No. 20-0363

In the Supreme Court of Texas

In re Shelley Luther,

Relator

Original Proceeding from the Fourteenth Judicial
District Court of Dallas County, Texas
No. DC-20-03161

Amicus Curiae Brief of James C. Harrington

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Statement of the Case

Nature of the Case	Petition for writ of habeas corpus challenging a district court's contempt order for TRO violation.
Respondents	Hon. Eric Moye, 14th Judicial District Court, Dallas County, Texas; Dallas County Sheriff Marian Brown.
Respondents' Action	The City of Dallas sued Shelly Luther and her salon for injunctive relief to obtain compliance with emergency regulations commonly known as "stay-at-home" orders. The district court signed a TRO prohibiting Luther from operating her salon. She violated it. After a show-cause hearing, the district court held Luther in civil and criminal contempt, ordering her jailed for seven days. The Sheriff's Department held Luther in custody until this Court ordered her released pending resolution of this petition.

Issues Presented

1. Has Luther shown that the orders violated the constitutional guarantees of equal rights or due process?

2. Are the disaster-powers provisions of the government code unconstitutional delegations of legislative authority?

Interest of Amicus Curiae

James C. Harrington is one of the leading authorities on the Texas Bill of Rights. Harrington founded the Texas Civil Rights Project—a nonprofit foundation that promotes civil rights and economic and racial justice for low-income Texans—and served as its director for more than two decades. He also taught constitutional law at the University of Texas Law School for 27 years and wrote *The Texas Bill of Rights: A Commentary and Litigation Manual*.

The undersigned counsel have not received, and will not receive, any fee for preparing this brief.

Reasons to Deny the Petition

Ms. Luther characterizes this case as a battle over the constitutional limits of executive power—can the governor, county judge, or mayor really shut down a hair salon temporarily, even in the midst of a public health crisis? This is an important question. But it isn't presented here because the constitutional challenges raised by Luther lack even arguable merit. Perhaps she could have chosen different ones. And maybe they would have had merit. But this Court does not raise constitutional issues for litigants or provide them with advisory opinions—not even on important constitutional questions.

Luther asks this Court to nullify executive orders designed to abate the

worst epidemic to hit Texas in more than a century. She claims those orders denied her equal rights and due process under the Texas Constitution. But the orders easily pass rational-basis review as efforts to inhibit the rapid spread of a deadly disease. Indeed, statistics suggest the orders succeeded in slowing the rate of infection and protecting vital healthcare resources.

Luther also argues that the statutes authorizing the orders unconstitutionally delegate legislative power to executive officials. But both this Court and the United States Supreme Court apply the nondelegation doctrine sparingly, and only when a statute lacks any identifiable guidance to executive officials in carrying out the tasks delegated to them. That isn't the situation here, where officials are exercising typical executive discretion over how, when, and where to employ the state's powers to preserve public safety and health—just as they have done in past public health crises.

To be sure, public health orders remain subject to constitutional constraints. But the ones here easily pass constitutional muster—at least as to Luther's challenges. This Court should deny the petition.

Statement of Facts

"As all are painfully aware, our nation faces a public health emergency caused by the exponential spread of COVID-19, the respiratory disease caused

by the novel coronavirus SARS-CoV-2 … Federal projections estimate that, even with mitigation efforts, between 100,000 and 240,000 people in the United States could die. In Texas, the virus has spread rapidly over the past two weeks and is predicted to continue spreading exponentially in the coming days and weeks." *In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020) (orig. proceeding) (internal quotation marks and citations omitted). This surge "threatens to overwhelm the Texas healthcare system, causing "critical shortages of doctors, nurses, hospital beds, medical equipment, and personal protective equipment . . . ." *Id.* (citation omitted).

Seeking to protect Texans from this global pandemic, Governor Abbott declared a state of disaster across Texas on March 13, 2020, and then issued executive orders closing most Texas businesses (OPR 158).

Dallas County Judge Clay Jenkins and Dallas Mayor Eric Johnson declared states of disaster for the county and city, and issued their own emergency orders and regulations closing most businesses (OPR 116, 120, 162–88, 189–231).

