NOS. 17-1286 AND 17-1290

In the Supreme Court of the United States

NATIONAL MINING ASSOCIATION,
Petitioner,
v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

AMERICAN EXPLORATION & MINING ASSOCIATION,
Petitioner,
v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief in Opposition to Certiorari for Respondents Grand Canyon Trust, Havasupai Tribe, Center for Biological Diversity, Sierra Club, and National Parks Conservation Association

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that a legislative-veto provision in the Federal Land Policy and Management Act is severable under the Act's express severability provision.

CORPORATE DISCLOSURE STATEMENT

Grand Canyon Trust, National Parks Conservation Association, Center for Biological Diversity, and Sierra Club are nonprofit conservation organizations that have not issued any stock and have no parent corporations. The Havasupai Tribe is a federally recognized Indian tribe that likewise has not issued any stock and has no parent corporations.

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INTRODUCTION

Petitioners seek this Court's review solely to challenge the court of appeals' application of well-established precedent governing severance of an unconstitutional legislative veto from a federal statute. This Court recently reaffirmed its long-standing approach to severability in *Murphy* v. *National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018), and there is no reason to revisit that approach here. Moreover, petitioners do not seriously contend that the court of appeals' decision conflicts with any decision of this Court or another court of appeals. Further review is not warranted.

The court of appeals correctly concluded that a legislative veto in the Federal Land Policy and Management Act (the Act or FLPMA) is severable from the rest of the statute. Because the Act contains a severability provision, the unconstitutional legislative veto is presumed to be severable absent "strong evidence that Congress intended otherwise." *Alaska Airlines* v. *Brock*, 480 U.S. 678, 686 (1987). No evidence—let alone "strong evidence"—suggests that Congress would have intended the legislative veto at issue here to be inseverable.

The Act governs the long-standing power of the Secretary of the Interior (the Secretary) to make land "withdrawals," which close designated areas of public lands to a particular otherwise lawful use. The Act sets forth the conditions and procedures under which the Secretary may make several kinds of withdrawals and reserves to Congress a legislative veto over most executive withdrawals of 5,000 acres or more. At the same time, the Act imposes on such large-tract withdrawals notice, public-comment, and extensive report-

ing requirements that afford Congress ample means of overseeing those withdrawals.

Nothing in the Act—not its text, not its structure, not its legislative history—yields any evidence, much less strong evidence, that Congress would have wanted the carefully engineered withdrawal system to fall along with the legislative veto. Without the veto, there remain other constraints on large-tract withdrawals. Severing the veto honors the text of both the statute's severability clause and the withdrawal delegation. And severance conforms to the legislative history, which reflects as much concern for empowering the Executive as for reserving power to Congress.

Decades of practice show that, without the veto, the large-tract withdrawal delegation works as Congress intended. Since 1983, when this Court held legislative vetoes unconstitutional, the Secretary has made dozens of large-tract withdrawals, and Congress has never attempted to revisit its withdrawal delegation to replace the invalid veto with other constraints. Invalidating the delegation would upset not only the withdrawal underlying this lawsuit—one that temporarily forecloses new uranium-mining claims around the Grand Canyon—but also a stable legal framework that has for decades allowed the Executive to temporarily preserve public lands for future uses. The mining industry has not previously challenged the supposedly urgent threat of the Secretary's authority "unfettered" by the legislative veto—and, according to petitioners' own statistics, the industry remains an important contributor to the United States economy.

The petitions should be denied.

STATEMENT

1. The Property Clause gives Congress "Power to dispose of and make all needful Rules and Regulations respecting the * * * Property belonging to the United States," including federal lands. U.S. Const. art. IV, § 3, cl. 2. Pursuant to that power, Congress enacted the General Mining Law of 1872, which provides that "all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase." 30 U.S.C. 22.

In *United States* v. *Midwest Oil Company*, 236 U.S. 459 (1915), this Court recognized that the Executive Branch had the authority to foreclose mining claims on public lands by "withdrawing" land from the mining law's open-access decree. *Id.* at 469, 475. With Congress's "uniform[] and repeated[]" acquiescence, the Department of the Interior (Department) regularly exercised that authority for over a century. *Midwest Oil*, 236 U.S. at 471; see *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 875–876 (1990) (discussing Congress's enactment in the years after 1872 of various laws giving the Executive certain express withdrawal authority).

2. In 1964, Congress established the Public Land Law Review Commission (Commission) to recommend improvements in public-land management. See *Lujan*, 497 U.S. at 876–877. On the subject of withdrawals, the Commission recommended enacting a two-tier system in which Congress would exercise complete authority over "permanent or indefinite" withdrawals and would delegate "[a]ll other withdrawal authority" to the Executive. Pub. Land Law Review Comm'n, *One Third of the Nation's Land* 9, 54–55 (1970).

Drawing heavily on the Commission's work, Congress enacted the Federal Land Policy and Management Act in 1976. See *Lujan*, 497 U.S. at 876–877. The Act declares it to be the policy of the United States that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," while also recognizing "the Nation's need for domestic sources of minerals." 43 U.S.C. 1701(a)(8), (12); see 43 U.S.C. 1701(a)(7), 1702(c) (providing that in managing public lands "consideration [must] be[] given to the relative values of * * * resources," including "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values," and "not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output").

The Act also sets forth the two-tier system contemplated by the Commission, articulating a federal policy that "Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw [public] lands without legislative action." 43 U.S.C. 1701(a)(4). In furtherance of that policy, the Act negates the withdrawal authority recognized in *Midwest Oil* and various pre-existing statutory provisions and grants the Executive a new, demarcated withdrawal authority. See 43 U.S.C. 1714(a); see also *ibid.* ("[T]he Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section."); 43 U.S.C. 1712(e)(3) ("public lands shall be removed from or restored to the operation of the Mining Law of 1872 * * * only by with-

drawal action pursuant to [the Act] or other action pursuant to applicable law"); Pub. L. 94-579, § 704, Oct. 21, 1976, 90 Stat. 2743, 2792.

