In the Supreme Court of the United States

COUNTY OF EL PASO, ET AL.,

Petitioners,

v.

MICHAEL CHERTOFF, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
ELIZABETH G. OYER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

On April 3, 2008, the Secretary of Homeland Security waived the application of thirty-seven federal statutes to activities relating to construction of the border fence along nearly 500 miles of the United States' border with Mexico. The Secretary's orders also purported to preempt "state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the waived federal statutes.

The Secretary claimed authority for these orders under Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act, as amended, which grants the Secretary "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" along the United States' border. 8 U.S.C. § 1103 note. Section 102(c) forecloses judicial review of the Secretary's waivers except for actions brought in federal district court alleging violations of the Constitution of the United States. A district court's decision may be reviewed only through a petition for writ of certiorari to this Court. The questions presented are:

1. Whether the grant of authority to the Secretary of Homeland Security to "waive all legal requirements" necessary to ensure rapid construction of a border fence, with no provision for judicial review to test the statutory and factual basis of the Secretary's waiver orders, is an unconstitutional delegation of legislative power.

2. Whether a general delegation of authority to "waive all legal requirements" is sufficient to permit the Secretary of Homeland Security to declare preempted every state and local law "related to" the thirty-seven waived federal statutes.

RULE 14.1(b) STATEMENT

Petitioners (plaintiffs below) are County of El Paso, City of El Paso, El Paso County Water Improvement District No. 1, Hudspeth County Conservation and Reclamation District No. 1, Ysleta del Sur Pueblo, Frontera Audubon Society, Friends of the Wildlife Corridor, Friends of Laguna Atascosa National Wildlife Refuge, and Mark Clark.

Respondents (defendants below) are Michael Chertoff, Secretary, U.S. Department of Homeland Security, and the U.S. Department of Homeland Security.

RULE 29.6 STATEMENT

Frontera Audubon Society, Friends of the Wildlife Corridor, and Friends of Laguna Atascosa National Wildlife Refuge state that none of them has a parent corporation and no publicly held corporation owns ten percent or more of the stock of any of the organizations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, County of El Paso, City of El Paso, El Paso County Water Improvement District No. 1, Hudspeth County Conservation and Reclamation District No. 1, Ysleta Del Sur Pueblo, Frontera Audubon Society, Friends of the Wildlife Corridor, Friends of Laguna Atascosa National Wildlife Refuge, and Mark Clark, respectfully petition for a writ of certiorari to review the judgment of the District Court for the Western District of Texas in this case.

OPINIONS BELOW

The opinion of the district court (App., *infra*, 49a-55a) dismissing petitioners' complaint is not reported. The opinion of the district court (App., *infra*, 18a-48a) denying petitioners' motion for preliminary injunction is not reported.

JURISDICTION

The judgment of the district court was entered on September 11, 2008 (App, *infra*, 55a). This Court's jurisdiction rests on Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 8 U.S.C. § 1103 note.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. U.S. Const. Art. I, § 1 provides in relevant part:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. U.S. Const. Amend. X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 8 U.S.C. § 1103 note, provides in relevant part:

> (a) In general.—The Secretary of Homeland Security 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.
>
> * * * *
>
> (c) Waiver.—
>
> (1) In general.—Notwithstanding any other provision of law, 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. Any such decision by the Secretary shall be effective upon being published in the Federal Register.
>
> * * * *

(2) Federal court review.—

(A) In general.—The district courts of the United States shall 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 paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

(B) Time for filing of complaint.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

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

4. The Secretary's Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 73 Fed. Reg. 19077 (Apr. 8, 2008), is reprinted at App., *infra*, 1a.

5. The Secretary's Determination Pursuant to Section 102 of the Illegal Immigration Reform and

Immigrant Responsibility Act of 1996, as amended, 73 Fed. Reg. 19078 (Apr. 8, 2008), is reprinted at App., *infra*, 7a.

STATEMENT

Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) delegates sweeping authority to a single unelected official, authorizing the Secretary of Homeland Security "to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction" of barriers and roads in the vicinity of the Nation's international border. IIRIRA § 102(c)(1), as amended, 8 U.S.C. § 1103 note ("Section 102(c)").

IIRIRA's waiver provision is unprecedented. Not only does the Secretary retain "sole discretion" to determine when a waiver is appropriate, but the Act imposes no restrictions on the type of "legal requirement" he may waive. Capping off the extraordinary features of this statutory scheme, the Secretary's exercise of discretion is immune from judicial review to ensure compliance with the statutory standard and other administrative law requirements. Challenges to the Secretary's actions under Section 102(c) "may only be brought alleging a violation of the Constitution of the United States." Section 102(c)(2)(A).

In the orders at issue here, the Secretary has taken full advantage of this limitless and unreviewable delegation of power, purporting to waive not only a host of federal environmental, historic, and cultural preservation laws, but also basic framework laws like the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*;

the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb note; and the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6303-6308 – some thirty-seven federal laws in all.

Moreover, the Secretary purported to "waive" all state and other laws "deriving from, or related to the subject of" these waived federal laws, without further identifying which state or "other laws" he intended to waive. The Secretary further "reserve[d] the authority to make further waivers from time to time as [he] may determine to be necessary." App., *infra*, 5a, 17a. The effect is to render the considerable physical area surrounding the border fence a legal no-man's land, subject to the unfettered discretion of the Secretary.

