No. 25-6911

In the Supreme Court of the United States

GREGORY W. PHEASANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF PACIFIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Federal Land Policy and Management Act (FLPMA or Act) makes it a crime to "knowingly and willfully violate[] any . . . regulation" promulgated by the Secretary of the Interior under the Act. 43 U.S.C. § 1733(a). The Act identifies no criminal conduct and contains no limiting principle as to what the Secretary might criminalize. It merely instructs the Secretary to "issue regulations necessary to implement the provisions of [the] Act with respect to the management, use, and protection of the public lands, including the property located thereon." *Ibid.* The question presented is:

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

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice for Americans who believe in limited government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers. PLF attorneys have participated as lead counsel in several cases involving the role of the Judiciary as an independent check on the executive and legislative branches under the Constitution's separation of powers. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120 (2012); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016); *Sackett v. EPA*, 598 U.S. 651 (2023). PLF has also submitted *amicus* briefs in many of this Court's recent separation of powers cases. *See, e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *FCC v. Consumers' Rsch., Inc.*, 606 U.S. 656 (2024); *Learning Res., Inc. v. Trump*, 146 S. Ct. 628 (2026).

Additionally, PLF attorneys, including counsel in this case, have produced extensive scholarship on separation of powers issues. *See, e.g.*, Luke A. Wake & Damien Schiff, *Practical Applications of the Major*

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[1] No party's counsel authored any part of this brief. And no person or entity, other than *Amicus Curiae* and its counsel, paid for the preparation or submission of the brief. On March 7, 2026, *Amicus Curiae* gave notice to the parties of its intent to file this brief pursuant to Rule 37.2.

Questions Doctrine, Harv. J. L. & Pub. Pol'y Per Curiam 20 (2024); Luke A. Wake, *Taking Non-Delegation Doctrine Seriously*, 15 N.Y.U. J. L. & Liberty 751 (2022); Todd Gaziano & Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Test Gets the Job Done*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 45-70 (Peter J. Wallison & John Yoo, eds., 2022).

PLF's experience in separation of powers offers the Court an important perspective in considering this Petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a frequently recurring issue of national significance that warrants this Court's attention. While this Court has long affirmed that the separation of powers forbids Congress from delegating its lawmaking powers to the Executive Branch, existing nondelegation caselaw provides painfully little direction to the lower courts. This Court recently said that *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), "offer object lessons about the amount of latitude Congress can confer[;]" however, the reality is that more direction is needed. *Consumers'*, 606 U.S. at 683. After nearly a century of federal decisions routinely upholding what seem like unfettered delegations, it is imperative that this Court take a case to clarify that the nondelegation doctrine is alive and enforceable in the 21st century.

What is needed is "an example—just one" of a statute that *does not* pass muster under the nondelegation

doctrine.[2] Such a decision would provide a useful comparator that the lower courts could look to in gauging whether a delegation has gone too far in handing over responsibility for deciding the "important subjects." *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825). "The educational effect" of providing "just one" modern example would be "substantial." Scalia, *supra*, at 28.

This case presents an ideal vehicle for such an example because it involves a clear delegation of Congress' legislative power to define the *actus reus* element of crimes. And the decisions below demonstrate clearly how framing the nondelegation test differently affects the ultimate outcome of a case. At the same time, they evince confusion over the standard of scrutiny applicable to criminal delegations.

In *Touby v. United States*, 500 U.S. 160, 166 (1991), this Court suggested that a less deferential test *might* apply when Congress delegates to agencies the authority to define what conduct shall be deemed subject to penal consequences. For thirty-four years, this Court has left this important question unanswered. But given that delegations in the criminal context raise serious liberty concerns, the time has come for this Court to provide clarity on this recurrent question.

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[2] Justice Scalia once said that "even those who do not relish the prospect of regular judicial enforcement of the unconstitutional delegation doctrine might well support the Court's making an example of one—just one—of the many [very broad] enactments," because "[t]he educational effect on Congress might well be substantial." Antonin Scalia, *A Note on The Benzene Case*, Regulation, July/Aug. 1980, at 25, 27; *see also* Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 Geo. Wash. L. Rev. 1079, 1133 (2021) (making a similar point).

