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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The government does not disagree that the constitutionality of the waiver provision in § 102(c) is an important and recurring issue. It accepts that the provision purports to give the Secretary of Homeland Security the power to waive *any* federal, state, or local laws that might apply to the construction of border barriers. It does not dispute that Section 102(c) authorizes the Secretary to determine the applicability of laws the Secretary has no expertise in enforcing, including environmental protection and wildlife management laws, worker safety and procurement integrity laws, and religious freedom and historic preservation laws, as well as laws governing the Secretary's own conduct, like federal contracting laws. And it cannot deny that this Court is the only arbiter that can resolve the critical issues presented here in a binding and conclusive manner, given that § 102(c) strips all other appellate courts of jurisdiction.

But, says the government, § 102(c)'s extraordinary and unprecedented delegation to an unelected cabinet official to decide which laws are in and which are out need not concern this Court. Moreover, in the government's telling, Congress' preclusion of normal court of appeals review makes this a weaker, not stronger, case for this Court's review.

The government is wrong. By any measure, the unfettered power this statute confers on the Secretary is staggering. And border-related litigation involving the Secretary's waiver authority proliferates, with no binding judicial decisions guiding district courts. As the amicus briefs in support of certiorari confirm, this

Court's guidance is urgently needed to pass upon the validity of this unusual and highly consequential Act of Congress.

I. Section 102(c)'s Sweeping Waiver Authority Violates The Separation Of Powers.

The government asks the Court to treat § 102(c) as a commonplace statute instructing the Secretary to carry out a legislative choice made by Congress. It is anything but. Section 102(c) shifts legislative power to an unelected cabinet official; provides the official with no meaningful guidance for exercising that power, which effectively includes the power to amend existing law; and cuts off judicial oversight of the exercise of that power. Each move threatens the separation of powers; together, they push this scheme past constitutional limits.

A. ***Nondelegation.*** The government acknowledges that the Constitution "'permits no delegation of [legislative] powers,'" but maintains that § 102(c) is just a means for Congress to "obtain[] the assistance of its coordinate Branches." Gov't Br. 13 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001), and *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). The government thus defends § 102(c) by implying that *Congress* made the policy judgment that otherwise applicable laws should not apply to the construction of border barriers and the Secretary is merely tasked with carrying out that judgment. In enacting § 102(c), however, Congress did *not* say, "All legal requirements that would otherwise impede expeditious construction of border barriers are hereby waived." Instead, Congress left the choice of which

laws apply to the Secretary's construction projects to the Secretary herself. That is a classic example of a "delegation of power to make the law, which necessarily involves a discretion as to what it shall be." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) (citation omitted). This "cannot be done." *Id.* at 694. Congress alone is responsible for making the law.

1. The government cannot identify any valid intelligible principle in § 102. The government points to the capacious standards "necessary to install additional physical barriers and roads" and "necessary to ensure expeditious construction." Gov't Br. 16, 17. But those broad phrases do not delineate the "general policy" or "boundaries of th[e] delegated authority" that must guide the Secretary's discretion. *Mistretta*, 488 U.S. at 373. And guidance from Congress is especially important here, because § 102's expansive waiver power is outside the Secretary's "traditional authority." *Loving v. United States*, 517 U.S. 748, 772 (1996).

In authorizing the Secretary to waive "all legal requirements" "necessary" to construct physical barriers on the border, Congress set no boundaries on the Secretary's discretion. It offered her no specified laws that might be waived to achieve her purpose, not even as nonexclusive examples. It provided no factors she might balance; imposed no limitations on the kinds of legal requirements that could be waived; and suggested no inputs—technical criteria, expert guidance, fact-finding hearings, or anything else—to inform her determination. And the word "necessary," on which the government hangs its entire argument that § 102(c) includes an intelligible principle, is so broad

as to be essentially meaningless. "Necessary" "additional physical barriers and roads" is no small sphere. The southern border with Mexico is nearly 2,000 miles long, while the border with Canada is another 5,500-plus miles. And the projects the Secretary believes are encompassed within the directive of "install[ing] additional barriers and roads" include, among other things, building prototypes, making repairs, and replacing existing fencing. *See* Pet. App. 34a-64a (rejecting Petitioners' argument that § 102 contains mandatory limits on projects the Secretary may undertake). "Necessary to ensure expeditious construction" is no more helpful in "establish[ing] the standard the Secretary is to apply in determining which if any legal requirements to waive in connection with those projects." Gov't Br. 17.

Contrast this with delegations the government cites as comparable, *id.* at 18 n.7. The Clean Air Act provisions challenged in *American Trucking* required the EPA to set air-quality standards based on technical criteria and included guidance regarding those criteria and the procedures for setting the standards. *Am. Trucking*, 531 U.S. at 465. In *American Power & Light*, the Court rejected a challenge to a statute that contained "a veritable code of rules … itself for the Commission to follow in giving effect to the standards of § 11(b)(2)." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105, (1946). In *Yakus*, the statute provided objective guidelines for the Administrator's exercise of price-setting authority, requiring the Administrator to consider the prices prevailing within a two-week window. *Yakus v. United States*, 321 U.S. 414, 421 (1944). And in *National Broadcasting Company v.*

United States, the Court rejected a challenge to a statute allowing the Federal Radio Commission to conduct investigations, promulgate regulations, and issue licenses, holding that "[t]he purpose of the Act, the requirements it imposes, and the context of the provision in question" provided more than just a "vague and indefinite" "standard to guide determinations." 319 U.S. 190, 215, 225-26 (1943) (citation omitted). Whatever guidance the Secretary derives from the word "necessary," it pales in comparison to the guidance provided in these cases. *See* Pet. 16-17; *see also infra* 8-9.

