

*GUNDY V. UNITED STATES*: REFLECTIONS ON THE  
COURT AND THE STATE OF THE NONDELEGATION  
DOCTRINE

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INTRODUCTION

This fall the Supreme Court heard arguments in the case, *Gundy v. United States*,<sup>1</sup> in which the Court must evaluate whether the federal Sex Offender and Registration and Notification Act (SORNA)<sup>2</sup> violates what is known as the “nondelegation doctrine.”<sup>3</sup> The doctrine, described in theoretical terms, relates to constitutional separation-of-powers principles. It is based on the idea that Article I of the U.S. Constitution vests in Congress all federal “legislative Powers.”<sup>4</sup> Therefore, no other branch of government, or any other federal entity, has the constitutional authority to exercise the legislative authority that the Constitution grants to Congress alone in Article I, Section 1. The nondelegation doctrine consequently posits that Congress may not even consent to permitting another federal entity to exercise its exclusively held legislative power—that is, Congress may not “delegate” its legislative power to another federal entity such as an executive branch actor or a federal court. To enforce this doctrine, however, two key questions must be addressed. First, what does the Constitution mean by “legislative power”? Second, what does it mean for Congress to delegate such power? Is giving away

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<sup>1</sup> 695 F. App’x 639 (2d Cir. June 22, 2017), *cert. granted*, 138 S. Ct. 1260 (Mar. 5, 2018) (No. 16-1829).

<sup>2</sup> Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20901–32.

<sup>3</sup> See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1230 (2015) (referencing a version of the doctrine); *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 472–76 (2001) (discussing the doctrine).

<sup>4</sup> U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); see also *Whitman*, 531 U.S. at 472 (associating the nondelegation doctrine with the Article I Vesting Clause); cf. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–43 (2002) (grounding the nondelegation doctrine in the proper understanding of the Vesting Clauses of Articles I, II, and III as well as “the principle of enumerated powers as it applies to Articles II and III of the Constitution”). *But see* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1729–32 (2002) (contending that the Vesting Clause in Article I does not address or contain any such doctrine).

any portion of legislative power problematic? At its core, the legislative power amounts to the enactment of “generally applicable rules” that govern behavior.<sup>5</sup> Or, put another way, “the power to fashion legally binding rules is legislative.”<sup>6</sup> In contrast, executive power at its most basic level involves carrying out and enforcing the legislature’s generally applicable rules binding private conduct.

More than eighty years have passed since the Supreme Court has held that any statute impermissibly delegated legislative power to the executive branch. In 1935, during the height of the New Deal, the Supreme Court handed down two decisions finding nondelegation violations. In the first case, *Panama Refining Company v. Ryan*,<sup>7</sup> the Court found that a legislative provision authorizing the President to prohibit the transportation of petroleum “in excess of the amount permitted to be produced or withdrawn from storage by” state law violated the nondelegation doctrine.<sup>8</sup> The relevant statutory provisions did not provide the President with any standard about how to determine whether to prohibit the commercial transportation of petroleum other than to say such an action was permissible if the amount of petroleum being released from storage exceeded a certain minimal threshold.<sup>9</sup> In the second case that dealt with a separate aspect of the same federal Act at issue in *Panama Refining*, the Court found a nondelegation violation where Congress had authorized the President to develop or approve “codes of fair competition” for various industries without defining the concept of “fair competition.”<sup>10</sup> In *Panama Refining Company*, the Court specified that the relevant section of the National Industrial Recovery Act delegated too much discretionary authority to the President because the statute lacked even an “intelligible principle” to guide executive actions under the law.<sup>11</sup> The phrase “intelligible principle” has been quoted repeatedly by the Supreme Court when evaluating nondelegation claims over the years.<sup>12</sup>

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<sup>5</sup> *Ass’n of Am. R.R.s.*, 135 S. Ct. at 1245 (Thomas, J., concurring) (“[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make ‘law’ in the Blackstonian sense of generally applicable rules of private conduct.”); see also JOSEPH POSTELL, BUREAUCRACY IN AMERICA 74–79 (2017) (discussing Gary Lawson’s scholarship and PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 83–89 (2014)).

<sup>6</sup> *Ass’n of Am. R.R.s.*, 135 S. Ct. at 1246 (Thomas, J., concurring).

<sup>7</sup> 293 U.S. 388 (1935).

<sup>8</sup> *Id.* at 405–06, 432–33.

<sup>9</sup> *Id.* at 415–16 (“So far as this section is concerned, it 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. And disobedience to his order is made a crime punishable by fine and imprisonment.”).

<sup>10</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530–39 (1935).

<sup>11</sup> *Pan. Ref. Co.*, 293 U.S. at 429–30.

<sup>12</sup> *E.g.*, *Whitman v. Am. Trucking Ass’ns Inc.*, 531 U.S. 457, 472 (2001); *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The Supreme Court also used the phrase to evaluate a nondelegation claim a few years prior to its *Panama Refining* decision when it handed down *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

The imprecision of such a standard, and the lack of an express nondelegation clause in the Constitution, has caused some scholars to contend that even if the Constitution embodies a nondelegation doctrine, the standard is not administrable and, thus, is unenforceable by courts.<sup>13</sup> But the challenge of formulating a clear test to administer a textually imprecise constitutional standard has not prevented the Court from enforcing numerous other open-ended constitutional requirements. For example, the Court routinely hears cases applying the reasonableness standard of the Fourth Amendment. To be sure, the text of the Fourth Amendment expressly bars “unreasonable searches and seizures,”<sup>14</sup> in contrast to the textually implied standard that Congress alone must exercise the legislative power without delegating it to someone else. But other imprecise and underdefined constitutional standards applied by the Supreme Court are not expressly in the constitutional text, yet the Court has still enforced the relevant constitutional command. Take, for example, the case of *Lucia v. SEC*,<sup>15</sup> decided by the Court this past Term. The Appointments Clause in Article II of the Constitution provides that “Officers of the United States” must be appointed in one of just four specific ways.<sup>16</sup> But the Constitution does not define the concept of “officer.” The Court itself has tried to give more content to that term and has said in recent modern cases that an Article II “officer” is one who exercises “significant authority”<sup>17</sup>—a phrase that on its face is just as vague<sup>18</sup> as the concept of “nondelegation” of “legislative powers.” Yet the Court has nonetheless formalistically applied the Constitution’s Appointments Clause requirements.<sup>19</sup>

Moreover, even if determining a precise dividing line between permissible and impermissible delegations of legislative authority would be a challenging task, courts should not be let off the hook under the guise of nonadministrability when resolving specific cases and controversies. If the nondelegation doctrine reflects a constitutionally required structural protection, Congress and the courts should attempt to adhere to it within the proper confines of their constitutional roles.<sup>20</sup> When considering nondelegation cases,

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<sup>13</sup> See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321–23 (2000).

<sup>14</sup> U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

<sup>15</sup> 138 S. Ct. 2044, (June 21, 2018).

<sup>16</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>17</sup> E.g., *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

<sup>18</sup> Compare *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 284–85 (D.C. Cir. 2016), with *Bandimere v. SEC*, 844 F.3d 1168, 1182–84 (10th Cir. 2016) (diverging on their understanding of the meaning of the Court’s “significant authority” standard for Article II officer status).

<sup>19</sup> See, e.g., *Buckley*, 424 U.S. at 128–31, 138–39 (expressing the importance of adhering to the “express language” of the Appointments Clause).

<sup>20</sup> Cf. Brett Kavanaugh, Judge, U.S. Court of Appeals for the D.C. Cir., Address at The Heritage Foundation: The Role of the Judiciary in Maintaining the Separation of Powers (Feb. 1, 2018), <https://www.heritage.org/courts/report/the-role-of-the-judiciary-maintaining-the-separation-powers> (“[T]he structure of the Constitution—the separation of powers and federalism—are not mere matters of etiquette

the Court should grapple with the contours of legislative power and seek to evaluate whether the particular challenged statutory provision improperly subdelegates the power to create general binding rules. Further, wherever the precise constitutional dividing line exists between impermissible delegation and permissible authorization of executive discretion, there must certainly be at least some subset of cases in which a statute gives such little guidance that it clearly crosses that line.<sup>21</sup>

This Essay consists of three parts. Part I discusses the background of the *Gundy* litigation relevant to understanding the stakes of the case this coming Supreme Court term—specifically, the interplay between the terms of the Sex Offender Registration and Notification Act and the nondelegation doctrine. Part II then reviews significant Supreme Court filings in the case, such as the certiorari petition that the Court granted, the government’s Brief in Opposition, the merits briefs filed by Gundy and several amici who support his case, and the government’s merits brief defending the law. Finally, Part III addresses the oral arguments in the case and its potential outcome, discussing some of the previously expressed views of the Justices on the nondelegation doctrine in general and on SORNA’s registration requirements in particular.