One answer might be that the intelligible principle test does not apply at all in the context of this kind of delegation. Another answer might be that, in the criminal context, the intelligible principle test requires more direction and clarity than might be expected in the civil context. For that matter, this Court should take this case if only to provide more direction as to how courts should apply the "general policy" and "boundaries" subtests, insofar as criminal delegations are assessed under the intelligible principle framework. *Consumers'*, 606 U.S. at 673 (internal quotation marks omitted). As explained herein, the lower courts have demonstrated persistent confusion over what suffices as a "general policy" or "boundary" to pass constitutional muster. And until this Court provides further direction, the courts will continue to bless even the most extreme delegations as providing a supposed "general policy" and "boundary"—even when appealing to hortatory goals at the highest level of abstraction that provide no practical direction.

ARGUMENT

I. The Court Should Grant Certiorari to Clarify the Standard of Review for Criminal Delegations

This case offers the Court a compelling opportunity to address criminal law delegations—*i.e.*, delegations empowering federal agencies to define the *actus reus* element of a crime. Because these are a particularly pernicious form of legislative delegation, this Court should take this case to clarify that the nondelegation doctrine demands a more exacting form of review than the deferential intelligible principle test applicable to the civil context.

Recognizing where threats to liberty are at their apex, the Framers afforded special protections to the accused in criminal cases.[3] And consistent with the Constitution's design, this Court has long recognized that criminal law is different in kind and thus deserving of "special restrictions." F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 Va. L. Rev. 281, 299 (2021). As such, there are compelling reasons to believe that a more stringent nondelegation test should apply in the criminal context.

Yet by treating 43 U.S.C. § 1733(a)—a vast delegation of criminal lawmaking authority covering millions of acres across several states—as any other, run-of-the-mill delegation, the court below disregarded constitutional structure, as well as the ancient admonition that "penal laws are to be construed strictly [against the government]." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The Ninth Circuit ignored the exceptional nature of criminal law in applying the "exceedingly modest" intelligible principle test to a criminal delegation. Pet. App. 7a (internal quotation marks omitted). And it did so because this Court has left unanswered the important question posed in *Touby*, as to whether the intelligible principle test applies in the criminal delegation context. 500 U.S. at

[3] Prohibitions on *ex post facto* laws and bills of attainder curtail the substance of criminal laws. U.S. Const. art. I, § 9. There are additional procedures that the government must follow in criminal cases, such as the grand jury requirement, the right to the assistance of counsel, the speedy and public trial guarantee, and the prohibition of double jeopardy. *Id.* art. III, § 2, cl. 2; *id.* amend. V & VI. And criminal convicts are legally immune from cruel and unusual punishment. *Id.* amend. VIII.

166. The Court should grant certiorari to provide doctrinal clarity.

A. This Case Provides an Ideal Vehicle for Answering the Question Left Open in *Touby*

In *Touby*, 500 U.S. 160, this Court weighed a nondelegation challenge to the Controlled Substances Act. In particular, the Court considered whether the Attorney General's authority to criminally proscribe substances when "necessary to avoid an imminent hazard to the public safety" constituted an unlawful delegation of legislative power. 500 U.S. at 163 (internal quotation marks omitted). Because the Attorney General's decision to schedule a drug required merely factual determinations, the Court rejected the nondelegation claim. *Id.* at 166-67. But the Court's rationale is crucial.

Recognizing the "heightened risk to individual liberty" posed by criminal delegations, the Court upheld the law—not because it contained an intelligible principle—but because, even assuming a more stringent standard applied, the Act "meaningfully constrain[ed] the Attorney General's discretion to define criminal conduct." *Id.* at 166. That was so, the Court reasoned, because the Executive could only criminalize a drug after making several specific ***factual determinations***, including whether it "ha[d] a high potential for abuse," "ha[d] no currently accepted medical use in treatment," and whether there was "a lack of accepted safe[] . . . use[s] of the drug under medical supervision." *Id.* at 167 (cleaned up). But while suggesting a

potential "meaningful constrain[t]" standard,[4] *Touby* left unresolved whether the nondelegation doctrine requires "greater congressional specificity . . . in the criminal context." *Id.* at 166.

