No. 20-1326

In the Supreme Court of the United States

REBECCA A. MORIELLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
JAVIER A. SINHA
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that 40 U.S.C. 1315(c)(1), which authorizes the Secretary of Homeland Security to "prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property[,] * * * includ[ing] reasonable penalties" within specified limitations, does not violate the nondelegation doctrine.

2. Whether the court of appeals correctly determined that neither 41 C.F.R. 102-74.385, which requires "[p]ersons in and on" government property to "comply with * * * the lawful direction of Federal police officers and other authorized individuals," nor 41 C.F.R. 102-74.390(c), which prohibits conduct on federal property that "impedes or disrupts the performance of official duties by Government employees," is unconstitutionally vague in the context of this case.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D.N.C.):

United States v. *Moriello*, 17-po-6 (July 17, 2018) (judgment entered by magistrate judge)

United States v. *Moriello*, No. 18-cr-187 (June 7, 2019) (judgment entered by district court on appeal of judgment of magistrate judge)

United States Court of Appeals (4th Cir.):

United States v. *Moriello*, No. 19-4464 (Nov. 18, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations, and rules:

In the Supreme Court of the United States

No. 20-1326

REBECCA A. MORIELLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a[1]) is reported at 980 F.3d 924. The order of the district court (Pet. App. 22a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2020 (Pet. App. 21a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of

[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the appendix as if it were consecutively paginated beginning with the first page of the court of appeals' opinion as 1a.

certiorari was filed on March 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial before a magistrate judge in the United States District Court for the Western District of North Carolina, petitioner was convicted on one count failing to comply with the lawful direction of an authorized individual while on property under the authority of the General Services Administration (GSA), in violation of 41 C.F.R. 102-74.365, 102-74.385, and 102-74.450, and one count of impeding and disrupting the performance of official duties by government employees while on property under the authority of the GSA, in violation of 41 C.F.R. 102-74.365, 102-74.390, and 102-74.450. Pet. App. 22a-23a, 54a. Petitioner was sentenced to pay a $2500 fine and a $10 assessment. *Id.* at 23a, 54a. The district court affirmed the judgment of the magistrate judge. *Id.* at 22a-53a. The court of appeals affirmed. *Id.* at 1a-21a.

1. Petitioner is an immigration attorney in Charlotte, North Carolina, who represented clients in the immigration court there. Pet. App. 2a; C.A. App. 252-253. The Charlotte immigration court is a federal facility of the Executive Office of Immigration Review (EOIR) within the United States Department of Justice, on property managed by the GSA. C.A. App. 252-253.

At relevant times, a placard posted in a common area near the entrance of the immigration court notified visitors that the facility was governed by federal regulations. Pet. App. 2a; see C.A. App. 175-177. The text of the regulations was set forth on the placard. C.A. App. 329. Among those regulations were 41 C.F.R. 102-74.385 and 102-74.390. Section 102-74.385 provides:

> **§ 102-74.385 What is the policy concerning conformity with official signs and directions?**
>
> Persons in and on property must at all times comply with official signs of a prohibitory, regulatory or directory nature and with the lawful direction of Federal police officers and other authorized individuals.

41 C.F.R. 102-74.385. Section 102-74.390 provides:

> **§ 102-74.390 What is the policy concerning disturbances?**
>
> All persons entering in or on Federal property are prohibited from loitering, exhibiting disorderly conduct or exhibiting other conduct on property that—
>
> (a) Creates loud or unusual noise or a nuisance;
>
> (b) Unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots;
>
> (c) Otherwise impedes or disrupts the performance of official duties by Government employees; or
>
> (d) Prevents the general public from obtaining the administrative services provided on the property in a timely manner.

41 C.F.R. 102-74.390; see C.A. App. 329. In addition, a sign posted outside the courtroom stated: "Persons in EOIR space must turn off their electronic devices (e.g., smartphone, laptop). For clear and immediate business purposes only, attorneys and other representatives are exempt from this rule and may use electronic devices in EOIR space." C.A. App. 327; see Pet. App. 27a n.1.

