No. 18-

IN THE

Supreme Court of the United States

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

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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 ("IIRIRA"), (8 U.S.C. § 1103 note), gives the Secretary of Homeland Security the authority to "waive all legal requirements"—including laws governing the Secretary's own conduct—that "in such Secretary's sole discretion" would impede "expeditious construction" of barriers along the U.S.-Mexico border. Section 102(c) further 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). The statute permits only constitutional challenges, with appellate review available only via a writ of certiorari to this Court. *Id.*

This action presents a constitutional challenge to the Secretary's decisions waiving dozens of federal laws, and all state and local legal requirements related to them, in connection with the construction, replacement, and upkeep of barriers (including prototype barriers) along specified portions of the border with Mexico.

The question presented is:

Whether IIRIRA § 102(c)—which grants the Secretary of Homeland Security sweeping power to waive any or all legal requirements in her sole discretion, and then insulates that exercise of discretion from judicial review—violates the separation of powers.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

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

Respondents are U.S. Department of Homeland Security, U.S. Customs and Border Protection, Kirstjen Nielsen, in her official capacity as Secretary of the U.S. Department of Homeland Security, Kevin K. McAleenan, in his official capacity as Commissioner of U.S. Customs and Border Protection, and United States of America.

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The opinion of the district court is reported at 284 F. Supp. 3d 1092. Pet. App. 3a-108a.

JURISDICTION

The district court entered final judgment on March 26, 2018. Pet. App. 1a-2a. On May 10, 2018 (for Petitioners Animal Legal Defense Fund and Defenders of Wildlife) and May 18, 2018 (for Petitioner Center for Biological Diversity), Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 23, 2018. 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."

STATUTORY PROVISIONS INVOLVED

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note, reproduced below and at Pet. App. 112a-116a, 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

[1] The appendix to this petition is cited as "Pet. App. __." The United States District Court for the Southern District of California's docket No. 17-cv-1215-GPV(WVG) pleadings are cited as "Dkt. __."

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), 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) 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. [amending 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.

Additional pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. *See* Pet. App. 109a-116a.

STATEMENT

Congress delegates to the DHS Secretary broad authority to construct "barriers and roads" along the border, authorizes the Secretary to waive any applicable legal requirements, and restricts judicial review to constitutional claims and appellate review to certiorari.

In 1996, Congress enacted § 102 of the IIRIRA "to deter illegal crossings in areas of high illegal entry into the United States." Pub. L. No. 104-208, div. C, tit. I, § 102(a), 110 Stat. 3009, 3009-554. The initial version of § 102 empowered the Attorney General to construct reinforcement fences "along the 14 miles of the international land border of the United States,

starting at the Pacific Ocean and extending eastward," i.e., in the vicinity of San Diego, California. *Id.* § 102(b)(1). To effectuate that mandate, Congress authorized the Attorney General to "waive[]" "provisions of" two statutes, "the Endangered Species Act of 1973 ["ESA"] and the National Environmental Policy Act of 1969 ["NEPA"] … to the extent … necessary to ensure expeditious construction of the barriers and roads under this section." *Id.* § 102(c). The Homeland Security Act of 2002 transferred responsibility for construction of the border barriers from the Attorney General to the Secretary of the newly created Department of Homeland Security ("DHS"). Pub. L. No. 107-296, 116 Stat. 2135.

Three years later, to speed completion of the fence near San Diego, Congress dramatically expanded the Secretary's power under § 102(c) to waive *any* applicable law, authorizing "waive[r of] *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." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I § 102, 119 Stat. 231, 302, 306 (emphasis added).

In addition to amending § 102(c) to delegate sweeping waiver authority to the Secretary, the 2005 amendment also largely insulated that authority from judicial review by sharply restricting the scope of any challenge to the Secretary's waiver determinations. First, the REAL ID Act ousted jurisdiction from state courts and gave the federal district courts "exclusive jurisdiction to hear all causes or claims arising from" the Secretary's waiver decisions. *Id.*

§ 102(c)(2)(A). Second, Congress limited challenges "only" to those "alleging a violation of the Constitution of the United States." *Id.* Third, those constitutional challenges must be filed not later than 60 days after the Secretary's waiver determination. *Id.* § 102(c)(2)(B). Fourth and finally, Congress eliminated ordinary appellate review in the courts of appeals and provided for review of the district court only by way of a petition for a writ of certiorari to this Court. *Id.* § 102(c)(2)(C); *see also* Pet. App. 7a. The 2005 amendment left unchanged IIRIRA Section 102(b)'s focus on the San Diego fence.

Congress acted in 2006 and 2008 to further address DHS's authority with respect to border barriers and roads. In 2006, Congress expanded the scope of Section 102(b) beyond the initial 14-mile San Diego fence construction to "at least 2 layers of reinforced fencing [and] the installation of additional physical barriers, roads, lighting, cameras, and sensors" in five specific segments along the southwest border totaling approximately 850 miles, including two "priority areas" with construction deadlines of May 30, 2008, and December 31, 2008. Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2639 § 102(b)(1)(A)(i)-(v). And in 2008, Congress again amended Section 102(b), authorizing the Secretary to "construct reinforced fencing along not less than 700 miles of the southwest border." Dep't of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Title V § 564, 121 Stat. 2042, 2090, § 102(b)(1)(A)-(B).

