Nos. 17-1286 and 17-1290

In the Supreme Court of the United States

NATIONAL MINING ASSOCIATION, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

AMERICAN EXPLORATION & MINING ASSOCIATION, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY H. WOOD
Acting Assistant Attorney General
ANDREW C. MERGEN
BRIAN C. TOTH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a provision of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*, authorizing the Secretary of the Interior to withdraw tracts of federal land larger than 5000 acres from settlement, sale, location, or entry under the general land laws, including the federal mining laws, is severable from an accompanying provision purporting to allow a legislative veto of such a withdrawal by the Secretary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes: Page

In the Supreme Court of the United States

No. 17-1286

NATIONAL MINING ASSOCIATION, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

No. 17-1290

AMERICAN EXPLORATION & MINING ASSOCIATION, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-65a)[1] is reported at 877 F.3d 845. The opinion of the district court (Pet. App. 66a-108a) is reported at 933 F. Supp. 2d 1215.

[1] The appendices to the petitions for writs of certiorari are identical.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2017. The petitions for writs of certiorari were filed on March 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases are challenges to the Secretary of the Interior's decision to withdraw certain federal lands near the Grand Canyon from location and entry of new mining claims under the General Mining Act of 1872 (Mining Act), ch. 152, 17 Stat. 91. Petitioners assert that the withdrawal is invalid because the statutory provision authorizing it cannot be severed from an invalid provision purporting to allow a legislative veto of such a withdrawal by the Secretary.

1. Under the Mining Act, mineral deposits in many lands owned by the United States are "free and open to exploration and purchase" by private citizens. 30 U.S.C. 22. The Executive Branch has, however, long exercised the authority to withdraw specific tracts of land from location and entry under the Mining Act (and other general land-use statutes) to preserve those tracts for military, conservation, or other public uses. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 469-472 (1915).

Until the 1970s, those withdrawals were often made not pursuant to an express statutory authorization, but instead under an "implied grant of power" that this Court recognized and approved in *Midwest Oil*. 236 U.S. at 475; see Pet. App. 10a-11a. In 1970, a congressionally chartered commission issued a report based on a review of federal land management policies. Pet. App. 11a. The report concluded that—in part because of the longstanding reliance on implied withdrawal authority —"the roles of Congress and the executive branch with

respect to public land use had 'never been carefully defined.'" *Ibid.* (citation omitted). The commission therefore recommended "new legislation specifying the precise authorities delegated to the executive for land management, including withdrawals." *Ibid.*

Congress responded by enacting the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743 (43 U.S.C. 1701 *et seq.*). Among other things, the FLPMA repealed "the implied authority of the President to make withdrawals," as well as various statutes granting withdrawal authority in particular circumstances. § 704(a), 90 Stat. 2792. Consistent with the commission's recommendation, the FLPMA replaced those implied and piecemeal authorizations with a single provision expressly defining the Executive Branch's general withdrawal authority, 43 U.S.C. 1714 (2012 & Supp. IV 2016).

The FLPMA defines a "withdrawal" to include "withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area." 43 U.S.C. 1702(j). Section 1714 provides that the Secretary of the Interior "is authorized to make, modify, extend, or revoke withdrawals * * * only in accordance with the provisions and limitations of this section." 43 U.S.C. 1714(a).

Section 1714 then prescribes requirements for, and limitations on, withdrawals. It provides that the Secretary's withdrawal authority may be delegated "only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate." 43 U.S.C. 1714(a). It further provides that, except in emergencies, the Secretary must

publish a notice of all proposed withdrawals in the Federal Register. 43 U.S.C. 1714(b). New withdrawals also require the opportunity for a public hearing. 43 U.S.C. 1714(h).

Section 1714's other requirements for withdrawals depend on the size of the tract at issue. For small-tract withdrawals of fewer than 5000 acres, the Secretary is authorized to withdraw land "for such period of time as he deems desirable for a resource use," "for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress," or "for a period of not more than twenty years for any other use." 43 U.S.C. 1714(d). The Secretary is not required to notify Congress of small-tract withdrawals.

