

IN THE
Supreme Court of the United States

MARKWAYNE MULLIN, SECRETARY OF HOMELAND SECURITY, ET AL.,

Applicants,

v.

FRIENDS OF THE RUIDOSA CHURCH, ET AL.,

Respondents.

TO THE HONORABLE JUSTICE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME
COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT

OPPOSITION TO APPLICATION FOR A STAY OF THE INJUNCTION
ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

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Pursuant to Supreme Court Rule 29.6, the Center for Biological Diversity states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

Pursuant to Supreme Court Rule 29.6, Friends of the Ruidosa Church states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The government asks this Court to stay a preliminary injunction so that it may immediately resume blasting, bulldozing, road construction, and other border barrier-related construction across one of the most remote and ecologically and culturally significant landscapes in the United States. A wilderness landscape that has remained largely unscathed through the ages, the Big Bend region lies in the heart of the Chihuahuan Desert and is defined by deep canyons, sheer cliffs, and rugged mountain ranges. Its formidable terrain, harsh desert environment, and lack of roads have long served as a natural barrier to travel through the region.

If granted, the requested relief would result in the permanent alteration of an irreplaceable landscape that includes Big Bend National Park, Big Bend Ranch State Park, and nearly 200 miles of the congressionally designated Rio Grande Wild and Scenic River corridor. A stay would likewise threaten unique historic and cultural resources (including the Ruidosa Church), myriad private ranchlands, and other property owners before the constitutionality of the challenged Waivers¹ has been finally adjudicated. As highly destructive activities were already underway, the district court entered its injunction to preserve the status quo and prevent further irreparable harm during the brief period necessary to resolve the merits on pending summary judgment motions. As the district court recognized, if construction proceeds and

¹ The “Big Bend Waivers” or “Waivers” are: 91 Fed. Reg. 7297 (Feb. 17, 2026), Supp. App. 16a, *as amended by*, 91 Fed. Reg. 40550 (July 2, 2026), App. 4a; 91 Fed. Reg. 27969 (May 15, 2026), Supp. App. 19a, *as amended by*, 91 Fed. Reg. 34831 (June 9, 2026), App. 1a; 91 Fed. Reg. 46939 (July 27, 2026), App. 7a.

Respondents ultimately prevail, this beloved landscape and Respondents' livelihoods, recreation, and enjoyment "will have been forever altered." App. 236a.

That conclusion followed extensive briefing and an evidentiary hearing at which Applicants declined to call a single witness, introduce any evidence, or otherwise develop the factual record supporting the claims of purported urgency they now advance. *See* Appl. 26–31; *infra* 11–13. Based on the evidence before it, the district court found that the challenged construction has already harmed and, without injunctive relief, would irreversibly harm Respondents' livelihoods, obstruct access to the Rio Grande, fragment wildlife habitat, and otherwise impair the ecology of the region by altering hydrologic function, damaging vegetation and fragile desert soils, and inflicting ecological injuries that would persist for "decades if not centuries," if not in perpetuity. App. 237a. The court likewise found serious, irreparable injuries to Respondents and the public at large from loss of wilderness that benefits tourism, recreation, farming, ranching, education, and many other concrete interests. App. 215a–217a. Those factual findings are entitled to substantial deference.

Against those irreparable injuries, the district court expressly found that the government would only suffer a "temporary delay" while the merits are assessed. App. 217a. *After* entry of the injunction, the government offered new declarations in attempting to substantiate its harm. App. 218a, 225a. But even its new submissions identify the apprehension of just 18 individuals over a period of years, only some of whom were alleged to have crossed in Big Bend. App. 227a–232a. As the district court found, the broader record demonstrates that the Big Bend Sector experiences, by far,

the lowest apprehension rates anywhere on the southern border, with rates lower than even the northern border's Buffalo Sector. *See* App. 213a.

Indeed, Applicants themselves previously concluded that a similar delay would not harm them. After construction began in Big Bend National Park, and following a bipartisan groundswell of intense opposition, Applicants voluntarily paused construction across a vast portion of the project area for weeks. App. 221a. That voluntary pause cannot be reconciled with Applicants' present insistence that emergency relief while the district court makes a final determination on the merits is necessary.

Applicants' claims of harm are further undermined by unrebutted evidence that border security operations in the Sector remain supported by extensive and effective surveillance technology, patrols, sensors, drones, and existing infrastructure. Supp. App. 222a–225a; App. 33a–34a. Applicants also remain free to pursue desired infrastructure projects by complying with the same laws that apply to agencies throughout the country. App. 202a. And even further undercutting Applicants' claim of urgency is this case's procedural posture. Summary judgment briefing is pending, and the injunction merely preserves the status quo during time necessary for the district court to resolve the constitutionality of Applicants' extraordinary assertion that Congress has authorized a single Executive Branch official to unilaterally dispense with all statutory safeguards for landowners, businesspeople, and other adversely affected members of the public across the *entire* border.

Nor have Applicants shown a likelihood of success on the merits. This case involves an unprecedented assertion of executive authority by the U.S. Secretary of

Homeland Security (the “Secretary”). The Secretary claims power under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sep. 30, 1996) (codified at 8 U.S.C. § 1103 note), as amended, Supp. App. 1a, to waive dozens of federal laws—and all “related” state, local, and tribal laws—across approximately one-third of the U.S.-Mexico border. *See* App. 1a, 4a, 6a; Supp. App. 16a, 19a, 124a. The Waivers follow a series of nine decisions in October 2025, waiving dozens of procurement laws for barrier construction spanning the entirety of the U.S.-Mexico border. Supp. App. 5a. The Secretary’s newfound view that Section 102’s waiver authority may be stretched to fiat construction of a continent-spanning border barrier from the Pacific Ocean to the Gulf of America is a quintessential major question.

The Secretary’s assertion of authority is profound. Yet Congress limited IIRIRA’s waiver authority to facilitating construction designed to “deter illegal crossings in areas of high illegal entry.” 8 U.S.C. § 1103(a) note. As the district court found, the Big Bend Sector has “the lowest rate of illegal entry along the entire U.S.-Mexico border.” App. 214a. And as the court explained, “if the Big Bend Sector is an area of high illegal entry, so is every other sector, and the waiver authority would apply to the entire U.S.-Mexico border.” App. 214a. To be sure, Congress has considered authorizing IIRIRA waiver authority across the entire border but declined to do so. *See infra* 8.

Here, it is undisputed that the Waivers are of major economic and political significance. App. 211a. Whatever authority Congress delegated, it did not clearly

authorize the sweeping exercise of power asserted here, and Applicants' actions therefore amount to a constitutional violation of the major questions doctrine. Under that doctrine, decisions of such consequence belong to Congress, not a single Executive Branch official.

There is likewise no merit to the government's request that the Court grant certiorari and summarily reverse. Not only have Applicants failed to cite any pertinent precedent for that extraordinary request, but the district court's preliminary ruling does not warrant this Court's review in any event. Accordingly, the Court should preserve the status quo and deny Applicants' request to stay the preliminary injunction, as well as their extraordinary request for certiorari and summary reversal before judgment.

