, as here, the challenged delegation purports to authorize the Executive branch to determine the scope of activity subject to criminal punishment.

Petitioners were convicted of conspiring to pay health care remunerations in violation 42 U.S.C. § 1320a-7b(b). But the statute Petitioners were convicted of violating is fatally flawed: In drafting the law, Congress accorded an Executive agency virtually unlimited discretion to determine the scope of the criminal liability the law seeks to impose. *See* § 1320a-7b(b)(3)(E) (exempting from criminal sanction "any payment practice" designated by the Secretary of Health and Human Services); § 1320a-7d(a)(2) (permitting the Secretary to exempt practices after considering, *inter alia*, "[a]ny . . . factors the Secretary deems appropriate in the interest of preventing fraud and abuse. . . ."). The Court should issue a writ of certiorari in order to decide whether Congress's delegation of unfettered discretion runs afoul of the separation-of-powers principles enshrined in the United States Constitution.

STATEMENT OF THE CASE

1. The statute at issue, 42 U.S.C. § 1320a-7b(b), on its face criminalizes a broad range of activities involving the receipt or payment of remunerations in exchange for arranging or recommending services paid by a federal health care program. *See* § 1320a-7b(b)(1) & (b)(2). However, § 1320a-7b(b)(3) exempts certain conduct from the criminal liability imposed by subsections (b)(1) and (b)(2). Subsection (b)(3) provides that the criminal provisions "shall not apply to" various financial arrangements, including "any payment practice specified by the Secretary" of the Department of Health and Human Services ("HHS"). § 1320a-7b(b)(3) & (b)(3)(E). A separate statute, 42 U.S.C. § 1320a-7d(a), purports to provide guidance to HHS concerning the promulgation of the regulatory "safe harbors" permitted by § 1320a-7b(b)(3)(E)—but concludes with a catch-all provision that removes all constraints on the agency's discretion:

> (2) Criteria for modifying and establishing safe harbors. In modifying and establishing safe harbors . . . , the Secretary may consider the extent to which providing a safe harbor for the specified payment practice may result in any of the following:
>
> > (A) An increase or decrease in access to health care services.
> >
> > (B) An increase or decrease in the quality of health care services.

(C) An increase or decrease in patient freedom of choice among health care providers.

(D) An increase or decrease in competition among health care providers.

(E) An increase or decrease in the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

(F) An increase or decrease in the cost to Federal health care programs (as defined in section 1128B(f) [42 USCS § 1320a-7b(f)]).

(G) An increase or decrease in the potential overutilization of health care services.

(H) The existence or nonexistence of any potential financial benefit to a health care professional or provider which may vary based on their decisions of—

> (i) whether to order a health care item or service; or
>
> (ii) whether to arrange for a referral of health care items or services to a particular practitioner or provider.

> *(I) Any other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs (as so defined).*

(Emphasis added).

2. On November 13, 2018, Petitioners were charged with a single-count indictment alleging a conspiracy to pay health care remunerations in violation of 18 U.S.C. § 371 and 42 U.S.C. §§ 1320a-7b(b)(1) and (b)(2). ER 129-36. The indictment charged, *inter alia*, that the alleged

> conspirators paid kickbacks to representatives of medical clinics in exchange for those clinics sending specimens to [MCL, a company owned by the Motamedi Petitioners,] for payment. The coconspirators offered these representatives, which in some instances were medical doctors and in others were clinical staff, either a percentage of Medi-Cal's reimbursement for tests or a fixed fee per specimen. These monetary payments were typically paid in cash and were designed to encourage the representative to refer specimens to MCL.

The district court had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231.

3. Petitioners filed a motion to dismiss the indictment, arguing that the statute they were charged with conspiring to violate, 42 U.S.C. § 1320a-7b(b), was unconstitutionally vague and unconstitutionally

delegated Congress's power to define a crime to the United States Department of Health and Human Services ("HHS"). The district court denied the motion. *United States v. Motamedi*, No. CR 18-00554 WHA, 2019 U.S. Dist. LEXIS 179353, 2019 WL 5212991 (N.D. Cal. Oct. 16, 2019). Nevertheless, the district court recognized the serious constitutional questions at issue; at sentencing, the court agreed to stay Petitioners' sentences pending appeal, stating:

> Okay. I'm going to stay until you do your appeal. Because it could be you win that appeal, and this is—you made some very good points today, all three of you. And maybe you'll win it. I—sometimes gonna root for the defendant. I'm not rooting for you, per se, but I'm telling you this is not the government's finest hour.

