CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2023 Term

ALLEN BROOKS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Submitted By:

Amanda L. Altman
Assistant Federal Public Defender
325 Broadway, Second Floor
Cape Girardeau, MO. 63701
(573) 339-0242

Counsel for Petitioner

QUESTION PRESENTED

Title 1 of the Adam Walsh Child Protection and Safety Act of 2006 created the Sex Offender Registration and Notification Act (SORNA). It established a national sex offender registry requiring persons convicted of a sex offense to register and keep their registration current in each jurisdiction in which the offender resided, worked as an employee, and enrolled as a student. 34 U.S.C. § 20913(a). Congress did not decide whether, when, or how SORNA's registration requirements and criminal penalties for noncompliance apply to persons convicted of a sex offense before SORNA's enactment. Congress delegated to the Attorney General the power to decide whether and how SORNA should apply to pre-Act offenders. It articulated no discernible principle to guide the Attorney General's choice of which, if any, pre-Act sex offenders should be subjected to the new restrictions on their liberty. Successive Attorneys General adopted different positions on the extent SORNA applied retroactively.

An eight-member Court in 2019 let Congress's delegation of this issue to executive branch stand despite claim it violated the mandate in U.S. Const. Art. I, §1 that only Congress may create federal laws restricting liberty. Justice Alito's concurrence voiced willingness to revisit the issue if a majority of the Court became ready to "reconsider the approach." That support appears to exist now to review this issue. Petitioner also seeks to challenge SORNA as exceeding Congress's Commerce Clause power. This case presents these issues to the Court:

1. Did Congress's delegation to Attorneys General the retroactive reach of SORNA to offenders convicted of sex crimes before its enactment violate U.S. Const. Art. 1, §1?

2. Did Congress exceed its authority under the Commerce Clause, U.S. Const. Art 1, §8 in enacting SORNA?

Parties to the Proceedings

Petitioner Allen Brooks, Jr. was represented in the lower court proceedings by his appointed counsel, Nanci H. McCarthy, Public Defender, 1010 Market, Suite 200, Saint Louis, MO 63101, and Assistant Federal Public Defender Amanda L. Altman, 325 Broadway, Second Floor, Cape Girardeau, Missouri, 63701, Suite 200, Saint Louis, Missouri 63101. The United States was represented by United States Attorney Sayler Fleming, 111 S. Tenth Street 20th Floor, Saint Louis, MO 63102, and Assistant United States Attorney John. N. Koester, 555 Independence Street, 3rd Floor, Cape Girardeau, Missouri, 63701.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings:

• United States v. Brooks, 1:22-CR-00021-SNLJ, (E.D. Mo) (criminal proceeding), judgment entered March 28, 2023,

• United States v. Brooks, 23-1694 (8th Cir.) (direct criminal appeal), appellate judgment entered October 18, 2023, and,

• Brooks v. United States, 23A648 (Supreme Court) (Application to extend time to file a petition for a writ of certiorari) order granting additional time entered Mar. 16, 2024.

There are no other proceedings related to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not published. It is unofficially reported at US v. Brooks, No. 23-1694, 2023 WL 6861861. The slip opinion appears in the Appendix ("Appx.," at 1-2).

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on October 18, 2023. Appx. 1-2. Mr. Brooks filed no motion for rehearing. Justice Kavanaugh granted Mr. Brooks's timely application for additional time in which to file his petition up through March 16, 2024. Appx. 3. This petition is timely filed within the time Justice Kavanaugh granted on the first open court day following that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. 1, § 1 Legislative powers vested in Congress.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. 1, § 8, cl. 3

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

18 U.S.C. § 2250 Unlawful acts (2020)

(a) In general.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act:

(2)(A) is a sex offender as defined for the purposes of the Sex offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

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

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

34 U.S.C. § 20913 (2020): Registry requirements for sex offenders

(a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration. The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the

sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b). The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply. Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title.

