No. 25-6911

In the Supreme Court of the United States

GREGORY PHEASANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Thomas A. Berry
Counsel of Record
Harrison Prestwich
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

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QUESTION PRESENTED

The question presented is:

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

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because the right to individual liberty is best preserved by a constitutionally constrained executive branch, consistent with the Framer's design. Specific to this case, *amicus* also has an interest in challenging government overreach in the criminal justice system, protecting the rule of law, and working to combat overcriminalization.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

On the night of May 28, 2021, Gregory Pheasant was arrested for riding his dirt bike through Moon Rocks, Nevada, without a taillight. Pet. Br. 4. Moon Rocks is a section of federally owned public land managed by the Bureau of Land Management ("BLM"). BLM has the authority to promulgate regulations governing the land it manages via a subdelegation of authority from the Secretary of the Interior. The secretary's authority to issue regulations derives from the Federal Land Policy and Management Act of 1976 ("Act"). Claiming authority under the Act, BLM issued a rule requiring that all dirt bikes operating at night be affixed with a taillight, on pain of criminal penalty. 43 C.F.R. § 8341.1(f)(5). Pheasant was charged with three offenses including violating BLM's taillight regulation. Pet. Br. 4.

Pheasant moved to dismiss his charges. *Id.* at 4–5. In his defense, Pheasant argued that the charges were unconstitutional under the nondelegation doctrine. *Id.* Pheasant maintained that the Act unconstitutionally delegated legislative authority to the Secretary of the Interior. Consequently, he argued that neither the secretary nor BLM had authority to issue rules creating these crimes, and that the regulations were void. While the district court agreed, the Ninth Circuit reversed on appeal. Pet. App. 14a. The Ninth Circuit found the criminal character of the regulations to be "irrelevant" to its analysis and upheld them under the intelligible principle standard. *Id.*

For the reasons Pheasant has explained, the Ninth Circuit incorrectly reversed the district court's nondelegation ruling. *Amicus* writes separately to urge this Court to resolve a doctrinal inconsistency. Parties

alleging a separation-of-powers challenge to overly vague criminal statutes risk facing the inconsistent application of two separate standards of scrutiny that should be unified—vagueness review and the nondelegation doctrine's intelligible principle test.

Vagueness review and the nondelegation doctrine share the same constitutional concern: delegations of authority to effectively create criminal laws. Both doctrines seek to prevent Congress from delegating away its lawmaking authority to other government actors charged with executing the law, namely judges, juries, police officers, prosecutors, and agencies. But while these doctrines share the same separation of powers concerns, they do not yet share the same legal standard. Parties bringing a nondelegation challenge under the intelligible principle test are less likely to prevail than those bringing a vagueness challenge. This distinction has no merit. This Court can fix this imbalance by clarifying that, in the context of statutes delegating criminal law-making authority, the same heightened standard applied in vagueness challenges also applies in nondelegation challenges.

Under a unified separation-of-powers standard that subjects vagueness and nondelegation challenges to equivalent scrutiny, this is an easy case. Pheasant's sole remaining charge for violating a regulatory crime should be dismissed. The Secretary of the Interior has been granted nearly unfettered authority to issue regulatory crimes for federally owned public lands. This tremendous grant of power far exceeds anything this Court has upheld under vagueness precedents. The Act's creation of a one-man super legislature for federally owned public lands violates the separation of powers. This Court should grant the petition and reverse.

ARGUMENT

I. THIS COURT'S REVIEW OF VAGUE CRIMINAL STATUTES SHOULD BE UNIFORM ACROSS SEPARATION-OF-POWERS DOCTRINES.

Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. Accompanying that power is a bar on its further delegation. *Gundy v. United States*, 588 U.S. 128, 135 (2019) (plurality op.). Congress may not transfer "powers which are strictly and exclusively legislative" to another branch. *Id.* (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825)). However, most legislation carries with it a degree of executive discretion. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). So long as another branch does not exceed that discretion, its actions are valid under the Constitution. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928). But Congress can only provide the executive (or judiciary) with so much discretion without unconstitutionally delegating away its lawmaking power.

