APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellant*, v. GREGORY W. PHEASANT, *Defendant - Appellee*.	No. 23-991 D.C. No. 3:21-cr-00024- RCJ-CLB-1 OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, Senior District Judge, Presiding

Argued and Submitted October 10, 2024
Las Vegas, Nevada

Filed February 19, 2025

Before: Carlos T. Bea, Mark J. Bennett, and Eric D. Miller, Circuit Judges.

Opinion by Judge Miller

SUMMARY*

Criminal Law

The panel reversed the district court's dismissal of a count charging Gregory W. Pheasant with driving an off-road vehicle on public lands at night without a taillight, in violation of 43 C.F.R. § 8341.1(f)(5), and remanded.

Section 8341.1(f)(5) was adopted by the Secretary of the Interior under authority vested in him by section 303(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), which directs the Secretary to "issue regulations necessary to implement the provisions of [the FLPMA] with respect to the management, use, and protection of the public lands, including the property located thereon." The statute provides that "[a]ny 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."

The district court held that section 303(a) is an unconstitutional delegation of legislative power because it gives the Secretary "unfettered legislative authority" to make rules that "cover almost all conduct on public lands" without "any guidance or restraint as to when the Secretary . . . shall promulgate rules."

Article I of the Constitution vests all legislative powers in Congress. Accompanying that assignment of power to Congress is a bar on its further delegation—Congress may

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

not transfer to another branch powers which are strictly and exclusively legislative. But Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. Under the Supreme Court's "intelligible principle" test, a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.

The panel held that section 303(a) easily satisfies the "intelligible principle" test because, taken together, the FLPMA's provisions set out a clear principle: The Secretary must develop a long-term management strategy to realize the land's value in a sustainable way. Such constraints are enough to satisfy Article I.

COUNSEL

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OPINION

MILLER, Circuit Judge:

Late at night on the Friday of Memorial Day weekend in 2021, Bureau of Land Management rangers were patrolling Moon Rocks, an area of BLM-administered land north of Reno, Nevada. When the rangers saw a group of motorcyclists riding without lights, they turned on their emergency lights to direct them to stop. According to the rangers, one of the motorcyclists, Gregory Pheasant, refused to stop. After the rangers chased him down, he allegedly came to a stop only to spin his rear wheel—thereby throwing rocks and dirt at the rangers—while making obscene gestures and abusive comments. He then sped away again.

Pheasant was eventually apprehended, and a grand jury in the District of Nevada returned a three-count indictment charging him with assault on a federal officer, resisting the issuance of a citation or arrest, and—in the only count at issue in this appeal—driving an off-road vehicle on public lands at night without a taillight, in violation of 43 C.F.R.

§ 8341.1(f)(5). That regulation was adopted by the Secretary of the Interior under authority vested in him by section 303(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1733(a), which directs the Secretary to "issue regulations necessary to implement the provisions of [the FLPMA] with respect to the management, use, and protection of the public lands, including the property located thereon." The statute provides that "[a]ny 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." *Id.*

Pheasant moved to dismiss the indictment, and the district court granted the motion. As to the taillight count, the court held that section 303(a) is an unconstitutional delegation of legislative power because it gives the Secretary "unfettered legislative authority" to make rules that "cover almost all conduct on public lands" without "any guidance or restraint as to when the Secretary . . . shall promulgate rules." The government appeals the dismissal of that count, and we review the district court's decision de novo. *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266 (9th Cir. 2021).

Article I of the Constitution vests "[a]ll legislative Powers . . . in a Congress of the United States." U.S. Const. art. I, § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation"—Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 588 U.S. 128, 135 (2019) (plurality opinion) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). But "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of

discretion to executive or judicial actors." *Touby v. United States*, 500 U.S. 160, 165 (1991).

The Supreme Court has defined the point beyond which a grant of discretion is too broad—and is thus a delegation of legislative power—through the "intelligible principle" test. *See Gundy*, 588 U.S. at 135 (plurality opinion). Under that test, "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.* (alterations in original) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

The requirement that Congress set out an "intelligible principle" to constrain executive discretion "is an exceedingly modest limitation." *Melgar-Diaz*, 2 F.4th at 1266. That is because "the extent and character" of the assistance that Congress may seek from the coordinate branches "must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). And "[s]ince Congress is no less endowed with common sense than [courts] are, and better equipped to inform itself of the 'necessities' of government," courts "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." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting). As courts confronted with non-delegation challenges regularly point out, the Supreme Court has only twice invalidated a statute as an impermissible delegation—both times in 1935, and "in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." *Gundy*, 588 U.S. at 146 (plurality opinion) (quoting *Mistretta*, 488 U.S. at 373 n.7);

see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

As long as Congress has provided *some* standard constraining discretion—even one phrased in broad terms—the Supreme Court has upheld statutes against constitutional scrutiny. *See, e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398–99 (1940) ("just and reasonable" rates); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216–17 (1943) ("public interest, convenience, or necessity"); *Yakus v. United States*, 321 U.S. 414, 423–26 (1944) ("fair and equitable" prices); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472–74 (2001) ("requisite to protect the public health"). As Justice Scalia asked, "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

Section 303(a) easily satisfies the "intelligible principle" test. The statute directs the Secretary to "issue regulations necessary to implement the provisions of [the FLPMA] with respect to the management, use, and protection of the public lands." 43 U.S.C. § 1733(a). The FLPMA instructs the Secretary to "manage the public lands under principles of multiple use and sustained yield." *Id.* § 1732(a). The "multiple use" mandate requires ensuring the utilization of "public lands and their various resource values"—including "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values"—in a manner that takes into account "the relative values of the resources" and avoids "permanent impairment of the productivity of the land and the quality of the environment." *Id.* § 1702(c); *see Public Lands Council v. Babbitt*, 529 U.S.

728, 737–38 (2000). The "sustained yield" mandate requires controlling depleting land uses to ensure "maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources." 43 U.S.C. § 1702(h). To that end, the statute also requires the Secretary to exercise his authority "to prevent unnecessary or undue degradations of the lands." *Id.* § 1732(b). Taken together, those provisions set out a clear principle: The Secretary must develop a long-term management strategy to realize the land's value in a sustainable way.

The Supreme Court's decision in *United States v. Grimaud* makes clear why that principle is sufficiently intelligible. 220 U.S. 506 (1911). In that case, the Court considered a statute authorizing the Secretary of Agriculture to issue rules "regulating the use and occupancy of the public forest reservations and preserving the forests thereon from destruction." *Id.* at 509. Acting under that authority, the Secretary issued a regulation—backed by criminal penalties—prohibiting grazing in a forest reserve without a permit. *Id.* at 514. The Court held that the statute sufficiently constrained the Secretary's authority because it "clearly indicated" that he was "to make provision to protect [the lands] from depredations and from harmful uses." *Id.* at 522. Section 303(a) and its complementary provisions provide similar guidance to the Secretary of the Interior. As in *Grimaud*, the constraints imposed by the FLPMA are enough to satisfy Article I.

Pheasant objects to this conclusion on three grounds. First, he argues that the adjacent statutory provisions in the FLPMA do not prescribe a relevant intelligible principle because they do not affect how the Secretary must execute his responsibilities under section 303(a). That argument runs headlong into the Supreme Court's instruction that, in non-

delegation cases as elsewhere, statutory provisions "need not be tested in isolation" because "[t]hey derive much meaningful content from the purpose of the [relevant] Act, its factual background and the statutory context in which they appear." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946); *accord Gundy*, 588 U.S. at 141 (plurality opinion) ("To define the scope of delegated authority, we have looked to the text in 'context' and in light of the statutory 'purpose.'" (quoting *National Broadcasting Co.*, 319 U.S. at 214, 216)). Section 303(a) directs the Secretary to issue regulations "necessary to implement the provisions of [the FLPMA] with respect to the *management*, use, and protection of the public lands." 43 U.S.C. § 1733(a) (emphasis added). Other provisions of the FLPMA define how the Secretary is to conduct the "[m]anagement of use, occupancy, and development of public lands," *id.* § 1732(a), and constrain the Secretary's "management of the public lands," *id.* § 1702(c); *see id.* § 1702(h). Those provisions are even more directly relevant than the "general policy declarations" that the Court considered in *American Power & Light Co.*; they expressly define the terms that limit the scope of the Secretary's authority. 329 U.S. at 105. The FLPMA thus makes clear that section 303(a) does not, as Pheasant suggests, permit the Secretary to issue any regulation he wishes with a colorable connection to the use of public lands. Instead, the remainder of the statute specifies the policy goals that the Secretary must advance.

Second, Pheasant argues that Congress had to provide the Secretary with more detailed guidance because the FLPMA authorizes the Secretary to promulgate regulations that apply on large areas of land in the American West. *See Whitman*, 531 U.S. at 475 (explaining that "the degree of agency discretion that is acceptable varies according to the

scope of the power congressionally conferred"). But the Supreme Court has never required Congress to provide something more specific than an "intelligible principle" simply because a statute authorizes economically or socially significant regulations. In *Yakus*, for instance, the Court considered a statute that authorized an executive official to promulgate regulations "fixing . . . maximum prices of commodities and rents." 321 U.S. at 419. That delegation undoubtedly had sweeping economic consequences, but the Court upheld it because it determined that the statute's directive to set prices in a manner that was "fair and equitable" and to "give due consideration, so far as practicable, to prevailing prices during the designated base period" sufficiently constrained the executive's discretion. *Id.* at 423. Likewise, in *Whitman*, the Court considered a statute that authorized the EPA to set air quality standards for certain pollutants. 531 U.S. at 472. Even though the Court conceded that this "sweeping regulatory scheme[]" allowed the EPA to "set[] air standards that affect the entire national economy," it held that the guidance in the statute—which called for standards to be set "at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air"—constituted an "intelligible principle" and thus "fit[] comfortably within the scope of discretion permitted by [the Court's] precedent." *Id.* at 473–76. That the delegation here authorizes regulations that may affect a large area of land does not compel heightened constitutional scrutiny.

Pheasant's related argument—that something more than an intelligible principle is required because BLM's mission provides no inherent limitation on the scope of its regulations—is similarly unavailing. BLM does not have plenary regulatory authority; it has defined responsibilities

related to the "management of lands and resources." 43 U.S.C. § 1731(a). The regulations that Pheasant cites to demonstrate the breadth of BLM's authority prove just the opposite. BLM surely regulates a wide range of conduct. *See, e.g.*, 43 C.F.R. § 8365.1-4(a)(1) (noise disturbances); *id.* § 8365.1-2(a) (camping); *id.* § 4140.1 (grazing). But all of its regulations cover conduct with a strong connection to the management, use, and protection of public lands. *See id.* §§ 8365.1-4, 8365.1-2(a), 4140.1 (confining the regulations to public lands). Pheasant points to no examples of BLM regulations of private conduct that does not affect public lands; BLM has no authority to promulgate such regulations.

If anything, section 303(a)'s relationship to public lands counsels in favor of more, rather than less, deference to Congress's choice about the degree of responsibility to assign to the Executive Branch. The Constitution expressly vests in Congress the authority to manage "Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. That authority is plenary—the Supreme Court has described it as "without limitations," *United States v. City & Cnty. of San Francisco*, 310 U.S. 16, 29 (1940), and analogous "to the police power of the several states," *Camfield v. United States*, 167 U.S. 518, 525 (1897). The Court has therefore recognized that Congress can, without creating a delegation problem, circumscribe the "implied license under which the United States [allows] its public domain to be used" by authorizing an agency to make "rules and regulations" that define "an unlawful use of the government's property." *Grimaud*, 220 U.S. at 521. That is precisely what Congress has done here.

Third, Pheasant and his *amici* urge us to apply greater scrutiny to section 303(a) because it empowers the Secretary to promulgate regulations whose violation may be punished

by criminal sanctions. Although Pheasant refers to a "delegation of criminal lawmaking power," that description is somewhat imprecise: It is Congress, not BLM, that created a criminal offense by providing that "[a]ny 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." 43 U.S.C. § 1733(a); *see Melgar-Diaz*, 2 F.4th at 1267. And Pheasant does not contend that Congress is prohibited from leaving to the agency the authority to fill in the details of a regulatory scheme simply because the scheme is enforced through criminal penalties. So the question is, as it always is in non-delegation cases, how much discretion can the agency exercise before it is legislating? That is precisely the question that the "intelligible principle" test answers. *See Loving v. United States*, 517 U.S. 748, 771 (1996).

Pheasant emphasizes that liberty concerns are especially salient in criminal law, but those concerns have only an attenuated relationship to the constitutional principles he invokes. The non-delegation doctrine guarantees that Congress does not give away the legislative power that Article I has vested in it. That guarantee protects individual liberty by preserving the separation of powers. But a power does not become more legislative simply because its exerciser can issue rules backed by criminal penalties. Thus, although the Supreme Court has not expressly resolved whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," *Touby*, 500 U.S. at 165–66, it has routinely applied the "intelligible principle" test even when the challenged statute authorized regulations backed by criminal

penalties. In *Grimaud*, for example, the Court explained that "the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." 220 U.S. at 521; *see Yakus*, 321 U.S. at 418, 427 (upholding grant of authority to executive to set price regulations backed by criminal penalties); *Loving*, 517 U.S. at 771–72 (upholding grant of authority to President to define aggravating factors applicable in military capital cases).

Pheasant's view finds no support in circuit precedent, either. To the contrary, in *Melgar-Diaz*, we rejected a non-delegation challenge to a statute that criminalized crossing the border at a time or place other than as designated by an immigration official. 2 F.4th at 1265. The criminal character of the statute was irrelevant to our conclusion that Congress provided a sufficiently intelligible principle. It mattered only that the statute "does not cast immigration officials completely adrift when they designate times and places of entry," which meant that Congress had not delegated legislative power. *Id.* at 1268. Other circuits have also "decline[d] to abandon the well-settled 'intelligible principle' standard" when reviewing "a statute with criminal consequences." *United States v. Nichols*, 775 F.3d 1225, 1232 (10th Cir. 2014), *rev'd on other grounds*, 578 U.S. 104 (2016); *accord United States v. Cooper*, 750 F.3d 263, 270–71 (3d Cir. 2014).

Even in the criminal context, the "intelligible principle" test provides the controlling legal standard for evaluating non-delegation challenges. And under that test, the district court erred in invalidating section 303(a).

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. GREGORY W. PHEASANT, Defendant.	Case No. 3:21-CR-00024-RCJ-CLB **ORDER**

The United States Attorney for the District of Nevada ("the Government") charged Gregory Pheasant ("Pheasant") with three felonies stemming from his alleged failure to use a taillight at night. Pheasant moved to dismiss the action, arguing that the indictment lacks specificity and that the two regulatory charges are unconstitutional. Pheasant also brings a Motion to Suppress, arguing that evidence was collected in violation of the Fourth Amendment. Beyond those arguments, Pheasant contends that the charges should be dismissed, and the evidence should be suppressed because the officers lacked stop and arrest power. For the reasons discussed below, the Court grants the Motion to Dismiss and denies the Motion to Suppress as moot.

