Nos. 17-1286 and 17-1290

In The
Supreme Court of the United States

NATIONAL MINING ASSOCIATION,
Petitioner,

v.

RYAN ZINKE, Secretary of the Interior, et al.,
Respondents.

AMERICAN EXPLORATION & MINING ASSOCIATION,
Petitioner,

v.

RYAN ZINKE, Secretary of the Interior, et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT GREGORY YOUNT'S BRIEF IN SUPPORT OF CERTIORARI

JEFFREY W. MCCOY
Counsel of Record
ANTHONY L. FRANÇOIS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: jmccoy@pacificlegal.org

Counsel for Respondent Gregory Yount

QUESTION PRESENTED

43 U.S.C. § 1714(c)(1) delegates authority to the Interior Secretary to withdraw large tracts of the roughly 640 million acres of the nation's public lands from public use. The delegation is subject to an unconstitutional legislative veto contained in the same subpart, intended to constrain the Secretary's exercise of this power.

The question presented is:

Whether an unconstitutional legislative veto in a subpart of an act, in which subpart Congress also expansively delegated its plenary authority over public lands to the executive branch, is so interwoven with the delegated authority that the veto cannot be severed from the rest of the subpart?

LIST OF ALL PARTIES

Respondent Gregory Yount was a plaintiff in the District Court and an appellant before the Ninth Circuit.

Petitioner in 17-1286 and Respondent in 17-1290 National Mining Association was a plaintiff in the District Court and an appellant before the Ninth Circuit.

Petitioner in 17-1290 and Respondent in 17-1286 American Exploration & Mining Association, was a plaintiff in the District Court and an appellant before the Ninth Circuit.

Respondents Metamin Enterprises USA, Inc., and the Arizona Utah Local Economic Coalition, were plaintiffs in the District Court and appellants before the Ninth Circuit.

Respondents Ryan Zinke, Secretary of the Interior; U.S. Department of the Interior; George E. Perdue, Secretary of Agriculture; U.S. Department of Agriculture; Bureau of Land Management; Brian Steed, Acting Director, Bureau of Land Management; and the U.S. Forest Service, were defendants in the District Court and appellees before the Ninth Circuit.

Respondents Grand Canyon Trust, Sierra Club, National Parks Conservation Association, Center for Biological Diversity, and Havasupai Tribe, were defendant-intervenors in the District Court and appellees before the Ninth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Rule

Other Authorities

OPINIONS BELOW

The opinion of the court of appeals in *National Mining Association v. Zinke* is reported at 877 F.3d 845 (9th Cir. 2017). The opinion of the district court in *Yount v. Salazar* is reported at 933 F. Supp. 2d 1215 (D. Ariz. 2013). All opinions are reproduced in the appendices to the Petitions.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

INTRODUCTION[1]

Gregory Yount is a self-employed prospector and miner from Arizona. National Mining Association Petition for Writ of Certiorari (NMA Pet.) App. 203a. As a part of his mineral exploration activities, Mr. Yount surveyed Forest Service lands in Northern Arizona in search of valuable mineral deposits that he could acquire under the General Mining Law of 1872. 30 U.S.C. § 22, *et seq.*; *see* NMA Pet. App. 204a, 220a. He eventually discovered two hard rock uranium mining claims in the Kaibab National Forest. *Id.*

Mr. Yount spent hundreds of hours and tens of thousands of dollars developing these claims, including conducting geophysical surveys, electromagnetic surveys, and laboratory analyses. *Id.*

---

[1] Pursuant to Supreme Court Rule 12.6, counsel of record for all parties received notice of Mr. Yount's intention to file a brief in support of the Petitions within 20 days after the cases were placed on the docket.

at 220a, 222a. As a result of this work, Mr. Yount concluded that there was a high probability that the claims contained valuable mineral deposits. *See id.* at 222a.

In order to confirm these conclusions, Mr. Yount submitted a plan of operations to the Forest Service in order to conduct exploratory drilling on his claims. *Id.* at 220a. But the Forest Service never processed that plan of operations. *Id.* Instead, in 2009, then-Interior Secretary Kenneth Salazar submitted a notice of a proposed withdrawal that would remove approximately one million acres of federal land, including the Forest Service land containing Mr. Yount's claims, from operation of the Mining Law.[2] 74 Fed. Reg. 35,887 (July 21, 2009). Upon the Secretary's issuance of the notice, the land was segregated from operation of the Mining Law for two years. *Id.*[3]

On January 9, 2012, Secretary Salazar issued Public Land Order 7787 and withdrew, for 20 years, over one million acres of public land from operation of the Mining Law. 77 Fed. Reg. 2563 (Jan. 18, 2012). The withdrawal significantly impacted Mr. Yount's mineral development activities. *See* NMA Pet. App. 220a–222a. Not only did the withdrawal foreclose any

---

[2] The Interior Secretary may withdraw lands under the administration of any department or agency with the consent of the head of the department or agency. 43 U.S.C. § 1714(i).

