No. 25-

IN THE

Supreme Court of the United States

GREGORY PHEASANT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Land Policy and Management Act makes it a crime to "knowingly and willfully violate[] any . . . regulation" promulgated by the Secretary of the Interior under the Act. 43 U.S.C. § 1733(a). Besides that provision, the Act identifies no criminal conduct. It merely instructs the Secretary to "issue regulations necessary to implement the provisions of [the] Act with respect to the management, use, and protection of the public lands, including the property located thereon." *Id.* The question presented is:

Whether § 1733(a) violates the nondelegation doctrine by giving the Executive near-unfettered power to define what conduct is subject to criminal punishment?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Gregory Pheasant.

Respondent is the United States of America.

There are no corporate parties involved in this case.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the District of Nevada and the United States Court of Appeals for the Ninth Circuit:

United States v. *Pheasant*
No. 21-CR-00024-RCJ-CLB (D. Nev. Apr. 26, 2023);

United States v. *Pheasant*
129 F.4th 576 (No. 23-991) (9th Cir. Feb. 19, 2025); and

United States v. *Pheasant*
157 F.4th 1119 (No. 23-991) (9th Cir. Oct. 31, 2025).

No other proceedings directly relate to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gregory Pheasant respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's panel opinion (App. 1a–14a) is reported at 129 F.4th 576. The district court's unreported decision (App. 15a–38a) is available at 2023 WL 3095959. The Ninth Circuit's order denying rehearing en banc (App. 39a–89a) is reported at 157 F.4th 1119.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on February 19, 2025, and denied a timely rehearing petition on October 31, 2025. App. 1a, 39a. On December 19, 2025, Justice Kagan extended the time to file this petition to February 28, 2026. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 1 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.

43 U.S.C. § 1733(a) provides:

> The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located

> thereon. Any person who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than $1,000 or imprisoned no more than twelve months, or both. Any person charged with a violation of such regulation may be tried and sentenced by any United States magistrate judge designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions and limitations as provided for in section 3401 of title 18.

INTRODUCTION

This case concerns whether Congress may create a fill-in-the-blank crime: Define the penalty, but leave an executive agency free to decide what conduct is proscribed. Petitioner Gregory Pheasant was charged with a federal crime not because Congress prohibited his conduct, but because the Bureau of Land Management (BLM) did so, issuing regulations under a statute that specifies no criminal act and gives the agency only hazy guidance. The district court dismissed the indictment, holding that this scheme violated the nondelegation doctrine. But the Ninth Circuit reinstated the charge, concluding that this expansive delegation of criminal lawmaking power passes muster under the "exceedingly modest" intelligible-principle test. Judges Bumatay and VanDyke dissented vigorously from the denial of rehearing en banc, calling for a stricter test for criminal delegations under the Constitution's separation of powers.

The statute at issue, 43 U.S.C. § 1733(a), authorizes the Secretary of the Interior to promulgate regulations the Secretary deems "necessary" for the management

of public lands under the Federal Land Policy and Management Act of 1976 (the Act). It then makes violations of those regulations punishable by up to twelve months' imprisonment. Congress did not identify *any* prohibited conduct in the statute itself. Instead, it affixed criminal penalties to whatever rules the agency might later adopt. The only guidance to the agency is to "manage the public lands" according to principles of "multiple use" and "sustained yield." 43 U.S.C. § 1732(a).

This Court has expressly left open whether delegations that contemplate criminal sanctions must satisfy more than the minimal intelligible-principle test. See *Touby* v. *United States*, 500 U.S. 160, 165–66 (1991). The decision below resolves that open question by allowing an agency to define the *actus reus* of a crime so long as Congress supplies a penalty and a generalized set of regulatory objectives. Because the statute defines no criminal act—and does not meaningfully constrain the agency's power to do so—the scope of federal criminal liability on vast areas of public land now turns on regulatory discretion rather than legislative choice.

This question arises in a particularly consequential setting. BLM administers federal lands covering massive swathes of the western United States. Regulations promulgated under § 1733(a) criminalize a wide range of ordinary conduct. Whether the Constitution permits Congress to delegate the definition of criminal conduct itself—especially across such broad geographic range—is a question of exceptional importance ripe for this Court's review.

This case presents an ideal opportunity for this Court "to reconsider [its] approach" to the nondelegation doctrine in the criminal context. *Gundy* v. *United States*, 588 U.S. 128, 149 (2019) (Alito, J., concurring in the judgment).

