No.

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

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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

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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.

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APPENDICES

APPENDIX A

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

April 8, 2008

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Notice of determination; correction.

SUMMARY: The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border of the United States. The notice of determination was published in the **Federal Register** on April 3, 2008. Due to a publication error, the Project Area description was inadvertently omitted from the April 3 publication. For clarification purposes, this document is a republication of the April 3 document including the omitted Project Area description.

DATES: This Notice is effective on April 8, 2008.

Determination and Waiver

The Department of Homeland Security has a mandate to achieve and maintain operational control

of the borders of the United States. Public Law 109-367, 2, 120 Stat. 2638, 8 U.S.C. 1701 note. Congress has provided the Secretary of Homeland Security with a number of authorities necessary to accomplish this mandate. One of these authorities is found at section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Public Law 104-208, Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C 1103 note), as amended by the REAL ID Act of 2005, Public Law 109-13, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109-367, 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, 564, 121 Stat. 2090 (Dec. 26, 2007). In Section 102(a) of the IIRIRA, Congress provided that 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. In Section 102(b) of the IIRIRA, Congress has called for the installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border, including priority miles of fencing that must be completed by December of 2008. Finally, in section 102(c) of the IIRIRA, Congress granted to me the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of the IIRIRA.

I determine that the following area of Hidalgo County, Texas, in the vicinity of the United States border, hereinafter the Project Area, is an area of high illegal entry:

• Starting approximately at the intersection of Military Road and an un-named road (i.e. beginning at the western end of the International Boundary Waters Commission (IBWC) levee in Hidalgo County) and runs east in proximity to the IBWC levee for approximately 4.5 miles.

• Starting approximately at the intersection of Levee Road and 5494 Wing Road and runs east in proximity to the IBWC levee for approximately 1.8 miles.

• Starting approximately 0.2 mile north from the intersection of S. Depot Road and 23rd Street and runs south in proximity to the IBWC levee to the Hidalgo POE and then east in proximity to the new proposed IBWC levee and the existing IBWC levee to approximately South 15th Street for a total length of approximately 4.0 miles.

• Starting adjacent to Levee Road and approximately 0.1 miles east of the intersection of Levee Road and Valley View Road and runs east in proximity to the IBWC levee for approximately 1.0 mile then crosses the Irrigation District Hidalgo County #1 Canal and will tie into the future New Donna POE fence.

• Starting approximately 0.1 mile east of the intersection of County Road 556 and County Road 1554 and runs east in proximity to the IBWC levee for approximately 3.4 miles.

• Starting approximately 0.1 mile east of the Bensten Groves road and runs east in proximity to

the IBWC levee to the Progresso POE for approximately 3.4 miles.

• Starting approximately at the Progresso POE and runs east in proximity to the IBWC levee for approximately 2.5 miles.

In order to deter illegal crossings in the Project Area, there is presently a need to construct fixed and mobile barriers and roads in conjunction with improvements to an existing levee system in the vicinity of the border of the United States as a joint effort with Hidalgo County, Texas. In order to ensure the expeditious construction of the barriers and roads that Congress prescribed in the IIRIRA in the Project Area, which is an area of high illegal entry into the United States, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of the IIRIRA as amended. Accordingly, I hereby waive in their entirety, with respect to the construction of roads and fixed and mobile barriers (including, but not limited to, accessing the project area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and 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) in the Project Area, all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, the following laws, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884) (Dec. 28, 1973) (16 U.S.C. 1531 *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. 1251 *et seq.*), the Na-

tional Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966) (16 U.S.C. 470 *et seq.*)), the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*), the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Archeological Resources Protection Act (Pub. L. 96-95, 16 U.S.C. 470aa *et seq.*), the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), the Noise Control Act (42 U.S.C. 4901 *et seq.*), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), the Archaeological and Historic Preservation Act (Pub. L. 86-523, 16 U.S.C. 469 *et seq.*), the Antiquities Act (16 U.S.C. 431 *et seq.*), the Historic Sites, Buildings, and Antiquities Act (16 U.S.C. 461 *et seq.*), the Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*), the Coastal Zone Management Act (Pub. L. 92-583, 16 U.S.C. 1451 *et seq.*), the Federal Land Policy and Management Act (Pub L. 94-579, 43 U.S.C. 1701 *et seq.*), the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 16 U.S.C. 668dd-668ee), the Fish and Wildlife Act of 1956 (Pub. L. 84-1024, 16 U.S.C. 742a, *et seq.*), the Fish and Wildlife Coordination Act (Pub. L. 73-121, 16 U.S.C. 661 *et seq.*), the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Eagle Protection Act (16 U.S.C. 668 *et seq.*), the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*), the American Indian Religious Freedom Act (42 U.S.C. 1996), the Religious Freedom Restoration Act (42 U.S.C. 2000bb), and the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6303-05).

I reserve the authority to make further waivers from time to time as I may determine to be necessary

to accomplish the provisions of section 102 of the IIRIRA, as amended.

Michael Chertoff,

Secretary.

APPENDIX B

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

April 8, 2008

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Notice of determination; correction.

SUMMARY: The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border of the United States. The notice of determination was published in the Federal Register on April 3, 2008. Due to a publication error, the description of the Project Areas was inadvertently omitted from the April 3 publication. For clarification purposes, this document is a republication of the April 3 document including the omitted description of the Project Areas.

DATES: This Notice is effective on April 8, 2008.

Determination and Waiver

I have a mandate to achieve and maintain operational control of the borders of the United States.

Public Law 109-367, 2, 120 Stat. 2638, 8 U.S.C. 1701 note. Congress has provided me with a number of authorities necessary to accomplish this mandate. One of these authorities is found at section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Public Law 104-208, Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C 1103 note), as amended by the REAL ID Act of 2005, Public Law 109-13, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109-367, 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, 564, 121 Stat. 2090 (Dec. 26, 2007). In Section 102(a) of IIRIRA, Congress provided that 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. In Section 102(b) of IIRIRA, Congress has called for the installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border, including priority miles of fencing that must be completed by December 2008. Finally, in section 102(c) of the IIRIRA, Congress granted to me the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA.

I determine that the following areas in the vicinity of the United States border, located in the States of California, Arizona, New Mexico, and Texas are

areas of high illegal entry (collectively "Project Areas"):

California

• Starting approximately 1.5 mile east of Border Monument (BM) 251 and ends approximately at BM 250.

• Starting approximately 1.1 miles west of BM 245 and runs east for approximately 0.8 mile.

• Starting approximately 0.2 mile west of BM 243 and runs east along the border for approximately 0.5 mile.

• Starting approximately 0.7 mile east of BM 243 and runs east along the border for approximately 0.9 mile.

• Starting approximately 1.0 mile east of BM 243 and runs east along the border for approximately 0.9 mile.

• Starting approximately 0.7 mile west of BM 242 and stops approximately 0.4 mile west of BM 242.

• Starting approximately 0.8 mile east of BM 242 and runs east along the border for approximately 1.1 miles.

• Starting approximately 0.4 mile east of BM 239 and runs east for approximately 0.4 mile along the border.

• Starting approximately 1.2 miles east of BM 239 and runs east for approximately 0.2 mile along the border.

• Starting approximately 0.5 mile west of BM 235 and runs east along the border for approximately 1.1 miles.

• Starting approximately 0.8 mile east of BM 235 and runs east along the border for approximately 0.1 mile.

• Starting approximately 0.6 mile east of BM 234 and runs east for approximately 1.7 miles along the border.

