No.

In the Supreme Court of the United States

DETROIT INTERNATIONAL BRIDGE COMPANY, INC. AND THE CANADIAN TRANSIT COMPANY,

Petitioners,

v.

U.S. DEPARTMENT OF STATE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

HAMISH P.M. HUME
Counsel of Record
SAMUEL C. KAPLAN
JAMES A. KRAEHENBUEHL
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue NW
Washington, DC 20005
(202) 237-2727
hhume@bsfllp.com
skaplan@bsfllp.com
jkraehenbuehl@bsfllp.com

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether Congress may delegate to an Executive Agency the duty the Constitution expressly assigns to Congress to decide whether to "Consent" to an "Agreement or Compact" between a State and "a foreign Power." U.S. Const. art. I, § 10, cl. 3.

2. Whether, when Congress is permitted to delegate power to an Executive-Branch agency, the constitutionally required "intelligible principle" may consist of nothing more than the identity of the agency receiving the delegation, with no principle anywhere in the statute itself to which the agency is directed to conform.

PARTIES TO THE PROCEEDING

Petitioners are Detroit International Bridge Co. and Canadian Transit Co., plaintiffs-appellants in the court below.

Respondents, who were the defendants-appellees in the court below, are the United States Department of State; Mike Pompeo, in his official capacity as Secretary of State, Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; Victor Mendez, in his official capacity as Administrator of the United States Federal Highway Administration; Elaine L. Chao, in her official capacity as Secretary of Transportation; Paul F. Zukunft, Adm., in his official capacity as Commandant of the United States Coast Guard; the United States Coast Guard; the Federal Highway Administration; the United States of America; the Government of Canada; the Canada-United States-Ontario-Michigan Border Transportation Partnership; and the Windsor-Detroit Bridge Authority.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners make the following disclosures: Neither Petitioner has any parent company, subsidiary or affiliate with any outstanding securities in the hands of the public. Canadian Transit Company is wholly owned by co-Appellant, Detroit International Bridge Company. Detroit International Bridge Company is wholly owned by DIBC Holdings LLC. The only owner of DIBC Holdings LLC is Matthew T. Moroun, an individual. None of the three entities discussed in this paragraph is publicly traded.

Detroit International Bridge Company, Canadian Transit Company, and DIBC Holdings LLC are engaged in the maintenance and operation of the Ambassador Bridge, which spans the Detroit River to connect the American city of Detroit, Michigan with the Canadian city of Windsor, Ontario.

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JURISDICTION

The U.S. Court of Appeals for the District of Columbia Circuit entered judgment on November 21, 2017 and denied a timely petition for rehearing and rehearing en banc on March 6, 2018. App. 90a-91a. On May 22, 2018, the Chief Justice extended the time to file a petition for certiorari to and including August 3, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this petition are reproduced in the Appendix at App. 94a-99a.

INTRODUCTION

This petition presents two important constitutional questions related to Congress' ability to delegate its Article I powers.

The first is whether Congress may properly delegate to an Executive Agency its responsibility to decide whether to give "Consent" to compacts between a State and a foreign power, which the Constitution expressly assigns to Congress in Article I, § 10, cl. 3. Petitioners submit that Congress may not do so, irrespective of whether Congress provides an intelligible principle to guide the agency's discretion.

If Congress is permitted to delegate this consent power, then the second question arises, which is this: can the mere identity of the agency to whom the power has been delegated (here, the State Department) alone provide the intelligible principle that this Court has said is required for all other delegations.

Review should be granted to address these questions because the Circuit Court's opinion in this case contravenes basic principles that this Court has repeatedly held govern the separation of powers set forth in the Constitution, and that most lower courts have faithfully applied.

This case challenges Congress' delegation of its power to approve agreements between U.S. states, on the one hand, and either Canada and Mexico, on the other, insofar as those agreements relate to international bridge crossings. Article I, § 10, cl.3 commits this consent power exclusively to Congress. In the International Bridge Act of 1972 ("IBA"), Congress purported to delegate the authority to approve international bridge agreements to the State

Department. 33 U.S.C. § 535a. That delegation occurred decades prior to the international agreement between the Michigan Governor and Canada that is the basis for this petition.

Further, Congress made this delegation without directing the State Department to conform to ***any*** standard in exercising the consent power that Congress delegated. The State Department expressly admitted in correspondence in this case that the IBA "does not set forth a particular standard" but "rather provides broad discretion to the Secretary of State in considering whether to approve an agreement between a U.S. state and the government of either Canada or Mexico." C.A. App. 635.

This delegation violated this Court's jurisprudence on the Constitution's separation of powers.

First, this Court has long held that Congress may not alter the basic structural roles the Constitution assigns to each of the branches of government. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 449 (1998); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239-40 (1995); *Bowsher v. Synar*, 478 U.S. 714, 719-27 (1986); *I.N.S. v. Chadha*, 462 U.S. 919, 954-59 (1983).

These cases stand for the proposition that when the Constitution assigns certain specific and clearly defined powers exclusively to one of the three branches of government, Congress may not reassign those powers to another branch, even in seemingly minor or reasonable ways.

Here, the Constitution assigns the power to give "consent" to an agreement or compact between a State and a foreign government exclusively to Congress. That consent power is a binary power: either consent

is given, or it is not given. There is no grey area involved in the exercise of this power. The Constitution assigns the power solely to Congress, and Congress may not delegate the power away. By holding that Congress can delegate the consent power to the State Department, the decision below contradicts this Court's separation of powers jurisprudence, including the cases cited above.

This Court has never held that any of the "consent" powers assigned to Congress or to the Senate can be delegated away. There is no meaningful difference between holding that these consent powers can be delegated and holding that Congress could delegate away the Senate's power to provide "consent" to the appointment of judges, other Executive appointments, or treaties. It is unthinkable that Congress can delegate away such consent powers, and this Court should grant the petition to make that clear.

