No. 19-975

In The Supreme Court of the United States

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

Petitioners,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY AND CHAD WOLF, ACTING SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States District Court For The District Of Columbia

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition reinforces the need for this Court to grant review and establish the outer bounds of when a statute does violence to the separation of powers. The Government does not dispute the astonishing power that Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) vests in an Executive official to waive any laws regarding any subject matter, across all jurisdictions, and as applied to an immense geography. Nor does the Government engage with Section 102(c)'s consequential effects on constitutional structure: an unelected Executive agent's license to make profound national policy decisions, and the people's crippled capacity to hold someone accountable for them.

Nevertheless, the Government contends that the Court should deny review. The Government's central argument is that Section 102(c) does not delegate legislative power to the Executive in violation of the non-delegation doctrine because Congress already determined that wall construction overrides all other interests protected by federal, state, tribal, or local laws. The Government is wrong. Section 102(c) squarely places the decision-making power of weighing barrier construction against all other statutorily-protected interests in the "sole discretion" of the Secretary of Homeland Security. That is pure legislative policy-making of the sort that members of this Court have recently opined flouts the separation of powers.

At base, the Government cannot conceal the reality that Section 102(c) is an essentially unbounded creature of legislative power cloaked in Executive agency skin. Because of that, this case presents an ideal opportunity for the Court to clarify and reassess when a statute crosses the constitutional line of the proper separation of powers. The necessity for that evaluation is patently clear if the non-delegation doctrine and Presentment Clause are to meaningfully intercept the increasing accretion of power in one branch. If Section 102(c) does not raise grave separation-of-powers concerns, then no statute does. The Court should grant certiorari.

ARGUMENT

I. This Case Is An Ideal Vehicle To Clarify The Outer Bounds Of The Non-Delegation Doctrine.

If the capacious Section 102(c) waiver authority does not violate the non-delegation doctrine as it has evolved in modern jurisprudence, then nothing does—and the doctrine is meaningless. Contrary to the Government's contentions, therefore, this case is an excellent vehicle for the Court to reevaluate and establish the outer bounds of an impermissible delegation of legislative authority to the Executive.

1. *Section 102(c) is Congressional policy-making power delegated to the Executive.* The Government does not dispute that the Secretary can dispense with any law he desires, including laws protecting civil rights,

property rights, criminal laws, anti-discrimination provisions, environmental laws, and most recently, competitive bidding requirements and wage and labor protections.[1] *See* Equal Voice Network Amicus Brief; North American Butterfly Association Amicus Brief. Nor does the Government refute that the Secretary can not only void federal law, but also preempt state, tribal and local laws, which raises serious federalism concerns in an unelected official's exercise of Supremacy Clause power. Opp. 22; *see* Local Governments Amicus Brief. Nor does the Government deny that the Secretary may unleash the waiver authority to build on a colossal geography, whereby his own department defines "vicinity of the border" as being anywhere within 100 miles of all coasts and borders where two-thirds of Americans live. Pet. 33-34. And though the Government asserts that Section 102(c) is "markedly narrower" than other delegations (Opp. 21), it offers not one word in defense of why.

Despite its failure to rebut Section 102(c)'s staggering scope, the Government argues that none of this presents a delegation problem because the waiver authority is not legislative policy-making. *Id*. at 22. That is incorrect.

According to the Government, the Secretary "is not making independent policy decisions" because

[1] Since the petition's filing, the Secretary issued an unprecedented waiver of ten federal procurement laws, eliminating requirements for open competition, the right for losing bidders to protest, adherence to Department of Labor wage and labor rates, and transparency on cost data, 85 Fed. Reg. 28,658-60 (May 13, 2020).

Congress "already balanced those interests" and "made the determination" that "expeditious construction . . . outweighs the policy interests advanced by other laws." *Id*. at 23. But that reading defies the statute's plain language and implementation. Section 102(c) provides that "the Secretary of Homeland Security shall have . . . authority to waive all legal requirements [in his] sole discretion [he] deems necessary" for expeditious barrier construction. Picking and choosing, per his "sole discretion," which of hundreds of federal, state, local, and tribal laws to comply with—and which to dispense with—for the purposes of wall construction is quintessentially an exercise of legislative policy-making.