From 1996 to 2016, the Section 102(c) waiver authority was used five times and was last invoked in

2008. *See* 73 Fed. Reg. 19078-01 (Apr. 8, 2008); 73 Fed. Reg. 19077-01 (Apr. 8, 2008); 72 Fed. Reg. 60870-01 (Oct. 26, 2007); 72 Fed. Reg. 2535-01 (Jan. 19, 2007); 70 Fed. Reg. 55622-02 (Sept. 22, 2005). Although cumulatively those waivers pertained to projects encompassing hundreds of miles along the U.S.-Mexico border, they all purported to apply to projects specifically encompassed within § 102(b). *See* Pet. App. 41a-43a.

The President orders DHS to obtain complete operational control of the southern border and the Secretary broadly waives all applicable federal, state, and local laws relating to three border wall projects.

On January 25, 2017, in one of his first official acts, President Trump issued an Executive Order authorizing the Secretary of DHS to take steps to "obtain complete operational control, as determined by the Secretary, of the southern border." Pet. App. 13a. Those steps include, as relevant here, to "immediately plan, design, and construct a physical wall along the southern border." *Id*. "Wall" is defined by the President's Executive Order as "a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier." Exec. Order No. 13767 § 3(e), 82 Fed. Reg. 8793 (Jan. 25, 2017).

Exercising the authority granted by E.O. No. 13767, the Secretary of DHS issued two determinations invoking the broad waiver authority under

§ 102(c) and authorizing three border wall construction projects.[2] The first Determination, dated August 2, 2017 ("San Diego Waiver"), Pet. App. 124a-131a, authorizes construction of 15 miles of replacement fencing near San Diego, plus construction of prototype border walls, and waives application of more than thirty laws ranging from the National Environmental Policy Act of 1969 ("NEPA") (42 U.S.C. § 4321 et seq.), and the Endangered Species Act ("ESA") (16 U.S.C. § 1531 et seq.), to the entirety of the Administrative Procedure Act ("APA") (5 U.S.C. § 551 et seq.), and the American Indian Religious Freedom Act (42 U.S.C. § 1996)—along with all state and local laws "related to the subject" of the listed statutes. Pet. App. 14a-15a, 98a-99a, 129a-130a.

The second Determination, dated September 12, 2017 ("Calexico Waiver"), Pet. App. 117a-123a, also waives application of a slew of federal and state laws, this time with respect to the construction of replacement fencing "along an approximately three mile segment of the border that starts at the Calexico West Land Port of entry and extends westward." Pet. App. 15a. Calexico is a border city in California, located about 120 miles east of San Diego, and about 60 miles west of Yuma, Arizona. The San Diego and Calexico Waivers are the first § 102(c) waivers to address border barriers not "limited to the mandates of section 102(b)." *See* Pet. App. 42a-43a.

[2] Then-Secretary John F. Kelly issued the first waiver. Acting Secretary Elaine Duke issued the second waiver.

The environmental impact of the projects authorized by the San Diego and Calexico Waivers is substantial. The border walls are within, or in close proximity to, the habitats of rare animal and plant species including the burrowing owl, Quino checkerspot butterfly, Tecate cypress, snowy plover, two species of fairy shrimp, and the Otay Mesa mint. *See, e.g.*, Dkt. 28-1 at 38; Dkt. 33-3 at 3. A portion of the area covered by the San Diego Waiver is located within California's coastal zone, which the California Coastal Commission regulates under the Coastal Zone Management Act (Pub. L. No. 92-583 (16 U.S.C. § 1451 et seq.) ("CZMA")) to ensure that coastal uses and resources are properly protected. Dkt. 30-9. The Secretary waived all requirements of the CZMA in the San Diego Waiver. Pet. App. 124a-131a. This area also includes the Tijuana River National Estuarine Research Reserve, which is designated as a "Wetland of International Importance" under the 1971 International Convention on Wetlands. The Tijuana River estuary is one of only two intact estuaries in California, and it provides productive marsh habitat for a range of invertebrates, fish, birds, and plants. Dkt. 30-9 at ¶ 6.

Construction and maintenance of the San Diego Waiver projects and the Calexico Waiver project remain ongoing. Contracts for the prototype border wall project—authorized by the San Diego Waiver—were awarded in August and September of 2017, construction began in September, and the prototypes were completed in October 2017. Pet. App. 15a. Construction of the 15 miles of replacement fencing authorized by the San Diego Waiver began in June 2018. Con-

struction of the three miles of replacement fencing authorized by the Calexico Waiver began in February 2018, and is expected to continue into the fall. Pet. App. 15a. Even after initial construction of the barriers is complete, the waivers will continue to apply to ongoing upkeep. *See* Pet. App. 117a-131a.

Petitioners sue the government alleging constitutional violations related to the statutory waiver authority and to the Secretary's San Diego and Calexico Waivers.

