No. 20-1595

In the Supreme Court of the United States

NAUM MORGOVSKY AND IRINA MORGOVSKY,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that 22 U.S.C. 2778 does not violate the nondelegation doctrine.

2. Whether the court of appeals correctly determined that the instruction in the Federal Rules of Criminal Procedure that, "if the [defendant] shows good cause," "a court may consider" an "untimely" challenge to an indictment for "failure to state an offense," Fed. R. Crim. P. 12(b)(3)(B)(v) and (c)(3), does not permit appellate review of the merits of such a motion if the defendant cannot show good cause.

3. Whether the court of appeals correctly determined that a defendant who expressly waived her right to appeal her conviction as part of a plea agreement may not raise a statutory claim on appeal contesting the validity or scope of the statute under which she was convicted.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not reported in the Federal Reporter but is reprinted at 827 Fed. Appx. 701.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2020. A petition for rehearing was denied on December 14, 2020 (Pet. App. 11-12). 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 certiorari was filed on May 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the Northern District of California, petitioners were convicted of conspiring to export defense articles without a license, in violation of 22 U.S.C. 2778(b)(2) and (c). Pet. App. 13-14, 29-30; see Superseding Indictment 9-10. Petitioner Naum Morgovsky was additionally convicted on two counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) and (2)(A). Pet. App. 29-30; see Superseding Indictment 10-11. The district court sentenced him to 108 months of imprisonment, to be followed by three years of supervised release. Pet. App. 32, 34. The district court sentenced petitioner Irina Morgovsky to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 15, 17. The court of appeals affirmed. *Id.* at 1-10.

1. The Arms Export Control Act (AECA), 22 U.S.C. 2751 *et seq.*, authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States," to "control the import and the export of defense articles and defense services" and "to promulgate regulations for the import and export of such articles and services." 22 U.S.C. 2778(a)(1). The AECA further authorizes the President to "designate those items which shall be considered as defense articles and defense services" for this purpose, by placing them on the "United States Munitions List." *Ibid.* And it generally prohibits "export[ing] or import[ing]" such "defense articles or defense services designated by the President * * * without a license for such export or import, issued in accordance with [the AECA] and regulations issued under" it. 22 U.S.C. 2778(b)(2). The AECA directs that

> [d]ecisions on issuing export licenses * * * shall take into account whether the export of an article would

> contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.

22 U.S.C. 2778(a)(2). Section 2778(c) provides in relevant part that "[a]ny person who willfully violates any provision of this section * * * or any rule or regulation issued under this section * * * shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than 20 years, or both." 22 U.S.C. 2778(c).

The President has delegated to the Secretary of State (with the concurrence of the Secretary of Defense) his authority under the AECA to designate covered defense articles and defense services and to issue regulations regarding exportation of such articles and services. See Exec. Order No. 13,637, § 1(n)(i), 3 C.F.R. 225 (2014); Exec. Order No. 11,958, § 1(*l*)(1), 3 C.F.R. 80 (1978). Exercising that authority, the Department of State has promulgated the International Traffic in Arms Regulations (Arms Regulations), 22 C.F.R. Pts. 120-130, which set out the Munitions List. The Munitions List includes a wide range of military items that constitute defense articles, such as missiles, warships, tanks, bombers, and fighter planes, as well as firearms and certain firearm components, among many others. 22 C.F.R. 121.1.

The Arms Regulations also specify various forms of unlawful conduct under the AECA. 22 C.F.R. Pt. 127. Among other "[v]iolations," the Arms Regulations provide that "it is unlawful" for a person, "[w]ithout first obtaining the required license or other" requisite government approval, "[t]o export or attempt to export from the United States any defense article * * * for which a

license or written approval is required"; "[t]o import or attempt to import any defense article whenever a license is required"; or "[t]o conspire to export, import, * * * or cause to be exported [or] imported * * * any defense article * * * for which a license or written approval is required." 22 C.F.R. 127.1(a)(1), (3), and (4) (emphasis omitted).

2. Petitioners are a husband and wife who conducted a multiyear, multimillion-dollar international scheme to export defense articles without a license and to launder the proceeds of those activities. See Gov't C.A. Br. 5-10. Petitioners used corporations that they controlled to purchase in the United States more than 1000 defense articles, including thermal and night-vision equipment and rifle scopes, which they sold to a company located in Russia without obtaining a license from the Department of State. *Id.* at 5-6. Although petitioners repeatedly provided written assurances to the U.S.-based sellers that petitioners knew the items were subject to export restrictions and that the items would not leave the United States, petitioners sold the items through businesses in Russia. *Id.* at 6.