[3] On June 28, 2011, the Secretary issued an order implementing a six month withdrawal of the land. 76 Fed. Reg. 37,826 (June 28, 2011). This decision was purportedly made pursuant to the Secretary's delegated authority to make emergency withdrawals pursuant to 43 U.S.C. § 1714(e). *Id.*

future exploration for new mining claims, it prevented further development of his already discovered claims. *Id.* at 222a.

As a result of the withdrawal, the Forest Service announced it would not process any plan of operations until it determined that the mining claims were valid on the date the lands were originally segregated in 2009. Bureau of Land Management, *Record of Decision: Northern Arizona Withdrawal 2012* 6 (Jan. 9, 2012).[4] As described by Secretary Salazar, "[d]etermining the validity of a mining claim is a complex and time-consuming legal, geological, and economic evaluation that is done on a claim-by-claim basis." *Id.* at 7. In order for Mr. Yount to prove that his claim was valid at the time the land was originally segregated, he would have to expose the minerals for analysis. NMA Pet. App. 221a. Mr. Yount was stuck in a catch-22, however, because exposing the minerals would require Mr. Yount to drill on the claims, which would require a plan of operations, which the withdrawal prevented the Forest Service from approving. *Id.*

Stuck with no option to develop his claims or even prove their validity, Mr. Yount, appearing *pro se*, filed a complaint against the Secretary and Bureau of Land Management on November 1, 2011. NMA Pet. App. 203a. Mr. Yount initially challenged the review process that led to the issuance of Public Land Order 7787 but later amended his Complaint to also challenge the Order itself. *See id.* at 140a. Three other

---

[4] Available at https://www.blm.gov/documents/national-office/blm-library/planningnepa/record-decision-northern-arizona-withdrawal-2012.

cases were consolidated with his case before the United States District Court for the District of Arizona. *Id.* at 203a.[5]

After cross-motions for summary judgment were filed, the district court granted judgment in favor of Defendants and upheld Public Land Order 7787. NMA Pet. App. 201a. On December 12, 2017, the Ninth Circuit affirmed the judgment of the district court. *Id.* at App. 64a. Plaintiffs National Mining Association and American Exploration & Mining Association filed Petitions for Writ of Certiorari on March 9, 2018. Because of the important federal question raised by this case, Mr. Yount urges this Court to grant the Petitions.

SUMMARY OF ARGUMENT

This case involves significant unresolved questions about the proper application of this Court's severability doctrine. For nearly the entire history of this Court, it has examined the extent to which an unconstitutional part of an act necessitates invalidating the remaining portions of the act. A clearly defined approach to severability is key to the

---

[5] In his Complaint, Mr. Yount did not raise a claim involving the Interior Secretary's large tract withdrawal authority and the unconstitutional legislative veto in 43 U.S.C. § 1714(c)(1). However, as a party to the consolidated action below, Mr. Yount is a respondent in this Court and can urge that the judgment be reversed on any grounds raised below. *See* Sup. Ct. R. 12.6; *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 783 n.14 (1980) ("Because he was a party to the proceeding below, the HEW Secretary was automatically joined as a respondent when the DPW Secretary filed his petition in this Court. . . . In that capacity, he may seek reversal of the judgment of the Court of Appeals on any ground urged in that court.").

proper function of the judiciary because an uncritical approach risks rewriting a statute to give it an effect different from Congress' intent.

Over time, this Court has articulated various aspects of its severability doctrine in an attempt to guide lower courts in their approach to this issue. While at times this Court has articulated a framework, it has never consistently reaffirmed that framework, focusing instead on different aspects of the severability doctrine depending on the case at hand.

As a result, this Court's severability doctrine remains ambiguous. This has caused confusion among the lower courts, which tend to misstate the framework by selectively quoting from this Court's severability decisions. This ad hoc application of severability can lead courts to make severability decisions based on their own policy preferences, rather than on the preferences of Congress.

Exacerbating the problem is that major issues related to the severability doctrine remain unanswered. For example, this Court has never clearly defined the meaning of the word "provision" in the context of its precedents or a statute's severability clause. As a result, it is unclear what portions of a statute should be presumed to be severable as one unit, and what portions should be presumed to be unseverable.

The panel's approach in this case exemplifies how the ambiguities in this Court's severability doctrine can result in a flawed analysis. At issue is whether the unconstitutional legislative veto in 43 U.S.C.

§ 1714(c)(1) is severable from the delegation of authority, contained in the same subsection, to make withdrawals of land over 5,000 acres. In answering the question, the panel did not conduct a thorough analysis of the text, structure, and legislative history of the relevant statute. Instead, it selectively quoted from the statute and legislative history and determined that an extensive, nearly unrestrained delegation of Congress' plenary power over public lands was within the "basic objectives" of the Act. The panel's application of the severability doctrine in this case is at odds with the approach taken by other courts.