For large-tract withdrawals of 5000 acres or more, the Secretary may withdraw land "only for a period of not more than twenty years," regardless of the use. 43 U.S.C. 1714(c)(1). The Secretary must "notify both Houses of Congress of such a withdrawal," and the notice must include a report addressing 12 specified topics. 43 U.S.C. 1714(c)(1) and (2). Congress also adopted a so-called "legislative veto" specifying that a large-tract withdrawal "shall terminate and become ineffective" if Congress adopts "a concurrent resolution" of disapproval within 90 days after receiving the notice. 43 U.S.C. 1714(c)(1).

2. Seven years after the FLPMA was enacted, in *INS* v. *Chadha*, 462 U.S. 919 (1983), this Court held that a one-House legislative-veto provision was invalid because it failed to comply "with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Id.* at 958. A legislative-veto provi-

sion, like the one in Section 1714(c)(1), that requires action by both Houses of Congress in a concurrent resolution is also invalid under *Chadha* because of the absence of presentment to the President. In *Chadha* itself and again in *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987), the Court held that specific legislative-veto provisions were severable from the underlying grants of authority to the Executive Branch. See *Alaska Airlines*, 480 U.S. at 697; *Chadha*, 462 U.S. at 931-935.

In the more than three decades since those developments, "Congress has not amended FLPMA to limit the Secretary's withdrawal authority" in light of the invalidity of the legislative veto. Pet. App. 15a. And although the Secretary has exercised large-tract withdrawal authority more than 80 times, Congress has never "attempt[ed] to override that authority"—either through a legislative veto or (after *Chadha*) through ordinary legislation. *Id.* at 33a.

3. In 2009, the Secretary published notice of a proposal to withdraw approximately one million acres of federal land in the Grand Canyon watershed from location and entry under the Mining Act for up to 20 years, subject to valid existing rights. 74 Fed. Reg. 35,887 (July 21, 2009). After soliciting and considering public input and consulting with local governments and other stakeholders, the Secretary issued an order withdrawing the land "to protect the Grand Canyon Watershed from adverse effects" attributable to mining. 77 Fed. Reg. 2563 (Jan. 18, 2012); see Pet. App. 22a.

4. Petitioners are two organizations that represent mining interests. Pet. App. 23a n.14. Along with other plaintiffs, petitioners filed suits in federal district court challenging the withdrawal on various grounds. *Id.* at

23a. The district court rejected those challenges and upheld the withdrawal. *Id.* at 23a-24a. As relevant here, the court rejected petitioners' contention that the Secretary lacks authority to make large-tract withdrawals because Section 1714(c)(1)'s authorization of such withdrawals cannot be severed from the invalid legislative veto. *Id.* at 66a-108a.

The district court began by emphasizing that "[t]he FLPMA includes a severability clause" in which "Congress specifically stated that 'if any provision of the Act or the application thereof is held invalid, the remainder of the Act and application thereof shall not be affected thereby.'" Pet. App. 73a (quoting FLPMA § 707, 90 Stat. 2794). The court explained that under this Court's severability precedents, such an express directive gives rise to a "presumption of severability." *Id.* at 72a (citing *Chadha*, 462 U.S. at 932, 934). And after a thorough review of the FLPMA's text, structure, and history, the court concluded that petitioners had failed to provide the sort of "strong evidence" required to overcome that presumption. *Ibid.* (quoting *Alaska Airlines*, 480 U.S. at 686); see *id.* at 73a-107a.

5. The court of appeals affirmed. Pet. App. 1a-65a. As relevant here, it agreed with the district court that petitioners had not mustered the strong evidence required to overcome the presumption of severability created by the FLPMA's express severability clause. *Id.* at 24a-35a. "To the contrary," the court concluded that "the limited delegation of large-tract withdrawal authority" in Section 1714(c)(1) remains "fully 'consistent with Congress' basic objectives' in enacting FLPMA even if there is no legislative veto." *Id.* at 28a (quoting *United States* v. *Booker*, 543 U.S. 220, 259 (2005)).

