

No. 25-6911

In The
Supreme Court of the United States

GREGORY PHEASANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF OF IDAHO, ALABAMA, ALASKA,
ARKANSAS, FLORIDA, INDIANA, KANSAS,
LOUISIANA, MISSOURI, MONTANA,
NEBRASKA, NORTH DAKOTA, OHIO,
OKLAHOMA, SOUTH CAROLINA,
TENNESSEE, UTAH, WEST VIRGINIA, AND
THE ARIZONA LEGISLATURE AS *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND INTERESTS OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT	4
I. The Constitution Forbids Delegation, Because Congressional Power Depends on the Consent of the People.	4
A. At Common Law, Delegation Required the Principal’s Consent.	5
B. John Locke Likewise Opposed Delegation Without Consent.	7
C. The Text and Structure of the Constitution Prohibit Delegation.....	9
II. The Challenged Statute Plainly Violates the Nondelegation Doctrine.	12
A. Section 303(a) Deals with Internal Affairs, Rather than Foreign Affairs.	14
B. Section 303(a) Grants Enormously Broad Authority.	14
C. Section 303(a) Transfers Criminal Lawmaking Power to the Executive.....	16
CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases	Page(s)
<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935).....	13
<i>Barbier v. Connolly</i> , 113 U.S. 27 (1884).....	1
<i>Caha v. United States</i> , 152 U.S. 211 (1894).....	17
<i>Carpenter v. United States</i> , 585 U.S. 296 (2018).....	7
<i>Cohens v. State of Virginia</i> , 19 U.S. 264 (1821).....	4
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982).....	2
<i>Fahey v. Mallonee</i> , 332 U.S. 245 (1947).....	18
<i>Fed. Commc’ns Comm’n v. Consumers’ Rsch.</i> , 606 U.S. 656 (2025).....	13, 14
<i>Gundy v. United States</i> , 588 U.S. 128 (2019).....	1, 9, 11, 14, 19
<i>Kleppe v. New Mexico</i> , 426 U.S. 529 (1976).....	2
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983).....	19
<i>Lichter v. United States</i> , 334 U.S. 742 (1948).....	13, 16
<i>Learning Resources, Inc. v. Trump</i> , 146 S. Ct. 628 (2026).....	16

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Meyer v. Holley</i> , 537 U.S. 280 (2003).....	5
<i>Murphy v. Nat’l Collegiate Athletic Ass’n</i> , 584 U.S. 453 (2018).....	1
<i>NFIB v. OSHA</i> , 595 U.S. 109 (2022)	12
<i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388 (1935).....	13
<i>Shankland v. Mayor of Wash.</i> , 30 U.S. 390 (1831).....	4
<i>Touby v. United States</i> , 500 U.S. 160 (1991).....	18
<i>United States v. Curtiss-Wright Exp. Corp.</i> , 299 U.S. 304 (1936).....	14
<i>United States v. Eaton</i> , 144 U.S. 677 (1892).....	17
<i>United States v. Gradwell</i> , 243 U.S. 476 (1917).....	17, 18
<i>United States v. Grimaud</i> , 220 U.S. 506 (1911).....	18
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995).....	4
<i>Wayman v. Southard</i> , 23 U.S. 1 (1825).....	12, 21
<i>Whitman v. Am. Trucking Ass’ns</i> , 531 U.S. 457 (2001).....	15

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutional Provisions

U.S. Const. pmb.	9
U.S. Const. art. I	10
U.S. Const. art. IV.....	14, 16

Statutes

18 U.S.C. §§ 1851–66	20
43 U.S.C. § 1701	21
43 U.S.C. § 1702	21
43 U.S.C. § 1732	20
43 U.S.C. § 1733	2, 15, 17, 19

Regulations

43 C.F.R. § 8365	2, 20
------------------------	-------

Other Authorities

1 Annals of Cong. (1789) (Joseph Gales ed., 1834) ..	11
1 Samuel Livermore, <i>A Treatise on the Law of Principal and Agent and of Sales by Auction</i> (1818).....	5, 6
1 The Digest of Justinian (Alan Watson trans., Univ. of Pa. Press 1985)	7

