No. 18-247

In the Supreme Court of the United States

ANIMAL LEGAL DEFENSE FUND, ET AL.,
PETITIONERS

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. I, § 102, 110 Stat. 3009-554, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 (8 U.S.C. 1103 note), Congress authorized and directed the Secretary of Homeland Security to install physical barriers and roads in the vicinity of the United States border to prevent illegal crossings. Section 102(c) provides that "the Secretary of Homeland Security shall have 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." *Ibid.* The question presented is as follows:

Whether the grant of authority in Section 102(c) to the Secretary to waive legal requirements as the Secretary determines to be necessary to ensure the expeditious construction of barriers and roads under Section 102 violates the Constitution's separation of powers.

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OPINION BELOW

The order of the district court (Pet. App. 3a-108a) is reported at 284 F. Supp. 3d 1092.

JURISDICTION

The judgment of the district court (Pet. App. 1a-2a) was entered on March 26, 2018. On May 10, 2018 (No. 17A1239), and May 22, 2018 (No. 17A1285), Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 23, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. I, § 102, 110 Stat. 3009-554, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 (8 U.S.C. 1103 note).

STATEMENT

1. a. In enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought to improve security at the Nation's borders. In furtherance of that goal, Section 102 of IIRIRA directed the Executive to undertake the construction of border infrastructure. IIRIRA Tit. I, § 102, 110 Stat. 3009-554 (8 U.S.C. 1103 note). As originally enacted, Section 102(a) provided that the Attorney General "shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." § 102(a), 110 Stat. 3009-554. IIRIRA further directed the Attorney General, "[i]n carrying out" that mandate, to undertake particular border infrastructure projects in San Diego, California, including certain fencing and road projects. § 102(b)(1), 110 Stat. 3009-554. Section 102(c) authorized the Attorney General to waive the provisions of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, to the extent he "determine[d] necessary to ensure expeditious construction of the barriers and roads under this section." IIRIRA § 102(c), 110 Stat. 3009-555. These functions have since been transferred to the Secretary of Homeland Security.[1]

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[1] In 2002, Congress created the Department of Homeland Security and transferred border-enforcement authority to that Department. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; see also 6 U.S.C. 251, 291 (2012 & Supp. V 2017); 8 U.S.C. 1103(a)(1) and (5). Section 102 of IIRIRA was subsequently amended to refer to the Secretary of Homeland Security. See 8 U.S.C. 1103 note. For simplicity, this brief refers throughout to the Secretary.

b. Since IIRIRA's enactment in 1996, the general authorization and directive to the Secretary in Section 102(a) to undertake border infrastructure projects to achieve the statute's stated objectives has remained substantially unchanged. IIRIRA § 102(a), 110 Stat. 3009-554; see 8 U.S.C. 1103 (note). Congress has amended Section 102(b) from time to time, however, to specify different priorities for border construction and to direct that the Secretary undertake specific construction projects. Congress first amended Section 102(b) as part of the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, to eliminate the previous requirement that the Secretary construct border infrastructure in San Diego, and to replace that requirement with direction that the Secretary "provide for" the construction of at "least 2 layers of reinforced fencing," and "additional physical barriers, roads, lighting, cameras, and sensors," in five other specified locations along the southern border. *Ibid.* In 2007, Congress again amended Section 102(b) to replace the specifications set forth in the Secure Fence Act with new requirements for construction "along not less than 700 miles of the southwest border where fencing would be most practical and effective." Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Tit. V, § 564(2), 121 Stat. 2090.

Congress also has amended Section 102(c), addressing the Secretary's waiver authority. In 2005, Congress substantially broadened the Secretary's authority in Section 102(c) to waive legal requirements. See REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 (8 U.S.C. 1103 note). Frustrated by "[c]ontinued delays caused by litigation" that were preventing DHS from completing construction of

the San Diego border infrastructure, Congress resolved to expand the Secretary's waiver authority to include "other laws that might impede the expeditious construction of security infrastructure along the border." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 171 (2005) (Conf. Report). Accordingly, the REAL ID Act amended Section 102(c) to authorize the Secretary to waive "all legal requirements"—not just those under the ESA and NEPA—that the Secretary, in his or her "sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." REAL ID Act § 102, 119 Stat. 306.

