No. 17-6086

In the Supreme Court of the United States

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

PHILIP HAMBURGER
MARK CHENOWETH
MARGARET A. LITTLE
New Civil Liberties Alliance
P.O. Box 19005
Washington, DC 20036-9005
(202) 830-1434

JONATHAN F. MITCHELL
Counsel of Record
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-1397
jfmitche@stanford.edu

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

In the Supreme Court of the United States

No. 17-6086

HERMAN AVERY GUNDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS[1]

The New Civil Liberties Alliance (NCLA) is a non-profit, public-interest law firm founded to challenge multiple constitutional defects in the modern administrative state through original litigation, amicus curiae briefs, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be

1. All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

tried in front of an impartial and independent judge, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels rather than by prosecutors or judges taking illicit unconstitutional shortcuts. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the Department of Justice, and federal administrative agencies have trampled them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern. NCLA is particularly disturbed that a series of Attorneys General has accepted a divestiture of legislative power from Congress. They have then enforced criminal sanctions against offenders like Mr. Gundy based on the "laws" those same Attorneys General have created—all in blatant violation of those offenders' constitutional liberties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States."

U.S. Const. art. II, § 2: "The President . . . may require the Opinion, in writing, of the principal Officer in

each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."

U.S. Const. art. II, § 3: "[The President] shall take Care that the Laws be faithfully executed."

34 U.S.C. § 20913(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 subchapter to sex offenders convicted before the enactment of this chapter 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)."

28 C.F.R. § 72.3: "Applicability of the Sex Offender Registration and Notification Act. The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

"Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

"Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in

2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce."

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be reversed for four separate and independent reasons. First, 34 U.S.C. § 20913(d) violates the Constitution by divesting Congress of legislative powers and transferring those powers to the Attorney General. Second, § 20913(d) fails to provide an "intelligible principle" to guide the Attorney General's discretion, as current doctrine of this Court requires. Third, the Constitution does not allow the Attorney General to simultaneously create and execute a rule like 28 C.F.R. § 72.3 that he is charged with enforcing. Fourth, the Constitution does not permit criminal offenses to be defined in administrative rules rather than statutes.

The vesting clauses of Articles I, II, and III protect the civil liberties of Americans by separating the constituent parts of the power to punish criminally. They ensure that no defendant can be imprisoned for committing a federal crime unless the legislature has first defined the crime, and all three branches of government have played their part in determining criminal culpability for an offense.

This Court should declare the underlying *statute* unconstitutional if it agrees with Gundy's constitutional arguments. But it is also important to note that the Court

could also or instead take the more modest step of invalidating the Attorney General's *rule* as an unconstitutional executive exercise of legislative power—regardless of whether an Act of Congress purported to authorize this rule.

ARGUMENT

I. CONGRESS MAY NOT DIVEST ITSELF OF THE POWER THAT THE CONSTITUTION VESTS IN IT

Mr. Gundy complains that § 20913(d) violates the "nondelegation doctrine," but that phrase is a misnomer and we urge the Court to abandon it. We also respectfully urge the Court to repudiate the legal fictions that have long sustained statutes that purport to confer lawmaking prerogatives on executive and agency officials. Although § 20913(d) is unconstitutional even under the Court's existing doctrine, this Court should put aside the nondelegation doctrine and its associated legal fictions.

Once the nondelegation doctrine and the associated legal fictions are left aside, it becomes clear that § 20913(d) is unconstitutional. Congress may not divest itself of legislative power—most basically because the Constitution vests this power in Congress, but also because Congress may not evade bicameralism and presentment.

A. The Court Should Abandon the Misleading Term "Delegation"

The doctrine upon which certiorari has been granted has appeared under the names of "nondelegation doctrine," "delegation doctrine," and "anti-delegation

doctrine" over the years. The Court should discard those terms for two separate and independent reasons.

First, it is imprecise and misleading to describe a *statute* that transfers lawmaking powers to the executive as a congressional "delegation" of authority. Second, the phrase "nondelegation *doctrine*" misleadingly implies that the limitations on executive-branch lawmaking are rooted in a court-created doctrine rather than the text of the Constitution.

1. "Delegation" Falsely Implies an Easily Revocable Transfer

When a political or governmental entity "delegates" its powers, it always retains the authority to unilaterally revoke its delegation. A cabinet secretary, for example, who "delegates" statutorily authorized powers to his subordinates has the right to terminate that arrangement at any time, for any reason, and without any need to secure the assent of the delegatee or any other person or institution.

That is not the case when a *statute* purports to confer lawmaking powers on executive or agency officials. Although Congress may revoke this arrangement, it may do so only by repealing or amending the statute through the bicameralism-and-presentment process of Article I, § 7. The President is empowered to veto any effort to withdraw powers that a statute vests in the executive, so Congress cannot unilaterally revoke a transfer of authority that a predecessor Congress made via statute. Congress must obtain the President's assent, or it must secure veto-proof supermajorities in both houses of Congress, before any previous transfer of authority can be undone.