To police this line, this Court has adopted multiple doctrines that guard against improper delegations. *See Gundy*, 588 U.S. 166–67 (Gorsuch, J., dissenting). The nondelegation doctrine limits, through the "intelligible principle" test, the amount of discretion Congress may delegate to executive branch lawmakers. Under that test, courts must determine whether Congress has given an "intelligible principle" that contains "boundaries on [an agency's] authority," and sets forth a clear "general policy" for it to pursue. *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409; *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

Unfortunately, the intelligible principle test has evolved into an often too-permissive standard. *See Gundy*, 588 U.S. at 166–67 (Gorsuch, J., dissenting). When the Court first articulated the phrase "intelligible principle," it did not intend to announce a more lenient standard. It meant to "explain the operation of . . . traditional [nondelegation] tests"—not overrule them. *Id.* at 162–63. As originally applied, the intelligible principle test allows for only three limited types of delegations. First, Congress may delegate the responsibility for "fill[ing] up the details" of less-important statutory objectives, and only after Congress has set forth a clear and "controlling" general policy. *Id*. at 157–58. Second, Congress "may make the application of that rule depend on executive fact-finding." *Id.* And finally, "Congress may assign the executive and judicial branches certain non-legislative responsibilities." *Id.* at 159.

The Court's gradual departure from this original understanding has been well documented. *See* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 624–25 (2017). This Court has twice found that a statute lacked an intelligible principle—once where the statute "provided literally no guidance for the exercise of discretion," and again where the statute "conferred authority to regulate the entire economy based on no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001); *see also Gundy*, 588 U.S. at 146 (plurality op.). But since then, the nondelegation doctrine has gone underenforced. *See* Iuliano & Whittington, *supra*, at 624.

Nevertheless, the statute at issue here fails even under this Court's current version of the intelligible principle test. As Pheasant argues, the Act unconstitutionally granted the interior secretary legislative authority over federally owned public land. Pet. Br. 7. The district court agreed, holding that the Act lacked an intelligible principle because it granted the secretary "unfettered" authority to issue regulations—including those backed by criminal penalties—without "provid[ing] any guidance or restraint as to when [he] shall promulgate rules." Pet. App. 26a. The Ninth Circuit reversed, holding that the Act "easily satisfies" the intelligible principle test. *Id.* at 8a. Notably, the Ninth Circuit also refused to apply a heightened standard in the criminal context. *Id.* at 14a. In the court's view, liberty concerns "have only an attenuated relationship" to nondelegation principles. *Id.* at 13a.

The district court was correct, and the Ninth Circuit erred in reversing it. However, there is another path on which this Court could choose to reverse the judgment of the Ninth Circuit. Because this case concerns *criminal* regulations, this Court should not apply the less-restrictive intelligible principle test. This Court has suggested that "something more than an intelligible principle" may be required when Congress grants another branch the power to promulgate regulations enforced by *criminal* sanctions. *See Touby v. United States*, 500 U.S. 160, 165–66 (1991). And it is easy to see why. The Framers' attention to the separation of powers was chiefly driven by fear of "endowing one set of hands with the power to create and enforce criminal sanctions." *United States v. Nichols*, 784 F.3d 666, 673 (10th Cir. 2015) (Gorsuch, J., dissenting). The Constitution authorizes only "the people's elected representatives . . . to 'make an act a crime.'" *United*

States v. Davis, 588 U.S. 445, 451 (2019). When Congress delegates away the power to create new crimes, as opposed to the power to increase penalties under current law, it violates nondelegation principles. *See Mistretta*, 488 U.S. at 373 n.7 (discussing *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947)); *Davis*, 588 U.S. at 451 (explaining that the separation of powers prevents Congress from passing "vague statutes" that "hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges.").

The same concern about delegation in criminal lawmaking animates the vagueness doctrine. Under the vagueness doctrine, courts will void criminal statutes that set standards insufficient to properly guide police officers, prosecutors, juries, and judges when enforcing the law. *See Sessions v. Dimaya*, 584 U.S. 148, 156 (2018). "In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Id.* The Court has explained that "the more important aspect of the vagueness doctrine 'is not actual notice . . . but the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

A vagueness analysis asks two questions: (1) whether the statute defines sanctionable conduct with "sufficient definiteness" so that "ordinary people can understand what conduct is prohibited," and (2) whether it defines conduct "in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 357. In short, "legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion." *Interstate Circuit v.*

Dallas, 390 U.S. 676, 648 (1968). This standard amounts to an even stricter form of what the intelligible principle test requires in the rulemaking context—more definitive guidelines on how executive officials may enforce criminal laws. The strictness of the vagueness standard is demonstrated by its statistics. Courts have struck down far more laws as impermissibly vague than as lacking an intelligible principle. *See* Todd Gaziano & Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Standard Gets the Job Done, in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT 45, 56–57 (Wallison & Yoo eds. 2022); *Gundy*, 588 U.S. 167–68 (Gorsuch, J., dissenting) (discussing the Supreme Court's use of vagueness doctrine instead of a forceful intelligible principle standard to police broad delegations).