Petitioners Center for Biological Diversity ("Center"), Defenders of Wildlife ("Defenders"), and the Animal Legal Defense Fund ("ALDF") are environmental conservation and animal protection organizations dedicated to ensuring that wildlife- and wildland-protection statutes are properly enforced and that the constitutional principles enabling those laws to be carried out are properly respected. Dkt. 16 ¶¶ 11-20. Members of the Petitioner organizations regularly visit the project areas to observe the rare and imperiled species that inhabit them. *See, e.g.*, Dkt. 28-1 at 38.

In September 2017, Petitioners filed complaints in district court challenging as unconstitutional the statutory conferral of waiver authority and the San Diego and Calexico waiver determinations. The complaints alleged, among other things, that Congress' delegation in § 102(c) of authority to waive "all legal requirements" inhibiting expeditious construction of the border wall and its restrictions on judicial review violate the separation of powers as implemented through the nondelegation doctrine under Article I,

Section 1 and Article II, Section 1 of the U.S. Constitution, the Presentment Clause under Article I, Section 7, and the Take Care Clause under Article II, Section 3. Petitioners alleged that the Secretary's San Diego and Calexico Waivers were legally invalid and were also ultra vires because the border projects at issue exceed the scope of § 102(b).

The district court grants summary judgment for the government and upholds the challenged waiver decisions against constitutional attack.

The district court resolved this case on summary judgment, rejecting, as relevant here, Petitioners' nondelegation, Presentment Clause, and Take Care Clause arguments. The district court held that there was no unconstitutional delegation because § 102 furnishes the Secretary with an "intelligible principle" for exercising the delegated waiver authority. Pet. App. 73a-81a. The district court further concluded that the Presentment Clause was not violated because the waivers are "narrow" and in keeping with congressional intent. Pet. App. 94-95a. The district court agreed that the Take Care Clause applies to Executive officers and not just to the President, Pet. App. 86a-87a, citing *United States v. Texas*, 136 S. Ct. 906 (2016) (order granting cert.), but held that the Secretary's waivers were "plausibly called for by an act of Congress" and therefore did not violate the Take Care Clause. *See* Pet. App. 89a-90a.

With respect to the nondelegation issues, the district court focused on the first and third factors of the intelligible principle test—whether the statute pro-

vides both a general policy and boundaries for the exercise of the delegated authority. The court determined the "'general policy' of section 102 [to be] deterrence of illegal crossings through construction of additional physical barriers to improve U.S. border protection." Pet. App. 76a (quoting 8 U.S.C. § 1103 note). The court acknowledged that "section 102(c) contains considerably fewer details than other challenged statutes" that have withstood nondelegation scrutiny. Pet. App. 78a. Nevertheless, the court concluded that § 102(c) articulates a sufficient "boundar[y] that limit[s] the Secretary's authority to waive all laws that are 'necessary to ensure expeditious construction of the barriers and roads.'" Pet. App. 77a-78a.

As to the Presentment Clause, after reviewing *Clinton v. City of New York*, 524 U.S. 417 (1998), the court determined that § 102(c)'s broad authorization to waive any and all legal requirements is "narrow in scope and only for the purpose of building border barriers something that is permitted by section 102(c)." Pet. App. 94a. Notwithstanding that the waivers at issue have been employed to undertake border wall projects not originally conceived of by the IIRIRA and to effectuate a partial repeal of a host of federal and state statutes, the district court concluded there was no Presentment Clause violation. In the court's view, the waived "statutes largely retain legal force and effect because the § 102(c) waivers only disturb the waived statutes for a specific purpose and for a specific time." *Id.*

The district court likewise rejected the arguments based on the Take Care Clause. Pet. App. 85a-90a. Petitioner Center had urged that the San Diego Waiver was not authorized by § 102(b) and that the Secretary violated multiple laws, including NEPA and the ESA, in undertaking the underlying border projects. Dkt. 28-1 at 31-32. The district court rejected the government's contention that the Secretary was not bound by the Take Care Clause. Pet. App. 87a. The court concluded, however, that "the challenged steps taken by the Secretary are ones that are plausibly called for by an act of Congress" and thus did not violate the Take Care Clause. Pet. App. 89a-90a.

The district court also reviewed Petitioners' ultra vires claim. After determining that the court could consider whether the Secretary's acts were ultra vires, Pet. App. 23a-25a, the court concluded that nothing in IIRIRA § 102 places a "clear and mandatory" limit on the Secretary's waiver authority, and so the waivers cannot be the basis for an ultra vires claim. Pet. App. 36a-64a; *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).[3]

[3] Petitioners appealed the district court's ruling on the ultra vires claim to the Ninth Circuit. *See Ctr. for Biological Diversity, et al. v. U.S. Dep't. Homeland Sec., et al.*, Nos. 18-55474, -55475, -55476. The Court of Appeals heard oral argument on August 7, 2018, and its decision is pending.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve Whether Section 102's Sweeping Waiver Authority Violates The Separation Of Powers.