TABLE OF AUTHORITIES—Continued

	Page(s)
2 Edward Coke, <i>The Second Part of the Institutes of the Laws of England</i> (London, M. Flesher & R. Young 1642)	6
Articles of Confederation, art. IX	16
Cong. Rsch. Serv., R42346, <i>Federal Land Ownership: Overview and Data</i> , (2020)	2, 16
David Schoenbrod, <i>A Judicially Manageable Test to Restore Accountability</i> , in <i>The Administrative State Before the Supreme Court</i> 346 (Peter J. Wallison & John Woo eds., 2022)	9, 10
David Schoenbrod, <i>Delegation and Democracy: A Reply to My Critics</i> , 20 <i>Cardozo L. Rev.</i> 731 (1999)	10
Felix Frankfurter, <i>Some Reflections on the Reading of Statutes</i> , 47 <i>Colum. L. Rev.</i> 527 (1947)	5
Gary Lawson, <i>A Private-Law Framework for Subdelegation</i> , in <i>The Administrative State Before the Supreme Court</i> 123 (Peter J. Wallison & John Woo eds., 2022)	5, 6
Ilan Wurman, <i>Nondelegation at the Founding</i> , 130 <i>Yale L.J.</i> 1490 (2021)	11, 17
James Madison, <i>The Report of 1800</i> , in 17 <i>The Papers of James Madison</i> (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991)	17
John Locke, <i>Second Treatise of Civil Government</i> (1690)	1, 7, 8
John Marshall, <i>Annals</i> , 6th Cong., col. 613	14

TABLE OF AUTHORITIES—Continued

	Page(s)
Jonathan H. Adler, <i>A “Step Zero” for Delegations</i> , in <i>The Administrative State Before the Supreme Court</i> 161 (Peter J. Wallison & John Woo eds., 2022).....	10
Joseph Story, <i>Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence</i> (1844).....	6
Mark Chenoweth & Richard Samp, <i>Reinvigorating Nondelegation with Core Legislative Power</i> , in <i>The Administrative State Before the Supreme Court</i> 81 (Peter J. Wallison & John Woo eds., 2022).....	19
Montesquieu, <i>The Spirit of the Laws</i> , bk. XI, chap. VI.....	12
Nicolas Elliott-Smith, <i>Crimes Without Law: Administrative Crimes and the Nondelegation Doctrine</i> , 115 <i>J. Crim. L. & Criminology</i> (2025) .	18
Philip Hamburger, <i>Nondelegation Blues</i> , 91 <i>Geo. Wash. L. Rev.</i> 1083 (2023).....	6–8, 11
Ronald Cass, <i>Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State</i> , 40 <i>Harv. J. L. Pub. Pol’y</i> 147 (2017).....	12
Saikrishna Bangalore Prakash, <i>The Sky Will Not Fall: Managing the Transition to a Revitalized Nondelegation Doctrine</i> , in <i>The Administrative State Before the Supreme Court</i> (Peter J. Wallison & John Woo eds., 2022).....	11
The Declaration of Independence (U.S. 1776)	3
The Federalist No. 43 (James Madison)	16

TABLE OF AUTHORITIES—Continued

	Page(s)
The Federalist No. 47 (James Madison)	12
The Federalist No. 51 (James Madison)	9
The Federalist No. 62 (James Madison)	10
The Federalist No. 78 (Alexander Hamilton)	3
Todd Gaziano & Ethan Blevins, <i>The Nondelegation Test Hiding in Plain Sight: The Void-for- Vagueness Standard Gets the Job Done</i> , in <i>The Administrative State Before the Supreme Court</i> 45 (Peter J. Wallison & John Woo eds., 2022)....	10
<i>What We Manage Nationally</i> , Bureau of Land Mgmt.	15

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

When the States declared their independence, they claimed all “the powers inherent in sovereignty,” including the power to legislate. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453, 470 (2018).¹ Under the Constitution, they retained the power to “prescribe regulations to promote the health, peace, morals, education, and good order of the people,” *Barbier v. Connolly*, 113 U.S. 27, 31 (1884), but they granted Congress the power to legislate on specific topics and even, through legislation, to overrule the States’ own laws. *Murphy*, 584 U.S. at 471. In short, they delegated a portion of their sovereign legislative power to Congress.

But *only* to Congress. “The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed.” John Locke, *Second Treatise of Civil Government* § 141 (1690). The positive grant of legislative power in the Constitution bestowed Congress with the authority “only to make laws, and not to make legislators”; Congress has “no power to transfer their authority of making laws, and place it in other hands.” *Id.* Or, as this Court recently put it, Congress may not transfer “powers which are strictly and exclusively legislative” to other branches of government. *Gundy v. United States*, 588 U.S. 128, 135 (2019) (plurality opinion) (citation omitted).

