

No. 26A560

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.

BRIEF OF FEDERATION FOR AMERICAN IMMIGRATION REFORM
AS *AMICUS CURIAE* IN SUPPORT OF APPLICATION FOR A STAY

CHRISTOPHER J. HAJEC

Counsel of Record

MATT A. CRAPO

Federation for American Immigration Reform

25 Massachusetts Ave., NW, Suite 330

Washington, DC 20001

chajec@fairus.org

(202) 328-7004

Counsel for Amicus Curiae

Federation for American Immigration Reform

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Federation for American Immigration Reform (FAIR) is a nonprofit membership organization founded in 1979 and headquartered in Washington, D.C. FAIR's mission is to advocate for immigration policies that are in America's best interest. FAIR has been involved in hundreds of legal cases since 1980 with the aim of advancing this mission.¹

For a variety of reasons, FAIR strongly believes that a continuous wall on the southern border is in America's best interest, and thus has an interest in stopping the court below from further delaying its construction in reliance on an assertion of jurisdiction that is clearly erroneous.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has charged the Secretary of Homeland Security with the duty to achieve and maintain operational control over the border, which is defined, in part, as the prevention of all unlawful entries into the United States. Congress has also directed the Secretary to install additional physical barriers at the border "to deter illegal crossings in areas of high illegal entry into the United States." § 102(a) of the Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. I, 110

¹ No counsel for any party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

Stat. 3009-554 (codified as amended as a note to 8 U.S.C. § 1103). Congress further authorized the Secretary to waive “all legal requirements” he determines necessary to ensure expeditious construction of such barriers and roads. IIRIRA § 102(c)(1) (as amended). Congress provided for judicial review of such waivers in federal district courts, but restricted such claims solely to those “alleging a violation of the Constitution of the United States.” IIRIRA § 102(c)(2)(A) (as amended by § 102 of the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 306 and codified as a note to 8 U.S.C. § 1103).

Secretary Mullin exercised this waiver authority three times in 2026 to facilitate expeditious barrier construction in the area designated by the Border Patrol as the Big Bend Sector. Appendix to Stay Application (Appx) at 1a, 4a, 6a. The Secretary determined that the Big Bend Sector “is an area of high illegal entry” requiring additional border barriers to achieve and maintain operational control of the border. Appx at 2a, 4a, 7a. Secretary Mullin therefore waived the application of certain environmental and conservation laws to facilitate expeditious border-wall construction in the Big Bend Sector. *Id.*

Respondents filed a complaint in the district court alleging that the Secretary’s waivers violate the major questions doctrine, the nondelegation doctrine, the Take Care Clause, the Fifth Amendment’s Due Process Clause, and the Presentment Clause. Stay Application (Stay App) at 11 (citing D. Ct. Doc. 26, ¶¶ 76-113 (Aug. 11, 2026)). The district court issued a preliminary

injunction enjoining the government from building border barriers or engaging in any construction activities unless it complies with all applicable laws notwithstanding the Secretary's waivers. Appx at 202a. The district court decided that Respondents' major-questions-doctrine claim is a constitutional claim over which the court retained jurisdiction because "the major questions doctrine is a constitutional clear statement rule grounded in separation of powers." Appx 210a. The district court further determined that Respondents were likely to succeed on their claim that the Secretary's waivers violated the major questions doctrine because the Secretary's waiver authority extends only to border wall construction "to deter illegal crossings in areas of high illegal entry," and according to the district court, the Big Bend Sector is not an area of high illegal entry compared with other sectors along the southwest border. *Id.* at 214a.

The court below retained jurisdiction only by dressing up a run-of-the-mill statutory construction claim in major questions garb, and then misidentifying that garb as constitutional. The major questions doctrine is not a constitutional doctrine, but a canon of statutory construction and clear statement rule designed to prevent agencies from exceeding their statutory power in major ways by relying on strained or tortuous constructions Congress was unlikely to have foreseen. It may be true that agencies lack authority under the Constitution to exceed their statutory authority, but the major

questions doctrine does not rely on that lack, since actions in excess of agency authority are unlawful under the Administrative Procedure Act (APA).

In any event, the argument that Congress granted the Secretary authority to waive legal requirements for construction projects in areas with “high” rates of illegal entry, and thus in areas with rates that are high in some relevant sense, but lower than those of other areas, is no strained or tortuous construction that Congress was unlikely to have foreseen. Rather, it is a straightforward interpretation that leaps off the page, especially when illegal entries through all areas have been “high” in some sense. So, even if the major questions doctrine is constitutional, it is not implicated here, and its inapposite invocation by the district court did not give that court jurisdiction.

ARGUMENT

A. The major questions doctrine is not constitutional.

“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). Congress has made clear that judicial review of the Secretary’s exercise of his waiver authority is limited to claims alleging a constitutional violation. IIRIRA § 102(c)(2)(A) (“A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The [district] court shall not have jurisdiction to hear any claim not

specified in this subparagraph.”). Thus, Congress sought to protect the Secretary’s exercise of his waiver authority from judicial review unless that exercise violates the Constitution.

The district court here decided that Respondents, by invoking the major questions doctrine, raised a constitutional claim in their challenge to the Secretary’s Big Bend waivers. Appx at 210a-11a (holding that “the major questions doctrine is a constitutional clear statement rule grounded in separation of powers,” and thus that Respondent’s major-questions-doctrine claim “alleges a Constitutional violation.”).

