

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**

**BRIEF OF *AMICUS CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF PETITIONER**

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**BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation (“AFPF”) respectfully submits this *amicus curiae* brief in support of Petitioner.¹

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Here, AFPF writes to highlight the critical importance of enforcing the Constitution’s bar against delegation of criminal lawmaking power to the Executive and the stakes for representative self-government, separation of powers, federalism, and individual liberty.

SUMMARY OF ARGUMENT

In this country, all governmental power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution. Our Constitution

¹ All parties have received timely notice of *amicus curiae*’s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

exclusively tasks the People's elected representatives with making policy choices. And under the Constitution, the political branches may only do so through duly enacted legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus. This means that unelected ministers are not allowed to make binding laws restricting the People's liberty or imposing obligations on them through bare administrative edict.

The Constitution does not vest in or permit the Executive to possess lawmaking powers. To the contrary, it flatly prohibits Congress from transferring its legislative power to other entities. U.S. Const. art. I, § 1. This means that such matters "must be entirely regulated by the legislature itself[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). This proposition holds true *a fortiori* in the criminal context where liberty, a core private right, is at stake.

Here, Congress has done that which the Constitution prohibits by transferring to the Bureau of Land Management ("BLM") sweeping legislative power to write its own criminal code covering 245 million acres of federal land. As Judge VanDyke observed below, "[t]he geographic size and substantive scope" of this delegation of core legislative power is "astounding" in its own right—and "gets even more monstrous given the plenary authority that the federal government has over its land." App. 88a (dissenting from denial of rehearing en banc). This agglomeration of legislative and prosecutorial powers within an administrative body with jurisdiction over one-tenth of the land in the United States cannot be allowed to stand.

Nor does this Court’s nondelegation precedent bless this unconstitutional arrangement, as the panel mistakenly concluded. *See* App. 14a. To the contrary, this Court’s cases indicate delegations of crime-writing authority should, at a minimum, be greeted skeptically. This “Court has repeatedly and long suggested that in the criminal context Congress must provide more ‘meaningful[]’ guidance than an ‘intelligible principle.’” *United States v. Nichols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc). Indeed, as Judge Bumatay observed below, “[i]f the nondelegation doctrine has teeth in any area, it must in the criminal law context.” App. 51a (dissenting from denial of rehearing en banc).

Nevertheless, this Court’s precedent is “not entirely clear as to whether more specific guidance is in fact required.” *Touby v. United States*, 500 U.S. 160, 166 (1991). And whether “something more than an ‘intelligible principle’ is required” for delegations of administrative crime-writing power remains an open, *see id.* at 165–66, and “important question,” App. 78a (VanDyke, J., dissenting from denial of rehearing en banc). The time has come for this Court to squarely answer it and “reconsider [its] approach” to criminal delegations. *Gundy v. United States*, 588 U.S. 128, 149 (2019) (Alito, J., concurring). This Petition is an ideal vehicle “because the criminal delegation at issue here does not survive the more exacting scrutiny due criminal delegations.” App. 79a (VanDyke, J., dissenting from denial of rehearing en banc).

This Court’s attention to this critical issue is urgently needed for a more fundamental reason. The Federal Land Policy and Management Act (“FLPMA”)

is emblematic of a broader problem: “Today, the vast majority of the rules that govern our society are not made by Congress, but by Presidents or agencies they struggle to superintend.” *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 745 (2025) (Gorsuch, J., dissenting). There is no way to sweep this constitutional disorder under the rug. It is long past time for the judiciary to “reshoulder the burden of ensuring that Congress itself make the critical policy decisions,” *Indus. Union Dep’t, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, C.J., concurring in judgment), by “hewing” the nondelegation doctrine “from the ice,” Antonin Scalia, *A Note on the Benzene Case*, Reg., July/Aug. 1980, at 28.

