No. 18-247

In the Supreme Court of the United States

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

v.

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

On Petition for a Writ of Certiorari to the
United States District Court
for the Southern District of California

BRIEF OF NINE MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GRANT D. FAIRBAIRN*
LORA M. FRIEDEMANN
NIKOLA L. DATZOV
HALEY L. WALLER PITTS
BENJAMIN R. TOZER
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7000
gfairbairn@fredlaw.com
Counsel for Amici Curiae
*Counsel of Record

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are nine members of Congress serving on numerous committees and representing districts in states that border Mexico. *Amici* Members are Filemon Vela (Border and Maritime Security Subcommittee Ranking Member), Bennie G. Thompson (Homeland Security Committee Ranking Member), Eliot L. Engel (Foreign Affairs Committee Ranking Member), Adam Smith (Armed Services Committee Ranking Member), Raúl M. Grijalva (Natural Resources Committee Ranking Member) Sheila Jackson-Lee of Texas, Beto O'Rourke of Texas, Juan Vargas of California, and Vicente Gonzalez of Texas.

Amici are uniquely situated to apprise the Court of the importance of the issues presented to the proper exercise of their constitutionally defined legislative responsibilities. The use of the waiver authority provided under § 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), as amended, by the Secretary of the Department of Homeland Security ("Secretary") greatly undermines—and manifests an

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[1] Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* state that timely notice of intent to file the brief was given to and received by all counsel of record. The parties have consented to this filing. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

utter lack of respect for—many laws that the *amici curiae* (and members of prior Congresses) drafted, debated and defended, and that have been enacted by the House of Representatives and Senate and signed by the President. Combining the features of a sweeping delegated waiver provision with an elimination of judicial review of statutory compliance, § 102 places in the hands of an unelected Executive Branch official the power to undo the work of Congress, without any commensurate obligation to justify, or defend, that decision. That transgresses the procedure set forth in Article I for making law and is a direct affront to the institution of Congress.

Additionally, *amici* Members who represent districts in states that border Mexico have a keen interest in seeing that laws are executed prudently, in a manner that respects the statutes and regulations that protect their communities. These Members are also particularly well situated to appreciate the important competing policies reflected in the Secure Fence Act, the REAL ID Act, and the dozens of laws critical to protecting the residents, environment, and historical and cultural sites in the border region.

STATEMENT

Delegations of waiver authority are a useful legislative tool that Congress has employed to assist in efficient and effective governance. But such delegations also present dangers of violating the Article I scheme for law-making, which operates to

ensure a structural check on the concentration of power in one branch of Government.

The delegation of waiver authority in § 102 of the IIRIRA is unprecedented. Section 102 is a statutory waiver provision that was enacted as a rider to an unrelated emergency wartime appropriations bill. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231, § 102 (May 11, 2005) (codified at 8 U.S.C. § 1103 note) ("Section 102"). It broadly confers on the Secretary, an unelected Executive Branch official, "the authority to waive *all legal requirements* such Secretary, *in such Secretary's sole discretion*, determines necessary to ensure expeditious construction of the barriers and roads under this section." *Ibid.* (emphasis added). The term "all legal requirements" is sweeping and presumably includes all forms of state and local law, including state constitutions, statutes, regulations, rules, and common law. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 322-26 (2008). It also includes all forms of federal law, including treaties, statutes, interstate compacts, regulations, court rules, and federal common law. Judicial review is limited to constitutional claims, and an appeal from a district court's determination may only be raised by petition for a writ of certiorari. § 102(c)(2)(C).

The Secretary issued two separate waiver decisions on August 2, 2017 and September 12, 2017 invoking § 102 to waive "all federal, state, or other laws, regulations and legal requirements of, deriving

from, or related to the subject of" over 30 laws ("San Diego and Calexico Waivers"). *See* Pet. App. 124a–131a and 117a–123a. The waived laws include the Endangered Species Act, Safe Drinking Water Act, Administrative Procedure Act, Native American Graves Protection and Repatriation Act, and the Religious Freedom Restoration Act. *Id.* Both Notices reserve the authority to "make further waivers from time to time as I may determine to be necessary under section 102 of the IIRIRA, as amended." *Id.* Congress had no opportunity to debate the San Diego and Calexico Waivers.