STATEMENT OF THE CASE

When Congress enacted the federal Sex Offender Registration and Notification ACT ("SORNA") in 2006, it did not decide whether, when, or how SORNA's registration requirements and criminal penalties for noncompliance apply to persons convicted of a sex offense before its enactment. Congress delegated to the Attorney General the power to decide whether and how SORNA should apply to pre-Act offenders. It provided no guidelines and stated no discernible principle to guide an Attorney General's choice of whether or how any pre-Act sex offenders should be subjected to new restrictions on their liberty. The Constitution in Art. I, §1 provides that "[a]ll legislative Powers herein granted shall be vested in a Congress." This "non-delegation principle" prohibits Congress from delegating the creation of criminal laws and determinations of the scope of their application to United States citizens to other branches of the government. SORNA imposes a pervasive burden on its subjects to register personal information on their residences, work, and schooling, yet Congress made no findings connecting SORNA registration to interstate commerce. Congress stated only that it aimed to "protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901.

Petitioner has full standing to litigate Congress's stark delegation to the Executive Branch the decision of whether persons convicted of sex offenses prior to SORNA's enactment should be subject to its demanding retroactive registration duties and strict penalties. Mr. Brooks' sole conviction for a sex offense in 2004 occurred two years before Congress enacted SORNA. The decision of an eight-member Court in 2019 upholding SORNA's application to pre-enactment offenders depended on Justice Alito's concurrence questioning the meager showing the Court's non-delegation cases had come to require to overcome challenges. *Gundy v. United States*, 139 S. Ct. 2116, 2130-31 (2019) (Alito, J., concurring). The Chief Justice and Justice Thomas joined

Justice Alito's concurring opinion. Justice Kavanaugh (who joined the Court after *Gundy* was argued) has also voiced support for reconsidering the issue and intervening decisions of the Court indicate a revived willingness to reexamine even longstanding precedents.

Factual background. On July 26, 2004, Mr. Brooks was convicted in Cook County, Illinois of aggravated criminal sexual abuse of a minor between the ages of 13 and 16 and sentenced to five years in prison with credit for 344 days already served. Two years later, on July 27, 2006, Congress enacted SORNA as part of the Adam Walsh Child Safety and Protection Act of 2006, Pub. L. No. 109-248, 20 Stat. 586 (2006). SORNA established a new federal requirement that persons convicted of a sex offense must "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student[.]" 34 U.S.C. §20913(a). Congress authorized the Attorney General "to specify the applicability of the [registration] requirements . . . to sex offenders convicted before. . . [SORNA's] enactment." 34 U.S.C. § 20913(d).

On September 25, 2021, Mr. Brooks moved from Cape Girardeau County in Missouri to live with his mother in Vienna, Illinois. Investigators later discovered that he had reestablished residence in Cape Girardeau in November of 2021 and did not register within three days as Missouri law required. On March 1, 2022, the United States indicted Mr. Brooks for failing to register in the Eastern District of Missouri in compliance with SORNA. Mr. Brooks filed a motion pursuant to Fed. R. Crim. P.12(b) to dismiss the indictment on the basis that SORNA violated the federal Constitution as applied to persons whose obligation to register thereunder depended on a conviction for a sex offense committed prior to its enactment. He argued that Congress's delegation to the Attorney General the authority to decide whether SORNA applied to persons convicted of sex offenses prior to its enactment violated U.S. Const. Art. I, §1. He

argued that Congress articulated no discernible standard to guide the executive's decision of whether pre-Act sex offenders would have to comply with SORNA's duties to register and subject to its penalties. Mr. Brooks acknowledged that SORNA survived such a challenge in *Gundy,* but preserved the issue noting the willingness expressed by members of the Court to reconsider the standards applied to claims of unlawful delegation of Congress's singular authority to define crimes and to whom they apply.