The Secretary's orders provide no explanation for the selection of statutes waived, no reasons why the statutory standard is satisfied, and no guidance concerning which local and state laws are "deriv[ed] from or relate[d] to" the federal statutes he has suspended. App., *infra*, 4a, 15a. The orders are unclear as to whether the Secretary has merely exempted himself from the laws' effects or whether the waived laws no longer apply to other persons or government entities engaged in activities within the zone of the waivers. Neither do the waivers indicate whether the affected laws are waived only during the period of construction or are waived indefinitely (as ongoing "upkeep" of fences, roads, supporting elements, and the like continues). Finally, although the orders identify by mileposts the length of the area affected, they do not specify the width of the area covered by the waivers. App., *infra*, 4a, 15a.

Section 102(c)'s extraordinarily broad delegation of power and the vagueness of the Secretary's orders would be less objectionable if aggrieved parties were

able to seek judicial review of the Secretary's actions. Ordinarily such review, if not otherwise provided for by statute, would be available under Section 704 of the APA, 5 U.S.C. § 704. The Secretary, however, has waived the APA. App., *infra*, 5a, 16a. Even if he had not, Section 102(c) categorically bars claims challenging the Secretary's compliance with the statute's substantive requirements, including the requirement that a waiver be "necessary to ensure expeditious construction of the barriers and roads" as authorized by the Section, and claims seeking interpretation or clarification of the Secretary's orders. It also precludes litigation in the state courts and all intermediate federal appellate review related to the Secretary's orders. The result is that Section 102(c) leaves aggrieved parties with no means of ensuring that the Secretary's waiver authority is exercised in accordance with the statute's prescribed limits, except by challenging the constitutional validity of the grant of authority itself. This Court is the only appellate court with jurisdiction to resolve that claim.

A. Statutory Background

In 1996, Congress directed the Attorney General to construct barriers and roads along the U.S. international border to deter illegal crossings. IIRIRA, Pub. L. No. 104-208, div. C, tit. I, § 102(a), 110 Stat. 3009-554 (codified as amended at 8 U.S.C. § 1103 note). As originally enacted, IIRIRA provided that, if and to the extent the Attorney General determined it was necessary, 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.*, were waived "to ensure expeditious construction of the barriers and roads" along the border. § 102(c), 110 Stat. at 3009-555.

The Act included no special review provision and did not preclude judicial review of the Attorney General's determinations. In 2002, Congress transferred oversight of the border fence project, along with many of the Attorney General's other responsibilities, to the newly created Secretary of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 1511, 1517, 116 Stat. 2309, 2311.

Three years later, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, 119 Stat. 302 (codified at 8 U.S.C. § 1103 note), as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005. That Act greatly expanded the scope of the Secretary's waiver authority to include not merely ESA and NEPA but "all legal requirements," transferring the decision regarding the legal requirements subject to waiver from Congress to the Secretary "in [his] sole discretion." REAL ID Act § 102(c)(1).

The Act also radically restricted the scope of judicial review of the Secretary's waiver decisions. The district courts are now permitted to hear only "[a] cause of action or claim * * * alleging a violation of the Constitution of the United States." *Id.* § 102(c)(2)(A). Further, "[a] claim shall be barred unless it is filed within" sixty days of the Secretary's decision. *Id.* § 102(c)(2)(B). A ruling by a district court under this provision may only be reviewed "upon petition for a writ of certiorari to the Supreme Court of the United States." *Id.* § 102(c)(2)(C).

B. Proceedings Below

On April 3, 2008, Secretary of Homeland Security Michael Chertoff, invoking his authority under Section 102(c), issued two orders waiving "all federal, state, or other laws, regulations and legal require-

ments of, deriving from, or related to the subject of" more than three dozen federal statutes. 73 Fed. Reg. 19077 (Apr. 8, 2008) (Hidalgo County waiver) (reprinted at App., *infra*, 1a); 73 Fed. Reg. 19078 (Apr. 8, 2008) (multistate waiver) (reprinted at App., *infra*, 7a). The two orders' combined abrogation of existing federal and state statutory rights covers nearly 500 miles of territory along the U.S.-Mexico border, an area crossing through four states. They are the fourth and fifth waivers, respectively, that the Secretary has issued under the IIRIRA authority and encompass nearly twice as many federal statutes as the largest previous waiver. 72 Fed. Reg. 60870 (Oct. 26, 2007) (waiving twenty federal statutes).

Petitioners – local government entities, an American Indian tribe, environmental groups, and an individual Texas resident – filed suit on June 2, 2008, in United States District Court for the Western District of Texas, challenging the constitutionality of the broad delegation of authority to the Secretary to waive any laws that he deemed impediments to rapid construction of the border fence. Petitioners argued (1) that granting the Secretary unlimited waiver authority while precluding judicial review for compliance with statutory requirements constitutes an unconstitutional delegation of legislative authority, and (2) Section 102(c) does not contain a sufficiently clear delegation to permit the Secretary to declare state and local law preempted on his own authority.

In affidavits filed in the district court, petitioners averred that they face a variety of serious potential harms as a result of the Secretary's orders. For example, the Secretary's waivers of federal and state law compromise the Ysleta del Sur Pueblo Indian tribe's ability to protect sacred grounds along the Rio Grande that have been used for more than 300 years

to perform religious and cultural ceremonies. Similarly, the waivers may jeopardize the ability of the El Paso County Water Improvement District No. 1 and the Hudspeth County Conservation and Reclamation District No. 1 to fulfill their statutory mandates to deliver water to the City of El Paso and to thousands of farmers throughout El Paso and Hudspeth Counties.

