

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
THOMAS KELLER,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

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

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

The Controlled Substances Act criminalizes dispensing controlled substances, but creates an exception for authorized persons—such as physicians engaged in medical practice—who are registered with the Attorney General. 21 U.S.C. §§ 822(b), 841(a). But the legal standard that defines the boundary between lawful medical practice and unlawful drug dealing by authorized physicians is defined solely by an administrative regulation promulgated by the Attorney General: 21 C.F.R. § 1306.04(a). *See Ruan v. United States*, 597 U.S. 450, 454 (2022). The question presented is:

Whether the “intelligible principle” test remains the appropriate standard for evaluating delegations of legislative power when the resulting regulations define the elements of a federal crime, or whether the nondelegation doctrine requires a more stringent standard when Congress delegates to the Executive the authority to fix the boundary between lawful conduct and criminal liability.

## **PARTIES TO THE PROCEEDING**

Petitioner is Thomas Keller.

Respondent is the United States of America.

No corporate parties are involved in this case.

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## **PETITION FOR A WRIT OF CERTIORARI**

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

### **OPINIONS AND ORDERS BELOW**

The Ninth Circuit's opinion (App. 1a-38a) is reported at 142 F.4th 645. The Ninth Circuit's order denying rehearing en banc (App. 39a) is unreported.

### **STATEMENT OF JURISDICTION**

The Ninth Circuit entered judgment on June 27, 2025, and denied a timely petition for rehearing on November 5, 2025. (App. 1a, 39a.) On February 3, 2026, Justice Kagan extended the time to file this petition to March 20, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS**

Article I, § 1 of the Constitution provides:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Title 21 U.S.C. § 821 provides:

The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals.

Title 21 U.S.C. § 871(b) provides:

The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and

appropriate for the efficient execution of his functions under this subchapter.

Title 21 C.F.R. § 1306.04(a) provides:

A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

## STATEMENT OF THE CASE

### A. Statutory and regulatory background

The Controlled Substances Act (CSA) makes it a federal crime, “[e]xcept as authorized by this subchapter . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” 21 U.S.C. § 841(a). Elsewhere the CSA expressly authorizes persons registered with the Attorney General, like physicians, to dispense controlled substances. *See* 21 U.S.C. § 822(b). But, although “[r]egistered doctors may prescribe these substances to their patients,” such a prescription is valid only if “as provided by regulation,” the “doctor issues it ‘for a legitimate medical purpose . . . acting in the usual course of his professional practice.’” *Ruan v. United States*, 597 U.S. 450, 454 (2022) (quoting 21 C.F.R. § 1306.04(a)). What separates a licensed physician acting lawfully from a federal

felon is defined by a single administrative regulation—and nothing else. *See id.* Indeed § 1306.04(a) expressly states that any person issuing a prescription not for a legitimate medical purpose and in the course of professional practice “shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.” 21 C.F.R. § 1306.04(a).

Congress in the CSA offered relatively sparse guidance to the Attorney General in promulgating such regulations. One provision broadly authorizes the Attorney General “to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals.” 21 U.S.C. § 821. And another provision allows the Attorney General to “promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.” 21 U.S.C. § 871(b).

#### B. Factual background

Petitioner Thomas Keller was a licensed pain-management physician, authorized to dispense controlled substances, who was charged with ten counts of distributing controlled substances, in violation of 21 U.S.C. § 841(a)(1), after a patient committed suicide by overdosing on opiates. (App. 5a–8a.) Keller moved to dismiss the drug-distribution charges, arguing that the substantive standard for criminal liability for a licensed prescriber was established only by an administrative regulation, § 1306.04(a), in violation of the nondelegation doctrine. Keller argued both that Congress’s delegation to the Attorney General the authority to promulgate § 1306.04(a) lacked an intelligible principle, and that more than an

intelligible principle was required for delegations that carried criminal penalties. The district court denied the motion, and a jury later convicted Keller on four of the drug-distribution counts, and could not reach a verdict on the remainder. (App. 7a–8a.)