Mr. Brooks also argued that SORNA did not embody a proper exercise of Congressional authority under the Commerce Clause in U.S. Const. Art. I, §8, cl. 3. He noted that SORNA purported to regulate a wide range of conduct ordinarily falling within the orbit of state regulation, requiring disclosure of one's criminal record, residence, employment, and school enrollment, all of which intrude on one's privacy yet had little connection or identification with commercial operations central to the Commerce Clause's role. Congress made no findings tying SORNA registration to interstate commerce, yet the registry effectively expanded the reach of federal police power. Mr. Brooks acknowledged that SORNA had survived challenges based on the Commerce Clause. The District Court referred Mr. Brooks' motion to dismiss to a Magistrate Judge, whose report recommended that it be denied based on *Gundy* and the Eighth Circuit's rejection of Commerce Clause challenges to SORNA. The District Court adopted the Magistrate's Report, noting the defendant's timely objections thereto. Mr. Brooks pled guilty to the SORNA charge in exchange for a Guidelines prison term and the right to appeal his Constitutional challenges. On March 28, 2023, the Court imposed a 33-month sentence, the maximum guideline sentence and supervised release for 20 years.

He maintained his claims on direct appeal to the Eighth Circuit. The Court of Appeals, under the still-binding *Gundy* issue affirmed by an unpublished opinion issued on October 18,

2023. The Eighth Circuit affirmed the conviction citing *Gundy* and Eighth Circuit authority declaring SORNA's criminal penalties a valid exercise of the Commerce Clause. Appx. 2. Justice Kavanaugh granted petitioner's request for additional time to file his petition for certiorari, up through March 16, 2024. Appx. 3. Petitioner files his petition on March 18, 2024, the first open-court day following Saturday March 16, 2024.

GROUNDS FOR GRANTING THE WRIT

I. The Court should grant certiorari and reconsider *Gundy* and SORNA's validity under Article 1, Section 1 of the Constitution as applied to persons whose predicate convictions for sex offenses predated its enactment.

Justice Kagan and three other members of this Court concluded in *Gundy v. United States*, that the broad terms by which Congress delegated to the Attorney General the decision of whether and how SORNA should apply to pre-Act offenders "instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible." 139 S. Ct. at 2129 (opinion of Kagan, joined by Ginsburg, Breyer, Sotomayor, JJ.). Justice Gorsuch's dissent (joined by Chief Justice Roberts and Justice Thomas) detailed the lack of any "intelligible principle" written into SORNA's delegation to guide the Attorney General's decision of whether and to what extent its demanding registration obligations and criminal penalties applied to persons convicted of sex offenders before SORNA's enactment. *Id.* at 2131-2133 (Gorsuch, J., dissenting). Justice Alito's concurring opinion in *Gundy* observed that, given the "capacious" standards by which the Court had upheld virtually every delegation of Congress in the preceding 85 years, he thought "it would be freakish to single out [SORNA] for special treatment." *Id.* at 2130-31 (Alito, J., concurring). Justice Alito simultaneously noted that if a majority of the Court were willing to reconsider those standards, he would favor change. *Id.* The Chief Justice and Justice Thomas joined Justice Alito's concurrence.

In providing the fifth vote on an eight-member Court in *Gundy*, Justice Alito's tentative concurrence in Justice Kagan's opinion embodies the actual holding. *See United States v. Wass*, 954 F.3d 184, 189 (4th Cir. 2020). "[T]he narrowest common ground that five Justices stood upon in *Gundy* is that the SORNA delegation did not violate long-standing delegation doctrine analysis." *Id.* A majority of this Court may favor a different ruling on whether SORNA violates

the non-delegation principle embodied in Article 1, § 1 and 8 today. Justice Kavanaugh took no part in the decision in *Gundy*, which was argued six days before his confirmation to the Court. 139 S. Ct. at 2130. Soon thereafter, however, Justice Kavanaugh endorsed Justice Gorsuch's dissent and agreed it may warrant further consideration in future cases. *Paul v. United States*, 140 S. Ct. 342, 342 (2019). Further support for reconsideration may exist with the additional Justices who have joined the Court since that time.

Congress's delegation to Attorneys General the decision of whether and how SORNA applies to pre-enactment offenders implicates the Separation of Powers

The basis for Petitioner's claim rests in the Constitutional separation of specified powers assigned to Congress and the Executive Branch. The Framers entrusted the authority to legislate laws solely to Congress. U.S. Const. Art. I, § 1, 1. The rule vesting federal legislative power in Congress is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring), quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). The "nondelegation doctrine" is rooted in the principle of separation of powers. *Mistretta v. United States*, 488 U. S. 361, 371 (1989). The legislative authority the framers entrusted solely to Congress encompassed "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 & n. 21 (Gorsuch, J., dissenting), quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). "[W]hen the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them." *Id.* at

2133-34 & n. 25, quoting J. Locke, The Second Treatise of Civil Government, and a Letter Concerning Tolerations §141, p. 71 (1947).