STATEMENT OF THE CASE

1. Over Memorial Day weekend in 2021, Petitioner Gregory Pheasant was riding a dirt bike on BLM-managed land outside Reno, Nevada—a location frequented by off-road enthusiasts. One evening, BLM rangers observed a group of riders and tried to stop them. App. 16a–18a.

At one point, rangers approached a rider who had briefly stopped on one of the trails. As that rider started his bike back up, the rear wheel spun, kicking up dirt and rocks towards the rangers. App. 68a–69a. Several minutes later, a ranger detained Mr. Pheasant, believing him to be the same person. Mr. Pheasant was ultimately cited for operating an off-road vehicle without a taillight, an offense defined by regulation and punished criminally under § 1733(a). *Id.* at 18a–20a.

2. The government later obtained a federal indictment charging Mr. Pheasant with three counts: assault on a federal officer in violation of 18 U.S.C. § 111(a)(1), (b), resisting issuance of a citation in violation of 43 C.F.R. § 8365.1-4(a)(4), and the regulatory taillight offense in violation of 43 C.F.R. § 8341.1(f)(5).

Mr. Pheasant moved to dismiss the indictment. The district court granted the motion in full. Relevant here, the district court held that the regulatory offenses rested on an unconstitutional delegation of legislative power because Congress had failed to supply an intel-

ligible principle guiding the creation of criminal prohibitions under § 1733(a). App. 21a. The court emphasized that the statute authorized the Executive Branch to define criminal conduct across most of Nevada without meaningful statutory limits. Further, the court identified independent defects, including the lack of statutory authority for BLM rangers to perform law-enforcement functions and the insufficiency of the indictment's factual allegations. *Id.* at 26a–29a.

3. The government appealed only the dismissal of the taillight offense. The Ninth Circuit reversed the district court's nondelegation ruling on that count, relying in part on its prior characterization of the nondelegation doctrine as an "exceedingly modest" limitation. App. 7a. The Act provides enough guidance to clear this low bar, the panel said, because it requires BLM "to realize the land's value in a sustainable way." *Id.* at 8a–9a. The panel declined to adopt a more demanding test for delegations of criminal lawmaking power. *Id.* at 13a–14a. The court did not suggest that § 1733(a) survives any stricter standard of review.

The court of appeals denied rehearing en banc over two detailed dissents, which underscored the constitutional significance of allowing an agency to define criminal conduct in the first instance. App. 39a. Judge Bumatay explained that the court should have imposed a stricter nondelegation test than the "toothless" intelligible-principle standard utilized by the panel. *Id.* at 42a. What the nondelegation doctrine requires is context specific. Because criminal law poses a greater threat to liberty—what the separation of powers is designed to protect—Judge Bumatay reasoned that the nondelegation doctrine's test ought to be stricter in this context. *Id.* At minimum, Congress must "define both the actus reus and the penalty for

any criminal offense." *Id.* Examining Founding-era sources, Judge Bumatay concluded that this rule followed the original understanding of the Constitution's separation of powers. *Id.* at 50a–62a. At the Founding, federal criminal statutes did not delegate to the Executive the power to "define an actus reus or affix a penalty." *Id.* at 58a. Because the Act failed to define the *actus reus* for the criminal offense in § 1733(a), it violates the nondelegation doctrine. *Id.* at 67a–68a.

Judge VanDyke agreed that the court should have reheard the case en banc. Judge VanDyke wrote that the panel wrongly treated the question of what test governs nondelegation challenges in the criminal context as settled, noting that this Court has expressly left it open. App. 73a–79a. Judge VanDyke also noted that the circuits have avoided answering the question often because the outcome of previous cases did not turn on the answer. *Id.* at 77a–79a. But "this case makes the question unavoidable" because the statute fails a stricter nondelegation test. *Id.* at 79a.

Further, Judge VanDyke reasoned that the enhanced threats to liberty in the criminal context justified a stricter nondelegation doctrine, as is consistent with this Court's approach to the rule of lenity, void for vagueness, and the prohibition of federal common-law crimes. App. 79a–83a. Drawing on this Court's opinion in *Touby*, Judge VanDyke proposed a "meaningful constraint" test, where (1) "Congress must draw a clear and generally applicable rule," (2) the rule's application must "hinge on a factual determination by the executive," and (3) "the statute must provide criteria constraining the executive as it makes its finding." *Id.* at 84a–85a. Under that test, the delegation in § 1733(a) fails. *Id.* at 84a–89a.

