No. 17-6086

In The
Supreme Court of the United States

HERMAN AVERY GUNDY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

1) Whether the Intelligible Principle test is compatible with the original meaning and purpose of the Constitution's Separation of Powers design.

2) Whether the approach this Court has applied in Void for Vagueness cases would more faithfully enforce the Non-Delegation Doctrine.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation and advocacy in matters affecting the public interest. PLF helps mainstream Americans defend constitutionally mandated Separation of Powers, limited government, private property rights, individual freedom, and free enterprise. PLF is the most experienced public interest legal organization defending the Separation of Powers in the arena of administrative law. In the last 12 years, this Court has ruled in favor of four parties PLF has directly represented (two decisions were unanimous) and participated as amicus in several other cases before this Court involving Separation of Powers issues. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *Lucia v. SEC*, 138 S. Ct. 736, *cert. granted* (2018) (administrative law judges and the Appointments Clause); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (Auer

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

PLF's adherence to constitutional principle and broad litigation experience offer the Court an important perspective that will assist in reviewing this case. Because the erroneous decision below violates core Separation of Powers principles, PLF supports reversal.

INTRODUCTION AND SUMMARY OF ARGUMENT

"It is the proud boast of our democracy that we have 'a government of laws, and not of men.'" *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting Part the First, Article XXX, of the Massachusetts Constitution of 1780). For this to be true, lawmaking and enforcement actions must remain in different hands. The text, history, and design of our Constitution make clear that this most important separation of functions and powers is part of our fundamental law.

This Court recognizes, at least in principle, that Congress may not re-delegate its legislative power.[2] "Article I, § 1, of the Constitution vests '[a]ll legislative

[2] Amicus uses the term "re-delegate" because *the people* made the original delegation of lawmaking power to Congress, and Congress is attempting a subsequent re-delegation. Other terms, including "sub-delegate," may capture a similar concept, but whatever terms are used, amicus does not think the Non-Delegation principle or its violation is distinguishable depending on the person or entity to which Congress attempts to re-delegate its lawmaking power.

Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . ." *Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 472 (2001). For that reason, "the constitutional question" in this and every Non-Delegation case "is whether the statute has delegated legislative power to the agency." *Id.* If it has, the statute granting such legislative power must be struck down.

Unfortunately, this Court has not enforced this principle in the last 83 years. No statute has been invalidated under the Non-Delegation Doctrine since 1935. *See Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). That failure is largely due to the overly deferential test this Court currently applies in Non-Delegation cases: the "Intelligible Principle" test, especially the lax version of the test applied during the last 80 years. This test asks whether a statute provides a re-delegatee of rulemaking power some "intelligible principle" to guide his rulemaking decisions. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

And yet the statute at issue in this case, the Sex Offender Notification and Registration Act (SORNA), violates even this highly permissive approach, since it provides *no* guidance to the Attorney General whatsoever in making his or her decision. Instead, Congress re-delegated to the Attorney General the sole discretion and "authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . . ." 34 U.S.C. § 20913(d) (formerly codified at 42 U.S.C. § 16913(d)). To be clear, SORNA would violate

any test this Court has yet or might in the future devise to determine if Congress crossed the line in re-delegating its lawmaking power, as Petitioner and many other amici have forcefully demonstrated. But this Court should go further than merely reversing the decision below on the narrowest of grounds. If SORNA is the only statute struck down as an excessive delegation in over 80 years, Congress will have no sense of the constitutional line it must tow. For this reason, amicus urges the Court to reexamine the Intelligible Principle test itself.

In the past, this Court has expressed hesitation to enforce a more robust Non-Delegation Doctrine, for fear that drawing such a line between permissible and impermissible executive discretion may be too difficult. *See, e.g.*, *American Trucking*, 531 U.S. at 474-75. But this hesitation is unwarranted. This Court has shown that it is fully capable of drawing such a line successfully because it already *has* drawn precisely this line in a closely related doctrine: the Void for Vagueness Doctrine. The Court has examined numerous statutes that granted so much discretion to police, prosecutors, judges, and juries that these enforcers, rather than Congress, were effectively re-delegated the power to create law according to their own preferences. This Court has, rightly, struck down these laws.

The responsibility for policing the constitutional Separation of Powers rests with the Judicial Branch and, ultimately, this Court. *See American Trucking*, 531 U.S. at 473. Amicus asks nothing more than that this Court apply the same scrutiny when the beneficiary of broad discretion is an Executive Branch rulemaker, as it does in other analogous contexts.