The Act's delegation of withdrawal authority is set forth in 43 U.S.C. 1714, which divides permissible withdrawals into three categories. First, when "an emergency situation exists" and "extraordinary measures must be taken to preserve values that would otherwise be lost," the Secretary "shall immediately make a withdrawal and file notice of such emergency withdrawal" with Congress. 43 U.S.C. 1714(e); see *ibid.* (Secretary must within three months after the withdrawal furnish Congress with information about the justification for the withdrawal). Such an emergency withdrawal may not exceed three years and cannot be extended except through the normal procedures for other types of withdrawals. 43 U.S.C. 1714(e).

Second, the Secretary may withdraw land "aggregating less than five thousand acres * * * on his own motion or upon request by a department or an agency head." 43 U.S.C. 1714(d); see 43 U.S.C. 1714(b), (h) (Secretary must give notice in Federal Register when withdrawal is under consideration and may not promulgate a withdrawal without an opportunity for "public hearing"). If such a withdrawal is "for a resource use," it may last "for such period of time as [the Secretary] deems desirable." 43 U.S.C. 1714(d)(1). Otherwise, it may last for only a limited amount of time, depending on the nature of the use, with a maximum duration of twenty years. 43 U.S.C. 1714(d)(2)–(3); see 43 U.S.C. 1714(b).

Finally, "a withdrawal aggregating five thousand acres or more may be made * * * only for a period of not more than twenty years by the Secretary on his

own motion or upon request by a department or agency head." 43 U.S.C. 1714(c)(1); see 43 U.S.C. 1714(b), (h) (setting forth requirements for notice of proposed withdrawal in the Federal Register and opportunity for public hearing before any withdrawal); 43 U.S.C. 1714(f). To make that sort of large-tract withdrawal, the Secretary must provide Congress with notice of the withdrawal, 43 U.S.C. 1714(c)(1), and concurrently furnish Congress with a broad array of information about the withdrawal, including "a clear explanation of the proposed use of the land involved," an assessment of effects of the proposed use on the natural resources and users of the affected and adjacent land ("including particularly aspects of use that might cause degradation of the environment"), an analysis of potential conflicts between future and current uses, a statement as to whether suitable alternative sites are available for the uses at issue, an evaluation of the economic impact of a change in use, and a geological report, 43 U.S.C. 1714(c)(2).

The Act also reserves to Congress a legislative veto over non-emergency, large-tract withdrawals. Such withdrawals, the veto provision states, "shall terminate and become ineffective at the end of ninety days" after submission of notice of the withdrawal to Congress "if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal." 43 U.S.C. 1714(c)(1); see *ibid.* (setting forth procedures governing exercise of any legislative veto).

In addition to those requirements for withdrawal of land by the Executive, the Act includes a broad severability provision. That provision reflects Congress's judgment that "[i]f any provision of [the] Act

or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby." Pub. L. 94-579, § 707, Oct. 21, 1976, 90 Stat. 2743.

3. In 2007, a spike in uranium prices set off a rush to stake mining claims around one of the least developed and most scenic landscapes in the world: the Grand Canyon. "Uranium mining," the Ninth Circuit explained, "has been associated with uranium and arsenic contamination in water supplies, which may affect plant and animal growth, survival, and reproduction, and which may increase the incidence of kidney damage and cancer in humans." Pet. App. 16a; see Trust-SER 84–85, 187;[1] Brandon Loomis, *Abandoned Uranium Mines Continue to Haunt Navajos on Reservation* (Aug. 4, 2014), available at https://www.azcentral.com/story/news/arizona/investigations/2014/08/04/uranium-mining-navajos-devastating-health-effects/13591333/ (discussing toxic health effects of former mines in northern Arizona). Such mining (and the exploration that precedes it) also disturbs the landscape by giving rise to industrial sites, new roads and power lines, and heavy truck traffic. See, *e.g.*, AEMA-ER 281–282, 290–292, 301–322; DOI-SER 315, 324.

Responding to public outcry about that potential damage, the Secretary proposed in 2009 to withdraw from additional mining claims approximately one million acres of federal public land around Grand Canyon National Park. 74 Fed. Reg. 35,887 (July 21, 2009); see Pet. App. 139a. The 2009 proposal initiated a two-year period during which the Department ex-

[1] Cites that include "SER" or "ER" refer to the appendices filed in the court of appeals.

tensively evaluated the impact of the proposed withdrawal. 74 Fed. Reg. at 35,887; see 42 U.S.C. 4332 *et seq*. The Department analyzed more than 1,000 local soil and water samples to understand how uranium mining has affected water in the area, finding "[c]onsistently high concentrations of uranium and arsenic" in certain locations. Pet. App. 18a; see U.S. Dep't of Interior, Bureau of Land Mgmt., Northern Arizona Proposed Withdrawal Final Environmental Impact Statement Vol. 1, Oct. 2011 (FEIS), at 3-82, 3-106, available at https://www.grandcanyontrust.org/sites/default/files/resources/gc_FEIS_Northern_Arizona_Proposed_Withdrawal.pdf. The Department also considered the economic impacts of the proposed withdrawal, including "[e]ffects to the local, regional, or national economy." 76 Fed. Reg. 66,747, 66,748 (Oct. 27, 2011); see Pet. App. 19a (Department sought input on proposed withdrawal from six local counties). The Department ultimately issued a lengthy analysis of its findings; held a 75-day public-comment period; and reviewed nearly 300,000 comments from the public, preparing responses to all substantive comments it received. 76 Fed. Reg. at 66,748.

