No. 16-5046

IN THE SUPREME COURT OF THE UNITED STATES

GLEN EARL COTONUTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 2250(a) if Title 18 of the United States Code imposes criminal penalties on a person who is required to register under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 et seq., travels in interstate commerce, and knowingly fails to register. The question presented is whether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. 16913(d) violates the nondelegation doctrine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not published in the Federal Reporter but is reprinted at 633 Fed. Appx. 501.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2016. On April 15, 2016, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including June 24, 2016. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on one count of failing to register as a sex offender, in violation of 18 U.S.C. 2250(a). 12/19/13 Judgment 1. He was sentenced to 20 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed his conviction. Pet. App. A1-A10. Petitioner's supervised release subsequently was revoked for failing to participate in sex offender treatment as directed by the Probation Officer and failing to comply with the rules of residential reentry, for which he was sentenced to six additional months of imprisonment. 12/31/15 Judgment 1-2.

1. Since at least 1996, all 50 States and the District of Columbia have had sex-offender-registration laws. See Smith v. Doe, 538 U.S. 84, 90 (2003). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA or Act), 42 U.S.C. 16901 et seq., which "establishe[d] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. 16901.

SORNA requires, as a matter of federal law, every sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C.

16913(a). SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 42 U.S.C. 16911(1); see 42 U.S.C. 16911(5)-(7). SORNA provides that a sex offender "shall initially register" either "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or, "if the sex offender is not sentenced to a term of imprisonment," "not later than 3 business days after being sentenced for that offense." 42 U.S.C. 16913(b). SORNA also directs that, "not later than 3 business days after each change of name, residence, employment, or student status," a sex offender "shall * * * appear in person in at least 1 jurisdiction involved pursuant to subsection (a) [i.e., where the sex offender resides, is an employee, or is a student] and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 42 U.S.C. 16913(c). And SORNA delegates to the Attorney General the permissive authority to promulgate regulations in certain situations:

> Initial registration of sex offenders unable to comply with subsection (b) of this section
>
> 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).

42 U.S.C. 16913(d).

To enforce these registration requirements, Congress created a federal criminal offense penalizing nonregistration. See 18 U.S.C. 2250(a). Under 18 U.S.C. 2250(a), a convicted sex offender who "is required to register under [SORNA]," "travels in interstate or foreign commerce," and then "knowingly fails to register or update a registration as required by [SORNA]" may be punished by up to ten years of imprisonment. Carr v. United States, 560 U.S. 438, 445 (2010) (quoting 18 U.S.C. 2250(a)). Sex offenders convicted before the Act's enactment on July 27, 2006, were not "required to register under [SORNA]" until the Attorney General exercised his delegated authority under 42 U.S.C. 16913(d) to "validly specif[y] that the Act's registration provisions apply to them." Reynolds v. United States, 132 S. Ct. 975, 980 (2012).

On February 28, 2007, the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. On July 2, 2008, the Attorney General (in coordination with the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking) promulgated final guidelines for the States and other jurisdictions on matters of SORNA's

implementation. See The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030. The guidelines were issued after notice and comment and they reaffirmed SORNA's application to all sex offenders. Id. at 38,035-38,036, 38,046, 38,063.[1]

2. In 1989, petitioner pleaded guilty in the United States District Court for the District of Colorado to one count of Abusive Sexual Contact (felony), involving the sexual abuse of his three-year-old niece. Presentence Investigation Report (PSR) ¶ 38. He was sentenced to 27 months of imprisonment, and 12 additional months after his supervised release was revoked. Ibid.

In 1993, petitioner was convicted in the United States District Court for the District of Colorado of Aggravated Sexual Abuse of a Child (felony), in violation of 18 U.S.C. 2241 (1988), after pleading guilty to sexually abusing his five-year-old and seven-year-old daughters. PSR ¶ 40. He was sentenced to 188 months of imprisonment, and his subsequent supervised release was revoked three times. Ibid. Petitioner was

[1] On December 29, 2010, the Federal Register published an Attorney General order finalizing the interim rule, with one clarifying change in an example to avoid any inconsistency with this Court's decision in Carr, supra. See Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,853 (28 C.F.R. 72.3).

sentenced to 13 months of imprisonment for the last supervised release violation and was released from that sentence on June 22, 2012. Ibid.

Both petitioner's 1989 offense and his 1993 offense involved direct sexual contact with children under the age of eight. As a result, petitioner was classified as a Tier III Sex Offender pursuant to SORNA. See 42 U.S.C. 16911(4). SORNA therefore requires petitioner to register as a sex offender for the remainder of his life. PSR ¶ 6 & n.1.