¹ Pursuant to Rule 37.2, *Amici* States provided timely notice of their intent to file this brief to all parties in the case.

Despite this long-established doctrine, Congress sometimes relinquishes its role as lawmaker and turns it over to executive agencies. This case is an especially egregious example of the problem. In Section 303(a) of the Federal Land Policy and Management Act (FLPMA), Congress authorized the Secretary of the Interior to pass *any* criminally enforceable regulations he wishes as long as they relate “to the management, use, and protection of the public lands.” 43 U.S.C. § 1733(a). The BLM used that power to create a wide range of crimes—“outdated vehicle registration, coal exploration, horse adoption, noisiness, fraud, discrimination, and homelessness”—many of which address subjects traditionally regulated by the States. App. 28a.

The States and their people are harmed by Congress’s unconstitutional delegation. The States are supposed to “possess primary authority for defining and enforcing the criminal law.” *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Yet, with respect to a large portion of their land—particularly in western States—their sovereignty is infringed by Section 303(a). *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (holding that although the federal government does not have exclusive jurisdiction over all federal land, any state laws which conflict with legislation passed pursuant to the property clause are void). Indeed, in Idaho, 22% of the land within its boundaries is controlled by the dictates of a single BLM official. See Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data*, 7, 9 (2020), <https://tinyurl.com/yck9xejr>; 43 C.F.R. § 8365.1-6 (allowing State BLM Directors to establish supplementary regulations “as he/she deems necessary”).

These consequences will continue until the Judiciary, “the guardian of the constitution,” intercedes. *See* The Federalist No. 78 (Alexander Hamilton). *Amici* States, including Idaho, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, West Virginia, and the Arizona Legislature, ask the Court to “demand[] more before letting the Executive branch—rather than Congress”—exercise the powers that the people have entrusted to Congress alone. App. 41a (Bumatay, J., dissenting from denial of rehearing en banc).

SUMMARY OF THE ARGUMENT

Government must “deriv[e] [its] just Powers from the Consent of the Governed.” The Declaration of Independence para. 2 (U.S. 1776). The people have granted the federal government consent to govern them, but the foundational document conveying consent (the Constitution) sets forth the metes and bounds of that consent. And in the Constitution, the people consented only to allow Congress—a body in which they were ensured representation—to wield the legislative power. Under settled principles of common law and political theory with which the Founders were no doubt familiar and by all accounts accepted, that means Congress cannot redelegate its delegated power to the Executive Branch.

The Court recognizes these principles of consent and delegation in the abstract but has rarely done anything about them. It hasn’t held that any law violates the nondelegation doctrine for more than 90 years. And Congress has responded predictably to the

incentives constructed by this judicial passivity—the law at issue in this case gives carte blanche to the Secretary of the Interior to create essentially any criminal rule on public land. Whatever the particular test for the nondelegation doctrine should be, this law checks all the boxes for when Congress’s ability to confer discretion on the Executive should be at its nadir. The Court should reaffirm that the nondelegation doctrine is not illusory by granting certiorari and reversing the decision of the Ninth Circuit.

ARGUMENT

I. The Constitution Forbids Delegation, Because Congressional Power Depends on the Consent of the People.

“The ultimate source of the Constitution’s authority is the consent of the people of each individual State.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting). “The people do not consent to obey any laws except those passed by their representatives according to the constitution.” *Cohens v. State of Virginia*, 19 U.S. 264, 341 (1821). For this simple reason, the authority that the people have loaned to Congress “cannot be delegated.” *Shankland v. Mayor of Wash.*, 30 U.S. 390, 395 (1831).

This principle—i.e., that legislative power may not be delegated because lawmaking requires consent—can be seen in English common law, in the political philosophy that influenced the Framers, in the Constitution’s text and structure, and in early post-ratification history.

A. At Common Law, Delegation Required the Principal's Consent.

The Constitution is a legal instrument and must be interpreted as such. *See* Gary Lawson, *A Private-Law Framework for Subdelegation*, in *The Administrative State Before the Supreme Court* 123, 130 (Peter J. Wallison & John Woo eds., 2022). And the Constitution, in its form, is a delegation of authority from a principal to an agent—from “We the People” to “a Congress of the United States.” *Id.* at 131.

