No. 19-975

In the Supreme Court of the United States

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,
PETITIONERS

v.

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. I, § 102, 110 Stat. 3009-554, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 (8 U.S.C. 1103 note), Congress authorized and directed the Secretary of Homeland Security to install physical barriers and roads in the vicinity of the United States border to prevent illegal crossings. Section 102(c) provides that "the Secretary of Homeland Security shall have 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." § 102(c), as amended by REAL ID Act, § 102, 119 Stat. 306. The question presented is as follows:

Whether the grant of authority in Section 102(c) to the Secretary to waive legal requirements as the Secretary determines to be necessary to ensure the expeditious construction of barriers and roads under Section 102 violates the Constitution's separation of powers.

ADDITIONAL RELATED PROCEEDING

United States District Court (D.D.C.):

Center for Biological Diversity v. *Nielsen*,
No. 18-cv-2396 (Sept. 11, 2019)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 15
Conclusion 30

TABLE OF AUTHORITIES

Cases:

A. L. A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 18
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 17, 18, 19, 21
Animal Legal Def. Fund v. *Department of Homeland Sec.*, 139 S. Ct. 594 (2018) 15, 30
Avent v. *United States*, 266 U.S. 127 (1924) 21
Border Infrastructure Envtl. Litig., *In re*, 284 F. Supp. 3d 1092 (S.D. Cal.), cert. denied *sub nom. Animal Legal Def. Fund* v. *Department of Homeland Sec.*, 139 S. Ct. 594 (2018) 5, 12, 29
Clinton v. *City of New York*, 524 U.S. 417 (1998) 13, 25, 26, 27
County of El Paso v. *Chertoff*, No. 08-CA-196:
2008 WL 4372693 (W.D. Tex. Aug. 29, 2008) 29
2008 WL 11417030 (W.D. Tex. Sept. 11, 2008), cert. denied, 557 U.S. 915 (2009) 5, 29
County of El Paso v. *Napolitano*, 557 U.S. 915 (2009) 15, 30
Defenders of Wildlife v. *Chertoff*:
527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 554 U.S. 918 (2008) 5, 12, 13, 14, 29

Cases—Continued: Page

554 U.S. 918 (2008) 15, 30
Fahey v. *Mallonee*, 332 U.S. 245 (1947) 18
Federal Power Comm'n v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944) 18, 21
Gundy v. *United States*, 139 S. Ct. 2116 (2019) 18, 23, 24
J. W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928) 6, 17, 18
Lichter v. *United States*, 334 U.S. 742 (1948) 18
Loving v. *United States*, 517 U.S. 748 (1996) 18, 20
Marshall Field & Co. v. *Clark*, 143 U.S. 649 (1892) 17, 25, 26
Mistretta v. *United States*, 488 U.S. 361 (1989) 12, 16, 17, 18, 19
National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 18, 21
Panama Ref. Co. v. *Ryan*, 293 U.S. 388 (1935) 18
Paul v. *United States*, 140 S. Ct. 342 (2019) 24
Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009) 27
Save Our Heritage Org. v. *Gonzalez*, 533 F. Supp. 2d 58 (D.D.C. 2008) 5, 12, 29
Sierra Club v. *Ashcroft*, No. 04-cv-272, 2005 WL 8153059 (S.D. Cal. Dec. 13, 2005) 5, 30
The Cargo of the Brig Aurora v. *United States*, 11 U.S. (7 Cranch) 382 (1813) 17
Touby v. *United States*, 500 U.S. 160 (1991) 18, 22
United States v. *Grimaud*, 220 U.S. 506 (1911) 17
United States v. *Mazurie*, 419 U.S. 544 (1975) 20
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 24
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 16, 18, 19, 21
Yakus v. *United States*, 321 U.S. 414 (1944) 16, 18, 21

Constitution and statutes: Page

U.S. Const.:
Art. I:
§ 1 16
§ 7, Cl. 2 (Presentment Clause)....10, 13, 14, 15, 25, 30
Art. II, § 3 (Take Care Clause)..... 10, 14, 15
Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, 121 Stat. 2042:
Tit. II, 121 Stat. 2049 29
Tit. V, § 564(a)(2), 121 Stat. 2090 4
Department of Homeland Security Appropriations Act, 2019, Pub. L. No. 116-6, Div. A, Tit. II, §§ 230-231, 133 Stat. 28 28
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 2
Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 3
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 2
Tit. I, 110 Stat. 3009-553:
§ 102, 110 Stat. 3009-554 (8 U.S.C. 1103 note)..... *passim*
§ 102(a), 110 Stat. 3009-554.....2, 3, 13, 19, 22, 24
§ 102(b), 110 Stat. 3009-554 3
§ 102(b)(1), 110 Stat. 3009-554..... 2
§ 102(c), 110 Stat. 3009-555..... 2, 3, 4
§ 102(c), as amended by REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306..... *passim*

Statutes—Continued: Page

§ 102(c)(1), as added by REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 ..... *passim*
§ 102(c)(2)(A), as added by REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 ..... 5, 9, 10, 11
§ 102(c)(2)(B), as added by REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 5
§ 102(c)(2)(C), as added by REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 5
Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 13
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 2
National Industrial Recovery Act, ch. 90, 48 Stat. 195 18
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 (8 U.S.C. 1103 note) 2, 4, 5
Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638:
§ 3, 120 Stat. 2638 3
§ 3(2), 120 Stat. 2639 3
Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.* 26
43 U.S.C. 1652(c) 26
2 U.S.C. 691e(4)(B) (Supp. IV 1998) 26
2 U.S.C. 691e(4)(C) (Supp. IV 1998) 26
6 U.S.C. 251 3
6 U.S.C. 291 3
8 U.S.C. 1103(a)(1) 3
8 U.S.C. 1103(a)(5) 3

Statutes—Continued: Page

10 U.S.C. 433(b) 26
10 U.S.C. 2350b(c)(1) 26
10 U.S.C. 2671(b) 26
25 U.S.C. 3405 26
25 U.S.C. 3406(b) 26
25 U.S.C. 3406(d) 26
46 U.S.C. 501(a) 26

Miscellaneous:

