UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

COUNTY OF EL PASO, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. EP 08-CA-0196-FM
	)	
MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security, *et al.*,	)	
	)	
Defendants.	)	

APPLICATION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs County of El Paso *et al.*, respectfully request that the Court enter a preliminary injunction barring the Secretary and Department of Homeland Security (DHS) from proceeding with construction of any fencing, walls, or other physical barriers or related infrastructure in the Project Areas identified in the Secretary's April 3, 2008 waivers, codified at 73 Fed. Reg. 19077 & 19078 (Apr. 8, 2008), unless and until they comply with all laws purportedly waived.

Plaintiffs have filed a Complaint for declaratory and injunctive relief challenging the authority of the Secretary of Homeland Security to waive otherwise-applicable laws in order to expedite construction of such barriers in the vicinity of the southwest border of the United States. Specifically, Plaintiffs have challenged two waivers of federal, state, and local laws issued by the Secretary on April 3, 2008 to facilitate construction of nearly 500 miles of fencing in four states. The April 3 waivers set aside more than three dozen federal statutes, as well as all related state and other laws, pertaining to a diverse array of subjects, including clean air, safe drinking water,

noise control, waste disposal, historic preservation, religious freedom, rights of Native American tribes, and protection of endangered species, wildlife refuges, farmland, and coastal zones, among other things. *See* 73 Fed. Reg. 19077 (Apr. 8, 2008) (Hidalgo County waiver); 73 Fed. Reg. 19078 (Apr. 8, 2008) (multistate waiver). Plaintiffs contend that these waivers and the statute purportedly authorizing them, Section 102(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, 8 U.S.C. § 1103 note, as amended by the REAL ID Act of 2005, Pub. L. No. 109-367, 120 Stat. 263, represent an unconstitutional exercise of legislative power by the Secretary of Homeland Security, contravene basic constitutional lawmaking procedures, and violate fundamental constitutional principles of separation of powers and federalism.

A preliminary injunction is necessary to prevent irreparable harm to the Plaintiffs and the public that will result if DHS is permitted to proceed with construction unconstrained by this vast body of law. Among other things, the commencement of construction without complying with these laws will impair the ability of the El Paso County Water Improvement District No. 1 to deliver water throughout the City and County of El Paso, limit the ability of the City and County of El Paso to enforce their duly enacted laws, destroy a sacred site used by the Tigua Indians of Ysleta del Sur Pueblo for 300 years to practice their traditional religion, and irrevocably damage the natural environment in the Rio Grande Valley from El Paso to Brownsville. Accordingly, Plaintiffs respectfully request that the Court grant their Application for Preliminary Injunction.

STANDARD FOR GRANTING A PRELIMINARY INJUNCTION

The decision to grant a preliminary injunctions lies "within the sound discretion of the trial court." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984)). Indeed, consideration of an application

for preliminary injunction is not "not a trial on the merits." *Free Market Found. v. Reisman*, 540 F. Supp. 2d 751, 756 (W.D. Tex. 2008). Four factors must be considered in deciding whether to grant a preliminary injunction: (1) whether there is "a substantial likelihood" that plaintiffs will prevail on the merits, (2) whether there exists "a substantial threat" that plaintiffs will suffer "irreparable injury if the injunction is not granted," (3) whether the injury to the plaintiffs outweighs any threatened harm to the government, and (4) whether the preliminary injunction will disserve the public interest. *Harris County v. CarMax Auto Superstores, Inc.*, 177 F.3d 306, 312-13 (5th Cir. 1999); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1051, 1056 (5th Cir. 1997). Irreparable injury is injury that cannot be prevented or fully rectified by a final judgment following a trial. *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 386 (7th Cir. 1984). Otherwise put, it is harm that cannot be undone by an award of monetary damages. *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981).

Preliminary injunctions have routinely and recently been granted by this Court to preclude irreparable harm that would otherwise result from potentially unconstitutional conduct by government officials. *See, e.g., Free Market Found.*, 540 F. Supp. 2d at 759 (enjoining Texas campaign finance laws); *Int'l Women's Day March Planning Comm.*, No. 07-971, 2008 WL 501286 (W.D. Tex. Feb. 21, 2008) (enjoining operation of city ordinance imposing burdens on marches and parades); *Villejo v. City of San Antonio*, 485 F. Supp. 2d 777, 785-86 (W.D. Tex. 2007) (enjoining city directive prohibiting city employees from participating in certain elections); *Rios v. Bexar Metro. Water Dist.*, No. 96-335, 2006 WL 2711819 (W.D. Tex. Sept., 21, 2006) (enjoining election). Pursuant to the Fifth Circuit's standards, preliminary injunctions are regularly affirmed. *See, e.g., Concerned Women for Am.*, 883 F.2d 32, 35 (5th Cir. 1989)

(affirming grant of preliminary injunction); *Valley*, 118 F.3d at 1056 (same); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188-89 (5th Cir. 1979) (same).

