No. _____

# In The
# Supreme Court of the United States

CENTER FOR BIOLOGICAL DIVERSITY, ANIMAL LEGAL DEFENSE FUND, DEFENDERS OF WILDLIFE, AND SOUTHWEST ENVIRONMENTAL CENTER,

*Petitioners,*

v.

U.S. DEPARTMENT OF HOMELAND SECURITY AND CHAD WOLF, ACTING SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States District Court For The District Of Columbia**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"), grants the Secretary of Homeland Security ("Secretary") the authority to "waive all legal requirements"—including all federal, state, local, and tribal laws, regulations, and legal requirements deriving therefrom—that the Secretary, in the Secretary's "sole discretion, determines necessary to ensure expeditious construction of barriers and roads" in the vicinity of the U.S. borders. The statute permits only legal challenges alleging a violation of the Constitution of the United States, and appellate review of a district court decision is available solely through a writ of certiorari to this Court with no circuit court review. *Id.* § 102(c)(2)(C). Further, IIRIRA § 102(c) prohibits any judicial review—whether federal or state—of the Secretary's waiver decisions for failure to comply with statutory standards. *Id.* § 102(c)(2)(A).

This action presents a constitutional challenge to the Secretary's issuance of six waiver decisions, made pursuant to IIRIRA § 102(c) in 2018 and 2019, waiving more than forty federal laws—and all related state, local, and tribal laws, regulations, and legal requirements deriving therefrom—which are otherwise applicable to the construction of 145-miles of steel-bollard walls along the U.S.-Mexico border in Arizona, California, New Mexico, and Texas.

The question presented is:

Whether IIRIRA § 102(c)—which grants the Secretary of Homeland Security unfettered discretion to

**QUESTION PRESENTED**—Continued

waive all federal, and related state, local, and tribal laws, regulations, and legal requirements, and sets forth no standards or criteria to apply in determining whether such waiver is necessary for expeditious border wall construction—violates the separation of powers, the non-delegation doctrine, and the Presentment Clause of the Constitution of the United States.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners Center for Biological Diversity, Animal Legal Defense Fund, Defenders of Wildlife, and Southwest Environmental Center each state that they are not a subsidiary or affiliate of a publicly-owned corporation.

Respondents are the United States Department of Homeland Security and Chad Wolf, in his official capacity as Acting Secretary of the United States Department of Homeland Security.

## STATEMENT OF RELATED CASES

- *Center for Biological Diversity, et al. v. Kevin McAleenan, Acting Secretary of the Department of Homeland Security, et al.*, Case No. 18-cv-0655, U.S. District Court for the District of Columbia. Judgment entered September 4, 2019.
- *Center for Biological Diversity, et al. v. Kevin McAleenan, Acting Secretary of the Department of Homeland Security, et al.*, Case No. 19-cv-2085, U.S. District Court for the District of Columbia. Dismissal entered September 13, 2019.

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## OPINIONS AND ORDERS BELOW

The two related judgments from which review is sought are: (1) *Center for Biological Diversity, et al. v. Kevin McAleenan, Acting Secretary of the Department of Homeland Security, et al.*, Case No. 18-cv-0655-KBJ (D.D.C. Sep. 4, 2019) ("*CBD v. McAleenan I*"); and (2) *Center for Biological Diversity, et al. v. Kevin McAleenan, Acting Secretary of the Department of Homeland Security, et al.*, Case No. 19-cv-2085-KBJ (D.D.C. Sep. 13, 2019) ("*CBD v. McAleenan II*").

The opinion of the district court for *CBD v. McAleenan I* appears at 2019 U.S. Dist. LEXIS 150576 (D.D.C. Sep. 4, 2019). Pet. App. 1-66.[1] The district court, in a separate order, dismissed *CBD v. McAleenan II* for the same reasons set forth in *CBD v. McAleenan I*, preserving the rights of Petitioners to appeal both cases. Pet. App. 67-68.

## JURISDICTION

The district court entered final judgment on September 4, 2019 and September 11, 2019 for *CBD v. McAleenan I*, and Sep. 13, 2019 for *CBD v. McAleenan II*. Pet. App. 63-68. On Oct. 29, 2019, Chief Justice Roberts extended the time within which to file a

[1] The appendix to this petition is cited as "Pet. App. ___". The U.S. District Court for the District of Columbia's docket No. 18-cv-0655-KBJ pleadings are cited as "*McAleenan I* Dkt. ___", and docket No. 19-cv-2085-KBJ pleadings are cited as "*McAleenan II* Dkt. ___".

petition for a writ of certiorari to and including February 1, 2020. The jurisdiction of this Court is invoked under 8 U.S.C. § 1103(c)(2)(C) note: "An . . . order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States."

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution, reproduced below and at Pet. App. 69-70, are:

- **Section 1 of Article I:** "All legislative Powers herein granted shall be vested in a Congress of the United States"; and
- **Section 7 of Article I**: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 8 U.S.C. § 1103 note, reproduced below and at Pet. App. 71-75, provides in relevant part:

> **(a) In General.**—The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the

United States border to deter illegal crossings in areas of high illegal entry into the United States.

**(b) Construction of fencing and road improvements along the border.—**

**(1) Additional fencing along southwest border.—**

**(A) Reinforced fencing.**—In carrying out subsection (a) [of this note], the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

**(B) Priority areas.**—In carrying out this Section [amending this section], the Secretary of Homeland Security shall—

**(i)** identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most

practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and

**(ii)** not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

**(C) Consultation.**

**(i) In general.**—In carrying out this Section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed

* * *

**(c) Waiver.—**

**(1) In general.**—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the

authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this Section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

**(2) Federal court review.—**

**(A) In general.**—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

**(B) Time for filing of complaint.**—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

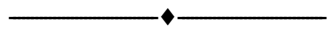
> **(C) Ability to seek appellate review.**—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

## INTRODUCTION

The Constitution is rooted in the simple and elegant vision that a system of separated governmental powers, enforced by checks and balances, ultimately safeguards our democracy and liberty. As part of that structure, the Constitution vests in Congress alone the distinct and exclusive authority to establish the relative priority of national policies and make law for the country. Yet the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"), corrupts that carefully-wrought architecture. The statute endows an unelected executive official with quintessential legislative authorities: (1) the *policymaking* power to unilaterally establish the relative priority of border wall construction against all other legally protected public and private interests, violating the non-delegation doctrine enshrined in Article I, § 1 of the Constitution; and (2) the *lawmaking* power to independently nullify the statutes securing those interests without complying with bicameralism and presentment procedures, violating the Presentment Clause. U.S. Const. art. I, § 7. Compounding this constitutional infirmity, IIRIRA radically shields the

Executive from the Judiciary's critical check against the impermissible accretion of power in a single government branch. Indeed, the statute entirely eliminates ordinary circuit court review of Petitioners' constitutional challenge, and instead makes discretionary review in this Court the sole means of appellate review of a district court decision.