This case presents a perfect opportunity to begin to articulate judicially manageable standards for *meaningfully* enforcing the Constitution’s guardrails against legislative delegations and put Congress on notice that it must do its job. Enough ink has been spilled to allow this Court to address line-drawing questions, as necessary, on a context-specific case-by-case basis. The sky will not fall if this Court enforces Article I’s demands over time, beginning in the criminal context. To the contrary, our constitutional Republic will be healthier for it.

For the foregoing reasons, this Court should grant the Petition.²

² This Court should also grant the petition in *RMS of Georgia, LLC v. EPA*, No. 25–____ (25A748), which presents a distinct but

ARGUMENT

I. Separation of Powers Protects Liberty.

“[T]he Constitution’s core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights.” *NLRB v. Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in the judgment). “If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers.” *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting 1 Annals of Congress 581).

Our founding document “sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 247 (2020) (Thomas, J., concurring in part, dissenting in part) (citations omitted). “[T]he legislature makes, the executive executes, and the judiciary construes the law[.]” *Wayman*, 23 U.S. (10 Wheat.) at 46. “Perhaps the most important consequence of this assignment concerns the power to punish. Any new national laws restricting liberty require the assent of the people’s representatives and thus input from the country’s ‘many parts, interests and classes.’” *Wooden v. United States*, 595 U.S. 360, 391 (2022) (Gorsuch, J., concurring in judgment)

related nondelegation question in a different context, and hear both cases alongside one another next Term. *Cf. Axon Enter. v. FTC*, 598 U.S. 175 n.* (2023). This would ensure fulsome briefing and argument on this broader, fundamental constitutional issue.

(quoting Federalist No. 51 (Madison)). This means that “only Congress—not the Executive and not the Judiciary—may define conduct as criminal.” *United States v. Wilson*, 164 F.4th 380, 390 (5th Cir. 2026) (Willett, J., concurring).

“The framers divided power among legislative, executive, and judicial branches not out of a desire for formal tidiness, but to ensure ours would indeed be a Nation ruled by ‘We the People.’” *Consumers’ Rsch.*, 606 U.S. at 744 (Gorsuch, J., dissenting). The point of the separation of powers required by the Constitution is “not merely to assure effective government but to preserve individual freedom.” *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting); see *Collins v. Yellen*, 594 U.S. 220, 245 (2021). As Madison explained: “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” Federalist No. 47 (Madison). Cf. Nadine Strossen, *Delegation as a Threat to Liberty*, 20 Cardozo L. Rev. 861, 861 (1999).

This separation “might seem inconvenient and inefficient to those who wish to maximize government’s coercive power.” *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). But for the Founders, it was not merely a matter of abstract political theory; the division of powers provided “practical and real protections for individual liberty[.]” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment); see *INS v. Chadha*, 462 U.S. 919, 959 (1983). The Framers were “fear[ful] of endowing one set of hands with the power to create and enforce criminal sanctions.” *Nichols*, 784 F.3d at

673 (Gorsuch, J., dissenting from denial of rehearing en banc). As history has shown, justifiably so.

II. The Constitution Bars Congress From Transferring Legislative Power.

Congress may not duck the Constitution’s accountability checkpoints by divesting itself of its legislative responsibilities. *See NFIB v. OSHA*, 595 U.S. 109, 124–25 (2022) (per curiam) (Gorsuch, J., concurring); *see also Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring). The Constitution bars Congress from transferring “powers which are strictly and exclusively legislative” to other entities. *Wayman*, 23 U.S. (10 Wheat.) at 42; *see Loving v. United States*, 517 U.S. 748, 758 (1996). That includes Congress’s power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”³ U.S. Const. art. IV, § 3, cl. 2. *Cf. Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (noting Congress exercises legislative power over public lands). Instead, such matters “must be entirely regulated by the legislature itself[.]” *Wayman*, 23 U.S. (10 Wheat.) at 43.