On January 9, 2012, the Secretary withdrew the area from new mining claims for twenty years under Section 1714(c). The Secretary concluded that, based on the available data, the risk that mining would give rise to a "serious impact" on water from radioactive contamination—including contamination of springs that are the lifeblood of the arid desert landscape—was "unacceptable." Pet. App. 21a–22a & n.13; AEMA-ER 173–74; see U.S. Dep't of Interior, Bureau of Land Mgmt., Record of Decision, Northern Arizona Withdrawal, Jan. 9, 2012, at 9, available at https://www.grandcanyontrust.org/sites/default/files/resources/Signed_NAZ_Withdrawal_ROD_0.pdf. In-

creased mining, the Secretary warned, would pose a radioactive hazard to wildlife and mar scenic vistas. AEMA-ER 175; see Pet. App. 22a. And the Secretary explained that "[a]ny mining within the sacred and traditional places of tribal peoples may degrade the values of those lands to the tribes that use them" in a way that likely "could not be mitigated." AEMA-ER 173, 175; see Pet. App. 22a.

The Secretary emphasized that the withdrawal would not bar mining on the withdrawn land by holders of valid existing mineral rights. Pet. App. 22a. As the Secretary explained, "potentially eleven mines, including * * * four mines currently approved, could proceed under [the] withdrawal." AEMA-ER 173, 175–76. Because the expected rate of uranium mining during the twenty-year withdrawal "would roughly match the rate of development at the time of the withdrawal," any "economic impact on local communities" would not "be severe." Pet. App. 22a (characterizing Record of Decision).

On the same day as the withdrawal, the Secretary submitted to Congress the notice and detailed report required under Section 1714(c). Pet. App. 70a. Congress did not take any action to block the withdrawal. See *ibid.*

4. a. Various mining interests, including petitioners, challenged the withdrawal decision. After the challenges were consolidated in the District of Arizona, respondents Grand Canyon Trust, Havasupai Tribe, Center for Biological Diversity, Sierra Club, and National Parks Conservation Association (collectively, the Trust) intervened as defendants and joined various federal entities and officials in defending the withdrawal. See Pet. App. 9a.

In the district court, the challengers contended, among other things, that the Act's legislative-veto provision is unconstitutional and is not severable from the remainder of the subsection of the Act in which it appears, which sets forth the Secretary's large-tract withdrawal authority. See Pet. App. 70a. As a consequence, they argued, that authority should be completely invalidated. See *ibid.*

The district court rejected that argument and granted summary judgment to the government and the Trust. Pet. App. 68a; see Pet. App. 201a. The court agreed—as all parties conceded—that the legislative-veto provision in Section 1714(c) is unconstitutional under *INS* v. *Chadha*, 462 U.S. 919 (1983). See *id.* at 946–958 (holding that a provision permitting Congress to invalidate a decision of the Executive Branch without presentment to the President violates Article I of the Constitution); Pet. App. 71a. The court concluded, however, that the veto provision is severable from the remainder of the Act and that the Department's large-tract withdrawal authority is "not * * * affected thereby." Pub. L. 94-579, § 707, Oct. 21, 1976, 90 Stat. 2743; see Pet. App. 67a–68a.

In assessing severability, the district court stated that, in light of the Act's express severability provision, "Plaintiffs can prevail in their quest to invalidate all of [Section 1714(c)] and the Secretary's withdrawal only if they present 'strong evidence' that Congress would not have granted the Secretary large-tract withdrawal authority in the absence of a legislative veto." Pet. App. 73a (citing *Alaska Airlines* v. *Brock*, 480 U.S. 678, 686 (1987), and *Chadha*, 462 U.S. at 932, 934); see Pet. App. 71a–72a. The court closely examined "the historical and political events leading up to the [Act], the language, structure, and context of

§ [1714], and the legislative history of the [Act]," Pet. App. 72a, and concluded that such evidence did not exist. See, *e.g.*, Pet. App. 105a (Congress was "equally concerned with granting withdrawal authority to the Executive as it was with setting proper limits and procedural safeguards on the exercise of that authority"). The court also emphasized that severing the legislative-veto provision did not impair the operation of the Act, for "Congress has never exercised the veto once." Nor did severance detract from the force of the Act's other significant "substantive and procedural restraints on executive action." Pet. App. 106a–107a; see Pet. App. 88a, 94a–95a.

b. The Ninth Circuit affirmed. Pet. App. 1a–64a.

The court of appeals, hewing to the same precedent of this Court as had the district court, recognized that "[i]nvalid portions of a federal statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" Pet App. 26a (quoting *Chadha*, 462 U.S. at 931–932). That principle, the court explained, "applies with greater force when, as here, the statute in question contains a severability clause," which creates a presumption of severability that can be overcome only by strong evidence. Pet. App. 26a–27a (citing *Alaska Airlines*, 480 U.S. at 686).

The court of appeals concluded that "[g]iven the recognized desire for executive authority over withdrawals of federal lands from new mining claims," there is "no indication, let alone 'strong evidence,'" that Congress would have chosen to delegate no large-tract withdrawal authority without the legislative veto. Pet. App. 33a (quoting *Alaska Airlines*, 480 U.S. at 686); see Pet. App. 28a. The court noted

that "Congress in [the Act] imposed significant limitations on the Secretary's withdrawal authority and provided for congressional oversight over executive withdrawals by means other than the legislative veto," including a time limit on the duration of large-tract withdrawals; limits on delegation of withdrawal authority; and requirements for notice, a public hearing, and a detailed report to Congress. Pet. App. 28a; see Pet. App. 29a–30a. The court explained that legislative history "confirms" that Congress would not have preferred the Executive to be stripped of any large-tract withdrawal authority absent a legislative veto. Pet. App. 30a; see Pet. App. 31a–33a. And the court observed that Congress's failure to legislatively veto any of the many large-tract withdrawals carried out under Section 1714, or to amend Section 1714 after this Court's decision in *Chadha*, "undermines the * * * contention that the legislative veto was an essential and indispensable component of [the Act] without which Congress would never have delegated large-tract withdrawal authority." Pet. App. 34a.

