No. 17-1290

In the Supreme Court of the United States

AMERICAN EXPLORATION & MINING ASSOCIATION,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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I. RESPONDENTS PRESENT A MISLEADING DEPICTION OF THIS COURT'S SEVERABILITY CLAUSE PRECEDENT

Both federal Respondents and the intervenor Respondents rely heavily on the fact that the Federal Land Policy and Management Act of 1976 ("FLPMA") contains a severability clause.[2] Both Respondents also cite to language this Court used in *INS v. Chadha*, 462 U.S. 919, 932 (1983) and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–85 (1987) stating that the presence of a legislative veto "gives rise to a presumption" of severability that must be overcome by "strong evidence." What both Respondents choose to ignore, however, is the increasing amount of evidence, both from scholarly research and from this Court's own decisions, that severability clauses are not nearly as determinative of Congress's intent as Respondents and the Ninth Circuit below would like this Court to believe.

Respondents fail to address the overwhelming evidence that severability clauses do not carry talismanic weight. Pet. App. at 33. Respondents ignore the fact that Congress routinely includes

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[1] "Zinke Opp." refers to the Brief in Opposition of Respondents Ryan Zinke, et al. "GCT Opp." refers to the Brief in Opposition of non-federal Respondents Grand Canyon Trust, et al.

[2] "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." FLPMA § 707, 90 Stat. 2794 (43 U.S.C. 1701 note).

severability clauses in its legislation with little thought as to how the invalidation of certain provisions by the courts may impact the rest of the statute—likely out of a habit borne of an earlier era in which this Court was much less likely to grant severance. *See* Glenn Chatmas Smith, *From Unnecessary Surgery to Plastic Surgery: A New Approach to the Legislative Veto Severability Cases*, 24 HARV. J. ON LEGIS. 397, 424–25 (1987). Severability clauses are not used sparingly to signal clearly to the courts which pieces of legislation have been carefully crafted to survive the potential invalidation of one or two provisions; they are slapped on haphazardly as a matter of course by overworked staffers. *See* Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2293 (2015) ("In Congress, severability clauses are often thrown in to far-reaching statutes that are drafted in several iterations, by several committees with legislative staff members who often lack the time and expertise to consider the clauses' potential ramifications adequately."). The ubiquity of these clauses should be construed as little more than an indication that Congress prefers a presumption in favor of severability *in general*, with little relevance to any statutory provision in particular.

Respondents also entirely fail to address the multiple cases in which this Court found statutory provisions not to be severable, despite the presence of a severability clause. This Court has repeatedly stated—as recently as 2016, in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016)—that severability clauses, while often relevant, should not

be taken as an inexorable command. Respondents merely quote the language from *Chadha* and *Alaska Airlines* stating that severability clauses create a presumption in favor of severance, while completely ignoring the authorities cited by AEMA that clearly weaken that presumption. In doing so, Respondents present an incredibly disingenuous picture of this Court's severability jurisprudence.

II. RESPONDENTS DOWNPLAY THE IMPORTANT ROLE THE LEGISLATIVE VETO PLAYED IN CONGRESS'S STATUTORY SCHEME

Congress clearly had multiple concerns in mind when crafting FLPMA. One of those concerns was to ensure that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values," 43 U.S.C. § 1701(a)(4). Respondents erroneously assert that this broad conservationist goal would be frustrated by the invalidation of the Secretary of the Interior's large- tract withdrawal authority.[3] App. 272a; Zinke Opp. 13.

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[3] It is important to note that FLPMA is equally concerned with the protection of Americans' property interests in federally managed land and the continuation of the country's long tradition of responsible multiple use in appropriate areas. *See* 43 U.S.C. § 1701(a)(7) ("[it is the policy of the United States that] management be on the basis of multiple use and sustained yield unless otherwise specified by law"); *id.* at (a)(12) ("[it is the policy of the United States that] the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands

What is clear from FLPMA's statement of policy in § 1701(a), the statute's structure, and the legislative history concerning its drafting and enactment, is that Congress was in no way agnostic as to how that broad conservationist goal was to be realized. The Secretary would be able to withdraw land only pursuant to specific limitations and restrictions established by statute, and only Congress would have the authority to make large-tract withdrawals permanent. Congress went to great lengths to "delineate the extent to which the Executive may withdraw lands without legislative action," *id.* at (a)(4), and the legislative veto was a key component of Congress's plan to enforce those limits.