A statutory transfer of lawmaking power to the executive thus ties the hands of Congress. When Congress by statute transfers legislative power to the executive, it cannot recall the transferred power easily. A statutory transfer of legislative power does not merely delegate legislative power, for it limits Congress's freedom to reassert its legislative powers.

Indeed, it is widely accepted that one Congress cannot bind a future Congress except by passing a statute (or ratifying a treaty). So, for example, neither House of Congress can pass a rule that forces a future Congress to follow certain procedures. Yet permitting delegation to the executive allows this forbidden outcome. By transferring legislative power to an executive or agency official like the Attorney General, a current Congress can get that official to enact rules without going through bicameralism and presentment—policies that a future Congress cannot reverse without taking those difficult steps.

2. The Court Should Employ the Constitution's Terminology and Should Therefore Conclude that Congress Has "Divested" Itself of Legislative Power

Article I, § 1 makes clear: "All legislative Powers herein granted shall be *vested* in a Congress of the United States." Statutes that divest Congress of these legislative powers by conferring them upon executive or agency officials are violating the Constitution itself—not mere judicial "doctrine" or precedents. Using the term "nondelegation doctrine" both misdescribes and understates the problem with statutes that give lawmaking powers to agency officials, and the widespread use of this

nomenclature stacks the deck in favor of administrative power and against the judicial enforcement of Article I's vesting clause.

Instead of addressing whether § 20913(d) violates the "nondelegation doctrine," the Court should ask whether § 20913(d) contravenes Article I's vesting clause, which vests "[a]ll legislative powers" in Congress and not other parts of government. The Court's terminology should be no different from the language it employs when discussing statutes that impermissibly transfer Article II powers from the President to Congress. When *Myers v. United States*, 272 U.S. 52 (1926), disapproved a federal statute that forbade the President from removing executive officers without the advice and consent of the Senate, it declared that the statute contravened the vesting and take-care clauses in Article II, not some court-created "non-arrogation doctrine." *See Myers v. United States*, 272 U.S. 52, 163–64 (1926) ("[A]rticle 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers . . . [A]rticle 2 excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices"); *id.* at 164 ("[T]o hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed.").

The text of the Constitution similarly forbids arrangements that transfer legislative powers from Congress to the executive. A statute cannot reallocate authority that

the Constitution itself has established—regardless of whether the statute is moving executive powers into the legislature or legislative powers into the executive—and statutes that improperly allocate powers among the branches offend the command of the relevant vesting clause, rather than a mere judicial "doctrine" or precedent.

In fact, the Constitution's text is especially clear in forbidding the divestiture of legislative powers—as evident from Article I's first substantive word. The article begins: "*All* legislative Powers herein granted shall be vested in a Congress." If all legislative powers are vested in Congress, they may not be assigned elsewhere. If the grant were merely permissive, not exclusive, there would be no reason for the word "All."[2] That word bars any divesting of legislative power.

When a statute transfers legislative powers to the executive (as in this case)—or when a statute transfers executive powers to the legislature (as in *Myers*)—it is

2. The use of the word "All" in Article I is unique. In articles II and III when granting executive or judicial power, the Constitution does not employ the word "all." Article II states, "The executive Power shall be vested in a President of the United States of America" and proceeds to provide for the appointment of officers to assist in the administration of executive power. Similarly, Article III contemplates a hierarchical grant of the judicial power which "shall be vested in one supreme Court, and in such inferior Courts as the Congress may … ordain and establish." By omitting the word "all" in Articles II and III, the Constitution permits the allocation of executive power not only to the President but also to his appointed executive officers, and it enables the judicial power to extend to inferior courts. *Cf.* P. Hamburger, *Is Administrative Law Unlawful?* 387–88 (U. Chicago Press 2014).

"divesting" rather than "delegating" the powers that the Constitution vests in a specific branch of the government. No one would say that President Grant "delegated" his removal powers to the Senate when he signed the law that forbade the removal of postmasters without Senate consent. *See* Act of Congress of July 12, 1876, 19 Stat. 80, 81, *declared unconstitutional in Myers*, 272 U.S. at 107. That is because neither President Grant (nor his successors) could have rescinded this divestiture of presidential power without first persuading Congress to repeal or amend the earlier statute. It is equally misleading to say that Congress has "delegated" its powers by enacting statutes that it cannot revoke without securing the President's assent or overriding his veto.

Article I vests the legislative power in Congress, and statutes that confer these powers on executive or agency officials contravene Article I by "divesting" Congress of its powers and assigning them to other institutions. The Court should eschew its previous "nondelegation" verbiage and use terminology that mirrors what the Constitution says: Legislative powers are "vested" in Congress, and statutes that contradict this command improperly "divest" Congress of Article I powers.