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I. FACTUAL BACKGROUND

(A) Parties Involved

This case arises from Pheasant's interaction with an officer of the Bureau of Land Management ("BLM"). The BLM is an Interior Department agency established in 1946 through the consolidation of the General Land Office and the U.S. Grazing Service. BLM, BLM NATIONAL HISTORY, https://www.blm.gov/about/history/timeline (last accessed April 18, 2023). Nevada is a large state, but most of the land is managed by the BLM. (ECF No. 59 at 2 ¶ 8-9). More specifically, the BLM manages over 48 million acres of land in the state, which amounts to 63% of the state. *See* BLM, BLM NEVADA HISTORY, https://www.blm.gov/about/history/history-by-region/nevada (last accessed April 16, 2023).

The BLM, through the Secretary of the Interior, has the authority to promulgate regulations governing the land it manages. That authority includes the ability to issue any "regulations necessary to implement the provisions of [the Federal Land Policy and Management Act of 1976] with respect to management, use, and protection of the public lands." 43 U.S.C. § 1733(a). The regulations promulgated under that authority are subject to penalties that include prison terms of up to one year, thousand-dollar fines, or both. *Id*. Essentially, the BLM acts as a conservationist agency with law enforcement powers on public lands.

(B) The Incident[1]

On the night of May 28, 2021, The BLM was conducting a special operation to ensure a "family-oriented recreational experience" at Moon Rocks. (ECF No. 75 at 11). The special operation consisted of efforts from both federal law enforcement and BLM officers. (*Id*.)

[1] The facts come from the Incident Record that Officer Yost filed (ECF No. 59 at Ex. A), the Supplementary Incident Report that Officer Sarcinella filed (ECF No. 59 at Ex. B), and the body camera footage from the night of the incident (ECF No. 57 at Ex. D, E, F).

Pheasant and a number of other riders were riding their motorized dirt bikes through the Moon Rocks area without their taillights on. (ECF No. 63 at 2 ¶ 19). BLM Officer Michael Yost ("Officer Yost"), in his BLM Utility Vehicle ("UTV"), "attempted to make a traffic stop on [the riders] and one particular member was harassing [Officer] Yost … [by] yelling profanities and riding away before [Officer] Yost could make contact and identify the driver." (ECF No. 59 at Ex. B). Officer Yost followed the riders for a bit longer before losing "visibility due to dust from heavy use" of the road. (ECF No. 59 at Ex. A). The riders, including Pheasant, rode away on their dirt bikes because Officer Yost decided to stop following them due to the dust and darkness. (*Id.*)

Officer Yost again ran into the riders while he was patrolling the area, and this time he activated the UTV's lights and siren, but the riders did not yield. (ECF No. 59 at Ex. A). Officer Yost claims that the riders flipped him off and rocks from their tires hit him as they rode away. (*Id.*) After a brief period, Pheasant stopped on the main road in front of Officer Yost and yelled at the officer. (*Id.*) The body camera footage shows Officer Yost approaching Pheasant on foot and Pheasant yelling, "speak louder." (ECF No. 57 at Ex. D). Officer Yost responds to Pheasant by saying, "I got you on camera, so I will find you don't worry. You're on camera." (*Id.*) Officer Yost started to walk away and Pheasant drove away a few feet and yelled, "what the fuck did I do to you?" (*Id.*) Officer Yost turned around briefly and said, "you have no taillights."[2] (*Id.*) Pheasant then drove away and Officer Yost got back in his UTV. (*Id.*)

[2] Officer Yost states in his Incident Record that he "yelled that [Pheasant] needed to stop, and [he] tried to explain he needed to have rear taillights, but Pheasant drove off yelling 'fucking cop' 'fuck you.'" (ECF No. 59 at Ex. A). The audio on the body camera footage is not of the best quality. However, it is clear that Officer Yost did not ask Pheasant to stop his dirt bike after Pheasant asked him to speak up, which is when Officer Yost claims that he approached Pheasant. (ECF No. 57 at Ex. D). Further, it is unclear from the body camera footage whether Pheasant yelled "fucking cop" "fuck you." (*Id.*)

Officer Yost radioed BLM Officer Sarcinella ("Officer Sarcinella") and the other officers to inform them that the riders were heading in their direction. (ECF No. 59 at Ex. B.) At that moment, Officer Sarcinella "activated [his] emergency lights and pulled [his] UTV behind the group and attempted to make a traffic stop." (*Id.*) Officer Sarcinella approached the riders with his lights on but none yielded to the lights. (*Id.*) Officer Sarcinella pulled up behind Pheasant, which caused Pheasant to slow "down briefly as if yielding to [the] lights [before Pheasant] paused and then accelerated off-road for several hundred yards." (*Id.*) "Pheasant was not traveling at a high rate of speed," allowing him to gesture with his middle finger toward Officer Sarcinella. (*Id.*) While in front of Officer Sarcinella, the rocks from Pheasant's dirt bike allegedly shot out from under his tire, struck Officer Sarcinella's UTV with a few of the rocks coming through to hit his face. (*Id.*) Again, Pheasant rode away on his dirt bike and Officer Sarcinella chose not to pursue him. (*Id.*)

However, Officer Yost spotted Pheasant and one other rider on a hill nearby. (ECF No. 59 at Ex. A). Officer Yost approached the two of them without his lights on and the two riders allegedly shifted "their weigh in what appeared … to be preparation to drive away." (*Id.*) Officer Yost "quickly exited [the] UTV and stuck [his] baton through the spokes in the front tire of Pheasant's motorcycle so he could not again flee from the area." (*Id.*)

The body camera footage picks up the rest of this interaction, starting with Pheasant asking, "the fuck did I do to you dude?" (ECF No. 57 at Ex. E). Officer Yost responded with, "earlier you ran away from me." (*Id.*) Pheasant, visibly upset, yelled, "I haven't seen you all night. I just got here bro." (*Id.*) Officer Yost took step towards Pheasant and asked him to turn his lights on. (*Id.*) Pheasant yelled, "I don't have to do anything for you bro. Get a fucking warrant" (*Id.*) Officer Yost stated, "I don't need a warrant for traffic stops." (*Id.*) Pheasant disagreed and stated, "you do to fucking touch my bike. You want to see my taillight? Watch buddy." (*Id.*) Officer Yost then

asked for Pheasant's name and Pheasant responded by asking why he was being detained. (*Id*.) Officer Yost responded with, "you have no taillight" and Pheasant asked, "I am being detained for having no taillight? Write me a ticket." (*Id*.)

At this point, a large crowd of people on foot, in vehicles, and on dirt bikes assembled around Pheasant, Officer Yost, and the unidentified rider that was with Pheasant at the time he was stopped. (ECF No 57 at Ex. E). Officer Yost continued to ask Pheasant his first name. (*Id*.) After taking off his gear and trying to start his taillight, Pheasant responded and stated, "my name is Gregory W. Pheasant, officer." (*Id*.) Pheasant provided Officer Yost with what he claimed was his taillight. (*Id*.) Officer Yost stated that the taillight needed to be red and face the rear of his bike. (*Id*.) Officer Yost asked Pheasant for his date of birth and Pheasant complied. (*Id*.) Pheasant asked for a ticket for not having a taillight so that he could be on his way. (*Id*.) Officer Yost asked for the vehicle's registration and Pheasant explained that the dirt bike was recently purchased and the dealership had the registration information. (*Id*.) Pheasant made a few statements about making donations to the BLM before Officer Yost started to walk away and told Pheasant to wait there while he wrote the ticket. (*Id*.) While Officer Yost walked over to his UTV to identify Pheasant and call more units over to deal with the situation, Pheasant turned his bike and showed Officer Yost that his taillight worked. (*Id*.)

Before Officer Yost could write the ticket, additional officers showed up at the scene and asked Pheasant what the issue was. (ECF No. 57 at Ex. E). Pheasant explained that he was being written a citation for not having taillights. (*Id*.) Pheasant, again visibly upset, also asked the officer why he was being detained for having no taillight. (*Id*.) The unidentified officer told Pheasant to take a step back or he would walk away in handcuffs because "you don't approach a law enforcement officer." (*Id*.) Pheasant took a step back, muttered another expletive, and waited a few moments before stating "fuck you guys and fuck Phil…" (*Id*.)

While Officer Yost was away, Pheasant explained that he obeys the rules, is a professional rider, "is an upstanding citizen," "contributes to the offroad community in positive ways," and the officers are wasting their "fucking time." (EXF No. 57 at Ex. F). The unidentified officer stated that Pheasant "was also saying fuck you and fuck Phil and fuck whoever you were saying right…" (*Id.*) Pheasant responded, "I can say whatever I want." (*Id.*) The officer and Pheasant continued to talk over each other before Officer Yost walked back over to Pheasant to ask him for his address, phone number, and social security number. (*Id.*) Pheasant kept his abrasive demeanor while providing only his address and phone number but argued that he was not required to provide his social security number. (*Id.*) Officer Yost provided Pheasant with a copy of the citation, explained the rules for contesting the citation, and allowed Pheasant to leave. (*Id.*) Pheasant walked over to his vehicle, revved his engine, showed his taillight, put his fist in the air, and rode away yelling. (*Id.*)

II. ANALYSIS

The Government brings three counts against Pheasant: Count I Assault on a Federal Officer (18 U.S.C. § 111(a)(1) and (b)); Count II Resisting Issuance of Citation or Arrest (43 C.F.R. § 8365.1-4(a)(4)); Count III Failure to Use Required Taillight at Night (43 C.F.R. § 8341.1(f)(5) and (h)). Pheasant moves to dismiss all three counts. (ECF No. 59). Pheasant believes that all three counts fail to include the essential elements required to prove the count and fail to include the necessary factual specificity to the elements that the Government pleads. (ECF No. 59 at 18 ¶ 3-4). For that reason, Pheasant argues that all counts should be dismissed. (*Id.*) Pheasant also argues that Counts II and III are unconstitutional under the nondelegation doctrine. (ECF No. 59 at 5-13). Finally, Pheasant argues that the BLM officers did not have the authority to detain Pheasant, so Counts I and II are unconstitutional, given the lack of authority. (ECF No. 74).

The Court agrees with most of Pheasant's arguments. The officers did not have the authority to stop and detain Pheasant, so Counts I and II are defective. Without the authority to detain Pheasant, the BLM officers cannot be engaged in official duties. Further, Counts II and III are unconstitutional under the nondelegation doctrine because there is no intelligible principle to guide the Secretary of the Interior. Finally, the Government provided enough specificity for Count III, however, Counts I and II lack the specificity required. Accordingly, the Court will dismiss all three counts.

(A) Specificity

Indictments "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." FED. R. CRIM. P. 7(c)(1). Rule 12(b)(3)(B) provides defendants with five ways to challenge an allegedly defective indictment. *United States v. Qazi*, 975 F.3d 989, 993 (9th Cir. 2020). Relevant to this Order is the requirement that courts dismiss an indictment for "lack of specificity" and "failure to state an offense." FED. R. CRIM. P. 12(b)(3)(B)(iii) & (v).

Indictments are sufficient if they "contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend" and "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 116 (1974). In ruling on a motion to dismiss an indictment for lack of specificity, the court is "bound by the four corners of the indictment" and must accept the facts alleged as true. *United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014) (quoting *United States v. Boren*, 278 F.3d 911, 914 (9th Cir.2002)).

Pheasant argues that the indictment fails to include "the type of assault alleged, the source of the alleged bodily injury, and identification of the injury itself." (ECF No. 59 at 19 ¶ 3-5). Count I alleges that on May 28, 2021, Pheasant "did forcibly assault, resist, oppose and interfere with [BLM] Ranger G.S.," while "Officer G.S. was engaged in and on account of the performance of

his official duties, inflicting bodily injury upon Ranger G.S." (ECF No. 1 at 1-2). The indictment does not provide any additional color to the events that occurred on the eve of May 28, 2021.

The Government failed to include any facts or circumstances to inform Pheasant of what he is being charged with under Count I and II. Rather, Count I merely states Pheasant's name, the date of the alleged crime, and a recitation of the statute he is being charged under. *See* 18 U.S.C. § 111(a)(1) ("forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [official] while engaged in or on account of the performance of official duties"). Indictments can use the language of a statute to describe the charges, but the language must be supplemented with enough "facts and circumstances" to "inform the accused of the specific [offense]... with which he is charged." *Id.* at 117–18 (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)). Count I simply provides a recitation of the statutory language and nothing more.

Even worse, Count I cites section (b) of the statute but does not identify a weapon that Pheasant used or a bodily injury that the BLM officers suffered. *See* 18 U.S.C. § 111(b) (those in violation of section (a) and use a "weapon … or inflict[] bodily injury, shall be" in violation of this title). At a minimum, the Indictment must provide the essential elements of the crime charged. *Qazi*, 975 F.3d at 993–94. Otherwise, how would Pheasant know what exact conduct violated federal law? Count I undoubtedly cannot answer this question and Pheasant is not required to answer it himself. For that reason, the Court dismisses Count I for lack of specificity.

Count II suffers from the same deficiencies. Count II alleges that "[o]n or about May 28, 2021, … Gregory W. Pheasant … resisted issuance of a citation by authorized officers engaged in the performance of their official duties." (ECF No. 1 at 2 ¶ 5-8). Again, the Indictment fails to include any facts or circumstances and merely restates the regulatory language. *See* 43 C.F.R. § 8365.1-4(a)(4) (no person shall engage in activities including "[r]esisting arrest or issuance of citation by an authorized officer engaged in performance of official duties"). When exactly did

Pheasant resist the issuance of a citation? At the moment that he initially saw BLM officers but was not stopped? At the moment that Officer Yost put his baton in Pheasant's wheel? How did he resist issuance? The language of Count II does not meet the specificity required under Rule 12. Accordingly, the Court dismisses Count II.

However, Count III provides enough context given the crime that Pheasant allegedly committed. Count III alleges that Pheasant "operated an off-road vehicle on public lands during night hours … without required lighted taillights." (ECF No. 1 at 2 ¶ 13-15). This provides Pheasant with the actions that allegedly violated the law and when he engaged in the conduct at issue. While the language mirrors the language of the regulation at issue, enough facts and circumstances are available to apprise Pheasant of the charges against him. *See* 43 C.F.R. § 8341.1(f)(5) & (h) ("No person shall operate an off-road vehicle on public lands … [d]uring night hours, from a half-hour after sunset to a half-hour before sunrise, without lighted headlights and taillights").

(B) Nondelegation Doctrine

Pheasant argues that Count II and Count III should be dismissed because the regulations creating the crimes were promulgated under an unconstitutional statute. Essentially, his argument is that 43 U.S.C. § 1733(a) delegates unfettered legislative authority to the Secretary of the Interior, a member of the Executive Branch, which violates the nondelegation doctrine. Therefore, accordioning to Pheasant, the regulatory charges of Count II and Count III are unconstitutional.

1. Legal Standard

The Constitution establishes three separate branches of government: legislative, executive, and judicial. U.S. CONST. art. I, II, & III. The Framers of the Constitution separated these three branches of government out of fear that mixing the "legislative, executive, and judiciary" powers would "hav[e] a dangerous tendency" to lead to the "accumulation of power." *See* The Federalist

No. 47, at 301 (James Madison). Therefore, a breakdown in the separation of these powers is "the very definition of tyranny" because one branch could aggrandize power from another. *Id*. With these concerns in mind, the Framers created a government where three bodies would exist together, but separately. *Id*. Accordingly, the Framers prohibited branches from delegating their powers entirely to one another.[3] *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (finding that the Constitution prohibits Congress from delegating legislative powers to other branches).

