No. 23-1074

In the United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID A. LESH,

Defendant-Appellant.

On Appeal from the U.S. District Court
for the District of Colorado
No. 1:22-cr-00033-DDD-GPG; Judge Daniel D. Domenico
No. 1:20-po-07016-GPG; Magistrate Judge Gordon P. Gallagher

DEFENDANT-APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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Forest Service	U.S. Forest Service
NFS	National Forest System
USDA	U.S. Department of Agriculture
USFS	U.S. Forest Service

INTRODUCTION

Defendant-Appellant David Lesh stands convicted of violating two regulations adopted by the U.S. Forest Service, despite—as thoroughly explained in Lesh's opening brief—prosecutors' failure to prove the elements of either crime.

With respect to Count I—operating a snowmobile in an area not designated for use by "over-snow vehicles," in violation of 36 C.F.R. § 261.14—the United States essentially concedes the deficiency of its evidence. Instead, its principal argument is that Lesh forfeited the issue by failing to raise it in the lower courts. That argument is belied by the record. The focus of Lesh's Count I appeal is that prosecutors failed to prove that the Forest Service posted maps showing where snowmobiling was and was not permitted as of April 2020 (the date of Lesh's alleged offense). Counsel for Lesh made that argument in the motion for a judgment of acquittal at the close of the Government's case (App. Vol. II at 429-431), in the closing arguments to the magistrate judge (App. Vol. II at 462-463), and in the appellate brief in the district court (App. Vol. I at 91-92). Both the magistrate judge and the district judge expressly rejected the argument thereby signaling their recognition that Lesh raised the argument. App. Vol. I at 180. The United States makes no serious effort to defend the adequacy of its Count I evidence on the merits, arguing instead that any error perhaps did not rise to the level of "plain error."

With respect to Count II—conducting unauthorized "work activity or service" on National Forest System (NFS) lands, in violation of 36 C.F.R. § 261.10(c)—the Government alleges that Lesh engaged in two activities on NFS lands in April 2020: (1) he snowmobiled at the terrain park in the Keystone Ski Resort; and (2) he arranged for the snowmobiling to be photographed. But the United States does not challenge Defendant's contention that no one else has *ever* been charged with violating the regulation under even remotely similar circumstances. Prosecutors do not allege that Lesh received any compensation for either alleged activity or that he made any effort to sell the photographs. Section 261.10(c) addresses *commercial* activity on NFS lands; Lesh cannot be shown to have engaged in commercial activity in the absence of evidence that he sought compensation for his alleged snowmobiling and photography.

The United States has abandoned its claim (raised in the district court) that Lesh did not adequately preserve his First Amendment challenge to Count II. Lesh argues that the Government violated his First Amendment rights by prosecuting him for posting photographs on Instagram. The Government responds that its prosecution of Lesh for his speech activities (posting pictures on Instagram) was justified because it served "an important governmental interest" in a narrowly tailored manner: it prohibits people from conducting commercial activity on NFS

land. U.S.Br. 30-31. That response makes little sense; Lesh was not on NFS lands when he posted pictures on his Instagram. App. Vol. II at 258-259, 408-409.

Although Prosecutors argue that Lesh did not adequately preserve his Fifth Amendment Due Process Clause void-for-vagueness challenge to Section 261.10(c), they concede that the district court held otherwise. U.S.Br. 33. They contend that the regulation passes due process muster, arguing that it "give[s] ordinary people fair notice of the conduct it punishes." *Ibid.* But they fail to explain why the phrase "work activity or service" should have placed Lesh on notice that he would violate the regulation if he posted pictures on his personal Instagram, particularly given the absence of any previous prosecutions for similar activity.

The Government argues that Ms. Lesh's nondelegation arguments were "novel," "inconsistent," or waived, U.S.Br. at 35-36, but the record and the law dictate otherwise. The Government contends that 7 U.S.C. § 1011(f) contains three intelligible principles and, for the first time ever, asserts additional *post hoc* intelligible principles supporting USFS's regulations. But it utterly ignores the fact that Congress cannot delegate the power to write criminal laws.

The Government describes Mr. Lesh as being on a "quixotic quest to establish a new right to a jury trial for petty misdemeanor offenses." U.S.Br. at 11. But he is not seeking a new right, just vindication of the complete right that the Constitution

itself and the Sixth Amendment thereof guarantee. Surely, when the Framers included the right to trial by jury in criminal cases in the Constitution, U.S. Const. art. III, § 2, and as an amendment, U.S. Const. amend. VI, those words and that decision to include the right meant something.

