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Jenny Neeley<sup>1</sup>

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# **\*139 OVER THE LINE: HOMELAND SECURITY’S UNCONSTITUTIONAL AUTHORITY TO WAIVE ALL LEGAL REQUIREMENTS FOR THE PURPOSE OF BUILDING BORDER INFRASTRUCTURE**

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**\*141I. INTRODUCTION**

***A. Waiver Authority Under IIRIRA Section 102(c)***

In April 2008, then-Secretary of the Department of Homeland Security (DHS) Michael Chertoff waived thirty-six federal and state laws across approximately 470 miles of the southern borderlands of the United States, an area spanning across all four border states, in order “to ensure the expeditious construction” of border barriers and roads.<sup>1</sup> In addition to waiving over two dozen environmental protection and cultural preservation laws, the Secretary also waived in their entirety laws protecting public health and safety, including the Federal Safe Drinking Water Act,<sup>2</sup> the Solid Waste Disposal Act,<sup>3</sup> and the Noise Control Act.<sup>4</sup> The Secretary also waived in its entirety the Administrative Procedure Act (APA), a law governing the actions of all federal agencies, providing transparency and oversight of agency decision-making.<sup>5</sup>

The Secretary made the unilateral decision to waive these laws for border barrier construction under the authority provided by § 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA): “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.”<sup>6</sup>

Aside from the April 2008 multi-state waiver and another waiver issued the same day for a twenty-two mile project in Hidalgo County, Texas, then-Secretary Chertoff used the waiver authority in § 102(c) three additional times. In September 2005, he waived eight laws for a fourteen-mile fencing project in San Diego;<sup>7</sup> in January 2007 he waived seven laws for thirty-seven miles of fencing along the Barry M. Goldwater military range in southwestern Arizona;<sup>8</sup> and in April 2007, he waived twenty-one laws for almost five miles of barriers through the San Pedro Riparian National Conservation Area in southeastern Arizona.<sup>9</sup> The waiver for the San Pedro project was the only one issued in response to a court challenge.<sup>10</sup> The others were apparently issued preemptively, as no specific reason for \*142 the waivers was given in the Federal Register notices, other than to “ensure expeditious construction of ... barriers and roads” along the U.S.-Mexico border.<sup>11</sup> To date, the waiver has been applied to almost 550 miles of barriers and roads along the southwest border.

***B. Court Challenges to Section 102(c)***

Except for the January 2007 waiver, each time the § 102(c) waiver authority has been used, the section’s constitutionality has been challenged. Each challenge has alleged an unconstitutional delegation of congressional authority to an executive agency,

specifically arguing that Congress failed to include an intelligible principle in their delegation;<sup>12</sup> that Congress unlawfully granted an executive official the authority to “partially repeal” laws;<sup>13</sup> and that the waiver unconstitutionally restricts judicial review.<sup>14</sup>

Each challenge has failed, and none has been appealed, because the waiver strips federal appellate courts of jurisdiction.<sup>15</sup> Regarding judicial review, the statute reads:

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 ....

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.<sup>16</sup>

These restrictions on judicial review have prevented an appeal of district court decisions regarding the waiver’s constitutionality, and thus far the U.S. Supreme Court has denied the petitions for certiorari requesting review of this waiver.

The purpose of § 102(c) is to “ensure expeditious construction of the barriers and roads” along U.S. borders in an effort to curb illegal immigration, and it has been used to expedite construction along almost 550 miles of the southwest border. However, there is growing evidence that the use of this waiver has resulted in severe consequences across the southwest borderlands. After outlining a brief history of U.S. border policy and § 102(c), this Paper will examine those consequences, particularly for borderland communities and natural resources.

This Paper will then demonstrate why § 102(c) likely violates the U.S. Constitution. First, the waiver bypasses constitutional requirements for enacting and repealing laws, \*143 violating the Constitution’s Presentment Clause. Second, the scope of authority delegated to the DHS Secretary is unprecedented, and likely falls outside the broad limits of the non-delegation doctrine. However, the scope of authority remains unexamined by district courts, which have thus far failed to recognize the waiver’s unprecedented nature and have repeatedly mischaracterized its breadth. They have found the delegation constitutional primarily because of incorrect assumptions about the waiver’s geographic scope or the types of laws that can be waived. With no opportunity to appeal, these faulty decisions have been used as precedent in subsequent findings that the waiver is constitutional, and these decisions continue to stand despite clear error in the court’s opinions.