4. On January 15, 2020, each Petitioner pled guilty without a plea agreement. On October 27, 2020, the district court imposed prison sentences on all three Petitioners; the court issued its final judgment as to each Petitioner on November 5, 2020. As discussed, the district court stayed the imposition of Petitioners' sentences until the outcome of their appeals.

5. Petitioners appealed their convictions to the Ninth Circuit. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. *See United States v. Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (en banc) ("Regardless of whether a defendant enters into a conditional plea or an unconditional plea, we retain jurisdiction to hear the appeal."). Petitioners argued in the court of appeals that 42 U.S.C. § 1320a-7b(b),

working in concert with 42 U.S.C. § 1320a-7d(a)(2), violated the Constitution's nondelegation principle.[1] Among other arguments, Petitioners asked the court of appeals to depart from the atrophied intelligible-principle test and instead to analyze Congress's delegation to HHS using a more robust approach such as the one suggested by Justice Gorsuch in his dissent in *Gundy*. Petitioners also pointed the panel to this Court's pending grant of certiorari in *West Virginia v. EPA*, No. 20-1530, 595 U.S. ___, 142 S. Ct. 420 (2021), which raises a similar nondelegation issue.

6. The appellate panel issued its opinion on January 11, 2022. Pet. App. 1-8. The panel declined to depart from the "exceedingly modest" version of the intelligible-principle test expressed in this Court's recent jurisprudence, stating that it was bound by "controlling Supreme Court precedent" to apply a permissive standard. Pet. App. 3-4 n.1. The panel likewise declined to rule on the still-unsettled question whether a more robust nondelegation test is especially appropriate in the context of a criminal statute like the one at issue here. Pet. App. 6. Instead, applying the "not demanding" intelligible-principle test, the panel affirmed Petitioners' convictions. Pet. App. 4-6.

7. Judge Bumatay concurred in the result. Pet. App. 6-8. Judge Bumatay opined that, even if 42 U.S.C. § 1320a-7b(b) suffers from a nondelegation

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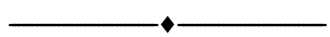
[1] *Class v. United States*, 583 U.S. ___, 138 S. Ct. 798 (2018), confirms that a guilty plea does not "bar[] a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." *Id*. at 803.

problem, the problem may be cured by severing a particular provision in the statutory scheme. Pet. App. 6-8.

8. Petitioners sought en banc review of the panel's decision. On February 23, 2022, the court of appeals denied rehearing en banc. Pet. App. 9-10. On March 2, 2022, the court of appeals granted Petitioners' motion to stay the mandate until this Court's disposition of this petition for a writ of certiorari.

9. On May 11, 2022, Justice Kagan, acting as Circuit Justice, granted Petitioners' application for an extension until June 23, 2022 of the deadline for filing this petition.



REASONS FOR GRANTING THE WRIT

I. The Prevailing Nondelegation Jurisprudence Does Not Adequately Implement The Constitution's Separation-Of-Powers Principles

1. This Court's nondelegation jurisprudence derives from Article I of the United States Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation. Congress . . . may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy*, 139 S. Ct. at 2123 (plurality opinion, quoting *Wayman*, 10 Wheat. at 42-43); *see also*, *e.g.*,

Mistretta, 488 U.S. at 371-72 ("'[T]he integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting *Marshall Field & Co.*, 143 U.S. at 692)). The authority to define crimes in one such distinctively legislative power. *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319, 2325 (2019) ("Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" (quoting *United States v. Hudson*, 11 U.S. 32, 7 Cranch 32, 34 (1812)).