SORNA originated in the Adam Walsh Child Protection and Safety Act of 2006. *See Carr v. United States*, 560 U.S. 438, 441-444 (2010). Title I of the Act, entitled the Sex Offender Registration and Notification Act, created a national sex offender registry. The law comprised multiple statutes that broadly define the term "sex offender" to include anyone "who was convicted of a sex offense," compel sex offenders to register, and obligate the states to undertake actions to register and monitor sex offenders. See 34 U.S.C. §§ 20911-20913, 20991. SORNA requires sex offenders to register and keep the registration current in each jurisdiction where the offender resides, works as employee, and/or enrolls as a student. 34 U.S.C. § 20913(a). The law requires that any person previously convicted of a sex offense must no later than three business days after each change of name, residence, employment, or student status, appear in person to inform authorities in the relevant jurisdiction of such changes, 34 U.S.C. § 20913(c). This registration requirement is enforced under 18 U.S.C. § 2250(a), which created a federal felony punishable by up to 10 years in prison for noncompliance.

Congress did not declare SORNA applicable to persons convicted of sex offenses before its enactment. Instead, Congress delegated to the Attorney General the "authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act" in 34 U.S.C. § 20913(d). By the Department of Justice's own admission, SORNA did not require the Attorney General to impose registration requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require [the Attorney General] to act at all." *Reynolds v. Washington*, S. Ct. No. 10-6549, Brief for the United States, p. 23, 2011 WL 2533008, *23 (filed June 23, 2011). A string of Attorneys General took conflicting positions:

> "For six months after SORNA's enactment, Attorney General [Alberto] Gonzales left past offenders alone. Then the pendulum swung the other direction when the Department of Justice issued an interim rule requiring pre-Act offenders to follow all the same rules as post-Act offenders. A year later, Attorney General [Michael] Mukasey issued more new guidelines, this time directing the State to register some but not all past offenders. Three years after that, Attorney General [Eric] Holder required the States to register only those pre-Act offenders convicted of a new felony after SORNA's enactment. Various Attorneys General have also taken different positions on whether pre-Act offenders might be entitled to credit for time spent in the community before SORNA was enacted."

Gundy, 139 S. Ct. at 2132 (Gorsuch, J., dissenting) (footnotes omitted). At the time of Petitioner's prosecution, the Attorney General's regulations retroactively applied SORNA's requirements to all sex offenders "regardless of when the conviction of the offense for which registration is required occurred (including if the conviction occurred before the enactment of the Act)[.]" *Id.* and n. 17, citing 28 C.F.R. § 72.3 (2022).

Justice Gorsuch's *Gundy* dissent forcefully notes the lack of any intelligible principle in SORNA guiding the decisions of Attorneys General whether SORNA's requirements and liabilities should apply to pre-ACT sex offenders. The *Gundy* dissent also plainly explains the negation this produces of the Separation of Powers and delegation of legislative powers entrusted solely to Congress. U.S. Const. Art. I § 1. *Gundy*, 139 S. Ct. at 2134-35 (Gorsuch, J., dissenting). "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions" with which it is vested. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). The Constitutional prohibition against Congress's delegation reflected the framers' knowledge that Congress could not be trusted to police itself and that liberty could not be guaranteed "where the legislative and executive powers are united in the same person, or body of magistrates." *Gundy*, 139 S. Ct. at 2135 & n. 36, quoting The Federalist No. 47, at 302 (Madison). If Congress could pass off its legislative power to the executive branch, the clauses of the Constitution vesting different powers to the three branches and the entire structure of the Constitution would "make

no sense." *Id.* at 2134-35. Excluding the involvement of representatives spanning the country and the demands of bicameralism and presentment, law-making would become "nothing more than the will of the current President." *Id.* at 2135.