2. On June 29, 2017, after attending a hearing in the immigration court on behalf of one of her clients, petitioner observed another, unrelated asylum hearing in a case in which she was not involved. Pet. App. 2a-3a, 25a. Because asylum proceedings are typically private and confidential, the courtroom was closed for the hearing. *Id.* at 25a (citing 8 C.F.R. 208.6(a) and (b)). The immigration judge (IJ) presiding over the hearing saw petitioner in the gallery and inquired of the asylum seeker's counsel as to why petitioner was there. *Ibid.* The asylum seeker's counsel explained that he had given petitioner permission to observe the hearing at her request, to "see what she could learn." C.A. App. 214; see Pet. App. 25a. After the IJ explained that only the asylum-seeker herself could consent to petitioner's presence, counsel obtained the asylum-seeker's permission, and the hearing proceeded. Pet. App. 25a.

Protective Security Officer (PSO) Pinar Bridges was on duty as the uniformed bailiff in the courtroom. Pet. App. 3a; C.A. App. 190-191. PSOs at EOIR facilities are independent contractors supervised by the Federal Protective Service (FPS) within the Department of Homeland Security (DHS), which is responsible for security in facilities managed by the GSA. Pet. App. 3a; C.A. App. 165-166. "PSOs 'have the power to detain' people, 'conduct administrative searches, put people on notice,' 'enforce the Federal Management Regulations' at the facility, and otherwise carry out all the functions of FPS officers other than 'making a full blown arrest.'" Pet. App. 3a (quoting C.A. App. 168-169) (brackets omitted). PSOs wear uniforms—including badges, shoulder patches, and identification cards indicating their "affiliat[ion] with a DHS contract"—and carry guns. C.A. App. 169.

During the asylum hearing, PSO Bridges observed petitioner typing on her cell phone in the courtroom gallery. Pet. App. 3a. PSO Bridges was aware of the Charlotte immigration court's policy to permit attorneys to use mobile devices in the courtroom only for business purposes. C.A. App. 195. She also knew that petitioner was not representing any party in the asylum proceeding and that petitioner maintained an office in the same building as the immigration court, and PSO Bridges assumed that petitioner had no immediate business in the courtroom. See Pet. App. 3a; C.A. App. 194-195, 203. PSO Bridges approached petitioner and asked her to turn off her cell phone while in the courtroom. Pet. App. 3a; C.A. App. 194-195. Petitioner refused, stating that it was "'her right' to use the phone for business purposes." Pet. App. 4a (quoting C.A. App. 196). PSO Bridges then returned to her usual station, standing next to the bench where the IJ sat. C.A. App. 196.

The IJ, though unaware of the exchange between PSO Bridges and petitioner, had also observed petitioner typing on her phone "at chest-level, easily visible to others in the courtroom." Pet. App. 4a. The IJ recounted that

> [petitioner] had specifically asked for permission to come into a private confidential asylum hearing which is very rarely allowed. And I assumed it was so that she could learn something from it. The entire time that [petitioner] was sitting in my courtroom I did not see her paying attention to what was going on with the attorney or with the witness. She was pretty much non-stop glued to her cell phone and she was texting away, and I found it to be very distracting. I also found it to be very disrespectful given that she had asked for permission to sit in on this very sensitive matter, and she was not paying attention.

Ibid. (quoting C.A. App. 216-217). The IJ "went off the record to direct PSO Bridges to tell [petitioner] to stop using her phone." *Ibid.* PSO Bridges approached petitioner again to relay the IJ's request, but petitioner "again refused" and "'became argumentative,' telling PSO Bridges that she was using her phone for business purposes and that she c[ould] 'do whatever she wants.'" *Ibid.* (citation omitted); see C.A. App. 196-197.

While the hearing continued, PSO Bridges spoke "with [petitioner] for 'some considerable period of time.'" Pet. App. 4a (quoting C.A. App. 218). At one point, petitioner "st[ood] up and move[d] to the back of the courtroom as PSO Bridges continued to try to get her to either stop using her phone or leave the courtroom." *Id.* at 4a-5a. Eventually, PSO Bridges enlisted a second PSO to assist, but the "two PSOs together were unable to convince [petitioner] to either stop using her phone or leave." *Ibid.* PSO Bridges ultimately called local police. *Ibid.*

The IJ found petitioner's conduct "very distracting" and "disturbing," C.A. App. 216, 222, and "found the exchange to be 'very disruptive visually,'" Pet. App. 5a (quoting C.A. App. 218). The IJ eventually ordered a recess in the asylum hearing "because [he] could see that it had escalated into a more serious situation." *Ibid.* (quoting C.A. App. 219) (brackets in original). During the recess, the local police arrived, and both they and PSO Bridges repeated to petitioner the IJ's instruction to cease using her cell phone in the courtroom. *Ibid.* When petitioner again refused, the local police officers escorted petitioner from the courtroom. *Ibid.* Petitioner asserted to the police officers that the IJ could not "tell her what to do" and that it was "her right" to use her phone. *Ibid.* (quoting C.A. App. 198). Two FPS officers arrived and issued petitioner a citation for violating Section 102-74.385. *Ibid.*

3. The government offered to resolve the citation without an admission of guilt, with a civil fine of "as little as $300." Pet. App. 5a; see C.A. App. 301-302. Petitioner declined the offer, requested a criminal trial, and moved to dismiss the citation. Pet. App. 5a-6a.