2. Despite this seemingly robust constitutional command, however, the Court's test for implementing the nondelegation principle has in recent decades become quite weak. The prevailing test inquires simply whether a congressional delegation provides an "intelligible principle to guide the delegee's use of discretion." *Gundy*, 139 S. Ct. at 2123. As the Court itself has recognized, this intelligible-principle test, as recently applied, has "not [been] demanding," *id.* at 2129, and the Court has almost never found legislation lacking under the intelligible-principle test—even where Congress has delegated broad authority to an Executive agency accompanied by only vague guidance, *see Whitman*, 531 U.S. at 474-75. For example, this Court has upheld delegations of broad authority to regulate "in the public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943), to set "fair and equitable prices," *Yakus v. United States*, 321 U.S. 414, 427 (1944), and to issue air quality standards that are "requisite to protect the public health," *Whitman*, 531

U.S. at 472. The lower courts have followed this Court's guidance. The Ninth Circuit—where the cases at bench were litigated—has described this Court's modern nondelegation jurisprudence as imposing only "an exceedingly modest limitation," *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266 (9th Cir. 2021), and in one case even questioned whether "the nondelegation doctrine" has any continued "vitality" at all, *see Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 n.3 (9th Cir. 1995). Likewise here, in rejecting Petitioners' arguments, the court of appeals cited *National Broadcasting Co.*, *Yakus*, *Whitman*, and *Melgar-Diaz* and conducted only an "exceedingly modest" inquiry. Pet. App. 4.

Commentators have recognized the atrophy of the Court's nondelegation doctrine. For example, Professor LaFave observed that under the intelligible-principle test this Court has "upheld standards 'so vague as to be almost meaningless.'" LaFave, 1 Subst. Crim. L. § 2.6(a) (3d ed.) (quoting 1 K. Davis, *Administrative Law Treatise* § 3:5 (1978)). Another scholar wrote that "[t]he [intelligible-principle] test has become so ephemeral and elastic as to lose its meaning." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1231 (1985). A third scholar was even more blunt, opining that in some cases where the Court has found an "intelligible principle" to guide agency decision-making, other observers could discern only "gibberish." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 328-29 (2002).

3. Justice Gorsuch explained in his *Gundy* dissent that the recent, permissive version of the intelligible-principle test is inadequate to accomplish the separation-of-powers purpose underlying Article I, § 1. *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). "When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons. . . ." *Id*. "The framers understood, too, that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* (quoting *Marshall Field & Co.*, 143 U.S. at 692). "Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement." *Id*. The framers "insist[ed] on this particular arrangement" to promote liberty by confining the task of legislating—and, thus, "enact[ing] laws restricting the people's liberty"—to Congress, the branch of government whose actions are most constrained by checks and balances, and are subject to a slow, public, deliberative process. *Id*. at 2134. "If Congress could pass off its legislative power to the executive branch, the vesting clauses, and indeed the entire structure of the Constitution, would make no sense." *Id*. at 2134-35 (simplified, quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002)); *see also Clinton v. City of New York*, 524 U.S. 417, 450-51 (1998) (Kennedy, J., concurring) ("[W]hen the people delegate some degree of

control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.").

4. In short, the Court's recent approach to the nondelegation doctrine fails adequately to implement the separation-of-powers protections built into the Constitution. Accordingly, as five Justices have previously recognized, the Court's nondelegation jurisprudence needs to be "revist[ed]." *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.); *see also id.* at 2131 (Alito, J., concurring); *Paul v. United States*, 589 U.S. ___, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari); *National Fed. of Indep. Bus. v. DOL*, 595 U.S. ___, 142 S. Ct. 661, 668-70 (2022) (Gorsuch, J., concurring, joined by Thomas, J., and Alito, J.); *West Virginia*, 142 S. Ct. 420 (granting a petition for writ of certiorari posing the question whether Congress, in enacting 42 U.S.C. § 7411(d), "constitutionally authorize[d] the Environmental Protection Agency to issue significant rules . . . without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements").