The court of appeals acknowledged that the legislative veto was intended to balance the FLPMA's codification of the Executive Branch's withdrawal authority with a mechanism for congressional oversight. Pet. App. 28a, 30a. But the court explained that Congress "imposed significant limitations on the Secretary's withdrawal authority and provided for congressional oversight * * * by means other than the legislative veto." *Id.* at 28a. And the court concluded that "[s]evering the legislative veto provision would leave the remaining limitations, and opportunity for congressional oversight and involvement, in place." *Id.* at 30a.

The court of appeals also concluded that "[t]he legislative history underlying FLPMA confirms" that the legislative veto is severable. Pet. App. 30a. For example, the court explained that one major purpose of the statute was to provide an explicit statutory foundation for withdrawals—a goal that would be seriously undermined if *all* authority for large-tract withdrawals were stripped from the statute. *Id.* at 30a-31a. And while the court acknowledged that some floor statements by individual Representatives had highlighted the legislative veto, it concluded that the legislative record as a whole provided "no indication, let alone 'strong evidence,'" that "Congress would have preferred 'no statute at all' to a version with the legislative veto provision severed." *Id.* at 33a (citation omitted).

ARGUMENT

Petitioners renew their contention (Pet. 11-40; 17-1290 Pet. 16-39)[2] that Section 1714(c)(1)'s authorization of

[2] Unless otherwise noted, references to the petition for a writ of certiorari refer to the petition in No. 17-1286.

large-tract withdrawals cannot be severed from the invalid legislative veto. The court of appeals correctly rejected that argument, which would transform the FLPMA from a statute codifying and regulating the Executive Branch's longstanding general withdrawal authority into one eliminating it altogether for any tract larger than 5000 acres. The court's decision does not conflict with any decision of this Court or another court of appeals. To the contrary, petitioners do not identify any other decision even considering the severability of the FLPMA's legislative veto. Nor do they cite any decision declining to sever a legislative veto where, as here, the relevant statute includes a severability clause. The petitions for writs of certiorari should be denied.

1. This Court's general approach to severability is well-established. "[W]hen confronting a constitutional flaw in a statute," a court must "limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation and internal quotation marks omitted). So long as the statute "remains fully operative as a law," its other provisions may not be struck down unless it is "evident from the statutory text and context that Congress would have preferred no statute at all" to a statute with the invalid provision severed. *Executive Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2173 (2014) (citations and internal quotation marks omitted); see, *e.g.*, *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1482 (2018); *United States* v. *Booker*, 543 U.S. 220, 246, 265 (2005); *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684-685 (1987).

As in *Chadha*, however, the courts "need not embark on that elusive inquiry" in this case because "Congress

itself has provided the answer to the question of severability." *INS* v. *Chadha*, 462 U.S. 919, 932 (1983). The FLPMA directs that "[i]f any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby." FLPMA § 707, 90 Stat. 2794 (43 U.S.C. 1701 note). Like the substantially identical severability clause in *Chadha*, "[t]his language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the [FLPMA] as a whole, or of any part of the [FLPMA], to depend upon whether the veto clause of [Section 1714(c)(1)] was invalid." 462 U.S. at 931. Indeed, "Congress could not have more plainly authorized the presumption that the provision for a [legislative] veto * * * is severable." *Ibid.*

2. This Court has stated that the presumption of severability created by a clause like the one in the FLPMA could be overcome only by "strong evidence" that Congress would have preferred no law at all to a law with the invalid provision severed. *Alaska Airlines*, 480 U.S. at 686. The court of appeals faithfully applied that standard and correctly held that petitioners failed to provide any sound reason—much less strong evidence—to believe that Congress would have preferred no large-tract withdrawal authority at all to the limited authority granted by Section 1714(c)(1) with the legislative veto severed. Petitioners now reprise the various arguments they made below, but those arguments remain unpersuasive.

a. Petitioner National Mining Association (NMA) asserts (Pet. 25) that the FLPMA's severability clause does not apply here because it addresses the severability of "provision[s]" and "[t]he legislative veto language

enmeshed within [Section 1714](c) is not a separate 'provision' or subsection." According to NMA (Pet. 25-26), "[t]he narrowest 'provision' to which the severability clause might refer * * * is [Section 1714](c)(1) *as a whole*." That argument is wrong for two independent reasons.