The nondelegation doctrine exists to enforce the prohibition on the unconstitutional delegation of exclusive power from one branch to another. *Gundy v. United States*, 139 S. Ct. 2116 (2019) (plurality op.). The Constitution gives Congress "[a]ll legislative Powers," the President "[t]he executive Power," and the Courts "[t]he judicial Power." U.S. CONST. art. I, II, & III. However, it is well established that Congress can delegate some authority away to Executive agencies. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). "[I]n our increasingly complex society, replete with ever changing and more technical problems . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id*. While Congress may not delegate to another branch "powers which are strictly and exclusively legislative," *Wayman*, 23 U.S. (10 Wheat.) at 42-43, Congress can give Executive agencies limited discretion to "implement and enforce the laws." *Gundy*, 139 S. Ct. at 2123 (plurality op.). The line between unconstitutional delegation and constitutional delegation sits between Congress properly "conferring authority or discretion as to [the law's] execution" or improperly delegating exclusively legislative power. *Field v. Clark*, 143 U.S. 649, 693-94 (1892) (quotation omitted).

[3] The Framer's idea of the separation of powers still exists today. As the Supreme Court recently pointed out, "[t]he federal government's powers, however, are not general but **limited and divided**." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin*., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (emphasis added) (citing *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819)).

The Supreme Court has wrestled with the dichotomy of delegation before. First, in *J.W. Hampton, Jr., & Co. v. United States*, the Supreme Court found that Congress does not violate the nondelegation doctrine if Congress "lay[s] down by legislative act and an **intelligible principle** to which the [Executive agency] is directed to conform." 276 U.S. 394 (1928) (emphasis added). From this decision, the intelligible principle test was borne. *Id.*; *see Mistretta*, 488 U.S. at 371-79 (1989) (holding that "[a]lthough Congress ha[d] delegated significant discretion," there was "no doubt" that the delegation was "sufficiently specific and detailed to meet constitutional requirements"); *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266–67 (9th Cir. 2021), cert. denied, 142 S. Ct. 813 (2022) (relying on the intelligible principle test); *see also Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 459 (5th Cir. 2022) ("Congress gave the SEC a significant legislative power by failing to provide it with an intelligible principle to guide its use of the delegated power").

The modern-day nondelegation doctrine's intelligible principle requirements are straightforward. "[A] delegation is permissible if Congress has made clear to the delegee (1) the general policy he must pursue and (2) the boundaries of his authority." *Melgar-Diaz*, 2 F.4th at 1267 (quotation and citation omitted). Essentially, a statute is unconstitutional if Congress delegates legislative power to an Executive agency and does not provide an intelligible principle outlining the boundaries of the legislative power. *Id.*; See *Jarkesy*, 34 F.4th at 461.

2. Nondelegation Applied

(a) Legislative Delegation

The statute at issue here delegates legislative power to an Executive agency. Government action is legislative if it has "the purpose and effect of altering the legal rights, duties and relations of persons, including … Executive Branch officials . . . [who are] outside the legislative branch." *INS v. Chadha*, 462 U.S. 919, 952 (1983). The statute reads as follows:

> 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.

43 U.S.C. § 1733(a). The statute at issue allows the Secretary of the Interior to promulgate regulations on behalf of the BLM. These regulations "alter" the legal rights of those that use BLM land, which makes the statute quintessentially legislative. Therefore, the intelligible principle applies to the delegation of legislative power.

(b) Intelligible Principle

The Government argues that the statute sets out an intelligible principle because the statute allows regulatory authority "with respect to the management, use, and protection of the public lands." *Id*. Further, the Government argues that the policy declarations accompanying the statute provide an intelligible principle. (ECF No. 63 at 5-6); 43 U.S.C. § 1701(a)(5), (8), & (12). Pheasant takes a textualist's view of the statute and argues that the language does not provide any intelligible principle. The Court agrees with Pheasant.

At a base level, Congress delegated the Secretary of the Interior broad legislative authority to determine when a rule is necessary for the management, use, and protection of public lands. 43 U.S.C. § 1733(a). The statute does not provide any guidance or restraint as to when the Secretary of the Interior shall promulgate rules. *Id*. Instead, the Secretary of the Interior can promulgate rules whenever it is "necessary." *Id*. There is no limiting language to provide the Secretary of the Interior with any considerations regarding when regulations are necessary. Instead, the words "management, use, and protection" serve as the limiting words. *Id*. But, the words "management, use, and protection" do not limit the authority to promulgate regulations because those words cover almost all conduct on public lands. That language has allowed the Secretary of the Interior to

promulgate a plethora of rules from housing policies[4], to traffic laws[5], to firearms regulations[6], to mining rules[7], to agriculture certifications[8]. (ECF No. 59 at 8 ¶ 8-14). That means that the Secretary of the Interior has unfettered legislative authority to promulgate rules for over 48 million acres of land, which is 68% of the state of Nevada.

Diving even deeper into the rules promulgated under the statute at issue, it is clear that the language provides the Secretary of the Interior with unfettered legislative authority. So broad that the Secretary of the Interior promulgated a rule allowing State BLM Directors to establish supplementary regulations "as he/she deems necessary." 43 C.F.R. § 8365.1-6. Not only can the Secretary of the Interior promulgate rules regarding the management, use, and protection of the public lands, but State BLM Directors that the BLM hires have the authority to issue regulations for the management, use, and protection of the public lands. Without any intelligible principle, the Secretary of the Interior has provided Executive employees with Congress' unfettered legislative power to govern individual states. In a state like Nevada, these State BLM Directors are essentially single-person legislators and governors because they promulgate regulations (laws) and enforce the regulations (laws). This delegation of power is the exact type of delegation that the nondelegation doctrine tries to prohibit because it tries to prevent "Congress from intentionally delegating its legislative powers to unelected officials." *NFIB*, 142 S. Ct. at 669. Nothing could be worse than delegating exclusive legislative authority to an appointed official and having that

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[4] 43 C.F.R. § 8365.1-2(a) (how long individuals can camp at a particular spot).
[5] *Id.* § 8365.1-3(b)(1) (what kind of seatbelts individuals must wear); *id.* § 8341.1(g) (whether saddle horses have the right-of-way over off-road vehicles).
[6] 79 Fed. Reg. 9,267-01(4)(a) (Feb. 14, 2014); 65 Fed. Reg. 69781-03(4)(e) (Nov. 20, 2000) (prohibiting shooting firearms in particular areas near Winnemucca and Carson City).
[7] 73 Fed. Reg. 39,027-02(2) (July 8, 2008) (picking up rocks in certain parts of Humboldt, Pershing, and Washoe Counties).
[8] 65 Fed. Reg. 54544-01(a)(1) (Sept. 8, 2000) (prohibiting having hay, straw, or mulch that is not certified as weed-free on any BLM-managed lands in the state).

appointed official delegate the exclusive legislative authority to an employee of the appointed official.

Beyond the Secretary of the Interior's ability to legislate for whatever they see necessary is the power to write regulations criminalizing behavior. Allowing Executive agencies to create the very crimes they are tasked with enforcing effectively turns them into "the expositor, executor, and interpreter of criminal laws." *Aposhian v. Wilkinson*, 989 F.3d 890, 900 (10th Cir. 2021) (Tymkovich, J., dissenting) (emphasis omitted). Essentially, in the words of the Supreme Court, "the nation's chief prosecutor [gets] the power to write his own criminal code" on the public lands. *Gundy*, 139 S. Ct. at 2131 (2019) (Gorsuch, J., dissenting); *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide").

Here, the statute allows the Secretary of the Interior to promulgate rules with penalties that include either a fine of no more than $1,000 or twelve months in prison. 43 U.S.C. § 1733(a). The statute does nothing to cabin the Secretary of the Interior's ability to choose what is a crime. *Id*. With no limiting language, the statute gives the Secretary of the Interior the authority to promulgate its own criminal code on 68% of the land in Nevada, giving the BLM a larger jurisdictional area than the state police. Essentially, the BLM controls a majority of the land in Nevada and has the authority to write the laws on that area of public land, acting with as much authority as both the state legislature and the governor. In fact, the BLM has used this authority to write regulations criminalizing behavior that the state would normally criminalize, like outdated vehicle registration, coal exploration, horse adoption, noisiness, fraud, discrimination, and homelessness.[9] If the BLM

[9] 43 C.F.R. § 9268.3(a)(iv) (relying on § 1733(a)) (prohibition on operating an off-road

can promulgate all these regulations under 43 U.S.C. § 1733(a) then "the statute would seem to give the BLM 'virtually unfettered' discretion to write crimes on the land it manages." (ECF No. 69 at 8 ¶ 4-5) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935)).

There is no language in the statute that cabins the authority of the Secretary of the Interior to promulgate rules on behalf of the BLM. "If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution." *Jarkesy*, 34 F.4th at 462. The Court understands the gravity of this Order, but it cannot "impos[e] limits on an agency's discretion that [is] not supported by the text" simply because it would make the ruling more palatable. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U. S. ___, ___ (2020) (slip op., at 16) (alteration and internal quotation marks omitted).

3. The Government's Arguments

The Government argues that the nondelegation doctrine case law forecloses Pheasant's argument and that other sections of 43 U.S.C. § 1733(a) provide an intelligible principle.

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vehicle without proper "registration"). 43 C.F.R. § 9269.3–3(d)(2) (relying on § 1733(a)) (prohibition on "unauthorized exploration for coal"). 43 C.F.R. § 9264.7(a)(2) (relying on § 1733(a)) (prohibition on "[c]onvert[ing] a wild free-roaming horse . . . to private use"). 43 C.F.R. § 9268.3(a)(3)(ii) (relying on § 1733(a)) (prohibition on off-road vehicles "producing excessive noise"); 43 C.F.R. § 3809.401(b)(4) (relying on § 1733(a)) (prohibition on monitoring plans that do not account for "noise levels"). 43 C.F.R. § 9269.3–5(b)(iii) (relying on § 1733(a)) (prohibition on "permits secured by fraud"); 43 C.F.R. § 9265.5 (relying on § 1733(a)) (incorporating by reference prohibition on "taking any timber, trees, or other vegetative resources through falsifying, concealing, or covering up by any trick, scheme, or device a material fact, or making any false, fictitious, or fraudulent statements or representations, or making or using any false, fictitious or fraudulent statement or entry"); 43 C.F.R. § 3715.8-1 (relying on § 1733(a)) (prohibition on "falsify[ing], conceal[ing] or cover[ing] up by any trick, scheme or device a material fact, or mak[ing] any false, fictitious or fraudulent statements or representations, or mak[ing] or us[ing] any false writings or document knowing the same to contain any false, fictitious or fraudulent statement or entry"). 43 C.F.R. § 2805.12(a)(5) (relying on § 1733(a)) (prohibition on grantees and lessees "discriminat[ing] . . . because of race, creed, color, sex, sexual orientation, or national origin"). 43 C.F.R. § 8365.1-2(a) (relying on § 1733(a)) (prohibition on "[c]amping longer than the period of time permitted by the authorizing officer").

(a) Case Law

The Government relies on *United States v. Cassiagnol*, to argue that the Fourth Circuit already heard a challenge to a statute similar to the one at issue in this Action and rejected the nondelegation doctrine argument. 420 F.2d 868, 876 (4th Cir. 1970). In that matter, the Fourth Circuit analyzed a statute that delegated authority to the General Services Administration ("GSA") to criminalize certain conduct on properties it owned. 40 U.S.C. § 318. The GSA had the authority to "make regulations governing the operation, maintenance and use of government property." *Cassiagnol*, 420 F.2d at 876. The Fourth Circuit reasoned that the GSA was entrusted with a vast number of buildings, so the authority to promulgate rules "had to be **somewhat** general in nature." *Id*. (emphasis added). The Fourth Circuit's analysis of the GSA's authority has no relevance to this Matter because the two agencies and the statutes themselves are vastly different.

First, the statute at issue in *Cassiagnol* is not relevant here because the GSA's role is not as significant as the BLM's. The GSA's statute provided the agency with authority over government property, but, more specifically, government buildings. *Cassiagnol*, 420 F.2d at 876. The BLM's authority extends to all public lands. The two spaces could not be more different. Citizens have different rights when they enter government buildings as opposed to public lands. *Id*. For example, citizens do not have the same speech rights in federal courthouses as on public lands. *United States v. Vosburgh*, 59 F.3d 177 (9th Cir. 1995) (citizens "cannot claim a fundamental right of free speech because the courthouse is a nonpublic forum"). Citizens cannot possess firearms in federal buildings, while citizens can possess one on almost all public land. 41 C.F.R. 102-74.440 (prohibition on possession in federal facilities with some exceptions). Relevant to this case, citizens cannot drive off-road vehicles through government buildings, hunt in government buildings, and camp in government buildings. However, citizens can do all these things on public lands. The statute in

Cassiagnol granted the GSA the authority to regulate a space entirely irrelevant to the type of land that the BLM has the authority to regulate in this matter.

With those types of spaces in mind, it makes sense that the Fourth Circuit found the words "management, use, and maintenance" to be a limiting principle. Of course, those words, as applied in a government building, are enough to limit the GSA. The GSA couldn't, for example, use those words to criminalize the use of a motorized vehicle at night without a taillight, picking up types of rocks, and growing types of agriculture. Rather, the words in the statute granting the GSA authority and the space in which the GSA is authorized to regulate give the GSA a clear line as to what they can and cannot regulate.

Furthermore, even if the GSA and the BLM regulated the same type of space, one agency regulates a tenth of the land in the United States, making it vital that Congress provides an intelligible principle. The space that GSA has authority over is tiny compared to the land that the BLM has authority over. In total, "the GSA manages 371 million square feet of space, slightly less than 8,517 acres" of space within government buildings. (ECF No. 59 at 12 ¶ 3-4); GSA, GSA PROPERTIES, available at https://www.gsa.gov/real-estate/gsa-properties (last accessed April 21, 2023). "In Nevada alone, the BLM manages over five-and-a-half-thousand times that figure: 48 million acres—over 2 trillion square feet of space." (*Id.*); *See* BLM, BLM NEVADA HISTORY, https://www.blm.gov/about/history/history-byregion/nevada (last accessed April 21, 2023). The vast difference in the size of the land that each executive agency regulates makes an intelligible principle all the more critical.[10] Giving an Executive agency authority to regulate 10% of the

[10] The government argues that the grant of authority over a vast area of land means that a grant of broad authority is even more necessary. This could not be any further from the truth. Under that logic, Congress could create an agency governing all the land in the United States and grant the agency all Congress' legislative authority to allow agency to regulate all the land properly. But, as the Supreme Court has pointed out, Congress cannot "transfer" its legislative authority, nor

country and 30% of the country's mineral resources without "substantial guidance" runs afoul of the constitution. *Whitman*, 531 U.S. at 475; CONG. RES. SERV., THE FEDERAL LAND MANAGEMENT AGENCIES 1 (updated February 16, 2021), available at https://crsreports.congress.gov/product/pdf/IF/IF10585.

(b) Statute's Subsections

The Government argues that the policy declarations in the statute giving the Secretary of the Interior authority limit the regulatory authority granted to the Secretary of the Interior. The Government points to three policy declarations:

> [I]n administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking. 43 U.S.C. § 1701(a)(5).
>
> [T]he public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use. 43 U.S.C. § 1701(a)(8).
>
> [T]he public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21(a) as it pertains to the public lands. 43 U.S.C. § 1701(a)(12).