B. The Court Should Repudiate the Three Main Legal Fictions that Have Sustained Congress's Divestiture of Lawmaking Powers to Executive Departments and Agencies

For far too long the administrative state has been sustained by the notion that agencies may impose "rules" that carry the force of law—and that act as the functional equivalent of statutes—so long as the agency can point to

a statute that authorizes (or that could be *reasonably construed* to authorize) the practice of agency lawmaking. At the same time, this Court, along with academic commentators, has nurtured and championed a series of legal fictions that deny the reality of agency lawmaking and thereby give a patina of constitutional legitimacy to this practice. The fictitious character of these three ideas makes them poor excuses for Congress's attempt to divest itself of power that the Constitution vested uniquely in it. We respectfully ask the Court to reconsider—or at least call into question—the most commonly invoked fictions that are used to justify rule by administrative agencies.

The first fictitious idea is that agencies are "executing" the law whenever they regulate pursuant to congressional authorization—even when the underlying statute empowers the agency to enact formal rules that carry the force of a congressionally enacted statute, and even when it gives the agency vast discretion to choose the rules that will be enacted. *See, e.g.*, Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1723 (2002) ("[A]gents acting within the terms of such a statutory grant are exercising executive power, not legislative power."). Not even James Landis, the leading expositor and defender of administrative power during the twentieth century, believed this fiction. Landis wrote that "[i]t is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power" and that "[c]onfused observers have sought to liken this development to a pervasive use of executive power." James M. Landis, *The Administrative Process* 15 (1966).

Landis is right. The notion that an agency is merely "executing" the law when it is choosing policies and imposing those policy choices in the form of codified rules is a transparent fiction and is incompatible with the jurisprudence of this Court. Agencies act as lawmakers when issuing rules that bind the public, which is why courts and commentators describe their work product as "legislative rules." *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("We described a substantive rule—or a 'legislative-type rule'—as one 'affecting individual rights and obligations.'"(citation omitted)); *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977) ("Legislative, or substantive, regulations are issued by an agency pursuant to statutory authority. … Such rules have the force and effect of law." (citation and internal quotation marks omitted)); Kenneth Culp Davis, 2 Administrative Law Treatise § 7:8 at 36 (2d ed. 1979) ("A legislative rule is the product of an exercise of delegated legislative power to make law through rules. … [V]alid legislative rules have about the same effect as valid statutes; they are binding on courts.").

This Court describes an agency's rulemaking and adjudicatory powers not as "executive" but as "quasi-legislative" and "quasi-judicial." *See, e.g.*, *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (describing agency rulemaking as "legislative or quasi-legislative activities."); *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). Indeed, this Court would not be able to characterize agency rulemaking as purely "executive" without overruling *Humphrey's Executor* and requiring *all* agency officials with rulemaking powers to be placed under presidential control.

The second fiction is the idea that agency lawmaking is merely "specifying" or "filling in the details" of a statutory standard that cannot be written in advance to account for all contingencies. *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 517 (1911) ("[W]hen Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations"). But even where authorizing statutes offer governing standards, the authorized agencies are not merely specifying or filling in details. As is widely understood, such statutes typically leave the most difficult legislative questions to the agencies—indeed, members of Congress notoriously use such statutes precisely to avoid making difficult legislative decisions. See D. Schoenbrod, *Power Without Responsibility*, 9–19, 55–59, 72–94, 102–05, 157–59 (Yale U. Press 1993).

The notion of specification is especially fictitious here because § 20913(d) does not even provide a governing standard for the Attorney General to "specify." The statute anticipates the issues of applying SORNA's registration requirements to pre-SORNA offenders and its implementation in any particular jurisdiction, but then it gives the Attorney General carte blanche to decide what—if anything—should be done about these questions. The Attorney General is not "specifying" or "filling in the details" of anything except his own druthers.

Congress divested these quintessentially political choices to a prosecutorial entity with very different institutional interests. Unsurprisingly, the Attorney General answered both questions in a way that maximized his own

enforcement authority—reaching convictions finalized before SORNA's enactment, whether or not a state chose to require registration. *See United States v. Stock*, 685 F.3d 621, 626 (6th Cir. 2012) (the obligation to register "exists whether or not a state chooses to implement SORNA's requirements and whether or not a state chooses to register sex offenders at all"). But legislative power is vested in the Congress precisely because it is politically accountable. *See I.N.S. v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) ("The only effective constraint on Congress' power is political[.]"). In this way, Congress shirked the toughest aspect of lawmaking while avoiding entirely its primary constitutional limit. These are hardly "details."