ARGUMENT

I. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CONSTITUTIONAL CHALLENGE.

Section 102(c) of IIRIRA delegates unprecedented 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 U.S.-Mexico border. IIRIRA § 102(c)(1), 8 U.S.C. § 1103 note.[1] IIRIRA's waiver provision is unprecedented both in its scope—authorizing a waiver of "all legal requirements"—and in the degree of discretion conferred upon the Secretary. The Secretary has "sole discretion" not only to determine when a waiver is appropriate, but also to choose from a limitless universe of possibilities which laws should be waived. Capping off the extraordinary features of this statutory scheme, the Secretary's exercise of discretion is immune from judicial review. Challenges to the Secretary's actions under Section 102(c) "may only be brought alleging a violation of the Constitution of the United States." *Id.* § 102(c)(2)(A).

The scope of the waiver authority conferred upon the Secretary is without parallel in federal law. *See* Congressional Research Service, Memorandum on Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2-4 (Feb. 9, 2005) (finding no statutory waiver provision comparable in scope to Section 102(c), and observing that waiver provisions generally (1) permit waiver only of the statutory requirements contained within the

[1] Section 102 is reproduced in full in the Statutory Addendum at the end of this Motion.

statute authorizing the waiver, (2) specifically enumerate the laws to be waived, or (3) allow waiver only of a grouping of similar laws).[2]

However, Section 102(c) is remarkable not only for the breadth of discretion it vests in the Executive, but also for the degree to which it represents an abrogation of Congress's constitutionally conferred lawmaking power. Congress has done little more than set a policy goal—constructing a border fence on an expedited basis—leaving the Executive to figure out how to make it happen. This abdication of legislative authority is not calculated to draw upon any special expertise of the Secretary of Homeland Security. Quite the contrary, it gives him broad responsibility for wading through a vast body of law, far beyond the statutes he is charged with administering, to identify those whose waiver could expedite completion of the fence.

No hypothetical examples are needed to illustrate the sweeping potential of Section 102(c). Here, the Secretary has used it to waive "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" thirty-seven federal statutes. In one fell swoop, a single, unelected federal official has eviscerated over three dozen congressional enactments dating back more than a century and has paralyzed state and local governments left to guess what the waiver means for their laws. This is a constitutionally unacceptable price to pay for a faster fence:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to the partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best

[2] A comparison of the current Section 102(c) to the prior version highlights the breadth of the delegated waiver authority. Before it was amended in 2005, Section 102(c) of IIRIRA authorized the Attorney General to waive provisions of just two federal laws—the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969. While the former version merely permitted the Executive branch to assess whether the two statutes identified by Congress as subject to waiver presented an actual obstacle to constructing the fence, the current Section 102(c) permits the Secretary to identify in the first place which provisions of law ought to be waived.

> intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

Printz v. United States, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 187 (1992)). It is to precisely this temptation that Congress succumbed in enacting Section 102(c).

A. Section 102(c)'s Grant Of Unfettered And Unreviewable Waiver Authority Is An Unprecedented And Unconstitutional Delegation Of Legislative Power, In Violation Of Article I, Section 1.

A waiver provision of Section 102(c)'s breadth offends the basic constitutional stricture that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const. Art. I, § 1. While Congress may enlist the assistance of the coordinate branches in executing its legislative prerogative, Article I, section 1 prohibits Congress from delegating its legislative power to another branch. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). Whether a statute delegates legislative powers depends on the critical distinction "between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892). A statute conferring discretionary authority on Executive officials must therefore "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton*, 276 U.S. at 409).

To satisfy the intelligible principle requirement, a statute must "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Here, Congress has articulated a general policy

(construction of a border fence) and an agency actor (the Secretary of Homeland Security), but has utterly failed to prescribe the requisite boundaries of the delegated authority.

1. Section 102(c) Vests The Secretary With Broad Discretionary Authority Without The Requisite Congressional Guidance.

Since the purpose of the intelligible principle standard is to ensure that congressional mandates limit and guide the discretion of Executive officials exercising delegated authority, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. If the scope of power conferred by a statute is narrow, there is little room for Executive officials to deviate from the will of Congress, whether or not Congress sets out guiding principles. In contrast, when Congress delegates broad powers, more detailed guidance is necessary to ensure that discretion is exercised only in ways that effectuate Congress's expressed legislative intent. Where, as here, the delegated authority is exceptionally broad—permitting the Secretary to waive "all legal requirements"—the intelligible principle standard cannot be satisfied by anything short of "substantial guidance" from Congress. *See id.* ("[Congress] must provide substantial guidance [to the Environmental Protection Agency] on setting air standards that affect the entire national economy.").

