No. 25-6911

In the Supreme Court of the United States

GREGORY W. PHEASANT,
Petitioner,
v.
UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

David C. Tryon
Counsel of Record
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Supreme power resides solely in the people. The Constitution separates and vests the legislative, executive, and judicial powers in their respective branches to ensure a government that is both responsive and effective.

In Article I, the people granted "*legislative* Powers" to the federal government and "vested [them] in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1 (emphasis added). Article I's additional

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

separation of powers "forces Congress to exercise those 'Powers' through an elaborate process of enacting the same legal text in two legislative chambers and presenting the passed bill to the President for approval." Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 Harv. L. Rev. 164, 164 (2019).

The Convention of 1787 adopted the doctrine of separation of powers between the three branches "not to promote efficiency but to preclude the exercise of arbitrary power." *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). To protect the separation of powers, the nondelegation doctrine, as traditionally understood, prohibits the transfer of "quintessentially legislative powers—the power to make laws—to actors outside the legislative branch." Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 Emory L.J. 417, 424 (2022). For "the legislative can have no power to transfer their authority of making laws, and place it in other hands." John Locke, *Second Treatise of Government* 75 (C.B. Macpherson ed., 1980). When Congress allows agencies to create rules and regulations with the effect of laws, Congress has abdicated the lawmaking function.

Protecting against broad delegation is especially important in the criminal context. When the two powers of crime definition and crime prosecution are combined in one branch, the structural protection of individual liberty is undermined at its core. The Constitution is designed to guarantee that before an

individual is subjected to a criminal prosecution, two separate judgments will have been made. First, that particular conduct—not conduct to be later defined—should be criminalized. Second, that the individual deserves prosecution for a violation of the law. That guarantee is eliminated when the prosecutor is given the power to make both judgments.

Some legislators and courts seem to treat the intelligent principle doctrine as permission to delegate rather than a restriction on delegation. But that is backwards. The Court should recognize that the nondelegation doctrine restricts delegation and applies with more force in the criminal context.

ARGUMENT

I. The nondelegation doctrine plays an important role in determining what powers have—and can be—delegated.

When assessing laws that allegedly grant authority to the executive branch, three fundamental questions must be answered: (1) Does Congress possess constitutional authority to regulate the matter in question? (2) Did Congress delegate regulatory authority to another branch? (3) Is Congress permitted to delegate this authority to another branch?

The answer to the first question naturally depends on an examination of the powers granted to Congress in Article I and elsewhere in the Constitution.

For the second, the Court must analyze the statute's language. If the language suggests a broad delegation of authority, the Court applies the major

questions doctrine and examines "the closely related domain of review for unconstitutional vagueness," Walters, *supra*, at 432 (citing *Sessions* v. *Dimaya*, 584 U.S. 148, 216 (2018) (Thomas, J., concurring)). This approach is taken because "in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'" *Biden* v. *Nebraska*, 600 U.S. 477, 515 (2023) (Barrett, J., concurring) (quoting *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). The Court applies the major questions doctrine "in service of the constitutional rule" that answers the third question: "Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy* v. *United States*, 588 U.S. 128, 167 (2019) (Gorsuch, J., dissenting).

As one scholar noted,

> [t]he nondelegation doctrine reflects deep and unresolved ambiguities about the extent to which the U.S. Constitution requires that the three branches of government be hermetically sealed off from one another, subject to certain explicit exceptions where the framers chose to subject the exercise of one power to the checks of a coordinate branch of government.

Walters, *supra*, at 424. While the Framers understood that a complete hermetic seal would not allow the nation to thrive, *Buckley* v. *Valeo*, 424 U.S. 1, 120–121 (1976), certain limits and precautions against the "accumulation of all powers, legislative, executive, and

judiciary, in the same hands," The Federalist No. 47, at 273 (James Madison) (Fall River Press ed. 2021), had to be instituted.

The separation of powers is much like an airlock, and the nondelegation doctrine acts like the doors. Before passing contents (powers) from one side (the legislature) to the other (the executive), the former side must complete certain tasks like decompression (lawmaking). If those tasks are not completed before opening the doors, the system fails.

