No. 24-_____

IN THE

Supreme Court of the United States

DAVID LESH,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article III of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And the Sixth Amendment provides that "[i]n all criminal prosecutions," the accused shall enjoy the right to trial by jury.

The question presented is: Whether the Constitution's dual guarantee of trial by jury contains an unstated exception for "petty offenses."

RELATED PROCEEDINGS

United States Court of Appeals (10th Cir.):

United States v. Lesh, No. 23-1074 (July 16, 2024)

United States District Court (D. Colo.):

United States v. Lesh, Crim. No. 20-PO-07016 (Mar. 10, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Lesh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1a-31a) is reported at 107 F.4th 1239. The relevant order of the magistrate judge (Pet. App. 49a-67a) is unpublished but available at 2021 WL 4941013. The order of the district court affirming the magistrate judge's conclusions (Pet. App. 32a-48a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2024. Pet. App. 1a. On September 17, 2024, Justice Gorsuch extended the time in which to file a petition for certiorari until November 13, 2024. *See* No. 24A270. On November 8, 2024, Justice Gorsuch further extended that time to December 13, 2024. *Id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

Article III, Section 2, Clause 3 of the Constitution states: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."

The Sixth Amendment to the Constitution states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

INTRODUCTION

In recent years, this Court has overruled several cases that mistakenly constricted the right to jury trial. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)); *Hurst v. Florida*, 577 U.S. 92 (2016) (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984)); *Alleyne v. United States*, 570 U.S. 99 (2013) (overruling *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Harris v. United States*, 536 U.S. 545 (2002)); and *Ring v. Arizona*, 536 U.S. 584 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). This case presents an equally compelling instance in which the Court should do the same.

The Constitution guarantees a right to jury trial in "all" criminal prosecutions not just once but twice—in Article III and in the Sixth Amendment—with no exception for so-called petty offenses. Yet "[m]any years ago this Court, without the necessity of an amendment pursuant to Article V, decided that 'all crimes' did not mean 'all crimes,' but meant only 'all serious crimes.'" *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Black, J., concurring in the judgment). Worse yet, the Court did so initially in dicta, and without the benefit of meaningful briefing. The Court later justified the exception on grounds of balancing and efficiency. *See Duncan v. Louisiana*, 391 U.S. 145, 160 (1968); *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542-43 (1989). Today, the petty-offense exception denies criminal defendants the right to jury trial when they are charged with crimes punishable by a maximum of six months' imprisonment and that are

not otherwise judicially classified as "serious"— even when charged with multiple counts punishable by six months each. *Lewis v. United States*, 518 U.S. 322, 326 (1996).

This departure from the plain and unambiguous text of the Constitution violates a core promise of the Framers: that, in a criminal case, a jury of one's peers would always stand between the accused and the power of the state to deprive him of liberty or property. It also makes a hash of the Constitution's broader structure, rendering other carefully calibrated language regulating criminal procedure either meaningless or nonsensical. And the petty-offense exception flouts the historical common-law rule the Constitution was meant to render inviolate.

As two of the three judges on the panel below have urged, *see* Pet. App. 26a-31a (Tymkovich, J., joined by Rossman, J., concurring), this Court should take the opportunity to fix this anomaly and restore the original scope of the jury-trial right. In the many decades since the petty-offense exception was minted, no party in a merits case has challenged its validity. And this case presents an ideal vehicle for a long-overdue airing of this issue and attendant stare decisis considerations. The Court should grant the petition.

STATEMENT OF THE CASE

A. Legal background

1. For hundreds of years under the common law of England, before the Founding of this country, all criminal defendants were entitled to trial by jury. Blackstone considered this right "the glory of the English law"—"the most transcendent privilege which

any subject can enjoy." 3 William Blackstone, Commentaries on the Laws of England *379 (1769). That was because the requirement of a jury ensured that no one in a criminal prosecution could be deprived of his liberty or property "but by the unanimous consent of twelve of his neighbours and equals." *Id.*

The Framers agreed the right to jury trial was indispensable. In fact, many viewed it as the "very palladium of free government." The Federalist No. 83, at 467 (Hamilton) (Clinton Rossiter ed., 1961); *see also* John Adams, Diary Entry (Feb. 12, 1771), *in* 2 Works of John Adams 252-53 (C. Adams ed., 1850). So vital was the right at the Founding that it was one of the few individual rights enshrined in the original Constitution. Article III explicitly provides: "The Trial of *all Crimes*, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2, cl. 3 (emphasis added). And the Bill of Rights reinforced that guarantee, providing in the Sixth Amendment that defendants are entitled to a trial by jury "in all criminal prosecutions." U.S. Const. amend. VI. The upshot of these provisions is simple yet profound: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

Congress likewise sought from the very beginning to safeguard the jury-trial right. The Judiciary Act of 1789—enacted one day before the Bill of Rights was introduced—provided that "the trial of issues in fact, in the district courts, in *all* causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Ch. 20, 1 Stat. 73, § 9 (emphasis added). And for over a century after the Founding, federal courts

afforded all criminal defendants—including those charged with offenses that carried relatively minor punishments—the right to jury trial. *See* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 599, 608-09 (2022).

2. In a smattering of decisions beginning a century after the Founding, this Court—almost offhandedly—fashioned an exception to the unqualified constitutional right to jury trial in all criminal prosecutions.

In *Callan v. Wilson*, 127 U.S. 540 (1888), the defendants were charged with conspiracy to commit extortion and sentenced to 30 days in jail. *Id.* at 540-42. The Court confirmed that the constitutional right to trial by jury applies to misdemeanors, including conspiracy. *Id.* at 549, 555. In dicta, however, the Court suggested that "there are certain minor or petty offences that may be proceeded against summarily, and without a jury." *Id.* at 552.

Not long thereafter, again without substantial briefing or adversarial disagreement on the issue, the Court turned this dicta into law. In *Schick v. United States*, 195 U.S. 65 (1904), the defendants were charged with purchasing unbranded oleomargarine, an offense punishable only by a fine of $50. *Id.* at 67. The defendants had waived their right to a jury trial and did not challenge the validity of that waiver. *Id.* The Court nevertheless considered whether the waivers were valid. *Id.* The Court held that they were, on the ground that when it comes to "petty offenses" such as the charge at issue, "there is no constitutional requirement of a jury" at all. *Id.* at 68; *see also District of Columbia v. Clawans*, 300 U.S. 617, 624-25 (1937)

(holding that an offense punishable by a 90-day maximum sentence was also "petty" and could therefore be tried without a jury).

When this Court incorporated the right to jury trial against the states, it carried forward the petty-offense exception. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the defendant was charged with an offense punishable by two years in prison. *Id.* at 146. The Court held that the jury-trial right applies to the states and that the Sixth Amendment entitled the defendant to a jury trial. *Id.* at 149-50. Though unnecessary to this decision, the Court added that "[s]o-called petty offenses" were "exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions." *Id.* at 160. In subsequent cases, the Court applied the petty-offense exception to condone denials of jury trials to defendants charged with crimes punishable by up to six months in prison. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 542-44 (1989); *Lewis v. United States*, 518 U.S. 322, 326-27 (1996).

Most states nevertheless have continued to guarantee the right to jury trials for all criminal charges, including minor crimes punishable by minimal or no prison time. *See* Memorandum #31 from the D.C. Crim. Code Reform Comm'n to the Code Revision Advisory Grp.: App. A (Feb. 25, 2020), https://perma.cc/V8UP-SPS2. Yet some states have exceptions to this guarantee for low-level offenses, and Congress has created a category of "petty offenses" that are punishable without providing a right to jury trial. *See id.*; 18 U.S.C. § 19.

3. Against this modern backdrop, the Court has acknowledged that its approach departs from the "common law," which applied the right to jury trial even to so-called petty offenses. *Blanton*, 489 U.S. at 541; *see also* 4 William Blackstone, Commentaries *280-82, *300. And the Court has "recognized that [a prison term of up to six months] will seldom be viewed by the defendant as 'trivial' or 'petty.'" *Blanton*, 489 U.S. at 542 (citation omitted). But the Court has concluded that "the disadvantages of such a sentence, 'onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.'" *Id.* at 543 (quoting *Baldwin*, 399 U.S. at 73); *see also Duncan*, 391 U.S. at 160.

Beyond the departure from the common law, several Justices over the years have objected to the entire enterprise of determining whether the defendant has a right to jury trial according to "whether the offense charged is a 'petty' or 'serious' one." *Baldwin*, 399 U.S. at 74 (Black, J., joined by Douglas, J., concurring in the judgment); *see also Clawans*, 300 U.S. at 633-34 (McReynolds & Butler, JJ., concurring in the judgment). These Justices have called this approach a "judicial mutilation of our written Constitution"—an impermissible substitution of judicial "balancing" for the plain text of our Charter's jury-trial provisions. *See Baldwin*, 339 U.S. at 75 (Black, J., joined by Douglas, J., concurring in the judgment) (internal quotation marks omitted). In their view, the Framers "engaged in all the balancing necessary. They decided that the value of a jury trial far outweighed its costs for 'all crimes' and in 'all criminal prosecutions.'" *Id.*

Numerous scholars have similarly decried the petty-offense exception. *See, e.g.*, Roth, 72 Duke L.J.; John D. King, *Juries, Democracy, and Petty Crime*, 24 U. Pa. J. Const. L. 817 (2022); Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the "Petty Offense" Exception, and Other Departures from Clear Constitutional Text*, 51 Hous. L. Rev. 89 (2013); Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wis. L. Rev. 133 (1997); Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 Kan. J. L. & Pub. Pol'y 7 (1994); George Kaye, *Petty Offenders Have No Peers!*, 26 U. Chi. L. Rev. 245 (1959).

B. Factual and procedural background

1. Petitioner David Lesh is a former professional skier, outdoor enthusiast, and owner of an outdoor apparel brand called Virtika. Pet. App. 2a, 4a. He is also something of a social media "influencer" and often promotes his brand through his Instagram account. *Id.* 16a. His overall approach is that of a rebel, defying convention and decrying the corporatization and overregulation of public lands.

In 2020, petitioner posted photos to his Instagram account of a person driving a snowmobile over a jump in a winter terrain park while another individual in the foreground watches. Pet. App. 34a. The driver is covered head-to-toe in winter gear; there is no way to make out the driver's face or any other identifying features.[1] The caption reads: "Solid park sesh, no lift ticket needed." *Id.* 33a. That same day, employees at

[1] Photos involved in this case can be viewed here: https://perma.cc/9RM7-6E2H.

the Keystone Resort in Colorado discovered someone had ridden a snowmobile around the resort's terrain park. *Id.* 34a. At that time, Keystone was closed due to the COVID-19 pandemic. *Id.*

A few months later, petitioner posted two more provacative images he later revealed were "photoshopped"—that is, not real. The first appeared to be a photo of himself standing in Hanging Lake, a hiking spot near Glenwood Springs, Colorado, where people are forbidden from entering the pristine turquoise water. Pet. App. 4a. The second appeared to show petitioner defecating in Maroon Lake near Aspen, another iconic location. *Id.*

In the wake of these photos, petitioner became the subject of media coverage. *See, e.g.*, Nick Paumgarten, *Trolling the Great Outdoors*, The New Yorker (Jan. 11, 2021). While some were offended by petitioner's behavior, others flocked to his company's website, increasing his sales by 30 percent. *Id.* Still others praised him as a "trolling aficionado" whose "free spirit" "promot[ed] freedom." *See* David Lesh (@davidlesh), Instagram, https://perma.cc/9RM7-6E2H.

2. Fed up with petitioner's antics, the Government decided to investigate him. Federal prosecutors then charged petitioner with operating an "over-snow vehicle" off designated routes on lands administered by the National Forest Service, in violation of 36 C.F.R. § 261.14. Pet. App. 4a. (Keystone Resort is located within the White River National Forest.) The Government also alleged five separate criminal violations related to his photo purporting to show him standing in Hanging Lake. *Id.* 4a-5a.

After it came to light that Petitioner had fabricated the images of himself in Hanging and Maroon Lakes, the Government dropped the charges related to activity purportedly represented in the photos. Pet. App. 4a-5a.

At the same time, the Government doubled down on its prosecution related to petitioner's alleged snowmobiling within Keystone Resort. Pet. App. 5a. In addition to pressing ahead with its charge of operating a snowmobile off a designated route, the Government next alleged that Mr. Lesh conducted "work activity" on national forest land without a permit, in violation of 36 C.F.R. § 261.10(c). *Id.* Each of these crimes is punishable by up to six months in prison and a financial penalty of up to $5,000. *Id.* 27a-28a n.3.

As the case proceeded toward trial before the magistrate judge, petitioner asked to be tried by a jury of his peers. Petr. C.A. Br. 5-6. The Government opposed this request and the magistrate judge denied it, instead holding a bench trial. *See id.*; Pet. App. 5a.

At the one-day trial, petitioner maintained that he was not the person depicted in the snowmobiling photos—and he even presented two witnesses saying they were the individuals in the photos. Petr. C.A. Br. 8-9. Petitioner also contended that the photos did not depict criminal activity in any event. In particular, he argued that the photos did not depict any "work activity" because, referring to the words of the relevant regulation, no commercial "merchandise" was sold or being "offered for sale." *Id.* 8 (quoting 36 C.F.R. § 261.10(c)). As to the "off designated route" count, petitioner contended that no evidence showed the

Forest Service had made known where snowmobiling was and was not permitted in the Keystone area. *Id.*

The magistrate judge found petitioner guilty on both counts. Pet. App. 66a. The judge found that the photos, coupled with cryptic statements petitioner later made on social media, established beyond a reasonable doubt that he was the snowmobiler in the photos. *Id.* 61a. The judge also concluded that the photos depicted "work activity" because they were designed to draw attention to petitioner's outdoor clothing business—and did, in fact, increase sales. *Id.* 64a-65a. Finally, after apparently conducting his own research on the internet, the judge took "judicial notice" of a "winter motor vehicle use map" that the Forest Service had posted online, and he found that the map, plus testimony the Government submitted regarding on-site signage, adequately established that petitioner was "outside of the roads, trails, and areas designated for over-snow vehicle use." *Id.* 61a n.5.

After a sentencing hearing, the judge ordered petitioner to pay $10,050—the maximum permissible penalty for each count, plus two $25 special assessments. Pet. App. 5a. The judge also sentenced petitioner to 160 hours of community service. *Id.*

The district judge affirmed the magistrate judge's decision. Pet. App. 32a-48a. The district judge observed that "as a matter of first principles," petitioner's argument for a jury trial was "not unpersuasive." *Id.* 36a. But the judge acknowledged that "here in an inferior court, first principles must yield to binding precedent." *Id.* 36a-37a. The district court thus upheld petitioner's convictions. *Id.* 48a.

3. The Tenth Circuit affirmed in part and reversed in part. Pet. App. 2a. The court of appeals concluded that there was insufficient evidence to find the snowmobiling at issue was a "work activity or service" under Section 261.10(c). *Id.* 24a. The court, however, upheld petitioner's conviction for improperly using an over-snow vehicle on national forest land. *Id.* 11a.