Finally, the court of appeals rejected petitioners' technical argument that, because the legislative-veto language is contained within the subsection that lays out the large-tract withdrawal authority, the veto is not a "provision" to which the severability clause applies. The court noted the lack of any support for the proposition that a statutory subsection "is the smallest unit that can be characterized as a 'provision.'" Pet. App. 34a (pointing out that one definition of "provision" is "clause"). The court also stated that petitioners' approach would lead to the "peculiar result" that courts should sever "*more* of a statute that contains a severability clause referring to a 'provision' than one that does not." Pet. App. 35a.

ARGUMENT

I. The Court of Appeals' Decision Does Not Conflict With Any Decision of This Court or Another Court of Appeals.

The decision below correctly stated and applied this Court's long-standing test for determining severability—the very test that this Court recently reaffirmed in *Murphy* v. *National Collegiate Athletic Association*, 138 S. Ct. 1461, 1482 (2018). The decision does not conflict with any decision of this Court or another court of appeals. Petitioners do not seriously contend otherwise. Rather, they seek only review of the Ninth Circuit's case-specific application of the well-established severability doctrine to the provisions of the statute at issue here. This Court should deny review.

A. The court of appeals correctly stated this Court's well-established severability test.

1. The court of appeals correctly articulated this Court's "well established" standard "for determining the severability of an unconstitutional provision"—a standard set out in a case in which this Court severed a legislative veto. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987); Pet App. 26a–35a. The court of appeals stated the standard precisely as this Court phrased it in *Alaska Airlines*: "[i]nvalid portions of a federal statute are to be severed '[unless] it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" Pet. App. 26a (citations omitted); compare *Alaska Airlines*, 480 U.S. at 684. The court of appeals then elaborated on the standard with reference to more recent precedents, explaining that courts generally "try to limit the solution to the prob-

lem" by leaving valid portions of the statute intact if possible, Pet. App. 26a (citing *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (*PCAOB*)), and that any remaining portion of the statute must be valid, capable of functioning independently, and consistent with congressional intent, *ibid*. (citing *United States* v. *Booker*, 543 U.S. 220, 258–259 (2005)).

That is precisely the severability analysis that this Court reaffirmed just two months ago in *Murphy*. There, this Court applied the *Alaska Airlines* standard, stating that valid portions of a statute are severable unless it is "evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not." *Murphy*, 138 S. Ct. at 1482 (quoting *Alaska Airlines*, 480 U.S. at 684). The Court also explained—as did the court of appeals here—that it would analyze "whether the law remains 'fully operative' without the invalid provisions," *ibid*. (quoting *PCAOB*, 561 U.S. at 509), and whether the remaining provisions would have "an effect altogether different from that sought by the measure viewed as a whole," *ibid*.

The decision below thus stated the severability standard just as this Court has stated it, both in decades of precedent and in its most recent opportunity to apply the doctrine. See, *e.g.*, *Murphy*, 138 S. Ct. at 1482; *PCAOB*, 561 U.S. at 509; *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320 (2006); *United States* v. *Booker*, 543 U.S. 220, 258–259 (2005); *New York* v. *United States*, 505 U.S. 144, 186 (1992).

2. No doubt for that reason, neither petitioner makes a serious argument that this Court's review is warranted either to correct the court of appeals'

statement of the severability standard or to refine this Court's severability analysis.[2] Respondent Yount alone urges (at 7–12) the Court to grant review to resolve "ambiguities" in its severability doctrine. But *Murphy*'s recent application of the long-standing severability test conclusively demonstrates that review is not warranted on that ground.

In all events, the "ambiguities" that Yount identifies are no more than semantic differences in how the Court has described the fundamental severability inquiry. For instance, while Yount suggests that *Booker* "arguably reframed the test for severability" (Br. 10), *Booker* relied on *Alaska Airlines* and articulated the same basic elements of severability analysis that are set forth in that case. See *Booker*, 543 U.S. at 223. Similarly, Yount is incorrect in arguing (Br. 10–12) that *New York* and *PCAOB* did not analyze whether the portions of the statute remaining after severance would function in a manner that Congress intended. In both decisions, the Court considered whether the valid provisions would function consistently with congressional intent.[3] See *New York*, 505 U.S. at 186–187; *PCAOB*, 561 U.S. at 480–481.

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[2] Petitioners assert that the appeals court applied a standard without foundation in this Court's precedent when it noted that there is "an obvious substitute for the legislative veto: the ordinary process of legislation." Pet. App. 27a; *see* NMA Pet. 3–4, 12; AEMA Pet. 15. That argument ignores that the court faithfully applied this Court's precedent in *Alaska Airlines* and its progeny in concluding the veto was severable. See *infra* Part II.B.3.

[3] Contrary to Yount's arguments (at 11), *Planned Parenthood* is inapposite, for in that case the Court remanded to the lower court to determine legislative intent for severability purposes. 546 U.S. at 331.

B. The court of appeals' decision does not otherwise conflict with any decision of this Court.

Petitioners contend (NMA Pet. 21–23; AEMA Pet. 28–29) that the court of appeals' decision conflicts with this Court's decisions in *Nguyen* v. *INS*, 533 U.S. 53 (2001), and *Miller* v. *Albright*, 523 U.S. 420 (1998). Petitioners are incorrect.

Petitioners rely not on any holding of the Court, or on the reasoning supporting a holding, but on an argument that a majority of the Court has twice declined to adopt. *Miller* was a fractured decision that rejected on three different grounds an equal-protection challenge to a naturalization requirement. 523 U.S. at 423–59. Two Justices concurred in the judgment, relying on the Judiciary's limited power over naturalization. *Id.* at 452–59 (Scalia, J., concurring in the judgment). They asserted, among other arguments, that another provision—one that specified the sole conditions under which a person could be naturalized—would prevent the Court from severing the challenged requirement. *Id.* at 457–58. Petitioners analogize (NMA Pet. 22) that provision to Section 1714(a), which provides that withdrawals must be made "only in accordance with the provisions and limitations of this section." 43 U.S.C. 1714(a). But the non-severability argument in *Miller* was not accepted by a majority of the Court in *Miller*.