The REAL ID Act also amended Section 102(c) of IIRIRA to limit the availability of judicial challenges to the Secretary's exercise of that waiver authority. Seeking "to ensure that judicial review of actions or decisions of the Secretary [does] not delay the expeditious construction of border security infrastructure, thereby defeating the purpose of the Secretary's waiver," Conf. Report 172, the REAL ID Act amended Section 102(c) to provide that federal district courts have "exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security" pursuant to Section 102(c)'s waiver authority. REAL ID Act § 102, 119 Stat. 306. Such review is available only for a claim "alleging a violation of the Constitution of the United States," and a court hearing a challenge under Section 102(c) "shall not have jurisdiction to hear any claim" besides such a constitutional challenge. *Ibid.* To streamline judicial review of such challenges, Congress additionally provided that claims must be filed within 60 days "after the date of the action or decision made by the Secretary of

Homeland Security," and that appellate review is available "only upon petition for a writ of certiorari" to this Court. *Ibid.*

c. The Secretary has issued waiver determinations under Section 102(c) on several occasions. See, *e.g.*, 70 Fed. Reg. 55,622 (Sept. 22, 2005); 72 Fed. Reg. 2535 (Jan. 19, 2007); 72 Fed. Reg. 60,870 (Oct. 26, 2007); 73 Fed. Reg. 19,077 (Apr. 8, 2008); 73 Fed. Reg. 19,078 (Apr. 8, 2008). Several waiver determinations have been the subject of unsuccessful constitutional challenges. See *County of El Paso* v. *Chertoff*, No. 08-CA-196, 2008 WL 11417030 (W.D. Tex. Sept. 11, 2008), cert. denied, 557 U.S. 915 (2009); *Save Our Heritage Org.* v. *Gonzalez*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 554 U.S. 918 (2008); *Sierra Club* v. *Ashcroft*, No. 04-CV-272, 2005 WL 8153059 (S.D. Cal. Dec. 13, 2005).

2. This case involves two waiver determinations issued by the Secretary in 2017. First, on July 26, 2017, the Secretary issued a Section 102(c) waiver of more than 30 laws "to ensure the expeditious construction of barriers" in the San Diego area. 82 Fed. Reg. 35,984 (Aug. 2, 2017) (San Diego Waiver). The waiver set forth specific findings that a specified area in the United States Border Patrol's San Diego Sector is "an area of high illegal entry" and that there is a present "need to construct physical barriers and roads * * * in the vicinity of the border * * * to deter illegal crossings" in that area. *Id.* at 35,985. The San Diego Waiver identified two projects to be completed in the San Diego Sector to "further Border Patrol's ability to deter and prevent illegal crossings." *Id.* at 35,984. One project involved building several border-wall prototypes. *Id.* at 35,985. The other project involved replacing 14 miles of primary

fencing—which had been constructed in the 1990s using the outdated landing-mat style fencing—with taller, stronger, and more effective bollard-style fencing. See 18-55474 Gov't C.A. Br. 9. To "ensure the expeditious construction" of the two projects, the Secretary "determined that it [wa]s necessary" to exercise Section 102(c)'s waiver authority to waive specified statutes, including (*inter alia*) the ESA and NEPA. 82 Fed. Reg. at 35,985.

Second, on September 5, 2017, the Secretary issued a separate Section 102(c) waiver of various laws "to ensure the expeditious construction of barriers and roads" near Calexico, California, in the United States Border Patrol's El Centro Sector. See 82 Fed. Reg. 42,829 (Sept. 12, 2017) (Calexico Waiver). The waiver set forth specific findings that a specified area in the El Centro Sector is an area of "high illegal entry," and that there is "a need to construct physical barriers and roads in the vicinity of the border * * * to deter illegal crossings" in that area. *Id.* at 42,830. The Calexico Waiver identified one project to be completed in furtherance of this goal: the replacement of existing primary fencing —which, like the fencing in San Diego, had been constructed in the 1990s using the outdated landing-mat style—and improvements to the existing patrol road within the project area. *Ibid.* As with the San Diego Waiver, the Calexico Waiver set forth specific findings that, "to ensure the expeditious construction of the barriers and roads" in the project area, "it [wa]s necessary" for the Secretary to waive specific laws under Section 102(c). *Ibid.*

Construction on the San Diego prototype project was completed in October 2017.[2] Construction on the remaining projects was commenced earlier this year.[3]

3. a. Petitioners are three environmental-conservation and animal-protection organizations. Pet. 10. In September 2017, petitioners filed two separate complaints under IIRIRA Section 102(c)(2)(A), which were later consolidated, in the District Court for the Southern District of California challenging the waivers. See Pet. App. 15a-16a; D. Ct. Doc. 16 (Sept. 6, 2017) (petitioner Center for Biological Diversity's operative second amended complaint); 17-cv-1873 D. Ct. Doc. 1 (Sept. 14, 2017) (petitioners Defenders of Wildlife's and Animal Legal Defense Fund's original complaint); D. Ct. Doc. 22, at 2 (Oct. 24, 2017) (consolidation order). Petitioners' complaints, as amended, collectively alleged (as relevant) that (1) the Secretary exceeded his Section 102(c) authority in issuing the San Diego Waiver and Calexico Waiver; (2) the projects undertaken pursuant to the waiver determinations therefore violated NEPA and the ESA, which were among the statutes the Secretary had waived; and (3) the waivers are invalid because Section 102(c) is an unconstitutional delegation of legislative authority, violates the Presentment Clause of the Constitution, U.S. Const. Art. I, § 7, Cl. 2, and violates the Take Care Clause, *id.* Art. II, § 3. Pet. App. 15a-18a & nn.5-6; see also D. Ct. Doc. 26 (Nov. 21, 2017) (petitioners

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[2] U.S. Customs & Border Prot., DHS, *CBP Completes Construction of Border Wall Prototypes* (Oct. 26, 2017), https://www.cbp.gov/newsroom/national-media-release/cbp-completes-construction-border-wall-prototypes.