The Constitution establishes a tripartite system of government that separates power among the three coordinate branches—Legislative, Executive, and Judicial. That separation of powers "diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This Court carefully guards the Constitution's separation of powers, as "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961). "The Framers regarded the checks and balances … they … built into the … Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 96, 122 (1976). Section 102's waiver and jurisdiction-stripping provisions unconstitutionally consolidate the power to make, enforce, and review laws in the Executive branch. *Infra* § I.A. Section 102 effectively allows an unelected Cabinet Secretary to repeal existing laws, *infra* § I.B., and then shields the repeals from judicial review, *infra* § I.C. This Court's intervention is warranted to review Congress' extraordinary conferral of waiver authority that fundamentally distorts the allocation of power in our tripartite system of government.

A. Section 102(c) gives the Secretary sweeping and unprecedented power to waive any and all legal requirements, in violation of the nondelegation doctrine.

1. "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 nondelegation doctrine prevents Congress from circumventing the Constitution's "single, finely wrought and exhaustively considered, procedure" for enacting laws. *INS v. Chadha*, 462 U.S. 919, 951 (1983). Congress may, however, "obtain[] the assistance of its coordinate Branches" if it lays "'down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (brackets omitted) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Under the intelligible principle test, a Congressional delegation of authority is constitutional only if it "clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of th[e] delegated authority." *Mistretta*, 488 U.S. at 372-73 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). This framework safeguards against Congress delegating its authority to an agency to decide "what [the law] shall be," by requiring clear instructions as to both the ends and the means. *Mistretta*, 488 U.S. at 418 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892)). "[T]he degree of agency

discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 475 (2001).

2. Section 102(c) lacks any proper intelligible principle that could sufficiently guide the Secretary's waiver discretion.

Under this provision, the Secretary has unguided and unfettered discretion to "waive all legal requirements such Secretary, in [his or her] sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." 8 U.S.C. § 1103(c)(1) note. The IIRIRA contains no further principles guiding the Secretary's waiver discretion. This sweeping conferral of authority is reminiscent of prior unconstitutional delegations, and its scope extends far beyond that of prior delegations that have survived constitutional scrutiny. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 418 (1935) ("Congress left the matter to the President without standard or rule, to be dealt with as he pleased".)

A study in contrasts, the delegation in *Mistretta* (involving the Sentencing Guidelines) was upheld because Congress there provided two sets of seven and eleven factors to "guide the Commission in its formulation" of offense and defendant categories, 488 U.S. at 375, and it provided explicit limits on the range of minimum and maximum sentences, *id.* The Commission's discretion was limited by numerous constraints, including the grade of the offense, the nature and degree of harm, and the offender's age, education,

or mental and emotional condition. *Id.* at 374-76. In *Touby v. United States*, 500 U.S. 160, 163 (1991), involving the Controlled Substance Act, the operative language was "necessary to avoid an imminent hazard to the public safety." There, the delegated authority was not the power to repeal whole laws, but merely the authority to temporarily schedule a controlled substance. Even then, in order for the Attorney General to exercise this temporary authority, he or she was required to consider three of eight codified factors for permanent scheduling. *Id.* And in *Whitman*, 531 U.S. at 465, 473—where the Clean Air Act delegated authority to the EPA to promulgate ambient air quality standards "to protect the public health"—the statute directed the EPA to use "technical 'criteria' documents" to aid the agency in "identify[ing] the maximum airborne concentration of a pollutant that the public health can tolerate."

Section 102 falls woefully short of these standards, particularly in light of the sliding scale between the scope of the power delegated and the specificity of the intelligible principle that is required, as contemplated in *Whitman*. *See* 531 U.S. at 475. Congress in § 102 authorized the Secretary to waive any and all legal requirements that the Secretary deems necessary to waive in order to ensure expeditious construction of the pertinent border barriers. But including the word "necessary," with no guidance as to what might meet that threshold, does not change the fact that the Secretary's discretion to waive applicable laws is extraordinarily broad. The Secretary has the authority to waive any laws regardless of subject matter, including federal environmental, animal and

wildlife protection, land management, religious freedom, and archeological protection laws that fall far outside the Secretary's expertise and sphere of authority, as well as (at least in the government's view) any and all matters of state, local, and tribal law. Yet Congress provided no guidance as to its intent regarding which laws the Secretary should waive or how the Secretary should balance the interest in building a border wall against the interests protected by other statutes. Section 102(c) is the quintessential example of a statute in which "Congress left the matter to the [Executive] without standard or rule, to be dealt with as he pleased." *Panama Refining Co.*, 293 U.S. at 418.