For two months in the summer of 2012, beginning with his release from prison on June 22, 2012, petitioner entered, left, and resided in Indian country without registering as a sex offender. PSR ¶ 6 n.1. Petitioner did not register as a sex offender until August 15, 2012, after a Deputy United States Marshal warned petitioner that he was not in compliance with SORNA's registration requirements. PSR ¶ 7.

3. On October 1, 2012, petitioner was indicted in the United States District Court for the District of Colorado on one count of knowingly failing to register as a sex offender, in violation of 18 U.S.C. 2250(a). Indictment 1-2. Petitioner moved to dismiss the indictment before trial on the grounds that SORNA's registration provision violates the nondelegation doctrine. The district court denied the motion. Pet. App. A11-A15.

Following a jury trial, petitioner was convicted of failing to register as a sex offender, in violation of 18 U.S.C. 2250(a). PSR ¶ 2. The Probation Office calculated his advisory Sentencing Guidelines range as 33 to 41 months of imprisonment, based on a total offense level of 16 and a criminal history category of IV. PSR ¶ 92. The district court sentenced petitioner below that range, to 20 months of imprisonment, to be followed by five years of supervised release. 12/19/13 Judgment 2-3. After his release, the court found that petitioner had violated the terms of his supervised release and sentenced him to six additional months of imprisonment. 12/31/15 Judgment 1-2.

4. The court of appeals affirmed. Pet. App. A1-A10. As relevant here, the court concluded that Section 16913(d)'s delegation to the Attorney General does not violate the nondelegation doctrine. See id. at A4-A7. The court found that it was bound by its prior "controlling decision" in United States v. Nichols, 775 F.3d 1225 (10th Cir. 2014), rev'd on other grounds, 136 S. Ct. 1113 (2016). Pet. App. A5. The court further observed that SORNA's statutory scheme "provided the Attorney General with information that is highly relevant to the question SORNA placed before him." Id. at A6. First, the court pointed to SORNA's policy statement, which "articulates a clear goal of creating 'a comprehensive national system for . . .

registration' to 'protect the public from sex offenders,'" an objective that "would counsel in favor of applying the registration requirement to all pre-Act offenders." Ibid. (quoting 42 U.S.C. 16901). The court further noted that SORNA "clearly delineate[s] the boundaries of the authority . . . delegated to the Attorney General," by specifying "where the offender must register, the timeframe within which the offender must register, the method of registration, and the information the offender must include in the registry." Ibid. (brackets in original) (quoting Nichols, 775 F.3d at 1231-1232). Such details, the court found, "do not just narrow the question the Attorney General must address, but also guide him in answering that question." Ibid. The court therefore reaffirmed its prior conclusion "that SORNA effects a constitutional transfer of authority to the Attorney General." Id. at A7 (citing Nichols, 775 F.3d at 1232 n.3).

Judge Lucero concurred. Pet. App. A10. While he recognized that the court of appeals' "reasoning and conclusion are compelled by our precedent," he expressed his "continued view that SORNA does not contain an intelligible principle upon which the Attorney General can evaluate SORNA's applicability to previous offenders." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 15-27) that SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. 16913(d) violates the nondelegation doctrine. As petitioner acknowledges (Pet. 24), every court of appeals to consider a nondelegation challenge to SORNA has rejected it, ten in published decisions and one in multiple unpublished decisions. See, e.g., United States v. Nichols, 775 F.3d 1225, 1231-1232 (10th Cir. 2014), rev'd on other grounds, 136 S. Ct. 1113 (2016); United States v. Richardson, 754 F.3d 1143, 1145-1146 (9th Cir. 2014); United States v. Cooper, 750 F.3d 263, 266-272 (3d Cir.), cert. denied, 135 S. Ct. 209 (2014); United States v. Goodwin, 717 F.3d 511, 516-517 (7th Cir.), cert. denied, 134 S. Ct. 334 (2013); United States v. Kuehl, 706 F.3d 917, 918-920 (8th Cir. 2013); United States v. Parks, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 133 S. Ct. 2021 (2013); United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012); United States v. Guzman, 591 F.3d 83, 91-93 (2d Cir.), cert. denied, 561 U.S. 1019 (2010); United States v. Whaley, 577 F.3d 254, 262-264 (5th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1212-1214 (11th Cir. 2009); see United States v. Sampsell, 541 Fed. Appx. 258, 259 (4th Cir. 2013) (noting that the Fourth Circuit has "consistently rejected similar non-delegation challenges in unpublished decisions").