REASONS FOR GRANTING THE PETITION

I. This Court should decide whether Congress may give the Executive carte blanche to define criminal conduct.

A. This question has important consequences for the separation of powers.

The standard for delegations of criminal lawmaking power is highly consequential in any context—but especially so here. BLM is the largest landowner in the United States, controlling approximately 10% of its total land mass. Dep't of the Interior, Bureau of Land Mgmt., *What We Manage,* https://shorturl.at/FTPXv (last visited Feb. 19, 2026). BLM thus has authority to define what conduct triggers criminal liability in an area nearly the size of California, Nevada, and Arizona combined. With § 1733(a)'s near-limitless standard, the agency thus has free rein to make criminal law governing a vast portion of our country.

This case therefore presents a question that strikes at the heart of the separation of powers: Can Congress delegate to the Executive the power to define what acts constitute a crime, with no meaningful constraint? Section 1733(a) makes it a crime to violate any regulation promulgated under the Act related to the management of public lands. The statute does not specify what conduct is or is not criminal. Instead, it merely instructs the Secretary to "issue regulations necessary to implement the provisions of [the] Act with respect to the management, use, and protection of the public lands, including the property located thereon." 43 U.S.C. § 1733(a). The *actus reus* of an unlimited number of criminal offenses, therefore, is up to the unconstrained discretion of the Executive.

This Court should decide whether such a delegation complies with the separation of powers. Article I vests the legislative power in Congress alone, and Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy*, 588 U.S. at 135 (plurality) (quoting *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). Determining what conduct is subject to criminal punishment *is* an exclusively legislative power: "Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States* v. *Davis*, 588 U.S. 445, 451 (2019) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812))). Section 1733(a) therefore unites legislative and executive power "in the same hands"—what the Framers warned was "the very definition of tyranny." The Federalist No. 47, at 261 (Madison) (J.R. Pole ed. 2005).

This Court has not yet settled whether Congress may give the Executive the power to define criminal conduct without meaningful constraint. In civil nondelegation challenges, this Court has applied the "intelligible principle" test from *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928). See*, e.g.*, *FCC* v. *Consumers' Research*, 606 U.S. 656 (2025). But in *Touby*, this Court acknowledged that a stricter test may apply in the criminal context. 500 U.S. at 165–66 (1991). *Gundy* did not settle the issue either, as only a plurality endorsed using that test there, and four Justices were open to something stronger. See 588 U.S. at 135 (plurality opinion); *id.* at 148–49 (Alito, J., concurring in the judgment); *id.* at 162–65 (Gorsuch, J., dissenting); *United States* v. *Moriello*, 980 F.3d 924, 932–33 (4th Cir. 2020) (acknowledging it is unsettled whether "a higher [nondelegation] standard exists for regulations imposing criminal penalties"). And the

statutes in *Touby* and *Gundy* provided far more guidance on what conduct could be criminalized than the Act here. See *Touby*, 500 U.S. at 162–64; *Gundy*, 588 U.S. at 132–34 (plurality).

"Given the deprivation of liberty at stake" in criminal law, § 1733(a)'s delegation warrants a "more demanding approach" to the nondelegation doctrine. App. 42a (Bumatay, J., dissenting from the denial of rehearing en banc). This Court has long recognized the special separation of powers concerns that apply in the criminal context. Unlike in other areas of law, criminal statutes must sometimes be read in favor of the defendant under the rule of lenity, *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820); *United States* v. *Bass*, 404 U.S. 336 (1971), and can be void for vagueness, *Davis*, 588 U.S. 445. And long before *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), this Court denied the federal courts common-law jurisdiction to create crimes. *Hudson*, 11 U.S. (7 Cranch) 32. These three doctrines are rooted in the principle that Congress alone is "authorized to 'make an act a crime.'" *Davis*, 588 U.S. at 451 (quoting *Hudson*, 11 U.S. (7 Cranch) at 34); *Wiltberger*, 18 U.S. (5 Wheat.) at 95; *Bass*, 404 U.S. at 348.

The Constitution's separation of powers demands enforcement. After all, "'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'" *N.L.R.B.* v. *Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in the judgment) (quoting *Bond* v. *United States*, 564 U.S. 211, 223 (2011)). And compared to other contexts, "[t]he power to make criminal law raises heightened concerns for liberty and arbitrary government power." App. 51a (Bumatay, J., dissenting from the denial of

rehearing en banc). Our Constitution consciously separates the powers to make and enforce the criminal law—but § 1733(a) unites them.

