No. _____

In The

Supreme Court of the United States

REBECCA A. MORIELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) **Whether 41 C.F.R. § 102-74.38 and 41 C.F.R. § 102-74.390 are inconsistent with the separation of powers doctrine?**

2) **Whether 41 C.F.R. § 102-74.38 and 41 C.F.R. § 102-74.390 are unconstitutionally vague?**

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PETITION FOR A WRIT OF CERTIORARI

Rebecca Moriello respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

The Fourth Circuit Court of Appeals erred when it concluded that the prosecution of Ms. Moriello, based on violations of two obscure General Service Administration regulations, was consistent with the U.S. Constitution. Both regulations violate the non-delegation doctrine.

Ms. Moriello, a licensed immigration attorney, now carries a federal criminal record based on violations of 41 C.F.R. § 102-74.385 and 41 C.F.R. § 102-74.390. The convictions are premised upon a petty dispute between Ms. Moriello and a private security guard at the Charlotte Immigration Court stemming from her use of the smartphone features of her cellular phone within a courtroom at the Charlotte Immigration Court. Moriello testified that she was using her phone for business purposes, as permitted by courtroom regulations. She did not obey the private security guard because she believed her actions were consistent with phone usage policies and that she was the victim of arbitrary enforcement based on prior disputes with court personnel.

The challenged regulations violate the non-delegation doctrine because Congress did not authorize the G.S.A. to create regulations that criminalize the

failure to obey every command of a G.S.A. tenant or subcontractor, nor did they suggest the imposition of criminal sanctions in response to petty arguments.

Here, the challenged criminal regulations are buried deep within the "Public Contracts and Property Management" section of the Code of Federal Regulations. They are not consistent with the intelligible principle doctrine because they are not supported by substantial guidance from Congress. They are based on policy judgments by the executive branch, and are arbitrarily exercised as such, particularly where the regulations are quietly becoming a Department of Justice workhorse for punishing unpopular conduct that would not otherwise violate the law.

The ill-defined regulations are unconstitutionally vague because they provide no guidance with respect to interpretation of essential terms. Instead, they provide law enforcement with the discretion to criminalize broad swaths of seemingly legal conduct. For example, the Fourth Circuit found that "relatively minor disturbances," including conduct that is "disruptive visually," was sufficient to sustain a conviction. (*Moriello* at 936). Similarly, they criminalize the failure to obey orders from "authorized individuals," without providing guidance on which government (or non-government) personnel must be obeyed.

This Court should take up Moriello's petition because it provides an opportunity to address the constitutionality of provisions this Court has not previously evaluated. The petition also provides the opportunity to build on Justice Gorsuch's thoughtful opinion in *Gundy v. United States,* 139 S. Ct. 2116 (2019), and

reinforce the principle that Congress must speak distinctly when it delegates authority to the executive branch to define criminal conduct.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. p. 1a) is reported at 980 F.3d 924 (2020). District Court Judge Martin Reidinger issued his written order on June 7, 2019. (App. p. 22a). That order affirmed the judgment entered by Magistrate Judge David Keesler on June 12, 2018. (App. p. 54a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 10, 2020. (App. p. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

The district court possessed jurisdiction based on 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction to review Moriello's appeal based on 28 U.S.C. § 1291.

REGULATORY PROVISIONS INVOLVED

41 C.F.R. § 102-74.385 provides:

> What is the policy concerning conformity with official signs and directions?
>
> Persons in and on property must at all times comply with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals.

41 C.F.R. § 102-74.390 provides:

> What is the policy concerning disturbances?
>
> All persons entering in or on Federal property are prohibited from loitering, exhibiting disorderly conduct or exhibiting other conduct on property that—

(a) Creates loud or unusual noise or a nuisance;

(b) Unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots;

(c) Otherwise impedes or disrupts the performance of official duties by Government employees; or

(d) Prevents the general public from obtaining the administrative services provided on the property in a timely manner.

The provision authorizing delegation to the executive branch is found at 40 U.S.C. § 1315(c)(1). It provides:

> The Secretary, in consultation with the Administrator of General Services, may prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property. The regulations may include reasonable penalties, within the limits prescribed in paragraph (2), for violations of the regulations. The regulations shall be posted and remain posted in a conspicuous place on the property.

STATEMENT OF THE CASE

A. Factual Background

On June 29, 2017, immigration attorney Rebecca Moriello appeared for a hearing at the immigration court located in Charlotte, North Carolina. (J.A. pp. 253-55). That facility is subject to regulation and control by the Federal Protective Services, as the agency responsible for security in properties managed by the Government Services Administration ("G.S.A."). (J.A. pp. 165-77).