Petitioners respectfully urge the Court to review whether IIRIRA's divestment of paradigmatic legislative authority to the Executive violates the separation of powers. At stake is the fraught accumulation of legislative powers in the unitary Executive official, who has discretionarily swept aside a vast breadth of public and private liberties protected by federal, state, local, and tribal statutes in the name of border wall construction—all without an iota of congressional guidance. In particular, should the Court find that even the extraordinarily capacious and consequential § 102(c) waiver authority embodies a sufficient "intelligible principle" and otherwise passes constitutional muster under current legal tests, *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989), then those tests ring hollow, and this Court's consideration of alternative, more robust approaches to enforcing the separation of powers is plainly warranted. This case thus serves as an ideal vehicle for the Court to re-affirm the vital roles of the non-delegation doctrine and the Presentment Clause as bulwarks of the separation of governmental powers "essential to [the] preservation of [our] liberty." *Id.* at 380.



## STATEMENT OF THE CASE

### I. Congress Grants The Executive Increasingly Broad Waiver Authority To Expedite Construction of Border Walls And Largely Insulates The Waiver Decisions From Judicial Review.

Enacted in 1996, IIRIRA was Congress's first attempt to affirmatively address border wall construction at the U.S. borders.[2] As originally enacted, IIRIRA required the Attorney General to construct a limited fourteen miles of reinforcement fencing at the San Diego, California-Mexico border pursuant to IIRIRA § 102(b).[3] Pub. L. No. 104-208, div. C, tit. I, § 102(b)(1), 110 Stat. 3009-554.[4] For this specific project only, Congress granted the Attorney General the authority to waive the enforcement of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, "to the extent [the Attorney General] determine[d] necessary" to

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[2] References to "border wall" in this petition refer, per the language of the Secretary's Waivers, to any physical barrier project and related infrastructure, including the construction, installation, and upkeep of "physical barriers, roads, supporting elements, drainage, erosion controls and safety features," and corresponding excavation and site preparation. *See*, *e.g.*, Pet. App. 80-81.

[3] All subsequent undesignated statutory references herein refer to IIRIRA (codified at 8 U.S.C. § 1103 note) unless otherwise designated.

[4] Under the 2002 Homeland Security Act, Congress transferred the responsibility for border barrier construction from the Attorney General to the Secretary of the newly created Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135.

"ensure expeditious construction" of the fourteen-mile project pursuant to § 102(c). *Id*. § 102(c).

In 2005, Congress vastly expanded the scope of the § 102(c) waiver power—the disputed provision here—to include "*all* legal requirements" that the Secretary of the Department of Homeland Security ("DHS"), in such Secretary's "sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." REAL ID ACT of 2005, Pub. L. No. 109-113, Div. B, Title I § 102(c), 119 Stat. 231, 302, 306 (emphasis added). Congress set forth no criteria or standards by which the Secretary should determine which "legal requirements" need to be waived to "ensure expeditious construction" of border infrastructure.

At the same time, Congress also radically curtailed judicial review of the Secretary's waiver decisions as they applied to the fourteen-mile San Diego project, including by: (1) granting federal district courts the "exclusive jurisdiction to hear all causes or claims arising from" the Secretary's waiver decisions, thus barring state court jurisdiction, *id*. § 102(c)(2)(A); (2) constricting legal challenges "only" to those "alleging a violation of the Constitution," thus eliminating statutory causes of action, including Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., review of waiver decisions, *id*.; and (3) eliminating ordinary appellate review in the circuit courts of appeals so that those aggrieved by waiver decisions may obtain such review only by petitioning for a writ of certiorari in this Court. *Id*. § 102(c)(2)(C).

Congress amended the project scope detailed in § 102(b) two additional times over as many years. In 2006, Congress expanded the provision for border wall construction beyond the initial fourteen-mile San Diego project, to encompass reinforced fencing "totaling approximately 850 miles." Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2639 § 102(b)(1)(A)(i)–(v). In 2008, Congress directed the Secretary to undertake "reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective," including "priority areas" with a construction deadline of December 31, 2008. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 564, 121 Stat. 2090, § 102(b)(1).

Prior to the current administration, the Secretary exercised the § 102(c) waiver authority just five times in a three-year period (2005 to 2008). *See McAleenan I* Dkt. 16-1, 20. These waivers applied to projects encompassed within the 700-mile mandate Congress established in § 102(b). *See McAleenan I* Dkt. 16-1, 21. DHS has fulfilled this existing mandate, stating that it had constructed 700 miles of border barriers and was thus in compliance with IIRIRA's legal requirements. *See McAleenan I* Dkt. 16-25, 4.

## II. Under President Trump's Directive, DHS Waives Myriad Federal And Other Laws In Erecting New Border Wall Across The Southern Border.

Shortly after his inauguration, President Trump issued an executive order directing DHS to construct a

"secure, contiguous, and impassable physical barrier" along the entirety of the nearly 2,000-mile-long U.S.-Mexico border. Exec. Order No. 13767 § 3(e), 82 Fed. Reg. 8,793, 8,794 (Jan. 25, 2017). In response, within this three-year period and as of the date of this filing, the administration's various DHS Secretaries have issued a total of fourteen waiver decisions pursuant to § 102(c), amounting to over 230 miles of executed and planned construction at the southern border.

Six of the Secretary's fourteen waiver determinations ("Waivers") are the subject of this petition. Through these Waivers, the Secretary has unilaterally denied the protection of public and private interests safeguarded by *forty-three* separate federal laws—and innumerable tribal, state, and local laws deriving therefrom—that would otherwise apply to 145 miles of border wall construction traversing Arizona, California, New Mexico, and Texas. These waived laws range widely and include, among many others:

- The Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., prohibiting arbitrary and capricious agency action;
- Public health and safety statutes, including the Clean Air Act, 42 U.S.C. § 7401 *et seq*., and the Clean Water Act, 33 U.S.C. § 1251 *et seq*.;
- Statutes protecting private farmland and other property interests, including the Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq*.;

- Environmental and wildlife protection statutes, such as the National Environmental Policy Act, the Endangered Species Act, and the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq*.;
- Laws safeguarding national parks and fish and game conservation, including the National Park Service Organic Act, 16 U.S.C. § 1 *et seq*., and the National Fish and Wildlife Act, 16 U.S.C. § 742a *et seq*.;
- Statutes designed to protect indigenous civil rights and liberties, including the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq*., and the American Indian Religious Freedom Act, 42 U.S.C. § 1996; and
- Archaeological and cultural preservation laws, such as the Antiquities Act, 54 U.S.C. § 320301 *et seq*., and the Paleontological Resources Preservation Act, 16 U.S.C. § 470aaa *et seq*.