The district court denied petitioners' motion for a preliminary injunction and thereafter granted respondents' motion to dismiss. The court found that the statute's preclusion of judicial review did not render the broad delegation of authority unconstitutional. App., *infra*, 30a-31a. Referring to this Court's decision in *Whitman* v. *American Trucking Associations*, 531 U.S. 457 (2001), the district court found that, no matter how sweeping the delegation or negligible the judicial review, the Constitution requires only that "Congress * * * provide an intelligible principle to guide the exercise of delegated authority." App., *infra*, 30a. The court concluded that petitioners had not "presented any cases in which the Supreme Court struck down a statute explicitly for lack of judicial review in the intelligible principle analysis," that "other courts have held the Supreme Court does not require judicial review in the intelligible principle analysis," and that "the Waiver Legislation does not preclude judicial review entirely because parties can petition for certiorari to the Supreme Court." App., *infra*, 32a.

Turning to petitioners' federalism arguments, the district court acknowledged that this Court has held Congress must clearly delegate authority before an executive official can preempt state law. But the district court deferred to the Secretary's argument that Section 102(c) satisfies the clear statement re-

quirement, because the statute "clearly manifests congressional intent to nullify other laws to the extent necessary to expeditiously construct the border fence." App., *infra*, 40a. Alternatively, the district court concluded that the Secretary's declaration of preemption could be upheld as a species of conflict preemption, since the Secretary "has only waived state and local laws which interfere with Congress's purpose to construct the border barrier." App., *infra*, 40a. The court did not advert to the fact that, because Section 102(c) precludes all judicial review sixty days after the issuance of a waiver order, the determination of the scope of this "conflict preemption" will lie in the unreviewable discretion of the Secretary of Homeland Security.

REASONS FOR GRANTING THE PETITION

When Congress enacted the original version of the provision at issue here in 1996, Congress itself determined that two statutes – the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 – would be suspended if the Attorney General determined such suspension was necessary to ensure expeditious construction of a border fence. § 102(c), 110 Stat. 3009-555. The Act contained no limits on judicial review of the Attorney General's necessity determinations. The Attorney General undertook construction of the first segment of the border fence without ever deeming it "necessary" to give effect to Congress's waiver of ESA or NEPA. Cal. Coastal Comm'n, *W 13a Revised Staff Report and Recommendation on Consistency Determination* 14 (CD-063-03) (2003), *available at* http://www.coastal.ca.gov/ccd/W13a-2-2004.pdf.

With the 2005 REAL ID Act amendments, Congress adopted a substantially different scheme, one

that impermissibly delegated legislative authority to the Secretary. Rather than specifying particular federal laws that would be waived upon an administrative determination of necessity, subject to the ordinary testing through judicial review, the revised Section 102(c) confers on the Secretary the unfettered choice of *what laws to waive*. And although the statute preserves the requirement that the Secretary's waiver authority be exercised only when "necessary," the Act's preclusion of judicial review to enforce this standard renders meaningless what might otherwise be an "intelligible principle." The Act thus permits the Secretary to eliminate the constraints imposed by any federal law, on the Secretary's mere assertion that such abrogation is "necessary" to assure rapid construction of the fence.

In addition, the Secretary's interpretation of the Act as authorizing administrative preemption of state and local laws lacks support in the text of the statute. If allowed to stand, the Secretary's order would constitute an unprecedented expansion of agency authority to preempt state and local law without clear congressional authority – and without any oversight by any court. This Court's intervention is essential to protect state and local legislative authority from unreviewable federal administrative preemption.

I. The Court Should Grant Certiorari To Resolve The Important Question, Which Has Divided The Lower Courts, Whether Broad Delegations Of Discretionary Authority That Impinge On Private Rights Must Be Subject To Judicial Review.

Although this Court has repeatedly pointed to the availability of judicial review in rejecting consti-

tutional challenges to congressional delegations of authority, the lower courts are divided as to whether judicial review is essential to the constitutionality of broad delegations of legislative power to agencies. This Court should grant review to resolve this important question.[1]

A. This Court's Decisions Recognize That Judicial Review Is Essential To Uphold A Delegation In This Context.

"The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby* v. *United States*, 500 U.S. 160, 164-65 (1991) (quoting U.S. Const., Art. I, § 1) (internal citations omitted).

Notwithstanding this fundamental constitutional limitation, there is little doubt that Congress can delegate power to executive-branch agencies in broad terms. As the Court noted in *American Power & Light Co.* v. *SEC*, "judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems." 329 U.S. 90, 105 (1946). The settled understanding that has emerged is that a delegation of discretionary power to the Executive Branch is permissible so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body author-

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[1] As discussed below (at 31-32), the issue is presented more clearly in this case, and with much greater practical consequences, than it was in *Defenders of Wildlife* v. *Chertoff*, 128 S.Ct. 2962 (June 23, 2008).

ized 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, 409 (1928)).

Yet where the exercise of broad delegated power threatens private rights, the availability of judicial review provides a crucial safeguard against the possible abuse by the executive of a broad delegation of power. Starting with its decision in *Yakus* v. *United States*, 321 U.S. 414 (1944), this Court has repeatedly underscored the importance of judicial review in sustaining the constitutionality of broad legislative delegations. The very purpose of requiring that Congress lay down an "intelligible principle," the Court explained, is to be able "in a proper proceeding to ascertain whether the will of Congress had been obeyed." *Id.* at 426.

The Court elaborated on this understanding in *American Power & Light Co.*: It is "constitutionally sufficient," the Court explained, "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.*" 329 U.S. at 105 (emphasis added).