ARGUMENT

I

THE INTELLIGIBLE PRINCIPLE STANDARD DOES NOT EFFECTIVELY PREVENT UNCONSTITUTIONAL RE-DELEGATION OF LEGISLATIVE POWER TO EXECUTIVE AGENCIES

This Court has treated the Intelligible Principle test as the *sine qua non* of Non-Delegation Doctrine analysis for 90 years. This test debuted in *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."). In that case, a reasonable argument could have been made that the statute *did* in fact leave only interpretation and enforcement to the executive since it called for a reasonably rigorous factual determination of economic costs based on various specified factors. *See id.* at 404-05. The Court's imprecise language and other dicta did more to mislead future judges than its holding.

And in the decades since 1935, this Court has required less and less specificity in the "intelligible principles" given to the executive. As a result, Congress has been encouraged to delegate huge swaths of its legislative power over different subject matters, with the merest instruction that the relevant agency regulate "in the public interest." *See, e.g.*, The Communications Act of 1934, 47 U.S.C. §§ 151, 201(b) (delegating power to the FCC to "prescribe such rules

and regulations as may be necessary in the public interest to carry out the provisions" of the Act, which broadly grants lawmaking power over "communications services"). OSHA's organic statute grants it power to issue workplace standards that are "reasonably necessary *or appropriate* to provide safe or healthful employment and places of employment." Occupational Health and Safety Act, 29 U.S.C. § 652(8) (1998). *See also* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 Va. L. Rev. 1407 (2008) (questioning whether OSHA statute even satisfies the intelligible principle standard).

Even this Court has frequently observed the inherent ambiguity in the reach of the Clean Water Act's term "navigable waters." *See, e.g., Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear."); *accord U.S. Army Corps of Engineers*, 136 S. Ct. at 1816 (Kennedy, J., joined by Alito, Thomas, J., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern."). Still worse, the Executive Branch maintains the position that EPA can bring administrative or judicial enforcement actions (which can be civil or criminal) wherever it considers an illegal discharge to navigable waters to have occurred, even where the Army Corps takes the view that navigable waters were not involved. *Id.* at 1817 (Kennedy, J., joined by Alito, Thomas, J., concurring).

Whether the Court's laxity since 1937 aided the growth of the regulatory state or not, the power and scope of regulatory agencies today make further broad delegations of lawmaking power especially concerning. *See City of Arlington*, *v. F.C.C.*, 569 U.S.

290, 315 (2013) (Roberts, C.J., dissenting) (noting "the danger posed by the growing power of the administrative state cannot be dismissed"). For this and related reasons, this Court should hold that the Intelligible Principle standard, at least as it has been interpreted in recent decades, does not effectively prevent the unconstitutional re-delegation of legislative power that the Non-Delegation Doctrine explicitly prohibits.

A. The Constitution's Text and Original Meaning Bar the Re-Delegation of Legislative Power

Despite modern debates over the degree to which Congress can or should delegate rulemaking authority, there can be no doubt that the Constitution requires *some* meaningful limitation on this practice. "To the Framers, the Separation of Powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring).

In the opening lines of the Constitution, the American people vested *all* legislative power in the United States Congress. *See* U.S. Const. art. I, § 1. The people granted the legislative power to Congress exclusively, just as the people granted coordinate powers exclusively to the Executive and Judicial Branches. S*ee Dep't of Transp. v. Association of American Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring). "When the Government is called upon to perform a function that requires an

exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Id.*

Unlike the grants of executive and judicial power, which may include powers inherent in a chief executive or court, Congress's legislative power is expressly limited to those powers granted in the Constitution. *See* U.S. Const. art. 1, § 1 ("All legislative powers *herein granted* . . . .") (emphasis added). *See also* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 337 (2002) ("Congress can exercise only those legislative powers referenced elsewhere in the Constitution rather than any imaginable powers that bear the label 'legislative.'"). Further, the subjects upon which Congress is empowered to legislate are enumerated in Article I. The theory of enumeration itself also strongly supports a bar on re-delegation of lawmaking power, for there is no re-delegation power provided, and detailed checks on lawmaking power in the original grant by the people to Congress would be worthless if a re-delegation power was implied. *See* Lawson, *supra*, at n.32.