Another aspect of the severability doctrine that needs clarification is the role background constitutional principles play in deciding how much of a statute to invalidate. By severing the legislative veto from the delegation it is intended to constrain, the panel undermined the constitutional principles that make the legislative veto unconstitutional in the first place. The Presentment Clause and the other requirements for enacting legislation are intentionally designed to make legislating difficult. But the result of the panel's opinion is a large unintended delegation of unchecked legislative power to the executive. Due to conflicting language from this Court's cases, these constitutional considerations were ignored by the panel.

The panel's cursory application of the severability doctrine has far reaching consequences. This case impacts the use of approximately 640 million acres of federal land, more than a quarter of all of the land in the United States. The Secretary's delegated

withdrawal authority applies to many uses of the public land, including outdoor recreation, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, and timber production. As a result of the panel's decision, the Secretary of Interior has nearly unfettered authority to prevent these uses of the nation's lands for up to 20 years at a time, with no limit to the number of times such withdrawals can be extended.

This Court should grant the Petitions to clarify the ambiguities in the severability doctrine, and reverse the judgment of the Ninth Circuit.

ARGUMENT

I.

THIS COURT SHOULD GRANT THE PETITIONS TO CLARIFY SIGNIFICANT AMBIGUITIES IN ITS SEVERABILITY DOCTRINE

A. This Court's severability doctrine remains ambiguous in important respects

For as long as this Court has exercised judicial review, it has grappled with the issue of how much of a statute, a portion of which is unconstitutional, should be invalidated. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (invalidating the thirteenth section of the Judiciary Act of 1789); *Bank of Hamilton v. Dudley's Lessee*, 27 U.S. (2 Pet.) 492, 526 (1829) ("The question whether any of [a statute's unconstitutional] provisions" can be severed "will

properly arise in the suit brought to carry them into effect."). The question of severability is essential to the constitutional rule of law and to a court's exercise of its judicial power. "An automatic or too cursory severance of statutory provisions risks 'rewrit[ing] a statute and giv[ing] it an effect altogether different from that sought by the measure viewed as a whole.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 692 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (quoting *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935)). "The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact." *Id.*

Thus, "[i]t is important for constitutional government that courts have an effective severability doctrine to conduct judicial review in a fashion that does not absolve the political branches of their responsibilities." Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 Tex. Rev. L. & Pol. 1, 9 (2011). Over the years, this Court's jurisprudence on severability has continued to evolve, in an attempt to guide the judiciary on its proper role. *See id.* at 18–39.

To ensure that the courts do not improperly intrude on the powers of a separate branch of government, this Court has stated that severability "is a question of interpretation and of legislative intent." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). To answer that question, a court must consider whether a valid portion of a statute is "so interwoven with" the portion

"held invalid that the section cannot stand alone." *Id.*; *see also Regan v. Time, Inc.*, 468 U.S. 641, 677 (1984) (Brennan, J., concurring in part and dissenting in part) ("[T]he two requirements are so completely intertwined as to be plainly inseverable; they constitute a single statutory provision which operates as an integrated whole. They therefore 'must stand or fall as a unit.'" (quoting *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 83 (1976))). With those overarching principles in mind, this Court has issued many decisions attempting to articulate its severability doctrine. *Champlin Ref. Co. v. Corp. Comm'n of State of Okla.*, 286 U.S. 210, 234 (1932); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam); *United States v. Jackson*, 390 U.S. 570, 585 (1968).

The closest this Court has gotten to clearly defining a cohesive severability framework is *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). There, this Court articulated a "well established" test for severability. *Id.* at 684. First, a court must determine if "the balance of the legislation is incapable of functioning independently" from the constitutionally flawed portion. *Id.* Next, the court must consider not just if the balance of the legislation is *literally* capable of functioning independently from the severed portion but "whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 685. "The final test" requires the court to determine whether the "statute created in [the unconstitutional portion's] absence is legislation that Congress would not have enacted." *Id.*

Although *Alaska Airlines* provides a good summary of this Court's severability doctrine, this

Court has not consistently reaffirmed the test in later severability cases. Rather, those cases focused on different aspects of the *Alaska Airlines* test.[6]

For example, in *New York v. United States*, 505 U.S. 144 (1992), this Court repeated only one part of the test, and stated that

> "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Id. at 186 (quoting *Alaska Airlines*, 480 U.S. at 684). Absent from the inquiry was whether the statute would function in a *manner* consistent with the intent of Congress. *Id.* Despite not considering this factor, this Court severed the invalid portion from the remainder of the act. *Id.* at 187.

In *United States. v. Booker* this Court arguably reframed the test for severability, stating that a court "must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." 543 U.S. 220, 258–59 (2005) (internal quotations and citations omitted). Although this Court purported to base its analysis on

---

[6] *See* Oral Argument at 9, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-393.pdf ("MR. CLEMENT: Well, two responses, Justice Scalia: We can look at this Court's cases on severability, and they all formulate the test a little bit differently. JUSTICE SCALIA: Yes, they sure do.").