To be sure, Congress itself could have jettisoned every legal requirement that might otherwise apply to construction. But Congress declined to do so, thereby avoiding responsibility for such a politically fraught result. Instead, it punted the politically difficult decision of weighing border construction against all other protected interests to a politically unaccountable Executive agent. It is that action—"decid[ing] what competing values will or will not be sacrificed to the achievement" of barrier construction—that is "the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). The Constitution prohibits collapsing these "structural constraints" which were intentionally architected "to ensure political accountability." *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, 590 U.S. ___, ___ (2020) (slip op., at 7).

2. *The Court should grant review to reinvigorate the non-delegation doctrine*. The Government spills substantial ink on the near century-long history of case law mostly upholding statutes under non-delegation challenges. Opp. 16-19. But the fact that the non-delegation doctrine has become little more than a rubber stamp—as exemplified by the district court ruling below and others like it—is a reason to grant the petition, not deny it. As the Government acknowledges, members of the Court have invited a fresh appraisal of the doctrine and its role in preserving the Constitution's structural integrity. Opp. 22. And as in other contexts, the Court has "revived" doctrines after many decades when the proper case warrants it. *See*, *e.g.*, *U.S. v. Balsys*, 524 U.S. 666 (1998) (resurrecting the "same-sovereign" rule concerning the scope of the Fifth Amendment's Privilege Against Self-Incrimination after decades of dormancy).

Accordingly, Petitioners seek review of Section 102(c) as an opportunity for the Court to expand the prior jurisprudence by both fleshing out meaningful criteria and setting an outer boundary as to the type of delegation that violates the non-delegation doctrine. A statute that confers unchecked and unreviewable authority to nullify every statute in the U.S. Code is an opportune vehicle for doing so.[2]

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[2] Section 102(c)'s authority to waive every law is far more vast and unrestrained than prior constitutional delegations cited by the Government (Opp. 18 n. 3); holding it unconstitutional, therefore, would not render "most of the Government . . . unconstitutional." *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

3. *If Section 102(c) does not fail the intelligible principle test, that test is devoid of substance*. The Government contends that the delegation at issue passes the prevailing intelligible principle test because Sections 102(a) and (c) provide the general policy and parameters to satisfy the test's elements. Opp. 19-20. That is wrong. First, the mere objective of building barriers does not circumscribe the Secretary's waiver discretion.

Second, nor do the terms "necessary" and "expeditious" act as boundaries for waiving laws because they are defined exclusively by whatever the Secretary desires them to mean in his "sole discretion." *See* Pet. 30. Worse, the exercise of that discretion is not even bounded by any experience with, let alone expertise in, the myriad laws waived, as the Government concedes. Opp. 22. The Government contends that the Secretary, on the one hand, "is not called upon to render definitive interpretations of or judgments about those other requirements that might be best suited to agencies or

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Specifically, Section 102(c) is not cabined to one statute but involves all federal, state, tribal, and local laws; lacks meaningful Congressional guidance to inform decision-making; and is immunized from ordinary judicial scrutiny for arbitrary exercises of the delegated authority. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457 (2001) (delegated authority to set air pollutant standards implicating only the Clean Air Act, based on technical criteria, rulemaking processes, and subject to judicial review); *Touby v. United States*, 500 U.S. 160 (1991) (delegated authority to designate controlled substances within the Controlled Substances Act, informed by numerous criteria, intra-agency consultation, public comment, and subject to judicial review).

entities that administer those other laws," yet on the other hand, is required to "determine whether waiving any other legal requirements is 'necessary' to achieve an objective" of barrier construction. *Id*.

This makes no sense. If the Secretary admittedly has no expertise in the *operation* of the numerous laws he is called to (and routinely does) waive and need not even consult the agencies with such expertise, on what "intelligible" basis is the Secretary making judgments that waiving any of these laws is actually "necessary"? The Government has no coherent answer, and there is none. The reality, as amplified by the Government itself, is that the Secretary has been given leeway to discard duly enacted laws at whim, with his "sole discretion" being the only guidepost. That is the furthest conceivable thing from an "intelligible principle" if that test has any teeth at all.