To conceal their scheme, petitioners used false identities, fake invoices and email accounts, numerous post-office boxes and shell companies, and convoluted, multi-person shipping routes involving multiple countries. Gov't C.A. Br. 6. Between 2007 and 2016, petitioners received approximately $10 million in international wire transfers, the majority of which came from shell companies purportedly located in Latvia, Estonia, Hungary, and the Seychelles. *Id.* at 7. Petitioners controlled bank accounts in the names of various entities and individuals other than themselves, and they structured cash withdrawals, frequently withdrawing just under the $10,000 reporting threshold from different bank branches on the

same day. *Ibid.* Naum Morgovsky laundered more $200,000 from the export scheme through the bank account of a dead man whose identity he had stolen. *Ibid.*

A search of petitioners' home uncovered defense articles on the Munitions List, including night-vision scopes with export-controlled image-intensifier tubes. Gov't C.A. Br. 7-8. In addition, the search uncovered digital evidence showing multiple six-figure international wire transfers to Naum Morgovsky from shell companies in countries bordering Russia; individual six-figure deposits over multiple years into accounts controlled by petitioners for "optical goods"; lists of dozens of serial numbers matching the defense items that petitioners purchased; and communications that Naum Morgovsky conducted under at least four different stolen identities and pseudonyms in furtherance of his business. *Id.* at 8 (citation omitted).

3. A grand jury in the Northern District of California returned a superseding indictment charging both petitioners with various offenses. Superseding Indictment 1-14. In connection with their international munitions scheme, each petitioner was charged with one count of conspiring to export defense articles without a license, in violation of 22 U.S.C. 2778(b)(2) and (c) and 22 C.F.R. 121.1, 122.1, 123.1, 127.1(a)(4), and 127.3; Naum Morgovsky was charged with two counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and (2)(A); and Irina Morgovsky was charged with one count of misuse of a passport, in violation of 18 U.S.C. 1544. Superseding Indictment 5-6, 9-11.

Naum Morgovsky pleaded guilty without a plea agreement to the export-conspiracy and money-laundering counts. In doing so, he represented that he had "willfully joined an agreement to export [Arms Regulations]-controlled night vision components to Russia and engaged

in international monetary transactions designed to conceal the proceeds of the unlawful activity." C.A. E.R. 1220. The district court found his guilty plea to those counts to be knowing, voluntary, and supported by a factual basis, and accepted the plea. *Id.* at 323, 1225.

Irina Morgovsky reached a plea agreement with the government, in which she agreed to plead guilty to the export-conspiracy charge, and the government agreed to dismiss the passport charge. C.A. E.R. 1209-1218. The agreement included an express waiver of her right to appeal, in which she "agree[d] to give up [her] right to appeal [her] conviction, the judgment, and orders of the Court, as well as any aspect of [her] sentence, including any orders relating to forfeiture and/or restitution, except that [she] reserve[d] [her] right to claim that [her] counsel was ineffective." *Id.* at 1213. The district court found her plea to the export-conspiracy count to be knowing and voluntary and supported by a factual basis, and accepted the plea. *Id.* at 338-339.

The district court sentenced Naum Morgovsky to 108 months of imprisonment on each of the three counts on which he was convicted, to be served concurrently. Pet. App. 32. The court also imposed a $1,000,000 fine and ordered the forfeiture of $222,929.61 and three night-vision rifle-scope lenses that had been seized from petitioners' residence. *Id.* at 40, 44-45. The court sentenced Irina Morgovsky to 18 months of imprisonment, imposed a $15,000 fine, and ordered the forfeiture from her of the same three night-vision rifle-scope lenses and her passport. *Id.* at 15, 23, 27-28.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1-10.

As relevant here, petitioners contended that their convictions for conspiring to export defense articles without a

license in violation of the AECA and regulations promulgated under it were invalid, asserting "(1) that 'Congress did not delegate to the Executive Branch its legislative authority . . . to create a separate crime of conspiracy,' and (2) that even if Congress purported to delegate this authority, such a delegation violates the separation of powers" under the nondelegation doctrine. Pet. App. 6 n.2. The court of appeals determined that Irina Morgovsky could not pursue either of those contentions on appeal because she had "waived her appeal rights pursuant to her plea agreement." *Id.* at 6. The court additionally determined that Naum Morgovsky could not pursue the first, statutory challenge on appeal because he failed to timely raise that argument in the district court as required by Federal Rule of Criminal Procedure 12(b)(3) and had not shown good cause to excuse that failure. Pet. App. 6.