Once her hearing concluded, Moriello attempted to observe an asylum trial to improve her trial skills. *Id.* Moriello received permission from the attorney for the asylum-seeker, who had no objection to her presence. *Id.* Moriello entered the courtroom and sat in the back of the courtroom, farthest away from Immigration Judge Barry Pettinato. (J.A. p. 254). Pettinato questioned Moriello's presence in the courtroom, but eventually permitted it because the asylum-seeker consented. (J.A. p. 255).

Moriello testified that while observing the hearing, she was managing office issues using the smartphone functions of her phone. *Id.* This is when conflict began.

The courtroom was staffed by private security. (J.A. p. 200). The guard on duty, Pinar Bridges, testified that she was employed by a company named Paragon. *Id.* Paragon was either contracted by the G.S.A., or by a subcontractor of a company contracted by the G.S.A. Bridges stated that she observed Moriello using her phone and instructed her to turn it off. (J.A. p. 202). She testified that attorneys can only use their phone for business purposes, and since Ms. Moriello "wasn't representing anybody… it wasn't business purposes, ***in my opinion.***" (J.A. p. 195) (emphasis added).

Moriello did not obey Ms. Bridges. She informed Bridges that courtroom policies permitted her to use her phone for business purposes. (J.A. p. 255). Based on that policy, attorneys are permitted to use their phones in the courtrooms. (J.A. p. 264). Moriello stated that the sign posted outside the courtroom was consistent with that understanding. (J.A. p. 255). The physical sign was introduced into evidence. It stated, "For clear and immediate business purposes only, attorneys and other representatives are exempt from this rule and may use electronic devices in EOIR space." (J.A. pp. 171, 256, 327).

Moriello resumed the silent use of her phone following her disagreement with Bridges. (J.A. pp. 196, 257). Bridges then testified that Pettinato called her up to the bench to ask her to tell Ms. Moriello to shut her phone off. (J.A. p. 196). Pettinato testified that he "could see her fingers going up and down" on her phone, and he had "found it to be very distracting." (J.A. pp. 216-17). He stated that the conversation

did not appear on the transcript of the asylum hearing because he went off the record when he instructed Ms. Bridges. He stated going off the record is not a significant ordeal, "it's just a little click on my mouse on the computer to turn the digital recording equipment on and off." (J.A. p. 216).

Bridges testified that she then again asked Moriello to get off the phone, but Moriello did not comply. (J.A. p. 197). She stated Moriello told her that, as an attorney, she was allowed to use the phone for business purposes. *Id.*

Bridges then spoke to her supervisor, and subsequently called local police, who arrived shortly. *Id.* Moriello spoke to them outside of the courtroom, and subsequently left the courthouse. *Id.* Bridges testified that multiple private security officers were disrupted by the entire encounter by having to shift posts. *Id.* The attorney for the asylum seeker testified that he was not disturbed by Moriello's cell phone usage, nor was he aware of its usage. (J.A. p. 251).

Moriello called witnesses at her trial who testified to knowing Moriello as an immigration attorney and as a volunteer attorney for immigrants. They characterized her as both "extremely honest," and "exhaustingly honest" (J.A. pp. 273, 277). Both also described attorney cell phone and other electronic device usage as both permitted and frequent. (J.A. pp. 274, 278).

Moriello testified that she believed she had been singled out for abuse as she is not popular within the courthouse. (J.A. pp. 272-265). She testified that her phone usage was consistent with policy. (J.A. p. 257). She stated that the immigration judge was frequently hostile to her in court, and that he allowed other attorneys to

use their phones silently. *Id.* Her concerns were not meritless. Judge Pettinato testified to general annoyance at Ms. Moriello.] He testified, "she's so zealous about trying to represent her clients that she gets disrespectful." (J.A. p. 231). He continued, "I think it's the general consensus within our court that Ms. Moriello is a difficult attorney to have to appear in front of any of the court—any of the judges." *Id.* Character witness Joanna Gaughan also testified that immediately following the to-do involving Ms. Moriello, she overheard a discussion among the private security guards where they expressed their dislike for Ms. Moriello. (J.A. p. 279). Pettinato testified that he encouraged the United States Attorney's Office to proceed with criminal charges. (J.A. p. 245).