• Starting approximately 0.4 mile east of BM 233 and runs east for approximately 2.1 miles along the border.

• Starting approximately 0.05 mile west of BM 232 and runs east for approximately 0.1 mile along the border.

• Starting approximately 0.2 mile east of BM 232 and runs east for approximately 1.5 miles along the border.

• Starting 0.6 mile east of Border Monument 229 heading east along the border for approximately 11.3 miles to BM 225.

• Starting approximately 0.1 mile east of BM 224 and runs east along the border for approximately 2.5 miles.

• Starting approximately 2.3 miles east of BM 220 and runs east along the border to BM 207.

Arizona

• Starting approximately 1.0 mile south of BM 206 and runs south along the Colorado River for approximately 13.3 miles.

• Starting approximately 0.1 mile north of County 18th Street running south along the border for approximately 3.8 miles.

• Starting at the Eastern edge of BMGR and runs east along the border to approximately 1.3 miles west of BM 174.

• Starting approximately 0.5 mile west of BM 168 and runs east along the border for approximately 5.3 miles.

• Starting approximately 1 mile east of BM 160 and runs east for approximately 1.6 miles.

• Starting approximately 1.3 miles east of BM 159 and runs east along the border to approximately 0.3 mile east of BM 140.

• Starting approximately 2.2 miles west of BM 138 and runs east along the border for approximately 2.5 miles.

• Starting approximately 0.2 miles east of BM 136 and runs east along the border to approximately 0.2 mile west of BM 102.

• Starting approximately 3 miles west of BM 99 and runs east along the border approximately 6.5 miles.

• Starting approximately at BM 97 and runs east along the border approximately 6.9 miles.

• Starting approximately at BM 91 and runs east along the border to approximately 0.7 miles east of BM 89.

• Starting approximately 1.7 miles west of BM 86 and runs east along the border to approximately 0.7 mile west of BM 86.

• Starting approximately 0.2 mile west of BM 83 and runs east along the border to approximately 0.2 mile east of BM 73.

New Mexico

• Starting approximately 0.8 mile west of BM 69 and runs east along the border to approximately 1.5 miles west of BM 65.

• Starting approximately 2.3 miles east of BM 65 and runs east along the border for approximately 6.0 miles.

• Starting approximately 0.5 mile east of BM 61 and runs east along the border until approximately 1.0 mile west of BM 59.

• Starting approximately 0.1 miles east of BM 39 and runs east along the border to approximately 0.3 mile east of BM 33.

• Starting approximately 0.25 mile east of BM 31 and runs east along the border for approximately 14.2 miles.

• Starting approximately at BM 22 and runs east along the border to approximately 1.0 mile west BM 16.

• Starting at approximately 1.0 mile west of BM 16 and runs east along the border to approximately BM 3.

Texas

• Starting approximately 0.4 miles southeast of BM 1 and runs southeast along the border for approximately 3.0 miles.

• Starting approximately 1 Mi E of the intersection of Interstate 54 and Border Highway and runs southeast approximately 57 miles in proximity to the IBWC levee to 3.7 miles east of the Ft Hancock POE.

• Starting approximately 1.6 miles west of the intersection of Esperanza and Quitman Pass Roads

and runs along the IBWC levee east for approximately 4.6 miles.

• Starting at the Presidio POE and runs west along the border to approximately 3.2 miles west of the POE.

• Starting at the Presidio POE and runs east along the border to approximately 3.4 miles east of the POE.

• Starting approximately 1.8 miles west of Del Rio POE and runs east along the border for approximately 2.5 miles.

• Starting approximately 1.3 Mi north of the Eagle Pass POE and runs south approximately 0.8 miles south of the POE.

• Starting approximately 2.1 miles west of Roma POE and runs east approximately 1.8 miles east of the Roma POE.

• Starting approximately 3.5 miles west of Rio Grande City POE and runs east in proximity to the Rio Grande river for approximately 9 miles.

• Starting approximately 0.9 miles west of County Road 41 and runs east approximately 1.2 miles and then north for approximately 0.8 miles.

• Starting approximately 0.5 mile west of the end of River Dr and runs east in proximity to the IBWC levee for approximately 2.5 miles.

• Starting approximately 0.6 miles east of the intersection of Benson Rd and Cannon Rd and runs east in proximity to the IBWC levee for approximately 1 mile.

• Starting at the Los Indios POE and runs west in proximity to the IBWC levee for approximately 1.7 miles.

• Starting at the Los Indios POE and runs east in proximity to the IBWC levee for approximately 3.6 miles.

• Starting approximately 0.5 mile west of Main St and J Padilla St intersection and runs east in proximity to the IBWC levee for approximately 2.0 miles.

• Starting approximately 1.2 miles west of the Intersection of U.S. HWY 281 and Los Ranchitos Rd and runs east in proximity to the IBWC levee for approximately 2.4 miles.

• Starting approx 0.5 miles southwest of the intersection of U.S. 281 and San Pedro Rd and runs east in proximity to the IBWC levee for approximately 1.8 miles.

• Starting approximately 0.1 miles southwest of the Intersection of Villanueva St and Torres Rd and runs east in proximity to the IBWC levee for approximately 3.6 miles.

• Starting approximately south of Palm Blvd and runs east in proximity to the City of Brownsville's levee to approximately the Gateway-Brownsville POE where it continues south and then east in proximity to the IBWC levee for a total length of approximately 3.5 miles.

• Starting at the North Eastern Edge of Ft Brown Golf Course and runs east in proximity to the IBWC levee for approximately 1 mile.

• Starting approximately 0.3 miles east of Los Tomates-Brownsville POE and runs east and then north in proximity to the IBWC levee for approximately 13 miles.

In order to deter illegal crossings in the Project Areas, there is presently a need to construct fixed

and mobile barriers (such as fencing, vehicle barriers, towers, sensors, cameras, and other surveillance, communication, and detection equipment) and roads in the vicinity of the border of the United States. In order to ensure the expeditious construction of the barriers and roads that Congress prescribed in the IIRIRA in the Project Areas, which are areas of high illegal entry into the United States, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of the IIRIRA as amended.

Accordingly, I hereby waive in their entirety, with respect to the construction of roads and fixed and mobile barriers (including, but not limited to, accessing the project area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and 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) in the Project Areas, all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, the following laws, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. 1251 *et seq.*)), the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966) (16 U.S.C. 470 *et seq.*)), the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*), the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Archeological Resources Protection Act (Pub. L. 96-95, 16 U.S.C. 470aa *et seq.*), the Safe Drinking Water Act

(42 U.S.C. 300f *et seq.*), the Noise Control Act (42 U.S.C. 4901 *et seq.*), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), the Archaeological and Historic Preservation Act (Pub. L. 86-523, 16 U.S.C. 469 *et seq.*), the Antiquities Act (16 U.S.C. 431 *et seq.*), the Historic Sites, Buildings, and Antiquities Act (16 U.S.C. 461 *et seq.*), the Wild and Scenic Rivers Act (Pub. L. 90-542, 16 U.S.C. 1281 *et seq.*), the Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*), the Coastal Zone Management Act (Pub. L. 92-583, 16 U.S.C. 1451 *et seq.*), the Wilderness Act (Pub. L. 88-577, 16 U.S.C. 1131 *et seq.*), the Federal Land Policy and Management Act (Pub L. 94-579, 43 U.S.C. 1701 *et seq.*), the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 16 U.S.C. 668dd-668ee), the Fish and Wildlife Act of 1956 (Pub. L. 84-1024, 16 U.S.C. 742a, *et seq.*), the Fish and Wildlife Coordination Act (Pub. L. 73-121, 16 U.S.C. 661 *et seq.*), the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Otay Mountain Wilderness Act of 1999 (Pub. L. 106-145), Sections 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103-433), 50 Stat. 1827, the National Park Service Organic Act (Pub. L. 64-235, 16 U.S.C. 1, 2-4), the National Park Service General Authorities Act (Pub. L. 91-383, 16 U.S.C. 1a-1 *et seq.*), Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978 (Pub. L. 95-625), Sections 301(a)-(f) of the Arizona Desert Wilderness Act (Pub. L. 101-628), the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Eagle Protection Act (16 U.S.C. 668 *et seq.*), the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*),

the American Indian Religious Freedom Act (42 U.S.C. 1996), the Religious Freedom Restoration Act (42 U.S.C. 2000bb), the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq*.), and the Multiple Use and Sustained Yield Act of 1960 (16 U.S.C. 528-531).

