No. 17-1286

In The
Supreme Court of the United States

NATIONAL MINING ASSOCIATION,

Petitioner,

v.

RYAN ZINKE,
SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY

Over 100 years ago, this Court approved the Executive's implied authority to unilaterally withdraw federal land as "practical" because, by then, withdrawals had "aggregated millions of acres." *United States v. Midwest Oil Co.*, 236 U.S. 459, 469-72 (1915). In 1976, Congress took the extraordinary step of expressly abrogating *Midwest Oil* and repealing any and all implied withdrawal authority Interior claimed. Congress then specified by statute the only withdrawal authority it intended Interior to have, subjecting to a legislative veto any long-term withdrawal of more than 5,000 acres – a sizeable area slightly smaller than three of D.C.'s Rock Creek Park, but a tiny fraction (1/200th) of the one-million-acre withdrawal at issue here.

Upholding this massive withdrawal without the check of the unconstitutional veto, the Ninth Circuit eviscerated Congress's repeal of *Midwest Oil*. This Court should grant *certiorari* and reverse before the Executive Branch effectuates another land-grab.

ARGUMENT

I. GENERALIZED POLICY STATEMENTS CANNOT SAVE LONG-TERM, LARGE-SCALE WITHDRAWAL AUTHORITY.

Respondents avoid grappling with the important federalism and separation-of-powers issues at stake beyond the instant case, not least the Western States'

ability to control their fate. These issues warrant this Court's review.

A. This Case Is Of Immense – And Immediate – Importance To Western States.

Western States are keenly dedicated to "promotion and preservation of local economies, reasonable and responsible mining and mineral development," and to the "continued vitality" of their "role in public land management," reflecting a "tacit bargain long ago struck between the U.S. and the states." Brief of the States of Utah, Arizona, Montana, and Nevada as *Amici Curiae* (W. States' Br.), No. 14-17350, Dkt. 29 at 4, 20 (9th Cir. Apr. 17, 2015). The Ninth Circuit's approval of "an unchecked authority to make large scale withdrawals of land," and hence the resources within that land, "violates that bargain." *Id.* at 21. Without the veto, Western States, home to "large blocks of federal public lands," have lost valuable "input into decisions that materially impact that land and resources that lie within them." *Id.* Further, unfettered withdrawal authority bypasses the States' significant regulatory role over activities on federal land within their borders. *Id.* at 20; *see also* National Research Council, *Hardrock Mining on Federal Lands* 68-69 (Nat'l Acad. Press 1999)[1] (identifying

[1] *Available at* https://www.nap.edu/initiative/committee-on-hardrock-mining-on-federal-lands.

withdrawal authority as only one of many tools available to safeguard sensitive areas).

Western States expressed grave concerns about the long-lasting adverse economic impacts of this enormous, unwarranted withdrawal, as well the absence of "available science [ ]or data" supporting "the withdrawal's stated purpose: protecting the Grand Canyon watershed." W. States' Br. 2, 4-5; *see also* Pet. Br. 40. Without the check of the legislative veto, Interior could – and did – turn a blind eye.

B. The Sky Will Not Fall Absent Long-Term, Large-Scale Withdrawal Authority.

Federal Respondents wisely mount no merits defense to Interior's million-acre withdrawal. Instead, they baldly assert that a FLPMA policy goal of environmental protection "would be seriously impaired" if the Secretary's withdrawal authority were limited to tracts smaller than 5,000 acres. Fed. Resp. 13. Not so. First, Interior retains emergency authority to withdraw land without acreage limitation, for up to three years, to thwart real threats to environmental and cultural values. App. 280a. Second, modern environmental permitting prerequisites to mining undercut the claimed necessity of long-term, large-scale withdrawal authority. Indeed, the regulatory framework covering hardrock mining (including uranium) is "complicated but generally effective." *Hardrock Mining*, *supra*, at 1, 5, 6; *see also id.* at 145-147 (highlighting uranium-mining regulations).

At the same time, the "delays and uncertainties associated with the U.S. regulatory environment" have "caus[ed] mining companies to replace domestic operations with overseas projects," *id.* at 34, a problem compounded by the specter of unconstrained Executive withdrawals. Federal Respondents assert that the twenty-year time limit on large-tract withdrawals remains a significant constraint. Fed. Resp. 15. But for all practical purposes a decades-long, indefinitely-renewable block on new mining investment may as well be a permanent ban.