Early practice affirms this principle. Some have suggested that instances of special rulemaking in the early days of the Republic provide a precedent for modern rulemaking-as-policymaking. But these early cases are not comparable to the rules set down by the modern administrative state. The first Congress did cede some special rulemaking authority to the executive and judiciary pursuant to its enumerated powers relating to the military, the Indian Commerce power, and federal court procedures. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L.

Rev. 405, 411-12 (2008). But no one doubted that Congress cannot delegate "powers which are strictly and *exclusively* legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825) (emphasis added); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."). At its most concrete, the power to legislate is the power to prescribe "the rules by which the duties and rights of every citizen are to be regulated." *The Federalist No. 78* (Alexander Hamilton) (J. Cooke ed. 1961).

B. The Intelligible Principle Standard Frustrates Democratic Accountability

The Declaration of Independence labels as self-evident that the legitimacy of government action is directly predicated on the consent of the governed. The Declaration of Independence ¶ 2 (U.S. 1776). Consent in a representative form of government is secured through participation in the democratic process. *See* Bernard Manin, *The Principles of Representative Government* 175, 178 (Cambridge University Press 1997) ("The central institution of representative government is election . . . ."). It is through their elected representatives that citizens are made "present" in their government. *Id.* And it is through the operation of democratic oversight that we can justify describing any form of government as "by the people." *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531, 532-33 (1998). *See also The Federalist No. 39* (James

Madison) (defining a republic as "a government which derives all its powers directly or indirectly from the great body of the people"). "The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted [sic] with it should be kept in independence [sic] on the people, by a short duration of their appointments." *Id.* Therefore, "[t]he natural cure for an ill-administration, in a popular or representative constitution, is a change of men." *The Federalist No. 21* (Alexander Hamilton).

But under the minimal requirements of the Intelligible Principle test, this carefully crafted electoral system no longer ensures that elected lawmakers are politically accountable for the vast majority of legal rules and obligations imposed in our Republic, because Congress can employ purposefully broad and ambiguous statutes as a means to avoid democratic accountability. *See generally* David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale University Press 1995). By giving the bulk of legislative responsibility to executive agencies, Congress has found a way to insulate *itself* from the voters. *Id.* The result of this dynamic "is power without accountability—a useful formula politically but an abysmal one for policymaking." James Gattuso, *Testimony before The Subcommittee on Regulatory Reform, Commercial and Antitrust Law in the Committee on the Judiciary*, U.S. House of Representatives (Mar. 5, 2013).[3] "[L]egislative abdication is the reigning modus operandi," with the

[3] https://www.heritage.org/testimony/reins-act-2013-promoting-jobs-growth-and-competitiveness. (last visited May 15, 2018).

result being "an executive that subsumes much of the tripartite structure of government." Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2316 (2006).

And despite "widely assumed [] instruments of political control of bureaucratic policymaking," such as complex statutory procedures, notice and comment periods, and the requirements that agencies provide a reasonable interpretation of their enabling statutes, Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & Pol. 129-30 (2013), agencies themselves have little accountability to Congress. *See, e.g.*, Jonathan Turley, *The rise of the fourth branch of government*, Washington Post (May 24, 2013) (comparing the effectiveness of congressional control over agency action to operating a train with an on/off switch). Nor are presidential elections an adequate substitute. Rationally ignorant voters have little concrete idea why they are voting for a particular candidate, *see generally* Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton University Press 2007), and even less regarding specific policy proposals for the Executive Branch, Robert A. Dahl, *Myth of the Presidential Mandate*, 105 Pol. Sci. Q. 355, 355–72 (1990). The unlawful delegation of rulemaking authority to agency career employees, *see generally* Complaint, *Moose Jooce, et al., v. FDA*, No. 1:18-cv-00203-CRC (D.D.C. Jan 30, 2018),[4] protection of even relatively high level policy staff through civil service rules, and the natural institutional interests of

[4]https://pacificlegal.org/documents/complaint-vape-dc/.

agencies, *see* Ernesto Dal Bo, *Regulatory Capture: An Overview*, Oxford Review of Economic Policy, vol. 22 no. 2 (2006), further insulate agencies and their staffs from presidential oversight.