The lack of any intelligible principle in the waiver provision is exacerbated by the fact that the determination it entails—the decision of whether to waive *any or all* applicable legal requirements, regardless of their source or subject matter—falls well outside the ordinary responsibilities of the Secretary of Homeland Security. Indeed, where a delegation "call[s] for the exercise of judgment or discretion that lies beyond the traditional authority of" an official, the nondelegation doctrine requires more granular guidance. *Loving*, 517 U.S. at 772.[1] Although the government insists that the "subject matter" of this delegation is "immigration," a topic at least generally within the

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[1] *Hope Natural Gas* (Gov't Br. 18 n.7) is illustrative. There, the Federal Power Commission was tasked with setting rates chargeable by natural gas companies—a task squarely within its traditional authority and expertise—following a hearing, at a "just and reasonable rate." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944). More detailed guidance was not "needed, given the nature of the delegation and the [agency that was] to exercise the delegated authority." *Loving*, 517 U.S. at 772.

Secretary's purview, the subject matter of the challenged *waiver provision* involves balancing competing policy interests across a broad array of substantive areas—a fundamentally legislative function. This matter falls well outside the "traditional authority" of the Secretary, and the delegation requires substantially more guidance than Congress has provided.

2. The government also argues that § 102(c) passes muster under *American Trucking*'s recognition that "the degree of agency discretion that is acceptable varies according to the scope of the power" involved. 531 U.S. at 475; Gov't Br. 18. But the government does not dispute the many ways in which § 102(c) is extraordinarily broad. *See* Pet. 18-23.

Section 102 empowers the Secretary to waive "all" applicable legal requirements, while tightly constraining judicial review of waivers. The requirements the Secretary may waive include provisions totally outside the Secretary's area of expertise, Pet. 19-20; laws governing the Secretary's conduct, *id.* at 21-22; and, at least in the government's view, state and local laws, despite no clear authorization to waive such laws, *id.* at 22; *see also Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 44 (2007) (Stevens, J., joined by Roberts, C.J., and Scalia, J., dissenting) (The scope of "an administrative agency's power to pre-empt state laws … affects the allocation of powers among sovereigns."). The government makes no effort to defend the scope of § 102(c), other than to say it applies only to construction, replacement, and maintenance of barriers and roads, Gov't Br. 19, which is plainly incorrect given the broad swath of unrelated laws the Secretary has waived, *see* Pet. 19-20.

All of this—the lack of delineated boundaries, the delegation outside the traditional authority of the Secretary, and the extraordinary nature of the power conferred—makes clear that "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative,'" and no "intelligible principle" saves the statute. *Am. Trucking*, 531 U.S. at 487 (Thomas, J., concurring).

3. The government disputes our showing that, at a minimum, the Court should hold this petition pending its decision in *Gundy v. United States*, No. 17-6086 (argued October 2, 2018). *See* Pet. 23-24. The government's reasons are wide of the mark. Both this case and *Gundy* implicate expansive delegations of power to an executive official to make legislative determinations about whether legal requirements should apply. In certain aspects, the delegation in this case is even more problematic than the one at issue in *Gundy*: In *Gundy*, the decision regarding the application of the sex-offender registration requirement to certain offenders at least falls within the general expertise of the official tasked with carrying out the delegation, the Attorney General. Here, the Secretary is given a blank check to disregard *any* legal requirements, regardless of subject matter, while building border barriers in any fashion she wishes.

B. *Presentment and Take Care Clauses.* The government argues that the Secretary's selective waiver of more than 30 federal statutes in each waiver comports with the Presentment Clause because § 102(c) "does not empower the Secretary to *repeal* any law." Gov't Br. 20 (emphasis added); *see also id.* at 22 (discussing *Clinton v. City of New York*). But

"*[a]mendment* … no less than enactment, must conform with" the Presentment clause. *INS v. Chadha*, 462 U.S. 919, 954 (1983) (emphasis added). And the Secretary's waiver effectively amends each waived statute by grafting on a provision that reads, "This law does not apply to the San Diego and Calixeco border barrier projects." *See* Pet. 25-26.

The government's list of purportedly analogous "waiver" and "exemption" provisions, Gov't Br. 21, does not remedy the problems with § 102(c). As an initial matter, petitioners do not agree that laws such as 43 U.S.C. §1652(c), which relates to construction of the Trans-Alaska pipeline, are necessarily constitutional. (And that statute at least permits judicial review of the merits of a waiver.) More importantly, *none* of the statutes listed gives an official the extraordinarily broad power to waive *all laws*, regardless of subject matter, and without input from the agencies responsible for executing those laws.