The challenged Waivers are: (1) the January 2018 New Mexico Waiver that waives twenty-five federal statutes and all related state, local, and tribal laws otherwise applicable to a twenty-mile border wall slicing through the highly sensitive Chihuahuan Desert, Pet. App. 76-82 ("New Mexico Waiver"); (2) the October 2019 Texas Waivers that nullify twenty-eight federal statutes and all related non-federal laws otherwise applicable to twenty-five miles of border wall affecting public and private lands in Texas's Lower Rio Grande Valley, Pet. App. 83-100 ("Texas Waivers"); and (3) the

May 2019 Arizona and California Waivers that dispense with forty-three federal laws and all related non-federal laws otherwise applicable to 100 miles of border wall bisecting federally-protected lands in Arizona and California, Pet. App. 101-109 ("Arizona Waiver") and Pet. App. 110-125 ("California Waivers").

The consequences of the Waivers are profound—both in tangible impacts to the environment and border communities, as well as impacts less tangible but no less destructive to our democracy. For example, the Secretary's waiver of the Endangered Species Act allows DHS to entirely ignore the impacts of its border wall construction on iconic endangered species such as the jaguar, Mexican gray wolf, Sonoran pronghorn, and Bighorn sheep, whose continued existence depends on the freedom of cross-border migration to southern populations. *McAleenan I* Dkt. 16-10.

The Waivers also permit DHS to suspend the protective status, enforced by the National Park Service Organic Act and other laws, of a tryptic of the country's most extraordinary natural resources that Congress explicitly set aside from development: the Organ Pipe Cactus National Monument, the first unit of the National Park System to be destroyed for border wall construction; the Cabeza Prieta National Wildlife Refuge, an area essential to the preservation of the abutting United Nations World Heritage site in Mexico; and the San Pedro National Conservation Area, containing Arizona's last free-flowing river that risks being dammed as a consequence of wall construction. *McAleenan II* Dkt. 8-1, 18-21.

In addition, the Secretary's waiver of the Farmland Protection Policy Act permits DHS to bypass requirements to minimize impacts on non-federal farmlands, which include hundreds of private family farms bisected by wall construction. *McAleenan I* Dkt. 31, 17. Further, the Waivers disavow DHS's obligations to preserve the rich archaeological sites on the border's public lands under the Antiquities Act, and to ensure access to Native American religious sites in accordance with the American Indian Religious Freedom Act. *McAleenan I* Dkt. 16-6.

Critically, the Waivers also unprecedently override state, local, and tribal interests protected by any non-federal laws in any way related to or deriving from the forty-three federal laws waived. *See*, *e.g.*, Pet. App. 119 (Secretary waiving the following enumerated federal states as well as "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" such statutes). Finally, to add insult to the range and sheer number of legally protected interests ignored, the Waivers further permit the Secretary to shield agency action from public scrutiny. By waiving laws like the National Environmental Policy Act, for example, the Secretary evades mandates to analyze and disclose the wall's adverse impacts on communities and to facilitate substantive public input, thereby undermining core democratic values that also undergird our system of government. *McAleenan I* Dkt. 16-11. Construction and maintenance of the Waivers' 145-mile wall project remain ongoing.

## III. Petitioners Challenge The Waivers In Federal District Court.

Petitioners Center for Biological Diversity, Animal Legal Defense Fund, Defenders of Wildlife, and Southwest Environmental Center are environmental conservation and wildlife protection organizations dedicated to ensuring that environmental and other statutes are properly enforced. *McAleenan I* Dkt. 16-1, 44-45. Members of the Petitioner organizations regularly visit and have professional, recreational, and other interests in the lands and waters affected by the Waivers. *Id.*

In March 2018, Petitioners sued the Secretary and DHS in the U.S. District Court for the District of Columbia, seeking to invalidate the New Mexico and Texas Waivers and require the Secretary to comply with all applicable laws in constructing the border wall.[5] *See CBD v. McAleenan I*, Case. No. 18-cv-0655-KBJ (D.D.C. Sep. 4, 2019). Separately, in October 2018, Petitioners Center for Biological Diversity, Animal Legal Defense Fund, and Defenders of Wildlife sued the Secretary and DHS in the same venue, seeking to invalidate the Arizona and California Waivers and require the Secretary to comply with all applicable laws with respect to those border wall projects. *See CBD v. McAleenan II*, Case No. 19-cv-2085-KBJ (D.D.C. Sep. 13, 2019). These two cases were related. *McAleenan II* Dkt. 6.

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[5] Plaintiffs filed two cases, one regarding the New Mexico Waiver and separately the Texas Waivers, that were consolidated under Case No. 18-cv-0655-KBJ (*CBD v. McAleenan I*).

The complaints alleged that Congress's § 102(c) delegation violates the separation of powers as implemented through the Constitution's non-delegation doctrine, Presentment Clause, and Take Care Clause. Petitioners also alleged that the Waivers were issued *ultra vires* because DHS had already fulfilled § 102(b)'s 700-mile mandate prior to the current administration's Waivers, and thus DHS has no further authority to grant waivers for any additional border construction beyond the § 102(b) scope. *McAleenan I* Dkt. 16-1, 26. In response to the *ultra vires* claim, the government argued that its waiver authority was not restricted to 700 miles along the southern border but, rather, applied to *any* activities along the entirety of all U.S. borders that DHS desired to undertake based on the asserted need to deter illegal immigration. *Id.* Dkt. 27, 19-24.

## IV. The District Court Upholds The Waivers Against Constitutional Challenge, Relying Exclusively On A Prior District Court Decision.