The court also rejected petitioner's argument that he was deprived of his constitutional right to trial by jury. Pet. App. 24a-25a. The Tenth Circuit acknowledged that the Constitution guarantees a jury trial for "all crimes," U.S. Const. art. III, § 2, cl. 3, and "[i]n all criminal prosecutions," *id.* amend. VI. Pet. App. 24a. Yet because petitioner faced no more than six months in prison for either of the counts with which he had been charged, the court considered itself bound by this Court's petty-offense exception to hold petitioner was not entitled to trial by jury. *Id.*

Judge Tymkovich, joined by Judge Rossman, issued a concurrence. Pet. App. 26a-31a. They recognized that "prevailing precedent" required the court to reject petitioner's jury-trial claim. *Id.* 26a. But they called for this Court to conduct "a closer examination" of "the correct scope of the Constitution's right to a trial by jury." *Id.*

In particular, the concurring judges observed that the petty-offense doctrine appears to "disregard [] the text of Article III and the Sixth Amendment." Pet. App. 28a. They also cited recent scholarship demonstrating that the doctrine "is incompatible with the original public understanding of the Constitution." *Id.* 29a. Finally, the judges stressed that the doctrine—which "directs the judiciary to rely

primarily on the legislative branch's 'judgment'" about when the right to jury trial is necessary—"abdicate[s]" "the judicial imperative" of enforcing the right to jury trial. *Id.* 30a.

REASONS FOR GRANTING THE WRIT

The petty-offense exception flouts the text, structure, and history of the Constitution's jury-trial provisions. What's more, it stands on shaky precedent reached with sparse briefing and has never been subjected to serious adversarial testing. This petition provides an ideal vehicle for the Court to fully address this important and recurring issue.

I. The petty-offense exception flouts the text, structure, and history of the Constitution's jury-trial provisions

A. Text

The Constitution guarantees a right to jury trial for "all criminal prosecutions" and for "all crimes" (save cases of impeachment). U.S. Const. amend. VI; *id.* art. III, § 2, cl. 3. Petty offenses fall squarely within this categorical language.

1. To state what should be obvious: Prosecutions for crimes punishable by six months in prison are "criminal prosecutions." U.S. Const. amend. VI. Founding-era dictionaries defined "criminal" to mean merely "[n]ot civil."[2] And Blackstone's discussion of the

[2] 1 Samuel Johnson, A Dictionary of the English Language (1773) (defining "criminal" as "Not civil; as a *criminal* prosecution."), https://perma.cc/7JSM-KSTN; *see also* Noah Webster, American Dictionary Of The English Language (1828)

"criminal" law commences by distinguishing the prior discussion of "civil injuries." 4 William Blackstone, Commentaries *1.

Moreover, dictionaries and treatises defined "prosecution" as "the institution or commencement and continuance of a criminal suit."[3] There was no carve-out for minor charges; "the term 'prosecution' typically include[d] any criminal proceeding, whether serious or minor." Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 599, 638 (2022); *see also* 4 William Blackstone, Commentaries *300-01 (classifying "presentments of petty offenses" as a mode of "prosecution").

Accordingly, the Framers understood the phrase "criminal prosecutions" as simply a way to differentiate criminal trials (the subject of the Sixth Amendment) from civil trials (the subject of the Seventh Amendment). *See* Roth, 72 Duke L.J. at 638; *see also, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 441

[hereinafter Webster] (defining "criminal" as "opposed to civil"), https://perma.cc/RT4F-6B9W.

[3] Webster (defining "prosecution"), https://perma.cc/5L3U-28DJ; *see also id.* (defining "criminal" as "a person indicted or charged with a public offense, and one who is found guilty"), https://perma.cc/RT4F-6B9W); *id.* (explaining that "Crimes and misdemeanors" are "punishable by indictment, information, or public prosecution" while defining "crime"), https://perma.cc/Z6CX-PQDN; II John Bouvier, A Legal Dictionary 382 (2d ed. 1843) (defining "prosecution" as a case initiated by "indictment" and "by an information" "to bring a supposed offender to justice and punishment by due course of law"); 4 William Blackstone, Commentaries *301-12 (explaining that a "prosecution" begins with an indictment, presentment, or information and is a "step towards the punishment of offenders").

(2011) ("[T]he Sixth Amendment does not govern civil cases."). That historical definition controls here. The Government charged petitioner by information with committing crimes and sought to convict him at trial and impose criminal punishment. Pet. App. 4a-5a. No one would call this anything other than a "criminal prosecution."

2. Article III independently dictates that the jury-trial right encompasses petty offenses. The Jury Trial Clause of Article III covers trials in federal court "of all *crimes.*" U.S. Const. art. III, § 2, cl. 3 (emphasis added). Founding-era dictionaries and treatises defined the word "crime" broadly to include the full range of criminal offenses, "includ[ing] petty crimes." Roth, 72 Duke L.J. at 637.

In *Schick v. United States*, 195 U.S. 65 (1904) this Court questioned the applicability of that broad definition, suggesting that Blackstone's treatise supported a more limited definition of "crime." *Id.* at 69. In the passage the Court quoted, Blackstone noted that in "common usage," the term "crimes" was sometimes used to mean "offenses . . . of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence" were referred to "under the gentler name of 'misdemeanors' only." *Id.* (quoting 4 William Blackstone, Commentaries *5). But the Court's reference to this isolated passage was misguided thrice over.

First, Blackstone explained in the very same sentence that the "general *definition*" of "crime" "comprehends both crimes and misdemeanors; which properly speaking, are mere synonymous terms." 4 William Blackstone, Commentaries *5 (emphasis

added). In other words, Blackstone's point about "common usage" was simply a point about colloquial speech: Sometimes, people speak of "crimes" and "misdemeanors" separately. But in actuality, no one has ever doubted that—as a legal matter—misdemeanors, too, are crimes. Lest there be any doubt, Blackstone presumed that in any prosecution by information—including for "misdemeanors"—the defendant was entitled to a "trial by jury." *Id.* at *309-10.

Second, even the *Schick* Court did not hold that misdemeanors are not "crimes." To the contrary, the Court emphasized it was "not go[ing] beyond" its previous decision in *Callan v. Wilson*, 127 U.S. 540 (1888), which expressly held that the category of jury-demandable "crimes" "embraces as well some classes of misdemeanors." *See Schick*, 195 U.S. at 70; *Callan*, 127 U.S. at 549. Nor has the Court ever suggested since that its test for "petty offenses" encompasses all misdemeanors. To the contrary, the Court's current test does not reach any offense punishable by more than six months in prison, *see infra* at 29, even though certain misdemeanors can be punishable by up to one year's imprisonment, 18 U.S.C. § 3559(a).[4]

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[4] Holding that the term "crimes" in Article III excludes misdemeanors would also be inconsistent with the Constitution's Interstate Extradition Clause. That Clause empowers states to demand the return of any person charged "with Treason, Felony, or other Crime" who has since fled its jurisdiction. U.S. Const. art. IV, § 2, cl. 2. And the Court has held that the phrase "other Crime" encompasses "every offense against the laws of the demanding state, without exception as to the nature of the crime." *Ex parte Reggel*, 114 U.S. 642, 650 (1885).

Third, even if the word "crimes" in Article III were somehow ambiguous, the Sixth Amendment is not. As explained above, the Sixth Amendment applies in all "criminal prosecutions"—a phrase that indisputably includes prosecutions for petty offenses. *See supra* at 13-15. "Given that the requirement of a jury in 'all Crimes' in Article III was restated as 'all criminal prosecutions' in the Sixth Amendment, any relevance of Blackstone's note of the colloquial use of 'crime' to mean particularly atrocious acts seems strained." Roth, 72 Duke L.J. at 618 (footnotes omitted).

3. The word "all" in the phrases "*all* criminal prosecutions" and "*all* crimes" confirms beyond debate that the Constitution's jury-trial guarantee applies to petty offenses. At the Founding, as now, *all* meant "the entire quantity, without reference to relative importance." *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140, 146 (2017); *see also* Samuel Johnson, A Dictionary of the English Language (1773) (defining "all" as "[b]eing the whole quantity; every part"), https://perma.cc/6QC8-5NMS. If the Framers had intended to allow legislatures or courts to provide juries only in some criminal prosecutions, they would not have included the word "all." The only function of the word "all" is to ward off any suggestion that the right to jury trial could be limited to only a subset of more serious "criminal prosecutions" or "crimes." Alexander Hamilton said as much: Because "arbitrary punishments upon arbitrary convictions" fuel "the great engines of judicial despotism," the Constitution "amply provided for" the "trial by jury in criminal cases." The Federalist No. 83, at 467 (Hamilton) (Clinton Rossiter ed., 1961).

B. Structure

1. The structure of the Sixth Amendment further undermines the petty-offense exception. The Sixth Amendment enumerates a total of nine rights, including the right to jury trial, that apply in "all criminal prosecutions." Those rights are: (1) a speedy trial, (2) a public trial, (3) a trial by jury, (4) an impartial jury, (5) a jury drawn from the vicinity of the crime (vicinage), (6) notice of accusation, (7) confrontation, (8) compulsory process for obtaining witnesses, and (9) aid of counsel. *See* U.S. Const. amend. VI.

If the phrase "all criminal prosecutions" contains an unstated exception for petty crimes, it should follow that every other Sixth Amendment right is similarly cabined. That would mean that the Constitution would have allowed the magistrate judge here to deny petitioner all of the other rights enumerated in the Sixth Amendment as well. The judge, for example, could have denied him any right to the assistance of retained counsel, refused to allow him to confront and cross-examine the witnesses against him, and precluded him from issuing subpoenas for witnesses to testify in his favor.

But, in fact, the magistrate could not have done so. This Court has "never limited" the reach of any of these other rights to non-petty or otherwise "serious offenses." *Argersinger v. Hamlin*, 407 U.S. 25, 27-31 (1972) (rejecting petty-offense exception for the right to the assistance of retained counsel; discussing public trial, notice of accusation, confrontation, and compulsory process rights). Rather, "the right to jury trial [is] the only Sixth Amendment right applicable to

the States that ha[s] been held inapplicable to 'petty offenses.'" *Scott v. Illinois*, 440 U.S. 367, 378 n.5 (1979) (Brennan, J., dissenting).[5]

This makes no sense. As a matter of grammar, the phrase "all criminal prosecutions" modifies the entire sentence and thus should have a consistent meaning across it. Equally important, it makes sense to apply all nine rights uniformly because all the rights are designed to effect the same goal: "to ensure a fair trial" under a set of minimum safeguards. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006).

2. The structure of the Constitution beyond the Sixth Amendment further confirms that the right to jury trial applies to "all criminal prosecutions," with no exception for petty offenses.

For one thing, the Framers knew how to limit the reach of constitutional provisions to subsets of "crimes" or "criminal prosecutions." The Constitution, for example, singles out "felonies" to delineate the scope of certain provisions. *See, e.g.*, U.S. Const. art. I, § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas"). Similarly, the Fifth Amendment attaches the right to presentment or indictment by a grand jury to "capital, or otherwise infamous crime[s]." If "crime" applied only to "offenses

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[5] In *Scott*, the Court held the right to appointed counsel does not apply to defendants who are not sentenced to jail time. *See* 440 U.S. at 373-74. But this restriction on the right the Court created in *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963), does not apply to the Sixth Amendment's explicit guarantee of the right to assistance of retained counsel. *See Scott*, 440 U.S. at 370. And even the *Gideon* right applies to petty offenses where, as here, the defendant faces jail time. *Id.* at 373-74.

of a deeper or more atrocious dye," *supra* at 15, then this specification would be meaningless. "Crimes" would have sufficed.

C. History

Nor can the petty-offense exception be squared with history.

1. The Court has made clear that the right to jury trial, like other Sixth Amendment rights, codified a common-law right and should therefore be construed in accordance with the common law. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1395-96 (2020) (unanimous jury); *Holland v. Illinois*, 493 U.S. 474, 481 (1990) (impartial jury); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (right to confrontation); *Giles v. California*, 554 U.S. 353, 358 (2008) (same). Consequently, the Court has repeatedly recognized that the right to jury trial extends to the "class of cases" that were so adjudicated at "common law." *See Callan*, 127 U.S. at 549; *accord Schick*, 195 U.S. at 69; *Duncan*, 395 U.S. at 151-52, 160.

The right to jury trial at common law covered prosecutions for petty offenses. As Blackstone put it, when the Crown sought to impose "punishment [upon] the subject" by way of indictment or presentment, the "ancient" rule was that the defendant was entitled to "our admirable and truly English trial by jury." 4 William Blackstone, Commentaries *280-82. This included trial following "presentment of petty offenses." *Id.* at *300.

2. The Court and the Government have resisted this straightforward analysis. When creating the petty-offense exception, the Court claimed that in

England before the Founding, as well as in the colonies, adjudications for certain minor crimes were handled "summarily," without juries. *See Callan*, 127 U.S. at 552, 555; *Schick*, 195 U.S. at 70; *see also* Felix Frankfurter & Thomas Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 922-965 (1926) (further documenting this historical practice). And the Government has taken this reliance on summary adjudications one step further, arguing that the Framers must have intended to allow legislatures to dispense with juries in criminal prosecutions for petty offenses because a handful of states in the post-Founding era tolerated summary adjudications for such offenses despite having Declarations of Rights that "expressly guaranteed a jury trial in all criminal 'prosecutions.'" BIO at 22, *Ehmer v. United States*, 145 S. Ct. ___ (2024) (No. 24-5160).

These arguments misapprehend what summary adjudications were. Most were "in [their] nature not criminal but *civil*" proceedings in which the presiding justice of the peace could impose nothing more than a *civil* fine—as opposed to criminal punishment. *Ex parte Marx*, 9 S.E. 475, 478 (Va. 1889) (emphasis added); *see also In re Glenn*, 54 Md. 572, 599, 605-06 (Md. 1880) (such proceedings were not an exercise "of criminal jurisdiction"). Even when a justice of the peace was empowered to impose some form of criminal punishment, the proceeding was not considered a criminal "prosecution" because it did not proceed by way of indictment or involve a prosecutor. *Marx*, 9 S.E. at 476; *Glenn*, 54 Md. at 605-06.

That being so, summary adjudications were "in *derogation of* the common law," not a reflection of it.

Roth, 72 Duke L.J. at 654; *see also* Philip Hamburger, Is Administrative Law Unlawful? 244 (2014). In the words of Blackstone, the "common law [wa]s a stranger to" summary adjudications in which "there is no intervention of a jury." 4 William Blackstone, Commentaries *280; *see also* 3 Richard Burn, The Justice of the Peace, and Parish Officer 159 (1756) ("The power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter."). The same understanding prevailed on this side of the Atlantic. As Justice Harlan explained, the allowance of summary adjudication "was contrary to the genius of the common law." *Schick*, 195 U.S. at 97 (Harlan, J., dissenting); *see also Geter v. Comm'rs for Tobacco Inspection*, 1 S.C.L. (1 Bay) 354, 356 (S.C. 1794) ("summary adjudications" were "in restraint of the common law").

Put another way, not even the English themselves understood the occasional legislative allowances for summary adjudications to suggest that a *court* could dispense with trial by jury in an actual criminal *prosecution*. *Compare* 4 William Blackstone, Commentaries *280-82 ("Of Summary Convictions") *with id.* at *301 ("Of the Several Modes of Prosecution"). Such legislatively approved deviations from the common law were like the deviations from the right to confrontation that sometimes crept into criminal prosecutions. It was one thing for "[j]ustices of the peace" to engage in inquisitorial practices; it was wholly another for such examinations to be "read in *court* in lieu of live testimony." *Crawford*, 541 U.S. at

43 (emphasis added). The latter was inconsistent with the common-law right to confrontation. *Id.* at 50. This Court, therefore, has understood such historical deviations to illustrate what the constitutional right to confrontation *forbids*, not what it allows. *See id.* at 43, 50.

The Court should follow the same course here. There can be no doubt that petitioner's case is a criminal "prosecution": It was commenced by information and instituted and litigated by a federal *prosecutor* on behalf of the United States. That should be the end of the matter.

II. The stare decisis factors support reconsidering the petty-offense exception

When deciding whether to overturn precedent, this Court considers the quality of the decision's reasoning, the jurisprudential and practical consequences of the decision, and any societal reliance on the decision. *See*, *e.g.*, *Ramos*, 140 S. Ct. at 1405-07; *id.* at 1414-15 (Kavanaugh, J., concurring); *Gamble v. United States*, 587 U.S. 678, 718 (2019) (Thomas, J., concurring). All of these factors point towards abrogating the petty-offense exception.