B. Proceedings Below

Moriello was initially charged by citation with a violation of 41 C.F.R. § 102-74.385 for failure to comply with instructions from a private security guard. The Government superseded with a 2-count criminal information.

Count 1 alleged that she violated 41 C.F.R. § 102-74.385 by failing to comply with "the lawful direction of an authorized individual, that is, an immigration judge" by "continuing to use a cellular phone in an immigration courtroom despite the command of the presiding immigration judge, transmitted through a private security officer, that Defendant cease such use within the courtroom." Count 2 alleged violation of 41 C.F.R. § 102-74.390 by "impeding and disrupting the performance of official duties by government employees" by "refusing commands from an

immigration judge and a private security officer to cease the use of a cellular phone within that judge's courtroom during a sealed asylum proceeding."

As a petty offense, the case was tried before a United States magistrate judge. Moriello filed a motion to dismiss based on vagueness and separation of powers. That motion was orally denied. The case proceeded to trial before the magistrate judge. Moriello was found guilty on July 17, 2018, following the bench trial. She was sentenced to a $2,500 fine. She appealed to the district court on July 26, 2018.

On June 7, 2019, following briefing by the Defense and the Government, the Honorable District Court Judge Martin Reidinger issued a written decision affirming the magistrate judge's finding of guilt. (App. p. 22a).

Moriello timely appealed to the Fourth Circuit on June 19, 2019. That court, in a unanimous published decision issued on November 18, 2020, affirmed the district court's order. The Fourth Circuit found that the regulations were not unconstitutionally vague, that they did not violate the Separation of Powers doctrine, and that the evidence was sufficient to support a guilty verdict. The court's judgment took effect on December 10, 2020.

REASONS FOR GRANTING THE PETITION

I. The Court should grant Moriello's petition and strike the challenged regulations as a violation of the separation of powers. They are inconsistent with the non-delegation doctrine, and lack an intelligible principle.

The challenged delegation violates the constitution because Congress did not create or authorize regulations requiring citizens to obey unspecified and assorted

government employees under threat of prosecution. And Congress has incentive not to create such regulations—such legislation would have the potential for inciting ire with legislative constituents, particularly given that large segments of the population take seriously any infringement upon their individual rights.[1]

While our system of Government is "rooted in the principles of separation of powers," a certain degree of flexibility is required for government functioning. *See Mistretta v. United States,* 488 U.S. 361, 371 (1989). Congress may seek legislative assistance from the executive branch "within proper limits." *Touby v. United States,* 500 U.S. 160, 165 (1991). That discretion may be "substantial." *Gundy v. United States,* 139 S. Ct. 2116, 2123 (2019) (plurality opinion). Such assistance may include "filling up details and finding facts." *Id.* at 2148 (2019) (J. Gorsuch, dissenting). Courts must be able to see "in an appropriate proceeding" that there is a "substantial basis" for the executive action and that the "will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 423, 425 (1944). In other words, Congress must have "supplied an intelligible principle to guide the delegee's use of discretion." *Gundy* at 2123.

Particular scrutiny of delegation is required when criminal sanctions are involved. In those cases, Congress must provide sufficiently clear directives to show that it deliberated and made the required "legislative judgment." *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible

[1] Not to say that Congress does not make these political decision. Congress has expressly legislated in regard to conduct on federal properties. *See, e.g.,* 18 U.S.C. § 1361, et. seq. (governing destructive or malicious conduct on or against federal properties); 54 U.S.C. § 320301 (Antiquities Act).

indefiniteness [of a delegation] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights").[2] Moreover, when delegating in important areas, Congress must provide "substantial guidance." *Whitman*, 531 U.S. 457, 475. Congress may not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes. *Id.* at 468.

Here, both the delegation and the regulations violate the Constitution. As a result, an obscure provision of the Code of Federal Regulations governing building contracts and maintenance, permits seemingly-arbitrary prosecutions of dissidents at the whim of the executive. The delegation violates the separation of powers. *See e.g., Trump v. Hawaii,* 138 S. Ct. 2392, 2448 (2019) (J. Sotomayor dissenting) ("Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments.").

These regulations exceed what is necessary for the "protection and administration" of property. 40 U.S.C. § 1315(c)(1). Property can be both safeguarded and administered without criminalizing general non-compliance with "authorized individuals."[3] Similarly, criminalizing nuisances and slight disruptions is unnecessary.