Shelley Luther owns and operates Salon a la Mode, a cosmetology salon. Despite the various orders—all of which prohibited Luther from operating her salon—she reopened on April 24 (OPR 109, 249–61). And she

kept the salon open in defiance of directives from county and city officials to close it (OPR 264–66).

On April 27, Governor Abbott issued Executive Order GA-18, permitting certain businesses to reopen (OPR 232–37). But that order did not permit salons to reopen—it prohibited Texans from patronizing salons and authorized enforcement of that order by local officials (OPR 236–37).

On April 28, the City sued Luther for temporary and permanent injunctive relief to require her to close the salon in compliance with the City's emergency regulations (OPR 112–13). The trial court signed a temporary restraining order ordering Luther to "cease and desist" operating the salon (2 OPR 1–2).

Luther received notice of the TRO—and defied it (OPR 55–58, 74–76). After a show-cause hearing—during which Luther made clear her intent to continue violating the TRO—the trial court held her in civil and criminal contempt, and ordered her jailed for seven days ("one day for each day that [Luther] violated" the order) (OPR 94). The Dallas County Sheriff held Luther in custody until this Court ordered her released on personal bond pending the outcome of this proceeding.

Summary of the Argument

The petition should be denied because—

- Luther has failed to establish any violation of her rights to equal treatment or due process—the regulations are rationally related to a legitimate governmental interest; and

- the disaster-powers provisions of the government code are permissible delegations of legislative authority; and

Argument

This Court's resolution of Luther's petition should turn solely on her specific challenges to the trial court's order. Other challenges may exist. Some may even have merit. But Luther has not raised them. As this Court recently reiterated, courts "do not, or should not, sally forth each day looking for wrongs to right" but instead "wait for the cases to come to" them, and then "decide only questions presented by the parties." *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *4 (Tex. Apr. 23, 2020) (orig. proceeding) (per curiam) (citations omitted).

1. Luther has not established any violation of her constitutional rights.

Luther contends that the City's regulations violated the constitutional guarantees of equal rights and due process. It does not appear she ever

identified either of these constitutional challenges to the trial court.[1] In any event, these challenges lack merit.

A. This case does not threaten any suspension of the Texas Bill of Rights.

Luther argues that the Texas Bill of Rights cannot be suspended even in times of war or pandemic. And that is true. "The Constitution is not suspended when the government declares a state of disaster." *Id.* at *1.

But this case does not threaten any suspension of the Bill of Rights. It involves the authority of executive officials to exercise their discretion under the disaster-powers provisions of Texas law to close a salon temporarily to protect public health. That is all.

B. Luther has not established any violation of equal rights or due process.

The Equal Rights Amendment to the Texas Constitution provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Tex. Const. art. I, § 3a.

In deciding an equal-rights challenge, this Court first decides whether equality has been denied. *In re McLean*, 725 S.W.2d 696, 697 (Tex. 1987) (orig.

[1] This type of error preservation may not be required in an original proceeding. But it is concerning that a member of our judiciary is being pilloried in some quarters over constitutional issues that Luther never asked him to consider.

proceeding) (plurality opinion). If it has, the Court next determines "whether equality was denied *because of* a person's membership in a protected class of sex, race, color, creed, or national origin." *Id.* (emphasis in original). If so, the Court applies strict scrutiny—meaning the challenged action cannot stand unless it is narrowly tailored to serve a compelling governmental interest. *See id.* at 698 (citation omitted).

But if equality was not denied based on membership in a protected class, the Court uses the more deferential rational-basis standard of review. *Sullivan v. Univ. Interscholastic League*, 616 S.W.2d 170, 172 (Tex. 1981). Under this standard, the government need only show that a classification is "rationally related to a legitimate state purpose." *Richards v. League of Latin Am. Citizens*, 868 S.W.2d 306, 310–11 (Tex. 1993) (citation omitted).

Luther does not allege a lack of equality based on membership in a protected class. As a result, the rational-basis standard of review applies to her equal-rights claim. Because no suspect classification or fundamental right is involved, the same standard applies to Luther's claim for due process.