"For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by [executive] agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process." *INS* v. *Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting). "The number of formal rules these agencies have issued thanks to their delegated legislative authority has grown so exuberantly it's hard to keep up." *Caring Hearts Pers. Home Servs., Inc.* v. *Burwell*, 824 F.3d 968, 969 (10th Cir. 2016) (Gorsuch, J.). "There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. The Administrative Procedure Act, 5 U.S.C. § 551(4) provides that a 'rule' is an agency statement 'designed to implement, interpret, or *prescribe law or policy*.'" *Chadha*, 462 U.S. at 986 (White, J., dissenting) (emphasis added); see also *id.* at 989 (White, J., dissenting) (noting that the Court agrees that agency rulemaking resembles legislation, the Court has described agency rulemaking as "'quasi-legislative' in character," and that "[s]uch rules and adjudications by the agencies

meet the Court's own definition of legislative action"). These regulations "may pre-empt state law and grant rights to and impose obligations on the public. In sum, they have the force of law." *Id.* at 986 (White, J., dissenting) (citations omitted).

The broken valve of the intelligible principle test has allowed nearly every incomplete law to slip past the seal between Article I lawmaking powers and Article II enforcement powers. It has simply failed to stop impermissible delegations. See, *e.g.*, *Gundy*, 588 U.S. at 146 (Gorsuch, J., dissenting) (noting that the Court has rarely found an impermissible delegation); *Chadha*, 462 U.S. at 985 (White, J., dissenting) ("In practice, [ ] restrictions on the scope of the power that could be delegated diminished and all but disappeared."). The intelligible principle test "serves to encourage broader and vaguer delegations by the implicit promise (which, as a practical matter, can rarely be redeemed) that actions pursuant to those delegations will be scrutinized by Congress; and its major effect is augmentation of the power of" Congress, see Brief of American Bar Association as Amicus Curiae, *INS* v. *Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171), 1982 U.S. S. Ct. Briefs LEXIS 1633, at *46 (Antonin Scalia as co-counsel).

II. Congress should not be "liberated" from the lawmaking process simply because it is easier for an agency to make a policy determination.

The filling-up-the-details exception to the nondelegation doctrine—and to a greater extent the intelligible principle test—are premised on the notion that Congress cannot do it all, and we must liberate it from some of its responsibilities. See John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 193 (2007). But this is no excuse for sloppy or incomplete lawmaking. Indeed, "[e]ven the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking." *Id.* at 198. "The very point of the structural element of the Constitution is to make some things difficult." Colleen Walsh, *Challenging the Constitution*, Harvard Gazette (Sept. 18, 2009), https://tinyurl.com/4npbwnyp (quoting Justice Souter). As Locke recognized, the large and slow nature of a legislative body is a benefit for lawmaking because "the creation of rules of private conduct should be an irregular and infrequent occurrence. The Framers, it appears, were inclined to agree." *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 86 (2015) (Thomas, J., concurring in the judgment) (citing John Locke, *Second Treatise of Civil Government* 72, 80 (J. Gough ed. 1947)).

While it may be more efficient for administrative agencies to handle certain *administrative* details, the fundamental task of lawmaking is better left to—and constitutionally remains with—Congress.

The "regulations" outlined in the Code of Federal Regulations—setting out standards supposedly derived from Congress's broad policy statements—demonstrate that lawmakers can draft precise laws. If Congress does not draft and pass legislation as specific as the federal agencies, it is likely due to a lack of political will. If such political will is lacking, this indicates that the Constitution's structure is functioning as intended.