Although the nondelegation doctrine does not prevent Congress from "obtaining the assistance of its coordinate Branches," it can do so only if it provides clear guidance in the form of "intelligible principles." *Id.* (Opinion of Kagan, J.) at 2123. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not forbidden delegation of legislative power." *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)). To determine whether a statute provides an intelligible principle, courts must determine if Congress assigned to the executive only the responsibility to make factual findings and set forth the facts that the executive must consider, the criteria against which to measure them. *Id.* at 2141. Courts must, "most importantly" determine whether "Congress, and not the Executive Branch, ma[d]e the policy judgments[.]" *Id.*

Justice Gorsuch's dissent documents that Congress set out no such principles in SORNA. Congress requested no factual findings from the Attorney General and announced no policy judgment to guide the Attorney General's application of SORNA to pre-Act offenders in 34 U.S.C. § 20913(d). As the Department of Justice admitted to the Court in earlier briefing, "SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, *or none of them*." *Id.* at 2143 (Gorsuch, J., dissenting) (quoting the Government's Brief in *Reynolds*, emphasis added). After SORNA's enactment, a succession of Attorneys General made varying choices of whether and how pre-SORNA offenders were subjected to its duties and penalties:

> "For six months after SORNA's enactment, Attorney General [Alberto] Gonzales left past offenders alone. Then the pendulum swung the other direction when the Department of Justice issued an interim rule requiring pre-Act offenders to follow all the same rules as post-Act offenders. A year later, Attorney General [Michael] Mukasey issued more new guidelines, this time directing the State to register some but not all past offenders. Three years after that, Attorney General [Eric] Holder required the States to register only those pre-Act offenders convicted of a new felony after SORNA's enactment. Various Attorneys General have also taken different positions on whether pre-Act offenders might be entitled to credit for time spent in the community before SORNA was enacted."

Id. at 2132 (Gorsuch, J., dissenting) (footnotes omitted)

Congress could have drafted Section 20913(d) to prescribe a line of fact-finding to fulfill a designated Congressional policy, such as by requiring all pre-Act offenders to register, subject to case-by-case exceptions administered by the Attorney General for those who did not present an "imminent hazard to the public safety" compared to that posed by newly released post-Act offenders. *Id.* at 2143. But,

> "SORNA did none of this. Instead, it gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders. The Attorney General's own edicts acknowledge the considerable policy-making powers he enjoys, describing his rules governing pre-Act offenders as 'of fundamental importance to the initial operation of SORNA, and to its practical scope . . . since [they] determine[e] the applicability of SORNA's requirements to virtually the entire existing sex offender population.' These edicts tout, too, the Attorney General's 'discretion to apply SORNA'S requirements to sex offenders with pre-SORNA convictions if he determines (as he has) that the public benefits of doing so outweigh any adverse effects.' Far from deciding the factual predicates to a rule set forth by statute, the Attorney General himself acknowledges that the law entitles him to make his own policy decisions."

Id. (footnotes excluded).

This Court should consider anew whether SORNA triggers the concerns that motivated the Founders' choice of the separation of powers. When Congress could not achieve consensus to resolve the problems associated with SORNA's application to pre-Act offenders who numbered some 500,000, it delivered the task to the Attorney General. Applying SORNA to pre-Act offenders who had completed their prison sentences posed unpopular and costly burdens on

States and localities by forcing them to adopt or overhaul their own sex offender registration schemes to identify and register half a million people nationwide. *Id.* at 2124 (Opinion of Justice Kagan); *id.* at 2131-32 (Gorsuch, J., dissenting). The Attorney General, facing no duty to assemble a broad supermajority of legislators to endorse the decision, freely applied the statute retroactively to a politically unpopular minority of sex offenders. *Id.* at 2132 (Gorsuch, J., dissenting).