This case provides the Court a compelling vehicle for addressing the issue. Unlike in *Touby*, Congress did not condition the Secretary's criminal lawmaking discretion on the finding of any articulable facts. Instead, the FLPMA authorizes the Secretary of the Interior, under 43 U.S.C. § 1733(a), to decide for himself what conduct shall be deemed acceptable, and what conduct shall be deemed a criminal offense, simply because the Secretary deems such restrictions "necessary" based on his own views of how public lands should be managed and used. Aside from the charge to "protect[] . . . the public lands," Congress provided no clear direction as to what kinds of conduct should be allowed or prohibited. Unlike other statutes that provide at least a modicum of practical direction, FLMPA does not direct the Secretary to consider any specific factors—much less direct the Secretary to adopt any specific kind of restriction.

The unguided nature of the Secretary's authority is even more remarkable given that 43 U.S.C. § 1733(a) authorizes him to define crimes as he deems "necessary" for the management of public lands, even though that means overriding Congress' default policy—under the Assimilative Crimes Act—of incorporating the criminal code of the state in which the federal enclave

[4] The difference between *Touby*'s meaningful constraint standard and the conventional intelligible principle test is more than semantic. The former looks for conditional factfinding to meaningfully constrain exercises of executive discretion. But the latter is often satisfied by broad policy pronouncements.

sits. *See* 18 U.S.C. § 13. One would, thus, expect Congress to provide clear direction as to the conditions warranting the creation of new criminal codes, given its incorporation of state criminal law standards elsewhere. *Ibid.*

These kinds of delegations leave extraordinary discretion to unelected bureaucrats to create criminal law based on nothing more than their personal values. And the regulatory history of the Multiple Use and Sustainable Yield Act (MUSYA) (a close analog of the FLPMA) provides a stark example of the oscillating policy choices that different Administrations may pursue in imposing, lifting, and re-imposing rules with criminal consequences, governing access and use of federal lands. *See* 16 U.S.C. § 551 (making violations of the MUSYA regulation punishable by up to six months in jail).

Like the FLPMA, the MUSYA delegates extraordinary discretionary authority for the Secretary of Agriculture to promulgate regulations—with penal consequences, *ibid.*—based on his personal views of what kind of access and uses should be allowed within the national forest system. The Ninth Circuit has held that the MUSYA "breathe[s] discretion at every pore." *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975); *see also Perkins v. Bergland*, 608 F.2d 803, 806-07 (9th Cir. 1979) (concluding that the MUSYA imposed no "concrete limits upon agency discretion."). And as such, the U.S. Department of Agriculture (USDA) has presumed discretion to impose such consequential rules as a criminally enforced ban on *any* construction or maintenance of roads across fifty-four

million acres of public lands—without any clear directive from Congress that it wanted that sort of prohibition.[5]

What is more, under the statute's amorphous charge to manage the national forests to ensure "multiple use and sustained yield," 16 U.S.C. § 529, successive presidential administrations have radically changed these roadless rule restrictions, at least as it concerns the politically sensitive question of building roads in the Tongass National Forest in Southeast Alaska. Remarkably, when the Trump Administration lifted roadless rule restrictions in 2020, it did so simply by asserting that USDA had changed its policy priorities.[6] And when the Biden Administration reimposed roadless rule restrictions in 2024, USDA once again justified its new regulations simply on the view that the agency had (once again) changed priorities.[7] And in neither case did the agency even attempt to

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[5] *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001).

[6] Special Areas; Roadless Area Conservation, 85 Fed. Reg. 68,688, 68,691 (asserting that "[r]oadless area management . . . is fundamentally an exercise in discretion and policy judgment concerning the best use of the NFS lands and resources," and explaining that USDA had "assign[ed] different value or weight to the various multiple uses" than had previous administrations).