## I. SORNA REQUIREMENTS

The statute at issue in *Gundy v. United States* would seem at first blush to constitute one of those easy cases that clearly presents a nondelegation violation. The Sex Offender Registration and Notification Act (SORNA) requires sex offenders to register in any legal jurisdiction where they live or work or where they study if they are students.<sup>22</sup> The statute is quite specific about when offenders must first register—either before the end of their imprisonment for the sex offense or within three business days of sentencing if they do not receive a sentence involving imprisonment.<sup>23</sup> The statute also provides specific instructions about steps a sex offender must take to keep his or her registration current after a major life event, such as a name change, the start of a new job, or a move.<sup>24</sup> The statute further details that state jurisdictions must impose a criminal penalty with a maximal prison term of at least one year for SORNA violations.<sup>25</sup> In stark contrast, however, the

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or architecture, but are essential to protecting individual liberty. Structure protects liberty. And . . . courts have a critical role, when a party has standing, in enforcing those separation of powers and federalism limits.”).

<sup>21</sup> See Lawson, *supra* note 4, at 378–81 (discussing “easy cases” of locating nondelegation violations under the Constitution’s original meaning).

<sup>22</sup> 34 U.S.C. § 20913(a).

<sup>23</sup> *Id.* § 20913(b)(1)–(2).

<sup>24</sup> *Id.* § 20913(c).

<sup>25</sup> *Id.* § 20913(e).

statutory subsection that Mr. Gundy has challenged lacks any guidance for sex offenders or the executive actors carrying out the Act's registration command. The challenged subsection 20913(d) discusses the applicability of registration requirements to sex offenders convicted before SORNA's enactment.<sup>26</sup> But rather than instructing whether SORNA requirements have retroactive applicability, Congress punted and left that determination up to the Attorney General. Subsection 20913(d) states:

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) [addressing the initial registration requirements].<sup>27</sup>

Rather than giving some kind of principle or standard to guide the Attorney General's retroactivity determination—even a broad or general one—this statutory subsection on its face provides no standard at all, much less an “intelligible” one.

In the twentieth century, the Supreme Court declined to find nondelegation violations even where statutory provisions contained very broad standards such as instructions to regulate in the “public interest” or to engage in wartime price-fixing that is “fair and equitable.”<sup>28</sup> And in the much more distant past of the nineteenth century, the Supreme Court affirmed the constitutionality of legislation that omitted even a requirement of “reasonable” action—as long as a certain contingent condition had occurred.<sup>29</sup> For example, in 1813 the Court concluded that it was permissible for Congress to authorize the President to determine and declare when France and Great Britain had stopped violating U.S. neutral commerce—a condition that would trigger the end of a prohibition on trade with the two countries.<sup>30</sup>

But in subsection 20913(d) of SORNA, there is neither a broad governing standard nor a threshold triggering condition guiding when the Attorney General is to apply the sex offender registry requirements to those convicted prior to SORNA's enactment in 2006. Under the provision, the Attorney General has apparently unlimited authority to specify when, if, or how previously convicted sex offenders must follow registration requirements—

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<sup>26</sup> *Id.* § 20913(d).

<sup>27</sup> *Id.*

<sup>28</sup> See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001) (collecting cases).

<sup>29</sup> See Lawson, *supra* note 4, at 363–69 (discussing contingent legislation and the nondelegation doctrine). That said, Gary Lawson has pointed out that the cases affirming the constitutionality of such legislative contingencies really do not support a lax delegation doctrine because the relevant discretionary lawmaking determination in fact consisted of Congress's “legislative specification of the relevant contingency”—not the Executive's subsequent factual determination that the triggering condition had occurred. *Id.* at 364–65.

<sup>30</sup> *Id.* at 363–65 (discussing the case *Cargo of the Brig Aurora v. United States*, 11 U.S. 382 (1813)).

subject to no textual limitations at all.<sup>31</sup> Because of the lack of any limiting standard here to govern the Attorney General's discretionary authority, this particular provision would seem to present a relatively open-and-shut case of standardless congressional lawmaking in violation of the Court's, admittedly lax, modern nondelegation standard.

In the past, there have been Justices who have suggested that the nondelegation doctrine might be more lenient where Congress has delegated discretionary authority in a matter of lesser significance<sup>32</sup> or in a matter that does not involve the exercise of massive raw executive power.<sup>33</sup> Perhaps one could argue that the specificity of the other SORNA provisions adequately hems in executive discretion in implementing SORNA. But there is nothing in the immediately adjacent statutory subsections regarding the mechanics of registration or the punishment for noncompliance that says anything at all to guide the Attorney General's determinations about retroactive applicability of the SORNA registration requirements.<sup>34</sup> And the Supreme Court has remained open to the possibility that statutes related to criminality may be subject to a more stringent delegation standard than the typical "intelligible principle" guideline.<sup>35</sup> To be sure, the Attorney General's retroactive authority here does not permit him to impose a criminal sanction for past behavior per se—something that would violate the Constitution's ban on *ex post facto*

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<sup>31</sup> 34 U.S.C. § 20913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter *or its implementation in a particular jurisdiction . . .*" (emphasis added)).

<sup>32</sup> See *Whitman*, 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy." (citations omitted)).

<sup>33</sup> Cf. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 433–34 (Cardozo, J., dissenting) (dissenting from the Court's determination that the President's authority to prohibit the transportation of petroleum constitutes a violation of the nondelegation doctrine and contrasting the presidential power at issue in this case with delegations in matters of more significance such as the formulation of fair competition codes).

<sup>34</sup> See 34 U.S.C. § 20913(a)–(e). Lower courts have found that surrounding statutory provisions regarding the goals and purposes and mechanics of SORNA registration requirements provide sufficient guidance for the Attorney General's discretion that the statute contains relevant limiting "intelligible principles." See, e.g., *United States v. Guzman*, 591 F.3d 83, 92–93 (2d Cir. 2010). But in *Panama Refining Co.*, the Supreme Court rejected a similar attempt to use surrounding statutory provisions to cure the nondelegation problem created by the absence of a limiting principle on the president's power to ban petroleum transportation. *Pan. Ref. Co.*, 293 U.S. at 416–20.

<sup>35</sup> See *Touby v. United States*, 500 U.S. 160, 165–66 (1991) (finding that it did not need to resolve in that case the petitioners' contention that Congress must provide more specific guidance in criminal-related statutes). But see *Yakus v. United States*, 321 U.S. 414, 424–26 (1944) (upholding a broad delegation of power in a case involving criminal sanctions).

laws in any event.<sup>36</sup> But the statute does allow the Attorney General to impose the serious civil consequence of subjection to onerous reporting requirements based on past conduct.<sup>37</sup> The reputational consequences could be severe if one were to become subject to the stringent registration requirements of SORNA. It seems as if members of Congress, constitutionally assigned to formulate policy and directly elected by the people, should be making the policy determination to impose such requirements on a broad new class of people<sup>38</sup>—not the unelected Attorney General.

## II. GUNDY FILINGS

With that, here is what the parties in the case have to say. In spring 2018, Mr. Gundy and thirteen separate groups of amici supporting the petitioner filed merits briefs in the case.<sup>39</sup> The government filed its brief defending the constitutionality of SORNA at the start of August; no amici filed briefs in support of the government.<sup>40</sup> The Supreme Court heard arguments on the case on Tuesday, October 2, during the first week of the 2018–2019 Term.<sup>41</sup> Distinct from the Court’s composition when it granted certiorari on March 5, 2018, the Court heard arguments with only eight members. Justice Anthony M. Kennedy had retired from the Court in July 2018; Justice Brett M. Kavanaugh had not yet been confirmed as of October 2. Four days after the *Gundy* arguments, the U.S. Senate voted on October 6, 2018, to confirm Justice Kavanaugh by a vote of 50 to 48. Justice Kavanaugh therefore will have no role in deciding *Gundy* unless the then-existing Court splits four to four, in which case the Court may schedule a new round of *Gundy* arguments to facilitate Justice Kavanaugh’s full participation in the decision.<sup>42</sup>

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<sup>36</sup> See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .”); cf. *Smith v. Doe*, 538 U.S. 84, 103–04 (2003) (upholding state law sex offender registration requirements against an ex post facto claim due to their nonpunitive regulatory nature).