70 Fed. Reg. 55,622 (Sept. 22, 2005) 5
72 Fed. Reg.:
p. 2535 (Jan. 19, 2007) 5
p. 60,870 (Oct. 26, 2007) 5
73 Fed. Reg.:
p. 19,077 (Apr. 8, 2008) 5
p. 19,078 (Apr. 8, 2008) 5
82 Fed. Reg.:
p. 35,984 (Aug. 2, 2017) 5
p. 42,829 (Sept. 12, 2017) 5
83 Fed. Reg.:
p. 3012 (Jan. 22, 2018) 6
p. 50,949 (Oct. 10, 2018) 7, 8
p. 51,472 (Oct. 11, 2018) 7, 8
84 Fed. Reg.:
p. 21,798 (May 15, 2019) 8, 9
p. 21,800 (May 15, 2019) 8, 9
p. 21,801 (May 15, 2019) 8, 9
p. 31,328 (July 1, 2019) 9
H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. (2005) 4, 23

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OPINIONS BELOW

The memorandum opinion of the district court in Nos. 18-cv-655 and 18-cv-2396 (Pet. App. 1-62) is reported at 404 F. Supp. 3d 218. The order of the district court in No. 19-cv-2085 (Pet. App. 67-68) is unreported.

JURISDICTION

The order of the district court dismissing the claims in No. 18-cv-655 was entered on September 4, 2019. The order of the district court dismissing the claims in No. 18-cv-2396 was entered on September 11, 2019. The order of the district court dismissing the claims in No. 19-cv-2085 was entered on September 12, 2019. On October 29, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 1, 2020, and the petition was filed on January 31, 2020. The jurisdiction of this

Court is invoked under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. I, § 102, 110 Stat. 3009-554, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 (8 U.S.C. 1103 note).

STATEMENT

1. a. In enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought to improve security at the Nation's borders. In furtherance of that goal, Section 102 of IIRIRA directed the Executive to undertake the construction of border infrastructure. IIRIRA Tit. I, § 102, 110 Stat. 3009-554 (8 U.S.C. 1103 note).

As originally enacted, Section 102(a) provided that the Attorney General "shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a), 110 Stat. 3009-554. IIRIRA further directed the Attorney General, "[i]n carrying out" that mandate, to undertake particular border infrastructure projects in San Diego, California, including certain fencing and road projects. § 102(b)(1), 110 Stat. 3009-554. Section 102(c) authorized the Attorney General to waive the provisions of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, to the extent he "determine[d] necessary to ensure expeditious construction of the barriers and roads under this section." IIRIRA § 102(c), 110 Stat. 3009-555. These functions

have since been transferred to the Secretary of Homeland Security.[1]

b. Since IIRIRA's enactment in 1996, the basic authorization and directive to the Secretary in Section 102(a) to undertake border infrastructure projects to achieve the statute's stated objectives has remained substantially unchanged. IIRIRA § 102(a), 110 Stat. 3009-554. Congress has amended Section 102(b) from time to time, however, to specify different priorities for border construction and to direct that the Secretary undertake specific construction projects. Congress first amended Section 102(b) as part of the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, to eliminate the previous requirement that the Secretary construct border infrastructure in San Diego, and to replace that requirement with a direction that the Secretary "provide for" the construction of at "least 2 layers of reinforced fencing," and "additional physical barriers, roads, lighting, cameras, and sensors," in five other specified locations along the southern border. §3(2), 120 Stat. 2639. In 2007, Congress again amended Section 102(b) to replace the specifications set forth in the Secure Fence Act with new requirements for construction "along not less than 700 miles of the southwest border where fencing would be most practical and effective" and to "provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors

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[1] In 2002, Congress created the Department of Homeland Security and transferred border-enforcement authority to that Department. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; see also 6 U.S.C. 251, 291; 8 U.S.C. 1103(a)(1) and (5). Section 102 of IIRIRA was subsequently amended to refer to the Secretary of Homeland Security. See 8 U.S.C. 1103 note. For simplicity, this brief refers throughout to the Secretary.

to gain operational control of the southwest border." Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Tit. V, § 564(a)(2), 121 Stat. 2090.

Congress also has amended Section 102(c), addressing the Secretary's waiver authority. In 2005, Congress substantially broadened the Secretary's authority in Section 102(c) to waive legal requirements. See REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 (8 U.S.C. 1103 note). Frustrated by "[c]ontinued delays caused by litigation" that were preventing the Department of Homeland Security (DHS) from completing construction of border infrastructure in San Diego, Congress resolved to expand the Secretary's waiver authority to include "other laws that might impede the expeditious construction of security infrastructure along the border." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 171 (2005) (Conf. Report). Accordingly, the REAL ID Act amended Section 102(c) to authorize the Secretary to waive "all legal requirements"—not just those under the ESA and NEPA—that the Secretary, in his or her "sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." REAL ID Act § 102, 119 Stat. 306.

The REAL ID Act also amended Section 102(c) of IIRIRA to limit the availability of judicial challenges to the Secretary's exercise of that waiver authority. Seeking "to ensure that judicial review of actions or decisions of the Secretary [does] not delay the expeditious construction of border security infrastructure, thereby defeating the purpose of the Secretary's waiver," Conf. Report 172, the REAL ID Act amended Section 102(c) to provide that federal district courts have "exclusive

jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security" pursuant to Section 102(c)'s waiver authority. REAL ID Act § 102, 119 Stat. 306 (IIRIRA § 102(c)(2)(A)). Such review is available only for a claim "alleging a violation of the Constitution of the United States," and a court hearing a challenge under Section 102(c) "shall not have jurisdiction to hear any claim" besides such a constitutional challenge. *Ibid.* To streamline judicial review of such challenges, Congress additionally provided that claims must be filed within 60 days "after the date of the action or decision made by the Secretary of Homeland Security," and that appellate review is available "only upon petition for a writ of certiorari" to this Court. *Ibid.* (IIRIRA § 102(c)(2)(B) and (C)).

c. The Secretary has issued waiver determinations under Section 102(c) on several occasions. See, *e.g.*, 70 Fed. Reg. 55,622 (Sept. 22, 2005); 72 Fed. Reg. 2535 (Jan. 19, 2007); 72 Fed. Reg. 60,870 (Oct. 26, 2007); 73 Fed. Reg. 19,077 (Apr. 8, 2008); *id.* at 19,078; 82 Fed. Reg. 35,984 (Aug. 2, 2017); 82 Fed. Reg. 42,829 (Sept. 12, 2017). Several waiver determinations have been the subject of unsuccessful constitutional challenges. See *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal.), cert. denied *sub nom. Animal Legal Def. Fund* v. *Department of Homeland Sec.*, 139 S. Ct. 594 (2018); *County of El Paso* v. *Chertoff*, No. 08-CA-196, 2008 WL 11417030 (W.D. Tex. Sept. 11, 2008), cert. denied, 557 U.S. 915 (2009); *Save Our Heritage Org.* v. *Gonzalez*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 554 U.S. 918 (2008); *Sierra Club* v.