[7] The Biden Administration acknowledged that there are "competing interests" at play, but explained that USDA had the prerogative to prioritize the concerns of those interest groups that wanted to reimpose roadless rule restrictions. 88 Fed. Reg. at 5,257 (asserting broad discretion to make policy judgments in weighing competing "social, economic, cultural, and environmental" concerns); *id.* at 5255 (emphasizing that USDA had—once more—decided to "assign[] different value or weight to the various multiple uses.").

argue that the text of the MUSYA meaningfully channeled the exercise of its rulemaking discretion.

Even if the FLPMA does not have the same regulatory history as the roadless rule saga under the MUSYA, the issue remains that the FLPMA leaves the Interior Secretary with extraordinary discretion to create crimes based on his personal policy judgments—just as the Agriculture Secretary has exercised under the MUSYA. In either case, we are dealing with an unaccountable actor creating a criminal code with penal consequences for any individual who should make a mistake.

In sum, this case offers a clean vehicle for answering the question left open in *Touby*. This is an especially good vehicle given the stark contrast between the conditional fact-finding delegation at issue in *Touby* and the FLPMA's open-ended delegation of authority to create an entire criminal code based solely on the Secretary's personal views of good management policy. *See Panama Refining*, 293 U.S. at 416-20 (rejecting the notion that a statute provides adequate direction in presuming that the President would act prudently in public interest).

B. The Lower Courts Need an Answer

The federal courts are confused about what nondelegation standard should apply in review of delegations authorizing federal officers to define criminal conduct. While the lower courts are consistent in rejecting nondelegation claims, they have exhibited persistent uncertainty over whether a more demanding nondelegation test applies in the criminal context. This lingering question warrants this Court's attention.

The lower courts generally fall into two camps. The first camp, which includes the decision of the Ninth Circuit below, Pet. App. 14a, expressly rejects the notion that criminal delegations warrant heightened scrutiny. Instead, these courts apply the ordinary intelligible principle test. *See, e.g.*, *United States v. Guzman*, 591 F.3d 83, 92-93 (2d Cir. 2010); *United States v. Cooper*, 750 F.3d 263, 271 (3d Cir. 2014); *United States v. Stewart*, 461 F. App'x 349, 351 (4th Cir. 2012); *United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir. 2013).

By contrast, the second camp assumes (without deciding) that a more exacting test may apply in the criminal context. *See, e.g.*, *United States v. Dharfir*, 461 F.3d 211, 216 (2d Cir. 2006); *United States v. Amirnazmi*, 645 F.3d 564, 576-77 (3d Cir. 2011); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093-94 (4th Cir. 1993); *United States v. Garfinkel*, 29 F.3d 451, 457-59 (8th Cir. 1994); *United States v. Melgar-Diaz*, 2 F.4th 1263, 1268-69 (9th Cir. 2021); *United States v. Shih*, 73 F.4th 1077, 1092 (9th Cir. 2023). These courts still apply the ordinary intelligible principle test as an initial matter; however, they then go on to ask—as a prophylactic measure to guard against any possible error—whether the delegated authority provides at least as much direction as the statute in *Touby*. Simply put, these courts hold out the possibility that criminal delegations must meaningfully constrain agency discretion beyond what is required under the intelligible principle test.

This case presents a particularly good vehicle for clearing up the doctrinal confusion, given the Panel's express rejection of *Touby*'s heightened standard and the vigorous dissenting opinions. *Compare* Pet. App. 14a (applying the intelligible principle test), *with id.*

at 84a (VanDyke, J., dissenting from the denial of rehearing en banc) (applying the meaningful constraint test from *Touby*); *see also id.* at 41a-69a (Bumatay, J., dissenting from the denial of rehearing en banc).

C. The Level of Scrutiny for Criminal Delegations Is Important and Deserves a Fresh Look

The question whether and to what extent Congress can delegate authority for an agency to define the *actus reus* element of a crime is critical. It strikes at fundamental liberty interests at the heart of the separation of powers. The question deserves this Court's consideration.