<sup>37</sup> 34 U.S.C. § 20913(d) (“The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . .”).

<sup>38</sup> And, of course, even Congress, which is institutionally assigned the federal legislative responsibility under the Constitution, may enact new law utilizing only the very particularized procedures authorized in Article I, Section 7 of the Constitution. See *INS v. Chadha*, 462 U.S. 919, 954–55 (1983).

<sup>39</sup> Docket, *Gundy v. United States*, No. 17-6086 (S. Ct. 2018), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-6086.html>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Rosemary Krimbel, *Rehearing SUA Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 945 (1989).

### A. *The Petition*

From the start, this case had a relatively unusual posture for a case in which the Court would eventually grant review. First, rather than a case involving a well-known corporate entity, a state, or a federal actor or a case with clients represented by a well-known Supreme Court litigator, Gundy petitioned *in forma pauperis* represented by a local public defender.<sup>43</sup> Gundy initially petitioned for certiorari review on four separate questions, the *fourth* of which was his nondelegation claim.<sup>44</sup> The other three questions, mentioned first on the certiorari petition, involved questions primarily related to statutory interpretation such as the timing of when certain registration requirements are triggered.<sup>45</sup>

The Government did not take the petition that seriously at first. It waived its right to submit a brief in opposition (BIO) to the petition.<sup>46</sup> Strategically, that decision made a lot of sense at the time. Mr. Gundy filed his certiorari petition on September 20, 2017—just one day after the U.S. Senate confirmed Solicitor General (SG) Noel Francisco.<sup>47</sup> Further, as is pretty typical near the start of a new administration, the SG’s office had been in a period of transition, with many new assistants to the Solicitor General having recently come on board.<sup>48</sup> The office efficiently focused resources on petitions that historically would have seemed more likely to result in Supreme Court consideration.

But on October 17, 2017, the Court called for a response from the SG to Gundy’s petition<sup>49</sup> (an action that can be taken at the request of just one Justice). And in that response, the SG string-cited the fifteen petitions raising nondelegation claims that the Court has denied in just the past nine years.<sup>50</sup> A similar denial here would have seemed like a sure thing.

Mr. Gundy’s petition focused primarily on his statutory claims that courts had been misinterpreting the Act.<sup>51</sup> Gundy’s argument for Supreme Court review of his nondelegation claim spanned only two pages of his

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<sup>43</sup> Petition for a Writ of Certiorari, *Gundy*, 2017 WL 8132120 (No. 17-6086) [hereinafter *Gundy Cert. Petition*].

<sup>44</sup> *Id.* at i.

<sup>45</sup> *Id.*

<sup>46</sup> Docket, *supra* note 39.

<sup>47</sup> *Id.*; see Jess Bravin, *Senate Confirms Noel Francisco as U.S. Solicitor General*, WALL ST. J. (Sept. 19, 2017, 7:48 PM), <https://www.wsj.com/articles/senate-confirms-noel-francisco-as-u-s-solicitor-general-1505864891>.

<sup>48</sup> See David Lat, *What’s Going On at the Solicitor General’s Office?*, ABOVE THE L. (July 20, 2017), <https://abovethelaw.com/2017/07/whats-going-on-at-the-solicitor-generals-office/>.

<sup>49</sup> Docket, *supra* note 39.

<sup>50</sup> See Brief for the United States in Opposition, *Gundy*, 2017 WL 8132119, at 21–22 (No. 17-6086) [hereinafter *Brief in Opposition*].

<sup>51</sup> *Gundy Cert. Petition*, *supra* note 43, at 8–9.



petition and was the third of three arguments raised in the petition.<sup>52</sup> Gundy simply pointed out that “Congress did not determine” the Act’s applicability to pre-enactment sex offenders.<sup>53</sup> Gundy cited no majority lower court opinion finding a nondelegation problem with SORNA, although he cited a dissenting opinion by former Justice Scalia and concurring opinions by then–Judge Gorsuch and one other circuit judge who raised nondelegation concerns with SORNA.<sup>54</sup> Gundy argued that the absence of any textual principle to guide the Attorney General’s specifications on retroactivity violated the “intelligible principle” requirement relied on by the Court in the past, similar to the statutory provisions found unconstitutional in *Panama Refining Co.* and *A.L.A. Schechter Poultry Corp. v. United States*.<sup>55</sup>

The facts that led to his challenge were as follows. In January 2013, Gundy was charged with failing to properly register as a sex offender after crossing state lines.<sup>56</sup> For that registration violation, Gundy received a “sentence of time served and a five-year term of supervised release.”<sup>57</sup> The underlying offense that had subjected Gundy to registration requirements was a 2005 Maryland state law conviction of sexual offense in the second degree for giving cocaine to an eleven-year-old girl and raping her.<sup>58</sup> That conviction occurred prior to SORNA’s enactment in July 2006.<sup>59</sup> The Second Circuit had determined that individuals convicted before the enactment of SORNA were required to follow the Act’s registration requirements as of August 1, 2008—the date on which the circuit court concluded that the Attorney General had made the registration requirements retroactive.<sup>60</sup>

In particular, the Attorney General had determined via regulation that pre-Act offenders or offenders in jurisdictions that have not implemented the Act should register under the same textual statutory registration requirements that govern post-enactment offenders.<sup>61</sup> The reason the Attorney General has a role in making this far-reaching determination, again, is Section 20913(d)’s language suggesting that it is up to the Attorney General to determine with *carte blanche* the Act’s applicability to any offender convicted before its

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<sup>52</sup> Gundy Cert. Petition, *supra* note 43, at 17–19.

<sup>53</sup> *Id.* at 17.

<sup>54</sup> *Id.* at 18 (first citing *Reynolds v. United States*, 565 U.S. 432, 448 (2012) (Scalia, J., dissenting); then citing *United States v. Fuller*, 627 F.3d 499, 509–13 (2d Cir. 2010) (Raggi, J., concurring); and then citing *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring)).

<sup>55</sup> 295 U.S. 495 (1935).

<sup>56</sup> *United States v. Gundy*, 804 F.3d 140, 144 (2d Cir. 2015); Gundy Cert. Petition, *supra* note 43, at 3.

<sup>57</sup> *United States v. Gundy*, 695 F. App’x 639, 641 (2d Cir. 2017) (summary order).

<sup>58</sup> Brief in Opposition, *supra* note 50, at 6.

<sup>59</sup> *Gundy*, 804 F.3d at 141, 143.

<sup>60</sup> *Id.* at 142–43.

<sup>61</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8894–96 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72); Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849, 81,849–50 (Dec. 29, 2010) (to be codified at 28 C.F.R. pt. 72).

enactment or in a non-implementing jurisdiction: basically, that is, to legislate *for* Congress regarding the offenders not otherwise governed by the legislature’s enacted text—some might say. Gundy had argued to the Second Circuit that SORNA violates the nondelegation doctrine, but the Second Circuit noted the claim was foreclosed by 2010 circuit precedent.<sup>62</sup>

Attorney General Alberto Gonzales first published an interim rule effective on February 28, 2007,<sup>63</sup> that imposed SORNA requirements on pre-enactment offenders.<sup>64</sup> The preamble to that rule opined “that SORNA applies of its own force to all sex offenders regardless of when they were convicted of their sex offenses.”<sup>65</sup> Nonetheless, to clear up any potential controversy about whether the text expressly applied to pre-enactment offenders, the Attorney General engaged in rulemaking to clarify the Act’s applicability to convictions occurring prior to SORNA’s enactment.<sup>66</sup> The Attorney General had concluded that assurance of the Act’s applicability to earlier offenders was “of fundamental importance to the initial operation of SORNA, and to its practical scope for many years, since it determines the applicability of SORNA’s requirements to virtually the entire existing sex offender population.”<sup>67</sup> Attorney General Gonzales concluded in the interim rule that Sections 112(b) and 113(d) of SORNA authorized him to promulgate this policy.<sup>68</sup>

The tension in establishing the precise extent of the Attorney General’s role identified by the interim rule became the subject of a six-to-five circuit split on whether the statute on its own applied the registration requirements to pre-enactment offenders.<sup>69</sup> The split favored the interpretation that “the Act’s registration requirements do not apply to pre-Act offenders unless and until the Attorney General so specifies.”<sup>70</sup> In 2012, the Supreme Court adopted that interpretation in *Reynolds v. United States*<sup>71</sup> by a seven-to-two margin.<sup>72</sup> Justice Breyer, writing for the majority, observed that a ruling by the Attorney General could minimize uncertainties about how the registration requirements apply to pre-enactment offenders, which would “help[] to

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<sup>62</sup> *Gundy*, 695 F. App’x. at 641 n.2.