[3] U.S. Customs & Border Prot., DHS, *Border Wall Replacement Project Starts Near Downtown Calexico* (Feb. 21, 2018), https://www.cbp.gov/newsroom/local-media-release/border-wall-replacement-project-starts-near-downtown-calexico.

Defenders of Wildlife's and Animal Legal Defense Fund's operative first amended complaint).[4]

b. The district court granted summary judgment for the Secretary. Pet. App. 3a-108a.

i. The district court first determined that, notwithstanding Section 102(c)(2)(A)'s language providing that "[a] cause of action or claim may only be brought alleging a violation of the Constitution of the United States" and that "[t]he court shall not have jurisdiction" over other, non-constitutional claims, IIRIRA § 102(c)(2)(A), as added by REAL ID Act § 102, 119 Stat. 306, the court could "consider whether the Secretaries ha[d] violated any clear and mandatory statutory obligations set forth in section 102." Pet. App. 24a; see *id.* at 23a-34a (citing, *inter alia*, *Leedom* v. *Kyne*, 358 U.S. 184 (1958)). The court concluded, however, that petitioners "ha[d] failed to demonstrate that the waivers violated a clear and mandatory provision of section 102." *Id.* at 64a; see *id.* at 34a-64a.[5]

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[4] Petitioner Center for Biological Diversity's operative complaint challenged only the San Diego Waiver. See Pet. App. 15a-16a, 17a n.8; D. Ct. Doc. 16, at 4-5. The other petitioners (joined by another entity that is not a petitioner here) challenged both waivers. See Pet. App. 16a; 17-cv-1873 D. Ct. Doc. 1, at 2-4; D. Ct. Doc. 26, at 2-4. In addition, the People of the State of California and the California Coastal Commission also filed an action that was consolidated with petitioners' suits, Pet. App. 17a, but they did not join in the petition for a writ of certiorari, see Pet. ii.

[5] The district court additionally concluded that petitioners could not obtain review of their statutory challenges to the waivers under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See Pet. App. 66a-70a. The court also rejected petitioners' contention that permitting judicial review of petitioners' claim that the San Diego Waiver exceeded the Secretary's statutory authority "is necessary to avoid serious constitutional problems," stating that "the Court d[id] not have serious constitutional doubts as to the constitutionality of section 102(c)," and observing that other constitutional challenges to Section 102(c) had been rejected by other courts. *Id.* at 106a-107a.

ii. The district court then considered and rejected on the merits petitioners' constitutional challenges to the waivers. Pet. App. 70a-106a. As relevant here, the court concluded that Section 102(c) does not violate the separation-of-powers principles embodied in the non-delegation doctrine, the Presentment Clause, U.S. Const. Art. I, § 7, Cl. 2, or the Take Care Clause, *id.* Art. II, § 3. Pet. App. 70a-90a, 92a-95a.

Nondelegation doctrine. The district court concluded that Section 102(c) "does not violate the nondelegation doctrine" under this Court's precedents. Pet. App. 85a; see *id.* at 70a-85a. The district court observed that this "Court has recognized * * * 'that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches,'" and the "Court has upheld all Congressional delegations of power since 1935." *Id.* at 71a (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989)). The district court further observed that, under this Court's precedents, "Congress may delegate its authority so long as it provides, by legislative act, 'an intelligible principle to which the person or body authorized to act is directed to conform.'" *Id.* at 72a (brackets and citation omitted). "Under the intelligible principle standard," the district court explained, "a statute delegating authority is constitutional if it 'clearly delineates (1) the general policy, (2) the public agency which is to apply it, and (3) the boundaries of the delegated authority.'" *Id.* at 72a-73a (quoting *Mistretta*, 488 U.S. at 372-373, in turn quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)) (brackets omitted).

The district court concluded that Section 102(c) "meets th[ose] three requirements of the intelligible