Alaska Airlines, the newly framed test "presaged the resegregation of severability analyses" by failing to strictly adhere to and reaffirm *Alaska Airlines*. Klukowski, 16 Tex. Rev. L. & Pol. at 59 n.258. But despite applying a different test, the Court still severed "two specific statutory provisions" from the remainder of the statute. 543 U.S. at 259.

The unraveling of severability analysis continued in *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006). In determining whether to sever an unconstitutional portion of the statute at issue, this Court stated that "[t]hree interrelated principles inform our approach to remedies." *Id.* at 329. Among the principles stated is that "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id.* at 330 (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979)). Still, this Court did not fully reaffirm the *Alaska Airlines* test, only citing to it once for the final portion of the test. *Id.* ("Would the legislature have preferred what is left of its statute to no statute at all?"). The result was that this Court reversed the lower court's decision to invalidate the entire statute, and held that declaratory and injunctive relief was the appropriate remedy. *Id.* at 331.

Then more recently, in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, this Court ignored *Booker* and applied a partial version of the *Alaska Airlines* test. 561 U.S. 477 (2010). Like *New York*, this Court focused primarily on whether a statute remained fully operative as a law without the unconstitutional provision. *Id.* at 509. And, once

again, this Court severed the unconstitutional portions of the act without fully applying the *Alaska Airlines* test. *Id.*

This Court's varying approaches to severability have led many scholars to call on this Court to clarify the proper application of the doctrine. *See* Brian Charles Lea, *Situational Severability*, 103 Va. L. Rev. 735, 748 (2017) ("Troubled by existing severability doctrine's potential for error and manipulation, scholars have proposed wide-ranging reforms."); Eric S. Fish, *Severability As Conditionality*, 64 Emory L.J. 1293, 1300 (2015) (Suggesting a modified framework because "[s]everability doctrine is confusing."). Without a clear doctrine, "[c]ourts sometimes misstate the framework for severability by quoting one major case, or only one relevant passage from a major case," which "readily lead[s] to an incomplete analysis and a faulty conclusion." Klukowski, 16 Tex. Rev. L. & Pol. at 109.[7] This ad hoc approach to severability can lead courts to make severability decisions based on their own policy preferences, rather than on the preferences of Congress.

---

[7] This varying approach among the lower courts cannot be explained by whether a case involves a statute that contains a severability clause. Such clauses are "merely" an "aid in determining [legislative] intent . . . not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). Furthermore, the proper interpretation of the words used in severability clauses, especially the word "provision," is a question this Court has never expressly addressed. *See* Part I.B.2, *infra*.

B. The panel's opinion demonstrates how ambiguities in the severability doctrine result in a flawed analysis

The panel's analysis in this case demonstrates the need for this Court to clarify the severability doctrine. Rather than attempting to apply the *Alaska Airlines* framework, the panel below merely quoted from different sections of this Court's severability cases. *See* NMA Pet. App. 26a. The resulting opinion provides an incomplete analysis and a suspect conclusion.

1. The panel selectively applied different aspects of the severability doctrine

The most noticeable defect in the panel's decision is its failure to conduct any meaningful analysis of the text and structure of the Federal Land Policy and Management Act (FLPMA). When it purportedly analyzed Congress' legislative intent, the panel failed to cite FLPMA's declaration of policy and barely quoted the actual text of FLPMA's withdrawal section. NMA Pet. App. 29a–30(a); NMA Pet. at 24 ("The Ninth Circuit quoted this policy in the 'Background' section of its opinion, App. 11a, but apparently forgot about it by the time it analyzed the legislative veto."). Instead, the panel selectively quoted the text and legislative history of the act because it believed it only needed to determine Congress' "'basic objectives' in enacting FLPMA." NMA Pet. App. 28a (quoting *Booker*, 543 U.S. at 259).

Determining Congress' "basic objectives" in passing a statute is different than determining

whether a statute will function in a manner consistent with the intent of Congress absent an invalid portion of the statute. The latter determination requires a much more thorough analysis, akin to a court's approach to statutory construction generally. *See* Klukowski, 16 Tex. Rev. L. & Pol. at 37 (arguing that this Court's severability doctrine is consistent with its methods of statutory interpretation). But because of the ambiguities in this Court's jurisprudence, the panel was able to choose the path of least resistance toward severing the unconstitutional veto from the withdrawal delegation.[8]

The panel should have recognized, and this Court should clarify, that legislative intent is the crucial aspect of the *Alaska Airlines* inquiry and the touchstone of severability analysis. *See Alaska Airlines*, 480 U.S. at 685 ("The more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress."); *Ayotte*, 546 U.S. at 329. When discerning legislative intent, a court should start with the text of the statute. *Nixon v. United States*, 506 U.S. 224, 232 (1993) ("[T]he plain language of the enacted text is the best indicator of intent."). This is especially true when, like in FLPMA, Congress includes a declaration of policy in the statute itself. 43 U.S.C. § 1701; *see* Klukowski, 16 Tex. Rev. L. & Pol. at 37 ("Although it

---

[8] The panel also weakened the meaning of *Booker* by taking the "basic objectives" language out of context. In *Booker*, the Court engaged in a relatively thorough analysis of the text and the structure of the act at issue and invalidated two separate statutory provisions. *Booker*, 543 U.S. at 259. This softening of *Booker* reaffirms the need for this Court to clarify and resynthesize its severability doctrine.

is occasionally more challenging to discern legislative purpose from statutory text, there are often statements of intent for various parts or for the statute as a whole.").