A. Egregiously wrong

1. For all of the reasons just stated, the petty-offense exception flouts the text, structure, and history of the Constitution. But that is not all; it is also flatly inconsistent with this Court's modern methodology for construing the Sixth Amendment.

This Court has recently and repeatedly made clear that judicial balancing and related "functionalist assessment[s]" are off-limits when it comes to the right

to jury trial. *Ramos*, 140 S. Ct. at 1401-02. "When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses." *Id.* at 1402. Nor were they licensing this Court to suspend the right to jury trial where inefficient or administratively inconvenient. To the contrary, "arguments from efficiency cannot alter the demands" of the constitutional right to jury trial. *See Erlinger v. United States*, 144 S. Ct. 1840, 1859 (2024); *see also id.* at 1856 ("There is no efficiency exception" to the right to jury trial); *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (same). The whole point of guaranteeing the right to jury trial in "all" criminal prosecutions is to *preclude* dispensing with the procedure on the basis of such expediency.

Yet instead of adhering to the original public meaning of the right to jury trial, the Court has grounded its petty-offense exception in a balancing of policy considerations. The Court has opined that "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." *Duncan*, 391 U.S. at 160. And when creating the six-month cutoff for petty offenses, this Court "weigh[ed] the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial and magically conclud[ed] that the scale tips at six months' imprisonment." *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Black, J., concurring in the judgment); *see also Blanton v. City of North Las Vegas*, 489 U.S. 538, 542-43 (1988).

This brand of reasoning will not fly anymore. Worse yet, under the petty-offense exception, "the judicial imperative of interpreting the fundamental-to-liberty jury right has been abdicated to the legislative branch, or in this case even the executive branch"—all in the name of "efficient government." Pet. App. 30a (Tymkovich, J., concurring) (quoting *Oil States Energy Servs. v. Greene's Energy Grp.*, 584 U.S. 325, 356 (2018) (Gorsuch, J., dissenting)). That is because the doctrine requires courts to defer to legislatures—or, more accurately here, administrative agencies—as to whether an offense is serious enough to require jury trial. *Blanton*, 489 U.S. at 541-43; *see also* Pet. App. 30a (Tymkovich, J., concurring).

The judiciary must not cede to the political branches its core "province and duty" to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Just as this Court recently clarified that administrative agencies may not curtail the Seventh Amendment right to jury trial by regulatory fiat, *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127-28 (2024), neither may agencies deprive criminal defendants of their Sixth Amendment right to jury trial in "all criminal prosecutions" by creating crimes punishable by up to "only" six months in prison. *See* Pet. App. 26a, 28a, 30a (Tymkovich, J., concurring).

2. The Court is even "less constrained to follow precedent" here because this Court has never had the benefit of "full briefing or argument on [the] issue." *Johnson v. United States*, 576 U.S. 591, 606 (2015) (citation omitted).

This Court first suggested in *Callan v. Wilson*, 127 U.S. 540 (1888), that the right to jury trial

contained a petty-offense exception. The *Callan* defendant had been summarily tried and convicted in a District of Columbia "police court." 127 U.S. at 547; *see* Roth, 72 Duke L.J. at 610-11. In briefing, the defendant assumed his offense—conspiracy to commit extortion—was jury-demandable because it was a crime. Petr. Br. at 15-18, *Callan*, 127 U.S. 540 (No. 1318). The Government did not disagree, instead arguing that the Sixth Amendment did not apply to D.C. courts, and that if it did, the regime at issue satisfied that requirement by providing for jury trial on appeal. Resp. Br. at 5-16, *Callan*, 127 U.S. 540 (No. 1318). Only at the end of the Government's brief—in all of one sentence—did it quip that "the guaranty of trial by jury has never been understood to embrace petty offenses." *Id.* at 16.

The Court ruled for the defendant, holding that the limited right to a jury in prosecutions commenced in the District's police court was a violation of the Sixth Amendment and Article III's jury-trial guarantee. *Callan*, 127 U.S. at 556-57. But the Court did not stop there. In dicta, the Court also distinguished the defendant's offense from "petty or minor offences," and it suggested that the latter could "be tried by the court and without a jury." *Id.* at 555.

When the Court turned this dicta into law in *Schick*, the parties did not brief the validity of the petty-offense exception either. *See* Roth, 72 Duke L.J. at 616-17. Nor was the issue ever squarely presented in any post-incorporation case applying the jury-trial guarantee to the states. *Id.* at 615, 632. All told, "in none of these later cases did a party present and brief the argument that a petty federal crime is still a 'crime' and a 'criminal prosecution' and should thus be

jury demandable under Article III and the Sixth Amendment." *Id.* at 615.

Nor has this Court ever considered the modern scholarship making clear that the Court's prior cursory historical analysis was decidedly incorrect. *See* Kaye, 26 U. Chi. L. Rev. at 245-46; Lynch, 4 Kan. J. L. & Pub. Pol'y at 7; King, 24 U. Pa. J. Const. L. at 817-822; Roth, 72 Duke L.J. at 601-08. As with past cases, this upswell of scholarship warrants reconsidering the Court's precedent. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 60-61 (2004).

B. Consequences

The petty-offense exception also has pernicious consequences. And in cases where, as here, a criminal procedure requirement "implicate[s] fundamental constitutional protections," stare decisis is "at its nadir." *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013); *see also Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring).

1. Perhaps most notably, the petty-offense exception contravenes the Jury Trial Clause's purpose. The Founders insisted upon "[t]rial by jury in criminal cases" to guard against "arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions." The Federalist No. 83, at 467 (Hamilton) (Clinton Rossiter ed., 1961). This Court has likewise recognized that the right to jury trial "protect[s] against unfounded criminal charges brought to eliminate enemies . . . and against the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 156. In light of these functions, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of

the commonsense judgment of a group of laymen." *Williams v. Florida*, 399 U.S. 78, 100 (1970). Without a jury, agents of the state—prosecutors and judges—could unilaterally brand someone a "criminal" and strip him of his liberty without any say whatsoever from the general citizenry.

This fundamental restraint on prosecutorial and judicial power is just as vital when dealing with offenses punishable by a maximum of six months in prison. *Any* amount of time in prison is seriously damaging: Spending months behind bars separates people from their families and communities, typically costs them their jobs, imposes a psychological toll, and places them at risk for physical harm while incarcerated. *See, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1322–23, 1325, 1371 (2012). Monetary penalties can also impose major hardship. *See, e.g.*, Bridget McCormack, *Economic Incarceration*, 25 Windsor Y.B. of Access to Just. 223, 228 (2007). And the stigma of being branded a "criminal" is the same regardless of how steep the resulting punishment might be.

What's more, the modern proliferation of substantive criminal law exposes pretty much the entire populace to these potential consequences. The range of crimes that might be classified as "petty" involves not just legislative prohibitions such as littering and assault, but also an "alarming" array of crimes created by "minute administrative regulations." *See Lewis v. United States*, 518 U.S. 322, 337 (1996) (Kennedy, J., concurring in the judgment). These regulations apply to, among others, "millions of persons in agriculture, manufacturing, and trade"—implementing everything from "migratory bird

treaties" to employment laws and recreational conduct on public lands. *Id.* at 337 (citation omitted); *see also* Neil Gorsuch & Janie Nitze, Over Ruled: The Human Toll of Too Much Law 108 (2024) ("Nor does anyone have a clue how many federal regulatory crimes are out there . . . the best anyone can do is guess that they number over 300,000.").

In short, prosecutors can almost always charge virtually anyone with a petty offense. Are we really content, in this day and age, to sacrifice for mere efficiency's sake the jury's role in protecting against vengeful prosecutors and eccentric or compliant judges?

2. The Court also recognized years ago that the "boundaries of the petty offense category [were] ill-defined, if not ambulatory." *Duncan*, 391 U.S. at 160. The Court later responded to its own critique by drawing the line—at least in general—between "petty" and "serious" crimes at six months' imprisonment. *See Baldwin*, 399 U.S. at 69 (internal quotation marks omitted). But that line remains fuzzy insofar as it is still possible for a defendant to "demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Blanton*, 489 U.S. at 543.

This modern jurisprudence points to a more fundamental problem, though. When courts make up rules of constitutional law that flout constitutional text, structure, and history, they have no neutral criteria to undergird their jurisprudence. The petty-offense exception represents just such an aberration—

to the detriment not only of criminal defendants but also the public's trust in the Court itself.

C. Reliance interests

Abrogating the petty-offense exception would upset no legitimate reliance interests. No one "has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that, should a crime occur, at least the accused may be sent away" without a jury trial. *Ramos*, 140 S. Ct. 83 at 1406.

Nor would abrogating the petty-offense exception implicate any interest in the finality of criminal judgments. As the Court recently held, "new procedural rules do not apply retroactively on federal collateral review." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021). So even individuals who objected to bench trials for petty offenses will not be able to attack such final convictions based on anything the Court holds here.

Granted, some trials in the future for minor crimes would need to be conducted in front of juries instead of judges. Yet the vast majority of states—from Texas to California—already protect the right to a jury trial for some or all petty offenses. *See* Memorandum #31 from the D.C. Crim. Code Reform Comm'n to the Code Revision Advisory Grp.: App. A (Feb. 25, 2020) (35 states), https://perma.cc/V8UP-SPS2. And there is no evidence that they have incurred any significant burden in doing so. *See id.* at 1-6. Among other things, most such cases end in plea bargains regardless.

At any rate, any incremental burden incurred by providing the right to jury trial for petty offenses cannot outweigh the long-term "interest we all share

in the preservation of our constitutionally promised liberties." *See Ramos*, 140 S. Ct. at 1408. Once precedent is shown to be egregiously wrong, a constitutional right should not be interred forever. *Id.*

III. This case provides an excellent vehicle for reconsidering the petty-offense exception

Petitioner recognizes that this Court recently denied certiorari in another case challenging the legitimacy of the petty-offense exception. *See Ehmer v. United States*, 145 S. Ct. ___ (2024) (No. 24-5160). But that denial should not influence the Court's consideration of this petition. The petitioner in *Ehmer* devoted only two pages in a second question presented to the issue, and he restricted his argument to the Sixth Amendment only. *Ehmer* Pet. for Cert. at i, 9-11. This petition, by contrast, provides this Court a comprehensive treatment of the constitutional and stare decisis issues involved, and it challenges the petty-offense exception under both the Sixth Amendment *and* Article III.

At any rate, this Court has often granted review after previously denying other petitions asking it to reconsider precedent limiting the reach of criminal procedure rights. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1428 (2020) (Alito, J., dissenting) (referencing multiple previous denials on question presented); BIO at 6, *Alleyne v. United States*, 570 U.S. 99 (2013) (No. 11-9335) (same); BIO at 5, *Gamble v. United States*, 587 U.S. 678 (2019) (No. 17-646) (same). And this case provides an ideal opportunity to reconsider the petty-offense exception. Petitioner preserved his constitutional claim at every stage of his proceedings—before the magistrate judge,

district court, and Tenth Circuit. Petr. C.A. Br. 48, 71-72. And the Tenth Circuit squarely addressed the issue, with two of the three judges on the panel urging this Court to do the same. Pet. App. 24a; *id.* 26a-31a (Tymkovich, J., joined by Rossman, J., concurring).

The facts of this case also place the question presented in stark relief because a jury may well have made a difference to the outcome at trial. Petitioner engaged in what some might think is flamboyant or provocative behavior, allegedly recreating in the Colorado backcountry to the consternation of government officials. Pet. App. 3a-5a. He posted various provocative photos and videos on social media, arguably daring the government to charge him with a crime. *Id.* 4a. At the same time, petitioner presented two witnesses who "stated that they were the individuals anonymously depicted riding snowmobiles in pictures posted on [petitioner's] Instagram account." Petr. C.A. Br. 18. It is quite possible that at least some members of a jury might have believed those witnesses or otherwise responded to the prosecution in general differently from "one judge" who, after all, also works for the government, *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

Indeed, the district court convicted petitioner of one offense—unauthorized work activity on public lands, in violation of 36 C.F.R. § 261.10(c)—for which the Tenth Circuit found insufficient evidence on appeal. *See* Pet. App. 21a-24a. Put another way, the Tenth Circuit found that "no rational jury" could have found that petitioner committed one of the two crimes the Government charged petitioner with committing here. *Carella v. California*, 491 U.S. 263, 266 (1989) (reciting standard for insufficient evidence); *see also*

Pet. App. 21a-22a. So, if this trial had included a jury, petitioner might have been able to obtain an acquittal on the other charge too. He should have that opportunity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 13, 2024

APPENDIX

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States
Court of Appeals
Tenth Circuit
July 16, 2024
Christopher M.
Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID LESH,

Defendant-Appellant.

No. 23-1074

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:22-CR-00033-DDD-GPG-1)

Richard A. Samp (Kara M. Rollins, Counsel of Record, and Mark S. Chenoweth, with her on the briefs), New Civil Liberties Alliance, Washington, D.C., for Defendant-Appellant.

Kyle Brenton, Assistant United States Attorney (Matt Kirsch, United States Attorney, with him on the brief[1]), Office of the United States Attorney, Denver, Colorado, for Plaintiff-Appellee.

[1] On May 31, 2024, Cole Finegan resigned as United States Attorney for the District of Colorado. Consequently, Matt Kirsch became Acting United States Attorney for the District of Colorado. He has been substituted for Cole Finegan as Acting United States Attorney.

Before **TYMKOVICH**, **BALDOCK**, and **ROSSMAN**, Circuit Judges.

TYMKOVICH, Circuit Judge.

David Lesh is a content creator on social media and owner of an outdoor apparel brand. At the beginning of the pandemic, Mr. Lesh posted two Instagram photos of himself snowmobiling over a jump in a terrain park at Keystone Resort, Colorado, at a time the ski resort was closed. The United States charged him with two crimes based on National Forest Service (NFS) regulations: (1) using an oversnow vehicle on NFS land off a designated route, and (2) conducting unauthorized work activity on NFS land. After a bench trial conducted by a magistrate judge, he was convicted of both counts.

Mr. Lesh challenges the sufficiency of the evidence to support his conviction and makes various constitutional arguments. We affirm in part and reverse in part. While Mr. Lesh was properly convicted of essentially trespassing under NFS regulations, his conviction for unauthorized work activity pursuant to 36 C.F.R. § 261.10(c) must be reversed. The regulation does not fairly warn social media users that posting images on the Internet could constitute a federal crime with imprisonment up to six months. For that reason, § 261.10(c) is impermissibly vague as applied to Mr. Lesh's conduct.

I. Background[2]

Keystone Resort is located on NFS lands within the White River National Forest. NFS lands are property of the United States of America, but the Forest Service leases acreage to Keystone Resort. The resort is one of many ski areas owned by the Vail Corporation and closed to the public in April 2020 due to the COVID-19 pandemic. Numerous closure signs were posted around Keystone Resort.

On April 25, 2020, the Director of Mountain Operations for Keystone Resort was alerted to two photographs posted on Mr. Lesh's Instagram account that day. The photos—posted on his verified account "@davidlesh"—depict Mr. Lesh[3] driving a snowmobile over a jump in a terrain park. The caption reads: "Solid park sesh, no lift ticket needed." Later, Mr. Lesh added the hashtag "#fuckvailresorts."

Keystone Resort employees also discovered someone had taken a shovel from a utility shed near the terrain park and dug a path through a snow barrier that was built to make the park inaccessible. The path was large enough for a snowmobile to access the jump, and the snowmobile tracks indicated the snowmobiler went over the jump multiple times and rode his snowmobile around other parts of the closed resort.

