No. _____

In the
Supreme Court of the United States

MANUEL MELGAR-DIAZ &
JOAQUIN BENITO-MENDOZA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether Congress can delegate its authority to another branch of government consistent with the Constitution by merely providing an "intelligible principle" to guide the delegee's exercise of authority.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This petition presents the issue of whether Congress can delegate its authority to another branch of government as long as it provides an "intelligible principle" to guide the delegee's exercise of authority. This Court, in *Gundy v. United States*, 139 S. Ct. 2116 (2019), declined to revisit that question. At the time, a majority of this Court was not yet willing to reconsider whether to replace the intelligible-principle test with something consistent with founding-era principles on the separation of powers. This petition gives this Court another chance to address this fundamental and pressing issue of constitutional law.

The nondelegation doctrine ensures that Congress does not "delegate" to executive-branch officials "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). But over the past century this Court has crafted a test to enforce this foundational principle that is "at war with" the Constitution's "text and history." *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). Usurping the framers' vision of the separation of powers, this Court has "uniformly rejected nondelegation arguments" since 1935 by merely determining whether Congress provided an intelligible principle to guide the executive-branch delegee's exercise of discretion. *Id.* at 2130–31 (Alito, J., concurring). This flimsy requirement permits anything but "the most extravagant delegations of authority" in which Congress provides "no standards to constrain administrative discretion." *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988).

Two terms ago, however, three members of this Court in *Gundy* announced a desire to return the nondelegation doctrine to something resembling the framers' vision. 139 S. Ct. at 2133–37 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.). A fourth justice "support[ed]" this "effort," but would not vote to do so until a "majority of this Court w[as] willing to reconsider the" doctrine. *Id.* at 2131

(Alito, J., concurring). And a majority of the Court was not then willing to do so. *See id.*; *but see Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (stating that "Justice Gorsuch's thoughtful *Gundy*" dissent "may warrant further consideration in future cases").

In *Gundy*'s wake, the court of appeals below—recognizing the "exceedingly modest limitation" the intelligible principle puts on Congress—rejected Petitioners' nondelegation challenge to 8 U.S.C. § 1325(a)(1). *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266–69 (9th Cir. 2021). Under § 1325(a)(1), Congress made it a crime for an "alien" to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers[.]" According to the court of appeals, § 1325(a)(1) includes an intelligible principle because immigration officials must designate "'time[s]' and 'place[s]'" for entry (rather than something else) for purposes of this crime. *Melgar-Diaz*, 2 F.4th at 1269 (alterations in original).

While § 1325(a)(1) survived a constitutional audit under the modern nondelegation doctrine, it flunks one under the framers' view about the separation of powers. As Justice Gorsuch explained in his *Gundy* dissent, the Constitution's text and history establish that the executive branch can assist Congress without exercising legislative power consistent in some situations:

- First, if "Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. 1 at 43).

- Second, "once Congress prescribes the rule governing private conduct, it may make" applying that rule dependent "on executive fact-finding." *Id.*

- Third, "Congress may assign the executive and judicial branches certain non-legislative responsibilities," including when the exercised power is one already inherent to the executive branch. *Id.* at 2137.

None of those situations describes § 1325(a)(1)'s delegation. The statute's delegation thus conflicts with an originalist understanding of the separations of powers.

This Court should grant review here to address the question *Gundy* left for another day. That is, Petitioners ask this Court to "reconsider [its] precedents on cessions of legislative power" and to address "whether [its] delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). This case squarely raises that issue, as the court of appeals rejected Petitioners' nondelegation challenge on the merits in a published decision. This case also presents an especially good vehicle to resolve the question presented because the choice of nondelegation test is outcome determinative. Finally, this Court would not benefit from waiting for other courts of appeals to weigh in on the question presented because the lower courts have no choice but to continue to evaluate nondelegation challenges under the intelligible-principle test. Congress also deserves prompt guidance about how it can lawfully delegate. This Court should not allow the meaning of a doctrine fundamental to the Constitution's integrity to continue to linger in uncertainty.