³ The Property Clause grants *Congress* “core legislative power” “to make substantive rules setting the conditions for deprivations of life, liberty, or property” that apply on federal land. *Learning Res., Inc. v. Trump*, No. 24–1287, 2026 WL 477534, at *41 (Feb. 20, 2026) (Thomas, J., dissenting); *see* Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 Fla. L. Rev. 1, 35–36 (2018) (citing clause as “exclusively legislative” power). This is distinct from the power “to dispose of federal property,” which does not. *See Learning Res.*, 2026 WL 477534, at *43 (Thomas, J., dissenting).

Article I's text makes this pellucidly clear: "All legislative Powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. "This text permits no delegation of those powers[.]" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 375 (1821) ("Legislative power is not, in its nature, transferrable."). The Constitution's structure reenforces this point. See Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1175–76 (2023). It makes clear that "when it comes to legislative power, Congress is the principal and executive officials are the agents." *Learning Res.*, 2026 WL 477534, at *20 (Gorsuch, J., concurring). Not vice versa. Indeed, "it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

This proposition holds true *a fortiori* for criminal laws. Cf. *Touby*, 500 U.S. at 165–66. "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *Nichols*, 784 F.3d at 668 (Gorsuch, J., dissenting from denial of rehearing en banc). And it may be that the Constitution's proscription against legislative delegations "is also rooted in the Due Process Clause" where, as here, core private rights are at stake. *Learning Res.*, 2026 WL 477534, at *42 (Thomas, J., dissenting); see U.S. Const. amend. V (referring to "depriv[at]ions" of life, liberty, or

property”). *Cf. Gundy*, 588 U.S. at 168 (Gorsuch, J., dissenting). That provision would apply with special force to criminal lawmaking delegations implicating the core private right to liberty.

Limits on Executive power to unilaterally create crimes are deeply rooted in Anglo-American jurisprudence, predating the Founding. *See Guedes v. BATFE*, 66 F.4th 1019, 1029 (D.C. Cir. 2023) (Walker, J., dissenting from denial of rehearing en banc). The principle that “[c]rimes are made by legislation, not executive fiat” traces its genesis to the Magna Carta.⁴ *Id.* And “[w]hen King James I tried to create new crimes by royal command, the judges responded that ‘the King cannot create any offence by his prohibition or proclamation, which was not an offence before.’” *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., statement respecting denial of certiorari) (quoting *Case of Proclamations*, 77 Eng. Rep. 1352, 1353 (K.B. 1611)).

The Founding generation’s discomfort with legislative delegations “had a great deal to do with the criminal law,” including that by uniting legislative and prosecutorial power “in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king.” *Nichols*, 784 F.3d at 670 (Gorsuch, J., dissenting from denial of rehearing en banc). To guard against this danger to liberty, under the Constitution “[o]nly the people’s elected representatives in Congress have the

⁴ “The Founders modeled” the Due Process Clause “on chapter 39 of the Magna Carta.” *Learning Res.*, 2026 WL 477534, at *42 (Thomas, J., dissenting) (cleaned up).

power to write new federal criminal laws.” *United States v. Davis*, 588 U.S. 445, 447–48 (2019). Cf. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1011–17 (2006).

In sum, from the beginning, “it has been a bedrock legal principle that our government cannot criminalize conduct and send people to prison except through democratically passed laws[.]” *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 910 (6th Cir. 2021) (en banc) (Murphy, J., dissenting) (citing *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)). As Chief Justice Marshall wrote, “the power of punishment is vested in the legislative,” which means “[i]t is the legislature . . . which is to define a crime, and ordain its punishment.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

III. Section 1733(a) Unconstitutionally Transfers Core Legislative Power to BLM.

A. Section 1733(a) Grants BLM Sweeping Crime-Writing Powers.

BLM’s vast and unconstrained power to create and enforce its own criminal code makes a mockery of the separation of powers required by the Constitution.