5. In addition to the general difficulties of applying the traditional intelligible-principle test in a manner adequately promoting the separation-of-powers doctrine that motivates the nondelegation rule in the first place, this Court's jurisprudence also lacks clarity on a specific point crucial to the resolution of these

cases. The Court has previously considered the proposition that Congress may be required to provide more specific guidance when it delegates authority to enact criminal rules—but has never resolved the question. *See Touby v. United States*, 500 U.S. 160, 165-66 (1991) (acknowledging that "[o]ur cases are not entirely clear as to whether more specific guidance is in fact required" when Congress is delegating authority "to promulgate regulations that contemplate criminal sanctions"); *see also United States v. Moriello*, 980 F.3d 924, 932 (4th Cir. 2020); *United States v. Dhafir*, 461 F.3d 211, 216 (2d Cir. 2006). The Court should grant certiorari to answer this unanswered question.

II. The Court Should Grant Review In Order To Consider A Reinvigorated Nondelegation Test, At Least For Cases Where Congress Delegates The Authority To Determine The Scope Of The Criminal Law

1. Petitioners asked the court of appeals to apply a more robust nondelegation test such as the one proposed by Justice Gorsuch in his dissent in *Gundy*. The court of appeals declined, holding that it could not apply a more robust test because the permissive version of the intelligible-principle test remains "controlling" Supreme Court precedent. Pet. App. 3-4 & n.1. This Court should reconsider that precedent and adopt Justice Gorsuch's proposed test—at least for legislation that delegates to an Executive agency the authority to determine the scope of a criminal law.

2. In his *Gundy* dissent, after discussing the policy underlying the nondelegation doctrine, Justice Gorsuch posited a more demanding test for examining a congressional delegation. *Gundy*, 139 S. Ct. at 2135. "First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" *Id*. at 2136. "Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed." *Id*. (quoting *Yakus*, 321 U.S. at 426). "Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." *Id*. "Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities," such as discretion to direct foreign affairs. *Id*. at 2137. Justice Gorsuch summarized his proposed test as follows:

> To determine whether a statute provides an intelligible principle, we must ask: 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? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

Id. at 2141.

3. The Court should grant review in order to consider adopting Justice Gorsuch's more demanding nondelegation test, at least for delegations in the criminal realm. A few years before dissenting in *Gundy*, Justice Gorsuch, as a Tenth Circuit judge, explicated the view that congressional delegations in the criminal sphere must be more strictly scrutinized:

> It's easy enough to see why a stricter rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation—something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider. *See*, *e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 404 (1958); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 26 (1996). Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here. *See*, *e.g.*, *Whitman v. United States*, [574 U.S. 1003,] 135 S. Ct. 352, 353, 190 L. Ed. 2d 381 (2014) (Scalia, J., statement respecting the denial of certiorari). When it comes to legislative delegations we've seen, too, that the framers' attention to the separation of powers was driven by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce

> criminal sanctions. And might not that concern take on special prominence today, in an age when federal law contains so many crimes—and so many created by executive regulation—that scholars no longer try to keep count and actually debate their number? *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (estimating that over 300,000 federal criminal regulations are on the books).

United States v. Nichols, 784 F.3d 666, 672-73 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

This view accords with the Court's traditional understanding that criminal laws require the most exacting scrutiny. *See*, *e.g.*, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties. . . ."); *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 621 (1946) (holding that, where Congress has provided for criminal sanctions, "to these [regulatory] provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action"); *Harrison v. Vose*, 50 U.S. 372, 9 How. 372, 378 (1850) ("In the construction of a penal statute, it is well settled . . . that all reasonable doubts concerning its meaning ought to operate in favor of [the defendant]."). More importantly, imposing a robust test for challenges to a congressional delegation in the criminal

sphere would vindicate the constitutional rule that "[o]nly the people's elected representatives in the legislature are authorized to make an act a crime." *Davis*, 139 S. Ct. at 2325 (cleaned up); *see also Wooden v. United States*, 595 U.S. ___, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring) ("[N]ew national laws restricting liberty require the assent of the people's representatives"—i.e., Congress—"and thus input from the country's 'many parts, interests and classes.'" (quoting The Federalist No. 51, at 324 (J. Madison))). The Court's current nondelegation jurisprudence, which permits Congress to delegate almost unfettered authority to the Executive branch to determine the scope of the criminal law, "undermine[s] the Constitution's separation of powers and the democratic self-governance it aims to protect." *Davis*, 139 S. Ct. at 2325; *see Gundy*, 139 S. Ct. at 2133-34 (Gorsuch, J., dissenting).