First, it is inconsistent with the ordinary meaning of "provision." As the court of appeals explained, "[t]here is no support for the proposition that a statutory subsection, like [Section 1714](c)(1), is the smallest unit that can be characterized as a 'provision' subject to a severability clause." Pet. App. 34a. To the contrary, the term "provision" includes "[a] clause in a statute." *Black's Law Dictionary* 1420 (10th ed. 2014). The FLPMA's legislative veto is contained in a clause in Section 1714(c)(1)'s second sentence (and in subsequent sentences establishing procedures for congressional consideration of a veto resolution). The court thus correctly concluded that the veto is a separate "provision" from the grant of large-tract withdrawal authority in Section 1714(c)(1)'s first sentence. Pet. App. 34a.

Second, and in any event, the severability clause would apply even if the authorization and veto were in the same "provision." In language NMA omits from its quotation of the severability clause (Pet. 25), Congress provided that "[i]f any provision of this Act *or the application thereof* is held invalid, the remainder of the Act *and the application thereof* shall not be affected thereby." FLPMA § 707, 90 Stat. 2794 (emphases added). Thus, even if Section 1714(c)(1) had to be regarded as a single indivisible "provision," the "application" of that provision to authorize legislative vetoes would be severable from its "application" to authorize large-tract withdrawals.

b. Petitioners also advance various arguments against severability based on the FLPMA's text and structure. Most of those arguments have little relevance to the question presented, and none of them suggest that Congress, had it known the legislative-veto provision is unconstitutional, would have preferred no large-tract withdrawal authority at all to the grant of authority in Section 1714(c)(1) absent a legislative veto.

i. Petitioners first observe (Pet. 20-23; 17-1290 Pet. 26-29) that Congress provided that the Secretary may withdraw land "only in accordance with the provisions and limitations" of Section 1714. 43 U.S.C. 1714(a). Because the legislative veto is one of those "provisions and limitations," petitioners assert (Pet. 20-21) that "the plain text" of the statute demonstrates that "Congress intended the Executive's large-scale withdrawal delegation to rise and fall with the legislative veto."

It is of course true that, in enacting the FLPMA, Congress provided that the Secretary may withdraw large tracts only subject to a legislative veto. But in a severability inquiry, the question is not whether Congress originally intended to require compliance with the invalid provision. By definition, it did. Instead, the question is whether the invalidity of one provision requires a court to decline to give effect to the other, valid provisions. The fact that Congress originally required compliance with the invalid provision sheds no light on that question. In *Alaska Airlines* and *Chadha*, for example, the Court considered agency authority that Congress had likewise expressly made subject to a legislative veto, and it had no difficulty concluding that the veto provisions were severable. *Alaska Airlines*, 480 U.S. at 682-683; *Chadha*, 462 U.S. at 931-932.

Petitioners place great weight (Pet. 20-21; 17-1290 Pet. 26-27) on Congress's statement that withdrawals may be made "only" under the procedures in Section 1714. 43 U.S.C. 1714(a). But that directive applies to *all* of the many "procedures and limitations" in Section 1714—it is not specific to the legislative veto. And Congress's statement that the withdrawal procedures in Section 1714 are exclusive simply reflects its intent to replace the previous system of piecemeal and implicit withdrawal authority with a single comprehensive provision. See pp. 2-3, *supra*. It sheds no light on the severability question presented here.[3]