B. This question is ripe for the Court's review.

This Court should not wait for a circuit split before addressing this question. The circuits are unwilling to get ahead of the Court on this issue, and geography means the constitutionality of § 1733's delegation in particular is unlikely to generate a split.

The lower courts are resistant to break new ground here. Several circuits have expressly stated they will not reconsider the intelligible-principle test in criminal delegations until this Court does so. See *United States* v. *Cooper*, 750 F.3d 263, 271 (3d Cir. 2014) ("Until the Supreme Court gives us clear guidance to the contrary, we assess the delegation of authority to the Attorney General [under SORNA] under an intelligible principle standard."); *United States* v. *Nichols*, 775 F.3d 1225, 1232 (10th Cir. 2014) ("'Until the Supreme Court gives us clear guidance to the contrary[,]' [w]e likewise decline to abandon the well-settled 'intelligible principle' standard . . . ." (citation omitted) (quoting *Cooper*, 750 F.3d at 271)), *rev'd*, 578 U.S. 104 (2016).

And the circuits that have acknowledged that a stronger test may apply to criminal delegations just mimic this Court's approach in *Touby*. Because they determined that the challenged delegation would pass even the stricter proposed test, they declined to resolve the question. See *United States* v. *Dhafir*, 461 F.3d 211, 216 (2d Cir. 2006) (upholding a delegation "[e]ven if a heightened standard should apply to delegations concerning criminal offenses"); *United States* v. *Arch*

Trading Co., 987 F.2d 1087, 1094 (4th Cir. 1993) ("Because the IEEPA meets [the proposed stricter] standard, we need not decide the unsettled question of whether delegation of the authority to define criminalized conduct must be held to a higher standard than delegation of civil authority."); *Moriello*, 980 F.3d at 933 (upholding a delegation "[e]ven assuming" but not deciding whether "a higher standard exists for regulations imposing criminal penalties"). And other courts have acknowledged the question without deciding it. See *Cargill* v. *Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (declining to "reach" whether "Congress's delegating legislative power to the Executive in the context of criminal statutes raises serious constitutional concerns" because it "d[id] not have to"), *aff'd*, 602 U.S. 406 (2024); see *also Carter* v. *Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring) ("[T]he Constitution may well also require Congress to state more than an 'intelligible principle' when leaving the definition of crime to the executive.").

As to § 1733(a)'s delegation specifically, only two circuits' views are likely to matter, and they agree with each other. Almost all BLM land lies within 12 western States—Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming—all located in the Ninth and Tenth Circuits. See Dep't of the Interior, Bureau of Land Mgmt., *Public Land Statistics 2024* (2025), https://www.blm.gov/sites/default/files/docs/2025-07/BLM-Public-Land-Statistics-2024.pdf. Since both circuits are unwilling to apply a stricter nondelegation standard, further percolation on § 1733(a)'s validity is unlikely.

In short, this Court should not wait for the circuits when they are waiting for the Court. Whether § 1733(a) violates the nondelegation doctrine is ripe for this Court's review.

II. Section 1733(a) violates the nondelegation doctrine by giving the Executive free rein to define criminal conduct.

A. A test stricter than the "exceedingly modest" intelligible principle must apply to criminal delegations.

This Court has long recognized that, to create a federal crime, Congress "must first make an act a crime [and] affix a punishment to it." *Hudson*, 11 U.S. (7 Cranch) at 34. Section § 1733(a) satisfies only the latter requirement. Congress provided that "any person who knowingly and willfully violates any such regulation … shall be fined no more than $1,000 or imprisoned no more than twelve months, or both," 43 U.S.C. § 1733(a). But it did not identify any prohibited conduct or even what sorts of conduct could be prohibited. Instead, it left the task of defining what acts are criminal entirely to BLM.

This Court has not often invalidated statutes under the nondelegation doctrine, but it has done so where Congress delegated "a power to make federal crimes of acts that never had been such before." *Fahey* v. *Mallonee*, 332 U.S. 245, 249 (1947) (discussing *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935)). Section 1733(a) authorizes precisely that type of delegation. It does not merely permit the Executive to fill in details or administer a legislative scheme; it empowers the Executive to decide, in the

first instance, what conduct will subject citizens to imprisonment.