In FLPMA, Congress expressly declared its intent that "the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4). To that end, the withdrawal section of FLPMA provides that "the Secretary is authorized to make, modify, extend, or revoke withdrawals but *only* in accordance with the provisions and limitations of this section." 43 U.S.C. § 1714(a) (emphasis added).

Congress delegated authority to the Secretary to make withdrawals under 5,000 acres without legislative action. 43 U.S.C. § 1714(d). It also delegated authority to make emergency withdrawals without legislative action. 43 U.S.C. § 1714(e). With the authority to make withdrawals over 5,000 acres, however, Congress conditionally delegated that authority, subject to legislative veto. 43 U.S.C. § 1714(c)(1). The plain language of the text indicates Congress' intent: it was fine with delegating some authority to make withdrawals without legislative action. But with large-tract withdrawals, it would not have delegated the authority without it being subject to "legislative action." 43 U.S.C. § 1701(a)(4). That the panel ignored this language shows its confusion over the proper application of the severability doctrine.

Further demonstrating the need for this Court's review is that the panel's application of the severability doctrine is markedly different from the approach taken by the D.C. Circuit in *City of New Haven, Conn. v. United States*, another case involving the question of whether a legislative veto is severable from a delegation of authority. 809 F.2d 900, 907 (D.C. Cir. 1987). Applying the *Alaska Airlines* test, that court recognized that "the ultimate inquiry in a severability case is not whether the statute may somehow continue to function after excision of the invalid portion, but rather whether it continues to function *in a manner consistent with congressional intent*." *Id.* at 906 (emphasis in original). And although the D.C. Circuit focused extensively on legislative history, it focused on all aspects of the legislative history and, importantly, it read that legislative history in context. *Id.* at 906–09. Based on that analysis, the court invalidated the delegation of authority along with the legislative veto. *Id.* at 909.

If the panel had recognized that it needed to conduct a thorough analysis of congressional intent in passing FLPMA, it would have examined all the relevant text and legislative history. Instead, it applied different portions of this Court's severability doctrine and superficially interpreted FLPMA. This Court should grant the Petitions in order to articulate a specific severability framework that lower courts can apply with consistency.

2. Ignoring opposing views from other courts, the panel answered the unresolved question about what constitutes a severable "provision" as if it were settled

Another aspect of the panel's opinion that demonstrates the ambiguity of this Court's severability doctrine is the panel's analysis of the word "provision" in FLPMA's severability clause. In the panel's view, what constitutes a "provision" for the purpose of severability is a straightforward question. NMA Pet. App. 34a–35a (severing, without specifically identifying the applicable language, "the unconstitutional legislative veto"). But this Court has never explicitly answered that question, which has led to different approaches to severability among the lower courts. Klukowski, 16 Tex. Rev. L. & Pol. at 73 ("One question yet to be answered is how to define a statutory 'provision.'").

In the panel and district court's views, the "provision" that should be severed was approximately seven and a half of the nine sentences in 43 U.S.C. § 1714(c)(1). The Ninth Circuit did not expressly state what portions of FLPMA it invalidated, but it affirmed the judgment of the district court. NMA Pet. App. 35a, 64a. Although the district court's opinion is not entirely clear, it at least attempted to define the severed "provision":

> The Court invalidates only the lines of [43 U.S.C. § 1714(c)(1)] beginning with the statement: "and the withdrawal shall terminate and become ineffective at the end of ninety days . . . if the Congress has adopted

> a concurrent resolution stating that such House does not approve the withdrawal. . . ." The preceding part of that section, which grants the Secretary large-tract withdrawal authority, and all of [§ 1714(c)(2)], setting forth detailed reporting requirements, remain in effect.

NMA Pet. App. 107a. Because the court referenced the "preceding part" of 43 U.S.C. § 1714(c)(1) and then the following subpart, § 1714(c)(2), it appears that the court severed all but the first one and a half sentences of § 1714(c)(1). *Id.*

The panel and the district court saw no issue with severing language in the middle of a sentence. NMA Pet. App. 34a. In fact, it appears that the panel did not even consider the language it was severing, stating that "no reason occurs to us why a sentence within a subsection is not a 'provision' of the statute." *Id.* But the district court did not sever a sentence within a subsection of the statute, it severed seven and a half sentences out of nine. Consistent with its cursory severability analysis, the panel did not describe the invalidated language, and simply held that "the unconstitutional legislative veto embedded in [43 U.S.C. § 1714(c)(1)] is severable from the large-tract withdrawal authority" without specifying which language was actually invalidated. *Id.* at 35a.