Justice Alito's tentative concurrence in Justice Kagan's opinion in *Gundy* supports Petitioner's request that the Court revisit the decision in light of the current Court's willingness to reconsider even longstanding precedents. *See, e.g., Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 269-270 (2022). "[T]he quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered." *Id.* at 269. Justice Alito's controlling concurrence in *Gundy* noted the "capacious" standards underlying the Court's precedents concerning the non-delegation principle." by which the Court had upheld virtually all delegations of Congressional authority in the preceding 85 years. Id. at 2130-31 (Alito, J., concurring). Five justices recognized that the Court's non-delegation jurisprudence should be "revisit[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*, 140 S. Ct. at 342 (Kavanaugh, J., concurring in denial of certiorari). This case provides a clear means to establish a more vibrant "intelligible principle" test to accomplish the separation of powers rule embodied in Article 1, § 1.

Additional support to address the issue may well exist in light of among the Justices who have joined the Court since *Gundy* was decided. Overturning the nearly 50-year-old and 30-year-old cases recognizing a woman's right to abortion in *Dobbs,* the Court observed:

> "stare decisis is 'not an inexorable command,' *see Dobbs* [,] 597 U.S. 215, at 2, *Pearson v. Callahan*, 555 U. S. 223, 233 [] (2009) (internal quotation marks omitted), and it 'is at

> its weakest when we interpret the Constitution,' *Agostini v. Felton*, 521 U. S. 203, 235, (1997). It has been said that it is sometimes more important that an issue 'be settled than that it be settled right.' *Kimble* [*v. Marvel Entm't, LLC*], 576 U. S.[446], [] 455 [(2015)], (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)). But when it comes to the interpretation of the Constitution—the 'great charter of our liberties," which was meant "to endure through a long lapse of ages,' *Martin v. Hunter's Lessee*, 14 U.S. 304, 1 Wheat. 304, 326, 4 L. Ed. 97 (1816) (opinion for the Court by Story, J.)—we place a high value on having the matter "settled right."

Dobbs, 597 S. Ct. at 264. The force of stare decisis in the context of the retroactive application of SORNA further ebbs given the record of Attorneys General adopting conflicting applications as to persons convicted of sex offenses before SORNA's enactment. *See Gundy*, 139 S. Ct. at 2132 (Gorsuch, J., dissenting) (detailing conflicting positions taken by successive Attorneys General).

Petitioner Brooks' case presents a perfect vehicle to resolve this issue, which he fully preserved in the District Court and the Eighth Circuit Court of Appeals. Appx. 1-2.

II. The Court should also grant certiorari to determine whether SORNA exceeds Congress's authority under the Commerce Clause of Art. I § 8.

Petitioner also challenged his SORNA conviction on the basis it exceeds the scope of Congress's Commerce Clause power under U.S. Const. Art. I, § 8, cl. 3. Every Circuit to address the issue has found that SORNA does not exceed Congress's Commerce Clause authority, *see, e.g., United States v. Anderson*, 771 F.3d 1064, 1067-71 (8th Cir. 2014); *United States v. Ambert*, 561 F.3d 1202, 1207 (11th Cir. 2009); *United States v. Lawrance*, 548 F.3d 1329, 1332-36 (10th Cir. 2008). Mr. Brooks maintains the Eighth Circuit ruling and similar cases in other circuits contravene this Court's commerce clause jurisprudence and warrants review by a writ of certiorari. Supreme Court Rule. 10(c).

Through SORNA, Congress regulated a wide range of conduct that properly falls within state regulation. It requires, as a federal matter, individuals who are "sex offenders" to register and maintain current information in each local jurisdiction: (a) where the sex offender was

convicted, (b) where the sex offender resides, (c) where the sex offender is employed, and/or (d) where the sex offender attends school. 34 U.S.C. § 20913(a). It mandates that offenders update their registration within three days after a change in name, residence, employment, or student status. *Id.* at § 20913(c). It imposes requirements on the states that intrude, as a federal matter, on an offender's privacy interests. It requires, for example, that every state establish an internet website, publishing information about sex offenders registered in that state, that each jurisdiction include in the design of its own website all field search capabilities needed for full participation in the National Sex Offender Public Website, and that each jurisdiction "participate in that website as provided by the Attorney General." *Id.* at § 20920(a).