Moreover, providing consent to a compact between a State and a foreign government converts that compact into ***federal law***. This Court has repeatedly held that while Congress may assign Executive agencies broad authority *to implement* federal law, it may not delegate its power to make federal law. Here, Congress did just that by delegating to the State Department the basic power to consent to compacts between States and foreign governments, and thereby to make federal law.

In this case and one prior decision, the D.C. Circuit has erroneously asserted that there is no difference between assigning the power to consent and delegating authority to implement statutory commands. That is not correct. This Court has made clear that Congress may not alter the basic structure

and express assignments of power set forth in the Constitution. This Court also has held that Congress may not delegate away its core legislative powers or alter its role in the legislative process. In the case of approving compacts between States and foreign governments, the Constitution expressly assigns Congress the role of exercising the binary power to consent or not to consent. That power cannot be delegated away without altering the Constitutional structure.

Second, even in areas where the Court has held that Congress may delegate broad authority to implement its statutory commands, it has made clear that Congress must do so *only* where it prescribes an intelligible principle that directs the agency to conform to a particular standard in the exercise of its authority. Here, by the State Department's own admission, Congress prescribed no such standard. The D.C. Circuit nonetheless held—without any support or precedent whatsoever—that the agency's general "mission" could supply that standard. This principle would, if upheld, eviscerate the last remaining limitation to delegation of Congress' powers—namely, that Congress must prescribe some standard to which the agency has been "directed to conform."

These questions significantly overlap with the questions presented in *Gundy v. United States*, No. 17-6086, which is scheduled for argument before this Court on October 2, 2018, while also presenting distinct questions related to Congress' power to delegate. Accordingly, the Court either should grant this petition to consider together with *Gundy*, or

should hold this case for consideration in light of its decision in *Gundy*.

STATEMENT OF THE CASE

A. Legal and Factual Background.

1. Under Article I, § 10, cl. 3 of the Constitution, "No State shall, without the Consent of Congress,…enter into any Agreement or Compact…with a foreign power." U.S. Const. Art. I, § 10, cl. 3.

In 1972, Congress enacted the International Bridge Act of 1972 ("IBA") (reprinted at App. 95a-98a). Under the IBA, Congress purported to grant Congress' consent to all future international bridge agreements between Canada or Mexico but provided that "[t]he effectiveness of such agreement shall be conditioned on its approval by the Secretary of State." 33 U.S.C. § 535a. The district court held this was a delegation of the "consent" power to the State Department, App. 37a-38a, and the State Department did not argue otherwise on appeal.

The IBA does not direct the Secretary to conform to any particular standard in deciding whether to approve or reject international bridge agreements. Instead, as the State Department confirmed in response to a letter from Petitioner inquiring what standard the State Department would apply in evaluating the agreement at issue in this case, the IBA "does not set forth a particular standard" but "rather provides broad discretion to the Secretary of State in considering whether to approve an agreement between a U.S. state and the government of either Canada or Mexico." C.A. App. 635.

Prior to Congress enacting the IBA, the State Department submitted to Congress a memorandum of law that addressed two constitutional questions. The first was whether the Constitution permits Congress to consent in advance to a compact before the terms of the Compact are known. H.R. Rep. 92-103, at 11 (1972).[1] The second is whether it would be "constitutional for Congress to delegate to the Department of State its power to consent to the conclusion of compacts." *Id.* The memorandum did not address the necessity for an intelligible principle for any delegation.

On the question of whether the consent power may be delegated at all, the State Department asserted that "doubt may exist as to whether Congress could constitutionally delegate its power generally to consent to compacts made by states and their subdivisions," but concluded that Congress could "condition such consent on review and approval by an administrative department." *Id.* at 14. It recognized, however, that examples of conditional consent to compacts were "rare," citing two examples, neither of which involved a situation where Congress gave unbounded power to an administrative agency to approve or disapprove an interstate or foreign compact. *Id.* at 15. Instead, one conditioned consent on approval by a certain number of the states. *Id.* The other provided for administrative review followed by a 60-day congressional review and approval period. *Id.*

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[1] The memorandum was appended to the House Committee Report.

2. The questions presented in this case address the State Department's consent, pursuant to authority delegated under the IBA, to an international agreement for the proposed Gordie Howe International Bridge ("GHIB"). If constructed, the GHIB would be the fourth international bridge between Michigan and Canada.

DIBC owns and operates the Ambassador Bridge, which spans the Detroit River to connect Detroit, Michigan with Windsor, Ontario. The bridge, first opened to traffic in 1929, is a historical landmark that carries more trade between the United States and Canada than any other port of entry between the two countries.

DIBC operates the bridge pursuant to a series of Special Acts passed by Congress in 1921, 1924, and 1926 that give DIBC the right to "maintain and operate" the Ambassador Bridge perpetually. Act of Mar. 4, 1921, 41 Stat. 1439 (reprinted at App. 99a); Act of Apr. 17, 1924, 43 Stat. 103; Act of May 13, 1926, 44 Stat. 535.

In accordance with this right, and in light of the fact that the Ambassador Bridge is now nearly 89 years old, DIBC and CTC have been trying to build a second span to the Ambassador Bridge for over a decade. The second span will modernize the bridge, provide better lane sizes for truck traffic, streamline the processing of commercial and non-commercial traffic through customs, and permit DIBC to perform repairs on the existing bridge without disrupting traffic flow. Petitioners have spent hundreds of millions of dollars pursing the regulatory approvals required and preparing for this second span.

In 2005, the State Department expressly recognized that the Special Acts of Congress authorized DIBC to build a second span to the Ambassador Bridge without the need for further approval from Congress or the State Department (but subject to other regulatory approvals from the Coast Guard, etc.). C.A. App. 182-83.