OPINION BELOW

The published opinion of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. Pet. App. 1a–5a.

JURISDICTION

The court of appeals entered judgment on June 29, 2021, Pet. App. 1a, and it denied a timely filed petition for rehearing on September 20, 2021, Pet App. 7a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statutory framework.

At issue is 8 U.S.C. § 1325(a)(1). That statutory subsection's origin can be traced to legislation that Congress passed more than a century ago in 1917. *United States v. Aldana*, 878 F.3d 877, 880 (9th Cir. 2017). It was then that Congress enacted a civil-immigration statute that required noncitizens to "be taken into custody and deported" if they had "entered the United States":

> [1] by water at any time or place other than as designated by immigration officials, or [2] by land at any place other than one designated as a port of entry for aliens by the Commissions General of Immigration, or [3] any time not designated by immigration officials.

Immigration Act of 1917, Pub L. No. 64-301, § 19, 39 Stat. 784, 889.

A dozen years later, in 1929, Congress eliminated the distinction between land and water entries, eliminated the reference to "a port of entry," and added a criminal penalty. Under the revised statute, Congress for the first time made it a crime—a misdemeanor—for an "alien" to "enter[] the United States at any time or place other than as designated by immigration officers[.]" *Aldana*, 878 F.3d at 880 (quoting Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 2, 45 Stat. 1551, 1551).

In 1952, Congress re-codified the illegal-entry prohibition in 8 U.S.C. § 1325 using identical language to the 1929 legislation. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 275, 66 Stat. 163, 229. A first offense qualified as a misdemeanor; a second offense, a felony. 8 U.S.C. § 1325(a). The only relevant subsequent change occurred in 1990, when Congress "added liability for 'attempt[ing] to enter.'" *United States v. Corrales-Vazquez*, 931 F.3d 944, 947 (9th Cir. 2019) (citing Immigration Act of 1990, Pub. L. No. 101-649, § 543(b)(2), 104 Stat. 4978, 5059). As a result, under current law, an "alien" commits a crime by

"enter[ing] or attempt[ing] to enter the United States at any time or place other than as designated by immigration officers." 8 U.S.C. § 1325(a)(1).

As far as who can exercise this delegated authority, Congress defined an "immigration officer" as "any employee . . . designated by the Attorney General . . . to perform the functions of an immigration officer." 8 U.S.C. § 1101(a)(18). Congress, then, delegated to an executive-branch official the ability to decide who can exercise the delegated authority. The Attorney General, in turn, designated various individuals, including "[b]order patrol agent[s]," to function as immigration officers. 8 C.F.R. § 287.5(c)(1)(i).

II. Regulatory framework.

When Congress delegated to immigration officers the ability to decide the scope of its improper-entry crime in 1929, Congress envisioned an entirely ad hoc designation process. As the 1929 statute's legislative history reveals: "Immigration officers, of course, will designate times and places only as authorized by their superior officers." H.R. Rep No. 70-2418, at 4 (1929).

Still, soon after the 1929 legislation went into effect, executive-branch officials created an "interdepartmental committee"—involving the "Department of Labor, the Treasury Department[,] and the Department of Commerce"—to decide what places to designate for entry. *See* Hearings before the H. Comm. on Immigration and Naturalization, 71st Cong. 7–8 (Jan. 15, 1930). Through that committee, immigration authorities designated geographic areas—cities—for entry. For example, in 1944, the Board of Immigration Appeals observed that immigration officials had "designated" the "limits of [the] city" of Calexico, California as a "port of entry[.]" *Matter of V-T-*, 2 I. & N. Dec. 213, 214 (BIA 1944).

Eventually, executive-branch officials created a more formalized memorialization of places to designate for entry for purposes of 8 U.S.C.