Finally, the Government argues that no further Congressional guidance is warranted in light of the Executive's responsibility over border protection and immigration. *Id*. at 20. But while the Secretary may possess expertise and have shared authority in those areas, the policy-making power enshrined in Section 102(c) implicates the far wider universe of all public and private interests protected by the laws the Secretary is empowered to waive. *See* Pet. 32. The delegation thus demands far more guidance than Congress furnished. Yet the intelligible principles to circumscribe the Secretary's waiver power are absent here.

4. *Section 102(c) delegates major policy-making powers that are prohibited under alternative approaches enforcing the non-delegation doctrine.* Section 102(c)'s quintessential policy-making character and its major social policy impacts render this case a particularly strong vehicle to consider the two alternative approaches to enforcing the non-delegation doctrine recently posited by Justices Gorsuch and Kavanaugh. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring).

The Court need not definitively address the merits of those approaches at this juncture. Even so, the Government's bid that Section 102(c) passes muster under them should be rejected. Opp. 23. With respect to Justice Gorsuch's proposed approach, Section 102(c) is the paradigm of an Executive official making policy judgments reserved for Congress, as discussed above and in the petition. Pet. 21-25.

Regarding Justice Kavanaugh's proposed approach, the Government asserts that Section 102(c) does not implicate major national policy decisions constitutionally reserved for Congress and the President in the legislative process. Opp. 24. Just the opposite. Choosing to strip border communities of the same legal rights enjoyed by other Americans is of tremendous national consequence. It cannot be, for example, that the Secretary's decision to preempt state laws and undermine federalism is not a major national policy decision of constitutional import. *See* Local Governments Amicus

Brief. Likewise, the Secretary's decisions to deprive border residents of the benefits of public health laws and to void statutes designed to safeguard Native Americans' interests—enacted in part "to guard unpopular minorities from the tyranny of the majority"—are surely major national policy decisions of political and socio-economic consequence. *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting); *see* Equal Voice Network Amicus Brief. Section 102(c) is thus an apt candidate to explore both approaches for breathing life back into the non-delegation doctrine.

II. The Presentment Issue Also Warrants The Court's Review.

In arguing that this case does not raise a Presentment Clause issue warranting this Court's consideration, the Government contends that Section 102(c) does not "empower the Secretary to repeal any law." Opp. 25. That is dually mistaken.

1. The Government likens Section 102(c) to plain vanilla waiver provisions that merely "waive certain applications of a statute" and do not alter the underlying law. *Id.* But that massively distorts the scope of Section 102(c), which entails the most sweeping waiver authority ever enacted by Congress.[3] The Government itself proves as much. None of the statutes in the Government's laundry list of purported analogies resemble the girth of Section 102(c): the extraordinary power to

[3] *See* David J. Barron and Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 290 (2013).

waive all laws, without input from agencies responsible for administering such laws and severed from ordinary judicial review.[4] This is a difference not only of degree but of kind. With authority this capacious and unaccountable, the Secretary's power to waive is, effectively, the power to repeal.

Thus, because of the behemoth nature of Section 102(c), the IIRIRA waivers function as amendments to the underlying laws being waived. To give an actual example, the Secretary has issued waivers nullifying the enforcement of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 *et seq*. ("Graves Protection Act"), with respect to more than 500 miles of borderlands. Significant swaths of this land contain sacred Native American burial grounds that are now subject to exhumation and permanent desecration. *See* Archaeology Southwest Amicus Brief. The Secretary's waivers have effectively amended the statute with the provision: "Nothing in this law in its entirety shall apply to one-fourth of the southern border." This significant amendment affronts the separation of powers. By bypassing the "difficult and deliberative" processes of the Presentment Clause, the

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[4] The Government's list highlights prototypically narrow waiver authorities: *e.g*., the waiver applies to one law or an enumerated set of laws (*e.g*., 10 U.S.C. 433(b); 10 U.S.C. 2350(b)(c)(1); 10 U.S.C. 2671(b); 43 U.S.C. 1652(c); and the provision in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)); gives limited waiver authority to an agency that administers a particular law (*e.g*., 25 U.S.C. 3406(b) and (d); 46 U.S.C. 501(a)); or is constricted to the President's particular authority over foreign relations (*e.g*., the provision in *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009)).