The district court resolved *CBD v. McAleenan I* on summary judgment in favor of the government, holding that § 102(c) does not violate, as relevant here, the Constitution's separation-of-powers principles, the non-delegation doctrine, and the Presentment Clause.[6]

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[6] The district court similarly dismissed Petitioners' Take Care Clause claim as "another iteration of Plaintiffs' Presentment Clause and non-delegation doctrine arguments, and it fails for the same reasons." Pet. App. 59. Petitioners do not raise the Take Care Clause claim in this petition.

Pet. App. 46-47.[7] The district court dismissed *CBD v. McAleenan II* for the reasons set forth in the *CBD v. McAleenan I* opinion, with the understanding that the parties' appeal rights remain preserved. Pet. App. 67-68. The district court relied entirely upon the reasoning of a 2007 district court case that upheld the § 102(c) waiver authority as constitutional, even though the government had not argued in the 2007 case that its waiver authority extended beyond the 700-mile area Congress had delineated in the statute. Pet. App. 51-59 (citing *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007) ("*Chertoff*")).

Regarding the non-delegation claim, the district court held that Congress furnished the Secretary with an adequate "intelligible principle" for a constitutional delegation. Pet. App. 54-56 (citing *Mistretta*, 488 U.S. at 372-73). The district court "[saw] no reason to diverge" from the prior court's reasoning that, applying the intelligible principle test, (1) the "general policy" for the delegated authority is found in the statute's purpose in § 102(a), which is to "expeditiously 'install additional physical barriers and roads . . . to deter illegal crossings in areas of high entry,'" Pet. App. 58 (quoting § 102(a)); and (2) the "boundaries" of the delegated authority are found in § 102(c) whereby "the Secretary may waive only those laws that he

[7] In a separate Order, the Court made clear that it was also dismissing the claims in the consolidated case on the same basis. Pet. App. 63-64.

determines 'necessary to ensure expeditious construction.'" Pet. App. 55 (quoting § 102(c)(1)).

Regarding the Presentment Clause claim, the district court likewise determined that § 102(c) was constitutional because the statute does not "'alter the text of any statute, repeal any law, or cancel any provision, in whole or part.'" Pet. App. 53 (quoting *Chertoff*, 527 F. Supp. 2d at 124).

Regarding the Petitioners' *ultra vires* claim that the Waivers were issued for border wall activities outside § 102(b)'s 700-mile project scope, the district court concluded that it lacked jurisdiction to review that claim because IIRIRA restricts review to constitutional claims. Thus, as now construed by DHS, the Executive wields the authority to waive *any and all* federal, state, local, or tribal laws *in perpetuity* as applied to *anywhere in the vicinity of the U.S. borders*, based only on DHS's unsupported and unreviewable assertion that such waiver is necessary for expedited wall construction. It is that extraordinary, unprecedented executive encroachment on core legislative authority that is at issue in this petition.[8]

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[8] Although the district court relied on the *Chertoff* ruling, the court failed to acknowledge the fundamental difference in the cases. Indeed, critical to *Chertoff* was that Congress had confined the waiver authority to a specified geographical scope and had not even contemplated a scenario where DHS would exceed § 102(b)'s 700-mile mandate. *Chertoff*, 527 F. Supp. at 128. That understanding has now been jettisoned and, with it, any arguable limitation on § 102(c)'s exercise.

## REASONS FOR GRANTING THE WRIT

### I. Because IIRIRA § 102(c) Empowers The Secretary To Make Fundamental Legislative Decisions Regarding Which Laws Should Apply And Where, This Is An Ideal Case For The Court To Either Clarify The Intelligible Principle Test Or, Alternatively, Adopt A New Approach To Resolving When A Vast Delegation of Legislative Authority Violates The Separation Of Powers.

The Constitution establishes a tripartite system of government that intentionally diffuses and distinguishes power among its three component branches. This carefully-wrought architecture was designed to prevent "[t]he accumulation of all powers, legislative, executive, and judiciary, [which] in the same hands may justly be pronounced the very definition of tyranny." *The Federalist No. 47* at 235 (James Madison) (Dover ed., 2019). Specifically, the Framers assigned the authority "to make laws" to Congress and, separately, charged the Executive with the "duty of [the laws'] enforcement." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976). Safeguarding the partition of those distinct powers between the two political branches, the non-delegation doctrine has long "mandate[d] that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S. at 372.

IIRIRA § 102(c) violates the Constitution under any legitimate formulation of the non-delegation doctrine. First, the IIRIRA delegation contravenes an originalist understanding of the non-delegation

doctrine because Congress impermissibly transferred to the Secretary the quintessential legislative authority of policymaking, whereby the Secretary establishes the relative priority of competing protected interests. Second, under this Court's more recent conceptions of Congress's delegation power embodied in the prevailing "intelligible principle" test, *Mistretta*, 488 U.S. at 372-73, § 102(c) is unconstitutional because it fails to provide any meaningful guidance to restrain and direct the Secretary's exercise of this exceptionally broad and paradigmatically legislative delegated authority. IIRIRA should be invalidated under either formulation of the non-delegation doctrine.

However, if, as the district court held, the extraordinarily capacious § 102(c) waiver authority survives the intelligible principle test, then that test as presently understood fails to provide any material limitations on congressional delegations.

This petition thus provides an ideal vehicle for the Court to consider more vigorous approaches to vast delegations of legislative power to the Executive, exemplified in § 102(c). Specifically, in expressing concern about the intelligible principle test's capacity to safeguard the separation of powers, both Justices Gorsuch and Kavanaugh, supported by other members of the Court, recently discussed alternative approaches to the non-delegation doctrine based on the originalist principles prohibiting the delegation of quintessential legislative powers to the Executive. *See*, *e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2139-40 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J. and

Thomas, J.); *id.*, 139 S. Ct. at 2130-31 (Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring). Under such traditional approaches, IIRIRA raises grave separation-of-powers concerns because Congress divested archetypal policy-making power to an unelected Executive official. Accordingly, this case presents a suitable opportunity for the Court to devise a more robust approach to the non-delegation doctrine that recognizes its essential role in preserving the separation of powers.