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[2] *See also Bilski v. Kappos*, 561 U.S. 593, 649 (2010) (Stevens, J., concurring) ("[A]t the 'fringes of congressional power,' 'more is required of legislatures than a vague delegation to be filled in later[.]'") (quoting *Barenblatt v. United States*, 360 U.S. 109, 139-40 (1959) (Black, J., dissenting)).

[3] A predecessor version of the conduct regulation did not convey the same authority to the executive. It outlawed a number of specific instances of misconduct and provided context to the term disorderly conduct. That regulation, 41 C.F.R. § 101-19.304 read as follows: The use of loud, abusive, or otherwise improper language,

Instead, what these regulations have done is permit the executive to criminalize behavior when it sees fit.

A. *This delegation of criminal rule-making authority to the G.S.A. violates the Constitution.*

Even if the regulations were consistent with the proposed delegation, the regulations go too far in criminalizing conduct. Decisions appropriating criminal penalties to "relatively minor disruptions"[4] should be made by our legislature, not the G.S.A.

The General Service Administration was conferred authority to "make all needful rules and regulations for the government of the Federal property under their charge and control." Based on this sentence, the G.S.A. has created its own mini-code of criminal regulations requiring obeisance to a slew of federal actors and permitting prosecutions at the whim of the executive. Individuals can be compelled, under threat of criminal prosecution, to obey authorized individuals at the post office, social security, or the VA. Even minor transgressions or disagreements constitute criminal offenses should the winds of justice favor prosecution.

The creation of regulations criminalizing disruptions or distractions of any magnitude, and imposing unconstitutional duties on citizens to obey 'authorized' individuals, exceeds delegated authority and is inconsistent with the intelligible

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unwarranted loitering, sleeping or assembly, the creation of any hazard to persons or things, improper disposal of rubbish, spitting, prurient prying, the commission of any obscene or indecent act, or any other unseemly or disorderly conduct on property, throwing articles of any kind from a building and climbing upon any part of a building, is prohibited.'

[4] *See Moriello* at 936.

principle doctrine. This is not a case where the executive engaged in fact-finding to determine whether dangerous drugs needed immediate regulation, it is a case of legislating by the wrong branch. *See Touby* at 165.

The history of the regulation's usage is also troubling. Searches related to § 102-74.385 trend toward prosecutions of protesters, lawyers, and journalists. In *Index Newspapers LLC v. United States Marshals Service,* 977 F.3d 817 (9th Cir., 2019), the court described authority to issue dispersal orders to reporters under that section as "dubious." In *United States v. Mumford,* 2017 WL 652449 (D. Oregon, 2019), an attorney was charged with violating the regulation based on a verbal confrontation with the U.S. Marshals following the acquittal of Ammon Bundy. Mumford had challenged the Marshals because he believed they no longer had authority to detain Mumford and was criminally charged. *Id.*

And Moriello's challenge is timely. Consistent with continued criminalization of regulatory violations, the executive has leaned on the regulation more and more in recent years.[5] Defendants are now responding with constitutional challenges. In total, 24 of the approximate 40 decisions appearing in Westlaw searches relating to § 102-74.385 were written within the past six years.

If prosecutions such as Moriello's are consistent with Congressional intent, it is not apparent from the delegating legislation. 40 U.S.C. § 1315(c)(1) does not provide guidance on when disruption becomes a criminal offense, nor does it suggest

[5] *See generally,* Glenn Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime,* 113 Colum. L. Rev. Sidebar 102 (2013).

that failure to obey G.S.A. tenants and subcontractors is unlawful. Instead, both Moriello's prosecution, and the regulation's past usage, suggest that the executive branch saw an opportunity and seized it.

B. *Moriello's non-delegation argument merits consideration by this Court.*

Moriello's case provides a vehicle for the Court to provide lower courts with guidance in evaluating criminal rulemaking by executive agencies in the absence of explicit legislative authorization.

Her case raises arguments that were not decided by *Gundy*. It would provide the Court the opportunity to build on Justice Gorsuch's thoughtful opinion in *Gundy*, and to reinforce the principle that Congress must speak "distinctly" if it wants to assign the executive branch discretion to define criminal conduct. *United States v. Grimaud,* 220 U.S. 506, 519 (1911).

More specifically, it would provide the Court the opportunity to answer the question of whether the Constitution requires something more than an intelligible principle, and to articulate a meaningful-constraint standard. In *Touby,* 500 U.S. at 166, the Court suggested that the Constitution may require more than an "intelligible principle," and that greater congressional specificity is required, "when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *Touby* at 155-56. (comparing *Fahey v. Mallonee,* 332 U.S 245, 249-50 (1947), with *Yakus v. United States,* 321 U.S. at 423-27, and *United States v. Grimaud,* 220 U.S. at 518, 521.).