“[T]he BLM acts as a conservationist agency with law enforcement powers on public lands.” App.16a. It has “a massive reach” and “is today the nation’s largest land manager,” “manag[ing] 245 million acres of public lands . . . and 700 million acres of mineral estate.” BLM, About Us, <https://www.blm.gov/about>. BLM manages 10 percent of the country’s land and 30 percent of its mineral resources, giving it great power.

See BLM, What We Manage, <https://www.blm.gov/about/what-we-manage>; see also *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1114 (9th Cir. 2010) (noting “BLM’s wide authority”).

A picture is worth a thousand words.⁵

Figure 1. Federal Land Managed by FS, BLM, FWS, and NPS



Source: CRS.

Note: BLM = Bureau of Land Management; FS = Forest Service; FWS = Fish and Wildlife Service; NPS = National Park Service. In this CRS product, the West refers to the following states: AK, AZ, CA, CO, ID, MT, NM, NV, OR, UT, WA and WY.

That is what 245 million acres of land looks like. Congress has tasked an administrative body with managing an area that is almost as large as Texas and California combined.

In so doing, Congress has also purported to empower BLM to act as legislature and governor over this wide swath of land, effectively wielding the powers of a sovereign within the borders of its

⁵ Congressional Research Service, The Federal Land Management Agencies 1 (Feb. 16, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF10585>; see also Congressional Research Service, Federal Land Ownership: Overview and Data 12–14 (Feb. 21, 2020) (maps showing land governed by BLM), <https://sgp.fas.org/crs/misc/R42346.pdf>.

kingdom. Section 1773(a) delegates to the Secretary of the Interior (who administers the BLM) unfettered power to issue any “regulations necessary to implement the provisions of [FLPMA] with respect to the management, use, and protection of the public lands, including the property located thereon.”⁶ 43 U.S.C. §1733(a); see *United States v. Henderson*, 243 F.3d 1168, 1171 (9th Cir. 2001). “These regulations ‘alter’ the legal rights of those that use BLM land[.]” App. 26a. Cf. *Chadha*, 462 U.S. at 952 (“altering the legal rights, duties, and relations of persons” is legislative). And violations of “any” of them can carry criminal penalties, 43 U.S.C. § 1733(a); see *Henderson*, 243 F.3d at 1171, implicating the right to liberty.

That delegation is boundless. To make something a federal crime, all the Secretary must do is find that a regulation is “necessary” for any rhyme or reason. There is no requirement for preliminary factfinding. Nor any meaningful limiting criteria bounding the Secretary’s discretion and power. “[T]he words ‘management, use, and protection’” for example, “do not limit the authority to promulgate regulations because those words cover almost all conduct on public lands.” App. 26a (citing 43 U.S.C. § 1733(a)).

⁶ BLM regulations purport to grant BLM State Directors discretion to issue supplementary rules that are binding within their jurisdictions “as he/she deems necessary.” 43 C.F.R. §8365.1-6. “[T]hese State BLM Directors are essentially single-person legislators and governors because they promulgate regulations (laws) and enforce the regulations (laws).” App. 27a.

To put this in practical perspective, this delegation lets the agency “promulgate a plethora of rules from housing policies, to traffic laws, to firearms regulations, to mining rules, to agriculture certifications,” thereby granting it “unfettered legislative authority to promulgate rules for over 48 million acres of land [in Nevada], which is 68% of the state[.]”⁷ App. 27a (footnotes omitted). BLM has used this legislative authority to criminalize uncertified hay, mulch, or straw possession, 65 Fed. Reg. 54,544, 54,545 (Sept. 8, 2000); camping longer than authorized, 43 C.F.R. § 8365.1-2(a); use of nonconforming seatbelts, *id.* § 8365.1-3(b)(1); and picking up rocks in certain areas, 73 Fed. Reg. 39,027, 39,030 (July 8, 2008). Tellingly, the agency uses this power to “criminaliz[e] behavior that the state would normally criminalize[.]” App. 28a.