On appeal, Keller argued, among other things, that the district court erred in denying his motion to dismiss on nondelegation grounds. A Ninth Circuit panel rejected Keller’s argument. Applying the ordinary “intelligible principle” test to Congress’s delegation to the Attorney General of the authority to promulgate regulations defining the scope of criminal liability under the CSA, the court of appeals held that the Attorney General’s promulgation of § 1306.04(a) satisfied that modest test. (App. 16a–22a.) The court of appeals also rejected Keller’s contention that a heightened standard should apply to delegations when they carry criminal penalties, reasoning that its holding in *United States v. Pheasant*, 129 F.4th 576 (9th Cir. 2025), *petition for cert. filed* (U.S. Feb. 20, 2026) (No. 25-6911), foreclosed Keller’s argument. (App. 22a.) The court never suggested that the delegation here would have survived any stricter standard. (App. 16a–22a.)

### **REASONS FOR GRANTING THE WRIT**

More than three decades ago, this Court reserved the question whether the nondelegation doctrine demands something more than an intelligible principle when Congress empowers the Executive to define criminal liability. *Touby v. United States*, 500 U.S. 160, 165–66 (1991). The Ninth Circuit has now twice answered that question in the negative. The Court should grant certiorari to resolve the question it reserved 35 years ago in *Touby*.

**I. The Court should decide whether the nondelegation doctrine requires Congress to articulate something more than an intelligible principle before delegating to the Executive the power to define criminal conduct.**

A. The question whether the nondelegation doctrine requires a heightened standard for criminal delegations is important, recurring, and ripe for this Court’s resolution.

The Constitution vests “[a]ll legislative Powers” in Congress. U.S. Const. art. I, § 1. From that foundational principle flows the nondelegation doctrine: 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) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)); *see also Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (noting that the text of Article I, § 1 “permits no delegation of these powers”). To ensure that Congress retains its constitutional role, this Court has required that when Congress delegates regulatory authority to an Executive agency, it must supply an “intelligible principle” to guide the agency’s exercise of that authority. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). That test has proven remarkably permissive in practice, and this Court has invalidated a congressional delegation on nondelegation grounds only twice, both in 1935. *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). Whether that permissive standard is appropriate in all contexts—and in particular whether it is appropriate when the delegated authority extends to defining the elements of a federal crime—is the question this case presents.

Specifically, the question whether the nondelegation doctrine demands something more in the criminal context has been open since this Court’s decision in *Touby*. Like this case, *Touby* arose under the CSA. The Attorney General had temporarily scheduled a designer drug pursuant to his emergency scheduling authority, which Congress permitted if the Attorney General determined that doing so was “necessary to avoid an imminent hazard to the public safety.” *Id.* at 162–63 (quoting 21 U.S.C. § 811(h)). The defendants were convicted of manufacturing and distributing such a designer drug and challenged their convictions on nondelegation grounds, arguing that Congress had unconstitutionally delegated to the Attorney General the power to define criminal conduct. *Id.* at 164–65. This Court rejected that challenge, but expressly declined to decide whether “something more than an ‘intelligible principle’ is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions,” explaining that the delegation would satisfy any such heightened standard in any event. *Id.* at 165–66. The Court has not revisited that question in the thirty-five years since.

In the absence of guidance from this Court, two circuits have explicitly refused to reconsider the intelligible-principle test in the criminal delegation context—not because they are confident it is correct, but because they regard the question as this Court’s to resolve. Specifically, the Third Circuit has continued to apply only the intelligible-principle standard to criminal delegations “[u]ntil the Supreme Court gives us clear guidance to the contrary.” *United States v. Cooper*, 750 F.3d 263, 271 (3d Cir. 2014) (citing *United States v. Amirnazmi*, 645 F.3d 564, 577 (3d Cir. 2011)). The Tenth Circuit followed suit, explicitly deferring to this Court on the same

question. *United States v. Nichols*, 775 F.3d 1225, 1232 (10th Cir. 2014), *rev'd*, 578 U.S. 104 (2016) (citing *Cooper* and refusing to abandon the intelligible-principle test for criminal delegations absent guidance from this Court). These courts did not hold that the intelligible-principle test is correct in the criminal context; rather, they held only that they were bound to apply it until this Court says otherwise. *See id.*; *Cooper*, 750 F.3d at 271.