This approach demonstrates the need to clarify what constitutes a "provision" for the purposes of a severability analysis. Fish, 64 Emory L.J. at 1313 ("[W]hat is the fundamental unit of legislation for judicial review purposes?"). As this Court has stated:

> [a]long with punctuation, text consists of words living "a communal existence," in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used."

U.S. Nat'l Bank of Oregon v. Indep. Ins Agents of Am., Inc., 508 U.S. 439, 454–55 (1993) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)). Yet the lower courts did not take into account punctuation or structure in their analyses. The panel did not even consider the language it was invalidating at all. As a result, the lower courts saw no problem with treating as a "provision" seven and a half of nine sentences in one subpart of an act.

This approach is at odds with the approach taken by other courts. While some courts may interpret a few words as a severable "provision", NMA Pet. App. 34a (citing one 11th Circuit case), others are "especially wary of severability in a situation . . . in which it is asked to sever particular words from within a single sentence." *Planned Parenthood Se., Inc. v. Strange*, 172 F. Supp. 3d 1275, 1282 (M.D. Ala. 2016), *judgment entered*, No. 2:13CV405-MHT, 2016 WL 1178658 (M.D. Ala. Mar. 25, 2016). Indeed, this Court tends to view subsections or subparts as the relevant "provision" for severability, especially when it is reviewing an Act of Congress. *See, e.g.*, *Buckley v. Valeo,* 424 U.S. at 54, 58 (severing two subsections); *INS v. Chadha*, 462 U.S. 919, 932 (1983) (severing subsection); *Alaska Airlines*, 480 U.S. at 697 (severing one subpart); *see also* Klukowski, 16 Tex. Rev. L. &

Pol. at 74–78 (providing examples of what this Court has treated as a severable "provision").

Furthermore, the panel's interpretation of "provision" is also inconsistent with how Congress has written severability clauses in other statutes. Sometimes Congress uses more specific language in a severability clause to indicate what portion of an act it would like to preserve. *See* Pub. L. No. 212, § 17, 67 Stat. 462, 471 (1953) ("If any provision of this Act, or any section, subsection, sentence, clause, phrase or individual word, or the application thereof to any person or circumstance is held invalid . . . ."). To the panel, there is no difference between this type of very specific severability clause and the broader severability clause in FLPMA. *See* Pub. L. No. 94-579, § 707, 90 Stat. 2743, 2794 (1976) ("If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby.").

The panel's implicit conclusion that all severability clauses are the same resulted from its failure to consider the language or structure of FLPMA when it conducted its severability analysis. Instead it haphazardly invalidated "the unconstitutional legislative veto." NMA Pet. App. 35a. This approach is not just inconsistent with the approach taken by other courts, it is inconsistent with the panel's own reasoning in other parts of its severability analysis.

The panel believed that the legislative veto could be severed from the delegation of large-tract withdrawal authority because Congress can always overturn a withdrawal decision via "the ordinary

process of legislation." NMA Pet. App. 27a.[9] This conclusion ignores the other, non-legislative veto aspects of 43 U.S.C. § 1714(c)(1) that indicate that Congress did not want a resolution of disapproval to be "ordinary legislation."

The panel not only severed the literal legislative veto, it also severed the internal procedural rules adopted by Congress to implement a joint resolution of disapproval. These portions of the subpart explain that any resolution of disapproval is highly privileged and not subject to the filibuster. *See, e.g.,* 43 U.S.C. § 1714(c)(1) (A motion to consider a joint resolution "shall be highly privileged and shall not be debatable."). Even without the legislative veto, these procedures are a valuable tool for overturning a withdrawal. Yet the panel did not even consider this language, and severed it without comment.

The panel's cursory approach to defining the fundamental unit of legislation for severability demonstrates the need for this Court's review. If this Court clearly defines what constitutes a "provision," lower courts will have a clear starting point for its severability analysis. Furthermore, a clear ruling by this Court will allow Congress to clarify its intent towards severability when it passes legislation. Therefore, this Court should grant the Petitions.

---

[9] The ordinary process of legislation is clearly not a substitute for the legislative veto, because the ordinary process of legislation would require the administration to agree to invalidate its own previous decision. *See* NMA Pet. at 4.

II.

THIS COURT SHOULD GRANT THE PETITIONS TO ADDRESS HOW BACKGROUND CONSTITUTIONAL RULES IMPACT A COURT'S SEVERABILITY ANALYSIS

In deciding how much of an unconstitutional statute to sever, this Court should clarify the role the overall constitutional structure plays in a severability analysis. In *Ayotte*, this Court stated that "[o]ur ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue . . . ." 546 U.S. at 329. Obviously, the proper role of the judiciary is the foundation for any severability analysis. But too often courts ignore the other aspects of the separation of powers that are implicated when a court severs a portion of a statute.