The government thereafter filed a superseding bill of information charging petitioner with one count of failing to comply with the lawful direction of an authorized individual while on property under the authority of the GSA, in violation of 41 C.F.R. 102-74.365, 102-74.385, and 102-74.450, and one count of impeding and disrupting the performance of official duties by government employees while on property under the authority of the GSA, in violation of 41 C.F.R. 102-74.365, 102-74.390, and 102-74.450. Pet. App. 56a-57a; see Fed. R. Crim. P. 58(b)(1). Both offenses are class C misdemeanors and petty offenses with a maximum term of imprisonment of 30 days and a maximum fine of $5000. See 18 U.S.C. 19, 3559(a)(8), 3571(b)(6); 40 U.S.C. 1315(c)(2); 41 C.F.R. 102-74.450.

Petitioner's case was assigned to a magistrate judge. Pet. App. 6a. She moved to dismiss both counts of the information, asserting (as relevant here) that the regulations under which she was charged were promulgated pursuant to an unconstitutional delegation of legislative authority and are unconstitutionally vague. C.A. App. 33-40. The magistrate judge denied the motion. *Id.* at 128. Following a bench trial, the magistrate judge found petitioner guilty on both counts. Pet. App. 6a, 54a. Petitioner was sentenced to pay a $2500 fine and a $10 assessment. *Ibid.*

Petitioner appealed to the district court, see Fed. R. Crim. P. 58(g)(2), which affirmed. Pet. App. 22a-53a. As relevant here, the court rejected petitioner's nondelegation and vagueness challenges to both regulations that she was convicted of violating. *Id.* at 43a-47a.

4. The court of appeals affirmed. Pet. App. 1a-20a.

The court of appeals rejected petitioner's contention that Sections 102-74.385 and 102-74.390 were promulgated in violation of the nondelegation doctrine. Pet. App. 10a-13a. The court observed that, under this Court's precedent, a "statutory delegation is constitutional as long as Congress 'lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Id.* at 10a (quoting *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion), in turn quoting *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989)) (brackets omitted). The court of appeals noted that it was unclear whether "more specific guidance" may be required where "Congress delegates authority to enact criminal rules." *Ibid.* (citing *Touby* v. *United States*, 500 U.S. 160, 165-166 (1991)). It found, however, that "[e]ven assuming a higher standard exists for regulations imposing criminal penalties," the regulations here were permissible. *Id.* at 12a.

The court of appeals stated that the regulations at issue here had been promulgated under 40 U.S.C. 1315. Pet. App. 11a. That provision authorizes the Secretary of Homeland Security, "in consultation with the Administrator of General Services," to "prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property." 40 U.S.C. 1315(c)(1). It further states that "[t]he regulations may include reasonable penalties, within the limits prescribed in paragraph (2), for violations of the regulations," and that they "shall be posted and remain posted in a conspicuous place on the property." *Ibid.* The cross-referenced paragraph (2) states that "[a] person violating a regulation

prescribed under [Section 1315(c)] shall be fined under title 18, United States Code, imprisoned for not more than 30 days, or both." 40 U.S.C. 1315(c)(2).