The third and final fiction is the idea that an agency cannot be involved in lawmaking if Congress has provided an "intelligible principle" to inform the agency's discretion. Acts of lawmaking and legislation do not depend on whether or not some other entity has supplied an "intelligible principle" that purports to guide the legislative decision. Every act of Congress, for example, is guided and controlled by an "intelligible principle" supplied by the enumerated-powers regime; Congress must always connect its statutes to one or more of those "intelligible principles" that define and limit what Congress may do. But Congress is most assuredly "legislating" when it enacts statutes, even though it does so pursuant to a grant of power that limits and controls Congress with a series of "intelligible principles." The result is no different when an agency issues an edict under a statute that confers powers defined by an "intelligible principle"—such as an

instruction to "regulate in the public interest." Every lawmaking entity holds powers that were authorized or vested in it by *somebody*, and there is almost always some semblance of an "intelligible principle" that defines the boundaries of those powers. But that does not change the legislative character of the resulting edict.

Rather than perpetuate these notorious fictions, this Court should recognize that Congress has asked the Attorney General to exercise legislative power in its stead, and he has complied—all in violation of the Constitution's vesting of legislative powers in Congress. The Court should therefore reject the results of that bargain.

C. Divesting Legislative Power also Evades Bicameralism and Presentment

When this Court permits Congress to divest itself of legislative power, it also weakens accountability to the people by allowing an evasion of bicameralism and presentment. Bicameralism and presentment make lawmaking difficult *by design.* The Federalist No. 62, pp. 319–24 (J. Madison) and No. 63, pp. 325–32 (Liberty Fund ed. 2001). These requirements ensure that laws are made by the two houses of Congress and are subject to the possibility of a veto. Responsibility thus lies in the two elected legislative bodies and in an elected president—all of whom are personally accountable to the people.

But when Congress divests itself of its legislative power, "the people lose control over the laws that govern them .... [T]he public loses the right to have both its elected representatives *and* its elected president take personal responsibility for the law." D. Schoenbrod, *Power Without Responsibility* 99, 105 (Yale U. Press

1993). Instead, only someone appointed by the president takes responsibility—an appointee who is not personally chosen by the public or accountable to them at the next election.

In this very case, Congress was not able to obtain the votes needed to apply SORNA to all prior sex offenders. That provision was in the House bill, but it was in neither the Senate bill nor the final bill that passed both houses. By assigning the decision about retroactive application to the Attorney General, SORNA led to adoption of a "law" that could not and did not clear the bicameral hurdle.

This Court should abandon its nondelegation doctrine and the attendant legal fictions. Having done this, it should recognize that § 20913(d) is unconstitutional because the Constitution bars Congress from divesting itself of legislative power and evading bicameralism and presentment.

II. Section 20913(d) Fails to Supply an "Intelligible Principle," as Required by the Precedents of this Court

This Court has repeatedly affirmed that the Constitution forbids Congress from giving lawmaking powers to executive or agency officials—even as the "nondelegation doctrine" moniker has misdescribed and downplayed the offense to the Constitution.

In *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), this Court observed:

> That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance

> of the system of government ordained by the constitution.

Id. at 692. This Court has further held—repeatedly and in an unbroken line of cases—that statutes that empower the executive to act without supplying *any* standard to guide his discretion, and without at least gesturing toward a congressional policy goal that will inform the executive's use of this discretion, violate Article I's vesting clause by improperly conferring legislative power on executive or agency officials.

A. SORNA Fails the Nondelegation Tests Enunciated in *Schechter Poultry* and *Panama Refining*

In *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), the Court unanimously and emphatically rejected a statutory scheme that empowered the President to impose "codes of fair competition" whenever he made formal findings that the industry-proposed codes would not "promote monopolies" and that the organizations proposing such codes were "truly representative" of the affected trade or industry. *Id.* at 522–23; *see also id.* at 534 ("[T]he approval of a code by the President is conditioned on his finding that it 'will tend to effectuate the policy of this title.'"). The Court quoted Article I's vesting clause and declared that the vesting clause forbids Congress to "abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529. And it pronounced the statute unconstitutional because it "supplies no standards" for guiding the President's discretion. *Id.* at 541. In the words of the Court:

> Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.

Id. at 537–38. Although other aspects of the *Schechter* opinion—such as its analysis of the commerce power—were later abandoned, this Court has *never* repudiated or undermined *Schechter*'s holding or analysis on the divestment of legislative power, and *Schechter*'s holding on this point remains good law. *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 332 (1999) (noting that *Schechter*'s nondelegation holding "has not been overruled even implicitly").