Here, congressional guidance is nearly nonexistent. The sole prerequisite to the Secretary's waiver of any and all laws is a determination that a waiver is "necessary to ensure expeditious construction" of the fencing contemplated by Congress—a limitation that amounts to little more than a restatement of the purpose of the underlying statute, which is to construct fencing along the border. Moreover, rather than even attempting to offer guiding principles, Section 102(c) unabashedly leaves it to the Secretary's "sole discretion" to determine both *when* a waiver is appropriate and *which* of the limitless universe of possible laws should be waived. Section 102(c) does not express *any* congressional will regarding which laws should be waived

under what circumstances, other than the desire for another branch to make the difficult decisions. Thus, Congress effectively delegates to the Secretary discretion to determine what the law should be. *Cf. A.L.A. Schechter Poultry v. United States*, 295 U.S. 495, 542 (1935) (striking down statute giving President "virtually unfettered" discretion as unconstitutional delegation of lawmaking authority); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 416 (1935) (same).

A handful of courts have upheld previous waivers under Section 102(c) against limited constitutional challenges. These courts reasoned that Congress's burden of supplying guidance is lightened in cases in which the Executive Branch possesses "independent constitutional authority," such as foreign affairs and immigration. *See Save Our Heritage Org. v. Gonzalez*, 533 F. Supp. 2d 58, 63 (D.D.C. 2008) ("the Executive has a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved" (citations and internal quotation marks omitted)); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 129 (D.D.C. 2007); *Sierra Club v. Ashcroft*, Civ. No. 04-272, 2005 U.S. Dist. LEXIS 44244, at *22 (S.D. Cal. Dec. 12, 2005). What these courts failed to consider, however, is that notwithstanding IIRIRA's general focus on immigration policy, the waiver provision of Section 102(c) does not itself implicate this subject matter. While the *policy goal* underlying Section 102(c) is to regulate immigration, the *delegated authority* is to waive laws with purely domestic application, wholly unrelated to immigration or foreign affairs. If the constitutional challenge at issue were to the Secretary's delegated authority to identify areas of "high illegal entry into the United States" pursuant to Section 102(a) of IIRIRA, the analysis might be different. The authority to waive federal, state, and local laws, however, implicates neither the expertise nor the constitutional authority of the Executive branch.

2. The Absence Of Judicial Review Further Defeats Section 102(c).

Section 102(c) is unconstitutional for the further reason that its broad delegation of authority to the Secretary is not constrained by judicial review. Section 102(c) contains a series of stringent limits on judicial review that eliminate the ability of any court to determine whether the Secretary is exercising his authority in a manner consistent with his congressional mandate:

> (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.

IIRIRA § 102(c), 8 U.S.C. § 1103 note (emphasis added).

Thus, Section 102(c) categorically bars all claims challenging the Secretary's compliance with Section 102's substantive requirements[3]—including the requirement that a waiver be "necessary to ensure expeditions construction of the barriers and roads under this section"—along with all litigation in the state courts and all intermediate appellate review in cases raising constitutional challenges. In addition, Section 102(c)'s 60-day limit for filing a complaint precludes any review of constitutional claims that do not become ripe within this short period.

[3] Typically, judicial review of the Secretary's compliance with his statutory mandate would be available under section 704 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 500 *et seq.* The APA permits courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Here, however, APA review is eliminated both by section 102(c)(2)(A) and by the Secretary's purported waiver of the APA.

The elimination of any judicial review of the Secretary's compliance with his statutory mandate is fatal to the delegation. Whenever Congress has delegated broad authority to the Executive branch, the Supreme Court has found the presence of judicial review essential to satisfy the intelligible principle standard. For decades, the Supreme Court has consistently emphasized the vital role of judicial review in statutes delegating broad authority to Executive officials. In *Yakus v. United States*, 321 U.S. 414 (1944), the Court identified as the hallmark of an unconstitutional delegation of legislative power "an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress had been obeyed." *Id.* at 426 (upholding statute on the ground that it provided standards guidance to "enable Congress, the courts and the public to ascertain whether the Administrator . . . has conformed to those standards"). The Court again highlighted the importance of judicial review in *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946):

> Necessity … fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient 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 light of these legislative declarations*.

Id. at 105 (emphasis added) (upholding the Public Utility Holding Company Act of 1935 against a nondelegation challenge because "the legislative policies and standards being clear, judicial review of the remedies adopted by the [SEC] safeguards against statutory or constitutional excesses").