This case provides a good example of how constitutional principles are implicated by the severability analysis. Congress has plenary power to manage the public lands. U.S. Const. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). Courts often strictly interpret delegations of this authority, to ensure that Congress remains the ultimate authority over public land decisions. *See United States v. California*, 332 U.S. 19, 27 (1947) ("[N]either the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power."); *Kidd v.*

U.S. Dep't of Interior, 756 F.2d 1410, 1412 (9th Cir. 1985) ("Once Congress has acted in . . . regard [to the administration and disposition of public lands], both the courts and the executive agencies have no choice but to follow strictly the dictates of such statutes."). To the extent that Congress can delegate such power over the public lands, *it* sets the limits on how the delegated authority is exercised.

In *Alaska Airlines*, this Court recognized that the type of delegated authority plays a role in the severability analysis, especially in the context of a statute involving a legislative veto:

> [I]t is necessary to recognize that the absence of the veto necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government. Thus, it is not only appropriate to evaluate the importance of the veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a veto.

480 U.S. at 685. This part of the analysis is important because a strong presumption in favor of severing a legislative veto from the delegation of power which it is intended to constrain will result in "judicial bias in favor of the legislative power grants at issue." Glenn Chatmas Smith, *From Unnecessary Surgery to Plastic Surgery: A New Approach to the Legislative Veto Severability Cases*, 24 Harv. J. on Legis. 397, 443–44 (1987).

Such a bias in favor of legislative delegations risks upsetting the fundamental purpose for the separation of powers: to protect individual liberty by preventing the accumulation of powers in a single branch. *See* The Federalist No. 47, at 324 (James Madison) (Jacob Cooke, ed. 1975). "Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Courts should take this principle into account when deciding whether to sever a legislative veto from a broad delegation of congressional power.

Furthermore, a bias in favor of severing the legislative veto from the delegation it is intended to constrain undermines the constitutional principles that make the legislative veto unconstitutional in the first place. As *Chada* states, the purpose of the Presentment Clause, and the other procedural requirements for passing legislation, is to make it difficult to legislate. 462 U.S. at 959. "The Constitution's deliberative process was viewed by the Framers as a valuable feature" because "[i]t would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints." *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring). But when a court refuses to engage in a through severability analysis it upsets that constitutional feature, making it easier for one individual to exercise unchecked legislative power. *Cf. Alaska Airlines*, 480 U.S. at 685. That is the case here, where Congress intended to make it more difficult to withdraw 5,000 or more acres of public land, but the

result of the panel's decision is that it is just as easy to withdraw large portions of public lands as small ones.

Ultimately, there is some tension between the language in *Alaska Airlines* and the language in *Chadha*. In *Chadha*, this Court did not examine the nature of the delegated authority, it merely stated that "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 462 U.S. at 955. But if Congress never would have delegated that authority without a legislative veto, the decision to sever only the veto amounts to a decision by the judiciary to transfer authority from the legislative to the executive branch, in a manner the legislative branch would not have approved. *Cf. Sebelius*, 567 U.S. at 692 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).[10]

This Court has never resolved the tension between *Chadha* and its other severability cases. As a result, lower courts ignore the instruction in *Alaska Airlines* to consider the nature of the delegated authority and the instruction in *Ayotte* to consider the background constitutional rules at issue in a case. *Cf.* Smith, 24 Harv. J. on Legis. at 444 ("In some cases, the courts simply signal their support for the power grants whose severability is at issue. In other cases, the courts exhibit a disinterested attitude toward the

[10] Ultimately, it appears that Justice Powell's and Justice White's concerns about the majority opinion in *Chadha* were well founded, and a proper interpretation of the Presentment Clause requires courts to more strictly apply the non-delegation doctrine. *See Chadha*, 462 U.S. at 963 (Powell, J., concurring); *id.* at 986 (White, J., dissenting).

power grant, one that suggests little sympathy for the power-restraining goal Congress sought to achieve through the legislative veto. In still other cases, the pro-delegation impulse is more subtly intertwined with other doctrinal issues.").

That was the case below, where the lower courts completely ignored separation of powers concerns when they conducted the severability analysis. *See* NMA Pet. App. 118a (district court citing only one of the three *Ayotte* principles for determining remedies). Once again, the courts instead selectively quoted from this Court's severability cases, resulting in an incomplete analysis. This Court should grant the Petitions to clarify the role background constitutional principles play in this Court's severability doctrine.

III.

THIS COURT SHOULD GRANT THE PETITIONS BECAUSE THE NINTH CIRCUIT'S OPINION ALLOWS THE SECRETARY OF THE INTERIOR NEARLY UNFETTERED DISCRETION TO PREVENT ANY USE OF APPROXIMANTLY 640 MILLION ACRES OF PUBLIC LAND, AGAINST CONGRESS' EXPRESS INTENT

The panel's cursory approach to severability in this case impacts many more than those immediately impacted by the one million acre withdrawal. The federal government controls approximately 640 million acres of land in the United States. *See* Carol Hardy Vincent, *et al.*, Cong. Research Serv., *Federal Land Ownership: Overview and Data*, Summary (Mar. 3, 2017), https://fas.org/sgp/crs/misc/

R42346.pdf.[11] The withdrawal power which FLPMA delegates to the Secretary applies to nearly all of this land, and is not limited to removing land from operation of the Mining Law. *Pac. Legal Found. v. Watt*, 529 F. Supp. 982, 996 (D. Mont. 1981), *supplemented*, 539 F. Supp. 1194 (D. Mont. 1982).