---

[3] Petitioners err in asserting (Pet. 21-23; 17-1290 Pet. 28) that their argument based on the word "only" is supported by *Nguyen* v. *INS*, 533 U.S. 53 (2001). In that case, the Court noted but did not resolve the question whether it could strike down a specific requirement for naturalizations while leaving the rest of the relevant naturalization procedure in place. *Id.* at 72. In discussing that issue, the Court stated that although the statute contained a severability clause, Congress had also provided that a person "may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise." *Ibid.* (quoting 8 U.S.C. 1421(d)). But the Court did not decide the severability issue, because it ultimately found no constitutional violation. See *ibid.* ("[W]e need not rely on this argument."). And the Court's discussion was also informed by the separation-of-powers concerns that would result from "the conferral of citizenship on terms other than those specified by Congress." *Id.* at 71-72; see *Miller* v. *Albright*, 523 U.S. 420, 457 (1998) (Scalia, J., concurring in the judgment). No similar concerns are presented here: Although the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, vests Congress with authority to provide for administration of land owned by the United States, the Executive Branch has exercised withdrawal authority "from an early period in the history of the Government," *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 471 (1915) (citation omitted); see *ibid.* (counting "at least 252 executive orders making reservations for useful, though non-statutory purposes").

ii. Petitioners next invoke (Pet. 23-24; 17-1290 Pet. 24-25) the portion of the FLPMA's declaration of policy stating that the Act is intended to allow Congress to "exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes" and to "delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. 1701(a)(4). But as the court of appeals explained, the Act continues to serve those goals—and to provide for congressional oversight—without the legislative veto. Pet. App. 28a-30a. And petitioners ignore other aspects of the declaration of policy that would be profoundly disserved if, as they maintain, the invalidity of the veto deprived the Secretary of *all* authority to make large-tract withdrawals under Section 1714. For example, Congress provided that it is the policy of the United States that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and, "where appropriate," to "preserve and protect certain public lands in their natural condition." 43 U.S.C. 1701(a)(8). That policy would be seriously impaired if, as petitioners maintain, the Secretary's withdrawal authority were limited to tracts smaller than 5000 acres.

iii. Petitioners also contend that because Congress placed both "the delegation of authority to make large-tract withdrawals and the legislative veto" in Section 1714(c)(1), the two provisions "are 'interwoven' and cannot be separated." 17-1290 Pet. 29-30 (quoting *Hill* v. *Wallace*, 259 U.S. 44, 70 (1922)); see Pet. 27. Petitioners misunderstand the precedents on which they rely. Those decisions did not rest on statutory *form*—the fact that the valid and invalid provisions were codified in a single

subsection or paragraph. Instead, they concluded that the relevant provisions were interwoven in *substance*.[4]

The decisions petitioners cite thus simply reflect the familiar principle that "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684 (citing *Hill*, 259 U.S. at 70-72). But "[t]his is not a concern * * * when the invalid provision is a legislative veto, which by its very nature is separate from the operation of the substantive provisions of a statute." *Id.* at 684-685.

Petitioners thus cannot plausibly contend that the legislative veto is "interwoven" with the remainder of Section 1714(c)(1) in the sense that large-tract withdrawal authority cannot function independently. To the contrary, Section 1714(c)(1)'s authorization of large-tract withdrawals has been functioning without the veto for more than three decades. And where, as here, other provisions of the statute operate independently, the fact that they are in the same subsection as an invalid provision is no barrier to severance. In *Alaska Airlines*, for example, this Court severed an invalid legislative veto

---

[4] See *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 83-84, 85-86 (1976) (declining to sever a sentence imposing criminal penalties for violations of an invalid substantive requirement); *Dorchy* v. *Kansas*, 264 U.S. 286, 290-291 (1924) (concluding that the severability question should be resolved by the state courts on remand, but explaining that the question is whether the statutory section at issue "is so interwoven with the system held invalid that the section cannot stand alone"); *Hill*, 259 U.S. at 70-71 (declining to sever provisions that could not function unless the statute were rewritten by "inserting [words] that are not now there") (quoting *United States* v. *Reese*, 92 U.S. 214, 221 (1876)).

from a reporting requirement contained in the very same sentence. 480 U.S. at 682, 689-690.