Other circuits have acknowledged that a heightened standard may apply but have declined to resolve the question, instead following the same assume-and-avoid path this Court took in *Touby*. The Second Circuit upheld a delegation “[e]ven if a heightened standard should apply to delegations concerning criminal offenses.” *United States v. Dhafir*, 461 F.3d 211, 216 (2d Cir. 2006). Likewise, the Fourth Circuit declined to “decide the unsettled question of whether delegation of the authority to define criminalized conduct must be held to a higher standard,” holding only that the challenged delegation would satisfy any such standard in any event. *United States v. Arch Trading Co.*, 987 F.2d 1087, 1094 (4th Cir. 1993). The Fourth Circuit more recently reaffirmed that approach, upholding a delegation while again explicitly leaving open whether a higher standard exists. *United States v. Moriello*, 980 F.3d 924, 932–33 (4th Cir. 2020). And the Fifth Circuit, sitting en banc, similarly declined to reach whether criminal delegations raise heightened constitutional concerns because it determined it did not need to. *Cargill v. Garland*, 57 F.4th 447, 471–72 (5th Cir. 2023) (en banc), *aff'd*, 602 U.S. 406 (2024); *see also Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring) (observing that “the Constitution may well also require Congress to

state more than an ‘intelligible principle’ when leaving the definition of crime to the executive”).

The Ninth Circuit has now gone further. Rather than applying the intelligible-principle test while flagging the open question, the court affirmatively held that no heightened standard applies to criminal delegations, and it did so twice, first in *Pheasant* and now in Keller’s case. *United States v. Pheasant*, 129 F.4th 576, 582–83 (9th Cir. 2025), *petition for cert. filed* (U.S. Feb. 20, 2026) (No. 25-6911); App. 22a. The Ninth Circuit’s affirmative resolution of the question *Touby* left open—a question that goes to the heart of who has the power to define federal criminal law—makes the need for this Court’s guidance acute.

The question is not merely recurring. Court after court has applied the intelligible-principle test to criminal delegations while explicitly flagging *Touby* and calling for this Court’s guidance. For thirty-five years, that call has gone unanswered. This case presents the Court with the opportunity, at last, to respond.

**B. Something greater than the exceedingly modest intelligible-principle test must apply to criminal delegations.**

The power to define what conduct subjects a citizen to criminal punishment is among the most consequential powers government exercises, and the Constitution assigns it exclusively to Congress. *See United States v. Davis*, 588 U.S. 445, 451 (2019) (“Only the people’s elected representatives in the legislature are authorized to ‘make an act a crime.’”) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)); *Sessions v. Dimaya*, 584 U.S. 148, 156 (2018) (the separation-of-powers principle requires “that Congress, rather than the executive or judicial branch,

define what conduct is sanctionable and what is not”); *see also* *Wooden v. United States*, 595 U.S. 360, 391 (2022) (Gorsuch, J., concurring in judgment) (“Perhaps the most important consequence of this assignment [of legislative powers to Congress] concerns the power to punish.”). In ordinary regulatory contexts, the nondelegation doctrine enforces that assignment by requiring Congress to supply an “intelligible principle” to guide the Executive’s exercise of delegated authority. *J.W. Hampton*, 276 U.S. at 409. But that test, already permissive enough to have invalidated only two statutes in nearly a century, is wholly inadequate when the power delegated is the power to fix the boundary between lawful conduct and a federal crime. The Constitution’s structure and original understanding, and this Court’s precedents in related contexts, all compel the same conclusion: when the Executive’s delegated authority extends to determining that boundary, something more than the “exceedingly modest” intelligible-principle test is required. *Contra Pheasant*, 129 F.4th at 579.

1. The Framers “believed the new federal government’s most dangerous power was the power to enact laws restricting the people’s liberty.” *Gundy*, 588 U.S. at 154 (Gorsuch, J., dissenting). “Defining crimes and fixing penalties are legislative . . . functions.” *United States v. Evans*, 333 U.S. 483, 486 (1948). When the Executive both defines criminal conduct and prosecutes citizens for it, the power to make the criminal law and the power to enforce it are united in the same hands, which is precisely the consolidation that the Framers identified as “the very definition of tyranny.” *The Federalist* No. 47 (J. Madison). As John Locke explained: “The legislative cannot transfer the power of making laws to any other hands; for it being

but a delegated power from the people, they who have it cannot pass it over to others.” *Gundy*, 588 U.S. at 153–54 (Gorsuch, J., dissenting) (quoting John Locke, *Second Treatise of Civil Government* § 141 (1690)).