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[2] These facts were found by the magistrate judge to be true beyond a reasonable doubt.

[3] The district court upheld the magistrate judge's factual determination that the individual pictured snowmobiling was Mr. Lesh, and he does not challenge this finding.

In the following months, Mr. Lesh posted two more photos on Instagram of him ostensibly on closed NFS lands in Colorado. In one, he posted a photo of himself standing on a log in the middle of Hanging Lake, a popular hiking trail in central Colorado. Another post showed him defecating in Maroon Lake near Aspen. Mr. Lesh claims he photoshopped the images.

A few months later, in January 2021, the *New Yorker* published a profile of Mr. Lesh entitled "Trolling the Great Outdoors." It quotes Mr. Lesh as saying "[t]he more hate I got, the more people got behind me, from all over the world . . . . It was an opportunity to reach a whole new group of people—while really solidifying the customer base we already had." He went on to claim that he posted the Hanging Lake and Maroon Lake images because he "wanted [the government] to charge me with something. The only evidence they have is the photos I posted on Instagram, which I know are fake, because I faked them. I was pissed off about them charging me for the snowmobiling . . . with zero evidence. I realized they are quick to respond to public outcry. I wanted to bait them into charging me." The article also notes that Mr. Lesh markets his clothing brand, "Virtika," on social media and that sales increased after he posted the photo at Hanging Lake. In a later interview, Mr. Lesh said "nothing [in the *New Yorker* article] was untrue or unfair, but it only captures one aspect of me, one part of my life, one part of our marketing, one part of my company."

Mr. Lesh was initially charged in September 2020 with violating 36 C.F.R. § 261.14 for improperly using an over-snow vehicle on NFS land. He was also

charged with five additional counts related to his entry into Hanging Lake, but these were later dropped. In February 2021, the United States filed a superseding indictment adding a new charge under 36 C.F.R. § 261.10(c) for conducting work activity at Keystone Resort.

Following a bench trial, a magistrate judge found Mr. Lesh guilty of both charges. He was required to pay $5,000 for each count, plus a special assessment of $25 per count, and perform 160 hours of community service. The district court affirmed his convictions.

II. Analysis

Mr. Lesh makes four arguments on appeal: (1) the government failed to present sufficient evidence to demonstrate his guilt on either count, (2) § 261.10(c) is overly vague and violates his Fifth Amendment rights, (3) the statute authorizing promulgation of the two regulations lacks an intelligible principle, and (4) he was deprived of his Sixth Amendment right to a trial by jury.[4]

We address each in turn.

A. Operating a snowmobile in violation of 36 C.F.R. § 261.14

Mr. Lesh argues the government was required to show that the NFS lands had "been designated for

[4] Mr. Lesh also argues he was punished for posting photos on Instagram in violation of his First Amendment free speech rights. Because we conclude there was insufficient evidence to convict Mr. Lesh pursuant to § 261.10(c), and because that section is vague as applied to him, we need not reach his First Amendment argument.

over-snow vehicle use" and that "these designations [had] been identified on an over-snow vehicle use map." Aplt. Br. at 17. Specifically, Mr. Lesh asserts the over-snow vehicle use map, of which the magistrate judge took judicial notice, does not satisfy the evidentiary burden.

The Department of Agriculture regulations prohibit snowmobiling except on terrain that has been designated for that purpose and snowmobilers have notice of permitted terrain:

> *After* National Forest System roads, National Forest System trails, and areas on National Forest System lands *have been designated for over-snow vehicle use* pursuant to 36 CFR 212.81 on an administrative unit or a Ranger District of the National Forest System, *and these designations have been identified on an oversnow vehicle use map*, it is prohibited to possess or operate an oversnow vehicle on National Forest System lands in that administrative unit or Ranger District other than in accordance with those designations[.]

36 C.F.R. § 261.14 (emphasis added).[5]

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[5] "Designation[s] . . . for over-snow vehicle use shall be reflected on an over-snow vehicle use map. Over-snow vehicle use maps shall be made available to the public at headquarters of corresponding administrative units and Ranger Districts of the National Forest System and, as soon as practicable, on the Web site of the corresponding administrative units and Ranger Districts. Over-snow vehicle use maps shall specify the classes of vehicles and the time of year for which use is designated, if applicable." 36 C.F.R. § 212.81.

At trial, the government did not affirmatively present evidence of map-posting. But as a part of his ruling on the charge, the magistrate judge took judicial notice of a publicly available "winter motor vehicle use map" provided online by the Forest Service. The map indicates Keystone Resort is not an area designated for snowmobile use. The magistrate judge therefore concluded Mr. Lesh operated a snowmobile on NFS lands outside of areas designated for snowmobile use.

Mr. Lesh claims the judicially noticed map is insufficient to satisfy the notice requirement of § 261.14 because it is not clear when it was published—in other words, because the map does not have a date of publication, it is unclear whether it was posted before Mr. Lesh accessed the terrain park. Mr. Lesh argues that "the fact of which the magistrate judge sought to take judicial notice—that the Forest Service had posted an over-snow vehicle use map. . . as of April 24, 2020—is simply not capable of accurate and ready determination." Aplt. Br. at 21 (internal quotation marks omitted).

But Mr. Lesh makes this argument for the first time on appeal. We therefore find Mr. Lesh has waived this challenge to the propriety of the magistrate judge's judicial notice.[6]

After trial, Mr. Lesh moved for leave to file an untimely motion for judgment of acquittal but did not

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[6] Mr. Lesh also challenges the magistrate judge's alternative holding—that closure signs are a sufficient replacement for an over-snow vehicle map in this case. We need not reach this argument because Mr. Lesh waived his judicial notice argument.

challenge judicial notice. Then, on appeal to the district court, Mr. Lesh challenged the sufficiency of the government's evidence: "the Government provided not an iota of proof for one [] element, specifically that the over-snow designations be made available to the public." Aplt. App. Vol. I at 89. He—again—did not challenge the judicial notice as improper, argue the judicially-noticed map was undated, and did not question whether it was posted before he accessed the terrain park. "When a defendant challenges in district court the sufficiency of the evidence on specific grounds, all grounds not specified in the motion are waived." *United States v. Goode*, 483 F.3d 676, 681 (10th Cir. 2007) (internal quotation marks omitted). Mr. Lesh did not raise this judicial notice argument at the magistrate level nor before the district court. Thus, he failed to preserve it for review on appeal.

Mr. Lesh also fails to argue plain error. "When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise." *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019). "We might elect to consider Defendant's argument if the Government neglected to raise either Defendant's failure to preserve his insufficient-evidence challenge or his failure to argue for plain error in his opening brief." *Id.* at 1199. But the government raised Mr. Lesh's failure to argue plain error in his opening brief. Thus, under these circumstances, we do not

believe reviewing Mr. Lesh's judicial notice argument would serve the adversarial process.[7]

Mr. Lesh next argues Congress impermissibly delegated authority to the Department of Agriculture as applied to both § 261.14 and § 261.10(c). Congressional delegation arises because, "in our increasingly complex society, replete with ever changing and more technical problems, [the Supreme Court] has understood that Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Gundy v. United States*, 588 U.S. 128, 135 (2019) (internal quotation marks omitted). But the nondelegation doctrine provides that "a statutory delegation is constitutional as long as Congress lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* (internal quotation marks omitted).

Congress delegated authority to the Department of Agriculture to promulgate the regulations for which he was convicted. *See* 7 U.S.C. § 1011(f). Mr. Lesh argues this delegation is improper because the statutory delegation does not contain an intelligible principle. He made this same argument to the magistrate judge: "[T]his legislative delegation [gives] the Department of Agriculture free reign to issue whatever criminal prohibition it wishes . . . . [Which] runs afoul of the separation of powers and

[7] Even if we were to conclude Mr. Lesh preserved this argument, we do not find it persuasive. Section 261.14 was adopted in 2015 and directed over-snow vehicle maps be made available to the public as soon as practicable. *See* § 212.81.

nondelegation doctrines." Aplt. App. Vol. I at 30–31. But he then made a *different* argument to the district court: "On its face, this was a *narrow* delegation of authority to the Executive Branch to regulate activities occurring *on* the land. Here, the Executive attempted to expand that authority to cover activities not contemplated by Congress." *Id.* at 94 (emphasis added). Simply put, Mr. Lesh argued before the district court that the government extended the reach of this otherwise narrow delegation to conduct occurring *off* NFS land—into his home, when he clicked "post" on the Instagram photo.

Now, Mr. Lesh attempts to resurrect his initial argument made to the magistrate judge—that the statutory delegation violates the nondelegation doctrine because it fails to articulate an intelligible principle. But, "[o]rdinarily, a party may not lose . . . on one theory of the case, and then prevail on appeal on a different theory." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011) (citing *Lone Star Steel v. United Mine Workers of Am.*, 851 F.2d 1239, 1243 (10th Cir. 1988)). At the district court, Mr. Lesh argued the regulation was impermissible because it extended to conduct that took place *off* NFS land. Thus, he assumed below that the regulation was otherwise permissible *on* NFS land. A party "may not on appeal change its theory and take a position inconsistent therewith." *Saulsbury Oil Co. v. Phillips Petroleum Co.*, 142 F.2d 27, 34 (10th Cir. 1944). We therefore decline to consider this resurrected—and inconsistent—theory.

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Because Mr. Lesh failed to preserve his appellate arguments, we affirm his conviction for using an over-snow vehicle on NFS land off a designated route in violation of 36 C.F.R. § 261.14.

B. Conducting Work Activity in Violation of 36 C.F.R. § 261.10(c)

Mr. Lesh makes two arguments challenging his conviction of unauthorized work activity on public lands. First, that the regulation is impermissibly vague, such that neither he (nor anybody) could discern that taking Instagram photos on off-limits NFS lands would constitute a crime. Second, he challenges the sufficiency of the evidence to support the conviction.

1. Void for Vagueness

Mr. Lesh contends the regulation, as applied to his conduct, is impermissibly vague.[8] "The Fifth Amendment provides that [n]o person shall . . . be deprived of life, liberty, or property, without due process of law." *Johnson v. United States*, 576 U.S.

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[8] The government argues Mr. Lesh failed to preserve this argument. Although Mr. Lesh never previously used the phrase "void for vagueness," he did argue before the district court that he did not have notice his conduct fell within the scope of this regulation. For instance, he argued "[t]he Supreme Court has long recognized [t]he basic principle that a criminal statute must give fair warning of the conduct that makes it a crime[.]" Aplt. App. Vol. I at 96. And that he "could not have anticipated that a regulation prohibiting the *sale of merchandise* or *conducting work activity on federal land* would be used to prosecute him for posting a photograph on social media depicting an unidentifiable individual engaged in recreational snowmobiling." *Id.* at 97 (emphasis in original). We therefore find this argument preserved.

591, 595 (2015) (internal quotation marks omitted). "Vague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "Vague laws also undermine the Constitution's separation of powers . . . [because] [they] threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id. See also Sessions v. Dimaya*, 584 U.S. 148, 175 (2018) (Gorsuch, J., concurring in part) ("[V]ague laws . . . can invite the exercise of arbitrary power[,] . . . leav[e] [] people in the dark about what the law demands[,] and allow[] prosecutors and courts to make it up.").

A statute or regulation is vague on its face, and thus void, where "no set of circumstances exists under which the [regulation] would be valid." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 741 (1987)). In contrast, a statute or regulation can also be void for vagueness "as applied to particular parties in particular circumstances." *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1234 (10th Cir. 2023). "[A]n as-applied challenge tests the application of that restriction to the facts of a plaintiff's concrete case." *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1248–49 (10th Cir. 2023) (quoting *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th Cir. 2014)). Mr.

Lesh's argument is an as-applied vagueness challenge.[9]

Section 261.10(c) prohibits "[s]elling or offering for sale any merchandise or conducting any kind of work activity or service unless authorized by Federal law, regulation, or special-use authorization." § 261.10(c). We have previously examined this provision in the context of a sale of services on NFS land. In *United States v. Brown*, the defendant was convicted for outfitting and guiding snowmobile tours on NFS land without a special use permit. 200 F.3d 710, 711–12 (10th Cir. 1999). In upholding the conviction, we noted "[r]eceipt of payment [] is not a required element under § 261.10(c)," but emphasized that the defendant delivered snowmobiles to customers who "fully expected to pay for the experience." *Id.* at 714–15. We also determined "[t]he key is whether the sale or offer of sale of merchandise or the work activity or service is a commercial activity." *Id.* at 714 (citing *United States v. Strong*, 79 F.3d 925, 928–30 (9th Cir. 1996)).

This interpretation is harmonious with other parts of the regulation. Section 261.2 defines "commercial activity" as any activity on NFS lands

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[9] Mr. Lesh also brings a facial challenge for the first time on appeal. We need not address this challenge because we afford him the requested relief through his as-applied challenge. *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014) ("[A]lthough the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.") (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 477–78 (1995)).

"(a) where an entry or participation fee is charged, or (b) where the *primary purpose* is the sale of a good or service, and in either case, regardless of whether the use or activity is intended to produce a profit." (emphasis added).

The district court concluded Mr. Lesh's behavior at Keystone Resort qualified as a "work activity" under the regulation because "[it] was reasonably clear . . . that taking photographs to promote a clothing line, which is unquestionably work activity, would have been prohibited on National Forest lands without authorization." Aplt. App. Vol. I at 184–85. We disagree. Under the facts here, Mr. Lesh would not have concluded that his off-limits snowmobiling to take Instagram photos was a "work activity" in violation of federal law.

The void for vagueness doctrine addresses two concerns: "first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Wyoming Gun Owners*, 83 F.4th at 1233 (citing *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012)). A law or regulation can be unconstitutionally vague "for either of [these] two independent reasons." *Id.* (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* Section 261.10(c) fails on both scores: "work activity" does not inform citizens like Mr. Lesh "what is required of [them] so [they] may act accordingly" and it lacks the

necessary "precision and guidance [][] so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television Stations, Inc.*, 567 U.S. at 253.

First, as to notice, Mr. Lesh's conduct of conviction boils down to snowmobiling on restricted land and then later posting a picture of the trespass on Instagram. But the regulation did not inform him that this type of conduct constituted a "work activity." *See Black's Law Dictionary* 1780 (rev. 4th ed. 1978) (defining "work" as "[t]o exert one's self for a purpose, to put forth effort for the attainment of an object, to be engaged in the performance of a task, duty, or the like").

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," *United States v. Gaudreau*, 860 F.2d 357, 361–62 (10th Cir. 1988) (citations omitted), and it "simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed," *United States v. Morales-Lopez*, 92 F.4th 936, 941 (10th Cir. 2024) (citing *Parker v. Levy*, 417 U.S. 733, 757 (1974)). "Criminal statutes must be more precise than civil statutes because the consequences of vagueness are more severe." *Gaudreau*, 860 F.2d at 360.

Given that § 261.10(c) prohibits (1) any work activity, or the sale or offer of merchandise, (2) for the primary purpose of selling goods or services, irrespective of actual receipt of consideration, the question is whether a person of ordinary intelligence

could reasonably understand that Mr. Lesh's conduct is prohibited.

We evaluate whether the regulation is vague as applied to Mr. Lesh with respect to Mr. Lesh's *actual* conduct. The government determined Mr. Lesh engaged in "work activity" on NFS lands when he took a photo of himself snowmobiling for his social media account. Mr. Lesh is a self-proclaimed "social media influencer,"[10] meaning he invests time into taking photos for social media. He also owns the brand Virtika and uses social media to advertise his products. But the snowmobiling post did not refer to or tag Virtika, no Virtika products were visible, and the photos were posted to his personal Instagram—as opposed to Virtika's Instagram account.[11]

A Ninth Circuit case, *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1028 (9th Cir. 2009), is instructive. There, the court considered a Montana regulation that defined

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[10] Merriam-Webster Dictionary online defines an "influencer" as "a person who is able to generate interest in something (such as a consumer product) by posting about it on social media." *Influencer*, Merriam-Webster, https://www.merriamwebster.com/dictionary/influencer (last visited April 29, 2024).