Congress has likewise taken steps to support the construction of the second span to the Ambassador Bridge. When Congress passed the IBA, a House Report stated that the IBA should not be construed to "adversely affect the rights of those operating bridges previously authorized by the Congress to repair, replace or enlarge existing bridges." H.R. Rep. 92-1303, at 3-4 (1972). In its 2005 letter to DIBC, the State Department cited this language as supporting its conclusion that DIBC had the statutory right under its franchise to build the proposed second span to the Ambassador Bridge. C.A. App. 182-83.

Additionally, between 1998 and 2010, Congress appropriated hundreds of millions of dollars for the Ambassador Bridge Gateway Project. C.A. App. 867 ¶ 132. This project created direct interstate highway connections to the Ambassador Bridge and its anticipated second span. *Id*. 866-67 ¶¶ 131-32. In making these appropriations, Congress explained that its expenditures were intended to "accommodate" and "protect plans" for the "second span of the Ambassador Bridge." H.R. Rep. No. 107-722, at 101 (2002).

Despite this congressional support, DIBC's efforts to build its second span have been stymied by bureaucratic obstacles in both the United States and Canada. For example, the U.S. Coast Guard delayed

DIBC for over a decade in its efforts to acquire a simple navigational permit—which should have been a ministerial act that simply confirmed that the second span (like the first) would not interfere with navigation over the Detroit River. In a previous appeal on that issue, the D.C. Circuit appeared to recognize in oral argument that the Coast Guard's delay had been unreasonable and excessive, C.A. App. 1328-29, and vacated a district court decision upholding the Coast Guard's actions, *Detroit Int'l Bridge Co. v. Gov't of Canada*, 2016 WL 10980929 (D.C. Cir. Apr. 4, 2016). In another example, after a decade of delays, Canada finally issued DIBC a permit for constructing its proposed second span, but conditioned that permit on DIBC destroying the existing Ambassador Bridge.[2] That would require destroying both an historical landmark and a functioning bridge, and would violate the conditions on which Michigan and the U.S. Government have approved DIBC's proposed second span—putting DIBC in a classic "catch-22" situation.[3]

2. Despite Petitioners' acknowledged rights and Congress' support, Canada and the Michigan Governor have sought to build a government-owned bridge (the GHIB referenced above) two miles from the Ambassador Bridge. Everyone agrees the construction of the GHIB would preclude DIBC from

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[2] Orders in Council, The Government of Canada, No. 2017-1112 at Arts. 22-24 (Aug. 31, 2017), *available at* http://orders-in-council.canada.ca/attachment.php?attach=35019&lang=en.

[3] Bridge Permit 2-16-9, U.S. Coast Guard ¶¶ 9-10 (Mar. 11, 2016), *available at* http://www.ambassadorbridge.com/!Downloads/1%20-%20USCG%20ABEP%20Bridge%20Permit%20-%20March.15.2016.pdf.

building its proposed second span. There is insufficient traffic to justify two new bridges. Indeed, traffic levels have been declining for the past two decades and are not projected to recover. C.A. App. 893-95 ¶¶ 219, 223. Moreover, the GHIB is projected to take 75% of the Ambassador Bridge's commercial traffic, which would make it economically irrational for DIBC to build its second span to the Ambassador Bridge. C.A. App. 834 ¶ 8; *id*. 211.

The State Department has recognized that only one of the two proposed new bridges can be built, stating in one of its documents that "the race is on" to see whether the GHIB or the Ambassador Bridge's second span will be built first. C.A. App. 187. As shown above, unelected agencies on both sides of the border have been trying to ensure that Canada wins this race, and DIBC loses.

The fact that a private American business owns the Ambassador Bridge has long been a source of acrimony for some Canadian officials. C.A. App. 859-64 ¶¶ 94-118. Indeed, in 1974, Canada attempted to stop DIBC from acquiring the bridge and only conceded its acquisition after over a decade of litigation was resolved through a 1990 settlement. *Id*. However, beginning around 2000, Canadian officials entered into a partnership with MDOT and FHWA to study traffic patterns near the Ambassador Bridge. C.A. App. 881-82 ¶¶181-82. Initially, this partnership was to study the benefits of the proposed second span and the Ambassador Bridge Gateway Project, which was supposed to include not only congressional expenditures to improve the highway connections on the U.S. side of the bridge (which happened at great expense to U.S. taxpayers) but also corresponding

expenditures by Canada to improve highway connections on the Canadian side of the bridge (which never happened). *Id*. Reneging on the Gateway Project, the new partnership decided to eliminate consideration of DIBC's proposed twin span altogether, and to recommend construction of a new, government-owned bridge to be located just two miles away. C.A. App. 882-91 ¶¶ 183, 196-210.

This government-owned bridge was initially referred to as the Detroit River International Crossing ("DRIC"), then as the New International Trade Crossing ("NITC"), and is now referred to as the "Gordie Howe International Bridge" ("GHIB"). The GHIB is projected to cost over $4.8 billion, roughly ten times the cost of DIBC's second span. The main reason DIBC's proposed second span is less expensive is that it will not require construction of new customs plazas and highway connections that the GHIB requires.

Canada and the Michigan Governor have pursued the GHIB despite the fact that traffic in the Detroit-Windsor corridor declined more than 50 percent between 1999 and 2010, C.A. App. 893-95 ¶¶219, 223, and has not recovered. Given this decline, and the fact the GHIB is projected to take up to 75 percent of the Ambassador Bridge's commercial traffic, there is no economic justification for building both bridges.