3. The breadth of the delegation here is truly staggering. Historically, constitutionally valid delegations have concerned the power to, for example, fix a price, set a sentence, determine excessive profits, prevent unfair voting power amongst shareholders, determine rates, or regulate licenses. *See Mistretta*, 488 U.S. at 373-74 (collecting cases). The authority in § 102 to waive "all legal requirements," and potentially in their entirety, while at the same time largely precluding judicial review of waiver decisions, *infra* at 29-31, appears unprecedented. *See* Memorandum from Stephen R. Viña & Todd Tatelman, Legislative Attorneys, Am. Law Division, Cong. Research Serv. on Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2-4 (Feb. 9, 2005). Other waiver provisions, for example, are typically cabined by (1) allowing waiver only of statutory requirements contained in the same statute that authorizes the waiver, (2) specifically enumerating the laws that may be waived, or (3) allowing waiver only of a

grouping of similar laws. *Id.* at 3. *See, e.g.*, 10 U.S.C. § 1107(a); 22 U.S.C. § 2375(d); 29 U.S.C. § 793; 42 U.S.C. § 6212(b); 42 U.S.C. § 6393(a)(2); 50 U.S.C. § 2426(e).

The delegation here is particularly problematic for at least three overarching reasons. First, as noted, it permits the Secretary to waive laws outside the Secretary's own statutory subject matter area. Second, the Secretary waived laws governing the Department's own conduct, effectively immunizing the Department itself from judicial scrutiny. Third, the Secretary waived not just federal laws but also state and local laws, thereby implicating serious federalism concerns.

a. Section 102(c) gives a Cabinet official the power to waive statutes that are within the purview of other agencies. The Secretary presumably has expertise in areas like immigration and national security, but § 102(c) permits waiver of laws governing areas where the Secretary lacks expertise or authority—most obviously here, regarding environmental policy, but also including wildlife management, historical preservation, public land management, and religious freedom. Indeed, the specific statutory waivers effectuated in this case run the gamut, encompassing, among others:

- The Administrative Procedure Act (5 U.S.C. § 551 et seq.);

- The National Environmental Policy Act (Pub. L. No. 91-190, 83 Stat. 852 (42 U.S.C. § 4321 et seq.)), the Endangered Species

Act (Pub. L. 93-205, 87 Stat. 884 (16 U.S.C. § 1531 et seq.)), the Clean Air Act (42 U.S.C. § 7401 et seq.), and the Clean Water Act, (33 U.S.C. § 1251 et seq.));

- The Fish and Wildlife Coordination Act (Pub. L. No. 73-121 (16 U.S.C. § 661 et seq.)), the Migratory Bird Conservation Act (16 U.S.C. § 715 et seq.), and the Eagle Protection Act (16 U.S.C. § 668 et seq.);

- The National Historic Preservation Act (Pub. L. No. 89-665, 80 Stat. 915, as amended, repealed, or replaced by Pub. L. No. 113-287 (formerly codified at 16 U.S.C. § 470 et seq., now codified at 54 U.S.C. § 100101 note and 54 U.S.C. § 300101 et seq.)), and the Paleontological Resources Preservation Act (16 U.S.C. § 470aaa et seq.)

- The Farmland Protection Policy Act (7 U.S.C. § 4201 et seq.), and the Federal Land Policy and Management Act (Pub. L. No. 94-579 (43 U.S.C. § 1701 et seq.)); and

- The Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 et seq.), the American Indian Religious Freedom Act (42 U.S.C. § 1996), and the Religious Freedom Restoration Act (42 U.S.C. § 2000bb).

In Section 102(c), the Secretary is given no standards for picking and choosing among laws to

waive and no guidance for balancing the competing interests of constructing the border wall versus the weighty interests embodied in other legislative enactments and enforced by DHS's sister agencies. How is the Secretary supposed to determine whether waiving the Paleontological Resources Preservation Act is necessary to ensure expeditious border barrier construction? The waiver decisions contain no indication that the Secretary even considered that question. As a practical matter, the Secretary may waive these laws without fully assessing or explaining the impact a waiver will have on the environment, land management, or tribal interests, and without having to consider the views of those who possess the requisite expertise and technical knowledge.[4]

b. Not only does section § 102(c) permit waiver of an apparently limitless range of federal laws, but the Secretary is waiving laws that govern the agency's own conduct. This means the Secretary could build a border barrier by giving "a contract to his political cronies that had no safety standards, using 12-year-old illegal immigrants to do the labor, run it through the site of a Native American burial ground, kill bald eagles in the process, and pollute the drinking water of neighboring communities." 151 Cong. Rec. H466

[4] Section 102(b)(1)(C) requires the Secretary "consult with" various stakeholders but provides no statutory mechanism for enforcing the consultation requirement. In this case, the Secretary failed to consult with the City of Calexico before making the waiver determination. *See* Pet. App. 57a.

(daily ed. Feb. 9, 2005) (statement of Rep. Blumenauer).

The waiver authority as embraced by the government then further exacerbates these problems, inasmuch as it allows the Secretary to insulate DHS's underlying conduct from judicial oversight, in derogation of normal principles subjecting agency action to review by the courts. The *only* check the statutory terms provide on the Secretary's unfettered ability to insulate his or her conduct from outside review is the very kind of constitutional challenge that this Petition raises. If ever a statute implicated nondelegation concerns, this is it.

c. In addition to waiving federal laws, the Secretary here also waived "all … state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the enumerated federal laws. Pet. App. 121a, 129a.