Vagueness principles are not limited to cases against individual agents of the state. Courts have employed the vagueness doctrine to strike down grants of criminal lawmaking power to municipal administrative boards. *See, e.g.*, *Interstate Circuit*, 390 U.S. at 676 (striking down as impermissibly vague a statute that delegated the creation of movie rating standards, backed by criminal penalty, to an administrative body).

Nonetheless, the applicability of the vagueness doctrine in the rulemaking context remains unsettled. Certain courts have suggested that vagueness challenges may not be brought against federal administrative agency rulemaking. *Compare Vill. of Hoffman Ests. v. The Flipside, Hoffman Ests.*, 455 U.S. 489, 504 (1982) (rejecting a vagueness challenge to a statute that prohibited the unlicensed sale of items "designed or marketed for" illegal drug use in part because

regulations had clarified "a standard with an otherwise uncertain scope."), *with Whitman*, 531 U.S. at 472–73 (holding, in the context of an intelligible principle nondelegation challenge, that an agency cannot save an unconstitutional grant of legislative authority by clarifying that authority through regulation).

Given that the vagueness and nondelegation doctrines share the same separation of powers concerns, it would be curious if they did not share the same standard when applied to criminal statutes. Both doctrines prevent Congress from delegating lawmaking authority to others. A defendant's relief should not be arbitrarily contingent on *where* the excessive discretion has been vested and thus which doctrine the defendant may invoke. A vague criminal regulation enforced by an agency should not face less scrutiny than a vague criminal statute enforced by the police.

For example, if Congress were to make it a crime to "behave on federal property in a manner annoying to persons passing by," the law would be struck down as impermissibly vague. *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). Such a statute would vest far too much discretion in the officers charged with enforcing the law. But if Congress instead added that "the Attorney General shall have the power to pass regulations that specify what behavior is annoying," a court might uphold the law under a nondelegation challenge if it applied the intelligible principle test. Both scenarios present the same constitutional problem, the only difference is that one gives too much discretion to the *police* and the other too much discretion to *rulemakers*. Both should use the same standard. Otherwise, vague laws imposing criminal sanctions through federal regulators will be scrutinized less than vague laws

enforced by police and prosecutors, granting Congress a backdoor by which they may grant too much criminal lawmaking power to the executive branch.

This imbalance is particularly pernicious because the latter hypothetical delegation to the Attorney General presents a *greater* danger to individual liberty. The police act case by case, but the Attorney General may enact regulations that govern universally. Given this context, it is particularly perplexing that a lower standard of judicial scrutiny would apply. If anything, greater scrutiny—not less—should accompany grants of significant power backed by significant consequences. *See Whitman*, 531 U.S. at 475 ("the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred"); *see also Dimaya*, 584 U.S. at 157 (applying the vagueness standard to a non-criminal immigration statute because it nonetheless presented the plaintiff with "a particularly severe penalty.").

In the criminal context, courts should apply the same strict standard irrespective of the delegee. This Court can resolve that doctrinal inconsistency by applying the equivalent of vagueness scrutiny for criminal statutes analyzed under nondelegation. Under this approach, Congress would no longer escape heightened review by delegating criminal law-writing power to executive agencies. And this test would squarely fit within the framework this Court considered in *Touby*. 500 U.S. at 165–66 (holding that § 201(h) of the Controlled Substances Act "passed muster" even if greater congressional specificity is required in the criminal context). Otherwise, Congress would be permitted to streamline a process the Framers intended to slow down with multiple checks. "'The inefficiency

associated with [the separation of powers] serves a valuable' liberty-preserving 'function, and, in the context of criminal law, no other mechanism provides a substitute.'" *Nichols*, 784 F.3d at 670 (Gorsuch, J., dissenting) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1011–31 (2006)).

This Court has not yet decided whether heightened scrutiny should apply when Congress grants another branch the power to promulgate regulations enforced by *criminal* sanctions. *Touby*, 500 U.S. at 165–66. That should change. When a nondelegation challenge concern's an agency's power to write and enforce its own criminal law, a heightened scrutiny equivalent to that of the vagueness doctrine must apply.