This principal/agent relationship would be familiar to every person responsible for drafting the Constitution. *Id.* And, like all other legal concepts “obviously transplanted from another legal source, whether common law or other legislation, it brings the old soil with it.” Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 537 (1947).

At common law as today, a central theme of agency law is the consent of the principal. *See, e.g., Meyer v. Holley*, 537 U.S. 280, 286 (2003) (“The Restatement § 1 specifies that the relevant principal/agency relationship demands not only control (or the right to direct or control) but also ‘the manifestation of *consent* by one person to another that the other shall act on his behalf’”) (emphasis added) (quoting Restatement (Second) of Agency (1957)); 1 Samuel Livermore, *A Treatise on the Law of Principal and Agent and of Sales by Auction* 1 (1818) (noting the importance of consent on the first page of his treatise on the law of agency).

Because consent was indispensable, 18th-century common law presumed that delegations of authority to a fiduciary did not permit the fiduciary to delegate the authority further. See Lawson, *supra* at 132; see also 2 Edward Coke, *The Second Part of the Institutes of the Laws of England* 597 (London, M. Flesher & R. Young 1642) (“*delegatam potestatem, quae non potest delegari*”²). For instance, Samuel Livermore, a noted agency-law theorist, searched through various attempts at subdelegation across many areas of law and concluded, “[a]n authority given to one person cannot in general be delegated by him to another; for being a personal trust and confidence it is not in its nature transmissible.” Lawson, *supra* at 132 (quoting Livermore, *supra* at 54). Joseph Story came to the same conclusion. *Id.* (quoting Joseph Story, *Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence* § 13 (1844)); see Philip Hamburger, *Nondelegation Blues*, 91 *Geo. Wash. L. Rev.* 1083, 1161 (2023) (“If a permissive approach to the subdelegation of legislative power was the prevailing eighteenth-century American position, one would expect to find at least one prominent theoretical exposition of it.”).

The Constitution’s text was drafted by four lawyers and a businessman.³ See Lawson, *supra* at

² “a delegated power, which cannot be delegated.”

³ The Committee of Detail, the group responsible for shaping the Constitutional Convention’s principles into a concrete draft of the Constitution, was comprised of Oliver Ellsworth, Nathaniel Gorham, Edmund Randolph, John Rutledge, and James Wilson. Lawson, *supra* at 131 n.33.

131 n.33. It is difficult to doubt they knew the common-law rule. Indeed, it would have been widely known at the time.

B. John Locke Likewise Opposed Delegation Without Consent.

Although the rule against subdelegation dates to Roman times, English philosopher John Locke grounded the rule in the need for popular consent. Hamburger, *supra* at 1153, 1154, 1160; *see also* 1 The Digest of Justinian 39 (Alan Watson trans., Univ. of Pa. Press 1985) (“It is obvious that one cannot delegate to another a jurisdiction which one holds by delegation.”). And Locke’s philosophy “permeated the 18th-century political scene in America.” *Carpenter v. United States*, 585 U.S. 296, 348 (2018) (Thomas, J., dissenting) (citation omitted).

Like the common law, Locke believed subdelegation was inconsistent with the principle of consent, but in his philosophy the belief took on new importance because, to him, consent lay at the root of all legitimate government. Hamburger, *supra* at 1160; *see id.* (“Locke’s reasoning against delegation was part of his broader arguments defending representative lawmaking”).

According to Locke, before government existed, man followed the law of nature and the execution of that law was put into his hands. Locke, *supra* at §§ 4, 7. However, with that freedom came a lack of security. *See id.* at § 131. Accordingly, man relinquished the liberty in nature and appointed individuals to enact laws. *Id.* at § 97. In return, he received civil liberty. *Id.* This was the freedom “to be under no other legislative power but that established by *consent* in

the commonwealth; nor under the dominion of any will or restraint of any law, *but what that legislative shall enact according to the trust put in it.*" *Id.* at § 22 (punctuation modernized) (emphasis added).

The nondelegation doctrine logically follows from this need for consent, making sure legislation cannot pass without the people's consent by forcing the people's appointed representatives to make laws themselves rather than authorizing others to make them. Hamburger, *supra* at 1166–67. "The Legislative neither must nor can transfer the Power of making laws to any Body else, or place it anywhere but where the People have." Locke, *supra* at § 142; Hamburger, *supra* at 1167–68.