The Court has reaffirmed this commitment to the importance of judicial review in permitting broad delegations in a number of recent cases. See, *e.g.*, *Mistretta,* 488 U.S. at 379 (reiterating that a permissible intelligible principle may be tested "in a proper proceeding" (quoting *Yakus*, 321 U.S. at 425-426)); *Skinner* v. *Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989) (allowing delegation pursuant to principles articulated "such that a court could 'ascertain whether

the will of Congress has been obeyed'" (quoting *Mistretta*, 488 U.S. at 379)).

The question whether a broad delegation affecting private rights is constitutional in the absence of judicial review was squarely presented in *Touby* v. *United States*, 500 U.S. 160 (1991). At issue was an amendment to the Controlled Substances Act that permitted the Attorney General temporarily to schedule new "designer drugs" as controlled substances on an expedited basis. The Act expressly provided that a decision temporarily to schedule such a drug was "not subject to judicial review." *Id.* at 168. The petitioner argued that this feature of the statute rendered the delegation unconstitutional.

This Court did not dispute that judicial review is required; it concluded that judicial review was in fact available under the Act. Although a pre-enforcement challenge to a temporary scheduling of a new drug was foreclosed, an individual facing criminal charges based on a violation involving a temporarily scheduled drug was free to bring a challenge to the Attorney General's order by way of a defense to prosecution. 500 U.S. at 168. This post-enforcement review, the Court found, was "sufficient to permit a court to ascertain whether the will of Congress has been obeyed." *Id.* at 168-169 (citation omitted). Two concurring Justices would have made it explicit that "[w]e must * * * read the Controlled Substances Act as preserving judicial review of a temporary scheduling order in the course of a criminal prosecution in order to save the Act's delegation of lawmaking power from unconstitutionality." *Id.* at 170 (Marshall, J., joined by Blackmun, J.).

B. The Lower Courts Have Reached Conflicting Conclusions Regarding The Necessity Of Judicial Review.

Both before and after *Touby*, lower federal courts have reached conflicting conclusions regarding whether judicial review is a necessary condition for sustaining a broad delegation of discretionary authority that impinges on private rights. This Court should grant review to resolve the persistent conflict among the lower federal courts on this important and far-reaching question.

The district court's decision here, along with each of the other district court decisions considering the constitutionality of the waiver authority delegated by Section 102(c), is consistent with a decision of the Ninth Circuit, *United States* v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992). *Bozarov* involved a non-delegation challenge to the Export Administration Act. Rejecting the appellee's contention that the absence of judicial review rendered that Act unconstitutional, the court determined that "the purpose of an intelligible principle is simply to channel the discretion of the executive and to permit *Congress* to determine whether its will is being obeyed." *Id.* at 1041 (emphasis added).

The Ninth Circuit is not the only Court of Appeals to confront this question, but it is the only one to conclude, as the court below did, that judicial review is dispensable in the intelligible principle analysis. Hence the decision below is at odds with decisions of the Eighth and Tenth Circuits, and a prominent three-judge court decision from the District of Columbia, all of which appreciated that a permissible intelligible principle for the exercise of delegated power must be susceptible of analysis by a

court. See *South Dakota* v. *Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996); *United States* v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), *vacated*, 502 U.S. 801 (1991); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737, (D.D.C. 1971).

In *Amalgamated Meat Cutters* v. *Connally*, a three-judge district court panel upheld the Economic Stabilization Act of 1970 against a non-delegation challenge. Central to the decision was the court's conclusion that decisions taken under the Act were subject to judicial review under sections 701-706 of the APA. 337 F. Supp. at 760. Speaking for the court, Judge Leventhal explained that "[t]he safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers." *Id.* at 759.

In *South Dakota* v. *Department of Interior*, the Eighth Circuit struck down as unconstitutional a section of the Indian Reorganization Act authorizing the Secretary of the Interior to acquire land in trust for Indians because the statute's preclusion of judicial review failed to "ensure[] that courts charged with reviewing the exercise of delegated discretion will be able to test that exercise against ascertainable standards." 69 F.3d at 885. The court determined that judicial review was an essential criterion of the non-delegation doctrine and "derivative" of the requirement that Congress provide an intelligible principle. *Ibid.*

Following the Eighth Circuit's decision, the Secretary of the Interior promulgated a new regulation that provided for judicial review. The Solicitor General sought certiorari and urged this Court to vacate the Eighth Circuit's decision and remand for recon-

sideration in light of the new regulation, which this Court did. *Dep't of Interior* v. *South Dakota*, 519 U.S. 919 (1996). Far from undermining the force of the Eighth Circuit's decision, the procedural history of *South Dakota* reveals that the Interior Department and the Solicitor General regarded it as, at the very least, a serious question whether a broad delegation without judicial review would be upheld as constitutional.

The Tenth Circuit, in *United States* v. *Widdowson*, likewise struck down a legislative delegation because it failed to provide for judicial review. 916 F.2d at 59. *Widdowson* presented the same question this Court confronted in *Touby*, and the Tenth Circuit concluded that the preclusion of judicial review of temporarily scheduled designer drugs rendered the statute unconstitutional. *Ibid.* This Court vacated the opinion and remanded the case in light of *Touby*, which found that the act at issue *did* provide adequate judicial review of the Attorney General's temporary scheduling orders. *United States* v. *Widdowson*, 502 U.S. 801, 801 (1991); see *Touby*, 500 U.S. at 168-170. Again, the Court's action did not undermine the reasoning of the Tenth Circuit, but indicated only that the serious constitutional question should have been avoided.