ARGUMENT

I. PROSECUTORS FAILED TO PROVE THAT THE U.S. FOREST SERVICE POSTED THE REQUISITE SNOWMOBILING MAPS

To prove a violation of Section 261.14 (Count I), prosecutors were required to show that *before* the date of Lesh's alleged offense (April 24, 2020), the Forest Service posted a map showing where snowmobiling is and is not permitted within the White River National Forest. It is uncontested that prosecutors failed to present *any* such evidence at trial. In the absence of such evidence, the conviction on Count I must be overturned.

A. Lesh Repeatedly Raised the Failure-to-Post Argument in Courts Below

The United States' brief does not assert that prosecutors introduced evidence to show that the USFS posted the requisite map. Rather, it claims Lesh forfeited this argument by failing to raise it in the lower courts or alternatively, that Lesh's alleged failure requires him to meet a "plain error" standard of proof. U.S.Br. 12-20.

The Government's forfeiture claim is belied by the record. Lesh repeatedly argued in the lower courts that he could not be convicted on Count I because there

was no evidence USFS had posted a snowmobile map.

In the motion for judgment of acquittal on Count I following the close of the prosecution's case, defense counsel focused largely on prosecutors' failure to present evidence that, as of April 2020, USFS had posted maps designating where snowmobiling was permissible within the Dillon Ranger District—the district within the White River National Forest where the Keystone Ski Resort is located. App. Vol. II at 429-431 (asserting that a pre-existing designation is a "critical element" of a Section 261.14 offense and that "the activity alleged is not criminal" unless "the Government has complied with those required designations.").

Similarly, in closing argument, defense counsel said, "With respect to Count 1: As mentioned, 36 C.F.R. § 261.14 has an absolute elemental requirement that there be designations that reflect an over-snow vehicle use map" and that prosecutors did not meet that requirement. App. Vol. II at 462-463. Lesh repeated that argument in his appellate brief filed with the district court. App. Vol. I at 91-92.[1]

[1] The Government inappropriately faults Lesh for not raising his failure-to-prove-map-posting claim in his post-conviction motion for leave to file a renewed motion for acquittal. U.S.Br. 13. Lesh's decision not to raise all contested issues in his motion for leave has no bearing on his right to raise those issues on appeal. The federal courts of appeal are unanimous in concluding that a defendant need not file a motion for judgment of acquittal following a conviction in a *bench* trial, in order to preserve "the usual standard of review" (*i.e.*, *de novo* review of legal issues) on claims challenging sufficiency of evidence at trial. *United States v. Grace*, 367 F.3d 29 (1st Cir. 2004) (citing similar rulings from Sixth, Seventh, Ninth, and D.C.

The Government's only challenge to the adequacy of Lesh's failure-to-prove-map-posting argument in the lower courts is that Lesh failed to take issue with the magistrate judge's decision to compensate for prosecutors' evidentiary deficiency by taking judicial notice of a map he uncovered through his own research. U.S.Br. 13-14. With respect to trial proceedings, that challenge is absurd. The magistrate did not take judicial notice of his map until he issued his decision on October 22, 2021—well after counsel raised the failure-to-prove-map-posting argument at the August 5, 2021 trial. Lesh could not have objected at trial to the magistrate's taking judicial notice of a map, given that it happened in a ruling nearly three months later.

Lesh's district-court appellate brief did not explicitly reference the magistrate judge's decision to take judicial notice of the map he uncovered. But the district judge's decision makes clear that he understood that Lesh objected to the judicial notice; he made an explicit finding that "[Magistrate] Judge Gallagher properly took judicial notice" of the map he uncovered. App. Vol. I at 180. Moreover, it is uncontested that Lesh's district court brief raised the precise issue he raises here: the conviction on Count I must be overturned because there was no evidence that USFS had posted the requisite over-snow map as of April 2020. App. Vol. I at 91-92.

Circuits).

B. The Map of Which the Magistrate Judge Took Judicial Notice Did Not Provide Evidence that the Forest Service Posted a Snowmobiling Map on or Before April 24, 2020

Lesh's opening brief explains at length why the map uncovered by the magistrate judge did not prove that the Forest Service had posted an over-snow vehicle map for the Dillon Ranger District on or before April 24, 2020. Opening Br. at 17-25. Judicial notice is unwarranted because the fact sought to be noticed (that the map in question had been posted on the Forest Service website for at least 18 months at the time the magistrate first saw it) does not meet the standard established by Federal Rule of Evidence 201(b).