STATEMENT

I. The Big Bend Region: A Great American Landscape

The Big Bend region is one of the most remote, rugged, and unique stretches of land in the country—defined by its tightknit communities, working ranches, deep canyons, rugged mountain ranges, vast public lands, dark skies, abundant archeological and historic sites, unique biodiversity, and remarkable stretches of the Rio Grande's wild and scenic river. The region's extraordinary and globally significant natural, cultural, aesthetic, and human values led to its designation as the Big Bend Biosphere Region by UNESCO in 1976. The region encompasses the largest intact

portion of the Chihuahuan Desert in the U.S. and is one of the world's most biologically rich and diverse desert ecoregions.²

Big Bend National Park, “one of the wildest places in the Lower 48,” sits at the heart of the region. App. 40a. It encompasses a “deceptively complicated terrain” shaped by canyons reaching 1,500 feet in depth and mountains rising to 7,800 feet, as well as steep cliffs, and hazardous, fragile vegetation unique to the Chihuahuan Desert. App. 39a. On the Mexican side of the border, the terrain is similar, but even vaster and more difficult to traverse. *Id.* Big Bend forms part of the largest trans-boundary protected area in North America: more than three million acres of Chihuahuan Desert and 200 miles of river are protected by the United States and Mexico.³ “Simply put, it’s the most wild, intact, unspoiled and hard-to-reach place left anywhere along the 2,000-mile U.S.-Mexico border.” Supp. App. 89a.

West of the National Park lies Big Bend Ranch State Park, the largest state park in Texas. Supp. App. 73a. The Park’s dramatic geology offers a unique window into the development of the North American continent, with rock formations uplifted millions of years ago, volcanic events that formed mountains in the heart of the park, and the Rio Grande continuing to shape the landscape along its southern boundary through a process that began some 25 million years ago.⁴ To the east of the National Park lies the mountainous Black Gap Wildlife Management Area, providing

² National Park Service, Big Bend National Park, Big Bend Biosphere Region, <https://www.nps.gov/bibe/learn/nature/mab.htm?fullweb=1> (last accessed Oct. 25, 2026).

³ National Park Service, Big Bend National Park Fact Sheet, <https://www.nps.gov/bibe/learn/management/statistics.htm> (last visited October 25, 2026).

⁴ Texas Parks & Wildlife, *Big Bend Ranch State Park*, <https://tpwd.texas.gov/state-parks/big-bend-ranch/nature> (last visited Oct. 25, 2026).

spectacular educational, recreational, and hunting opportunities for Texans and visitors alike. *Id.*

Starting upriver from Mariscal Canyon in the National Park and ending at the Terrell-Val Verde County line, lies the congressionally designated Rio Grande Wild and Scenic River, a stretch of river protected for its “scenic, geologic, fish and wildlife, and recreational values.” Supp. App. 120a; *see also* 16 U.S.C. §§ 1271, 1274(a)(17). Those who visit are rewarded with “the clearest spring-fed waters and most dramatic canyon scenery in the Big Bend Region.” Supp. App. 136a. This stretch of river, bordered by canyon rims rising over 1,000 feet, is renowned for its wildlife viewing and recreational opportunities, particularly in the Lower Canyons, “the crème de la crème” of the river corridor. App. 41a, 167a.

The region is cherished by a remarkably diverse community of people: hunters, anglers, ranchers, conservationists, indigenous communities, historic preservationists, paddlers, birders, and other outdoor enthusiasts. From a beloved golf course situated on the borderlands to miles of the Rio Grande, its lands and waters support livelihoods, tourism, recreation and a way of life deeply rooted in a region unlike anywhere else in the country. *See, e.g.*, Supp. App. 156a–157a.

II. Legal Background

IIRIRA Section 102 directs the Secretary to install physical barriers in the “vicinity of the United States border to deter illegal crossings in areas of *high illegal entry*.” 8 U.S.C. § 1103(a) note (emphasis added). To support that important but limited authority, Congress also conferred on the Secretary the waiver power in IIRIRA Section 102(c)(1), providing 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.” 8 U.S.C. § 1103(c)(1) note.

Outside of IIRIRA Section 102, the Secretary maintains authority to construct border barriers based on the general statutory responsibility to “guard the boundaries and borders of the United States against the illegal entry of aliens.” Immigration and Nationality Act, Pub. L. No. 82-414 § 103(a)(5) (1952), 8 U.S.C. § 1103(a)(5). That authority exists independent of IIRIRA Section 102 and is unaffected by the district court’s injunction.

III. The Big Bend Waivers

For years, the United States has been embroiled in an “extensive, and often intense” debate about whether our southern border should be barricaded by a wall. *California v. Trump*, 379 F. Supp. 3d 928, 936 (N.D. Cal. 2019). In 2023, this debate reached Congress—where both houses considered bills that would have authorized the Secretary’s IIRIRA waiver authority to encompass the entirety of the U.S.-Mexico Border. H.R. 2, 118th Cong. (2023); S. 2824, 118th Cong. (2023). That legislation did not pass. Undeterred, then-Secretary Noem attempted to get there on her own. On October 15, 2025, she issued nine new waiver determinations pursuant to IIRIRA Section 102(c), waiving dozens of procurement laws for barrier construction along the southern border (the “Procurement Waivers”).⁵ Each waiver encompasses the totality

⁵ The “Procurement Waivers” are: 90 Fed. Reg. 48281, 48282, 48283, 48284, 48285, 48286, 48287, 48288, 48289 (Oct. 15, 2025), Supp. App. 5a.

of a border patrol sector and, for the first time, span the entirety of the U.S.-Mexico border. Supp. App. 109a.

Between February and July 2026, then-Secretary Noem and Secretary Mullin issued another series of IIRIRA waivers that span approximately 607 miles of the U.S.-Mexico border and make up the Big Bend Waivers at issue. *See* Supp. App. 73a. The Waivers cover the entirety of the Big Bend Sector—an area that amounts to around one quarter of the U.S.-Mexico border, App. 75a, 95a, and now stretch into the Del Rio Sector, encompassing one-third of the southern border. App. 95a; Supp. App. 124a. In issuing each of the Waivers, the Secretary asserted that this area is one “of high illegal entry” and that “Border Patrol apprehended over 89,000 illegal aliens attempting to enter the United States between border crossings in the Big Bend Sector” over a five-year period. App. 2a, 4a, 7a; Supp. App. 18a, 20a.

To rapidly construct “additional physical barriers and roads,” the Waivers eliminate compliance with dozens of laws, including bedrock federal environmental protection statutes (such as the Clean Water Act, Clean Air Act, Safe Drinking Water Act, and Endangered Species Act) as well as laws designed to protect historic resources, Native-American artifacts and other cultural interests, farmland, private property, and virtually all natural or human resources otherwise protected by law. App. 1a, 4a, 6a; Supp. App. 16a, 19a. The Waivers also sweep within their scope all “state, or other laws, regulations, and legal requirements, deriving from, or related to the subject” of the enumerated federal statutes. *Ibid.* All of these legal safeguards are waived “in their entirety, with respect to the construction of physical barriers and

roads,” which includes, “but [is] not limited to,” roads for “accessing the project areas,” “earthwork, excavation, fill, and site preparation,” and “installation and upkeep of physical barriers, roads, supporting elements, drainage, [and] erosion controls.” *Ibid.*

IV. The Proceedings Below

On April 16, 2026, Plaintiff-Respondents filed suit in the U.S. District Court for the Western District of Texas, challenging the Secretary’s waiver determinations in Big Bend. D. Ct. Doc. 1. Respondents later amended and supplemented their complaint to challenge additional Big Bend waivers. Supp. App. 22a. In addition to claiming that the waivers constitute a “violation of the major questions doctrine under the U.S. Constitution, Article I, Section 1,” Supp. App. 57a, the operative Complaint claims that, “in the alternative,” granting complete discretion to one executive branch official to discard any and all federal statutes—along with any “related” state, local, and tribal laws and regulations—along the entirety of the border violates the non-delegation doctrine and Presentment Clause, art I, § 7. Supp. App. 61a–64a.⁶

During the week of August 3, 2026, Applicants began border barrier construction in Big Bend National Park without providing Respondents 30 days’ advance notice, as had been agreed. D. Ct. Doc. 34 at 4. Respondents then moved for emergency injunctive relief (the “Emergency Motion”) to enjoin border barrier construction and associated activities within the Big Bend Sector pursuant to the Waivers until final resolution on the merits. D. Ct. Doc. 34 at 20. On the same day, Applicants voluntarily paused “all construction activity” in the National Park, a pause later described as

⁶ The Complaint also asserts violations of the Take Care Clause, art. II, § 3, and the Fifth Amendment’s Due Process Clause, U.S. Const. amend. V.

encompassing all of BBT-2 and BBT-4.⁷ D. Ct. Doc. 34 at 5; Supp. App. 256a. On September 19, 2026, Respondents submitted supplemental evidence of then-ongoing construction in BBT-1 and imminent construction in BBT-2 and/or 3. D. Ct. Doc. 55.