<sup>63</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. at 8894.

<sup>64</sup> *Id.* See also Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. at 81, 849–50.

<sup>65</sup> Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. at 81, 849–50.

<sup>66</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. at 8896.

<sup>67</sup> *Id.*

<sup>68</sup> Adam Walsh Child Protection and Safety Act § 112(b), 34 U.S.C. § 20912(b) (authorizing the Attorney General regulations “to interpret and implement this title”); *id.* § 20913(d)).

<sup>69</sup> *Reynolds v. United States*, 565 U.S. 432, 438–39 (2012).

<sup>70</sup> *Id.* at 438.

<sup>71</sup> 565 U.S. 432 (2012).

<sup>72</sup> *Id.* at 435.

eliminate the very kind of vagueness and uncertainty that criminal law must seek to avoid.”<sup>73</sup>

Justice Scalia dissented, joined by Justice Ginsburg.<sup>74</sup> They interpreted the statutory registration requirements to “apply of their own force, without action by the Attorney General.”<sup>75</sup> Specifically, Justice Scalia concluded that “[t]he Act’s statement that ‘[t]he Attorney General shall have the authority to specify the applicability of the [registration] requirements’ to pre-Act sex offenders is best understood as conferring on the Attorney General an authority to make exceptions to the otherwise applicable registration requirements.”<sup>76</sup> He did not believe that the provision was best read, within the statutory scheme, as authorizing the Attorney General to decide whether the requirements should apply to pre-enactment offenders in the first place.<sup>77</sup>

Justice Scalia further pointed out that he believed the majority’s interpretation might create a nondelegation problem.<sup>78</sup> This was notable coming from Justice Scalia, a jurist who had not been quick to find nondelegation violations in statutory schemes leaving quite broad discretion to the executive branch.<sup>79</sup> But here, Justice Scalia observed that the Court’s interpretation would be “leaving it up to the Attorney General whether the registration requirement would *ever* apply to pre-Act offenders, even though [such] registration . . . was . . . what the statute sought to achieve.”<sup>80</sup> In light of “no statutory standard whatever governing” the Attorney General’s discretionary determination of “whether a criminal statute will or will not apply to certain individuals,” Justice Scalia said the statute “seem[ed] to [him] sailing close to the wind with regard to the principle that legislative powers are nondelegable.”<sup>81</sup> Thus, he would have applied the constitutional avoidance canon to avoid the Court’s potentially problematic statutory interpretation in favor of the “reasonable alternative interpretation” that the Act applied to pre-enactment offenders of its own force, but the Attorney General could specify

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<sup>73</sup> *Id.* at 441–42.

<sup>74</sup> *Id.* at 448–51 (Scalia, J., dissenting).

<sup>75</sup> *Id.* at 448.

<sup>76</sup> *Id.* (citation omitted).

<sup>77</sup> *Reynolds*, 565 U.S. at 448–49.

<sup>78</sup> *Id.* at 450.

<sup>79</sup> *Cf., e.g., Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474–75 (2001) (observing that the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law” (internal quotation omitted)). *But see id.* at 475 (noting that the degree of acceptable agency discretion “varies according to the scope of the power congressionally conferred” and thus, *e.g.*, Congress would have to “provide substantial guidance” on a matter such as “setting air standards that affect the entire national economy” albeit not a “determinate criterion” (internal quotation omitted)).

<sup>80</sup> *Reynolds*, 565 U.S. at 449 (Scalia, J., dissenting).

<sup>81</sup> *Id.* at 450.

reductions in registration requirements if he so chose.<sup>82</sup> With Justice Ginsburg having joined Justice Scalia in his dissent, there appears to be at least one Justice on the record for the conclusion that SORNA, as interpreted by the Supreme Court in 2012, raises potential nondelegation concerns.

When he served on the Tenth Circuit, Justice Gorsuch also expressed nondelegation concerns regarding SORNA, writing just for himself in a concurring opinion in 2008.<sup>83</sup> Justice Gorsuch cited Supreme Court precedent espousing the “intelligible principle” standard and found that an interpretation leaving it up to the Attorney General to determine whether the registration requirements applied to pre-enactment offenders improperly gave away “*unfettered discretion*.”<sup>84</sup> He objected that under this reading of the statute, “the Attorney General could, willy nilly, a) require every single one of the estimated half million sex offenders in the nation to register under SORNA, b) through inaction, leave each of those half million offenders exempt from SORNA, c) do anything in between those two extremes, or d) change his or her mind on this question, making the statute variously prospective and retroactive, as administrative agencies are normally entitled to do when Congress delegates interpretive questions to them.”<sup>85</sup> He suggested that the best approach would have been to apply the constitutional avoidance doctrine to determine that the statute applied retroactively without any further action by the Attorney General, an interpretation that he felt was more consistent with congressional intent in any event.<sup>86</sup> Of course, the Court’s opinion four years later in *Reynolds* would preclude such a construction, making it seem likely that Justice Gorsuch would conclude the challenged provision indeed violates the Constitution’s limitation on delegations of legislative power.

## B. *Brief in Opposition*

In the BIO that the Court requested, the Solicitor General (“SG”) kept his argument opposing Supreme Court review of Gundy’s nondelegation challenge to four pages.<sup>87</sup> The bulk of the argument was essentially a string citation to case after case in which circuit courts of appeals had rejected nondelegation challenges to SORNA. Specifically, the BIO cited eleven courts of appeals that had rejected such claims.<sup>88</sup> The next page of the BIO’s argument included a string citation to fifteen occasions on which the Supreme

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<sup>82</sup> *Id.* (describing the constitutional avoidance canon as “our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question” (quoting *Gomez v. United States*, 490 U.S. 858, 864 (1989))).

<sup>83</sup> *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring).

<sup>84</sup> *Id.* (quoting *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir. 2012)).

<sup>85</sup> *Id.* (citing *Nat’l Cable & Tel. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005)).

<sup>86</sup> *Id.*

<sup>87</sup> Brief in Opposition, *supra* note 50, at 20–24.

<sup>88</sup> *Id.* at 20–21.

Court had denied certiorari review to SORNA nondelegation claims.<sup>89</sup> The SG then contended that the design and policy goals of the Act along with the many registration-related requirements stipulated in surrounding provisions within the Act sufficiently hemmed in the Attorney General’s decision-making authority, such that Congress had provided adequate “intelligible principles” to guide the Attorney General’s implementation of the Act.<sup>90</sup> In particular, Congress had enacted SORNA “to provide the broadest possible protection to the public.”<sup>91</sup> And the government cited other lower court opinions highlighting Congress’s delineation of “the crimes requiring registration, the circumstances of registration, the information required to register, and the penalties for non-registration,” which left “to the Attorney General only” the determination of the appropriate “applicability of SORNA to a discrete set of persons.”<sup>92</sup> One lower court described this determination as essentially just the determination whether the benefits of the regulatory reporting requirements “would be offset, in the case of pre-SORNA sexual offenders, by problems of administration, notice and the like for this discrete group of offenders—problems well suited to the Attorney General’s on-the-ground assessment.”<sup>93</sup>

It requires the votes of at least four Justices to grant certiorari review in any given case, although at times the practice within the Court has been for a fourth Justice to provide a “join three” vote to grant certiorari if three other Justices support review.<sup>94</sup> In March 2018, the Court granted certiorari review in *Gundy*. If members of the Court currently follow a practice of providing courtesy “join three” votes, it is possible that certiorari review in *Gundy* may have been supported by only two currently sitting Justices in the event that Justice Kennedy was one of three initial votes for review.