The result is a class of unelected bureaucrats beyond the reach of the electorate that are responsible for the bulk of lawmaking. *See* Turley, *supra* ("One study found that in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.").[5] According to the Founders, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments . . . ." *The Federalist No. 51* (Alexander Hamilton or James Madison). But the current dynamic is something that the Framers did not foresee: a branch of the federal government purposefully giving away its own power to avoid democratic consequences.

[5]https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.600a52f35bee.

C. When Combined with Doctrines of Judicial Deference, the Intelligible Principle Test Leads to Arbitrary Individual Rights Violations

In addition to lacking a textual basis in the Constitution and frustrating democratic accountability, the Intelligible Principle test, when combined with judicial deference to executive agency interpretations of statutes, can lead to arbitrary violations of individual constitutional rights.

During the Founding era, "the United States—unlike European countries—lacked a well-defined bureaucratic apparatus." Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, 18 (Harvard University Press 1990). Therefore, regulations "could be found principally in judge-made rules of the common law. From corporate and property law to family law, judges performed the basic regulatory functions that might otherwise have been carried out by bureaucrats." *Id.* This ancient judicial function is reflected in our constitutional design and our earliest legal precedents. *See* U.S. Const. art. III, § 1 (the people vest judicial power in "one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.") *and Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014), Oral Argument Trans., p. 51 (statement of Chief Justice Roberts) (describing the authority of federal courts to decide cases as a "constitutional birthright").

"Courts were preferable to administrators, in the Founders' view, because of judicial adherence to the intentions of the law as opposed to administrators' using the law as mere guidance for their own lawmaking." Joseph Postell, *From Administrative State to Constitutional Government*.[6] As the body constitutionally charged with interpreting and applying the law, courts function as "neutral decision makers" insulated from political pressures "who will apply the law as it is, not as they wish it to be." *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

1. General Judicial Deference Doctrines

But in recent decades this judicial function was weakened for a variety of questionable justifications. The Intelligible Principle test allows Congress to delegate legislative authority if a statute provides the barest of guidelines. But under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), executive agencies can go a step further by imposing their *own interpretations* of the statute's "intelligible principle" on both the courts and the public. *See generally* Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 Harv. L. Rev. 2043 (2010). Relatedly, under *Auer v. Robbins*, 519 U.S. 452 (1997), agencies are given free interpretative rein over not only their own enabling statutes, but over the interpretation of their own regulations. *See generally* Conor Clarke, *The Uneasy Case Against Auer and Seminole Rock*, 33 Yale L. & Pol'y Rev. 175 (2014). Finally, under *National Cable*

[6] http://thf_media.s3.amazonaws.com/2012/pdf/sr116.pdf.

& Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005), agencies are empowered to toggle from one interpretation to another, depending upon nothing more than the ebb and flow of political power. *See generally* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of the Law: A Brand X Doctrine of Constitutional Avoidance*, 64 Admin. L. Rev., 139-90 (2012). The collective result of these cases is not merely the improper delegation of legislative power to the Executive Branch, but rather the creation of a whole new category of lawmaking power vested in administrative agencies with neither the consent of the people nor judicial review. Such unchecked power abrogates many cherished constitutional guarantees.

As a result of minimal guidance from Congress and agency interpretations owed extreme judicial deference, an entire host of otherwise fundamental constitutional protections are cast aside when agencies apply their vast regulatory power to individual Americans. Bedrock protections like the Rule of Lenity, which instructs courts to interpret ambiguous criminal laws to favor individuals charged—*United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37 (1820)—are rejected for deference to agency interpretations. "[Deference doctrines] allow one administration to criminalize conduct within the scope of [an] ambiguity, the next administration to decriminalize it, and the third to recriminalize it, all without any direction from Congress." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013).

2. The "No Law to Apply" Doctrine Is Routinely Abused

A particularly problematic example of mixing the Intelligible Principle standard with other deference doctrines is the so-called "no law to apply" doctrine. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (discussing "statutes [] drawn in such broad terms that in a given case there is no law to apply."). Under decisions by this Court, judicial review of final agency action is unavailable under the Administrative Procedure Act when Congress has provided no substantive law to apply. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Scholars have noted "the tension between the classic Non-Delegation claim and this unreviewability doctrine." Thomas W. Merrill, *Delegation and Judicial Review*, 33 Harv. J.L. & Pub. Pol'y 73, 82 (2010). "The Non-Delegation Doctrine says that Congress must supply an intelligible principle to guide executive action, in part to provide a basis for meaningful judicial review; the unreviewability doctrine says that if Congress supplies no principle at all the action is unreviewable." *Id.* Yet courts have refused to strike down such statutes for want of an intelligible principle, thereby allowing executive agencies to have it both ways: the statute granting them power survives, and the agency discretion stands completely unchecked.