In this case, the question cannot be avoided. Congress has provided that the district court shall have "exclusive jurisdiction to hear all causes or claims arising from any action undertaken" pursuant to the waiver authority, and that the only claims that may be brought are those "alleging a violation of the Constitution of the United States." Section 102(c)(2). Thus, claims challenging the statutory or factual basis of waiver decisions, or seeking clarification of the many uncertainties raised by the cryptic

language of the waiver orders, are expressly precluded. In addition, the Secretary has waived the APA. The only way petitioners can obtain judicial review is by securing a ruling from this Court that the preclusion of review in Section 102(c)(2) is unconstitutional.

C. The Preclusion Of Judicial Review Makes The Secretary The Sole Arbiter Of All Issues Relating To The Scope Of His Waiver Authority, Effectively Nullifying Any Limitations Imposed By Congress.

Judicial review, as this court explained in *American Power*, is of vital importance to ensure that executive branch officials adhere to the boundaries of their delegated authority. 329 U.S. at 105-106. The orders at issue in this case illustrate the importance of this protection. The Secretary did not merely waive more than three dozen federal statutes – he also purported to interpret the statutory language, defining "construction" to include, among other things, "*upkeep* of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communication, and detection equipment of all types, radar and radio towers, and lighting." App., *infra*, 4a, 15a (emphasis added). This interpretation is seemingly at odds with the statute's plain command that the Secretary exercise his waiver authority only where "necessary to ensure expeditious *construction*" – not "upkeep" – of the border fence. Section 102(c)(1) (emphasis added). Given Section 102(c)'s preclusion of judicial review for all but constitutional questions, however, there is no way aggrieved parties can challenge the Secretary's expansive interpretation of his own power. The combina-

tion of a broad delegation and the preclusion of review permits the Secretary to extend the waivers' duration indefinitely.

The uncertainty surrounding the duration of the waivers is not the only ambiguity in the Secretary's orders. It is also unclear whether the Secretary was exempting only himself from compliance with various federal, state, and local laws, or whether he was declaring all persons and governmental entities exempt from these legal requirements. Disputes may well arise in the future about this issue. Likewise, it is unclear how wide a swathe of land is covered by the orders. Under the terms of the statute, the only legal authority capable of resolving these and other possibly unforeseeable disputes is the Secretary himself. No state or local government body or private citizen will have any recourse to any court if the Secretary fails to resolve the dispute, or does so in a way the aggrieved party regards as unlawful.

In addition, as we discuss more fully in Section II, *infra*, in each of the two orders at issue here the Secretary also accorded his actions preemptive force. This Court has never permitted an executive agency, pursuant to a vague and general delegation of regulatory power, to preempt state law on its own authority. Yet the preclusion of review strips aggrieved parties of any means of challenging future "interpretations" by the Secretary of the scope of his declaration of preemption. The statute in effect allows the Secretary to determine the scope of his powers *vis-à-vis* those of state and local governments, without any judicial check.

The potential impairment of private rights by the Secretary's orders is further compounded by Section 102(c)'s inordinately short statute of limitations.

While the statute purports to permit the district courts to hear "claim[s] * * * alleging a violation of the Constitution," such actions must be filed within sixty days of the date of the Secretary's *waiver* order – not sixty days from the infliction of any harm (even of constitutional stature) caused thereby. Section 102(c)(2)(A). And, as discussed below, Section II, *infra*, the district court's decision means the Secretary need not provide *any* notice of his abrogation of state and local law. Absent judicial review, the Secretary's ambiguous preemption of unenumerated state and local laws "of, deriving from, or related to the subject of" the federal statutes he has waived confers upon him the otherwise judicial function of determining whether and when state laws have been displaced by his actions once the sixty day clock has run. App., *infra*, 4a, 15a.

Recognizing a right to judicial review where broad legislative delegations impinge on private rights would not mean that all executive action would be subject to judicial review. Petitioners acknowledged in the court below that judicial review of agency action may be unavailable in circumstances when the "delegated authority falls squarely within the independent authority of the Executive and thus does not require an 'intelligible principle.'" App., *infra*, 28a-29a. Delegations directly to the President, the exercise of prosecutorial discretion, allocations of lump-sum appropriations, and agency determinations that affect only public, as opposed to private, rights comprise narrow but well-recognized exceptions to the general presumption of reviewability.

The Secretary's waiver authority falls well outside any of these areas. Section 102(c) delegates waiver authority directly to the Secretary, not to the President. The decision to abrogate federal, state,

and local law is scarcely analogous to core executive functions like prosecutorial discretion or budgeting. And in this case, the Secretary's actions may affect private, as well as public, rights. The record developed below indicates that the orders, for example, may interfere with valuable water rights currently held by municipal water authorities and the rights of the many private individuals and firms that purchase water from these authorities. They may also jeopardize access of American Indian tribes to their traditional burial grounds.

Congress's delegation of unprecedented and practically unlimited power to nullify federal and state law, combined with the elimination of meaningful judicial review of the Secretary's actions, leaves the separation of powers in tatters. This Court's review is plainly warranted to end the dispute among the federal courts over whether broad delegations of discretionary authority affecting private rights must be cabined by judicial review, and to clarify that Section 102(c)'s preclusion of judicial review to ensure compliance with the statute's standard renders Section 102(c) an unconstitutional delegation of legislative power.

II. The Court Should Grant Review To Resolve The Important Question Whether A Clear And Unequivocal Grant Of Authority Is Required To Permit An Executive Branch Agency To Preempt State Law On Its Own Authority.