### C. *Merits Briefs*

In May 2018, Gundy filed his brief on the merits.<sup>95</sup> The thirteen amicus briefs filed in support of him represented an unusual alliance of interests. The American Civil Liberties Union (ACLU) along with religious liberties groups and conservative constitutional organizations, as well as libertarian

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<sup>89</sup> *Id.* at 21–22.

<sup>90</sup> *Id.* at 23–24.

<sup>91</sup> *Id.* at 23 (parroting a circuit court’s description of the Act rather than quoting from the Act itself) (internal quotation omitted). *Contra* Pan. Ref. Co. v. Ryan, 293 U.S. 388, 417–19 (declining to rely on the statute’s general-purpose statement as a sufficient restraint on the President’s discretion to make the delegation constitutional).

<sup>92</sup> Brief in Opposition, *supra* note 50, at 23–24.

<sup>93</sup> *Id.* at 24 (quoting *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir. 2012)).

<sup>94</sup> See ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, & KENNETH S. GELLER, SUPREME COURT PRACTICE § 5.1.4 (10th ed.) (BNA 2013).

<sup>95</sup> Docket, *supra* note 39.

institutes, are all aligned in support of Gundy's cause.<sup>96</sup> A group of fifteen constitutional, criminal, and administrative law professors also signed a brief in support.<sup>97</sup>

So, what unifying interest has brought together the eclectic mix of organizations supporting Gundy's nondelegation claim? This case brings advocates for criminal defendant rights and individual liberties together with theorists who favor strong constitutional structural separation-of-powers constraints. One key way to effectuate a strong separation of powers is "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>98</sup> One outworking of these structural safeguards is the elected body of Congress making sure that legislation sets forth principles to guide the discretion of the executive branch as it carries out statutory commands. Continued commitment to the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty."<sup>99</sup> The joinder of civil liberties groups and conservative structural constitutional advocates in this case underscores this relationship between a strong adherence to constitutional separation of powers and individual freedom.

For example, the Center for Constitutional Jurisprudence affiliated with the Claremont Institute, summarizes in its brief that the "nondelegation" doctrine is rooted in both the plain text of the Constitution and [its] separation of powers design."<sup>100</sup> The brief then explains that structural "[s]eparation of powers is the key to the Constitution's protection of individual liberty" because it protects against unrestrained consolidated power.<sup>101</sup> The brief continues on to "urge[] [the] Court to reconsider the 'intelligible principle' doctrine" in favor of a more historical approach that is in line with the text and structure of the Constitution, citing sources like *Blackstone's Commentaries* and *The Federalist Papers*.<sup>102</sup>

Requiring Congress to play the legislative role also makes Congress more accountable for enacting good laws. As the Cato Institute points out in its amicus brief, "why should Congress deliberate, make judgments, and stand accountable for each determination when it can license the executive to apply purportedly greater wisdom or technocratic expertise?"<sup>103</sup> Further,

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<sup>96</sup> *See id.*

<sup>97</sup> *See* Brief of William D. Araiza and 14 Other Constitutional, Criminal, and Administrative Law Professors as Amici Curiae in Support of Petitioner, *Gundy*, 2018 WL 2733950, at 25 (No. 17-6086).

<sup>98</sup> THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) (The Avalon Project 2008).

<sup>99</sup> *Id.*

<sup>100</sup> Brief *Amicus Curiae* of Center for Constitutional Jurisprudence in Support of Petitioner, *Gundy v. United States*, 2018 WL 2684380, at 3 (No. 17-6086).

<sup>101</sup> *Id.* at 3, 5.

<sup>102</sup> *Id.* at 4–6.

<sup>103</sup> Brief for the Cato Institute and Cause of Action Institute as *Amici Curiae* in Support of Petitioner, *Gundy*, 2018 WL 2412171, at 3 (No. 17-6086).

the Cato brief points out that “concerns for the separation of powers, and ultimately the rule of law, are most acute where they implicate personal liberty,” particularly when it comes to “preventing abuses of criminal law.”<sup>104</sup>

The American Civil Liberties Union’s brief relies on narrower nondelegation claims. It contends that “special nondelegation concerns” are raised when Congress legislates in the area of criminal law, even though quite broad delegations are permissible in general administrative law contexts.<sup>105</sup> This brief’s approach may foreshadow a potential narrow basis for a majority ruling for Gundy—or perhaps just a majority judgment—unless the Court’s more conservative bloc were to coalesce around Gundy’s nondelegation claims and decide it is time to tighten up the Court’s “intelligible principle” doctrine. But cases in the Court’s previous term, such as *Lucia v. SEC*, suggest that such an approach is unlikely. The Court might very well just reach a narrow “intelligible principle” holding against the SORNA retroactivity provision based on its absence of any guiding standard or on the ground that its precedent in *Touby v. United States*<sup>106</sup> suggested heightened caution might be appropriate when legislating in the area of criminal law.<sup>107</sup>

In Gundy’s own merits brief, he puts more flesh on the bones of the initial sketch of nondelegation arguments that he made in his certiorari petition.<sup>108</sup> He contends that “Section 20913(d) of SORNA grants the Attorney General *undirected discretion* to decide whether the more than 500,000 people convicted of sex offenses before July 2006 are subject to onerous federal registration requirements and the attendant criminal penalties.”<sup>109</sup> In his view, the statute thus “grants the Attorney General what can only be characterized as ‘legislative’ powers” and thus must be “unconstitutional under *any* formulation of the nondelegation doctrine.”<sup>110</sup> This is because the subsection provides no directives of any kind regarding *whether* the Attorney General “should make any pre-Act offenders register; *which* offenders should be required to register; or even *what he must (or must not) consider in deciding* these questions.”<sup>111</sup> With its shout-outs to the original meaning of the Constitution’s Article I legislative power and its focus on structural separation of

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<sup>104</sup> *Id.* at 4.

<sup>105</sup> Brief *Amicus Curiae* of the American Civil Liberties Union in Support of Petitioner at 5–16, *Gundy*, 2018 WL 2684381, at 5–16 (No. 17-6086).

<sup>106</sup> 500 U.S. 160, 165–66 (1991) (saving for another day the issue of whether federal criminal laws should be subject to a tougher nondelegation standard).

<sup>107</sup> See generally Brief of William D. Araiza and 14 Other Constitutional, Criminal, and Administrative Law Professors as *Amici Curiae* in Support of Petitioner, *Gundy*, 2018 WL 2733950, at 13, 18–20 (No. 17-6086) (raising these two distinct grounds as possible alternatives for striking down the retroactivity provision under current “intelligible principle” doctrine).

<sup>108</sup> See generally Brief for Petitioner, *Gundy*, 2018 WL 2441585, at ii–iii (No. 17-6086).

<sup>109</sup> *Id.* at 15 (emphasis added).

<sup>110</sup> *Id.* at 15–16 (emphasis added).

<sup>111</sup> *Id.* at 16 (emphasis added).

powers and liberty,<sup>112</sup> Gundy’s brief, written in part by Jeffrey Fisher and Pamela Karlan of the Stanford Supreme Court Clinic, is consistent with one that could have been written by the strongest constitutionally conservative theorist.

The government’s merits brief responds by emphasizing broad delegations previously upheld by the Court and contending that SORNA’s surrounding subsections significantly constrain the Attorney General’s authority to apply registration requirements to pre-enactment offenders.<sup>113</sup> First, the government highlights numerous cases in which the Court has upheld broad delegations, recounting the Court’s explanation that delegations are “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority.”<sup>114</sup> The government also quotes the Court’s acknowledgment that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>115</sup> But the government fails to grapple with the fact that even Justice Scalia<sup>116</sup>—the author of one of its principal authorities—thought that SORNA, as interpreted by the Court, likely violates the nondelegation doctrine.