§ 1325(a)(1). They did so in 8 C.F.R. § 100.4, where immigration officials designated physical port facilities rather than geographic areas for purposes of § 1325(a)(1).[1] *Aldana*, 878 F.3d at 881. Within that regulation, immigration officers have designated port facilities for entry for noncitizens "arriving by any means of travel other than aircraft" in § 100.4(a) and "arriving by aircraft" in § 100.4(b). For example, the port facilities in "San Ysidro, CA" and "Calexico, CA" have been designated for entry for those coming to the United States on foot or in a vehicle. 8 C.F.R. § 100.4(a).

III. Petitioners' convictions and appeals.

Petitioners are Mexican citizens. Before this case, neither had criminal history. In September 2019, both Petitioners crossed from Mexico into the United States between port facilities. Immigration officers arrested them both and charged them with attempting to enter the United States "at a time or place other than as designated by immigration officers" under 8 U.S.C. § 1325(a)(1).

Soon after their arrest, Petitioners both pleaded guilty without a plea agreement before a magistrate judge. They each received a time-served sentence.

In separate proceedings, Petitioners each appealed their convictions to the district court. Each argued that § 1325(a)(1) violated the nondelegation doctrine.

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[1] The Secretary of Treasury still designates geographic areas for entry for purposes of the nation's customs law. Under 19 U.S.C. § 1459(a), Congress has made it a crime for anyone—including U.S. citizens—to "enter the United States" outside a "border crossing point designated by the Secretary," without immediately presenting themselves "for inspection" at the "customs facility designated for that crossing point[.]" The Secretary has exercised this authority in 19 C.F.R. § 101.3 by designating geographic areas. For example, one listed area is "San Diego," 19 C.F.R. § 101.3(b)(1), which immigration authorities defined as a geographic area, *see* Change in the Customs Service Field Organization; San Diego, CA, 50 Fed. Reg. 4504-01 (Jan. 21, 1985) (providing geographic boundaries for "port of San Diego" by referring to highways, the Pacific Ocean, and the international border).

They contended that the statute's delegation did not come with an "intelligible principle" to guide the discretion of immigration officials, and thus constituted an improper exercise of the "legislative powers" in Article I by an executive-branch official.

The district court affirmed. It held that § 1325(a)(1) does not violate the nondelegation doctrine.

Petitioners appealed to the Court of Appeals for the Ninth Circuit. After formally consolidating their cases, Petitioners again argued that § 1325(a)(1) violated the nondelegation doctrine.

The court of appeals affirmed. In doing so, the court observed that "the non-delegation doctrine" placed "an exceedingly modest limitation" on Congress under "modern precedent." *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266 (9th Cir. 2021). "[A] statutory delegation is constitutional," the court held, "as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Id.* at 1266–67 (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). Applying that standard, the court held that the statute itself provided an intelligible principle: it required immigration authorities to select "'time[s]' and 'place[s]'" for entry (rather than using some other criterion, such as requiring the entry to occur after an immigration inspection). *Id.* at 1269 (alterations in original).

Petitioners timely petitioned for panel rehearing and rehearing en banc. The court denied the rehearing request. Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

Two terms ago, this Court in *Gundy* declined to align the nondelegation doctrine with the framers' understanding of the Constitution's separation of powers.

Gundy thus left in place this Court's nondelegation test, a test that permits Congress to delegate away its authority if it provides an intelligible principle that guides the exercise of discretion. Courts have invariably found that various statutes containing delegations meet this meek requirement. Indeed, the court of appeals below rejected Petitioners' nondelegation challenge to 8 U.S.C. § 1325(a)(2) by concluding that the statute's delegation came with sufficient guidance. *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267–69 (9th Cir. 2021).

This Court should grant review to address the important question of federal law *Gundy* ultimately failed to address. This petition squarely presents that question. This petition is an especially good vehicle to resolve the question presented. And this Court should resolve the question presented now rather than allowing it to further percolate.

I. This Court should grant review because this case squarely raises the important federal question *Gundy* declined to revisit.