The court of appeals observed that it had previously rejected nondelegation challenges to "§ 1315's predecessor statute," which had authorized the GSA to "'make all needful rules and regulations for the government of the property under its charge and control.'" Pet. App. 11a-12a (quoting 40 U.S.C. 318a (2000)) (brackets omitted); see *id.* at 11a (citing *United States* v. *Crowthers*, 456 F.2d 1074, 1077 (4th Cir. 1972), and *United States* v. *Cassiagnol*, 420 F.2d 868, 876 (4th Cir.), cert. denied, 397 U.S. 1044 (1970)). The court recounted that, in upholding Section 1315's precursor in *Cassiagnol*, it had recognized that "it is reasonable and constitutional to delegate to the agency charged with maintenance and protection of government property the right to fix . . . minimum acceptable conduct thereon, and to provide for the punishment of those violating such regulations." *Id.* at 11a (quoting *Cassiagnol*, 420 F.2d at 876-877) (brackets omitted). The court explained that "such authority necessarily had to be somewhat general in nature due to the vast number and great variety of properties entrusted to the charge and control of GSA," and "to require Congress specifically to enumerate GSA's duties would be to require the impractical, if not the impossible." *Ibid.* (quoting *Cassiagnol*, 420 F.2d at 876) (brackets omitted). And the court found that "the modern iteration of the delegating authority" in current Section 1315 "provides an even narrower delegation than" its precursor by "specif[ying] that the rules must be 'for the protection and administration of property owned or occupied by the Federal Government and persons on the property.'" *Id.* at 12a (quoting 40 U.S.C. 1315(c)(1)).

The court of appeals also rejected petitioner's contention that Sections 102-74.385 and 102-74.390 are unconstitutionally vague. Pet. App. 8a-10a. The court noted that, "[u]nder the vagueness doctrine, a criminal statute must 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* at 8a (citation omitted). The court further observed that, outside the First Amendment context, "[v]agueness challenges * * * must be examined in the light of the facts of the case at hand," *ibid.* (quoting *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975)), and accordingly "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," *ibid.* (quoting *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). The court found petitioner's reliance on cases involving "facial vagueness and overbreadth * * * in the First Amendment context" to be misplaced. *Id.* at 9a.

Here, the court of appeals determined that "any person of ordinary intelligence would understand that the regulations prohibit the repeated refusal to cease distracting conduct in a courtroom during ongoing immigration proceedings as directed by both the presiding [IJ] and the uniformed bailiff assigned to that courtroom." Pet. App. 9a. "Indeed," the court observed, petitioner's "behavior was so disruptive as to prompt [the IJ] to call a recess and PSO Bridges to seek assistance from one additional PSO and two additional [local-police] officers to remove [petitioner] from the courtroom." *Ibid.*

ARGUMENT

Petitioner renews her contentions (Pet. 8-20) that the regulations she was convicted of violating, 41 C.F.R. 102-74.385 and 102-74.390, were promulgated pursuant to an unconstitutional delegation of legislative authority and are unconstitutionally vague. The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that Sections 102-74.385 and 102-74.390 were not promulgated pursuant to an unconstitutional delegation of legislative authority. Pet. App. 10a-13a. That decision accords with this Court's precedent and does not warrant review.

a. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. The Court has explained that "[t]his text permits no delegation of those powers." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). It "ha[s] recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). The Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality . . . to perform its function." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944) (citation omitted).

The Court "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *American Trucking*, 531 U.S. at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). And it has recognized that "Congress is not

confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus*, 321 U.S. at 425-426. Instead, the "extent and character of [the] assistance" that Congress may seek from another Branch in a particular context "must be fixed according to common sense and the inherent necessities of the governmental co-ordination" at issue, *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)—matters that Congress is typically best positioned to assess. See *Mistretta*, 488 U.S. at 372; see also *id.* at 416 (Scalia, J., dissenting).

The Court has accordingly held that Congress may confer discretion on the Executive to implement and enforce the laws so long as it supplies an "intelligible principle" defining the limits of that discretion. *Mistretta*, 488 U.S. at 372 (quoting *J. W. Hampton*, 276 U.S. at 409). The Court has further clarified that the vesting of authority in an Executive Branch official is "constitutionally sufficient" under that intelligible-principle standard "if Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of th[e] delegated authority." *Id.* at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). In determining whether a statute supplies an intelligible principle, a court should consider the "'words of a statute * * * in their context and with a view to their place in the overall statutory scheme,'" and may "look[] to 'history and purpose' to divine the meaning of language." *Gundy* v. *United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion) (brackets and citations omitted).