II. THE ACT VIOLATES THE NONDELEGATION DOCTRINE UNDER A HEIGHTENED ANALYSIS AKIN TO VAGUENESS.

When evaluating whether a statute violates the nondelegation doctrine, courts begin their review by discerning its meaning. *See Gundy*, 588 U.S. at 135 (plurality op.) ("Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I."). Once interpreted, "it may find that the constitutional question all but answers itself." *Id.*

Under the Act, the Secretary of the Interior has broad powers to regulate federally managed public lands, and his regulations are backed by criminal penalty. The Act empowers the secretary to issue any regulations "necessary to implement the [Act's provisions] with respect to the management, use, and protection

of the public lands, including the property located thereon." 43 U.S.C. § 1733(a). That section also provides that "any person who knowingly and willfully violates any such regulation . . . shall be fined no more than $1,000 or imprisoned no more than twelve months, or both." *Id.*

The Act sets forth several purposes that the secretary must pursue, along with some purported restraints on his ability to issue regulations. First, the secretary must consider "the views of the general public" before using "comprehensive rules and regulations."[2] 43 U.S.C. § 1701(a)(5). Second, the secretary must manage public lands 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.

Id. at § 1701(a)(8). Third, the secretary must manage public lands in a manner that "recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including

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[2] Section 1701(a)(5) provides no meaningful restriction on the secretary's rulemaking power because the scope of what he may regulate is not limited by this vague provision. This provision provides only that the secretary must abide by a vague process of obtaining public comment before issuing regulations, without specifying what that process is. It does not place any substantive limitations on the content of a rule. *See* 43 U.S.C. § 1701(a)(5).

implementation of the Mining and Minerals Policy Act of 1970." *Id.* at § 1701(a)(12).

The Ninth Circuit disagreed with the district court's conclusion that the Act granted the secretary "unfettered legislative authority" over public property without providing guidance as to when he should promulgate rules. Pet. App. 9a, 27a. Instead, it stated that the broad purposes stated in the Act "counsels in favor of more, rather than less, deference to Congress." Pet. App. 12a. The district court's original understanding of the Act was correct. Congress has the power to "make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." U.S. CONST. art. IV, § 3. This authority grants a general police authority over federally owned public land. *See Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). Section 1733 grants the secretary the ability to regulate under that same authority, meaning he could regulate anything Congress could legislate concerning federally owned public lands.

To be sure, § 1701 purports to restrain the secretary's power to issue regulations. The secretary may not issue regulations inconsistent with the purposes of the Act. *See* 43 U.S.C. § 1733(a). Yet in practice, any policy could be justified as consistent with the Act's purpose. The Act's stated purposes are so numerous and general that they do not restrict the secretary any more than if the Act had given him unbridled authority to promulgate regulations deemed "necessary" for overseeing public lands.

Consider § 1701(a)(8), which gives the secretary broad flexibility to select from approximately eleven objectives to support the enactment of a new regulation. These objectives are as general as "provid[ing] for

outdoor recreation" or protecting the "quality" of "scenic" resources. Under this mandate, it is hard to imagine what regulations the secretary may not pursue. Even if the secretary enacts a regulation that seems opposed to one—or numerous—objectives under § 1701(a)(8), he may justify that regulation by pointing to another contrary purpose in the same title.

For example, suppose the secretary wants to construct a recreation center atop a scenic lookout on federal land. That regulation would certainly "provide for outdoor recreation." But it might also destroy or diminish the land's scenic value. No matter, the secretary has the power to enact the regulation irrespective of any adverse effects on other statutory purposes—because the determination is wholly within his discretion. *See generally* 43 U.S.C. § 1701.

This issue is further compounded by § 1701(a)(12), which permits the secretary to promulgate regulations aimed at promoting resource extraction. However, each time the secretary does so, he contradicts the objectives outlined in § 1701(a)(8). The delicate balance between preserving the environment and extracting resources is precisely the sort of policy question Congress is expected to address. Yet the Act remains silent on this tension, leaving the task of balancing these interests to the secretary's sole discretion. *See id.* at §§ 1701(a)(8), (12). And through BLM, the secretary has issued a plethora of regulations that directly implicate this conflict. *See, e.g.*, 43 C.F.R. §§ 5511.1-1, 9269.3-5 (criminalizing the unauthorized cutting of timber and setting strict guidelines on timber extraction); 43 C.F.R. § 9268.3(d) (allowing for the temporary closure of public lands to further resource extraction, "prevent excessive erosion," or preserve "scientific

values," among other regulatory objectives). In this way, the Act creates the "mirage" of congressional consensus, but in fact leaves a "politically diverse" yet "fundamental" purpose of the statute for the interior secretary to "hammer out." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 681, 687 (1980) (Rehnquist, J., concurring).