The Constitution establishes a tripartite system of government that divides power among the federal branches. While the branches must work together, no branch can do a task exclusively assigned to another branch. "[D]iffus[ing] power" in separate, co-equal branches helps to "secure liberty[.]" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Permitting one branch of government to exercise the power of another risks undermining "the integrity and maintenance of the system of government ordained by the Constitution." *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

The nondelegation doctrine helps enforce this power division fundamental to our system. The doctrine patrols the boundaries between the branches to make sure Congress does not "delegate" to executive-branch officials "powers which are strictly

and exclusively legislative." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). As James Madison explained: "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." The Federalist No. 78.

In 1935, this Court held a statute violated the nondelegation doctrine for the first time in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). There, this Court struck down a statute authorizing the President to criminalize the interstate transportation of petroleum "produced or withdrawn" in violation of state law. *Id.* at 405. In delegating this authority, Congress "ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule." *Id.* at 430. And Congress had not merely asked the executive branch "'to fill up the details' under the general provisions made by the legislature." *Id.* at 426 (quoting *Wayman*, 23 U.S. at 43).

Later that same year, this Court struck down another statute on nondelegation grounds in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). There, this Court addressed a statute authorizing the President to create a "code of fair competition" for the poultry industry. *Id.* at 526. Calling it "delegation running riot," this Court held that the statute impermissibly delegated legislative power because the statute itself did not sufficiently "limit[] . . . the exercise of the President's discretion." *Id.* at 538, 553.

Since 1935, this Court has not struck down any statute on nondelegation grounds. And in addressing whether Congress permissibly delegated authority to the executive branch, this Court has merely determined whether Congress laid down "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).)

Though this Court has not struck down a statute under the nondelegation doctrine in decades, members of this Court recently suggested that the doctrine still has relevance. In 2019, this Court—in *Gundy v. United States*, 139 S. Ct. 2116 (2019)—granted review to address whether the Sex Offender Registration and Notification Act ("SORNA") violated the nondelegation doctrine. Under SORNA, Congress provided that the "Attorney General shall have the authority to specify the [Act's] applicability" to those convicted of sex offenses before the Act took effect. 34 U.S.C. § 20913(d). The defendant in *Gundy* argued that this delegation permitted the Attorney General to apply SORNA's registration requirement to all, none, or a subset of defendants convicted of sex offenses before SORNA took effect. *Gundy*, 139 S. Ct. at 2123 (plurality opinion). The defendant contended that this delegation violated the nondelegation doctrine. *Id.*

As explained momentarily, an eight-member court affirmed the defendant's conviction in 4-1-3 decision, and a majority of the court declined to address whether to replace the intelligible principle with a test consistent with the Constitution's original understanding. As also explained, this case raises the same question *Gundy* left for another day. This Court, then, should grant review to resolve this "important question of federal law." Sup. Ct. R. 10(c).

A. In a plurality decision, four justices in *Gundy* reaffirmed a commitment to a weakened, non-originalist nondelegation doctrine.

In *Gundy*, a four-Justice plurality reaffirmed that Congress could delegate away its authority if it had "set out an 'intelligible principle' to guide the delegee's exercise of authority." 139 S. Ct. at 2129 (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409.) This standard, the plurality observed, is "not demanding" and permits even "very broad delegations." *Id.*

Under that forgiving standard, the plurality thought SORNA "easily passes constitutional muster." 139 S. Ct. at 2121. It first rejected the defendant's reading of the statute and held that the Attorney General had to apply SORNA to pre-Act offenders. *Id.* at 2124. Having determined the delegation's scope, the plurality distilled the purpose of Congress's delegation to the Attorney General: to resolve "practical problems." *Id.* at 2124–25. When SORNA took effect, many pre-Act sex offenders had completed their prison sentences, and Congress did not know how to best ensure that those individuals registered. *Id.* at 2124–25, 2128. Thus, the Attorney General had to apply "SORNA to pre-Act offenders as soon as he thought it feasible to do so." *Id.* at 2125. This guidance meant SORNA did not violate the nondelegation doctrine. *Id.* at 2123–25.

