

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

HERMAN AVERY GUNDY,)
)
) Petitioner,)
)
) v.) No. 17-6086
)
) UNITED STATES,)
)
) Respondent.)
)

Pages: 1 through 62

Place: Washington, D.C.

Date: October 2, 2018

HERITAGE REPORTING CORPORATION

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HERMAN AVERY GUNDY,)
Petitioner,)
v.) No. 17-6086
UNITED STATES,)
Respondent.)
- - - - -

Washington, D.C.

Tuesday, October 2, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:
SARAH BAUMGARTEL, ESQ., New York, New York; on behalf of the Petitioner.
JEFFREY B. WALL, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for the Respondent.

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-6086,
5 Gundy versus the United States.

6 Ms. Baumgartel.

7 ORAL ARGUMENT OF SARAH BAUMGARTEL

8 ON BEHALF OF THE PETITIONER

9 MS. BAUMGARTEL: Mr. Chief Justice,
10 and may it please the Court:

11 SORNA's delegation provision grants
12 unguided power to the nation's top prosecutor
13 to expand the scope of criminal laws and to
14 impose burdensome, sometimes lifetime
15 registration requirements on hundreds of
16 thousands of individuals. It combines criminal
17 law-making and executive power in precisely the
18 way that the Constitution was designed to
19 prohibit.

20 This delegation is unconstitutional.
21 This delegation can be distinguished from every
22 delegation that has previously been upheld by
23 this Court due to a combination of its total
24 lack of standard and the nature and power --
25 nature and significance of the delegated power.

1 Unlike other delegations that this
2 Court has approved, SORNA has no standard to
3 guide the Attorney General's exercise of
4 discretion.

5 CHIEF JUSTICE ROBERTS: Well, the
6 government says that they do have a standard
7 and it's the -- apply the prohibition or the
8 requirements in the law to the maximum extent
9 feasible.

10 MS. BAUMGARTEL: Your Honor, that
11 language does not appear anywhere in the
12 statutory text, nor can it be derived from the
13 sources that the government cites.

14 JUSTICE GINSBURG: What about the list
15 that's contained in, what is it, 20901, the --
16 the list of past offenders? On your view, none
17 of those people would be required to register?

18 MS. BAUMGARTEL: That's not correct.
19 So one important thing about this case is that
20 every -- every state had an existing sex
21 offender registration system prior to SORNA's
22 enactment, and those registration systems would
23 remain in effect regardless of whether SORNA
24 existed or not. And so, for example,
25 Petitioner was required to register under

1 existing Maryland law, and so would the vast
2 majority of sex offenders who were also then
3 required to reregister under SORNA.

4 These state registration systems had
5 been in existence, many of them, since the
6 early '90s, but since 1996, every state had its
7 own registration system.

8 JUSTICE GINSBURG: But they would
9 be -- they would not come under the federal
10 registration system, which was the purpose of
11 SORNA to create. None of those examples would
12 be covered by the federal registration
13 requirement.

14 MS. BAUMGARTEL: Well, as -- as this
15 Court held in Reynolds, the Congress left it to
16 the Attorney General to determine whether SORNA
17 would apply retroactively at all. And so
18 Congress declined to make the initial decision
19 as to whether any pre-Act offender should be
20 required to register. This was consistent with
21 how Congress had approached registration
22 schemes in the past.

23 Congress had previously enacted
24 registration legislation that conditioned state
25 funding on requiring certain things from sex

1 offender registries, and in each of those prior
2 cases, Congress had not made the law
3 retroactive. And so there's -- there's nothing
4 strange about Congress doing this.

5 As the Court held in Reynolds, it then
6 gave the Attorney General full authority to
7 decide whether the law should be applied
8 retroactively, so the initial on/off
9 determination, but then as well how it should
10 apply, which offenders should be included, if
11 it should extend all the way back to 20, 30, 40
12 years. There was absolutely no guidance
13 provided to the Attorney General in making --

14 JUSTICE ALITO: Well, suppose the --
15 the statute said that the Attorney General
16 shall have the authority to determine the
17 application of this subchapter to pre-enactment
18 offenders as public safety and fairness
19 requires. Would that be a -- a violation of
20 the Non-Delegation Doctrine?

21 MS. BAUMGARTEL: Yes, Your Honor.
22 Given the subject matter of this delegation,
23 Congress needs to provide more guidance than
24 something along the lines of "in the public
25 interest." And --

1 JUSTICE BREYER: What about the most
2 famous regulation, that I think people in this
3 room would imagine, Rule 10b-5? I mean, Rule
4 10b-5 is promulgated under a statute that says
5 the SEC can forbid the use of any manipulative
6 device -- that's like the sex offender part --
7 in contravention of such rules as are
8 appropriate in the public interest.

9 MS. BAUMGARTEL: So there are -- there
10 are a few distinctions. One is that the SEC,
11 obviously, is a different body than the
12 Attorney General, and so this is a point where
13 the Court's due process and delegation concerns
14 converge. And it's important from the
15 Constitution to have a separation between the
16 body that is the regulatory lawmaker and the
17 body that is the prosecutor.

18 JUSTICE BREYER: Is it only the
19 Attorney General who falls within the rule that
20 -- falls within your argument?

21 MS. BAUMGARTEL: That's something that
22 exacerbates this delegation.

23 JUSTICE BREYER: No, but -- but I'm --
24 look, the SEC has a rule such as we know,
25 10b-5, the word is the public interest. The

1 Consumer Product Safety Commission has another
2 one very similar. And we're told in one of the
3 briefs that there are 300,000 such regulations.
4 That may be an exaggeration, I don't know.

5 So which, in fact, fall, as you said,
6 within your specially harsh rule? All of the
7 300,000? We'll be busy in this Court for quite
8 a while.

9 MS. BAUMGARTEL: Your Honor, it's not
10 an especially harsh rule. What it would
11 require is some more --

12 JUSTICE BREYER: Your especially
13 strict rule.

14 MS. BAUMGARTEL: -- some more specific
15 congressional guidance when this power is
16 delegated. And a few things to say. First --

17 JUSTICE SOTOMAYOR: Sorry, you're
18 answering Justice Breyer, yes, that all 300,000
19 of those -- whatever the number is, of those
20 delegations are wrong?

21 MS. BAUMGARTEL: No, that's absolutely
22 not our position.

23 JUSTICE SOTOMAYOR: So what
24 distinguishes those -- that delegation or those
25 delegations from the example that Justice Alito

1 gave you?

2 MS. BAUMGARTEL: So, in each of the
3 prior delegations that this Court has upheld,
4 there has actually been some standard in the
5 delegation provision, even if it was what the
6 Court might consider to be a broad standard.

7 JUSTICE GINSBURG: But there are
8 standards here. I mean, it's not the Attorney
9 General, it's the Congress that defines what
10 crimes will require registration, where, and
11 when the individual is required to register, of
12 what information is necessary, and the
13 penalties for failure to register. All that is
14 specified by Congress. The Attorney General
15 doesn't -- is not at liberty to prescribe when,
16 where, how, what crimes. All that is done by
17 Congress.

18 MS. BAUMGARTEL: But none of those
19 very detailed provisions of SORNA that Congress
20 set forth apply to pre-Act offenders. The
21 Attorney General was given the power both to
22 decide whether the law applied to pre-Act
23 offenders and then how it should apply.