And Congress has shown that it can legislate with great detail and precision when it has the political will to do so. Just a few examples:

- The Internal Revenue Code is highly detailed, specifying tax rates, deductions, credits, penalties, and reporting requirements. Indeed, it even details the rules for charitable contribution deductions, including percentage limits, record-keeping requirements, and restrictions on certain types of donations. 26 U.S.C. § 170. Congress delegated only the detail of prescribing regulations to verify the charitable contribution. 26 U.S.C. § 170(a)(1).
- The Americans with Disabilities Act (ADA) includes detailed provisions on accessibility, employment discrimination, public accommodations, and enforcement mechanisms. See, *e.g.*, 42 U.S.C. § 12182. The ADA defines "public accommodations" and specifies the types of businesses covered under the ADA. *Id.*

- The Social Security Act governs Social Security benefits and includes detailed requirements and benefit formulas. See, *e.g.*, 42 U.S.C. § 415. It even sets forth the criteria for disability benefits, including medical conditions and work history requirements. 42 U.S.C. § 423.
- The Public Safety and Recreational Firearms Use Protection Act, enacted in 1994 and sunsetting in 2004, provided very specific descriptions of characteristics of banned firearms and included a long list of specific firearms, leaving few details to any agency. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 110101–110105, 108 Stat. 1796, 1996–2010 (1994).

Title 18—while not always perfect—exemplifies Congress's ability to write precise criminal laws as well. In fact, Congress had no issue providing detailed criminal laws related to public lands:

- In Title 18, Congress declared it a crime, punishable by a fine and imprisonment, for anyone to "wantonly injure[ ] or destroy[ ] any tree growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use . . . ." 18 U.S.C. § 1853. The law clearly demarks the actual conduct that is criminal, leaving nothing for an agency to decide.

- Title 18 also punishes the use of "a hazardous or injurious device on Federal land" when the individual acts with a specified mental state and causes specified injury or damage. 18 U.S.C. § 1864. The law provides in comprehensive detail that "the term 'hazardous or injurious device' means a device, which when assembled or placed, is capable of causing bodily injury, or damage to property, by the action of any person making contact with such device subsequent to the assembly or placement. Such term includes guns attached to trip wires or other triggering mechanisms, ammunition attached to trip wires or other triggering mechanisms, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, lines or wires, lines or wires with hooks attached, nails placed so that the sharpened ends are positioned in an upright manner, or tree spiking devices including spikes, nails, or other objects hammered, driven, fastened, or otherwise placed into or on any timber, whether or not severed from the stump . . . ." *Id.* at (d)(3). Congress had no issue detailing what actions are criminal.

These laws—and many others—show that Congress can do it—it just does not want to.

By "requiring legislators to agree on a relatively specific form of words, the nondelegation principle seems to raise the [political] burdens and costs associated with the enactment of federal law." Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in*

Mouseholes, 62 Admin. L. Rev. 19, 55 (2010) (quoting Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 320 (2000)). If Congress must make laws with precision and care, it imposes a crucial safeguard for individual liberty. *Id.* (citation omitted). The doctrine "ensure[s] that national governmental power may not be brought to bear against individuals without a consensus, established by legislative agreement on relatively specific words." *Id.* (citation omitted).

The argument that Congress should be liberated of its lawmaking responsibility because it lacks the expertise of agencies holds little weight. The Constitution's nondelegation principle does not prevent Congress from adopting rules and regulations suggested by agencies through the constitutionally prescribed lawmaking process. See Brief of American Bar Association as Amicus Curiae, *supra*, at *44 ("Instead of conferring authority to promulgate rules, it may confer authority to propose legislation."). Congress could even utilize the agencies to collect and summarize comments on proposed laws, like what agencies do now when rulemaking. This collaboration ensures an accountable and responsive government that adheres to the processes outlined in the Constitution.

A. The Constitution's structure and protections require a strengthened nondelegation doctrine for criminal laws.

The Constitution recognizes the unique nature of criminal laws. As originally written, the Constitution only guaranteed a jury trial in criminal cases. U.S. Const. art. III, § 2. The original Constitution also protected the "Privilege of the Writ of Habeas Corpus . . . ." U.S. Const. art. I, § 9, cl. 2. As to the crime-defining power, the Constitution recognizes its special nature in, for example, the prohibitions on ex post facto laws and bills of attainder. See U.S. Const. art. I, § 9, cl. 3.

