SUPREME COURT OF THE UNITED STATES

No. 17–6086

HERMAN AVERY GUNDY, PETITIONER *v.* UNITED STATES

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

[June 20, 2019]

JUSTICE GORSUCH, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?

Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But JUSTICE ALITO supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

I

For individuals convicted of sex offenses *after* Congress adopted the Sex Offender Registration and Notification Act (SORNA) in 2006, the statute offers detailed instructions. It requires them "to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries."[1] The law divides offenders into three tiers based on the seriousness of their crimes: Some must register for 15 years, others for 25 years, and still others for life.[2] The statute proceeds to set registration deadlines: Offenders sentenced to prison must register before they're released, while others must register within three business days after sentencing.[3] The statute explains when and how offenders must update their registrations.[4] And the statute specifies particular penalties for failing to comply with its commands.[5] On and on the statute goes for more than 20 pages of the U. S. Code.

But what about those convicted of sex offenses *before* the Act's adoption? At the time of SORNA's enactment, the nation's population of sex offenders exceeded 500,000, and Congress concluded that something had to be done about these "pre-Act" offenders too. But it seems Congress couldn't agree what that should be. The treatment of pre-Act offenders proved a "controversial issue with major policy significance and practical ramifications for states."[6] Among other things, applying SORNA immediately to this group threatened to impose unpopular and costly burdens

[1] *Reynolds* v. *United States*, 565 U. S. 432, 434 (2012).

[2] 34 U. S. C. §§20911, 20915(a).

[3] §20913(b).

[4] §20913(c).

[5] §20913(e).

[6] Logan, The Adam Walsh Act and the Failed Promise of Administrative Federalism, 78 Geo. Wash. L. Rev. 993, 999–1000 (2010).

pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate.

Unsurprisingly, different Attorneys General have exercised their discretion in different ways.[12] For six months after SORNA's enactment, Attorney General Gonzales left past offenders alone. Then the pendulum swung the other direction when the Department of Justice issued an interim rule requiring pre-Act offenders to follow all the same rules as post-Act offenders.[13] A year later, Attorney General Mukasey issued more new guidelines, this time directing the States to register some but not all past offenders.[14] Three years after that, Attorney General Holder required the States to register only those pre-Act offenders convicted of a new felony after SORNA's enactment.[15] Various Attorneys General have also taken different positions on whether pre-Act offenders might be entitled to credit for time spent in the community before SORNA was enacted.[16]

These unbounded policy choices have profound consequences for the people they affect. Take our case. Before SORNA's enactment, Herman Gundy pleaded guilty in 2005 to a sexual offense. After his release from prison five years later, he was arrested again, this time for failing to register as a sex offender according to the rules the Attorney General had then prescribed for pre-Act offenders. As a result, Mr. Gundy faced an additional 10-year prison term—10 years more than if the Attorney General had, in

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[12] See, *e.g.*, 72 Fed. Reg. 8894 (2007); 73 Fed. Reg. 38030 (2008); 76 Fed. Reg. 1639 (2011).

[13] 28 CFR §72.3 (2007); 72 Fed. Reg. 8894.

[14] See 73 Fed. Reg. 38030.

[15] See 76 Fed. Reg. 1639.

[16] Compare 73 Fed. Reg. 38036 (no credit given) with 75 Fed. Reg. 81851 (full credit given).

his discretion, chosen to write the rules differently.

II

A

Our founding document begins by declaring that "We the People . . . ordain and establish this Constitution." At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people. From that premise, the Constitution proceeded to vest the authority to exercise different aspects of the people's sovereign power in distinct entities. In Article I, the Constitution entrusted all of the federal government's legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

To the framers, each of these vested powers had a distinct content. When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,"[17] or the power to "prescribe general rules for the government of society."[18]

The framers understood, too, that it would frustrate "the system of government ordained by the Constitution" if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.[19] Through the Constitution, after

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[17] The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton).

[18] *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810); see also J. Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration §22, p. 13 (1947) (Locke, Second Treatise); 1 W. Blackstone, Commentaries on the Laws of England 44 (1765).

[19] *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 692 (1892).

all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not "delegate . . . powers which are strictly and exclusively legislative."[20] Or as John Locke, one of the thinkers who most influenced the framers' understanding of the separation of powers, described it:

> "The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them."[21]

Why did the framers insist on this particular arrangement? They believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty.[22] An "excess of law-making" was, in their words, one of "the diseases to which our governments are most liable."[23] To address that tendency, the framers went to great lengths to make lawmaking difficult. In Article I, by far the longest part of the Constitution, the

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[20] *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825).

[21] Locke, Second Treatise §141, at 71.

[22] The Federalist No. 48, at 309–312 (J. Madison).

[23] *Id.*, No. 62, at 378. See also *id.*, No. 73, at 441–442 (Hamilton); Locke, Second Treatise §143.