On September 21, 2026, with the voluntary “pause on ground disturbing activities in the Big Bend Sector” about to expire, the district court set a hearing on the Emergency Motion. D. Ct. Doc. 56. The court ordered the parties to present evidence regarding whether: (1) the Big Bend Sector is an “area of high illegal entry” within the meaning of IIRIRA; (2) Plaintiffs were being irreparably harmed by ongoing construction activity pursuant to the Waivers; (3) Plaintiffs would be irreparably harmed by planned future construction; and (4) Defendants or the public interest would be harmed by a preliminary injunction. *Id.* On September 29, 2026, Applicants reported the end of the construction pause in BBT-2 and BBT-4. Supp. App. 257a.

At the evidentiary hearing on October 2, 2026, Respondents presented live testimony from six fact witnesses and two expert witnesses, in addition to prior testimony from a sheriff and former Customs and Border Protection officer. The government did not call a single witness. Nor did it introduce any other evidence at the hearing on the factual issues the court ordered the parties to address. App. 26a–201a, 193a. Accordingly, the evidentiary record from the preliminary injunction hearing consists of Respondents’ own exhibits and additional government documents that Respondents moved into evidence for their own use. App. 100a, 103a–104a, 129a–130a.

⁷ From west to east, the five Big Bend construction projects (“BBT”) are BBT-1, BBT-3, BBT-2, BBT-4, and BBT-5. *See* Supp. App. 73a (map approximating project areas).

Thereafter, the district court entered a preliminary injunction providing that, pending resolution of the case on the merits, “Defendants shall not build border barrier or related infrastructure, or engage in any construction or ground disturbing activities, in the Big Bend Sector until and unless Defendants comply with all applicable laws . . . notwithstanding the ‘Big Bend Waivers.’” App. 206a.

The district court’s opinion makes specific factual findings based on the testimony and other evidence adduced at the hearing. The court found that the “unrebutted evidence shows that the Big Bend Sector is, by far, the sector with the lowest rate of migrant apprehensions along the entire U.S.-Mexico border, both in terms of gross totals and apprehensions per mile of border.” App. 213a–14a. “Therefore, if the Big Bend Sector is an area of high illegal entry, so is every other sector, and the waiver authority would apply to the entire U.S.-Mexico border.” App. 214a. Because the government did not dispute that the assertion of such authority is of “major economic and political significance,” and there was no clear Congressional authorization for the Secretary to waive compliance with law across the border without limitation, the court held that “Plaintiffs are likely to succeed on the merits of their major questions doctrine claim” *Id.*

As for irreparable injury and the balance of equities, the district court credited “Plaintiffs’ witnesses['] descri[ption] [of] how construction has and will restrict their livelihood[s],” impair their recreational and other concrete interests, “and impact the natural ecosystem.” App. 215a (*e.g.*, crediting testimony from a third-generation rancher who “testified that construction would cut him off from the river and, with

no alternative water source, prevent him from growing crops”); *id.* (crediting testimony from river guides who would be prevented from launching boat tours on the Rio Grande). In contrast to these serious irreparable harms, and in the absence of any evidence produced by Applicants at the hearing, the court found that the government “only suffer[s] a temporary delay while the Court assesses the merits of the pending summary judgment motions.” App. 217a.

Having declined multiple opportunities to develop the evidentiary record below, the government now seeks extraordinary relief based on new declarations submitted only *after* the district court issued its preliminary injunction. App. 218a, 225a; *see* D. Ct. Doc. 74.

REASONS TO DENY THE APPLICATION

I. **The District Court Correctly Held That Respondents Are Likely to Succeed on Their Major Questions Doctrine Claim.**

The major questions doctrine demands a clear congressional statement before an executive body may assert authority over “decisions of vast economic and political significance.” *West Virginia v. EPA*, 597 U.S. 697, 716 (2022). The doctrine enforces the Constitution’s allocation of legislative power to Congress by counseling skepticism where an agency claims sweeping authority absent unmistakably clear text. Here, the Secretary asserts newfound and extraordinary authority that he may invoke IIRIRA’s Section 102 waiver authority across the entirety of the southern border. *See* Supp. App. 114a. Under our Constitution, when confronted with decisions of this magnitude, the question before the Court “is not whether something should be done; it is who has the authority to do it.” *Biden v. Nebraska*, 600 U.S. 477, 501 (2023);

see also Gonzales v. Oregon, 546 U.S. 243, 265 (2006) (the government’s sought after authority was “inconsistent with the design of the statute”). Under the major questions doctrine, the decision of whether to waive laws across one-third of the border for a cross-continental barrier, including areas that, as found by the district court, involve the lowest border crossings by far, must be made by Congress, not the Executive. Failing to identify any clear congressional authorization for the power the Secretary now claims, the Big Bend Waivers violate the major questions doctrine.

A. The district court has jurisdiction over Respondents’ major questions doctrine claim.

Section 102(c)(2)(A) of IIRIRA limits judicial review of waiver determinations to causes of action or claims alleging a violation of the Constitution. Because the major questions doctrine is, at its core, a constitutional doctrine designed to protect separation of powers, the district court correctly determined that it has jurisdiction to resolve Respondents’ claim. App. 211a. This conclusion is supported by the doctrine’s history and relationship to the nondelegation doctrine.

1. At its inception, the major questions doctrine was born of “the hydraulic pressures of our constitutional system” and the Court’s need to “rein in Congress’s efforts to delegate legislative power.” *Gundy v. United States*, 588 U.S. 128, 166–67 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting). Operationally, it works as a “dice-loading” clear statement rule, where something extrinsic to the plain meaning of a statute’s text tips the scales towards a particular outcome. In major questions cases, that extrinsic source is the Constitution. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 274 (2026) (Gorsuch, J., concurring).

A major questions doctrine claim does not merely allege that an agency misread a statute. It is not, as Applicants allege, a statutory or *ultra vires* claim. *See* Appl. at 14, 16 (characterizing major questions cases as simple statutory interpretation questions). Instead, a well-developed body of caselaw sets this doctrine apart from more routine statutory violations. It alleges that an agency arrogated to itself quintessential legislative power that the Constitution vests exclusively in Congress—a claim that is constitutional at its core. *See West Virginia*, 597 U.S. at 735–36 (Gorsuch, J., joined by Alito, J., concurring). Indeed, the doctrine operates to interpret a statutory grant of authority, but any contention that this feature is divorced from constitutional underpinnings is misplaced.

2. By way of analogy, the nondelegation doctrine implicates the same separation of powers safeguards, and similarly operates through statutory interpretation to determine whether delegated authority is within constitutional bounds. *See Gundy*, 588 U.S. at 135–36 (“[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation . . . Only after a court has determined a challenged statute’s meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I.”). That a doctrine is *effectuated* through statutory interpretation and probes a grant of authority does not change its constitutional source or purpose.