On the contrary, the major questions doctrine is a tool of statutory construction with no direct dependence on the Constitution or the separation of powers. It expands on earlier, metaphorical statements by the Supreme Court not about the Constitution, but about the discernment of congressional intent. *E.g.*, *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”); *Ala. Ass’n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (“We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”) (quotation omitted).

Under the major questions doctrine, courts presume that Congress does not confer vast power on agencies through strained or tortuous paths of logic it was unlikely to have foreseen. *See, e.g., West Virginia v. EPA*, 597 U.S. 697, 724-25 (2022). Rather, where an agency claims broad authority to regulate matters of vast economic or political significance, the agency “must point to ‘clear congressional authorization’ for the power it claims.” *Id.* at 732 (quoting *Util. Air Regulatory Grp. v. Env’t Prot. Agency*, 573 U.S. 302, 324 (2014)). The major questions doctrine may serve a function similar to that of the constitutional delegation doctrine² “by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power.” *Nat’l Fed’n of Indep. Bus. (NFIB) v. Dep’t of Labor*, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring). But, as the government observes, the major questions doctrine “helps determine whether Congress ‘meant to confer’ on the Executive Branch ‘the authority it claims’ under a particular statute,” and thus helps determine “whether the Executive Branch has exceeded its *statutory* authority.” Stay App at 15 (quoting *West Virginia*, 597 U.S. at 725) (emphasis added). Nor is any constitutional prohibition against agencies’ exceeding their delegated powers

² The delegation doctrine prohibits the delegation of power unless “Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.’” *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

necessary to decide a case under the major questions doctrine, since agencies are barred from exceeding their statutory power under the APA. 5 U.S.C. § 706(2)(C).

Because the major questions doctrine is a tool of statutory construction without direct reference to the Constitution, a claim under the major questions doctrine falls far short of a constitutional claim.

B. The major questions doctrine is not implicated here.

This is not a case where the Secretary is claiming broad statutory authority to take significant actions to secure the border based on a strained or tortuous path of logic Congress was unlikely to have foreseen. Instead, there is no question that Congress has clearly and unambiguously conferred upon the Secretary broad authority to take such actions as he deems necessary to secure the border.

In IIRIRA, Congress directed the Secretary to “take such actions as may be necessary to install additional physical barriers” at the border “to deter illegal crossings in areas of high illegal entry into the United States.” IIRIRA § 102(a) (codified as amended as a note to 8 U.S.C. § 1103). Congress has further directed the Secretary to “take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States.” § 2(a) of the Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638 (codified as a

note to 8 U.S.C. § 1701); *see also id.* § 2(b) (defining “operational control” as “the prevention of *all unlawful entries* into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband”) (emphasis added). Thus, Congress has not only directed the Secretary to construct border barriers in areas of high illegal entries, but charged him with preventing all unlawful entries into the United States. In addition, Congress also authorized the Secretary to waive, “[n]otwithstanding any other provision of law,” “all legal requirements” he, in his “sole discretion,” determines necessary to ensure expeditious construction of such barriers and roads. IIRIRA § 102(c)(1) (as amended).

Congress’s conferral of authority to construct border barriers and waive any legal requirements to ensure expeditious construction could not be more explicit and clear. Indeed, by prefacing its statement of the Secretary’s waiver authority with the words “notwithstanding any other provision of law,” Congress signaled its intent to confer broad authority. *See Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (explaining that use of a “notwithstanding” clause “clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section”); *Liberty Mar. Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (describing similar “notwithstanding” language as granting the broadest

possible discretion and declaring that a clearer statement is difficult to imagine) (quotation omitted).

The question here boils down to whether the area in which the Secretary exercised his waiver authority is one of “high illegal entry.” Appx at 212a (interpreting the Secretary’s waiver authority to reach “only construction ‘to deter illegal crossings in areas of high illegal entry’”). Because the court determined that alien encounters in the Big Bend Sector are lower than other sectors, it concluded that the Secretary’s Big Bend waivers were not authorized by the statute. *Id.* at 214a. The district court’s conclusion, apart from being clearly erroneous, does not rest on the major-questions doctrine—Congress explicitly conferred waiver authority upon the Secretary—but instead on whether the Secretary’s exercise of his waiver authority in this case met the statutory requirement (that is, were the waivers issued “to deter illegal crossings in [an area] of high illegal entry”). Such a garden-variety application of a statutory standard to the circumstances of a particular case does not involve the major-questions doctrine, much less the Constitution.

Nor is the government’s interpretation of the statute—that it grants waiver authority over the Big Bend sector, because rates of illegal entry in that area have been high, even if lower than in other areas—a convoluted, strained, or tortuous one Congress was unlikely to have foreseen or intended. Rather, it is a straightforward interpretation that suggests itself immediately. The major

questions doctrine, even if constitutional, is not even implicated here, and its mere invocation does not confer jurisdiction.

CONCLUSION

For the foregoing reasons, the Application for Stay should be granted.

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Respectfully submitted,

CHRISTOPHER J. HAJEC

Counsel of Record

MATT A. CRAPO

Federation for American Immigration Reform

25 Massachusetts Ave., NW, Suite 330

Washington, DC 20001

chajec@fairus.org

(202) 328-7004

Counsel for Amicus Curiae

Federation for American Immigration Reform