The Act's many statutory purposes and lack of prescribed balancing grants the secretary nearly unfettered discretion to issue regulations, including criminal ones. The delegation lacks an "intelligible principle" according to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). And it certainly exceeds any delegation this Court has been willing to uphold under its vagueness precedents. A statute granting police officers on federal land the power to arrest anyone taking any action detrimental to any of the statutory goals listed in § 1701 would easily be struck down under a vagueness challenge. This case would thus be easier if this Court applied that same, higher standard.

This Court's vagueness precedents explain why laws like the Act vest far too much discretion in executive branch actors. In *Interstate Circuit v. Dallas*, this Court struck down an obscenity ordinance that forbade movie theater owners from admitting minors to movies judged "not suitable for young persons" by the city's Motion Picture Classification Board. 390 U.S. at 676. The board was instructed to rate movies based on whether they contained (1) violent scenes "likely to incite or encourage crime or delinquency on the part of young persons," or (2) sexual scenes "likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or appeal to their prurient

interest." *Id.* at 681. Theaters were subject to misdemeanor penalties if they allowed minors into movies the board deemed "not suitable for young persons." *Id.* at 680.

The Court explained that the ordinance was "so vague" and "so loose" that it left the board "adrift upon a boundless sea," granting it wide discretion to issue regulations in accordance with its beliefs, rather than issuing "regulation by law." *Id.* at 684–85. The Court also held that granting an administrative board such broad powers posed another concern: vague laws shield administrative agencies from judicial review. *Id.* at 685 ("where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative [by vagueness.]" (quoting *Joseph Burstyn v. Wilson*, 343 U.S. 495, 532 (1952))). "Thus, to the extent that vague standards do not sufficiently guide the censor, the problem is not cured merely by affording de novo judicial review." *Id.*

The Act exemplifies the same unbounded discretion that led this Court to strike down the obscenity ordinance in *Dallas*. Like the motion picture board's movie classifications, the secretary's regulations are backed by criminal penalty. However, the legislative authority vested in the interior secretary far exceeds the authority of the board. The board only determined what movies triggered the obscenity ordinance. But under the Act, the secretary's authority is not confined to deciding the applicability of existing standards to specific situations. Rather, the secretary is empowered to create new laws (regulatory crimes) that dictate future behavior. And while the Act imposes restrictions on

the extent of penalties for violators, the secretary still determines what those violations are.

A quick glance at the Code of Federal Regulations reveals the extent of the secretary's rulemaking authority. Pursuant to § 1733(a), the BLM (exercising the secretary's delegated power) has created what amounts to its own criminal code governing public lands. *See, e.g.*, 43 C.F.R. § 9268.3(a)(iv) (a prohibition on operating an off-road vehicle without proper "registration"); *id.* at § 9269.3-5(b)(iii) (a prohibition on "permits secured by fraud"); *id.* at § 3715.8-1 (a prohibition on making false statements to BLM officials); 65 Fed. Reg. 69781-03(4)(e) (Nov. 20, 2000) (a prohibition on shooting firearms in particular areas near Carson City). Put simply, under this Court's vagueness standard, the Act's delegation of criminal lawmaking authority unconstitutionally violates the separation of powers. *See Davis*, 588 U.S. at 451 ("[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" (quoting *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812))).

But the Act's breadth lies not just in the range of conduct the secretary may regulate, but also from the wide sweep of those regulations' applicability. Under the Act, the secretary may issue regulations for over 48 million acres of land in the state of Nevada (244 million acres nationwide), which amounts to 63% of the state's total landmass. Pet. Br. 18. This means that, on a member per acre basis, the secretary possesses more geographic lawmaking power than either Congress or the Nevada state legislature.

The Secretary of the Interior thus functions as a one-man super legislature, wielding Congress's broad

police powers over federally managed public lands solely based on personal convictions and judgments, rather than enacting regulations determined strictly "by law." *Interstate Circuit*, 390 U.S. at 685. Even under the intelligible principle standard, the Act does not adequately set forth a discernable congressional policy or reasonable restraints upon the secretary. And certainly, by any heightened standard that should apply in the criminal context, the Act must also fail for lack of adequate definitiveness. For these reasons, this Court must reverse the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, as well as those described by Petitioner, this Court should grant the petition.

Respectfully submitted,

Thomas A. Berry
Counsel of Record
Harrison Prestwich
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

Dated: March 16, 2026