The Bill of Rights and other future amendments extended the Constitution's protections in criminal cases. "The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to 'any criminal case.' Similarly, the protections provided by the Sixth Amendment are available only in 'criminal prosecutions.'" *United States* v. *Ward*, 448 U.S. 242, 248 (1980). The Court has noted that the Fourth Amendment has special force in the criminal arena. See *City of Los Angeles, Calif.* v. *Patel*, 576 U.S. 409, 420 (2015) (discussing the relaxed rules for administrative searches "where the 'primary purpose' of the searches is '[d]istinguishable from the general interest in crime control'" (citation omitted)).

Further, the Court has recognized due-process limits on vagueness in criminal laws. See *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). The doctrine requires "'that a legislature establish minimal guidelines to govern law enforcement.' Where the legislature fails to provide such minimal guidelines, a

criminal statute may [unconstitutionally] permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 358 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574–575 (1974)). The Court has recognized the danger of imprecise criminal legislation:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

United States v. *Reese*, 92 U.S. 214, 221 (1875).

Relatedly, the Court strictly construes criminal statutes against the government. The rule of strictly construing penal statutes—"better known today as the rule of lenity—first emerged in 16th-century England in reaction to Parliament's practice of making large swaths of crimes capital offenses . . . ." J*ohnson* v. *United States*, 576 U.S. 591, 613 (2015) (Thomas, J., concurring in the judgment).

> Courts relied on this rule of construction in refusing to apply vague capital-offense statutes to prosecutions before them. As an example of this rule, William Blackstone described a notable instance in which an English statute imposing the death penalty on anyone convicted of

> "stealing sheep, or other cattle" was "held to extend to nothing but mere sheep" as "th[e] general words, 'or other cattle,' [were] looked upon as much too loose to create a capital offence."

Id. at 614 (Thomas, J., concurring in the judgment) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 88 (1765)). Parliament responded in the proper way by passing another statute to clarify the ambiguity. *Id.* at 614 n. 2 (Thomas, J., concurring in the judgment).

The rule of lenity made its way to this Nation where "American courts—like their English predecessors—simply refused to apply [vague laws] in individual cases under the rule that penal statutes should be construed strictly" against the government. *Id.* at 615 (Thomas, J., concurring in the judgment) (citing *United States* v. *Sharp*, 27 F.Cas. 1041 (C.C.Pa. 1815) (Washington, J.)). Unfortunately, Congress has not always followed its English predecessors in fixing ambiguity through new statutes. Instead, it often relies on executive agencies to sort out the ambiguity—and, it seems, it sometimes purposely implants ambiguity so the agencies can do its bidding.

"Each branch's role and responsibility with regard to criminal statutes is clear. First, '[o]nly the people's elected representatives in the legislature are authorized to make an act a crime.'" *Gun Owners of Am., Inc.* v. *Garland*, 992 F.3d 446, 464 (6th Cir.) (quotation marks omitted) (quoting *United States* v. *Davis*, 588 U.S. 445, 451 (2019)), *reh'g en banc granted, opinion vacated*, 2 F.4th 576 (6th Cir. 2021), *and on reh'g en banc*, 19 F.4th 890 (6th Cir. 2021).

> Making something a crime is serious business. It visits the moral condemnation of the community upon the citizen who engages in the forbidden conduct, and it allows the government to take away his liberty and property. The rule of lenity carries into effect the principle that only the legislature, the most democratic and accountable branch of government, should decide what conduct triggers these consequences.

Carter v. *Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring); see, *e.g.,* Paul J. Larkin, Jr., Chevron *and Federal Criminal Law*, 32 J.L. & Pol. 211, 235 (2017) ("The criminal law reflects underlying moral judgments that it is the responsibility of the people to make in a democracy. Agencies lack expertise in making these moral judgments; their skills lie elsewhere."). If "unelected commissioners and directors and administrators [are given] carte blanche to decide when an ambiguous statute justifies sending people to prison," then this ideal of democratic accountability diminishes. *Carter*, 736 F.3d at 731 (Sutton, J., concurring).

Congress cannot skirt its responsibility by conferring its legislative authority to enact criminal laws to agencies. "[O]nly the *legislature* may define crimes and fix punishments. Congress cannot . . . effectively leave that function to the courts—much less to the administrative bureaucracy." *Whitman* v. *United States*, 574 U.S. 1003, 1003 (2014) (statement of Scalia & Thomas, JJ., respecting the denial of certiorari).