The Court's intervention is also warranted because of the grievous blow the district court's decision deals to fundamental principles of constitutional federalism. "[N]umerous constitutional provisions, * * * not only those, like the Tenth Amend-

ment, that speak to the point explicitly" establish a system of "dual sovereignty," *Printz* v. *United States*, 521 U.S. 898, 923 n.13 (1997) (citation omitted), under which the states "retain 'a residuary and inviolable sovereignty.'" *Alden* v. *Maine*, 527 U.S. 706, 714-715 (1999) (quoting The Federalist No. 39 (James Madison)). This Court has repeatedly made clear that state sovereignty is "not to be superseded * * * unless that was the clear and manifest purpose of Congress." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Yet there is nothing clear or manifest in Section 102(c) to suggest that Congress has delegated power to the Secretary to preempt state or local laws. In fact, Section 102(c) is silent about preemption. As this Court has made clear, where preemption is concerned, "mere silence * * * cannot suffice to establish the 'clear and manifest purpose' to preempt local authority." *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607 (1991) (citing *Rice*, 331 U.S. at 230).

Under the Supremacy Clause, federal officials have no inherent authority to declare state laws preempted. The Supremacy Clause identifies three sources of federal law as "the supreme law of the land" and hence as potential sources of preemption of state law: the Constitution, treaties, and the laws of the United States which shall be made "in Pursuance" of the Constitution. U.S. Const. Art. VI, cl. 2. Federal agencies obviously have no authority to amend the Constitution, enter into treaties, or adopt supreme "laws" on their own initiative. Consistent with the Supremacy Clause, only agency action based on a delegation of authority from Congress and having the force of law can qualify as a source of preemption. Agency authority to preempt, in other

words, requires a clear and unequivocal delegation of preemptive authority from Congress.

This Court has recognized as much. In *Louisiana Public Service Commission* v. *FCC*, the Court rejected the FCC's contention that it could preempt state regulation to "effectuate a federal policy" absent Congressional authorization. 476 U.S. 355, 374 (1986). The Court, extensively reviewing its preemption case law, was "both unwilling and unable" to "grant to the agency the power to override Congress" by permitting the agency to "confer power on itself." *Id.* at 374-75.

The district court in this case offered for upholding the Secretary's assertion of power to preempt state and local laws. Neither satisfies the constitutional standard.

1. The first justification advanced by the district court was that Section 102(c) is itself an express preemption clause, that is, an express delegation of authority to the Secretary to preempt. This claim is untenable. Section 102(c) authorizes the Secretary to "waive" laws that might, in his judgment, impede the expeditious construction of the border fence. Federal officials are occasionally given authority to waive federal laws that they are charged with administering. See, *e.g.*, 5 U.S.C. § 609(e) (empowering Chief Counsel for Advocacy to waive certain federal rulemaking review requirements of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1168 (1980), upon his written finding); 5 U.S.C. § 8137 (allowing Secretary of Labor to waive provisions of federal law governing payment to non-citizens and nonresidents for work-related injuries); 7 U.S.C. § 1308-3a(2)(A)(ii) (granting Secretary of Agriculture power to preserve environmentally sensitive land through

case-by-case waivers of income requirements otherwise applicable to federal farm assistance). But federal officials have no authority to "*waive*" state laws. State laws can be *preempted* only when they conflict with or frustrate federal laws, or when Congress clearly intends that state laws be displaced.

When Congress delegates authority to an agency to preempt, it uses precise terms like "preempt" or "supersede" or otherwise makes its intent to confer preemptive authority clear.[2] Petitioners are aware of no instance in which a court has construed an authority to "waive" laws to mean or imply an authority to "preempt."

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[2] See, *e.g.*, 49 U.S.C. § 31141(a) ("Preemption after decision. A State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced."); 30 U.S.C. § 1254(g) (preempting any statute that conflicts with "the purposes and the requirements of this chapter" and permitting the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); 21 U.S.C. § 360k(a) & (b) (establishing that "no State or political subdivision of a State may establish or continue in effect" any requirement with respect to a medical device, unless the Secretary, "by regulation promulgated after notice and opportunity for an oral hearing, exempt[s] * * * a requirement of such State or political subdivision"). Congress uses similar language in express preemption clauses more generally. See, *e.g.*, 29 U.S.C. § 1144 ("[T]his chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title * * *."); 46 U.S.C. § 31307 ("This chapter supersedes any State statute conferring a lien on a vessel * * *."); 8 U.S.C. § 1324a ("(2) Preemption. The provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

Although the district court found that Section 102(c) "is not ambiguous" in expressing Congress's intent to preempt, App., *infra*, 39a, the court rested this conclusion not on an analysis of the language Congress used, but rather on what it characterized as the Secretary's "clarifi[cation] that 'all legal requirements' includes 'state or other laws.'" App., *infra*, 39a-40a. In other words, it was the Secretary's interpretation of his own authority, not the language of the statute, that supplied the basis for the court's conclusion that "Section 102 clearly manifests congressional intent to nullify [state and] other laws." App., *infra*, 40a.

The district court's deference to the Secretary's interpretation of his own authority was manifestly inappropriate. Such deference undercuts the very purpose of the "clear and manifest" requirement of *Rath Packing*, 430 U.S. at 525. A clear and manifest statement of preemptive intent *by Congress* is required precisely to protect against agency overreaching that threatens the dual system of government that "ensures our liberties, representation, diversity, and effective governance." Kenneth Starr et al., *The Law of Preemption: A Report of the Appellate Judges Conference, American Bar Association* 40 (1991).