More recent cases, too, consistently observe that an essential purpose of the intelligible principle requirement is "to permit a court to ascertain whether the will of Congress has been obeyed." *Touby v. United States*, 500 U.S. 160, 168-69 (1991) (citation and internal quotation marks omitted); *see also, e.g.*, *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989);

Mistretta v. United States, 488 U.S. 361, 379 (1989). Accordingly, the Court has dispensed with the requirement of judicial review only in the limited category of cases in which delegated authority falls squarely within the independent authority of the Executive Branch and thus does not require an "intelligible principle." *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 601 (1988) (CIA Director's exercise of statutory authority to terminate an employee). Where, on the other hand, the statute grants broad authority to an administrative official requiring judgments outside of her inherent constitutional authority, the Court has strained to find judicial review available. In *Touby*, the petitioner challenged the Controlled Substances Act's delegation of authority to the Attorney General to temporarily schedule a drug as a controlled substance, arguing that the absence of judicial review rendered it unconstitutional. Although the statute expressly stated that temporary scheduling orders were not subject to judicial review, the Court interpreted the Act to allow criminal defendants to raise such challenges as a defense to prosecution, which was "sufficient to permit a court to 'ascertain whether the will of Congress has been obeyed.'" 500 U.S. at 168-69 (quoting *Skinner*, 490 U.S. at 218).[4]

Given Section 102(c)'s unprecedented breadth of delegated authority and lack of judicial review, it is an unconstitutional delegation of legislative authority. The unparalleled scope of the authority granted by Section 102(c) to waive any provision of law, unchecked by judicial review for arbitrary or capricious action, is the starkest example of the dangers that inhere when the powers of all branches of government are accumulated by a single, unelected official. For

[4] The lower courts have placed similar weight on the availability of judicial review in analyzing the constitutionality of statutory delegations. The Fifth Circuit, for example, upheld the Comprehensive Drug Abuse Prevention and Control Act of 1970 against a nondelegation challenge because "the detailed procedures to be followed in determining whether to control a drug and the availability of judicial review" provided "sufficient safeguards against the arbitrary control of drugs" by the Attorney General. *United States v. Gordon*, 580 F.2d 827, 839-40 (1978); *see also, e.g.*, *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994); *United States v. Pastor*, 557 F.2d 930, 941 (2d Cir. 1977); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) ("The safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers.").

without judicial review, what little guidance Section 102(c) provides becomes mere window dressing. Section 102(c)'s "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (Madison) (C. Rossiter ed. 1961).

B. In Legal And Practical Effect, Section 102(c) Authorizes The Secretary To Amend By Partial Repeal Duly Enacted Laws, In Violation Of Article I, Section 7.

Article I of the Constitution mandates that the power to enact, amend, or repeal statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered procedure." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983). Pursuant to this legislative procedure, any federal statute must pass both houses of Congress and "be presented to the President of the United States: If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." U.S. Const. art. I, § 7. The amendment or repeal of statutes "no less than enactment, must conform with Art. I." *Chadha*, 462 U.S. at 954.

The Supreme Court in *Clinton* v. *City of New York*, 524 U.S. 417 (1998), invalidated the Line Item Veto Act as violative of Article I, section 7, because it permitted the President "in both legal and practical effect" the power to "amend … Acts of Congress by repealing a portion of each." *Id.* at 438. The Act authorized the President to cancel items of spending contained within previously enacted laws.[5] The Court reasoned that the laws emerging from the President's exercise of his cancellation power were "truncated versions of two bills that passed both Houses

[5] The Act restrained the President's discretion in much more explicit terms than provided by Section 102(c). He was required to consider the legislative history and purpose of the items, as well as determine that each cancellation would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." *Clinton*, 524 U.S. at 436 (quoting Act). Accordingly, the authority delegated to the President was substantially less legislative in character than that vested in the Secretary under Section 102(c).

of Congress. They [were] not the product of the 'finely wrought' procedure that the Framers designed." *Clinton*, 524 U.S. at 440 (citing *Chadha*, 462 U.S. at 951).

Waivers pursuant Section 102(c) have precisely the same effect of "truncat[ing]" duly enacted laws by Executive fiat rather than "the 'finely wrought' procedure that the Framers designed." *Id.* at 440. The Secretary's April 3 waivers amended more than three dozen congressional enactments "[i]n both legal and practical effect" (*id.* at 438) by rendering them inoperative "in their entirety" in nearly 500 miles of designated Project Areas. *See* 73 Fed. Reg. 19077, 19078. Accordingly, the waivers violate Article I, section 7.[6]

C. The Waivers, To The Extent Applicable To State And Local Laws, Violate The Basic Principles Of Federalism Embodied In The Tenth Amendment

Although Section 102(c) does not explicitly grant the Secretary power to waive state or local laws, his April 3 waivers purport to do so. The waivers are so broad and so vague as to state and local laws that they violate basic principles of federalism by placing the governmental Plaintiffs in the intolerable position of not knowing which state and local laws are currently in effect and which may have been indefinitely nullified. Thus, the Secretary has encroached on the most fundamental aspect of any state's sovereignty: the power to govern by its own duly enacted laws. To the extent that Section 102(c) authorizes the waivers as to state and local laws, it infringes upon the "residuary and inviolable sovereignty" of the states embodied in the Tenth Amendment. *See* The Federalist No. 39, at 245 (Madison) (C. Rossiter ed. 1961). But the Court