Without citing any legal authority, Luther appears to suggest that her claims implicate the constitutional right to freedom of assembly. But the

United States Supreme Court rejected such a notion in *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

Stanglin involved a challenge to the Dallas ordinance restricting admission to certain dance halls to patrons between the ages of 14 and 18. *Id.* at 20. The Court held that rational-basis scrutiny applied because these business patrons were not members of an organized association, generally were strangers to each other, the dance halls admitted all who paid the admission fee, and the patrons did not gather to take positions on public questions. *Id.* at 24–25. The same is true of the patrons of Luther's salon.[2] This type of "activity qualifies neither as a form of 'intimate association' nor as a form of 'expressive association'" and the First Amendment does not "recognize[ ] a generalized right of 'social association.'" *Id.* at 25.

Because Luther's claim does not involve any suspect classification or fundamental right, rational-basis scrutiny applies—meaning the regulations survive constitutional scrutiny if they are rationally related to a legitimate governmental purpose. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (citation

[2] The Court applies identical analysis to constitutional claims of assembly and association. *See Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB/SCY, 2020 WL 1905586, at *25 (D.N.M. Apr. 17, 2020) (citations omitted) ("[T]he Supreme Court has applied the freedom-of-association standard to freedom of assemblies cases, rendering them one and the same.").

omitted) ("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end").

Courts applying this standard must determine (1) whether the challenged legislation has a legitimate purpose, and (2) whether it was reasonable for lawmakers to believe that the use of the challenged classification would promote that purpose. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 639 (Tex. 2008). A government action satisfies this test if it is at least fairly debatable that the action was rationally related to a legitimate government interest. *City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 65 (Tex. 2007).

Luther appears to suggest that the City's regulations cannot survive even this deferential level of review because they are not rationally related to protecting citizens from the pandemic. But the stay-at-home orders advance the legitimate governmental interest of limiting the pandemic's spread and ensuring the viability of the Texas healthcare system.

Epidemiological modeling shows that stay-at-home orders, when largely observed by the public, mitigate the spread of the virus and resulting

deaths by flattening the curve of infection.[3] These measures are working in Dallas,[4] just as they are across the country.[5] But the threat is not over.

The orders and regulations address these legitimate purposes. There is nothing irrational or unreasonable in the determination that non-essential businesses must close temporarily to slow spread of the virus; it is "at least fairly debatable." *See City of San Antonio*, 218 S.W.3d at 65. And Texas courts do not "second guess" these types of policy choices. *See id*. at 67. Governmental entities enjoy "large leeway in making classifications and drawing lines . . . ." *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 359 (1973). Luther simply cannot negate any rational or reasonable basis for the regulations, which vitiates both her due process and equal rights challenges.

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[3] Lindsay Huth and Yan Wu, *Some Forecasts See Virus Upswing for States That Resisted Shutdown Measures*, Wall St. J., April 24, 2020, *available at* https://www.wsj.com/graphics/coronavirus-projections-for-shutdown-reopening-states/.

[4] Hayat Norimine, *"We prevented New York City from happening in Dallas": Health experts push the importance of staying vigilant*, Dallas Morning News, May 22, 2020, *available at* https://www.dallasnews.com/news/public-health/2020/05/21/we-prevented-new-york-city-from-happening-in-dallas-health-experts-push-importance-of-staying-vigilant/.

[5] *See* James Glanz, Benedict Carey, Josh Holder, Derek Watkins, Jennifer Valentino-DeVries, Rick Rojas, and Lauren Leatherby, *Where America Didn't Stay Home Even as the Virus Spread*, N.Y. Times, April 2, 2020, *available at* https://www.nytimes.com/interactive/2020/04/02/us/coronavirus-social-distancing.html.

In arguing to the contrary, Luther complains principally that the orders and regulations permitted grooming of animals while prohibiting haircuts for people. She also complains that grocery-related workers remained on the job while many end-user consumers could not. Both of these arguments are silly. More important, they are precisely the type of policy-choice nit-picking that the rational-basis standard is designed to prevent.