B. In a concurring opinion, one justice in *Gundy* did not think it was appropriate yet to reconsider the Court's nondelegation jurisprudence.

Justice Alito concurred in the judgment. He recognized that the Constitution's text "confers on Congress certain 'legislative [p]owers,' Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government." *Gundy*, 139 S. Ct. at 2130 (brackets in original). Still, he recognized that this Court "has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." *Id.* at 2130–31. From there, he stated that, "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort." *Id.* at 2131. "But because a majority is not willing to do that," Justice Alito declined to do so as well.

C. Three dissenters in *Gundy* were willing to realign the nondelegation doctrine to match the Constitution's original understanding.

Justice Gorsuch—joined by Chief Justice Roberts and Justice Thomas—dissented and stated that he would ground the nondelegation doctrine in the Constitution's text and history. In doing so, Justice Gorsuch began with the Constitution's text. Under Article I, "[a]ll legislative Powers" were "vested in a Congress." "[T]he framers understood" legislative powers "to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated[.]" *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting The Federalist No. 78). That is, "the power to 'prescribe general rules for the government of society.'" *Id.* (quoting *Fletcher v. Peck*, 10 U.S. 87, 136 (1810)). The Founders kept this legislative power separate from the executive power, assigned to the President in Article II, and the judicial power, given to "independent judges" in Article III. *Id.*

The framers "insist[ed]" on this particular arrangement because they "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (citing The Federalist No. 48). And to ensure that the legislative power was not abused, they required that "any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto." *Id.* These structural limitations on the exercise of legislative power helped protect "minority rights" and ground the passing of laws in political actors subject to accountability through the political process. *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting). Among other

things, this walled off the legislative power from the executive branch to make sure "legislation" did not become "nothing more than the will of the current President." *Id.* at 2135. Indeed, if the President could exercise the legislative power, laws "would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice." *Id.*; *see also* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1503–26 (2021) (summarizing voluminous evidence that founding generation understood the Constitution to reflect a nondelegation doctrine).

These concerns have special salience in the criminal context. "To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to 'unite' the 'legislative and executive powers . . . in the same person'—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands." *Gundy*, 139 S. Ct. at 2133–45 (Gorsuch, J., dissenting) (quoting Federalist No. 47); *see also* F. Andrew Hessick & Carrisa B. Hessick, *Nondelegation and Criminal Law*, 107 Va. L. Rev. 281, 299–329 (2021) (explaining why nondelegation doctrine should apply more robustly to criminal laws).

Having reviewed these principles, Justice Gorsuch asked: "What's the test" to enforce them? *Gundy*, 139 S. Ct. at 2135. In answering that question, he identified when Congress could work with the executive branch in crafting legal rules to guide private conduct without defying the constitutional command that "all legislative Powers" be vested in Congress. "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.'" *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). "Second, once Congress prescribes the rule governing private conduct, it may make the

application of that rule depend on executive fact-finding." *Id.* And "[t]hird, Congress may assign the executive and judicial branches certain non-legislative responsibilities." *Id.* at 2137.

These categories, Justice Gorsuch explained, did not match the intelligible-principle test, a test "at war with" the Constitution's "text and history." *Gundy*, 139 S. Ct. at 2131. Indeed, this Court in *Panama Refining* and *Schechter Poultry* did not use the phrase "intelligible principle" at all. *Gundy*, 139 S. Ct. at 2138–39. Instead, the phrase came from *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), where Chief Justice Taft, writing for the Court, stated: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409. At the time, no one "thought the phrase meant to effect some revolution in this Court's understanding of the Constitution." *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting). Rather, it "seem[ed] plain enough that [Chief Justice Taft] sought only to explain the operation of [the] traditional tests" for when a delegation of authority violated the Constitution's separation of powers. *Id.* Still, the "intelligible principle" took "on a life of its own" starting in the 1940s, where it become the essence of the nondelegation test in this Court. *Id.*

Because the "'intelligible principle'" as it came to be understood "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked," Justice Gorsuch thought the Court should discard it entirely. *Gundy*, 139 S. Ct. at 2139; *see also Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (stating that "Justice Gorsuch's thoughtful *Gundy*" dissent "may warrant further consideration in future cases").

