

No.

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In the Supreme Court of the United States

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ARNOLD BENNETT CALDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

This case involves the same issue raised in the petition for certiorari in *Gundy v. United States*, 138 S. Ct. 1260, 17-6086 (2018), which was granted on May 5th, 2018, and oral arguments were heard on October 2nd, 2018. The question presented in *Gundy* is as follows:

Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) (formerly 42 U.S.C. § 16913(d)) violates the constitutional nondelegation doctrine.

Brief of Petitioner, *Gundy v. United States*, 17-6086, at i (U.S. May 25, 2018).

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## **OPINION BELOW**

The opinion of the United States Court of Appeals for the Sixth Circuit affirming Arnold Caldwell’s sentence on grounds not at issue here, is unreported but can be found at *United States v. Caldwell*, No. 17-2062, 2018 WL 3998412 (6th Cir. Aug. 21, 2018).

## **JURISDICTION**

The Court of Appeals entered its judgment on August 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Article I, § 1, of the Constitution of the United States provides: “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.”

Relevant portions of the Sex Offender Registration and Notification Act (“SORNA”), SORNA, 18 U.S.C. § 2250(a) and 34 U.S.C. § 20901, et seq (formerly 42 U.S.C. § 16901 et seq), are reproduced in the Appendix to this brief. It is attached as Appendix A.

## **STATEMENT**

On March 8, 2017, Arnold Caldwell was charged in a one-count Indictment with failing to register as a sex offender in Michigan after his interstate travel from Illinois, in violation of 18 U.S.C. § 2250(a) and 34 U.S.C. § 20901 et seq (formerly 42 U.S.C. § 16901 et seq). (Sex Offender Registration and Notification Act, “SORNA”). Mr. Caldwell pleaded guilty and was sentenced to 24 months of incarceration followed

by five years of supervised release. Mr. Caldwell appealed his sentence raising an issue not relevant here, relating to his criminal history computation. On August 21, 2018, the Court of Appeals for the Sixth Circuit affirmed his sentence in an unpublished opinion. *United States v. Caldwell*, No. 17-2062, 2018 WL 3998412 (6th Cir. Aug. 21, 2018).

In the meantime, on March 5, 2018, this Honorable Court granted a petition for writ of certiorari on a constitutional challenge to SORNA's retroactivity. *Gundy v. United States*, 138 S. Ct. 1260, 17-6086 (2018). The Court granted certiorari to determine whether SORNA unconstitutionally delegated legislative authority by allowing the Attorney General to determine whether SORNA applies retroactively. *Id.*; *Brief of Petitioner, Gundy v. United States*, 17-6086, at i (U.S. May 25, 2018). Oral arguments in *Gundy* were heard on October 2, 2018.

This case involves the same issue raised in *Gundy*. The Indictment charges that Mr. Caldwell is required to register as a sex offender due to his 2004 conviction for assault in the second degree with sexual motivation in the State of Washington. SORNA was enacted in 2006, two years after his conviction, thus Mr. Caldwell is subject to SORNA's penalties only if SORNA applies retroactively to predicate convictions that predate SORNA.

Although not raised in the courts below, the ruling in *Gundy* would apply to Mr. Caldwell. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716 (1987) (new rule for the conduct of criminal prosecutions applies retroactively to all cases pending on direct review or not yet final). Mr. Caldwell respectfully requests that



this Honorable Court grant Mr. Caldwell’s petition for writ of certiorari and consolidate it with *Gundy v. United States*, 138 S. Ct. 1260 (2018), 17-6086, or in the alternative, hold it in abeyance pending this Court’s decision in *Gundy*.

### REASONS FOR GRANTING THE PETITION

This petition raises the same issue that was raised in the petition for certiorari in *Gundy v. United States*, 138 S. Ct. 1260, 17-6086 (2018). The issue is whether Congress’s delegation to the Attorney General to decide whether SORNA’s registration requirements apply retroactively to persons convicted before SORNA was enacted violates the constitutional nondelegation doctrine.

Under the Sex Offender Registration and Notification Act (“SORNA”), a person convicted of a sex offense is required to register in each jurisdiction where he resides, works, or is a student. 34 U.S.C. § 20911(5), 20913(a).<sup>1</sup> Failure to register or update one’s sex offender registration as required is a federal felony punishable by up to ten years in prison. 18 U.S.C. § 2250(a). SORNA was enacted on July 27, 2006. Congress did not determine whether SORNA applies to individuals convicted of a sex offense prior to its enactment in 2006. Instead, 34 U.S.C. § 20913(d) delegated to the Attorney General the “authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act . . . .”

Only Congress has the constitutional authority to legislate. U.S. CONST. Art. I §§ 1, 8. “Congress manifestly is not permitted to abdicate or transfer to others the legislative functions” with which it is vested. *Panama Refining Co. v. Ryan*, 293 U.S.

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<sup>1</sup> The Act was originally codified at 42 U.S.C. § 16901 *et seq.* and is now codified at 34 U.S.C. § 20901 *et seq.* This brief cites to the Act as currently codified.

388, 421 (1935). This “nondelegation doctrine is rooted in the principle of separation of powers.” *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

While the nondelegation doctrine does not prevent Congress from “obtaining the assistance of its coordinate Branches,” it can do so only if it provides clear guidance. *Id.* at 372-73. “So long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not forbidden delegation of legislative power.’” *Id.* at 372 (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)). On multiple occasions, the Supreme Court has held that Congress unconstitutionally authorized the Executive branch to make laws because it “had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom [it] delegated power.” *Mistretta*, 488 U.S. at 374, n.7.

Similarly, in SORNA, Congress failed to articulate any policy to guide the Attorney General in determining whether the law applied to pre-Act offenders. Thus, Congress gave no guidance as to how the Attorney General should exercise this delegated authority. Because of this lack of an intelligible principle, jurists have repeatedly questioned whether Congress could constitutionally make this delegation. For example, in his dissenting opinion in *Reynolds v. United States*, Justice Scalia questioned whether Congress could constitutionally take such action, noting this “sail[s] close to the wind with regard to the principle that legislative powers are nondelegable.” 132 S. Ct. 975, 986 (2012); *accord. United States v. Fuller*, 627 F.3d

499, 509 (2d Cir. 2010) (Raggi, J., concurring), vacated on other grounds by *Fuller v. United States*, 132 S. Ct. 1534 (2012); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, concurring), abrogated on other grounds by *Reynolds v. United States*, 132 S. Ct. 975 (2012).

Because SORNA grants the Attorney General unfettered discretion to determine who is subject to criminal legislation without an “intelligible principle” to guide this discretion, it violates the nondelegation doctrine. Accordingly, the regulations that purportedly make SORNA retroactive are unconstitutional and invalid. Therefore, Mr. Caldwell cannot be convicted of a SORNA violation because his predicate conviction predates SORNA.

## CONCLUSION

Arnold Caldwell respectfully requests that this Honorable Court grant this petition for writ of certiorari and consolidate it with the petition for certiorari in *Gundy v. United States*, 138 S. Ct. 1260, 17-6086 (2018), or in alternative, hold it in abeyance pending this Court's decision in *Gundy*.

Respectfully submitted,

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Dated: November 19, 2018

**CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33**

I hereby certify that this petition for writ of certiorari complies with the type-volume limitation set forth in Rule 33(2). This petition contains seven pages, complied with 12-point Century Schoolbook proportionally spaced type.

Respectfully submitted,

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