### A. IIRIRA § 102(c) impermissibly delegates quintessential legislative authority to the Executive.

**1.** The Constitution provides that "[a]ll legislative Powers" are vested in Congress alone. U.S. Const., art. I, § 1. The non-delegation doctrine bars Congress from "transfer[ring] to another branch 'powers which are strictly and exclusively legislative.'" *Gundy*, 139 S. Ct. at 2119 (quoting *Wayman v. Southard*, 23 U.S. 1 (1825)). One fundamental legislative power is "establish[ing]" the "relative priority [of policies] for the Nation," a function that is the "exclusive province of the Congress." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

IIRIRA impermissibly delegates to the Executive the quintessential legislative power of prioritizing competing public policies through the "authority to waive" any laws that the Secretary "determines necessary" for expeditious wall construction. § 102(c)(1). This sweeping provision grants the Executive the

hallmark legislative functions of: (1) considering the relative prioritization of expeditiously constructing the border wall against the universe of all other legally protected public and private interests, including those which fall entirely outside the Secretary's zone of expertise (*e.g.*, civil rights, public health, environmental) and lawful jurisdiction (interests protected by state, local, and tribal laws); and (2) making the major policy decision of choosing which laws to disregard—and which to comply with—in pursuing border barrier construction.

In short, Congress has abdicated to the Secretary the power exclusively vested to the Legislature to "[d]ecid[e] what competing values will or will not be sacrificed to the achievement of a particular objective," which is "the very essence of *legislative choice*." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis added). At base, it is constitutionally untenable for an Executive official to unilaterally dispense with any and all safeguards and rights already established by Congress (as well as state, local, and tribal governments) in other statutes; doing so transfers to the Executive the fundamental legislative power "to prescribe general rules for the government of society." *Fletcher v. Peck*, 7 Cranch 87, 136 (1810).

Petitioners do not dispute that Congress possesses the legal authority to enact legislation that prioritizes border wall construction above any other legally protected interests—or, for that matter, over *all* other such interests. However, Congress did not legislate any such prioritization here. Instead, Congress improperly

punted that distinctive and ultimately difficult legislative function of choosing which interests to subjugate to border wall construction to the Executive Branch (and not even an elected official within that branch), amounting to the "delegation of power to make the law, which . . . cannot be done." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892) (citation omitted).[9] *See also Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) ("important choices of social policy" must be made by Congress and not delegated to the Executive).

**2.** Additionally, the IIRIRA delegation undermines the separation of powers by alienating the Constitution's ultimate check on government power: the citizenry. "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberate lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). IIRIRA's unlawful delegation bypasses this extensive lawmaking process by transferring that power solely to an unelected Executive official—and eliminates the people's ability to

[9] Irrespective of this case's outcome, the Secretary still maintains the independent authority to undertake wall construction pursuant to the 1953 Immigration and Nationality Act ("INA"), 8 U.S.C. § 1103(a)(5) (2018), which grants the Secretary the independent discretion, absent congressional directive, to pursue border barrier construction through the agency's "power and duty to guard" U.S. borders "against the illegal entry of aliens." *Id*. The Executive Branch relied on this INA authority to construct border barriers prior to the use of an IIRIRA waiver. The INA contains no waiver provision, and exercising that authority will not raise the significant constitutional concerns of IIRIRA.

ensure responsive and responsible lawmaking through their elected representatives. Further, the delegation of policymaking power muddies the public's ability to hold either political branch democratically accountable, as "opportunities for finger-pointing" over adverse policies "threaten to disguise responsibility for [policy] decisions," *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (internal quotations omitted), and enables both branches to "wield power without owning up to the consequences." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

**3.** Positing an originalist approach to adjudicating Congress's improper divestment of its responsibilities, Justice Gorsuch has opined that the fundamental question in assessing the constitutionality of a congressional delegation should be: "[D]id Congress, and not the Executive Branch, make the policy judgments?" *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting). *See infra* II(C). Here, the answer is indisputably "no." The Executive, and not Congress, is making the overarching policy judgment as to which of the myriad legally protected national, state, local, and tribal interests are to be sacrificed in the name of border wall construction. The Court should clarify that, whatever the outer boundary of a permissible delegation may be, affording the Executive this species of unchecked (and unreviewable) policymaking power unquestionably crosses the constitutional line. *See Marshall Field*, 143 U.S. at 692 ("That congress cannot delegate legislative power to the President is a principle universally recognized as

vital to the integrity and maintenance of the system of government ordained by the Constitution.").

### B. In view of Congress's delegation of boundless discretion to the Secretary to decide which laws to comply with and which to disregard, IIRIRA § 102(c) must fail the intelligible principle test if that test is to serve as more than a rubber-stamp of any congressional delegation.

In addition to violating originalist principles governing congressional delegations, § 102(c) also fails the Court's more permissive intelligible principle test. This case is thus an appropriate vehicle for establishing that, when properly applied, the Court's prevailing "intelligible principle" doctrine may serve as a meaningful check on delegations run amok, rather than a rubber-stamp exercise with a preordained outcome of constitutionality. While affirming that Congress cannot forfeit its legislative powers to the Executive, the Court has also acknowledged that substantial delegation is necessary in the modern administrative state. Congress may "obtain[ ] the assistance of its coordinate Branches," but only if it "lay[s] down by legislative act an intelligible principle" which "clearly delineates the general policy" and "boundaries of th[e] delegated authority." *Mistretta*, 488 U.S. at 372-73 (internal quotations omitted).

Critically though, all delegations are not created equal; the strictness of the intelligible principle tightens and the level of agency deference recedes with the

breadth of delegated power. *See Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable" under the intelligible principle test "varies according to the scope of the power congressionally conferred."). The non-delegation doctrine thus does not—and should not—prohibit a robust administrative state. Rather, where Congress seeks to grant the Executive broad and important authority—exemplified in IIRIRA's power to waive any statutorily-protected interest in perpetuity as applied to a vast and undefined geographical scope—concerns for liberty are heightened, and Congress is thus required to provide more detailed instruction to channel the broad authority in keeping with legislative intent. Any such intelligible principle is absent in § 102(c).

**1.** IIRIRA fails to provide any concrete intelligible principle for the Secretary to determine which laws to ignore and which to follow. IIRIRA § 102(c) states:

> "[T]he Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such *Secretary's sole discretion*, *determines necessary to ensure expeditious construction of the barriers and roads* under this section."

What guidance has Congress furnished to circumscribe the Secretary's discretion to decide which laws are "necessary" to ignore in order to ensure the expeditious construction of border barriers? The answer is: none. Congress proffered no factors, standards, criteria, or any other grounds on which to base a waiver determination. Rather, the Secretary has been afforded full

and "sole discretion" to decide whether compliance with every single law in the United States code, and every single statute and legal requirement enacted by any state, local, or tribal legislature, should be waived to "ensure expeditious construction." § 102(c).