Congress should—and constitutionally *must*—decide what conduct triggers criminal condemnation.[8] "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). And laws defining criminal conduct "represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation." *United States v. Nichols*, 784 F.3d 666, 672-73 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc). The democratic accountability of the lawmaker is an essential check on that power. *United States v. Davis*, 588 U.S. 445, 451 (2019).

[8] Several states have held that "more stringent rules and greater scrutiny [] is required" for criminal delegations. *B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994). *See, e.g.*, *In re Certified Questions from the U.S. Dist. Court*, 958 N.W.2d 1, 19 (2020) ("The area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions . . . .") (internal quotation marks omitted).

Related doctrines recognize and vindicate these concerns in demanding greater scrutiny of criminal laws. Hessick & Hessick, *supra*, at 301-05. For instance, this Court has long held that the void-for-vagueness doctrine requires greater drafting specificity in criminal laws. *See Sessions v. Dimaya*, 584 U.S. 148, 156 (2018); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests.*, 455 U.S. 489, 498-99 (1982); *see also* Gaziano & Blevins, *supra*, at 45-70. And the same liberty concerns support the "familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Skilling v. United States*, 561 U.S. 358, 410 (2010) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)); *see also Snyder v. United States*, 603 U.S. 1, 20 (2024) (Gorsuch, J., concurring).[9]

The impetus for a more stringent nondelegation standard is the same here. If "Congress cannot, through ambiguity, effectively leave th[e] function [of defining crimes] to . . . the administrative bureaucracy," *Whitman*, 574 U.S. at 1005 (statement of Scalia, J.), it follows that it cannot do so deliberately through delegation. After all, "vague and fluid" crim-

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[9] Both the void for vagueness and rule of lenity doctrines are applied versions of nondelegation, specific to the criminal context. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."); *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (Scalia, J., respecting the denial of certiorari) (explaining that the rule of lenity "vindicates the principle that only the *legislature* may define crimes and fix punishments.").

inal delegations "may be as much a trap for the innocent" as vaguely defined offenses. *United States v. Cardiff*, 344 U.S. 174, 176 (1952). The concern is not theoretical. Law-abiding Americans acting in good faith keep getting ensnared by open-ended criminal delegations to administrative agencies. Take, for example, Michelino Sunseri: a professional mountain runner whom the federal government prosecuted for taking on a well-worn, albeit "restricted," trail that no reasonable person could have known was off limits. Sunseri's actions were not violative of any law written by Congress. But because they violated a National Park Service regulation, promulgated under a vast delegation of criminal lawmaking power, Sunseri was criminally condemned for breaking the rules of unelected bureaucrats. *See United States v. Sunseri*, No. 24-PO-00893 (D. Wyo. Sep. 2, 2025).

Yet here the Ninth Circuit waved away the "liberty concerns" that "are especially salient in criminal law" by reasoning that "a power does not become more legislative" when it is "backed by criminal penalties." Pet. App. 13a. Not so. As a function of the potent effect of criminal condemnation on liberty, this Court has long recognized that "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *Davis*, 588 U.S. at 451 (quoting *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812)); *see also Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); *United States v. Evans*, 333 U.S. 483, 486 (1948); *United States v. Kozminski*, 487 U.S. 931, 949 (1988). This basic principle is backed by

a chorus of state supreme court decisions.[10] And indeed, the notion of legislative supremacy in this arena predates the Constitution. *See Case of Proclamations* (1611) 77 Eng. Rep. 1352, 1353, 12 Co. Rep. 74, 75 (K.B.) (rejecting James I's effort to create new crimes by proclamation).

In short, defining criminal conduct is quintessentially legislative—more so than, for example, regulating emissions or benzene exposure.[11] The power of criminal condemnation is both the epitome and apogee of legislative authority, and only legislatures answerable to the People may exercise it.