Trust Respondents focus on hypothetical horribles that might ensue in event of reversal, Trust Resp. 7, ignoring the rigorous regulatory process that would apply to any future mining, Pet. Br. 39. Moreover, the size of the withdrawal masks the small footprint of actual mines, once located. As of 1999, only 0.06% of BLM lands were "affected by currently active plan-level and notice-level mining activities." *Hardrock Mining, supra*, at 19. So while Interior removed 1,000,000 acres of *potential* development, any *actual* development would have been on a vanishingly smaller scale.

II. CONGRESS EXPRESSLY REPEALED INTERIOR'S WITHDRAWAL AUTHORITY AND CAREFULLY CIRCUMSCRIBED FUTURE WITHDRAWALS.

The Ninth Circuit's decision reallocates federal power vis-à-vis public land in a manner contrary to

Congress's intent. Nothing in Respondents' mischaracterization of law and obfuscation of legislative history successfully counteracts the compelling reasons for reversal.

A. Respondents' Avoidance Of Congress's Express Abrogation Of *Midwest Oil* Highlights Their Faulty Arguments.

In undertaking a severability analysis, the Court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy v. NCAA*, 138 S.Ct. 1461, 1482 (2018) (citation omitted). Respondents would have the Court do just that.

Contrary to Federal Respondents' unsupported characterizations, FLPMA did not "codify" the "Executive Branch's longstanding general withdrawal authority. . . ." Fed. Resp. 8. Far from it. Instead, Congress rescinded and abrogated the implied authority recognized in *Midwest Oil*, App. 283a, and created and delegated new withdrawal authority constrained by procedural requirements and substantive limitations, *see also* Pet. Br. 7. In the Justice Department's own words, "the section [of FLPMA] repealing the *Midwest Oil* power contains no exceptions, and the most natural reading of that section is that Congress intended to restrict the President's withdrawal authority to only that authority specifically provided by statute." *Administration of Coral Reef Resources in the*

Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 202 (2000). Decades of scholarship confirm this interpretation. Pet. Br. 30, 35-37; *e.g.*, George Coggins & Robert Glicksman, *The legislative veto in public natural resources law – Severance*, 1 Pub. Nat. Resources L. § 4:3 (2d ed. 2011) ("[S]imply [] excising the legislative vetoes . . . would return unfettered and unsupervised discretion to the executive branch, the very result FLPMA was enacted to prevent.").

B. The Remainder Of § 1714(c) Is Not A Meaningful Check On A Runaway Interior Department.

Congress's delegation authorized Interior to effect withdrawals "*only* in accordance with the provisions and limitations of this section." App. 275a (emphasis added).

The legislative veto was the primary substantive limitation Congress imposed on Interior's long-term, large-scale withdrawal authority. Pet. Br. 36. The various reporting requirements merely inform Congress in exercising that veto. Federal Respondents, quoting the Ninth Circuit, assert that the reporting requirements accompanying a large-scale withdrawal "provide a meaningful limitation on executive action even if no legislative veto may be exercised." Fed. Resp. 17 (quoting App. 85a). Were the legislative veto constitutional, perhaps the reporting requirements would then force Interior to question the propriety of a large-scale withdrawal, lest Congress swiftly reject it.

But without veto authority, the reports amount to so much useless bureaucratic paperwork.

C. Post-*Chadha* Events Do Not Override The 1976 Congress's Intent In Passing FLPMA.

Respondents make two principal arguments about events post-*INS v. Chadha*, 462 U.S. 919 (1983), to validate their views: (1) Congress has not acted to amend Interior's FLPMA authority, Trust Resp. 23, and (2) Interior has continued to withdraw land without congressional rebuke, Fed. Resp. 22; Trust Resp. 23. Neither bears on this Court's severability test, which asks only what "Congress contemplated when [a statute] was enacted," *Murphy*, 138 S.Ct. at 1482, not what Congress did or did not do later.

1. It matters not a whit that later Congresses have not mustered the legislative will to change FLPMA; what matters is what the 1976 Congress "[a]t that time" sought to achieve. *Id.* And as confirmed by scholarly inquiry and the Office of Legal Counsel, *see supra* § II.A, Congress sought not to delegate broad large-scale withdrawal authority, but rather to *repeal* the broad authority that had been imputed to Interior, but never expressly delegated. Consistent with Congress's role under the Property Clause, Congress limited large-scale withdrawals to emergencies and situations where Congress could effect a swift reversal. That successive Congresses have not taken action to repeal the authority Interior has reasserted does not

mean the 1976 Congress would have countenanced such Executive overreach.

2. That Interior continues to assert its withdrawal authority post-*Chadha* is hardly surprising. Given that Congress's hands are tied, why would Interior refrain? Nor is the number of withdrawals pertinent. Respondents identify no withdrawal of similar scale and controversy to that at stake here. Thus, the Ninth Circuit's reaffirmance of "a decades-old status quo," Fed. Resp. 22, even if accurate, means nothing. In any event, this characterization of the past 35 years is misleading.