In short, “Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out.” *Nichols*, 784 F.3d at 674 (Gorsuch, J., dissenting from denial of rehearing en banc). In so doing, it essentially empowered the BLM with the crime-writing powers of a state legislature and a governor, outsourcing its nondelegable duty to “make all needful Rules and Regulations respecting” federal land, U.S. Const. art. IV, § 3, cl. 2, to unelected

⁷ Nevada is not unique in this regard. See *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) (“Almost half the State of Utah” “is federal land administered by” BLM.).

administrators.⁸ “This is delegation running riot,” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (Cardozo, J., concurring), “a result inimical to the people’s liberty and our constitutional design,” *Nichols*, 784 F.3d at 677 (Gorsuch, J., dissenting from denial of rehearing en banc). And it is unconstitutional both as an original matter and under a proper understanding of this Court’s precedent.

**B. As an Original Matter, 43 U.S.C. § 1733(a)
Violates Article I and Due Process.**

“Strictly speaking, there is *no* acceptable delegation of legislative power.” *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting). This raises the antecedent question of what is the “legislative power” that Congress may not delegate. “When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons[.]” *Gundy*, 588 U.S. at 153 (Gorsuch, J., dissenting); *see Ass’n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring). *Cf.* Philip Hamburger, *Is Administrative Law Unlawful?* 84 (2014) (“In general, the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not.”).

“[L]egislative power most basically involves an exercise of will in ordaining legally binding rules.”

⁸ If anything, FLPMA’s blank-check crime-writing delegation is “even more monstrous given the plenary authority that the federal government has over its land.” App. 88a (VanDyke, J., dissenting from denial of rehearing en banc).

Hamburger, 91 Geo. Wash. L. Rev. at 1113. *Cf.* App. 43a (Bumatay, J., dissenting from denial of rehearing en banc) (“The Legislative Power is the exclusive power to make laws that are binding on citizens.” (citation omitted)). Among other things, that includes the power to “make[] the policy decisions when regulating private conduct[.]” *Gundy*, 588 U.S. at 157 (Gorsuch, J., dissenting). And the “core legislative power” the Legislative Vesting and Due Process Clauses prohibit Congress from delegating “is the power to make substantive rules setting the conditions for deprivations of life, liberty, or property.” *Learning Res.*, 2026 WL 477534, at *41 (Thomas, J., dissenting). That most certainly includes writing crimes. *Cf. United States v. Evans*, 333 U.S. 483, 486 (1948) (“[D]efining crimes and fixing penalties are legislative, not judicial, functions.”). As a matter of first principles, this means that “for federal ‘crimes’ to be consistent with the ‘Legislative power,’ Congress—and no other branch—must specify the *actus reus* of the criminal offense.” App. 57a (Bumatay, J., dissenting from denial of rehearing en banc).

By that measure, 43 U.S.C. § 1733(a)—which criminalizes violations of “any” regulations BLM deems “necessary” to implement the statute—allows unelected ministers at BLM to exercise the legislative power to create federal crimes and is thus unconstitutional. *See* App. 67a–67a (Bumatay, J., dissenting from denial of rehearing en banc). That is especially so because it grants BLM free-floating power to make binding policy decisions backed by criminal sanctions governing one-tenth of United States land. Those fundamental policy choices are no mere details or fill-in-the-blank factfinding exercises.

Cf. Gundy, 588 U.S. at 157–59 (Gorsuch, J., dissenting). That should be the end of the analysis.

But this Court’s delegation precedent has strayed from the Constitution’s original public meaning, as scholars and jurists alike have observed.⁹ And “[t]he current formulation of the nondelegation doctrine has been called into serious question.” *Mayfield v. DOL*, 117 F.4th 611, 620 n.7 (5th Cir. 2024). Indeed, “[a]t least five Justices have already expressed an interest in reconsidering this Court’s approach to Congress’s delegations of legislative power.” *Allstates Refractory Contractors, LLC v. Su*, 144 S. Ct. 2490, 2491 (2024) (Thomas, J., dissenting from denial of certiorari).