B. Individuals face grave consequences from overcriminalization caused by executive agencies.

"[C]riminal law is the heavy artillery of society." Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. Pitt. L. Rev. 737, 738 (1981). In *City of Arlington Tex.* v. *FCC*, Chief Justice Roberts observed that the "Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." 569 U.S. 290, 320 (2013) (Roberts, C.J., dissenting). "This problem did not always exist. The Framers were concerned that a voluminous criminal code was a threat to liberty . . . ." Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 725 (2013). "There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes." *Id.* at 726.

Organizations of many stripes and philosophies agree that overcriminalization is a serious problem in America today. In 2014,

> the U.S. House of Representatives renewed the bipartisan task force it created to review the federal criminal code and the trend toward "over-criminalization;" groups who have testified in support of reform include the American Bar Association, the Heritage Foundation, . . . the Judicial Conference

> of the United States[,] and the Sentencing Commission.

United States v. *Valdovinos*, 760 F.3d 322, 339 (4th Cir. 2014).[2] And criminalization via regulation is one of the phenomenon's "core drivers." James R. Copland & Rafael A. Mangual, *Let's End Criminalization Without Representation*, Manhattan Institute (Jan. 14, 2017), https://tinyurl.com/2tzvefa4.

The number of "laws" through regulatory rulemaking has increased exponentially. Overcriminalization "has been particularly immense with regard to the twentieth century pursuit of 'regulatory crimes,' also known as malum prohibitum crimes . . . ." Larkin, *Public Choice Theory and Overcriminalization*, *supra*, at 728. The sheer amount of federal criminal regulations is impossible to follow. "If regulations enforceable in criminal prosecutions are included, the number of potentially relevant federal laws could exceed 300,000," *id.* at 729, far in excess of the already massive "3,300 congressionally enacted federal criminal statutes," *id.* at 728. Indeed, by one account, the Code of Federal Regulations now spans more than 180,000 pages. *Buffington* v. *McDonough*, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting from denial of certiorari). Each year, the agencies add between "three thousand to five thousand final rules." *West Virginia* v. *EPA*, 597 U.S.

---

[2] See also, *e.g.*, Tim Lynch, Cato Institute, *Cato Handbook for Policymakers* 193–199 (8th ed. 2017); James Copland & Rafael Mangual, *Overcriminalizing America*, Manhattan Institute, https://tinyurl.com/rxcdw2w7 (last visited Mar. 20, 2026); Charles G. Koch & Mark V. Holden, *The Overcriminalizaton of America*, Politico Magazine (Jan. 7, 2015), https://tinyurl.com/2s3jvmjb.

697, 741 n. 2 (2022) (Gorsuch, J., concurring) (quoting Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 Geo. Mason L. Rev. 683, 694 (2021)). Nearly "98 percent of the more than 300,000 crimes on America's books were never voted on by Congress." Copland & Mangual, *Overcriminalizing America*, *supra*.

Overcriminalization through agency rulemaking exponentially increases the risk that citizens will be subject to the "serious deprivations of liberty" that flow from "the consequences of criminal guilt," *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 551 (1971) (White, J., concurring)—and it does so without the ordinary checks the separation of powers and political accountability provide. Where the stakes are so high for so many, it is urgent to resolve whether Congress can criminalize the violation of a regulation and then delegate to an agency the power to determine what acts are actually criminal.

Criminalization through regulation at the whim of everchanging agency determinations

> "turn[s] the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon* v. *United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment). . . . [I]t [ ] allow[s] an agency to depart from its longstanding interpretation of a criminal law merely for policy reasons associated with a change in presidential administrations and merely by going through the notice-and-comment

> process. See *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005). Such a policy-laden expansion of the scope of prohibited conduct has no place in this criminal sphere. "[A] criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language." *M. Kraus & Bros., Inc.* v. *United States*, 327 U.S. 614, 626 (1946).

Gun Owners of Am., Inc. v. *Garland*, 19 F.4th 890, 923 (6th Cir. 2021) (en banc) (Murphy, J., dissenting) (citations cleaned up).