In Locke's view, apart from the need for consensual lawmaking, the principle of legislative nondelegation also followed from the nature of constitutions, which set out the structure of the government chosen by the people. Hamburger, *supra* at 1167. "The People alone can appoint the Form of the Commonwealth" and when they "submit" to "be govern'd by Laws made by such Men, and in Such Forms, no Body else can say other Men shall make laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen." Locke, *supra* at § 142.

By allowing the "legislative" to delegate its power and "make legislators," Congress breaks the link between legislation and the consent of the people, the source of Congress' power. *Id.* at § 141.

C. The Text and Structure of the Constitution Prohibit Delegation.

With Locke’s philosophy and fundamental principles of agency law close in the background, the Framers etched a radical idea into the very beginning of our founding document: “We the People . . . ordain and establish this Constitution.” U.S. Const. pmbl.; *Gundy*, 588 U.S. at 152 (Gorsuch, J., dissenting). And the Framers included an unmistakable implication in that document: the consent of the people requires that lawmaking power be exercised by their elected representatives—not by unelected magistrates like the ones they had recently defenestrated.

Central to the constitutional framework was that legislators are personally responsible for the use of these powers. David Schoenbrod, *A Judicially Manageable Test to Restore Accountability*, in *The Administrative State Before the Supreme Court* 346, 349 (Peter J. Wallison & John Woo eds., 2022). In Article I of the text, the Constitution “vested” the power to legislate in the two Houses of Congress, the branch of government that “necessarily[] predominates” over the others. The Federalist No. 51 (James Madison). The Vesting Clause placed the legislative authority in Congress, and “the essence of the legislative authority is to enact laws, or in other words, to prescribe rules for the regulation of the society.” The Federalist No. 75 (Alexander Hamilton); see Schoenbrod, *Judicially Manageable Test*, *supra* at 349.

And the reason the Founders made legislators personally responsible for the use of the powers was to ensure that lawmakers continued to depend on the consent of the people. The Federalist No. 51 (James

Madison); Schoenbrod, *Judicially Manageable Test*, *supra* at 349.

Apart from the Vesting Clause, Article I further ensures that consent of the people is required at each stage of the legislative process by requiring Congress to “publish” their proceedings. U.S. Const. art. I, § 5 cl. 3; Jonathan H. Adler, *A “Step Zero” for Delegations*, in *The Administrative State Before the Supreme Court* 161, 163–64 (Peter J. Wallison & John Woo eds., 2022) (citing David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 *Cardozo L. Rev.* 731 (1999)). This feature was to ensure that “government may not expand its powers in any controversial way unless voters know just whom to blame if blame there be.” Adler, *supra* at 163–64 (quoting Schoenbrod, *Delegation and Democracy*, *supra* at 731).

Finally, the lawmaking process itself requires broad consent because of bicameralism and presentment. “No law or resolution [could] be passed without the concurrence first of a majority of the people, and then of a majority of the states.” The Federalist No. 62 (James Madison). The veto power makes the president an additional barrier to legislation. U.S. Const. art. I, § 7, cl. 2.

In short, the Framers ensured each new law would have popular consent by specifically and exclusively vesting the people’s lawmaking power in Congress, specifying how Congress was elected, forcing Congress to publish proceedings, and requiring each new law to obtain the approval of three different sets of the people’s representatives. See Todd Gaziano & Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness*

Standard Gets the Job Done, in *The Administrative State Before the Supreme Court* 45, 49 (Peter J. Wallison & John Woo eds., 2022).

These safeguards logically imply a nondelegation doctrine: without one, the great care the Founders gave to ensuring the consent of the people would not be worth the effort. Instead, legislation would become “nothing more than the will of the current President” as agencies could pass the same rules without satisfying Article I’s demands. *Gundy*, 588 U.S. at 155 (Gorsuch, J., dissenting).

That the founding generation would have considered such a system absurd is confirmed by historical records from nondelegation controversies immediately before, during, and after the Constitutional Convention. For example, shortly after ratification, James Madison proposed a constitutional amendment expressly forbidding delegation—but it was agreed that the amendment was “unnecessary, inasmuch as the Constitution assigned the business of each branch of the Government to a separate department.” Ilan Wurman, *Nondelegation at the Founding*, 130 *Yale L.J.* 1490, 1504 (2021) (citing 1 *Annals of Cong.* 789 (1789) (Joseph Gales ed., 1834)). Scholars have gathered many more examples. *See, e.g., id.* at 1503–18; Hamburger, *supra* at 1161–66 (examining the Founders’ nondelegation controversies in New York and at the Constitutional Convention); *id.* at 1159 (examining a broadly read New York newspaper’s praise of Locke’s views on nondelegation at the time of the founding); Saikrishna Bangalore Prakash, *The Sky Will Not Fall: Managing the Transition to a Revitalized Nondelegation Doctrine*, in *The Administrative State*

Before the Supreme Court 274, 276 (Peter J. Wallison & John Woo eds., 2022) (noting the nondelegation controversy at the Second Congress).