This Court should view the Secretary's arrogation of power to waive state, local, and tribal laws with a particularly skeptical eye. The scope of "an administrative agency's power to pre-empt state laws … affects the allocation of powers among sovereigns." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 44 (2007) (Stevens, J., joined by Roberts, C.J., and Scalia, J., dissenting). The purported authority for this waiver comes from § 102(c)(1)'s generic reference to the authority to waive "all legal requirements" as necessary to ensure expeditious construction of the border barriers. This hardly constitutes a clear delegation of the authority to waive state and local law. And absent judicial review, *see infra* § I.C., the

Secretary will be free to preempt any state law he or she chooses, with no check to assure that the agency's actions are consistent with Congress's delegation of authority.

4. The government, and the court below, would have this Court believe that § 102's delegation is permissible because the Executive has "independent and significant constitutional authority in the area of 'immigration and border control enforcement and national security.'" Pet. App. 82a (citation omitted). But the Executive cannot automatically insulate itself from constitutional scrutiny simply by invoking "national security." *See Youngstown Sheet & Tube Co.*, 343 U.S. at 587-90. And generally speaking, immigration—the target of the border wall—is a matter left to Congress. *See U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("Normally Congress supplies the conditions of the privilege of entry into the United States."). Even if the Executive may have broad power regarding the border, *see Trump v. Hawaii*, 138 S. Ct. 2392 (2018), it does not have the quintessentially Legislative power to repeal existing federal, state, and local laws, *see Clinton*, 524 U.S. at 437. Regardless of the Executive's power over national security or whether the word "necessary" sets out an intelligible principle, "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative'" and violates the separation of powers. *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

5. Another case raising nondelegation issues, *Gundy v. United States*, No. 17-6086, is currently on the Court's docket and is scheduled for oral argument

in this Court on October 2, 2018. *Gundy* involves the federal Sex Offender Registration and Notification Act's ("SORNA's") delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913. The petitioner in *Gundy* argues that § 16913 does not contain an adequate intelligible principle, particularly in light of SORNA's criminal penalties. This Court's decision in *Gundy* could inform the appropriate disposition in this case, which raises, among other issues, a challenge to the adequacy of § 102's "intelligible principle" and the Secretary's waiver of laws that include criminal penalties. *See, e.g.,* 16 U.S.C. § 1540(b) (criminal penalties under the ESA); *id.* § 668(a) (criminal penalties relating to bald and golden eagles). At a minimum, the Court should hold this petition pending its disposition in *Gundy*, and then dispose of this petition as appropriate in light of the disposition in *Gundy*.

B. A Section 102(c) waiver is a partial repeal of enacted law in violation of the Presentment and Take Care Clauses.

The authority to legislate is entrusted solely to Congress. U.S. Const. art. I, §§ 1, 7. Statutes may be enacted "only … in accord with a single, finely wrought and exhaustively considered, procedure." *Clinton*, 524 U.S. at 419 (internal quotation omitted). The Executive's constitutional role is not to make or unmake laws unilaterally, but to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3.

1. The Constitution does not allow the Executive "to enact, to amend, or to repeal statutes." *Clinton*, 524 U.S. at 438. "Amendment and repeal of statutes,

no less than enactment, must conform with" the bicameralism and presentment requirements of Article I. *Chadha*, 462 U.S. at 954. Following the textual requirements of the Constitution ensures that political accountability is not compromised. *See* Mitchell J. Widener, *The Presentment Clause Meets The Suspension Power: The Affordable Care Act's Long And Winding Road To Implementation*, 24 B.U. Pub. Int. L.J. 109, 119 (2015).

The Secretary's publication of a § 102(c) waiver in the Federal Register has the same effect as a partial repeal or amendment of the underlying law. It is as if the Secretary grafted onto each of dozens of statutes a new subsection stating that "Nothing in this section, or any law deriving from, or related to the subject of this section, shall apply to the construction of border barriers outside San Diego or Calexico." *See* Pet. App. 121a-123a, 129a-131a (waiving "in their entirety" more than two dozen statutes, "including all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the enumerated statutes.). Such an amendment alters those statutes' "legal force or effect" as applied to the construction of border barriers. *Clinton*, 524 U.S. at 438.

In light of the Secretary's and the district court's position that the waiver authority in § 102(c) is not constrained by the particular projects identified in § 102(b), *see generally* Pet. App. 36a-64a, the waiver authority in their view apparently extends to *any* "areas of high illegal entry" along the *entire* U.S. border, including, potentially, the border with Canada or marine borders. *Compare* § 102(a) *with* § 102(b) (barriers

along the "southwest" border). And as noted, prior waivers already covered substantial stretches of the southern land border with Mexico.

The district court believed that the waiver authority generally and the particular waivers at issue here nevertheless complied with Article I because the waivers are "permitted by section 102(c)" and "narrow." Pet. App. 94a. But similar logic did not stop this Court in *Clinton* from striking down the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, (codified at 2 U.S.C. § 691 et seq., (1996)), which was enacted by Congress and permitted the partial repeal of an enacted statute.

The power granted to the President by the Line Item Veto Act was not materially different than the power granted to the Secretary here. The Constitution prohibits a complete cancellation of a provision, as in the Line Item Veto Act, no less than it prohibits executive amendment of an enacted law. *Chadha*, 462 U.S. at 954.