The court of appeals did, however, review de novo Naum Morgovsky's second, nondelegation challenge to Section 2778, and rejected that challenge on the merits. Pet. App. 6-7. The court observed that it is "well established that Congress may constitutionally provide a criminal sanction for the violation of regulations which it has empowered the President or an agency to promulgate." *Id.* at 7 (citation omitted). The court noted that it had already rejected a nondelegation challenge to Section 2778 in *United States* v. *Chi Tong Kuok*, 671 F.3d 931 (9th Cir. 2012), in which it had explained that "Congress set forth an intelligible principle in charging the President to designate, and regulate the export of, 'defense articles and defense services.'" Pet. App. 7 (quoting *Chi Tong Kuok*, 671 F.3d at 939). The court additionally noted that it had previously upheld an "earlier, similarly-worded version of the same AECA provision" against a challenge, similar to petitioners' contention here, that the provision

improperly "'empowered the President to criminalize "attempt" conduct.'" *Ibid.* (quoting *United States* v. *Gurrola-Garcia*, 547 F.2d 1075, 1078 (9th Cir. 1976)) (brackets omitted).

ARGUMENT

Petitioners principally contend (Pet. 12-21) that their convictions for conspiring to export defense articles without a license, in violation of the AECA and Arms Regulations promulgated under it, are invalid on the theory that the AECA's provision conferring rulemaking authority on the Executive violates the nondelegation doctrine. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. This case would not provide a suitable vehicle for review of that contention in any event.

Petitioners additionally contend (Pet. 21-28) that the court of appeals erred in determining that they had failed to preserve certain arguments for appellate review. Specifically, they assert (Pet. 21-26) that the court should have considered Naum Morgovsky's contention that the Arms Regulations exceed the statutory authorization in Section 2778 to the extent that they impose criminal conspiracy liability, notwithstanding his failure to raise that contention in a timely pretrial motion or to show "good cause" to excuse that failure under Federal Rule of Criminal Procedure 12(c)(3). And they assert (Pet. 26-28) that the court erred in finding that the appeal waiver contained in Irina Morgovsky's plea agreement precluded her from challenging either the validity or the scope of Section 2778. The court of appeals correctly rejected those arguments, and its determinations do not warrant review.

This Court has recently denied petitions for writs of certiorari presenting questions that are the same as or

similar to each of the questions presented in the petition in this case. See *Henry* v. *United States*, 139 S. Ct. 2615 (2019) (No. 18-7471) (AECA nondelegation challenge); *Cain* v. *United States*, 141 S. Ct. 1082 (2021) (No. 20-5639) (Rule 12(c)(3)); *Galindo-Serrano* v. *United States*, 140 S. Ct. 2646 (2020) (No. 19-7112) (same); *Guerrero* v. *United States*, 140 S. Ct. 1300 (2020) (No. 19-6825) (same); *Bowline* v. *United States*, 140 S. Ct. 1129 (2020) (No. 19-5563) (same); *Lowman* v. *United States*, 141 S. Ct. 371 (2020) (No. 20-143) (appeal waiver); *Haynes Timberland, Inc.* v. *United States*, 139 S. Ct. 288 (2018) (No. 18-202) (same). The same result is warranted here.

1. The court of appeals correctly determined that 22 U.S.C. 2778 does not violate the nondelegation doctrine. Pet. App. 6-7. That determination does not warrant further 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 "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.'" *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 474-475 (2001) (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.[1]

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[1] 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 (authority to promulgate then-binding 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. The court of appeals correctly upheld Section 2778 under those principles. Pet. App. 7. Section 2778 authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States," to "control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services." 22 U.S.C. 2778(a)(1). To that end, it authorizes the President "to designate those items which shall be considered as defense articles and defense services for the purposes of this section," which "constitute the United

States Munitions List," and "to promulgate regulations for the import and export of such articles and services." *Ibid.*

Section 2778 generally prohibits the import or export of defense articles and services on the Munitions List unless the importer or exporter has obtained a license. 22 U.S.C. 2778(b)(2). Congress specified in Section 2778 criteria for the Executive to consider in determining whether to grant such licenses, providing that

> [d]ecisions on issuing export licenses under this section shall take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.

22 U.S.C. 2778(a)(2). In addition, Congress established criminal liability for willful violations of Section 2778 and "any rule or regulation issued under th[at] section," prescribing penalties of up to 20 years of imprisonment, a fine of up to $1,000,000, or both. 22 U.S.C. 2778(c).