Ashcroft, No. 04-cv-272, 2005 WL 8153059 (S.D. Cal. Dec. 13, 2005).

2. This case involves waiver determinations issued by the Secretary in 2018 and 2019.

On January 10, 2018, the Secretary issued a Section 102(c) waiver "to ensure the expeditious construction of barriers" near the Santa Teresa Land Port of Entry in New Mexico, located in the United States Border Patrol's El Paso Sector. 83 Fed. Reg. 3012 (Jan. 22, 2018) (New Mexico Waiver). That waiver set forth specific findings that an area within the El Paso Sector was "an area of high illegal entry" and that there was a present "need to construct physical barriers and roads in the vicinity of the border * * * to deter illegal crossings" in that area. *Id.* at 3013. Specifically, the waiver explained that the El Paso Sector has "seen an increase in apprehensions" in recent years, and the waiver identified a 20-mile segment of the border that is near a "heavily populated" urban area, with "quick[] access" to "state highways," which "creates opportunities for illegal entrants to gain quick and immediate access to the border" and "a means of travel into the interior of the United States." *Ibid.* The waiver explained that "[r]eplacing the existing vehicle barrier with bollard wall within the project area will improve Border Patrol's operational efficiency" in that area "and, in turn, further deter and prevent illegal crossings." *Ibid.* To "ensure the expeditious construction" of the project, the Secretary "determined that it [wa]s necessary" to exercise Section 102(c)'s waiver authority to waive a number of specified laws, including (*inter alia*) the ESA and NEPA, "with respect to the construction of roads and physical barriers" in the project area. *Ibid.*; see *id.* at 3013-3014 (waiving requirements of a list of enumerated "statutes,

including all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, [those] statutes").

In October 2018, the Secretary issued two additional Section 102(c) waivers "to ensure the expeditious construction of barriers and roads" in Cameron County and Hidalgo County, Texas, located in Border Patrol's Rio Grande Valley Sector. 83 Fed. Reg. 50,949, 50,950 (Oct. 10, 2018) (Cameron County Waiver); 83 Fed. Reg. 51,472, 51,472 (Oct. 11, 2018) (Hidalgo County Waiver). The waivers explained that the Rio Grande Valley Sector "has seen more apprehensions of illegal aliens than any other sector," and, in fiscal year 2017 alone, "Border Patrol seized approximately 260,000 pounds of marijuana and approximately 1,200 pounds of cocaine" in that Sector. 83 Fed. Reg. at 50,950; see 83 Fed. Reg. at 51,473. In each waiver, the Secretary found "an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries into the United States in the project area[s]." 83 Fed. Reg. at 51,473; see 83 Fed. Reg. at 50,951. Specifically, the Cameron County Waiver identified 11 project areas within the Rio Grande Valley Sector in which a present need existed for "mechanical gates and roads within gaps of existing barriers." 83 Fed. Reg. at 50,950; see *id.* at 50,950-50,951. The Hidalgo County Waiver identified six additional project areas in which a present need existed to "construct barriers and roads." 83 Fed. Reg. at 51,473. As with the New Mexico Waiver, the Cameron County and Hidalgo County Waivers explained that, "to ensure the expeditious construction of the barriers and roads" in the project areas, "it [wa]s necessary" for the Secretary to waive certain specified laws, including the

ESA and NEPA, under Section 102(c). 83 Fed. Reg. at 50,951; see 83 Fed. Reg. at 51,473-51,474.

In May 2019, the Secretary published three additional waiver determinations "to ensure the expeditious construction of barriers and roads" in five other project areas, located in Arizona and California. See 84 Fed. Reg. 21,798 (May 15, 2019) (Arizona Waiver); *id.* at 21,800 (Imperial County Waiver); *id.* at 21,801 (Tecate and Calexico Counties Waiver). In each waiver, the Secretary found "an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries into the United States in the project areas." *Id.* at 21,799; *id.* at 21,801; *id.* at 21,802. The Arizona and Imperial County Waivers each set forth the high rates of illegal crossings and drugs seized near those areas; explained that existing barriers had proved insufficient at stopping transnational criminal organizations that operate in the area; and identified project areas in which existing, outdated barriers would be replaced "with an 18 to 30 foot barrier that employs a more operationally effective design." *Id.* at 21,799; *id.* at 21,801; see *id.* at 21,802. The Tecate and Calexico Counties Waiver identified three projects; explained the high rates of illegal crossings and drug-related events near those project areas; and found that an immediate need existed to replace existing pedestrian fencing with updated barriers "to meet the Border Patrol's operational requirements." *Id.* at 21,802. Each of the three May 2019 waivers, like the Secretary's prior waivers, determined that it was necessary to waive certain specified laws, including the ESA and NEPA, "with respect to the construction of physical barriers and roads" in the project areas to "ensure the expeditious construction of the

barriers and roads in the project areas." *Id.* at 21,799; see *id.* at 21,799-21,800; *id.* at 21,801; *id.* at 21,802-21,803.

In July 2019, the Secretary published an additional waiver determination "to ensure the expeditious construction of barriers and roads" near Starr County, Texas, in the Rio Grande Valley Sector. 84 Fed. Reg. 31,328, 31,328 (July 1, 2019) (Starr County Waiver). The Secretary reiterated the October 2018 waivers' finding of "an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries into the United States in the project areas." *Id.* at 31,328-31,829. The waiver explained that the Rio Grande Valley Sector remained "an area of high illegal entry" and that, "[i]n fiscal year 2018 alone, the Border Patrol apprehended over 162,000 illegal aliens attempting to enter the United States between border crossings in" that sector, "had over 1,400 separate drug-related events between border crossings," and had "seized over 204,000 pounds of marijuana, over 1,850 pounds of cocaine, over 16 pounds of heroin, and over 750 pounds of methamphetamine." *Id.* at 31,328. The waiver identified two additional areas where barriers and roads were needed. *Ibid.* As with the prior waivers, the Starr County Waiver determined that, "to ensure the expeditious construction of the barriers and roads" in the project area, "it [wa]s necessary" for the Secretary to waive certain specified laws, including the ESA and NEPA, under Section 102(c). *Id.* at 31,329.

