

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 *AMICUS CURIAE* OF THE
NEW CIVIL LIBERTIES ALLIANCE
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae the New Civil Liberties Alliance (“NCLA”) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state’s depredations. The “civil liberties” at issue include rights at least as old as the U.S. Constitution, such as the right to have laws made by the Nation’s elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—because Congress, executive branch officials, administrative agencies, and even the judiciary have neglected them for so long.

NCLA defends civil liberties primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type that the Constitution was designed to prevent. This unconstitutional state within the Constitution’s United States is the focus of NCLA’s concern.

NCLA represents individuals and businesses harmed by Congress’s unconstitutional divesting of legislative power to administrative agencies. In those cases, unelected executive-branch officials—not the

¹ No party’s counsel authored any portion of this brief, and no party, party counsel, or person other than *amicus curiae* made a monetary contribution intended to fund this brief’s preparation or submission. All parties received timely notice of intent to file this brief.

nation’s elected lawmakers—exercise sweeping delegated authority over private rights and individual liberty. That authority includes the power to determine what conduct will constitute a federal crime on millions of acres of public land, *see BASE Access, et al. v. National Park Service, et al.*, No. 4:25-cv-00790, 2025 WL 4186330 (S.D. Tex. Feb. 24, 2025), and the unconstrained power to allocate market share across entire national industries. *See* Pet. for Writ of Certiorari, *RMS of Georgia, LLC v. EPA*, No. 25-1079 (U.S. Feb. 27, 2026). NCLA thus has a strong interest in faithful judicial enforcement of Article I’s Vesting Clause—and the nondelegation doctrine that flows from it.

SUMMARY OF ARGUMENT

The “nondelegation” doctrine is failing—and nowhere is that failure more dangerous than in the criminal context. That mounting threat to liberty warrants this Court’s review.

The nondelegation doctrine was intended to prevent the legislative power, vested exclusively in Congress, from being divested² to any other branch. Today, however, lower courts too often invoke this Court’s language to uphold Congress’s transfer of

² This brief refers to the divesting of legislative power rather than “delegation.” Once conveyed, Congress cannot later terminate or withdraw such statutory transfers without a supermajority or the Executive Branch’s assent. *See* Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE* 81, 98 (Peter J. Wallison & John Yoo eds., 2022).

legislative power to executive agencies, so long as Congress supplied some “intelligible principle,” however broad or amorphous. The decision below illustrates how far that doctrine has drifted from its constitutional moorings, even when criminal punishment is implicated and physical liberty is at stake.

First, the panel’s decision further dilutes this Court’s already degraded nondelegation precedent. Early cases required Congress to supply judicially discernible standards—later described as “intelligible principles”—that both directed executive decision-making and enabled courts to determine whether an agency had adhered to Congress’s will. *See, e.g., Opp Cotton Mills v. Adm’r of Wage and Hour Div.*, 312 U.S. 126 (1941); *Yakus v. United States*, 321 U.S. 414 (1944). The statutes in those cases did not merely announce broad policy aspirations. Congress supplied concrete criteria, factual predicates, and limiting principles that confined the agency’s substantive authority.

Yet the panel invoked those same precedents to uphold a statute lacking anything resembling the limiting features that rendered those earlier delegations constitutionally tolerable, thereby transforming precedents that required meaningful congressional direction into authorities approving virtually boundless Executive discretion. That error stems largely from this Court’s erroneous dicta—most prominently in *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)—suggesting that broad phrases such as “public interest” may substitute for meaningful standards. Repeated over time, that

dictum has reduced the constitutional inquiry to a single, impoverished question: whether Congress's guidance is at least as definite as "in the public interest."

However, this Court has never held that vague statutory aspirations, standing alone, satisfy the Constitution's requirement that Congress establish a governing rule for the exercise of delegated authority. The cases on which the panel relies involved statutes that meaningfully constrained executive action. And certainly, none authorized executive officials to determine, in the first instance, what conduct should qualify as a federal crime. Yet the Federal Land Policy and Management Act of 1976 (FLPMA) empowers the Secretary of the Interior to promulgate criminal regulations governing virtually all conduct across millions of acres of public land. Such a sweeping transfer of lawmaking authority cannot be squared with the Constitution's basic structural command that the power to legislate, including the power to define crimes, belongs to Congress alone.