The Constitution creates a federal government "acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). The powers the Founders delegated to the federal government were to be "few and defined." Those which were to remain in the State governments were to be "numerous and indefinite." *United States v. Lopez,* 514 U.S. 549, 552 (1995) (quoting The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961)). This principle preserves the goal of liberty: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, SORNA's requirements contradict the federal balance the Framers designed. *Lopez*, 514 U.S. at 583 (1995) (Kennedy, J., concurring). Imposing a federal obligation to register threatens federalism and the constitutional "order because it gives such an expansive

meaning to the Commerce Clause that all private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers." *Nat'l Fed 'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 658 (2012) ("NFIB") (Scalia, J. dissenting, joined by Kennedy, Thomas, and Alito).

Congress made no findings connecting SORNA registration to interstate commerce. Congress stated only that it aimed to "protect the public from sex offenders and offenders against children." 34 U.S.C. §20901. Its criminalization of non-registration in 18 U.S.C. §2250 includes a scant jurisdictional element, punishing those who fail to register and travel in commerce if not convicted of federal, District of Columbia, or tribal sex offenses. Section 2250(a)(2)(A), -(B). SORNA's registration requirement has no commercial or economic character. The Commerce Clause does not empower Congress to force defendants convicted of purely local offenses under state law to register as sex offenders. *See United States v. Kebodeaux*, 570 U.S. 387, 410-411 (2013) (Thomas, J., dissenting) (Commerce Clause did not authorize Congress to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce", quoting *United States v. Morrison,* 529 U.S. 598, 617 (2000)).

The authority granted in the Commerce Clause allows Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Although this power has been invoked to support federal incursions into policing crime, this Court's precedents mandate that the authority must focus on commerce's economic nature. In *Lopez*, Justice Kennedy rejected Congress's reliance on the Commerce Clause to regulate "an activity beyond the realm of commerce in the ordinary and usual sense of that term" (i.e. gun possession near schools) because exercising authority in that way foreclosed "the States from experimenting and exercising their own judgment in an area to which States lay claim by

right of history and expertise." 514 U.S. at 583 (Kennedy, J., concurring). *See also id.* at 584 (Thomas, J., concurring) ("The Federal Government has nothing approaching a police power.").

SORNA does not identify under what authority Congress imposed its registration requirements. The statute does not on its face purport to regulate interstate commerce. SORNA requires that all persons convicted of a "sex offense" place their name on a state registry, 34 U.S.C. §§ 20901-209623. Failure to comply is an element of a federal offense. The Court's Commerce Clause cases make clear that Congress does not have the power to regulate individuals convicted of purely intrastate offenses. *See, e.g., Lopez*, 514 U.S. at 595; *Morrison*, 529 U.S. at 618; *Jones v. United States*, 529 U.S. 848 (2000). The term "commerce" in the Constitution does not authorize unlimited power in Congress. "The enumeration [of power 'among' the states] presupposes something not enumerated; and that something . . . must be the exclusively internal commerce of a State." It bears a discrete meaning: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by the prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 194-195 (1824).

This Court identifies three broad categories of activity Congress may regulate under its commerce power. First, Congress may regulate the use of and channels of interstate commerce, such as interstate highways, the mail, or air traffic routes. *Morrison*, 529 U.S. at 608-09 Second, Congress may regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce. *Id.* Finally, Congress can regulate those activities that have a substantial effect on interstate commerce. *Id.* SORNA's registration requirements cannot be upheld under the first two categories. They have nothing to do with the channels of interstate

commerce and are imposed on individuals who need not have engaged in interstate commerce or even have any connection to commerce. The registration requirements can be upheld only if they regulate "those activities that substantially affect interstate commerce." *Lopez*, 514 .S. at 558-59. *See also United States v. Robertson*, 514 U.S. 669 (1995) (per curiam) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial interstate effects.") (emphasis in original).