In proceedings below, Mr. David Fredley, a former Interior minerals specialist, provided an uncontested declaration regarding withdrawals since *Chadha*. He attested that "from 1983 until 2012, no [FLPMA] withdrawal exceeded one million acres apart from the northern Arizona withdrawal now at issue in this case." Second Declaration of David C. Fredley, *Yount v. Salazar*, No. 11-8171, Doc. 110-1, ¶ 9 (Feb. 22, 2013). He also attested that from 1983 to 2008, only six FLPMA withdrawals exceeded 100,000 acres in size. *See id.* ¶ 8. Only after the district court's affirmation of the large-scale withdrawal authority did Interior fully embrace its asserted power by, for example, proposing to withdraw ten million acres. Pet. Br. 38. Accordingly, this million-acre withdrawal of the most valuable uranium lands in the country is not consistent with a "decades-old status quo."

III. RESPONDENTS' DISCUSSION OF THIS COURT'S SEVERABILITY PRECEDENTS OVERLOOKS THE IMPORTANT DIFFERENCES HERE THAT RENDER THIS CASE AN APPROPRIATE VEHICLE FOR CLARIFICATION OF THE SEVERABILITY TEST.

Respondents cherry-pick phrases from this Court's severability jurisprudence to fit their narrative. But reading the entirety of the Court's explanations reveals the Ninth Circuit's – and Respondents' – misguided conclusions.[2]

A. *Alaska Airlines* And *Chadha* Are Meaningfully Different.

1. Federal Respondents rely on *Alaska Airlines* and *Chadha* to their detriment. In each of those cases, delegated authority in question existed in different codified subsections from the congressional veto power that the Court deemed severable. The structure and

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[2] Federal Respondents, without support, imply the lack of a circuit split is dispositive, as if that were the only reason to grant review. Fed. Resp. 23 (characterizing circuit-split review as the Court's "usual practice[ ]"). To Federal Respondents, the existence of withdrawals within other circuits is reason enough to deny review. *Id.* 22-23. This argument is misguided, but in any event we do not urge review based on a circuit split. The exceptional importance of this issue even just within the Ninth Circuit – where approximately 459.5 million of the 621.5 million acres of federal lands reside – is more than enough to warrant review. *See* Pet. Br. 8 n.2 (citing report providing total federal acreage state by state).

text of FLPMA is unique, providing a far more compelling case to rescind the paired veto and delegation of large-scale withdrawal authority.

In *Alaska Airlines Inc. v. Brock*, 480 U.S. 678 (1987), while "this Court severed an invalid legislative veto from a reporting requirement contained in the very same sentence," Fed. Resp. 15, that reporting requirement was applicable to the entire statutory program at issue, 480 U.S. at 689-90. The question presented was whether the *remainder of the program*, *i.e.*, the remaining subsections, had to fall as well. The Court evaluated other elements of the program and concluded that because "Congress did not link specifically the operation of [other elements] to the issuance of regulations" subject to the legislative veto, it made little sense to invalidate them all. *Id.* at 687. Here the legislative veto *is* intentionally and specifically linked to delegated authority, but *only* to the large-scale withdrawal authority granted in the very same subsection. Severing this subsection thus respects Congress's intent but does no violence to the remainder of the section.

Federal Respondents also rely on *Alaska Airlines* to support their argument that all the statute need do to survive is "function" without the legislative veto. Fed. Resp. 14. That argument ignores the key requirement: that the statute, without the veto, function "in a *manner* consistent with the intent of Congress." *Id.* at 685 (emphasis in original). Independent functioning, standing alone, cannot supplant congressional intent. The remaining

withdrawal authorities found in separate subsections can stand, because Congress did not subject those authorities to the legislative veto. But long-term, large-scale withdrawal authority must end unless Congress re-delegates it.

Chadha is even less on point. There, the legislative veto independently resided in a separate subsection, apart from any grant of authority to or any separable requirement of the Executive Branch. 462 U.S. at 925.

Federal Respondents accuse Petitioners of elevating form over substance. Fed. Resp. 13-14. But it is they who forget that, in interpreting the substance of a statute, courts look to statutory structure. *See, e.g.*, *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 669 (1990). The differences between § 1714(c)(1) and the statutes in *Alaska Airlines* and *Chadha* thus counsel strongly in favor of treating them differently, for Congress knew how to separate the veto from the grant of authority when it intended to. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485-88 (1996) (explaining intentionality of Congress in enacting similar, but not identical, statutory language).