This delegation's criminal context sets it apart from run-of-the-mill delegations of regulatory authority, justifying a stricter approach than the "exceedingly modest" test the panel below used. App. 7a. This Court has long observed that because "criminal punishment usually represents the moral condemnation of the community," it follows that legislatures "should define criminal activity." *Bass*, 404 U.S. at 348. It is contrary to self-government "to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges," or, for that matter, bureaucrats. *Davis*, 588 U.S. at 451. The people must have the "ability to oversee the creation of the laws they are expected to abide." *Id.*

The Framers recognized that our constitutional structure prevented a delegation so "general" that "the whole power of legislation might be transferred by the legislature from itself" to the Executive. James Madison, *Report of 1800*, Nat'l Archives, https://founders.archives.gov/documents/Madison/01-17-02-0202 (last visited Feb. 19, 2026). And with "criminal subjects," the legislature's "details should leave as little as possible to the discretion of those who are to apply and to execute the law." *Id.* To do otherwise would produce "a union of the different powers" our Framers deliberately sought to prevent. *Id.* Congress must provide something more than a general policy goal.

Drawing on these principles, Judge Bumatay carefully explained why Congress, at a minimum, must specify the *actus reus* of an offense. App. 42a; see *also* Nicolas Elliott-Smith, *Crimes Without Law: Administrative Crimes and the Nondelegation Doctrine*, 115 J.

Crim. L. & Criminology 429, 483–84 (2025). And Judge VanDyke proposed the three-pronged "meaningful constraint" test described in *Touby*. App. 84a (citing *Touby*, 500 U.S. at 166–67).

Nor does history support applying the ordinary intelligible-principle test here. Save for one arguable exception, Congress did not delegate the power to define criminal conduct until well after the Founding. App. 57a–58a (Bumatay, J., dissenting from the denial of rehearing en banc) (citing Michael C. McCue, *Modern Times, Hidden Crimes: Criminal Lawmaking Delegations from the Founding to Today*, 20 Dartmouth L. J. 1, 12, 13, 28 (2022)). Early federal criminal statutes specified the prohibited conduct, and the only delegations involved details, such as specifying the object of the prohibited conduct. See*, e.g.*, Act of July 6, 1797, ch. 11, §§ 10, 13, 1 Stat. 527, 529, 531 (criminalizing "fraudulently us[ing] any stamp or mark, directed or allowed to be used by this act" and delegating to the "Secretary of the Treasury[] to cause to be provided so many marks and stamps," the objects of the offense); Act of Apr. 30, 1790, ch. 9, §§ 25, 28, 1 Stat. 112, 117–18 (criminalizing assault and other acts against "ambassador[s] and other public minister[s]" and identifying those public ministers as ones "authorized and received as such by the President").

The only arguable exception was the Northwest Ordinance. But as Judge Bumatay noted, territorial governors and judges could enact only pre-existing criminal laws that existed in the original states, not make crimes from scratch. App. 62a–65a (citing Northwest Ordinance § 5, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a)). Those territories also lacked local legislatures, and the delegation lasted only until legislatures were formed—the bodies who are supposed to make crimes.

Id. at 64a–65a; Northwest Ordinance § 5, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a). Thus, the Northwest Ordinance's "broad delegations to temporary territorial governments fulfilled rather than undermined the fundamental principle of democratic accountability underlying the non-delegation doctrine." App. 65a. At bottom, the Constitution's structure and original public meaning forbid broad delegations to the Executive to decide on its own what conduct is criminal.

The panel below suggested that the nondelegation doctrine is weaker here because the Act is an exercise of Congress's plenary powers under the Property Clause of Article IV. App. 12a. But however sweeping that authority is, the Constitution vests it exclusively with Congress, not another branch. U.S. Const. art. IV, § 3, cl. 2. And as Judge VanDyke discussed, Congress having such expansive authority under the Property Clause strengthens the nondelegation doctrine's bite. App. 88a (VanDyke, J., dissenting from denial of rehearing en banc). Delegations of sweeping power require *greater* congressional guidance, not less. *Id.* at 88a–89a (citing *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001)).

B. Section 1733(a)'s delegation goes far beyond those upheld by this Court or the lower courts.

Contrary to the panel decision below, the delegation here cannot be sustained based on this Court's decisions upholding more limited delegations.

In *Gundy*, Congress had already defined the criminal offense (failure to register under SORNA) and delegated only the questions of timing and applicability to a subset of individuals (pre-Act offenders). See 588 U.S. at 132–34 (plurality). That case thus involved

only the implementation of an existing crime, and the Attorney General's only role was to "apply SORNA to pre-Act offenders as soon as he thought it feasible to do so." *Id.* at 138.