The Government argues that these provisions go beyond providing a guiding principle and provide a "process by which the Secretary would issue regulations and what purposes such regulations should serve." (ECF No. 63 at 7 ¶ 2-3). The Government is incorrect.

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can it abdicate Article I power. *Schechter Poultry*, 295 U.S. at 529.

The policy declarations that the Government relies on provide the Secretary of the Interior with more authority, not a guiding principle to limit authority. The language in each policy declaration sets out goals for the Secretary of the Interior. These goals include "protect[ing]" "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," assisting with "the Nation's need for domestic sources of minerals, food, timber, and fiber," and "provid[ing]" for "human occupancy and use." 43 U.S.C. § 1701(a)(8), (12). The language here goes past simply issuing rules for the "management, use and protection" and expands it to a group of goals encompassing an impossibly wide set of subject matters. 43 U.S.C. § 1733(a). The Government also conveniently leaves out the other eleven policy declarations that further expand the Secretary of the Interior's authority. *See id*. (a)(1)-(7), (9)-(11), (13). While this language identifies specific policy goals, the policy goals themselves provide authority over almost every subject matter. For that reason, these policy goals do not provide an intelligible principle. Without an intelligible principle, the statute is unconstitutional and the regulations promulgated thereunder that Pheasant allegedly violated are dismissed.

(C) Stop-and-Arrest Authority

Pheasant also argues that the BLM officers lacked the authority to stop and arrest him, so Pheasant's detention was unlawful and the Counts relying on BLM officers "engaged in" official duties are defective. Pheasant is correct.

1. Statutory Authority

Federal law provides the BLM, through the Secretary of the Interior, with enforcement authority. That authority includes the authority to issue regulations, bring actions in federal court, contract with local law enforcement to enforce laws issued under the statute, and the establishment of a uniformed desert ranger force in the California Desert Conservation Area. *See* 43 U.S.C. § 1733(a)-(g). Importantly, the statute does not provide the BLM with the authority to detain

individuals for alleged violations of federal law, nor does any other statute. The statute allows the Secretary of the Interior to promulgate regulations that provide BLM officers with the authority to "carry out … law enforcement responsibilities." 43 U.S.C. § 1733(c)(2). But, the Secretary of the Interior never promulgated a regulation providing BLM officers with that authority.[11]

The statute only allows the BLM to contract with "local officials" to enforce "Federal laws and regulations relating to the public lands or their resources." 43 U.S.C. § 1733(c)(1). According to the statute's language, these local officials have the right to carry out various law enforcement responsibilities across the public lands.[12] *Id*. The right to carry out law enforcement responsibilities includes the privilege to "carry firearms," "execute and serve any warrant," "make arrests," as well as "search" and "seize." *Id*. Accordingly, the statute's text is unambiguous on local officials' authority to stop-and-arrest people like Pheasant who allegedly violate federal law on public land.

Moreover, the statute's establishment and delegation of law enforcement authority to the uniformed desert ranger force for the California Desert Conservation Area indicates Congress' willingness to provide BLM officers with law enforcement authority. Under § 1733(e), "[t]he officers and members of [the uniformed desert] ranger force shall have the same responsibilities and authority as" the local officials that the BLM contracts with. The statute specifically recognizes this force but no others, even though the statute's enforcement authority extends to 244 million acres of public lands. (ECF No. 69 at 8 ¶ 9-10). Simply put, "[h]ad Congress wanted to do the

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[11] Here, the BLM issued special operational guidelines that provided local law enforcement with the authority to stop-and-arrest people at the event that Pheasant was riding at. (ECF No. 74 at 4). The language of the operational guidelines clearly states that "[local law enforcement] must detail suspects prior to affecting a federal arrest. The U.S. Attorney's Officer will be contacted before making a federal arrest." (*Id*.) At bottom, this is an indication that the BLM officers in this case knew that they did not have stop-and-arrest authority.

[12] This of course excludes any regulations that the Secretary of the Interior may promulgate, but, as mentioned previously, the Secretary of the Interior has not issued any regulations providing the BLM officers with law enforcement authority.

same for BLM rangers everywhere, it could have done so." (ECF No. 74 at 5 ¶ 4); *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) (articulating the interpretive canon that the text of a statute may express one thing and that inclusion "implies the exclusions of others"). Notably, the only officers with the authority to arrest are the uniformed desert ranger force and local law enforcement contracted for specific circumstances.

Congress has shown its willingness to provide executive bodies with officers that have law enforcement authority. These bodies include – but are not limited to – the GSA[13], Fish and Wildlife Service[14], National Park Service[15], Forest Service[16], Postal Service[17], Veterans Affairs[18], and Amtrak[19]. The statutes providing these federal bodies with officers all grant the officers the authority to make arrests, which is something that 43 U.S.C. § 1733 does not provide the BLM officers. While these statutes expressly provide these officers with arrest authority, there is one other statute that a few of these statutes use to define law enforcement: 28 U.S.C. § 2680. Under

[13] 40 U.S.C. § 1315(b) (the Secretary of Homeland Security may designate officers to "enforce federal laws," "make arrests," "serve warrants," and "conduct investigations").
[14] 16 U.S.C. § 7421(b)(3) (providing the Fish and Wildlife Service with officers that can "search, seize, arrest, and exercise any other law enforcement functions").
[15] 54 U.S.C. § 102701(a)(2)(B), (C), (D) (providing the National Park Service with officers that can "make arrests," "execute any warrant," and "conduct investigations").
[16] 16 U.S.C. § 559c(2)-(6) (providing the National Forest System with officers that can conduct investigations, "make arrests," "serve warrants," "search," and "seize").
[17] 18 U.S.C. § 3061(a)(1), (2), (5) (providing the United States Postal Service ("USPS") with officers that can "serve warrants," "make arrests," "make seizures"); *see* 39 C.F.R. § 233.1 (further specifying what the officers can do).
[18] 38 U.S.C. § 902(a)(1)-(2) (providing the Department of Veterans Affairs with officers that can "enforce Federal laws," "conduct investigations," "make arrests," and execute an "arrest warrant"); see 38 C.F.R. § 1.218 (setting out the guidelines for officers and the penalties for different infractions).
[19] 49 U.S.C. § 28101 (providing any United States railroad service with officers that can "enforce the laws of any jurisdiction in which the rail carrier owns property, to the extent of the authority of a police officer certified or commissioned under the laws of that jurisdiction").

that statute, an "investigative or law enforcement officer" is an officer "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). Again, Congress did not provide BLM officers with any authority to execute searches, seize evidence, or make arrests, so the BLM officers neither meet the statutory definition that other statutes refer to nor do the BLM officers have the same authority that other federal officers have.[20]

Finally, Nevada state law does not provide BLM officers with stop-and-arrest authority. Nevada Law provides DEA officers, FBI and Secret Services agents, BIA officers, and USPS Postal Inspectors with stop-and-arrest authority. *See generally* NEV. REV. STAT. §§ 171.124, 1245, 1255, 1257. At the risk of sounding like a broken record, if the Nevada Legislature wanted to provide BLM officers with stop-and-arrest authority, it would have.

2. No Authority to Stop Pheasant

It appears that the BLM officers here were not authorized law enforcement officers. Without the authority to stop-and-arrest people for allegedly violating federal law, Count I and Count II must be dismissed. The BLM officers did not have the authority to stop Pheasant, so they could not have been engaged in "official duties" when the BLM officers tried to stop-and-arrest him. *See* 18 U.S.C. § 111(a)(1) and (b); *see also* 43 C.F.R. § 8365.1-4(a)(4). Therefore, Pheasant could not have interfered with the BLM officers or resisted the issuance of a citation because the BLM officers were not engaged in official duties.

Further, Pheasant was illegally arrested because the officers did not have stop-and-arrest authority. "There has been an arrest if, under the circumstances, a reasonable person would

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20 The Court recognizes that 43 U.S.C. § 1733 provides the BLM, through the Secretary of the Interior, with the authority to provide their officers with the authority to execute searches, seize evidence, or make arrests. But, as mentioned previously, that statute is an unconstitutional delegation of legislative authority.

conclude that he was not free to leave after brief questioning." *United States v. Del Vizo*, 918 F.2d 821, 824 (9th Cir.1990). Anything beyond "a brief stop, interrogation and, under proper circumstances, a brief check for weapons" is an arrest. *United States v. Robertson*, 833 F.2d 777, 780 (9th Cir.1987). In determining whether a stop amounts to an arrest, the Ninth Circuit also "consider[s] the specificity of the information that leads the officers to suspect that the individuals they intend to question are the actual suspects being sought and the number of police officers present." *United States v. Miles*, 247 F.3d 1009, 1013 (9th Cir. 2001) (citation and quotation omitted). "A warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause. . . [and] is presumptively unreasonable." *Ross v. Neff*, 905 F.2d 1349, 1353–54 (10th Cir. 1990). Unreasonable arrests are illegal arrests in violation of the Fourth Amendment. *United States v. Henderson*, 906 F.3d 1109, 1116–18 (9th Cir. 2019).

Officer Yost arrested Pheasant when he put his baton through the spokes of Pheasant's dirt bike. Pheasant was not free to move after a brief stop, interrogation, and brief questioning. Pheasant's dirt bike was unusable because Officer Yost had put his baton through the spoke of the vehicle. (ECF No. 59 at Ex. A). Further, a large group of BLM officers showed up to aid Officer Yost at the stop and made it clear to Pheasant that he was being stopped for his taillight. (*Id*.) Both of these factors point in the direction of an arrest. Without the authority to make an arrest, Officer Yost executed an unreasonable, illegal arrest in violation of the Fourth Amendment.

(D) Motion to Suppress

Pheasant's Motion to Suppress is denied as moot, given the dismissal of the charges brought against him.

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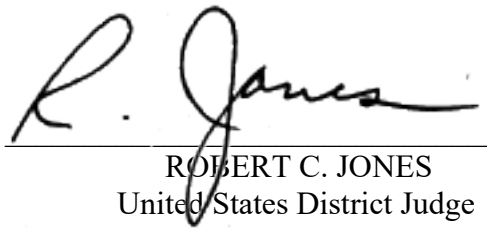
III. CONCLUSION

IT IS HEREBY ORDERED that Pheasant's Motion to Dismiss is GRANTED. (ECF No. 59).

IT IS FURTHER ORDERED that Pheasant's Motion to Suppress is DENIED as moot. (ECF No. 57).

IT IS SO ORDERED.

Dated this 26th day of April 2023.



ROBERT C. JONES
United States District Judge

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellant*, v. GREGORY W. PHEASANT, *Defendant - Appellee*.	No. 23-991 D.C. No. 3:21-cr-00024-RCJ-CLB-1 ORDER

Filed October 31, 2025

Before: Carlos T. Bea, Mark J. Bennett, and Eric D. Miller, Circuit Judges.

Order;
Dissent by Judge Bumatay;
Dissent by Judge VanDyke

SUMMARY*

Criminal Law

The panel denied a petition for panel rehearing and a petition for rehearing en banc in a case in which the panel reversed the district court's dismissal of a count charging the defendant with driving an off-road vehicle on public lands at night without a taillight, in violation of 43 C.F.R. § 8341.1(f)(5), which was adopted by the Secretary of the Interior under authority vested in him by section 303(a) of the Federal Land Policy and Management Act of 1976.

Dissenting from the denial of rehearing en banc, Judge Bumatay wrote that the Ninth Circuit should have demanded more before letting the Executive branch—rather than Congress—define the conduct made criminal under the Federal Land Policy and Management Act. Given the text and history of the Constitution's Article I Vesting Clause, Congress cannot delegate authority to define the actus reus of a crime to the Executive branch. While some discretion may be left in the hands of executive officials, Congress must establish the conduct that subjects the people to a core deprivation of personal liberty—imprisonment.

Dissenting from the denial of rehearing en banc, Judge VanDyke, joined in part by Judge Bumatay, wrote that the court should have reheard this case en banc to resolve the question whether criminal delegations are held to the same exceedingly low standard that applies to civil delegations

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and to correct the panel's erroneous conclusion that criminal delegations are not held to a higher standard.

ORDER

The panel has voted to deny the petition for panel rehearing. Judge Bennett and Judge Miller have voted to deny the petition for rehearing en banc, and Judge Bea has so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 40.

The petition for panel rehearing and rehearing en banc is **DENIED**. Dkt. No. 75.

BUMATAY, Circuit Judge, dissenting from the denial of rehearing en banc:

As Judge VanDyke thoughtfully explains, we should have heard this case en banc. The Ninth Circuit should have demanded more before letting the Executive branch—rather than Congress—define the conduct made criminal under the Federal Land Policy and Management Act. *See* 43 U.S.C. § 1733(a).

Of course, the Supreme Court has endorsed some level of congressional delegation to the Executive branch. *See FCC v. Consumers' Rsch.*, 145 S.Ct. 2482, 2491 (2025). But

history—and precedent for that matter—make clear that the non-delegation doctrine is context specific. *See id.* at 2503 (looking to "broader statutory contexts" to identify intelligible principles). And what's permissible "varies according to the scope of the power congressionally conferred." *Id.* at 2397 (simplified). So it's "not [a] one size fits all" test. *Id.* at 2525 (Gorsuch, J., dissenting). While a more lenient non-delegation doctrine may suffice in some areas of the law, other areas require a more demanding approach.

Criminal law is in the *more demanding* bucket. Given the deprivation of liberty at stake, 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." Instead, to satisfy the non-delegation doctrine that our separation of powers demands, Congress must—at a minimum—define both the actus reus and the penalty for any criminal offense. Our court was thus wrong to simply gesture at a toothless "intelligible principle" and call it a day. *See United States v. Pheasant*, 129 F.4th 576, 583 (9th Cir. 2025).

Because the separation-of-powers demands more before throwing people in prison, I respectfully dissent from the denial of rehearing en banc.

I.

The Non-Delegation Doctrine

A.

The non-delegation doctrine "bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 588 U.S. 128, 132

(2019) (plurality). It's a function of the Constitution's Article I Vesting Clause, which requires that "[a]ll Legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. And it is "rooted in the principle of separation of powers." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). It preserves the tripartite system of government established by the Constitution's first three articles: three branches—each with distinct and "exclusive" authority. *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment).

The Legislative Power is the exclusive power to make laws that are binding on citizens. *See* The Federalist No. 78 (Alexander Hamilton) (George W. Cary & James McClellan ed., 2001) ("[T]he legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."). As one early English treatise put it, "[b]y the Legislative Power, we understand the Power of making, altering, or repealing Laws, which in all well-ordered Governments, hath ever been lodged in a succession of the supreme Councels of Assemblies of a Nation." Marchamont Nedham, *The Excellencie of a Free-State* (1656), in 1 The Founders' Constitution 314 (1986). Another publication closer to the Founding Era said the power included "consulting, debating, enacting laws, and forming regulations, according to which all are to conduct themselves." 1 James Burgh, Political Disquisitions 5 (London 1774).

A key limit on the legislative power is that it cannot be delegated. As John Locke said, the legislature could only make new laws—not new legislators:

> The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.

John Locke, *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* § 141 (1764 ed.); *see also* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1518 n.146 (2021) (collecting sources showing Locke's influence on the Founding generation).