24 JUSTICE KAGAN: Well, that gets back
25 to the question that the Chief Justice started

1 with, because it seems that there is some
2 language in the statute that supports the
3 government's reading, that this is a statute
4 that basically says register all pre-Act
5 offenders as far as possible, with some
6 understanding that there are feasibility
7 considerations that may make immediate
8 registration of everybody impossible. So
9 comprehensiveness but moderated with a
10 feasibility understanding.

11 And I think you would point to three
12 things. You would point to the preamble, which
13 talks about a comprehensive national system. I
14 think you would point then to the definition,
15 which says that the term "sex offender" means
16 an individual, any individual, an individual
17 who was convicted of a sex offense. And I
18 think, to get in the idea of feasibility, you
19 might look to the -- the delegation provision
20 itself, which talks about categories of sex
21 offenders who are unable to comply with
22 subsection (b).

23 So both comprehensiveness as moderated
24 by some flexibility -- some -- some feasibility
25 constraint seems in the statute as long as

1 you're taking the statute as a whole.

2 MS. BAUMGARTEL: So there -- there are
3 a few problems with reading it that way. To
4 start with the fact that in J.W. Hampton, the
5 Court emphasized that the intelligible
6 principle had to be clear from the legislative
7 act itself. And so, to the extent that the
8 Court is looking through other provisions --

9 JUSTICE KAGAN: From the legislative
10 act itself meaning only from the delegation
11 provision?

12 MS. BAUMGARTEL: From -- so from the
13 legislative act. And so to start --

14 JUSTICE KAGAN: Well, this is the
15 legislative act. These are all parts of the
16 statute.

17 MS. BAUMGARTEL: That's right. And in
18 Panama Refining, the Court rejected the idea
19 that if there was a narrow delegation provision
20 that did not contain any standards, that that
21 could then be governed and given content by the
22 general preamble to the Act, which is exactly
23 the argument that the government is making
24 here.

25 JUSTICE KAGAN: Well, but when we are

1 thinking about non-delegation, it's essentially
2 a statutory interpretation question, which it
3 seems should be governed by the same rules of
4 statutory interpretation that we use elsewhere.

5 And we never look only to one
6 provision. We look to one provision in a
7 context of other provisions, including purpose
8 provisions.

9 So we've -- if you look at Justice
10 Scalia's -- Justice Scalia was a pretty
11 committed textualist -- if you look at his
12 separate opinion in Reynolds, he clearly is
13 looking to the purpose provision of this Act
14 and saying it demands comprehensiveness.

15 MS. BAUMGARTEL: So, Your Honor, I --
16 I agree 100 percent with you that this could be
17 a statutory interpretation issue, but we would
18 prevail under that.

19 The problem with the government's
20 statutory interpretation argument is that the
21 delegation provision here is not ambiguous. It
22 gives plenary authority to the Attorney
23 General. When the Court looks to, say, the
24 statutory context or legislative history,
25 things to interpret that statute, that's

1 generally when the text itself is ambiguous and
2 provides for two different plausible readings,
3 but here that's not the situation.

4 I just note Justice Scalia was
5 dissenting, of course, in Reynolds because --

6 JUSTICE KAGAN: He -- he was
7 dissenting, but nine Justices in Reynolds all
8 had the same view of this statute, which is
9 that this statute demanded comprehensiveness in
10 the registration of pre-Act sex offenders.

11 In other words, both in the majority
12 and in the dissent, this was the one point in
13 common, that they said this statute was
14 designed for something and this statute did
15 something, that it insisted that a sex offender
16 should be read broadly to include any
17 individual who was convicted of a sex offense
18 and that all those people should be registered,
19 you know, with some feasibility recognition.

20 MS. BAUMGARTEL: So I'd like to
21 address both comprehensiveness and the
22 definition of "sex offender" while also noting
23 that, of course, if Congress had actually
24 wanted that construction, it would have been
25 very easy for it to simply say that. The --

1 JUSTICE KAGAN: Well, but nine of us
2 said it.

3 MS. BAUMGARTEL: The preamble --

4 JUSTICE KAGAN: Were we all wrong,
5 every single one of us?

6 MS. BAUMGARTEL: Your Honor, I -- I
7 don't believe that's what Reynolds says, but
8 just with respect, because comprehensive is
9 coming up so many times, the preamble states
10 that it is a comprehensive national
11 registration system.

12 In the same way that the National
13 Gallery is a comprehensive art museum, that
14 doesn't mean that it has every painting that
15 has ever been made. Comprehensive can have
16 different meanings.

17 In this context, SORNA is a
18 40-something provision statute that addresses
19 every aspect of sex offender registration, not
20 just who should register but information
21 sharing among jurisdictions, the Internet
22 design of websites for public registration,
23 civil commitment of sex offenders, the use of
24 federal law enforcement resources to assist
25 with state registration systems.

1 These various provisions comprise the
2 comprehensive national registration system, and
3 there's no indication that that general
4 preamble meant that every pre-Act offender had
5 to be registered.

6 There was a House bill that was
7 rejected that was pending at the same time that
8 would have both made it explicitly retroactive
9 and that included a definition of "sex
10 offender" that explicitly said offenders
11 convicted either before or after the enactment
12 of this Act.

13 JUSTICE KAGAN: I guess I have --

14 JUSTICE GORSUCH: I guess --

15 JUSTICE KAGAN: -- two quick -- I'm
16 sorry.

17 JUSTICE GORSUCH: Well, I guess where
18 I get stuck on -- on the preamble argument is
19 that normally we -- we, when we're doing
20 statutory interpretation, prefer the more
21 specific statutory provision over the more
22 general. And the specific statutory section
23 dealing with pre-enactment offenders says
24 unambiguously that the Attorney General decides
25 whether, how, when, and who, even who. So you

1 don't even know if you're going to be subject
2 to this law.

3 MS. BAUMGARTEL: Yes.

4 JUSTICE GORSUCH: How do people even
5 know who is going to be included in this class
6 until they hear from the Attorney General? And
7 I -- I'm having trouble thinking of another
8 delegation in which this Court has ever allowed
9 the chief prosecutor of the United States to
10 write the criminal law for those he's going to
11 prosecute.

12 We say that vague criminal laws must
13 be stricken. We've just repeated that last
14 term. What's vaguer than a blank check to the
15 Attorney General of the United States to
16 determine who he's going to prosecute?

17 MS. BAUMGARTEL: Yes.

18 JUSTICE GINSBURG: That's your
19 argument stated very concisely.

20 MS. BAUMGARTEL: I'll cede my time.

21 (Laughter.)

22 JUSTICE KAGAN: Well, then I'll take
23 back my time.

24 (Laughter.)

25 JUSTICE ALITO: Well, suppose what

1 this was -- what was at stake here was civil
2 liability rather than -- suppose what was at
3 stake here was civil liability rather than
4 criminal liability. Would you make the same
5 argument?

6 MS. BAUMGARTEL: That would -- that
7 would certainly be a much closer case. Our
8 argument is that -- that SORNA would still be
9 unconstitutional simply because of the total
10 lack of standard.

11 Even in cases like NBC or American
12 Power & Light where the Court has upheld
13 arguably very broad delegations, there has been
14 some standard in the law that, even if
15 seemingly broad as written, drew upon an
16 existing body of established law.