In response, the Government argues, "It is not plainly irrational for a factfinder to conclude—as the magistrate judge did—that a government map available on the internet in October of 2021 was also available in April of 2020." U.S.Br. 16. But "plainly irrational" is not the standard governing judicial notice. A fact may be judicially noticed only if "it is not subject to reasonable dispute because it is … 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be disputed.'" *United States v. Burch*, 169 F.2d 666, 671 (10th Cir. 1999) (quoting Fed. R. Evid. 201(b)). The date of posting is subject to reasonable dispute, so it cannot be determined by resort to judicial notice of a map.

C. The Court Should Reject the Government's Request that It Take Judicial Notice of a Document Maintained on a Private Internet Site

In a last-ditch effort to salvage the conviction on Count I, the Government requests that this Court take judicial notice of yet another document. It contends that a document maintained on a private internet site, the "Wayback Machine," proves that the Forest Service posted an over-snow vehicle map for the Dillon Ranger District on or before April 24, 2020. U.S.Br. 18 & n.4.

The Court should reject that request. The proffered document is not maintained by the Government; it is maintained by a private party and is inadmissible in the absence of authentication. As the Fifth Circuit has observed:

> The party offering an exhibit must produce evidence sufficient to support a finding that the item is what the proponent claims it to be. Where a website or electronic source is concerned, testimony by a witness with direct knowledge of the source, stating that the exhibit fairly and fully reproduces it, may be enough to authenticate. Although a witness need not be a document's author to authenticate it for purposes of Rule 901, we have observed that a witness attempting to authenticate online content as evidence was unlikely to have the requisite direct knowledge where that content was created and maintained by a third party.

Weinhoffer v. Davie Shoring, Inc., 23 F. 4th 579, 582 (5th Cir. 2022) (citations omitted).

The Government has made no effort to authenticate the Wayback Machine document it has brought to the Court's attention. It boldly asks the Court to take

judicial notice of facts allegedly established by the document, even though the document is not maintained by the Government, which thus has no direct knowledge of the document's authenticity. Under those circumstances, judicial notice is unwarranted; facts allegedly established by the proffered document cannot possibly be deemed facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

No federal appellate decision condones taking judicial notice of documents maintained on private internet sites. The Fifth Circuit declined to take judicial notice of the contents of a document maintained on the Wayback Machine, explaining, "a private internet archive falls short of being a source whose accuracy cannot reasonably be questioned as required by Rule 201." *Weinhoffer*, 23 F. 4th at 584. The Fifth Circuit noted that its decision was consistent with decisions from the Second, Third, and Eighth Circuits, all of which hold that federal courts may rely on archived webpages only "where someone with personal knowledge of the reliability of the archive service" has authenticated the webpage pursuant to Fed. R. Evid. 901. *Ibid.* (citing *United States v. Gasperini*, 894 F.3d 482, 490 (2d Cir. 2018); *Specht v. Google Inc.*, 747 F.3d 929, 933 (7th Cir. 2014); and *United States v. Bansal*, 663 F.3d 634, 667-68 (3d Cir. 2011)). The Federal Circuit has similarly rejected an effort to take judicial notice of a Wayback Machine document first proffered in the appeals

court. *Juniper Networks, Inc. v. Shipley*, 394 F. App'x 713 (Fed. Cir. 2010)).

The Government cites two district court decisions taking judicial notice of unauthenticated Wayback Machine documents. U.S.Br. at 18 n.4. But a majority of district court decisions has refused to take judicial notice of such documents. *See, e.g., My Health, Inc. v. Gen. Elec. Co.*, No. 15-CV-80-JDP, 2015 WL 9474293, at *4 (W.D. Wis. Dec. 28, 2015); *Nassar v. Nassar*, No.3:14-CV-1501-J-34MCR, 2017 WL 26859, at *5 (M.D. Fla. Jan. 3, 2017); *Ward v. Am. Airlines, Inc*., No. 4:20-CV-00371-O, 2020 WL 8300505, at *1 (N.D. Tex. Oct. 16, 2020). *Ward*'s ruling invokes the Wayback Machine's terms of use, which disclaim any guarantees of "accuracy, currency, completeness, reliability, or usefulness" of the content stored there. *Ibid.*

In any event, the judicial notice doctrine cannot compensate for missing evidence that forms an element of a crime in circumstances where a party claims the trier of fact had sufficient evidence to convict. Assuming *arguendo* that the map was posted on the website during the requisite time period, that evidence was not presented to the district court and so could not have served as a basis for conviction.