SUMMARY OF ARGUMENT

Certiorari is warranted because § 102 undermines the separation of powers, principles of federalism, and the checks and balances established by the Constitution in an unprecedented manner. Section 102 places in the hands of an unelected Executive Branch official sweeping power to undo the work of Congress by, in effect, repealing or amending *any* federal, state, or tribal law—without any required explanation or justification. The Secretary does not have expertise to weigh the competing policies reflected in the various laws being waived against the need to build border barriers. Nor does § 102 give the Secretary sufficient criteria to weigh those competing interests. Such broad powers stray far from this Court's approval of prior congressional delegations of authority and violate the procedure set forth in Article I for the enactment of law. This is especially true because, as held by the district court, § 102

immunizes the Secretary's waiver decisions from any meaningful judicial or administrative review.

Amici, as members of Congress, request that this Court grant certiorari to resolve the important constitutional issues presented, to correct the district court's flawed decision, and to provide greater guidance concerning the meaning of Article I in this setting. While Congress independently considers the constitutionality of its own enactments, Congress legislates with an eye toward this Court's interpretation of constitutional standards. Where confusion exists and this Court nonetheless stays its hand, Congress legislates with uncertainty.

ARGUMENT

I. Section 102's Unprecedented Scope Undermines the Separation of Powers and Checks and Balances Established by the Constitution.

The glaring flaws in § 102 are structural, irremediable and antithetical to our tripartite government. *See Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the Branches seek to transgress the separation of powers."); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) ("[I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch….").

A. Section 102 Delegates an Unprecedented Scope of Authority to the Secretary to Waive Any Federal, State, or Tribal Law.

Section 102's delegation of waiver authority is unprecedented in scope. As one of the undersigned *amici curiae* observed during floor debate of § 102:

> To my knowledge, a waiver this broad is unprecedented. It would waive all laws, including laws protecting civil rights; laws protecting the health and safety of workers; laws, such as the Davis-Bacon Act, which are intended to ensure that construction workers on federally-funded projects are paid the prevailing wage; environmental laws; and laws respecting sacred burial grounds. It is so broad that it would not just apply to the San Diego border fence that is the underlying reason for this provision. It would apply to any other barrier or fence that may come about in the future.

151 Cong. Rec. H459 (daily ed. Feb. 9, 2005) (statement of U.S. Representative Jackson-Lee). A report by the nonpartisan Congressional Research Service on the use of waivers and regulation of judicial review in legislation confirmed the truth of Ms. Jackson-Lee's observation that § 102 is "unprecedented." *See* Memorandum from Stephen R. Viña & Todd Tatelman, Legislative Attorneys, Am. Law Division, Cong. Research Serv. on Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2 (Feb. 9, 2005)

(reaching that conclusion based on "a review of federal law, primarily through electronic database searches and consultations with various CRS experts"); *see also* 151 Cong. Rec. H554 (daily ed. Feb. 10, 2005) (statement of U.S. Representative Farr) ("Mr. Chairman, it has never been done before, waiving all labor laws, all contract laws, all small business laws, all laws relating to sacred places. It is a broad sweep, just a total repeal of all of those laws or a waiver of all those laws.").

Section 102 places *no restrictions* on the laws that can be waived. It does not include only certain requirements or certain statutes, but, rather, allows for the waiver of any laws. Many of the "waived" statutes in this case are pillars of U.S. environmental and historical and cultural preservation policy. Every one of the waived statutes was passed by both houses of Congress and signed into law by the President. Thus, each is the product of the "'single, finely wrought and exhaustively considered, procedure'" prescribed by the Constitution for enacting statutes. *Clinton*, 524 U.S. at 439-40 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

Waiver authority granted by statute is usually limited in scope and is often vested in an expert administrative agency that is charged with administering the underlying statute. Here, in contrast, § 102 grants to the Secretary far-reaching power to waive an *unlimited* set of federal statutes, treaties, regulations, and court rules which the Secretary has no role in administering and as to

which she has no expertise. According to the district court below, it does not require the Secretary to even consult with the agencies that have the relevant expertise or authority to administer the statute prior to issuing a waiver. Section 102 also grants the Secretary sweeping authority to waive state laws in all of their myriad forms. The unprecedented scope of Congress's delegation in § 102 provides a particular need for the Court to grant certiorari in this case, so that it can address the harms wrought by such an overbroad delegation.

B. The Waiver Provisions in Section 102 Are Atypical.

Waiver provisions are useful tools in the legislative toolbox. As this Court has recognized, executive waivers of statutory requirements have been used many times. *See Clinton*, 524 U.S. at 444-45 (citing statutes and interpreting decisions); *see also* Memorandum from Stephen R. Viña & Todd Tatelman, Legislative Attorneys, Am. Law Division, Cong. Research Serv. on Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 4-5 nn. 8-9 (Feb. 9, 2005) (listing examples). The need for their continued use in the future underscores the importance of this Court's review. *Cf. Chadha*, 462 U.S. at 944 ("[O]ur inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes.").