principle standard." Pet. App. 73a; see *id.* at 73a-81a. First, the court held that "Congress clearly delineated the 'general policy' of section 102 as deterrence of illegal crossings through construction of additional physical barriers to improve U.S. border protection." *Id.* at 76a; see *id.* at 73a-76a. The court explained that Section 102(a) articulates that "general policy" by directing that "the Secretary of DHS shall take actions as necessary to 'deter illegal crossings in areas of high illegal entry into the United States'" and, to that end, "authoriz[ing] the DHS Secretary to 'take such actions as may be necessary to install additional physical barriers and roads.'" *Id.* at 74a (quoting IIRIRA Section 102(a)). The court rejected petitioners' contention that other courts that had previously upheld Section 102(c) against nondelegation changes had articulated "different general policies." *Id.* at 73a; see *id.* at 73a-75a. Second, the court noted that "it [was] undisputed" that Congress had identified the Executive official—the Secretary of Homeland Security—who "is to apply th[at] general policy." *Id.* at 76a. Third, the court "conclude[d] that Congress has clearly delineated the boundaries of delegated authority" by "expressly limit[ing] the DHS Secretary's discretion to waive laws to those 'necessary to ensure expeditious construction of the barriers and roads under this section.'" *Id.* at 79a, 81a (citation and internal quotation marks omitted); see *id.* at 76a-81a. The court explained that Section 102(c) "is easily distinguishable from the statutes" this Court held to violate the nondelegation doctrine in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and "well with[in] the limits of non-delegation precedents." Pet. App. 79a.

The district court further explained that, under this Court's precedents, the "limits" on Congress's ability to delegate authority "are less rigid where the entity 'itself possesses independent authority over the subject matter,'" and "Congress can confer more discretion to an entity when that entity already has significant, independent authority." Pet. App. 73a, 81a (quoting *Loving* v. *United States*, 517 U.S. 748, 772 (1996)). The district court concluded that, because Section 102(c) grants "authority to the DHS Secretary," and "because the DHS Secretary * * * has significant, independent authority over immigration, Congress is justified in delegating broad authority." *Id.* at 81a-82a.

Presentment Clause. The district court also rejected petitioners' contention that Section 102(c) violates the Presentment Clause, U.S. Const. Art. I, § 7, Cl. 2. Pet. App. 92a-95a. They "argu[ed] that allowing DHS to waive laws through section 102(c) amounts to an amendment or repeal of statutes" analogous to the provision of the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, held invalid in *Clinton* v. *City of New York*, 524 U.S. 417 (1998). Pet. App. 92a. The court rejected that analogy. *Id.* at 94a-95a. The court explained that the Line Item Veto Act had "rendered the cancelled legal provisions powerless and effectively changed the law entirely." *Id.* at 94a. Here, in contrast, the statutory provisions that are waived "largely retain legal force and effect because the § 102(c) waivers only disturb the waived statutes for a specific purpose." *Ibid.*

Take Care Clause. Finally, the district court rejected petitioners' contention that Section 102(c) violates the Take Care Clause, Art. II, § 3. Pet. App. 86a-90a. The court explained that, when the Secretary issues a waiver, the Secretary is taking steps "that are plausibly

called for by an act of Congress" in Section 102. *Id.* at 89a. The court further reasoned that "a Take Care challenge in this case would essentially open the doors to an undisciplined and unguided review process for all decisions made by the Executive Department" pursuant to a federal statute. *Id.* at 89a-90a.

4. In addition to seeking review in this Court of the district court's decisions rejecting petitioners' constitutional claims, petitioners and other plaintiffs below also have appealed the rejection of their other challenges to the waivers to the court of appeals, which consolidated the appeals. *In re Border Infrastructure Envtl. Litig.*, Nos. 18-55474, 18-55475, 18-55476 (9th Cir. Apr. 19, 2018). The government has argued that the Ninth Circuit lacks jurisdiction over those challenges under Section 102(c) and that the challenges are barred in any event by the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (specifically, Section 701(a)(2)). See 18-55474 Gov't C.A. Br. 14-32. The court of appeals heard oral argument on August 7, 2018, but has not yet rendered its decision.

ARGUMENT

Petitioners contend (Pet. 14-31) that the grant of authority to the Secretary in Section 102(c)(1) of IIRIRA to waive legal requirements as the Secretary "determines" to be "necessary to ensure expeditious construction of the barriers and roads under" Section 102 violates the separation-of-powers principles embodied in the nondelegation doctrine, the Presentment Clause, and the Take Care Clause. The district court correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other court. Further review is not warranted.

1. The district court correctly concluded that Section 102(c) comports with the separation of powers. Pet. App. 70a-90a, 92a-95a. That decision accords with this Court's precedent and does not warrant further review.

a. The district court correctly determined that Section 102(c) does not violate the nondelegation doctrine. Pet. App. 70a-85a.

i. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. The Court has explained that "[t]his text permits no delegation of those powers." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). It "ha[s] recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). The Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality . . . to perform its function." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944) (citation omitted).

The Court "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *American Trucking*, 531 U.S. at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). It has recognized that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus*, 321 U.S. at 425-426. Instead, the "extent and character of [the] assistance" Congress may seek from another Branch in a particular context "must be fixed according to common sense and the inherent necessities of the governmental co-ordination" at issue,

J.W. Hampton, Jr. & Co. v. *United States*, 276 U.S. 394, 406 (1928)—matters that Congress is typically best positioned to assess. See *Mistretta*, 488 U.S. at 372; see also *id.* at 416 (Scalia, J., dissenting).