In *Nguyen*, the Court upheld the constitutionality of the challenged naturalization requirement, and therefore did not decide whether the provision at issue would prevent severability. 533 U.S. at 72 ("we need not rely on this argument").

C. The court of appeals' decision does not conflict with any decision of another court of appeals.

1. Petitioners do not contend that the decision below conflicts with any decision of another court of appeals. NMA Pet. 11–13; AEMA Pet. 16–34; see S. Ct. R. 10(a). Nor could they. No other court of appeals has addressed the constitutionality of the Act's legislative veto, let alone decided whether that provision is severable from the Act. This Court's review is therefore not warranted.

2. Respondent Yount argues that "the panel's application of the severability doctrine is markedly different from the approach taken by the D.C. Circuit" (Yount Br. 16) in *City of New Haven* v. *United States*, 809 F.2d 900 (D.C. Cir. 1987), which held that the legislative veto in the Impoundment Control Act of 1974, 2 U.S.C. 684, was not severable. *New Haven*, 809 F.2d at 905. But Yount does not identify any aspect of the D.C. Circuit's analysis that conflicts with the decision below; instead, he emphasizes that the D.C. Circuit reached a different result. This Court has made clear, however, that severability analysis turns on the specific characteristics of, and congressional intent with respect to, the particular statute in question. *PCAOB*, 561 U.S. at 509 (internal quotation marks omitted).

Yount also contends (at 17–18) that the decision below "ignor[es] opposing views from other courts" by treating one sentence of a subsection as a severable "provision." But the only appellate decision on which Yount relies is *consistent* with the Ninth Circuit's approach, holding that a single clause *may* constitute a severable "provision." *Alabama Power Co.* v. *U.S.*

Dep't of Energy, 307 F.3d 1300, 1306–1308 (11th Cir. 2002).[4]

II. The Ninth Circuit Reached the Right Result in Applying This Court's Settled Severability Test.

A. The Ninth Circuit properly applied settled precedent on severability.

The Ninth Circuit correctly applied this Court's long-settled severability precedent. After considering the Act's severability clause, as well as the statutory language, structure, and legislative history, the court concluded that there was "no indication, let alone 'strong evidence,'" that Congress would not have enacted the statute without the legislative veto. Pet. App. 33a; see *Murphy*, 138 S. Ct. at 1482. This Court's review of that case-specific application of well-established law is not warranted. See S. Ct. R. 10.

1. The severability inquiry is "eased" in this case because Congress expressly stated its intent that invalid provisions of the Act should be severed from the remainder of the statute. *Alaska Airlines*, 480 U.S. at 686. Congress included in the Act a broad severability provision stating that "[i]f any provision of [the] Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby." Pub. L. 94-579, § 707, Oct. 21, 1976, 90 Stat. 2743. The inclusion of that

[4] Yount also cites a decision of a district court within the Eleventh Circuit that purportedly conflicts with *Alabama Power*. Yount Br. 19 (citing *Planned Parenthood Se., Inc.* v. *Strange*, 172 F. Supp. 3d 1275, 1282 (M.D. Ala. 2016)). That decision lacks precedential effect and cannot create a conflict warranting this Court's review.

clause requires the courts to presume that the legislative veto can be severed unless there "is strong evidence that Congress intended otherwise." *Alaska Airlines*, 480 U.S. at 686; see Pet. App. 27a (no court has ever held "that a legislative veto provision could not be severed where the statute in question contained a severability clause").

Petitioners resist (NMA Pet. 25–26) that conclusion, contending that the Act's severability clause applies only to independent "provision[s]" of the statute. The legislative veto, petitioners argue, is not covered by the severability clause because it is set forth in one portion of a statutory section. That argument is contrary to this Court's precedent and common sense, and the court of appeals correctly rejected it. Pet. App. 34a–35a. This Court has approved the severance of unconstitutional language from a sentence in reliance on a severability clause directing unconstitutional "provision[s]" of a statute to be severed. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504–07, 506 n.14 (1985) (remanding to consider whether to invalidate six words within subsection defining "prurient" where statute contained a severability clause using the word "provision"). That approach effectuates the purpose of a severability clause: to direct courts to remove only the unlawful parts of a statute and preserve the rest. As the court of appeals correctly concluded, petitioners' approach would lead to the opposite and illogical result of requiring "courts to sever *more* of a statute that contains a severability clause referring to a 'provision' than one that does not." Pet. App. 34a–35a.

In any event, as the court of appeals explained, even if the severability clause did not apply to the Act's legislative veto, that veto would still be severa-

ble, because there is "no indication," much less strong evidence, that Congress would not have enacted the Act without the legislative veto. Pet. App. 33a; see *infra* Part II.A.2-3.

2. The court of appeals correctly held that "the limited delegation of large-tract withdrawal authority is fully consistent with Congress' basic objectives in enacting FLPMA even if there is no legislative veto option." Pet. App. 28a (quoting *Booker*, 543 U.S. at 259); see *Alaska Airlines*, 480 U.S. at 684.

Congress enacted Section 1714(c)(1) to eliminate the Executive's unlimited withdrawal authority and replace it with a two-tier system: one that retained for Congress the primary authority to withdraw lands permanently, while delegating to the Executive a delimited authority to withdraw lands temporarily. Thus, Congress declared in the Act that "it is the policy of the United States that * * * the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress *delineate the extent* to which the Executive may withdraw lands *without legislative action*." 43 U.S.C. 1701(a)(4) (emphasis added). If the legislative veto is struck, Section 1714(c)(1) still functions in a manner that is consistent with that intent. The Executive retains its delegated authority to make time-limited, large-tract withdrawal decisions, and that authority remains subject to extensive constraints that ensure congressional and public influence over the Executive's decision-making process.