iv. Petitioners assert that severing the legislative veto gives the Secretary the same "unfettered large-tract withdrawal authority" that the FLPMA repealed. 17-1290 Pet. 26; see Pet. 24-25. That is not so. In fact, the legislative veto "was only one of many provisions" in Section 1714 through which Congress limited and provided for oversight of the Secretary's withdrawals. Pet. App. 30a. "For example, Congress reserved to itself the exclusive authority to make *permanent* large-tract withdrawals, limiting the Secretary's large-tract withdrawals to no more than twenty years." *Id.* at 28a. Congress also expressly reserved to itself the authority to make or modify certain other withdrawals. 43 U.S.C. 1714(j) (Supp. IV 2016). Congress "limited the Secretary's power to delegate withdrawal authority." Pet. App. 29a (citing 43 U.S.C. 1714(a)). "The statute also delineates specific requirements for public hearings concerning proposed withdrawals and requires publication in the Federal Register." *Ibid.* (citing 43 U.S.C. 1714(b)(1) and (h). "And for large-tract withdrawals," the statute requires the Secretary to "provide timely notice to Congress (enabling Congress to address the proposed withdrawal legislatively if it so chooses)." *Ibid.* (citing 43 U.S.C. 1714(c)). Like the similar requirement in *Chadha*, that notice provision ensures that "Congress' oversight of the exercise of this delegated authority is preserved." 462 U.S. at 935.

The continued operation of all of those other procedural and substantive limitations on withdrawals refutes petitioners' assertion that severing the legislative veto leaves the Secretary with the sort of "unfettered" withdrawal authority that existed before the FLPMA.

And for much the same reason, petitioners are wrong to assert that the decision below "leaves no meaningful difference between large-tract withdrawals and small-tract withdrawals." 17-1290 Pet. 31; see Pet. 27-28. Large-tract withdrawals are limited to 20 years; certain small-tract withdrawals may extend "for such period of time as [the Secretary] deems desirable." 43 U.S.C. 1714(d)(1). Large-tract withdrawals require notice to Congress; small-tract withdrawals do not. 43 U.S.C. 1714(c)(1) and (d). And the notice must be accompanied by "a detailed report addressing twelve specific issues of concern." Pet. App. 29a. Among other things, that report must include:

- "[A]n inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use." 43 U.S.C. 1714(c)(2)(2).
- "[A]n identification of present users of the land involved, and how they will be affected by the proposed use." 43 U.S.C. 1714(c)(2)(3).
- "[A]n analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination." 43 U.S.C. 1714(c)(2)(4).
- "[A] statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace." 43 U.S.C. 1714(c)(2)(6).

- "[A] statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups." 43 U.S.C. 1714(c)(2)(7).
- "[A] report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mining potential, [and] present and potential market demands." 43 U.S.C. 1714(c)(2)(12).

Those detailed requirements apply only to large-tract withdrawals, and they "provide a meaningful limitation on executive action even if no legislative veto may be exercised." Pet. App. 85a.

c. Finally, petitioners rely (Pet. 14-16, 29-34; 17-1290 Pet. 16-23) on an argument based on congressional purpose, which they derive primarily from their reading of the FLPMA's legislative history. Petitioners assert that the FLPMA was intended to limit the Executive Branch's withdrawal authority; that the legislative veto was an essential means to that end; and that the statute thus will not function "in a *manner* consistent with the intent of Congress" if the veto is severed, Pet. 14 (quoting *Alaska Airlines*, 480 U.S. at 685). Each step of that argument is flawed.

First, while it is certainly true that *one* purpose of the FLPMA was to impose limits on withdrawals, petitioners seriously err in treating that as the *only* relevant purpose. In fact, the statutory text and legislative history show that "the FLPMA was equally concerned with granting withdrawal authority to the Executive as

it was with setting proper limits and procedural safeguards on the exercise of that authority." Pet. App. 105a. For example, the committee report on which petitioners rely (Pet. 31; 17-1290 Pet. 22) states that one of the FLPMA's "major objectives" was to "[c]lothe the Bureau of Land Management with sufficient authority to enable it to carry out the goals and objectives established by law for the public lands under its jurisdiction." H.R. Rep. No. 1163, 94th Cong., 2d Sess. 2 (1976) (House Report); see *id.* at 2-3 (listing "withdrawals" as one of "[t]he authorities that would be granted to the Bureau of Land Management"). Accordingly, in explaining the repeal of the Executive Branch's implied and piecemeal withdrawal authorities, the report emphasizes that the FLPMA "substitutes a general grant of authority * * * to make and modify withdrawals subject to certain procedural requirements." *Id.* at 29.