This waiver does not supersede, supplement, or in any way modify the previous waivers published in the Federal Register on September 22, 2005 (70 FR 55622), January 19, 2007 (72 FR 2535), and October 26, 2007 (72 FR 60870).

I reserve the authority to make further waivers from time to time as I may determine to be necessary to accomplish the provisions of section 102 of the IIRIRA, as amended.

Michael Chertoff,

Secretary.

APPENDIX C

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

COUNTY OF EL PASO, *et al.*,

Plaintiffs,

v.

MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security, and U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendants.

EP-08-CA-196-FM

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

On this day, the Court considered County of El Paso, City of El Paso, El Paso County Water Improvement District No. 1 (the "Water District"), 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's (collectively, "Plaintiffs") "Application for Preliminary Injunction" ("Application") [Rec. No. 19], filed on June 23, 2008, in the above-captioned cause. In their Application, Plaintiffs request the Court to enter a preliminary injunction to prevent Michael

Michael Chertoff, Secretary of the Department of Homeland Security ("Chertoff" or "Secretary") and the Department of Homeland Security ("DHS") (collectively, "Defendants") from constructing any fencing, walls, or other physical barriers along the United States-Mexico border in Texas, New Mexico, Arizona, and California, unless and until DHS complies with the laws waived by Chertoff on April 3, 2008. After carefully considering the parties' briefs, arguments, and applicable law, the Court concludes it should deny Plaintiffs' Application.

I. BACKGROUND

A. Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") Section 102

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which, pursuant to Section 102(a), required the Attorney General to "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."[1] IIRIRA Section 102(c), as originally enacted, authorized the Attorney General to waive the Endangered Species Act of 1973 ("ESA") and the National Environmental Policy Act of 1969 ("NEPA") when he determined such waiver "was necessary to ensure expeditious construction of the barriers and roads under this section."[2] The Homeland Security Act of

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[1] Pub. L. No. 104-208, § 102(a), 110 Stat. 3009, 3009-554 (1996), codified at 8 U.S.C. § 1103 note.

[2] *Id.* § 102(c).

2002 abolished the Immigration and Naturalization Service and transferred responsibility for the construction of border barriers from the Attorney General to DHS.[3] In 2005, pursuant to the REAL ID Act, Congress amended Section 102(c) and gave the Secretary, "notwithstanding any other provision of law . . . the authority to waive all legal requirements such Secretary . . . determines necessary to ensure expeditious construction of the barriers and roads under this section" ("Waiver Legislation").[4] Section 102, as amended, only permits claims alleging a constitutional violation,[5] and any "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."[6]

B. Factual and Procedural History

On April 3, 2008, Chertoff exercised his authority, pursuant to Section 102, and published two notices in the Federal Register waiving various federal, state, and local laws to facilitate construction of physical barriers and roads along the United States-Mexican border. Specifically, Chertoff waived twenty-seven laws to facilitate construction of barriers and roads along twenty-two miles of the Texas-

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[3] Pub. L. No. 107-296, 116 Stat. 2135.

[4] Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note ("REAL ID Act"). The Secretary's waiver becomes effective upon publication in the Federal Register. *Id.*

[5] *Id.* § 102(c)(2)(A).

[6] *Id.* § 102(c)(2)(C).

Mexico border in Hidalgo County, Texas.[7] Chertoff also waived thirty-seven laws to facilitate construction of barriers and roads along 470 miles of the United States-Mexico border in Texas, New Mexico, Arizona, and California.[8]

On June 2, 2008, Plaintiffs filed their "Complaint for Declaratory and Injunctive Relief" ("Complaint") [Rec. No. 1]. In their Complaint, Plaintiffs raise three constitutional challenges to the Waiver Legislation: (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment. On June 23, 2008, Plaintiffs filed their Application for Preliminary Injunction. On June 24, 2008, Defendants responded by filing their "Memorandum of Points and Authorities in Opposition to Plaintiffs' Application for Preliminary Injunction and in Support of Defendants' Motion to Dismiss" ("Response") [Rec. No. 21]. On July 8, 2008, Plaintiffs filed their "Reply Brief in Support of Plaintiffs' Application for Preliminary Injunction and Brief Opposing Defendants' Motion to Dismiss" [Rec. No. 23]." Defendants' Reply Memorandum in Support of Defendants' Motion to Dismiss" [Rec. No. 26] followed on July 21, 2008.

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[7] *See* 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) ("Hidalgo County Waiver").

[8] *Id.* at 73 Fed. Reg. 19078 (Apr. 8, 2008) ("Multi-state Waiver").

II. APPLICABLE LAW

"A preliminary injunction 'is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries a burden of persuasion.'"[9] The purpose of a preliminary injunction is to preserve the parties' relative positions until a court is able to adjudicate the merits of their respective grievances.[10]

To obtain a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood the plaintiff will prevail on the merits; (2) a substantial threat the plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to the plaintiff outweighs the threatened injury to the defendant; and (4) granting the preliminary injunction will not adversely affect the public interest.[11]

III. ANALYSIS

A. Factor One: Substantial Likelihood Plaintiffs Will Prevail on the Merits

In their Application, Plaintiffs raise three constitutional challenges to the Waiver Legislation: (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Con-

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[9] *Black Fire Fighters Ass'n v. Dallas*, 905 F.2d 63, 65 (5th Cir. 1990) (citing *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)).

[10] *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

[11] *Harris County v. CarMax Auto Superstores*, 177 F.3d 306, 312 (5th Cir.1999).

stitution, and (3) a Federalism challenge pursuant to the Constitution's Tenth Amendment.

(1) Plaintiffs' Nondelegation Challenge

(a) Applicable Law

Article I, Section 1, of the Constitution provides "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[12] "From this language the [Supreme] Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government."[13] The Nondelegation Doctrine requires Congress to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[14] To satisfy the intelligible principle standard, courts apply a three prong test and deem a statute to be constitutional only "if Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority."[15]

In 1935, the Supreme Court invalidated two federal statutes because they lacked an intelligible principle to guide the respective agencies.[16] Since 1935,

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[12] U.S. CONST. art. I, § 1.

[13] *Touby v. United States*, 500 U.S. 160, 165 (1991).

[14] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

[15] *Mistretta v. United States,* 488 U.S. 361, 372-73 (1989) (quoting *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946)).