The Court has accordingly held that Congress may confer discretion on the Executive to implement and enforce the laws so long as it supplies an "intelligible principle" defining the limits of that discretion. *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton*, 276 U.S. at 409). As petitioners acknowledge (Pet. 15), the Court has further clarified that the vesting of authority in an Executive Branch official is "constitutionally sufficient" under that intelligible-principle standard "if Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of th[e] delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)).

Consistent with those principles, the Court has upheld against a nondelegation challenge nearly every statutory provision it has confronted. "From the beginning of the Government," Congress has enacted, and the Court has upheld, statutes "conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern." *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911). For example, early Congresses enacted a series of statutes that conferred on the President the power to impose or lift trade sanctions and tariffs, *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 683-689 (1892), and the Court rejected a nondelegation challenge to one such statute in 1813, see *The Cargo of the Brig Aurora* v. *United States*, 11 U.S.

(7 Cranch) 382, 388 (1813), and again in 1892, see *Marshall Field*, 143 U.S. at 681-694. In the 90 years since the Court articulated the "intelligible principle" standard, it has similarly upheld numerous statutes against nondelegation challenges.[6]

In the Nation's history, only twice has the Court found that a statute exceeded Congress's authority on nondelegation grounds. *American Trucking*, 531 U.S. at 474 (discussing *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935)). In 1935, the Court concluded that two provisions of the National Industrial Recovery Act (Recovery Act), ch. 90, 48 Stat. 195—enacted in response to the Great Depression—contained "excessive delegations" because Congress "failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 & n.7 (emphasis added). The Court held those provisions invalid because "one * * *

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[6] See, *e.g.*, *American Trucking,* 531 U.S. at 472-476 (authority to set nationwide air-quality standards limiting pollution); *Loving* v. *United States*, 517 U.S. 748, 771-774 (1996) (aggravating factors for death penalty in courts martial); *Touby* v. *United States*, 500 U.S. 160, 165-167 (1991) (temporary designation of controlled substances); *Mistretta*, 488 U.S. at 374-377 (Sentencing Guidelines); *Lichter* v. *United States*, 334 U.S. 742, 785-786 (1948) (recovery of excessive profits from military contractors); *Fahey* v. *Mallonee*, 332 U.S. 245, 247, 249-250 (1947) (rules for reorganization, etc., of savings-and-loan associations); *American Power & Light*, 329 U.S. at 105 (prevention of unfair or inequitable distribution of voting power among security holders); *Yakus*, 321 U.S. at 425-427 (commodity prices); *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (natural-gas wholesale prices); *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (*NBC*) (broadcast licensing); *J.W. Hampton*, 276 U.S. at 407-411 (tariffs).

provided literally no guidance for the exercise of discretion, and the other * * * conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *American Trucking*, 531 U.S. at 474. Since 1935, the Court has "upheld, again without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373.

ii. The district court correctly determined that the authority conferred by Section 102(c) is valid under this Court's nondelegation precedents because "Congress clearly delineate[d] [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of th[e] delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light*, 329 U.S. at 105); see Pet. App. 73a-81a. As in the district court, Pet. App. 76a, petitioners do not dispute that Section 102(c) satisfies the second element by expressly identifying the Secretary of Homeland Security as the public official empowered to exercise the waiver authority. See IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306. The court correctly concluded that the first and third elements are satisfied as well.

As to the first element, Section 102 "clearly delineates the general policy" the Secretary is to pursue. *Mistretta*, 488 U.S. at 372-373 (citation omitted). Section 102(a) provides that the Secretary "shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a), 110 Stat. 3009-554. Section 102(c)(1) authorizes the Secretary to waive legal requirements as the

Secretary "determines necessary to ensure expeditious construction of the barriers and roads" that are the subject of Section 102. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306. Section 102 thus identifies the types of roads and barriers to be constructed and the purposes of those projects, and it further establishes the standard the Secretary is to apply in determining which if any legal requirements to waive in connection with those projects.

As to the third element, for similar reasons, Section 102(c) also establishes the boundaries of the Secretary's authority. The statute authorizes the Secretary to issue a waiver only for construction of roads and barriers along the border for the purpose of deterring illegal entry. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306. Even in connection with such projects, the Secretary may issue a waiver only if and to the extent the Secretary determines that the waiver is "necessary to ensure expeditious construction of the barriers and roads under" Section 102. *Ibid.*

Section 102 thus makes clear by its terms what action the Secretary is authorized to take and what policy those actions should be calibrated to advance. Moreover, as the district court observed, Pet. App. 81a-82a, Section 102(c)'s vesting of such authority in the Secretary is especially appropriate in light of the Secretary's "independent authority over the subject matter" of enforcing the Nation's immigration laws, *Loving*, 517 U.S. at 772 (quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)).

iii. Petitioners' contrary arguments (Pet. 16-24) lack merit. Petitioners contend (Pet. 16-18) that Section 102(c) provides less detailed guidance to the Secretary than other statutes the Court has upheld. But even for

statutes that confer much broader authority than Section 102(c), the Court has held that Congress need not "provide a 'determinate criterion' for saying 'how much of the regulated harm is too much.'" *American Trucking*, 531 U.S. at 475 (brackets and citation omitted).[7]