Moreover, the Line Item Veto Act contained detailed procedures providing a check on the President's use of the statutory veto power. The President could veto only three specific types of provisions and in doing so he had "to adhere to precise procedures whenever he exercises his cancellation authority." *Clinton*, 524 U.S. at 436-38. Those procedures included consideration of specific factors, a finding by the President that cancellation would meet three specified requirements, and transmission of written findings to Congress. The statute also provided Congress with an opportunity to disapprove the president's cancellation

(subject to the President's constitutional veto authority). *Id.*

Here, in contrast, § 102(c) gives the Secretary "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," and merely requires notice of a waiver in the Federal Register. Section 102(c) then provides for no further legislative or (non-constitutional) judicial review of the Secretary's waiver determinations. § 102(c)(1), Pet. App. 116a. The statute does not include even the very minimal oversight by Congress that the Line Item Veto Act provided. The waivers effected by section 102(c) certainly cannot be characterized as "narrow" when they are compared to the Line Item Veto legislation that this Court held violated the separation of powers.

The government has tried to analogize a § 102(c) waiver to an "'executive grant of immunity or waiver of claim.'" Dkt. 35-1 at 61 (quoting *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 671 F.3d 881, 895 (9th Cir. 2011) ("*In re Telecomms.*")). That is wrong. The Secretary's waiver does not "trigger a defense or immunity for a third party." *In re Telecomms*, 671 F.3d at 895. As explained above at 21, the waiver encompasses statutes governing the Secretary's own conduct. Nor does the waiver merely provide "a defense or immunity" to a suit brought by a citizen or tribal, state, or local government seeking to enforce a waived law; the waiver provides that those laws do not apply *at all*. That is no different than an amendment to the law, which in our tripartite system the

President (let alone an unelected Secretary) lacks the power to effectuate.

2. The Secretary likewise violated the Take Care Clause by using the waiver authority in § 102(c) to unilaterally excise a host of laws that would otherwise govern the border wall. *Supra* at 19-21. The Secretary imposed his or her own view of the relative importance of various congressionally enacted laws—including NEPA, the ESA, and the entirety of the APA—against the Secretary's desire to build prototype walls and replacement fencing. But the Take Care Clause "impose[s] a duty on the President to enforce the law, regardless of his own administration's view of its wisdom or policy." Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 799 (2013) (discussing founders' understanding of the Take Care Clause). It does not matter that § 102(c) purports to give the Secretary that power; it is "the *exclusive* province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (emphasis added). Unless and until *Congress* decides that certain statutory requirements that otherwise govern the border wall should be disregarded, the Executive must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. *See also* Pet. App. 87a ("the Take Care clause applies not only to the President but also his Executive officers").

C. Section 102(c)'s jurisdiction-stripping provision insulates the Executive from judicial review and further aggravates the separation of powers violation.

There is a strong presumption that agency action is subject to judicial review. *See, e.g.*, *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 670-672 (1986). But, as the government argued below, § 102(c)'s preclusion of judicial review is "emphatic and comprehensive." Dkt. 35-1 at 11-12. First, § 102(c)(2)(A) grants federal district courts exclusive jurisdiction over all causes or claims arising under the section, thus eliminating state court review. Second, § 102(c)(2)(A) limits claims to those alleging a violation of the Constitution and purports to divest the federal courts of jurisdiction to hear any other claim. Third and finally, § 102(c)(2)(C) takes the nearly unprecedented step of extinguishing ordinary appellate review as of right; the statute provides that a district court's decision may only be reviewed by writ of certiorari in this Court.[5]

Section 102(c)'s "emphatic and comprehensive" preclusion of judicial review is particularly insidious in the context of a broad delegation of power. After all, "[p]rivate rights are protected by access to the courts to test the application of the policy in the light of these

[5] The only other example we have located of Congress eliminating appellate review in this manner is the Trans-Alaskan Pipeline Authorization Act ("TAPAA"). *See* 43 U.S.C. § 1652(d). Importantly, the TAPAA permits the district court to adjudicate claims that the agency had exceeded its own statutory authority. Claims of mere statutory violation are precluded under § 102(c)(2)(A).

legislative declarations." *Am. Power & Light Co.*, 329 U.S. at 105. As the Court has explained, "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds," and is 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); *see also Mistretta*, 488 U.S. at 379 (a permissible intelligible principle may be tested "in a proper proceeding" (quoting *Yakus v. United States*, 321 U.S. 414, 425-26 (1944))).

The district court recognized that "judicial review provides an important check on the power delegated by Congress," but reasoned that judicial review "would defeat the purpose of the law to expedite the construction of border barriers and roads in areas where they are needed." Pet. App. 84a-85a. But *without* judicial review, there is no way to ensure the Secretary is carrying out the directives enacted by Congress. *See Touby*, 500 U.S. at 168-69; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 533; *Yakus*, 321 U.S. at 426 (recognizing that one of the purposes of requiring Congress to provide intelligible principles was so that a judicial tribunal "in a proper proceeding [may] ascertain whether the will of Congress has been obeyed."). Absent judicial review, typically through the Administrative Procedure Act, administrative agencies cannot be "confined to the scope of authority granted or to the objectives specified," and delegations "in effect be[come] blank checks drawn to the credit of some administrative officer or board." S. Rep. No. 79-752, at 212 (1945).