Moreover, the historical instances of apparently broad delegations that the Court identifies may well involve much narrower delegations than the government suggests. The government points to the Executive’s early power to regulate commerce with Native American tribes and to trigger trade embargoes, among other examples.<sup>117</sup> But Gary Lawson’s detailed study of delegation and original meaning notes that at least some of the relevant early cases involved “a widespread phenomenon known as *contingent legislation*” in which executive branch action would trigger imposition of a new policy but only because Congress had made the effectuation of an earlier-legislated standard contingent on executive fact-finding.<sup>118</sup> For instance, in *Cargo of the Brig Aurora v. United States*,<sup>119</sup> Congress had legislated that a “trade prohibition was to be in effect unless the President declared by proclamation that the relevant countries . . . had ceased to violate the neutral commerce of the

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<sup>112</sup> *E.g.*, *id.* at 16, 17–21, 25; *see also id.* at 40 n.7 (observing that “Congress has no general police power” and that SORNA intrudes on state sovereignty).

<sup>113</sup> Brief for the United States, *Gundy*, 2018 WL 3727086, at 12–13 (No. 17-6086).

<sup>114</sup> *See id.* at 15, 19 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

<sup>115</sup> *Id.* at 15 (quoting *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474–75 (2001)).

<sup>116</sup> Justice Scalia authored *Whitman*, 531 U.S. at 462, 472, 474–75, the opinion that cautioned against second-guessing Congress and that upheld the constitutionality of “nationwide air-quality standards limiting pollution to the level required to protect the public health,” an opinion on which the government relies. *See* Brief for the United States, *supra* note 113, at 20.

<sup>117</sup> Brief for the United States, *supra* note 113, at 16–18.

<sup>118</sup> Lawson, *supra* note 4, at 361–67.

<sup>119</sup> 11 U.S. 382 (1813).



United States.”<sup>120</sup> So, Congress legislated the conditions under which trade restrictions were to remain in effect; the Executive just evaluated factually whether such considerations continued to exist.<sup>121</sup>

Second, after attempting to establish that even broad delegations have always been constitutional, the government further argues that the Attorney General’s authority over pre-enactment sex offenders is really rather narrow.<sup>122</sup> The government notes that the Act provides many detailed instructions about how the registration requirements are to be carried out, including the prescription of where offenders must register, the determination of the type of information that registrants must record, and the definition of which specific crimes necessitate registration.<sup>123</sup> But these instructions do nothing to answer the question of whether individuals convicted of such sex offenses *prior to* SORNA’s enactment have to register.

The government’s attempt to point to SORNA’s general statutory purposes as adequately constraining also may be unavailing. The Act’s purpose is “to protect the public from sex offenders and offenders against children” by “establish[ing] a comprehensive national system for the registration of those offenders.”<sup>124</sup> In the government’s view, this express statutory purpose to require a comprehensive registration system suggests that the Attorney General must require as many pre-enactment offenders to register as is feasible—thus providing an “intelligible principle” to govern the statutory subsection under review.<sup>125</sup> But, as the government acknowledges, the Court’s *Panama Refining* decision rejected the general statutory purpose statement at issue in that case as an adequate intelligible principle confining executive discretion.<sup>126</sup> The government claims, in contrast, that the statutory purpose statement in SORNA is more closely connected to the pre-enactment registration provision than the connection between the relevant provisions in *Panama Refining*.<sup>127</sup> But the Court may not be convinced. One of the general statutory policies in *Panama Refining* was “to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof.”<sup>128</sup> The challenged provision gave the President authority “to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State

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<sup>120</sup> Lawson, *supra* note 4, at 363.

<sup>121</sup> *See id.* at 363–64.

<sup>122</sup> Brief for the United States, *supra* note 113, at 29.

<sup>123</sup> *Id.* at 22–23.

<sup>124</sup> 34 U.S.C. § 20901.

<sup>125</sup> Brief for the United States, *supra* note 113, at 24–25.

<sup>126</sup> *Id.* at 36.

<sup>127</sup> *Id.*

<sup>128</sup> *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 417 (1935).

law.”<sup>129</sup> One could have contended that the Act’s general principle of promoting commerce would have guided the President to prohibit the transportation of surplus oil only when such a prohibition would advance the overall national economy. But the Court rejected the connection because the general policy statement did not address the specific statutory issue at hand—the transportation of petroleum.<sup>130</sup> Similarly, here, SORNA’s general instruction that the registration system be comprehensive does not specifically address that system’s applicability to pre-enactment convictions.

### III. ORAL ARGUMENT AND POSSIBLE OUTCOME

So, what is the Court likely to do in this case? It is possible that the Court might conclude the retroactivity provision in SORNA violates the non-delegation doctrine, but if it does so, it would likely do so on narrow grounds. Rather than revamp the modern “intelligible principle” standard, it seems likely that any nondelegation violation found by the Court—if it finds one—would rely on a conclusion that the challenged provision offers *no standard* to guide Attorney General determinations about whether to apply SORNA requirements to pre-Act offenders. That said, at least five Justices asked questions at oral argument suggesting skepticism of such an interpretation or highlighting other very broad statutory standards that seem at least as far-reaching as the relevant SORNA requirements. These Justices seemed open to Principal Deputy Solicitor General Jeff Wall’s contention that surrounding provisions within the relevant statutory scheme adequately hem in the Attorney General’s discretion under Section 20913(d). In particular, Wall argued that the comprehensive nature of the SORNA registration framework suggests that the Attorney General necessarily would have to apply SORNA requirements to pre-Act offenders and that his discretion would be limited to addressing details related to the feasibility of such requirements.<sup>131</sup> This argument is curious in light of the *Reynolds* Court’s pointed determination that the enactment of SORNA did not independently subject pre-Act offenders to SORNA requirements and that Attorney General regulations were necessary to effectuate application of the law to such offenders.<sup>132</sup> Nonetheless, petitioner Gundy’s conception of the statutory scheme faced a tough audience in the Justices.

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<sup>129</sup> *Id.* at 405–06 (quoting National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, 200, 15 U.S.C. tit. 1, § 709(c) (1933)).

<sup>130</sup> *Id.* at 417–18 (“This general outline of policy contains nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited . . . . It is manifest that this broad outline is simply an introduction of the Act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections.”).

<sup>131</sup> See Transcript of Oral Argument, *Gundy v. United States*, at 30–42, available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2018/17-6086\\_6khn.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-6086_6khn.pdf).

<sup>132</sup> See *Reynolds*, 565 U.S. at 435.

Leaving aside for a moment the Justices' comments during the *Gundy* oral arguments, the previous jurisprudence of several members of the Court contains hints of their potential nondelegation views, at least in the abstract. Justice Gorsuch is already on record as a lower court judge in raising concerns that the SORNA retroactivity provision, broadly construed, might violate the nondelegation doctrine.<sup>133</sup> And as this Essay discusses, Justice Ginsburg joined the *Reynolds* dissent by Justice Scalia raising potential delegation concerns with the SORNA provision<sup>134</sup> (although joining a dissent that raises this as one point among many is a far cry from holding that a congressional provision is unconstitutional). Justice Thomas has clearly indicated his view that the original meaning of the Vesting Clause calls for much stricter enforcement of the nondelegation doctrine than is accomplished by the "intelligible principle" standard.<sup>135</sup> Petitioner Gundy raises original meaning nondelegation arguments in his brief, so perhaps Justice Thomas will conclude that this is an appropriate case in which to revisit the proper delegation standard under Article I and the structural separation of powers within the Constitution.

Justice Alito's and Chief Justice Roberts's jurisprudential views on the strictness of the nondelegation doctrine are less clear. Chief Justice Roberts has suggested that vague congressional directions like authorizing agencies simply to regulate "in the public interest" make it look very much like the agency is the entity doing the legislating.<sup>136</sup> And just this past term, Justice Alito characterized the Vesting Clauses as imposing "*strict limits* on the kinds of institutions that Congress can vest with legislative, executive, and judicial power."<sup>137</sup> Further, in a 2015 case challenging the delegation of governmental power to private actors, Justice Alito emphasized that "[t]he principle that Congress cannot delegate away its vested powers exists to protect liberty."<sup>138</sup> But in his very next paragraph, Justice Alito pointed out that the Court almost never second-guesses Congress on the policy judgments that it hands over to its coordinate branches and acknowledged that some agency policymaking is really just a permissible exercise of executive power.<sup>139</sup> Further, Justice Alito and Chief Justice Roberts often rule on the side of law enforcement in cases brought by criminal defendants.<sup>140</sup> So it is not clear whether rule of law concerns regarding public safety or broader structural

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<sup>133</sup> See *supra* notes 83–86.