Founding-era debates over the Constitution reflected Locke's ideas. At the Pennsylvania Ratifying Convention, James Wilson—the only Founder to have signed the Declaration of Independence and the Constitution—favorably contrasted the limits on delegation imposed by the Constitution with the lack of limits on Parliament to do the same. James Wilson, *Speech at the Pennsylvania Ratifying Convention* (Nov. 24, 1787). While the British constitution allowed "the Parliament [to] transfer[] legislative authority to Henry VIII," Wilson observed that the "control [over] the power and conduct of the legislature by an overruling constitution was an improvement in the science and practice of government reserved to the American states." *Id.*; *see also* The Federalist No. 53, at 277–78 (James Madison)

(George W. Cary & James McClellan ed., 2001) (comparing "the transcendent and uncontrollable" authority of Parliament with the "constitutional security . . . established in the United States" because of its "constitution paramount to the government"). Or as an anonymous Virginia essayist put it, legislative power could not be "transferred," because it would "surpass the power of legislation and require the assent of the people at large." Philip Hamburger, Is Administrative Law Unlawful? 599 n.16 (2014) (citing *Observations upon the Seven Articles, Reported by the Grand Committee . . . and Now Lying on the Table of Congress*, Virginia Independent Chronicle (Feb. 21, 1787)).

The Founding generation understood that one way to violate the prohibition on legislative delegation was if Congress authorized another branch of government to address too many details left unresolved by statute. This is because, at the time of the Founding, providing sufficient statutory detail was inherent in the nature of the Legislative power. If Congress promulgated a statute that delegated to the Executive branch the ability to provide necessary legislative details, it would exceed the legislative authority. As James Madison wrote in a widely read post-Ratification circular:

> Details to a certain degree, are essential to the nature and character of a law . . . . If nothing more were required . . . than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the

> legislature from itself, and proclamations might become substitutes for law.

James Madison, The Report of 1800 (Jan. 7, 1800).[1] Chief Justice Marshall echoed these views: "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42 (1825).

The non-delegation doctrine addressed two Founding-era concerns—preventing tyranny and maintaining accountability. Centuries of English common law taught that maintaining a strict separation of powers was crucial to preserving liberty. Blackstone, for example, "defined a tyrannical government as one in which 'the right both of *making* and of *enforcing* the laws, is vested in one and the same man, and the same body of men,' for 'whenever these two powers are united together, there can be no public liberty.'" *Ass'n of Am. Railroads*, 575 U.S. at 73 (Thomas, J., concurring in the judgment) (quoting Blackstone, 1 Commentaries *142). Countless other writings from the common law accord with his view. *See id. at* 70–74 (citing writings of de Bracton, Coke, Hale, Locke, Hume, and Blackstone). And the English experience in resisting delegations to the Crown made this principle concrete. *Id.* at 71–72 (citing the *Case of Proclamations,* 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K.B. 1611) (Coke, C.J.) (holding the King could not "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.")).

So the idea that the "separate and distinct exercise of the different powers of government [was] essential to the

[1] https://founders.archives.gov/documents/Madison/01-17-02-0202.

preservation of liberty" was embraced at the time of the Founding. The Federalist No. 51, at 268 (James Madison) (George W. Cary & James McClellan ed., 2001). As said by Montesquieu, "[t]here can be no liberty where the legislative and executive powers are united in the same person . . . lest the same monarch . . . should enact tyrannical laws to execute them in a tyrannical manner." Baron de Montesquieu, The Spirit of the Laws 151 (Thomas Nugent, trans., Hafner Pub. Co. 1949) (1748). And Madison wrote that it would be "absurd" for the Executive's orders to have the force of law "like all *other laws*," because that would presuppose that the "executive department naturally includes a legislative power." Helvidius No. 1 (James Madison), Aug. 24, 1793.[2] In fact, to Madison, it was more than "an absurdity"—it was "tyranny." *Id.*

The Founders also understood that the non-delegation principle secured democratic accountability. Simply, permitting delegation of legislative powers to unelected Executive branch officials undermines representative democracy—the bedrock of legitimacy for creating binding laws. *Cf. Resolutions of the Boston Town Meeting on Sept. 13, 1768*, *in* A Report of the Record Commissioners of the City of Boston, Containing the Boston Town Records, 1758–1769, at 261, 262–63 (Boston, Rockwell & Churchill 1886) (protesting efforts to levy taxes or maintain a standing army in the colonies as "illegal" unless prescribed by "Representatives of [citizens'] own free Election"). The Founders knew that "[r]estricting the task of legislating to one branch characterized by difficult and deliberative processes . . . promote[d] fair notice and the rule of law, ensuring the people would be subject to a relatively stable

[2] https://founders.archives.gov/documents/Madison/01-15-02-0056.

and predictable set of rules," and guaranteed "that the lines of accountability would be clear." *Gundy*, 588 U.S. at 155 (Gorsuch, J., dissenting) (citing The Federalist No. 50 (James Madison)). And that way, "the adoption of new laws restricting liberty" would remain "a hard business, the product of an open and public debate among a large and diverse number of elected representatives"—rather than "hand[ed] off" to another branch where "unelected judges and prosecutors [are] free to 'condemn all that they personally disapprove and for no better reason than they disapprove it." *Sessions v. Dimaya*, 584 U.S. 148, 182 (2018) (Gorsuch, J., concurring) (simplified).

B.

To be sure, Congress was not categorically precluded from leaving some discretion in the hands of the Executive in implementing laws. But early examples of what some have labeled "delegations" were nothing like today's grants of nearly unlimited administrative rulemaking authority to executive officers. And importantly, as a historical matter, any delegations took place in specific, limited contexts. Simply, some—but only some—legislative matters allowed greater discretion to the Executive.

Understanding why the Founders delegated some details helps explain why today's broadest criminal delegations are impermissible. Experience had shown that a deliberative legislative body was ill-suited to exhausting future contingencies in legislation, quickly responding to emergencies, or nimbly dealing with sensitive matters of foreign affairs. *See* Akhil Reed Amar, America's Constitution: A Biography 132–33 (2005) ("Under the old Articles, various recesses and quorum failures of the Confederation Congress had compromised America's ability

to conduct foreign affairs."). As then-Ambassador Thomas Jefferson complained in a letter to a fellow Virginian, the Articles of Confederation Congress obsessed over the "smallest trifle" rather than the "most important act[s] of legislation," because it had to exercise both executive and legislative power. Thomas Jefferson to Edward Carrington (Aug. 4, 1787).[3] According to Jefferson, this was "the source of more evil than we have ever experienced from any other cause." *Id.* Jefferson's solution was "to separate in the hands of Congress[,] the Executive and Legislative powers." *Id.* Similarly, Jefferson wrote to Madison that an executive committee be appointed to "receive and dispatch all executive business, so that Congress itself should meddle only with what should be legislative." Thomas Jefferson to James Madison (Dec. 16, 1786).[4]

So Founding-era laws didn't always specify every detail in their legislative acts. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 302–05 (2021) (giving examples of grants of legislative authority in Founding-era statutes); Wurman, 130 Yale L.J. at 1540–53 (same). Nor could they—almost every statute requires at least *some* discretion in execution.

Instead, it was understood that some legislative areas—to respect the separation of powers and to adhere to democratic accountability—required Congress to make all the essential decisions. In the words of Chief Justice Marshall, "important subjects . . . must be entirely regulated by the legislature itself." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). Otherwise, in areas of "less interest," Congress

[3] https://founders.archives.gov/documents/Jefferson/01-11-02-0588.

[4] https://founders.archives.gov/documents/Jefferson/01-10-02-0461.

may identify the "general provision" and give power "to those who are to act under such general provisions to fill up the details." *Id.*

As a historical matter, Congress granted the Executive greater discretion in implementing laws requiring ministerial administration or in areas involving executive prerogatives. Take the Founding-era example of veteran pensions. The law allowed the President to regulate the distribution of pension payments to veterans—a mere act of bureaucratic process. Act of Sept. 29, 1789, ch. 24, 1 Stat. 95. Another allowed the Secretary of State, the Secretary of War, and the Attorney General to issue exclusive patents if they determined an invention or discovery was "sufficiently useful and important"—a highly individualized, fact-specific inquiry difficult to treat broadly via legislation alone. Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 109–110. And another authorized the President to determine whether a foreign nation sufficiently interfered with American trade to trigger a preexisting embargo statute—a decision already within the Executive's foreign-policy wheelhouse. Act of Mar. 1, 1809, ch. 24, § 11, 528, 530; Act of May 1, 1810, ch. 39, § 4, 2 Stat. 605, 606; *see also Cargo of the Brig Aurora v. United State*s, 11 U.S. (7 Cranch) 382, 382 (1813).

Likewise, whether the delegation implicated public or private rights served as a fault line for permissible delegation. "The idea that the Executive may not formulate generally applicable rules of private conduct" has "ancient roots." *Ass'n of Am. Railroads*, 575 U.S. at 70 (Thomas, J., concurring in the judgment). Indeed, according to some scholars, while delegations in the areas of public rights, such as foreign and military affairs, spending, and management of government property, were permissible, for other areas, such as "rules that regulate citizens as to their private rights in the

domestic sphere," "the Constitution imposes a strict prohibition on such delegation." Michael Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine*, 2 San Diego Legal Stud. Paper No. 20-471 (2020); [5] *see also* Hamburger, Is Administrative Law Unlawful? 388–95 (noting delegations with a historical pedigree from states to municipalities, the federal government to territories, municipalities to local administrative bodies, to courts for matters of procedure, and to the military for martial orders).

Non-delegation was thus understood at the Founding to be a real limitation on Congress's "Legislative powers." History shows that non-delegation's mandate varied based on subject matter, allowing significant discretion to the Executive in foreign, territorial, and military affairs. But outside these historical exceptions, and especially in subjects of great "importan[ce]," the non-delegation doctrine is violated when a statute is insufficiently detailed and vests authority in an agency to write the rules necessary to make the law enforceable.

II.

Non-Delegation and Criminal Law

If the non-delegation doctrine has teeth in any area, it must in the criminal law context. The power to make criminal law raises heightened concerns for liberty and arbitrary government power. After all, what else could encroach more on personal liberty than the threat of imprisonment? The drafting of criminal law thus requires a more stringent non-delegation doctrine because it "implicate[s] potentially two core private rights: the right to

[5] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710048.

life and personal liberty." Nicolas Elliott-Smith, *Crimes Without Law: Administrative Crimes and the Nondelegation Doctrine*, 115 J. Crim. L. & Criminology 429, 450 (2025). So when enacting criminal statutes, the Constitution requires far more legislative detail and prohibits broad delegations.

Founding-era criminal statutes reflected these concerns by specifying an actus reus and punishment. Indeed, it was recognized long ago that "[t]he legislative authority of the Union must first make an *act* a crime" and "affix a punishment to it." *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (emphasis added). Thus, the textual and historical evidence shows that, to comply with Article I's exclusive grant of "Legislative powers," Congress must at a minimum define the actus reus within the four corners of the statute.

A.

So great was the concern for the deprivation of liberty in the criminal context that our Founding generation understood that Congress needed to provide more specificity in enacting criminal statutes. In 1800, Madison warned of this need when "personal liberty" was invaded:

> [O]n criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law. . . . To determine then, whether the appropriate powers of the distinct departments are united by [the act], it must be enquired whether it contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded,

> property deprived of its value to the owner, and life itself indirectly exposed to danger.

James Madison, The Report of 1800 (Jan. 7, 1800).[6] Thus, shortly after ratification, it was acknowledged that only Congress could set the "details, definitions, and rules" of criminal violations. *Id.* *See also* Wurman, 130 Yale L.J. at 1555 (arguing that only permissible delegations at the Founding were those involving a "narrow" "category of conduct").

At a minimum, this means that Congress must define the actus reus by statute. After all, the criminal *act* is at the heart of criminal offense. *See* 4 Blackstone Commentaries *5 (defining a "crime or misdemeanor" as "an act committed or omitted, in violation of a public law either forbidding or commanding it"); Samuel Johnson, A Dictionary of the English Language (4th folio ed.,1773) (defining "crime" as "[a]n act contrary to right; an offence; a great fault; an act of wickedness"); *see also City of Grants Pass v. Johnson*, 603 U.S. 520, 545 (2024) ("[H]istorically, crimes in England and this country have usually required proof of some act (or *actus reus*) undertaken with some measure of volition (*mens rea*)."). Indeed, one would search in vain through the Founding-era criminal law treatises of Hawkins and Hale for mention of a penal statute that did *not* include an actus reus. *See generally* William Hawkins, 1 A Treatise of the Pleas of the Crown (1716); Matthew Hale, 1 Historia Placitorum Coronæ: The History of the Pleas of the Crown (1736); *see also* 4 Blackstone Commentaries (Of Public Wrongs).

The Marshall Court also twice held the power to define and enact criminal statutes, including the actus reus, belongs

[6] https://founders.archives.gov/documents/Madison/01-17-02-0202.

to Congress alone. In deciding whether federal courts could exercise common-law jurisdiction in criminal cases, the Court emphatically said no. *See Hudson & Goodwin*, 11 U.S. at 34. While the Court recognized some "implied powers" for the courts, the "jurisdiction of crimes against the state is not among those powers." *Id.* Instead, the Court understood that criminal rulemaking was part of the "legislative authority." *Id.* And chief among Congress's responsibilities was to "first make an *act* a crime." *Id.* (emphasis added). Thus, the Court required Congress to set the actus reus for any criminal statute.

This was no anomaly. A few years later, Chief Justice Marshall reiterated that "[i]t is the legislature . . . which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Simply, to the Chief, it was "a plain principle that the power of punishment is vested in the legislative . . . department." *Id.*; *see also United States v. Bailey*, 34 U.S. 238, 257 (1835) (McLean, J., dissenting) (objecting to a perjury statute's potential delegation to the Treasury Department to prescribe who could administer oaths, because it involved "the construction of a highly penal law of the union" and was thus an "important" matter). *But see id.* at 253–54 (maj. op. of Story, J.) (upholding the conviction without relying on a delegation because the statute's plain language empowered a state justice of the peace to administer oaths).

Several reasons support this differential treatment of criminal law for purposes of the non-delegation doctrine.

First, the Constitution's text supports treating criminal law differently. Indeed, the Constitution reflects unique "concern with the danger to liberty associated with the criminal process." Rachel E. Barkow, *Separation of Powers*

and the Criminal Law, 58 Stan. L. Rev. 989, 1015 (2006). Consider a few of the Constitution's criminal safeguards. It prohibits the passage of ex post facto laws and bills of attainder, but only as to criminal law. U.S. Const., Art. I, § 9. It requires that all criminal trials be conducted by a jury of peers and held within the State where the offense was committed. *Id.* Art. III § 2. And a conviction for treason requires two independent witnesses. *Id.* § 3. The Fifth Amendment's due process guarantee requires a higher standard of proof in criminal cases. *In re Winship*, 397 U.S. 358, 364 (1970). And the Sixth Amendment guarantees a speedy and public trial, notice of charges, confrontation, assistance of counsel, and juries in criminal proceedings. U.S. Const. Amend. VI. Thus, the Constitution's overriding concern for limiting government power in the criminal sphere should be reflected in the non-delegation doctrine.