Petitioners additionally contend (Pet. 17) that Section 102's guidance is inadequate "in light of the sliding scale between the scope of the power delegated and the specificity of the intelligible principle that is required." Petitioners are correct that "the degree of agency discretion that is acceptable varies according to the scope of the power" involved. *American Trucking*, 531 U.S. at 475. But that further supports Section 102(c)'s validity. The authority that provision confers is markedly narrower than the authority upheld in the cases petitioners cite (Pet. 16-17): to adopt Sentencing Guidelines applicable in all federal criminal cases, in *Mistretta*; to

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[7] See, *e.g.*, *American Trucking*, 531 U.S. at 472 (upholding grant of of authority to set air-quality standards "the attainment and maintenance of which in the judgment of the Administrator * * * are requisite to protect the public health" (citation omitted)); *American Power & Light*, 329 U.S. at 104 (authority to modify structure of holding-company systems as agency finds necessary to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders" (citation omitted)); *Yakus*, 321 U.S. at 420 (authority to fix maximum commodity prices that, in Administrator's judgment, "will be generally fair and equitable and will effectuate the purposes of this Act" (citation omitted)); *NBC*, 319 U.S. at 225 (upholding authority to license radio broadcasters as "public interest, convenience, or necessity" requires); *Hope Natural Gas*, 320 U.S. at 600 (authority to set "just and reasonable" rates for natural gas (citation omitted)); see also *Avent* v. *United States,* 266 U.S. 127, 130 (1924) (Holmes, J.) (statute authorizing emergency rules for railroad-equipment shortages that are "reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed").

designate controlled substances on a temporary basis, in *Touby* v. *United States*, 500 U.S. 160 (1991); and to prescribe nationwide air-quality standards, in *American Trucking*.

Petitioners also argue (Pet. 19) that Section 102(c) is "problematic" because it authorizes the Secretary "to waive statutes that are within the purview of other agencies," as well as state and local laws. See Pet. 19-23. That argument misconceives the operation of Section 102(c). In exercising the authority conferred by Section 102(c) to waive other legal requirements, the Secretary is not called upon to render definitive interpretations of or judgments about those other requirements that might be best suited to agencies or entities that administer those other laws. Instead, Section 102(c) merely requires the Secretary to determine whether waiving any other legal requirements is "necessary" to achieve an objective within the Secretary's expertise and experience: "ensur[ing] expeditious construction of the barriers and roads" under Section 102. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306. Petitioners' suggestion (Pet. 21) that Section 102(c) lacks "guidance for balancing the competing interests" at stake disregards that *Congress* already balanced those interests in enacting Section 102(c) and made the determination that the need for expeditious construction of such projects outweighs the policy inter-

ests advanced by other laws. The district court correctly concluded that Section 102(c) does not violate the nondelegation doctrine.[8]

b. The district court also correctly concluded that Section 102(c) does not violate the Presentment Clause, U.S. Const. Art. I, § 7, Cl. 2. Pet. App. 92a-95a. That Clause provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." U.S. Const. Art. I, § 7, Cl. 2. Petitioners contend (Pet. 24-28) that Section 102(c) violates that Clause by authorizing the Secretary to "repeal" statutes enacted by Congress, contrary to this Court's decision invalidating the Line Item Veto Act in *Clinton* v. *City of New York*, 524 U.S. 417, 438 (1998). That is incorrect.

Section 102(c) does not empower the Secretary to repeal any law. It merely permits the Secretary to exempt certain specific federal projects from otherwise-applicable legal requirements. Those requirements remain in force and effect for other purposes. In this respect, Section 102(c) resembles waiver provisions that

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[8] Petitioners note (Pet. 23-24) that the Court is currently considering a nondelegation challenge to a provision of the Sex Offender Registration and Notification Act, 34 U.S.C. 20913(d), in *Gundy* v. *United States*, No. 17-6086 (argued Oct. 2, 2018). Contrary to petitioners' suggestion (Pet. 24), there is no basis to hold this petition pending the decision in *Gundy*. As the government has explained, Section 20913(d) fully comports with this Court's precedents. Gov't Br. at 14-38, *Gundy*, *supra* (No. 17-6086). But even if the Court were to disagree, Section 102(c) clearly comports with the Court's case law as explained in the text, and it does not implicate any of the arguments raised in *Gundy* for departing from the Court's ordinary nondelegation standards in that case, cf. *id.* at 38-56.

are common in federal statutes. The Court has long recognized that Congress may authorize the Executive to waive certain applications of a statute. In *Marshall Field*, for example, the Court upheld a statute that gave the President the "power" and "duty" to "suspend" specified provisions of a statutory tariff "for such time as he shall deem just," "whenever, and so often as the President shall be satisfied that the government of any country * * * imposes duties or other exactions upon the agricultural or other products of the United States, which * * * he may deem to be reciprocally unequal and unreasonable." 143 U.S. at 680 (citation omitted); see *id.* at 681-694. Such provisions are commonplace in federal statutes.[9]