3. Petitioners are four environmental-conservation and wildlife-protection organizations. Pet. 15. Between March 2018 and July 2019, they collectively commenced three separate actions challenging the above waivers. Pet. 15 & n.5. In March 2018, all four petitioners filed a complaint under IIRIRA Section 102(c)(2)(A) in the

United States District Court for the District of Columbia challenging the New Mexico Waiver. See 18-cv-655 Compl. ¶ 1. In October 2018, three of the petitioners (Center for Biological Diversity, Defenders of Wildlife, and Animal Legal Defense Fund) filed a second complaint in the district court challenging the Cameron County and Hidalgo County Waivers. See 18-cv-2396 Compl. ¶ 1. And in July 2019, the same three petitioners filed a third complaint in the district court challenging the Arizona, Imperial County, and Tecate and Calexico Counties Waivers. 19-cv-2085 Compl. ¶ 1. They later amended that complaint to include a challenge to the Starr County Waiver. 19-cv-2085 Am. Comp. ¶ 1. As relevant here, all of the complaints alleged that (1) in issuing the waivers, the Secretary exceeded his statutory authority under Section 102, and (2) the waivers are invalid because Section 102(c) is an unconstitutional delegation of legislative authority and violates the Presentment Clause, U.S. Const. Art. I, § 7, Cl. 2, the Take Care Clause, *id.* Art. II, § 3, and "the Separation of Powers Doctrine." 18-cv-655 Compl. ¶ 7; 18-cv-2396 Compl. ¶ 7; 19-cv-2085 Am. Compl. ¶ 7.

a. In January 2019, before the third suit was filed, the district court consolidated the first two suits—which challenged the New Mexico Waiver and the Cameron County and Hidalgo County Waivers, respectively. 18-cv-655 Docket entry (Jan. 9, 2019); 18-cv-2396 Docket entry (Jan. 9, 2019); see Pet. App. 21. The court observed that "[t]he legal arguments" in each case "are identical." Pet. App. 21 n.14. Petitioners sought summary judgment on their statutory and constitutional claims. *Id.* at 4. The government sought dismissal of the claims as barred by Section 102(c)(2)(A) of IRRIRA, or alternatively summary judgment. *Ibid.* The court

dismissed the claims in both cases. *Id.* at 1-62; see *id.* at 63-66.

i. The district court first determined that it lacked jurisdiction to adjudicate plaintiffs' claim that the Secretary exceeded his Section 102 waiver authority because Section 102(c)(2)(A) provides that "[a] cause of action or claim may only be brought alleging a violation of the Constitution of the United States," and that "[t]he court shall not have jurisdiction" over other, nonconstitutional claims. IIRIRA § 102(c)(2)(A), as added by REAL ID Act § 102, 119 Stat. 306; see Pet. App. 37. The court stated that "[c]ourts have long recognized that an aggrieved party can sue in federal court to challenge agency action as *ultra vires*, even when a statute does not specifically delineate that right," and even in some circumstances where Congress has otherwise "precluded judicial review of agency action." Pet. App. 28-29. The district court observed that such courts have typically applied a "presumption" in favor of judicial review. *Id.* at 29 (citation omitted).

The district court determined, however, that Congress had clearly overcome that presumption and expressly precluded review of petitioners' claims that the waivers are ultra vires. Pet. App. 32-37. The court reasoned that "the plain language of" Section 102(c)(2)(A) "leaves no doubt that, except for review of alleged violations of the Constitution, Congress intended to preclude *completely* judicial review of agency actions taken, or decisions made, pursuant to section 102's waiver provision, including the contention that a particular waiver decision is not authorized by statute." *Id.* at 35. The court rejected petitioners' contention that Section 102(c)(2)(A)'s language barring review of agency action "pursuant to" Section 102(c) precludes review only

of waivers that are "*lawfully made* 'pursuant to'" IIRIRA § 102(c)(1), but not waivers that are alleged to have been "'*not* properly issued.'" Pet. App. 37-38 (citations omitted). The court found that argument "entirely circular," *id.* at 38, and in any event foreclosed by the statutory text, which it explained authorizes only constitutional claims and eliminates federal-court jurisdiction over any other claim. *Id.* at 39-43.

ii. The district court then considered and rejected petitioners' constitutional challenges to the waivers. Pet. App. 45-62. The Court noted that plaintiffs in at least three prior cases resulting in published decisions had raised the same challenges against the Secretary's IIRIRA waiver authority, "and none ha[d] succeeded." *Id.* at 51; see *id.* at 50-51 (citing *In re Border Infrastructure Envtl. Litig.*, *supra*; *Save Our Heritage Org.* v. *Gonzales*, *supra*; and *Defenders of Wildlife*, *supra*). The court found persuasive the reasoning of those decisions and rejected petitioners' contentions as well. *Id.* at 51-61.