At least one circuit has noted the ambiguity characterized in *Touby*. *See, Carter v. Welles-Bowen Realty,* 736 F.3d 722, 733 (6th Cir., 2013) (J. Sutton, concurring) ("Under the government's approach, an agency could fill a gap in a criminal statute even where Congress provides no specific guidance about how to fill it.").

Because *Gundy* was decided during a temporary vacancy, similar non-delegation arguments are likely to reoccur. *See, e.g., Paul v. United States,* 140 S.Ct. 342 (2019) (J. Kavanaugh concurring in the denial of *certiorari*) (Justice Gorsuch's opinion "may warrant further consideration in future cases."; *United States v. Lopez-Alvarado,* 812 Fed. Appx. 873, 879 (11th Cir., 2020) (noting support for new consideration of the non-delegation doctrine).

Here, the Court should consider taking up the question and clarifying a standard. Prior to joining this Court, Justice Gorsuch suggested three elements for a "meaningful" constraint: "(1) Congress must set forth a clear and generally applicable rule *** that (2) hinges on a factual determination by the Executive *** and (3) the statute provides criteria the Executive must employ when making its finding." *United States v. Nichols,* 784 F.3d 666, 673 (J. Gorsuch, dissenting from denial of rehearing *en banc*). Alternatively the Court could consider a standard similar to the requirements for retroactive rulemaking by administrative agencies, including "that power [be] conveyed by express terms." *See Bowen v. Georgetown University Hosp.,* 488 U.S. 204, 208 (1988).

Now is the time for the Court to take up the challenge. More and more frequently (as here), the executive branch draws up new, and frequently poorly

defined, criminal regulations that cover an ever-widening range of conduct. *See, e.g.,* Over-Criminalization of Conduct/Over-Federalization of Criminal Law, Hearing before the Subcomm. On Crime, Terrorism, and Homeland Security of the Comm. On the Judiciary, H.R. Serial No. 111-67, 111th Cong., 1st Sess. 6 (July 22, 2009) (testimony of Hon. Richard Thornburgh, former Attorney General) ("The unfortunate reality is that the Congress has effectively delegated some of its most important authority to regulate crime in this country to Federal prosecutors who are given an immense amount of latitude and discretion to construe Federal crimes and not always with the clearest motives or intentions.").

Ms. Moriello's case presents a perfect example of an unconstitutional delegation. Her challenge merits review.

II. The regulations are unconstitutionally vague where they invite arbitrary enforcement and fail to provide notice that specific conduct is unlawful.

The Court should also consider granting *certiorari* because the regulations are unconstitutionally vague. Moriello's case provides an excellent vehicle because the challenged regulations provide little in the way of guidance, and plenty in the way of unconstrained discretion. The vagueness problem, which might not be sufficient to justify *certiorari* on its own, is magnified because the regulations are prime examples of ill-defined regulations drawn up by the executive branch that sweep up too broad a range of conduct. The net they cast risks criminalizing mundane encounters with federal employees or subcontractors. The Fourth Circuit said so itself, specifically noting that both conduct that is "disruptive visually," and "relatively minor

disturbances,"[6] are sufficient to violate the regulations, to turn a remonstrating attorney into a criminal, and to put her at risk of disbarment.

The prohibition on vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (internal quotation omitted). *See also, Gundy* at 2141 ("we have explained that our doctrine prohibiting vague laws is an outgrowth and corollary of the separation of powers.") (J. Gorsuch dissenting) (internal citation omitted).

The greatest degree of certainty is required in criminal statutes because "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A "vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *See also, United States v. Williams*, 553 U.S. 285, 306 (2008) (this Court strikes down statutes tying criminal culpability to "wholly subjective judgments without statutory definitions."); *City of Chicago v. Morales* ("the broad sweep of the ordinance" must not cause it to "reach a substantial amount of innocent conduct." 527 U.S. 41, 60 (1999)).

[6] *Moriello* at 936.

In this case, the Fourth Circuit wrongly failed to analyze vagueness claims by simply asserting that persons of ordinary intelligence would know not to engage in similar conduct. Even if an individual were to estimate the wrongfulness of their conduct, that estimation would very well be limited to anticipation of incurring the ire of a private security guard or immigration judge. That is a separate analysis than whether the conduct would constitute a criminal act. One anticipates the likelihood of criminal charges if they engage in drug dealing or insider trading; they anticipate a potential tongue-lashing if they squabble with a private security guard.