And “th[e] mutated version of the ‘intelligible principle’ remark” in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the basis of 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.” *Gundy*, 588 U.S. at 164 (Gorsuch, J., dissenting). “[T]he phrase ‘intelligible principle’ has taken on an entirely different meaning than it once held.” *Consumers’ Rsch.*, 606 U.S. at 737 n.15 (Gorsuch, J.,

⁹ See, e.g., *Gundy*, 588 U.S. at 164 (Gorsuch, J., dissenting); *Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *Consumers’ Rsch. v. FCC*, 88 F.4th 917, 928 (11th Cir. 2023) (Newsom, J., concurring in judgment); *id.* at 938 (Lagoa, J., concurring); Hamburger, 91 Geo. Wash. L. Rev. at 1095 (noting lack of “originalist foundation”); see *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring); *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 788 n.17 (6th Cir. 2023) (Nalbandian, J., dissenting); see also *Rettig*, 993 F.3d at 417–18 (Ho, J., dissenting from denial of rehearing en banc).

dissenting). This judicially created test has opened the floodgates for Congress to shirk its duty to make policy choices by transferring its legislative power to administrative bodies. *Cf. Whitman*, 531 U.S. at 487 (Thomas, J., concurring). It “purports to hold the line against congressional delegation but actually lets Congress delegate legislative power to agencies,” “serv[ing] as little more than an open gate for the delegation of legislative power[.]” Hamburger, 91 *Geo. Wash. L. Rev.* at 1091. And “a gap exists between constitutional meaning and the judicial standards for enforcement.” Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 *N.Y.U. L. Rev.* 1463, 1508 (2015).

Congress’s legislative-power transfers are far from constitutionally harmless and pose even “greater threats to the principles underlying the nondelegation doctrine” in the criminal-lawmaking context. F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 *Va. L. Rev.* 281, 286 (2021). Unsurprisingly, “[f]or many jurists, the question of Congress’s delegating legislative power to the Executive in the context of criminal statutes raises serious constitutional concerns.” *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (plurality op.) (collecting cases), *aff’d*, 602 U.S. 406 (2024). For good reason. These delegations “mak[e]” the agency “the expositor, executor, and interpreter of criminal laws.” *Aposhian v. Wilkinson*, 989 F.3d 890, 900 (10th Cir. 2021) (Tymkovich, J., dissenting from denial of rehearing en banc). That agglomeration of power in the hands of unelected bureaucrats plainly threatens the core private right to

liberty and reminds of Madison’s “very definition of tyranny.” *See* Federalist No. 47 (Madison).

C. Section 1733(a) Lacks Meaningful Constraints Cabining BLM’s Authority.

Even under this Court’s current precedent, properly understood, the delegation at issue here fails to pass constitutional muster.

Under this Court’s modern test, as a general matter “Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.’” *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton*, 276 U.S. at 409). Delegations must contain standards that “are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the” agency “has conformed to those standards.” *Yakus v. United States*, 321 U.S. 414, 426 (1944). And Congress must at a minimum “ma[k]e clear both ‘the general policy’ that the agency must pursue and ‘the boundaries of [its] delegated authority.’” *Consumers’ Rsch.*, 606 U.S. at 673 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

“History shows,” however, “non-delegation’s mandate varied based on subject matter[.]” App. 51a (Bumatay, J., dissenting from denial of rehearing en banc). Properly understood, “the intelligible principle test is context dependent.” *Consumers’ Rsch.*, 606 U.S. at 739 (Gorsuch, J., dissenting). Whether a delegation passes constitutional muster under the intelligible-principle approach turns “on ‘context’ and ‘the nature of the particular constitutional powers’ at issue.” *Id.* at 723 (Gorsuch, J., dissenting) (quoting *Lichter v.*

United States, 334 U.S. 742, 778 (1948)). As this Court has made clear, “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” *Consumers’ Rsch.*, 606 U.S. at 673 (quoting *Whitman*, 531 U.S. at 475); *see also Synar v. United States*, 626 F. Supp. 1374, 1386 (D.C. Cir. 1986) (per curiam) (“When the scope increases to immense proportions (as in *Schechter*) the standards must be correspondingly more precise.”). This means “[l]aws that vest more power require more constraints.” *Allstates*, 79 F.4th at 776 (Nalbandian, J., dissenting).