Second, the panel's reliance on *United States v. Grimaud*, 220 U.S. 506 (1911), is misplaced and dangerous. *Grimaud* did not involve anything like FLPMA's sweeping transfer of general criminal lawmaking authority. There, Congress authorized the Secretary to issue regulations narrowly directed to protecting forest reservations from fire, depredations, and destructive uses. The delegation was thus bounded by a clearly defined congressional policy and meaningful limits. It did not authorize executive officials to criminalize whatever conduct they deemed "necessary" for the "management, use, and

protection” of millions of acres of federal lands. *See* 43 U.S.C. § 1733(a). Yet the panel deployed *Grimaud* much as courts have invoked *American Power’s* “public interest”—not as precedent to be closely read in light of its reasoning, statutory framework, and context, but as a doctrinal talisman for dispatching nondelegation claims. That misguided approach warrants this Court’s review. If left uncorrected, it threatens to make *Grimaud* in the criminal context what “public interest” has become elsewhere: a ready-made substitute for the serious constitutional analysis that Article I requires.

Finally, the panel’s decision further entrenches an enervated form of the nondelegation doctrine under which Congress need only gesture at broad policy aims while executive officials dictate what conduct qualifies as criminal. Without this Court’s intervention, that shortcut approach will continue to erode the Vesting Clause, undermine the role of the judiciary, and normalize the divesting of criminal lawmaking power untethered from meaningful legislative standards. This Court should grant certiorari to make clear that the Constitution does not tolerate a regime in which Congress legislates in aspirations, the Executive defines the crimes (even at the point of enforcement), and courts are expected to bless that arrangement as law.

ARGUMENT

I. THE NONDELEGATION DOCTRINE IS FAILING AND IN NEED OF THIS COURT’S ATTENTION

This Court developed the nondelegation doctrine

to ensure that the legislative power³ vested in Congress would remain there.

Through the Constitution, the People consented to the exercise of legislative power by Congress—and by Congress alone. U.S. CONST. art. I, § 1 (“*All* legislative powers ... *shall be* vested in a Congress[.]”) (emphasis added). This consent is fundamental to the legitimacy of the government.⁴ To safeguard liberty, the Constitution placed procedural burdens on the legislative process, *see* THE FEDERALIST NO. 70, at 475 (A. Hamilton) (J. Cooke ed. 1961), and it isolated the legislative and other governmental powers, vesting executive and judicial power in separate branches. U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

Limiting legislative power to Congress is essential to respect the consent of the governed and to uphold individual liberty, yet the precedent meant to enforce that stricture now falls short. Even this Court has erroneously qualified what the Constitution makes absolute, stating “Congress *generally* cannot delegate its legislative power.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (emphasis added).

The modern nondelegation doctrine no longer protects the separation of powers (*i.e.*, it no longer confines legislative power to the legislative branch). To vindicate the Constitution’s design—particularly

³ The power to legislate has been described as the power through an exercise of will to make general, prospective, binding rules intended to limit liberty. *See INS v. Chadha*, 462 U.S. 919, 952 (1983).

⁴ *See* Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1105-08 (2023).

where criminal punishment is concerned—this Court should grant review and restore meaningful enforcement of the nondelegation doctrine.

II. VESTED POWERS PRECEDENT ONCE DEMANDED THAT CONGRESS SET LEGISLATIVE STANDARDS

To protect the separately vested constitutional powers, this Court once demanded that Congress provide judicially discernible standards before empowering an agency to administer a statute with substantive power to limit rights. In this case, for instance, precedent predating 1946 would have required that a court and the public be able to point to the language of the statute and identify a standard that would allow *them*, not BLM, to decipher whether the agency had complied with the will of Congress or whether it had exercised authority beyond the scope of Congress’s delegation, in determining what conduct qualifies as a criminal act on 245 million acres of public lands.