Section 20913(d) presents an even graver offense to Article I's vesting clause because the statute does not require the Attorney General to make *any* findings before deciding whether and to what extent the statutory registration requirements should apply to pre-SORNA convicts. Not only does this statute "suppl[y] no standards" to guide the Attorney General's discretion, it requires no findings either, making this statute even worse than the statutory scheme that this Court unanimously disapproved in *Schechter*. It essentially tells the Attorney General to do whatever he wants when it comes to imposing statutory registration requirements on pre-SORNA offenders. It even licenses him to vary its implementation by particular jurisdictions, as if laws can vary in their application as dictated by a given public official for his own reasons. A statute of this sort cannot logically co-exist with the holding of *Schechter*—nor can it co-exist with a

constitution that "vests" legislative power in Congress rather than in the executive or its agencies.

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), reaffirmed that statutes empowering the executive must provide some semblance of criteria or factual findings to guide the executive's discretion—otherwise the statute becomes a forbidden transfer of lawmaking power. *Panama Refining* disapproved a statute that authorized the President to prohibit the transportation of petroleum goods produced in excess of state quotas, but that failed to provide any standard or guideline to the President regarding whether or to what extent he should use this power. In the Court's words, the statute "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415.

So too here. Section 20913(d) has nothing at all to say as to whether the Attorney General should require pre-SORNA convicts to register, or the extent to which he should do so. It allows the Attorney General unfettered discretion in choosing how—or even whether—to extend the statute's registration requirements to this class of sex offenders, without even the pretense of an "intelligible principle" to guide him. Like the statute in *Panama Refining*, it "establishes no criterion to govern the [executive's] course," and it "does not require any finding . . . as a condition of his action." *Id.* at 415. No standard or policy is declared in the statute, and no findings are required to be made. If a statute of this sort can pass constitutional muster, it is hard to imagine a statute that would violate

the nondelegation doctrine or (in the Constitution's words) the vesting clause of Article I.

Indeed, if this statute suffices, it is hard to see why a statute that entrusted the Attorney General to decide whether or not *all* sex offenders—past and future—have to register would be unconstitutional. That is, if unfettered discretion is permissible for half the law, why by the same logic would it not be permissible for the other half of the law?

The only way that the Court could sustain this statute is to throw up its hands and give up on policing the separation of powers—an approach that would effectively carve out a separation-of-powers exception to the rule of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See, e.g.*, Jesse H. Choper, *Judicial Review and the National Political Process* (1980). What is not possible is to do what the Solicitor General is proposing: Retain the nondelegation doctrine and the "intelligible principle" requirement—as well as the holdings in *Schechter* and *Panama Refining*—but then declare that this statute falls on the proper side of the boundary that separates laws that confer guided discretion on the executive from those that confer unguided discretion. This statute does not even *pretend* to supply an "intelligible principle"; it expressly leaves the decision to the Attorney General and gives him unfettered discretion in applying SORNA's requirements to pre-SORNA convicts.

B. The Court Should Reinvigorate the "Intelligible Principle" Requirement If It Will Not Reject It as a Legal Fiction

For the reasons explained *supra* at pp. 14-15, having an "intelligible principle" does not avoid administrative lawmaking. Hence, this Court should repudiate the "intelligible principle" requirement as a legal fiction. Short of that, however, we respectfully urge the Court to at least substantially strengthen what that requirement entails. The rulings of this Court have so watered down the "intelligible principle" standard as to render it neither intelligible nor principled. It has been held to be enough for a statute to tell an agency to regulate in the "public interest," *i.e.*, whatever the agency regards to be the "public interest." *See, e.g.*, *National Broadcasting Co. v. United States,* 319 U.S. 190, 225–26 (1943) (Federal Communications Commission's power to regulate airwaves).

We have already shown that § 20913(d) offers *no* principle, let alone an "intelligible" one, to guide the Attorney General's discretion—and that is enough to condemn the statute under existing doctrine. But we urge the Court to go further and to put some teeth in the "intelligible principle" requirement. A statute that empowers an agency to go forth and "regulate in the public interest" is a legislative abdication that confers lawmaking powers on agency officials and allows Congress to escape responsibility and accountability for federal policy decisions. If this Court is prepared to hold that § 20913(d) violates Article I's vesting clause by improperly transferring lawmaking powers to the Attorney General, does it really want to imply that Congress can fix the problem simply by adding a

subjective and indeterminate "public interest" requirement to the statute?

The Court's prior decisions have misled Congress into believing that the most open-ended "intelligible principle" will pass muster, and where the Court's own actions have left such a profoundly dangerous misimpression about the law—one that radically diminishes the liberty of Americans—the Court has a responsibility to correct its error and rectify the misimpression now that the chance to do so has arisen.

III. Section 20913(d) Violates the Constitution by Empowering the Attorney General to Act as Both Lawmaker and Law Enforcer

Another constitutional problem with § 20913(d) is both simple and obvious: Congress only passed half a law. The result allows the Attorney General, a member of the *executive* branch, to act as both lawmaker and law enforcer. The Attorney General—and he alone—gets to decide whether and to what extent hundreds of thousands of pre-SORNA convicts must register. And he can change his mind at any time and as many times as he chooses. At the same time, the Department of Justice under his supervision is empowered to decide whether to prosecute those who violate his unilateral edicts.