In effectuating Article I, the nondelegation and major questions doctrines are two sides of the same coin—“[b]oth are designed to protect the separation of powers” and to ensure that new authorities affecting the lives of Americans “are subject to the

robust democratic processes the Constitution demands.” *Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109, 124 (2022) (Gorsuch, J., joined by Thomas & Alito, J.J., concurring); *see also Learning Res.*, 607 U.S. at 284 (Gorsuch, J., concurring) (“Like the nondelegation doctrine, the major questions doctrine protects Article I’s Vesting Clause . . .”). Both doctrines enforce an affirmative constitutional prohibition against overexpansive delegations of Congress’s legislative power. In this way, major questions is best described as an “as-applied nondelegation doctrine” which allows courts to “hold that the [executive action], rather than the statute, violates the Constitution.” Ilan Wurman, *The Specification Power*, 168 U. Pa. L. Rev. 689, 730 (2020).⁸

3. Nothing in Respondents’ claim or the major questions precedent on which Respondents rely is in tension with *Dalton v. Specter*, 511 U.S. 462 (1994). *Dalton* stands for the unremarkable proposition that not “*every* action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution.” *Id.* at 472 (emphasis added). Respondents’ position is not to the contrary. Rather, the claim put forth, and preliminarily accepted by the district court, is a narrow one: the decision to waive myriad federal, state, local, and tribal laws across vast geography for the purpose of building border infrastructure,

⁸ While the caselaw supports a finding that the major questions doctrine is, at core, a Constitution-enforcing, clear-statement rule, the Court need not definitively resolve that issue to find that the district court did not abuse its discretion in issuing injunctive relief here. As the district court reasoned, if everywhere along the nearly 2,000-mile border qualifies as an area of “high illegal entry,” then there is absolutely no limiting principle to the extraordinary delegation of authority to the Secretary to waive legal protections designed to protect the interests of landowners, business operators, and millions of people who live along the border. Accordingly, in this case, both the major questions and nondelegation doctrines implicate essential separation of powers safeguards.

even through national and state parks where border crossings are miniscule, is a truly “extraordinary” assertion of power. *See West Virginia*, 597 U.S. at 723.

Under our tripartite system of government, such sweeping assertions of power must be decided by Congress. That the Secretary has usurped such power for himself, in the absence of a clear delegation, violates the Constitution. “And without doctrines like major questions, our system of separated powers and checks-and-balances threatens to give way to the continual and permanent accretion of power in the hands of one man. That is no recipe for a republic.” *Learning Res.*, 607 U.S. at 270–71 (Gorsuch, J., concurring).

B. The authority the Secretary asserts in issuing the Big Bend Waivers is extraordinary.

The political and economic significance of the government’s assertion of authority here is profound and undisputed. App. 211a; *see also* Appl. 19–20 (declining to challenge the political or economic significance of the Big Bend Waivers). The Big Bend Waivers are a substantial component of a coordinated federal effort to complete contiguous barrier infrastructure that Secretary Mullin states will span “from the Pacific to the Gulf of America.” Supp. App. 114a. On their own, the challenged Waivers authorize construction along nearly half of the remaining unwallled border, amounting to roughly one-third of the entire U.S.-Mexico border, Supp. App. 124a, and are the subject of an “earnest and profound debate across the country.” *West Virginia*, 597 U.S. at 732. Moreover, the costs associated with the Big Bend Waivers amount to approximately \$159 billion. D. Ct. Doc. 32-4 at ¶ 44. A conservative

calculation of the wall’s total cost is around \$513 billion with an upward estimate of over one trillion dollars. D. Ct. Doc. 19-3 at 18. These figures are vast.

The authority the Secretary asserts through the Big Bend Waivers also constitutes a transformative expansion of power. Under the Secretary’s newfound interpretation of the IIRIRA waiver authority, *every* segment of the U.S.-Mexico border is now deemed an “area of high illegal entry.” On the heels of the October 2025 Procurement Waivers that spanned the entire southern border, the Big Bend Waivers now mark the first time that environmental, historic and cultural preservation, and myriad other laws have been waived across the Big Bend Sector and in a National Park—areas that see vanishingly low rates of unlawful crossings. App. 213a, 227a–232a; Supp. App. 75a.⁹ As a result, the Secretary now purports to have the authority to waive federal, state, local, and tribal laws anywhere in the vicinity of a U.S. border, regardless of whether it is an area of high illegal entry. *See* App. 214a. While DHS has relied on the IIRIRA waiver authority in discrete areas in the past, it has never before invoked the authority along the entire southern border irrespective of the level of entry. As with the powers asserted in this Court’s past major-questions cases, the unprecedented scale, size, and purpose of the Big Bend Waivers mark them as vast and transformative assertions of authority. *See Biden*, 600 U.S. at 501 (finding the “magnitude” of the proposed student debt forgiveness plan set it apart from prior actions); *West Virginia*, 597 U.S. at 725 (finding that the Clean Power Plan’s generation shifting quality distinguished it from prior regulatory schemes promulgated

⁹ *See* Kenneth D. Madsen, *DHS Sec. 102(c) Border Barrier Waivers*, Ohio State Univ. (Oct. 1, 2026), <https://u.osu.edu/madsen.34/dhs-waivers/> (listing all IIRIRA waivers).

under the Clean Air Act). This is especially so where they purport to “alter the balance between federal and state power” by overriding state laws and making use of state property for their own ends. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (per curiam).

Thus, as conceded below, the Big Bend Waivers amount to an unprecedented interpretation of IIRIRA and carry undisputed and extraordinary political and economic significance. In such cases, “something more than a merely plausible textual basis for the agency action is necessary.” *West Virginia*, 597 U.S. at 723.

C. Congress did not clearly authorize the Big Bend Waivers.

1. The district court found that Big Bend is, “by far, the sector with the lowest rate of migrant apprehensions” along the entire border, and the court concluded that Respondents are likely to prevail on their argument that Congress did not clearly authorize the Secretary to waive a multitude of laws in such an area. App. 214a. As the court explained, “if the Big Bend Sector is an area of high illegal entry, so is every other sector” and IIRIRA’s waiver authority would apply, without exception, to the entirety of the nearly 2,000-mile border. *Id.* Far from undermining this reasoning (or its factual underpinnings), the government’s stay request confirms its validity. Applicants insist that Congress recognized no distinction between areas of relatively high or low entry and thus did indeed intend to grant the Secretary unchecked power to make the entire border a law-free zone. As the district court reasoned, that argument “render[s] limiting language meaningless” and runs counter to Congress’s intent to circumscribe where and when IIRIRA’s waiver authority may be invoked. *Id.*

The district court’s analysis is entirely consistent with this Court’s precedent. When assessing an extraordinary assertion of authority, a court should be “reluctant to read into ambiguous statutory text the delegation claimed to be lurking there.” *West Virginia*, 597 U.S. at 723 (cleaned up). Thus, “clear congressional authorization” is necessary. *Id.* Here, Applicants point to IIRIRA for authority to waive laws across the Big Bend Sector, but the statute grants no such authority.

2. IIRIRA Section 102 authorizes the Secretary of Homeland Security to take actions “necessary to install . . . physical barriers and roads” along the U.S. border in “areas of high illegal entry,” and to waive laws that, in his “sole discretion,” are “necessary to ensure expeditious construction of the barriers and roads.” 8 U.S.C. § 1103(a), (c)(1). But nothing authorizes a single Executive Branch official to waive statutory safeguards across the entire border, including in areas that have, by far, the lowest rates of unlawful entry. *See Biden*, 600 U.S. at 500 (holding that the HEROES Act’s authorization to “waive or modify” student-aid programs did not authorize comprehensive student debt forgiveness).