Even the now-maligned intelligible-principle test, as this Court originally applied it, required Congress to furnish standards to meaningfully constrain Executive authority.

A. Early Vested Powers Precedent Required That Congress Set Legislative Standards

For over 150 years after the founding of our Republic, this Court dutifully observed the constitutional mandate to limit legislative power to Congress. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That [C]ongress cannot delegate

legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”); *Wayman v. Southard*, 23 U.S. 1, 42 (1825) (“It will not be contended that Congress can delegate ... powers which are strictly and exclusively legislative.”); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) (“it is a breach of the national fundamental law if Congress gives up its legislative power ...”).

In the 1930s and early 1940s, this Court took care to delineate what Congress must do before it may delegate authority to an executive agency. Specifically, it would not suffice for Congress to identify a broad policy and then grant power to advance that policy. To ensure that legislative power remained in the Legislative Branch, Congress also had to prescribe standards and establish rules of decision that would allow courts to determine whether the Executive’s administrative acts conformed to the legislative will. *See Panama Refining*, 293 U.S. at 422-26; *Schechter*, 295 U.S. at 530; *Yakus*, 321 U.S. at 424-26.

In *Panama Refining*, the Court held § 9(c) of the National Industrial Recovery Act unconstitutional because, notwithstanding the statute’s many articulated policy goals, it failed to provide any standard dictating when or how the specific power at issue should be applied. 293 U.S. at 430-32.

The Court identified the key distinction between § 9(c) and other statutory delegations that the Court had previously upheld. *Id.* at 421-30. In those prior

cases, Congress had established not only policies, but *standards* or rules of conduct, leaving the Executive to develop “subordinate” rules or to find facts necessary to apply the legislative standard. *Id.* at 421-26. In *Panama Refining*, “Congress ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule,” *specifically concerning the transportation of hot oil. Id.* at 430.

Later, the Court struck another part of the Act, holding again that Congress must “itself establish[] the standards of legal obligation, thus performing its essential legislative function.” *Schechter*, 295 U.S. at 530. “[F]ailure to enact such standards” amounted to an “attempt[] to transfer [the legislative] function to others.” *Id.* As to legislative power, when the purpose of a statute is not to establish law, but to authorize the executive to make “new and controlling prohibitions [*i.e.*, restrictions on liberty] through codes of laws,” and when any congressional restrictions “leave virtually untouched the field of policy envisaged,” Congress has exceeded the bounds of its lawful authority to divest legislative power. *Id.* at 535, 538. Such is surely the case in FLPMA.

As the Court explained in *Opp Cotton Mills*, the “essentials of the legislative function are the determination of the legislative policy *and* its formulation as a rule of conduct.” 312 U.S. at 145 (emphasis added); *id.* at 144 (statutory criteria supplied a “definition of the circumstances in which [the statute’s] command is to be effective,” which together with the declared policy, “constitute the performance, in the constitutional sense, of the legislation function.”). And, as this Court recently

reaffirmed, to determine whether a statute contains the requisite “intelligible principle,” courts must assess whether it has provided “sufficient standards to enable both ‘the courts and the public [to] ascertain whether the agency’ has followed the law.” *FCC v. Consumers’ Research, et al.*, 606 U.S. 656, 673 (2025) (quotation omitted). In other words, Congress must do more than announce an objective—it must prescribe the rules governing when and how that objective may be pursued.

Judicially discernible standards also serve a core constitutional function with respect to the role of the judiciary. The panel suggests that the Court should adhere to the modern, permissive approach to Vested Powers and the intelligible-principle test because constitutional limits on divesting are ostensibly difficult for courts to enforce. App. 7a (“[C]ourts ‘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.’”) (quotation omitted). But that purported concern is avoided if the Court returns to its traditional requirement that Congress supply standards sufficient to permit courts to ascertain whether an agency has conformed to, contravened, or exceeded the will of Congress. The Ninth Circuit’s reasoning illustrates the consequences of abandoning that requirement: the modern nondelegation doctrine not only facilitates divesting legislative power, but also impedes the exercise of judicial power.