Even without the legislative veto, the Executive's large-tract withdrawal authority remains delimited by a "plethora of constraints." Pet. App. 29a. In particular:

- Large-tract withdrawals are not permanent; they expire after at most 20 years and must be renewed, if at all, by a different presidential administration and (almost certainly) a different Secretary of the Interior. Pet. App. 28a (citing 43 U.S.C. 1714(c)(1)).
- A withdrawal may be renewed only if the renewal serves the withdrawal's original purpose. See 43 U.S.C. 1714(f); *New Mexico* v. *Watkins*, 969 F.2d 1122 (D.C. Cir. 1992) (setting aside withdrawal renewal where Interior changed the withdrawal's purpose).
- Only Senate-confirmed officials within the Department of the Interior may exercise the Secretary's large-tract withdrawal authority. Pet. App. 29a (citing 43 U.S.C. 1714(a) and 43 U.S.C. 1714(c)(2)).
- Before making a large-tract withdrawal, the Secretary of the Interior must provide notification and extensive information to Congress. In particular, the Secretary must submit to Congress a "clear explanation" of the reasons for the withdrawal, 43 U.S.C. 1714(c)(2)(1); an evaluation of environmental impact and economic impact, 43 U.S.C. 1714(c)(2)(2); an identification of present land uses and users, including how they will be affected by a withdrawal, 43 U.S.C. 1714(c)(2)(3); an explanation of provisions made for continuing or terminating existing uses, 43 U.S.C. 1714(c)(2)(4); a statement of consultation that has or will occur with local governments and other affected parties, 43 U.S.C. 1714(c)(2)(7)–(8); a description of public hearings or other public involvement, 43 U.S.C. 1714(c)(2)(10); a statement of where

> the records of the withdrawal are made available to the public, 43 U.S.C. 1714(c)(2)(11); and a report about the area's geology and mining prospects as well as present and future market demands, 43 U.S.C. 1714(c)(2)(12).

Petitioners' complaint that the Secretary has "unfettered" authority absent the legislative veto is thus rhetoric divorced from reality. See AEMA Pet. 17, 36; NMA Pet. 13, 25. The remaining statutory requirements, taken together, impose significant constraints on the Secretary's authority. They ensure that Congress has ample opportunity to be involved in and oversee the Secretary's large-tract withdrawal decisions. See *Chadha*, 462 U.S. at 934–35 (concluding that, even without the severed veto, "Congress' oversight of the exercise of this delegated authority is preserved" by provisions requiring reports to Congress, which maintain Congress's ability to influence or repeal the executive action); *Alaska Airlines*, 480 U.S. at 689–90 (reaching same conclusion). The requirements also ensure that the Secretary's decision-making process includes input from all interested stakeholders and local governments.

Petitioners argue that striking the legislative veto leaves large-tract withdrawals subject to fewer limitations than small-tract and emergency withdrawals, "thwarting" congressional intent by making it easier to withdraw larger tracts of land than it is to withdraw smaller tracts. NMA Pet. at 28; see AEMA Pet. at 30–32. But important distinctions remain between the various types of withdrawals. Small-tract withdrawals can last indefinitely, while emergency withdrawals (including of more than 5,000 acres) can last only three years. See 43 U.S.C. 1714(d) (small-tract withdrawals); 43 U.S.C. 1714(e) (emergency with-

drawals). And small-tract and emergency withdrawals are not subject to the rigorous pre-decisional notice-and-reporting requirements described above. See 43 U.S.C. 1714(d)–(e).

NMA also contends that without the legislative veto Congress has less authority to reverse an executive withdrawal than Congress intended to reserve for itself. NMA Pet. 15–16 (quoting *Alaska Airlines*, 480 U.S. at 685). While it is true that where a legislative veto is invalidated, the remaining provisions will no longer confer on Congress the ability to reverse an executive action through means short of enacting new legislation, the Court has never allowed that reality to preclude severability. See *Alaska Airlines*, 480 U.S. at 689–690; *Chadha*, 462 U.S. at 959. The key question is whether Congress would have preferred to enact the statute with its remaining oversight provisions, but absent the legislative veto, or to delegate no large-tract withdrawal power at all. As the court of appeals correctly found here, there is no evidence, let alone "strong evidence," that Congress would not have enacted the statute without the legislative veto, as the remaining statutory provisions permit significant congressional oversight and implement Congress's basic purpose of delineating the situations in which the Executive may make withdrawals without congressional action. Pet. App. 28a (citing *Booker*, 543 U.S. at 259); Pet. App. 30a, 33a.

Indeed, as the Ninth Circuit noted, the Secretary has made at least 82 large-tract withdrawals since the Act was enacted, and Congress has never attempted to exercise its legislative veto. Even more significantly, Congress has never amended the Act to strengthen its oversight capabilities—even though it has been clear since this Court decided *Chadha* in

1983 that the Act's legislative veto is unconstitutional. In the wake of *Chadha*, the Secretary has made dozens of large-tract withdrawals. See, *e.g.*, *infra* nn.7–11. Had Congress been concerned that the Act's remaining provisions provided it with insufficient ability to influence the Secretary's large-tract withdrawal decisions, it could have amended the statute. Pet. App. 33a–34a. The legislature's quiescence indicates that Congress has understood the remaining constraints on the Secretary's authority as sufficient to give effect to congressional intent to limit executive discretion over large-tract withdrawals. Pet. App. 34a.

3. The legislative history confirms the absence of any evidence, let alone "strong" evidence, that Congress would not have enacted the Act without the legislative veto. As the Ninth Circuit explained, the legislative history as a whole demonstrates that Congress was "equally concerned with enabling the Executive to act through controlled delegation as it was with preserving Congress's reserved powers." Pet. App. 30a; see Pet. App. 32a; see also Pet. App. 95a–105a (district court analysis concluding legislative history fails to provide "strong evidence" against severability).