3. It is undisputed that the Big Bend Sector records, by far, the lowest levels of apprehensions across all southern border sectors, foreclosing any claim that it is an area of “high illegal entry.” App. 214a. Context reinforces this conclusion. In fiscal year 1996, when IIRIRA was enacted, the Big Bend Sector recorded 13,214 apprehensions (including inland apprehensions), or approximately two individuals per border-mile per month. Supp. App. 179a. By contrast, the San Diego Sector recorded 483,815 apprehensions, or approximately 670 apprehensions per border-mile per

month. *Id.* Since then, the Big Bend Sector has maintained its position in “extraordinarily distant last place” among southern border sectors. App. 213a; *see* Supp. App. 179a–209a. Even in 2022, when border-wide apprehensions reached historic highs, the Big Bend Sector recorded only about 5 apprehensions per border-mile per month. Supp. App. 205a. And fiscal year 2026 is on track to set record-low numbers amounting to fewer than one apprehension per border-mile per day.¹⁰ *Id.* 209a. The same is true of drug-trafficking activity, which remains minimal in the Big Bend Sector. *See infra* 27–28.

Congress decided to limit its delegation of waiver authority for the “expeditious construction of . . . barriers and roads” to “areas of high illegal entry.” 8 U.S.C. § 1103(a), (c). Even under the most basic canons of statutory interpretation, “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. United States*, 556 U.S. 303, 314 (2009) (cleaned up). Under a clear-statement rule based on constitutional prohibitions on excessive delegation of legislative power, even more is required.

4. As the district court correctly determined, “Congress could have simply authorized construction” anywhere that would “‘deter illegal crossings.’” Instead, it authorized construction ‘to deter illegal crossings in areas of high illegal entry.’” App. 214a. Indeed, Congress has considered—and declined—to grant precisely the authority Applicants invoke here. *See* H.R. 2, 118th Cong. (2023); S. 2824, 118th Cong.

¹⁰ An apprehension is not synonymous with an “alien[] attempting to enter” the U.S. across the border in the Big Bend Sector. *See* Appl. 3 (framing total apprehensions in this way); *infra* 25–27.

(2023). Any interpretation that “area of high illegal entry” encapsulates the Big Bend Sector effectively permits the Secretary to unilaterally enact legislation that Congress has declined to adopt. *See Learning Res.*, 607 U.S. at 244 (rejecting an interpretation that would delegate “power to unilaterally impose unbounded tariffs” alongside a “backdrop of clear and limited delegations”).

5. Applicants’ reliance on the Secure Fence Act of 2006 is misplaced, Appl. 23, as that Act did not amend IIRIRA Section 102(a) or incorporate the term “operational control” into the statute’s text, *see* Pub. L. No. 109-367, 120 Stat. 2638 (Oct. 26, 2006). It was in a subsequent amendment to Section 102(b) that Congress directed the Secretary, “[i]n carrying out subsection (a),” to pursue border infrastructure in not less than 700 miles in areas that would help gain “operational control” of the border, while simultaneously clarifying that physical barriers are not required if such infrastructure is “not the most appropriate means to achieve and maintain operational control.” Pub. L. No. 110-161, § 564, 121 Stat. 2090–91 (Dec. 26, 2007); 8 U.S.C. § 1103(b)(1)(A), (D). *See Border Infrastructure Env’t Litig. v. U.S. Dep’t of Homeland Sec.*, 915 F.3d 1213, 1225 (9th Cir. 2019) (“If section 102(b) defines the entire scope of DHS’s authority . . . section 102(a) would lack any independent effect.”).

There is nothing to suggest that Section 102(b) of IIRIRA in any way limits Section 102(a) or authorizes the waiver of laws to facilitate border barrier construction in areas with low rates of unlawful entry. Moreover, IIRIRA’s reference to gaining “operational control” of the border cannot be squared with an understanding that it commands barrier construction, when Section 102(b)(1)(D) clearly contemplates

that control may be achieved through other, more “appropriate” means. Section 102(a)’s authorization to build border barrier construction in specific “areas” (*i.e.*, not across the entire border) “of high illegal entry” (*i.e.*, not low illegal entry) continues to govern the waiver provision in Section 102(c)—and, as held by the district court, does not clearly authorize the Big Bend Waivers.

II. Applicants Will Not Suffer Irreparable Harm.

Applicants have not established that maintaining the status quo pending resolution of the case on the merits will cause irreparable harm. To the contrary, after weighing the evidence before it, the district court expressly found that the government would suffer only a “temporary delay” while the merits are resolved on the pending summary judgment motions. App. 217a. Although Applicants invoke the government’s general interest in border security and drug interdiction, they fail to identify any concrete evidence showing that continuation of the preliminary injunction during that brief period will irreparably impair those interests. *Id.* Instead, Applicants rely on generalized assertions about border security, isolated incidents, speculative and farfetched predictions regarding future migration “funneling” patterns, and alleged construction costs untethered to any demonstrated security need in the Big Bend Sector. That falls well short of the showing required for the extraordinary relief they seek. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

Nor is the government irreparably harmed merely because it is temporarily prevented from carrying out a project in a manner that the district court concluded likely violates the Constitution. Applicants remain free to secure the border through the extensive enforcement and surveillance measures already operating in the Sector

while this litigation proceeds. Supp. App. 222a–225a. Applicants are also free to pursue their desired infrastructure projects by complying with applicable law, App. 202a, and to employ any number of available measures to advance border security objectives during the pendency of this litigation. *See, e.g.*, 8 U.S.C. § 1103(a)(5).

1. As a threshold matter, at the evidentiary hearing below, Applicants chose to disregard the district court’s order to call any witnesses or introduce any evidence concerning the government’s asserted operational concerns. *See supra* 11–13. Having elected to do so, Applicants have waived any argument that the district court inadequately considered their asserted harms or should have made findings unsupported by the record before the court. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”).

2. In any event, even the government’s belated submissions do not establish that preliminary relief in any way threatens border security. Applicants’ irreparable harm argument rests on the unsupported premise that the paused construction is necessary to address an urgent border security problem in the Big Bend Sector. But Applicants’ own conduct undermines that assertion. Before the injunction entered below, in response to intense local opposition, Applicants voluntarily paused construction for weeks in vast portions of the project area. *See* App. 221a. It cannot be the case that Applicants’ self-imposed pause is consistent with border security but the district court’s equivalent action somehow rises to the level of irreparable harm.

The record likewise fails to support the claimed urgency. Even Applicants’

supplemental evidence, which they failed to produce at the preliminary injunction hearing, identifies only a handful of individuals apprehended after reportedly crossing the border within the Sector. App. 227a–232a (discussing the apprehension of 18 individuals between 2021 and 2026, only some of whom were alleged to have crossed in Big Bend). Applicants likewise identify only a single marijuana seizure—from nearly five years ago—that was “confirmed to have crossed the border in the Big Bend Sector.” Appl. 28. Those isolated incidents do not establish that maintaining the injunction during the pendency of this litigation will impair border security, much less that the waiver of laws for the immediate construction of barriers and roads is necessary to avert imminent harm.

3. The evidentiary record refutes Applicants’ characterization of the Big Bend Sector as an area facing urgent border security concerns. Decades of sector-wide apprehension data demonstrates that Big Bend has consistently experienced the lowest apprehension rates along the southern border. *See, e.g.*, Supp. App. 97a. This Sector’s remarkably low apprehension rates are even more striking given that it is the largest Sector: it approximates the size of Germany. App. 62a; Supp. App. 97a. Apprehensions in the Big Bend Sector have not exceeded six per border mile per month in every year since 1996 and, in most years, remain below two per border mile per month. Supp. App. 173a. Apprehension figures within Big Bend National Park are lower still. Robert Krumenaker, a retired Superintendent of Big Bend National Park, was for years responsible for managing lands including approximately 245 miles of the Big Bend border. App. 32a–33a. He testified that apprehensions in the Park,

which were “always peaceful,” never exceeded one apprehension per mile per month from 2016 through 2025. *Id.* 34a–36a; Supp. App. 74a. As Mr. Krumenaker explained—without refutation—existing technology jointly operated by Border Patrol, the National Park Service, and the county was already “very effective.” App. 34a.