“[H]istorical practice and [this Court’s] cases [also] suggest other guides, beyond the intelligible principle test, for assessing when Congress has impermissibly ceded legislative power[.]” *Consumers’ Rsch.*, 606 U.S. at 746 (Gorsuch, J., dissenting). This Court’s precedent indicates “greater congressional specificity [may be] required in the criminal context,” *Touby*, 500 U.S. at 166, as numerous jurists have recognized, *see, e.g., Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring); *Nichols*, 784 F.3d at 672 (Gorsuch, J., dissenting from denial of rehearing en banc) (collecting cases); *see also United States v. Moriello*, 980 F.3d 924, 932 (4th Cir. 2020). *Cf.* App. 70a (VanDyke, J., dissenting from denial of rehearing en banc).

This makes sense because “[t]he power to make criminal law raises heightened concerns for liberty and arbitrary government power.” App. 51a (Bumatay, J., dissenting from denial of rehearing en banc). Criminal delegations necessarily implicate the core private rights to liberty and, at the Founding, potentially life. *See* Nicolas Elliott-Smith, *Crimes*

Without Law: Administrative Crimes and the Nondelegation Doctrine, 115 J. Crim. L. & Criminology 429, 450–51 (2025). Given the stakes, the need for legislative specificity in the criminal context is particularly acute. Cf. *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring in result) (“The area of permissible indefiniteness narrows” “when the regulation invokes criminal sanctions[.]”); *Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting) (similar).

James Madison drew this same distinction between civil and criminal law, writing that “[d]etails, to a certain degree, are essential to the nature and character of a law,” generally, but “on criminal subjects, it is proper, that details 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 (Jan. 7, 1800).¹⁰ Such an approach accords with other due-process and separation-of-powers-based principles that apply with special force to the criminal law, such as the rule of lenity, see *Wiltberger*, 18 U.S. (5 Wheat.) at 95, and void-for-vagueness doctrine, see *Davis*, 588 U.S. at 447–48; Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 Yale L.J. 1672, 1806 (2012).

Parsed carefully, this Court’s decision in *Touby*, 500 U.S. at 166–67, recognizes “at least three ‘meaningful’ limitations” that apply with special force to criminal delegations: “Congress must set forth a clear and generally applicable rule”; “hing[ing] on a

¹⁰ <https://founders.archives.gov/documents/Madison/01-17-02-0202>.

factual determination by the Executive”; and the statute must supply “criteria the Executive must employ when making its finding[.]” *Nichols*, 784 F.3d at 673 (Gorsuch, J., dissenting from denial of rehearing en banc); see *Gundy*, 588 U.S. at 165–66 (Gorsuch, J., dissenting); App. 84a–85a (VanDyke, J., dissenting from denial of rehearing en banc); see also *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935). Cf. *Allstates*, 79 F.4th at 776 (Nalbandian, J., dissenting); *Bradford v. DOL*, 101 F.4th 707, 733–35 (10th Cir. 2024) (Eid, J., dissenting). The delegation at issue here fails this test on every level.

First, the statute lacks any pretense of a generally applicable rule, let alone a clear one. It “defines no prohibited activity and provides no notice of what conduct would constitute a criminal offense.” App. 67a (Bumatay, J., dissenting from denial of rehearing en banc). “[I]n effect, Congress has said, ‘do as the minions of the Secretary of the Interior tell you—or go to jail,’” App. 68a (Bumatay, J., dissenting from denial of rehearing en banc), with “no limiting principles” cabining BLM’s power. App. 88a–89a (VanDyke, J., dissenting from denial of rehearing en banc).