This Court has made clear that "the authoritative source for finding the Legislature's intent," outside of the text itself, "lies in the Committee Reports on the bill." *Garcia* v. *United States*, 469 U.S. 70, 76 (1984). The court of appeals appropriately reviewed those authorities and found no strong evidence undermining severability. In fact, the Conference Report "barely discussed the legislative veto" (Pet. App. 32a n.21), noting merely that the Senate version of the bill did not contain a legislative veto, whereas the House

version did. H.R. Rep. No. 94-1724, at 57 (1976). The Senate materials, of course, did not discuss the legislative veto at all, S. Rep. No. 94-583, at 1–24 (1975); see Pet. App. 95a–96a, and the House Report discussed the veto only in the context of other oversight mechanisms such as notice and reporting requirements and time limits, H.R. Rep. No. 94-1163, at 2 (1976); see Pet. App. 30a–31a.[5] Taken together, those authorities do not provide any evidence, let alone strong evidence, to indicate that Congress would have preferred not to grant the withdrawal authority in question if unqualified by a legislative veto.

B. Petitioners' remaining arguments against severability lack merit.

1. Petitioners argue that the authorization for large-tract withdrawals must be struck because it is located in the same subsection as the legislative veto. NMA Pet. 21–22; AEMA Pet. 23–24. This Court's precedent dictates otherwise. "The point is not whether the [valid and invalid] parts are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance,—whether the provisions are so interdependent that one cannot operate without the other." *Loeb* v. *Trs. of Columbia Twp.*, 179 U.S. 472, 490 (1900) (citation and internal quotation marks omitted).

Here, the language granting the Executive authority to make large-tract withdrawals is easily separa-

[5] Individual floor statements, which this Court has held to be among the least illuminating forms of legislative history, *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1661 (2017), showed disagreement among members of the House as to the importance of the veto. Pet. App. 31a–32a & nn.20–21.

ble from the legislative veto in substance: one grants the Secretary withdrawal authority, while the other provides Congress after-the-fact review of the Secretary's decision. This Court has expressly concluded that legislative-veto provisions are not likely to be "so intertwined" with a statute's other provisions "that the Court would have to rewrite the law to allow it to stand." *Alaska Airlines*, 480 U.S. at 684. That is so because "a legislative veto * * * *by its very nature is separate* from the operation of the substantive provisions of a statute." *Id.* at 684–685 (emphasis added).

The cases on which petitioners rely (NMA Pet. 26; AEMA Pet. 30) are inapposite. In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), the Court found two sentences "inextricably bound together" where both criminalized activities of healthcare professionals providing abortions. *Id.* at 82–84. Here, there is nothing unconstitutional about Congress's delegating withdrawal authority to the Secretary. Nor does *Murphy*, in which the challenged statute had no severability clause, help petitioners. In *Murphy*, it was this Court's analysis of Congress's purpose, and not the unlawful provision's location within the statute, that led the Court to conclude that the entire statute must fall. 138 S. Ct. at 1482.[6]

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[6] Other cases cited by petitioners are similarly inapposite. Justice Brennan's non-majority opinion in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), criticized the majority's severance of only part of a statutory phrase because doing so fundamentally altered the prohibitory scheme Congress adopted. *Id.* at 667–668 (Brennan, J., concurring and dissenting in part). Severing the legislative veto here would have no novel or transformative effect. And *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), is irrelevant; the Court found the challenged provision there constitutional. *Id.* at 594.

2. Petitioners also argue that the court of appeals' decision to sever the legislative veto is erroneous in light of Section 1714(a), which allows withdrawals to be made, extended, or revoked "only in accordance with the provisions and limitations of this section." NMA Pet. 20–23; AEMA Pet. 26–29 (citing 43 U.S.C. 1714(a)). Petitioners argue that, because the veto is a limitation contained in Section 1714, withdrawals may occur only in accordance with that limitation, and may not occur at all if any of Section 1714's many limitations are invalidated.

Again, petitioners' argument misses the mark. Section 1714(a) makes clear only that the Secretary's withdrawal authority arises from Section 1714, and not—as was true before the Act was enacted—by congressional acquiescence, or from other parts of the U.S. Code. Reading Section 1714(a) to require the large-tract withdrawal authority to be struck along with the veto would improperly render the Act's severability clause ineffective. See generally *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). It is the severability clause, not Section 1714(a), that expresses Congress's intent about severability. The only reading of the Act that gives full effect both to Section 1714(a) and to the severability clause is one that allows severance of the invalid limitation on the withdrawal authority: the legislative veto. Under the severability clause, the withdrawal authority remains intact after the veto is severed, and under Section 1714(a) withdrawals are permitted "only in accordance with" the valid limitations. That reading, unlike petitioners', fully harmonizes the two provisions.

3. In addition, petitioners contend that the court of appeals "applied a standard without foundation in Supreme Court precedent," NMA Pet. 12, because the court noted in passing that "the ordinary process of legislation" provides "an obvious substitute for the legislative veto," Pet. App. 27a. See NMA Pet. 3–4, 12; AEMA Pet. 15.

Petitioners are incorrect. The court of appeals carefully applied this Court's severability precedents. It clearly did not believe that the availability of the ordinary legislative process allowed it to bypass the mandated inquiry into Congress's intent, because it undertook just such an analysis. The court reviewed the text, structure, and legislative history of the Act in detail to determine whether there was "strong evidence" that Congress would not have delegated large-tract withdrawal authority absent the legislative veto. Pet. App. 28a–35a. That analysis was grounded firmly in this Court's decisions, including *Alaska Airlines*. See Pet. App. 28a (Act's language, structure, and history do not provide the requisite "strong evidence"), 27a (citing *Alaska* Airlines), 33a (again reciting *Alaska Airlines'* "strong evidence" test). Contrary to petitioners' argument, the Ninth Circuit's unremarkable observation that Congress is free to go about the ordinary process of legislation, which was not the basis for the court's severability conclusion, cannot somehow be understood as an announcement of a "new standard" that diverges from this Court's precedent.