[16] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

however, the Supreme Court has "upheld . . . without deviation, Congress'[s] ability to delegate power under broad standards."[17] The Supreme Court has stated "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,"[18] but if the delegation is in an area where the Executive Branch maintains traditional authority, Congress may delegate in even broader terms.[19]

(b) Discussion

(i) Boundaries of Delegated Authority (3rd Prong)

First, Plaintiffs argue the Waiver Legislation unconstitutionally delegates legislative power to DHS. No one disputes Congress has successfully "articulated a general policy (construction of a border fence) [Prong 1] and an agency actor (the Secretary of Homeland Security) [Prong 2]"[20] to satisfy the first two prongs of the intelligible principle standard. However, Plaintiffs contend Congress has "utterly failed to prescribe the requisite boundaries of the delegated authority [Prong 3]."[21] Plaintiffs maintain when Congress broadly delegates its 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 . . . the intelligible principle standard cannot be satisfied by

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[17] *Mistretta*, 488 U.S. at 373.

[18] *Whitman*, 531 U.S. at 475.

[19] *Loving v. United States*, 517 U.S. 748, 772 (1996).

[20] Pls.' Application at 6-7.

[21] *Id.*

anything short of 'substantial guidance' from Congress."[22] Plaintiffs compare the current version of Section 102(c) with its prior version (under which the Attorney General could only waive NEPA and ESA), arguing the current version of Section 102(c) radically differs from the prior version because it permits the Secretary to identify *which* laws can be waived, instead of merely deciding *if* the laws should be waived.[23]

Plaintiffs' nondelegation arguments have been addressed in depth in one or more of the previous district court opinions on this issue.[24] Specifically, in *Sierra Club,* the district court compared both versions of Section 102(c) and found that, even though Congress had expanded the delegation provision to include the waiver of "all laws," it only did so for the "narrow purpose of expeditious completion" of the construction authorized by the Waiver Legislation.[25] The district court found Congress had laid down an intelligible principle in the Waiver Legislation be-

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[22] Pls.' Application at 7.

[23] *Id.* at 5.

[24] *See Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005), *no petition for cert. filed*[] (addressing the constitutionality of the Secretary's waiver authority and holding the delegation of authority was constitutional); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 2008 WL 728197, 76 U.S.L.W. 3512 (June 23, 2008) (holding the Secretary's waiver authority, pursuant to Section 102, is a constitutional delegation of authority); *Save Our Heritage Organization v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008), *no petition for cert. filed* (adopting the *Sierra Club* district court's analysis and holding the Secretary's waiver power, pursuant to Section 102, is constitutional).

[25] 2005 U.S. Dist. LEXIS 44244 at *20.

cause "improvement of U.S. border protection is the 'clearly delineated general policy,' required for a proper delegation, and [] Congress adequately circumscribed the actions permitted to be taken as those 'necessary to install additional physical barriers and roads.'"[26] The district court also found the "necessity" standard provided in the Waiver Legislation was constitutional.[27] Finally, the district court found because "the delegation of authority in this instance implicates immigration enforcement and national security – matters in which the Executive Branch already exercises considerable independent authority, the delegation was appropriate."[28]

In *Defenders of Wildlife,* the district court applied the same reasoning as the *Sierra Club* court and held the waiver provision did not constitute an impermissible legislative delegation.[29] The district court held Section 102

> meets the requirements of the Supreme Court's nondelegation cases.

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[26] *Id.*

[27] *Id.* at *21. The district court compared the Waiver Legislation's necessity standard to the standard found in *Whitman,* in which the Supreme Court held a delegation to the Environmental Protection Agency to "set air quality standards at the level that is 'requisite,' that is, not lower or higher than is necessary – to protect public health," was constitutional. *Id.* (quoting *Whitman*, 531 U.S. at 474-76).

[28] Id. at *23. The district court noted the Supreme Court's holding that immigration policy falls within the inherent executive powers. *See Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.").

[29] *Defenders of Wildlife*, 527 F. Supp. 2d at 127.

> The "general policy" is "clearly delineated" – i.e. to expeditiously "install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry."And, the "boundaries" of the delegated authority are clearly defined by Congress's requirement that the Secretary may waive only those laws that he determines "necessary to ensure expeditious construction."[30]

Moreover, in response to plaintiffs' arguments that the Secretary's scope of authority was exceptionally broad, the district court observed "there is no legal authority or principled basis upon which a court may strike down an otherwise permissible delegation simply because of its broad scope."[31] The district court noted that "[w]hen the area to which the legislation pertains is one where the Executive Branch already has significant independent constitutional authority, delegations may be broader than in other contexts."[32] In *Save Our Heritage Organization,* the district court agreed with the *Defenders of Wildlife* court's analysis and held it found "no constitutional impediment to the Secretary's waivers because there is an intelligible principle [to which] the

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[30] *Id.* (quoting *Mistretta*, 488 U.S. at 372-73; 8 U.S.C. § 1103 note).

[31] *Id.* at 128; *see also Loving*, 517 U.S. at 771 ("[W]e have since [1935] upheld, without exception, delegations under standards phrased in sweeping terms.").

[32] *Id.* at 129 (quoting *Sierra Club*, 2005 U.S. Dist. LEXIS at *17 (citing *Loving*, 517 U.S. at 772)).

Secretary must conform [] in the exercise of his delegated power."[33]

After carefully considering the relevant law, the Court concludes the Waiver Legislation clearly satisfies the intelligible principle standard. In light of the *Sierra Club, Defenders of Wildlife,* and *Save Our Heritage Organization* courts' well-analyzed decisions on this issue, the Court finds Congress constitutionally delegated its authority in the Waiver Legislation because it provided the Secretary with an intelligible principle to guide his discretionary waiver of legal requirements to expeditiously complete construction of physical barriers and roads at the nation's borders.

(ii) Lack of Judicial Review

Second, Plaintiffs argue the Waiver Legislation is unconstitutional because the Secretary's authority is "not constrained by judicial review."[34] Plaintiffs argue a constitutional delegation of legislative authority requires an intelligible principle *and* judicial review. Plaintiffs claim "[w]henever 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."[35] They contend "the [Supreme] Court has dispensed with the requirement of judicial review *only* in the limited category of cases in which delegated authority falls squarely within the inde-

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[33] *Save Our Heritage Organization*, 533 F. Supp. 2d at 63-64.

[34] Pls.' Application at 9.

[35] *Id.* at 10.

pendent authority of the Executive Branch and thus does not require an 'intelligible principle.'"[36]

Plaintiffs cite the Supreme Court cases of *Yakus v. United States* [37] and *American Power & Light Co. v. SEC*[38] for the principle that judicial review is required in the context of the intelligible principle analysis.[39] In *Yakus,* the Supreme Court upheld the Emergency Price Control Act ("EPCA") against a nondelegation challenge because it determined Congress had provided constitutionally-adequate standards to guide the Price Administrator's fixing of price controls.[40] The Supreme Court stated:

> Only if we could say that there is 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 has been obeyed,* would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation. The standards prescribed by the present Act [EPCA], with the aid of the 'statement of the considerations' required to be made by the Administrator, are sufficiently definite and

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[36] *Id.* at 11 (emphasis added).

[37] 321 U.S. 414 (1944).

[38] 329 U.S. 90 (1946).

[39] Plaintiffs also cite to other Supreme Court cases which cite back to *Yakus* and *American Power* for the same principle. *See, e.g.*, *Touby*, 500 U.S. at 168-69; *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989)[;] *Mistretta*, 488 U.S. at 379.

[40] 321 U.S. at 426.