The court of appeals correctly rejected petitioners' contention that Section 2778 is an impermissible delegation of legislative authority. Pet. App. 7. As discussed above, see pp. 9-10, *supra*, and as petitioners acknowledge (Pet. 18), 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. Petitioners do not appear to dispute that Section 2778

satisfies the second and third requirements. Section 2778 expressly confers authority on the President, 22 U.S.C. 2778(a)(1), who in turn has delegated that authority (as relevant here) to the Department of State, see pp. 2-3, *supra*. The authority conferred consists of designating defense articles and services, determining whether to grant licenses, and "promulgat[ing] regulations for the import and export of such articles and services." 22 U.S.C. 2778(a)(1). And Congress itself imposed criminal liability for willful violations of the AECA and regulations promulgated thereunder and prescribed the maximum penalties. 22 U.S.C. 2778(c).

Petitioners appear to dispute (Pet. 19-21) 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 2778, however, makes clear Congress's policy of "further[ing] * * * world peace and the security and foreign policy of the United States" by means of "control[ling] the import and the export of defense articles and defense services." 22 U.S.C. 2778(a)(1). The statutory context, including the criteria that Congress specified in the text of Section 2778(a)(2)—such as "whether the export of an article would * * * support international terrorism" or "increase the possibility of outbreak or escalation of conflict," 22 U.S.C. 2778(a)(2)—that the Executive should consider in determining whether to grant a license, further informs that general policy. Section 2778'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 "public interest, convenience, or necessity" requires, *National Broad. 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) (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").

Petitioners contend (Pet. 19) that Section 2778 impermissibly delegates legislative authority because it fails to supply "sufficiently clear instructions" with respect to the substance of regulations that the President or his delegee may promulgate. This Court has recognized, however, that "the question to be asked is not whether there was any explicit principle telling the President how to" draft regulations, "but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority." *Loving* v. *United States*, 517 U.S. 748, 772 (1996). In *Loving* v. *United States*, the Court upheld against a nondelegation challenge a statute authorizing the President to select aggravating factors for the death penalty in military cases. *Id.* at 771-774. The absence of specific statutory direction concerning how to select those factors was immaterial because "the delegation [was] set within boundaries the President may not exceed" and because the delegation fell within the "traditional authority" of the Executive official at issue—*i.e.*, the President's prerogative to set rules for the military. *Id.* at 772.

Here, as in *Loving*, the nature of the delegation and the Executive's traditional authority over foreign affairs and national security made more detailed statutory

direction unnecessary. The restriction and regulation of the import and export of defense articles and services fall within a sphere long entrusted to, and particularly appropriate for, executive judgment. This Court has recognized that, in light of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," and the need for "discretion and freedom" to undertake those responsibilities effectively, "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); see *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965) ("[I]n giving the Executive authority over matters of foreign affairs," "Congress * * * must of necessity paint with a brush broader than that [which] it customarily wields in domestic areas."); accord *Haig* v. *Agee*, 453 U.S. 280, 299-300 (1981). Applying that principle, the Court in *United States* v. *Curtiss-Wright Export Corp.* rejected a nondelegation challenge to a joint resolution authorizing the President to prohibit the "sale of arms and munitions of war in the United States to those countries [then] engaged in" a certain conflict "if the President f[ound] that" such a prohibition "may contribute to the reëstablishment of the peace between those countries." 299 U.S. at 312 (citation omitted); see *id.* at 315-329.

The AECA's grant of authority to designate defense articles appropriate for export and import limitations implicates those same foreign-affairs and national-security concerns at the core of Executive authority. And it is

closely analogous to the delegation upheld in *Curtiss-Wright*. See *United States* v. *Chi Tong Kuok*, 671 F.3d 931, 939 (9th Cir. 2012) (explaining that the logic of *Curtiss-Wright* "applies with equal force" to the AECA). The regulatory prohibitions on attempting and conspiring to export or import defense articles unlawfully similarly constitute appropriate exercises of the Executive's authority to "control the import and the export of defense articles." 22 U.S.C. 2778(a)(1). The court of appeals accordingly correctly determined that Section 2778 is not an invalid delegation of legislative power.

c. Petitioners do not contend that the court of appeals' decision rejecting their nondelegation challenge to the AECA conflicts with any decision of another court of appeals. As they appear to recognize (Pet. 15 n.5), every court of appeals to consider the issue has determined, in accord with the Ninth Circuit in the decision below and prior decisions, that Section 2778 or its precursor do not impermissibly delegate legislative power. See *United States* v. *Henry*, 888 F.3d 589, 597 (2d Cir. 2018), cert. denied, 139 S. Ct. 2615 (2019); *United States* v. *Hsu*, 364 F.3d 192, 205 (4th Cir. 2004); *Samora* v. *United States*, 406 F.2d 1095, 1098 (5th Cir. 1969); accord Pet. App. 7; *Chi Tong Kuok*, 671 F.3d at 938-939; *United States* v. *Gurrola-Garcia*, 547 F.2d 1075, 1077-1079 (9th Cir. 1976).