* * *

Only Congress can define crimes, and only Congress can be held accountable for the resulting deprivations of liberty. But delegations to define criminal conduct strike at the heart of the constitutional separation of powers, unifying as nearly as practicable the lawmaking and enforcement powers of government—"the very definition of tyranny." *The Federalist No.* 47, at 301 (James Madison) (Jacob E. Cooke ed. 1961); *see also* James Madison, *The Report of 1800*, *reprinted*

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[10] *See, e.g.*, *State v. Alfonso*, 753 So.2d 156, 160 (La. 1999) ("Th[e] legislative power includes the power to create and define criminal offenses and their penalties."); *People v. Lepik*, 629 P.2d 1080, 1082 (Colo. 1981) (stating that "power [to define crimes] may not be delegated to persons not elected by nor responsible to the People."); *State v. Gallion*, 572 P.2d 683, 689 (Utah 1977) ("There are sound reasons for ruling the definition of a crime and the precise punishment therefor to be essential legislative functions, which cannot be transferred.").

[11] *See Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 472 (2001); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980).

by Nat'l Archives: Founders Online, https://tinyurl.com/bdzneyya (stressing that criminal statutes "should leave as little as possible to the discretion of those who are to apply and to execute the law."). The question whether and under what conditions to permit such delegations is of central importance to the separation of powers, and the liberty of the American People. Given the gravity of the issue, the Court should grant the petition.

II. This Court Should Clarify the General Policy and Boundaries Tests

A decision in this case would still provide valuable guidance to the lower courts, even if this Court should ultimately conclude that the intelligible principle test applies. Even assuming that criminal delegations are reviewed under that framework, significant questions remain as to how that test applies when assessing criminal delegations—not least because this Court has stressed that the degree of direction required from Congress depends on the *context* of the delegation in question. *Whitman*, 531 U.S. at 475.

A. The Lower Courts Need Direction

To pass muster under the intelligible principle test, the burden is on the government to demonstrate both that Congress has (1) established a "general policy" guiding administrative discretion; and (2) imposed "boundaries" limiting discretion. *Consumers'*, 606 U.S. at 673. Yet this Court has provided surprisingly little guidance on the proper framing of the "general policy" and "boundaries" subtests.[12] *See South Dakota*

[12] This Court's precedents are hardly a beacon of clarity on this score. *Compare Mistretta v. United States*, 488 U.S. 361, 372

v. U.S. Dep't of the Interior, 69 F.3d 878, 881 (8th Cir. 1995) (stating that the intelligible principle test is "easy to state," but notoriously "difficult to apply.").

For nearly a century, this Court has upheld one broad delegation after the next—but without clarifying whether a claimed "general policy" may be too abstract to provide adequate direction on what Chief Justice Marshall called the "important subjects." *Wayman*, 23 U.S. at 43. And likewise, the Court's post-1935 nondelegation cases provide next to no guidance on how the boundaries test should work in practice.[13]

But the proper framing for these subtests matters immensely. If these tests are framed at the highest level of abstraction, then anything goes. At that point even the National Industrial Recovery Act (NIRA) would survive scrutiny in delegating open-ended authority for the President to decide whether to prohibit the transport of hot oil, or whether to impose industry codes. After all, Congress had some kind of

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(1989) (suggesting "broad general directives" are sufficient for nondelegation purposes), *with Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (looking for a "clear[] delineat[ion of] the general policy" and "the boundaries of this delegated authority"); *see also Whitman*, 531 U.S. 457, 475 (stating the answer depends on "the scope of the power congressionally conferred.")

[13] In *Consumers'* this Court strongly implied that Congress must impose a ceiling on how much revenue an agency can be authorized to raise to achieve a specific end. 606 U.S. at 681. That, at least, provides direction for applying the boundaries test when an agency has been delegated authority to impose fees or taxes. But it does not speak to whether Congress has imposed a sufficient boundary when delegating authority for an agency to make whatever rules it deems appropriate on a specific regulatory subject, or within the agency's jurisdictional reach.

purpose in mind when it enacted the NIRA. And even the NIRA conceived of some limits on President Roosevelt's authority. *E.g.*, *Panama Refining*, 293 U.S. at 434 (Cardozo, J., dissenting) (explaining that, under the NIRA, the President could only "prohibit" oil shipping in interstate commerce that was "in excess of the amount permitted by any state law").