III. Under An Appropriately Robust Nondelegation Test, 42 U.S.C. § 1320a-7b(b) Should Be Found Unconstitutional, And Petitioners' Convictions Should Be Reversed

1. Petitioners were convicted of conspiring to violate 42 U.S.C. § 1320a-7b(b), the so-called "Anti-Kickback Statute." Pet. App. 2. Petitioners' convictions must be reversed because the statute delegated to HHS virtually unfettered authority to determine the scope of the criminal prohibition, thereby running afoul the robust version of the nondelegation bar that should properly be applied, as discussed above.

42 U.S.C. § 1320a-7b(b) on its face criminalizes a broad range of activities involving the receipt or payment of remunerations in exchange for arranging or recommending services paid by a federal health care program. *See* § 1320a-7b(b)(1) & (b)(2). However, § 1320a-7b(b)(3) establishes various carve-outs to the criminal liability set forth in subsections (b)(1) and (b)(2). Subsection (b)(3) provides that the criminal provisions "shall not apply to" various financial arrangements, including "any payment practice specified by the Secretary" of HHS. § 1320a-7b(b)(3) & (b)(3)(E). A separate statute, 42 U.S.C. § 1320a-7d(a), purports to provide guidance to HHS concerning the promulgation of the regulatory "safe harbors" permitted by § 1320a-7b(b)(3)(E)—but concludes with a catch-all provision that removes all constraints on the agency's discretion. Section 1320a-7d(a) provides, in relevant part, as follows:

> (2) Criteria for modifying and establishing safe harbors. In modifying and establishing safe harbors . . . , the Secretary may consider the extent to which providing a safe harbor for the specified payment practice may result in any of the following:
>
> > (A) An increase or decrease in access to health care services.
> >
> > (B) An increase or decrease in the quality of health care services.
> >
> > (C) An increase or decrease in patient freedom of choice among health care providers.

(D) An increase or decrease in competition among health care providers.

(E) An increase or decrease in the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

(F) An increase or decrease in the cost to Federal health care programs (as defined in section 1128B(f) [42 USCS § 1320a-7b(f)]).

(G) An increase or decrease in the potential overutilization of health care services.

(H) The existence or nonexistence of any potential financial benefit to a health care professional or provider which may vary based on their decisions of—

> (i) whether to order a health care item or service; or
>
> (ii) whether to arrange for a referral of health care items or services to a particular practitioner or provider.

(I) Any other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in

> *Federal health care programs (as so defined).*

(Emphasis added). The statute thus leaves almost entirely to HHS the decision which remunerative activities should be legal and which illegal. *See*, *e.g.*, *Williams v. Korines*, 966 F.3d 133, 142 (2d Cir. 2020) ("[I]t is hard to imagine a rule with a catch-all provision that adequately cabins discretion."); *cf. also Kolender v. Lawson*, 461 U.S. 352, 357-58 & n.7 (1983) (discussing a related separation-of-powers problem: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government." (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

The statutory "guidance" provision's reference to "preventing fraud and abuse," § 1320a-7d(a)(2)(I), does not help to guide HHS's discretion: the reference is so circular as to be useless. The stated purpose of the statutes themselves is to combat "fraud and abuse." *See*, *e.g.*, Pub. L. No. 950142, 91 Stat. 1175, 1182 (1977) (legislation titled "Medicare-Medicaid Anti-Fraud and Abuse Amendments," which amended the kickback statutes to prohibit remunerative activities); S. Rep. No. 109, 100th Cong., 1st Sess. 1987, 1987 U.S.C.C.A.N. 682, 1987 WL 61463, at *1-2 (1987) (describing the purpose of the 1987 Amendments to the kickback laws as, *inter alia*, "protect[ing] Medicare, Medicaid, Maternal

and Child Health Services Block Grant, and Title XX Social Services Block Grant programs from fraud and abuse"); H.R. Rep. 104-496(I), 104th Cong., 2d Sess. 1996, 1996 U.S.C.C.A.N. 1865, 1996 WL 139575 (1996) (stating that one purpose of the statutory scheme is to "enabl[e] federal and state criminal justice agencies to focus on the most deliberate cases of fraudulent and abusive practices"). But, as discussed, the legislation on its face prohibits a vast swath of conduct that includes *any* remuneration while allowing HHS to pick which remunerative practices to permit. *See* § 1320a-7b(b).