* * *

The common law, early philosophers, and the Founders all agree: consent for one is not consent for all. The people have granted Congress power to make laws regulating their private conduct, but Congress cannot delegate the primary exercise of that power.

II. The Challenged Statute Plainly Violates the Nondelegation Doctrine.

Knowing that there is a nondelegation doctrine is one thing, and applying it is another. Or as Chief Justice Marshall put it, “undoubtedly,” “the legislature makes” and “the executive executes” the law, but “the precise boundary of th[ese] power[s] is a subject of delicate and difficult inquiry.” *Wayman v. Southard*, 23 U.S. 1, 46 (1825).

Though applying the doctrine may be difficult, it is essential. The nondelegation doctrine is a bulwark of liberty that “prevent[s] tyranny,” App. 46a (Bumatay, J., dissenting from denial of rehearing en banc)—for “[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty.” The Federalist No. 47 (James Madison) (quoting Montesquieu, *The Spirit of the Laws*, bk. XI, chap. VI). The doctrine is also indispensable to preserving clear lines of political accountability by combatting legislators’ “tempt[ation] to delegate power to agencies to ‘reduc[e] the degree to which they will be held accountable for unpopular actions.’” *NFIB v. OSHA*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring) (quoting Ronald Cass,

Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. Pub. Pol’y 147, 154 (2017)).

Unfortunately, the Court has historically shrunk from applying the nondelegation doctrine, requiring only that Congress utter an intelligible principle before calling its work done. While that standard has been characterized as not entirely “toothless,” *Fed. Commc’ns Comm’n v. Consumers’ Rsch.*, 606 U.S. 656, 703 (2025) (Kavanaugh, J., concurring), it hasn’t bit into anything for more than 90 years. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). And if the Ninth Circuit is right that Section 303(a) contains an intelligible principle, then it’s hard to see how the nondelegation doctrine will ever sink its teeth into something again. App. 67a (Bumatay, J., dissenting from denial of rehearing en banc) (“This statutory prohibition is as indefinite as it gets.”).

Whether the intelligible-principle test can be salvaged or whether it needs to be overhauled for something else entirely, this Court’s precedents make clear that Congress’s ability to confer broad discretion on the Executive Branch “depends on ‘context’ and ‘the nature of the particular constitutional powers’ at issue.” *Consumers’ Rsch.*, 606 U.S. at 723 (Gorsuch, J., dissenting) (quoting *Lichter v. United States*, 334 U.S. 742, 778 (1948)); *id.* at 684 (majority opinion agreeing that “context” matters). And the context surrounding Section 303(a) indicates that Congress’s ability to confer discretion should be at its weakest.

A. Section 303(a) Deals with Internal Affairs, Rather than Foreign Affairs.

For starters, Section 303(a) concerns internal affairs, not foreign affairs. In the field of foreign affairs, “delegations pose[] fewer problems” because “many foreign affairs powers are constitutionally vested in the president under Article II.” *Consumers’ Rsch.*, 606 U.S. at 746 n.20 (Gorsuch, J., dissenting) (first quote); *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting) (second quote). Indeed, “[t]he president is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting John Marshall, *Annals*, 6th Cong., col. 613). Thus, a statute conferring broad discretion on the Executive with respect to foreign affairs may be valid even if it “would be invalid” “if it were confined to internal affairs.” *Id.* at 315.

But it doesn’t get much more internal than a grant of rulemaking authority to the Secretary of the Interior to regulate conduct on federal land. That doesn’t “overlap[]” with Article II powers, *Gundy*, 588 U.S. at 170 (Gorsuch, J., dissenting)—it falls squarely within Congress’s power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. Const. art. IV § 3, cl. 2.

B. Section 303(a) Grants Enormously Broad Authority.

Next, Congress’s ability to confer discretion on the Executive is weaker (and Congress’s grant of power must be more specific) in the context of Section 303(a) because the power being conferred is greater.