For example, waivers of the National Environmental Policy Act's environmental review

requirements are commonplace in the context of federal disaster relief efforts under provisions of the Stafford Act. *See* Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (May 22, 1974) (codified at 42 U.S.C. §§ 5121-5206, as amended) ("Stafford Act"). Congress will undoubtedly continue to include waivers such as this in legislation with the expectation that the Executive Branch will employ them sensibly. The Stafford Act reflects an appropriately restricted congressional delegation of its power to Executive Branch officials who possess the relevant expertise to make the waiver decisions in question. Thus, for example, § 5170a applies only "[i]n a[] major disaster" (§ 5170a); is limited to efforts to restore a facility to its pre-disaster condition (§ 5159); and applies only to an enumerated list of specified activities (§ 5170a(1)-(5)). In addition, waivers under the Stafford Act are subject to judicial review under the Administrative Procedure Act (APA). *See Hayne Blvd. Camps Pres. Ass'n v. Julich*, 143 F. Supp. 2d 628, 633 (E.D. La. 2001) (citing 5 U.S.C. § 706).

Section 102, by contrast, permits a single official in the Executive Branch to waive application of every imaginable federal statute, from environmental protection to child labor laws to transportation safety (plus, of course, the APA itself). Exactly where to draw the line between a waiver provision like that in the Stafford Act—which *amici* believe restricts Executive Branch discretion enough to meet the constitutional standards for delegated authority and separation of powers—and

an unconstitutional waiver provision is not entirely clear under this Court's decisions. Further guidance from this Court is needed by both the litigants in this matter, and by Congress. This is especially so where, as here, meaningful judicial review and normal appellate review are themselves statutorily restricted.

C. Insulating the Secretary's Unfettered Discretion from Judicial Review Poses a Danger of Abuse.

The merits of the Secretary's waiver decisions made under the sweeping authority granted by § 102 appear to be entirely immune from challenge. Under the district court's view, the Secretary's waiver decisions are not subject to administrative review. *See In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1130 (S.D. Cal. 2018) (holding that actions taken pursuant to § 102(c) are not subject to APA review). Nor can the basis of any waiver decision be challenged in state or federal court; the only cause of action or claim that may be brought in federal court is one "alleging a violation of the Constitution of the United States." *See* § 102(c)(2)(A). As a non-elected official, the Secretary's waiver decisions also cannot be the basis for ouster by a vote of the people—immunizing the Secretary not only from any legal recourse but also from public censure.

Such comprehensive immunity vests the Secretary with great comfort that, in exercising her sweeping power, her waiver decisions will stand

unquestioned. The same level of comfort does not apply to the people, states, tribes, and agencies impacted by the Secretary's waiver decisions. "In this world, with great power there must also come—great responsibility." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2415 (2015) (quoting S. Lee and S. Ditko, Amazing Fantasy No. 15: "Spider–Man," p. 13 (1962)). As interpreted by the district court, the Secretary remains accountable to no one. Such monarch-like powers are entirely antithetical to our democratic republic, the separation of powers, and Congress' function to legislate pursuant to the will of the people. *See The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands…may justly be pronounced the very definition of tyranny.").

The Secretary's decision-making is not only challenge-proof, it requires no explanation or analysis. Although the statute authorizes the Secretary to waive "legal requirements" *only* when "necessary to ensure expeditious construction," § 102(c)(1), the district court adopted the Defendants' argument that "nothing in section 102(c) requires that the Secretaries explain the factual basis of their Waiver Determinations." *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d at 1127-28. Seemingly, then, nothing requires the Secretary to (1) explain why she concluded the waiver is necessary; (2) provide any evidence in support of her conclusion; or (3) consider the impact of waiving any particular law

to any property, people, or geographic area.[2] Instead, as with the pronouncement of an authoritarian decree, the Secretary can swiftly undo a limitlessness number of vigorously debated, carefully crafted laws enacted by representatives of the people.