D. This petition gives this Court the chance to address the question *Gundy* declined to revisit about the proper nondelegation test.

The court of appeals below, consistent with its role in a hierarchical judiciary, evaluated Petitioners' nondelegation challenge by analyzing whether Congress had provided an "intelligible principle" with its delegation in 8 U.S.C. § 1325(a)(1). *Melgar-Diaz*, 2 F.3d at 1268. It held that Congress had. According to the court, "it is obvious that § 1325(a)(1) does not cast immigration officials completely adrift when they designate times and places of entry." *Melgar-Diaz*, 2 F.3d at 1268. The court noted that the statute requires immigration officers to designate "'time[s]' and 'place[s]'" for entry. *Id.* at 1269 (alterations in original). "This on its own provides an intelligible principle: immigration officials must create rules for the passage of people into the United States based on the criteria of location and timing." *Id.* Accordingly, the court of appeals rejected Petitioners' nondelegation challenge to § 1325(a)(1) on the merits in a published decision.

This petition asks this Court to "reconsider [its] precedents on cessions of legislative power" and to address "whether [its] delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). Given that the court of appeals definitively resolved Petitioners' nondelegation challenge on the merits, granting this petition would allow this Court to address the appropriate test for the nondelegation doctrine, an "important question of federal law" left untouched in *Gundy*. Sup. Ct. R. 10(c).

II. This case presents an ideal vehicle to resolve the question presented.

This Court should also grant review because the petition presents an ideal vehicle to resolve the question presented. The petition squarely raises the question of the appropriate test for the nondelegation doctrine, as just explained. And, as

discussed momentarily, the choice of nondelegation test is outcome determinative. While 8 U.S.C. § 1325(a)(1) passed the modern nondelegation test, the statute's delegation conflicts with the originalist version.

A. Applying the modern version of the nondelegation doctrine, the court of appeals upheld the constitutionality of § 1325(a)(1).

As already explained, the court of appeals determined that 8 U.S.C. § 1325(a)(1)'s delegation to "immigration officers" to determine where and when entries into the United States would qualify as crimes (rather than mere civil offenses) did not violate the nondelegation doctrine. The court held that Congress had included an "intelligible principle" when it enacted § 1325(a)(1). *See United States v. Melgar-Diaz*, 2 F.4th 1263, 1266–67 (9th Cir. 2021). The statute thus passed constitutional scrutiny under "modern precedent," which placed "an exceedingly modest limitation" on Congress. *Id.* at 1266.

B. The delegation in § 1325(a)(1) conflicts with an originalist nondelegation doctrine.

In contrast, scrutinizing § 1325(a)(1) with an originalist view of the nondelegation doctrine outlined by Justice Gorsuch in his *Gundy* dissent leads to a much different result. In his dissent, Justice Gorsuch detailed when Congress could lawfully delegate authority consistent with the Constitution's history and text. *Gundy*, 139 S. Ct. at 2136–37. And Congress's delegation in § 1325(a)(1) cannot be squared with that view of the separation of powers.

1. Congress's delegation in § 1325(a)(1) does not require the executive branch to just "fill up the details."

To begin with, consistent with the Constitution's original meaning, Congress can delegate to "another branch" the ability to "'fill up the details" of a regulatory regime governing "private conduct" if it made "the policy decisions[.]" *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). "But it's hard to see how [§ 1325(a)(1)] could be

described as leaving [immigration officers] with only details to dispatch." *Id.* at 2143.

As noted, Congress under § 1325(a)(1) made it a crime for an "alien" to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers." While Congress required immigration officers to choose times and places for entry for purposes of this crime, it did not further restrict the types of places immigration offices could designate. This means they can designate geographic areas for entry—as they have previously, *see Matter of V-T-*, 2 I. & N. Dec. 213, 214 (BIA 1944)—or they can designate physical port facilities—as they currently do, *see United States v. Aldana*, 878 F.3d 877, 881 (9th Cir. 2017) (citing 8 C.F.R. § 100.4).