When heads of administrative agencies enjoy both rulemaking power and oversight over agency enforcement under their authorizing statutes, this combination is defended on the theory that the Constitution's separation of powers requires only a separation of functions. From this perspective, it is said that the Administrative Procedure Act sufficiently segregates the different functions of

government within agencies as to leave few serious concerns about the combination of lawmaking and prosecution in a single agency. But unlike the authorizing statutes of administrative agencies, which make at least some effort to allocate different governmental functions to different persons, SORNA empowers a single person—the Attorney General—personally to make the rules and enforce them. SORNA thus does not admit a separation of functions. On the contrary, it combines them in violation of the theories that are said to justify administrative power.

Indeed, its combination of powers in a single person also violates the Constitution. By vesting legislative and judicial powers in different branches of government, the Constitution bars the combination of these powers in one agency, let alone one person. Nor should this be a surprise, for the combination of such powers in one body (institutional or personal) has long been considered very dangerous. *See* Montesquieu, *The Spirit of the Laws* (1748) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."); P. Hamburger, *Is Administrative Law Unlawful?* 261 ("The combination of powers in administrative agencies . . . gives them a power of extortion." For example, an agency, "by threatening executive or judicial action" can "pursu[e] one power by threatening the use of another.").

But the strongest arguments against SORNA's combination of lawmaking and prosecutorial powers in the

Attorney General do not rest merely on the administrative theory of separated functions, nor even on general ideas about the Constitution's separation of powers. Instead, the really telling objections are more focused.

A. SORNA Is Incompatible with the Attorney General's Duties

The Attorney General is not just another head of a government agency. He is the principal legal officer of the federal government. He is, indeed, its chief prosecutor who, more than any other officer, has the task of carrying out the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And he is "the principal Officer" of one of "the executive Departments," of whom the President "may require the Opinion, in writing . . . upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II, § 2. In overseeing that the laws be faithfully executed, and in giving the President formal opinions on the law, the Attorney General exercises an element of executive power, which the Constitution carefully places in a different department than the one in which it locates legislative powers.

The Attorney General, moreover, like other government lawyers, has a duty that goes beyond the mundane duty of a private lawyer to zealously represent his client. In addition to his duty of representation, a government lawyer has a duty to adhere to the law. P. Hamburger, *Law and Judicial Duty* 111, 320–21, 492 (Harvard U. Press 2008). Although not specified in the Constitution, this duty is implicit in the Constitution's assumption that the President will appoint officers such as the Attorney General to

effectuate the President's duty to "take Care that the Laws be faithfully executed." The Attorney General, acting under the President, thus has a constitutional duty, derived from the President's, to take care that the laws be faithfully executed.

The Attorney General's duty is different from that of a judge because government lawyers have a duty, not of judgment in accord with the law, but of advising, prosecuting, and arguing in accord with the law. Put another way, their duty is one of providing advice and representation rather than of independent judgment; but whereas private lawyers are free to give advice, bring actions, and make arguments that they know to deviate from the law, government lawyers must try to remain within its scope.

And it is in tension with this duty for the Attorney General to personally enact law (here in administrative rules) and then oversee the prosecution of offenders under these laws. Of course, government lawyers do not need to be as completely without predispositions as the judges in their decisions, for government lawyers have a client—the government and ultimately the people of the United States. And in this context, they advise the executive branch on legislation enacted by Congress. But the Constitution establishes the executive branch apart from the legislative branch, and it thus takes for granted that lawyers within the executive will not have any predisposition arising from their personal enactment of law. In other words, it is assumed in the Constitution that government lawyers will try to remain within the law when prosecuting and arguing for the government, without the partiality

that comes from having personally enacted the underlying rule.

By enacting binding rules under SORNA, the Attorney General will inevitably be inclined in favor of his own enactments, in favor of their rigorous enforcement, and in favor of their constitutionality. He therefore cannot be expected to "take Care that the Laws be faithfully executed" under SORNA to the same extent as when he does not participate in lawmaking. He cannot personally make a law without jeopardizing his duty (derivative of the president's) to take care that the laws be faithfully executed.

SORNA creates, in other words, an unconstitutional conflict of interest. Under the Constitution, the Attorney General has a duty to the people to take care that the laws are faithfully executed. And by locating his office outside of Congress, the Constitution enables him to do his duty without the conflict of interest that would be inevitable if he also enacted the laws. In contrast, when he makes law, he acquires an interest in that law that conflicts with his ability to do his duty to the people—a conflict that the Constitution carefully avoided by separating his office from the legislature.