The "no law to apply" doctrine has been greatly expanded beyond its original context by several federal circuit courts to insulate a wide range of decisions that profoundly impact property rights and individual livelihoods. *See, e.g.*, *Building Industry Association of the Bay Area v. U.S. Dep't of Commerce*,

792 F.3d 1027, 1034 (9th Cir. 2015) (relying upon "no law to apply doctrine" to deny review of decision not to exclude an area from a critical habitat designation under the Endangered Species Act). Like the Ninth Circuit, the Fifth Circuit has held that an agency decision not to exclude an area from a critical habitat designation for an endangered species—despite dramatic economic impacts to the land owner and absolutely no benefit to the species—is immune from judicial review for want of any law to apply to such a decision. *See Markle Interests, L.L.C., v. U.S. Fish & Wildlife Serv.,* 827 F.3d 462 (5th Cir. 2016), *cert. granted, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.,* 138 S. Ct. 924 (2018). These decisions all show the extent to which the "intelligible principle" standard has been reduced to a fig leaf: a law that grants absolute and unreviewable discretion to an agency official cannot also be said to contain a sufficiently definitive "intelligible principle" to satisfy Non-Delegation.

The combined effect of the Intelligible Principle test and extreme judicial deference is to move from a government with legislative power in elected Members of Congress to a government that, through the Executive Branch (including bureaucracies insulated even from presidential control with for-cause removal protections), acts arbitrarily and without any check or balance on its authority. To remedy this constitutionally perilous situation, this Court should hold that the current Intelligible Principle test does not effectively prevent the unconstitutional re-delegation of legislative power, and should instead rely upon a workable and analogous line already in operation with deep roots in the common law.

II

THIS COURT IS CAPABLE OF DRAWING A MORE EFFECTIVE LINE TO PREVENT UNCONSTITUTIONAL RE-DELEGATIONS

Reaffirming the Non-Delegation Doctrine in theory still leaves a practical question for the Court to address. Over the last several decades, several members of this Court have suggested that even if delegation is impermissible *in principle*, the difficulty in drawing the line between impermissible executive lawmaking and permissible executive discretion may be particularly difficult and elude judicial definition. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."). *See also American Trucking*, 531 U.S. at 474-75 ("[W]e have '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.'") (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). Some scholars have likewise argued that practical line-drawing difficulties make enforcing the doctrine difficult or impossible. *See, e.g.*, Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775, 791 (1999) ("The line-drawing problems are simply insuperable, which is why the Supreme Court . . . has resisted any robust nondelegation doctrine . . . ."); Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York*: More Than "A Dime's Worth of*

Difference," 49 Cath. U. L. Rev. 337, 415 (2000) (noting this Court's refusal to "tackle the line-drawing problem of how to invest new life in the non-delegation doctrine without unleashing a parade of horribles . . . .").

This reluctance is misguided. This Court is demonstrably capable of finding and enforcing the line past which discretion turns into lawmaking power, because this Court has for many years *already* drawn such a line in a closely analogous doctrine: Void for Vagueness cases.

A. The Void for Vagueness and Non-Delegation Doctrines Serve the Same Separation of Powers Purpose

This Court has consistently identified two independent justifications for invalidating impermissibly vague statutes. The first of these justifications is the Due Process right of fair notice: because this Court "assume[s] that man is free to steer between lawful and unlawful conduct," this Court "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The second justification is structural: this Court insists that "laws must provide explicit standards for those who apply them," because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ." *Id.* at 108-09. This Court recognized as far back as 1875 that "if the legislature could set a net large enough to catch all

possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large," the effect would "to some extent, substitute the judicial for the legislative department of government." *United States v. Reese*, 92 U.S. 214, 221 (1875). *See also United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92 (1921) (noting that vague laws "delegate legislative power"); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227-28 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (observing that vague laws not only "risk allowing judges to assume legislative power" but also "threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions").