“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001), and the scope of the power bestowed by Section 303(a) is truly “astounding.” App. 88a (VanDyke, J., dissenting from denial of rehearing en banc).

To start, the legal scope of the grant of power is breathtaking on its face. Section 303(a) directs the Secretary of the Interior to “issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands.” 43 U.S.C. § 1733(a). As it turns out, just about any rule regulating private conduct occurring on public land can be deemed necessary for the use and management of the land. Section 303(a)’s broad power has been invoked to “promulgate a plethora of rules from housing policies, to traffic laws, to firearm regulations to mining rules, to agriculture certifications.” App. 26–27a; *accord* App. 28 (regulations “criminalizing outdated vehicle registration, coal exploration, horse adoption, noisiness, fraud, discrimination, and homelessness”).

The legal scope of Section 303(a)’s grant of power is only amplified by its immense geographic reach. The BLM alone manages 245 million acres, so that means that one-tenth of America’s land mass is regulated by a code of conduct enacted by a single agency. *What We Manage Nationally*, Bureau of Land Mgmt., <https://tinyurl.com/mpm7hsxz> (last visited Mar. 20, 2026). That impact is felt disproportionately in western States—the BLM manages 22% of the land in Idaho and 67% of the land in Nevada. *See* Cong. Rsch. Serv., R42346, *Federal Land Ownership:*

Overview and Data, 7, 9 (2020), <https://tinyurl.com/yck9xejr>.

What’s more, the broad power being transferred away is an exceedingly important one that has been expressly given to Congress. *See Lichter*, 334 U.S. at 778 (ability to confer discretion on Executive depends on “nature of the particular constitutional power[]” at issue). After winning their liberty, the early colonists did not see fit to entrust their Continental Congress with direct power to hold and manage land. *See* Articles of Confederation, art. IX. But because the issue of land was “of very great importance” and “jealousies and questions” abounded among the States concerning western lands, it was “rendered absolutely necessary” that States cede control of national lands to Congress. *The Federalist* No. 43 (James Madison).

The Property Clause conveys a core power upon Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. Const. art. IV § 3, cl. 2. Broadly delegating that power is not something that would be expected of such a “core Congressional power.” *Learning Resources, Inc. v. Trump*, 146 S. Ct. 628, 639 (2026) (lead opinion of Roberts, C.J.) (applying closely related major questions doctrine).

C. Section 303(a) Transfers Criminal Lawmaking Power to the Executive.

The breadth of Section 303(a)’s grant of power is reason enough to restrict Congress’s ability to delegate. But the law’s extreme breadth carries with it added potency—Section 303(a) grants the Executive Branch the ability to regulate conduct with *criminal*

penalties, which provides yet another reason why the nondelegation doctrine should be at its zenith here. See 43 U.S.C. § 1733(a) (“Any person who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than \$1,000 or imprisoned no more than twelve months, or both.”).

James Madison singled out “criminal subjects” as ones on which Congress must “leave as little as possible to the discretion of those who are to apply and to execute the law,” lest “the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws.” Wurman, *supra* at 1512–13 (quoting James Madison, *The Report of 1800*, in 17 *The Papers of James Madison* 303, 324 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991)).

Madison’s view has generally been espoused by this Court. The Court has long demanded that Congress be the body that makes criminal law. The Judiciary cannot make criminal law—“there are no common-law offenses against the United States.” *United States v. Gradwell*, 243 U.S. 476, 485 (1917). Nor can the Executive, which cannot “prescribe a criminal offense by the regulation of a department.” *United States v. Eaton*, 144 U.S. 677, 687 (1892). Indeed, “[i]t would be a very dangerous principle” for “a needful regulation” “to become a criminal offense.” *Id.* at 688. For an agency to prescribe a rule that carries criminal penalties, “[t]here [must be] an act of congress” that at least prescribes what *actus reus* constitutes a crime. *Caha v. United States*, 152 U.S.

211, 218 (1894); *Fahey v. Mallonee*, 332 U.S. 245, 252 (1947).