The district court found this evidence essentially undisputed. As the district court explained, the “Big Bend Sector experienced both the lowest aggregate number of apprehensions and the lowest number of apprehensions per mile of border” among all southern border sectors and, over the last thirty years, “fluctuated between 0.3% to 2.2% of total border-wide apprehensions.” App. 213a. Indeed, the Sector’s apprehension rates are so low that they fall below those in the Buffalo Sector, which covers 450 miles of the U.S.-Canada border from the Ohio-Pennsylvania state line to Jefferson County, New York. *See* App. 80a. Yet the government has never suggested that federal, state, local, and tribal laws must be waived to protect the northern border.¹¹

Moreover, even these exceptionally low apprehension figures overstate the number of individuals who actually crossed the international border within the Big Bend Sector. Uncontroverted testimony established that CBP’s sector-wide apprehension data include apprehensions occurring throughout the Sector’s 135,000 square miles, including “at large” apprehensions and apprehensions at interior Border Patrol checkpoints, as well as people seeking asylum. App. 62a–67a; *see also*

¹¹ *See, e.g.*, Rebecca Santana, AP Exclusive: Trump’s Border Chief Defends Wall Plans in Texas’ Big Bend Despite a Court Setback, Associated Press (Oct. 23, 2026), <https://ap-news.com/article/border-immigration-big-bend-rodney-scott-wall-32734cc4aa2f83a7b3b23c81163d6fef> (video at 0:33) (Rodney Scott suggesting that a border wall is not needed along the U.S.-Canada border).

Supp. App. 175a. The record indicates that individuals apprehended “at-large” may never have unlawfully crossed the border, having instead entered the United States lawfully and remained here for years before apprehension. App. 64a.

The record further shows that many of the apprehensions recorded in the Big Bend Sector occurred at interior checkpoints. App. 66a; Supp. App. 175a. In Fiscal Year 2025, checkpoint apprehensions accounted for 27% of all apprehensions. *Ibid.* And available CBP data reflects that many of those individuals had not recently entered the United States: approximately 42.7% involved individuals who had been present in the United States for more than a month and approximately one-third involved individuals who had been present in the country for more than one year before apprehension. App. 66a–67a; Supp. App. 175a. As Respondents’ expert testified, without refutation, these data demonstrate that Applicants’ aggregate apprehension figures significantly overstate the number of individuals who unlawfully crossed the international border in the Big Bend Sector. App. 67a; Supp. App. 174a, 176a. Applicants nevertheless invoke these aggregate apprehension figures as though they accurately represent individuals attempting to unlawfully cross between ports of entry in the Big Bend Sector. *See, e.g.*, Appl. 10; App. 2a, 4a, 7a; Supp. App. 16a, 19a.

Applicants’ reliance on narcotics seizure data fares no better. As the district court found, “the Big Bend Sector accounts for one percent of non-marijuana drug seizures” in the “period for which we have data, 2020 to 2026.” App. 213a. But even that figure overestimates the amount of cross-border smuggling in the Sector. As the district court explained, the seizure totals include “drugs seized while moving

through the interior of the country.” App. 213a. The Big Bend Sector contains multiple highway checkpoints, and nationally, “twenty-five to fifty percent” of border patrol seizures occur at such checkpoints. *Id.* Nor does the seizure data distinguish between drugs unlawfully imported across the border and drugs originating within the United States. App. 71a–72a. Tellingly, even Applicants’ post-injunction declaration identifies only a single marijuana seizure that allegedly involved drugs crossing the border in the Sector. Appl. 28.

4. Applicants also ignore unrebutted testimony regarding the substantial border security infrastructure already effectively operating in the Big Bend Sector and unaffected by the preliminary injunction. Sheriff Thaddeus Cleveland, the Sheriff of Terrell County, Texas, with four years’ experience in that role, was a former Border Patrol agent with 26 years of service. Supp. App. 214a, 227a–232a.¹² Sheriff Cleveland testified that Border Patrol uses the BuckEye System, a network of trail cameras that transmits images to monitoring agents, reducing unnecessary deployments when triggered by wildlife. *Id.* 222a–223a. In addition, he testified about existing Anduril Autonomous Surveillance Towers, which employ radars programmed to detect human gait patterns and, upon detection, automatically direct cameras to the area and transmit footage to an agent. *Id.* 223a. Sheriff Cleveland further testified regarding manned patrols, blimps equipped with cameras and radar, and the

¹² Although that testimony was originally elicited in a separate action, *The People of La Junta for Preservation, et al. v. Department of Homeland Security, et al.*, No. SA-26-CV-5245-OLG (W.D. Tex. Aug. 28, 2026), it was submitted to and considered by the district court here. App. 192a–193a; Supp. App. 210a; D. Ct. Doc. 59 (order granting Respondents’ motion to supplement their Emergency Motion).

Predator B. drones equipped with radar and cameras that monitor the border regions, including from Sierra Blanca Station on the western end of the Big Bend Sector to the Gulf of Mexico. *Id.* 224a–225a.

In short, border security in Big Bend does not depend on waiving all legal safeguards to facilitate expedited construction of additional barriers and roads. Rather, the unrebutted evidence demonstrates that Border Patrol already possesses extensive and effective technological and operational capabilities to detect, monitor, and respond to any unlawful crossings. For that reason as well, Applicants fail to show that preserving the status quo will impair border security operations.

5. Without evidence of any present border security problem in the Big Bend Sector, Applicants speculate that failure to expediently construct barriers in the Big Bend Sector will create “funnel point[s]” that may divert unlawful activity into the Sector. Appl. 29. Once again, the government presented no such testimony to the district court despite its order to “present any evidence” demonstrating that “Defendants and/or the public interest will be harmed” if an injunction issued. D. Ct. Doc. 56 at 2.

Even now, Applicants are unable to identify any evidence demonstrating that such diversion into the Big Bend Sector is occurring or is likely to occur during the pendency of this litigation. Unsupported assertions that migration patterns might change at some point in the future cannot establish irreparable harm, especially in the absence of any indication that such diversion has previously occurred. Indeed, even with the Waivers, Applicants now claim that substantial portions of the border in the Big Bend region will *remain* free of wall construction, including Big Bend

National Park, Big Bend Ranch State Park, the Black Gap Wildlife Management Area, and the entirety of BBT-5. Appl. 33. In the State Park, specifically, Applicants tout that “no border-barrier construction whatsoever is planned.” *Id.* Far from “mak[ing] sense,” as Applicants insist, *id.* 29, their admissions expose the speculative nature of the asserted “funneling” theory. Applicants cannot plausibly contend that immediate construction in the Sector is essential to border security while simultaneously asserting that substantial portions of the region will remain unwalled regardless of whether a stay is granted.¹³

6. Applicants’ alleged construction-related harms fare no better. Their claims of urgency are difficult to reconcile with their voluntary pause of construction in portions of the project area (BBT-2 and 4) and the fact that work could not immediately resume in all areas absent the injunction. App. 221a. The government lacks necessary rights of entry for portions of the project because several landowners “have declined to engage with the government” or provide “rights of entry,” necessitating condemnation actions. Supp. App. 258a. And with respect to BBT-4, Applicants have not made a final decision regarding the project’s scope. *See* Supp. App. 258a–259a.