> precise to enable *Congress, the courts and the public* to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards.[41]

In *American Power,* the Supreme Court upheld the Public Utility Holding Company Act of 1935 ("PUHCA") against a nondelegation challenge because it found the statute provided constitutionally-adequate guidance.[42] The Supreme Court stated:

> Necessity therefore 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 the light of these legislative declarations. Such is the situation here.[43]

After carefully considering Plaintiffs' argument, the Court finds the Supreme Court does not require judicial review to satisfy the intelligible principle standard. In *Whitman,* the Supreme Court held a constitutionally permissible delegation only required Congress to provide an intelligible principle to guide the exercise of delegated authority.[44] The Supreme

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[41] *Id.* (emphasis added).

[42] 329 U.S. at 104-06.

[43] *Id.* at 105.

[44] 531 U.S. at 472.

Court first announced this clearly in *J.W. Hampton, Jr. & Co.,* when it declared "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[45]

Moreover, Plaintiffs' argument that *Yakus* and *American Power* stand for the proposition that judicial review is required to satisfy the intelligible principle standard is unavailing. In *Yakus,* the Supreme Court discussed how Congress had provided adequate standards in the EPCA long before the Supreme Court even mentioned judicial review. The excerpt from *Yakus*[46] above could also be read to simply imply the Supreme Court understands the need to facilitate accountability generally. In that portion of the *Yakus* opinion, the Supreme Court merely mentions review by Congress, the courts and the public, rather than mandating a necessary framework for judicial review. Moreover, in *American Power,* the plaintiff did not directly challenge PUHCA on the grounds it lacked judicial review. The plaintiff instead challenged PUHCA because certain statutory terms were not defined and allegedly gave the commission unfettered discretion in its decisions.[47]

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[45] 276 U.S. at 409.

[46] "The standards prescribed by the present Act [EPCA], with the aid of the 'statement of the considerations' required to be made by the Administrator, are sufficiently definite and precise to enable *Congress, the courts and the public* to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards." *Yakus*, 321 U.S. at 426 (emphasis added).

[47] *American Power*, 329 U.S. at 104.

In light of the fact that (1) Plaintiffs have not presented any cases in which the Supreme Court struck down a statute explicitly for lack of judicial review in the intelligible principle analysis, (2) the Supreme Court denied certiorari in *Defenders of Wildlife* where the plaintiffs' main arguments asserted judicial review was required in the intelligible principle standard analysis, (3) other courts have held the Supreme Court does not require judicial review in the intelligible principle analysis,[48] and (4) the Waiver Legislation does not preclude judicial review entirely because parties can petition for certiorari to the Supreme Court,[49] the Court concludes

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[48] In *United States v. Bozarov,* the Ninth Circuit considered whether judicial review was required to satisfy the intelligible principle standard and held preclusion of judicial review in the Export Administration Act did not violate the Nondelegation Doctrine. 974 F.2d 1037 (9th Cir.1992), *cert. denied*, 507 U.S. 917 (Feb. 22, 1993). Bozarov argued the "purpose of requiring an intelligible principle is to permit a court to ascertain whether the will of Congress has been obeyed." *Id.* at. 1041. However, the Ninth Circuit panel agreed with the Government's argument 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.* The panel analyzed the *Yakus*, *American Power*, and *Touby* decisions and stated that, while the cases suggested the availability of judicial review was a factor to consider, the Supreme Court did not hold judicial review was always constitutionally required. *Id.* at 1042. *See also United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir.1994) (suggesting the existence of judicial review is a factor to be considered in determining whether Congress has unconstitutionally delegated its legislative authority).

[49] Section 102, as amended, provides any "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." REAL ID Act, Pub. L. No. 109-13,

Plaintiffs' argument requiring the need for judicial review of the scope of the Secretary's waivers fails.

(2) Plaintiffs' Presentment Clause Challenge

(a) Applicable Law

Article I of the Constitution provides any federal statute must pass both houses of Congress, and "before it become a Law, be presented to the President of the United States: If he approve 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."[50] "Amendment and repeal of statutes, no less than enactment, must conform with" the presentment and bicameralism requirements of Article I.[51]

In *Clinton v. City of New York*,[52] the Supreme Court struck down the Line Item Veto Act of 1996 because "[i]n both legal and practical effect," it authorized the President to amend "Acts of Congress by repealing a portion of each."[53] The Line Item Veto Act gave the President the power to cancel items of spending which had been previously signed into law.[54] Upon cancellation by the President, these items no longer had any "legal force or effect" what-

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§ 102(c)(2)(A), 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note.

[50] U.S. CONST. art. I, § 7 ("Presentment Clause").

[51] *INS v. Chadha*, 462 U.S. 919, 954 (1983).

[52] 524 U.S. 417 (1998).

[53] *Id.* at 438.

[54] *Id.* 436.

soever.[55] The Supreme Court observed the laws resulting from the President's statutory cancellation powers produced "truncated versions of two bills that passed both Houses of Congress"[56] and held the Constitution does not authorize the President "to enact, to amend, or to repeal statutes."[57]

(b) Discussion

Plaintiffs argue the Waiver Legislation violates the Presentment Clause of the Constitution because it acts as a "partial repeal" of the law, which the Supreme Court found unconstitutional in *Clinton,* when it invalidated the Line Item Veto Act.[58] Plaintiffs contend the Waiver Legislation violates the Presentment Clause because it "amend[s] more than three dozen congressional enactments 'in both legal and practical effect' by rendering them inoperative 'in their entirety' in nearly 500 miles of designated Project Areas."[59] They argue the Waiver Legislation truncates duly enacted laws,[60] a result the Supreme Court held unconstitutional in *Clinton.*

The *Defenders of Wildlife* court addressed a similar argument to Plaintiffs' at length, holding "the waiver provision of the REAL ID Act [Waiver Legislation] is not equivalent to the partial repeal or amendment at issue in Clinton."[61] The district court

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[55] *Id.* at 437 (citation omitted).

[56] *Id.* at 440.

[57] *Id.* at 438.

[58] Pls.' Application at 12.

[59] *Id.* at 13.

[60] *Id.*

[61] *Defenders of Wildlife,* 537 F. Supp. 2d at 124.

observed that in *Clinton,* it was critical to the Supreme Court that the Line Item Veto Act "[gave] the President the unilateral power to change the text of the duly enacted statutes."[62] However, when the Secretary invokes Section 102, the *Defenders of Wildlife* court noted

> [t]he Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part. Each of the twenty laws waived by the Secretary . . . retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President.[63]

In response to the plaintiffs' argument that the Waiver Legislation constituted a partial repeal because the laws did not apply to the extent they otherwise would have regarding the construction of the border barriers, the *Defenders of Wildlife* court cited to numerous other statutorily-authorized executive waivers, which would also be invalid under this logic, and found *Clinton's* holding could not support this conclusion.[64]

After carefully considering the relevant law and noting Plaintiffs fail to adequately develop their argument, the Court concludes the Waiver Legislation does not violate the Presentment Clause. The Court recognizes the cogent analysis set forth in *Defenders of Wildlife* and concludes that unlike the laws at is-

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[62] *Id.* (quoting *Clinton*, 524 U.S. at 447).

[63] *Id.*

[64] *Id.* at 124-25.

sue in *Clinton,* which no longer had any "legal force or effect" whatsoever once the President applied the line-item veto, the laws waived pursuant to Section 102 still overwhelmingly remain in effect outside the limited scope of the Secretary's waiver.