The government highlights *Marshall Field* as an example of a valid waiver provision. Gov't Br. 21 (citing *Marshall Field,* 143 U.S. at 693). But *Marshall Field* did not reflect executive authorization to waive laws at all. In that case, Congress enacted a statute in which it provided for the "free introduction" of five consumer goods into the country but authorized the President—in the event he found other countries to be imposing "reciprocally unequal and unreasonable" "duties or other exactions" on the same goods—to impose tariffs at congressionally set rates. *Marshall Field*, 143 U.S. 680-81. The sole discretion vested in the President was in determining whether that precondition had been met; if so, he was to implement

tariffs delineated by Congress. Far from representing congressional authorization to the President to amend a duly enacted law, the challenged provision required the President to enforce the law *as written* if he found the "unequal and unreasonable" condition to be met: "What the president was required to do was simply in execution of the act of congress." *Id.* at 693. *Marshall Field* exemplifies Congress enacting and the President executing the law, as the separation of powers requires. It does not support any argument that § 102(c)—which vests the decision of which laws even apply entirely in the hands of the Executive—is constitutional.

The government's effort to distinguish *Clinton v. City of New York* falls flat, too. Gov't Br. 22. By waiving the applicability of a law that would otherwise apply to construction of a border barrier, the Secretary changes the law's "legal force or effect." *Clinton*, 524 U.S. 417, 437 (1998). That change reflects the Secretary's (unreviewable and unguided) "rejection of the policy judgment [of] Congress" that the waived law should otherwise apply. Gov't Br. 22 (alterations and quotations omitted).

Congress did not decide that construction of border barriers would be a lawless enterprise, but rather impermissibly gave the choice of *what* laws govern the Secretary's border wall construction to the Secretary herself. *Supra* 3. That places the Secretary in the untenable position of "establish[ing the laws'] relative priority for the Nation," a task that is "the exclusive province of the Congress." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). The Secretary cannot, consistent with the Take Care Clause, make those

choices, but must instead execute the laws Congress wrote.

C. Lack of judicial review. The government asserts that the statute's preclusion of normal court of appeals review "has no bearing on" the constitutional inquiry. Gov't Br. 24. That is wrong; "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., joined by Blackmun, J., concurring). Without judicial oversight, there is no way to ensure that the Secretary acts in accordance with whatever limitations Congress placed on her discretion. *See id.*

Indeed, in this case the Secretary has decided she is not constrained by the statute's original limits, or even the limits of § 102(b), regarding the scope of the border projects that can be covered by a waiver decision. *See* Pet. 31. And for the prototype walls—as to which the government makes no effort whatsoever to defend the waiver—the Secretary went far beyond any principle found in § 102(a); no 25-foot-wide prototype wall will "deter illegal crossings."

The government's fallback position is that Congress may check the Executive. Gov't Br. 25. Perhaps. But our Constitution created a system of *two* meaningful checks on the Executive. In addition to congressional oversight, judicial review "in a proper proceeding to ascertain whether the will of Congress has been obeyed" is necessary. *Yakus*, 321 U.S. at 426 (upholding delegation of authority to fix prices, and noting availability of judicial review). Section 102(c)

thwarts "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta*, 488 U.S. at 380.

II. The Government Does Not Dispute That This Is An Important And Recurring Issue, Raised In An Ideal Vehicle.

This case is an excellent vehicle for the Court to resolve the important and recurring issue of whether § 102(c) violates the separation of powers.

The government does not dispute that this petition presents an important and recurring issue. Pet. 31-33; Gov't Br. 26. Instead, it contends that the unavailability of normal appellate review is a feature, not a bug, militating against certiorari. Gov't Br. 27. Just the opposite. The statute's preclusion of court of appeals review fosters uncertainty in the district courts, which lack binding precedent to guide their consideration of challenges to § 102(c) and the Secretary's waivers. *See* Pet. 32-33. The issues raised here will come to a more "expeditious" final resolution (Gov't Br. 27) if this Court grants certiorari and resolves them, instead of letting challenges proliferate and fester in the district courts.

The government also points to previous cert denials. As the government notes (at 5, 26), two prior cert petitions challenged § 102(c). But this is the first clean vehicle involving a waiver that extends to projects beyond those authorized by § 102(b). The first petition challenging § 102(c), *Defenders of Wildlife v.*

Chertoff, 554 U.S. 918 (2008) (No. 07-1180), was limited to a fencing project specifically identified in § 102(b). *Compare* 72 Fed. Reg. 60870-01 (waiving laws applicable to barrier construction from "approximately 4.75 miles west of the Naco, Arizona Port of Entry to the western boundary of the San Pedro Riparian National Conservation Area") *with* Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638 (authorizing fencing "extending from 10 miles west of the Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry."). The second petition, *County of El Paso v. Napolitano*, 557 U.S. 915 (2009) (No. 08-751), involved ancillary standing and injunctive relief issues not implicated here. This is an important case about the allocation of power across the three branches of the Federal government, it presents the issues cleanly, and it warrants this Court's review.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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Date November 12, 2018