Petitioner submits that none of the factors *Lopez* and other cases set forth to analyze whether a regulation can be upheld as an activity substantially affecting interstate commerce support the SORNA registration requirement. First, the regulated activity must be economic in nature. *See Morrison*, 529 U.S.at 610 (striking civil penalties for violence-against-women offenses); *Lopez*, 514 U.S. at 549 (striking law criminalizing gun possession near schools). SORNA's registration requirements have no commercial character and do not relate to economic activity. The "Declaration of Purpose" plainly states that SORNA was enacted "to protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901. Congress wields no broad police power to protect the public. *See Kebodeaux*, 570 U.S. at 402 (Roberts, C. J., concurring). SORNA's registration requirement simply has "nothing to do with commerce," and is not justified by Congress's Commerce Clause power. *Lopez*, 514 U.S. at 560; *Morrison*, 529 U.S. at 614.

The second factor examined in *Lopez* and *Morrison* was whether the statute contains a "jurisdictional element," such as a requirement of travel across state lines for the purposes of committing the regulated act. *Morrison*, 529 U.S. at 611-12. The registration requirements contain no such jurisdictional element. 34 U.S.C. §§ 20913-20916. Instead, the registration

requirements, unlike the provision criminalizing the failure to comply with them, apply to offenders whose criminal activities are purely intrastate. 18 U.S.C. § 2250(a). Under this Court's precedent, an express jurisdictional element "might limit [the provision's] reach to a discrete set of [sex offenders] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 561-62. However, Congress did not restrict its registration reach to activity connected to interstate commerce.

Legislative findings are another factor courts consider in assessing Commerce Clause authority. Findings demonstrating a connection to commerce will at least enable a court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 563. Title I of SORNA, including its registration requirement, contains no such findings. *Id.* Like the Gun Free School Zone Act examined in *Lopez*, 514 U.S. at 562-63, SORNA is unsupported by legislative findings indicating that purely local sex crimes have any link with interstate commerce.

Although the "Necessary and Proper Clause" can extend Congress's authority to act in furtherance of executing one of its enumerated powers, *Nat'l Fed 'n of Indep. Bus.*, 567 U.S. at 537, petitioner seeks this Court's consideration of whether Congress exceeded the limits of this clause in SORNA's registration requirement. An exercise of the Necessary and Proper Clause must be an exercise "of authority derivative of, and in service to, a granted power." Id. at 560 (Roberts, C.J.). This Court has stated Congress's exercise of the power must be "narrow in scope," or "incidental" to the commerce power. *Id.* The power Congress exercised in SORNA is not narrow or incidental. *See United States v. Thomas*, 534 F. Supp. 2d 912, 921-22 (N.D. Iowa 2008) (while upholding registration requirement under Necessary and Proper Clause, noting that it was not "narrowly tailored or absolutely necessary" to Congress's ability to monitor sex

offenders). Every person convicted of a sex offense must register, regardless of whether they have traveled in commerce. 34 U.S.C. § 20913. Congress may not compel registration in anticipation of potential interstate travel. "The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent.... Each one of our cases ... involved preexisting economic activity." *Nat'l Fed. Of Indep. Bus.*, 567 U.S. at 557 (Roberts, C.J); see also id. at 657 (Scalia, dissenting) ("But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.").

Finally, the extent of the relationship between the regulated activity and its effects on commerce must be examined. *Morrison*, 529 U.S. at 612. The registration requirements regulate a person who is a sex offender without reference to any activity affecting, or not affecting, interstate commerce. An effect on commerce cannot be reached by extrapolating the aggregate economic effects that sex crimes and sex offenders inflict upon society. *Id.* at 617. Nor can the "costs of crime" or the effects of crime on "national productivity" support the use of the Commerce Clause to regulate intrastate criminal activity. *See Lopez*, 514 U.S. at 563-64; *Morrison*, 529 U.S. at 598, 612-13.

The Eighth Circuit's ruling that SORNA constitutes an appropriate exercise of Congress's authority under the Commerce Clause stands in stark conflict with this Court's precedents and warrants this Court's consideration by a writ of certiorari. Supreme Court Rule 10(c).

CONCLUSION

WHEREFORE, Petitioner Brooks requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

Amanda L. Altman
Assistant Federal Public Defender
325 Broadway, Second Floor
Cape Girardeau, MO 63701
Telephone: (573) 339-0242
Fax: (573) 330-0305
E-mail: Amanda_Altman@fd.org