(3) Plaintiffs' Tenth Amendment Challenge

(a) Applicable Law

Article VI of the Constitution provides the "Constitution[] and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land."[65] Pursuant to the Supremacy Clause, if there is a conflict between federal law and state or local law, the latter is deemed preempted.[66]

> Pre-emption may be either expressed or implied, and "is compelled whether Congress'[s] command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is ""so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"" and conflict pre-emption,

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[65] U.S. CONST. art. VI, cl. 2 ("Supremacy Clause").

[66] *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (deriving preemption from the Supremacy Clause).

> where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[67]

Moreover, "[f]ederal regulations have no less preemptive effect than federal statutes."[68]

In *Gregory v. Ashcroft*,[69] Missouri state court judges challenged a provision of the Missouri state constitution, which set a mandatory retirement age, as violating the federal Age Discrimination in Employment Act of 1967 ("ADEA"). The Supreme Court held a federal law will be applied to important state government activities only if there is a clear statement from Congress that the law was meant to apply.[70] The Supreme Court noted " '[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' "[71] The Supreme Court explained this rule of statutory construction

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[67] *Id.* at 98 (citations omitted).

[68] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[69] 501 U.S. 452 (1991).

[70] *Id*. at 460-61."If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 460 (citation omitted).

[71] *Id.* at 461 (citation omitted) (internal quotation marks omitted).

should be applied when the statutory language was ambiguous.[72] The Supreme Court found the ADEA lacked such a clear statement and held the statute did not preempt the Missouri mandatory retirement age provision.[73]

In New York v. United States,[74] the Supreme Court invalidated the 1985 Low-Level Radioactive Waste Policy Amendments Act ("the Act") because it violated the Tenth Amendment.[75] The Act created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders.[76] The Act provided monetary incentives to the states to comply with the law and included a "take title" provision, which imposed state liability if the states did not properly dispose of waste within their borders.[77] The Supreme Court held the "take title" provision was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress,"[78] both of which were impermissible options for Congress to impose on the states. The Supreme Court held, pursuant to the Tenth Amendment, the federal government may not commandeer state officials "to enact or administer a

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[72] *Id.* at 470.

[73] *Id.*

[74] 505 U.S. 144 (1992).

[75] The Tenth Amendment 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." U.S. CONST. amend. X.

[76] *New York*, 505 U.S. at 152.

[77] *Id.* at 152-54.

[78] *Id.* at 175.

federal regulatory program."[79] "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress'[s] instructions."[80] The Supreme Court explained if Congress was allowed to commandeer state governments, it would undermine government accountability because Congress could make decisions, but the states would take the political heat and be held responsible for a decision that was not theirs.[81]

(b) Discussion

Plaintiffs argue Section 102(c) does not contain a "clear statement" indicating Congress's intent to preempt state or local law because the section only states the Secretary has authority "to waive all legal requirements."[82] The Supreme Court has stated that courts should apply the clear statement rule only when the statutory language is ambiguous.[83] Here, the language is not ambiguous. Section 102 can be construed as an express preemption clause because Congress expressly gives the Secretary authority, "notwithstanding any other provision of law," to "waive all legal requirements."[84] The Secretary clari-

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[79] *Id.* at 188.

[80] *Id.* at 162.

[81] *Id.* at 168-69.

[82] Pls.' Application at 18.

[83] *Gregory*, 501 U.S. at 470.

[84] REAL ID Act, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note.

fies that "all legal requirements" includes "state or other laws, regulations and legal requirements of, deriving from, or related to the subject of" various federal statutes explicitly waived "with respect to the construction of roads and fixed and mobile barriers."[85] Section 102 clearly manifests congressional intent to nullify other laws to the extent necessary to expeditiously construct the border fence.[86]

Moreover, even if the Waiver Legislation does not contain explicit preemptive language, the Supreme Court still recognizes "conflict preemption," where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[87] The Secretary, pursuant to the Supremacy Clause, has only waived state and local laws which interfere with Congress's purpose to construct the border barrier. If Plaintiffs were allowed to enforce state and local laws which impede construction of the border infrastructure, Plaintiffs' actions would directly conflict with Congress's objective of expeditiously constructing a border fence. Therefore, to the extent Plaintiffs' enforcement of state and local laws interfere with meeting the federal objective, the state and local laws are preempted.

Plaintiffs argue the "waivers are so broad and so vague as to state and local laws that they violate basic principles of federalism by placing the govern-

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[85] *See* Determination Pursuant to Section 102 of the IIRIRA, 73 Fed. Reg. at 19077, 19078.

[86] *See Gade*, 505 U.S. at 96 (noting that whether federal law preempts state law requires an examination of congressional intent).

[87] *Id.* at 98 (citations omitted).

mental Plaintiffs in the intolerable position of not knowing which state and local laws are currently in effect and which may have been indefinitely nullified."[88] The Secretary's waivers set aside all "federal, state or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the various federal statutes explicitly waived and the project.[89] After carefully reviewing the Waiver Legislation, the Court concludes the Secretary's waivers do not affect the validity of the state and local laws. Rather, the waivers merely suspend the effects of the state and local laws. The state and local laws remain operative to the extent they have not been preempted by the Waiver Legislation according to its own terms, i.e., those laws that do not interfere with the expeditious construction of the border fence.

Plaintiffs also argue the Secretary's waivers of state and local laws have "commandeered" state and local governments in violation of the Tenth Amendment. Plaintiffs claim "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."[90] Thus, Plaintiffs argue if local officials are unable to perform services for citizens because of the waivers, such as districts delivering water, these officers will nevertheless have to shoulder the blame, even though it was not their idea to waive the state or local laws.[91] Plaintiffs fur-

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[88] Pls.' Application at 13.

[89] *See* Determination Pursuant to Section 102 of the IIRIRA, 73 Fed. Reg. at 19077, 19078.

[90] Pls.' Application at 17.

[91] *Id.*

ther contend the "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."[92]

Plaintiffs spend two pages alleging the Secretary's waivers "devour[s] the essentials of state sovereignty" by "commandeering" its state and local governments, but Plaintiffs do not provide any support for this conclusion. Unlike the legislation in *New York,* the Waiver Legislation does not require Plaintiffs to enact laws and implement a federal program. The Waiver Legislation merely preempts Plaintiffs from enforcing state and local laws that would impede Congress's ability to expeditiously construct the border fence. Therefore, Plaintiffs' argument they will have to spend extra money to maintain the federal construction plan is without merit because Plaintiffs are not implementing the construction plan, but rather are fulfilling their duty to maintain the Water District's infrastructure. Moreover, although Plaintiffs' argument that local officials will take the blame for decisions they did not make tracks the Supreme Court's explanation in *New York,* it is not a persuasive argument for impeding federal construction of the border barriers, especially because Plaintiffs are not implementing a federal program.

The Waiver Legislation does not violate the Tenth Amendment. Section 102 clearly manifests congressional intent to preempt state and local laws which would interfere with Congress's objective to expeditiously construct the border fence. Moreover,

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[92] *Id.* at 18.

even if Section 102 does not contain explicit preemptive language, the Waiver Legislation still preempts these laws, pursuant to the Supreme Court's explanation of conflict preemption. Because Plaintiffs' federalism arguments are more rhetorical than substantive, Plaintiffs' argument fails because they have not clearly shown how the Secretary's waivers affects Plaintiffs' sovereignty.

(4) Summary of Plaintiffs' Challenges

Plaintiffs fail to satisfy the first factor for granting a preliminary injunction. Plaintiffs have not established there is a substantial likelihood they will prevail on the merits because Plaintiffs' Nondelegation Clause, Presentment Clause, and Tenth Amendment challenges are unavailing.