Consistent with those principles, the Court has upheld against a nondelegation challenge nearly every statutory provision it has confronted. "From the beginning of the Government," Congress has enacted, and the Court has

upheld, statutes "conferring upon executive officers power to make rules and regulations * * * for administering the laws which did govern." *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911). For example, early Congresses enacted a series of statutes that conferred on the President the power to impose or lift trade sanctions and tariffs. *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 683-689 (1892). The Court rejected a nondelegation challenge to one such statute in 1813, see *The Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382, 388 (1813), and again in 1892, see *Marshall Field*, 143 U.S. at 681-694. And in the 90 years since the Court articulated the "intelligible principle" standard, it has similarly upheld numerous statutes against nondelegation challenges.[2]

---

[2] See, *e.g.*, *Gundy*, 139 S. Ct. at 2128-2130 (plurality opinion) (authority to specify how sex-offender registration statute applies to individuals who committed sex offenses prior to the statute's enactment); *id.* at 2130-2131 (Alito, J., concurring in the judgment); *American Trucking,* 531 U.S. at 472-476 (authority to set nationwide air-quality standards limiting pollution); *Loving* v. *United States*, 517 U.S. 748, 771-774 (1996) (authority to set aggravating factors for death penalty in courts martial); *Touby* v. *United States*, 500 U.S. 160, 165-167 (1991) (authority to temporarily designate controlled substances); *Mistretta*, 488 U.S. at 374-377 (Sentencing Guidelines); *Lichter* v. *United States*, 334 U.S. 742, 785-786 (1948) (authority to set standards for recovery of excessive profits from military contractors); *Fahey* v. *Mallonee*, 332 U.S. 245, 247, 249-250 (1947) (authority to set rules for reorganization, etc., of savings-and-loan associations); *American Power & Light*, 329 U.S. at 105 (authority to set standards for prevention of unfair or inequitable distribution of voting power among security holders); *Yakus*, 321 U.S. at 425-427 (authority to set commodity prices); *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (authority to set natural-gas wholesale prices); *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (authority to set standards for broadcast licensing); *J. W. Hampton*, 276 U.S. at 407-411 (authority to set tariffs).

In the Nation's history, the Court has viewed only two statutes as exceeding Congress's authority on non-delegation grounds. *American Trucking*, 531 U.S. at 474 (discussing *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935)). In 1935, the Court concluded that two provisions of the National Industrial Recovery Act, ch. 90, 48 Stat. 195—enacted in response to the Great Depression—contained "excessive delegations" because Congress "failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 & n.7 (emphasis added). The Court held those provisions invalid because "one * * * provided literally no guidance for the exercise of discretion, and the other * * * conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *American Trucking*, 531 U.S. at 474. Since 1935, the Court has "upheld, again without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373.

b. Petitioner contends (Pet. 8-13) that Sections 102-74.385 and 102-74.390 were promulgated pursuant to an unconstitutional delegation of legislative authority. That contention lacks merit.

Sections 102-74.385 and 102-74.390 were promulgated by the GSA in 2002, invoking its general rulemaking authority under 40 U.S.C. 486(c) (2000), since recodified at 40 U.S.C. 121(c). See 67 Fed. Reg. 76,820, 76,838 (Dec. 13, 2002); 70 Fed. Reg. 67,786, 67,806 (Nov. 8, 2005) (reissuing with immaterial alterations); see also Act of Aug. 21, 2002 (2002 Act), Pub. L. No. 107-217, § 1, 116 Stat. 1068 (40 U.S.C. 121(c)); § 6(b), 116 Stat. 1313,

1316 (repealing 40 U.S.C. 486 (2000)). Section 121(c) authorizes the GSA to "prescribe regulations to carry out" Subtitle I of Title 40, governing federal property and administrative services, and directs the GSA to "prescribe regulations that [the GSA] considers necessary to carry out [its] functions under th[at] subtitle." 40 U.S.C. 121(c). Petitioner does not contend that Section 121(c) violates the nondelegation doctrine.

Instead, the parties and lower courts have focused on rulemaking authority conferred by 40 U.S.C. 1315. *E.g.*, Pet. 10, 12; Pet. App. 11a-13a. Precursors of 41 C.F.R. 102-74.385 and 102-74.390 were promulgated by the GSA pursuant to a predecessor of Section 1315, then codified at 40 U.S.C. 318-318a (Supp. II 1948). See 18 Fed. Reg. 8607, 8621 (Dec. 22, 1953) (44 C.F.R. 100.4-100.5 (1954)); see also *United States* v. *Cassiagnol*, 420 F.2d 868, 872-876 & nn.3-4 (4th Cir.), cert. denied, 397 U.S. 1044 (1970)); 2002 Act §§ 1, 6(b), 116 Stat. 1140-1141, 1312, 1323. When Congress established DHS in 2002, it transferred FPS, and the GSA's functions relating to FPS, to DHS. Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. IV, Subtit. A, § 403, 116 Stat. 2178. In the same enactment, Congress amended Section 1315 to its current form, conferring on DHS responsibility to protect certain federal property. See Tit. XVII, § 1706(b)(1), 116 Stat. 2316-2318; see also Tit. XV, Subtit. B, § 1512(d), 116 Stat. 2310-2311 (6 U.S.C. 552(d)) (facilitating transfer of certain authority from the GSA to DHS, and "deem[ing]" "[r]eferences relating to * * * delegations of authority that precede such transfer" to DHS, its components, or officials, as appropriate); *United States* v. *Baldwin*, 745 F.3d 1027, 1030 (10th Cir. 2014) (Gorsuch, J.) (noting history).