To accomplish their purpose, standards must thus be “sufficiently definite and precise.” *Yakus*, 321 U.S. at 425-26. While this prescription permits flexibility,

it precludes reliance on unqualified policy statements. *Id.* at 425. *Yakus* examined a wartime price-control statute that declared its policy objectives in Section 1, while Section 2 and an amending statute supplied the operative standard—prices prevailing on a specified date—for setting maximum prices. *Id.* at 420-21; *but see* App. 8a (panel misleadingly referring to applicable statutory standard in *Yakus* as simply “fair and equitable’ prices”). It was the standards specified that “define[d] the boundaries” for agency action. *Id.* at 423. The Court reiterated that the essence of the legislative function consists not only in the determination of policy, but also in its “formulation and promulgation as a defined and binding rule of conduct.” *Id.* at 424.

The Court should grant certiorari and restore the requirement that Congress prescribe standards sufficiently discernible for “the courts and the public” to identify when and how a statute may be applied to impinge rights. *Consumers’ Research*, 606 U.S. at 673.

B. The Intelligible-Principle Test Once Required Standards but Has Devolved

When this Court first began speaking in terms of an “intelligible principle,” it did not relax its requirement that Congress supply meaningful standards.

In *J.W. Hampton*, the Court found that Congress had established a “perfectly clear and perfectly intelligible” standard for administering a tariff statute: the President was to determine the difference between domestic and foreign production costs and adjust tariffs to offset that difference, thereby

enabling domestic producers to compete “on terms of equality with foreign producers.” *Id.* at 404. The standard was clear and fixed, even though the circumstances to which it applied were complex and varied. *Id.* at 404-05.

After surveying numerous statutory schemes that followed this model—namely, Congress providing clear standards that govern when and how the Executive should apply legislated authority—the Court observed that “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [administer the law] is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *Id.* at 409. That formulation did not suggest that Congress could satisfy constitutional requirements merely by announcing broad policy aspirations.

Contrast that approach with the panel below, App. 8a–10a, equating broad statutory aims with an “intelligible principle,” rather than identifying concrete legislative standards directing agency’s exercise of delegated authority. Rather than confront whether Congress supplied judicially discernible standards governing the exercise of BLM’s delegated criminal lawmaking authority, the Ninth Circuit treated the constitutional inquiry as satisfied so long as Congress provides “*some* standard constraining discretion,” even “one phrased in broad terms.” App. 8a. Indeed, according to the panel, statutory directives as amorphous as instructing an agency to set “fair and equitable” prices, to adopt measures “requisite to protect the public health,” or to act in the “public interest, convenience, or necessity” suffice to

satisfy the nondelegation doctrine. *Id.* (citing *Yakus v. United States*, 321 U.S. 414, 423 (1944), *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472-74 (2001), and *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943)).

That flawed understanding stems largely from this Court's erroneous dicta—most prominently in *American Power & Light*—which lower courts have repeatedly quoted and invoked to nearly foreclose the need for judicial analysis beyond asking if Congress's guidance is at least as definite as “in the public interest.”

In *American Power & Light*, the Court rejected a Vested Powers challenge to the Public Utility Holding Company Act of 1935. The Act prohibited nested holding company structures that “unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders.” 329 U.S. at 97 (quotation omitted). The Court concluded that to “those familiar with corporate realities[,]” the statutory language conveyed concrete meaning even “standing alone.” *Id.* at 104. Even so, the phrases did not stand alone. The Court emphasized that the statute provided “a veritable code of rules ... for the Commission to follow in giving effect to the standards.” *Id.* at 105.