This Court has never permitted an agency such wide interpretive latitude where preemption is at issue. In *Watters* v. *Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), the Court was presented with a request that it defer to the judgment of the Office of the Comptroller of the Currency that certain state banking visitorial regulations were preempted. A majority of the Court resolved the case without addressing whether deference to the agency on preemption was appropriate. *Id.* at 1572-1573. Three dissenting Justices stated that whether deference was owed to the

agency was the "most pressing" question presented by the case. *Id.* at 1582 (Stevens, J. dissenting, joined by Roberts, C.J. and Scalia, J.). The dissenters cautioned that "congressional silence should [not] be read as a conferral of preemptive authority," and concluded that sanctioning a practice of deferring to agencies about the scope of their power to preempt would "easily disrupt the federal-state balance." *Id.* at 1584.

This case presents, in its most elemental form, the question left unresolved in *Watters*: Is an agency entitled to deference for its determination that state law is preempted absent a clear and unequivocal delegation of authority from Congress authorizing it to preempt? That question is an urgent one, which has been presented in the lower courts with increasing frequency, and which this Court has not resolved, but should. See, *e.g.*, *State Farm Bank* v. *Reardon*, 539 F.3d 336, 340-341 (6th Cir. 2008) (considering but avoiding question of deference due to Office of Thrift Supervision opinion letter regarding preemption of Ohio banking law); *Fellner* v. *Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 250-251 (3d. Cir. 2008) (refusing to defer to FDA letter finding preemption); *Green Mtn. RR Corp.* v. *Vermont*, 404 F.3d 638, 642 n.2 (2d Cir. 2005) (declining to reach issue of whether deference due to agency preemption determination); *Ass'n of Int'l Auto. Mfgrs.* v. *Comm'r*, 208 F.d 1, 5-6 (1st Cir. 2000) (denying deference to agency's view on statute's preemptive scope); *Massachusetts* v. *U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (avoiding question "whether an agency's interpretation of a statute on the preemption question is subject to Chevron analysis"); *Colo. Pub. Utils. Comm.* v. *Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (denying deference to agency's pre-

emption views because "a preemption determination involves matters of law-an area more within the expertise of the courts than within the expertise of the Secretary of Transportation").

2. The district court's second rationale for upholding the Secretary's authority was nothing more than an application of the principle that state laws that conflict with federal law are necessarily preempted. The court reasoned that "even if the Waiver Legislation does not contain explicit preemptive language," state law is still "conflict preempt[ed]" by the Secretary's waivers. App., *infra*, 40a.

It is of course true that agency action can preempt state law without an express grant of preemptive authority where a *court* determines that "compliance with both federal and state regulations is a physical impossibility" *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when a *court* finds that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See, *e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000) (holding that Department of Transportation safety standards preempted conflicting state tort law); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982) (holding that Federal Home Loan Bank Board's regulation preempted conflicting state law).

Principles of conflict preemption, however, cannot sustain the Secretary's preemption orders. The Secretary declared preempted all state and local laws "of, deriving from, or related to the subject of" each of thirty-seven federal statutes that he had waived. This goes far beyond any concept of conflict preemp-

tion. As this Court has instructed, "[t]o prevail on the claim that the regulations have pre-emptive effect, [the Secretary] must establish more than that they 'touch upon' or *'relate to' that subject matter.*" *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (emphasis added) (citing *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-384 (1992)). The Secretary's orders purporting to preempt all state laws "related to" thirty-seven waived federal laws goes far beyond conflict preemption and arrogates to the Secretary a broad power of field preemption never authorized by Congress.

There is a more fundamental flaw with the district court's conflict preemption argument. Even if the district court were correct that the conflict preemption framework is applicable here, "[t]he question remains whether the [Secretary] acted within [his] statutory authority in issuing the pre-emptive [] regulation," *de la Cuesta*, 458 U.S. at 159, as well as whether or not there actually is a conflict. *Id.* at 159 n.14. The Secretary nowhere enumerates which state and local laws are displaced; nor does he explain why all laws "of, deriving from, or related to the subject of" his mandate under the REAL ID Act is synonymous with the set of laws actually *conflicting* with execution of that mandate. Hence it is possible, as the district court speculated, that only those state and local laws that "would directly conflict with Congress's objective of expeditiously constructing a border fence" are preempted by the Secretary's orders. App., *infra*, 40a.

Due to the lack of judicial review, however, only the Secretary is now able to make that limiting construction of his orders. In effect, the district court held that Congress may confide in an agency the authority to determine when state law conflicts with

a federal program *and* to declare any such laws preempted; to do so on an ad hoc, after-the-fact basis; and to make such determinations without any possibility of judicial review.

The district court's decision, coupled with Section 102(c)'s sixty-day statute of limitations, makes the Secretary the sole arbiter of preemption decisions. The statute's preclusion of judicial review, once this narrow window has closed, guarantees that any dispute over which laws fall within the vague bounds of the Secretary's declaration of preemption will be resolved by agency fiat. This Court should grant review to confirm that these questions are inherently judicial, and that no agency is entitled, in the absence of a clear and unequivocal delegation from Congress, to interpret an ambiguous grant of authority to confer upon itself a limitless and unreviewable power to preempt state and local law.

III. The Questions Presented Are Important.

As explained above, the lower courts are in need of guidance with respect to both of the questions presented. Review is warranted for three additional reasons.

First, the legislative process will be more effective and efficient if Congress is able to ascertain in advance the constitutional requirements applicable to delegations of authority to executive agencies. This case gives the Court an opportunity to address two issues that arise frequently: the extent to which Congress must provide for judicial review when it delegates authority to affect private rights, and the specificity with which Congress must act when it wishes to delegate authority to preempt state law.

Second, Congress's elimination of any appeal makes a grant of certiorari all the more pressing.