FLPMA provides that withdrawals "may be used in carrying out management decisions." 43 U.S.C. § 1712(e)(3). Such management decisions include "exclusions (that is, total elimination) of one or more of the principal or major uses" of public lands. 43 U.S.C. § 1712(e)(1). These principal uses include "domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production." 43 U.S.C. § 1702(*l*).

Under the panel's decision, there is little to stop the Secretary from preventing one or more of these uses on vast amounts of this nation's lands. While the initial length for a 5,000 acre or more withdrawal is limited to 20 years, there is no limit to the number of times a withdrawal can be renewed. 43 U.S.C. § 1714(f). With such a broad power at stake, it was critical that the lower courts properly evaluate Congress' intent in delegating to the Secretary the authority to make large-tract withdrawals. Unfortunately, the lower courts engaged in only a cursory severability analysis, and entered an order

[11] The amount of federally owned land amounts to approximately 27.4% of the land in the United States. Vincent, *et al.*, *supra* at 9.

that results in a massive delegation of power from the legislature to the executive.

There is no indication that the executive will self-regulate its use of this power. The number and size of withdrawals have continued to increase over the past couple of decades. *See, e.g.,* Bureau of Land Management, *Public Land Statistics* (2001–2016 annual publication that records, among other statistics, the amount of land withdrawn).[12] Since 2001 alone, there have been seven withdrawals, including the withdrawal in this case, that each withdrew more than 100,000 acres of land. 66 Fed. Reg. 6657 (Jan. 22, 2001) (withdrawal of 405,000 acres of land in Montana); 66 Fed. Reg. 36,589 (July 12, 2001) (withdrawal of 167,137.69 acres of public land in Nevada); 69 Fed. Reg. 59,953 (Oct. 6, 2004) (withdrawal of 111,895 acres of land in Utah); 70 Fed. Reg. 76,854 (Dec. 28, 2005) (withdrawal of 308,600 acres of public lands in Nevada); 74 Fed. Reg. 56,657 (Nov. 2, 2009) (withdrawal of 944,343 acres of public lands in Nevada); 78 Fed. Reg. 40,499 (July 5, 2013) (withdrawal of 303,900 acres of land in six states). These withdrawals have been made unilaterally, despite being at least twenty times the size (and in this case, two hundred times the size) of the threshold for a large withdrawal in FLPMA.

It is clear that Congress did not intend for these massive withdrawals to be within the sole power of one individual. 43 U.S.C. § 1701(a)(4); 43 U.S.C. § 1714(a) ("the Secretary is authorized to make, modify, extend, or revoke withdrawals but *only* in

[12] Available at https://www.blm.gov/about/data/public-land-statistics.

accordance with the provisions and limitations of this section." (emphasis added)). In the years prior to the passage of FLPMA, one of the chief public lands concerns was the fact that nearly all of the public domain had been withdrawn unilaterally by the executive. Public Land Law Review Commission, *One Third of the Nation's Land* 43 (1970) (noting "[c]oncern about problems associated with the 'withdrawal' and 'reservation' of public domain lands," and that withdrawals "have been used by the Executive in an uncontrolled and haphazard manner."); *id.* at 52 (noting that "virtually all" of the public land had been withdrawn "under one or more of the public land laws.").[13] While Congress delegated some authority to the executive to make withdrawals without Congressional approval, it drew a clear line between those withdrawals that could be made unilaterally and those that had to be made with the consent of Congress. *Compare* 43 U.S.C. § 1714(c)(1), *with* § 1714(d). Congress drew the line at 5,000 acres, and now the executive routinely and unilaterally withdraws portions of land well in excess of that, against Congress' clear intent.

Even if this case did not raise significant issues about the proper application of this Court's severability doctrine, that this case involves the management of around 640 million acres of public land would warrant review. The panel's decision will impact whether, and how, these lands can be used in

[13] A copy of the PLLRC Report is available at https://archive.org/stream/onethirdofnation3431unit#page/n1/mode/2up.

the future. This Court should grant the Petitions to address this important issue.

CONCLUSION

This case raises important federal questions regarding the application of this Court's severability doctrine and the management of approximately 640 million acres of federal land. This Court should grant the Petitions to address these issues and determine whether the delegation of authority to make large-tract withdrawals in FLPMA is severable from the legislative veto that appears in the same subpart.

DATED: April, 2018.

Respectfully submitted,

JEFFREY W. MCCOY
Counsel of Record
ANTHONY L. FRANÇOIS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: jmccoy@pacificlegal.org

Counsel for Respondent Gregory Yount