[11] Mr. Lesh's conduct is more analogous to "still photography"—or the creation of content—which is defined as a non-commercial activity under 36 C.F.R. § 251.50(c). "Still photography," defined as the "use of still photographic equipment on [NFS] lands that takes place at a location where members of the public generally are not allowed . . . or uses models, sets, or props," § 251.51, requires a special authorization. But Mr. Lesh was not charged pursuant to this section.

"in-kind expenditures" in the state's election code. It was defined as "the furnishing of services, property, or rights without charge or at a charge which is less than fair market value to a person, candidate, or political committee for the purpose of supporting or opposing any person, candidate, ballot issue or political committee." *Id.* The defendant was accused of placing campaign literature in a Church's foyer and then exhorting parishioners to sign a petition during a sermon. Montana's election commissioner argued that this was an in-kind expenditure on behalf of the petition campaign.

But the Ninth Circuit determined that, as applied, the "in-kind expenditure" is impermissibly vague because "an activity that might not appear to be an expenditure becomes one if the activity turns out to have been of value to the beneficiary. . . . Such uncertainty does not provide people of ordinary intelligence a reasonable opportunity to understand whether their activities require disclosure under the statute." *Id.* at 1029 (internal quotation marks omitted).

So too here: although "work activity" as a phrase may have a clear meaning in the abstract, it becomes vague when applied to Mr. Lesh's conduct. Any activity that might not appear to be a work activity could later become one if an individual owns a brand or has a social media presence. The regulation therefore does not provide people of ordinary intelligence a reasonable opportunity to understand what kind of conduct is prohibited. A snapshot of a model who works for Patagonia, or an employee of REI, or a celebrity on a ski day, are all potential victims of the government's interpretation.

Given today's tendencies to take photos to promote oneself on social media, the notice standards are not satisfied here. In *Smith v. Goguen*, the Supreme Court determined a Massachusetts statute that subjects to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States" to be vague. 415 U.S. 566, 568 (1974). The Court noted that

> casual treatment of the flag in many contexts has become a widespread contemporary phenomenon . . . [and] in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag.

Id. at 574.

Similarly, taking photos for social media has become a widespread contemporary phenomenon. And it could not be the regulation's purpose to criminalize all such behavior as a work activity simply because an individual's identity is tied to his or her work.

Like *Smith*, where "[t]he statutory language . . . fail[ed] to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not . . . and [] men of common intelligence [will] be forced to guess at the meaning of the criminal law," *id.*, an ordinary person in Mr. Lesh's position would also be forced to guess at what social media posts constitute a prohibited work activity. Under the government's theory, Mr. Lesh's

social media presence is inextricable from his job. And that may be true in some sense. But Mr. Lesh did not conduct a Virtika shoot on NFS land; he created personal content for his personal page. That distinction is significant. *See also Carolina Youth Action Project; D.S. by & through Ford v. Wilson*, 60 F.4th 770, 782 (4th Cir. 2023) (quoting S.C. Code Ann. § 16-17-530(A)(1)–(2)) (finding criminal statute unconstitutionally vague).

Thus, the phrase "work activity" is vague as applied to Mr. Lesh—whose *personal* life is in many ways inextricable from his *commercial* life—because it failed to provide sufficient notice his conduct constituted a crime. In addition, one manifestation of the fair warning requirement "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). To our knowledge, this regulation has never before been applied to punish conduct of this kind.

We separately conclude the regulation is void for vagueness as applied because it "encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. To this end, we consider whether "the [regulation] is so imprecise that discriminatory enforcement is a real possibility." *Wyoming Gun Owners*, 83 F.4th at 1237 (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991)). "We recognize that we cannot expect mathematical certainty in statutes," *id.* at 1239 (citations omitted), but "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them," *Grayned v. City of*

Rockford, 408 U.S. 104, 108–09 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Id.* Without "such minimal guidelines, a criminal [regulation] may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citations omitted).

As applied to Mr. Lesh, § 261.10(c) does not provide "sufficient guidance to law enforcement to dispel the fear of subjective enforcement." *United States v. Corrow*, 119 F.3d 796, 804 (10th Cir. 1997). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). As the regulation is currently interpreted by the government, any individual who takes a photo on NFS land is subject to criminal penalties, contingent on the ambiguous criteria of whether he or she owns a business or has a large social media following.

It is one thing to require a movie producer or a photographer for *Vogue* to seek a permit for using public lands to conduct their business. But it is another thing to say that same individual is liable under the regulation when he or she visits NFS lands for a ski trip and makes a personal video for Instagram. Under the government's theory, and confirmed at oral argument, any person who takes a photo at Keystone Resort and later posts it on a social media account could be arrested if the posting bore

some proximal relationship to a commercial undertaking. Given the breadth of this argument, it invites arbitrary and subjective enforcement of the regulation. Like in *Wyoming Gun Owners*, the regulation vests unfettered discretion in the hands of the government to determine whether a suspect has committed a violation on an "ad hoc and subjective basis." 83 F.4th at 1238 (quoting *Grayned*, 408 U.S. at 109).[12]

In sum, as applied to Mr. Lesh's conduct, the regulation is impermissibly vague.

2. Sufficiency of the Evidence

We separately conclude the evidence was insufficient to find his photoshoot at Keystone Resort was a "work activity or service" under § 261.10(c). "We review de novo the sufficiency of the evidence, viewing all evidence and any reasonable inferences drawn therefrom in the light most favorable to the conviction." *United States v. Fernandez*, 24 F.4th 1321, 1326 (10th Cir. 2022) (citing *United States v. Christy*, 916 F.3d 814, 843 (10th Cir. 2019)). "[E]vidence is sufficient to support a conviction if . . . a rational trier of fact could find guilt beyond a

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[12] Nor is the regulation susceptible to a limiting construction. "Even assuming that a more explicit limiting interpretation of the [regulation] could remedy the flaws we have pointed out . . . we are without power to remedy the defects by giving the [regulation] constitutionally precise content." *Wyoming Gun Owners*, 83 F.4th at 1239 (quoting *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 622 (1976)). "We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." *Id.* (internal quotation marks omitted).

reasonable doubt." *United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012) (citing *United States v. Hoskins*, 654 F.3d 1086, 1090 (10th Cir. 2011)). "We will not weigh conflicting evidence or second-guess the fact-finding decisions of the [trial] court." *Id.* (quotations omitted). "This review is highly deferential." *United States v. Burtrum*, 21 F.4th 680, 685 (10th Cir. 2021) (quotations omitted).

As defined above, § 261.10(c) prohibits the sale or offer for sale of any merchandise, as well as any *work activity* or service, when such activities are engaged in with the *primary purpose* of selling goods or services for consideration—even if no consideration is ever received. If Mr. Lesh did not post the snowmobiling photos with the primary purpose of selling goods or services, then he did not engage in a work activity in violation of § 261.10(c).

The government argues Mr. Lesh engaged in a work activity because his Instagram photos effectively marketed his brand Virtika. And the magistrate judge agreed, concluding Mr. Lesh embarked on a marketing campaign beginning with the Keystone Resort snowmobiling photos and relied on social media to stir up controversy and press while using NFS lands as the backdrop. The magistrate judge also pointed to Mr. Lesh's statements in the *New Yorker* article: "[t]he more hate I got, the more people got behind me. . . . It was an opportunity to reach a whole new group of people—while really solidifying the customer base we already had[,]" and his statement that Virtika's "annual sales . . . were up thirty percent since he'd posted the photo at Hanging Lake." The magistrate judge concluded Mr. Lesh's activities at Keystone Resort were commercial

in nature and without authorization. The district court agreed and affirmed that a reasonable trier of fact could conclude the snowmobiling photos were driven by the purpose of promoting Virtika through social media.

Mr. Lesh challenges the sufficiency of the evidence and contends the government failed to prove his primary purpose in photographing his snowmobiling activities was for the sale of goods or services. We agree. The fact that Mr. Lesh creates content for Instagram, owns his own brand, and has a large Instagram following does not mean his primary purpose with every post is to sell or market Virtika products. No goods or services were advertised in the post. Nor did it reference or tag Virtika. No Virtika products were visible in the post, and it was posted to his personal Instagram—not on Virtika's Instagram account. While the posts may have contributed to his "bad boy" persona, that is far too tenuous a connection to his apparel line to fall within the ambit of the regulation. The government's view of Mr. Lesh's conduct would criminalize even the most petty or innocuous social media post. That view could apply to thousands of persons whose crime would be a photo op on public lands.

The *New Yorker* article does not save the day. In the interview, Mr. Lesh espoused several motivations for his social media content, including to get back at the government, to go after Vail Resorts, and to increase his Virtika customer base. Even if he had *some* commercial motivation, that does not mean his *primary purpose* in posting the snowmobiling photos was to sell goods or services. Nor did the district court make a primary purpose finding in evaluating

Mr. Lesh's conduct. In some more precise circumstances, the creation of marketing content on NFS land may constitute a work activity, but not here.

In sum, we conclude the evidence was insufficient to prove beyond a reasonable doubt that Mr. Lesh posted the snowmobiling photos with the primary purpose of exchanging goods or services.

C. Sixth Amendment Right to Jury Trial

Finally, Mr. Lesh contends he was deprived of his constitutional right to a trial by jury. The Constitution's text provides for a trial by jury of "all crimes," art. III, § 2, and "[i]n all criminal prosecutions," amend. VI. Binding Supreme Court precedents limit the jury trial right to "serious" infractions punishable by six or more months of imprisonment. *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. 538, 542 (1989). Mr. Lesh nevertheless argues he is entitled to a jury trial because the petty offense exception "contradicts the Constitution's text" and is "untethered from the Framers' understanding of that right." In this case, the maximum penalty that Mr. Lesh faced under either charged regulatory violation was "a fine of not more than $500 or imprisonment for not more than six months, or both." 16 U.S.C. § 551. Accordingly, unless and until the Supreme Court reexamines the scope of the Sixth Amendment right to a jury trial, we must conclude Mr. Lesh was not deprived of his Sixth Amendment right.

III. Conclusion

We affirm in part and reverse in part and remand for further proceedings consistent with this opinion.

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TYMKOVICH, Circuit Judge, concurring.

Judge Rossman joins in the concurrence.

Under prevailing precedent, Mr. Lesh was not deprived of his Sixth Amendment right. But the correct scope of the Constitution's right to a trial by jury may warrant a closer examination by the Supreme Court.

Although the text of the Constitution provides for a trial by jury of "all crimes," art. III, § 2, and "[i]n all criminal prosecutions," amend. VI, the Supreme Court has not interpreted the jury right to attach to every violation of public law. Instead, the Court understands the right as applying to only "serious infractions"—not to "petty offenses." *Duncan v. Louisiana*, 391 U.S. 145, 160–61 (1968).[1] To distinguish between a serious and petty offense "the maximum penalty attached to the offense [is the] criterion [] considered the most relevant . . . because it reveals the legislature's judgment about the offense's severity." *Lewis v. United States*, 518 U.S. 322, 326 (1996) ("The judiciary should not substitute its judgment as to seriousness for that of a

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[1] In early cases the Court instructed the existence of the jury right was to be determined by examining whether the nature of the offense "at common law . . . was entitled to be tried by a jury." *Callan v. Wilson*, 127 U.S. 540, 549 (1888). But over time the Court found the "common-law approach [was] [] undermined by the substantial number of statutory offenses [which] lack[ed] common-law antecedents." *Blanton v. N. Las Vegas*, 489 U.S. 538, 541 (1988). As a result, the Court instead held the jury right turned on whether an offense was "serious"—determined by looking to "objective criteria, chiefly the existing laws and practices in the Nation." *Duncan*, 391 U.S. at 161.

legislature, which is far better equipped to perform the task.") (citations omitted).

Consequently, in a series of Supreme Court opinions which defer to Congress's statutory definition of what constitutes a "petty offense," the Court established a near-bright-line rule which separates serious from petty offenses at the six-month imprisonment mark. *See Baldwin v. New York*, 399 U.S. 66, 70–71, 74, n.6 (1970) (plurality opinion) ("[A] potential sentence in excess of six months' imprisonment *is sufficiently severe by itself* to take the offense out of the category of 'petty'" and require a jury trial.) (emphasis added). Similarly, in *Blanton*, the Court held that if an offense carries a maximum prison term of six months or less the right to a jury trial presumptively does *not* apply because the "disadvantages of such a sentence" for the accused "may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications." 489 U.S. at 542 (citations omitted).[2]

In this case, the maximum penalty that Mr. Lesh faced under either charged regulatory violation was "a fine of not more than $500 or imprisonment for not more than six months, or both." 16 U.S.C. § 551.[3] He

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[2] The Court did recognize there could be the "rare situation" where an offense carries a maximum six-month prison term but contains "additional statutory penalties" that are "so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* Here, Mr. Lesh does not argue the additional statutory penalties for his charged offenses—a $500 fine under each—would create such a situation.

[3] Section 261.1b provides that "[a]ny violation of the prohibitions of this part (261) shall be punished by a fine of not more than $500 or imprisonment for not more than six months

argues that he is entitled to a jury trial because the exception for petty offenses "contradicts the Constitution's text" and is "untethered from the Framers' understanding of that right." But binding precedent forecloses this theory. He was charged with two petty offenses, neither of which carried the potential for more than six months' imprisonment. Accordingly, under *Blanton*, because Mr. Lesh was only charged with two petty counts, he was not entitled to a jury trial. *See* 489 U.S. at 543.[4]

But we note the Court's doctrine has not escaped criticism for its disregard of the text of Article III and the Sixth Amendment. Justice Black wrote separately in *Baldwin* to disagree "with the view that a defendant's right to a jury trial under the Sixth Amendment is determined by whether the offense

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or both pursuant to [16 U.S.C. § 551], unless otherwise provided." 18 U.S.C. § 3559(a)(7) classifies offenses with a maximum term of imprisonment of six months or less as Class B misdemeanors—which encompasses the two charged offenses against Mr. Lesh. Under 18 U.S.C. § 3571(b)(6), the maximum fine for a Class B misdemeanor was increased to $5,000, which is what the district court ordered Mr. Lesh to pay for each count.

[4] Mr. Lesh alternatively argues that because he was charged with multiple petty offenses—each with a possible penalty of six months imprisonment—a court could apply the charges consecutively to create a term of imprisonment longer than six months. But, as Mr. Lesh concedes, this argument is squarely foreclosed by binding Supreme Court precedent—thus his alternative argument also relies on his broader constitutional challenge to the Court's doctrine. *See Lewis*, 518 U.S. at 330 ("Where the offenses charged are petty, and the deprivation of liberty exceeds six months only as a result of the aggregation of charges, the jury trial right does not apply.").

charged is a 'petty' or 'serious' one." 399 U.S. at 75 (Black, J., concurring).

> This decision is reached by weighing the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial and magically concluding that the scale tips at six months' imprisonment. Such constitutional adjudication . . . amounts in every case to little more than judicial mutilation of our written Constitution. Those who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary. They decided that the value of a jury trial far outweighed its costs for all crimes and in all criminal prosecutions.

Id. (internal quotation marks omitted).