Nor is the Secretary required even to explain *why* the enforcement of any one particular law is detrimental to expeditious border wall construction. Inevitably, this has resulted in the Secretary's issuance of an ever-expanding compendium of waived federal statutes—along with all associated non-federal laws—for which the Secretary need not provide explanation or be held accountable. At base, if such an unrestricted and consequential delegation as IIRIRA § 102(c) does not violate the intelligible principle test, then no delegation does.

This paucity of congressional instruction is inexcusable, especially in light of Congress's prior history of providing robust intelligible principles for similarly broad and significant delegations. Absent in the § 102(c) delegation is substantive guidance that exists for past constitutional delegations, such as: (1) enumerated factors and criteria to consider when weighing competing interests, *see Touby v. United States*, 500 U.S. 160, 166-67 (1991) (intelligible principle for setting drug designations included congressional mandate that the agency consider at least three of eight codified factors); or (2) express limitations on the kinds of factors that can be taken into account in making a decision, s*ee Mistretta*, 488 U.S. at 374-75 (intelligible principle for establishing sentencing guidelines

included Congress's setting of explicit restrictions on range of minimum and maximum sentences, grade of offense, nature and degree of harm, and demographics of offender). Indeed, Congress did not even mandate that the Secretary seek expert guidance and input through fact-finding hearings, public comment processes, intra-agency consultation, or other mechanisms to inform the Secretary's waiver decision, *see Whitman*, 531 U.S. at 475 (constitutional delegation as Congress required agency to undertake an extensive technical expert consultation and extensive public administrative rulemaking process for agency's setting of air pollutant standards).[10] The Court's past precedents therefore support the conclusion that IIRIRA runs afoul of the non-delegation doctrine; it provides none of the important guard rails that Congress mounted for past constitutional delegations.[11]

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[10] Respondents have consistently maintained that the consultation provision in § 102(a)(1)(C) does not apply *prior* to the Secretary's issuance of the waiver decision, thus stripping even that pro forma consultation of its utility to inform the Secretary of the choice of waiving laws and weighing competing interests. *See McAleenan I* Dkt. 21-1, 28.

[11] IIRIRA § 102(c) raises delegation concerns that implicate a far broader set of interests than those at issue in *Gundy*. In *Gundy*, the disputed delegation involved the Attorney General's authority to craft registration requirements for sex offenders convicted prior to the enactment of the Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d). Here, the application of the vast IIRIRA waiver authority affects potentially millions of members of the public who live on or anywhere near the border and whose legal rights and interests protected by statute may now be eviscerated with the stroke of an executive officer's pen.

**2.** The dearth of any intelligible principle is further evident in the absence of a judicial standard that a court could apply—even assuming the existence of judicial review of arbitrary applications of IIRIRA, which Congress eliminated—to determine whether the Secretary acted within § 102(c)'s bounds. Where an intelligible principle exists, it "ensures that courts . . . reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Indus. Union Dep't AFL-CIO*, 448 U.S. at 686 (Rehnquist, J., concurring). Here, courts have no meaningful standards to judge the Secretary's exercise of the essentially boundless § 102(c) waiver authority.

To be sure, citing *Chertoff*, the district court held that the term "necessary to ensure expeditious construction" in § 102(c) provided sufficient " 'boundaries' " of an intelligible principle. Pet. App. 55 (quoting *Mistretta*, 488 U.S. at 372-73).[12] But that cannot be the case. As illustrated by the vast number of laws that have been waived for no apparent rhyme or reason, let alone explanation, the term "necessary" has a plethora of possible meanings. It could refer to "economic"

[12] The district court also concluded that § 102(a) provided the "purpose" underlying an intelligible principle, whereby the Secretary shall do what is "*necessary*" to "deter illegal crossings in areas of high illegal entry." *Id*. But this term faces the same problem as the § 102(c) text in lacking any criteria, principles, or standards to guide the Secretary's waiver power. Further, this Court has held that broad and sweeping statements about "a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue [the delegation encompassed in the § 102(c) waiver authority] under consideration." *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993) (emphasis deleted).

necessity, "administrative" necessity, "political" necessity or any other category that the Secretary deems "necessary" for any reason or, seemingly, no legitimate reason at all. Indeed, laws that are merely designed to publicly disclose what the Executive is doing and why can be waived under this contentless standard on the Secretary's asserted grounds that it is "necessary" to keep the public in the dark. In short, since "necessary" means whatever a particular DHS Secretary desires it to mean in the Secretary's "sole discretion," the term effectively means nothing at all.

The term "expeditious" is equally devoid of any real meaning. What are the time limitations to determine whether the enforcement or application of a particular federal, state, local, or tribal law must be waived to ensure "expeditious" construction of a barrier or a road—*e.g.*, a month, a week, an hour, or a minute? And how is the Secretary even to evaluate whether compliance with a particular environmental, civil rights, criminal, open government, or any other statute—the vast majority of which the Secretary has no expertise in—will have a substantial or a *de minimis* effect on construction timing?

The lack of any intelligible answer to these questions means that, as both a legal and practical matter, the Secretary is empowered to waive compliance with otherwise applicable laws—even where there will not be the slightest real-world impact on construction activities but there will be the needless sacrifice of vitally important public and private interests impacting thousands if not millions of people. *See infra* I(B)(3). As this

Court has observed, virtually "no legislation pursues its purposes at all costs," *Rodriguez*, 480 U.S. at 525-26, yet the IIRIRA delegation fails to put any outer bounds on those costs and the Secretary's determination. Accordingly, the conclusion is unavoidable that Congress actually imposed no restraint whatsoever on the Secretary's exercise of pure policymaking authority, much less an "intelligible" one.

**3.** Finally, Congress's lack of any meaningful instruction is highly problematic given the breadth, importance, and consequence of the Secretary's waiver authority. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) (the amount of required congressional guidance depends on the "extent and character" of the power conferred). IIRIRA § 102(c) effectively grants the Secretary a *carte blanche* to (1) unilaterally choose to disregard compliance with *any and all laws*—including state, local, and tribal laws that the Secretary's waiver declarations do not even bother to expressly enumerate but are deemed to somehow "derive from" or be "related to the subject of" the waived federal laws, *see* Pet. App. 81—to pursue (2) *any kind* of border construction (such as infrastructure that may be only tenuously connected to deterring immigration) (3) at *any* time and *in perpetuity* (without any sunset date) (4) *anywhere* within the border's "vicinity"—which, given the Secretary's position as sustained by the district court, could be dozens or even hundreds of miles from any U.S. border.