17 So, for example, in NBC, the public
18 interest, convenience, and necessity
19 certification for licensing was an established
20 body of law, that it was a certification that
21 states had made to public service industries
22 since roughly the 1870s.

23 There's no existing body of law to
24 give context --

25 JUSTICE ALITO: So if you compare what

1 we have before us with the statute that says --
2 gives or authorizes the Attorney General to
3 devise a rule to protect public safety,
4 feasibility, and consideration of individual
5 rights, that's the difference between a
6 improper delegation and proper delegation?

7 MS. BAUMGARTEL: Perhaps. Certainly
8 --

9 JUSTICE ALITO: In the civil context,
10 let's start there.

11 MS. BAUMGARTEL: Certainly, the
12 Congressional guidance is the difference. And
13 this just comes back to the purpose of the test
14 itself. The idea of the intelligible principle
15 test is that it's not a delegation of
16 legislative authority because Congress itself
17 has made the key legislative decisions.

18 Here, with respect to pre-Act
19 offenders, Congress has not made any of the
20 decisions, despite the extremely detailed
21 framework that there is for post-Act
22 registration.

23 JUSTICE GINSBURG: Do you think the
24 Attorney General could, in that retroactivity,
25 have a different set of offenders than the text

1 of FORNA -- SORNA itself, have different
2 requirements for where and when the
3 registration is to occur?

4 MS. BAUMGARTEL: Yes. I -- and this
5 is something the Court contemplated in
6 Reynolds, where it noted that 20913(d), the
7 delegation provision, essentially gave the
8 Attorney General three different spheres of
9 authority. He could decide whether the Act
10 applied to pre-Act offenders, whether it
11 applied to pre-implementation offenders, and
12 then how it applied to those offenders.

13 And the Court recognized that he
14 might, for example, want to set different
15 registration rules for different classes of
16 pre-Act offenders, and that was contemplated
17 and permitted by the broad plenary grant of
18 authority.

19 CHIEF JUSTICE ROBERTS: What -- what
20 if the Act said that it applies to pre-Act
21 offenders and there was a provision saying the
22 Attorney General may waive the requirements of
23 this Act when he determines that it's not
24 feasible to apply them?

25 MS. BAUMGARTEL: Yeah --

1 CHIEF JUSTICE ROBERTS: And the
2 Attorney General says, you know, I don't think
3 it's feasible to apply this to pre-Act
4 offenders, so I waive the Act with respect to
5 pre-Act offenders. Is that okay?

6 MS. BAUMGARTEL: So if -- if the Act
7 said this -- Congress determines that this
8 should apply to pre-Act offenders and then gave
9 the Attorney General a limited power to grant
10 exemptions, something which is basically the
11 opposite of what this as written does, that
12 would likely be constitutional, particularly if
13 the -- if Congress provided some guidance
14 around where --

15 CHIEF JUSTICE ROBERTS: Even though
16 the consequences are the same -- the
17 consequences are the same with respect to
18 whether or -- who's making the decision about
19 whether the criminal laws should apply to whom?

20 MS. BAUMGARTEL: Respectfully, the --
21 the consequences are not the same. In the
22 first instance, Congress has made the decision.
23 And then they have afforded the Attorney
24 General a power that is -- first, if there is
25 guidance provided with respect to the granting

1 of exemptions, then it's still --

2 CHIEF JUSTICE ROBERTS: Well, let's
3 say it isn't. The Attorney General may issue
4 exemptions to this Act with respect to
5 particular categories of offenders.

6 MS. BAUMGARTEL: Even -- even if, that
7 would still be much closer to being
8 constitutional because Congress has made the
9 initial decision and has afforded the Attorney
10 General a power that is something more akin to
11 traditional prosecutorial discretion.

12 It's not the same, but this was the
13 point that Justice Scalia, joined by Justice
14 Ginsburg, made in dissent in Reynolds, which is
15 that that is much -- that seems closer to being
16 constitutional because the power that the
17 Attorney General has is closer to a traditional
18 clemency or prosecutorial discretion power.

19 In this case, however, the -- the
20 statute is truly worded in the opposite
21 fashion. It does not apply of its own force to
22 any pre-Act offenders. And the question of
23 whether it should apply is left to the sole
24 discretion of the Attorney General, with --

25 JUSTICE SOTOMAYOR: Don't we routinely

1 read into statute limitations in order to save
2 its constitutionality?

3 MS. BAUMGARTEL: Yes.

4 JUSTICE SOTOMAYOR: We do do that
5 routinely. And we have read into delegation
6 cases limits. So why is the reading in a
7 feasibility here so unusual, given the three
8 contextual signals that Justice Kagan listed
9 previously?

10 MS. BAUMGARTEL: So there are three
11 reasons. One is that that is essentially the
12 interpretation that the Court rejected in
13 Reynolds. That -- that was squarely the
14 government's argument in Reynolds, and the
15 Court said no, that's not a plausible
16 construction of this statute.

17 The second reason is that in the
18 context of the intelligible principle, it is
19 essential that Congress itself state the
20 intelligible principle. The Court addressed
21 this in American Trucking v. Whitman, where
22 there the agency itself had tried to propose a
23 limiting construction to the delegation. And
24 the Court rejected that and said that the
25 imposition of that limiting construction would

1 be the exercise of the constitutional -- the
2 legislative power itself. And so the
3 imposition of that limiting construction would
4 be unconstitutional because it's exercising the
5 legislative power.

6 JUSTICE SOTOMAYOR: Can we go back to
7 -- mention your third. But on the first folded
8 in, in Reynolds, we said that it would have
9 been strange, indeed, for anyone to imagine
10 that Congress intended the AG -- I'm trying to
11 put it into a positive -- that Congress
12 intended the AG to -- to apply the Act
13 retroactively. It would have been strange for
14 them to imagine that he or she wouldn't, that
15 there might have been limitations because of
16 some feasibility difficulties, but no one
17 imagined the AG would exempt everyone.

18 MS. BAUMGARTEL: The intelligible
19 principle cannot be the Court's speculation
20 about what Congress thinks the Attorney General
21 might do.

22 JUSTICE SOTOMAYOR: But we're
23 speculating from the Act itself.

24 JUSTICE KAGAN: It's not speculating.
25 It's interpreting. So if the -- if the best

1 interpretation -- and I realize you don't agree
2 with this, but -- so I'm posing it as a
3 hypothetical. If the best interpretation of
4 the Act is the SG's interpretation, do you
5 agree that that would not pose a delegation
6 problem?

7 MS. BAUMGARTEL: No, I don't agree.
8 And so if the -- my friend uses different
9 formulations of their interpretation.
10 Sometimes it's to the maximum extent feasible.
11 Sometimes it's to the extent feasible.
12 Sometimes it's to the extent practicable.

13 And I would argue that there is --
14 there are differences there.

15 JUSTICE KAGAN: Let's -- let's call
16 it, which is I think consistent with what
17 Reynolds said, to the maximum extent feasible.
18 In other words, what the Act is telling the AG
19 is go register pre-Act offenders, except if you
20 find it unfeasible.

21 MS. BAUMGARTEL: I -- again, that's --
22 that's nowhere in the statute, and --

23 JUSTICE KAGAN: Yeah, I -- I
24 understand that you think that. But if the
25 statute -- if the -- if that is the best

1 interpretation of the statute, would it pose a
2 delegation problem?