Additionally, multiple scholars have argued the Court's doctrine is incompatible with the original public understanding of the Constitution. *See e.g.*, Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 599, 605–607 (2022) (asserting that "based on previously unexplored historical sources and text-based arguments, that the petty offense exception is untenable" and "the jury right must at a minimum include federal criminal cases in which defendants are formally prosecuted by a United States Attorney and subject to punishment"); Laura Appleman, *The Lost Meaning of the Jury Trial Right*, 84 Ind. L.J. 397, 398–99 (2009) (arguing the Court's "latter-day interpretations have shifted the meaning of the jury trial right well away from its original meaning,"

which "was strictly a collective right . . . allowing the local community to hand down a public punishment and then restore the offender back to his place in society"); Colleen Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wis. L. Rev. 133, 134–35 (1997) (stating "the Court's decisions have produced an unduly restrictive interpretation of the entitlement to jury trial . . . [and the Court] has distorted the constitutional meaning of the jury right").

The Court's doctrine directs the judiciary to rely primarily on the legislative branch's "judgment" about the severity of an offense, and, in turn, that judgment completely defines the scope of the Article III and Sixth Amendment right to a trial by jury.

> Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn't about protecting judicial authority for its own sake. It's about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before.

Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1386 (2018) (Gorsuch, J., dissenting).

Under current doctrine, the judicial imperative of interpreting the fundamental-to-liberty jury right has been abdicated to the legislative branch, or in this case even the executive branch. But such discretion "in regard to criminal causes is abridged by the express injunction of trial by jury in all such cases."

The Federalist No. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). The Framers all agreed as to the value of the criminal jury trial, and "regard[ed] it as a valuable safeguard to liberty . . . [and] as the very palladium of free government." *Id.*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Case No. 1:22-cr-00033-DDD-GPG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID LESH,

Defendant-Appellant.

ORDER AFFIRMING CONVICTIONS

Tom Wolfe died a few years before the events of this case took place, so we are left to imagine what he might have made of the intersection of COVID-pandemic lockdowns, social-media culture, and Defendant-Appellant David Lesh's business model. This order addresses one product of that intersection: Mr. Lesh's conviction on two federal misdemeanors.

Mr. Lesh owns a company that sells outdoor equipment and apparel. He also is "a prominent skier with a large Instagram following" who frequently posts provocative images on that social-media platform. (Doc. 122 at 3.) Whether the social-media posts exist to support the company, or whether the company exists to capitalize on the social-media fame

is perhaps an open question. That the two are intertwined, however, does not seem to be in dispute.[1]

This case stems from posts Mr. Lesh made on Instagram between April and October of 2020. In April, Mr. Lesh posted a photo of a snowmobiler jumping into the air in the terrain park at Keystone Resort, with the comment, "solid park sesh,[2] no lift ticket needed." (Doc. 125-1 at 2.) In June, he posted photographs appearing to show him standing in the protected area of Hanging Lake. (*Id.* at 27.) And in October, in his own counsel's words, he "posted a photograph to his personal Instagram account that depicted him 'defecating in Maroon Lake,' and bearing the caption, 'a scenic dump with no one there was worth the wait.'" (Doc. 122 at 10; *see also* Doc. 125-1 at 28.)

Classlessness is within the bound of the First Amendment, so none of these posts was itself the subject of criminal charges. The conduct that appeared to be depicted in them, however, was. Since Keystone, Hanging Lake, and Maroon Lake are all located on U.S. Forest Service lands, the United States charged Mr. Lesh with one count of operating a snowmobile outside authorized areas based on the Keystone incident, and one count of selling or offering for sale merchandise or conducting work activity

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[1] (*See, e.g.*, Doc. 130 at :32-:45 (asserting that a magazine article describing some of the facts of this case "only captures one aspect of me, one part of my life, one part of our marketing, one part of my company"); Doc. 122 at 8 (noting Mr. Lesh had stated that his sales increased thirty percent after particular posts gained widespread notoriety).)

[2] Short for the too-long "session."

without authorization on lands administered by the National Forest Service. (Doc. 90 at 1.)

Following a bench trial, Magistrate Judge Gordon P. Gallagher convicted Mr. Lesh on both counts. Mr. Lesh now seeks to vacate his convictions. Because Mr. Lesh's legal arguments are misplaced and the evidence at trial was sufficient to convict him, the convictions are affirmed.

BACKGROUND

In April 2020, the Keystone Resort, located on National Forest Service lands, was closed due to the COVID-19 pandemic. (Doc. 90 at 3.) On April 25, 2020, Mr. Lesh posted a photo to his Instagram account of two individuals, one of whom was operating a snowmobile on a Keystone ski jump. (Doc. 125-1 at 1.) The following day, Christopher Ingham, the Director of Mountain Operations for Keystone Resorts, found snowmobile tracks around a Keystone ski jump, even though employees were not using snowmobiles during the resort's closure. (Doc. 90 at 4.) On June 10 and October 21, 2020, Mr. Lesh posted images showing him standing in protected bodies of water on National Forest Service lands, Hanging Lake and Maroon Lake, though, unlike the Keystone photo, the Government does not assert that these are authentic photographs. (*Id.* at 5.) On January 11, 2021, the *New Yorker* published a profile of Mr. Lesh that quoted him saying that the illegality of his photographed behavior increased his sales and that he wanted the Government to charge him for the violations. (*Id.* at 5-6.)

The United States Attorney for the District of Colorado initially charged Mr. Lesh with operating a

snowmobile outside of a designated route and improperly entering Hanging Lake and Maroon Lake. (Doc. 1.) The Government then dropped the charges related to Hanging Lake and Maroon Lake, but added a separate charge for conducting work activity without authorization. (Doc. 53.) After a bench trial, Judge Gallagher found Mr. Lesh guilty of both violations. (Doc. 89.) Mr. Lesh appeals those convictions. (Doc. 107.)

DISCUSSION

Mr. Lesh raises four issues on appeal. He argues that the Government failed to present evidence sufficient to prove either violation, that Judge Gallagher erred in permitting the Government to introduce the *New Yorker* article, that admitting evidence of the Hanging Lake and Maroon Lake posts unfairly prejudiced him, and that he was deprived of his right to a jury trial. (Doc. 122.)

The scope of an appeal from a magistrate judge's judgment of conviction to a district court is the same as an appeal from a district court to a court of appeals. Fed. R. Crim. P. 58(g)(2)(D). I therefore review legal matters, including sufficiency of the evidence, *de novo*, "viewing all evidence and any reasonable inferences drawn therefrom in the light most favorable to the conviction." *United States v. Fernandez*, 24 F.4th 1321, 1326 (10th Cir. 2022).

I. Binding precedent forecloses Mr. Lesh's argument that he is entitled to a jury trial.

The two offenses for which Mr. Lesh was tried each carry a maximum sentence of six months' imprisonment. *See* 36 C.F.R. § 261.1b. They are thus

Class B misdemeanors and, by statute and binding precedent, petty offenses. *See* 18 U.S.C. § 3559(a)(7) (offense with maximum six-month term of imprisonment is a Class B misdemeanor); 18 U.S.C. § 19 (Class B misdemeanor is a petty offense); *Lewis v. United States*, 518 U.S. 322, 326 (1996) (offenses with maximum prison terms of six months or less are presumptively petty offenses).

As Mr. Lesh points out, the text of the U.S. Constitution says that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury," art. III, § 2, and that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," amend. VI. (*See* Doc. 122 at 28.) He also provides an impressive array of authorities arguing that the Constitution's text should mean what it says, with sources ranging from the Declaration of Independence, to Alexander Hamilton's Federalist No. 83, to Justices Black and Douglas, to Professor Philip Hamburger. (Doc. 122 at 37-38.)

As a matter of first principles, this argument is not unpersuasive. "Constitutional analysis must begin with 'the language of the instrument,'" and "all" is not a term generally considered to contain much ambiguity. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244-45 (2022) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 186-89 (1824)). The Supreme Court has in fact recently said, "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019). But here in an inferior court, first principles must yield to binding precedent, and "the Supreme Court has long held that 'there is a

category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'" *United States v. Luppi*, 188 F.3d 520, 1999 WL 535295, at *6 (10th Cir. 1999) (unpublished table decision) (quoting *Duncan v. Louisiana*, 391

U.S. 145, 159 (1968)). "Even where a defendant is charged with multiple petty offenses which, taken cumulatively, could result in a sentence longer than six months, the Sixth Amendment right to a jury trial does not apply." *Id.* (citing *Lewis*, 518 U.S. at 330).

Given that binding precedent, whether, as Mr. Lesh argues, it is "impossible" (or necessary) "to square the Supreme Court's line of cases denying the right to trial by jury in petty offense prosecutions with Founding-era writings" is not for me to say. *See Dobbs*, 142 S. Ct. at 2262 ("An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances [the Supreme Court] must be willing to reconsider and, if necessary, overrule constitutional decisions." (citations omitted)). I am required to apply those cases, as was Judge Gallagher. Neither of us can reverse the convictions on that basis.

II. The evidence was sufficient to convict Mr. Lesh.

Mr. Lesh argues that the Government failed to prove his guilt on each count beyond a reasonable doubt. His primary argument is that the Government did not produce sufficient evidence to convict him, but he also raises other contentions that the Government calls "ancillary."

A. Mr. Lesh's general sufficiency-of-the evidence arguments

Mr. Lesh's sufficiency-of-the-evidence arguments can be dismissed quickly. Appellate review on this basis is "highly deferential." *United States v. Burtrum*, 21 F.4th 680, 685-86 (10th Cir. 2021). The relevant question is not whether I believe the evidence establishes guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (holding that the requirement to prove criminal guilt beyond a reasonable doubt is an essential feature of due process). It is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact" could do so. *Id.* at 319; *see also Fernandez*, 24 F.4th at 1326 (reversal permissible "only when no reasonable [finder of fact] could find the defendant guilty beyond a reasonable doubt").

1. Operating a snowmobile off a designated route in violation of 36 C.F.R. § 261.14

To support his conclusion that Mr. Lesh had operated a snowmobile off a designated route, Judge Gallagher pointed to (1) "photographs showing snowmobile track marks in the snow . . . taken on the morning of April 25, 2020," (2) "testimony that resort employees were neither using nor had access to snowmobiles during the time that the resort was closed," (3) a *New Yorker* magazine article quoting Mr. Lesh as saying "[h]ere I am—or supposedly me—with one misdemeanor, in a terrain park," and (4) Mr. Lesh's comment on a podcast that "nothing that he [the author of the article] said was untrue or unfair" (brackets in original). (Doc. 90 at 7-8.)

This is plenty.[3] Mr. Lesh points out a variety of other theories of what might have been depicted in the photo he posted: he had posted photos of friends snowmobiling in the past; he posted it not because it was actually him but "to irritate the Government"; it might have been taken a month earlier; etc. (*See* Doc. 122 at 11-13.) But those interpretations, while also perhaps plausible, did not persuade the factfinder here. The existence of other possible explanations for the photograph does not make the factfinder's conclusion—that it was a photo of Mr. Lesh taken while the park was closed—unreasonable. The evidence is therefore sufficient as a matter of law.

While Mr. Lesh is right that the snowmobile operator is unidentifiable in the photograph and nobody testified that it was him, inferring that it was Mr. Lesh was "within the bounds of reason." *United States v. Triana*, 477 F.3d 1189, 1195 (10th Cir. 2007). Mr. Lesh's own public post more than suggests that he was the one taking advantage of Keystone's closure to get in a "solid sesh." (*See* Doc. 125-1 at 2.) His apparent affirmation of a magazine article explicitly saying the photos were "of him" only adds to the weight of the evidence. (*See* Doc. 90 at 8.) Making that determination was therefore up to the factfinder, and his weighing of the evidence is not grounds for reversal.

Mr. Lesh also argues that the Government failed to prove one of the elements of its case: that it had designated certain trails for over-snow vehicle use. (Doc. 122 at 13.) If the National Forest Service

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[3] Judge Gallagher also described a number of other factual findings that support this conclusion. (*See* Doc. 90 at 3-6.)

designates certain areas for over-snow vehicle use, it is forbidden to operate over-snow vehicles in non-designated areas. 36 C.F.R. § 261.14. But the designation had been "identified on an over-snow vehicle use map," of which Judge Gallagher properly took judicial notice. *See* Fed. R. Evid. 201(b); *United States v. Burch*, 169 F.3d 666, 672 (10th Cir. 1999).

2. Conducting work activities in violation of 36 C.F.R. § 261.10(c)

Mr. Lesh's main challenge to the sufficiency of the evidence for his second conviction, under Section 261.10(c), is the same as for his first count: that the Government didn't prove Mr. Lesh was the one jumping the snowmobile. As explained above, however, the Government introduced sufficient evidence to permit that inference.

Mr. Lesh alternatively argues that even if it is him snowmobiling, snowmobiling is not "work activity." (Doc. 122 at 14.) "Section 261.10(c) prohibits . . . (1) conducting any kind of work activity or service; (2) on lands encompassed by the regulation; (3) without a special use authorization." *United States v. Parker*, 761 F.3d 986, 993 (9th Cir. 2014) (internal quotation marks omitted). Photography can be work activity if it is conducted for commercial purposes. *See United States v. Patzer*, 15 F.3d 934 (10th Cir. 1993) (upholding a conviction for photographing a hunting trip). Here, a reasonable trier of fact could conclude that the driving purpose of the snowmobiling session and its attendant photography was to promote Mr. Lesh's outdoor apparel company through social media. (*See, e.g.*, Doc. 90 at 11; Doc. 89 at 122-23; Doc. 125-1 at 9-24

(describing the use of social media to generate publicity for Mr. Lesh's company).) Mr. Lesh himself asserted that sales increased by thirty percent in the wake of these controversies. (Doc. 89 at 108, 183, 190.) Snowmobiling is not inherently "work activity," but generating marketing materials is plainly in that category.

B. Mr. Lesh's Other Arguments

Mr. Lesh raises a number of other arguments under the sufficiency-of-the-evidence rubric, although most are more properly considered on their own.

1. The *New Yorker* article

Mr. Lesh contends the evidence was insufficient to convict him because Judge Gallagher improperly admitted into evidence and relied on statements made in the *New Yorker* magazine. The Government points out, however, that it is well established that a court reviewing the sufficiency of evidence must "consider all evidence admitted at trial, *even if admitted improperly*." *Davis v. Workman*, 695 F.3d 1060, 1078-79 (10th Cir. 2012) (emphasis added). Mr. Lesh says that "the judicial system does not work this way," but the cases say otherwise. (Doc. 137 at 6.) To win an appeal based on insufficiency of the evidence, an appellant has to show that the evidence admitted was insufficient, not that it was wrongly admitted. *See Davis*, 695 F.3d at 1078-1079; *Fernandez*, 24 F.4th at 1327. This does not, as Mr. Lesh asserts, mean that "evidentiary rulings in bench trials lie beyond the reach of any meaningful appellate review." (Doc. 137 at 6-7.) It simply means that arguments about improperly admitted evidence are reviewed under their own rules and doctrines, not as

part of a sufficiency-of-the-evidence dispute. Indeed, Mr. Lesh makes just such an argument here, and it is given full, meaningful appellate review in Section III below.