Current Section 1315 directs DHS, "[t]o the extent provided for by transfers made pursuant to the Homeland Security Act of 2002," to "protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government (including any agency, instrumentality, or wholly owned or mixed-ownership corporation thereof) and the persons on the property." 40 U.S.C. 1315(a). To that end, Section 1315(c)(1) authorizes "[t]he Secretary" of DHS, "in consultation with the Administrator of General Services," to "prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property." 40 U.S.C. 1315(c)(1). Section 1315(c)(1) specifies that "[t]he regulations may include reasonable penalties, within the limits prescribed in paragraph (2), for violations of the regulations," and that they "shall be posted and remain posted in a conspicuous place on the property." *Ibid.* Paragraph (2) states that "[a] person violating a regulation prescribed under this subsection shall be fined under title 18, United States Code, imprisoned for not more than 30 days, or both." 40 U.S.C. 1315(c)(2).

The court of appeals correctly rejected petitioner's contention (Pet. 10-13) that Section 1315(c)(1) is an impermissible delegation of legislative authority. Pet. App. 10a-13a. As discussed above, this Court has made clear that a statutory delegation of authority is "constitutionally sufficient if Congress clearly delineates" (1) "the general policy" to be pursued, (2) "the public agency which is to apply it," and (3) "the boundaries of th[e] delegated authority." *American Power & Light*, 329 U.S. at 105. Petitioner does not appear to dispute that Section 1315(c)(1) satisfies the second and third requirements. Section 1315 unquestionably identifies "the

public agency which is to apply" the federal policy, *ibid.*, by expressly vesting authority in "[t]he Secretary [of Homeland Security], in consultation with the Administrator of General Services," to promulgate regulations. 40 U.S.C. 1315(c)(1). Congress also "clearly delineate[d] * * * the boundaries of th[e] delegated authority," *American Power & Light*, 329 U.S. at 105, by authorizing regulations "necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property," 40 U.S.C. 1315(c)(1); see *Baldwin*, 745 F.3d at 1029. Congress additionally confined any penalties that such regulations may impose for violations to fines of no more than $5000 and imprisonment of no more than 30 days. See 42 U.S.C. 1315(c)(2); see also 18 U.S.C. 3559(a)(8), 3571(b)(6).

Petitioner appears to dispute (Pet. 9-10) only the first requirement that the statute identify the "general policy" that agency should pursue. *American Power & Light*, 329 U.S. at 105. The text of Section 1315(c)(1), however, makes clear Congress's policy of taking steps that are "necessary for the protection and administration of" federal property and persons on it. 40 U.S.C. 1315(c)(1). That policy is even clearer considering the "context" of those words "with a view to their place in the overall statutory scheme." *Gundy*, 139 S. Ct. at 2126 (plurality opinion) (citation omitted). The conferral of rulemaking authority in Section 1315(c)(1) is in service of DHS's duty under Section 1315(a) to "protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government * * * and the persons on the property." 40 U.S.C. 1315(a). Section 1315's identification of the applicable general policy is thus just as specific as—if not even more specific than—

other delegations that the Court has upheld, such as authority to license radio broadcasters as the "public interest, convenience, or necessity" requires, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943); to set "just and reasonable" rates for natural gas, *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); and to establish commodity prices that would be "fair and equitable," *Yakus*, 321 U.S. at 427; see *Avent* v. *United States*, 266 U.S. 127, 130 (1924) (Holmes, J.) (determining that a statute authorizing emergency rules for railroad-equipment shortages that are "reasonable and in the interest of the public and of commerce fixe[d] the only standard that is practicable or needed").[3]

c. Three additional considerations confirm that Congress supplied sufficient direction to the agency in promulgating regulations under Section 1315. First, this Court has recognized that "[t]he general Government * * * has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976). In that context in particular, Congress's determination regarding the appropriate degree of discretion to confer on an agency it has