II. PROSECUTORS FAILED TO PROVE THAT LESH ENGAGED IN "WORK ACTIVITY OR SERVICE" ON NATIONAL FOREST LAND

To prove a violation of 36 C.F.R. § 261.10(c) (Count II), prosecutors were required to show that Lesh engaged in "selling or offering for sale any merchandise"

or any "work activity or service"[2] on Forest Service land. *See* 36 C.F.R. § 261.1(a) (stating that the prohibitions set out in § 261.10(c) apply when "an act or omission occurs in the National Forest System or on a National Forest System road or trail"). Lesh's opening brief explains in detail why the Government's evidence failed to establish that Lesh engaged in *any* commercial activity on Forest Service land.

The magistrate judge found that evidence that Lesh photographed the Keystone snowmobiling satisfied the commercial-work-activity requirement; he based that finding largely on his ruling that "still photography" is a commercial "work activity or service" within the meaning of 36 C.F.R. § 261.10(c). App. Vol. I at 60. As Lesh's opening brief explains, that finding was predicated on a misinterpretation of 36 C.F.R. §§ 251.51 and 251.50(c), the regulations defining "still photography"; those regulations make clear that the Forest Service deems still photography to be a *non*commercial activity. Opening Br. 29-30. The United States makes no effort to defend the magistrate's "still photography" error. Instead, it argues that the Court "need not consider" the magistrate's discussion of still photography because it was a mere "alternative holding." U.S.Br. 25.

[2] "Work activity or service" is a term of art understood by USFS and the courts to be limited to *commercial* activity. *See, e.g., United States v. Strong*, 79 F.3d 925, 928 (9th Cir. 1996) (citing USFS Special Uses Handbook).

But absent the (erroneous) still-photography holding, there is no evidence that Lesh engaged in commercial activity on Forest Service land. Prosecutors contend that in April 2020 Lesh snowmobiled at the Keystone Ski Resort and photographed himself doing so. U.S.Br. at 23-24. Neither activity qualifies as commercial in character when, as here, there is no evidence that Lesh either sought or accepted compensation for his activity. The fact he may have profited from the photographs indirectly and unintentionally does not change this analysis. Case law interpreting § 261.10(c) makes clear that the regulation "prohibits the specified activities only when they are engaged in for consideration." *Strong*, 79 F.3d at 928; *accord United States v. Bartels*, 1998 WL 289231, at *4 (D. Colo. 1998) ("Some evidence must be presented to show that the activity or service was commercial in nature—*i.e.*, for money or other consideration."). Because Lesh received neither cash nor anything else of value for his Keystone activities, his conviction on Count II must be reversed.

The decision relied on by prosecutors, *United States v. Brown*, 200 F.3d 710 (10th Cir. 1999), fully supports Lesh's position. *Brown* involved the owner of a snowmobile-rental company charged with violating § 261.10(c). On the occasion at issue, he agreed to rent a vehicle for $200 and delivered it to the renter on Forest Service property. When the defendant returned to pick up the snowmobile, a Forest Service law-enforcement officer was standing within earshot. The renter offered to

pay the agreed-upon $200, but the defendant declined to accept payment. This Court upheld the defendant's conviction on the ground that he had agreed to accept $200 in return for the lease of a snowmobile and that the regulation expressly prohibits "selling or offering merchandise for sale" on Forest Service land without a special use authorization permit. *Id.* at 714. The Court held that it made no difference that the defendant changed his mind (in the presence of a law-enforcement officer) and declined to accept the agreed-upon payment; his activity nonetheless violated the regulation because he had in fact engaged in "commercial activity" on Forest Service land when he agreed to lease his snowmobile in return for a $200 payment. *Id.* at 714-15.

In sharp contrast, Lesh never sought any payment for his alleged snowmobiling and photography, nor did he ever receive such payment. To illuminate the absurdity of the Government's position, imagine a person who takes a photograph of a scenic landscape on federal lands and hangs it in her house, where a friend sees it and offers to pay her for the photograph, which she decides to accept. According to the Government's interpretation of the regulation, the person who took the photograph could be prosecuted for violating it, despite having had no intention when taking the photograph to sell it or profit from it. Indeed, this scenario is *less* ridiculous, since at least some exchange of money occurred.