At the highest level of abstraction, one might say the "general policy" of the NIRA was to enable the President to carry out policies that would stabilize the national economy and remove obstructions to interstate commerce. *Schechter*, 295 U.S. at 531 n.9 (quoting NIRA). Of course, that was not a sufficient "general policy." Nor were the hortatory goals of the NIRA a sufficient "boundary." Indeed, *Panama Refining*, 293 U.S. at 430, and *Schechter*, 295 U.S. at 541-42, rejected arguments that Congress had provided an intelligible principle in the NIRA's hortatory statement of policy. But it seems that the lower courts have either missed or forgotten the "object lessons" that *Panama Refining* and *Schechter* teach. *Consumers'*, 606 U.S. at 683.

Not surprisingly, in the absence of even a single nondelegation violation since the NIRA in 1935, the lower courts have erred on the side of applying the intelligible principle test to uphold even the most extreme delegations, simply by appealing to the vaguest of statutory goals. But that approach leaves "unaccountable ministers" without meaningful direction on highly consequential matters. *West Virginia v. EPA*, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring).

For example, in *Bradford v. U.S. Dep't of Lab.*, 101 F.4th 707 (10th Cir. 2024), the Tenth Circuit upheld a

delegation, 40 U.S.C. § 121(a), that authorized the President to "prescribe policies and directives that [he] considers necessary to carry out" the goals of the Federal Property and Administrative Services Act (FPASA). The President invoked this authority for an unprecedented $15 per hour minimum wage mandate on contractors, notwithstanding that raising minimum wages on contractors arguably contravenes Congress' stated goals of encouraging economy and efficiency in government contracting. 40 U.S.C. § 101. Nonetheless, the Tenth Circuit held that this was an appropriate exercise of delegated authority and that there was an intelligible principle in the FPASA's hortatory provisions. *Bradford*, 101 F.4th at 722, 728-30.

But the dissent demonstrates that the framing of the general policy and boundaries test matters. Judge Eid argued that the statute lacked any "objective" policy to guide, or boundary to limit, the President's discretion. *Id.* at 737 (Eid, J., dissenting) (emphasis omitted). It merely empowered the President to promulgate any policy *he thought* subjectively necessary to advance abstract efficiency values. *Ibid.* So, while the panel saw an "intelligible principle" in the statute's meta-level goals of encouraging economy and efficiency in contracting, Judge Eid found that Congress had failed to establish the relevant general policy or to impose meaningful boundaries. In her words, "[n]othing stop[ped] the President" from "impos[ing] any conditions at any time as long as he consider[ed] th[em] necessary." *Id.* at 740.

Likewise, the Sixth Circuit's decision in *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755 (6th Cir. 2023), demonstrates that the framing of the subtests matters. In that case, the Sixth Circuit upheld a delegation that authorized the Secretary of Labor to

promulgate workplace safety standards that are, in his judgment, "reasonably necessary or appropriate." 29 U.S.C. §§ 652(8), 655(b). The majority concluded that this text was sufficient because the statutory goals of the Occupational Safety and Health Act "guide the agency's decision-making in setting its standards, and . . . provide 'overarching constraints' on its discretion." *Allstates*, 79 F.4th at 764. But in his dissenting opinion, Judge Nalbandian argued there was no intelligible principle because—even accounting for the Act's general statement of purpose—the statute left everything to the subjective judgment of the Secretary. *Id.* at 781-84 (Nalbandian, J., dissenting).