B. The Only "Provision" Suitable For Severance Here Is The Entirety Of § 1714(c)(1).

Federal Respondents cite the 2014 *Black's Law Dictionary* to argue that "provision" can mean a "clause in a statute," therefore the use of "provision" in FLPMA's severability clause means the legislative

veto clauses can be excised from the remainder of the subsection. Fed. Resp. 10. This is a slender reed upon which to build a theory of what Congress meant in 1976, for at the time of enactment *Black's Law Dictionary* gave little insight into what "provision" may mean in the context of a congressional statute. It noted, though, that in English history "provision" was "a name given to certain statutes or acts of parliament. . . ." *Black's Law Dictionary* 1389 (4th ed. 1968). Respondents identify no case law equating statutory "provisions" and statutory "clauses." To the contrary, this Court, prior to FLPMA's enactment, has described statutory subsections – such as § 1714(c)(1) here – as "provisions" *comprised of* clauses. *Helvering v. Cement Investors*, 316 U.S. 527, 534 (1942).

No more persuasive is Federal Respondents' new, half-hearted argument that the phrase "or the application thereof" in the severability clause rescues § 1714(c)(1). Federal Respondents identify no precedent supporting such a notion, despite the frequent use of those four words in severability clauses. *E.g.*, *Chadha*, 462 U.S. at 932; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 88-89 (1976). Regardless, it makes no sense. The "application" of the legislative veto in one particular scenario was not ruled unconstitutional here. If it had been, perhaps its "application" to another scenario would still be valid. But the legislative veto is *prima facie* unconstitutional; no other "application" is to be had. Therefore, if § 1714(c)(1) is indivisible such that

the entire subsection must be read out of FLPMA, it no longer applies in any other instance, either.

C. *Murphy v. NCAA* Is Irreconcilable With The Ninth Circuit's Opinion, Underscoring Why The Severability Doctrine Is Ripe For Clarification.

In *Murphy*, this Court focused its severability inquiry on whether Congress would have enacted "those provisions which are within its power, independently of those which are not." 138 S.Ct. at 1482 (quoting *Alaska Airlines,* 480 U.S. at 684) (alterations omitted); *see also Murphy* (Thomas, J., concurring), 138 S.Ct. at 1486. The Court found it "most unlikely" that Congress would have prohibited state-run sports lotteries if it could not also prohibit sports gambling in private casinos. *Id.* at 1482-83 (citation omitted). By that standard, the Ninth Circuit committed clear error, for it observed that "[i]t is possible – *perhaps even likely* – that had Congress known in 1976 that the legislative veto provision was unconstitutional, a somewhat different legislative bargain would have been struck." App. 32a (emphasis added). Moreover, the Ninth Circuit recognized Congress "preferred tightly regulated [delegations of authority] over total deregulation," *Murphy*, 138 S.Ct. at 1482 n.29: "FLPMA eliminates the implied executive branch withdrawal authority recognized in *Midwest Oil*, and substitutes express, limited authority," App. 13a.

Despite these admissions, the lower court confoundingly ruled the long-term, large-scale withdrawal authority could stand, articulating the test as "not whether Congress would have drafted the statute differently in the absence of the unconstitutional provision," but rather whether "Congress would have preferred no statute at all." App. 32a-33a (citation omitted). That the court rejected the former question, which hews so closely to this Court's construction in *Murphy,* in favor of the latter highlights that the two questions are not the same. The former evaluates the likelihood that Congress would have enacted something else, while the latter implies that Congress would have scrapped the statute altogether. Yet this Court has framed the question both ways. *See, e.g.*, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006). While the "no statute at all" test may work to evaluate a short, single-purpose statute such as that at issue in *Ayotte*, it has no logical application to a statute as wide-ranging as FLPMA.

By ruling that Congress would have preferred delegating unrestricted authority to Interior over "no statute at all," App. 33a, the Ninth Circuit has given FLPMA "an effect altogether different from that

sought by the measure viewed as a whole," *Murphy*, 138 S.Ct. at 1482 (citation omitted).[3]

CONCLUSION

The Court should grant the petition to effectuate congressional intent and clarify the proper test for severability.

Respectfully submitted,

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[3] If the Court nevertheless reads the Ninth Circuit's opinion as consistent with its opinions severing legislative vetoes, this Court's "modern severability precedents" are most certainly "in tension with longstanding limits on the judicial power." *Id.* at 1485 (Thomas, J., concurring); *see also* Respondent Gregory Yount's Brief in Support of Certiorari, Nos. 17-1286 and 17-1290, at 22-26 (April 2018).