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[9] See, *e.g.*, 10 U.S.C. 433(b) (authorizing Secretary of Defense to waive "compliance with certain Federal laws or regulations pertaining to the management and administration of Federal agencies"); 10 U.S.C. 2350b(c) (authorizing waiver, with respect to contracts, of "any provision of law," other than two specified laws, that prescribes contractual procedures or requirements); 10 U.S.C. 2671(b) (authorizing Secretary of Defense to "waive or otherwise modify the fish and game laws of a State"); 25 U.S.C. 3406(b) and (d) (Supp. V 2017) (authorizing the "head of each affected Federal agency" to "waive any applicable statutory, regulatory, or administrative requirement, regulation, policy, or procedure promulgated by the agency" identified by those agencies and Indian tribe that submits a plan under 25 U.S.C. 3405 for integration of training and other programs as "necessary to enable the Indian tribe to efficiently implement the plan"); 43 U.S.C. 1652(c) (authorizing Secretary of the Interior and other federal officials and agencies to "waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of [the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.*]"); 46 U.S.C. 501(a) (authorizing "head of an agency responsible for the administration of the navigation or vessel-inspection laws" to "waive compliance with those laws to the extent the Secretary [of Defense] considers necessary in the interest of national defense").

Section 102(c) therefore differs markedly from the Line Item Veto Act at issue in *City of New York*. The constitutional defect the Court identified in that statute was that it authorized the Executive to "cancel[]" a previously enacted law, and thereby deprive it of "legal force or effect." 524 U.S. at 437 (quoting 2 U.S.C. 691e(4)(B) and (C) (Supp. IV 1998)). Nothing in Section 102(c)'s text supports the conclusion that issuance of a waiver of legal requirements operates to repeal those requirements. As the district court recognized, the waived requirements—such as provisions of NEPA and the ESA—do not apply to specific construction projects identified by the Secretary, but they remain operative in all other respects. See Pet. App. 94a; cf. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 861 (2009) (rejecting argument that statutory "proviso expressly allow[ing] the President to render certain statutes inapplicable" resulted in a disfavored implied repeal, because the proviso "did not repeal anything, but merely granted the President authority to waive the application of particular statutes to a single foreign nation" (emphasis omitted)).

In addition, Section 102(c) does not implicate the concern the Court articulated in *City of New York* that the President's exercise of a line-item veto would necessarily reflect his "rejecti[on]" of "the policy judgment made by Congress." 524 U.S. at 444. The Court observed that, because only a few days could elapse between the appropriation statute's enactment and the issuance of any line-item veto, such a veto usually could not be based on circumstances that had arisen after enactment and must reflect policy disagreement with Congress regarding that provision. *Ibid.* In contrast, in exercising the authority conferred by Section 102(c), the Secretary is implementing Congress's judgment by

giving priority to IIRIRA's stated goal of "ensur[ing] the expeditious construction" of border barriers over other legal requirements that might otherwise stand as obstacles to that objective. IIRIRA § 102(c)(1), as added by REAL ID Act § 102, 119 Stat. 306.

c. Finally, the district court correctly concluded that Section 102(c) does not violate the Take Care Clause, U.S. Const. Art. II, § 3. Pet. App. 85a-90a. That Clause provides that "[t]he President * * * shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

As an initial matter, the Take Care Clause furnishes no independent basis for affirmative relief in an Article III court. For the Judicial Branch to undertake such an inquiry would express a "lack of the respect due" to the Nation's highest elected official, *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), by assuming judicial superintendence over the exercise of Executive power that the Clause commits to the President. Indeed, this Court has recognized that "the duty of the President in the exercise of the power to see that the laws are faithfully executed" "is purely executive and political," and not subject to judicial direction. *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867). There is no basis for entering those uncharted constitutional waters here.

In any event, petitioners' claims under the Take Care Clause are without merit. Petitioners contend that Section 102(c) violates that Clause because it empowers the Secretary "to unilaterally excise a host of laws that would otherwise govern the border wall," in contravention of the Executive's duty to "'enforce the law.'" Pet. 28 (citation omitted). Assuming arguendo that the Clause applies directly to the Secretary, sepa-

rate from its application to the President, in the Secretary's exercise of the waiver authority under Section 102(c), petitioners' contention fails for reasons similar to those given above concerning the Presentment Clause.