As an even more stark example, during the pandemic, the federal courts initially upheld the Centers for Disease Control and Prevention's (CDC) claim of sweeping powers to prohibit evictions nationwide, and to regulate every other aspect of civil society because Congress had delegated authority for CDC to impose orders as deemed "necessary" to control the spread of contagious disease. 42 U.S.C. § 264(a). This Court eventually rejected CDC's claimed statutory authority in *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758 (2021). But in the interim, when the lower courts were still upholding this claim of "near-dictatorial power[,]"[14] the Western District of Louisiana concluded that CDC's asserted authority would likely withstand scrutiny under the nondelegation doctrine. Congress had, according to the District Court, established a "general policy" and imposed

[14] *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021).

boundaries in authorizing the CDC Director to "'prevent the introduction, transmission, or spread of communicable diseases.'" *Chambliss Enters., LLC v. Redfield*, 508 F. Supp. 3d 101, 117 (W.D. La. 2020) (citation omitted). Yet that meta-level framing of the general policy and boundaries tests would seemingly uphold any delegation—even if the statutory text is devoid of practical guidance. It left the agency without any practical direction as to whether Congress wanted such heavy-handed measures as a national eviction moratorium, indefinite closure of entire industries, mandatory vaccinations, or anything else, to control contagious disease at all costs.

Simply put, something has gone seriously awry in lower courts' understanding and application of the nondelegation doctrine. Without meaningful guidance fleshing out the general policy and boundaries tests in practice, the lower courts will continue paying only lip service to the nondelegation doctrine.

B. This Case Presents an Ideal Vehicle

This petition presents an opportunity to clarify that more concrete direction, and more meaningful limitations, are required under the intelligible principle test, in the context of a delegation of authority for an agency to define the *actus reus* element of a federal crime. Just as this Court has signaled that the "usual intelligible-principle test," *Consumers'*, 606 U.S. at 680, requires "greater" guidance in the context of a sweeping delegation "affect[ing] the entire national economy," *Whitman*, 531 U.S. at 475, this Court should clarify that something more than an appeal to vague meta-level goals is required when Congress delegates authority on criminal matters that affect individual liberty.

And because the decisions below illustrate how divergent the nondelegation analysis can be depending on how the intelligible principle test is framed, this case presents an ideal vehicle for providing direction on the context-specific nature of nondelegation analysis. Indeed, the District Court and the Panel came to divergent conclusions because they framed the intelligible principle test differently.

The District Court observed that on a "base level" Congress decided to delegate "broad legislative authority [for the Secretary] to determine when a rule is necessary for the management, use, and protection of public lands." Pet. App. 26a. But the District Court did not view that meta-level choice as providing adequate direction for deciding what kinds of conduct should be criminalized. *Id.* at 26a-29a. And relatedly, the Court saw no meaningful boundary because the "words [of 43 U.S.C. § 1733(a)] cover almost all conduct on public lands." *Id.* at 26a. Because the important matter of deciding what kind of conduct shall be criminalized was left to the "unfettered" discretion of the Secretary, the District Court held that the statute went too far in delegating authority to make the rules "'altering the legal rights'" of those who use Bureau of Land Management (BLM) properties. *Id.* at 25a, 27a (citation omitted).

By contrast, the Ninth Circuit found that Congress had established a sufficient general policy and boundaries on the view that the Act charges the Secretary with "develop[ing] a long-term management strategy to realize the land's value in a sustainable way." *Id.* at 9a. According to the Ninth Circuit this was adequate, even though the text gave no practical direction as to what kind of conduct the Secretary should allow or criminalize—and imposed no objective

limitation on the Secretary containing any specific restriction.[15] Simply put, the District Court and Ninth Circuit took irreconcilably different views of the intelligible principle test. *Compare* Pet. App. 26a-29a (concluding there was no intelligible principle because nothing cabined the Secretary's discretion to promulgate criminal offenses), *with id.* at 8a-9a (concluding that there was at least "*some* standard," "phrased in broad terms").

CONCLUSION

For the foregoing reasons, and those advanced by the Petitioner, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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[15] The Secretary could prohibit kids from playing Pokémon Go, whistling on trails, talking on cell phones, drying laundry while camping, moving picnic tables, or anything else he finds annoying in his subjective judgment. Any of that could be deemed "necessary" for the management of BLM areas under the Ninth Circuit's interpretation of the Act.