2. Constitutional arguments

Also under the broad theme of his sufficiency-of-the-evidence challenge, Mr. Lesh raises three constitutional arguments that the Government calls "ancillary" and argues have not been preserved for appeal. (*See* Doc. 131 at 18.)

a. Non-delegation

Mr. Lesh argues that the Government's interpretation of the underlying statute violates the non-delegation clause. The statute, 7 U.S.C. § 1011(f), authorizes the Secretary of Agriculture "[t]o make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property" held by the Department of Agriculture. Mr. Lesh argues that construing Section 1011(f) to permit the Agriculture Department to prevent posting photos on social media—conduct that occurs after a defendant has left federal lands—violates the non-delegation doctrine, since such an interpretation would have no intelligible limitation on the Agriculture Department's authority. (Doc. 122 at 24-25.) His trial counsel preserved this argument for appeal by raising a similar version in a motion to dismiss. (Doc. 67 at 4) ("The language central to this legislative delegation—to 'regulate the use and occupancy of property'—is alarmingly vague and would appear to authorize nearly any criminal law the Department of Agriculture felt like issuing with respect to federal land.").) This argument

mischaracterizes the offense for which Mr. Lesh was convicted, however, which was taking photos on National Forest lands, as opposed to posting them on social media after he had left. (Doc. 90 at 12); *see supra* Part II(a)(2).

b. First Amendment

Mr. Lesh argues that Judge Gallagher's interpretation of 36 C.F.R. § 261.14 "cannot be squared with Appellant's constitutional rights to free speech and expression and to due process." (Doc. 122 at 17.) He notes that the First Amendment protects his "right to doctor photos and post them to social media for artistic purposes, to stir up controversy, or for no reason at all," even if the photos "appear to depict a violation of a USFS regulation." (*Id.*) He contends that "[i]f this Court permits the prosecution (and persecution) of Appellant for posting what even the Government and its witnesses acknowledged was probably a photoshopped image, then artists, social media influencers, advertisers, and any number of people could find themselves facing criminal charges for publicizing provocative material." (*Id.* at 18.) The Government contends that this argument was waived, but Mr. Lesh's counsel did argue, in summation, that "[t]here are First Amendment concerns with" setting a "precedent whereby influencers in social media . . . simply do a post that doesn't even reference their business, that has nothing to do with their business, that still can trigger federal prosecution and a federal offense." (Doc. 89 at 237.)

Assuming this is sufficient to preserve the issue, it does not change the outcome. Judge Gallagher

found that "Defendant's still photography at the Keystone resort was a commercial use or activity, [so] he was required to seek special-use authorization." (Doc. 90 at 12.) While Mr. Lesh is right that the First Amendment protects his ability to "depict a violation of a USFS regulation," his right to freedom of expression does not immunize him from criminal liability for the underlying conduct that he is depicting. (Doc. 122 at 17.) Even Mr. Lesh concedes that "a person may be convicted for unlawful conduct captured in a photograph only insofar as that photograph provides proof that the person engaged in said conduct." (*Id.* at 18.) Mr. Lesh's photographs—some of which were doctored—provided proof that he had conducted commercial activity on National Forest lands.

c. Due process

Mr. Lesh argues that he received insufficient notice that a regulation prohibiting commercial activity on National Forest Service lands prohibited the operation of a snowmobile. (Doc. 122 at 27 ("Appellant could not have anticipated that a regulation prohibiting the *sale of merchandise* or *conducting work activity on federal* land would be used to prosecute him for posting a photograph on social media depicting an unidentifiable individual engaged in recreational snowmobiling.").) Mr. Lesh's trial counsel preserved this argument in his summation. (Doc. 89 at 238 ("[T]hat appears to prohibit me going to Keystone and setting up a stand and offering for sale some gloves, and saying, Hey, buy these gloves. That's what it appears to prohibit.").)

The Due Process Clause "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Muskett*, 970 F.3d 1233, 1243 (10th Cir. 2020). The question is not whether a criminal defendant has previously been convicted for identical behavior, but whether "the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* The relevant regulation, 36 C.F.R. § 261.10(c), prohibits "conducting any kind of work activity or service unless authorized by Federal law, regulation, or special-use authorization." It was reasonably clear from this regulation that taking photographs to promote a clothing line, which is unquestionably work activity, would have been prohibited on National Forest lands without authorization.

III. Judge Gallagher did not err by considering the *New Yorker* article.

Mr. Lesh argues that Judge Gallagher committed reversible error by admitting the *New Yorker* article about Mr. Lesh as evidence. (Doc. 122 at 28-32.) Mr. Lesh argues that (1) the article is inadmissible hearsay, *see* Fed. R. Evid. 802, and (2) the article contains inadmissible evidence of other past crimes, wrongs, or acts, *see* Fed. R. Evid. 404(b).

A. Hearsay

Judge Gallagher concluded that "the Defendant's statements within the article and podcast were not inadmissible hearsay under Federal Rule of Evidence 801(d)(2)(B)." (Doc. 90 at 8-9.) That rule permits

admission of a statement that "is offered against an opposing party and is one the party manifested that it adopted or believed to be true." Fed. R. Evid. 801(d)(2)(B). The statements by Mr. Lesh in the *New Yorker* article were unquestionably attributable to him and offered by his opponents. (Doc. 90 at 8-9.) Judge Gallagher found that Mr. Lesh had manifested that he believed the statements to be true by "verbally confirm[ing on a podcast] that nothing written by the [*New Yorker*] author was 'untrue or unfair'" and "not contend[ing] that the author had misquoted him or improperly insinuated that Defendant was the individual operating the snowmobile in the Keystone Resort." (*Id.* at 9.)

Mr. Lesh argues his podcast endorsement may not have been "carefully analyzed" and that some of the *New Yorker* statements that Judge Gallagher admitted into the record were made by the journalist, rather than Mr. Lesh. (Doc. 122 at 30-31.) Perhaps, but Rule 801(d)(2)(B) allowed Judge Gallagher to admit statements in the *New Yorker* article that were by the journalist, in addition to those attributed to Mr. Lesh, since Mr. Lesh had adopted them by asserting that the article was accurate. Fed. R. Evid. 801(d)(2)(B); *see* (Doc. 90 at 9). Admission of evidence is reviewed "for abuse of discretion." *United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005). "Because . . . hearsay determinations are particularly fact and case specific . . . review of those decisions is especially deferential." *Id.* Judge Gallagher did not abuse his discretion in admitting the *New Yorker* article based on Mr. Lesh's admission, even if that admission may not have been "carefully analyzed."

B. Other Crimes, Wrongs, or Acts

Federal Rule of Evidence 404(b) prevents courts from admitting evidence of a past acts "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Trial courts are entitled to "broad discretion" in Rule 404(b) determinations and will only be overruled if a decision "exceeded the bounds of permissible choice in the circumstances or was arbitrary, capricious, or whimsical." *United States v. Cushing*, 10 F.4th 1055, 1075 (10th Cir. 2021).

The *New Yorker* article meets the Tenth Circuit's four criteria for admission of evidence in accordance with Rule 404(b). *See United States v. Lazcano-Villalobos*, 175 F.3d 838, 846 (10th Cir. 1999). First, the article was admitted for a proper purpose that Judge Gallagher identified. (Doc. 89 at 87 ("The purpose of this argument is for statements of the defendant. The Court is fully competent of reviewing this article and looking at it only for the statement of the defendant and not as to his opinions on matters aside from this.").) It is apparent that Mr. Lesh's statements in the article were relevant to show intent, plan, and knowledge (*see, e.g.*, Doc. 125-1 at 16 ("Here I am—or supposedly me—with one misdemeanor, in a terrain park."); *id.* at 17 ("It was an opportunity to reach a whole new group of people—while really solidifying the customer base we already had.")), and that Judge Gallagher did not use the article's mention of other past acts of Mr. Lesh to prove character, as prohibited by Rule 404(b). Second, the article was relevant to the case. Third, Judge Gallagher determined that the article's

probative value was not substantially outweighed by its potential for unfair prejudice. (*See* Doc. 89 at 87-88.) Finally, while there was no jury to receive a limiting instruction, Judge Gallagher stated that he would not consider the portions of the article that discussed other past acts. (*Id.*) Judge Gallagher did not abuse his discretion under Rule 404(b) by admitting the article.

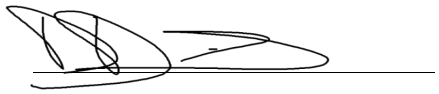
IV. Judge Gallagher did not err by admitting evidence relating to Hanging Lake and Maroon Lake.

Mr. Lesh argues that Judge Gallagher's decision to admit (1) evidence that he had been charged with offenses related to his supposed trespass of Hanging Lake in June of 2020, and (2) a photograph depicting Mr. Lesh appearing to defecate in Maroon Lake violated Federal Rules of Evidence 403 and 404(b). (Doc. 122 at 32-36.) Judge Gallagher admitted the Hanging Lake and Maroon Lake evidence as *res gestae*, so the admission was not forbidden by Rule 404(b). (Doc. 89 at 7); *see United States v. Kravchuk*, 335 F.3d 1147, 1155 (10th Cir. 2003). Admission of this evidence was otherwise relevant and therefore entitled to deference.

CONCLUSION

It is **ORDERED** that David Lesh's convictions are **AFFIRMED**.

DATED: March 10, 2023 BY THE COURT:



Daniel D. Domenico
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Case No. 20-PO-07016-GPG

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID LESH,

Defendant.

MEMORANDUM OF DECISION AND ORDER

This matter was tried to the Court on August 5, 2021. (D. 89).[1] Defendant is charged by Superseding Information[2] with two counts: (1) on or about April 24, 2020, operation of a snowmobile off a designated route upon lands administered by the United States Forest Service, in violation of 36 C.F.R. § 261.14; and (2) on or about April 24, 2020, through October 21, 2020, selling or offering for sale any merchandise or conducting any kind of work activity or service

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[1] "(D. 89)" is an example of the stylistic convention used to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Order.

[2] This Court has already detailed the facts and procedural history of this case in its prior Order and will not do so here. (*See* D. 61).

without authorization upon lands administered by the United States Forest Service, in violation of 36 C.F.R. § 261.10(c). (D. 53). I find Defendant GUILTY of Count 1 and Count 2.

The offenses charged are Class B misdemeanors, which are petty offenses. 18 U.S.C. § 19. As such, there is no right to a jury trial. Fed. R. Crim. P. 58(b)(2)(F). At the conclusion of the bench trial, this Court informed the parties that it would issue a Memorandum of Decision and Order containing specific findings of fact consistent with the provisions of Federal Rule of Criminal Procedure 23(c). (D. 89, pp. 247-48); *see United States v. Unser*, 165 F.3d 755, 760 n.3 (10th Cir. 1999).

First, under 36 C.F.R. § 261.14:

> After National Forest System roads, National Forest System trails, and areas on National Forest System lands have been designated for over-snow vehicle use pursuant to 36 CFR 212.81 on an administrative unit or a Ranger District of the National Forest System, and these designations have been identified on an over-snow vehicle use map, it is prohibited to possess or operate an over-snow vehicle on National Forest System lands in that administrative unit or Ranger District other than in accordance with those designations, provided that the following vehicles and uses are exempted from this prohibition:
>
> (a) Limited administrative use by the Forest Service;

> (b) Use of any fire, military, emergency, or law enforcement vehicle for emergency purposes;
>
> (c) Authorized use of any combat or combat support vehicle for national defense purposes;
>
> (d) Law enforcement response to violations of law, including pursuit;
>
> (e) Over-snow vehicle use that is specifically authorized under a written authorization issued under Federal law or regulations; and
>
> (f) Use of a road or trail that is authorized by a legally documented right-of-way held by a State, county, or other local public road authority.

Second, 36 C.F.R. § 261.10(c), prohibits "[s]elling or offering for sale any merchandise or conducting any kind of work activity or service unless authorized by Federal law, regulation, or special-use authorization." This subsection of the regulation does not state that the person or entity must be on National Forest System lands.

I. FACTS

I find the following facts to be true beyond a reasonable doubt:

(1) The Keystone Resort, in April 2020, was closed due to the COVID-19 pandemic, per decisions by Vail Resorts and a state-wide directive issued by Governor Polis.

(2) The Keystone Resort is on National Forest Service lands (NFS lands) within the White River National Forest in the state of Colorado.

(3) NFS lands are the property of the United States of America.

(4) In March 2020, employees, using plows attached to snowcat utility vehicles, created snow barriers in front of the terrain park features to make them inaccessible. Employees posted signs around the Keystone Resort indicating that the ski areas and terrain park were closed. Employees conducted weekly patrols of the entire area to ensure buildings were secure and signage was visible and in place.

(5) On April 25, 2020, Christopher Ingham, the Director of Mountain Operations for Keystone Resort, was alerted to two photographs that were posted on Defendant's Instagram account that same day.

(6) Defendant owns a small outdoor apparel company called Virtika.

(7) Defendant's Instagram account bears the username "davidlesh," which maintains a blue verification badge issued by Instagram to accounts that are the authentic presence

of public figures, celebrities, or global brands or entities it represents.[3]

(8) The first image, posted on April 25, 2020, in a series of two, depicts an individual wearing outdoor apparel consisting of dark-colored pants, a camouflage jacket, and a dark-colored ski cap, jumping a red and black snowmobile off a jump at the Keystone Resort in April of 2020. A second individual, wearing a dark-colored ski bib and white shirt, stands on the ski jump and is in the process of taking a photograph or filming. The first photograph was taken either using a tripod stand or a third person.

(9) The second image, posted on April 25, 2020, is of the same individual on the red and black snowmobile but from a different perspective.

(10) The caption for the photographs posted on April 25, 2020, on Defendant's Instagram account states: "Solid park sesh, no lift ticket needed." Before or on August 3, 2021, Defendant edited the caption to state: "Solid park sesh, no lift ticket needed. #FuckVailResorts."

(11) At approximately 9:00 a.m., on April 25, 2020, Ingham drove a snowcat (which has wider and larger tracks than a snowmobile

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[3] I take judicial notice of Instagram's definition for a verified badge on an Instagram account. *See Verified Badges*, https://help.instagram.com/854227311295302 (last visited Oct. 21, 2021).

with a 20-feet-by-30-feet overall footprint) to the terrain part at the Keystone Resort and found snowmobile tracks looping around a ski jump. Ingham observed and photographed these tracks. Ingham noted that employees were not using snowmobiles during the closure of the resort in April 2020, the vehicle maintenance shop that housed the access keys for those vehicles was locked at this time, and employees exclusively relied upon snowcat utility vehicles and other tractor-type utility vehicles to patrol and maintain the grounds of the Keystone Resort.

(12) Ingham also observed that a utility shed about a hundred yards above the ski jump had been entered and a snow shovel had been removed. The snow shovel was used to clear a channel in the snow berm that had been created to block access to the ski jump. The channel was approximately five feet wide, which was enough for a snowmobile to ride through.

(13) Ingham noted that the tracks indicated that more than one jump had taken place and that, in addition to using the ski jump, the tracks indicated that snowmobiling had occurred around the resort, terrain park, through an area called Erickson Bowl, and down a trail on the NFS lands.

(14) On June 10, 2020, and October 21, 2020, two more images depicting Defendant standing in protected bodies of water on NFS lands,

namely Hanging Lake and Maroon Lake, were posted to the davidlesh Instagram profile. The Government does not argue that these photographs are authentic.

(15) On January 11, 2021, an article entitled "Trolling the Great Outdoors" by Nick Paumgarten was published in The New Yorker, a national weekly publication.

(16) The author of the article states:

a. "Lesh decided to poke the bear. He posted a couple of photos of him snowmobiling off a jump in a closed terrain park at the Keystone ski area, which, like Breckenridge, is operated by the company that owns Vail ski resort, on land belonging to the Forest Service."

b. "Lesh declined to reveal Virtika's annual sales, though he claimed they were up thirty per cent since he'd posted the photo at Hanging Lake; he said he owns the company outright and carries very little debt."