Nondelegation doctrine. The district court concluded that Section 102(c) does not violate the nondelegation doctrine under this Court's precedents. Pet. App. 54-59. The district court observed that Section 102(c) contained an "intelligible principle" to guide the Secretary's waiver decisions, because Congress had "clearly delineated" a "general policy" to the Secretary, and had "clearly defined" the "boundaries of the delegated authority." *Id.* at 55 (quoting *Defenders of Wildlife*, 527 F. Supp. 2d at 127, in turn quoting *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989)) (internal quotation marks omitted). Specifically, the court explained that Congress has specified that, "[i]n order to exercise the waiver authority under the [IIRIRA]," the

Secretary must first determine that the waiver is "'necessary to ensure expeditious construction of the barriers and roads under [section 102 of IIRIRA],'" and those barriers and roads must be "'in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.'" *Id.* at 54-55 (quoting *Defenders of Wildlife*, 527 F. Supp. 2d at 127, in turn quoting IIRIRA § 102(a) and (c)(1)) (brackets in original). The court agreed with the reasoning set forth by the district court in *Defenders of Wildlife*, which had rejected a nearly identical nondelegation doctrine challenge to the Secretary's IIRIRA waiver authority. *Id.* at 54-57; see *Defenders of Wildlife*, 527 F. Supp. 2d at 128. As the district court here recounted, the court in *Defenders of Wildlife* had explained that, "even if * * * [Section 102(c)'s] waiver provision is unique insofar as the number of laws that may be waived is theoretically unlimited, the Secretary may only exercise the waiver authority for the 'narrow purpose' prescribed by Congress: 'expeditious completion' of the border fences authorized by IIRIRA in areas of high illegal entry." Pet. App. 55-56 (quoting *Defenders of Wildlife*, 527 F. Supp. 2d at 128); see also *id.* at 56-59.

Presentment Clause. The district court also determined that Section 102(c) does not violate the Presentment Clause, U.S. Const. Art. I, § 7, Cl. 2. Pet. App. 52-54. The court rejected petitioners' argument that the Secretary's waiver authority is analogous to the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, which this Court held invalid in *Clinton* v. *City of New York*, 524 U.S. 417 (1998). Pet. App. 52. The court again agreed with the analysis set forth in *Defenders of Wildlife*, explaining that the Line Item Veto Act had given the President the authority to "cancel[]" laws, meaning

that they would "no longer have any 'legal force or effect' under any circumstance." *Id.* at 53 (quoting *Defenders of Wildlife*, 527 F. Supp. 2d at 123). "By contrast," the district court here explained, "under the IIRIRA's waiver provision, '[t]he Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part.'" *Ibid.* (citation omitted; brackets in original). The court additionally reasoned that, when the Secretary issues a waiver pursuant to IIRIRA, the Secretary is not "'repeal[ing] * * * laws for his own policy reasons,'" but rather "acting as Congress has expressly directed—*i.e.*, to 'expeditiously' construct 'physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry.'" *Ibid.* (brackets and citations omitted). The court also observed that IIRIRA "'relates to foreign affairs and immigration control,' which are two 'areas in which the Executive Branch has traditionally exercised a large degree of discretion.'" *Ibid.* (brackets and citation omitted).

Take Care Clause. Finally, the district court rejected petitioners' challenge under the Take Care Clause, U.S. Const. Art. II, § 3. Pet. App. 59-61. The court expressed uncertainty whether a challenge under that Clause "presents a justiciable claim for th[e] Court's resolution." *Id.* at 59 (citation omitted). But it reserved judgment on that threshold issue, concluding that, even if petitioners' "Take Care Clause claim" is justiciable, that claim "merely repackages" their nondelegation and Presentment Clause claims and so failed for the same reasons. *Id.* at 60; see *id.* at 60-61.

b. Following the district court's decision in Nos. 18-cv-655 and 18-cv-2396, the three petitioners who brought suit in No. 19-cv-2085 challenging the other

waivers stipulated to the dismissal of their claims in that case, while preserving their appellate rights. 19-cv-2085 D. Ct. Doc. 20, at 1-2 (Sept. 11, 2019). The court then dismissed the claims in that suit as well. Pet. App. 67-68.

ARGUMENT

Petitioners contend (Pet. 19-42) that the grant of authority to the Secretary in Section 102(c)(1) of IIRIRA to waive legal requirements as the Secretary "determines" to be "necessary to ensure expeditious construction of the barriers and roads under" Section 102(c)(1), § 102(c)(1), as added by REAL ID Act, § 102, 119 Stat. 306, violates the separation-of-powers principles embodied in the nondelegation doctrine and the Presentment Clause. The district court correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other court. Further review is not warranted.[2]

This Court has recently and repeatedly denied petitions for writs of certiorari raising substantially similar challenges to Section 102(c). *Animal Legal Def. Fund* v. *Department of Homeland Sec.*, 139 S. Ct. 594 (2018) (No. 18-247); *County of El Paso* v. *Napolitano*, 557 U.S. 915 (2009) (No. 08-751); *Defenders of Wildlife* v. *Chertoff*, 554 U.S. 918 (2008) (No. 07-1180). It should follow the same course here.

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[2] Although the district court also rejected petitioners' additional challenge to Section 102(c) based on the Take Care Clause, petitioners' have abandoned that challenge in this Court. Pet. 16 n.6 ("Petitioners do not raise the Take Care Clause claim in this petition.").

1. The district court correctly determined that Section 102(c) does not violate the nondelegation doctrine. Pet. App. 54-59. That decision accords with this Court's precedent and does not warrant further review.

a. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. The Court has explained that "[t]his text permits no delegation of those powers." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). It "ha[s] recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). The Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality . . . to perform its function." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944) (citation omitted).

The Court "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *American Trucking*, 531 U.S. at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). It has recognized that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus*, 321 U.S. at 425-426. Instead, the "extent and character of [the] assistance" Congress may seek from another Branch in a particular context "must be fixed according to common sense and the inherent necessities of the governmental coordination" at issue, *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)—matters that

Congress is typically best positioned to assess. See *Mistretta*, 488 U.S. at 372; see also *id.* at 416 (Scalia, J., dissenting).

The Court has accordingly held that Congress may confer discretion on the Executive to implement and enforce the laws so long as it supplies an "intelligible principle" defining the limits of that discretion. *Mistretta*, 488 U.S. at 372 (quoting *J. W. Hampton*, 276 U.S. at 409). As petitioners acknowledge (Pet. 25), the Court has further clarified that the vesting of authority in an Executive Branch official is "constitutionally sufficient" under that intelligible-principle standard "if Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of th[e] delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)).