---

[3] To the extent that petitioner contends (Pet. 10-11) that Sections 102-74.385 and 102-74.390 themselves "violate the Constitution" by exceeding the authority conferred by Section 1315(c)(1), that contention lacks merit and does not warrant further review. Apart from a cursory assertion that the regulations "exceed what is necessary for the 'protection and administration' of property" by purportedly "criminalizing nuisances and slight disruptions" Pet. 10 (quoting 40 U.S.C. 1315(c)(1)), petitioner does not attempt to show that the regulations rest on an erroneous (much less an unreasonable) interpretation of the statute.

tasked with implementing a statutory scheme warrants deference.

Second, Section 1315(c)(1) confers only limited authority, as to which Congress need not provide as much detail as might be necessary for much broader authority. "[T]he degree of agency discretion that is acceptable varies according to the scope of the power" delegated. *American Trucking*, 531 U.S. at 475. Indeed, when Congress confers narrow authority, it "need not provide any direction." *Ibid.* Section 1315(c)(1)'s limited grant of authority to prescribe rules necessary to protect and administer federal property does not necessitate granular instructions.

Third, although the scope of authority that Section 1315 confers is limited, the nature and circumstances of each federal property the agencies are charged with protecting vary considerably. As the court of appeals observed, the authority Congress conferred to establish regulations governing those diverse properties "necessarily had to be somewhat general in nature due to the vast number and great variety of properties," and "to require Congress specifically to enumerate GSA's duties would be to require the impractical, if not the impossible." Pet. App. 11a (quoting *Cassiagnol*, 420 F.2d at 876) (brackets omitted).

d. Petitioner does not appear to contend that the decision below conflicts with any decision of this Court. She also does not contend that the court of appeals' rejection of her nondelegation challenge conflicts with a decision of any other circuit. Cf. *Baldwin*, 745 F.3d at 1031 (noting issue but reserving judgment). Further review is not warranted.

2. Petitioner separately contends (Pet. 15-20) that Sections 102-74.385 and 102-74.390 are unconstitutionally vague. The court of appeals correctly rejected that contention. Pet. App. 8a-10a.

a. The Due Process Clause bars enforcement of a criminal statute on vagueness grounds only if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *Johnson* v. *United States*, 576 U.S. 591, 595-596 (2015). Regulations that carry criminal sanctions must likewise "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); see *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340-341 (1952).

A statute or regulation is not void for vagueness simply because its applicability is unclear at the margins, *Williams*, 553 U.S. at 306, or because a reasonable jurist might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling* v. *United States*, 561 U.S. 358, 403 (2010). Rather, a provision is impermissibly vague only if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. *Williams*, 553 U.S. at 306; see *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974). The "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997).

In addition, as the court of appeals recognized, because petitioner does not challenge the regulations at issue on First Amendment grounds, she cannot prevail

in her vagueness challenge to the regulations simply by positing hypothetical situations may exist in which the regulations would be ambiguous. Pet. App. 9a. Instead, under this Court's precedent, she could succeed only by demonstrating that the regulations failed to provide clear warning that her own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * * , so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

The court of appeals correctly determined that petitioner did not make that showing in the circumstances of this case. Pet. App. 9a. Section 102-74.385 requires persons on federal property to "comply with * * * the lawful direction of [an] authorized individual[]," 41 C.F.R. 102-74.385, and Section 102-74.390(c) prohibits (among other things) "exhibiting disorderly conduct or exhibiting other conduct on [federal] property that * * * [o]therwise impedes or disrupts the performance of official duties by Government employees," 41 C.F.R. 102-74.390(c). The evidence at trial evidence showed that petitioner ignored instructions from both PSO Bridges and the IJ (conveyed through the PSO) in refusing to turn off her phone while in the courtroom. C.A. App. 194-199, 215-216, 219. Her repeated refusals to comply and the resulting exchanges created a disruption that required the IJ to interrupt the asylum proceedings twice—the second time adjourning the pro-

ceedings and leaving the bench. *Id.* at 196, 215-216, 219. As the court of appeals found, "any person of ordinary intelligence would understand that the regulations prohibit the repeated refusal to cease distracting conduct in a courtroom during ongoing immigration proceedings as directed by both the presiding immigration judge and the uniformed bailiff assigned to that courtroom." Pet. App. 9a.

b. Petitioner contends (Pet. 17) that the court of appeals erred in analyzing her vagueness claim "under an 'as applied' analysis." That contention lacks merit.