Applicants’ financial assertions are similarly unsupported. They identify broad categories of purported expenses but have refused to supply Respondents or the district court with the underlying contracts necessary to assess whether those costs are attributable to the injunction, unavoidable regardless of project status, subject to

¹³ Even if Applicants’ speculative “funneling” or some surge of unlawful crossings materializes in this remote region of the Chihuahuan desert, Applicants would remain free to exercise the Secretary’s existing authority or return to the district court for relief based on those concrete circumstances.

mitigation requirements, or otherwise recoverable.¹⁴ *See* Appl. 30–31. Their assertions that the injunction “may” result in additional costs underscore the speculative nature of the alleged injury. *See* Appl. 30–31.¹⁵

In short, the record demonstrates that Applicants’ asserted injuries are neither concrete nor imminent. Applicants ask this Court to set aside a carefully reasoned preliminary injunction based not on actual evidence of imminent harm, let alone any provided to the district court when Applicants were obligated to do so, but on generalized rhetoric regarding border security, conjecture concerning migration patterns, and unsupported assertions regarding costs. Nothing in the record before the district court or even in the tardy submission to this Court supports those claims.

III. A Stay Will Irreparably Harm Respondents and the Balance of Equities Weigh Decisively in Favor of Respondents.

1. A stay would permit the very injuries the district court entered a

¹⁴ *See, e.g.*, Fed. Acquisition Regul. Council, *FAR Overhaul Part 52, Section 52.242-14* (standard government “Suspension of Work” clause, under which the contractor is not automatically entitled to recover all costs associated with a work stoppage), available at: <https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-52> (last accessed Oct. 20, 2026).

¹⁵ The legal authorities on which Applicants rely also do not demonstrate irreparable harm. Far from being enjoined from carrying out its statutory obligations, *see* Appl. 26, the preliminary injunction simply requires the government to comply with the very same laws that apply throughout the rest of the country. Unlike the injunctions in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), *Trump v. California*, No. 26A124 (Aug. 24, 2026), and *U.S. Dep’t of Homeland Sec. v. League of Women Voters*, No. 26A308 (Sept. 25, 2026), the preliminary injunction here does not allegedly exceed the authority conferred by the Judiciary Act, interfere with any statutory duty, disable an existing federal program, or foreclose the government from pursuing its border security objectives through lawful means. Nor does *National Treasury Employees Union v. Von Raab* aid Applicants, as it does not address irreparable harm. 489 U.S. 656 (1989). And *Trump v. Sierra Club*, 588 U.S. 930 (2019), is likewise inapposite. There, the Court granted a stay because the Government had made a “sufficient showing” that the plaintiffs lacked a cause of action to challenge the “Acting Secretary’s compliance with Section 8005 of the Department of Defense Appropriations Act, 132 Stat. 2999.” 588 U.S. at 930. The Court’s order did not discuss irreparable harm.

preliminary injunction to prevent. Applicants attempt to minimize those harms as merely “aesthetic and recreational harms,” Appl. at 5, 32, but that characterization bears little resemblance to either the record or the district court’s factual findings. On the record before it, the court found that border wall construction “has and will restrict [Respondents’] livelihood,” “impact the natural ecosystem,” and affect spiritual, recreational and other interests. App. 215a.

The district court found that construction would directly harm Respondents’ livelihoods by impairing river-based businesses and agricultural operations that depend on access to the Rio Grande. For example, the court credited testimony by Respondent Miller, a professional river guide, who stated that the planned border infrastructure would prevent him from launching river tours and fundamentally impair the business through which he earns his livelihood. App. 121a, 215a. Likewise, Bill Guerra-Addington testified that construction would bifurcate a wilderness corridor, cutting off access to river water that his family’s ranching and farming operations have relied upon for generations. App. 143a, 146a, 157a-158a. The district court found these injuries both substantial and immediate. App. 215a–216a.

The record also demonstrates profound threats to historic and cultural resources. Respondents submitted evidence that construction activities jeopardize irreplaceable historic features, including the El Corazón Sagrado de la Iglesia de Jesús (the Sacred Heart of the Church of Jesus, or the Ruidosa Church), a historic adobe Catholic church in Ruidosa, Texas, that holds profound cultural and historic significance in the Big Bend region. App. 134a–135a. It is recognized by the Texas Historical

Commission as a Recorded Texas Historic Landmark, has been designated one of America's Most Endangered Historic Places, and is listed as an Endangered Latinx Landmark. App. 125a. More broadly, the Waivers authorize construction across hundreds of miles of landscape rich with cultural, historical, and archaeological resources that cannot be restored once destroyed. App. 116a. Once these resources are damaged, "[t]here's no gluing . . . back the rocks to mountains." App. 170a.

Applicants seek to belittle Respondents' recreational and related harms as merely "subjective, attenuated injuries." Appl. 32. The record demonstrates otherwise. The affected landscape encompasses one of the largest remaining undeveloped regions along the southern border, including Big Bend National Park, Big Bend Ranch State Park, and the Rio Grande Wild and Scenic River corridor. Witnesses testified and submitted written declarations attesting to the increasingly rare opportunities for solitude, spiritual reflection, recreation, education, and wildlife observation that this landscape provides. App. 106a-108a, 167a-168a. While Applicants accord little value to these interests, the district court correctly found otherwise.

Mr. Miller testified that the wilderness in Big Bend "saved [his] life," App. 108a, and explained that he often refers to being on the Rio Grande as his "church or cathedral." Supp. App. 84a. Those interests are hardly abstract. He owns property with direct access to the Rio Grande, intentionally maintains the land in its natural and undeveloped state, and regularly camps there with his family. App. 112a. The planned border wall would cut across his land, irreversibly altering the very character, solitude, and connection that drew him to the property in the first place. App.

113a; Supp. App. 80a. Far from “attenuated,” such harms would directly and irreversibly alter Mr. Miller’s property and his longstanding use and enjoyment of it. *See* App. 113a; Supp. App. 80a.

Ms. Devine likewise testified to her enjoyment of the National Park’s exceptional dark skies, birding opportunities, and wilderness character. App. 167a. She explained how construction within the National Park would destroy those qualities by transforming undeveloped wilderness into an industrialized corridor. App. 171a. She further testified that waterborne barriers would prevent the river trips she planned to lead. App. 171a; Supp. App. 127a–128a. The district court found the harms to the ecosystem would take “decades to recover, if ever” based on uncontroverted expert testimony establishing that construction would disrupt hydrologic function, alter drainage patterns, destroy native vegetation, impair wildlife habitat, and facilitate long-term ecological degradation across the region. App. 216a, 237a. Therefore, due to cascading, ecological harms from such construction, impacts to the river corridor are “not isolated to the areas in which Applicants ‘set foot’.” App. 237a.

Mr. Guerra-Addington testified that his ranch and the surrounding landscape has been a part of his family for generations and that it is where he “worship[s] God and creation,” and encounters “the most beautiful and sacred living things” to him. Supp. App. 144a. The district court credited Guerra-Addington’s testimony that throngs of construction vehicles on a road adjacent to his ranch caused a dramatic increase in wildlife mortalities. App. 150a. Guerra-Addington further testified that a border wall would prevent him from accessing a nearby fishing area that he has

visited regularly since childhood. App. 151a; Supp. App. 148a–149a. By the time of the hearing, construction had already begun to transform this landscape into a “dystopian nightmare,” App. 155a, through blasting, vegetation clearing, wildlife collisions, and other construction impacts. App. 150a–152a; Supp. App. 146a–149a.

Such injuries are paradigmatic irreparable harms. Once habitat is destroyed, vegetation cleared, historic resources damaged, livelihoods and private property destroyed, and wilderness landscapes fragmented by roads, barriers, and associated infrastructure, no final judgment can restore the status quo. Nor are these impacts confined to the immediate construction footprint. The district court credited expert testimony that construction disrupts the region’s overall hydraulic function and drainage patterns, producing cascading irreversible ecological effects. App. 186a–188a, 216a, 237a. Based on the evidence before it, the district court found that if construction proceeds and Respondents ultimately prevail, “then both the natural landscape and Plaintiffs’ ability to put it to their preferred uses will have been forever altered.” App. 236a. Indeed, the court credited testimony that even the construction already undertaken had left a “visible scar that’ll never go away.” App. 216a.