To be sure, the Court has also stated once that its “cases are not entirely clear on whether more specific guidance is in fact required” when Congress attaches criminal penalties to a statute. *Touby v. United States*, 500 U.S. 160, 166 (1991). But the case that served as the basis for the Court’s confusion—*United States v. Grimaud*, 220 U.S. 506 (1911)—does not actually muddy the doctrinal waters. There, the Court addressed a law that did prescribe the relevant actus reus—it criminalized trespass on federal land, and allowed the executive agency to set forth the conditions under which land use would be considered unauthorized. *Id.* at 522 (“[t]he subjects as to which the Secretary can regulate are defined,” and were even “clearly indicated and authorized by Congress”); accord *Gradwell*, 243 U.S. at 485 (“before a man can be punished as a criminal under the Federal law his case must be plainly and unmistakably *within the provisions of some statute*”) (emphasis added).

Demanding more specificity from Congress when it grants power to the Executive in the criminal law context tracks broader themes across criminal law respecting the separation of powers. Nicolas Elliott-Smith, *Crimes Without Law: Administrative Crimes and the Nondelegation Doctrine*, 115 J. Crim. L. & Criminology 429, 431 (2025) (it is a “broader constitutional axiom” that “Congress alone must enact criminal law”). The separation of powers has been understood to undergird “foundational principles of criminal law” like “[t]he rule of lenity, void-for-vagueness doctrine, and *nullum crimen sine lege* (‘no crime without law’).” *Id.*

For example, in the void-for-vagueness context, the Court has explained that the “more important aspect of vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (cleaned up). “Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.” *Id.* (cleaned up).

In the same way, when Congress broadly delegates authority to the Executive Branch to decide what conduct will be criminal, it “unite[s] the legislative and executive powers in the same person”—namely, “the nation’s chief law enforcement officer.” *Gundy*, 588 U.S. at 172 (Gorsuch, J., dissenting) (cleaned up). And that erosion of separation of powers raises the same risks of “tyranny” and arbitrary enforcement. *Id.*; see Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, in *The Administrative State Before the Supreme Court* 81, 102 (Peter J. Wallison & John Woo eds., 2022) (“If Congress could delegate its criminal law-drafting function, it would collapse the division of the government’s potent criminal power built into the Constitution.”).

Section 303(a) does not determine that any particular act constitutes a crime—it prescribes maximum penalties, but leaves it entirely to the BLM to decide what conduct will trigger penalties up to those statutory limits. 43 U.S.C. § 1733(a). Congress could have established certain crimes on federal land,

as it has done in the past, *see* 18 U.S.C. §§ 1851–66 (creating misdemeanors on federal land by statute), but it chose not to. Section 303(a) therefore raises the risk of arbitrary policymaking and enforcement that the separation of powers was meant to thwart. *E.g.*, 43 C.F.R. § 8365.1-4(a) (BLM regulation prohibiting “caus[ing] a public disturbance” by “making unreasonable noise” or “creating a hazard or nuisance”).

* * *

Because Section 303(a) regulates internal affairs, grants extraordinarily broad authority, and authorizes the creation of crimes, Congress’s ability to convey discretion on the Executive Branch should be at its nadir. To use the parlance of the Court’s current nondelegation standard, the principle set forth to constrain agency discretion had better be ultra “intelligible.”

Unfortunately, Congress has done next to nothing in Section 303(a) to restrain agency discretion. Between “management, use, and protection of the public lands,” Congress tried to provide guidance only for management, indicating that “[t]he Secretary shall manage the public lands under principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a). But the considerations the Secretary should account for only cascade from there. The definitions of “multiple use” and “sustained yield” add a laundry list of other generalized considerations, like utilizing “resource values” to “best meet the present and future needs of the American people,” preventing “impairment of the productivity of the land and the quality of the environment,” and preserving resources as varied as “recreation, range, timber, minerals,

watershed, wildlife and fish, and natural scenic, scientific and historical values.” *Id.* § 1702(c), (h); *see also id.* § 1701 (listing thirteen policies of FLPMA, such as that land management must “serve the national interest”).

In short, Section 303(a) directs the Secretary of the Interior to consider the universe of potential policy considerations impacting public lands and enact general rules for private conduct on those lands. Of course, that’s Congress’s job. That’s the legislative power. *Wayman*, 23 U.S. at 43. And that’s the Property Clause.

It’s hard to imagine a clearer application of the nondelegation doctrine than this, and the Court should take this opportunity to reinforce the separation of powers, the bedrock of our Constitution. Because despite the common nomenclature, this is not actually BLM land; it’s the people’s. And the people have not agreed to have their liberty restrained under the BLM’s conditions—only under the conditions set forth by their elected representatives in Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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