This Court has explained that the appropriate general practice is to "consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (quoting *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-611 (1973) (collecting cases). "This means, of course, that a litigant challenging the statute ordinarily must show that it is vague as applied to him; and if the statute undoubtedly applies to his conduct, he will not be heard to argue that the statute is vague as to one or more hypothetical scenarios." *United States* v. *Cook*, 970 F.3d 866, 873 (7th Cir. 2020); see pp. 20-21, *supra*.

Contrary to petitioner's claim (Pet. 17), this Court's decision in *Johnson* v. *United States*, *supra*, did not abrogate the traditional rule that a vagueness challenge (outside the First Amendment context) must be evaluated as to the challenged provision's application to the facts of the particular case. In *Johnson*, this Court held

that the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), was impermissibly vague without requiring the defendant to first show that the clause was vague as applied to him. See 576 U.S. at 595-606. But that clause presented unique vagueness concerns not implicated here.

The ACCA specifies an enhanced sentence of 15 years to life imprisonment for a defendant convicted of a firearms offense if the defendant has three or more prior convictions for either a "serious drug offense" or a "violent felony," and it defines "violent felony" to include a crime punishable by a year or more in prison that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court had previously construed that provision to require a categorical approach, which looks to the generic version of an offense in deciding whether a defendant's prior conviction qualified as a violent felony. See *Taylor* v. *United States*, 495 U.S. 575, 602 (1990). The statute in *Johnson* required a court to apply the qualitative standard of "'serious potential risk of physical injury'" "to an idealized ordinary case of the crime." 576 U.S. at 593, 604 (quoting 18 U.S.C. 924(e)(2)(B)(ii)). But because the Court perceived "uncertainty about how much risk it takes for a crime to qualify as a violent felony," and "because 'the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect,'" the Court concluded that the residual clause "offer[ed] significantly less predictability than one 'that deals with the actual, not with an imaginary condition other than the facts.'" *Id.* at 598, 604 (brackets and citation omitted).

The regulations that petitioner challenges present none of the issues that concerned the Court in *Johnson*.

The regulations do not gauge the riskiness of conduct by comparison to hypothetical facts of an idealized case or call for courts to engage in any abstract analysis. They simply call for courts to apply the regulatory prohibition to a defendant's own real-world conduct. Cf. *United States* v. *Davis*, 139 S. Ct. 2319, 2327 (2019) ("[A] case-specific approach would avoid the vagueness problems that doomed the statute[] in *Johnson*."). And unlike "the ACCA's residual clause, there is no judicial history of courts struggling to appreciate what particular conduct Congress meant to reach * * * or to apply the [regulatory] terms to varying sets of facts." *Cook*, 970 F.3d at 877. Petitioner identifies no sound basis for departing from the traditional as-applied approach in evaluating her vagueness challenge here.

c. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals addressing a similar vagueness challenge to Sections 102-74.385 and 102-74.390.[4]

Petitioner cites (Pet. 18) then-Judge Gorsuch's opinion for the Tenth Circuit in *United States* v. *Baldwin*, *supra*. But that decision rejected an as-applied vagueness challenge to the regulations. 745 F.3d at 1031-1032. The Tenth Circuit declined to consider the defendant's arguments based on hypothetical applications of the

---

[4] In *United States* v. *Estrada-Iglesias*, 425 F. Supp. 3d 1265 (D. Nev. 2019), a magistrate judge found Section 102-74.390 vague as applied to a defendant's conduct that included refusing to show his identification upon entering a courthouse when asked to do so, recording video with his phone inside the courthouse, attempting to block the courthouse entrance to prevent officers from removing him, making a profane gesture and yelling a profanity at officers, and resisting arrest. *Id.* at 1272-1274. On appeal, however, the district court reversed that ruling. See *United States* v. *Estrada-Iglesias*, No. 19-cv-2076, 2020 WL 6471012 (D. Nev. Nov. 2, 2020).

regulations to other facts, emphasizing that a defendant "may complain *only* about the vagueness of the law as it applies in *his own* case," and that under this Court's precedent "the relevant question in void for vagueness challenges is merely whether the defendant * * * 'had fair notice from the language' of the law 'that the particular conduct which he engaged in was punishable.'" *Id.* at 1031 (citation omitted). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
NICHOLAS L. MCQUAID
Acting Assistant Attorney General
JAVIER A. SINHA
Attorney

JULY 2021