Moreover, the Court ignored *Johnson's* precedent by requiring Moriello to prevail under an "as applied" analysis. *See Moriello* at 931. *Johnson,* consistent with prior precedent, made clear that a statute can be unconstitutionally vague even if there are cases that could be easily resolved under the statutory language. *See Johnson* at 602-03, citing *United States v. L. Cohen Grocery Co.,* 225 U.S. 81 (1921) and *Coates v. Cincinatti,* 402 U.S. 611 (1971). The Court noted, "our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.*

Here, both regulations "are uncertain both in nature and degree" and the Court should strike them down. *Johnson* at 604 (citing *International Harvester Co. of America v. Kentucky,* 234 U.S. 216 (1914)).[7]

[7] These vagueness concerns further contribute to difficulty in "ascertain[ing] whether Congress's guidance has been followed." *Gundy* at 2136 (J. Gorsuch dissenting) (internal citation omitted).

A. *The 'impeding or disrupting official duties' count fails to provide fair notice and provides for arbitrary enforcement.*

41 C.F.R. § 102-74.390(c), which criminalizes conduct that "otherwise impedes or disrupts the performance of official duties by Government employees," runs afoul of both requirements. It provides no threshold level of disturbance, not even a requirement that the disturbance be substantial. Thus, it leaves the decision to law enforcement of whether to bring a criminal charge or give a pass on a particular occasion.

Circuits have raised similar questions regarding the term "disrupt". In *Novak v. City of Parma,* 932 F.3d 421 (6th Cir., 2019), the circuit addressed a law criminalizing any action through the use of a computer that would "disrupt, interrupt, impair the functions of any police operation." The law was sufficiently vague that the court noted, "[t]his broad reach gives the police cover to retaliate against all kinds of speech under the banner of probable cause." "Critical online comments, mail-in or phone bank campaigns, or even informational websites that incite others to "disrupt" or "interrupt" police operations violate the law.

And, as was noted in *United States v. Baldwin,* 745 F.3d 1027, 1031 (10th Cir, 2014), ***the specific challenged provision*** opens the door to prosecution based on "a prosecutorial whim." "Pressing a prosaic conversation with a co-worker about ski conditions in the high country might seem enough to make criminals of us all." *Id.*

The Court should grant Moriello's petition because the regulation "both denies fair notice to defendants and invites arbitrary enforcement." *Johnson* at 597. Even under an "as applied" standard, the regulations are not constitutional. Vagueness

problems are readily apparent when the Fourth Circuit finds the Government can meet its burden based on "relatively minor disturbances," and conduct that is "disruptive visually."

B. *The 'failure to comply with authorized individuals' count is unconstitutionally vague because it does not provide notice of who we are required to obey under threat of prosecution.*

41 C.F.R. § 102-74.385 states, "Persons in and on property must at all times comply with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals." The question left open by the regulation is, who are the authorized individuals, and how does one know they are authorized. Criminal regulations should not leave such questions open.

The Fourth Circuit cited to immigration regulations contained in 8 C.F.R. § 1003.10, as well as Eleventh Circuit caselaw on "an immigration judge's role in immigration proceedings," to reach the conclusion that immigration judges are authorized under the regulation. *See Moriello* at 935 (citing *Stevens v. Osuna,* 877 F.3d 1293, 1302 (11th Cir., 2017). The court also found that immigration judge affiliation with the Department of Justice was relevant. *Id.* The testifying immigration judge was questioned regarding his authority to give orders, and responded, "I think there is some policy matters from our headquarters." (J.A. p. 232).

The Fourth Circuit's criteria for concluding that private security officers were authorized individuals was similarly lacking in grounding. The court noted a number of factors as salient, including that they "look like an actual police officer," and are

required "to be in uniform." The district court's analysis went a different direction. That court decided private security officers are authorized based on the "strict control test" and "principles of agency" (App. p. 40a) (citing *Leone v. United States,* 910 F.2d 46, 49 (2nd Cir., 1990)).

Both the Fourth Circuit and the district court grounded their decisions in sound logic. Their conclusions constitute a fair-ish assessment of who might be authorized to give orders in the G.S.A. context. But that is the problem. Guesswork and Monday morning quarterbacking are not a substitute for fair notice.

Rough estimates, particularly when they need to be performed after the fact, are not consistent with due process. A criminal regulation should provide some clarity regarding who we are legally required to obey.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, this March, 2021.

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