(17) Defendant is quoted in the article saying:

a. "But, me being a little guy, it's not interesting or unique. You're not getting noticed being super 'eco this' and 'eco that.' It's also just not my thing."

b. "Here I am—or supposedly me—with one misdemeanor, in a terrain park, and everyone goes nuts. It's absolutely ridiculous."

c. "The more hate I got, the more people got behind me, from all over the world," Lesh said. "These people couldn't give two fucks about me walking on a log in Hanging Lake. It was an opportunity to reach a whole new group of people—while really solidifying the customer base we already had."

d. Regarding the images of Hanging Lake and Maroon Lake: "I wanted them to charge me with something. The only evidence they have is the photos I posted on Instagram, which I know are fake, because I faked them. I was pissed off about them charging me for the snowmobiling on Independence Pass with zero evidence. I realized they are quick to respond to public outcry. I wanted to bait them into charging me."

e. "I want to be able to post fake things to the Internet. That's my fucking right as an American."

(18) Defendant does not state that the Keystone Resort images posted on April 25, 2020, are photoshopped.

(19) Defendant later appeared on the Vance Crowe Podcast. When asked about The New Yorker article, Defendant responded that "nothing that he [the author of the article] said was untrue or unfair, but it only captures one aspect of me, one part of my life, one part of our marketing, one part of my company."

II. ANALYSIS

There are two disputes in this case, whether: (1) Defendant is the person riding the snowmobile at the Keystone Resort in April 2020, and (2) Defendant's post regarding the Keystone Resort constitutes the selling or offering for sale any merchandise or conducting unauthorized work activity or service on NFS lands.[4]

The Government does not argue that the Hanging Lake and Maroon Lake photographs are authentic, thus I will not consider the photographs as separate violations of the second count because the Government does not argue that Defendant was on NFS lands when these photographs were created or taken. Rather, the Government argued that the Hanging Lake and Maroon Lake photographs were offered to show that Defendant continued to promote

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[4] Generally, courts have found that a violation of Forest Service regulations to be a public welfare offense and lacks a *mens rea* requirement. *See United States v. Unser*, 165 F.3d 755, 763-74 (10th Cir. 1999) (finding that violations of 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a) do not have a required *mens rea* element). Accordingly, for such offenses, courts impose strict liability without a scienter requirement. *Id.*; *see also United States v. Good*, 257 F. Supp. 2d 1306, 1318 (D. Colo. 2003) (finding violations of 36 C.F.R. §§ 261.9(a) and 261.10(a) are public welfare offenses); *United States v. Ellison*, 112 F. Supp. 2d 1234, 1235, 1237 (D. Colo. 2000) (finding the defendant's violation of 36 C.F.R. § 261.10 to be a strict liability offense). The Court, as discussed *infra*, does not need to reach a conclusion regarding the violations in this case and strict liability because the evidence supports an inference that Defendant knew he was on NFS lands. *See United States v. Brown*, 200 F.3d 710, 715 (10th Cir. 1999).

his business with controversial photographs depicting NFS lands and were relevant as *res gestae*. At most, the Hanging Lake and Maroon Lake photographs can be considered evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *See* Fed. R. Evid. 404(b)(2); *see United States v. Sangiovanni*, 660 F. App'x 651, 655 (10th Cir. 2016) (finding that the district court did not abuse its discretion in admitting two photographs of the defendant that he emailed to the victim, which depicted him holding a firearm). Furthermore, Rule 404(b) applies "only to prior bad acts extrinsic to the crime charged." *United States v. Kravchuk*, 335 F.3d 1147, 1155 (10th Cir. 2003).

This Court is persuaded in particular by Government exhibits numbers 4 through 7. These exhibits consist of photographs showing snowmobile track marks in the snow from a person snowmobiling off of a ski jump at the Keystone Resort and that were taken on the morning of April 25, 2020. Of particular importance, the Government provided testimony that resort employees were neither using nor had access to snowmobiles during the time that the resort was closed due to the COVID-19 pandemic. Rather, the employees were using large snowcats and tractor utility vehicles to patrol the resort and construct the berms blocking access to the ski jumps. Furthermore, employees were patrolling the Keystone Resort on a weekly basis. Thus, on or about April 24, 2020, one or more persons had to bring a snowmobile into the terrain park, clear the artificially made snow mounds blocking the ski jump using the snow shovel in the utility shed, and then joy ride around the resort and jump off the ski jumps.

The discovery and existence of track marks in the terrain park on April 25, 2020, which was the same day that Defendant posted the photographs on his social media account, indicates that the photographs are authentic. Indeed, Defendant never argued that the Keystone Resort photographs were photoshopped.

This Court is also persuaded by Government exhibits numbers 9 and 13. Exhibit 9 is the article published in The New Yorker magazine. In the article, the author places Defendant on the snowmobile, writing "[h]e posted a couple of photos of him snowmobiling off a jump in a closed terrain park at the Keystone ski area." Nevertheless, this statement by the author alone does not prove identity. Defendant is directly quoted in the article stating, "[h]ere I am—or supposedly me—with one misdemeanor, in a terrain park, and everyone goes nuts. It's absolutely ridiculous." Exhibit 13 consists of a short segment of a podcast interview. At the start of the podcast, Defendant confirmed that "nothing that he [the author of the article] said was untrue or unfair, but it only captures one aspect of me, one part of my life, one part of our marketing, one part of my company." Defendant noted that the article could not be a "fluff piece" and therefore other aspects of his life and company were not included. The question is whether Defendant manifested an adoption or belief in the truth of the statements in The New Yorker article. This Court finds that he did. During the bench trial, the Court determined that Defendant's statements within the article and podcast were not inadmissible hearsay under Federal Rule of Evidence 801(d)(2)(B). *See United States v. Harrison*, 296 F.3d

994, 1001 (10th Cir. 2002). Furthermore, the Tenth Circuit has noted:

> In view of our decision to reverse the district court's determination with respect to the fraud issue, we must examine plaintiff's claim that the district court improperly refused to admit into evidence certain reprints of newspaper articles that were delivered by defendants to plaintiff's decedent. The reprints make statements about defendants' financial situation that are claimed to be inflated representations relevant to the fraud inquiry. In the first trial the district court ruled that these newspaper reprints were inadmissible as hearsay. This decision was incorrect. Fed.R.Evid. 801(d)(2) provides that a statement is not hearsay if it is offered against a party and is "a statement of which he has manifested his adoption or belief in its truth." By reprinting the newspaper articles and distributing them to persons with whom defendants were doing business, defendants unequivocally manifested their adoption of the inflated statements made in the newspaper articles.

Wagstaff v. Protective Apparel Corp. of Am., 760 F.2d 1074, 1078 (10th Cir. 1985). Here, Defendant went beyond merely reprinting an article and distributing it, rather he appeared on a podcast and verbally confirmed that nothing written by the author was "untrue or unfair." Defendant did not contend that the author had misquoted him or improperly insinuated that Defendant was the individual operating the snowmobile in the Keystone Resort.

With the combination of circumstantial evidence plus Defendant's adoption or belief in the truth of the article's statements, this Court finds beyond a reasonable doubt that Defendant possessed or operated an over-snow vehicle on NFS lands on or about April 24, 2020, that such operation or possession of an over-snow vehicle was outside of the roads, trails, and areas designated for over-snow vehicle use because the Keystone Resort was closed due to the COVID- 19 pandemic and the terrain park was not a designated route[5], and that defendant's

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[5] Defendant argued that under 36 C.F.R. § 261.14, the Government failed to prove an element of its case, namely that the NFS lands needed to be identified on an over-snow vehicle use map and that the Government did not provide evidence of such required designations by furnishing a map as an exhibit. The Court denied Defendant's motion for judgment of acquittal under Rule 29, finding that the Keystone Resort is not an area of NFS lands that has been designated for over-snow vehicle use and therefore a map did not need to be furnished, the resort and terrain park were closed due to the COVID-19 pandemic, signage of the closure was placed throughout the resort and terrain park, and employees of the resort had created snow berms to prevent trespassers from using the terrain park during the closure. Therefore, it was abundantly clear to a reasonable person that these NFS lands were not designated for over-snow vehicle use. Regardless, because the winter motor vehicle use map is publicly available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd491314.pdf, I take judicial notice of it, which notice may be taken at any time including on appeal. *United States v. Burch*, 169 F.3d 666, 671-72 (10th Cir. 1999) ("[O]fficial government maps are generally an acceptable source for taking judicial notice."); *see Klamath-Siskiyou Wildlands Ctr. v. Gerritsma*, 638 F. App'x 648, 655 n.4 (9th Cir. 2016). Accordingly, Defendant's argument is unavailing.

conduct did not fall within any of the regulatory exemptions under 36 C.F.R. § 261.14(a)-(f).

There is no dispute that Defendant then posted the June 10, 2020, photo of Hanging Lake and October 21, 2020, photo of Maroon Lake. Defendant conceded this. Defendant stated in The New Yorker article, "I wanted them to charge me with something. The only evidence they have is the photos I posted on Instagram, which I know are fake, because I faked them. I was pissed off about them charging me for the snowmobiling on Independence Pass with zero evidence." While the Government did not argue that the Hanging Lake and Maroon Lake photographs were authentic, it did argue that they show that Defendant continued to promote his business with photographs that depicted NSF lands.

Under 36 C.F.R. § 261.10(c), a person is prohibited from "[s]elling or offering for sale any merchandise or conducting any kind of work activity or service unless authorized by Federal law, regulation, or special-use authorization." To be found guilty of violating § 261.10(c), the Government must prove: (1) that the defendant was "conducting any kind of work activity or service"; (2) that was "on lands encompassed by the regulation"; and (3) that was "without a special use authorization." *United States v. Parker*, 761 F.3d 986, 993 (9th Cir. 2014). Defendant challenged only the first two elements.

Regarding the first element, the Tenth Circuit has noted that "[r]eceipt of payment, however, is not a required element under § 261.10(c). The key is whether the sale or offer of sale of merchandise or the work activity or service is a commercial activity."

United States v. Brown, 200 F.3d 710, 714 (10th Cir. 1999) (listing cases). Noncommercial or gratuitous activities (i.e., uncompensated aid to a friend) are not the target of § 261.10(c). *United States v. Bartels*, No. F053881, 1998 WL 289231, at *4 (D. Colo. May 28, 1998) (citing *United States v. Strong*, 79 F.3d 925, 929 (9th Cir. 1996)). Indeed, in *Bartels*, the Court noted that:

> Some evidence must be presented to show that the activity or service was commercial in nature—i.e., for money or other consideration. Otherwise, § 261.10(c) would prohibit a friend, relative or neighbor from picking up horses for a third party. There is no question that § 261.10(c) is not directed at friends or relatives. It is directed at the [party] who is profiting [directly] or indirectly from the service or activity.

Id.

The advertisement and marketing campaign with which Defendant embarked, beginning with the Keystone Resort photographs, was one that relied upon social media trolling as a way to stir up controversy and free press while using NFS lands as the location or backdrop because as a small business, he was "not getting noticed being super 'eco this' and 'eco that.'" In the ever- growing lexicon of internet lingo, a troll is defined as "an online user who purposefully posts provocative, offensive, or insulting speech in order to draw a reaction from others." Fernando L. Diaz, *Trolling & the First Amendment: Protecting Internet Speech in the Era of Cyberbullies & Internet Defamation*, 2016 U. Ill. J.L. Tech. & Pol'y

135, 137 (2016). While the Government did not challenge the authenticity of the Hanging Lake and Maroon Lake posts, these posts are relevant under Federal Rule of Evidence 404(b)(2) for proving motive, opportunity, and intent.

Defendant assisted the Government in proving his motive, opportunity, and intent when he stated in The New Yorker article "[t]he more hate I got, the more people got behind me, from all over the world… It was an opportunity to reach a whole new group of people—while really solidifying the customer base we already had." And Defendant confirmed as true and accurate the statement in the article that noted that "Lesh declined to reveal Virtika's annual sales, though he claimed they were up thirty per cent since he'd posted the photo at Hanging Lake; he said he owns the company outright and carries very little debt." Thus, the Court finds that Defendant's activity while trespassing at the Keystone Resort was commercial in nature and that the activity was on lands encompassed by the regulation and without a special use authorization.

Regardless, even without considering these admissions by Defendant, the Court could still find that Defendant's actions were commercial in nature. Commercial use or activity is defined as "any use or activity on National Forest System lands (a) where an entry or participation fee is charged, or (b) where the primary purpose is the sale of a good or service, and in either case, *regardless of whether the use or activity is intended to produce a profit*." 36 C.F.R. § 261.2 (emphasis added). And still photography is defined as the "use of still photographic equipment on National Forest System lands that takes place at a

location where members of the public generally are not allowed or where additional administrative costs are likely, or uses models, sets, or props that are not a part of the site's natural or cultural resources or administrative facilities." 36 C.F.R. § 251.51. Indeed, filming and photography on NFS lands have been found to be commercial activities falling within the scope of 36 C.F.R. § 261.10(c). *See United States v. Patzer*, 15 F.3d 934, 938 (10th Cir. 1993) (affirming a conviction under §§ 251.50 and 261.10(c) for engaging in commercial service, outfitting, and filming motion pictures on NFS lands without special use authorization); *United States v. Lewton*, 575 Fed. Appx. 751, 753 (9th Cir. 2014) (affirming a conviction under 36 C.F.R. § 261.10(c) for engaging in the commercial activity of filming bighorn sheep for profit without special use authorization). Because Defendant's still photography at the Keystone Resort was a commercial use or activity, he was required to seek special-use authorization, such as a "written permit, term permit, lease, or easement that authorizes use or occupancy of National Forest System lands and specifies the terms and conditions under which the use or occupancy may occur." 36 C.F.R. §§ 251.51, 261.2. Having failed to do that, and then posting the photographs on Instagram, this Court finds that Defendant was engaged in a work activity or service in violation of § 261.10(c). Either way, this Court finds beyond a reasonable doubt that on or about April 24, 2020, through October 21, 2020, Defendant sold or offered for sale any merchandise or conducted any kind of work activity or service without authorization by Federal law, regulation, or special-use authorization in the Keystone Ski Area

within the White River National Forest. And, ultimately, this Court does not need to decide if the regulations contain a *mens rea* requirement as the "evidence supports an inference [Defendant] knew he was on Forest Service land" while at the Keystone Resort. *United States v. Brown*, 200 F.3d 710, 715 (10th Cir. 1999).

III. CONCLUSION

Accordingly, I find beyond a reasonable doubt that on or about April 24, 2020, Defendant possessed or operated an over-snow vehicle in the Keystone Ski Area, outside of the roads, trails, and areas designated for over-snow vehicle use on the winter motor vehicle use map for the Dillon Ranger District of the White River National Forest and that Defendant's conduct did not fall within any of the regulatory exemptions (count 1). Consequently, I find Defendant GUILTY of violating 36 C.F.R. § 261.14.

Furthermore, I find beyond a reasonable doubt that Defendant on or about April 24, 2020, through October 21, 2020, sold or offered for sale any merchandise or conducted any kind of work activity or service in the Keystone Ski Area within the White River National Forest without authorization by Federal law, regulation, or special-use authorization (count 2). Consequently, I find Defendant GUILTY of violating 36 C.F.R. § 261.10(c).

IT IS FURTHER ORDERED THAT:

(1) On or before **November 15, 2021**, the Government shall file any request for restitution, if any is sought. This request shall state, with specificity, the amount sought and what this

amount would pay for. Defendant shall respond to the Government's restitution request within **fourteen days (14)** thereafter. Defendant shall state, with specificity, any amounts agreed to and any amounts in disagreement. Within **ten days (10)**, the Government shall reply to Defendant's response. If either party believes that a contested hearing is needed on the issue of restitution, they shall so state in their written filing (the Government may so state in their reply after finding out if the Defendant disputes any amount) and include for the Court an estimated time for the length of such hearing.

(2) The Court will later set a sentencing date after the parties have determined whether restitution is at issue.

(3) A final judgment will not enter until the date of sentencing, with the time for appeal commencing on that date.

Dated at Grand Junction, Colorado this October 22, 2021.

Gordon P. Gallagher
United States Magistrate Judge