This discretion to designate places of entry without further restriction imbues immigration officers with the decision to resolve significant "policy decisions," not just "fill up the details." *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). For example, immigration officers could choose to designate most or even the entire border—a geographic area—for entry for purposes of § 1325(a)(1). Designating the entire border for entry would mean the bare act of crossing into the United States would not be a criminal offense. That is, the decision to designate the entire border for entry would decriminalize the border for simple illegal entry, as some politicians have suggested would be a good policy. *See* Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. Rev. 1967, 1972 (2020) (documenting the views of several prominent politicians who wish to decriminalize unauthorized border crossings). Differently minded immigration officers could choose to designate only part of the border. For example, they could designate the entire northern border but only specific points along the southern border. This would decriminalize the northern border but not the southern border. These sorts of decisions would

reflect a significant shift in legislative policy. The framers, then, would not have envisioned that the President, let alone a single immigration officer, could bring about this major change on his or her own.

That this policy choice is significant is underscored by the sheer number of people it would affect. In *Gundy*, Justice Gorsuch found that the decision whether to make SORNA retroactive was not insignificant in part because it could affect the criminal liability of up to "500,000" people total. *Gundy*, 139 S. Ct. at 2143. In comparison, hundreds of thousands of people *every year* are apprehended at the border. *See* U.S. Customs and Border Protection, Southwest Border Encounters, *available at* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited October 24, 2021). Thus, giving the executive branch the ability to decide how to define the scope of § 1325(a)(1)'s entry prohibition affects a small city's worth of people each and every year. For the most part, the executive branch "may choose which [of these] offenders to subject to" this criminal prohibition. *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting). And immigration officers are "free to change [their] mind at any point or over the course of different political administrations." *Id.*

The court of appeals below suggested that the delegation of authority in § 1325(a)(1) was modest because immigration officers could not designate the entire border for entry. *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021). In support, the court pointed to various immigration statutes that "presuppose the existence of a definitive points of entry, to allow for lawful travel and commerce and to maintain orderly operations at our borders." *Id.* at 1269. But an immigration officer could bring about a significant policy change without designating the *entire* border, as just noted.

But that aside, this argument is misguided. The statutes the court of appeals cited all govern the *civil* immigration process. For example, 8 U.S.C. § 1225 requires noncitizens to cross into the United States and undergo an immigration inspection before they can obtain lawful admission into the United States. But nothing in 8 U.S.C. § 1325(a)(1) requires immigration authorities to make the civil-immigration process coterminous with the criminal process. Put concretely, there is nothing inconsistent with having a civil immigration system that requires individuals to be inspected at port facilities before a lawful admission can occur while not criminalizing the failure to enter at all or some of those ports of entry. Indeed, that was the regime in this country before 1929: it simply was not yet a crime to enter the United States outside a port of entry. *See* Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 Loy. U. Chi. L.J. 65, 70–92 (2012) (tracing the history of the United States' criminalizing entry at the border).

For these reasons, § 1325(a)(1) gives the executive branch considerable leeway to answer a policy question—indeed, an important contemporary policy question about when crossing into the United States should be a criminal offense rather than merely a civil one. The statute does not merely give the executive branch the ability to fill in the details.

2. Congress's delegation in § 1325(a)(1) does not merely require the executive branch to find facts.

Consistent with the Constitution's original meaning, Congress can also set rules whose application depends "on executive fact-finding." *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). Nothing about the delegation of authority in § 1325(a)(1), however, has to do with applying a rule based on executive fact-finding.

3. Congress's delegation in § 1325(a)(1) does not permit the executive branch to exercise authority it already possesses.

Finally, consistent with the Constitution's original meaning, "Congress may assign the executive and judicial branches certain non-legislative responsibilities," including when the exercised power is one already inherent to the executive branch. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting). Nothing about defining the scope of a criminal offense is a non-legislative or quintessentially executive responsibility.