Section 102's delegation of power raises significant constitutional concerns not only because of its unprecedented scope but also because it allows for unfettered discretion immune from scrutiny. There are no means to understand the basis for the Secretary's waiver decisions, let alone ensure they remain true to the intent of Congress. Such unfettered discretion is rife with potential for abuse and violates the checks and balances set forth in the Constitution. The recent waivers by the Secretary in 2017 raise anew the constitutional problems inherent in § 102. The Secretary's waiver decisions "are not the product of the 'finely wrought' procedure that the Framers designed" for the enactment of laws. *Clinton*, 524 U.S. at 440. As the district court recounted, "the prerogative to make policy judgment…[is] entrusted to our Nation's elected leaders, who can be thrown out of office if the people

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[2] Although § 102(b)(1)(C) requires the Secretary to "consult with" various stakeholders "to minimize the impact" of any waiver to affected "communities and residents," the lack of any enforcement or challenge to the Secretary's waiver decisions permits her to ignore Congress' directive prior to making the determination. As the district court recognized, the Secretary "did not consult with the City of Calexico prior to the Waiver Determination." *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d at 1125.

disagree with them." *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d at 1102-03 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012)).

Section 102's unprecedented delegation of authority to a single Executive Branch official undermines the separation of powers and checks and balances established by the Constitution. The district court's decision that § 102 is constitutional is an abrupt departure from—and significant expansion of—this Court's separation of powers and non-delegation cases. As the only appellate court with authority to review, the Court should grant certiorari to address these important questions.

II. Section 102(c) Fails to Provide an "Intelligible Principle" for the Secretary to Wield Such an Immense Delegation of Authority.

In § 102(c), Congress has attempted to authorize the Secretary to waive "all legal requirements" to pursue the construction of border walls along the United States border. This blanket waiver from Congress to the Executive Branch violates the non-delegation doctrine and separation of powers. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Pursuant to Article I, Section I of the Constitution, Congress—not the Executive Branch—is vested with all legislative powers. Although Congress may obtain the assistance of the Executive Branch by delegating

some of its authority to the Executive Branch, Congress must provide "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.* at 372. Under this standard, a statute delegating authority is constitutional only if it "clearly delineates (1) the general policy, (2) the public agency which is to apply it, and (3) the boundaries of the delegated authority." *Id.* at 372-73 (internal quotations omitted). The blanket waiver in this case fails to meet those requirements and gives the Secretary authority to waive *any* legal requirement, regardless of its subject matter or significance.

With respect to the third "intelligible principle" requirement—that the statute clearly delineate the boundaries of the delegated authority—the district court held that § 102(c)'s statement that the Secretary may waive laws that are "necessary to ensure expeditious construction of the barriers and roads" was sufficient. *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d at 1134. *Amici* do not agree with this assessment, and even the district court acknowledged that § 102(c) "contains considerably fewer details than other challenged statutes." *Id.* Congress provided no guidance to the Secretary regarding when a waiver would be "necessary to ensure expeditious construction," as is evidenced by the broad and seemingly unlimited collection of statutes waived in both the San Diego and Calexico Waivers.

In addition, the district court's ruling ignored a key component of the intelligible principle standard:

the availability of judicial review to determine compliance with the constraining principle set forth in the statute. Section 102(c)'s limit on judicial review prohibits a court from "ascertain[ing] whether the will of Congress has been obeyed." *Touby v. United States*, 500 U.S. 160, 168-69 (1991) (internal quotations omitted). A critical question, then, is not only whether § 102(c) provides an "intelligible principle" (it does not), but also whether the exercise of that delegated authority may be reviewed for compliance with any such intelligible principle. In § 102(c), by both delegating immense and broad authority to the Secretary and also functionally limiting judicial review of the Secretary's compliance with that unprecedented level of delegation, the provision goes too far. *Amici*, as members of Congress, now ask this Court to exercise its review, and provide meaningful guidance as to what waiver provisions are constitutionally acceptable for Congress' future enactments.

The district court also failed to appreciate another rationale behind the "intelligible principle" standard—namely, that an overbroad delegation thwarts the will of the people. It gives an administrative official who is not answerable to the electorate the authority to make difficult decisions that Congress and the President might wish to avoid. Here, the waivers are actions that could be politically difficult to achieve through the Article I legislative process; there is no question that there is currently immense public scrutiny surrounding issues of immigration and border protection. The Constitution requires that Congress make these

decisions, not an unelected, unaccountable administrative official. "Failure of the political will does not justify unconstitutional remedies." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring).

In concluding that § 102(c) provides the Secretary with an "intelligible principle," the district court noted that "Congress can confer more discretion to an entity when that entity already has significant, independent authority over the subject matter." *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d at 1135; *see also id.* at 1132 ("[W]hile courts have recognized limits on Congress' authority to delegate its legislative power, those limits are less rigid where the entity itself possesses independent authority over the subject matter.") (internal quotations and citations omitted)). The district court then concluded that, because the Secretary has subject matter expertise with respect to immigration and border protection, § 102(c) was valid.