Petitioners asked the courts below to respond to the invalidity of the FLPMA's legislative veto by preserving the Act's repeal of existing withdrawal authorities, but completely eliminating the accompanying authorization of withdrawals of tracts larger than 5000 acres. That result would severely undermine the "general grant of authority" that Congress intended to serve as a "substitute[]" for the Executive Branch's longstanding implied withdrawal authority. House Report 29. And it is thus petitioners, and not the court of appeals, who would create a version of the FLPMA that would not operate "in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685.

Second, petitioners greatly overstate the significance of the legislative veto in Congress's consideration of the FLPMA. Petitioners rely in substantial part on

general quotations from the House Report (and secondary sources) to establish that the FLPMA was intended to "limit executive withdrawal authority." Pet. 18. But the legislative veto "was only one of many provisions" that Congress adopted to advance that broad purpose. Pet. App. 30a. As the court of appeals observed, "[t]he House Report discussed the legislative veto only in the context of several other mechanisms for congressional oversight and limitations on the Secretary's authority." *Id.* at 30a-31a. The Report did not suggest that the committee would have preferred no large-tract withdrawal authority at all had it known that the legislative veto was invalid.[5] And while petitioners also cite (Pet. 31-32, 17-1290 Pet. 22-23) a handful of floor statements that focused specifically on the legislative veto, this Court has repeatedly instructed that "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

Third, petitioners err in asserting (Pet. 15) that the court of appeals "wholly failed to acknowledge" this Court's observation in *Alaska Airlines* that the invalidation of a legislative veto "necessarily alters the balance of powers" between Congress and the Executive

---

[5] The error in petitioners' contrary argument is illustrated by the assertion that the House Report shows that "Congress expressly included the legislative veto to ensure [that] 'the integrity of the great national resource management systems will remain under the control of Congress.'" 17-1290 Pet. 22 (quoting House Report 9). In fact, the quoted statement was not referring to the legislative veto at all; instead, it was discussing an entirely different provision of Section 1714 that "reserve[s] to the Congress the authority to create, modify, and terminate withdrawals" for specified purposes, such as "national parks, national forests, [and] the Wilderness System." House Report 9; see 43 U.S.C. 1714(j) (Supp. IV 2016).

Branch and that some delegations "may have been so controversial or so broad that Congress would have been unwilling to make [them] without a strong oversight mechanism." 480 U.S. at 685. In fact, the court expressly recognized that the FLPMA was a "compromise between groups of lawmakers with divergent and sometimes competing interests"—including differing views on the proper scope of the Secretary's withdrawal authority. Pet. App. 32a. The court thus acknowledged that "[i]t is possible—perhaps even likely—that had Congress known in 1976 that the legislative veto provision was unconstitutional, a somewhat different legislative bargain would have been struck." *Ibid.*

The court of appeals emphasized, however, that the relevant question "is not whether Congress would have drafted the statute differently in the absence of the unconstitutional provision." Pet. App. 32a. Instead, it is whether the "text or historical context" of the statute Congress actually enacted "makes it evident that Congress . . . would have preferred no statute at all" if it had known that the legislative-veto provision would be held invalid. *Id.* at 32a-33a (citation omitted). And on that question, the court rightly concluded that "[g]iven the recognized desire for executive authority over withdrawals of federal lands from new mining claims—and given Congress's preference regarding the survival of that authority, as expressed in the severability clause—there is no indication, let alone 'strong evidence'" that Congress would have preferred no large-tract withdrawal authority at all to the authority granted by Section 1714(c) with the legislative veto severed. *Id.* at 33a (citation omitted).