Second, BLM’s power to issue regulations carrying criminal penalties is not contingent on factfinding. See App. 28a (noting BLM’s “ability to legislate for whatever they see necessary”).

Third, the statute provides no judicially administrable standards or criteria to cabin BLM’s crime-writing powers, let alone sufficiently detailed ones given the sweeping scope of BLM’s authority over one-tenth of the land in the United States.

Here, everything turns on whether the word “necessary” in 43 U.S.C. § 1733(a) sets out an intelligible principle. *See* App. 26a. It does not. It instead grants the Secretary “an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as [the Secretary] may see fit.” *Panama Ref.*, 293 U.S. at 415. BLM “is free to select as [it] chooses” “and then to act without making any finding[s],” *id.* at 388, as BLM “roam[s] at will” “in that wide field of legislative possibilities,” *Schechter*, 295 U.S. at 538. This “absence of standards” makes it “impossible” “to ascertain whether the will of Congress has been obeyed[.]” *Yakus*, 321 U.S. at 426.

As with the unconstitutional delegations at issue in *Panama Refiners*, 293 U.S. at 415, and *Schechter*, 295 U.S. at 527–28, FLMPA grants BLM unfettered discretion to criminalize private conduct however it wants for whatever reason it wants.¹¹ As in *Panama Refining* and *Schechter Poultry*, FLMPA “delegate[s]” to the Executive “power to make federal crimes of acts that never had been such before[.]” *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947). It “does nothing to cabin the Secretary of the Interior’s ability to choose what is a crime.”¹² App. 28a.

¹¹ “It is particularly noteworthy that the only two cases in which the Supreme Court has ever found an impermissible delegation were in cases that presented criminal delegations.” App. 82a (VanDyke, J., dissenting from denial of rehearing en banc).

¹² *Cf. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92–93 (1921) (striking down vague criminal law in part because it transferred legislative power to judges and juries).

IV. The Sky Will Not Fall If This Court Enforces The Constitution's Demands.

Finally, any suggestion that modern society is too complicated for the People to rule themselves through their elected representatives or a resort to parade-of-horribles handwaving about the consequences of invalidating BLM's blank-check criminal lawmaking authority is unavailing. Those policy arguments are constitutionally irrelevant and lack merit on their own terms. *See Tiger Lily*, 5 F.4th at 674–75 (Thapar, J., concurring).

The crimes BLM creates by administrative edict are similar to the ones that States routinely regulate by statute. *See* App. 28a. If State legislatures are able to handle such matters, so is Congress. We should demand nothing less. Underscoring this, Congress has passed numerous federal statutes criminalizing specific conduct on federally owned or federally managed land in many contexts, showing that it is more than capable of doing so. *See, e.g.*, 18 U.S.C. §1853 (national forests); *id.* § 1382 (military bases); *id.* § 1793 (federal prisons). For that matter, Congress can incorporate state law by reference, if it chooses. *See, e.g., id.* § 13 (incorporating state law for certain areas otherwise under federal jurisdiction); *see Forbes v. Phelan*, 153 F.4th 73, 79 (D.C. Cir. 2025). In short, the sky will not fall if this Court enforces the Constitution. To the contrary, “[t]he educational effect on Congress” of invalidating FLPMA “might well be substantial.” Scalia, *A Note on the Benzene Case*, *supra*, 28.

Nor should line-drawing challenges stand in the way. To be sure, “[t]he line has not been exactly

drawn” between “important subjects, which must be entirely regulated by the legislature itself” and matters of “less interest” that Congress can delegate to others “to fill up the details.” *Wayman*, 23 U.S. (10 Wheat.) at 43. “But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution” and beginning to establish the necessary lines. *Ass’n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring). It is long past time to do so.

CONCLUSION

This Court should grant the Petition.

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