Petitioners assert (Pet. 12-17) that the Court should grant review to consider whether to overrule its longstanding precedent addressing the nondelegation doctrine generally, or alternatively to abrogate that precedent in "the criminal law context." Pet. 15. That assertion is unsound.

"Adherence to precedent is 'a foundation stone of the rule of law.'" *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S.

782, 798 (2014)). The Court's articulation of the nondelegation doctrine has been settled for nearly a century, see *J. W. Hampton*, 276 U.S. at 409, and the underlying principle traces back even earlier, nearly to the founding, see, *e.g.*, *Marshall Field*, 143 U.S. 681-694; *The Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 387-388. Granting review to reconsider that longstanding precedent "would ill serve the goals of 'stability' and 'predictability'" that stare decisis "aims to ensure." *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 699 (2011) (quoting *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)). Overruling any precedent generally requires a "special justification, not just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (citation and internal quotation marks omitted); see, *e.g.*, *Gamble* v. *United States*, 139 S. Ct. 1960, 1969 (2019). Petitioners identify no such special justification here.

Moreover, the AECA would be constitutional even under the alternative approach advanced in the separate opinions on which petitioners rely. They principally rely (Pet. 2, 12-14) on the dissenting opinion in *Gundy*. That opinion observed, however, that even "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power,'" such as "foreign affairs." *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (citation omitted). For example, the *Gundy* dissent observed that the "foreign-affairs-related statute in *Cargo of the Brig Aurora*"—which authorized the President unilaterally to impose a trade embargo against either Great Britain or France—could be viewed as

"permissible lawmaking," rather than an impermissible delegation of legislative power, because "many foreign affairs powers are constitutionally vested in the president under Article II." *Ibid.*; see *Department of Transp.* v. *Association of Am. R.Rs.*, 575 U.S. 43, 80-81 & n.5 (2015) (Thomas, J., concurring in the judgment) (stating that another 18th century "embargo statute involved the external relations of the United States, so the determination it authorized the President to make arguably did not involve an exercise of core legislative power").

d. In any event, this case would not be a suitable vehicle in which to resolve the first question presented because petitioners did not raise it in the district court. As discussed further below, Federal Rule of Criminal Procedure 12(b)(3) provides that a "defect in the indictment or information, including * * * failure to state an offense," "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(B)(v). Rule 12(c)(3) specifies the "consequences of not making a timely motion under Rule 12(b)(3)," stating that, "if a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely," such that "a court may consider the defense, objection, or request" only "if the party shows good cause." Fed. R. Crim. P. 12(c)(3) (capitalization altered; emphasis omitted); see pp. 21-25, *infra*.

Petitioners do not dispute that their nondelegation challenge to Section 2778 is covered by Rule 12(b)(3)'s pretrial-motion requirement. Nor do they dispute the court of appeals' determinations that they "did not raise this challenge in the district court" and "ha[d] not shown good cause" to excuse that failure. Pet. App. 6. Appellate

review of that challenge is therefore unavailable. See, *e.g.*, *United States* v. *Bowline*, 917 F.3d 1227, 1229-1238 (10th Cir. 2019), cert. denied, 140 S. Ct. 1129 (2020); see also *Davis* v. *United States*, 411 U.S. 233, 239-242 (1973) (construing prior version of Rule 12). Although the court of appeals did not reject petitioners' constitutional challenge to Section 2778 based on their failure to raise the issue in the district court, and instead considered the merits with respect to Naum Morgovsky, this Court may affirm the court of appeals' judgment "on any ground permitted by the law and the record." *Dahda* v. *United States*, 138 S. Ct. 1491, 1498 (2018) (citation omitted).

Although, as discussed below, see pp. 22-25, *infra*, petitioners contend (Pet. 21-26) that Rule 12(c)(3) in fact allows appellate review of challenges that a defendant fails to raise in a pretrial motion without a showing of good cause, even under their own contrary approach, their nondelegation challenge would be subject only to plain-error review on appeal. Under the plain-error standard, a determination by this Court that the court of appeals erred in rejecting their nondelegation challenge to Section 2778 would not benefit petitioners unless they additionally demonstrated that the error was "clear or obvious." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (citation omitted). That showing would be particularly difficult for petitioners to make in light of the courts of appeals' uniform rejection of nondelegation challenges to Section 2778 and its precursor.

In addition, as discussed below, Irina Morgovsky is precluded from challenging her conviction on any ground by the express appeal waiver included in her plea agreement. See pp. 28-29, *infra*. At a minimum, the threshold issue of whether petitioners' nondelegation challenge is

not reviewable, or reviewable only for plain error, counsels strongly against review.