The Framers took that warning to heart. They went to great lengths to make lawmaking difficult, requiring the concurrence of two houses and a presidential signature, because they understood that only a genuinely arduous legislative process could protect liberty against the government’s most dangerous impulse. *See id.* at 154–55. Allowing the Executive to make that determination by regulation short-circuits the structural protection bicameralism and presentment were designed to provide. *Cf.* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1031 (2006) (“The inefficiency associated with the separation of powers serves a valuable function, and, in the context of criminal law, no other mechanism provides a substitute.”).

The intelligible-principle test provides no meaningful check on that consolidation of Executive power. A test that permits Congress to authorize whatever the Executive deems consistent with a broadly stated policy goal is not a constitutional constraint; it is a formality. The Court’s own fractured decision in *Gundy* underscores the point. Only a four-Justice plurality applied the intelligible-principle test to the criminal delegation at issue there, with the remaining Justices advocating for a more robust standard or signaling openness to a more exacting one in a future case. *See Gundy*, 588 U.S. at 135 (plurality); *id.* at 148–49 (Alito, J., concurring in the judgment) (expressing willingness to reconsider the delegation doctrine “in a future case”); *id.* at 162–65 (Gorsuch, J., dissenting, joined by Roberts,

C.J., and Thomas, J.) (arguing the intelligible-principle test “has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked”); *see also Paul v. United States*, 589 U.S. 1087 (2019) (Kavanaugh, J., respecting denial of certiorari) (stating that Justice Gorsuch’s “scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases”). That the intelligible-principle test has been applied to uphold virtually every delegation the Court has ever reviewed—finding sufficient intelligible principles in vague statutory mandates to regulate in the “public interest” or promote “fair competition”—confirms that it provides no real constraint when the stakes are highest. *See Whitman*, 531 U.S. at 474. This is especially true in the criminal context, where the separation of powers means at a minimum that “the prosecutor isn’t allowed to define the crimes he gets to enforce.” *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

The Founders understood criminal lawmaking as an exclusively legislative function, and the early practice of Congress reflected that understanding. Early federal criminal statutes specified the prohibited conduct with particularity. The only delegations to the Executive involved ministerial details, such as specifying the objects of a pre-defined offense, not the power to determine in the first instance what conduct was criminal. *See United States v. Pheasant*, 157 F.4th 1119, 1127–31 (9th Cir. 2025) (Bumatay, J., dissenting from denial of rehearing en banc). Congress did not delegate the power to define criminal conduct itself until well after the Founding. *See id.* at 1130–31. James Madison was explicit about why: with respect

to “criminal subjects,” legislative enactments “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*, available at <https://founders.archives.gov/documents/Madison/01-17-02-0202> (last accessed Mar. 18, 2026).

Criminal law is not merely a technical regulatory matter. It carries the moral condemnation of the community and the most severe consequences the state can impose. “Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community,” the power to define criminal activity belongs to the legislature alone. *United States v. Bass*, 404 U.S. 336, 348 (1971). That principle of democratic accountability is undermined when Congress delegates criminal lawmaking to an Executive agency, because it simultaneously transfers to unelected officials the power to impose that moral condemnation and leaves no elected official accountable for the decision to make that conduct criminal. *See Gundy*, 588 U.S. at 155 (Gorsuch, J., dissenting).

That accountability concern has particular resonance in the medical context. This Court has already recognized that § 1306.04(a), the regulation that defines the boundary of criminal liability for licensed prescribers, is “ambiguous,” written in “generalit[ies], susceptible to more precise definition and open to varying constructions,” and gives “little or no instruction on’ major questions.” *Ruan*, 597 U.S. at 459 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 257–58 (2006)). The ambiguity of § 1306.04(a) is not a drafting failure. It is the predictable result of a delegation that gave the Attorney General no meaningful guidance on where the line between medicine and crime should fall. The line between a physician

practicing medicine and a physician committing a federal felony thus rests on a regulatory standard that Congress never defined and no elected official has ever been required to clarify or defend. That is the constitutional defect the nondelegation doctrine exists to correct.