Despite lacking any evidence of payment, or even that Lesh sought to profit, the Government doggedly insists that the evidence suffices to establish that the "primary purpose" of Lesh's snowmobiling/photography was "the sale of a good or service." He allegedly would not have snowmobiled over the jump at the Keystone Ski Resort were it not for his desire to promote the sale of Virtika merchandise. U.S.Br. 23. But the magistrate judge never made any such "primary purpose" finding—and with good reason: there is no evidence that the activity increased Virtika's sales or that doing so was Lesh's purpose. Lesh simply posted a picture of the snowmobiling on his personal (not professional) Instagram account without stating who was depicted and without any mention of Virtika or any allusion to Virtika products. App. Vol. I at 192. Virtika itself did nothing to promote the picture. App. Vol. II at 397-398. And, of course, *Strong* establishes that § 261.10(c)'s "work or service activity" provision is not violated in the absence of evidence that the activities "are engaged in for consideration." 79 F.3d at 928.

If the Court concludes that § 261.10(c) is ambiguous regarding its application to activities undertaken without "consideration," then the rule of lenity requires reversal. Opening Br. 31-32. The Government attempts to dismiss that argument as "a drive-by reference to the rule of lenity." There is nothing "drive-by" about this fundamental argument. Case law cited by Lesh demonstrates that the regulation

unambiguously does *not* apply to activity undertaken without consideration. But if the Court harbors doubts on that score, the rule of lenity dictates that "the tie goes to the presumptively free citizen and not the prosecutor." *United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (Gorsuch, J.).

Upholding the conviction on Count II without evidence that Lesh was paid for his activities would expand criminal law significantly.

A. Punishing Lesh for His Instagram Post Violates His First Amendment Free-Speech Rights

The Government denies that it is prosecuting Lesh for posting a picture on his Instagram account. Rather, it asserts, it is merely using the Instagram post as evidence that Lesh's alleged activities at Keystone were commercially motivated. U.S.Br. 26-27. But that assertion ignores an obvious fact: Lesh's snowmobiling and photography would not violate § 261.10(c) if considered in isolation, or in other words, absent the Instagram post. Regardless of what may have motivated Lesh's alleged activities on April 24, 2020, they were not inherently commercial in nature. Opening Br. at 25-42. No evidence suggested that he engaged in the conduct in return for a promise of compensation; nor did any evidence show that he received any. No arguable basis existed for charging Lesh with commercial activity until after he posted snowmobile pictures on his personal Instagram account.

In other words, the Government is *not* using the Instagram photographs

merely as evidence that Lesh's Keystone activities were commercial in nature. Rather, Lesh's speech—the posting of the pictures—is an essential element of his alleged crime. As Lesh's opening brief explains in detail (at 34-38), prosecuting him in this manner implicates his First Amendment free-speech rights. *United States v. Caronia*, 703 F.3d 149, 162 (2d Cir. 2012) (stating that the First Amendment is directly implicated when "the proscribed conduct for which [the defendant] was prosecuted was precisely his speech"). This prosecution cannot withstand First Amendment scrutiny because it is content-based (*i.e.*, Lesh faced charges because of the content of his pictures—they depicted a National Forest scene), and the Government has not demonstrated that its prosecution is "narrowly tailored to serve compelling state interests." *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1227 (10th Cir. 2021) (citation omitted).

The Government's argument that its restrictions on Lesh's speech are not content-based, U.S.Br. 31-32, derives from an apparent misunderstanding of that term. It argues that the restrictions are not content-based because "the vast majority of conduct [§ 261.10(c)] prohibits is not expressive at all." *Id*. at 32. That may be so, but the issue here is whether the Government's application of the regulation *in this instance* regulates Lesh's speech on the basis of its content. It clearly does. The Government would not and could not have prosecuted Lesh if he had posted a picture

of someone snowmobiling on private land instead of in the Keystone Ski Resort.

Government-cited case law is distinguishable. It cites *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993), for the proposition that "[t]he First Amendment … does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[3] But as explained above, the Government is not using Lesh's Instagram post simply as evidence that some other actions undertaken by Lesh constituted a crime. Rather, under the prosecutors' theory, there would be no crime but for Lesh's decision to post pictures on Instagram.

Although the Government asserted in the district court that Lesh failed to preserve his First Amendment claim in the trial court, the district court rejected that contention and ruled on the merits of Lesh's claim. App. Vol. I at 182-183. The Government now abandons its forfeiture point. U.S.Br. 26. The First Amendment

[3] The criminal defendant in *Mitchell* had been convicted of aggravated battery. Wisconsin law provided that his sentence was subject to enhancement if he chose his victim because of the victim's race. The defendant argued that the sentence-enhancement provision violated his First Amendment rights. The Court held that the First Amendment did not preclude the admission of the defendant's bigoted statements to help establish that he had acted with the requisite intent—that is, he battered his victim based on race. 508 U.S. at 489-90. But the Court never suggested that prosecuting someone for making racially bigoted statements could survive First Amendment scrutiny. Indeed, the Supreme Court struck down such a law in *R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992), holding that it was a content-based speech restriction that violated the First Amendment.

claim is properly before this Court. *United States v. Henson*, 9 F.4th 1258, 1274 (10th Cir. 2021), *vacated and remanded on other grounds*, 142 S. Ct. 2902 (2022).

B. 36 C.F.R. § 261.10(c) Is Void for Vagueness as Applied to Lesh

The conviction on Count II should be overturned for the additional reason that § 261.10(c) is overly vague as applied to Lesh's conduct and thereby violates his due process rights. The Fifth Amendment provides, "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The prohibition of vagueness in criminal statutes" is an "essential of due process," required by both "ordinary notions of fair play and the settled rules of law." *Johnson v. United States*, 576 U.S. 591, 595 (2015). The void-for-vagueness doctrine "guarantees that ordinary people have fair notice of the conduct a statute proscribes" and "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

The Government's assertion that Lesh failed to preserve his due process void-for-vagueness argument is meritless. The district court explicitly held that Lesh raised the argument both before the magistrate judge and the district judge. App. Vol. I at 184. The court below stated explicitly that "Mr. Lesh's trial counsel preserved this argument in his summation" at the conclusion of trial before the

magistrate. *Ibid*. (citing trial transcript at 238, App. Vol. II at 482). The district judge also recognized that Lesh's appeal to the district court challenged Count II on due process grounds, quoting Lesh's district court brief as follows:

> 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.

Ibid. (quoting App. Vol I at 97) (emphasis in original).

The Government asserts that Lesh did not adequately preserve the claim because in prior court submissions he failed to use the phrase "void-for-vagueness" when arguing his due process claim. U.S.Br. 32. That assertion is unavailing. The district court fully understood that Lesh contended that § 261.10(c) as applied to him violated the Fifth Amendment because it failed to provide him fair notice that his conduct violated the regulation. The court stated that the due process question was "whether 'the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" App. Vol I. at 184 (quoting *United States v. Muskett*, 970 F.3d 1233, 1243 (10th Cir. 2020)). Lesh raises that identical due process void-for-vagueness claim here.

Before this matter arose, ordinary people could comprehend what conduct was and was not prohibited by § 261.10(c). Under the standard articulated by the Ninth

Circuit, activities undertaken on Forest Service land are prohibited "only when they are engaged in for consideration." *Strong*, 79 F.3d at 928. The Government urges the Court to abandon the *Strong* standard in favor of a weaker one that focuses on whether the "motivation" for one's activities is "commercial in nature." U.S.Br. 34.

As Lesh's opening brief explains (at 38-42), the Government's proposed standard is overly vague and fails to provide the requisite guidance regarding what the statute does and does not prohibit. Although the Government does not contend that anyone agreed to pay Lesh for his activities, it contends that his disclosure of those activities on Instagram qualifies as "commercial" in nature because Lesh recognized that the disclosure might redound to his benefit in some ill-defined and unproven manner. Many individuals post on their online accounts pictures of themselves engaging in uncompensated activities on National Forest lands, and (as explained in Lesh's opening brief) a significant number of those postings could potentially provide them with some financial benefit. If the Court adopts the ill-defined commercial-motivation standard espoused by the Government, individuals like Lesh will be unable to distinguish permissible conduct from prohibited conduct.

Moreover, as so construed, § 261.10(c) also fails to establish minimal guidelines to govern law enforcement, thereby inviting arbitrary and discriminatory enforcement. As explained in Lesh's opening brief (at 42), the sequence of events

in this case suggests just such arbitrary and discriminatory enforcement. The Government's brief fails to respond to that (accurate) allegation.

III. 7 U.S.C. § 1011(f) LACKS AN INTELLIGIBLE PRINCIPLE TO GUIDE USFS

A. Lesh's Nondelegation Arguments Are Preserved and Do Not Conflict

The Government's attempt to frame Mr. Lesh's nondelegation arguments as "novel," "inconsistent," or waived, U.S.Br. at 35-36, is belied by the record. Lesh's Motion to Dismiss for Violation of the Nondelegation Doctrine, App. Vol. I at 27-32, shows that his arguments do not hinge solely on then-Judge Gorsuch's dissent from denial of rehearing en banc in *United States v. Nichols*, 784 F.3d 666, 667-77 (10th Cir. 2015). Mr. Lesh made the same arguments there that he renews before this Court, that "[a]ll legislative powers" are "vested" in Congress and that Congress cannot transfer core legislative functions to another branch of government. *Compare* App. Vol. I at 67 *with* Opening Br. at 43-44; *see also* Opening Br. at 43 n.19 (discussing how courts typically discuss violations of the Vesting Clause as the "nondelegation doctrine"). The Legislative Branch violates that principle when it instructs the Executive Branch to create new criminal laws based on "alarmingly vague" statutory language. *Compare* App. Vol. I at 29-31 *with* Opening Br. at 45-46, 47. Stated another way, an "alarmingly vague" delegation is one that "lacks any principle, let alone an intelligible one, to guide" the agency in implementing and

enforcing laws. App. Vol. I at 30; Opening Br. at 44-45, 47.

Nor is there anything inconsistent about the argument made in Lesh's appeal of the Magistrate Judge's decision, and those made here. U.S.Br. 36-37. As Lesh argued in his opening brief (at 46, 47-48), "7 U.S.C. § 1011(f), purports to provide the Secretary of Agriculture with 'unfettered legislative authority' to promulgate rules addressing trespass, use, and occupancy of public lands managed by the Forest Service" but the power to *criminalize* behavior "belongs to Congress and Congress alone" so the breadth of the authority allegedly granted is too broad. This argument is completely consistent with those made below. *See* App. Vol. I at 30-31, 94-95.

B. Congress Cannot Delegate the Power to Write Criminal Laws and It Provided No Intelligible Principle to Guide the Agency's Regulations

The Government's response ignores one of Mr. Lesh's key arguments—that Congress alone has the power to determine what is a crime, a power which cannot be delegated. App. Vol. I at 28, 30-31; Opening Br. at 43-44. "Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quoting *United States v. Hudson*, 11 U.S. 32, 33 (1812)). The power to write criminal laws is "strictly and exclusively legislative[.]" Opening Br. at 43-44. And "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529

(1935). The Government ignores this argument altogether and instead asserts that 7 U.S.C. § 1011(f) provides intelligible principles to guide USFS's decision-making. But that does not resolve the problem that, intelligible principle or not, Congress may not grant an Executive agency power to write criminal laws, as occurred here.

Even if Congress could delegate its power to make an act a crime, the statute's passing references to "prevent trespass," "conserve" land, or "utilize" land do not provide an intelligible principle guiding the adoption of regulations that criminalize behavior, including speech, on NFS lands. 7 U.S.C. § 1011(f). But, according to the Government, 7 U.S.C. § 1011(f) provides three intelligible principles guiding the criminalization of any manner of behavior on NFS lands: "preventing trespass, conserving the land, and utilizing the land." U.S.Br. at 39. This broad language cannot support the weight of the Government's argument. As the Supreme Court has recognized, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred" and the greater the scope of the power, the greater the substance of the guidance that must be provided. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 475 (2001); *see also* App. Vol. I at 94 (arguing that "extraordinarily broad regulatory authority … [is] not to be lightly accepted").

Relying on *Whitman*, the court in *United States v. Pheasant* determined that

"[g]iving an Executive agency authority to regulate 10% of the country and 30% of the country's mineral resources without 'substantial guidance' runs afoul of the constitution." No. 321CR00024RCJCLB, 2023 WL 3095959, at *9 (D. Nev. Apr. 26, 2023). The same analysis applies here, where USFS manages some 300,000 square miles, Opening Br. at 22, or roughly eight percent of the country, and 7 U.S.C. § 1011(f) provides no substantial guidance or intelligible principle on how to do so.

The Government's reliance on 7 U.S.C. § 1010, U.S.Br. at 40, is misplaced for one simple reason: USFS has never relied on that provision as the basis for promulgating either regulation at issue here. Initially promulgated in 1977, 36 C.F.R. § 261.10(c) was amended once in 1981 before taking its present form in 1984.[4] At promulgation and in each subsequent amendment thereto, USFS clearly stated that the "authority" for 36 C.F.R. § 261.10(c) was 7 U.S.C. § 1011(f) but never section 1010. *See* 42 Fed. Reg. at 2,957; 46 Fed. Reg. at 33,519; 49 Fed. Reg. at 25,449-50. Likewise, 36 C.F.R. § 261.14, was not authorized pursuant to section 1010. *See* 80 Fed. Reg. 4,500 (Jan. 28, 2015). Thus, at the time the regulations at

[4] The "occupancy and use" regulation has been amended eight times in total. The Forest Service has never asserted authority to promulgate any amendment to the regulation pursuant to 7 U.S.C. § 1010. *See generally* 42 Fed. Reg. 2,956 (Jan. 14, 1977); 46 Fed. Reg. 33,518 (June 30, 1981); 49 Fed. Reg. 25,447 (June 21, 1984); 53 Fed. Reg. 16,548 (May 10, 1988); 59 Fed. Reg. 31,146 (June 17, 1994); 60 Fed. Reg. 45,228 (Aug. 30, 1995); 66 Fed. Reg. 3,206 (Jan. 12, 2001); 69 Fed. Reg. 41,946 (July 13, 2004); 73 Fed. Reg. 65,984 (Nov. 6, 2008).

issue here were promulgated, even the Government did not think that 7 U.S.C. § 1010 applied to its actions. The Court should not countenance the Government's *post hoc* "litany of intelligible principles" under section 1010 now, U.S.Br. at 40.

IV. THE CONSTITUTION GUARANTEES THE RIGHT TO AN IMPARTIAL JURY IN *ALL* CRIMINAL PROSECUTIONS

"[T]he promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (finding that the Sixth Amendment's unanimity requirement applies to the States) (emphasis in original). Indeed, "imagine a constitution that included the same hollow guarantee *twice*—not only in the Sixth Amendment, but also in Article III." *Id.* (citing U.S. Const. art. III, § 2 and U.S. Const. amend. VI) (emphasis in original). But that cannot be so because "[t]he text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning." *Id.* (emphasis in original). So too, here. The Constitution's clear guarantee of a right to a jury trial for "all Crimes," U.S. Const. art. III, § 2, and "[i]n all criminal prosecutions," U.S. Const. amend. VI, must mean *something*. But for far too long, defendants like Mr. Lesh have been denied that enumerated right.

The Government offensively frames Mr. Lesh's jury-trial right argument as a "quixotic quest to establish a new right to a jury trial for petty misdemeanor offenses." U.S.Br. at 11. But that framing misses that he is not seeking a new right,

but rather recognition of the complete old right that the Constitution and the Sixth Amendment guarantee. Moreover, the Government does not seriously engage with Lesh's arguments that (i) the so-called petty offense exception directly contradicts the Constitution and the Sixth Amendment's text; (ii) the exception starkly contrasts with the Framers' profound reverence for jury trials when they adopted that right; or (iii) the divergence from that right finds its origins in dicta. Opening Br. at 48-54. Hence, Mr. Lesh is not arguing for a new right; he is arguing for restoration of the full right guaranteed by the express words of the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. amend. VI; *see also* U.S. Const. art. III, § 2.

Mr. Lesh does not dispute that flawed precedent binds this Court. Opening Br. at 54 (noting that courts may act consistent with precedent while recognizing a precedent's incompatibility with the Constitution). However, the Government has abolished his right to a trial by jury on the charged offenses, so he is entitled to raise arguments in support of restoring that irreducible right. Indeed, as the Supreme Court has noted: *stare decisis* "is 'at its weakest when we interpret the Constitution.'" *Ramos*, 140 S. Ct. at 1405 (citation omitted). Full vindication of Mr. Lesh's jury trial right requires preserving his argument to jettison precedent on appeal. *See* Opening Br. at 50-51 (noting that displacement of the Sixth Amendment

right to trial by jury has never been fully litigated). He has done so. There is nothing quixotic about that. Unless, perhaps, the Government means that Mr. Lesh is ambitiously idealistic to expect federal courts eventually to uphold his constitutional rights. Of that, he pleads guilty.

> *For neither good nor evil can last forever; and so it follows that as evil has lasted a long time, good must now be close at hand.*
> *—Miguel de Cervantes Saaverda,* Don Quixote

CONCLUSION

Mr. Lesh's convictions should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(ii) because it contains 6,481 words. This brief also complies with the typeface and type-style requirements of the Federal Rules of Appellate Procedure because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2023, I electronically filed the foregoing Appellant's opening brief with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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