This case concerns the permanent alteration of livelihoods, historic resources, property rights, spiritual values, recreational interests, wilderness landscapes, and ecological systems in the Big Bend region. The district court carefully evaluated a substantial evidentiary record and correctly concluded that those injuries are irreparable. Applicants’ dismissal of Respondents’ harms boils down to a disagreement with the district court’s factual assessment of the evidence. But those findings have ample

support in a fact-intensive record, are entitled to substantial deference, and provide no basis for disturbing the district court’s determination. *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (“[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings”). Applicants would have this Court disregard those findings and reweigh evidence of harm to resolve the balance of equities in their favor. The district court heard live testimony, considered witness credibility, reviewed the evidentiary record (including the absence of any testimony or evidence adduced by DHS) and concluded that Respondents’ permanent injuries outweigh Applicants’ temporary delay. Nothing in the Application justifies setting aside that determination.¹⁶

2. Respondents’ documented harms stand in stark contrast to the failure of the government to demonstrate any concrete injury through temporary maintenance of the status quo. If a stay is granted and construction resumes, Respondents’ livelihoods, property interests, historic and cultural resources, recreational uses, and the landscape on which these interests rely, will suffer injuries that no future judgment can remedy. As the district court unequivocally concluded, if construction proceeds and Respondents ultimately prevail, “both the natural landscape and Plaintiffs’ ability to put it to their preferred uses will have been forever altered.” App. 236a.

¹⁶ Moreover, in denying the stay request below, the district court was entitled to place far less weight on defendant’s post-preliminary-injunction declarations compared to the live witness testimony Respondents presented. As this Court has recognized, the “trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise” and “only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” *Anderson*, 470 U.S. at 575. *See also* Fed. R. Civ. P. 52(a).

Nor do Applicants' authorities support a different result. *Trump v. Sierra Club*, 588 U.S. 930, does not establish that, regardless of the factual record, any asserted border security interests categorically outweigh private property, environmental, cultural, or recreational harms or injuries to Respondents' livelihoods. Likewise, *TVA v. Hill*, 437 U.S. 153 (1978), and *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001), are inapposite. As Applicants apply them, those cases stand for the proposition that courts may not disregard Congress' express statutory priorities. But Respondents' claim is that Applicants are usurping Congress's authority and wielding IIRIRA's waiver authority beyond constitutionally permissible bounds to avoid compliance with federal, state, local, and tribal laws that are designed to protect the very interests at stake here. In any case, Congress expressly preserved constitutional challenges to waiver determinations. 8 U.S.C. § 1103 note. Accordingly, Applicants cannot argue that Congress's policy preferences dictate the balance of equities when the very question presented is whether the Waivers exceed constitutional limits in a manner that causes truly irreparable harm.

In sum, the district court found that Applicants face, at most, a temporary delay pending a final merits ruling, while Respondents face permanent and irreversible loss. Based on these factual findings, the district court correctly concluded that the balance of equities decisively favors Respondents. App. 204a, 233a.

IV. The District Court's Preliminary Ruling Does Not Warrant Certiorari.

The government's request that the Court treat its application as a petition for a writ of certiorari and "summarily reverse the district court's order," Appl. at 35–36, should be denied. The government cites no relevant precedent to support that

extreme request.¹⁷ In any event, the district court’s preliminary ruling does not warrant this Court’s review, much less summary reversal.

First, there is no conflict with any other ruling because none of the other district court decisions upholding different waiver decisions were presented with, or addressed, a major questions issue. Nor has any other court held an evidentiary hearing, considered extensive evidence including fact and expert testimony, and then made specific factual findings that the area for which basic legal safeguards have been waived is “in ‘extraordinarily distant last place’ for apprehensions” along the entire southern border. App. 213a. Consequently, this Court’s review, at least at this preliminary juncture, is unnecessary to resolve any conflict in the lower courts.

Second, a preliminary injunction decision is, in any case, a poor vehicle for this Court’s review. The district court’s final ruling on the pending summary judgment motions may alter or refine the court’s reasoning on the major questions doctrine as well as resolve Respondents’ additional constitutional claims that are directly related to application of the major questions doctrine. *See Abbott v. Veasey*, 580 U.S. 1104, 1105 (2017) (Roberts, C.J., statement respecting denial of certiorari) (explaining that the “District Court has yet to enter a final remedial order” and that the “issues will be better suited for certiorari review at that time”).

¹⁷ In the only case the government cites where the Court took that step, *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398 (2022), the Court did so to afford the Wisconsin Supreme Court “sufficient time to adopt maps consistent with the timetable” for an impending election. *Id.* at 401. In the only other cases cited by the government, the Court considered full petitions and responses before taking any action.

For example, if, as the government contends, Congress actually did intend to authorize a single Executive Branch official to waive compliance with a vast array of federal laws along the entire border—including in treasured national and state parks where migrant apprehensions have been the lowest “by far,” App. 214a—that raises grave nondelegation concerns. If “areas of high entry” literally means *everywhere*—as the government contends—then there is no “intelligible principle” that guides or limits the Secretary’s exercise of the extraordinary authority to unilaterally dispense with the laws enacted by Congress. *Gundy*, 588 U.S. at 134 (“The constitutional question is whether Congress has supplied an intelligible principle to guide the delegate’s use of discretion.”).

Indeed, accepting the government’s position that IIRIRA confers on the Secretary the unfettered power to pick and choose which of dozens of duly enacted statutes apply *anywhere* along the nearly 2,000-mile Southern border (or, for that matter, the entire Northern border) would mean that Congress has delegated its “[c]ore legislative power” to “make [the] ‘law’” affecting the “life, liberty, and property” of millions of Americans. *Learning Res.*, 607 U.S. at 316 (Thomas, J., dissenting). It also means that Applicants’ position is in clear conflict with the Presentment Clause. *See Clinton v. New York*, 524 U.S. 417, 439 (1998) (holding that the line-item veto violated the Constitution by allowing “unilateral Presidential action that either repeals or amends parts of duly enacted statutes”). The district court should have an opportunity to address these and Respondents’ other constitutional claims, in the final disposition of the case, before this Court assesses whether review is warranted. *Nat’l Football*

League v. Ninth Inning, Inc., 592 U.S. 1081, 1082 (2020) (Kavanaugh, J., statement respecting denial of certiorari) (the case’s “interlocutory posture” was a “factor counseling against the Court’s review at th[e] time”).

Third, the extent to which the major questions doctrine presents a constitutional issue—a principal focus of the government’s legal argument—arises in this case because of IIRIRA’s unusual jurisdictional provision. *See* 8 U.S.C. § 1103(c)(2)(A) note. The government does not identify any other statutes with the same or comparable provisions governing judicial review, let alone any such provisions as to which the major questions doctrine may become an issue. Nor does the government point to any other pressing need for the Court to provide further guidance to lower courts regarding the constitutional dimensions of the major questions doctrine. That the government disagrees with the preliminary legal reasoning of the district court is an insufficient reason to grant certiorari.

Finally, there is also no compelling practical reason for the Court to grant review at this juncture. As explained, the parties have already filed summary judgment briefing with the district court; border apprehensions in the Big Bend Sector have fallen to historic lows even without invocation of IIRIRA’s waiver authority; and the preliminary injunction simply requires DHS to comply with the same laws that apply to other agency actions throughout the country.

CONCLUSION

The Court should deny the government’s application.

Respectfully Submitted,

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