2. This Court’s cases reflect, across several related contexts, a consistent principle: that when criminal liability is at stake, Congress must speak with greater precision than the intelligible-principle test requires. First, the rule of lenity requires courts to resolve statutory ambiguity in favor of criminal defendants, reflecting the principle that only the legislature may define crimes and fix punishments. As Justice Scalia observed, the doctrine prevents Congress from “effectively leav[ing] that function to the courts—much less to the administrative bureaucracy.” *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., statement respecting denial of certiorari). The same constitutional principle that bars Congress from passing its criminal lawmaking responsibility to courts through ambiguity bars it from passing that responsibility to the Executive through delegation. *See id.*

Second, the void-for-vagueness doctrine reflects the same separation-of-powers principle that animates the nondelegation doctrine: it 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.” *Dimaya*, 584 U.S. at 156. The Court has expressed “greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe,” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S.

489, 498–99 (1982), confirming that the criminal context demands the most exacting scrutiny. A standard that demands that precision when Congress speaks directly but tolerates ambiguity when Congress delegates to the Executive creates an obvious and troubling asymmetry, permitting Congress to achieve through delegation what it cannot achieve through direct legislation.

As this Court recognized in *Ruan*, issuing an invalid prescription is “often difficult to distinguish from the gray zone of socially acceptable . . . conduct,” i.e., issuing a valid one. *Ruan*, 597 U.S. at 459 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978)). The ambiguity that compelled a demanding scienter requirement in *Ruan* is not coincidental. It flows directly from the absence of any meaningful congressional standard for what separates lawful prescribing from criminal distribution — the very defect the nondelegation doctrine exists to prevent. When a delegation is so unguided that it produces a regulation the Court describes as written in “generalit[ies], susceptible to more precise definition and open to varying constructions,” *Ruan*, 597 U.S. at 459 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006)), the delegation itself cannot satisfy any meaningful constitutional standard.

Third, this Court long ago denied federal courts common-law jurisdiction to create crimes, holding that the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence. *Hudson*, 11 U.S. at 34. That foundational rule would be rendered hollow if Congress could achieve the functional equivalent by delegating criminal lawmaking to an Executive agency. As this Court explained in *Fahey v.*

*Mallonee*, one reason the Court struck down the delegations in *Panama Refining* and *Schechter Poultry* was precisely that they delegated the “power to make federal crimes.” 332 U.S. 245, 249 (1947).

These three doctrines share a common premise: that Congress, not the Executive or Judicial branches, bears the constitutional responsibility for defining what conduct is criminal. “Laws that vest more power require more constraints,” *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 776 (6th Cir. 2023) (Nalbandian, J., dissenting), and there is no greater power than the power to subject a citizen to criminal punishment. The nondelegation doctrine, the most direct constitutional check on that responsibility, should reflect the same premise. It does not, and cannot, do so under the exceedingly modest intelligible-principle test applied by the Ninth Circuit below. *Contra* App. 22a; *Pheasant*, 129 F.4th at 579.

3. This case illustrates the inadequacy of the ordinary intelligible-principle test with particular force. Although Congress defined the offense of distributing controlled substances, it delegated to the Attorney General the power to define the conduct that separates lawful medical practice from criminal distribution. The result is that the line between a physician practicing medicine and a physician committing a federal felony is drawn not by Congress but by a single administrative regulation, § 1306.04(a), promulgated by the Attorney General without any meaningful statutory constraint on where that line falls.

The sparseness of Congress’s guidance in the CSA underscores the constitutional defect. The two provisions identified by the Ninth Circuit below as

purportedly authorizing the Attorney General to promulgate regulations governing prescriptions by physicians, *see* App. 20a–22a, offer nothing resembling meaningful constraint. Section 821 authorizes the Attorney General “to promulgate rules and regulations . . . relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances.” Section 871(b) permits the Attorney General to “promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions.” Neither provision identifies any standard for determining where the line between authorized and unauthorized prescribing by physicians should fall.