[6] In declining to find that Section 102(c) violates Article I, section 7, the court in *Defenders of Wildlife v. Chertoff* erroneously concluded that "[t]he fact that the laws no longer apply to the extent they otherwise would have with respect to construction of border barriers and roads . . . does not, as plaintiffs argue, transform the waiver into an unconstitutional 'partial repeal' of those laws." 527 F. Supp. 2d 119, 124 (D.D.C. 2007). This holding directly contradicts the Supreme Court's admonition in *Clinton* that significant changes to the applicability of a legal provision "do not lose their character simply because the canceled provisions may have some continuing" effect in other respects. 524 U.S. at 441. Like the statutory provisions waived by the Secretary, the canceled provisions in *Clinton* were not nullified in totality; it was sufficient that they were rendered "entirely inoperative *as to appellees*." *Id.* (emphasis added).

need not confront the constitutional issues because Section 102(c) does not authorize the Secretary to waive state and local laws.

1. The Waivers Threaten The Governmental Plaintiffs' Ability To Enforce The Law And Fulfill Their Legal Functions.

The Secretary's purported waivers of state and local laws invade "the natural, inherent right that belongs to the sovereignty of the state of making and enforcing laws." 1 Blackstone, Commentaries 48. The Secretary's April 3 waivers purport to set aside "all … state[] or other laws, regulations and legal requirements … deriving from, or related to the subject of" the multitude of federal statutes explicitly waived. 73 Fed. Reg. 19077, 19078. The vague and sweeping language by which the Secretary attempted to displace the laws of other sovereigns leaves municipalities along the 500-mile path of the planned border wall without any certainty about the state of the law following the waiver.

The body of state and other laws that could be construed as "deriving from or relating to the subject of" the enumerated statutes is vast. In the County of El Paso, for example, the waiver casts doubt upon the continuing validity of numerous state statutes, including the Texas Local Government Code, Antiquities Code, Natural Resources Code, Health and Safety Code, Agriculture Code, Parks and Wildlife Code, Penal Code, and Water Code and Auxiliary Laws, as well as County orders related to health and safety, waste disposal, and the environment, among other things. In the City of El Paso, the waiver calls into question not only state and municipal laws, but also certain City contracts, including contracts with the water district for the delivery of water to the City and its citizens, as well as vital City grant agreements with the State, which require the City to certify that it will comply with federal laws, including several of those waived, as a condition of receiving grant money.

The waiver similarly jeopardizes 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, respectively. The Secretary's ambiguous and open-ended waiver calls into question the continuing validity of sections of the Texas Water Code, as well as certain federal reclamation laws, codified at 43 U.S.C. § 371 *et seq.*, governing the Districts' operations and essential to their very existence. In addition, the Secretary's waiver of "other … legal requirements" calls into question the continuing validity of certain contracts between the Districts and the United States, entered into pursuant to the reclamation laws, authorizing the Districts to divert water from the Rio Grande River. These contracts are at the heart of the Districts' operations and vital to their ability to supply water to local residents. The waiver and the resulting construction will "impair the ability of the District to deliver water to the City of El Paso and to thousands of farmers throughout the County of El Paso who contract with the District for their water supply." Declaration of Jesus Reyes ¶ 7.

The specter of the waiver hangs like the sword of Damocles over the states and municipalities within its scope, paralyzing their essential police powers. *See* 16A Am. Jur. 2d Const. Law § 316 (describing the police power as "the power inherent in the state to prescribe, within the limits of the state and federal constitutions, reasonable regulations necessary to preserve the public order, health, safety, and morals"). In effect, the waivers enable the Secretary to decide at any time that any state or local law is within the scope of his open-ended waivers. Municipalities are left to guess how to prepare for both the possibilities they can anticipate (*e.g.*, loss of their water supply), and those they cannot. No less than a federal directive to enact and enforce regulations, a decree that essentially gives the federal government

ongoing and undefined authority to insert itself into state lawmaking and enforcement processes has the effect of "commandeer[ing] the legislative process of the States." *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). In this respect, the waivers plainly offend "underlying federal premises of the Constitution" that "the Constitution precludes the National Government from devouring the essentials of state sovereignty." *Garcia v. San Antonio Trans. Auth.*, 469 U.S. 528, 547 (1985) (citation and alterations omitted).