2. Petitioners contend (Pet. 21-26) that the court of appeals erred in determining that Rule 12(c)(3) precluded Naum Morgovsky from challenging his conspiracy conviction on the theory that the regulation making it unlawful "[t]o conspire to export * * * any defense article" "[w]ithout first obtaining the required license," 22 C.F.R. 127.1(a)(4), exceeds the authority delegated by Section 2778. That contention lacks merit and does not warrant further review.

a. As noted above, Rule 12(b)(3) provides that certain "defenses, objections, and requests," including contentions that an indictment is defective because it "fail[s] to state an offense," must be raised by pretrial motion "if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(B)(v); see pp. 19-20, *supra*. Rule 12(c)(3) establishes the "consequences of not making a timely motion under Rule 12(b)(3)," stating that "the motion is untimely[,] [b]ut a court may consider the defense, objection, or request if the party shows good cause." Fed. R. Crim. P. 12(c)(3) (capitalization altered; emphasis omitted). Construing an earlier version of Rule 12, this Court explained that "a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Davis*, 411 U.S. at 239-242; accord *Wainwright* v. *Sykes*, 433 U.S. 72, 84 (1977) ("[W]e concluded [in *Davis*] that review of" a claim not timely brought under Rule 12 "should be barred on habeas, as on direct appeal, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.").

Petitioners do not dispute that Rule 12(b)(3) covers—among other claims, see pp. 19-20, *supra*—Naum Morgovsky's contention that 22 C.F.R. 127.1(a)(4) exceeds the authority delegated by Section 2778 to the extent that it specifies that conspiring to violate the relevant regulations is itself unlawful, and thus subject to the statutory criminal penalties for regulatory violations. And they do not dispute the court of appeals' determinations that Naum Morgovsky neither presented that argument in a pretrial motion nor showed good cause. Pet. App. 6. Instead, petitioners contend (Pet. 22-25) that "defenses, objections, and requests" covered by Rule 12(b)(3) and not raised in a timely pretrial motion are merely "forfeited (not waived)," and therefore Naum Morgovsky's statutory challenge should have been "reviewed for plain error." Pet. 24. That contention is unsound.

Petitioners' interpretation of Rule 12 to permit appellate consideration of untimely claims without a showing of good cause rests (Pet. 22-23) on the Rules Committee's removal of the term "waiver" from the Rule in 2014. Before that amendment, Rule 12 provided that "[a] party waives" any objection or defense within the ambit of the Rule by failing to raise the claim before trial, but the court "[f]or good cause * * * may grant relief from the waiver." Fed. R. Crim. P. 12(b)(3)(B) and (e) (2012). In 2014, all variations on the term "waiver" were removed from the Rule. Petitioners appear to argue (Pet. 23-24) that the absence of an explicit reference to an untimely claim as "waive[d]" necessarily means that on appeal such a claim is reviewable for plain error under Rule 52(b) in the same manner generally applicable to forfeited claims not subject to Rule 12, rather than under the good-cause standard provided by Rule 12 itself.

As the Tenth Circuit explained in its extensive analysis of Rule 12(c)(3) in *United States* v. *Bowline*, *supra*, however, the general framework of "waiver" as "the 'intentional relinquishment or abandonment of a known right'" and "forfeiture" as other failures to raise a claim—described in *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (citation omitted)—does not itself describe all of the legal rules that may apply in all circumstances. *Bowline*, 917 F.3d at 1232. Instead, "there are common circumstances in which appellate review of an issue is precluded even when a party's failure to raise the issue was not an intentional relinquishment of a known right." *Id.* at 1231. For example, a defendant's failure to raise an issue in his opening brief may relieve the court of appeals from considering the issue (under plain-error review or otherwise) regardless of the defendant's intentions. *Ibid.* And a statute of limitations may bar a cause of action or claim for postconviction relief regardless of whether the delay in seeking such relief was intentional or negligent. *Id.* at 1232.

This Court's decision in *Davis* v. *United States*, *supra*—which petitioners do not address—makes clear that Rule 12 operates in a similar manner. In *Davis*, this Court interpreted the original 1944 version of Rule 12, which provided in part that "[f]ailure to present any * * * defense or objection" covered by the Rule (with specified exceptions) "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." Fed. R. Crim. P. 12(b) (1944). The defendant in *Davis*, who sought to attack the composition of the grand jury for the first time in a postconviction proceeding under 28 U.S.C. 2255 (1970), argued that he was entitled to raise his claim because he had not "deliberately bypassed or understandingly and knowingly waived his

claim." 411 U.S. at 236 (internal quotation marks omitted). In other words, "[t]he meaning the defendant sought to give waiver matched that later set forth in *Olano*." *Bowline*, 917 F.3d at 1232 (emphasis omitted). Relying on the plain language of the Rule, this Court rejected the defendant's argument, reasoning that, "when a rule 'promulgated by this Court and . . . adopted by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived,' the standard specified in the rule controls." *Id.* at 1233 (quoting *Davis*, 411 U.S. at 241).