Second, some of the Founding Era's most influential legal philosophers wrote on the need for more specificity in criminal law. Discussing the nature of criminal laws, Blackstone wrote that "[in] proportion to the importance of the criminal law, ought also to be the care of the legislature in properly forming and enforcing it." 4 Blackstone Commentaries **2–3. This, he explained, was because "to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a willful disobedience may expose us, is a matter of universal concern." *Id*. Illustrating his point, Blackstone discussed an old English statute that had made stealing sheep "or other cattle" a felony. 1 Blackstone Commentaries *88. According to Blackstone, these "general words, 'or other cattle,' [were] looked upon as much too loose to create a capital offence," leading a court to strike the general phrase. *Id.* In response, Parliament passed another theft statute

specifically listing "bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name." *Id.*

Blackstone's views accorded with those of the criminal-law reformist Cesare Beccaria, one of the most influential writers of the era. Beccaria's treatise *On Crimes and Punishments* advocated for codifying the criminal law rather than maintaining judge-made crimes. Cesare Beccaria, On Crimes and Punishments 13 (David Young, trans., Hackett Publ. Co. 1986) (1764). He argued that "without written texts, society will never assume a fixed form of government in which power derives from the whole rather than the parts and in which the laws, which cannot be altered save by the general will, are not corrupted as they move through the crush of private interests." *Id.*; *see generally* John Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, 37 Mitchell Hamline L.J. Pol'y & Prac. 1 (2017) (demonstrating Beccaria's literary popularity in the United States during the Founding). The writings of Blackstone, Beccaria, and others make clear that the principle that the legislature must define the act forbidden and its penalty was within the Framers' consciousness.

Third, age-old criminal-law doctrines support greater specificity in criminal legislation. Take the rule of lenity. It teaches "that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 588 U.S. 445, 464 (2019). Lenity reinforces the separation of powers by "strik[ing] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

Or take the void-for-vagueness doctrine. It applies with greatest force to "criminal penalties because the consequences of imprecision are qualitatively less severe [in the civil context]." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982). Many of the concerns that drive vagueness doctrine may apply equally to non-delegation doctrine. *See Sessions*, 584 U.S. at 216 (Thomas, J., dissenting) (suggesting that "the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation"). Indeed, "[v]ague statutes have the effect of delegating lawmaking authority to the executive." Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 Yale L.J. 1672, 1806 (2012). Vague statutes simply make it "more likely that any individual enforcement decision will be based on a construction of the statute that accords with the executive's unstated policy goals, filling the gaps of the legislature's policy goals." *Id.*

Thus, as an original matter, for federal "crimes" to be consistent with the "Legislative power," Congress—and no other branch—must specify the actus reus of the criminal offense. *See* Elliott-Smith, 115 J. Crim. L. & Criminology at 483–84 ("When Congress delegates rulemaking authority to an agency to unilaterally determine the actus reus of a criminal offense, it has impermissibly delegated the authority to regulate a citizen's core [personal] right to liberty.").

B.

Founding-Era Criminal Statutes

The need for specificity in criminal enactments was reflected in early congressional practice. Although the "number of federal crimes at the Founding was low," an

examination of those laws suggests that "the blanket authorization for an executive body to create regulations punishable by criminal penalties directly contravenes the Founding-era conceptualization of the separation of powers." Michael C. McCue, *Modern Times, Hidden Crimes: Criminal Lawmaking Delegations from the Founding to Today*, 20 Dartmouth L.J. 12, 13, 28 (2022) (simplified). One lone exception exists—the Northwest Ordinance—but that law dealt with the unique enclave of federal territories. Criminal statutes approaching the criminal administrative laws we see today—statutes delegating to an executive official the power to define the actus reus—did not appear until the late 19th century. This historical evidence supports that Article I's Vesting Clause, as originally understood, required that Congress define, at a minimum, a crime's actus reus and penalty.

1.

Early Criminal Laws

With a single exception, federal criminal statutes at the Founding never delegated to other branches the authority to define an actus reus or affix a penalty.

Consider the first criminal law enacted by Congress. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790). It specified many crimes, including treason, piracy, murder and manslaughter within federal enclaves and at sea, and more. *Id.* These were well known criminal offenses—even if they were defined with respect to the common law or the law of nations. So in each case, Congress had specified an actus reus and a penalty.

Of course, sometimes discretion was involved. The Act, for example, provided that a person who "violate[s] any safe-conduct . . . under the authority of the United States, or shall . . . offer[] violence to the person of an ambassador or other public minister" would be imprisoned for up to three years and fined. 1 Stat. 112, 118 § 28. So the statute did not specify who counted as an "ambassador or other public minister" (a determination strictly within the President's foreign-policy authority). But Congress specified the actus reus—violating the official's safe-conduct. The Act thus only represents "an extraordinarily *narrow* amount of executive discretion." McCue, 20 Dartmouth L.J. at 14 (emphasis added).

Consider next a law enacted a few years later—one outlawing unregulated trade with Indians. *See* An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, 1 Stat. 329 (1793). While granting the Executive branch some discretion over licensing, the law sufficiently specified the conduct it made unlawful. *Id.* The law prohibited "any trade or intercourse" with Indian Tribes "without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose." *Id.* at 329 § 1. So unlike some modern delegations, the law didn't authorize an executive administrator to set a course of conduct for punishment. Rather, it let the Executive grant exceptions to a congressionally mandated, general prohibition, which fit within the Executive's traditional purview anyway. *See Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting) ("[T]he power to *reduce* congressionally imposed requirements . . . is little more than a formalized

version of the time-honored practice of prosecutorial discretion.").

In the years following, Congress clearly specified in several early criminal laws the *conduct prohibited* even if it left to the Executive the discretion to determine the *precise objects* of the conduct made criminal. The Stamp Act, for example, prohibited "counterfeit[ing] or forg[ing] any stamp or mark, directed or allowed to be used by this act." *See* An Act Laying Duties on Stamped Vellum, Parchment, and Paper, ch. 11, § 13, 1 Stat. 527, 531 (1797). But that statute allowed "the Secretary of the Treasury . . . [to] provide[the] many marks and stamps" subject to the criminal offense. *Id.* at 529. Likewise, another law punished those who "falsely make, alter, forge or counterfeit . . . any bill or note issued by order of the president, directors and company of the Bank of the United States" with a term of imprisonment. An Act to Punish Frauds Committed on the Bank of the United States, ch. 61, 1 Stat. 573, 573–74 (1798). Yet another law subjected persons who "cut any timber on the lands reserved" by the Navy Secretary to fine and imprisonment, with the Secretary authorized to select "such tracts or portions . . . as in his judgment may be necessary to furnish for the navy a sufficient supply" of wood. An Act Making Reservation of Certain Public Lands to Supply Timber for Naval Purposes, 3 Stat. 347 (1817). In all these statutes, Congress itself unambiguously specified the actus reus: counterfeiting, forging, or altering of governmental instruments or chopping down protected trees—even if Congress left to the Executive branch or others the task of specifying the precise *object* of the conduct proscribed.

Amid this backdrop, a constitutional controversy was sparked by an extraordinarily broad criminal statute, the Alien Friends Act of 1798. *See* An Act Concerning Aliens,

ch. 58, 1 Stat. 570 (1798). While the criminal portion of the Act provided a well-defined actus reus—illegal re-entry of previously deported aliens—it controversially gave unlimited discretion to the President to "order [the deportation of] all such aliens as he shall judge dangerous to the peace and safety of the United States." *Id.* at 571. The Act punished the return of "alien[s]" previously "ordered to depart" with imprisonment and disqualification from ever becoming a United States citizen. *Id.* Thus, the Act sparked concerns over too much delegation to the President to determine who could be subject to criminal punishment.

Debates over this delegation spurred Madison to passionately criticize the Act's blurring of legislative lawmaking and executive enforcement, particularly in the criminal context. *See* James Madison, The Report of 1800 (Jan. 7, 1800) ("[T]he alien act . . . unites legislative, judicial and executive powers in the hands of the President . . . . [A]ll will agree, that the powers referred to [the Executive and Judiciary] may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional.").[7] And Madison was not alone in his opposition. *See* Wurman, 130 Yale L.J. at 1514–15 (discussing the opposition to the bill by Representatives Gallatin, Williams, and Livingston). Agreeing with Madison, for instance, Rep. Gallatin said in the House of Representatives that unless crimes and punishments were "accurately defined," "States and the State Judiciary would, indeed they must, consider the law as a mere nullity, they must declare it to be unconstitutional." 8 Annals of Cong. 1982 (1798). Even Representative Otis, a supporter of the Bill, thought that such fundamental liberty

[7] https://founders.archives.gov/documents/Madison/01-17-02-0202.

could not "depend[] upon the will of *one man*." 8 Annals of Cong. 2021 (1798). In the shadow of this constitutional controversy, the Alien Friends Act was never enforced and not renewed upon its expiration in 1800. *See* McCue, 20 Dartmouth L.J. at 26. Thus, the Act's attempt at excessive delegation was thwarted before such delegation could become a trend.

Finally, Congress was often specific as to *all* aspects of the crime when it wrote a statute. For example, a statute regulating imports forbade "defac[ing], alter[ing] or forg[ing] any certificate, granted for the protection of merchandise transported as aforesaid[,]" subjecting violators to imprisonment and fines. An Act to Regulate the Collection of Duties on Imports and Tonnage, ch. 22, § 109, 1 Stat. 703, 703 (1799). This provision didn't just specify an actus reus and penalty. Congress set the *object* of the guilty act, too: it drafted and specified the text of the certificate one could be charged for forging. *Id.*; *see* McCue, 20 Dartmouth L.J. at 19. So while Congress *sometimes* gave the Executive the leeway to set the specific objects of an actus reus, it more commonly handled even those details itself.

2.

The Northwest Ordinance

Of course, some countervailing history exists. The Northwest Ordinance is sometimes cited as proof that the Founders had no issue with broadly delegating the power to define criminal laws. *See* Mortenson & Bagley, 121 Colum. L. Rev. at 335. The Ordinance provided that territorial governors and judges could temporarily adopt criminal and civil laws of existing states until an assembly could be formed, at which point the "[territorial] Legislature shall

have authority to alter them as they shall think fit." *See* An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio §§ 5, 9 (1787) ("Northwest Ordinance");[8] Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51 (1789) (expressly re-adopting the Northwest Ordinance as previously enacted by the Continental Congress). And similar laws were passed to regulate other pre-statehood territories.[9] Thus, Congress perhaps authorized criminal lawmaking in the Ordinance without specifying the actus reus of the offenses.

But the Ordinance is fundamentally different from general criminal delegations that would have been understood to exceed Congress's "Legislative powers." So the Ordinance is best viewed as the exception that proves the rule that criminal legislation required specificity, including establishing an actus reus. First, the Ordinance limited the forms of criminal conduct. The territorial governors and judges still couldn't define a criminal law's actus reus from scratch—rather, they could only temporarily adopt laws that had already been written and enacted by other states' legislatures. Northwest Ordinance § 5. And they could only do so until a territorial legislature was formed to enact laws blessed by local voters. *Id.*

Second, and more important, the Northwest Ordinance involved the administration of territorial lands—an area subject to a less stringent non-delegation doctrine. Hamburger, Is Administrative Law Unlawful? 389–90.

[8] https://www.archives.gov/milestone-documents/northwest-ordinance.

[9] Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123, 123 (Southwest Territory); Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550 (Mississippi Territory); Act of May 7, 1800, ch. 41, § 2, 2 Stat. 58, 59; Act of May 8, 1792 (Indiana Territory).

When debates about non-delegation regained prominence in the early twentieth century, the chief justice of the Florida Supreme Court wrote that history and necessity justified delegations to territories:

> *Immemorial usage* and the necessities of local government justify the delegation of some minor legislative power of a police nature within definite limitations to municipalities where express organic provisions do not forbid. Congress may [thus] confer limited and defined legislative powers upon the territories.

J.B. Whitfield, *Legislative Powers That May Not Be Delegated*, 20 Yale L.J. 87, 88 (1910) (emphasis added); *see also Territory ex rel. Cty. of Oahu v. William L. Whitney*, 17 Haw. 174, 180–81 (Haw. 1905) (upholding a criminal delegation to a territory's county government); *id.* at 188 (Hartwell, J., concurring) ("Delegating certain legislative powers to municipal organizations, such as towns and cities, has been found so essential to public welfare, and its delegation has been so often sustained by judicial decisions, as to be established beyond question.") (simplified). So congressional delegations to temporary territorial governments are a different playing field.

It's also worth noting that no local legislatures existed in the territories before the Ordinance. *See* Elliott-Smith, 115 J. Crim. L & Criminology at 462. So the Ordinance's protection of local inhabitants—then without a local representative government—justified expansive delegation. After all, whenever local government had been denied to colonial Americans, they experienced logistical nightmares

in petitioning Parliament and awaiting legislation from an ocean away. *See* Akhil Amar, The Words That Made Us: America's Constitutional Conversation 1760-1820, at 4–7 (2021). So the Northwest Ordinance (and later delegations to territorial governors) allowed for the quick adoption of laws most suitable for local conditions. Thus, Congress's broad delegations to temporary territorial governments fulfilled rather than undermined the fundamental principle of democratic accountability underlying the non-delegation doctrine.

3.

Broad Delegations Long Postdated the Founding

The earliest federal statute to broadly delegate to an executive official the power to proscribe criminal conduct was enacted over a hundred years after the Founding. *See* McCue, 20 Dartmouth L.J. at 35–36 (explaining that the Organic Administration Act of 1897 marked the beginning of modern administrative crimes). The Organic Administration Act of 1897 granted the Secretary of the Interior authority to "make provisions for the protection" of "public forests" and "make such rules and regulations . . . to preserve the forests . . . from destruction." *See* Act of June 4th, 1897, ch. 2, 30 Stat. 11, 35 (1897). And "any violation" of these "rules and regulations" was punishable "by a fine of not more than $500 or imprisonment for not more than twelve months, or both." *Id.* (cross-referencing punishment provided by the Act of June 4th, 1888, ch. 340, 25 Stat. 166) So this was the start of broad delegations at the turn of the 20th century. Some—the Court blessed. *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 515–23 (1911). Others—the Court struck down on non-delegation grounds. *See, e.g.*,

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–42 (1935).

That we don't see the first broad delegation of criminal lawmaking authority until the late 19th century suggests that our Founding generation would have considered such power contrary to the original meaning of "the Legislative power." *See Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 482 (2020) (explaining that a tradition that "arose in the second half of the 19th century . . . cannot by itself establish an early American tradition"); *see also New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 36 (2022) ("[T]o the extent later history contradicts what the text says, the text controls.").

* * *

A pattern emerges from this history. For over a century, Congress understood that *it* must establish the conduct proscribed as criminal. Excluding the Northwest Ordinance (which is in a different context), no Founding-era federal law broadly delegated authority to the Executive to set the range of criminal conduct without significant constitutional controversy. That doesn't mean that Congress could not leave any discretion to the Executive. So long as Congress "identifie[d] an actus reus, the Executive Branch may retain broad discretion to prohibit particular types of conduct [within the actus reus] without running afoul of any originalist constraints on the delegation of criminal lawmaking authority." Elliott-Smith, 115 J. Crim. L. & Criminology at 483. So Congress could specify the range of conduct proscribed (the actus reus) and the Executive could determine which precise *objects* would be included within that narrow range of conduct—like choosing which lands were to be protected or what stamps and marks could not be

counterfeited. Yet, at a minimum, the non-delegation principle has always required that Congress specify the actus reus and the penalty within the text of the statute to meet constitutional muster.

III.