<sup>134</sup> See *supra* note 74 and accompanying text.

<sup>135</sup> See *Dept. of Trans. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240–52 (2015) (Thomas, J., concurring).

<sup>136</sup> *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

<sup>137</sup> *Ortiz v. United States*, 138 S. Ct. 2165, 2196 (2018) (Alito, J., dissenting) (emphasis added).

<sup>138</sup> *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring).

<sup>139</sup> *Id.*

<sup>140</sup> See Michael A. McCall & Madhavi M. McCall, *Quantifying the Contours of Power: Chief Justice Roberts & Justice Kennedy In Criminal Justice Cases*, 37 PACE L. REV. 115, 114–26 (2016) (acknowledging Chief Justice Roberts and Justice Alito as "dependable conservatives in criminal justice cases").

separation-of-power concerns will drive Justice Alito and the Chief Justice in this case.

On the more pro-delegation side, writing as a scholar in her seminal article *Presidential Administration*, Justice Kagan stated that it is “a commonplace that the nondelegation doctrine is no doctrine at all.”<sup>141</sup> She also observed that the only two instances where the Court has applied the doctrine involved delegations of power directly to the President and not to administrative officials—distinct from the facts of this case.<sup>142</sup> And Justice Breyer has pointedly observed that the Court has interpreted the Vesting Clause “generously in terms of the institutional arrangements that [it] permit[s].”<sup>143</sup>

What about Justice Kavanaugh in the event that the Court splits four-to-four in *Gundy* and Justice Kavanaugh must participate in the case? Several months prior to Justice Kavanaugh’s confirmation, Professor Gary Lawson wrote about then-Judge Kavanaugh’s jurisprudence and its potential implications for the *Gundy* litigation.<sup>144</sup> Lawson offered no particular prediction about Judge Kavanaugh’s potential leanings in the case.<sup>145</sup> But Lawson did suggest that a vote by Kavanaugh in *Gundy* could be very predictive about whether Kavanaugh generally will approach his role more as a “legal conservative[,]” like Alito and Roberts who “favor a minimalist . . . role for the undemocratic judiciary,” or more like the constitutionalists Gorsuch and Thomas, who prioritize enforcement of the constitutional separation of powers.<sup>146</sup> In general, Lawson predicted that Kavanaugh “will align predominantly, but not consistently with the constitutionalist wing on the Court.”<sup>147</sup>

In reviewing then-Judge Kavanaugh’s administrative law jurisprudence, Professor Chris Walker also observed that Judge Kavanaugh’s take on the “major rules doctrine” amounts to “a second-order means of addressing nondelegation doctrine concerns.”<sup>148</sup> By referencing Kavanaugh’s “major rules doctrine,” Walker is referring to Judge Kavanaugh’s stated separation-of-powers position that courts should decline to find that Congress delegated regulatory policymaking authority to agencies in very significant (i.e.,

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<sup>141</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001).

<sup>142</sup> *Id.* at 2364–65.

<sup>143</sup> *Clinton v. City of New York*, 524 U.S. 417, 471 (1998) (Breyer, J., dissenting).

<sup>144</sup> Gary Lawson, *POV: Brett Kavanaugh, Conservative or Constitutionalist?*, BU TODAY (July 11, 2018), <http://www.bu.edu/today/2018/brett-kavanaugh-conservative-or-constitutionalist/>.

<sup>145</sup> *See id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Christopher Walker, *Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018, 2:55 PM), <http://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/>; *see generally* Michael Sebring, *The Major Rules Doctrine* (May 15, 2018) (draft student note), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3215295](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215295) (discussing the Major Rules Doctrine and Judge Kavanaugh’s application of the doctrine to a specific case).

“major”) areas unless Congress’s delegation of such authority is clear.<sup>149</sup> In other words, Judge Kavanaugh has written in dissent, “For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful.”<sup>150</sup>

How this interpretive approach would play out in *Gundy* if Justice Kavanaugh were called upon to consider the case is unclear. One would think that he would likely conclude in the abstract that the issue of whether more than 500,000 people are retroactively subjected to sex offender reporting requirements is a “major” policy question and, thus, one that courts should not readily assume Congress has left up to the executive branch to answer on its own.<sup>151</sup> If that is correct, Justice Kavanaugh may be inclined to conclude that leaving the pre-Act applicability of SORNA entirely within the purview of the Attorney General would be unconstitutional and thus may be inclined, at a minimum, to support some kind of narrowing construction for the retroactivity provision based on surrounding provisions within the overarching statutory scheme. As Professor Cass Sunstein observes, within the modern Court the use of the nondelegation doctrine seems as though it will be limited to the application of a so-called nondelegation canon of construction that calls for narrowly interpreting provisions to contain “intelligible principles” constraining executive branch discretion.<sup>152</sup> That said, reliance on such a canon may at first blush appear inconsistent with Justice Kavanaugh’s cautionary writings about over-reliance on substantive statutory canons of construction.<sup>153</sup> Therefore, Justice Kavanaugh might feel constrained to reach a narrow interpretation of SORNA’s retroactivity provision only if he in fact believes the best reading of the overall statutory scheme is to apply the Act’s general objectives and definitions directly to the retroactivity provision.

If the claim of SORNA’s unconstitutionality garners majority support in the end, it could be because the majority consists of an interesting alliance, perhaps made up of those Justices with a keen interest in fairness for criminal defendants, along with Justice Thomas and Justice Gorsuch, who have expressed fidelity to a robust constitutional nondelegation principle. Even if the

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<sup>149</sup> See, e.g., *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 417–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

<sup>150</sup> *Id.* at 419.

<sup>151</sup> See *id.* at 422–23 (observing that the determination of whether an agency regulation qualifies as a “major rule[]” depends on factors such as “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue.”). Those last two factors seem particularly relevant in this case, particularly with SORNA’s repeated appearance in cases taken up by the Supreme Court.

<sup>152</sup> See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–17, 342–43 (2000) (discussing the benefits of the nondelegation canons approach in contrast to application of a broader nondelegation limitation on the merits).

<sup>153</sup> Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (Oxford Univ. Press 2014)).

Court did reach this holding—an outcome that appears less likely after numerous Justices’ skepticism at oral argument—the Court would likely couch the holding in very narrow terms, similar to the Court’s approach to its separation-of-powers decision last term in *Lucia v. SEC*. The Court in that case ultimately reached a constitutional outcome enforcing the limits of the Article II Appointments Clause as it relates to agencies’ administrative law judges.<sup>154</sup> But rather than revisit the Constitution’s original meaning or clarify the Court’s vague standard for defining “Officers of the United States,” the Court just engaged in a fact-bound determination comparing the ALJs to adjudicators found in the past to be “officers.”<sup>155</sup> Similarly, here it seems that a coalition of Justices particularly attuned to rights for criminal defendants, like Justice Ginsburg and Justice Sotomayor, could join a coalition of the Court’s “constitutionalists” to find that the retroactivity provision is an inappropriately broad delegation of power under Court precedent. But rather than expansively redefining the “intelligible principle” standard, this alliance of Justices would more likely decide this case in light of its specific facts—perhaps concluding that the specific statutory subsection under review is standardless and therefore a bridge too far for executive power in criminalization.

The outcome of *Gundy* is unclear following oral arguments in the case, however. For example, Justice Ginsburg asked tough questions of both the petitioner and the government. Justice Ginsburg first suggested to Gundy’s counsel that she believed the statutory scheme here provided detailed standards regarding matters such as which crimes require registration and when and where such registration must occur.<sup>156</sup> (Petitioner’s counsel pointed out, however, that none of these standards are relevant to the particular issue before the Court of whether the statute gave the Attorney General adequate guidance regarding whether the Act’s requirements apply to pre-Act, in addition to, post-Act offenders.)<sup>157</sup> But during the government’s argument, Justice Ginsburg then expressed concern to Principal Deputy Solicitor General Wall about the fairness of an Act that might impose registration requirements based on a thirty-year-old conviction with inadequate notice.<sup>158</sup> Wall responded that perhaps pre-Act offenders could in theory bring as-applied due process challenges on this ground, but such a challenge would not apply to Gundy as he received notice of the registration requirements in 2012 before

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<sup>154</sup> See *supra* notes 15 and accompanying text (explaining the constitutional issues relevant to the case).