Put more generally, the combination of powers in the Attorney General at work here reveals how administrative power corrupts executive power. By transferring lawmaking power to the nation's supervising prosecutor, SORNA not only divests Congress of the power that the Constitution vested in it, but it also gives the Attorney General a legislative role that is incompatible with the duties that the Constitution vests in the executive—in particular, the duty to take care that the laws be faithfully

executed. If there is to be a legitimate role for an administrative state, it cannot undermine the constitutional duties of the executive.

B. SORNA Revives the Constitutionally Forbidden Suspending and Dispensing Powers

SORNA empowers the Attorney General to exclude persons from the statute's ambit and thereby confers upon him the long-forbidden suspending and dispensing powers. In allowing him to make the statute applicable to prior offenders and then change his mind, § 20913(d) permits him to suspend the statute. And in authorizing him initially or later to pick and choose which sorts of prior offenders are not covered and even to relax "its implementation in a particular jurisdiction," § 20913(d) allows him to dispense with the statute.

This administrative revival of the suspending and dispensing powers violates Article I's vesting of legislative powers in Congress. Early English kings claimed an absolute power to suspend statutes for all persons and to dispense with statutes for particular persons, and these powers came to be viewed as incompatible with legislative power. P. Hamburger, *Is Administrative Law Unlawful?* 69 (quoting, for example, Sir William Williams: "Is there anything more pernicious than the dispensing power? There is an end of all the legislative power, gone and lost.") The exercise of such powers did much to provoke the English Revolution of 1688, and in response, the English Declaration of Rights in 1689 barred any exercise of the dispensing or suspending powers unless authorized by Parliament. ("That the pretended power of suspending of laws or the execution of laws by regal authority without

consent of Parliament is illegal" and that "no dispensation by non obstante of or to any statute or any part thereof shall be allowed but that the same shall be held void and of no effect except a dispensation be allowed of in such statute.").

Early American state constitutions vested legislative power in their legislatures and thereby generally defeated executive dispensations and suspensions of statutes. The exception was that about half the early state constitutions followed the English Declaration of Rights in leaving room for executive suspensions of statutes with legislative authorization. (The Maryland Constitution, for example, provided that "no power of suspending Laws, or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed." Md. Decl. of Rights, Art. 9.) The U.S. Constitution is even more sparing; it leaves space only for a suspension of habeas corpus, only in extreme circumstances, and only when Congress itself suspends the writ. U.S. Const. art. I, § 9. The U.S. Constitution thus bars any executive dispensing or suspending of statutes, or of their execution. It follows that the Attorney General cannot enjoy discretion to choose the application and implementation of SORNA.

The combination of executive and legislative powers in the Attorney General violates the administrative theory of separated functions and the Constitution's separation of powers. But even if one could get past those objections, it is also incompatible with the Attorney General's executive duties—notably to take care the laws are faithfully enforced—and it gives him suspending and dispensing powers that Article I forbids.

IV. Constitutional Concerns Are Especially Grave When Congress Divests Itself of Criminal Lawmaking Powers

Perhaps the most disturbing feature of this case is that § 20913(d) gives the Attorney General unilateral authority to decide whether individuals will be subject to the requirements of a *criminal* statute. The consequences of violating SORNA are severe: a fine and imprisonment up to 10 years. *See* 18 U.S.C. § 2250(a). Yet the statute *refuses to say* whether the hundreds of thousands of sex offenders convicted before SORNA are subject to the law's requirements and its criminal penalties. Instead, the statute empowers the Attorney General to decide—in his complete and unfettered discretion—whether the law even applies to this vast category of individuals.

No less troubling is the fact that the statute allows the Attorney General to change his mind or change the policies of his predecessor on these matters at any moment whenever he sees fit to do so. What is today a federal crime might not be a federal crime tomorrow, depending on what today's Attorney General happens to be thinking or deciding. And what is not a federal crime today might become a federal crime tomorrow—depending once again on a unilateral edict from the Attorney General.

It is intolerable for the law-making and law-enforcing powers to be combined in the person of a single individual officeholder when criminal penalties are at stake. The power to impose imprisonment and criminal sanctions is among the most awesome and dangerous powers that a government wields over its citizens, and it is a power that has been gravely abused by governments throughout

world history. Our Constitution is almost obsessed with controlling these powers to ensure that our nation never falls prey to the abuses and atrocities that have plagued the administration of criminal justice in other nations, as shown by the prohibitions on Bills of Attainder and Ex Post Facto laws, the jury guarantee in Article III, the definition of treason, the two-witness requirement, and the remarkable set of protections that appears in the Bill of Rights.

But the most important protection of all comes in the vesting clauses of Articles I, II, and III. No citizen can be imprisoned for a federal crime unless Congress—a multimember body—enacts a statute making the conduct illegal, the executive decides to bring charges, and the defendant is convicted in court before an independent judge, with a right to a jury. Popular sovereignty bookends this process: the criminal prohibition must be enacted by a representative legislature, and the defendant has the right to have the criminal conviction come from a jury chosen from the citizenry. *See Blakely v. Washington*, 542 U.S. 296, 306 (2004). And the essential involvement that is needed from all three branches prevents the corruption of a single branch—or even the corruption of two of the three branches—from leading to unjust imprisonment.