The Federal Land Policy and Management Act's criminal provision violates the non-delegation doctrine because it empowers an executive agency to define the actus reus of its criminal offense. It provides that "[t]he Secretary [of Interior] 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" and "[a]ny 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." 43 U.S.C. § 1733(a). The Act's text defines no prohibited activity and provides no notice of what conduct would constitute a criminal offense.

This statutory prohibition is as indefinite as it gets. The Act says nothing about where or when motorists can drive off-road vehicles on public lands. It doesn't specify what conduct could land you in jail. Instead, the public would need to plumb the depths of the Federal Register to know what's off-limits. *See* 43 C.F.R. § 8341.1(f)(5). This is no simple task. *See* Neil Gorsuch & Janie Nitze, Overruled: The Human Toll of Too Much Law 17 (2024) (explaining that the Federal Register has expanded from 16 pages in 1936 to over 188,000 pages as of 2021). And it was likely unelected bureaucrats—and not politically accountable actors—who wrote those regulations. *See id.* at 77 ("If laws governing major facets of our society were once largely the

work of elected representatives and the product of democratic compromises, nowadays they often represent only the current thinking of relatively insulated agency officials in a distant city."). So in effect, Congress has said, "do as the minions of the Secretary of the Interior tell you—or go to jail." Such a statute fails to provide the necessary legislative detail contemplated by the Constitution's "Legislative powers." Because Congress has not exercised its "strictly and exclusively legislative" authority to define the offense's criminal conduct, *see Gundy*, 588 U.S. at 135 (simplified), Gregory Pheasant's conviction under the Act is constitutionally invalid.

Our precedent shows why. Recently, we upheld a criminal delegation because the statute's four corners "penalized a particular type of conduct[.]" *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021). Congress made it a crime "to enter the United States unless an alien presents himself for inspection at an approved time and place." *Id.* Thus, the statute did "not give immigration officials the power to create crimes," but allowed discretion in determining the *object* of prohibited criminal activity (i.e., the location and time of entry). *Id.* This distinction between the criminal *act* (which cannot be delegated) and the criminal act's precise *object* (which can) is reflected in our Nation's history and criminal non-delegation precedents. *See, e.g.*, *Yakus v. United* States, 321 U.S. 414, 423 (1944) (upholding a statutory prohibition on selling commodities above maximum prices, when the type of commodity and maximum prices were set by wartime administrators).

The Court has expressly left open what "'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *See Touby v. United States*, 500 U.S. 160, 165–

66 (1991). Based on the text of the Constitution and its historical understanding, the answer is clear. We should read the "intelligible principle" requirement in the direction of our constitutional history and demand that Congress decide the actus reus before criminalizing conduct. The Constitution demands no less.

IV.

Given the text and history of the Vesting Clause, Congress cannot delegate authority to define the actus reus of a crime to the Executive branch. While some discretion may be left in the hands of executive officials, Congress must establish the conduct that subjects the people to a core deprivation of personal liberty—imprisonment. Because today we bless a conviction where some unaccountable bureaucrat rather than the People's Congress established the conduct made criminal, I respectfully dissent.

VANDYKE, Circuit Judge, joined by BUMATAY, Circuit Judge, except as to Part II.C, dissenting from the denial of rehearing en banc:

Section 303 of the Federal Land Policy and Management Act ("FLPMA") grants to the Secretary of the Interior broad authority to issue regulations "with respect to the management, use, and protection of the public lands." 43 U.S.C. § 1733(a). The Secretary can back up those regulations with hefty criminal penalties—up to one year in prison and a $1,000 fine. The Secretary used this authority to create a broad array of regulatory crimes across the Bureau of Land Management. Gregory Pheasant violated one such regulation by driving his motorcycle with a broken

taillight on BLM land. He was indicted for violating that taillight regulation, and then he successfully moved to dismiss that indictment. The district court concluded that the regulations violated the nondelegation doctrine and dismissed them. The panel reversed, holding that the BLM regulations did not violate the nondelegation doctrine.

The panel held that congressional delegations of criminal lawmaking power are to be reviewed under the same standard as civil delegations. "Even in the criminal context," the panel held, "the 'intelligible principle' test provides the controlling legal standard for evaluating non-delegation challenges." *United States v. Pheasant*, 129 F.4th 576, 583 (9th Cir. 2025). The panel was our court's first to reach that conclusion. And although the Supreme Court has explicitly declined to conclude one way or the other whether the deferential intelligible-principle test applies in the criminal context, Supreme Court precedent and first principles suggest that it does not. Given the heightened concerns that criminal delegations create with respect to the separation of powers and individual liberty, courts should scrutinize criminal delegations more closely than they review civil delegations. By denying rehearing en banc, our court missed an auspicious opportunity to correct the panel's erroneous conclusion otherwise. I respectfully dissent from the denial of rehearing en banc.

I.

The Bureau of Land Management manages some 245 million acres of land—roughly 10% of all the land in the United States. *See* U.S. Dep't of the Interior, Bureau of Land Mgmt., *What We Manage*, https://www.blm.gov/about/what-we-manage (last visited Oct. 7, 2025). Most of that land falls within this circuit. *Id.*

Roughly two-thirds of Nevada (where this case originated) falls under BLM's authority. U.S. Dep't of the Interior, Bureau of Land Mgmt., *BLM Nevada*, https://www.blm.gov/nevada (last visited Oct. 7, 2025).

Across this wide swath, Congress has granted the Secretary of the Interior, acting through BLM, broad authority to issue any "regulations necessary to implement the provisions of [FLPMA] with respect to the management, use, and protection of the public lands." 43 U.S.C. § 1733(a). The Secretary can back up those regulations with criminal penalties: "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." *Id.* Under this authority, the BLM has constructed a vast criminal code regulating the conduct of anyone present on BLM land with respect to, inter alia, housing policies, traffic laws, firearms regulations, mining rules, and agricultural policies.

Over the Memorial Day weekend of 2021, Pheasant rode his dirt bike on a portion of BLM land known as Moon Rocks, a few miles north of Reno, Nevada. Because off-roaders use Moon Rocks frequently, it is regularly patrolled by BLM rangers. Pheasant's dirt bike did not have an operating rear taillight. By operating his dirt bike without the traffic light, Pheasant violated BLM's traffic regulation in 43 C.F.R. § 8341.1(f)(5), which bans the operation of an off-road vehicle on BLM land without a taillight. Once apprehended he was cited (then indicted) for violating § 8341.1(f)(5)'s taillight regulation and indicted for assault on a federal officer and resisting issuance of citation or arrest.

Pheasant moved to dismiss the indictment, and the district court granted his motion. As relevant to this appeal and the panel's opinion, the district court found that the two counts premised on Pheasant's violation of BLM's regulatory crimes were invalid because they relied on an unconstitutional delegation of authority. The court determined that § 1733(a), which delegated the authority to create the regulations under which Pheasant was charged, lacked an intelligible principle, rendering it unconstitutional.

The government appealed, challenging the dismissal of the taillight count on nondelegation grounds. A panel of our court reversed in a published opinion, holding that § 1733(a) satisfies the "intelligible principle" test and is therefore a constitutional delegation of power. The panel noted that the intelligible-principle test is "an exceedingly modest limitation." *Pheasant*, 129 F.4th at 579 (quoting *United States v. Melgar-Diaz*, 2 F.4th 1263, 1266 (9th Cir. 2021)). The panel therefore determined that it would uphold the statute so long as it contained "*some* standard constraining discretion." *Id.* at 580. The panel found such a standard in the statute's requirement that any regulations issued be "necessary to implement the provisions of [FLPMA] with respect to the management, use, and protection of the public lands." *Id.* (alteration in original) (quoting 43 U.S.C. § 1733(a)). Coupled with FLPMA's instruction to "manage the public lands under principles of multiple use and sustained yield," *id.* (quoting 43 U.S.C. § 1732(a)), the court found a "clear principle: The Secretary must develop a long-term management strategy to realize the land's value in a sustainable way," *id.*

The panel concluded its opinion by addressing Pheasant's argument that the statute requires greater scrutiny "because it empowers the Secretary to promulgate

regulations whose violation may be punished by criminal sanctions." *Id.* at 582. Citing various Supreme Court cases, the panel asserted that the Court has previously upheld such delegations under the "intelligible principle" test. *Id.* at 583. Though it acknowledged the Supreme Court's statement that perhaps "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," *id.* (quoting *Touby v. United States*, 500 U.S. 160, 165–66 (1991)), the panel concluded that "[e]ven in the criminal context, the 'intelligible principle' test provides the controlling legal standard for evaluating non-delegation challenges," *id.*

II.

The Constitution vests "[a]ll legislative Powers [t]herein granted … in a Congress of the United States." U.S. Const. art. I, § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy v. United States*, 588 U.S. 128, 135 (2019) (plurality opinion). Moreover, "the principle of separation of powers that underlies our tripartite system of Government" independently compels the conclusion that Congress, not agencies, must make legislative decisions. *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *see also Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting) ("[I]t would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." (internal quotation marks and footnote omitted)). So there is no doubt that "the lawmaking function belongs to Congress." *Loving v. United States*, 517 U.S. 748, 758 (1996). No matter the context, Congress "may not constitutionally delegate its legislative

power to another" constitutional actor. *Touby*, 500 U.S. at 165.

Still, "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 421 (1935). So the Supreme Court has made clear that delegations are constitutional so 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." *Mistretta*, 488 U.S. at 372 (alteration marks omitted) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Here, the panel misread Supreme Court and circuit precedent to support its conclusion that criminal delegations are subject only to the "intelligible principle" test for reviewing nondelegation challenges. Far from supporting the panel's conclusion, precedent in fact cuts the other way—confirming that courts must apply a stricter test when assessing criminal delegations. And FLPMA's criminal delegation to the Secretary runs afoul of this stricter test.

A.

The panel held, for the first time in this circuit, that the intelligible-principle test—and only that test—applies to congressional delegations of criminal lawmaking authority. *See Pheasant*, 129 F.4th at 583. The panel found support for this conclusion in both Supreme Court and circuit precedent. *See id.* Neither offers the support that the panel claimed to find. At best, precedent has simply left open the criminal-delegation question.

Supreme Court precedent first. The panel described *United States v. Grimaud*, 220 U.S. 506 (1911), as an example of the Supreme Court's "routine[] appli[cation of] the 'intelligible principle' test even" to statutes that "authorize[] regulations backed by criminal penalties." *Pheasant*, 129 F.4th at 583. That can't be. *Grimaud* was decided in 1911, a decade and a half *before* the intelligible-principle test came to the fore in *J.W. Hampton*, 276 U.S. at 409. So that case is certainly not an example of the Supreme Court's applying the intelligible-principle test to a criminal delegation.

If anything, *Grimaud* is an example in which the Supreme Court applied a standard *higher* than the intelligible-principle test to evaluate the legality of a delegation enforced by a criminal penalty. There, the statute authorized the Secretary of Agriculture to "regulat[e] the use and occupancy of the public forest reservations and preserv[e] the forests thereon from destruction," and to enforce those regulations with criminal penalties. *Grimaud*, 220 U.S. at 509. The Court reasoned that this delegation was permissible because it only included the "power to fill up the details"—that is, the power to "administer the law and carry the statute into effect." *Id.* at 517–18.[1] Given this focus, the *Grimaud* Court effectively applied a higher standard for assessing congressional delegation. *See, e.g.*, *Gundy*, 588 U.S. at 157–58 & n.38 (Gorsuch, J., dissenting) (describing *Grimaud* as consistent with a higher nondelegation standard).

[1] The Court has similarly upheld criminal delegations in other instances providing adequate limitations on the executive's actions pursuant to the delegation. *See, e.g.*, *Loving*, 517 U.S. at 771–72; *Yakus v. United States*, 321 U.S. 414, 424–25 (1944).

But you needn't take my word for it that *Grimaud* doesn't settle the criminal-delegation question. Even when upholding delegations backed by criminal penalties after *Grimaud*, the Supreme Court itself has acknowledged that "whether more specific guidance is in fact required" when Congress "authorizes another Branch to promulgate regulations that contemplate criminal sanctions" remains an open question. *Touby*, 500 U.S. at 165–66.[2] Thus, the Supreme Court itself has said it hasn't provided any definitive conclusion as to whether criminal delegations require greater congressional guidance, but rather that it has explicitly left this question open for resolution in later cases. *Grimaud* neither compels nor supports the panel majority's conclusion in this case.

Nor have the circuit courts, including ours (until now), definitively decided this question. For a half century, when our court has been presented with the criminal-delegation question, we have declined to conclusively resolve it. *See United States v. Gurrola-Garcia*, 547 F.2d 1075, 1079 & n.6 (9th Cir. 1976) (concluding that "Congress may constitutionally provide a criminal sanction for the violation of regulations which it has empowered the President or an agency to promulgate," but also explaining that "if we were to apply Justice Brennan's [heightened standard] we would reach the same result" (citing *United States v. Robel*, 389 U.S. 258, 272 (1967) (Brennan, J., concurring in the result))); *United States v. Motamedi*, No. 20-10364, 2022

[2] Contrast the Court's treatment of the criminal-delegation question (which it has explicitly avoided answering) with its treatment of delegations concerning the taxation power. In the context of tax delegations, the Court has made explicit that the intelligible-principle standard applies. *See Skinner v. Mid.-Am. Pipeline Co.*, 490 U.S. 212, 223 (1989).

WL 101951, at *2 (9th Cir. Jan. 11, 2022). Recently, in *Melgar-Diaz*, our court considered a nondelegation challenge to a statute that made it a crime to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers." 2 F.4th at 1266 (quoting 8 U.S.C. § 1325(a)(1)). That statute passed muster because it did "not give immigration officials the power to create crimes." *Id.* at 1267. Rather, *Congress* "penalized a particular type of conduct"—unlawfully entering the United States—and provided the executive no more than a "ministerial authority" of "determining [approved] times and places." *Id.* So our court concluded that the delegation at issue did "provide[] an intelligible principle." *Id.* at 1269. And we further reasoned that the criminal delegation in *Melgar-Diaz* "present[ed] even fewer nondelegation concerns than [the criminal delegation in] *Touby*." *Id.* at 1268. Thus, like *Touby*, *Melgar-Diaz* simply assumed that a higher standard may apply to criminal delegations and declined to resolve that question. *Id.* So until the panel's opinion in this case, our court has consistently applied both the "intelligible principle" test *and* a heightened standard to nondelegation challenges to criminal delegations.

Other circuits have taken a similar approach. They have frequently evaluated delegations of criminal lawmaking power under both the intelligible-principle test and a stricter test without endorsing one or the other. *See, e.g.*, *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (plurality opinion), *aff'd*, 602 U.S. 406 (2024); *United States v. Cooper*, 750 F.3d 263, 271 (3d Cir. 2014); *United States v. Amirnazmi*, 645 F.3d 564, 576–77 (3d Cir. 2011); *United States v. Dhafir*, 461 F.3d 211, 216–17 (2d Cir. 2006); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093–94 (4th Cir. 1993). In rare cases, circuit courts have applied

only the intelligible-principle test—but even then, they have declined to conclusively state that it is the controlling legal standard, recognizing that the Supreme Court has suggested that a higher standard may be appropriate. *See Cooper*, 750 F.3d at 271 ("In *Amirnazmi*, we did not resolve 'the unsettled question of whether something more demanding than an "intelligible principle" is necessitated within the context of delegating authority to define criminal conduct.' We likewise decline to do so here." (citation omitted)); *United States v. Nichols*, 775 F.3d 1225, 1232 (10th Cir. 2014) ("[T]he Supreme Court left open the question whether a heightened 'meaningfully constrains' standard applies to Congress's delegation of authority involving statutes with criminal implications."), *rev'd on other grounds*, 578 U.S. 104 (2016).