III. History illustrates that the Framers understood the distinction between filling up the details and lawmaking.

Many of the First Congress's acts appropriately imposed limits on executive discretion. See *Ilan Wurman, Nondelegation at the Founding*, 130 Yale L.J. 1490, 1540–1544 (2021) (examining early acts and concluding that they are consistent with nondelegation principles). For example, when the first Congress established military pensions, "Congress decided all the important subjects: that the disabled veterans shall be paid, and how much. The President then merely had to decide when the payments should be made—the statute required they be made within one year . . . —and what proofs would be necessary." *Id.* at 1540.

When Congress began delegating broad legislative authority, however, influential Founders voiced their concerns. For instance, in An Act Concerning Aliens, 1 Stat. 570 (1798), Congress empowered the President to order the deportation of "aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government." The act also granted the President the discretion to issue residence licenses, require bonds of indeterminate amounts, and revoke such licenses. *Id.*

Thomas Jefferson called the law "a most detestable thing" and was "glad" "that laws of the US. subsequent to a treaty, controul [sic] it's operation, and that the legislature is the only power which can controul [sic] a treaty." Letter From Thomas Jefferson to James Madison (May 31, 1798), *reprinted by* Nat'l Archives: Founders Online, https://tinyurl.com/48nzt9ud.

James Madison similarly responded and made clear that each of the powers granted by the act violated the nondelegation principle. Madison declared that

> [h]owever difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of

> an executive or judicial nature; and may for that reason be unconstitutional.

James Madison, *The Report of 1800* (Jan. 7, 1800), *reprinted by* Nat'l Archives: Founders Online, https://tinyurl.com/bdf3fz43. Madison then expounded on "details":

> Details, to a certain degree, are essential to the nature and character of a law; and, *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*. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.

Id. (emphasis added).

Madison pondered whether a power could be "well given in terms less definite, less particular, and less precise" than allowing the President to judge an alien "dangerous to the peace and safety of the United States," or to "suspect" that they "are concerned in any treasonable, or secret machinations" against the government. *Id.* For these terms are not "legal rules or

certain definitions. They leave every thing to the President. His will is the law." *Id.*

Madison concluded that the law not only gave legislative power to the President, but

> [h]e is to stand in the place of the judiciary also. His suspicion is the only evidence which is to convict: his order the only judgment which is to be executed. . . .
>
> It is rightly affirmed therefore, that the act [unconstitutionally] unites legislative and judicial powers to those of the executive.

Id.

At least two members of Congress expressed concerns about nondelegation when the act was debated. Wurman, *supra*, at 1513. Representative Williams stated that "it is inconsistent with the provisions of our Constitution, and our modes of jurisprudence, to transfer power in this manner." *Id.* at 1514. And Representative Livingston argued that "[l]egislative power prescribes the rule of action; the Judiciary applies that general rule to particular cases, and it is the province of the Executive to see that the laws are carried into full effect." *Id.* Livingston further contended that the act granted the President legislative power because it empowered the President alone "to make the law, to fix in his mind what acts, what words, what thoughts or looks, shall constitute the crime contemplated by the bill." 8 Annals of Cong. 1963 (1798). He concurred with Madison that the act

unconstitutionally vested the President with all three powers. See Wurman, *supra*, at 1514.

CONCLUSION

The Federal Land Policy and Management Act makes it a crime to "knowingly and willfully violate[ ] any . . . regulation" issued by the Secretary of the Interior under the Act. 43 U.S.C. § 1733(a). "These words are not literally gibberish, but they are so vacuous that any attempt to implement th[e] law would amount to creation of a new law." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002). By its terms, the Secretary—not Congress—determines what actions are criminal. The language "leaves so much undetermined that it would constitute an act of legislation to attribute any meaning to it." *Id.*

The nondelegation doctrine still plays an important role in determining whether an agency action is constitutional. Its role is more important than ever in the criminal context, and the Court should make clear that Congress must determine what act—in more detail than any violation of an agency regulation—is criminal.

Respectfully submitted,

David C. Tryon
Counsel of Record
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org