3 MS. BAUMGARTEL: That likely would be
4 constitutional if you could read into the
5 statute a command to the Attorney General to
6 register pre-Act offenders to the maximum
7 extent feasible, although, you know, as Justice
8 Rehnquist articulated in Industrial Union, the
9 benzene case, there is still a question about
10 what feasibility means.

11 And in this context particularly,
12 because these are not -- this is not a
13 technical scientific area. This is not a
14 question of how much air particle, at what cost
15 can be taken from the environment. This is
16 really the fundamental weighing of liberty
17 versus security interests, the sorts of
18 decisions that the people's legislative body is
19 supposed to make and not supposed to delegate
20 to the chief prosecutor.

21 JUSTICE BREYER: Are we supposed to do
22 that -- are we supposed to, in your opinion,
23 start distinguishing among the 300,000 and say,
24 well, you have a weak standard if all that's at
25 interest is the cost of pollution or something,

1 but you have to have a strong standard where,
2 in fact, it's what you said, liberty and so on,
3 and a medium standard perhaps for the SEC? I
4 don't -- I don't know what we do about the SEC.

5 And there are 300,000, approximately.
6 Maybe there are only 200,000. But is that what
7 you're suggesting we ought to do? Yes? No?

8 MS. BAUMGARTEL: Yes, and the -- the
9 Court in American --

10 JUSTICE BREYER: Yes, all right,
11 300,000.

12 MS. BAUMGARTEL: I should -- Your
13 Honor, I should -- I'm not conceding the
14 300,000.

15 JUSTICE BREYER: No, I wouldn't
16 either.

17 (Laughter.)

18 MS. BAUMGARTEL: But this is -- this
19 is what the Court said in American Trucking v.
20 Whitman, that the amount of guidance required
21 depends on the scope of the delegated power.

22 JUSTICE BREYER: Okay. So, if we're
23 supposed to go through the 200,000 or 100,000
24 or whatever they are, what are the different
25 categories where it's tough, not so tough, in

1 your opinion?

2 MS. BAUMGARTEL: Your Honor, the
3 question is not a matter of tough versus --

4 JUSTICE BREYER: No, you see what I
5 mean, categories where Congress can delegate
6 with an SEC-type standard or the standard here
7 in categories where Congress has to be more
8 specific.

9 MS. BAUMGARTEL: The --

10 JUSTICE BREYER: What -- what in your
11 opinion are the right categories?

12 MS. BAUMGARTEL: The -- so the factors
13 about SORNA that are critical include the fact
14 that it contemplates criminal sanctions. In
15 Touby, this Court recognized that its
16 precedents supported requiring greater guidance
17 for the promulgation of regulations that
18 contemplate criminal sanctions.

19 JUSTICE KAGAN: But are -- isn't that
20 all over the place we have confronted
21 delegation challenges to civil regulations
22 whose violation will result in criminal
23 sanctions? So, I mean, there are numerous of
24 those cases, but I'll just give you three:
25 Kollock is like that, Grimaud is like that,

1 Avent is like that.

2 So these are all places where the
3 delegation is to a civil regulation as it is
4 here, but if you violate that regulation that
5 some secretary or attorney general or whatever
6 has written, you're going to face criminal
7 sanctions.

8 So what's the difference between this
9 case and all those other cases where we said
10 that's -- you know, that's -- criminal
11 sanctions is not what matters?

12 MS. BAUMGARTEL: Well, Kollock is the
13 perfect example because this is very different
14 than oleomargarine label. This is not a
15 question of Congress --

16 JUSTICE KAGAN: You know, you can say
17 that, and it's easy to make fun of
18 oleomargarine labels, but the person who
19 violated that position was going to go to
20 prison in the same way that the person who
21 violates this provision is going to go to
22 prison.

23 MS. BAUMGARTEL: It's not making fun,
24 Your Honor. It's that there are certain
25 fundamental choices about a statutory scheme

1 that Congress itself must make. And so
2 Congress can say that there needs to be
3 particular packaging and a label, and then it
4 can delegate or assign to an agency the power
5 to design that label.

6 JUSTICE KAGAN: The point I was making
7 is that all of these are civil regulations.
8 The delegation is to say you write the -- we're
9 going to give you some degree of discretion to
10 write the civil regulation, understanding that
11 if somebody violates that, that person is going
12 to jail.

13 MS. BAUMGARTEL: Your Honor, may I
14 answer your question and then reserve the
15 remainder of my time?

16 Just the -- the question is always the
17 nature and significance of the delegated power
18 and it -- it is perfectly fine for Congress to
19 permit agencies to fill in the details or
20 otherwise implement statutes, but not to make
21 these sorts of fundamental policy choices.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Wall.

1 ORAL ARGUMENT OF JEFFREY B. WALL
2 ON BEHALF OF THE RESPONDENT

3 MR. WALL: Mr. Chief Justice, and may
4 it please the Court:

5 I wanted to start this morning where
6 Justices Ginsburg and Kagan did, with the text
7 of the Act, because I do think it is best
8 interpreted in the way that we have said. It
9 starts in the first section -- this is at 3a of
10 the appendix of the government's brief -- with
11 findings about existing sex victims and their
12 offenders. It then says, "we want a
13 comprehensive national system" to address the
14 offenders. It broadly defines sex offender and
15 the registration requirement. That's at pages
16 5a and 11a. And then it says -- in the 913(d),
17 it says, look, we know that translating the
18 system that we've just crafted for offenders
19 going forward is going to create some real
20 practical problems.

21 For one, it's literally impossible for
22 them to comply with the timing requirement.
23 Unable to comply. Those are the words in the
24 title and text of 913(d). So we are going to
25 give to the Attorney General the authority to

1 take this scheme and implement it with respect
2 to pre-Act offenders, recognizing that there
3 are going to be some transitional issues.

4 That kind of implementation is a
5 classic executive function. It is what
6 statutes give to the executive branch all the
7 time. And Petitioner has conceded, I think,
8 just now, that if the statute is best read in
9 the way I'm positing, that it's -- it's
10 perfectly permissible under this Court's cases.

11 CHIEF JUSTICE ROBERTS: Well, let's
12 take one of the items you just mentioned,
13 comprehensive. The Act says that it's
14 comprehensive -- that doesn't mean that it
15 covers everything. It means that it has a
16 scheme that it thinks addresses the waterfront.

17 And part of the way it -- it does that
18 is to say we're not going to decide this
19 significant category of cases.

20 MR. WALL: Oh --

21 CHIEF JUSTICE ROBERTS: It's
22 comprehensive. They've told you what's going
23 to happen there, and what they've said is the
24 Attorney General gets to decide.

25 MR. WALL: Oh, it -- it's certainly

1 true that Congress made certain legislative
2 judgments about what sex offenses would
3 qualify, how long people would have to register
4 for. They didn't say every offense that
5 relates to sex means you've got to register for
6 a lifetime. That is -- that is certainly true.