Consistent with those principles, the Court has upheld against a nondelegation challenge nearly every statutory provision it has confronted. "From the beginning of the Government," Congress has enacted, and the Court has upheld, statutes "conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern." *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911). For example, early Congresses enacted a series of statutes that conferred on the President the power to impose or lift trade sanctions and tariffs, *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 683-689 (1892), and the Court rejected a nondelegation challenge to one such statute in 1813, see *The Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382, 388 (1813), and again in 1892, see *Marshall Field*, 143 U.S. at 681-694. In the 90 years since

the Court articulated the "intelligible principle" standard, it has similarly upheld numerous statutes against nondelegation challenges.[3]

In the Nation's history, only twice has the Court found that a statute exceeded Congress's authority on nondelegation grounds. *American Trucking*, 531 U.S. at 474 (discussing *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935)). In 1935, the Court concluded that two provisions of the National Industrial Recovery Act, ch. 90, 48 Stat. 195—enacted in response to the Great Depression—contained "excessive delegations" because Congress "failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 & n.7 (emphasis

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[3] See, *e.g.*, *Gundy* v. *United States*, 139 S. Ct. 2116, 2128-2130 (2019) (plurality opinion) (authority to specify how sex-offender registration statute applies to individuals who committed sex offenses prior to the statute's enactment); *id.* at 2130-2131 (Alito, J., concurring in the judgment); *American Trucking,* 531 U.S. at 472-476 (authority to set nationwide air-quality standards limiting pollution); *Loving* v. *United States*, 517 U.S. 748, 771-774 (1996) (aggravating factors for death penalty in courts martial); *Touby* v. *United States*, 500 U.S. 160, 165-167 (1991) (temporary designation of controlled substances); *Mistretta*, 488 U.S. at 374-377 (Sentencing Guidelines); *Lichter* v. *United States*, 334 U.S. 742, 785-786 (1948) (recovery of excessive profits from military contractors); *Fahey* v. *Mallonee*, 332 U.S. 245, 247, 249-250 (1947) (rules for reorganization, etc., of savings-and-loan associations); *American Power & Light*, 329 U.S. at 105 (prevention of unfair or inequitable distribution of voting power among security holders); *Yakus*, 321 U.S. at 425-427 (commodity prices); *Federal Power Comm'n* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944) (natural-gas wholesale prices); *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (*NBC*) (broadcast licensing); *J. W. Hampton*, 276 U.S. at 407-411 (tariffs).

added). The Court held those provisions invalid because "one * * * provided literally no guidance for the exercise of discretion, and the other * * * conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *American Trucking*, 531 U.S. at 474. Since 1935, the Court has "upheld, again without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373.

b. The district court correctly determined that the authority conferred by Section 102(c) is valid under this Court's nondelegation precedents. Pet. App. 54-58. "Congress clearly delineate[d] [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of th[e] delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light*, 329 U.S. at 105). Petitioners do not dispute that Section 102(c) satisfies the second element by expressly identifying the Secretary of Homeland Security as the public official empowered to exercise the waiver authority. See IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306. The court correctly concluded that the first and third elements are satisfied as well.

As to the first element, Section 102 "clearly delineates the general policy" the Secretary is to pursue. *Mistretta*, 488 U.S. at 372-373 (citation omitted). Section 102(a) provides that the Secretary "shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a), 110 Stat. 3009-554. Section 102(c)(1) authorizes the Secretary to waive legal requirements as the Secretary "determines necessary to

ensure expeditious construction of the barriers and roads" that are the subject of Section 102. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306. Section 102 thus identifies the types of roads and barriers to be constructed and the purposes of those projects, and it establishes the standard the Secretary is to apply in determining which if any legal requirements to waive in connection with those projects. See Pet. App. 55-56.

As to the third element, for similar reasons, Section 102(c) also establishes the boundaries of the Secretary's authority. The statute authorizes the Secretary to issue a waiver only for construction of roads and barriers along the border for the purpose of deterring illegal entry. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306. Even in connection with such projects, the Secretary may issue a waiver only if and to the extent the Secretary determines that the waiver is "necessary to ensure expeditious construction of the barriers and roads under" Section 102. *Ibid.*

Section 102 thus makes clear by its terms what action the Secretary is authorized to take and what policy those actions should be calibrated to advance. Moreover, as the district court noted, Pet. App. 53-54, Section 102(c)'s vesting of such authority in the Secretary is especially appropriate in light of the Executive's responsibility for protecting the Nation's border and "independent authority over the subject matter" of enforcing the Nation's immigration laws, *Loving* v. *United States*, 517 U.S. 748, 772 (1996) (quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)).

c. Petitioners' contrary arguments lack merit.

Petitioners contend (Pet. 27-28) that Section 102(c) provides less detailed guidance to the Secretary than

other statutes the Court has upheld. But even for statutes that confer much broader authority than Section 102(c), the Court has held that Congress need not "provide a 'determinate criterion' for saying 'how much of the regulated harm is too much.'" *American Trucking*, 531 U.S. at 475 (brackets and citation omitted).[4]

Petitioners additionally contend (Pet. 25-26) that Section 102's guidance is inadequate in light of the "breadth of delegated power" in Section 102(c). Petitioners are correct (Pet. 26) that "the degree of agency discretion that is acceptable varies according to the scope of the power" involved. *American Trucking*, 531 U.S. at 475; see Pet. 25-26. But that further supports Section 102(c)'s validity. The authority that provision confers is markedly narrower than the authority upheld in the cases petitioners cite (Pet. 27-28): to adopt Sentencing Guidelines applicable in all federal criminal cases, in *Mistretta*; to designate controlled

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[4] See, *e.g.*, *American Trucking*, 531 U.S. at 472 (upholding grant of authority to set air-quality standards "the attainment and maintenance of which in the judgment of the Administrator * * * are requisite to protect the public health" (citation omitted)); *American Power & Light*, 329 U.S. at 104 (authority to modify structure of holding-company systems as agency finds necessary to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders"); *Yakus*, 321 U.S. at 420 (authority to fix maximum commodity prices that, in Administrator's judgment, "will be generally fair and equitable and will effectuate the purposes of this Act"); *Hope Natural Gas*, 320 U.S. at 600 (authority to set "just and reasonable" rates for natural gas); *NBC*, 319 U.S. at 225 (upholding authority to license radio broadcasters as "public interest, convenience, or necessity" requires); see also *Avent* v. *United States*, 266 U.S. 127, 130 (1924) (Holmes, J.) (statute authorizing emergency rules for railroad-equipment shortages that are "reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed").

substances on a temporary basis, in *Touby* v. *United States*, 500 U.S. 160 (1991); and to prescribe nationwide air-quality standards, in *American Trucking*.