Moreover, the statute displaces the political accountability that normally acts as a check on decisionmakers. It is a fundamental feature of federalism that the federal government and the states each be politically accountable to their respective electorates. The Supreme Court therefore held in *New York v. United States*, 505 U.S. 144 (1992), that while the federal government may encourage states to participate in a federal regulatory scheme it may not force them to do so, in part because such legislation muddles political accountability. If Congress encourages the states to participate in federal regulation, "state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *Id.* at 168. On the other hand, "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *Id.*

Had Congress offered incentives to the States to *encourage* them to waive various statutes and other requirements to enable construction of the border fence, appropriate political accountability would have been maintained. The Texas legislature would have had to deliberate over whether to cooperate with the federal plan to build the border fence in full view of its citizenry. Likewise, had Congress actually examined particular state statutes and decided to preempt some of them (assuming it was within Congress's authority to do so in the first place),

such a decision would be "in full view of the public," thus subjecting Federal legislators to political accountability "if the decision turns out to be detrimental or unpopular." *Id.* However, political accountability is greatly diminished when "due to federal *coercion*, state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169 (emphasis added).

The waivers relieve the burden of political accountability from congressional lawmakers and place it squarely on the shoulders of local officials who did not in any way participate in the decisionmaking process. Not a single Texas official deliberated or considered—in either Congress or the state legislative process—whether the particular local provisions of law at issue should be suspended in order to expedite the federal government's construction of the border fence. Nevertheless, when the County of El Paso is prevented from enforcing provisions of the Penal Code or Health Safety Code, or when the water districts are precluded from delivering water to residents, local officials are likely to shoulder the brunt of the blame from constituents. In other words, when the Secretary elects to issue a waiver of state and local laws, state governments are "put in the position of taking the blame for its burdensomeness and for its defects." *Printz,* 521 U.S. at 930.

The waivers further undermine accountability by acting as an unfunded mandate on the states and localities. For example, with respect to Plaintiff El Paso County Water Improvement District No. 1, the waiver facilitates construction that "will interfere with the District's access to and ability to maintain its canals; damage the facilities and infrastructure on which the District relies to deliver water; generate debris crippling to the District's flood control infrastructure; circumvent the District's permitting processes for use of District property; and interfere with the District's standards for bridge construction, road maintenance, and dust pollution, among other

things." Declaration of Jesus Reyes ¶ 8. Each of these costs resulting from the waiver and subsequent construction will be foisted upon the governmental Plaintiffs, forcing them to spend Texas taxpayers' dollars to administer the federal government's construction plan.

2. To Avoid The Constitutional Issues, The Court Should Construe Section 102(c) As Not Authorizing The Secretary To Waive State And Local Laws

In light of these severe federalism implications, Section 102(c) should not be read as permitting the Secretary to waive state or local laws. Before interpreting a statute in a manner that overrides the "usual constitutional balance of federal and state powers, … 'it is incumbent upon the federal courts to be certain of Congress' intent.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). Congress's intention to alter the federal-state balance must be "unmistakably clear in the language of the statute." *Id.* (citation omitted); *see also id.* at 461 ("Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." (citation omitted)); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004) (when "federal legislation threaten[s] to trench on the States' arrangements for conducting their own governments[,] [it] should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires"); *City of Dallas v. FCC*, 165 F.3d 341, 348-49 (5th Cir. 1999) (rejecting agency's assertion of authority to preempt state law where "Congress certainly did not provide the clear statement that *Gregory* requires"). The purpose of the plain statement requirement is to ensure "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Section 102(c) supplies no clear statement that state or local laws are subject to waiver; rather, it states ambiguously that the Secretary shall have authority "to waive all legal

requirements." IIRIRA § 102(c)(1), 8 U.S.C. § 1103 note. This language is properly interpreted as authorizing the Secretary to waive only the body of law that Congress itself enacted and therefore retains the power to repeal or limit—not the laws of other sovereigns. "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking" upon which the Supreme Court relies "to protect states' interests." *Gregory*, 501 U.S. at 464 (quoting Tribe, Am. Const. Law § 6-25, at 480 (2d ed. 1988)).

Accordingly, to avoid confronting the grave Tenth Amendment problems presented by the Secretary's use of the statute, Section 102(c) must be interpreted not to preempt state law. The Secretary's waivers of state and other laws should therefore be rejected as inconsistent with the statutory text. If they are not inconsistent with the statutory text, then Section 102(c) is unconstitutional.

II. PLAINTIFFS FACE A SUBSTANTIAL THREAT OF IRREPARABLE INJURY IF AN INJUNCTION IS NOT ISSUED.

Permitting DHS to proceed with construction unconstrained by the vast body of waived laws will cause substantial and irreparable injury to the Plaintiffs and the public. DHS has a statutory mandate to construct not less than 700 miles of fencing along the U.S.-Mexico, including 370 miles in priority areas to be completed no later than December 31, 2008. IIRIRA § 102(a), as amended. At last count, DHS had built 322 miles of fencing. *See* DHS, Southwest Border Fence, http://www.dhs.gov/xprevprot/programs/border-fence-southwest.shtm (last modified May 19, 2008). DHS "is committed to completing a total of 670 miles of pedestrian and vehicle fence along the Southwest border by the end of 2008." *Id.* Accordingly, during the next seven months, DHS intends to construct over 300 miles of additional border fencing. The very purpose of the April 3 waivers was to effectuate this ambitious goal.