Luther's complaint about veterinarians lacks merit—even if this Court were inclined to wade into the weeds of public policymaking. First, Luther overlooks the important limitation on the provision relating to animals: it permits grooming only "if necessary for the health and well being of the animal." This isn't a matter of looking good for the doggie prom—grooming is allowed only where ***necessary*** to the animal's ***health***. A surgeon performing emergency brain surgery during the pendency of the orders probably could have shaved the patient's head without violating the salon prohibition.

And while Luther tries to cast the animal provision as directed toward "pet owners," it probably has far more to do with the cattle and dairy industries—which in Texas combine to account for $12 billion in annual

sales.[6] Given the importance of these industries, it is understandable that officials would permit grooming where necessary to animal health.

Luther's complaints about the food chain make even less sense. Luther's role as an end-user differs from the role of those who grow, manufacture, transport, sell, and deliver her food. She is not similarly situated to anyone in the food-supply chain, and her differential treatment is neither irrational nor arbitrary; it reflects her different situation.

Luther's only legal authority for her due-process claim relates to what she contends is a "stigmatic mar" against salon owners created by the regulation. But the theory of "stigmatic mar" relates to public employees discharged based upon false accusations that become public and create a "badge of infamy" so great that it destroys their ability to obtain other employment. *See Caleb v. Carranza*, 518 S.W.3d 537, 545 (Tex. App.—Houston 2017, no pet.) (citations omitted). Luther offers no explanation as to how order that closed thousands of Texas businesses—from law firms, to book stores, to surgery centers—caused her this type of stigma.

[6] Bob Sechler, *Texas cattle herd hits 8-year high; will prices suffer?*, Statesman, Mar. 22, 2019, *available at* https://www.statesman.com/news/20190322/texas-cattle-herd-hits-8-year-high-will-prices-suffer.

Finally, Luther suggests that Mayor Johnson's presumed failure to perform a personalized examination of the hygienic practices in her particular salon violates the Texas Constitution. But she offers no legal authority or analysis to support this contention—nor does she explain how any governmental official possibly could meet such an onerous burden. Imposing such a requirement would render government officials unable to draw lines or make classifications at all.

In the end, Governor Abbott, Judge Jenkins, and Mayor Johnson could have made different decisions about the classifications in their respective orders. Perhaps Luther is correct that some of those other classifications would have made more sense than the ones they made. But under entrenched precedent, if the choice is between two reasonable responses to a public crisis, the choice must be left to the governing authorities. "It is no part of the function of a court or a jury to determine which one of two modes [i]s likely to be the most effective for the protection of the public against disease." *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905)

To the contrary, such a choice properly belongs to the legislative and executive branches. In light of the threat posed by the COVID-19 pandemic, this Court "would usurp the functions of another branch of government if it

adjudged, as matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case." *Id*. at 28.

Because the regulation is rationally related to legitimate governmental purposes, it does not violate the Equal Rights Amendment or the due-process guarantee.[7]

One final note: The Fifth Circuit recently held that "'under the pressure of great dangers,' constitutional rights may be reasonably restricted 'as the safety of the general public may demand.'" *In re Abbott*, 954 F.3d at 783 (quoting *Jacobson*, 197 U.S. at 29). This Court may disagree. *See In re Abbott*, 2020 WL 1943226, at *1.[8] This is an important discussion. But this case does not implicate it. Luther raised only two claims under the Texas Bill of Rights. And those claims lack merit. Any conversation about the viability of other claims is for another day, or another forum.

[7] The result would be the same under strict-scrutiny review. The exercise of authority during a pandemic can support reasonable restrictions even where those restrictions impinge on the right to assemble. *In re Abbott*, 954 F.3d at 778 (citations omitted).

[8] But a decision in Luther's favor here would result in a bizarre dichotomy with the Fifth Circuit holding that executive officials may restrict access to healthcare services during a pandemic, and this Court holding that the same officials cannot temporarily close a hair salon for the same reason.