This case is illustrative. The Secretary waived the entirety of the APA and is using § 102(c)'s waiver authority as a blank check. The Secretary has used unbridled discretion to effectively repeal dozens of federal, state, tribal and local laws—robbing them of legal force and effect for an indefinite period and with respect to as yet undefined activities at the border. This reading permits DHS to treat *every* border infrastructure project it proposes under the IIRIRA as within the § 102 waiver authority, potentially in perpetuity and unconstrained by any of the geographic limits provided in § 102(b) or any of the animating purposes reflected in § 102(a).

These concerns are not merely hypothetical. The Secretary is using the waiver authority to construct prototype walls to "evaluate" the prototypes' "design features." Pet. App. 128a. A 25-foot wide prototype wall will not "deter illegal crossings." IIRIRA § 102(a). And the Secretary is also extending the waiver authority to encompass replacement walls and construction projects outside of the statute's original limits. *See* Pub. L. No. 104-208, div. C, tit. I, § 102(a), 110 Stat. 3009, 3009-554 (limiting waiver to NEPA and ESA for specific 14-mile segment of border barrier).

II. The Question Presented Is Important And Recurring, And The Impossibility Of A Circuit Conflict Highlights The Need For This Court's Review.

This Court's review is warranted in light of the extraordinary legal and practical significance of the issues. As outlined above, § 102(c) upsets the distri-

bution of powers among the three branches of government and operates to insulate important and highly consequential border-related activities from judicial review. But there will never be a circuit split on the constitutionality of the statute because the statute precludes ordinary appellate review by the courts of appeals. Even in more quotidian settings, the Court regularly grants review of cases raising separation of powers issues even absent a circuit split. *See, e.g.*, *Gundy*, No. 17-6086; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Clinton*, 524 U.S. 417. This is especially so when Congress devises new ways of allocating power between the branches. *See, e.g.*, *Free Enter. Fund*, 561 U.S. 477; *Clinton*, 524 U.S. 417; *Mistretta*, 488 U.S. 361; *Chadha*, 462 U.S. 919. These considerations militate in favor of this Court's review in this case as well.

Indeed, the absence of normal appellate review also means that, without a decision from this Court, there will never be binding precedent on § 102(c)'s constitutionality: "'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'" *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting J. Moore et al., *Moore's Federal Practice* § 134.02 (3d ed. 2011)). That is a particular problem here, with the U.S-Mexico border spanning four states and multiple federal judicial districts in multiple circuits (and the District of Columbia is also an additional possible venue for border-wall-related litigation, *see Ctr. For Biological*

Diversity v. U.S. Dep't of Homeland Sec., No. 18-cv-655 (D.D.C. March 22, 2018)).

III. This Case Is An Ideal Vehicle To Address The Question Presented.

This case presents a perfect vehicle to address the important constitutional issues regarding § 102(c)'s infringement upon the separation of powers. The issues were squarely presented and ruled upon below. The district court received extensive briefing on the constitutional issues, *see* Dkts. 28-1, 29-1, 30-2, 35-1, 36, 38, 39, 42, and issued a detailed opinion on summary judgment, *see* Pet. App. 70a-85a (nondelegation); Pet. App. 92a-95a (presentment); Pet. App. 85a-90a (take care); Pet. App. 83a-85a (lack of judicial review).

Unlike the two prior petitions considered by this Court, *Defenders of Wildlife v. Chertoff*, 554 U.S. 918 (2008) (No. 07-1180) and *County of El Paso v. Napolitano*, 557 U.S. 915 (2009) (No. 08-751), this case is the first petition to involve the Secretary's use of a waiver that on its face extends beyond the border projects specifically identified by Congress under either § 102(a) or § 102(b)—specifically, a project to create a "prototype" wall that by itself cannot prevent anyone from crossing the border, as well as constructing replacement fencing (in contrast to the "additional" fencing authorized by § 102).

Without this Court's review, there will be no binding precedent governing these issues, and suits challenging the statute and the Secretary's waivers will continue to proliferate. The President has made clear

his intention to "secure the southern border of the United States through the immediate construction of a physical wall on the southern border" and to "obtain complete operational control" of the border. *See* Exec. Order No. 13767, 82 Fed. Reg. 8793. Indeed, the District Court for the District of Columbia is currently considering a challenge to a waiver determination for 20 miles of border barriers in New Mexico. *Ctr. For Biological Diversity*, Case No. 18-cv-655 (D.D.C. March 22, 2018). This Court's review is urgently needed to address the serious separation of powers issues implicated by § 102, and to resolve them in a binding and conclusive manner.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari. In the alternative, the Court should hold this petition pending its disposition in *Gundy v. United States*, No. 17-6086, and then dispose of this petition as appropriate in light of the disposition in *Gundy*.

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