Up to that point, *American Power's* analysis faithfully tracked earlier nondelegation precedent. What followed, however, was dicta that has been widely adopted but seemingly seldom scrutinized. After concluding that the statute supplied a sufficiently clear regulatory framework, the Court

observed that the standards were “certainly no less definite in nature than ... ‘public interest,’ ‘just and reasonable rates,’ ‘unfair methods of competition’ or ‘relevant factors.’ The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue.” *Id.*

The Court’s offhand suggestion that broad, indeterminate policy statements may serve as substitutes for meaningful congressional standards was not only dicta, but also incorrect. As support for this faulty proposition, *American Power* cited *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932)—yet it ignored that Court’s explicit observation that it was a “mistaken assumption that [the ‘public interest’ criterion mentioned in the statute] is a mere general reference to public welfare without any standard to guide determinations.” *N.Y. Cent. Sec. Corp.*, 287 U.S. at 24. In *New York Central*, the Court considered “[t]he purpose of the Act, the requirements it imposes, and the context of the provision in question,” and it concluded that the statute’s “public interest” term was not “without ascertainable criteria,” but had a “direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities[.]” *Id.* at 25. Equally important, “the Interstate Commerce Commission ha[d] constantly addressed” these terms, and their meaning was informed by decades of ICC practice, related statutory provisions, and judicial precedent. *Id.*

American Power’s stray suggestion that vague policy directives—divorced from statutory purpose,

context, established legal meaning, or legislative standards—may themselves constitute an intelligible principle was mistaken. Properly understood, the precedent that *American Power* invoked did not treat such language as a free-standing substitute for congressional lawmaking. Rather, those decisions interpreted broad statutory terms within clear legislative schemes that supplied concrete standards governing the agency’s exercise of authority. The panel’s ruling below collapses that critical distinction, effectively reducing the constitutional inquiry to whether Congress has announced a policy objective—while leaving it to the Executive to determine the operative rules and standards governing the law’s substantive content.

III. THE NINTH CIRCUIT DANGEROUSLY APPLIED A TOOTHLESS INTELLIGIBLE-PRINCIPLE TEST UNMOORED FROM LEGISLATIVE STANDARDS

The improper influence of *American Power*’s dicta is evident in modern nondelegation decisions, including the panel’s ruling below, which have embraced and further diluted its purported reframing of the intelligible-principle test, leaving the vesting clause largely toothless. *See* App. 8a (“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?”) (citation omitted). “General policy” has come to be mistaken for the “principle” in the intelligible-principle test, untethering the doctrine from its original mooring in congressionally supplied standards.

The Ninth Circuit’s analysis reflects that dilution. Starting from the premise that the intelligible-principle requirement is an “exceedingly modest limitation,” and that courts “almost never” second-guess Congress regarding how much “policy judgment” it may leave to those executing the law, the panel asked only whether Congress had supplied “*some* standard constraining discretion—even one phrased in broad terms.” App. 7a-8a.

From there, the panel treated FLPMA’s broad transfer of authority to issue whatever criminal regulations BLM deems necessary “with respect to the management, use, and protection of the public lands”—combined with the FLPMA’s “multiple use and sustained yield” provisions—as a “clear principle,” which, the court concluded, “easily satisfies” the intelligible-principle test. App. 8a-12a. That “principle,” however, supplies no ascertainable standards to govern BLM’s authority to define criminal conduct on public lands. At most, it paraphrases FLPMA’s general policy aims, which supply no rules for determining, *inter alia*, what conduct should be criminalized, when criminal regulation is appropriate, what factual findings the agency should make, or how the agency should balance the statute’s numerous, competing objectives. Such a “standard” does not, for example, enable a court to determine whether BLM conformed to or exceeded Congress’s will when it criminalized riding a bike without a functioning taillight. Yet, under the panel’s approach, Congress need only announce lofty objectives, leaving it to the agency to decide what binding rules—including criminal prohibitions—will advance them.

That is precisely the kind of transfer of power that *Panama Refining* and *Schechter Poultry* invalidated as unconstitutional. Neither decision rested on the notion that Congress had provided *no* policy or guidance at all, and both acknowledged the “necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly.” *Schechter*, 295 U.S. at 592-30; *Panama Refining*, 293 U.S. at 421. Still, both rulings faulted Congress for divesting its “essential legislative functions” to another branch without supplying any standards or policy to govern the specific power at issue. *Schechter*, 295 U.S. at 592-30; *Panama Refining*, 293 U.S. at 421. Although the Constitution does not forbid Congress from “laying down policies and establishing standards, while leaving to [the Executive] the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply,” it does prohibit Congress from abdicating its vested powers and authorizing another branch to exercise them in its stead. *Id.* By transferring through FLPMA the essential legislative function at issue here—the power to write criminal laws—Congress committed the same Article I violation that the Court identified in *Panama Refining* and *Schechter Poultry*.

The panel’s reasoning rests on a series of misreadings of this Court’s early nondelegation cases—misreadings traceable to *American Power’s* dicta and repeated so often that they now pass for doctrine—resulting in a “test” that asks little more than whether Congress has announced a policy aspiration. On that view, Congress effectively need

only gesture at lofty hopes and capacious dreams to transfer its legislative power to the Executive—including its power to create new crimes. But the Constitution does not tolerate such arrangements. Certiorari is warranted to arrest—and ideally reverse—this dangerous erasure of the requirement that Congress prescribe meaningful standards.

IV. CERTIORARI IS WARRANTED TO STOP COURTS FROM MAKING THE NONDELEGATION DOCTRINE A DEAD LETTER IN THE CRIMINAL CONTEXT

The Ninth Circuit’s decision below warrants this Court’s review for reasons extending well beyond this case. That ruling not only reflects, but threatens to accelerate, the broader doctrinal decay that the intelligible-principle test has suffered for decades. Further, it does so here in the particularly alarming context of divested criminal lawmaking power, where the question is not simply who regulates, but who decides what conduct will subject an individual to criminal prosecution and imprisonment.

A. Reliance on *Grimaud* to Uphold Standardless Delegations of Criminal Lawmaking Authority Is Misplaced

The Ninth Circuit’s decision to uphold FLPMA’s divestiture of criminal lawmaking power leans heavily on this Court’s ruling over 100 years ago in *United States v. Grimaud*. But *Grimaud* cannot bear the weight that the panel places on it. Neither *Grimaud*’s reasoning, context, nor statutory framework bears any resemblance to FLPMA’s standardless transfer of criminal lawmaking authority.

To begin, *Grimaud* was not an intelligible-principle case at all. It was decided in 1911—nearly two decades before *J.W. Hampton* first coined that now-familiar phrase. See 276 U.S. at 409. Thus, *Grimaud* cannot serve as an example of this Court’s “routine[] appli[cation of] the ‘intelligible principle’ test” to criminal delegations, as the panel below contends. App. 13a. If anything, *Grimaud* applied “a standard *higher* than the intelligible-principle test to evaluate the legality of a delegation enforced by a criminal penalty.” App. 75a (VanDyke, J., dissenting from denial of rehearing en banc). There, the Court upheld Congress’s delegation of authority to the Secretary of Agriculture to promulgate a criminal regulation prohibiting the grazing of livestock on national forest reservations without a permit. The Court explained that the delegation was lawful because Congress had not conferred open-ended authority to make “rules and regulations for any and every purpose,” but instead had authorized the Secretary only to “fill up the details” necessary to administer the law within clearly defined statutory parameters. *Id.* at 517-522 (Congress “cannot delegate its power to make a law”). That reasoning bears little resemblance to the panel’s toothless test, under which broad policy aspirations are treated as adequate substitutes for the meaningful standards and limitations that Article I requires.

Nor did *Grimaud* uphold anything like the delegation challenged here. Indeed, the key principle in *Grimaud* was that Congress made the fundamental policy decisions and then provided clear guidance for the Executive’s enforcement of the law. *Id.* at 522. The statute there authorized the creation of forest

reservations, declared the purposes of those reservations, and empowered the Secretary to issue regulations to protect the reservations “against destruction by fire and depredations” and “to preserve the forests thereon from destruction.” *Id.* at 509. The Secretary’s authority was thus limited to “defined” subjects—protecting the forest reserves from “depredations and from harmful uses”—which Congress had “clearly indicated and authorized.” *Id.* at 522.

FLPMA bears little resemblance. It does not direct BLM to protect public lands from a concrete and determinate category of harms. It authorizes the agency to issue whatever criminally enforceable regulations it deems “necessary” for the “management, use, and protection” of public lands, while pursuing broad and often competing aims of “multiple use and sustained yield.” 43 U.S.C. §§ 1732(a), 1733(a). As Judge VanDyke explained, those principles do not meaningfully constrain the agency at all, but instead can be marshaled to justify “almost any of the potential uses of land that [the agency] might pursue.” App. 85a-86a.

Context makes the distinction even clearer. This Court has repeatedly emphasized that whether Congress supplied an intelligible principle depends not only on the bare text of a statute, but also on its purpose, factual background, and context. See *Consumers’ Research*, 606 U.S. at 684; *Gundy v. United States*, 588 U.S. 128, 136 (2019); *Am. Power & Light Co.*, 329 U.S. at 104-05. Read that way, the statute in *Grimaud* supplied a far more determinate principle than FLPMA does here. When Congress

enacted the statute, the first forest reservations had only recently been established, and unrestricted grazing on those reserves was widely understood to be a serious and ongoing source of destruction to the forest reserves. Sheep herders, in particular, were notorious for disregarding the new restrictions and grazing freely on protected reserves, causing substantial damage.⁵ Against that historical backdrop, Congress's policy in *Grimaud* was not an indeterminate aspiration, but a clear and bounded legislative directive: to protect forest reservations from destruction and depredations—at a time when uncontrolled grazing was widely understood to be a principal harm.

By contrast, FLPMA's grant of authority to issue whatever criminally enforceable regulations BLM deems "necessary" for the "management, use, and protection of the public lands" provides no similarly concrete benchmark by which courts or citizens can discern why riding a dirt bike at night without a taillight—or *countless* other activities across 245 million acres of public land—may be criminalized.

In short, *Grimaud* offers FLPMA no refuge. The defect in that statute does not concern the "filling of details," but the standardless transfer of criminal lawmaking power. *Grimaud* did not sanction such an

⁵ Char Miller, *How Counting Sheep Saved the U.S. Forest Service*, Peeling Back the Bark (May 3, 2011), <https://fhsarchives.wordpress.com/2011/05/03/how-counting-sheep-saved-the-u-s-forest-service/>; see also Logan Sawyer, *Grazing, Grimaud, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes*, 24 J.L. & Pol. 169, 181 (2008).

arrangement, and this Court's later cases foreclose it. At a minimum, whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions" remains an open question long overdue for this Court's resolution. *Touby v. United States*, 500 U.S. 160, 165-66 (1991).

**B. *Grimaud* Risks Becoming a Talisman for
Reflexive Deference to Standardless
Criminal Delegations**

Much as *American Power* has been read to support an enfeebled intelligible-principle test far removed from that decision's actual holding, the panel likewise stretched *Grimaud* beyond its actual holding, logical reasoning, and facts. Left undisturbed, that misreading threatens to make *Grimaud* in the criminal sphere what *American Power*'s "public interest" language has too often become elsewhere: a doctrinal talisman invoked not as precedent carefully read in light of its reasoning, statutory framework, and context, but as a ready-made excuse for rejecting nondelegation challenges whenever Congress has supplied some lofty but amorphous bromide to "govern" agency action. That danger is especially acute where, as here, the delegated power bears criminal consequences and individual liberty is at its apex.

Nor is the Ninth Circuit alone in its talismanic invocation of *Grimaud*. Multiple courts, eschewing *Grimaud*'s reasoning and statutory context, as the panel did here, have cited the century-old precedent as purported support for the proposition that

Congress need not supply meaningful standards when it divests power to the Executive to define the very crimes that it will later enforce. *See, e.g.*, App. 13a; *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 761 (6th Cir. 2023); *United States v. Mingo*, 964 F.3d 134, 138 (2d Cir. 2020); *United States v. Brown*, 364 F.3d 1266, 1274 (11th Cir. 2004). But neither *Grimaud*'s actual reasoning, nor this Court's subsequent precedent support that proposition. Read that way, *Grimaud* becomes an all-purpose citation for dispensing with meaningful scrutiny whenever Congress gestures toward some broad policy aspiration and leaves the Executive to supply the operative content of the law.

That shortcut approach is especially untenable because it effectively displaces the core reasoning of this Court's controlling decisions in *Panama Refining* and *Schechter Poultry*—both of which invalidated congressional divestitures of criminal lawmaking power. In neither case did the Court find that Congress had provided no restrictions, policies, or standards, nor that “some standard” “phrased in broad terms” could have saved the day. To the contrary, the Court acknowledged that Congress had defined the subject to be regulated and had articulated numerous broad policy objectives. *Panama Refining*, 293 U.S. at 414–18, 432; *Schechter*, 295 U.S. at 521–23, 537–42. Yet that was not enough because Congress still had failed to supply ascertainable standards or conditions with which the President was required to comply “as a ground of his [actions].” *Panama Refining*, 293 U.S. at 431-32. The panel below used *Grimaud* to sidestep those two precedents and uphold a transfer of criminal

lawmaking power that suffers the same deficiencies. Properly assessed under this Court’s precedent, FLPMA plainly vests BLM with an “uncontrolled legislative power,” *id.*, to “make whatever laws [it] thinks may be needed or advisable” to effectuate an amorphous range of objectives. *Schechter*, 295 U.S. at 538.

Absent this Court’s intervention, the Ninth Circuit’s decision and others like it will encourage courts to uphold transfers of criminal lawmaking power so long as Congress supplies a broad outline of amorphous policy aims. That cannot be reconciled with Article I nor the Constitution’s separation of powers. As Justice Gorsuch put it, “The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty.” *Gundy*, 588 U.S. at 157 (Gorsuch, J., dissenting).

C. Delegations of Criminal Lawmaking Authority Require Heightened Judicial Scrutiny—Not Deference

The Framers recognized that, with “criminal subjects,” Congress should “leave as little as possible to the discretion of those who are to apply and to execute the law.” James Madison, *The Report of 1800*, in 14 *The Papers of James Madison* 266, 307, 324 (Robert A. Rutland et al. eds., 1983). This Court’s precedent has long reflected that same understanding, *see, e.g., United States v. Evans*, 333 U.S. 483, 486 (1948) (“defining crimes” is a “legislative” function); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“It is the legislature ...

which is to define a crime, and ordain its punishment.”). And this Court has made explicit that Congress may not delegate “the inherently legislative task” of determining what conduct “should be punished as crimes.” *United States v. Kozminski*, 487 U.S. 931, 949 (1988).

This principle reflects a foundational premise of Vested Powers: laws restricting liberty must be enacted by the people’s elected representatives—not by unaccountable executive-branch bureaucrats. See *Schechter*, 295 U.S. at 529 (“Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is ... vested.”); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 55 (2015) (“[T]he structural principles secured by the separation of powers protect the individual”). The Constitution does not permit such lawmaking by executive fiat—and for good reason. When Congress broadly delegates its legislative power, the people can no longer “readily identify the source of legislation or regulation that affects their lives.” *Ass’n of Am. R.Rs.*, 575 U.S. at 57 (Alito, J., concurring). That, in turn, allows “[g]overnment officials [to] wield power without owning up to the consequences.” *Id.*



Although this Court once insisted that Congress set the legislative standards that govern when rights may be infringed, later cases drifted from that first principle. After nearly 80 years of steadily diminishing protection for Vested Powers, it is long past time for this Court to restore the Constitution’s prohibition on divesting legislative power.

CONCLUSION

The Court should grant the petition in this case to restore the Constitution's allocation of legislative power and to clarify that Congress must supply judicially discernible standards when delegating authority that affects private rights and individual liberty—especially in the criminal context.

For similar reasons, the Court should also grant the petition for a writ of certiorari in *RMS of Georgia, LLC v. EPA*, No. 25-1079 (U.S. Feb. 27, 2026), which presents a closely related question concerning Congress's transfer of sweeping policymaking authority to an administrative agency to allocate market share across an entire industry. Together, these petitions present the Court with an opportunity to reaffirm that Article I's Vesting Clause and the nondelegation doctrine are not mere formalities, but enduring structural safeguards of liberty.

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Respectfully submitted,

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