3. In furtherance of the GHIB, in June 2012, the Michigan Governor, Michigan Department of Transportation ("MDOT"), and Michigan Strategic Fund ("MSF") purported to enter an agreement on Michigan's behalf with Canada called the Crossing Agreement. C.A. App. 415, 674. MDOT and MSF signed the Crossing Agreement despite unambiguous

statutes enacted by the Michigan Legislature providing that those two agencies "shall not commit the state to any new contract related to the construction planning or construction of the Detroit River International Crossing or a renamed successor unless the legislature has enacted specific enabling legislation to allow for the construction of the Detroit River International Crossing or a renamed successor." 2011 Mich. Pub. Acts 63 § 384(1); 2012 Mich. Pub. Acts 236 § 402(1). The Michigan Legislature never enacted any such "specific enabling legislation."

The Crossing Agreement governs the planning, construction, and operation of the GHIB. C.A. App. 373; *Id*. 904-05 ¶¶ 253-55. The Crossing Agreement makes clear that Canada will control the entity that will control and operate the GHIB. *Id*. 905 ¶ 255.

4. On June 21, 2012, the Michigan Signatories submitted the Crossing Agreement for State Department approval pursuant to IBA Section 3. As part of its evaluation of the application, the State Department solicited public comment on the application. DIBC asked the State Department to explain "the criteria used by the Department of State in deciding whether to approve an agreement between a U.S. state and the government of Canada or Mexico under § 3 of the International Bridge Act of 1972." C.A. App. 635.

In response, on August 10, 2012, the State Department admitted the IBA "***does not set forth a particular standard*** but rather provides broad discretion to the Secretary of State in considering whether to approve an agreement between a U.S. state and the government of either Canada or

Mexico." C.A. App. 635 (emphasis added). It continued explaining that, while it "will consider matters of international relations and foreign affairs," these were just two "among other factors" it would consider. *Id.*

5. In an April 12, 2013 letter, the State Department informed the Michigan proponents of the GHIB that it approved the Crossing Agreement. C.A. App. 825. In approving the Crossing Agreement, the State Department gave no indication that it considered whether doing so would (a) render worthless the hundreds of millions of dollars Congress spent on the Ambassador Bridge Gateway Project, or (b) conclusively determine that the Canadian bridge would win "the race" against DIBC's twin span, thereby preventing DIBC from ever exercising its right to build that twin span.

B. Proceedings Below.

1. On May 29, 2013, DIBC filed its third amended complaint. Count One of this complaint challenged the constitutionality of the delegation contained in IBA section 3. After the parties filed and briefed dispositive motions, the District Court granted the federal defendants' motion to dismiss this count in an opinion dated September 30, 2015. App. 36a-40a.

With respect to Petitioners' constitutional challenge to Section 3 of the IBA, the District Court held that the provision was not an unconstitutional delegation of a Congressional power because it provided an intelligible principle of "managing U.S. foreign policy and foreign relations." App. 39a.

In reaching this conclusion, the district court ignored the State Department's admissions and

neither quoted nor cited any part of the statutory language of IBA Section 3 (or any other part of the IBA) in support of its conclusion. *See* App. 36a-40a. Instead, it relied on (a) the identity of the agency to which Congress delegated the power in question, App. 39a (explaining the Department "is guided by its traditional role in setting and managing U.S. foreign policy and foreign relations"); and (b) language in the memorandum the State Department submitted to Congress that is attached to the House report, App. 39a-40a.

2. On August 24, 2016, the District Court issued a Rule 54(b) final judgment with respect to the claims against the federal defendants (including the Count One constitutional challenge to IBA section 3), retaining claims against several Canadian defendants. C.A. App. 151-54.

C. The D.C. Circuit's Decision.

1. On September 22, 2016, Petitioners filed a notice of appeal to the U.S. Court of Appeals for the D.C. Circuit. The Court affirmed the District Court's dismissal of Petitioners' claims against the federal defendants. In rejecting Petitioners' constitutional challenge to the delegation in Section 3 of the IBA, the panel identified nothing in the statutory text that directed the State Department to conform to any particular standard in exercising its discretion. Instead, it found that the intelligible principle "derives from the narrow context of the IBA on international bridges and agreements with foreign nations, combined with the delegation of authority to the Secretary of State." According to the Court, "the intelligible principle is that **in view of the Secretary's mission** relating to foreign affairs, the

Secretary will review international bridge agreements for their potential impact on United States foreign policy." App. 14a (emphasis added).

Like the District Court, the panel did not address the State Department's prior admission that the statute contained no standard. *See* C.A. App. 635.

2. On January 5, 2018, Petitioners filed a petition for rehearing en banc or, in the alternative, for a panel rehearing. With respect to the panel's rejection of the constitutional challenge to Section 3 of the IBA, Petitioners argued that the D.C. Circuit (1) should overturn its decision in *Milk Industry Foundation v. Glickman*, 132 F.3d 1467 (D.C. Cir. 1998), which held that Congress can delegate the consent power set forth in Article I, § 10, cl. 3, and should hold that this consent power cannot be delegated at all, and/or (2) should correct the panel's ruling that an intelligible principle can be derived solely from an agency's identity.

3. On March 6, 2018, the Circuit Court denied the petition for rehearing *en banc* and issued an amended opinion that did not alter its delegation analysis. App. 90a-93a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant The Petition To Hold That Congress May Not Delegate To An Executive Agency The Power To "Consent" To Agreements Between A State And A Foreign Government.

The Constitution prohibits States from entering into any "Treaty, Alliance, or Confederation." U.S. Const. Art. I, § 10, cl. 1. It further provides that "No State shall, without the Consent of Congress,…enter

into any Agreement or Compact…with a foreign power." U.S. Const. Art. I, § 10, cl. 3. Thus, the Constitution assigns solely to Congress the power to provide or withhold its consent to any "Agreement or Compact" that a State may seek to enter into with a foreign government.

In Section 3 of the IBA, Congress delegated to the Secretary of State the power to determine whether or not to approve an agreement entered into by a State with either Canada or Mexico regarding any international bridge between that State and either Canada or Mexico. 33 U.S.C. § 535a ("The effectiveness of such agreement shall be conditioned on its approval by the Secretary of State.").