In reaching that conclusion—and in placing principal reliance on the FLPMA's express severability clause—

the court of appeals correctly identified *Chadha* rather than *Alaska Airlines* as the most analogous precedent. In *Alaska Airlines*, the Court engaged in an extended analysis of legislative history in part because it decided the case on the assumption that no severability clause applied. 480 U.S. at 686-687. In *Chadha*, in contrast, the Court emphasized that a severability clause like the one in the FLPMA unambiguously indicates that "Congress did not intend the validity of the [statute] as a whole, or of any part of the [statute], to depend upon whether the veto clause * * * was invalid." 462 U.S. at 932. The Court then relied on the severability clause to reject a legislative history argument similar to the one advanced by petitioners, explaining that "[a]lthough it may be that Congress was reluctant to delegate final authority over [the relevant matter]" to the Executive Branch absent a legislative veto, "such reluctance is not sufficient to overcome the presumption of severability raised by [a severability clause]." *Ibid.*; see Pet. App. 33a (quoting this portion of *Chadha*). So too here.

3. Petitioners do not contend that the decision below conflicts with any decision of another court of appeals. To the contrary, it appears that no other court has even considered the contention that Section 1714(c)(1)'s large-tract withdrawal authority must fall along with the legislative veto. And, more broadly, petitioners have not "cited any case holding that a legislative veto provision could not be severed where the statute in question contained a severability clause." Pet. App. 27a.[6]

---

[6] In the 1980s, the Second and D.C. Circuits issued two decisions finding other legislative-veto provisions inseverable. *City of New Haven* v. *United States*, 809 F.2d 900, 909 (D.C. Cir. 1987); *EEOC* v. *CBS, Inc.*, 743 F.2d 969, 973 (2d Cir. 1984). But those decisions rested on the particular text, structure, and history of the statutes

Petitioners also identify no sound reason for this Court to grant review in the absence of a circuit conflict. They seek to portray the court of appeals' decision as a dramatic development that threatens to "cripple the mining law and the domestic mining industry." 17-1290 Pet. 35; see Pet. 37-40. But in the 35 years since *Chadha*, the Secretary has exercised large-tract withdrawal authority dozens of times. Pet. App. 33a. Congress has never attempted to override any of those withdrawals. *Ibid.* And it appears that, until this case, no party had argued that the authority granted by Section 1714(c)(1) is invalid. The court of appeals' reaffirmation of the Secretary's large-tract withdrawal authority thus merely confirmed a decades-old status quo.

Petitioners also assert (17-1290 Pet. 38) that the decision below is likely to be the "last word" on the question presented because the Ninth Circuit encompasses many of the federal lands where future large-tract withdrawals from the Mining Act could be made. But as petitioners acknowledge (*ibid.*), "federal lands open to operation of the Mining Law" are also found in the Tenth Circuit. See, *e.g.*, 80 Fed. Reg. 57,635 (Sept. 24, 2015) (detailing a proposal, now cancelled, for large-tract withdrawal of lands in several states, including Utah and Wyoming). Review of withdrawals could also be had in the D.C. Circuit, the site of the Secretary's official residence. 28 U.S.C. 1391(e)(1)(A); see, *e.g.*, *Mount*

---

at issue, which differed markedly from the FLPMA. Most notably, neither statute included a severability clause. To the contrary, the Second Circuit emphasized that the legislative history showed that the statute at issue in *CBS* "intentionally d[id] not contain a severability clause" because Congress wanted the entire statute to be held invalid if the legislative veto were struck down. 743 F.2d at 943 (citation and emphasis omitted).

Royal Joint Venture v. *Kempthorne*, 477 F.3d 745, 747-748 (D.C. Cir. 2007) (reviewing a large-tract withdrawal of land in Montana).

In addition, Section 1714 allows the Secretary to withdraw lands from any of the general land laws, not just the Mining Act, and to reserve them for other purposes or programs. That means that future withdrawals could involve lands situated outside the Ninth and Tenth Circuits. For example, a proposed large-tract withdrawal of lands situated in the Eighth Circuit from the mineral and geothermal leasing laws is currently pending before the Secretary. 82 Fed. Reg. 6639 (Jan. 19, 2017). The presence of significant federal lands in the Ninth Circuit thus provides no persuasive reason for this Court to depart from its usual practices by taking up the question presented in the absence of a circuit conflict—indeed, in the very first case in which it has arisen.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
ANDREW C. MERGEN
BRIAN C. TOTH
Attorneys

JULY 2018