The elimination of an appeal as of right – either to the courts of appeals or to this Court – sharply distinguishes this statute from the norm in our federal system. Generally, when Congress bypasses the courts of appeals, it provides for a direct appeal to this Court.[3] Here, however, it provided only for discretionary review on certiorari. That approach is virtually unprecedented.[4] Congress's decision to eliminate any appeal of right renders discretionary review by this Court the only means of obtaining a definitive resolution of the serious constitutional questions this case raises.

Indeed, because of the statute's sixty-day statute of limitations, this case presents the last chance for *any* court to ensure that the Secretary's waiver authority conforms to the Constitution. Absent review by this Court, petitioners will be left to the mercy of the Secretary's interpretation of the scope of his delegated authority. He will be the sole arbiter of

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[3] See, *e.g.*, Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. §§ 901 & 922(b) & (c) (granting that decisions of the district court "shall be reviewable by appeal directly to the Supreme Court of the United States" and creating a "duty" for the district court and the Supreme Court "to advance on the docket and to expedite to the greatest possible extent the disposition" of any case challenging the constitutionality of the Act); Line Item Veto Act of 1996, Pub. L. No 104-130, 110 Stat. 1200 (formerly codified at 2 U.S.C. § 692), invalidated by *Clinton* v. *New York*, 524 U.S. 417 (1998); Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § § 437h note (providing for direct appeal to Supreme Court for constitutional challenges).

[4] The only other example we have located is the Trans-Alaskan Pipeline Authorization Act. See 43 U.S.C. § 1652. But the TAPAA – unlike Section 102(c) – permitted the district court to adjudicate claims that the agency had exceeded its own statutory authority.

whether the waived laws are partially or totally inoperative, whether the hundreds of state and local laws implicated by his ambiguous waiver have been preempted, to what extent, and how long the waivers shall remain in effect. That power is inconsistent with the Nation's traditions, and with our Constitution.

Third, the constitutional questions about the need for judicial review and the scope of the Secretary's power of preemption are important and are fully and fairly presented by the record and decision in this case.

This Court declined to hear an earlier case that arose from a different waiver issued by the Secretary along a different part of the border: *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S.Ct. 2962 (June 23, 2008). In that case, however, the district court's decision did not squarely address the argument that the statute's preclusion of judicial review rendered the delegation unconstitutional, and the Solicitor General asserted that the petitioners had failed to advance in the district court the contention regarding the necessity of judicial review. Br. in Opp. at 14-15, *Defenders of Wildlife* v. *Chertoff*, No. 07-1180 (May 23, 2008). Here, the argument plainly was raised in and addressed by the district court.

The earlier case also did not present a separate question regarding the Secretary's assertion of authority to preempt state and local laws. As the Solicitor General observed, that case "which arose exclusively under three federal statutes" was "an inappropriate vehicle for evaluating the effects of the Secretary's waiver on state and local laws." No. 07-1180 Br. in Opp. at 11 n.5. Here, by contrast, the

preemption issue is squarely presented and was addressed by the district court.

Moreover, the waiver in the earlier case concerned a fourteen-mile stretch of the fence around and in the San Pedro Riparian National Conservation Area (SPRNCA). Construction of that portion of the fence had been completed at the time of the *Defenders* petition. Although the Solicitor General agreed that this did not render the case moot, this fact obviously diminished the practical significance of the question presented. See No. 07-1180, Br. in Opp. at 8 n.3, *Defenders of Wildlife* v. *Chertoff*, No. 07-1180 (May 23, 2008). In contrast, the action below arose from the Secretary's waiver of federal, state, and local laws in an area 470 miles in length, passing through four states. Construction along this segment of the border fence is ongoing. See U.S. Customs and Border Protection, *CBP Offers Landowners Additional Consultation on Border Fence,* http://www.cbp.gov/xp/cgov/newsroom/news_releases/nov_2008/11192008.xml (explaining that construction of the fence is "underway" and is an "ongoing" process).

Finally, we recognize that Congress has directed the Department of Homeland Security to construct a substantial barrier along significant portions of the United States' international border, and has indicated that it regards the expeditious construction of the border fence to be of the highest priority. This legislative judgment is entitled to respect. Unfortunately, in its effort to insure rapid construction of a border fence, Congress delegated to an Executive official unreviewable power to waive "*all* legal requirements," and this power has been exercised by the Secretary in a way that runs roughshod over

fundamental principles of separation of powers and federalism. Section 102(c)(1) (emphasis added).

Petitioners believe, however, that the constitutional infirmities identified in this petition can be rectified without a judgment enjoining further construction of the fence, and without this Court setting aside the waiver authority delegated to the Secretary in Section 102(c). The unconstitutional dimensions of the statute and the orders under review can be set aside and severed from the balance of the statute, leaving the basic mandate from Congress to achieve expeditious construction of the border fence, and the broad authority of the Secretary to waive federal legal requirements that are truly necessary to achieve that objective, unaltered.

The constitutional infirmities challenged by this Petition are two: (1) the statute's preclusion of judicial review to ensure that the Secretary's waiver decisions comply with applicable legal requirements, and (2) the Secretary's declaration that all state and local laws "derived from or related to" thirty-seven federal statutes are preempted. The first infirmity can be cured by enjoining the second sentence of Section 102(c)(1), and by interpreting the phrase "legal requirements" and the sixty-day statute of limitations to provide for judicial review of the Secretary's actions. The second infirmity can be cured by holding that Section 102(c) does not contain the clear and unequivocal delegation of authority which is required to confer authority on an executive agency to preempt state and local law. Once these errors are corrected, the balance of the statutory scheme, and the Secretary's orders implementing it, can function effectively and constitutionally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
ELIZABETH G. OYER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

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