7 But, once they've defined the bounds
8 of the people they want into the system going
9 forward, then they said to the Attorney
10 General: Your job is to get as many of the
11 existing offenders who fall into that universe
12 into the registries as you can, recognizing
13 there are going to be some practical barriers.
14 You're going to have to specify the
15 applicability of the requirements in a way --

16 JUSTICE GORSUCH: But, Mr. Wall --

17 MR. WALL: -- to get them in. That's
18 very narrow language.

19 JUSTICE GORSUCH: -- you didn't -- the
20 government didn't make that argument in
21 Reynolds. The government made the opposite
22 argument in Reynolds. The government said that
23 (d) is the more specific provision and the
24 nature of the comprehensiveness, as the Chief
25 Justice indicated, for purposes of

1 pre-enactment offenders was that the Attorney
2 General gets to decide, and the Attorney
3 General could decide to do nothing, the
4 government said, the Attorney General could
5 decide to include some offenders, none of the
6 offenders, or all of the pre-enactment
7 offenders.

8 The government said that it could then
9 determine which of the Act provisions it wished
10 to, in a Chinese menu manner, apply to these
11 people it had chosen. The government then said
12 the Attorney General could change his or her
13 mind about all of this at any given time.

14 And, in fact, the Attorney General has
15 changed his mind from time to time on these
16 matters. So how do you square with what you've
17 just told us with the government's prior
18 representations in this case?

19 MR. WALL: Well, the Attorney General
20 has never changed his or her mind with respect
21 to the registration duty for individuals, but
22 -- but to go squarely to the question --

23 JUSTICE GORSUCH: There have been
24 changes in --

25 MR. WALL: Only with respect to the

1 state's obligations to go out and find
2 offenders --

3 JUSTICE GORSUCH: All right.

4 MR. WALL: -- not with the individual
5 duty on offenders to come forward and present
6 themselves and register.

7 JUSTICE GORSUCH: Attorney General
8 Holder changed the guidance provided by -- by
9 the prior Attorney General, correct?

10 MR. WALL: He narrowed the states'
11 obligations to give the states a little more
12 breathing room. That's true. The individual
13 duty to step forward and register has always
14 been constant.

15 But, to go to your question, I really
16 don't think that, reading our brief in
17 Reynolds, there's any inconsistency. We came
18 in and said as a statutory matter this says he
19 shall have the authority to specify the
20 applicability.

21 That clearly means, since we know that
22 they want everybody in, that we should read
23 that like a waiver provision. And to be sure,
24 the Court disagreed with us on that and said
25 the default rule was different but in the

1 process accepted exactly our argument as the
2 premise that the default rule didn't matter
3 because Congress wanted everybody into the
4 system.

5 And so I think --

6 JUSTICE SOTOMAYOR: Mr. Wall --

7 MR. WALL: -- everybody was working
8 off of that page in Reynolds.

9 JUSTICE SOTOMAYOR: -- your -- your
10 brief in Reynolds is very important to me. If
11 I read it the way Justice Gorsuch does, assume
12 his hypothetical, that you, in fact, said it
13 was an on and off button that the -- that the
14 Attorney General could turn on and off. If
15 that's the position you took then, what does
16 that do to you now?

17 MR. WALL: Oh, that's -- to be clear,
18 Justice Sotomayor, that's exactly the same
19 position I'm taking here today. 913(d) is --

20 JUSTICE SOTOMAYOR: No, you're adding
21 in a caveat. You're saying he can turn it on
22 and off based only on maximum lack of
23 feasibility.

24 MR. WALL: No. I'm addressing a
25 question that wasn't squarely before the Court

1 in Reynolds. It is an on/off switch to the
2 Attorney General. Specify the applicability of
3 the requirements -- it's pretty narrow language
4 -- and do it in such a way as to get them in.
5 I read it as the statute --

6 JUSTICE SOTOMAYOR: Now you're reading
7 to get them in. That's --

8 MR. WALL: Well --

9 JUSTICE SOTOMAYOR: I understand
10 Justice Gorsuch's point that you said he could
11 turn it on and off as he decided.

12 MR. WALL: Yes. That's the Attorney
13 General's authority as a statutory matter.
14 That's what the statute means. I believe the
15 statute means the same thing we said in
16 Reynolds, though the Court disagrees in the
17 default rule.

18 The separate question is, is there
19 guidance provided to the Attorney General in
20 the statute on how he should exercise that
21 on/off switch authority? And that question,
22 not before the Court in Reynolds and not
23 briefed in Reynolds, the answer to that is
24 pretty obviously yes.

25 I mean, this falls well inside a

1 number of the delegations that the Court has
2 looked at because here it's not as if there is
3 some standard in the statute like public
4 interest or fair and reasonable rates, where
5 the executive is really doing the fleshing in.

6 Here, Congress set forth all the
7 rules. It made judgments about all the
8 requirements.

9 JUSTICE GORSUCH: What do you say --

10 MR. WALL: And all it said to the
11 Attorney --

12 JUSTICE GORSUCH: -- about the ACLU's
13 argument on that score that, under your view,
14 that Congress could have simply enacted a
15 statute with respect to post-enactment
16 offenders that mirrored the language of (d) and
17 said, well, it's up to the Attorney General to
18 come up with a comprehensive and feasible
19 registration regime in the public interest?
20 You'd be here defending that, wouldn't you?

21 MR. WALL: Justice Gorsuch, it would
22 be a much broader delegation. Under this
23 Court's cases, you'd need more of a general
24 policy. It's not at all clear why Congress
25 wouldn't apply it going forward.

1 JUSTICE GORSUCH: Why? What's the
2 difference? A half a million people are
3 affected by this delegation.

4 MR. WALL: Yes, if Congress found
5 there are real practical problems with applying
6 it even going forward, here is our general
7 policy to the Attorney General, I don't know
8 that it would be importantly different from
9 saying to the Attorney General in Touby which
10 drugs will be controlled substances under the
11 Act, or -- or in Union Bridge, which obstruct
12 -- which bridges will we think obstruct the
13 rivers, or in Grimaud, who will be allowed to
14 graze on federal land?

15 JUSTICE GORSUCH: Could you answer my
16 question? Would you be here defending a
17 statute that mimicked (d) with respect to
18 post-enactment offenders, and in -- in -- in
19 which case why does Congress bother to
20 legislate SORNA at all?

21 MR. WALL: It's very difficult to know
22 in that situation, Justice Gorsuch, what the
23 equivalent practical problems would be for why
24 Congress didn't apply it.

25 JUSTICE GORSUCH: So you might defend

1 that statute too?

2 MR. WALL: No, I -- I -- I -- what I'm
3 saying is I -- I don't know. I don't see any
4 practical problems that would have required
5 Congress to legislate in that way, so it's very
6 difficult to imagine that that statute would
7 pass muster.

8 But if there were similar practical
9 problems and if they supplied a general policy,
10 it wouldn't be importantly different from
11 Loving or Grimaud or Fahey or Kollock or Union
12 Bridge.

13 JUSTICE GINSBURG: Mr. Wall, can you
14 tell me how -- how this retroactivity works?
15 So let's take somebody who was convicted of a
16 sex offense 30 years ago. He's had a clean
17 record ever since.

18 How do you -- first, tell me how such
19 a person gets notice of the registration
20 requirement.

21 MR. WALL: So he's -- he's only
22 required to register if he's a Tier III
23 offender, so if he's got a really grave sex
24 offense like Petitioner --

25 JUSTICE GINSBURG: Yes, but let's say

1 he is such an offender, but it was 30 years
2 ago.