While the State Department initially argued that Section 3 should be interpreted not as a delegation but instead as providing Congress's "advance consent" to such agreements subject only to a condition, the District Court correctly rejected that argument, and the State Department did not renew the argument on appeal. App. 37a-39a. Section 3 of the IBA thus presents the question of whether the Constitution permits Congress to delegate to an Executive agency the power and responsibility that the Constitution assigns solely to Congress: whether or not to give consent to an "Agreement or Compact" between a State and a foreign government.

The Court should grant this petition to make clear that the Constitution does not permit Congress to delegate the consent power set forth in Article I, § 10, cl. 3.

First, this Court has repeatedly held that absent a constitutional amendment, Congress may not alter

the processes and structures that the Constitution sets forth in assigning specific powers and responsibilities to the different branches of government. *See Clinton*, 524 U.S. at 449 ("If there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution."); *Plaut*, 514 U.S. at 217-231 (Congress violates the separation of powers when it attempts to reopen final judgments through legislation); *Bowsher*, 478 U.S. at 721-732 (Congress may not vest executive power in an official that Congress has the power to remove); *Chadha*, 462 U.S. at 954-56 (Congress may not make law outside of the constitutionally specified process of bicameralism and presentment).

These cases make clear that Congress may not even make what may appear to be minor tweaks or adjustments to the express procedures and structural assignment of powers specifically set forth in the Constitution, no matter how narrow or reasonable they may seem.

Here, the Constitution is crystal clear: it is Congress alone that must decide whether to give its "consent" to an "Agreement or Compact" between a State and a foreign government. U.S. Const. Art. I, § 10, cl. 3. Congress may no more delegate that power to an agency than it may delegate away any of the Constitution's procedural requirements that were applied to strike down federal statutes in *Clinton*, *Chadha*, or *Bowsher*.

In addition, this Court has never held that Congress may delegate any of the "consent"

requirements that the Constitution expressly assigns to Congress or the Senate. It is inconceivable that these consent powers can be delegated. If they could, then Congress could delegate away the Senate's responsibility to "consent" to the appointment of federal judges, as well as other Presidential appointments. *See, e.g.*, U.S. Const. Art. II, § 2, cl. 2 (power of 2/3 of the Senate to "consent" to Treaties); *id*. (Senate power to "consent" to appointment of "Ambassadors, other public Ministers and Consuls, and all other Officers of the United States whose Appointments are not herein otherwise provided for"); *Freytag v. C.I.R.*, 501 U.S. 868, 884 (1991) ("Even with respect to 'inferior Officers,' the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law."); *Chadha*, 462 U.S. at 955 ("[W]hen the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action.").

The Constitution's assignment of this consent power exclusively to Congress is especially significant because the Constitution simultaneously provides that (a) it is categorically forbidden for States to enter a 'Treaty" with a foreign power (U.S. Const. Art. I, §10, cl. 1), and (b) it is also forbidden for a State to enter into an "Agreement or Compact" with a foreign power "without the consent of Congress." Thus, in deciding whether to approve an "Agreement or Compact," Congress must first decide that what the State has done with the foreign government is not a "Treaty." Congress cannot assign that constitutional responsibility away to an Executive agency.

The Court's prior nondelegation precedent confirms that Congress's power to consent to foreign compacts is nondelegable. The Court has repeatedly made clear that the text of Article I "permits no delegation of" the legislative powers set forth in Article I. *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 472 (2001) (citing *Loving v. United States*, 517 U.S. 748, 771 (1996)). Instead, as reflected in various cases addressing Congress' powers under Article I section 8, Congress may "delegate no more than the authority to make policies and rules that ***implement*** its statutes" by laying down "'by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Loving*, 517 U.S. at 771 (emphasis added) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); *see also id.* at 777 (Scalia, concurring in part and concurring in the judgment) ("Legislative power is nondelegable. Congress can no more 'delegate' some of its Article I power to the Executive than it could 'delegate' some to one of its committees."); *United States v. Grimaud*, 220 U.S. 506, 521 (1911) ("That Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution…[b]ut the authority to make administrative rules is not a delegation of legislative power.").

Unlike legislation that the Executive must enforce and "implement," there is nothing to "implement" with respect to the power to consent to an Agreement or Compact between a State and a foreign government. Thus, the delegation of this consent

power contradicts this Court's nondelegation holdings.

Further, when Congress consents to a compact between a State and a foreign government (or between States), that consent converts the compact into federal law. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (acknowledging that federal courts can enforce interstate compacts that have Congressional consent as such compacts are considered federal law); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (interstate agreements that fall outside the scope of the Compact power and do not require congressional consent only become state law, whereas congressional consent transforms compacts into federal law enforceable by federal courts).

By delegating the power of consent to approve particular compacts to an Executive agency, Congress is ***delegating the power to make federal law***. That violates the plain text of Article I and this Court's longstanding precedent. Congress cannot delegate away the procedures required to made federal law in the context of a foreign compact any more than it can in the context of a line item deletion to an otherwise approved spending law (*Clinton*) or to the revision of deportation decisions (*Chadha*). *See also Mistretta v. United States*, 488 U.S. 361, 425 (1989) (Scalia, J., dissenting) ("[L]egislative powers have never been thought delegable…. Senators and Members of the House may not send delegates to consider and vote upon bills in their place."). The decision below therefore contradicts this Court's clear holdings that Congress may not alter even in the most minor way the constitutionally-prescribed procedures for making federal law.

Notably, prior to enacting the IBA, the State Department submitted a memorandum of law that was then appended to the House Committee Report. H.R. Rep. 92-1303 (1972). That memo addressed, *inter alia*, whether it would be "constitutional for Congress to delegate to the Department of State its power to consent to the conclusion of compacts." *Id.* at 11. The State Department conceded that "**doubt may exist as to whether Congress could constitutionally delegate its power generally to consent to compacts made by states and their subdivisions**." *Id.* at 14. (emphasis added). However, it concluded that Congress could "condition such consent on review and approval by an administrative department" based on its general power to attach conditions to consent. *Id.*

Thus, when the IBA was passed, the State Department admitted that if Section 3 of the IBA were understood to be an actual delegation of power, then its constitutionality would be in "doubt." The district court held that Section 3 of the IBA was a delegation of power, App. 37a-38a, and the State Department on appeal decided not to challenge that reading. Thus, the State Department acceded to a reading of Section 3 of the IBA that it previously admitted made the provision constitutionally dubious.

Moreover, the State Department's memo failed to cite any precedents that could support the constitutionality of Section 3 of the IBA. It cited two prior acts, neither of which involved a delegation to an administrative agency of the power to approve or disapprove a compact. *Id.* at 15. Instead, one conditioned consent to an interstate compact on approval by a certain number of the states to the

compact. *Id*. The other provided for administrative review of a different interstate compact followed by a 60-day congressional review and approval period. *Id*. Neither delegated to an agency Congress's ultimate power to convert the compact into federal law through the power of consent.

Congress may assuredly consent to a compact on the condition that it be changed in some way or contingent upon the parties taking some action. What it may not do is delegate the power to consent – and thus the political judgment as to whether the agreement should go into effect as federal law – to an Executive agency. *Loving*, 517 U.S. at 758-59 ("The true distinction ... is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution…."). The IBA's delegation to the State Department of the power to approve a foreign compact is thus unprecedented and contrary to the prescribed procedures established by the Constitution.

The D.C. Circuit declined to address this issue *en banc*, and Petitioner did not raise the issue before the panel because the panel was bound by the D.C. Circuit's prior decision in *Milk Indus. Foundation v. Glickman*, 132 F.3d 1467, 1473-74 (D.C. Cir. 1998). In *Glickman*, the D.C. Circuit upheld Congress' decision to consent to an interstate milk Compact subject to a finding by the Department of Agriculture that the Compact was in the compelling public interest of the Compact region. 132 F.3d at 1474-75. The *Glickman* court based its reasoning on the premise that a "constitutional power implies a power of delegation of authority under it sufficient to effect

its purposes" and that there was no "compelling reason why the compact consent clause should be understood differently from Congress' other Article I powers for purposes of the delegation doctrine." *Id*. at 1474 (internal quotations and citations omitted).

The reasoning of *Glickman* would permit Congress to delegate away any of the "consent" powers the Constitution assigns to Congress or the Senate, including the Senate's power to consent to Presidential appointments. That cannot be correct.

As discussed above, and contrary to the reasoning of *Glickman* that the D.C. Circuit refused to revisit in this case, this Court has made clear that Congress may not delegate its Article I powers at all. Prior delegations that have been approved are delegations ***to implement*** the laws that Congress enacts pursuant to its Article I, § 8 powers. By contrast, in Article I, § 10, cl. 3, the power that has been delegated is the binary power to consent (or not to consent) to an agreement and thereby make it federal law—*i.e.*, the very power that may not be delegated. Accordingly, even where Congress provides an intelligible principle (unlike here where it provided none at all, *see* Section II *infra*), it may not delegate the power to approve the agreement to an agency because in doing so it is delegating the entirety of the Article I power in question, and thereby is altering the constitutionally prescribed procedure for how a Compact becomes federal law. This was true in *Glickman*, where the delegation at least occurred when Congress had some knowledge of the compact being proposed. *Glickman*, 132 F.3d at 1471-72. The constitutional violation is even starker here, where Congress delegated away its

consent power decades before the proposed compact in question even existed.

II. The Court Should Grant The Petition To Make Clear That The "Intelligible Principle" Required For Permissible Congressional Delegations Requires More Than Just Identifying The Agency To Which The Power Was Delegated.

A. IBA Section 3 Provides No "Intelligible Principle" To Which The State Department Has Been "Directed To Conform" In Exercising Congress' Power To Approve Or Disapprove International Bridge Agreements.

IBA Section 3 states: "The effectiveness of such agreement shall be conditioned on its approval by the Secretary of State." 33 U.S.C. § 535a. Nothing in this sentence or anywhere else in the statute lays "'down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (brackets in original)). Instead, the statute provides "literally no guidance for the exercise of discretion" regarding whether the State Department should consent to agreements between States and foreign countries. *Id*. at 474. It neither "state[s] whether or in what circumstances or under what conditions" the State Department is to approve agreements it has authority to approve nor "require[s] any finding by the [State Department] as a condition of [its] action." *Panama Refining v. Ryan*, 293 U.S. 388, 415 (1935).

The State Department itself admitted in writing that the IBA "does not set forth a particular standard but rather provides broad discretion…in considering whether to approve an agreement." C.A. App. 635. The panel never addressed this concession. Thus, even assuming that the Compact Clause consent power may be delegated, Section 3 is a quintessential (and conceded) example of what the nondelegation doctrine never permits—a delegation that does not direct the agency to conform to ***any*** standard in exercising Congress' power.

B. In Locating The "Intelligible Principle" In the Agency's "Mission," The Circuit Court Eliminates An Essential Constitutional Check On The Delegation Of Congress' Power

While this Court and the lower courts have consistently upheld the assignment of broad authority to implement statutes to executive agencies, they also have unfailingly held that there are limitations to that power. In particular, to ensure that Congress does not delegate its legislative powers, this Court has long held that "when Congress confers decision making authority on agencies," it "'must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is *directed to conform*.'" *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added)). This is true in the domestic context and in the context of international relations, where the Supreme Court has held that Congress may paint with a broader brush but cannot "grant the Executive totally unrestricted freedom of

choice" merely "because a statute deals with foreign relations." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

Review of the Circuit Court's decision, which derived an intelligible principle from the agency's mission, is important because its approach does away with a fundamental and longstanding essential check on Congressional delegations. Every federal agency, through the statutes creating them, has a "mission." *E.g.*, 22 U.S.C. § 2656 (Department of State); 7 U.S.C. § 2201 (Department of Agriculture); 31 U.S.C. § 321 (Department of the Treasury). If an agency need only have a mission to exercise delegated authority, then every delegation to an agency would be lawful. The Supreme Court's nondelegation decisions have long said otherwise and have further made clear that the nondelegation doctrine is a core element of the Constitution's separation of powers. *E.g.*, *Loving*, 517 U.S. at 758; *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist concurring).

The Circuit Court reached this conclusion by ignoring the *Whitman* test. As an initial matter, the Circuit Court quoted *Whitman* but omitted the critical words "to which the person or body authorized to [act] is directed to conform." 531 U.S. at 472. The omitted words are critical to applying the intelligible principle requirement. This is because they make clear that an intelligible principle must in some way constrain the agency's discretion in performing the delegated task—here, the approval or disapproval of agreements between States and foreign countries relating to international bridges.

The Circuit Court's failure to quote the entire standard previewed its failure to apply the standard

correctly. It points to nothing in the IBA that directs the State Department to conform to any particular standard in exercising its legislative authority. Instead, the Circuit Court defined the intelligible principle solely by reference to the agency's general "mission" relating to foreign affairs, without pointing to anything in the IBA or any other statute that directs the agency to conform to any particular standard in exercising the discretion to approve international bridge compacts. App. 13a ("the intelligible principle is that in view of the Secretary's mission related to foreign affairs, the Secretary will review international bridge agreements for their potential impact on United States foreign policy").

This approach is at odds with the requirements of *Whitman* as well those of various lower courts applying that precedent. This Court has explicitly recognized that the identity of the agency to which the power has been delegated is separate from the question of what standard constrains the exercise of its discretion. *Mistretta*, 488 U.S. at 372-73 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) (statute must at a minimum "'clearly delineate the general policy, the public agency which is to apply it, and the boundaries of this delegated authority"). Thus, the mere identity of the agency (here, the State Department) and the boundaries of its authority (here, international bridges) do not alone suffice.

It is true that, as the Circuit Court observes, in evaluating the constitutionality of a statutory delegation, the standard to which the agency has been directed to conform need not be interpreted in "isolation" from the remainder of the statute. App. 13a-14a (citing *Am. Power & Light Co. v. SEC*, 329

U.S. 90, 103 (1946)). Instead, it may be informed by such factors as the "statutory context" or the statutory "purpose." *Id*. But there must be some standard to which the agency has been "directed to conform." *Whitman*, 531 U.S. at 472. Simply identifying the agency to which power has been delegated does not meaningfully constrain the agency in the exercise of that delegated power.[4] Finding it sufficient would therefore eliminate any remaining limitation on Congress' power to delegate.

This case powerfully illustrates the point. The statute here gives the authority to approve or disapprove international bridge agreements to the State Department. It does not direct it to approve or disapprove agreements in particular circumstances or upon a particular finding. It does not direct it to conduct a particular type of analysis or limit the factors it may consider in making that evaluation. Instead, it delegates all discretion to the State Department as to how to exercise Congress' consent power. The State Department thus admitted what the

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[4] The cases cited by the Circuit Court reflect this basic principle. *Am. Power* addressed the Public Utility Holding Company Act, which stated that the SEC "shall take such steps…necessary to ensure that the corporate structure or continued existence of any company in a holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system." *Id*. at 97. Similarly, a separate decision cited by the D.C. Circuit construed the statute in light of a consistent administrative practice that in an earlier case had resulted in the invalidation of an earlier passport requirement as unauthorized by the statute. *See Zemel*, 381 U.S. at 16-18. In both cases, the statute meaningfully limited the agency's discretion.

language of the statute makes clear – *i.e.*, that the statute "does not set forth a particular standard."

Contrary to the Circuit Court's conclusion that the intelligible principle is somehow limited to examination of foreign policy, the State Department admitted that foreign relations—*i.e.*, its "mission"—was just one "among other factors" it would consider. C.A. App. 635; *see also* App. 2a-3a (explaining that Secretary's approval depended on conclusions beyond just furthering foreign relations such as traffic and jobs). Moreover, while referring loosely to the agency's mission, the D.C. Circuit identified nothing in ***any*** statute (including whatever statutes the Circuit Court viewed as defining the State Department's mission) that would constrain the Secretary's approval authority in any way.

The Circuit Court referenced the statute's purportedly "narrow context"—*i.e.*, international bridge agreements—and cited *Whitman* for the proposition that the level of specificity required in establishing the requisite intelligible principle can depend upon the breadth of the delegation. App. 13a. This is true but irrelevant given that the problem with the IBA is not the level of specificity of the intelligible principle, but rather the total absence of one. The Circuit Court did not conclude that this was a situation where *no* intelligible principle was required.

Nor could it have done so. This Court has expressly recognized the distinction between the boundaries of the authority conferred (here international bridge agreements) and the intelligible principle that is to guide the agency's exercise of its discretion in exercising the delegated authority. *Mistretta*, 488 U.S. at 372-73; *see also U.S. v. Nichols*,

784 F.3d at 676 (Gorsuch, dissenting from denial of rehearing *en banc*) (citing *Mistretta*) ("Delegation doctrine teaches that Congress must set *both* the 'boundaries' of the Executive's discretion *and* supply an 'intelligible principle' for the exercise of that discretion within those boundaries").[5] Thus, the Circuit Court's discussion of the scope of the State Department's authority as limited to international bridge agreements, App. 13a, cannot serve as a basis for the intelligible principle prescribing how and when the Department should exercise its approval authority.

The Circuit Court's rationale also is at odds with various lower court decisions that, while upholding various delegations, have properly analyzed whether statutory delegations contain standards to which the agency is "directed to conform." *See, e.g.*, *United States v. Anderson*, 686 F.3d 585, 590 (8th Cir. 2012) ("By instructing the Commission to consider the [several specific] factors when creating policy statements, Congress has laid down an intelligible principle to guide [the Commission's] work."); *United States v. Brown*, 364 F.3d 1266, 1274 (11th Cir. 2004) (upholding National Park Service regulations after finding that "Congress has stated the legislative

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[5] The only example *Whitman* cited for where no further intelligible principle at all is required was the exemption of a type of grain elevator used for storage or forwarding (known as a "country elevator") with a prescribed storage capacity specified by Congress from regulations governing grain elevators more generally. *See Whitman*, 531 U.S. at 475 (citing 42 U.S.C. § 7411(i)). In that instance, both the term itself and the prescribed storage capacity constrained the EPA administrator's discretion in setting out the scope of the exemption.

objective, has prescribed the method of achieving that objective, and has laid down standards to guide the Secretary's determination of the occasions for the exercise of his rule- and regulation-making authority.") (emphasis added); *S.C. Med. Ass'n v. Thompson*, 327 F.3d 346, 351 (4th Cir. 2003) (upholding HHS's health privacy regulations because, inter alia, Congress established a general policy to guide the regulations); *United States v. Touby*, 909 F.2d 759, 767 (3d Cir. 1990) (finding that the Controlled Substances Act was a constitutional delegation to the Attorney General because it "require[d] the Attorney General to consider three specified factors" in determining drug scheduling), *aff'd*, 500 U.S. 160 (1991).

Review is necessary to make clear that the requirement of a statutory standard to which the agency is "directed to conform" is an indispensable part of a constitutional delegation.

This case also presents an appropriate vehicle to address the concern of various courts and commentators that the nondelegation doctrine generally has become too unmoored from the original conception of separation of powers. *See Whitman*, 531 U.S. at 486-87 (Thomas, concurring) (stating that it may be time "to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers"); *see also United States v. Nichols*, 784 F.3d 666 (10th Cir. 2014) (Gorsuch, dissenting from denial of rehearing en banc) (addressing the absence of any intelligible principle in SORNA and citing various commentators expressing concern over the absence of

limits on congressional delegation).[6] Allowing the agency mission to serve as the intelligible principle is effectively the *reductio ad absurdum* of a doctrine that has evolved in such a way that courts struggle to find statutory constraint even in statutes that contain no real limitation at all.

As Chief Justice Rehnquist stated in his concurrence in *Industrial Union*, 448 U.S. at 671-88, in the course of expressing his view that §6(b)(5) of OSHA was an unconstitutional delegation:

> "the nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion. Third, and

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[6] *See also, e.g.*, *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008) (Brown, dissenting) (concluding in evaluating the constitutionality of a provision of the Indian Reorganization Act that the "majority's willingness to imagine bounds on delegated authority goes so far as to render the principle nugatory"); *see also South Dakota v. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded on other grounds*, 519 U.S. 919 (1996) (striking down the same statute until the Supreme Court vacated the judgment based upon the Government's reversal of its prior position that the policy was not subject to judicial review); *South Dakota v. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005) (later decision of same court upholding the constitutionality of the same statute).

> derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."

Id. at 685-86 (internal citations omitted). Each of these three functions is undermined by the decision below, which holds that the nondelegation doctrine allows the identity of the delegee to serve as the intelligible principle.

III. The Court Should Consider This Case With *Gundy v. United States* Or, Alternatively, Hold This Case Pending This Court's Decision In *Gundy*.

In *Gundy v. United States*, No. 17-6086, the Court granted a petition for writ of certiorari for the question of "Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) (formerly 42 U.S.C. § 16913(d)) violates the constitutional nondelegation doctrine." *Gundy v. United States*, 138 S. Ct. 1260 (Mem) (Mar. 5, 2018). That case is scheduled for oral argument on October 2, 2018.

Gundy raises questions that are similar to those in this case. First, like Petitioners here, the petitioner in Gundy argues that there are powers that cannot be delegated even where the statute prescribes an intelligible principle. Specifically, Gundy argues that defining the scope of the elements of a criminal offense is a legislative power that cannot be delegated. Brief for Petitioner, *Gundy v. United States*, at 23-25 (May 25, 2018). Petitioner here argues that Congress cannot delegate its consent power under Article I, § 10, cl. 3. *See* Part I, *supra.*

Moreover, with respect to the intelligible principle, both cases involve delegations with no Congressional guidance. The relevant part of SORNA provides that "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter [SORNA] to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders…." 34 U.S.C. § 20913(d). IBA Section 3 states that "The effectiveness of such agreement[s] shall be conditioned on its approval by the Secretary of State." 33 U.S.C. § 535a. Neither delegation contains an intelligible principle. Both therefore raise important questions regarding how, and to what extent, Congress must specify the standards to which the agency is "directed to conform." *Whitman*, 531 U.S. at 472.

By the same token, this case raises aspects of the nondelegation doctrine that, while overlapping with those presented in *Gundy*, are distinct. That makes this consideration of the two cases in the same term an appropriate combined vehicle for addressing the doctrine. The Court should therefore consider this case along with its consideration of the *Gundy* case.

In the alternative, given the overlap in issues, the Court should hold this case pending resolution of *Gundy*, for possible remand to the D.C. Circuit for consideration in light of the Court's decision in *Gundy*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAMISH P.M. HUME
Counsel of Record
SAMUEL C. KAPLAN
JAMES A. KRAEHENBUEHL
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue NW
Washington, DC 20005
(202) 237-2727
hhume@bsfllp.com
skaplan@bsfllp.com
jkraehenbuehl@bsfllp.com

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