But SORNA short-circuits this process by allowing the Attorney General rather than Congress to decide whether pre-SORNA offenders should be required to register and be subject to criminal penalties for failing to do so. Rather than resolving this issue in the statute, § 20913(d) responds with a shrug and a punt that purports to authorize the law-enforcing authority to be the

lawmaker as well—all in a criminal matter with the risk of imprisonment that entails.

SORNA administratively combines lawmaking and prosecution. The criminal law itself is thereby corrupted.

James Madison spoke eloquently of the constitutional offense that arises when statutes empower those who enforce the criminal laws to simultaneously define the relevant criminal prohibitions:

> However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power from the other departments of power, all will agree that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature, and may for that reason be unconstitutional. Details, to a certain degree, are essential to the nature and character of a law; and on criminal subjects, it is proper that details should leave as little as possible to the discretion of those who are to apply and execute the law. *If nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for law.* A delegation of power in this latitude would not be denied to be a union of the different powers.

James Madison, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 559–60 (Jonathan Elliot ed., 2d ed., 1836) (emphasis added). The Court cannot remain faithful to the government established by Madison and the other Framers if it is willing to allow the Attorney General's "proclamation" to serve as the basis for a criminal prosecution. Congress must codify the Attorney General's rule through bicameralism and presentment before Gundy (or any other pre-act offender) may be prosecuted for "violating" SORNA.

V. The Court May Remedy the Constitutional Violations by Just Invalidating the Attorney General's Rule

When a statute such as § 20913(d) improperly confers lawmaking powers on executive or agency officials, the conventional remedy is to declare the underlying statute unconstitutional. *See Schechter Poultry*, 295 U.S. at 542; *Panama Refining*, 293 U.S. at 430. But this is not the only possible remedy, for this Court can also focus on the executive or agency lawmaking done under the statute and hold that executive or agency action unconstitutional and void.

And while we of course believe that this Court *should* pronounce § 20913(d) unconstitutional, we note that this Court could also or instead take the more modest step of invalidating the Attorney General's rule as an unconstitutional usurpation of legislative power. The Attorney General's rulemaking was the unconstitutional government action that most directly and immediately penalized Gundy, and the Court should therefore at the very least

hold the Attorney General's rule unconstitutional and void.

This Court has often said that an Act of Congress is entitled to a strong presumption of constitutionality, and that rulings pronouncing a federal statute unconstitutional are not to be made lightly. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("[W]e invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (describing the decision to declare an Act of Congress unconstitutional as "the gravest and most delicate duty that this Court is called on to perform"). Here, this Court can take the less dramatic step of disapproving the Attorney General's rule. Lawmaking by executive officials is improper regardless of whether an Act of Congress purports to authorize it—and this Court can simply proclaim that the Attorney General's rule has no legal effect because it was not enacted according to the "finely wrought" constitutional procedure for creating laws. *See Clinton v. City of New York*, 524 U.S. 417, 440 (1998).

Either way, the Court must recognize the Attorney General's complicity in this unconstitutional lawmaking. Executive and agency officials are all too often pleased to receive legislative powers from Congress, without pausing to ask whether the Constitution would allow the allotment of powers described in the underlying statutes. But a conscientious Attorney General does not passively accept Congress's divestitures of legislative power. Instead, he conducts his own investigation into the constitutionality of this arrangement. And if he concludes that Congress

has improperly divested itself of legislative powers, then he must insist that Congress codify his proposed rulemaking in a statute before taking any steps to issue and enforce his rule.

Congress of course deserves blame for its eagerness to pass the buck to executive and agency officials. But it should not be forgotten that the Attorney General's unconstitutional rulemaking under SORNA was the more direct and immediate cause of harm to Gundy. So let us not absolve the *recipients* of these divested congressional powers of blame by focusing solely on the congressional malfeasance that undergirds these unconstitutional lawmaking regimes.

If the Attorney General cannot be counted upon to decline taking the unconstitutional bait, there is little hope that other cabinet officers or agency officials—many of whom are not lawyers—will reject invitations to legislate that Congress never should have extended. Perhaps by striking down the Attorney General's unconstitutional rule, this Court can drive home the point that executive officials have a duty to decide for themselves whether they can constitutionally perform statutory directions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PHILIP HAMBURGER
MARK CHENOWETH
MARGARET A. LITTLE
New Civil Liberties Alliance
P.O. Box 19005
Washington, DC 20036-9005
(202) 830-1434

JONATHAN F. MITCHELL
Counsel of Record
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-1397
jfmitche@stanford.edu

June 1, 2018