It is the second of these two purposes that is directly comparable to the Non-Delegation Doctrine. Just like the Non-Delegation Doctrine, this aspect of the Void for Vagueness Doctrine "is a corollary of the Separation of Powers—requiring that Congress, rather than the Executive or Judicial Branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212 (plurality op.); *see also id.* at 1227 (Gorsuch, J., concurring in part and concurring in the judgment) ("[I]t would be a mistake to overlook the [Void for Vagueness] doctrine's . . . debt to the separation of powers."). And just like the Non-Delegation Doctrine, this aspect of the Void for Vagueness Doctrine is necessitated by the Constitution's vesting of lawmaking power solely in the Legislative Branch. Since "legislatures may not consent, through the delegation of broad discretion, to executive lawmaking, . . . vague laws are objectionable because they vest so much discretion in the police that 'enforcement' decisions are, in effect, lawmaking."

Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 Vand. L. Rev. 1497, 1550 (2007). Thus, "[v]ague statutes have the effect of delegating lawmaking authority to the executive," thereby making it "likely that any individual enforcement decision will be based on a construction of the statute that accords with the executive's unstated policy goals . . . ." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1806 (2012). *See also* Carissa Byrne Hessick, *Vagueness Principles*, 48 Ariz. St. L.J. 1137, 1145 (2016). ("[T]he non-delegation principle underlying the vagueness doctrine is a concern that vague laws allow law enforcement and fact finders to pursue their own policy agenda.").

The Void for Vagueness and Non-Delegation Doctrines are thus closely related variants of the same fundamental principle: that legislative power may not be re-delegated from the legislature to any other government actor or third party. The two doctrines differ only in the *recipients* of that re-delegated power. The Void for Vagueness Doctrine requires "that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Dimaya*, 138 S. Ct. at 1212 (plurality op.) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983)). The Non-Delegation Doctrine analogously requires that a statute provide the same standards to govern the actions of Executive Branch rulemakers. But in either case, the fundamental inquiry is the same: whether a statute grants so much discretion that legislative power has effectively been re-delegated from the legislature to another entity.

The fact that the enquiry in either type of case is the same has a crucial practical consequence: this Court has *already* successfully drawn the line between permissible and impermissible grants of discretion for nearly a century, in its extensive body of Void for Vagueness cases. The cases that this Court has decided over the years serve both as an illustration that this Court is up to the line-drawing task and as a robust set of precedents that can aid this Court in drawing the same line in all Non-Delegation cases. A survey of some of the statutes that this Court has struck down as void due to their vagueness demonstrates that SORNA clearly crosses the line to impermissible delegation.

B. This Court Has Previously Invalidated Many Statutes under the Void for Vagueness Doctrine for Granting Impermissibly Broad Discretion

While this Court has not invalidated a single statute under the Non-Delegation Doctrine itself since 1935, it has regularly applied the Void for Vagueness Doctrine to strike down excessive delegations. *See* Schoenbrod, *supra*, at 42 ("[U]nder the rubric of *void for vagueness* [the Supreme Court] has regularly struck down statutes that fail to define crimes clearly, on the basis that the legislature—rather than the police, judges, and juries—should state what constitutes a crime."). This Court has—for nearly a century—successfully drawn the line separating statutes granting the normal discretion inherent in executing the law and statutes granting impermissible unguided discretion that amounts to *creation* of law. By working to find and draw this line,

the Court has successfully enforced the principle that the Legislative Branch may not re-delegate lawmaking power through overly vague laws. A survey of these cases demonstrates both that this Court is capable of drawing the line past which discretion turns to lawmaking, *and* that the discretion granted to the Attorney General by SORNA is clearly beyond that line.[7]

One of the first statutes that this Court struck down as void for vagueness made it illegal for grocers "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . . ." *L. Cohen Grocery*, 255 U.S. at 86. The Court held that this language delegated lawmaking power to individual juries because there was no "fixing by Congress of an ascertainable standard of guilt . . . ." *Id.* at 89. The terms "unjust and unreasonable," which were neither defined elsewhere in the statute nor by prior case law, were so vague that "to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Id.*

Sixteen years later, this Court invalidated a Georgia state statute prohibiting "[a]ny attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State . . . ." *Herndon v. Lowry*, 301 U.S. 242, 246 n.2

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[7] While this Court has struck down many more laws under the Void for Vagueness Doctrine than will be listed here, this survey will be limited to those where the Court explicitly invoked Separation of Powers concerns as a reason for invalidating the statute.