3 MR. WALL: Yes. So I think he's on
4 notice from the enactment of SORNA and then the
5 Attorney General's interim rule in 2007,
6 carried forward in the final rule in 2010, that
7 there's an across-the-board registration
8 requirement.

9 JUSTICE GINSBURG: So he -- he has to
10 know what the Attorney General's regulation is?
11 There's no notice given to these people. They
12 can be charged with -- with failure to
13 register, even though nobody -- no one ever
14 gave them notice that they had to register?

15 MR. WALL: I suppose you could try to
16 bring an as-applied due process challenge. Of
17 course, Petitioner is not going to be able to
18 do that. Petitioner was informed in 2012
19 before he left the BOP's custody, both in
20 writing and orally, that he needed to register
21 when he moved to New York, and then he failed
22 to do it. So I -- I take the point that there
23 could be as-applied notice problems, but I
24 don't think that there's one here.

25 And to get back to -- to the -- to the

1 colloquy I was having with Justice Gorsuch, I
2 do think at the end of the day this is not a
3 provision that just lays out a general standard
4 and then requires all of the fleshing in.
5 That, the Court has held, is permissible,
6 provided you supply a general policy.

7 But it really is inside even that,
8 because Congress set up a pretty reticulated
9 scheme, made a lot of judgments along the way.

10 JUSTICE KAGAN: Do you think that if
11 there were a new attorney general who came in
12 and said, you know, I think that this
13 registration stuff has just gone overboard, and
14 I'm going to start making some exceptions with
15 respect to pre-Act offenders, because I think
16 that's just unfair to penalize them for the
17 rest of their lives, could the attorney general
18 do that?

19 MR. WALL: No. We don't think the
20 attorney general could make judgments on the
21 basis, other than feasibility, and disagree
22 with Congress's policy judgments.

23 And if the Court had any doubt about
24 that, it should construe the statute more
25 narrowly, in the way I think is the most

1 reasonable interpretation, so as to avoid the
2 constitutional problem.

3 JUSTICE KAGAN: And when you say the
4 Attorney General could -- tell me what you
5 think the Attorney General cannot do, given the
6 language of this statute and given the language
7 of Reynolds.

8 MR. WALL: So I don't think the
9 Attorney General could say: Look, I know
10 Congress set up three tiers with registration
11 links of 15, 25 years, and life, but I'm going
12 to require you to register, but only for a few
13 years.

14 It's perfectly feasible. I could
15 require you all to register and there would be
16 no problem on the state registries, but I just
17 disagree with Congress's judgment that you
18 ought to be -- you ought to register.

19 JUSTICE BREYER: Is -- is --

20 MR. WALL: I don't think the Attorney
21 General could do that.

22 JUSTICE BREYER: I'm -- I'm trying to
23 think of -- I think Ms. Baumgartel was trying
24 to make a point that in my mind is something
25 like this: That the Executive Branch has many

1 different functions. They do all kinds of
2 different things.

3 One of the things they do is prosecute
4 people. Now it's quite different from the SEC
5 and all these other agencies because they have
6 other things to do.

7 And, moreover, there's a safeguard
8 going through the Department of Justice. And
9 there is a particular danger when you combine
10 prosecuting a person with the writing of the
11 law under which you prosecute.

12 And the danger is captured in the bill
13 of attainder clause, it's captured maybe in ex
14 post facto clause, it's captured in the word
15 liberty, and it is that particular danger that
16 means where you have a person whose job is
17 prosecuting, be careful, especially careful
18 that that person cannot also write the law
19 under which he prosecutes, because there we
20 risk vendetta.

21 Now I think my interpretation of what
22 she's saying is something like that. So what
23 is your response?

24 MR. WALL: So I do think that plays
25 itself out in certain rules, like not deferring

1 to the executive in the interpretation of
2 criminal statutes, but the Court's considered
3 that argument twice in the non-delegation
4 context and rejected it both times.

5 JUSTICE BREYER: What -- which --

6 MR. WALL: In *Touby*, they made exactly
7 the same argument. They said, look, you can't
8 delegate to the Executive Branch which
9 substances will be controlled under the Act
10 because they're both defining what's illegal to
11 possess and they're prosecuting you.

12 And in *Touby*, you said, no, not for
13 non-delegation purposes. That controls from
14 one branch to the other. Not where the power
15 is allocated within the Executive Branch.

16 And even more to the point, in *Loving*,
17 there was the availability of the death
18 penalty. The president was just specifying
19 aggravating factors nowhere to be found in the
20 statute, and this Court, where you were
21 actually -- the executive was actually defining
22 the criminal penalty, which is not what the
23 executive has done here. This Court said we've
24 upheld delegations whereby -- this is at page
25 768 of *Loving* -- we've upheld delegations where

1 the executive defines by regulation what
2 conduct will be criminal, so long as Congress
3 has created the criminal offense --

4 JUSTICE BREYER: That -- those are the
5 standards, quite right.

6 MR. WALL: Fixed the punishment --

7 JUSTICE BREYER: But suppose you put
8 --

9 MR. WALL: -- and given the executive
10 the authority.

11 JUSTICE BREYER: No, I -- I see where
12 you're going there. But -- but what we've been
13 arguing here is basically the Non-Delegation
14 Doctrine, informed perhaps by the need to
15 prevent vendettas in liberty. Suppose you
16 reverse that. Suppose you said the problem
17 here is a due process argument. It is a
18 liberty-protecting argument. And in
19 interpreting that liberty-protecting argument,
20 we should inform our thought with
21 non-delegation principles.

22 MR. WALL: Justice Breyer, I just
23 think the non-delegation context is a very odd
24 one in which to try to cache that out, as
25 opposed to -- to vagueness or -- or due

1 process, because it's asking whether Congress
2 has made the basic policy judgments that can
3 inform the executive's exercise of power.

4 And, boy, if -- if the executive can
5 define the availability of the death penalty in
6 Loving and Mistretta, here it seems well
7 withinside that to say, look, this is a civil
8 requirement; yes, there are criminal penalties
9 that could potentially attach. But that's a
10 commonplace feature in the law. The IRS tells
11 you what kind of tax return you've got to file.
12 Now not filing that tax return is a criminal
13 violation, but nobody thinks that the IRS is
14 defining the scope of the criminal law, though
15 in some sense it is by telling you what the
16 civil requirement is.

17 CHIEF JUSTICE ROBERTS: Well, this
18 is -- this is different in the sense that the
19 Attorney General is deciding what law applies,
20 not whether a particular act or a particular
21 exercise in commercial activity is covered by
22 an Act that certainly applies in a general
23 sense.

24 I mean, it's not this -- in those
25 instances, even in -- in Touby, it's -- it's

1 exercising fairly refined authority with
2 respect to what activity is covered.

3 Here, it's just saying are you going
4 to be -- it's not just covered by a law; does
5 the law even apply to you?

6 MR. WALL: Well --

7 CHIEF JUSTICE ROBERTS: And it seems
8 to me that those -- that -- that's a
9 substantive difference.

10 MR. WALL: I don't -- I don't know,
11 Mr. Chief Justice. I don't know why we would
12 think that specifying whether the drug you're
13 holding is lawful or unlawful, whether your
14 bridge has to be taken down, whether you can
15 graze on public land, whether your rates are
16 unreasonable is different in kind from whether
17 you have to register going forward and report
18 to the federal government.