The Court thus determined that "the necessary effect of the congressional adoption of [the Rule was] to provide that a claim once waived pursuant to that Rule [could] not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Davis*, 411 U.S. at 242. The current version of Rule 12, no less than the pre-2014 version or original version, continues to define for itself the circumstances when a court may consider an untimely claim covered by the Rule. See Fed. R. Crim. P. 12(c)(3) ("[A] court may consider the defense, objection, or request if the party shows good cause."); see also p. 21, *supra*. Particularly because the term "waiver" in Rule 12 never meant the affirmative relinquishment of a known right, the elimination of that term in the amendments to Rule 12 does not carry the significance that petitioners attribute to it.

Indeed, the Advisory Committee's note to the 2014 amendments, on which petitioners rely (Pet. 25), illustrates that the word "waiver" was removed specifically because it was descriptively imprecise—and not because any substantive change from *Davis* was intended. At the time of the amendments, "the *Olano* standard

had become dominant in the case law in determining when there had been a waiver, rendering the use of that term in Rule 12 idiosyncratic." *Bowline*, 917 F.3d at 1235. The Advisory Committee's note explained that

> [n]ew paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion, the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

Fed. R. Crim. P. 12 advisory committee's note (2014 Amendment). In other words, the removal of the word "waiver" was intended to avoid confusion with the *Olano* framework, not create it.

The Advisory Committee's note further explained that "[n]ew paragraph 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show 'good cause' for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case." Fed. R. Crim. P. 12 advisory committee's note (2014 Amendment). And because this Court in *Davis* had already made clear that Rule 12's good-cause standard applied throughout the criminal proceedings, the Committee would have understood the retention of that standard to apply equally to both district and appellate courts. See 411 U.S. at 242.

b. Although some disagreement exists among the courts of appeals regarding whether a defendant must satisfy the good-cause standard before an appellate court can review an untimely claim subject to Rule 12, that disagreement does not warrant this Court's review.

Most courts of appeals to have addressed the question have recognized that amended Rule 12 precludes consideration of untimely claims without a showing of good cause. See *United States* v. *Galindo-Serrano*, 925 F.3d 40, 47, 49 (1st Cir. 2019), cert. denied, 140 S. Ct. 2646 (2020); *United States* v. *O'Brien*, 926 F.3d 57, 82-84 (2d Cir. 2019); *United States* v. *Fattah*, 858 F.3d 801, 807-808 & n.4 (3d Cir. 2017);[2] *United States* v. *McMillian*, 786 F.3d 630, 635-636 & n.3 (7th Cir. 2015); *United States* v. *Anderson*, 783 F.3d 727, 740-741 (8th Cir.), cert. denied, 577 U.S. 872, and 577 U.S. 925 (2015); *United States* v. *Guerrero*, 921 F.3d 895, 897-898 (9th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 1300 (2020); *Bowline*, 917 F.3d at 1237 (10th Cir.).

Petitioners identify three courts of appeals—the Fifth, Sixth, and Eleventh Circuits—that have reviewed untimely claims subject to Rule 12 for plain error, without a showing of good cause. Pet. 23 (citing *United States* v. *Vasquez*, 899 F.3d 363, 372-373 (5th Cir. 2018), cert. denied, 139 S. Ct. 1543 (2019); *United States* v. *Soto*, 794 F.3d 635, 652 (6th Cir. 2015), cert. denied, 136 S. Ct. 2007 (2016); and *United States* v. *Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015), cert. denied,

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[2] The Third Circuit subsequently stated that the availability of plain-error review of an untimely Rule 12 claim was an open question. See *United States* v. *Ferriero*, 866 F.3d 107, 122 n.17 (3d Cir. 2017), cert. denied, 138 S. Ct. 1031 (2018). *Ferriero*, however, did not cite the Third Circuit's prior decision in *Fattah*.

136 S. Ct. 2461 (2016)).[3] Only one of those decisions (the Sixth Circuit's in *Soto*), however, examined the question in any depth, and none considered the significance of this Court's interpretation of Rule 12 in *Davis* to the proper interpretation of the Rule. Particularly considering the Tenth Circuit's relatively recent, comprehensive opinion on the issue in *Bowline*, the issue would, at a minimum, benefit from further consideration of the question by other courts in light of that analysis.

