

No. 17-6086

IN THE
Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44 of this Court, Petitioner Herman Avery Gundy respectfully petitions for rehearing before a full nine-Member Court.

1. Petitioner’s case concerns Congress’s ability to transfer to the Executive Branch—in particular, the Attorney General—the power to determine the applicability of criminal laws to roughly half a million people. Petitioner specifically challenges a provision of the Sex Offender Registration and Notification Act (“SORNA” or “the Act”), 34 U.S.C. § 20901 *et seq.*, that empowers the Attorney General to decide whether individuals convicted of sex offenses prior to SORNA’s enactment are required to register under that law, and thus whether they are subject to criminal penalties for failing to register under SORNA, *see id.* § 20913(d) (“The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter ... and to prescribe rules for the registration of any such sex offenders ...”).

Petitioner was convicted of a state sex offense before SORNA’s enactment. In 2015, he was convicted in federal district court for failing to register under SORNA. His conviction was upheld by the Second Circuit Court of Appeals on June 22, 2017.

2. On March 5, 2018, this Court granted certiorari on the question of whether SORNA’s delegation to the Attorney General of the power to determine the Act’s applicability to pre-Act offenders like Petitioner violates the nondelegation doctrine.

The Court heard argument on this case on October 2, 2018, while there was a temporary vacancy on the Court following the retirement of one Member. As a

result, the case was heard by only eight Justices. Justice Kavanaugh joined the Court four days later.

On June 20, 2019, a divided Court that failed to issue a majority opinion affirmed the judgment of the court of appeals. *See Gundy v. United States*, 139 S. Ct. 2116 (2019).

In a plurality opinion authored by Justice Kagan, four Members of the Court opined that § 20913(d) of SORNA did not violate the nondelegation doctrine. *See Gundy*, 139 S. Ct. at 2121 (plurality opinion).

In dissent, Justice Gorsuch, joined by the Chief Justice and Justice Thomas, opined that SORNA's delegation was unconstitutional. *See Gundy*, 139 S. Ct. at 2144-47 (Gorsuch, J., dissenting). These three Justices also advocated a more rigorous application of separation of powers principles, and the constitutional nondelegation doctrine, than has sometimes been thought required under the Court's "intelligible principle" test. *See id.* at 2139-40 (noting that the "mutated version" of the "intelligible principle" test that has developed "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked" and that "[j]udges and scholars representing a wide and diverse range of views have condemned it as resting on 'misunderst[ood] historical foundations'").

Justice Alito concurred in upholding SORNA's delegation, but did not join the plurality's constitutional or statutory analysis. *See Gundy*, 139 S. Ct. at 2130-31 (Alito, J., concurring in the judgment). Instead, Justice Alito concurred in the result because, as he opined, it would be "freakish to single out" this provision of SORNA for "special treatment" under the nondelegation doctrine, given the "extraordinarily

capacious” delegations the Court has previously upheld. *Id.* at 2131. Justice Alito stated, however, that if “a majority of this Court were willing to reconsider the approach [to nondelegation] we have taken for the past 84 years, I would support that effort,” *id.*

Thus, while four Justices endorsed a permissive approach to delegations, the other four Justices expressed concerns regarding that approach—particularly when it condones a delegation of power as capacious as that in § 20913(d) of SORNA.

3. The Court rarely grants rehearing. But this case presents precisely the situation in which the Court has deemed rehearing appropriate: the decision was rendered by what was effectively an equally divided Court comprised of only eight Members. The case was decided by eight Members because of a temporary vacancy—not disqualification of a Member—meaning that a full nine-Member Court could participate in a rehearing.

“[R]ehearing petitions have been granted in the past where the prior decision was by an equally divided Court and where it appeared likely that upon reargument a majority one way or the other might be mustered. ... Particularly was this true when a new Justice became available to break the tie.” Eugene Gressman, *et al.*, *Supreme Court Practice* § 15.6(a), at 816 (9th ed. 2007).

The Court has granted rehearing in cases argued during a temporary Court vacancy, where the Court was divided in its initial decision. *See, e.g., Indian Towing Co. v. United States*, 349 U.S. 926 (1955) (granting rehearing for case heard during absence caused by Justice Jackson’s death); *Ryan Stevedoring Co. v. Pan-Atl. Steamship Corp.*, 349 U.S. 926 (1955)

(same); *MacGregor v. Westinghouse Elec. & Mfg. Co.*, 327 U.S. 812 (1946) (granting rehearing following Justice Jackson’s leave of absence); *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 305 U.S. 666 (1938) (granting rehearing in case decided prior to confirmation of Justice Frankfurter); *Toucey v. New York Life Ins. Co.*, 313 U.S. 596 (1941) (granting rehearing in case argued following Justice McReynolds’s retirement).

That is the situation here. Petitioner’s case was argued following the retirement of Justice Kennedy and before this vacancy was filled. And the eight-Member Court that heard this case was effectively equally divided: four Members voted to uphold SORNA’s delegation without reservation, while the other four Members expressed skepticism that SORNA’s delegation complied with the nondelegation doctrine, properly understood. Indeed, Justice Alito’s concurrence expressly noted his willingness to “reconsider” the plurality’s approach to nondelegation if a majority of the Court were willing to do so. A new Justice has now joined the Court and his participation in reargument could resolve this division.

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For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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July 11, 2019

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.1.

_____/s/_____
SARAH BAUMGARTEL