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Scrambled SCOTUS Lineup in 'Gundy' Ruling Upholds Executive Power

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U.S. Supreme Court Justices Elena Kagan and Samuel Alito Jr. arrive to testify in at U.S. House of Representatives about the court's budget. Credit: Diego M. Radzinski/ NLJ

A divided U.S. Supreme Court on Thursday upheld a federal law on sex offender registration, finding that Congress did not delegate too much power to the attorney general to establish the statute's regulations.

The long-awaited ruling in *Gundy v. United States* sidestepped a full examination of the nondelegation doctrine, which limits the ability of Congress to delegate its legislative powers to executive branch agencies.

The doctrine has been largely dormant for decades but drew attention as the Trump administration launched its effort to dismantle the administrative state. When Congress vaguely delegates its powers to executive agencies in legislation, the concern is that regulations affecting people and businesses can bloom without congressional enactment or approval.

Justice Elena Kagan, joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor, said that the delegation of regulations that are part of the Sex Offender Registration and Notification Act (SORNA) statute "falls well within permissible bounds."

"Indeed, if SORNA's delegation is unconstitutional, then most of government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs," Kagan wrote.

Justice Samuel Alito Jr., concurring in the judgment, joined with the court's liberal wing as the fifth vote for Thursday's ruling. Alito did not join his liberal colleagues' constitutional or statutory analysis. He said he would be open, in a future case, to revisiting the court's long-taken approaches.

"If a majority of this court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment," Alito wrote.

Alito voted to affirm the law "because I cannot say that the statute lacks a discernable standard that is adequate under the approach this court has taken for many years."

Neil Gorsuch testifies before the Senate Judiciary Committee during the second day of his confirmation. Credit: Diego M. Radzinski / National Law Journal

Justice Neil Gorsuch wrote a dissent that was joined by Chief Justice John Roberts Jr. and Justice Clarence Thomas.

“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,” Gorsuch wrote. “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?”

Gorsuch said: “Nor would enforcing the Constitution’s demands spell doom for what some call the ‘administrative state.’ The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government.”

The Gundy case was argued last Oct. 2, before Justice Brett Kavanaugh had taken the bench. Kavanaugh did not participate in Thursday’s ruling. New justices who join after a case has been argued traditionally do not vote on those disputes.

The high court has not used the nondelegation doctrine in more than 80 years to strike down a statute as unconstitutional. But it has become the focus of renewed attention as courts developed principles of deference to federal agencies that interpret their own rules or implement laws without clear guidance from Congress.

The doctrine stems from Article 1, Section 1, of the Constitution, which vests “all legislative powers” in Congress. As it has evolved, the test for determining nondelegation is whether Congress has provided an “intelligible principle” to guide agency rulemaking discretion.

The vehicle for reexamining the doctrine was an unusual one, involving a provision of SORNA that delegates to the attorney general the power to issue certain regulations under the law.

Plaintiff Herman Gundy ran afoul of the SORNA regs when, after serving his sentence for a sexual assault in Maryland, he received permission to travel unsupervised from Pennsylvania to a New York halfway house and failed to register as a sex offender in Maryland and New York.

His lawyer, New York federal defender Sarah Baumgartel, appealed, and the high court granted review on only one issue: whether SORNA unlawfully delegates authority to the U.S. attorney general to impose the law’s registration requirements on offenders convicted before the law was enacted.

Conservative groups are not ordinarily keen on helping sex offenders, but they filed amicus briefs in favor of Gundy, as did liberals. Stanford Law School professors Jeffrey Fisher and Pamela Karlan are on Gundy’s brief, though Baumgartel argued on his behalf. Deputy Solicitor General Jeffrey Wall argued that SORNA does not violate the nondelegation doctrine.

“Herman Gundy was punished for violating a law that no legislature enacted. He now stands convicted of a crime based on the attorney general’s whim. Few insults to the principles of a free society could be greater,” Cato Institute’s Ilya Shapiro wrote in an amicus brief.

Gorsuch said in his dissent: “It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from

giving the executive carte blanche to write laws for sex offenders is the same rule that protects everyone else.”