Moreover, it is not apparent that, in practice, the current disagreement will affect the outcome in any meaningful number of cases. Rule 12 applies only where the defense or objection is one for which "the basis for [a pretrial] motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). And plain-error review itself is discretionary. See *Puckett*, 556 U.S. at 135 (explaining that, even where the requirements of plain error are otherwise met, "the court of appeals has the discretion to remedy the error" (emphasis omitted)). A defendant's failure to timely raise an available challenge to the statute of conviction in a pretrial motion in the district court will often present a strong case for the court of appeals to decline to exercise such discretion.

In addition, Rule 12's good-cause standard is generally understood to require a defendant to show "cause for his untimeliness" in filing such a motion and "prejudice

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[3] In *United States* v. *Robinson*, 855 F.3d 265 (4th Cir. 2017), the Fourth Circuit stated that it would not review an untimely Rule 12 claim "absent a showing of good cause or plain error," and it found neither. *Id.* at 270 (citations omitted). More recently, the Fourth Circuit has noted that whether unpreserved Rule 12 claims may be reviewed for plain error is an open question. See *United States* v. *Fall*, 955 F.3d 363, 373, cert. denied, 141 S. Ct. 310 (2020).

suffered as a result of the error." *Bowline*, 917 F.3d at 1234; see *United States* v. *Edmond*, 815 F.3d 1032, 1044 (6th Cir. 2016), cert. denied, 137 S. Ct. 619 (2017), and vacated on other grounds, 137 S. Ct. 1577 (2017). The plain-error standard similarly requires a showing of prejudice, see Fed. R. Crim. P. 52(b) (requiring a "plain error that affects substantial rights"), meaning that many claims that would be precluded by Rule 12(c)(3) would also fail plain-error review. And in cases in which defense counsel fails to raise in a timely motion a claim covered by Rule 12(b)(3) without good cause, and the defendant could otherwise demonstrate plain error on appeal, defendants may pursue a remedy in postconviction proceedings based on a claim of ineffective assistance of counsel. See *Bowline*, 917 F.3d at 1237; *Edmond*, 815 F.3d at 1044 (suggesting that the availability of such ineffective-assistance claims "narrows the set of affected defendants * * * perhaps * * * to nil").

c. In any event, this case would not be a suitable vehicle for resolving whether a claim like Naum Morgovsky's statutory challenge to Section 127.1(a)(4) may be reviewed for plain error even absent a showing of good cause, as petitioners contend (Pet. 24), because relief on that claim would be precluded by his inability to meet the plain-error standard. To prevail under the plain-error standard, a defendant must show, among other things, a "clear or obvious" error. *Puckett*, 556 U.S. at 135 (citing *Olano*, 507 U.S. at 734). Petitioners do not identify any decision accepting the contention that Section 127.1(a)(4) exceeds the conferral of rulemaking authority in Section 2778.

3. Finally, petitioners contend (Pet. 26-28) that the court of appeals erred in determining that Irina Morgovsky could not challenge Section 2778's constitutional validity or scope on appeal in light of the appeal waiver

contained in her plea agreement. That contention likewise lacks merit and does not warrant review.

"[P]lea bargains are essentially contracts." *Puckett*, 556 U.S. at 137. "[A] valid and enforceable appeal waiver" thus generally "precludes challenges that fall within its scope." *Garza* v. *Idaho*, 139 S. Ct. 738, 744 (2019) (citation omitted). In her plea agreement, Irina Morgovsky expressly "agree[d] to give up [her] right to appeal [her] conviction, the judgment, and orders of the Court, as well as any aspect of [her] sentence, including any orders relating to forfeiture and/or restitution, except that [she] reserve[d] [her] right to claim that [her] counsel was ineffective." C.A. E.R. 1213. Her appeal was therefore foreclosed.

Petitioners contend (Pet. 27) that *Class* v. *United States*, 138 S. Ct. 798 (2018), makes appeal waivers unenforceable to the extent that a defendant challenges the statute of conviction. That is incorrect. *Class* held only that a "guilty plea *by itself*" does not "bar[] a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." *Id.* at 803 (emphasis added); see *id.* at 801-802 (stating the question presented as whether "a guilty plea bar[s] a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution," and concluding that "a guilty plea by itself does not bar that appeal"). Irina Morgovsky's appeal is barred not by her guilty plea "by itself," *id.* at 802, but instead by her agreement not to appeal her conviction in exchange for, among other things, the dismissal of the misuse-of-passport charge against her. *Class* did not abrogate longstanding doctrine providing that appeal waivers in plea agreements are enforceable pursuant to their terms, and Irina Morgovsky cites no authority for her claim that it did so. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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