Petitioners contend (Pet. 30-33) that Section 102(c) poses separation-of-powers concerns because it authorizes the Secretary to waive statutes as to which they allege "the Secretary has no expertise," Pet. 30, as well as state and local laws. That argument misconceives the operation of Section 102(c). In exercising the authority conferred by Section 102(c) to waive other legal requirements, the Secretary is not called upon to render definitive interpretations of or judgments about those other requirements that might be best suited to agencies or entities that administer those other laws. Instead, Section 102(c) merely requires the Secretary to determine whether waiving any other legal requirements is "necessary" to achieve an objective within the Secretary's expertise and experience under the statute: "ensur[ing] expeditious construction of the barriers and roads" that he has found, under Section 102(a), necessary to deter illegal crossing in areas of high illegal entry into the United States. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306. Petitioners' suggestion (Pet. 27) that Section 102(c) lacks adequate guidance for "weighing [the] competing interests" at stake disregards that *Congress* already balanced those interests in enacting Section 102(c), and it has made the determination that the need for expeditious construction of such projects outweighs the policy interests advanced by other laws. The district court correctly concluded that Section 102(c) does not violate the nondelegation doctrine.

d. Petitioners alternatively assert (Pet. 35) that the Court should grant review "to reconsider the Court's

prevailing intelligible principle test." See Pet. 34-36. Section 102(c), however, would pass constitutional muster even under the "alternative approaches" (Pet. 35) to the nondelegation doctrine that petitioners posit.

In particular, petitioners point (Pet. 35) to Justice Gorsuch's dissenting opinion in *Gundy* v. *United States*, 139 S. Ct. 2116 (2019). That opinion suggested a test that would ask, for example, whether "Congress, and not the Executive Branch, ma[d]e the policy judgments"; whether the statute "set[s] forth the facts that the executive must consider and the criteria against which to measure them"; and whether the relevant powers at issue are separately vested under the Constitution in the Executive Branch. *Id.* at 2141 (Gorsuch, J., dissenting); see *id.* at 2135-2137. Section 102(c) satisfies that standard.

As explained above, when the Secretary exercises his waiver authority under Section 102(c), the Secretary is not making independent policy decisions. See pp. 19-20, 22, *supra*. It is Congress, and not the Executive Branch, that made the policy judgment in Section 102(c) that the need for expeditious construction of barriers and roads in areas of high illegal entry in the vicinity of the United States border outweighs the policy interests advanced by other laws. Indeed, Congress has weighed those considerations more than once, and Congress broadened the Secretary's waiver authority in 2005 to allow the Secretary to waive all laws because Congress determined that such waiver authority was necessary to best achieve Congress's goal of expeditious border construction. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306; see Conf. Report 171 (discussing

frustrations over "[c]ontinued delays caused by litigation" preventing DHS from completing construction of the San Diego border fence).

In issuing a waiver under Section 102(c), the Secretary determines only that the criteria set forth by Congress have been satisfied: that the waiver of a particular law is "necessary to ensure the expeditious construction of the barriers and roads" that Congress identified in Section 102—namely, "barriers and roads * * * in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a), 110 Stat. 3009-554. And, as discussed above, that grant of statutory authority to the Secretary is particularly appropriate because the Executive has independent constitutional authority over immigration and the Nation's borders. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); see also *Gundy*, 139 S. Ct. at 2137, 2140 (Gorsuch, J., dissenting). And it is the Secretary who is principally responsible for implementing the responsibility for protecting the border in all respects.

Petitioners also point (Pet. 36) to Justice Kavanaugh's statement respecting the denial of certiorari in *Paul* v. *United States*, 140 S. Ct. 342 (2019). That statement discussed a different approach to nondelegation for "major national policy decisions," under which a statutory grant of authority to resolve "major policy questions" must be "express[] and specific[]." *Id.* at 342. That approach would not be implicated here, however, because Section 102(c) does not confer authority to make any "major national policy decision[]." *Ibid.* It grants the Secretary only limited authority with respect to individual border-construction projects to waive legal requirements that otherwise would apply to, and that

would impede the "expeditious construction of," those barriers and roads. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306.

2. The district court also correctly concluded that Section 102(c) does not violate the Presentment Clause, U.S. Const. Art. I, § 7, Cl. 2. Pet. App. 52-57. That Clause provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." U.S. Const. Art. I, § 7, Cl. 2. Petitioners contend (Pet. 37-39) that Section 102(c) violates that Clause by authorizing the Secretary to "repeal" statutes enacted by Congress, contrary to this Court's decision invalidating the Line Item Veto Act in *Clinton* v. *City of New York*, 524 U.S. 417, 438 (1998). That is incorrect.

Section 102(c) does not empower the Secretary to repeal any law. It merely permits the Secretary to exempt certain specific federal projects from otherwise-applicable legal requirements. Those requirements remain in force and effect for other purposes. In this respect, Section 102(c) resembles waiver provisions that are common in federal statutes. The Court has long recognized that Congress may authorize the Executive to waive certain applications of a statute. In *Marshall Field*, for example, the Court upheld a statute that gave the President the "power" and "duty" to "suspend" specified provisions of a statutory tariff "for such time as he shall deem just," "whenever, and so often as the President shall be satisfied that the government of any country * * * imposes duties or other exactions upon the agricultural or other products of the United States, which * * * he may deem to be reciprocally unequal and unreasonable." 143 U.S. at 680 (citation omitted);

see *id.* at 681-694. Such provisions are commonplace in federal statutes.[5]

Section 102(c) therefore differs markedly from the Line Item Veto Act at issue in *City of New York*. The constitutional defect the Court identified in that statute was that it authorized the Executive to "cancel[]" a previously enacted law, and thereby deprive it of "legal force or effect." 524 U.S. at 437 (quoting 2 U.S.C. 691e(4)(B) and (C) (Supp. IV 1998)). Nothing in Section 102(c)'s text supports the conclusion that issuance of a waiver of legal requirements operates to repeal those requirements. As the district court recognized, the waived requirements—such as provisions of NEPA and the ESA—do not apply to specific construction projects

