

No. _____

IN THE
Supreme Court of the United States

CENTER FOR BIOLOGICAL DIVERSITY,
Petitioner,

v.

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

**APPLICATION TO THE HONORABLE ANTHONY KENNEDY
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA**

Pursuant to Rule 13(5) of the Rules of this Court, Petitioner Center for Biological Diversity moves for an extension of time of 60 days, to and including August 23, 2018, within which to file a petition for a writ of certiorari.

1. The judgment from which review is sought is *Center for Biological Diversity et al. v. U.S. Department of Homeland Security, et al.*, Case Nos. 17-cv-1215-GPC-WVG, 17-cv-1873-GPC-WVG, 17-cv-1911-GPC-WVG (S.D. Cal. March 26, 2018) (attached as Exhibit 1). The judgment arises from the district court's February 27, 2018 Order granting summary judgment in *In re: Border Infrastructure Environmental Litigation*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018) (attached as Exhibit 2) and the district court's order granting a joint motion to voluntarily dismiss the Center for Biological Diversity's cause of action under the Freedom of Information Act, 5 U.S.C. § 552, Dkt. No. 53 (March 26, 2018) (attached

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as Exhibit 3). The date within which a petition for writ of certiorari would be due, if not extended, is June 24, 2018, calculated from the date of judgment pursuant to 28 U.S.C. § 2101(c). Petitioners are filing this Application at least ten days before that date. See S. Ct. R. 13.5. The jurisdiction of this Court is based on Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") § 102(c)(2)(C), codified at 8 U.S.C. § 1103 note. Specifically, IIRIRA § 102(c)(2)(C) provides for this Court's direct certiorari review of the district court's rulings:

(C) Ability to seek appellate review.--An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

2. On May 8, 2018, Animal Legal Defense Fund, Sierra Club, and Defenders of Wildlife submitted an application for an extension of time of 60 days within which to file a petition for a writ of certiorari in one of the consolidated cases to this action (17-cv-1873-GPC-WVG)(attached as Exhibit 4). The Animal Legal Defense Fund, *et al.*, application was granted by Justice Kennedy on May 10, 2018 (Dkt. No. 17A1239, Entry BL-4)(attached as Exhibit 5).

3. This application seeks an extension of time for filing a petition for writ of certiorari on the same grounds as those described in paragraphs #2-5 of the Animal Legal Defense Fund, *et al.* application. These grounds, with minor variations, are described in paragraphs #4-7 below.

4. This case presents several substantial questions of law meriting this Court's attention, including: (1) Whether IIRIRA § 102(c), which gives the Secretary

of the Department of Homeland Security (“the Secretary”) unfettered discretion to waive “all applicable laws” impeding the construction of barriers along the U.S. border, is an unconstitutional delegation of power to the Executive Branch in violation of Article I, Section I of the Constitution; (2) Whether IIRIRA § 102(c) violates the Presentment Clause, Article I, Section 7 of the Constitution, by giving the executive branch unfettered discretion to, in effect, selectively repeal privately enforceable laws; and (3) Whether the Secretary’s waivers of law pursuant to IIRIRA §102(c) violate the Take Care Clause, Article II, Section 3 of the Constitution, by exceeding the authority Congress delegated to the Executive Branch.

5. This case arises from the Administration’s pursuit of a border wall along the U.S.-Mexico border.

a. In 1996, Congress passed § 102 of IIRIRA, which allowed the Attorney General to waive certain environmental laws when the Attorney General determined such waiver “was necessary to ensure expeditious construction” of a specific section of border barriers. Pub. L. No. 104-208, Div. C., Title I, § 102(c), 110 Stat. 3009, 3009-554 (1996). Congress amended IIRIRA § 102 in 2005, expanding the government’s waiver authority to include “all legal requirements” that the Secretary of Homeland Security deemed “necessary to ensure expeditious construction of the barriers and roads under this section.” REAL ID Act, Pub. L. No. 109-13, Div. B, Title I, § 102, 119 Stat. 231, 302, 306 (May 11, 2005).