The ability of the Secretary to invoke this vast power in an arbitrary and, indeed, totally uniformed

manner is self-evident. While the Secretary may possess expertise in areas of immigration and border security, the waiver decision requires considering the universe of all other statutorily-protected public and private interests. Because the Secretary has no expertise or even experience in the immense array of interests, the Secretary has no discernible means of assessing whether those interests can be met *while* border activities and construction may proceed.

For example, how is the Secretary equipped to determine the necessity of waiving the American Indian Religious Freedom Act or the Paleontological Resources Preservation Act, for the Arizona Waiver border project, and how would complying with those laws hinder the necessary construction of barriers or roads? The affected public will never know notwithstanding the fact that, invoking the delegated power in § 102(c), the Secretary waived any compliance with those laws designed to safeguard interests vital to indigenous peoples and the nation as a whole. Pet. App. 101-117.

Further, the blanket waiver authority means that DHS Secretaries can even waive laws with which they themselves are personally required to comply. This means the Secretary could waive minimum wage statutes, child labor prohibition laws, anti-sexual and -racial discrimination acts, and even criminal laws. Not only does this invite flagrant abuses of power, but it also impermissibly unites the "legislative and executive powers . . . in the same person," *The Federalist No. 47*, at 236 (James Madison) (Dover ed., 2019), thus

abolishing the separation of powers when the enforcer and law-maker are one.

Moreover, in permitting the Secretary to waive "*all* legal requirements," § 102(c) (emphasis added), IIRIRA empowers the Secretary, without any justification (or even express acknowledgment of what is being waived), to override every state, local, or tribal law with which the Secretary would prefer not to comply. *See* Pet. App. 106-109 (Arizona Waiver waiving "in their entirety" forty-three statutes, including "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" the enumerated statutes). This allocation of unchecked power to a single federal executive official threatens the country's foundational system of federalism, whereby "an administrative agency's power to pre-empt state law . . . affects the allocation of powers among sovereigns." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 43-44 (2007) (Stevens, J., joined by Roberts, C.J. and Scalia, J., dissenting).

Finally, the vast scope of the IIRIRA waiver authority is magnified not only by the truly limitless universe of laws that may be waived, but also the immense geographical scope to which it applies in perpetuity. According to § 102(a), border projects subject to the waiver authority are permitted *anywhere* in the "vicinity of the United States border"—a phrase that is defined nowhere in IIRIRA and, as construed by DHS and upheld by the court below, leaves entirely open to the Secretary's unreviewable interpretation the

appropriate distance from a U.S. border to execute border construction.

For example, Customs and Border Patrol, a component agency of DHS, operates anywhere within 100 miles of all U.S. borders—where nearly two out of three people in this country reside. *McAleenan II* Dkt. 8-1. Under the ruling below, therefore, DHS could invoke the power to waive all laws to unilaterally build roads and erect barriers anywhere inside the 100-mile border zone—which includes, *e.g.*, not only cities near the Mexico border (such as San Diego) but also Washington, D.C., San Francisco, New York City, and the entirety of Hawaii—so long as the Secretary invokes the § 102(c) waiver authority.

In sum, the boundlessness of the Secretary's waiver authority, and the breadth of individual liberties and public and private interests it may infringe (and has infringed), demands a heightened intelligible principle to cabin the Secretary's waiver decisions. Yet none exists here, and IIRIRA necessarily fails even this permissive non-delegation doctrine test.

### C. Should the Court hold that IIRIRA § 102(c) passes the intelligible principle test, then this case is an ideal vehicle to reconsider more meaningful approaches to enforcing the non-delegation doctrine and separation-of-powers principles.

If the court below correctly upheld § 102(c)'s open-ended and unguided policymaking authority as

passing the intelligible principle test, then the test means nothing, and the Court is disserving the separation of powers by paying lip service to this prevailing legal test. Because of the egregiousness of the IIRIRA delegation, this case presents an ideal vehicle to reconsider the Court's prevailing intelligible principle test to safeguard the non-delegation doctrine. That is because IIRIRA not only raises many of the same concerns regarding an essentially limitless grant of authority to the Executive that has recently been voiced by many members of the Court but, at the same time, the statute implicates a far broader set of public and private interests and competing policy concerns than, *e.g.*, the statute at issue in *Gundy*. Although, should the Court grant review, merits briefing would address the parameters of any new framework, members of the Court have recently suggested alternative approaches that warrant further consideration.

In his dissent in *Gundy*, Justice Gorsuch proposed the following analysis building upon historical understandings of the non-delegation doctrine to assess the validity of a congressional delegation:

> [1] Does the statute assign to the executive only the responsibility to make factual findings? [2] Does it set forth the facts that the executive must consider and the criteria against which to measure them? [3] And most importantly, did Congress, and not the Executive Branch, make the policy judgments?

139 S. Ct. at 2141 (Gorsuch, J., dissenting) (numbers inserted). Expanding on Justice Gorsuch's analysis,

Justice Kavanaugh advocated for the development of a "nondelegation principle for major questions," supporting the approach of prohibiting those delegations where Congress "expressly and specifically delegate[s] to the agency the authority both to decide the major policy question and to regulate and enforce." *Paul*, 140 S. Ct. 342 (Kavanaugh, J., concurring).

Under these alternative approaches, IIRIRA fails: the Executive, and not Congress, has been empowered to both make and enforce the major policy decision as to which legally protected interests and rights are to be nullified; and, as discussed, there are no meaningful criteria the Secretary must apply in making such archetypal legislative decisions. The statute thus highlights the precise concerns, recently raised by members of this Court, about transforming the Executive into "a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties." *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

## II. The Court Should Resolve Whether § 102(c) Improperly Grants The Executive The Authority To Unilaterally Repeal Existing Laws In Violation Of The Presentment Clause And Separation Of Powers.

The authority to legislate is entrusted solely to Congress. U.S. Const. art I, §§ 1, 7. The Constitution forbids the Executive to "enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438

(1998). The "[a]mendment and repeal of statutes, no less than enactment, must conform with" the extensive bicameralism and presentment requirements of Article I, *INS v. Chadha*, 462 U.S. 919, 954 (1983), which the Framers considered to be "bulwarks of liberty." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

IIRIRA § 102(c) grants the Secretary the legislative authority to unilaterally repeal any existing law without complying with the Constitution's dual presentment and bicameralism procedures, thus surpassing even Congress's law-making power authorized under the Constitution. The Secretary's Waivers function as partial repeals of or amendments to the underlying laws being waived. In practical effect, the Secretary has grafted onto the forty-three waived federal laws a new provision stating that "at my discretion, nothing in this law in its entirety, or any law deriving from or related to the subject of this law, shall apply to border wall construction" in the applicable states. *See*, *e.g.*, Pet. App. 106-109 (waiving "in their entirety" forty-three statutes as applied to the Arizona Waiver border wall project). Such an amendment alters each of those statutes' "legal force or effect" as applied to the construction of the Waivers' border barriers. *Clinton*, 524 U.S. at 438.