Executive has been permitted to trample the very "minority interests" that the Graves Protection Act was birthed to protect. *Gundy*, 139 S. Ct. at 2134-35 (Gorsuch, J., dissenting).

2. The Government's attempt to distinguish *Clinton v. City of New York*, 524 U.S. 417 (1998), also fails. Contrary to the Government's reading (Opp. 27), Section 102(c) implicates the same concern the Court had in *Clinton*: in exercising immense authority to dispense with duly enacted statutes, the Secretary is substituting his own policy judgment for that of Congress just as the President was able to do in cancelling line items. *Clinton*, 524 U.S. at 444. In addition, the Court in *Clinton* rejected the government's defense that Congress intended the cancellation of items, which is essentially the same argument the Government advances here with respect to waiver decisions. Opp. 27. The fact that Congress anticipates the Executive to act on the waiver authority is of no moment and in no way "alter[s] the procedures" of the Presentment Clause. *Clinton*, 524 U.S. at 445-46.

III. This Case Warrants The Court's Intervention To Address This Important And Recurring Issue.

The Government argues that the Court need not intervene because Congress provides a sufficient check on Executive power. Opp. 28. This misses the mark. The petition seeks review of whether *Congress* unlawfully ceded its power to the Executive, not whether

the Executive has acted "within the limitations" of that unlawfully delegated legislative power. *Id.* Court intervention is vital to strike down Congress's relinquishment of power, for "[a]bdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). In any case, the Government's reliance on the Congressional purse as a "check" on Executive Action is hollow in view of the administration's 2019 emergency declaration redirecting military funding to finance wall construction after Congress rejected the President's bid for increased appropriations. 84 Fed. Reg. 4,949-50 (Feb. 20, 2019).

Further, the Court's consideration of these weighty constitutional questions is warranted because Congress has denied Petitioners effective review in the lower courts. By eliminating Circuit court review—the traditional means of "promot[ing] decisional accuracy," *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991), and crystallizing constitutional issues for this Court's deliberation—Congress has left this Court as the only appellate tribunal empowered to cast judgment on whether Section 102(c) impermissibly blurs the separation of powers. This affords another crucial reason for review.

Finally, the issue before the Court is not only important; it is recurring. Since the petition's filing, the Secretary has issued nine additional waivers abrogating 65 federal statutes as applied to over 235 miles of construction—amounting to nearly one-fourth of the entire southern border and vicinity covered by

this administration's waivers.[5] The Secretary's ever-expanding exercise of Section 102(c) will continue to have profound practical and legal implications, especially in light of the immense geographical area to which Section 102(c) may be applied. There is thus a compelling public interest in having this Court address the constitutionality of Section 102(c).[6]

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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[5] 85 Fed. Reg. 14,953-55 (Mar. 16, 2020); 85 Fed. Reg. 14,958-60 (Mar. 16, 2020); 85 Fed. Reg. 14,960-61 (Mar. 16, 2020); 85 Fed. Reg. 14,963-65 (Mar. 16, 2020); 85 Fed. Reg. 14,965-66 (Mar. 16, 2020); 85 Fed. Reg. 21,015-17 (Apr. 15, 2020); 85 Fed. Reg. 28,658-60 (May 13, 2020); 85 Fed. Reg. 28,660-62 (May 13, 2020); 85 Fed. Reg. 29,472-73 (May 15, 2020).

[6] That the Court has previously denied petitions in other cases challenging Section 102(c) (Opp. 30) is no obstacle to the Court granting review here, especially in view of the expanding exercise of the waiver authority and recent concerns expressed by the Court's members regarding the non-delegation doctrine's validity.

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