b. On August 2, 2017 and on September 12, 2017, the Secretary published two waiver determinations in the Federal Register. *See* 82 Fed. Reg. 35,984-85; 82 Fed. Reg. 42,829-30. The waivers purport to waive the requirements of more than 30 state and federal laws. *Id.*

Petitioner, along with the State of California and the California Coastal Commission, and Animal Legal Defense Fund, Defenders of Wildlife, and Sierra Club, sued the Secretary and other federal agencies, seeking to set aside the waiver and require the Secretary to comply with all applicable state and federal laws in constructing any border wall. *See* Case Nos. 17-cv-1215-GPC-WVG, 17-cv-1873-GPC-WVG, 17-cv-1911-GPC-WVG. The district court consolidated the three actions. *See* Order Granting Joint Motion to Consolidate, Case No. 17-cv-1215-GPC-WVG, Dkt. 22 (S.D. Cal. Oct. 24, 2017). After briefing and argument, the district court granted summary judgment for the government. *See Border Infrastructure Environmental Litigation*, 284 F. Supp. 3d at 1103.

6. This Court's review is warranted in light of the important legal issues at stake and IIRIRA § 102(c)'s extraordinary withdrawal of appellate review by the court of appeals. As a practical matter, in light of Congress's decision to displace the normal course of appellate review, only this Court can resolve the important constitutional questions raised by Petitioner. Moreover, questions over the constitutionality of § 102(c) are likely to recur as the Administration issues new waivers; since this case began, the Secretary has issued an additional waiver. *See* 83 Fed. Reg. 3,012 (January 22, 2018). Continued litigation in district courts along

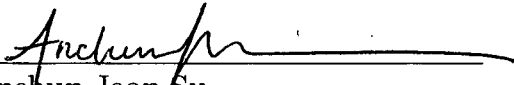
the southern border, as well as in the District of Columbia, has the potential to create conflicting precedents, even within the same judicial district or circuit. Because Congress has eliminated normal review by the court of appeals, only this Court can bring uniformity to this area of law.

7. The extension requested is also justified because of ongoing litigation in the Court of Appeals for the Ninth Circuit. In its decision at issue here, the district court, in addition to rejecting plaintiffs' constitutional claims, also rejected the argument that the Secretary's waivers were ultra vires. Petitioner, along with the State of California and the California Coastal Commission, and Animal Legal Defense Fund, Defenders of Wildlife, and Sierra Club, have appealed to the Ninth Circuit the district court's determination that the Secretary did not act ultra vires when making the waiver determinations, urging that the Court of Appeals retains appellate jurisdiction with respect to that issue. *See* Case Nos. 18-55474, 18-55475, 18-55476 (9th Cir. April 11, 2018). The Ninth Circuit has consolidated the cases and ordered expedited briefing and argument. *See* Order Consolidating Cases, *In re Border Infrastructure Environmental Litigation*, No. 18-55474, Dkt. No. 7 (9th Cir. April 19, 2018); Order Expediting Briefing, No. 18-55474, Dkt No. 10 (9th Cir. April 26, 2018). Briefing in the court of appeals will be complete by July 16, 2018, with oral argument in August 2018. Extending the deadline for certiorari will allow time for the Ninth Circuit to consider the ultra vires issue and could clarify the appropriate avenue for judicial review of the Secretary's waiver decisions.

8. This application would promote judicial efficiency by maintaining consistent deadlines for the filing of a petition for writ of certiorari in the three consolidated cases adjudicated by the court's decision in *In re: Border Infrastructure Environmental Litigation*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018).

For the foregoing reasons, petitioner Center for Biological Diversity hereby requests that an extension of time be granted, to and including August 23, 2018, within which petitioner may file a petition for a writ of certiorari.

Respectfully submitted,


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May 18, 2018

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioner Center for Biological Diversity states that it is not a publicly-held corporation, does not issue stock, and does not have any parent corporations.