2. The disaster-powers provisions of the government code are permissible delegations of legislative authority.

Luther contends that sections 418.018(g) and 418.0105 of the government code—relating to various disaster powers—constitute an unconstitutional delegation of legislative power. But a century of American law says otherwise.

Section 418.108(g) of the code authorizes a county judge or mayor to "control the movement of persons and the occupancy of premises" in a disaster area. Tex. Govt. Code Ann. § 418.108(g). The statutory definition of "disaster" includes an "epidemic." Tex. Gov't Code § 418.004(1).

Section 418.0105 of the code designates the presiding officer of each county and municipality as the "emergency management director" of that political subdivision and permits such an officer to "exercise the powers granted to the governor under this chapter on an appropriate local scale." Tex. Govt. Code § 418.1015. This includes the power to issue orders and regulations with "the force and effect of law." Tex. Gov't Code § 418.012.

By these provisions, the Legislature granted executive officials pandemic-response powers that easily encompass the orders at issue. The statutory language explicitly includes the power to issue orders in response to an epidemic.

The orders aimed to mitigate a pandemic that has killed nearly 100,000 Americans since February. Yet, at a moment of deep uncertainty about the risk of a resurgence, Luther demands that this Court gut these orders by striking down the statutory provisions authorizing them. Nothing in the law supports this demand.

"Although the Constitution vests legislative power in the Legislature, courts have recognized that in a complex society like ours, delegation of legislative power is both necessary and proper in certain circumstances." *FM Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000) (citation omitted). "Thus, the Legislature may delegate legislative power to local governments, administrative agencies, and even private entities under certain conditions." *Id.* (citation omitted).

This type of delegation remains permissible "as long as the Legislature establishes reasonable standards to guide the agency in exercising those powers." *Id.* (citations omitted). This standard is not onerous. As this Court has noted, "[t]he nondelegation doctrine should be used sparingly," and "courts should, when possible, read delegations narrowly to uphold their validity." *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 22 (Tex. 2016) (citation omitted).

This Court's reluctance to apply the nondelegation doctrine tracks federal law. As Justice Scalia has observed:

> Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political … it is small wonder that we 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. As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago.

Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (citations and internal citations omitted).

The United States Supreme Court recently declined to apply the nondelegation doctrine in *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). The Court reiterated that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* (citation omitted). Thus, "a statutory delegation is constitutional as long as Congress lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* (citations omitted). In other words, the statute must inform the executive official of "the general policy he must pursue and the boundaries of [his]

authority." *Id*. at 2129 (citation and internal quotation marks omitted). These standards "are not demanding." *Id.*

The Court has "over and over upheld even very broad delegations." *Id*. Perhaps of greatest applicability here, the Court has affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

Here, the Legislature's delegations of authority are bounded in a number of ways. The code provided executive officials with a series of clearly-stated purposes to guide their discretion. Tex. Gov't Code § 418.002. Moreover, section 418.108 applies only following the declaration of a local state of disaster, and is limited to a period of seven days except with the consent of the locality's governing body. Tex. Gov't Code § 418.108(a), (b). None of this is less clear than the legislative delegation of power to set any air standard necessary to protect public health. *Whitman*, 531 U.S. at 472.

Perhaps most important, the Legislature reserved to itself the power to terminate a declared state of disaster "at any time." Tex. Gov't Code § 418.014(c). If the Legislature disapproves of how executive officials exercise the discretion granted to them, the Legislature may wield its most fundamental power: it may terminate the orders.

The statutes at issue are functionally no different than state statutes vesting executive agencies with powers to mitigate pandemics or otherwise prevent disease and protect public health. *See* Lawrence O. Gostin & Lindsay F. Wiley, Public Health Law 426 (3d ed. 2016) (explaining that states "broadly authoriz[e] action where necessary to protect" the public "in the face of a novel infectious disease"). That explains why, in virtually every state across the country, executive officials—not legislatures—are the ones issuing anti-pandemic orders.[9]