Construction of fencing in the areas where Plaintiffs reside is imminent. DHS has not published its construction schedule, but it is apparent that the Department is actively laying the groundwork to begin construction. For example, in a letter dated May 9, 2008, the U.S. Army Corps of Engineers notified the El Paso Water Improvement District No. 1 that it had completed a site evaluation of the District's property and had "determined to acquire certain permanent interests in [the District's] land to construct border infrastructure."[7] Declaration of Jesus Reyes ¶ 3. The letter attached a proposed "Offer to Sell Easement." *Id.* A subsequent letter dated May 21, 2008, informed the District that "the Government has an *immediate need* to enter [the District's] property to complete construction," and stated the Government's intention to file a condemnation action "within the next 30-60 days." *Id.* ¶ 5 & Ex. B (emphasis added). Based on its interactions to date with the Corps and DHS, the District believes that construction in El Paso County is likely to begin immediately upon commencement of the condemnation proceeding. *Id.* ¶ 6.

The commencement of construction will irreparably harm the District as well as the City and County of El Paso and their citizens. Construction will impair the ability of the District to deliver water to the City of El Paso and to thousands of farmers throughout the County of El Paso who contract with the District for their water supply. *Id.* ¶ 7. DHS's use of the District's land will interfere with the District's access to and ability to maintain its canals; damage the facilities and infrastructure on which the District relies to deliver water; generate debris crippling to the District's flood control infrastructure; circumvent the District's permitting processes for use of District property; and interfere with the District's standards for bridge construction, road maintenance, and dust pollution, among other things. *Id.* ¶ 8.

[7] U.S. Customs and Border Protection, the component of DHS managing construction of the border fence, "has engaged the Army Corps of Engineers (USACE) to obtain the real estate necessary to support this project." Ex. A to Declaration of Jesus Reyes.

In addition, construction will irreparably injure Ysleta del Sur Pueblo by cutting off its access to a section of the Rio Grande River that the Tiguas have used for 300 years to conduct religious ceremonies. Declaration of Gov. Frank Paiz ¶ 3. The loss of access to the river will significantly impair the ability of the Tiguas to continue their traditional religious practices. *Id.* ¶ 4. Furthermore, the commencement of construction will irreparably alter the sacred character of the land used by the Tiguas. *Id.*

Construction of the levee wall in Hidalgo County is expected to begin in July. The County has announced that it has finalized a timeline with DHS whereby construction of a 22-mile cement border wall along Hidalgo County's levees would begin July 25, 2008. Declaration of Wayne Bartholomew ¶ 5. Hidalgo County's agreement with DHS calls for construction to be "substantially complete" by December 31, 2008. *Id.* ¶ 5.

The commencement of construction of the Hidalgo County levee wall will irreparably damage the natural environment of the Lower Rio Grande Valley. *Id.* ¶ 9. Initiating construction without completing the Environmental Impact Statement process imposed by the National Environmental Policy Act means that the impacts of construction on the natural environment will never be fully known. *Id.* ¶ 10. Moreover, construction will destroy the integrity of the Lower Rio Grande wildlife corridor and threaten the survival of numerous species, including the endangered ocelot and jaguarundi. *Id.* ¶ 11. As the U.S. Fish and Wildlife Service has concluded, construction of the levee wall "would impair the ability of the wildlife corridor to fulfill its function" by eliminating wildlife passage through the area of the wall. *Id.* Ex. A. The efforts of Plaintiffs Frontera Audubon, Friends of the Wildlife Corridor, and Friends of Laguna Atascosa National Wildlife Refuge to restore and conserve a continuous wildlife corridor will be wholly defeated by construction of a wall bisecting the region. *Id.* ¶ 11.

All of these are harms that could not be undone by an award of monetary damages after a trial on the merits. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Accordingly, a preliminary injunction is necessary.

III. THE THREATENED INJURY TO PLAINTIFFS AND OTHERS OUTWEIGH ANY POTENTIAL HARM THAT WOULD RESULT FROM AN INJUNCTION.

The injury that would result to Plaintiffs from construction of the wall far outweigh any harm that would result from a brief suspension of construction pending resolution of this litigation. During the 160 years since the Treaty of Guadalupe Hidalgo established the Rio Grande as the international boundary between the Republic of Mexico and the United States of America, no border fence of the nature now planned by the United States has been constructed. A preliminary injunction would require nothing more than that DHS now wait to begin construction until this Court has determined whether it is proceeding in a lawful manner. Plaintiffs' lawsuit presents a purely legal challenge to the waivers, which is unlikely to require a lengthy trial or other extended proceedings to resolve.