Respondents, much like the Ninth Circuit below, fail to recognize the criticality of the legislative veto to Congress's efforts to maintain effective oversight over the land withdrawal process. *See* Zinke Opp. 13–17; GCT Opp. 20–23. The mere existence of other limitations on the Secretary's withdrawal authority does not negate the necessity of the legislative veto. Respondents attempt to draw this Court's attention away from the need for the legislative veto by pointing to the fact that, even absent the veto, large-tract withdrawals are not permanent. Zinke Opp. 15; GCT Opp. 21. While technically true, endlessly and easily renewable twenty-year terms are permanent in all but name, particularly to private stakeholders like Dr. Karen Wenrich and other AEMA members that have had significant investments effectively wiped out by

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including implementation of the Mining and Minerals Policy Act of 1970 as it pertains to the public lands") (citation omitted)).

the illegal withdrawal at issue in this case. *See* App. 37–38.

Respondents also point to FLPMA's large-tract withdrawal notification requirements as providing "sufficient" oversight to satisfy Congress's intent to rein in the Executive Branch. *See* Zinke Opp. 15–16; GCT Opp. 21. This argument, however, ignores the incontrovertible fact that, without the legislative veto as a means of enforcement, the Secretary's obligation to notify Congress of new large-tract withdrawals has no actual teeth. The notification rules set forth in 43 U.S.C. § 1714(c), require the Secretary to explain, *inter alia*, why the withdrawal is necessary, the mineral potential of the area, and the economic impact of the withdrawal, but provide no substantive limitation on the Secretary's ability to make large-tract withdrawals. Without the legislative veto, the other limitations and restrictions on large-tract withdrawals are paper tigers—they may look robust but offer little more than minor bureaucratic inconvenience.

III. RESPONDENTS MISCONTSTRUE PETITIONERS' ARGUMENTS ABOUT FLPMA'S STRUCTURE

Respondents also misconstrue several of AEMA's arguments, such as the relevance of Congress's placement of the legislative veto and the delegation of large-tract withdrawal authority within the same subsection, as well as the use of nonbinding though still persuasive authority.

Respondents seriously misrepresent Petitioners' argument regarding the placement of the legislative veto and the large-tract withdrawal authority, claiming Petitioners argued that the two provisions are interwoven *because* they are placed together. Zinke Opp. 13–15; GCT Opp. 25–26. Petitioners have never asserted that the act of placing the two provisions together *causes* them to become "so intertwined that the Court would have to rewrite the law to allow it to stand." *Alaska Airlines*, 480 U.S. at 684. The fact is that this statutory structure is indicative of Congress's intent to connect the two provisions. That they are placed together implies that Congress considered them linked in some important way. Clearly, the language in *Alaska Airlines*, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), and the other cases cited by Petitioners do not stand for the proposition that merely placing two provisions in the same section automatically interweaves them so that they cannot be separated. This structure, however, is one of multiple pieces of evidence militating against allowing the Secretary to retain unfettered large-tract withdrawal authority.

Indeed, that federal Respondents would accuse Petitioners of elevating form over substance, *see* Zinke Opp. 13, is curious, considering the fact that it is the Respondents who insist that FLPMA's severability clause is, by definition, outcome-determinative, despite substantial authority (left completely unaddressed by Respondents, *see* Part I, *supra*) stating otherwise.

IV. THIS COURT'S RECENT DECISION IN *MURPHY V. NCAA* SUPPORTS PETITIONERS' ARGUMENTS

Intervenor Respondents make the curious decision to open their Brief in Opposition with a reference to this Court's recent decision in *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018). This decision is confusing because, despite Respondents' claim that *Murphy* reaffirmed "precisely the severability analysis" that the Ninth Circuit employed below, GCT Opp. 13–14, this Court in *Murphy* actually held *against* the severability of multiple unconstitutional provisions, while reaffirming the principle that "[the Court] cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy*, 138 S. Ct. at 1482 (quoting *Railroad Retirement Bd. V. Alton R. Co.*, 295 U.S. 330, 362 (1935). Federal Respondents, notably, do not discuss *Murphy* at all and reference the decision but once, merely as part of a string cite.

Murphy, in which this Court struck down parts of a federal statute prohibiting state legalization of sports gambling, is similar to this case in one key respect: Respondents' preferred severability analysis would lead to an absurd result directly contrary to Congress's original intent in enacting the statute. *See id.* at 1482–83 ("If the provisions prohibiting state authorization and licensing are stricken but the prohibition on state 'operat[ion]' is left standing, the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted."

"[L]egalizing sports gambling in privately owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards.").

Similarly, here, allowing the Secretary to retain large-tract withdrawal authority without the substantive limitation of the legislative veto creates an absurd situation in which the Secretary's authority to make large-tract withdrawals is practically identical to the Secretary's extremely broad authority to make small-tract or emergency withdrawals. This sort of broad and unfettered discretion to lock up potentially millions of acres of land without any real congressional oversight is the exact situation Congress was attempting to avoid when it enacted FLPMA.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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