4. Finally, petitioner NMA argues that the fact that Congress enacted the Act pursuant to its Property Clause authority should have prevented the court of appeals from severing the legislative veto. NMA appears to contend that because Congress's power

under the Property Clause is plenary, severing the legislative veto raises separation-of-powers concerns. NMA Pet. 4, 35–37. That argument is meritless. NMA does not suggest that Congress's power under the Property Clause is *exclusive* of the Executive; thus, Congress may delegate its Property Clause authority to the Executive. Congress chose to include a legislative veto in the Act, but it could just as easily have enacted the statute without the veto. The question whether to sever the veto in this context is thus no different than in any other context: in either case, the ultimate question is one of congressional intent. Indeed, in another area where Congress is at the apex of its authority under the Constitution—regulating immigration—this Court severed a legislative veto without adopting the novel approach NMA proffers. *Chadha*, 462 U.S. at 931–959.

III. The Court of Appeals' Decision Does Not Give Rise to the Harms Petitioners Claim, But Reversing It Would Undercut Decades of Settled Practice and Multiple Uses of Public Land.

Failing to identify any conflict in authority or significant legal issue warranting this Court's review, petitioners assert that the Ninth Circuit's ruling will "cripple" the mining industry, threatening the American economy and national security. AEMA Pet. 35, 38. Petitioners are wrong. The decision below merely maintains the Secretary's large-tract withdrawal authority as it has stood, without giving rise to petitioners' claimed harms, for over forty years. And eliminating that authority would undermine decades of settled practice by the Secretary and Congress to protect public land.

Since Congress enacted the Act, the Secretary has made numerous large-tract withdrawals—for major water projects,[7] hunting habitats,[8] energy development,[9] unique recreational values,[10] and archaeological and cultural resources.[11] Neither before nor after the Court's 1983 decision in *Chadha* did Congress exercise its legislative-veto power to block such a withdrawal. And in the three decades after *Chadha*, despite the Secretary making dozens of large-tract withdrawals, the mining industry did not previously challenge the supposedly urgent threat of the Secretary's authority "unchecked" by the legislative veto. Further, according to petitioners' own statistics, the industry has remained a significant contributor to the nation's economy and employment during the relevant period. See AEMA Pet. 36.

Petitioners and amici (at 9) also significantly overstate the effect of withdrawals on the ability to mine in a withdrawn area. While large-tract withdrawals

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[7] *E.g.*, Public Land Order No. 7668, 71 Fed. Reg. 42,661 (July 27, 2006) (withdrawing 6,450 acres for the Central Utah Project); Public Land Order No. 5688, 44 Fed. Reg. 70,467 (Dec. 7, 1979) (withdrawing land for dam and reservoir project).

[8] *E.g.*, Public Land Order No. 6797, 55 Fed. Reg. 37,878 (Sep. 14, 1990), extended by Public Land Order No. 7748, 75 Fed. Reg. 57,061 (Sep. 14, 2010) (withdrawing bighorn sheep winter range).

[9] *E.g.*, Public Land Order No. 7818, 78 Fed. Reg. 40,499 (July 5, 2013) (withdrawing land for future solar energy development).

[10] *E.g.*, Public Land Order No. 7794, 77 Fed. Reg. 47,665 (Aug. 6, 2012); Public Land Order 6629, 51 Fed. Reg. 41,104 (Nov. 13, 1986); Public Land Order No. 6844, 56 Fed. Reg. 14,476 (Apr. 10, 1991).

[11] *E.g.*, Public Land Order No. 7737, 74 Fed. Reg. 56,657 (Nov. 2, 2009).

foreclose the staking of *new* mining claims for a limited period, the Act provides that such withdrawals must be made subject to valid existing rights. Pub. L. No. 94-579 § 701(h). A withdrawal by itself thus cannot extinguish the rights of claimants who have found valuable mineral deposits. Even *within* withdrawn areas, mining may continue on such claims. Here, the Bureau of Land Management predicted that, with the challenged withdrawal in place, 11 uranium mines (four existing and seven new) would be developed on existing claims, and more than 2.5 million tons of uranium ore would be mined in the area. See FEIS at 2-14 to 2-15; Pet. App. 22a.

Even assuming that time-limited large-tract withdrawals might be renewed "indefinitely" (AEMA Pet. 34), the 20-year limit on large-tract withdrawals means a different administration will review a withdrawal when it expires, and need not renew it. New administrations also have the authority to revoke withdrawals before their termination dates, assuming Interior meets other regulatory and legal requirements for doing so. 43 U.S.C. 1714(a), (i), (j). It is therefore hyperbole to say that the "Nation loses the value of domestic uranium production" because of the withdrawal (NMA Pet. 40), since the minerals remain in place and mining may occur if the withdrawal expires or is revoked.

While the court of appeals' decision maintains the status quo, petitioners' proposed approach would upend settled law and give rise to serious harms. Eliminating the Secretary's time-limited large-tract withdrawal authority would throw into disarray the legal framework and practice that has been settled since the Act's passage, preventing the Secretary from continuing to protect the rights of hunters, anglers,

tribes, recreationists, and renewable-energy providers, among others (except under the Act's emergency provision, which allows large-tract withdrawals for only three years).[12] Such an outcome would undermine the judgments Congress itself made in the Act about the proper approach to land withdrawal, thereby placing a burden on Congress that it has affirmatively decided not to shoulder, and ultimately would harm the public interest.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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[12] The only authority aside from the Act that permits the Executive Branch to put 5,000 acres or more of public lands off limits to new mining claims is the President's authority to designate national monuments pursuant to the Antiquities Act, 54 U.S.C. 320301 *et seq*.

Respectfully submitted,

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