The only conceivable injury that DHS could suffer in the interim is some economic cost from altering construction timetables, which would likely be minimal since construction is not yet in progress. Moreover, no measure of financial expenditure could outweigh the widespread destructive effects of an unconstitutional abrogation of dozens of duly enacted federal, state, and local laws. Permitting DHS to embark on the unprecedented course of constructing hundreds of miles of border wall unconstrained by law is surely a course that counsels caution.

IV. AN INJUNCTION WILL NOT DISSERVE THE PUBLIC INTEREST.

While the public has an interest in securing its border, that interest must be weighed against the interests served by the dozens of federal, state, and local laws that the Secretary would set aside to achieve this goal. The need for border fencing simply is not so urgent to justify running roughshod over the public's interests in clean air, safe drinking water, religious freedom, historic preservation, and all of the other interests served by the century's worth of

congressional enactments and related state and other laws nullified by the Secretary's April 3 waivers. The public interest demands that this vast body of law is not abrogated without caution.

Enjoining construction for a brief period to allow judicial review of the Secretary's unprecedented exercises of waiver authority surely will not disserve the public interest. Indeed, Section 102(c) explicitly contemplates constitutional challenges to the Secretary's actions. IIRIRA § 102(c)(2)(A), 8 U.S.C. § 1103 note. A preliminary injunction is the only way to ensure that this review is meaningfully available to the segment of the public deprived of the benefit of a multitude of duly enacted laws. Once construction has begun, many of the interests protected by the waived statutes will be harmed irreparably.

CONCLUSION

Plaintiffs respectfully request that the Court set a hearing at its earliest convenience, upon notice to the Defendants as required by Federal Rule of Civil Procedure 65(a). Upon notice and a hearing, the Court should grant Plaintiffs' Application for Preliminary Injunction and enjoin Defendants from commencing or continuing construction of any wall, fence, road, or other barrier or related infrastructure in the Project Areas subject to the Secretary's April 3, 2008 waivers for the duration of this litigation, unless and until they comply with the purportedly waived laws.

Under Federal Rule of Civil Procedure 65(c), the court may issue a preliminary injunction order "only if the movant gives security in an amount that the court considers proper …." The amount of security required under Rule 65(c) "is a matter for the discretion of the trial court," which "may elect to require no security at all." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996). Because most of the Plaintiffs are either governmental units or nonprofit organizations, no bond should be required.

Dated: June 23, 2008

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

COUNTY OF EL PASO, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. EP 08-CA-0196-FM
	)	
v.	)	
	)	
MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security, *et al.*,	)	
	)	
Defendants.	)	

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Application for Preliminary Injunction and Defendants' opposition thereto, the Application is hereby GRANTED. Plaintiffs are likely to succeed on the merits of their constitutional challenge. Allowing construction of the border fence to commence or proceed without complying with the waived laws would irreparably harm the Plaintiffs and disserve the public interest. Therefore, Defendants are ENJOINED, until further order of this Court, from commencing or continuing construction of any wall, fence, road, or other barrier or related infrastructure in the Project Areas identified in 73 Fed. Reg. 19077 & 19078 (Apr. 8, 2008). Because Plaintiffs are primarily governmental units or nonprofit organizations, the Court, it its discretion, finds that no security shall be required for the issuance of this Preliminary Injunction.

IT IS SO ORDERED.

Signed: _____, 2008

_____
United States District Judge

STATUTORY ADDENDUM

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1103 note):

(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.

(b) Construction of fencing and road improvements along the border.--

(1) Additional fencing along southwest border.--

(A) Reinforced fencing.--In carrying out subsection (a) [of this note], the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

(B) Priority areas.--In carrying out this section [Pub.L. 104-208, Div. C, Title I, § 102, Sept. 30, 1996, 110 Stat. 3009-554, which amended this section and enacted this note], the Secretary of Homeland Security shall--

(i) identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and

(ii) not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

(C) Consultation.--

(i) In general.--In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

(ii) Savings provision.--Nothing in this subparagraph may be construed to--

(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

(II) affect the eminent domain laws of the United States or of any State.

(D) Limitation on requirements.--Notwithstanding subparagraph (A), nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.

(2) Prompt acquisition of necessary easements.--The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act (as inserted by subsection (d)) [subsec. (b) of this section], shall promptly acquire such easements as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) Safety features.--The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) Authorization of appropriations.--There are authorized to be appropriated such sums as may be necessary to carry out this subsection. Amounts appropriated under this paragraph are authorized to remain available until expended.

(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.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June 2008, I caused a true and correct copy of the foregoing Application for Preliminary Injunction to be served by electronic mail on:

Daniel Bensing
U.S. Department of Justice
Civil Division, Federal Programs Division
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Washington, D.C. 20044
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/s/ Elizabeth Oyer