B. Factor Two: Substantial Threat Plaintiffs Will Suffer Irreparable Injury if the Injunction is Not Granted

Plaintiffs claim the construction of the border barriers will irreparably injure Plaintiffs and the public. Specifically, Plaintiffs allege the Waiver Legislation will impair the Water District's "ability . . . to deliver water to the City of El Paso and to thousands of farmers throughout the County of El Paso who contract with the [Water] District for their water supply."[93] The Water District maintains the Waiver Legislation will damage its facilities and infrastructure, interfere with canal maintenance, and "generate debris crippling to the [Water] District's

[93] Pls.' Application, Reyes Decl. ¶ 7.

flood control infrastructure."[94] Plaintiffs also argue the construction will affect Ysleta del Sur Pueblo because it will obstruct the tribal community's access to land located by the Rio Grande River, which they use for religious ceremonies.[95] Finally, Plaintiffs argue the construction of the Hidalgo County levee would irreparably damage the Lower Rio Grande Valley's wildlife corridor because it would "create a physical barrier impenetrable to wildlife" and would "threaten the survival of numerous species, including the endangered ocelot and jaguarundi."[96]

Plaintiffs' allegations of harm are conclusory and thus insufficient to establish a concrete or irreparable harm. Plaintiffs allege broad, speculative, and all-encompassing injuries without reasonable specificity. The allegations regarding the harms that would impair the Water District simply consist of conclusory assertions.

The alleged harm to the Ysleta Del Sur Pueblo is reasonably specific. In response, Defendants submit the tribal community will not lose access to the entire Rio Grande River because the construction will not close any of the tribe's current crossing points.[97] Defendants assert current construction plans actually will increase the tribe's access to the Rio Grande River by adding seven additional crossing points.[98]

In response to Plaintiffs' allegations of harm to the wildlife and the environment, Defendants main-

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[94] *Id.* ¶ 8.

[95] Pls.' Application, Paiz Decl. ¶¶ 3-4.

[96] Pls.' Application, Bartholomew Decl. ¶ 6, 11.

[97] Defs.' Resp., Ahern Decl. ¶ 22.

[98] *Id.*

tain DHS is aware of the potential hazards construction may cause in the Lower Rio Grande Valley and DHS has taken steps to mitigate these hazards. Defendants present three specific mitigation measures which address Plaintiffs' allegations. First, DHS has proposed "installing over 400 'cat holes' that allow for passage of small animals, including the Ocelot and Jaguarundi cats" and "modif[ying] the fence design to create a four inch gap at the bottom of the fence to allow small animals – in particular the Texas horned lizard – passage."[99] Second, DHS is also completing Environmental Stewardship Plans ("ESP"), which provide a comprehensive analysis of the potential environmental impacts associated with the construction of the fence."[100] The ESPs "include the identification and analysis of potential impacts to endangered species . . . and contain appropriate Best Management Practices to avoid or minimize" these potential impacts.[101] Finally, DHS has set aside $24 million to "mitigate impacts to threatened and endangered species, wetlands, and cultural and historic resources."[102]

It is unclear whether DHS's proposed measures, including the amount of allocated federal funds and the implementation of Best Management Practices to avoid or minimize impacts to threatened and endangered species and environmentally sensitive areas, are adequate to mitigate or remedy reasonably anticipated problems which may occur in the construction zone. Nevertheless, Defendants have provided

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[99] *Id.* ¶ 17.

[100] *Id.* ¶ 16.

[101] *Id.*

[102] *Id.* ¶ 17.

extensive information on measures which address Plaintiffs' concerns. The Court concludes Plaintiffs fail to satisfy the second factor for granting a preliminary injunction. Plaintiffs have not shown there is a substantial threat they will suffer irreparable injury if the Court does not grant a preliminary injunction.

C. Factors Three and Four: Threatened Injury to Plaintiffs Outweighs the Threatened Injury to Defendants and Granting the Preliminary Injunction Will Not Adversely Affect the Public

Because the third and fourth factors for granting a preliminary injunction are closely related, the Court will address both factors in this section. Plaintiffs argue the alleged harms they have presented far outweigh the alleged harms to DHS.[103] Plaintiffs contend the "only conceivable injury that DHS could suffer [from suspending construction pending resolution of this litigation] is some economic cost from altering construction timetables, which would likely be minimal since construction is not yet in progress."[104] Further, while Plaintiffs concede the public has an interest in securing its border, they argue this 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."[105]

Defendants counter "the injury to DHS in its efforts to enforce the immigration laws, as well as the public interest in receiving the benefit of those laws,

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[103] Pls.' Application at 23.

[104] *Id.*

[105] *Id.*

is substantial."[106] Defendants contend the border barriers will significantly reduce the number of undocumented immigrants who cross from Mexico into Texas,[107] which will in turn "reduce the threat to public health and safety because past apprehensions demonstrate that approximately 20% of illegal aliens had criminal records."[108] Defendants argue the public interest is also served by the border barriers' construction because it reduces the adverse environmental effects caused by illegal immigration. Specifically, Defendants note illegal entrants create roads and trails, which divert the normal flow of water and destroy sensitive vegetation; illegal entrants leave behind large quantities of trash, human waste, and abandoned vehicles; and ". . . illegal entrants fill water bottles in wetland locations, [which] can infest these protected Federal wetlands with invasive parasites and diseases [and] doom native fish and wildlife."[109]

After carefully considering the parties' arguments, the Court concludes Plaintiffs fail to successfully develop their claim that preserving the waived laws outweighs the public's interest in securing its borders. Because Defendants' arguments clearly demonstrate DHS and the public will be adversely affected if the preliminary injunction is granted, the Court concludes Plaintiffs have failed to establish the third and fourth factors for granting a prelimi-

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[106] Defs.' Resp. at 23.

[107] Defs.' Resp., Ahern Decl. ¶ 8 (noting a substantial decline in apprehensions of undocumented immigrants after completion of border barriers in the CBP San Diego Sector).

[108] *See id.* ¶ 25.

[109] *Id.* ¶¶ 19-20.

nary injunction. Plaintiffs have not shown the threatened injury to them outweighs the threatened injury to Defendants, nor have Plaintiffs demonstrated that granting the preliminary injunction will not adversely affect the public interest.

IV. CONCLUSION

For the reasons discussed, the Court concludes Plaintiffs have failed to establish the four factors for granting a preliminary injunction and the Court should, and hereby does, **DENY** Plaintiffs' Application for Preliminary Injunction [Rec. No. 19]. Accordingly, Plaintiffs' pending motion, "Plaintiffs' Unopposed Motion for Hearing Regarding Motion for Preliminary Injunction" [Rec. No. 27], is **DENIED AS MOOT**.

SO ORDERED.

SIGNED this **29th** day of **August, 2008**.

[signed]
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

APPENDIX D

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

COUNTY OF EL PASO, *et al.*,
Plaintiffs,
v.
MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security, and U.S. DEPARTMENT OF HOMELAND SECURITY,
Defendants.