Any attempt to minimize the § 102(c) waivers as narrowly applied to individual border projects must be rejected because the cumulative effect of the § 102(c) waivers amounts to significant repeals of dozens of underlying statutes. It bears emphasizing that § 102(c) waivers now apply to approximately one-third of the

entire U.S.-Mexico border, with respect to nearly fifty federal laws and innumerable state, local, and tribal laws. Taken together, the Secretary's unilateral decision to issue the Waivers, along with new § 102(c) waivers that are sure to come, effectively repeal the application of an ever-increasing number of federal statutes as applied to an ever-expanding number of projects.[13]

The § 102(c) waiver power granted to the Secretary is not materially different from the unconstitutional power granted to the President by the Line Item Veto Act. *Clinton*, 524 U.S. 417. The Line Item Veto Act granted the President the authority to unilaterally cancel entire portions of duly enacted statutes concerning statutory spending and taxes, which effectively permitted the President to "amend" the underlying laws. *Id*. at 438, 448-49. The Constitution prohibits a complete cancellation of a provision, as in the Line Item Veto Act, just as it prohibits the executive amendment of an enacted law, as is the case with the Waivers and their effective amendment to existing laws.

In fact, the Secretary's waiver discretion is far broader than the President's cancellation authority invalidated in *Clinton*. There, Congress provided guard rails for the Line Item Veto authority, which could

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[13] As a concrete example, the existing § 102(c) waivers have, collectively, repealed significant swaths of the Endangered Species Act because they have "in both legal and practical effect" denied the Act's vital application to and protection of the nearly 100 endangered and threatened species at the borderlands. *McAleenan I* Dkt. 8-1, 40; *Clinton*, 524 U.S. at 438.

apply only to specific spending and tax items and was required to meet certain criteria, and Congress moreover retained the power to reject the vetoes. *Clinton*, 524 U.S. at 436. By contrast, here, the Secretary may waive any laws absent any guidance, and Congress has no authority to reject the waiver decision. This effectively grants the Executive exclusive lawmaking power, which is constitutionally impermissible. *See also Chadha*, 462 U.S. at 954. Indeed, Congress has bestowed on the Secretary even more power than Congress itself possesses. While Congress can only amend or repeal a law through an arduous Article I process, the Secretary operates under none of these "finely wrought" constitutional constraints, but rather has the power, free from all non-constitutional judicial review, to repeal laws. *Clinton*, 524 U.S. 417. The Court should therefore grant review to consider whether the § 102(c) waiver authority violates the Presentment Clause and thus must be invalidated.

## III. IIRIRA's Severe Truncation Of Judicial Review Exacerbates The Separation-Of-Powers Violations And Underscores The Need For This Court's Review.

Congress's decision not only to cede its policymaking power to the Executive, but also to shield the exercise of that power from the Judiciary's full scrutiny, exacerbates the separation-of-powers violations, and reinforces the necessity of this Court's review.

First, the fact that IIRIRA insulates the Secretary's waiver decisions from the Judiciary's traditional review of statutory claims—including arbitrary and unexplained agency decisions—further undermines any assertion of § 102(c)'s constitutionality. As this Court explained, "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds," and is thereby necessary "in order to save the [statute's] delegation of lawmaking power from unconstitutionality." *Touby*, 500 U.S. at 170 (Marshall, J., joined by Blackmun, J., concurring). Here, however, the Secretary's Waivers are immune to the Judiciary's crucial check to ensure that the Secretary's actions are contained within statutory limits, thus granting DHS an effective *carte blanche* to claim the § 102(c) waiver authority for *any* border wall project it desires, unconstrained by *any* geographic limits provided in § 102(b) or *any* animating purpose reflected in § 102(a). Without even a semblance of judicial review (other than of constitutional claims, as raised here), the separation-of-powers problems plaguing IIRIRA are graver still because an executive official possesses, in effect, the unpoliced and thus limitless power to nullify duly-enacted statutes designed to protect the interests of Petitioners and many others.[14]

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[14] To address these concerns, Respondents have previously argued that Congress's appropriations power acts as the "primary check[ ] on any potential abuse of that [§ 102(c) waiver] freedom." *McAleenan I* Dkt. 27-16, n.15. However, even aside from the fact that a subsequent appropriations cannot remedy a constitutional infirmity in the underlying statute, *cf. TVA v. Hill*, 437 U.S. at

Second, IIRIRA also dispenses with ordinary circuit court appellate review, which is the typical avenue through which weighty constitutional matters are tested and fleshed out before they reach this Court. While a number of district courts have rejected the kinds of separation-of-powers arguments raised here—by generally falling in lockstep with prior district court rulings, as did the court below—there has, to date, been no opportunity for any appellate review on the merits of the serious separation-of-powers issues afflicting IIRIRA. In the meantime, the Executive's waivers have only increased in frequency and the breadth of laws waived, as has the Secretary's (unreviewable) interpretation of the vast geographical scope as to where these waivers may apply. In view of these developments, along with the fact that additional review confined to the district courts will not better illuminate the constitutional issues, this is an appropriate juncture for this Court to afford the separation-of-powers concerns raised by § 102(c) the scrutiny they warrant.

As Chief Justice Marshall explained, while the Constitution exists to impose limits on government, those limits are rendered meaningless if not enforced by the Judiciary, whose "province and duty" is "to say

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190 (holding that an appropriations rider could not be construed as impliedly modifying a substantive statute), any reliance on the appropriations power as a "check" must now be seen as totally hollow in view of President Trump's 2019 emergency declaration redirecting military and other funds to finance wall construction after Congress rejected the President's bid for increased appropriations. 84 Fed. Reg. 4,949-50 (Feb. 20, 2019).

what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Here, this Court is not only the court of *last* resort, it is the court of *only* resort for appellate review to clarify "what the law is" for IIRIRA: the extraconstitutional delegation of core legislative power to the Executive. *Id*. This affords yet another compelling reason for this Court to grant review.

## CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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