Large testing laboratories—like Labcorp and Quest Diagnostics—have the financial resources to lobby HHS to approve practices favorable to them, which gives them a competitive advantage over smaller labs like the one operated by Petitioners, which lack the resources to influence HHS to approve their practices. The direction in § 1320a-7d(a)(2)(I) that HHS should seek to "prevent[] fraud and abuse" does little more than instruct HHS to implement § 1320a-7b(b), leaving entirely to the Executive branch (and those with the clout to influence its regulatory processes) the policy decision about what types of remunerative practices fall into the amorphous categories of "abuse" and "fraud."

Indeed, Congress *acknowledged* that the criminal statute at issue here was confusing and unclear. In 1987, Congress recognized that the "breadth" of the anti-kickback provisions in § 1320a-7b(b) had "created uncertainty among health care providers as to which

commercial arrangements are legitimate, and which are proscribed." S. Rep. No. 109, 1987 WL 61463 at *27. But Congress did not address this problem by clarifying the statutory language. Instead, it largely shifted its constitutional responsibility to the Executive branch by directing *HHS* to issue regulations defining the specific scope of criminal liability. *Id.*; *see also* 100 P.L. 93 § 14(a), 101 Stat. 680, 697-98 (1987); 42 U.S.C. § 1320a-7b(b)(3)(E). Accordingly, this case presents the precise danger about which Justice Gorsuch warned in *Gundy*: recognizing the difficult choices it faced in "restricting the people's liberty," Congress declined to make those choices, instead "announc[ing] vague aspirations and then assign[ing] others the responsibility of adopting legislation to realize its goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting, quoting *Marshall Field & Co.*, 143 U.S. at 692)). Section 1320a-7b(b) does not pass constitutional muster under Justice Gorsuch's nondelegation test, and this Court should hold that Petitioners could not properly be convicted under such a statute.

2. In a concurring opinion in the court below, Judge Bumatay proposed a separate ground for affirming Petitioners' convictions. Pet. App. 6-8. He noted Petitioners' argument that the catchall provision that appears at § 1320a-7d(a)(2)(I) "grants HHS almost unfettered authority to decide which actions are criminal under the Anti-Kickback Statute with no meaningful congressional guidance." Pet. App. 7. But Judge Bumatay believed that, even if "Congress has unconstitutionally delegated its authority to HHS[,] the

catchall provision is easily severable from the Anti-Kickback Statute" and the convictions may therefore be affirmed. Pet. App. 8. Petitioners respectfully disagree; severance could not retroactively cure the constitutional problem in a manner that saves Petitioners' convictions.

As an initial matter, when § 1320a-7b(b) was first enacted in 1977, Congress assigned no definitional powers to HHS. In 1987, Congress recognized that the "breadth" of the anti-kickback provisions in § 1320a-7b(b) had "created uncertainty among health care providers as to which commercial arrangements are legitimate, and which are proscribed." S. Rep. No. 109 (1987), 1987 WL 61463 at *27, 1987 U.S.C.C.A.N. 682, 707. Congress sought to address this problem by shifting to the Executive branch the responsibility of clarifying what is lawful and what is not, by directing HHS to issue regulations sculpting the scope of criminal liability. *Id*.; *see also* 100 P.L. 93 § 14(a), 101 Stat. 680, 697-98 (1987); 42 U.S.C. § 1320a-7b(b)(3)(E).