These enactments reflect the recognition by state legislatures that they are not equipped institutionally to formulate and enact lightning-fast responses to fast-changing patterns of contagion and centers of infection. Legislation takes time. And "[e]pidemics don't always give you a two-week heads up on their next move." *Wisconsin Legislature v. Palm*, No. 2020AP765-OA, 2020 WL 2465677, at *54 (Wis. May 13, 2020) (Hagedorn, J., dissenting). Through statutes vesting flexible discretion in executive officials, legislators sought to avoid "the confusions and delays"—and inevitable partisan politics—that would result from legislative attempts to respond to an acute

[9] *See, e.g.*, Kaiser Family Foundation, State Data and Policy Actions to Address Coronavirus (Apr. 28, 2020), available at https://bit.ly/2xYzKBc.

and immediate public health crisis. See *State v. Superior Ct. for King Cty.*, 174 P. 973, 978 (Wash. 1918).

American courts routinely uphold these types of statutes. As the United States Supreme Court explained more than a century ago, the authority to respond to public health crises must be "lodged somewhere," and it is "not an unusual, nor an unreasonable or arbitrary, requirement," to vest it in officials "appointed, presumably, because of their fitness to determine such questions." *Jacobson*, 197 U.S. at 27. In the wake of the 1918 influenza pandemic, the Illinois Supreme Court reflected that the "necessity of delegating to an administrative body the power to [identify] and take necessary steps to restrict and suppress [contagious] disease is apparent to everyone who has followed recent events." *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922).

Just last month, the Pennsylvania Supreme Court rejected a claim that the state's governor usurped legislative authority by restricting business operations and imposing social distancing requirements. *See Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *14–15 (Pa. Apr. 13, 2020). And, as a federal court noted three days ago, federal courts across the country have rejected various constitutional challenges to Covid-19 restrictions in

other states during the past three weeks. *See Open Our Oregon v. Brown*, No. 6:20-cv-773-MC, 2020 WL 2542861, at *2 (D. Ore. May 19, 2020) (gathering cases).[10] At least one of those decisions rejected challenges based on the rights to equal protection, due process, and freedom of association. *Henry v. DeSantis*, No. 20-cv-80729-SINGHAL, 2020 WL 2479447, at *6–7 (S.D. Fla. May 14, 2020).

When executive officials use their delegated powers to mitigate a deadly pandemic, they do not trench on legislative power. Instead—as courts have recognized for a century—separation-of-powers principles are advanced, not subverted, when public health statutes are construed to enable the executive "to meet the exigencies of the occasion." *Bd. of Trustees of Highland Park Graded Common Sch. Dist. No. 46 v. McMurtry*, 184 S.W. 390, 394 (Ky. 1916).

Finally, Luther places heavy emphasis on the potential imposition of criminal penalties. Again, though, nothing about this is impermissible. The United States Supreme Court upheld this type of penalty in *United States v. Grimaud*, 220 U.S. 506 (1911). There, a statute vested rulemaking authority related to grazing of sheep on public lands in the Secretary of Agriculture—and made any violation of those rules a criminal offense. *Id.* at 514. The Court

[10] *But see Wisconsin Legislature*, 2020 WL 2465677, at *1.

upheld the statute, holding it did not constitute an impermissible delegation of legislative authority. *Id*. at 518.

The same was true in *Gundy*, where federal law delegated powers to the Attorney General and made noncompliance with them a crime. *See Gundy*, 139 S. Ct. at 2123; *see also Touby v. United States*, 500 U.S. 160 (1991). The possibility of criminal enforcement does not birth a nondelegation violation. But if this were a nondelegation problem, this Court could simply issue a ruling that the orders may be enforced only by civil fines and sever the language concerning criminal penalties.

Conclusion

Luther has failed to establish any constitutional infirmity associated with her confinement. The petition should be denied.

Respectfully submitted,

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Certificate of Compliance

This brief was prepared using Microsoft Word. Relying on the word count function in that software, I certify that this response contains 4,479 words (excluding the cover, tables, signature block, and certificates).

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Certificate of Service

The undersigned certifies that a true and correct copy of this instrument was served this 22nd day of May, 2020 by efiling and by email upon the following counsel of record:

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