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[5] See, *e.g.*, 10 U.S.C. 433(b) (authorizing Secretary of Defense to waive "compliance with certain Federal laws or regulations pertaining to the management and administration of Federal agencies"); 10 U.S.C. 2350b(c)(1) (authorizing waiver, with respect to contracts, of "any provision of law," other than two specified laws, that prescribes contractual procedures or requirements); 10 U.S.C. 2671(b) (authorizing Secretary of Defense to "waive or otherwise modify the fish and game laws of a State"); 25 U.S.C. 3406(b) and (d) (providing that the "head of each affected Federal agency shall waive any applicable statutory, regulatory, or administrative requirement, regulation, policy, or procedure promulgated by the agency" identified by those agencies and Indian tribe that submits a plan under 25 U.S.C. 3405 for integration of training and other programs as "necessary to enable the Indian tribe to efficiently implement the plan"); 43 U.S.C. 1652(c) (authorizing Secretary of the Interior and other federal officials and agencies to "waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of [the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.*]"); 46 U.S.C. 501(a) (authorizing "head of an agency responsible for the administration of the navigation or vessel-inspection laws" to "waive compliance with those laws to the extent the Secretary [of Defense] considers necessary in the interest of national defense").

identified by the Secretary, but they remain operative in all other respects. See Pet. App. 52-53; cf. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 861 (2009) (rejecting argument that statutory "proviso expressly allow[ing] the President to render certain statutes inapplicable" resulted in a disfavored implied repeal, because the proviso "did not repeal anything, but merely granted the President authority to waive the application of particular statutes to a single foreign nation" (emphasis omitted)).

In addition, Section 102(c) does not implicate the concern the Court articulated in *City of New York* that the President's exercise of a line-item veto would necessarily reflect his "rejecti[on]" of "the policy judgment made by Congress." 524 U.S. at 444. The Court observed that, because only a few days could elapse between the appropriation statute's enactment and the issuance of any line-item veto, such a veto usually could not be based on circumstances that had arisen after enactment and must reflect policy disagreement with Congress regarding that provision. *Ibid.* In contrast, in exercising the authority conferred by Section 102(c), the Secretary is implementing Congress's judgment by giving priority to IIRIRA's stated goal of "ensur[ing] the expeditious construction" of border barriers over other legal requirements that might otherwise stand as obstacles to that objective. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306; see Pet. App. 53.

3. Petitioners additionally assert (Pet. 39) that Congress's decision to limit judicial review of challenges to the Secretary's exercise of the waiver authority conferred by Section 102(c) "exacerbates the separation-of-powers" concerns. That is incorrect. The availability vel non of judicial review of an agency's action has no

bearing on whether the authorizing statute violates the nondelegation doctrine, or whether it improperly permits the Executive to repeal a duly enacted law without observance of bicameralism and presentment.

Moreover, petitioners' premise (Pet. 40) that, without judicial review, the Secretary possesses "unpoliced and thus limitless power to nullify duly-enacted statutes" is incorrect. Section 102(c)'s limitations on judicial review reflect Congress's informed judgment that the political Branches, rather than the courts, are best suited to oversee the Secretary's waiver determinations for projects to protect the Nation's borders and whether those waiver determinations are within the bounds Congress provided. Congress itself is well positioned to assess whether the Secretary has acted within the limitations prescribed by Congress and to take action if it concludes that the Secretary has exceeded those limitations.

The construction of border barriers has been a frequent and intense subject of congressional attention. For example, any construction project undertaken by the Secretary requires the appropriation of funds by Congress. Congress has regularly included in annual appropriations acts certain limitations on where border barriers may be built, as well as congressional notice requirements. See, *e.g.*, Department of Homeland Security Appropriations Act, 2019, Pub. L. No. 116-6, Div. A, Tit. II, §§ 230-231, 133 Stat. 28 (appropriating funds to DHS for border barrier construction in the 2019 fiscal year, specifying the type of barriers that may be built, and prohibiting construction at five specified areas of the border). Congress may condition appropriations on compliance with particular aspects of the law,

see, *e.g.*, Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Tit. II, 121 Stat. 2049 (prohibiting obligation of appropriated funds for waiver projects "until 15 days have elapsed" after notice required by Section 102(c)(1) is published in the Federal Register), or Congress may withhold such funds if it determines that the Secretary has used the waiver authority conferred by Section 102(c) in a way inconsistent with the principles Congress set forth in the statute. And of course Congress is free to amend Section 102(c), as it did in expanding the Secretary's waiver authority in 2005, to address any concerns about the scope of the authority it confers.

4. Petitioners do not contend that the district court's decision rejecting their constitutional challenges to Section 102(c) conflicts with a decision of any other court. Indeed, every federal court to consider constitutional challenges to the statute has rejected them. See *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1130-1141 (S.D. Cal.) (rejecting nondelegation and Presentment Clause challenges), cert. denied *sub nom. Animal Legal Def. Fund* v. *Department of Homeland Sec.*, 139 S. Ct. 594 (2018); *County of El Paso* v. *Chertoff*, No. 08-CA-196, 2008 WL 4372693, at *2-*7 (W.D. Tex. Aug. 29, 2008) (denying preliminary injunction based on rejection of nondelegation and Presentment Clause challenges and arguments based on limitation of judicial review); *County of El Paso* v. *Chertoff*, No. 08-CA-196, 2008 WL 11417030, at *2-*3 (W.D. Tex. Sept. 11, 2008) (dismissing complaint in same case based on same analysis), cert. denied, 557 U.S. 915 (2009); *Save Our Heritage Org.* v. *Gonzalez*, 533 F. Supp. 2d 58, 63-64 (D.D.C. 2008) (rejecting nondelegation challenge); *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119, 123-129 (D.D.C.

2007) (rejecting nondelegation and Presentment Clause challenges), cert. denied, 554 U.S. 918 (2008); *Sierra Club* v. *Ashcroft*, No. 04-cv-272, 2005 WL 8153059, at *4-*7 (S.D. Cal. Dec. 13, 2005) (rejecting nondelegation challenge). Petitions for writs of certiorari were filed in three of those cases presenting substantially similar constitutional challenges to Section 102(c), all of which were denied. See *Animal Legal Def. Fund*, 139 S. Ct. 594 (No. 18-247); *County of El Paso*, 557 U.S. 915 (No. 08-751); *Defenders of Wildlife*, 554 U.S. 918 (No. 07-1180). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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