19 Either way, the executive branch tells
20 you whether your conduct brings you within the
21 scope of the law or it doesn't.

22 CHIEF JUSTICE ROBERTS: Well, but it's
23 -- the bridges, yes. I mean, the executive
24 branch has to specify what type of bridge needs
25 to be what height or whatever and if it's this

1 or that. But there's another -- it's a
2 different thing when the Attorney General says,
3 okay, here's a law that covers bridges; you get
4 to decide whether it governs at all in
5 particular areas.

6 MR. WALL: I -- I understand if SORNA
7 didn't have the kind of guidance that it had
8 here, if it hadn't defined the criminal
9 offense, if it hadn't fixed the punishment, if
10 it hadn't set a reticulated scheme on the civil
11 side. I understand that if it hadn't made all
12 of those judgments, there could be more serious
13 problems. But to do all of that and then say
14 but, look, we know that there's going to be
15 some practical problems, it's not just the
16 timing, the state -- SORNA requires a lot of
17 things: Provide your motor vehicle
18 information, provide your DNA, provide your
19 photos, do periodic show-ups.

20 And there's no dispute, I think, that
21 the state registries at the time SORNA was
22 passed were not equipped to do all of that.
23 And so Congress, looking at that, said: Look,
24 we've got hundreds of thousands of people out
25 there we want to bring into this system. We

1 know they can't all come in on day one.
2 There's going to be some transitional issues
3 that we're going to have to work out. And the
4 person to work those out is the person who for
5 the last 12 years has been dealing with exactly
6 that subject and interacting with the states.

7 And at the end of the day, that's
8 really much more about implementation than it
9 is about policy judgment. I mean, here it
10 really is inside of the Grimaud, the Fahey, the
11 outer bound, because you've got an intelligible
12 principle that's anchored in the text of the
13 statute, not always true in some of those
14 cases, like Grimaud and Fahey, and you really
15 have what's much closer to a classic executive
16 function because it's just specifying the
17 applicability of the requirements themselves.

18 It's not even like the Attorney
19 General is providing the substance of those
20 requirements. And even that, of course, the
21 Court has said okay, but I just -- I think
22 we're --

23 JUSTICE GORSUCH: Well, Mr. Wall, I --
24 I want to develop a little bit what Justice
25 Breyer was after. Is there something unusual

1 about the Attorney General's presence in this
2 case as the chief prosecutor and kind of a
3 conflict of interest? And what if -- what if,
4 instead of feasibility, you were arguing just
5 and reasonable or in the public interest, other
6 standards that might have applied in a -- in a
7 civil delegation context?

8 Would you think that the Attorney
9 General of the United States could decide the
10 applicability of a criminal law for a half a
11 million people on the basis of his or her
12 judgment about its public interest or whether
13 it's just and reasonable? Or -- or would -- or
14 do you accept the -- the suggestion of this
15 Court in *Touby* that delegations in the criminal
16 context involving the Attorney General may
17 merit a heightened standard of review?

18 MR. WALL: Justice Gorsuch, I -- I --
19 I don't think the Court needs to cross that
20 bridge here.

21 JUSTICE GORSUCH: I understand that.
22 I'm asking you to answer that question.

23 MR. WALL: I -- and I want to -- I
24 want to try to. I think the Court has had
25 several cases where criminal penalties were

1 indirectly or directly involved, from Grimaud
2 to Yakus, to Loving, Mistretta. It's never
3 suggested, even when faced with this exact
4 argument in Touby, that the bar ought to be
5 raised higher. But I'll grant that in Touby,
6 the Court said it didn't need to address that,
7 though it had never done that in any of its
8 previous cases, and just say, look, if this
9 statute did that, if it did nothing more than
10 say to the Attorney General register them, you
11 know, as reasonable, with no requirements, no
12 creation of the criminal offense, no fixing of
13 the penalty --

14 JUSTICE GORSUCH: No. Just and
15 reasonable or in the public interest. Would
16 those be okay or not okay?

17 MR. WALL: I think, as -- as long as
18 it's done the things it did here, it's created
19 the crime, to define the elements --

20 JUSTICE GORSUCH: Those would be okay?

21 MR. WALL: -- it's fixed the penalty.
22 And then, on the civil side, it has said, and
23 you provided some standard like that in the
24 statute, the Court's cases indicate that's
25 enough. But I -- I do want to say, even if you

1 think that's not enough, this statute does come
2 inside of that because this is not an agency
3 just supplying all of the real content or
4 substance to a broad standard like public
5 interest or just and reasonable.

6 JUSTICE SOTOMAYOR: Is it a right --

7 MR. WALL: Reading the statute,
8 Congress made a lot of those judgments for
9 itself and left to the Attorney General a much
10 narrower practical problem.

11 JUSTICE SOTOMAYOR: There's a lot of
12 discussion in our case law about the propriety
13 of the Court reading into statute words, and I
14 think a fundamental issue that Justice Gorsuch
15 has been aiming at is, especially in criminal
16 law, is it just to delegate to the Attorney
17 General a fundamental decision about who gets
18 covered or doesn't get covered by a statute?
19 That seems like -- it seems like at the core of
20 what a law is, if someone does X act, you're
21 covered or you're not.

22 And if Congress had said that, we
23 probably wouldn't have found a retroactivity
24 problem. But what is the essence of
25 non-delegation that we don't let the

1 legislature define who's a criminal? And so
2 isn't retroactivity a definition of who's a
3 criminal or not?

4 MR. WALL: So two separate points,
5 Justice Sotomayor.

6 JUSTICE SOTOMAYOR: Or who might be a
7 criminal because of their acts?

8 MR. WALL: Two separate points.
9 First, if Congress had given the same authority
10 to the Attorney General and not otherwise
11 expressed any intention with respect to how
12 that authority would be exercised, I'll grant
13 that would be --

14 JUSTICE SOTOMAYOR: There's no plain
15 words that add maximum feasibility --

16 MR. WALL: So --

17 JUSTICE SOTOMAYOR: -- in this
18 statute. So you're -- you're discerning words.

19 MR. WALL: I am, Justice Sotomayor.
20 And that's my second point. I'm doing exactly
21 what the Court did in Grimaud, Fahey, Kollock,
22 Loving. In none of those was the intelligible
23 principle spelled out in the statute in so many
24 words. And the Court engaged in an
25 interpretive act. It looked at the Act as a

1 whole, and said based on the provisions we
2 have, would a reasonable attorney general
3 understand or a reasonable executive official
4 understand what policy they were meant to
5 pursue in exercising this authority?

6 And I -- to be honest with you, I
7 think it defies both the text of SORNA and
8 reality to think that Congress was agnostic
9 about whether hundreds of thousands of people
10 who have committed very serious sex offenses,
11 as Petitioner has, should be required to
12 register. I think there's no way to read
13 SORNA's text, its legislative history, and not
14 come away with the firm and definite notion
15 that Congress wanted as many of those offenders
16 in the system as the Attorney General could get
17 in --

18 JUSTICE SOTOMAYOR: If you take out --

19 MR. WALL: -- and it was just a
20 practical problem of how to accomplish that.

21 JUSTICE SOTOMAYOR: -- if you take out
22 legislative history and you take out policy
23 statements, because there are some of my
24 colleagues who don't rely on either of those
25 two things, what's left?