In Section 102(c), *Congress* made the determination that other federal laws should not apply to the extent necessary to "ensure expeditious construction of the barriers and roads under" Section 102, IIRIRA § 102(c), as added by REAL ID Act § 102, 119 Stat. 306, and it merely tasked the Secretary with determining with respect to a particular project which laws' application it is necessary to waive to achieve that objective. When the Secretary exercises that waiver authority, the Secretary therefore is "Tak[ing] Care" that the laws Congress has enacted, including Section 102, are "faithfully executed." U.S. Const. Art. II, § 3. Petitioners' contrary view would threaten to imperil a host of federal statutes that authorize the Executive to waive statutory requirements in particular circumstances.

d. Petitioners additionally assert that Congress's decision to limit judicial review of challenges to the Secretary's exercise of the waiver authority conferred by Section 102(c) "aggravates the separation of powers" concerns. Pet. 29 (emphasis omitted); see Pet. 29-31. That is incorrect. The availability *vel non* of judicial review of an agency's action has no bearing on whether the authorizing statute violates the nondelegation doctrine; whether it improperly permits the Executive to repeal a duly enacted law without observance of bicameralism and presentment; or whether the Executive has failed faithfully to execute the laws. A grant of authority to the Executive, for example, may or may not sup-

ply an intelligible principle irrespective of whether Congress separately determined to allow judicial review of specific exercises of that authority by the Executive.

Moreover, petitioners' premise that, "without judicial review, there is no way to ensure the Secretary is carrying out" Congress's directives, Pet. 30 (emphasis omitted), is incorrect. Section 102(c)'s limitations on judicial review reflect Congress's informed judgment that the political Branches, rather than the courts, are best suited to oversee the Secretary's waiver determinations and whether those waiver determinations are within the bounds Congress provided. Congress itself is well positioned to assess whether the Secretary has acted within the limitations prescribed by Congress and to take action if it concludes that the Secretary has exceeded those limitations. For example, any construction project by the Secretary requires the appropriation of funds by Congress. See, *e.g.*, Department of Homeland Security Appropriations Act, 2018, Pub. L. No. 115-141, Div. F, Tit. II, § 230(a)(1), 132 Stat. ___ (March 23, 2018, appropriation for San Diego secondary fence construction). Congress may condition appropriations on compliance with particular aspects of the law, see, *e.g.*, Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Tit. II, 121 Stat. 2049 (prohibiting obligation of appropriated funds for waiver projects "until 15 days have elapsed" after notice required by Section 102(c)(1) is published in *Federal Register*), or Congress may withhold such funds if it determines that the Secretary has used the waiver authority conferred by Section 102(c) in a way inconsistent with the principles Congress set forth in the statute. And of course Congress is free to amend Section 102(c), as it did in expand-

ing the Secretary's waiver authority in 2005, if it concludes that the scope of the authority it confers is too broad or has been misused.

2. The district court's decision rejecting petitioners' constitutional challenges to Section 102(c) does not conflict with a decision of any other court. Indeed, every federal court to consider constitutional challenges to the statute has rejected them. See *County of El Paso* v. *Chertoff*, No. 08-CA-196, 2008 WL 4372693, at *2-*7 (W.D. Tex. Aug. 29, 2008) (denying preliminary injunction based on rejection of nondelegation and Presentment Clause challenges and arguments based on limitation of judicial review); *County of El Paso* v. *Chertoff*, No. 08-CA-196, 2008 WL 11417030, at *2-*3 (W.D. Tex. Sept. 11, 2008) (dismissing complaint in same case based on same analysis), cert. denied, 557 U.S. 915 (2009); *Save Our Heritage Org.* v. *Gonzalez*, 533 F. Supp. 2d 58, 63-64 (D.D.C. 2008) (rejecting nondelegation challenge); *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119, 123-129 (D.D.C. 2007) (rejecting nondelegation and Presentment Clause challenges), cert. denied, 554 U.S. 918 (2008); *Sierra Club* v. *Ashcroft*, No. 04-CV-272, 2005 WL 8153059, at *4-*7 (S.D. Cal. Dec. 13, 2005) (rejecting nondelegation challenge). Petitions for writs of certiorari were filed in two of those cases presenting substantially similar constitutional challenges to Section 102(c), both of which were denied. See *County of El Paso* v. *Napolitano*, 557 U.S. 915 (2009) (No. 08-751); *Defenders of Wildlife* v. *Chertoff*, 554 U.S. 918 (2008) (No. 07-1180).

Petitioners acknowledge (Pet. 31-32) that the district court's decision does not conflict with a decision of any other court. They maintain (Pet. 32), however, that this Court's review is warranted because, "without a deci-

sion from this Court, there will never be binding precedent on § 102(c)'s constitutionality." But Congress's decision not to provide for review in the courts of appeals, and instead to permit appellate review only in this Court via certiorari, is not a basis to relax the Court's ordinary criteria for plenary review. To the contrary, Congress enacted Section 102(c)(2)'s judicial-review provisions because it wanted "expeditious construction" of border barriers in areas of high illegal entry to take priority over the normal operation of other federal statutes and the "delays caused by litigation." Conf. Report 171. This special (albeit not unique, see 43 U.S.C. 1652(d)) framework weighs against granting review of a district-court decision that, like each decision before it, carefully considered and rejected constitutional challenges to Section 102(c)'s conferral of authority on the Secretary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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