Still, the court of appeals suggested that Congress in § 1325(a)(1) did not impermissibly delegate authority away because the executive branch already has the independent power "to exclude aliens from the United States." *Melgar-Diaz*, 2 F.4th at 1267. In support, the court of appeals relied on *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), which affirmed that "'[t]he exclusion of aliens is a fundamental act of sovereignty' that stems not alone from legislative power but is inherent in the executive power.'" *Melgar-Diaz*, 2 F.4th at 1268. In other words, the court of appeals reiterated the uncontroversial point that the executive has plenary power over civil-immigration matters, deciding which noncitizens it may exclude from the United States and under what circumstances.

But § 1325(a)(1) is a criminal statute and has nothing to do with *excluding* noncitizens. Instead, the statute permits the government to keep noncitizens *in* the United States and put them in prison (for up to two years, *see* 8 U.S.C. § 1325(a)) for violating its requirements. Thus, whatever the scope of the executive branch's inherent power to keep out unwanted noncitizens, that power has nothing to do with the power delegated to it in § 1325 (a)(1). Indeed, "defining crimes" has long been viewed as a uniquely "legislative function," *United States v. Evans*, 333 U.S. 483, 486 (1948), and an "inherently legislative task," *United States v. Kozminski*,

487 U.S. 931, 949 (1988). Because the power Congress delegated in § 1325 is the power to define criminal conduct, it is the antithesis of an "inherent executive power." *Knauff*, 338 U.S. at 542.

* * *

In short, while the court of appeals determined that § 1325(a)(1) passes the modern nondelegation doctrine, the statute would flunk the original version. The choice of nondelegation test, then, is outcome determinative. This underscores that this case presents an ideal vehicle to reconsider the nondelegation doctrine.

III. This Court should resolve the proper test for the nondelegation doctrine now rather than wait for the question presented to further percolate.

This Court should resolve the question presented now rather than waiting for a future case. This Court's split decision in *Gundy* has cast a shadow over the nondelegation doctrine and the continued vitality of the intelligible principle. *See* Gary Lawson, *"I'm Leavin' It (All) Up to You":* Gundy *and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2018-2019 Cato Sup. Ct. Rev. 31, 32, 56–57 (2018-2019) (discussing the uncertainty surrounding the nondelegation doctrine following *Gundy*). This uncertainty makes legislating harder. Congress doesn't know with certainty what standard this Court will judge the lawfulness of its delegations. Likewise, administrative agencies lack certainty about the lawfulness of any particular delegation. Thus, no matter what this Court ultimately chooses to do with the nondelegation doctrine, it owes the other two branches of government a prompt resolution. This Court should not permit this important, foundational doctrine to remain in limbo any longer.

Nor is there any benefit to deferring the matter for another time. Waiting to resolve the question presented will not give this Court the benefit of allowing more

courts of appeals to weigh in about whether to reattach the nondelegation doctrine to its original meaning. This Court's modern precedents are clear: a congressional delegation is permissible as long as it comes with an intelligible principle, no matter whether the delegation conflicts with the framers' view on separation of powers. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474 (2001) (addressing nondelegation challenge by determining whether Congress provided an "intelligible principle"); *Touby v. United States*, 500 U.S. 160, 165 (1991) (same); *Mistretta*, 488 U.S. at 372 (same). The lower courts must follow this command. It is this Court's "prerogative" alone to "overrul[e] its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted). This is thus not a situation in which this Court should wait to have "the benefit of numerous and varied rulings on [a] particular issue[]" because those rulings will never come. *Butler v. McKellar*, 494 U.S. 407, 430 n.12 (1990) (Brennan, J., dissenting).

For these reasons, this Court should grant review here and resolve the test for determining under what circumstances Congress can delegate authority to the executive branch. It should not wait for this issue to further percolate.

CONCLUSION

The petition for a writ of certiorari should be granted.

November 4, 2021

Respectfully submitted,

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