This Court has repeatedly denied petitions for writs of certiorari raising the same nondelegation claim, and it has continued to do so after Justice Scalia's January 2012 dissenting opinion in Reynolds v. United States, 132 S. Ct. 975, 985-987, on which petitioner relies (Pet. 19). See Nichols v. United States, 136 S. Ct. 445 (2015) (No. 15-5238) (limiting grant of a writ of certiorari to the first question presented and thereby excluding review of nondelegation challenge); see, e.g., Harges v. United States, 135 S. Ct. 507 (2014) (No. 14-6748); Stacey v. United States, 135 S. Ct. 419 (2014) (No. 14-6321); Crosby v. United States, 135 S. Ct. 390 (2014) (No. 14-6167); Cooper v. United States, 135 S. Ct. 209 (2014) (No. 14-5174); Atkins v. United States, 134 S. Ct. 56 (2013) (No. 12-9062); Mitchell v. United States, 133 S. Ct. 2854 (2013) (No. 12-8807); Parks v. United States, 133 S. Ct. 2021 (2013) (No. 12-8185); Clark v. United States, 133 S. Ct. 930 (2013) (No. 12-6067); Rogers v. United States, 133 S. Ct. 157 (2012) (No. 11-10450); Yelloweagle v. United States, 132 S. Ct. 1969 (2012) (No. 11-7553); Johnson v. United States, 132 S. Ct. 135 (2011) (No. 10-10330); Beasley v. United States, 562 U.S. 801 (2010) (No. 09-10316); May v. United States, 556 U.S. 1258 (2009) (No. 08-7997). There is no reason for a different outcome here.

This Court's decisions recognize that the nondelegation doctrine is satisfied when a statutory grant of authority sets

forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." Mistretta v. United States, 488 U.S. 361, 372-373 (1989) (citations omitted). As the Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle," and it has not found any in the last 80 years. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001) (referring to A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935)); see Loving v. United States, 517 U.S. 748, 771 (1996) (same); Mistretta, 488 U.S. at 373 (same); Mistretta, 488 U.S. at 416 (Scalia, J., dissenting) (explaining 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").

In enacting SORNA, Congress "broadly set policy goals that guide the Attorney General" -- it "created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders." Ambert, 561 F.3d at 1213. Congress appropriately identified the Attorney General as its agent, see 42 U.S.C. 16913(d), and it "made virtually every legislative determination in enacting SORNA, which has the effect of constricting the Attorney

General's discretion to a narrow and defined category." Ambert, 561 F.3d at 1214; see Parks, 698 F.3d at 7-8 (explaining that Congress "delegated to the Attorney General the judgment whether [the regulatory policy underlying the registration system] 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"); Guzman, 591 F.3d at 93 (explaining that Congress delineated the crimes requiring registration, the circumstances of registration, the information required to register, and the penalties for non-registration, leaving to the Attorney General only the applicability of SORNA to a discrete set of persons). This "Court has upheld much broader delegations than" Section 16913(d). Guzman, 591 F.3d at 93 (citing Mistretta, 488 U.S. at 372-373); cf. Touby v. United States, 500 U.S. 160, 165 (1991) (upholding the Attorney General's power to schedule controlled substances on a temporary basis).

Petitioner argues (Pet. 17-21) that a standard higher than the "intelligible principle" test should apply when Congress delegates authority to promulgate regulations that can lead to criminal sanctions. This Court did not need to resolve that question in Touby because the statute at issue in that case -- Section 201(h) of the Controlled Substances Act, 21 U.S.C.

811(h)(1) (1988)[2] -- exceeded the "intelligible principle" standard by "plac[ing] multiple specific restrictions" on the Attorney General's authority to temporarily schedule controlled substances that "meaningfully constrain[ed] the Attorney General's discretion to define criminal conduct." See 500 U.S. at 165-167. Since Touby, the courts of appeals have "decline[d] to abandon the well-settled 'intelligible principle' standard for the undeveloped 'meaningfully constrains' standard." Nichols, 775 F.3d at 1232; see Cooper, 750 F.3d at 271 (rejecting application of the "meaningfully constrains" standard, which "has been referenced in only a handful of cases, none of which set[s] forth factors or a substantive analytical framework against which to assess whether a specific delegation satisfies that standard."). This Court should not reconsider the well-established "intelligible principle" standard in the absence of a circuit split on the question.

[2] Section 811(h)(1) authorizes the Attorney General to use expedited and streamlined procedures to schedule a substance temporarily "to avoid an imminent hazard to the public safety." 21 U.S.C. 811(h)(1); see Touby, 500 U.S. at 163-164 (describing the statutory scheme).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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