(1937). As the Court pointed out, this language was so broad that it might seem to apply to anyone who "ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government . . . ." *Id.* at 262. No limiting principle was established as to how long a time frame could be imagined when determining that resistance might eventually be induced. "If a jury returned a special verdict saying twenty years or even fifty years, the verdict could not be shown to be wrong." *Id.* at 263. For that reason, the law "license[d] the jury to create its own standard in each case." *Id.*

Likewise, this Court struck down as impermissibly vague a statute which made it illegal "for any person to stand or loiter upon any street or sidewalk * * * after having been requested by any police officer to move on." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965). The Court explained that such a broad law "'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.'" *Id.* (quoting *Cox v. State of Louisiana*, 379 U.S. 536, 579 (1965) (Black, J., concurring in part and dissenting in part)).

After *Shuttlesworth* came perhaps the single most analogous case to the present one, *Giaccio v. State of Pennsylvania*. In that case, this Court invalidated a Pennsylvania law which allowed juries, after acquitting a defendant of any nonfelony charge, to "determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the [court] costs . . . ." 382 U.S. 399, 400-01 (1966). As the Court explained, this statute "contain[ed] no standards at all" to guide the jury in making this choice, and thus

jurors necessarily made "determinations of the crucial issue upon their own notions of what the law should be instead of what it is." *Id.* at 403.

Giaccio is also notable as confirmation that it is not just the creation of criminal penalties that jeopardizes the Separation of Powers, but also the creation of civil penalties and other monetary obligations. Considering that the consequences of many civil enforcement regimes are more devastating and destructive to the citizenry than the penalties for some crimes, there is no reason to weigh this Court's Separation of Powers concerns more heavily in the criminal than civil context. *See Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring) ("[T]he happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive. . . . In fact, if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes?").

Soon after, the Court struck down an obscenity ordinance which forbade movie theater owners from "knowingly admit[ting] a youth under age 16" to a movie judged "not suitable for young persons" by the city's Motion Picture Classification Board. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 680 (1968). The board itself was instructed to find "not suitable for young persons" any film containing a violent scene "likely to incite or encourage crime or delinquency on the part of young persons" or any sexual scenes "likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest." *Id.* at 681. The Court

explained that because these standards left such wide discretion to the individual board members, the result would be "'regulation in accordance with the beliefs of the individual censor rather than regulation by law.'" *Id.* at 685 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 701 (1959) (Clark, J., concurring in result)).

The next statute to fall was a Jacksonville, Florida vagrancy ordinance which criminalized, among other activities, "persons wandering or strolling around from place to place without any lawful purpose or object . . . ." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972). The law was an invalid delegation because of the "unfettered discretion it place[d] in the hands of the Jacksonville police." *Id.* at 168. The true "law" would have effectively been created by the police, because there were "no standards governing the exercise of the discretion granted by the ordinance . . . ." *Id.* at 170. Rather than conforming to the requirements of written law passed by a legislature, the citizens of Jacksonville were in effect "required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts." *Id.*

Two years later, this Court invalidated as impermissibly vague a Massachusetts statute that prohibited "treat[ing] contemptuously the flag of the United States . . . ." *Smith v. Goguen*, 415 U.S. 566, 568-69 (1974). Because the term "contemptuously" went undefined, the statute granted "unfettered latitude" to "law enforcement officials and triers of fact." *Id.* at 578. The statute had "a standard so indefinite that police, court, and jury were free to react

to nothing more than their own preferences for treatment of the flag." *Id.* The statute thus failed the constitutional "requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 574. This Court found once again that the discretion crossed a line such that the legislature had delegated away its lawmaking power: "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Id.* at 575.

This Court has also struck down a statute which required persons validly stopped by the police "to provide a 'credible and reliable' identification and to account for their presence . . . ." *Kolender*, 461 U.S. at 353. Fatally, the statute "contain[ed] no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Id.* at 358. Thus, the Court recognized that "the statute vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute . . . ." *Id.* Even though many valid statutes vest *some* discretion in police, this Court was up to the task of determining that this level of discretion crossed the line such that police, not legislators, were the ones truly creating law.