Whether congressional delegations backed by criminal penalties are reviewed under the same standard as those backed by civil enforcement is an important question. And I concede that it is not an easy question. As scholars have noted, "the Court's decisions on criminal delegations are confused and conflicting." F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 Va. L. Rev. 281, 295 (2021). Yet even while the courts have refrained from answering this question conclusively, there is no shortage of judges who have described the serious constitutional concerns that arise from Congress's delegations to the executive in the context of criminal statutes. *See, e.g.*, *Cargill*, 57 F.4th at 472; *Aposhian v. Wilkinson*, 989 F.3d 890, 900 (10th Cir. 2021) (Tymkovich, C.J., dissenting); *United States v. Nichols*, 784 F.3d 666, 672–73 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J.,

concurring). Nor have individual Justices been silent on this issue. *See Robel*, 389 U.S. at 272–73 (Brennan, J., concurring in the result); *Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting).

The Supreme Court has found occasion to avoid answering this question, as have the other circuit courts. But this case makes the question unavoidable because the criminal delegation at issue here does not survive the more exacting scrutiny due criminal delegations. And given the important separation-of-powers and individual-liberty interests at stake, our court should have taken the opportunity to correct the panel's decision en banc. Criminal delegations require a heightened standard.

B.

Our en banc court should have considered the question left open by longstanding Supreme Court precedent. The panel's conclusion that criminal delegations are not held to a higher standard undermines the principles underlying the nondelegation doctrine—separation of powers and protection of individual liberty. Moreover, it contradicts the Supreme Court's commonsense idea that the degree of congressional guidance must be commensurate with the scope of the delegation. Holding criminal delegations to a higher standard than civil delegations is also consistent with the way courts treat other constitutional and quasi-constitutional doctrines regarding criminal-law impositions upon individual freedom. So courts should scrutinize criminal delegations to a greater degree than civil delegations.

The basis for scrutinizing criminal delegations more rigorously than civil delegations is simple: laws defining criminal conduct "represent the ultimate intrusions on

personal liberty and carry with them the stigma of the community's collective condemnation." *Nichols*, 784 F.3d at 672–73 (Gorsuch, J., dissenting from the denial of rehearing en banc). It was for that reason that the Founders exercised caution to separate the criminal enforcement power from the lawmaking power. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1017, 1031 (2006); *see also* The Federalist No. 47 (Madison) ("The accumulation of all powers … in the same hands … may justly be pronounced the very definition of tyranny."). Thus, as the Supreme Court has explained since its earliest days, "[t]he legislative authority of the Union must first make an act a crime," and "affix a punishment to it." *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Congress must "define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). When Congress simply sets a punishment, as it did in 43 U.S.C. § 1733(a), without defining the specific conduct that warrants that punishment, Congress fails to comply with that central ideal of the separation of powers. *See* James Madison, *Report on the Virginia Resolution*, *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546, 560 (Jonathan Elliot ed., 2d ed. 1836) ("Details, to a certain degree, are essential to the nature and character of a law; and on criminal subjects, it is proper that details should leave as little as possible to the discretion of those who are to apply and execute the law.").

Congress may not transfer to others "powers which are strictly and exclusively legislative"—such as the power to write criminal laws. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress

is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."). "[E]nacting criminal statutes is a core congressional function, because the alternative (delegating legislative power to the executive branch) has an untenable result—placing the lawmaking and the law-enforcing in a single branch of government." Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power, in The Administrative State Before the Supreme Court* 97 (Peter J. Wallison & John Yoo eds., 2022).

The panel incorrectly concluded otherwise. It reasoned that "a power does not become more legislative simply because its exerciser can issue rules backed by criminal penalties." *Pheasant*, 129 F.4th at 583. Not true. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures … should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971); *see also Gundy*, 588 U.S. at 154 (Gorsuch, J., dissenting); Hessick & Hessick, *supra* at 300. That is why "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). Contrary to the panel's conclusion otherwise, criminal lawmaking is an *especially* legislative matter.

Requiring a higher standard for delegations in the criminal context is also not a novel idea. Rather, it is the logical extension of the general idea that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Melgar-Diaz*, 2 F.4th at 1267 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001)). That is, "[l]aws

that vest more power require more constraints." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 776 (6th Cir. 2023) (Nalbandian, J., dissenting). There is no greater power than the power to punish criminally. *See* Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. Irvine L. Rev. 855, 880 (2020) ("[T]he uniquely harsh sanctions that result from criminal law violations makes delegation of criminalization a matter of special concern …."); Chenoweth & Samp, *supra* at 102. Because the power to impose harsh criminal sanctions is so great, Congress must provide a comparably greater degree of guidance.

It is particularly noteworthy that the only two cases in which the Supreme Court has ever found an impermissible delegation were in cases that presented criminal delegations. In *Fahey v. Mallonee*, the Court reasoned that the statutes at issue in *Schechter Poultry* and *Panama Refining* were found to have violated the nondelegation doctrine because each "dealt with delegation of a power to make federal crimes of acts that never had been such before." 332 U.S. 245, 249 (1947). And even when the Court has upheld other criminal delegations it has nonetheless "suggested that 'greater congressional specificity [may be] required in the criminal context.'" *Carter*, 736 F.3d at 734 (Sutton, J., concurring) (quoting *Touby*, 500 U.S. at 166); *see also Nichols*, 784 F.3d at 672 (Gorsuch, J., dissenting from the denial of rehearing en banc) (collecting cases). The Court has suggested that these delegations might require more "meaningful[]" guidance than a mere "intelligible principle." *Touby*, 500 U.S. at 166; *Fahey*, 332 U.S. at 249–50; *see also, e.g.*, *Robel*, 389 U.S. at 272–73 (Brennan, J., concurring); *Barenblatt*, 360 U.S. at 140 n.7 (Black, J., dissenting). Thus, while the nondelegation doctrine has only ever had "one good year" at the Supreme Court, Cass R. Sunstein, *Nondelegation*

Canons, 67 U. Chi. L. Rev. 315, 322 (2000), that was the year in which the Court was presented with rampant delegations backed by criminal penalties.

Requiring greater specificity with respect to criminal delegations is also consistent with other doctrines that require greater clarity in the criminal context. *See* Hessick & Hessick, *supra* at 301–05. For example, the void-for-vagueness doctrine demands greater specificity in criminal laws. *See Sessions v. Dimaya*, 584 U.S. 148, 156 (2018). The Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982). So too with the centuries-old prohibition on federal common-law crimes, even while federal common law remains commonplace in the civil context. *See Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34. The quasi-constitutional doctrine of lenity also lends support with its standard conception that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). Criminal delegations should not be the glaring exception amidst these constitutional and quasi-constitutional doctrines properly limiting Congress's ability to impose criminal penalties based upon open-ended statutes.

In sum, Supreme Court precedent, the principles underlying the nondelegation doctrine, and the Supreme Court's treatment of corollary criminal-law doctrines all suggest a higher standard when reviewing criminal delegations.

C.

So criminal delegations should be subject to a stricter test than non-criminal delegations. But what might this stricter test require? *Touby* lays out one option. *See* 500 U.S. at 166. There, the Court noted three factors that justified the Controlled Substances Act's delegation of the power to schedule a drug as a controlled substance. *Id.* at 166–67. First, Congress required that before scheduling a drug as a controlled substance, the executive must first determine it to be an "imminent hazard" to public safety. *Id.* at 166. Second, the executive was required to weigh the history, current state, scope, duration, and significance of the drug's abuse to determine what risk it presents to the public health. *Id.* And finally, the executive, after making a factual finding that the drug "has a high potential for abuse," has no medical use, and is not safe under medical supervision, could list the drug as a controlled substance. *Id.* at 167.

From the Court's analysis flows a three-pronged "meaningful constraint" test. *See Nichols*, 784 F.3d at 673–74 (Gorsuch, J., dissenting from the denial of rehearing en banc). First, Congress must draw a clear and generally applicable rule—in the case of the Controlled Substances Act, the statutory requirement that no unauthorized person may possess a controlled substance. *Touby*, 500 U.S. at 166–67. Second, that rule must hinge on a factual determination by the executive. *Id.* at 167. And third, the statute must provide criteria constraining the executive as it makes its finding. *Id.*; *see also Mistretta*, 488 U.S. at 372–73 (Congress must "clearly delineate[] the general policy … and the boundaries of this delegated authority." (citation omitted)). Circuit courts, including ours, have used essentially this analysis drawn from *Touby* when evaluating criminal delegations in other statutes. *See United States v.*

Shih, 73 F.4th 1077, 1092 (9th Cir. 2023); *Amirnazmi*, 645 F.3d at 576–77; *Dhafir*, 461 F.3d at 216–17; *United States v. Garfinkel*, 29 F.3d 451, 457–59 (8th Cir. 1994); *Arch Trading Co.*, 987 F.2d at 1093–94.

Applying the appropriate standard for criminal delegations—a test akin to *Touby*'s meaningful-constraint test—FLPMA's unbounded delegation to determine, by regulatory fiat, the actions to which criminal penalties attach fails to pass constitutional muster. Even if § 1733(a) draws a clear and generally applicable rule, it does not require the Secretary to make a specific factual finding (with or without any criteria) when determining what actions to criminalize.

And Congress did not provide any criteria to constrain the Secretary's exercise of policy judgment in determining what actions to criminalize. When issuing regulations necessary for "the management, use, and protection of the public lands," § 1733(a), the Secretary must consider the "principles of multiple use and sustained yield," § 1732(a). "Multiple use" means treating the competing uses for BLM land to "best meet the present and future needs of the American people." § 1702(c). "Sustained yield" entails "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." § 1702(h). These principles—though they purport to live in harmony—can be used to justify almost any of the potential uses of land that a Secretary might pursue. Decisions about land use always involve tradeoffs, and uses of land are often mutually exclusive. For just one example, devoting land to recreational use will inevitably inhibit resource extraction and commercial use. But does that recreational use (which may yield a sizable *intangible* benefit) "best meet the present and future needs of the American people," considering the

tangible economic opportunity cost? And if so, would commercial use not be "consistent with multiple use"? Reasonable minds may differ. The Supreme Court has explained, "'[m]ultiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) (quoting 43 U.S.C. § 1702(c)).

From this inherently contradictory statutory guidance, the panel concluded that Congress "set out a clear principle: The Secretary must develop a long-term management strategy to realize the land's value in a sustainable way." *Pheasant*, 129 F.4th at 580. But that principle does nothing to meaningfully limit the Secretary's ability to decide what conduct can, or should, be criminalized.

Sometimes, less is more. This is one such time. In FLPMA, the Secretary must balance many contradictory objectives—present and future uses, recreational and commercial uses, and short-term and long-term extraction—to name just a few. And because of these inherently contradictory objectives, the statute "does nothing to cabin the Secretary of the Interior's ability to choose what is a crime." This arrangement gives the Secretary effectively carte blanche "power to write a criminal code rife with his own policy choices." *Gundy*, 588 U.S. at 171 (Gorsuch, J., dissenting).

Because there is no Congressional guidance for balancing these competing objectives, and unfettered discretion when balancing them, other cases where the Supreme Court upheld exceedingly broad civil or criminal delegations are inapposite here. For example, in *Yakus*, the Court upheld a statute that allowed an administrator "to

stabilize commodity prices so as to prevent war-time inflation" and stymie "enumerated disruptive causes and effects" of inflation. 321 U.S. at 423. But unlike the statute here, the delegating statute in *Yakus* represented a congressional policy judgment that came with a "stated … legislative objective," a "prescribed … method of achieving that objective," and "standards to guide the administrative determination." *Id.* So too in *Grimaud*, where the Court rejected a nondelegation challenge to a statute that delegated authority to the Secretary of Agriculture to regulate the occupancy and use of public forest reservations to preserve them from destruction. 220 U.S. at 515, 522. But the *Grimaud* Court understood that this rulemaking authority was limited to "regulating the use and occupancy of the public forest reservations" so as to "preserv[e]" them and keep them from "destruction." *Id.* at 509; *see also Gundy*, 588 U.S. at 158 & n.37 (Gorsuch, J., dissenting). Here, in contrast, the Secretary can freely exercise his own policy judgment when picking among the *competing* objectives—without any guidance from Congress on how he must weigh each particular objective of BLM's "multiple use and sustained yield" mandate. And unlike the limitation in *Touby*, which required the agency to conclude that a drug posed "an imminent hazard to the public safety," 500 U.S. at 166 (citation omitted), here the Secretary is not bound to achieve a direct policy objective that Congress has first set in the statute. Instead, the Secretary has unfettered discretion to balance a host of competing directives as the Secretary sees fit.

Further, when looking at the delegation here we should also consider the extent and scope of the delegation's impact. BLM manages not only 10% of the United States's landmass but is also the largest landholder in

the United States and manages roughly 30 percent of the Nation's mineral resources. *See* U.S. Dep't of the Interior, Bureau of Land Mgmt., *What We Manage*, https://www.blm.gov/about/what-we-manage (last visited Oct. 7, 2025). Practically, this delegation lets the agency "promulgate a plethora of rules from housing policies, to traffic laws, to firearms regulations, to mining rules, to agriculture certifications," thereby granting it "unfettered legislative authority to promulgate rules for over 48 million acres of land [in Nevada], which is 68% of the state." *See Norton*, 542 U.S. at 58.

The geographic size and substantive scope of BLM's criminal lawmaking authority is already astounding. But it gets even more monstrous given the plenary authority that the federal government has over its land. As the panel acknowledged, "[t]he Constitution expressly vests in *Congress*, the authority to manage 'Property belonging to the United States.'" *Pheasant*, 129 F.4th at 582 (emphasis added) (quoting U.S. Const. art. IV, § 3, cl. 2). "That authority is plenary—the Supreme Court has described it as 'without limitations,' and analogous 'to the police power of the several states.'" *Id.* (citation omitted) (first quoting *United States v. City & Cnty. of San Francisco*, 310 U.S. 16, 29 (1940); and then quoting *Camfield v. United States*, 167 U.S. 518, 525 (1897)); *see also Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). Far from lessening the dangers of delegations, complete delegations of a plenary power necessitate greater scrutiny. *See Pheasant*, 129 F.4th at 582. The settled principle that the scope of Congressional guidance must be commensurate with the scope of the delegated authority demands as much. *See Melgar-Diaz*, 2 F.4th at 1267; *Whitman*, 531 U.S. at 475. And here, where Congress has provided no limiting principles on what crimes

the Secretary may fashion pursuant to Congress's plenary power, the effectively unbounded delegation runs afoul of the Constitution's demands.

III.

This case squarely presents an issue at the core of separation of powers and individual liberty. The panel opinion in this case broke new ground as the first circuit court to conclusively resolve that criminal delegations are held to the same exceedingly low standard that applies to civil delegations. That conclusion does not follow from Supreme Court precedent, prior Ninth Circuit precedent, or out-of-circuit precedent, which have all declined to resolve this question. Our court should have reheard this case en banc to resolve that question and to correct the panel's erroneous conclusion that criminal delegations are not held to a higher standard. I respectfully dissent from the denial of rehearing en banc.