Judge Bumatay would sever the catchall provision in § 1320a-7d—subsection (a)(2)(I). Pet. App. 6-8. But severance would be improper. The portions of the Anti-Kickback Statute that delegate broad authority to HHS are not merely adjuncts to the statutory scheme; they were the *central purpose* of Congress's 1987 revision. S. Rep. No. 109 (1987), 1987 WL 61463 at *27, 1987 U.S.C.C.A.N. 682, 707; 100 P.L. 93 § 14(a), 101 Stat. 680, 697-98 (1987). In other words, Congress *wanted* to delegate unfettered authority to HHS to define the scope of the criminal law. The statute that

would remain "in [the] absence" of the broad delegation "is legislation that Congress would not have enacted"—and subsection (a)(2)(I) is therefore not severable from the Anti-Kickback statute as a whole. *Seila Law LLC v. CFPB*, 591 U.S. ___, 140 S. Ct. 2183, 2208 (2020); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

More importantly, even if severance could cure the legislation's constitutional infirmity going forward, it would do nothing to address the problems that infected the statute *at the time of Petitioners' conduct and convictions*. After Congress's broad and unfettered delegation, HHS promulgated numerous regulations designating as lawful various payment practices—and leaving other practices criminalized. *See* 42 C.F.R. § 1001.952. Thus, the scope of criminal liability as it existed at the time of Petitioners' convictions was impermissibly sculpted by HHS under a broad delegation from Congress that included the catchall provision set forth in § 1320a-7d(a)(2)(I).

This Court's recent decision in *Seila Law* is instructive on this last point. There, the Court confronted an enforcement action by the Consumer Financial Protection Bureau. 140 S. Ct. at 2191-95. The Court held that "the structure of the CFPB violates the separation of powers" principles enshrined in the Constitution because the agency's director was improperly protected from removal by the President. *Id*. at 2192, 2201-07. Nevertheless, the Court did not strike down the CFTC's enabling legislation in its entirety; instead, the Court found that it could sever from the statute the

offending provisions relating to the independence of the CFTC's director. *Id*. at 2208-10. Yet, despite finding that it could sever the unconstitutional provision and save the enabling legislation, the Court did not then simply affirm the agency's enforcement action. Instead, the Court remanded the case to the lower courts to "consider whether the [CFTC's enforcement action] was validly ratified" by a director who was accountable to the President in a constitutionally appropriate manner. *Id*. at 2208, 2211; *see also CFPB v. Seila Law LLC*, 984 F.3d 715, 717-18 (9th Cir. 2020) (finding on remand from the Supreme Court that the CFTC action was properly ratified).

Clearly, no *post hoc* ratification would have been necessary in *Seila Law* if a violation of the Constitution's separation-of-powers principles could be retrospectively cured by a court severing the offensive portion of the statute. Similarly here, even if a court were to find that severing § 1320a-7d (a)(2)(I) could save the Anti-Kickback Statute from a nondelegation problem, enforcement actions undertaken *before* the severance would nonetheless have been infected with the constitutional infirmity. Petitioners were convicted under a scheme in which HHS had essentially unconstrained discretion to determine the scope of the criminal law. Even if the Court were to sever certain provisions in order now to constrain HHS's discretion, that action would not remedy the fact that the original rulemaking, and thus Petitioners' convictions, were

infected by a Congress's improper delegation of legislative authority to the Executive.

CONCLUSION

This petition for a writ of certiorari should be granted.

Dated: June 23, 2022

Respectfully submitted,

RAPHAEL GOLDMAN*
Email: goldman@achlaw.com
TED W. CASSMAN
Email: cassman@achlaw.com
ARGUEDAS, CASSMAN, HEADLEY & GOLDMAN LLP
803 Hearst Avenue
Berkeley, CA 94710
(510) 845-3000

Counsel for Petitioner Shayan Motamedi
**Counsel of Record*

SHEPARD S. KOPP
Email: shep@shepardkopplaw.com
LAW OFFICES OF SHEPARD S. KOPP
10100 Santa Monica Blvd., Suite 1700
Los Angeles, CA 90067
(310) 914-4444

Counsel for Petitioner Heriberto Moises Lopez

ALAN S. YOCKELSON, ESQ.
Email: yockelson@appellatelaw.net
501 W. Broadway, #A-385
San Diego, CA 92101
(949) 290-6515

WYATT TIFFANY KOZINSKI
Email: wkozinski@sacfirm.com
LAW OFFICES OF STEPHENSON ACQUISTO & COLMAN
303 N. Glenoaks Blvd., #700
Burbank, CA 91502
(310) 748-5312

Counsel for Petitioner Shapour Motamedi