More recently, this Court struck down a Chicago ordinance which prohibited failing to disperse after being instructed by a police officer, whenever that officer reasonably believed that at least one of the persons in a group was a gang member and that the group was "loitering." *City of Chicago v. Morales*, 527

U.S. 41, 47 (1999). The ordinance defined "loitering" as simply "remain[ing] in any one place with no apparent purpose." *Id.* (alterations in original). Once again, this Court determined that "[t]he broad sweep of the ordinance" violated "'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 60 (quoting *Kolender*, 461 U.S. at 358). The Court found that the statute impermissibly conferred "vast discretion" on the police, because the text of the statute "'provide[d] absolute discretion to police officers to decide what activities constitute loitering.'" *Id.* at 61 (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 63 (Ill. 1997)). Just like each of the previous cases, the ordinance fell on Separation of Power grounds, independent of any notice problem. Published police "regulations" might have provided some notice, but they would not have solved the Separation of Powers problem.

C. Void for Vagueness Precedents Provide a Solid Basis for Drawing the Line in Non-Delegation Cases

In each and every one of the cases just discussed, the statutory prescriptions were so standardless that they effectively re-delegated lawmaking power away from the legislature and to some other actor further down the road. Despite the fact that *some* discretion and inconsistency in application of written law is inevitable, this Court consistently confronted the necessary task of determining whether the discretion exceeded the limits of mere law *application* and crossed the line into law *creation*. This Court has proved capable of meeting this sometime-difficult line-drawing

challenge, just as it has in many other areas of Constitutional law.

Most relevant to the question of line-drawing in *Non-Delegation* cases, the vague statutes at issue in each of the cases discussed could easily be reimagined as vesting precisely the same level of discretion in an executive *rulemaker* rather than in police, judges, or juries, and in each case the reasoning of this Court would have required the same result. Suppose, for example, that the provision at issue in *Giaccio*, instead of vesting individual *juries* with the unguided choice as to who would pay costs, instead vested a single choice in the state attorney general, one that would apply to all future trials. Just as this Court determined for individual juries in the actual statute, this would have resulted in the state attorney general making a decision "upon [his] own notion[] of what the law should be instead of what it is." *Giaccio*, 382 U.S. at 403. The extent of abdication by the legislature would have been identical, and thus the violation of Separation of Powers would have been the same.

Likewise in *Smith v. Goguen*, suppose the law in question had vested the state attorney general with the power to define the meaning of "contemptuously" by promulgating regulations. His choice would have been just as unguided as the choices of police and juries were under the actual statute, and the resulting regulation would have been "nothing more than [his] own preferences for treatment of the flag." *Smith*, 415 U.S. at 578. Once again, because the result in *Smith* was derived from Separation of Powers concerns, the hypothetical statute would be invalid for precisely the same reasons.

None of these hypothetical alterations could possibly alleviate the Separation of Powers concerns that were present before such alterations, because clauses granting rulemaking power to an executive official add no additional legislatively created standards. Thus, the precedents set and the lines drawn by this Court in Void for Vagueness cases drawing the same lines in Non-Delegation cases. Put simply, if this Court can draw the line in Void for Vagueness cases (which it has), it can draw the line in Non-Delegation cases.

And this brings us to SORNA. Just as we can imagine a Void for Vagueness case transformed into a Non-Delegation case by shifting the discretion from individual enforcers to agency rulemakers, so can we imagine a transformation in the opposite direction. Suppose that instead of allowing the Attorney General unguided discretion in determining retroactivity, SORNA instead assigned this task to individual case workers for convicted sex offenders, such that each case worker could decide whether to deem a particular failure to register as a violation, for any reason or no reason. Such a statute would clearly be void for vagueness under the precedent set in *Giaccio*; the case workers would each be deciding what the law of retroactivity *should be*, not what it is. And since such discretion in the hands of individual enforcers clearly amounts to an exercise of legislative power, so must the identical discretion placed in the hands of a single executive rulemaker. SORNA grants the Attorney General the power to make his own law, and for that reason it violates the Separation of Powers at the heart of the Constitution's structure.

This Court need not formulate one definition that will determine for every future case whether the discretion granted veers into a re-delegation of lawmaking power. It is enough for this Court to operate as it always has; slowly illuminating the line through precedent and case-by-case determinations. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012) ("We have no need to fix a line . . . . It is enough for today that wherever that line may be, this statute is surely beyond it."). This Court's precedents in Void for Vagueness cases show that enough of the line has already been illuminated to make clear that the standardless grant of power to the Attorney General in SORNA falls well beyond it.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Second Circuit should be reversed.

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Respectfully submitted,

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