This misses the mark. Section 102(c)'s waiver authority gives the Secretary the authority to waive not just statutes that may relate to immigration and border protection, but *all* legal requirements. There can be no dispute that the Secretary lacks subject matter expertise or authority over the broad swath of statutes included in the waivers. For example, the Secretary certainly does not have expertise regarding the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 94 Stat. 2767, as amended, 42 U.S.C. §§ 9601-9675 ("CERCLA"), which is otherwise known as Superfund and provides federal authority to respond

directly to releases or threatened releases of hazardous substances that could endanger public health and the environment. Under the district court's view, § 102(c) allows the Secretary to waive CERCLA's requirements related to, for example, hazardous waste sites without any expertise regarding the potential effect of doing so and how Congress' stated interest in enforcing CERCLA may balance against "expeditious construction" of a border wall segment. Similarly, the Secretary does not have expertise regarding the subject matter of the Farmland Protection Policy Act, the purpose of which is to preserve farmland and includes provisions for restoring, maintaining, and improving farmland. Likewise, the Secretary does not have expertise regarding the numerous statutes waived regarding important cultural resources, such as the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, or the National Historic Preservation Act.

Without subject matter expertise in these areas, the Secretary cannot know the potential impact of a broad-brush waiver of these statutes (and indeed, could not even know whether the waiver is, in fact, necessary to ensure "expeditious construction"). Nonetheless, the Secretary has acted under the authority purportedly delegated by § 102(c) and waived these statutes and countless other important statutory and regulatory regimes about which the Secretary does not have subject matter expertise. These statutes, too, were enacted by Congress and do not, on their face, indicate that they may be

waived by the Secretary for the "expeditious construction" of a border wall. Section 102(c)'s apparent authorization to the Secretary to contravene the will of Congress (and, indeed, state, local, and tribal lawmakers, as well) in all of these other subject matters is an overbroad delegation in violation of the Constitution. The Court should grant certiorari so that it can address this overbroad delegation and provide Congress with guidance.

III. As the Only Appellate Court with Authority to Review, the Court Should Address These Important Constitutional Questions.

Section 102 provides that an "order of the district court may be reviewed *only* upon petition for a writ of certiorari to the Supreme Court of the United States." § 102(c)(2)(C). As such, the important constitutional questions raised by the broad waiver under § 102 will escape appellate review unless this Court grants certiorari. The unprecedented and sweeping waiver authority under § 102 undoubtedly raises "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." S. Ct. R. 10(c).

As the district court's 101-page decision illustrates, there is no bright-line rule for determining whether Congress' delegation of power is constitutional. The issue presents a complex legal question. It has been the role of this Court to develop the law and pronounce the limits of legislative actions that violate the Constitution. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137 (1803). The

grant of authority delegated to the Executive under § 102 tests the limits of the Constitution in an unprecedented manner, and the district court's decision below authorizes a scope of delegation beyond any previously authorized by this Court. Indeed, the district court itself acknowledged that § 102(c) "contains considerably fewer details than other challenged statutes." *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d at 1134. Unless this Court grants certiorari, the district court's decision will stand, and no appellate court jurisprudence will develop for future district courts facing challenges to § 102. While the Court traditionally stands as the *final* "guardian of the Constitution," *see The Federalist No. 78* (Alexander Hamilton), under § 102's mandate, the Court here stands as the *only* appellate guardian. The Court should not permit such a significant expansion of a critically important doctrine without further scrutiny from *any* appellate court.

Nor can the impact of the district court's decision be understated. Congress' delegation to a single unelected member of the Executive Branch the awesome power to amend or repeal an unlimited number of federal, state, and tribal laws undermines interwoven policies for the separation of powers, federalism, and tribal sovereignty that have been fundamental pillars of our democratic republic. Such questions of constitutional magnitude are inherently the province of this Court and should be answered by this Court—particularly because no other appellate review is available.

The questions presented by the petition are of such weighty constitutional moment, and are so cleanly presented on the record below, that the case is a perfect vehicle for this Court's review. The decision by the sole district judge below is incorrect and further appellate review is needed. Only by granting certiorari can this Court ensure that its co-equal branches of government have the guidance they need to discharge their functions in ways that respect the constitutional rights of all individuals and organizations in the United States, which *amici* are charged with protecting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GRANT D. FAIRBAIRN*
LORA M. FRIEDEMANN
NIKOLA L. DATZOV
HALEY L. WALLER PITTS
BENJAMIN R. TOZER
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7000
gfairbairn@fredlaw.com

*Counsel of Record

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