1 MR. WALL: I would say the findings in
2 20901, the statement of express statutory
3 purpose, which this Court has relied on in
4 cases like NBC and New York Central for a
5 comprehensive national system, the inclusive
6 definition of "sex offender," the broad
7 registration requirement in 2913(a), and then
8 the text and title of 913(d), which say that
9 this grant of authority was about addressing
10 the inability to comply. We know on its face
11 that what spurred this was a practical
12 consideration, a concern by Congress about how
13 to get these people into the system.

14 All of those things taken together, I
15 think, far -- the -- the intelligent principle
16 here far more anchored in the text of this
17 statute. Then take a case like Fahey, where
18 Justice Jackson for the Court looked at the
19 norms of the banking industry. Or Grimaud,
20 where the Court discerned it from a number of
21 other statutory provisions I don't think were
22 as definite as what it faces here. Loving, the
23 same thing. Kollock, the same thing.

24 I think here you've got an
25 intelligible principle, a general policy that

1 really is anchored in the text of the Act, even
2 apart from legislative history and policy
3 statements and all the rest, which we -- we
4 have not -- we have not relied on in -- in our
5 brief.

6 JUSTICE BREYER: The part that's still
7 gnawing at me, I mean, your basic argument is
8 there is a standard here and that's the end of
9 the case. All right. But, in writing it, I
10 guess I have to think through the
11 Non-Delegation Doctrine.

12 So I'm just interested if this strikes
13 any thought in your mind. Let's take the
14 Securities Act of '34. What it says is you
15 can't use a manipulative device, that's a
16 fraudulent device, that's the equivalent here
17 of the sex offense. It says you cannot use
18 them in contravention of such rules as the SEC
19 may proscribe as appropriate in the public
20 interest.

21 Suppose instead of that word "SEC,"
22 everything's the same, but it doesn't say SEC,
23 it says Attorney General, so what you have is
24 it is a crime to violate a rule, where it
25 concerns a manipulative device, in violation of

1 such rules as the Attorney General finds
2 appropriate.

3 The difference being we don't think
4 he's an expert on securities, though the SEC
5 is.

6 MR. WALL: Right.

7 JUSTICE BREYER: Does that matter?
8 Should it matter? Should we suggest in the
9 opinion that it might matter?

10 MR. WALL: So, to the extent it
11 matters, here is what I think you could say in
12 the opinion.

13 If the executive official, the
14 Attorney General, were defining the elements of
15 the offense or defining the criminal
16 punishment, that would raise the Touby
17 question. But where the Attorney General or
18 the executive official is defining a civil
19 requirement, as with the '34 act, to which
20 criminal consequences can possibly attach, that
21 falls squarely inside a handful of cases where
22 the Court has proved exactly that.

23 So I think the Court can set aside the
24 tougher case than this one where Congress
25 hasn't defined the elements of the offense and

1 fixed the punishment itself but left those
2 things to the Executive Branch.

3 I do want to say just a word about the
4 harms here before I sit down so that we -- we
5 all understand what's in play. Eighteen
6 jurisdictions have substantially implemented
7 SORNA. Of the remaining 32 states, 26 of them
8 have taken federal funds and are attempting to
9 substantially implement, but they're not there
10 yet.

11 If Petitioner prevails, I believe,
12 though Petitioner's briefs don't say, that all
13 of their arguments translate not just from the
14 pre-Act offender clause but also to the
15 pre-implementation clause. And if that's
16 right, there will be no federal duty to
17 register in the 32 states that haven't
18 substantially implemented.

19 As a matter of federal law, more than
20 half the country will be a sex offender
21 registration-free zone. Even in the remaining
22 18 states, they will not be picking up new
23 pre-Act offenders who come into contact with
24 the justice system because there will no longer
25 be a duty to register.

1 All told, our best estimate is that
2 we'll lose a couple of thousand people out of
3 the registries every month, and that's not even
4 including tribal areas, where we wouldn't be
5 able to get at non-tribal members.

6 And, of course, some substantial
7 portion of the 4,000 convictions at issue would
8 be in -- in -- in jeopardy of being vacated
9 either on direct or collateral review.

10 SORNA's efficacy, if Petitioner
11 prevails, will not just be sharply curtailed.
12 It will arguably be thoroughly gutted as -- as
13 a matter of how this federal law works.

14 And if it is possible, and we think it
15 is not just possible but the most natural
16 interpretation of the Attorney General's
17 authority to say this is a narrow authority, to
18 specify the applicability of requirements in an
19 on/off way in order to get people into the
20 system, and that interpretation avoids
21 constitutional problems, right, it's
22 constitutional, if we read it to say do it as
23 to the extent you can, then, as Petitioner
24 concedes, I think if that's -- if it's possible
25 to read the statute that way, that's

1 constitutional and that's what we would urge
2 the Court to do.

3 If there are no further questions.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Wall.

6 Ms. Baumgartel, you have four minutes
7 remaining.

8 REBUTTAL ARGUMENT OF SARAH BAUMGARTEL
9 ON BEHALF OF THE PETITIONER

10 MS. BAUMGARTEL: Thank you.

11 Just to pick up where my friend left
12 off, I want to emphasize that prior to SORNA's
13 enactment, every single state had an existing
14 sex offender registry and those will continue
15 to exist and to require the registration of
16 offenders, regardless of what happens with
17 SORNA.

18 Individuals like Petitioner were
19 required to register under existing state law
20 and they will still be required to register.
21 This was a law whose retroactive application
22 was opposed by the states, which is part of the
23 reason why only 18 states have implemented it.
24 States spoke out against the retroactive
25 application of the law before the Attorney

1 General made his determination.

2 And so states themselves, who are the
3 experts in this area having run registration
4 systems for years, don't want this Act to be
5 fully retroactive.

6 My friend emphasized that this
7 delegation was all about practicality, but the
8 reality is, is that the Attorney General's
9 promulgated rule does not account for
10 practicality in any way, which is further
11 evidence for this Court that to the extent
12 feasible was not the standard of this
13 delegation.

14 That is not the standard that exists
15 in the text. It is not the intelligible
16 principle that was found by any Circuit Court
17 to consider this issue. And it was not even
18 the intelligible principle that the Attorney
19 General himself said that he was acting
20 pursuant to when he issued his regulation.

21 In his final regulation, he said that
22 Congress delegated to him, and I quote, "the
23 discretion to apply SORNA's requirements to sex
24 offenders to the extent that he determines that
25 the public benefits of doing so outweigh any

1 adverse costs."

2 So the Attorney General believed that
3 his discretion was to essentially undertake the
4 fundamental policy determination as to whether
5 the costs outweigh the benefits. He did not
6 view this as an issue of feasibility or
7 practicality.

8 Finally, I'd just like to emphasize
9 the special nature of this delegation. This is
10 not licensing. This is not civil rule-making.
11 This is the retroactive application of criminal
12 law penalties that affect individual liberty
13 interests in the most profound way.

14 This is the area where the
15 Constitution specifies that there must be a
16 division between the law-maker and between the
17 executive. And for that reason, this
18 delegation is unconstitutional.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 10:59 a.m., the case
23 was submitted.)

24

25

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