<sup>155</sup> See Jennifer Mascott, *Symposium: The Appointments Clause—A Modest Take*, SCOTUSBLOG (June 22, 2018, 3:35 PM), <http://www.scotusblog.com/2018/06/symposium-the-appointments-clause-a-modest-take/>.

<sup>156</sup> See Transcript of Oral Argument, *Gundy v. United States*, at 9, available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2018/17-6086\\_6khn.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-6086_6khn.pdf).

<sup>157</sup> See *id.* at 9.

<sup>158</sup> See *id.* at 39–40.

leaving government custody.<sup>159</sup> Chief Justice Roberts’s position in the case also was not entirely clear from oral argument. He did not ask as many questions as some. To petitioner’s counsel he observed that the statute offered a standard requiring the Attorney General to apply the relevant requirements “to the maximum extent feasible”<sup>160</sup>—perhaps suggesting support for the statutory scheme as is. However, during the government’s argument, the Chief Justice noted that one key matter left undetermined within the statutory text was the precise identity of the group of people to whom the statutory requirements apply—arguably a huge gap if the Chief Justice’s suggestion is correct.<sup>161</sup>

Justice Sotomayor’s questions initially suggested that she believed one avenue for upholding the legality of the statute would be to read it with a narrowing construction that requires the Attorney General to impose registration requirements on pre-Act offenders subject just to a feasibility limitation.<sup>162</sup> That said, later in the arguments, Justice Sotomayor expressed concern to General Wall about whether the Act would leave future Attorneys General too much room to change the government’s position on the applicability of SORNA requirements to pre-Act offenders.<sup>163</sup> Even Justice Breyer’s position in the case seemed to become a little less clear as the arguments continued. Justice Breyer primarily expressed great skepticism for petitioner’s position, intimating that the Court might need to find as many as 300,000 other statutory provisions unlawful under petitioner’s theory of non-delegation.<sup>164</sup> But at the very end of the argument session in an exchange with General Wall, Justice Breyer seemed to ponder whether the Attorney General’s role as the nation’s chief prosecutor might create a need for a tougher delegation standard than the broad general standards like “in the public interest” permitted in other agency-related contexts.<sup>165</sup>

Justice Kagan, on the other hand, seemed clearly persuaded that the Act’s preamble regarding the need for a comprehensive registry and the Act’s broad definition of sex offenders provided ample guidance for the Attorney General’s role in applying the requirements to pre-Act offenders.<sup>166</sup> Justice Alito limited his questioning to the petitioner. He did not ask many questions, but the ones he did ask requested petitioner’s counsel to specify just how much of a standard the statute needed to include before it would amount to a constitutional delegation of power. Specifically, Justice Alito inquired

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<sup>159</sup> *See id.* at 40.

<sup>160</sup> *See id.* at 4.

<sup>161</sup> *See id.* at 31–32.

<sup>162</sup> *See id.* at 22–23. Justice Sotomayor also asked General Wall about the potential source for such a limiting construction, expressing concern that a feasibility limitation was not directly apparent from the face of the relevant statutory text. *See id.* at 52–55.

<sup>163</sup> *See id.* at 35–36.

<sup>164</sup> *See id.* at 25–26.

<sup>165</sup> *See id.* at 6–8, 45, 56–57.

<sup>166</sup> *See, e.g., id.* at 9–10, 11–14, 23–25, 27–29.

whether the constitutional delegation standard should differ in civil and criminal contexts and whether a standard requiring just feasibility and the promotion of public safety would be sufficient.<sup>167</sup> In contrast, as anticipated, Justice Gorsuch's questions suggested that he continues to believe that SORNA lacks sufficient standards to pass muster under constitutional nondelegation requirements.<sup>168</sup>

## CONCLUSION

Rather than issuing a very narrow fact-bound decision, it would be preferable for the Court to take the opportunity in *Gundy* to provide more clarity on the boundaries protecting the Article I Vesting Clause, perhaps by revisiting whether the “intelligible principle” standard properly captures the Constitution's original meaning. If the Justices are willing to go down that road, they may consider Gary Lawson's scholarship on the original meaning of the nondelegation doctrine. In his landmark article on the topic, Lawson explains, “[i]t is well within the original meaning of ‘[t]he executive Power’ for executive officials to exercise discretion with respect to minor or ancillary matters in the implementation of statutes . . . . But a statute that leaves to executive (or judicial) discretion matters that are of basic importance to the statutory scheme is not a ‘proper’ executory statute.”<sup>169</sup> Or, as Justice Thomas put it in his 2015 concurrence, the formulation of “generally applicable rules of private conduct” necessarily constitutes the exercise of legislative power and, thus, must be done by Congress.<sup>170</sup>

Some scholars have attempted to contest these original meaning arguments on their own terms by contending that there never really was a robust federal nondelegation doctrine in the Supreme Court, even at the Founding.<sup>171</sup> But Professor Joseph Postell recently published a compelling piece breaking down this attempt to deconstruct the original meaning analysis. Postell first notes that even the nondelegation deconstructionists found that federal nondelegation cases from 1825 to 1940 resulted in a 12% invalidation rate of the challenged statutory provisions.<sup>172</sup> Further, Postell observes: (1) These data omit all of the occasions on which legislatures relied on nondelegation limitations to avoid enacting overly broad statutes “in the first place.”<sup>173</sup> He goes on to note that, indeed, “[t]he historical record reveals that, on many

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<sup>167</sup> See *id.* at 6, 16–18.

<sup>168</sup> See, e.g., *id.* at 15–16, 37–38.

<sup>169</sup> Lawson, *supra* note 4, at 334.

<sup>170</sup> *Dept. of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring).

<sup>171</sup> See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PENN. L. REV. 379, 381 (2017).

<sup>172</sup> Joseph Postell & Paul D. Moreno, *Not Dead Yet—Or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONSTITUTIONAL STUDIES 41, 42 (2018).

<sup>173</sup> *Id.* at 43.



important occasions, Congress and the state legislatures rewrote statutory provisions as a consequence of the nondelegation principle”—statutes that consequently never would have been challenged in court.<sup>174</sup> (2) Also, the invalidation dataset analysis neglects to distinguish between the various categories of delegations being upheld by the pre-twentieth century courts.<sup>175</sup> Thus, some of the approved delegations may have involved statutes delegating—or calling for the exercise of—what was really executive power, not delegating authority that was truly legislative in nature.<sup>176</sup> (3) And, finally, Postell explains that it bears noting that the 17% invalidation rate (combining federal and state challenges) “might actually be indicative of a robust doctrine” as theorists in the past have “claimed that an almost identical invalidation rate was evidence” of robust constitutional constraints in other areas of the law.<sup>177</sup>

Scholars continue year after year to debate the constitutional limits of Congress’s authority to delegate power. Will the Court now take the opportunity in *Gundy* to revisit the contours of the “intelligible principle” doctrine and provide more guidance to Congress on how to properly guide executive discretion when authorizing administrative action? We shall see. The stakes are high. The outcome of this case will determine whether Congress has to take responsibility for applying SORNA registration requirements to more than 500,000 pre-enactment sex offenders or whether the Attorney General is stuck with the task. At least four members of the Court believed this issue was sufficiently important to justify Supreme Court review. Moreover, the proper division of labor between Congress and the executive branch in crafting federal policy is one of the great separation-of-powers questions of our time, particularly in light of the deference that administrative agencies receive when formulating policy within their delegated authority. By clarifying the constitutional contours of any potential nondelegation holding that the Court might reach in *Gundy*, the Court could communicate beneficial boundaries on future congressional action, calling on Congress to legislate more precise instructions on SORNA’s retroactive applicability and to legislate more precise guidance for regulatory activity across the board.

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*; see also Lawson, *supra* note 4, at 360–61.

<sup>177</sup> See Postell & Moreno, *supra* note 172, at 43–44.