EP-08-CA-196-FM

Sept. 11, 2008

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On this day, the Court considered Michael Chertoff, Secretary of the Department of Homeland Security ("Chertoff" or "Secretary"), and the Department of Homeland Security's ("DHS") (collectively, "Defendants") "Motion to Dismiss" (originally filed as "Memorandum of Points and Authorities in Opposition to Plaintiffs' Application for Preliminary Injunction and in Support of Defendants' Motion to Dismiss") [Rec. No. 21], filed June 24, 2008, in the above-captioned cause. In their Motion to Dismiss, Defendants request the Court to dismiss Plaintiffs' Complaint because it fails to state a claim upon which relief can be granted. On July 8, 2008, 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 (collectively, "Plaintiffs") filed their "Brief Opposing Defendants' Motion to Dismiss" (originally filed as "Reply Brief in Support of Plaintiffs' Application for Preliminary Injunction and Brief Opposing Defendants' Motion to Dismiss") [Rec. No. 23]. "Defendants' Reply Memorandum in Support of Defendants' Motion to Dismiss" [Rec. No. 26] followed on July 21, 2008. After carefully considering the parties' briefs, arguments, and applicable law, the Court concludes it should grant Defendants' Motion to Dismiss.

I. BACKGROUND

On June 2, 2008, Plaintiffs filed their "Complaint for Declaratory and Injunctive Relief" ("Complaint") [Rec. No.1]. In their Complaint, Plaintiffs raise three constitutional challenges to Chertoff s congressionally-delegated waiver authority:[1] (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment. On June 23, 2008, Plaintiffs filed their "Application for Preliminary Injunction" [Rec.

[1] In 2005, pursuant to the REAL ID Act, Congress gave the Secretary, "notwithstanding any other provision of law . . . the authority to waive all legal requirements such Secretary . . . determines necessary to ensure expeditious construction of the barriers and roads under this section." ("Waiver Legislation"). Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note ("Section 102").

No. 19], requesting the Court to enjoin Defendants from constructing any fencing, walls, or other physical barriers along the United States-Mexico border in Texas, New Mexico, Arizona, and California, unless and until DHS complies with the laws waived by Chertoff on April 3, 2008.[2] On August 29, 2008, the Court entered its "Memorandum Opinion and Order Denying Plaintiffs' Application for Preliminary Injunction" ("Memorandum Opinion and Order") [Rec. No. 28].

II. MOTIONS TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted."[3]

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[2] On April 3, 2008, Chertoff exercised his authority, pursuant to Section 102, and published two notices in the Federal Register waiving "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" various federal statutes explicitly waived "with respect to the construction of roads and fixed and mobile barriers" along the United States-Mexican border. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19077 ("Hidalgo County Waiver") & 19078 ("Multi-state Waiver") (Apr. 8, 2008). Specifically, Chertoff waived twenty-seven laws to facilitate construction of barriers and roads along twenty-two miles of the Texas-Mexico border in Hidalgo County, Texas. *Id* at 73 Fed. Reg. 19077. Chertoff also waived thirty-seven laws to facilitate construction of barriers and roads along 470 miles of the United States-Mexico border in Texas, New Mexico, Arizona, and California. *Id* at 73 Fed. Reg. 19078.

[3] FED. R. CIV. P. 12(b)(6).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact.[4]

Nonetheless, a "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."[5] "The task of the court in ruling on a Rule 12(b)(6) motion 'is merely to assess the legal feasibility of the complaint, [and] not to assay the weight of the evidence which might be offered in support thereof.'"[6] Thus, when considering a Rule 12(b)(6) motion, a court must accept all well-pleaded facts as true, and construe all reasonable inferences in the light most favorable to the plaintiffs.[7] Although the

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[4] *Vanderbrook v. Unitrin Preferred Ins. Co. (In re Katrina Canal Breaches Litigation)*, 495 F.3d 191, 205 & 205 n.10 (5th Cir. 2007) (internal quotations and citations omitted) (citing *Bell Atl. Corp. v. Twombly*, __ U.S. __, __, 127 S. Ct. 1955, 1974 (2007)) (noting the Supreme Court's clarification of the minimum standard of adequate pleading governing a complaint's survival).

[5] *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

[6] *Cooper v. Parsky,* 140 F.3d 433, 440 (2d Cir. 1998) (quoting *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984)).

[7] *See Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir. 1996); *Capital Parks, Inc. v. Se. Adver. & Sales Sys., Inc.*, 30 F.3d 627, 629 (5th Cir. 1994); *see also Jolly v. Klein,* 923 F. Supp. 931, 942 (S.D. Tex. 1996) ("A motion to dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim tests only the formal sufficiency of the statements of the claims for relief. It is not a procedure for resolving contests about the facts or the merits of the case.").

Court must accept well-pleaded allegations in a complaint as true, it does not afford conclusory allegations similar treatment.[8]

III. DISCUSSION

In their Complaint, Plaintiffs raise three constitutional challenges to the Waiver Legislation: (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment. In their Motion to Dismiss, Defendants argue "[P]laintiffs' [C]omplaint should be dismissed with prejudice [because] the Waiver Legislation is clearly constitutional and there are no relevant factual disputes that would prevent dismissal."[9]

The Court previously analyzed Plaintiffs' constitutional challenges at length in the Memorandum Opinion and Order it entered on August 29, 2008, in which it denied Plaintiffs' Application for Preliminary Injunction. First, the Court found the Waiver Legislation did not violate the Nondelegation Clause because "Congress constitutionally delegated its authority in the Waiver Legislation [when] it provided the Secretary with an intelligible principle to guide his discretionary waiver of legal requirements to expeditiously complete construction of physical barriers and roads at the nation's borders."[10] The

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[8] *See Kaiser*, 677 F.2d at 1050 (citing *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)).

[9] Defs.' Mot. to Dismiss at 24.

[10] Mem. Op. & Order Den. Pls.' Applic. Prelim. Inj. at 9.

Court also found "the Supreme Court does not require judicial review to satisfy the intelligible principle standard."[11]

Second, the Court found the Waiver Legislation did not violate the Presentment Clause because "unlike the laws at issue in *Clinton* [*v. City of New York*],[12] which no longer had any "legal force or effect" whatsoever once the President applied the line-item veto, the laws waived pursuant to Section 102 still overwhelmingly remain in effect outside the limited scope of the Secretary's waiver."[13] Finally, the Court found the Waiver Legislation did not violate the Tenth Amendment because "Section 1 02 clearly manifests congressional intent to preempt state and local laws which would interfere with Congress's objective to expeditiously construct the border fence. Moreover, even if Section 102 does not contain explicit preemptive language, the Waiver Legislation still preempts these laws, pursuant to the Supreme Court's explanation of conflict preemption."[14]

The Court finds its Memorandum Opinion and Order is dispositive of Plaintiffs' constitutional claims for purposes of Defendants' Motion to Dismiss. Therefore, in construing all reasonable inferences in the light most favorable to Plaintiffs, the Court concludes Plaintiffs' Complaint should be dis-

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[11] *Id.* at 11.

[12] 524 U.S. 417 (1998). In Clinton, the Supreme Court struck down the Line Item Veto Act of 1996 because "[i]n both legal and practical effect," it authorized the President to amend "Acts of Congress by repealing a portion of each" in violation of the Presentment Clause. Id. at 438.

[13] Mem. Op. & Order Den. Pls.' Applic. Prelim. Inj. at 16.

[14] *Id.* at 22.

missed for failure to state a claim upon which relief can be granted.

IV. CONCLUSION AND ORDERS

For the reasons discussed, the Court concludes it should, and hereby does, **GRANT** Defendants' Motion to Dismiss [Rec. No. 21]. The Court **DISMISSES** the above-captioned cause **WITH PREJUDICE**.

SO ORDERED.

SIGNED this **11th** day of **September, 2008**.

[signed]
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE