No. 25-6911

IN THE

Supreme Court of the United States

GREGORY PHEASANT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

RENE L. VALLADARES
FEDERAL PUBLIC DEFENDER
ELLESSE HENDERSON
Counsel of Record
ROHIT RAJAN
SEAN MCCLELLAND
ASSISTANT FEDERAL PUBLIC DEFENDERS
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101

TOBIAS S. LOSS-EATON
VISHNU TIRUMALA
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8427
tlosseaton@sidley.com

JEFFREY T. GREEN
DANIELLE HAMILTON
THE CARTER G. PHILLIPS/ SIDLEY AUSTIN LLP SUPREME COURT CLINIC
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

Counsel for Petitioner

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The government's brief in opposition confirms the central problem with the decision below: it never identifies the *act* Congress made criminal. The government insists that "it was Congress—not the BLM—that created a federal crime." Opp. 9. But Congress created half a crime at most. It set the penalty and the mental state: "knowingly and willfully." But then it handed the Executive a blank check to define the conduct, with only the fig-leaf of a limitation provided by a set of abstract, contradictory policy goals. That is how Mr. Pheasant faces a year in prison for riding a dirt bike at night without a taillight: not because Congress prohibited it, but because the Bureau of Land Management did.

Against that reality, it is telling what the government does not contest. It does not dispute that criminal law carries the moral condemnation of the community; that self-government demands crimes defined by accountable lawmakers; or that letting one branch make *and* enforce criminal law is one of the chief dangers the separation of powers seeks to prevent. Those considerations demand a stricter test for delegations like this one. And the fact that the delegation here barely passes muster under the civil intelligible-principle doctrine—while sweeping more broadly than other criminal delegations—makes this a perfect case to erect *some* guardrails around Congress's power to let the executive define criminal conduct.

The government's remaining arguments lack merit. Though no circuit split exists, that is because lower courts have said for decades that they are waiting for this Court to decide the issue—and since BLM land lies almost entirely in two circuits that agree on this question, no split will form. And while this petition is

interlocutory, the Court has granted review before in the same posture to resolve important threshold questions of criminal law.

At bottom, whether Congress can delegate the power to define criminal conduct is exceptionally important, squarely presented, and ready now. The petition should be granted.

I. The question presented warrants review.

The Ninth Circuit's insistence that the "exceedingly modest" intelligible principle test governs delegations of criminal lawmaking power raises an important and unsettled constitutional question. The government does not meaningfully rebut this showing, ignoring many of the reasons why this case presents an ideal chance to clarify the nondelegation doctrine in the unique criminal context.

A. The government believes that a mere intelligible principle suffices to sustain a statute that delegates nearly unfettered power to define criminal conduct. Opp. 6–7. That is wrong—and this Court has certainly never held as much.

In *Touby* v. *United States*, the Court acknowledged that "whether more specific guidance is in fact required" when "Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions" remains open. 500 U.S. 160, 165–66 (1991). Alone, *Touby* forecloses the government's argument that this question is settled. And in thirty-five years since *Touby*, the question remains unanswered. Lower courts "have exhibited persistent uncertainty over whether a more demanding nondelegation test applies in the criminal context." See Pacific Legal Foundation Amicus Br. 10–12 (collecting cases). The Court need "not wait" any longer. *Gundy* v. *United States*, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting).

On the merits, the government refuses to grapple with a fundamental point: The criminal context is different. Basic constitutional design requires a stricter test in this context. "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty." *Id.* This arrangement aligns with the risks associated with the criminal process. Criminal punishment reflects the moral condemnation of the community, so the people, through their elected legislatures, must have the ability to oversee how these laws are created. See Pet. 13. Self-government does not permit this responsibility to rest with unaccountable bureaucrats. Such an arrangement would invite the abuse that "follows when lawmaking and law enforcement responsibilities are united in the same hands." *Gundy*, 588 U.S. at 172 (Gorsuch, J., dissenting). And it is inconsistent with "a structure designed to protect [the people's] liberties, minority rights, fair notice, and the rule of law." *Id.* at 156.

The government says nothing about these considerations, all of which compel a stricter test in the criminal context.

B. On the merits, the government likens the delegation here to others upheld in the criminal context. Opp. 9–12. But this delegation is uniquely broad.

It has been established since at least Chief Justice Marshall's time 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*, 11 U.S. (7 Cranch) 32, 34 (1812). The government echoes the Ninth Circuit's assertion that "it was Congress—not the BLM—that created a federal crime for 'knowingly and willfully' violating BLM regulations." Opp. 9 (citation omitted). But that formulation undermines the Government's position, for it shows that Congress only

defined *part* of a crime—and not the most basic part. Congress set out the mens rea element ("knowingly and willfully") but omitted the actus reus—the conduct being criminalized. And as this Court recently explained, a crime is not a crime under our Nation's laws unless the Government can come forward with "proof of some act (*or actus reus*) undertaken with some measure of volition (*mens rea*)." *City of Grants Pass* v. *Johnson*, 603 U.S. 520, 545 (2024).

Mr. Pheasant does not dispute that—even where criminal penalties are implicated—Congress may authorize another branch to "fill up the details" of a regulatory scheme, *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911), so long as Congress provides "sufficiently definite and precise" standards "to enable Congress, the courts and the public to ascertain" whether Congress's guidance has been followed. *Yakus* v. *United States*, 321 U.S. 414, 426 (1944). But that standard, which requires an actus reus, is not met here.

The government's contrary argument rests on *Grimaud*. But *Grimaud* was decided well before the modern non-delegation doctrine developed. It also did not grapple with the question of whether criminal delegations should face a stricter standard—which is why *Touby* recognized that question remains open.

Even on its own terms, though, *Grimaud* does not sustain this delegation. The statute there directed the Secretary of Agriculture to "regulat[e] the use and occupancy of the public forest reservations and preserv[e] the forests thereon from destruction." 220 U.S. at 509. The scope of that power, the Court said, "was much less" than municipalities typically enjoy—and municipal ordinances do not "declare what shall be crimes." *Id.* at 516. Thus, the Court specifically

disclaimed upholding the power to define criminal conduct. And given the statutory language, the defendant could not complain about being punished for willfully "driving and grazing sheep on a reserve" with no permit. *Id.* at 509. The act bore a direct relationship to the clear statutory command to "preserve" the protected lands from "destruction" and "depredation[]," which could occur from grazing on "young growth and native grasses." *Id.* at 522.

Not so here. The government strains to draw a sufficient limitation from Congress' directive to the Secretary of the Interior to "manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). Nothing in that delegation, nor in the definition of those terms, comes remotely close to providing any meaningful guidance or laying down even a general rule about operating a motor vehicle on those lands, including the so-called "taillight requirement" set out in 43 C.F.R. § 8341.1(f)(5).

The government tries (at 8) to pull in a separate subsection from the Federal Land Policy and Management Act, which instructs the Secretary to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). But that instruction is limited by the purpose of the subsection, covering "[e]asements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns." *Id.* Because this language cannot apply generally throughout the Act, it does not constrain BLM's discretion in creating criminal regulations outside the easement and permitting process.

The Act's "grant of authority to issue whatever criminally enforceable regulations BLM deems 'necessary'" has no "concrete benchmark by which courts or citi-

zens 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." See New Civil Liberties Alliance Amicus Br. 21. The gap between "principles of multiple use and sustained yield" and the motor vehicle infraction is simply too large and offers no meaningful guidance on the types of conduct that can lead to criminal liability under § 1733(a). "These principles (multiple use and sustained yield)—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." App. 85a (VanDyke, J., dissenting from denial of rehearing en banc). Using the government's own examples, Congress delegated to unelected executive officials the policy choice to prioritize competing interests like mining rights, scenic beauty, historic values, or wildlife, "among other things." Opp. 8.

Far from "fill[ing] up the details," *Grimaud*, 220 U.S. at 517, any criminal act punished under § 1733(a) is solely BLM's creation, acting beyond any authority that Congress could have delegated to it under the separation of powers.

The government's other cases come nowhere close to justifying this expansive delegation. See Opp. 10–11. The Department of Homeland Security does not create a federal crime by designating ports of entry because it was Congress, not the agency, that defined the actus reus of entering outside those designated ports. See 8 U.S.C. § 1325(a)(1); *United States* v. *Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021). And the Drug Enforcement Agency does not create a federal crime by scheduling new controlled substances because Congress defined the actus reus with respect to those drugs: manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or

dispense. 21 U.S.C. § 841(a); see *Touby*, 500 U.S. at 166–67.

At bottom, the Act infringes on the constitutional separation of powers by authorizing the Secretary "to create crimes based on his personal policy judgements" and leaves "an unaccountable actor creating a criminal code with penal consequences." See Pacific Legal Foundation Amicus Br. 10. Under the government's theory, there is no principled reason why Congress could not attach criminal penalties to any number of broad administrative standards and leave executive officials to determine what conduct will subject citizens to prosecution. That is precisely the Pandora's Box the separation of powers was designed to prevent.

C. The government says little about the widespread consequences that follow from authorizing the prosecution in this case, which underscores the need for review.

BLM manages approximately 245 million acres of public land, or one-tenth of America's land mass—roughly the land area of Egypt or Tanzania. See New Civil Liberties Alliance Amicus Br. 21; States of Idaho et al. Amicus Br. 15. Through § 1733(a), Congress has authorized executive officials to define criminal liability that could ensnare millions of Americans who use public lands every year. If the Constitution permits Congress to transfer its power here, it is difficult to identify any meaningful limiting principle preventing delegations elsewhere. The breadth of the land affected, the number of citizens subject to potential criminal liability, and the fundamental interests at stake make this question exceptionally important and worthy of this Court's review.

Worse yet, the liberty interests implicated by this case are immediate and substantial. Section 1733(a)

does not merely authorize administrative regulation; it authorizes the creation of criminal offenses punishable by prison time. "That danger is especially acute where, as here, the delegated power bears criminal consequences and individual liberty is at its apex." See New Civil Liberties Alliance Amicus Br. 22. The practical consequences are substantial. The paper edition of the Code of Regulations for the BLM weighs in at 1,144 pages, with each administrative crime classified as a Class A misdemeanor punishable by up to 12 months in prison; thus, there is no shortage of punishable offenses under § 1733(a). See Ninth Circuit Federal Public and Community Defender Offices Amicus Br. 8. And many of those subjected to these offenses unknowingly plead guilty to a federal Class A misdemeanor by signing a routine-looking citation. See *id.* at 11–14. This case therefore concerns far more than land management. It concerns who decides when citizens may be deprived of liberty.

The government's retreat to the Property Clause only underscores the dangers of this unbounded delegation. Pet. 15. Property Clause authority is plenary, so if Congress can give the Executive crime-defining power wherever the Clause applies, the President can potentially fix and prosecute offenses on any topic in vast swathes of the country. That is all the more reason to recognize some constraints in this area. It has long been settled "that the scope of Congressional guidance must be commensurate with the scope of delegated authority." Pet. 88a (VanDyke, J., dissenting from denial of rehearing en banc).

And if the government believes the Property Clause affects the merits, it is mistaken; the Clause expands the *subjects* on which Congress may make law, but not *how* it may do so. Congress can "make all needful Rules and Regulations" only by legislating. U.S.

Const. art. IV, § 3, cl. 2. The Clause grants the Executive no power at all.

* * *

At least since *Touby* and *Gundy*, the Court has recognized the tension between excessive delegation and insufficient protection of citizens' liberty from the creeping administrative criminal code. As the reach of the federal government through the federal regulatory code grows ever more expansive, so does the need for accountability through the people's elected representatives. This case presents a clear opportunity to take an important step in that direction, restoring to Congress the responsibility to define what acts give rise to criminal punishment while using public lands.

II. This is an ideal vehicle.

The government does not dispute that the question presented is the sole, dispositive issue in this case, litigated and addressed thoroughly at each level below. See Pet. 19. And because this delegation is uniquely broad—while just barely surviving ordinary intelligible-principle review—this case is the perfect vehicle to decide this question.

The government contends, however, that "the decision below does not warrant further review because it is interlocutory." Opp. 14. This is not, of course, an argument about whether the Court can reach and cleanly decide the question presented here—it plainly can. Rather, the government suggests that Mr. Pheasant should have to face trial and conviction before raising an issue that is already fully ventilated below and ready for this Court's resolution. *Id.* But in other criminal cases, the Court has granted certiorari over the same argument in the same posture.

In *Lang* v. *United States*, as here, the district court granted pretrial motions to dismiss, the government appealed, and the court of appeals reversed and remanded for trial. The government thus argued that "any review by this Court is unwarranted at this time because these cases are in an interlocutory posture." U.S. Br. in Opp. 12–13, *Lang* v. *United States*, 144 S. Ct. 2706 (filed Oct. 30, 2023) (Nos. 23-32, 23-94, 23-5572), 2023 WL 7164427, at *12–13. The Court granted review anyway, presumably because the case raised an important question of substantive criminal law. See *Fischer* v. *United States*, 144 S. Ct. 537 (2023). Nor is that the only example. See, *e.g.*, *Sabri* v. *United States*, 541 U.S. 600, 604 (2004) (review granted in the same posture to decide the validity of a federal anti-bribery statute); *Bates* v. *United States*, 522 U.S. 23, 28–29 (1997) (same, to decide whether a criminal statute included an intent-to-defraud element); *Solorio* v. *United States*, 483 U.S. 435, 437–38 (1987) (same, to decide whether a service member's criminal offense requires a service connection for court-martial jurisdiction); cf. U.S. Br. in Opp. 18–19, *Turkiye Halk Bankasi A.S.* v. *United States*, 483 U.S. 1056 (filed July 18, 2022) (No. 21-1450) 2022 WL 2819476, at *18–19 (unsuccessfully opposing review of interlocutory appeal of denial of motion to dismiss indictment).

In each case, the Court granted review to decide whether the legal theory underlying the prosecution was valid. As here, the Court could have waited until after a conviction to decide that question, but it did not. The question presented here is no less significant.

CONCLUSION

The petition should be granted.

Respectfully submitted,

RENE L. VALLADARES
FEDERAL PUBLIC DEFENDER
ELLESSE HENDERSON
Counsel of Record
ROHIT RAJAN
SEAN MCCLELLAND
ASSISTANT FEDERAL PUBLIC DEFENDERS
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101

TOBIAS S. LOSS-EATON
VISHNU TIRUMALA
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8427
tlosseaton@sidley.com

JEFFREY T. GREEN
DANIELLE HAMILTON
THE CARTER G. PHILLIPS/ SIDLEY AUSTIN LLP SUPREME COURT CLINIC
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

Counsel for Petitioner

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