The delegation in *Touby* was similarly narrow. That statute also defined what conduct was criminal—the manufacturing, possession, and distribution of controlled substances—and delegated only the determination of what objects that conduct applied to, *i.e.*, which substances were controlled. See *Touby*, 500 U.S. at 162–64. And Congress significantly constrained that determination with several factors and required the Attorney General to make certain factual findings. *Id.* at 166–67.

These differences matter. The fundamental problem with § 1733(a) is that it allows the Executive to define crimes from scratch. As Judge Bumatay urged, Congress "cannot simply leave it to the Executive branch to unilaterally declare what acts can subject the people to criminal confinement. In this context, the Constitution requires more than the standard, opaque version of an 'intelligible principle.'" App. 42a.

The court below relied on *United States* v. *Grimaud*, 220 U.S. 506 (1911). But that decision did not resolve the question presented here. As Judge VanDyke explained, *Grimaud* arose decades before this Court articulated the intelligible-principle framework or recognized that delegations touching criminal liability may warrant heightened scrutiny. App. 74a–75a. At that time, the Court evaluated delegations through a far narrower lens, asking only whether Congress had enacted a criminal prohibition and authorized the Executive to administer it. *Id* at 75a. The statute in *Grimaud* prohibited unauthorized entry and grazing on

forest reserves and allowed the Executive to issue regulations governing how those prohibitions operated. 220 U.S. at 514–16. The Court allowed this delegation, as it was limited to the "power to fill up the details" and "administer the law and carry the statute into effect." *Id.* at 517–18. The regulations did not define new crimes; they implemented a legislative command already in place.

By contrast, § 1733(a) does not identify any conduct as criminal. Instead, it authorizes the Secretary of the Interior to promulgate whatever regulations deemed "necessary" and attaches criminal penalties to their violation. That structure leaves the definition of criminal conduct to the Executive in the first instance.

To be sure, the Act includes some (vague) policy goals. It instructs the Secretary to "manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). The Act defines "multiple use" to mean, in short, managing public lands in a way that "will best meet the present and future needs of the American people." 43 U.S.C. § 1702(c). And "sustained yield" means "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* § 1702(h). As Judge VanDyke observed, these principles are essentially about tradeoffs which involve "balanc[ing] many contradictory objectives" and "can be used to justify almost any of the potential uses of land." App. 85a–86a. They tell BLM almost nothing about what conduct should be criminalized. Effectively, BLM can criminalize anything it wants.

C. This delegation has produced an entirely agency-created criminal code.

The absence of any legislatively defined act has predictable consequences. Free to write its own criminal code without the constraints of bicameralism and presentment, BLM has criminalized all sorts of conduct: watching TV or playing instruments unreasonably loudly, 43 C.F.R. § 8365.2-2(a), repositioning a table at a campground, *id.* § 8365.2-3(f), searching for buried treasure, *id.* § 3715.6(j), and racing water crafts or playing war games, *id.* § 6302.20(i). Each offense risks up to twelve months imprisonment and a $1,000 fine. Any person enjoying the land managed by BLM must comb the extensive, ever-changing Federal Register to discern whether he is subject to new regulations issued by executive officials that could carry imprisonment if violated.

Without this Court's intervention, BLM will retain unfettered authority to use the wide breadth of § 1733(a) to apply criminal consequences across the nearly 48 million acres it administers (or two-thirds of the land) in the state of Nevada, not to mention vast swaths of recreational spaces in other Western states. As the Bureau itself recognizes, "[a]ccess to wide open spaces is in the fiber of Nevada history." Dep't of the Interior, Bureau of Land Mgmt., *Nevada State Office,* https://www.blm.gov/office/nevada-state-office (last visited Feb. 19, 2026). The same can be said of Colorado, New Mexico, Utah, Arizona, and the entire region where BLM essentially acts as the Nation's landlord and lawmaker. Citizens enjoying BLM land should not be subject to a sprawling criminal code confined only by an "exceedingly modest" limitation. The Constitution demands more.

III. This case presents the ideal opportunity to reconsider the Court's approach to the nondelegation doctrine.

The question presented is the sole dispositive issue here. The Ninth Circuit's decision turns on whether it applied the correct standard. As Judge VanDyke concluded, "this case makes the question unavoidable" because § 1733(a) would fail under a stricter nondelegation test. App. 79a. The issue is a question of law which was preserved at every stage of litigation. It was pressed and passed upon by the courts below—as of now, BLM can criminalize whatever it deems appropriate. This case enables the Court to finally settle this issue.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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