This stands in stark contrast to the delegation this Court upheld in *Touby*, where Congress placed “multiple specific restrictions” on the Attorney General’s discretion to define criminal conduct. *Touby*, 500 U.S. at 167. Before temporarily scheduling a drug, the Attorney General was required to find that doing so was “necessary to avoid an imminent hazard to the public safety,” to consider an enumerated list of factors including the drug’s history and pattern of abuse, the scope, duration, and significance of that abuse, and the risk to public health, and to satisfy additional criteria governing which substances could be added to each schedule — including findings that the substance had a high potential for abuse, no currently accepted medical use, and lacked accepted safety for use under medical supervision. *Id.* at 166–67. Sections 821 and 871(b) contain nothing comparable. They require no factual finding before the Attorney General acts, identify no criteria to guide that judgment, and provide no standard for determining where the line between lawful and criminal prescribing falls. The absence of any comparable

constraint is precisely why the applicable standard matters, and why this case, unlike *Touby*, cannot be resolved without answering the question that *Touby* left open.

The Ninth Circuit did not dispute that §§ 821 and 871(b) provide no guidance comparable to what Congress provided in *Touby*. It simply held that no such guidance was necessary, that the question of whether a heightened standard applies was “foreclosed” by *Pheasant*, and that because the delegation satisfied the ordinary intelligible-principle test, Keller’s challenge failed. *See* App. 22a. This is the case *Touby* left open, and it warrants this Court’s resolution.

C. This case presents an ideal vehicle to address whether the nondelegation doctrine requires a heightened standard for delegations that contemplate criminal sanctions.

This case presents a clean vehicle to address whether the nondelegation doctrine demands a heightened standard for delegations that carry the power to define conduct giving rise to criminal liability. Keller raised this challenge at every stage of the proceedings below, and the Court of Appeals addressed it squarely on the merits. *See* App. 8a, 16a–22a. Unlike in *Touby*—where this Court sidestepped the reserved question because the delegation there would have survived any heightened standard in any event—the court below made no such alternative finding. The Ninth Circuit held only that the question was foreclosed by *Pheasant*; it never suggested that the delegation here would survive more exacting scrutiny. *See* App. 16a–22a. The applicable standard is therefore fully dispositive of the outcome, making this case an ideal vehicle to resolve the question *Touby* left open. No jurisdictional or preservation concerns cloud the path to this Court’s review. And

the issue is fully dispositive in another sense as well: because every count of conviction rests on regulations issued under the challenged delegation, a ruling in Keller’s favor would require vacatur of all charges.

**II. Alternatively, this Court should hold this petition pending disposition of *Pheasant v. United States*, No. 25-6911.**

As noted above, in *United States v. Pheasant*, the Ninth Circuit addressed a question this Court expressly left open in *Touby*: whether “something more than an ‘intelligible principle’ is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions.” 500 U.S. at 166; *see Pheasant*, 129 F.4th at 582–83. The Ninth Circuit answered in the negative, holding that the “exceedingly modest limitation” of the ordinary intelligible-principle test is all that restrains Executive power even in the criminal context. *See Pheasant*, 129 F.4th 576, 582–83 (9th Cir. 2025).

The Ninth Circuit’s rejection of Keller’s nondelegation challenge turned entirely on this holding. In its opinion below, the court relied exclusively on *Pheasant* to conclude that the Attorney General’s exercise of delegated authority to define criminal liability for physicians was subject only to the most deferential level of review, under its interpretation of the intelligible-principle test. *See App. 22a.*

A petition for a writ of certiorari is currently pending in *Pheasant*, challenging the Ninth Circuit’s permissive approach to the nondelegation doctrine in criminal cases. *See Pet. for Cert., Pheasant v. United States*, No. 25-6911 (U.S. Feb. 20, 2026). Because the legal standard applied in Keller’s case was exactly the rule announced in *Pheasant*, the resolution of that petition—and any subsequent merits

review—will control the outcome here. Accordingly, the Court should hold this petition pending the disposition of *Pheasant*. If the Court grants certiorari in *Pheasant* and resolves the question presented there favorably to petitioner or otherwise abrogates the standard applied below, the Court should then grant this petition, vacate the judgment below, and remand for further proceedings consistent with that decision.

### CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,  
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March 20, 2026



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