The waiver is also unconstitutional under the non-delegation doctrine because it precludes any judicial review of whether the delegated authority is being used in conformance with the intentions of Congress, or whether that authority has been exceeded. This type of review is intricately tied to the intelligible principle requirement and is a critical factor of the otherwise broad non-delegation doctrine. This is because, without the availability of this type of review, there is no way to ensure that the intelligible principle is being followed. Appellate courts have repeatedly found this type of judicial review essential in finding delegations constitutional, despite the expansive parameters of the doctrine as it exists today.

Aside from its unconstitutionality, the policy interests behind this delegation justify neither the breadth of this waiver nor its absence of accountability. The purpose of the waiver is to expedite construction of barriers along the U.S.-Mexico border in order to curb illegal immigration, yet there is little evidence to show this policy underlying the waiver provides any benefit to these efforts. In fact, most available evidence points to the conclusion that building border barriers does little to stop illegal immigration, despite its high price tag. In light of the troubling evidence regarding the costs and benefits of the policy the waiver is meant to further, as well as the severe consequences to both communities and the environment that are directly related to the use of the waiver, it is clear that § 102(c) is bad policy. It is also unconstitutional, and immediate action should be taken to repeal the waiver authority, either through U.S. Supreme Court review or immediate legislative action, before more damage is done.

## II. HISTORY OF U.S. BORDER POLICY AND SECTION 102(C)

The waiver authority found in § 102(c) is one piece of a broader policy that relies heavily on the installation of tactical infrastructure to secure U.S. borders from illegal entry outside designated ports-of-entry. Starting with fencing construction along California's border in 1990 and the implementation of Operation Gatekeeper in 1994, the United States has been constructing fences and other infrastructure along the U.S.-Mexico border for twenty years.<sup>17</sup>

**\*144** The IIRIRA, passed in 1996, continued this policy by giving broad authority to the U.S. Attorney General to construct border barriers, including granting the authority to waive the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) to the extent necessary to ensure expeditious construction of a specific, fourteen-mile fencing project in the San Diego sector.<sup>18</sup> In 2005, this waiver authority was expanded by the REAL ID Act to encompass not just the San Diego fence, but all barriers and roads that may be constructed pursuant to IIRIRA.<sup>19</sup> It was also expanded to apply not just to NEPA and the ESA, but to “all legal requirements [the DHS] Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads[.]”<sup>20</sup> This expansion came in the form of an amendment attached to must-pass appropriation measures funding the Iraq war and Indonesian tsunami relief, and it was passed without any consideration by the appropriate committees.<sup>21</sup>

In 2006, the IIRIRA was amended again with the passage of the Secure Fence Act (SFA), and now mandates that fences be built “along not less than 700 miles of the southwest border where fencing will be most practical and effective ....”<sup>22</sup> As of June 2009, DHS had completed 633 miles of fencing mandated by the SFA.<sup>23</sup> To accomplish this, the DHS Secretary waived federal and state laws along almost 550 miles of U.S. border, applying the § 102(c) waiver to almost all of the fencing built under the SFA.

### III. IMPACTS OF SECTION 102(C) TO COMMUNITIES AND THE ENVIRONMENT

The use of the waiver authority has already had significant consequences across the southwest border region, severely impacting communities along the entire stretch of that region, and inflicting irreversible damage upon some of the most unique and valuable natural areas on the continent.

#### *A. Impacts to Communities*

##### *i. Communities in Texas*

Texas has numerous population centers lining its southern border, and many of these communities are directly impacted by border infrastructure, particularly the 700 miles of new fencing mandated under the SFA. Many communities strongly opposed this **\*145** additional border infrastructure, including the Texas Border Coalition, which describes itself as a “collective voice of border mayors, county judges, and communities on issues that affect border region quality of life,” representing “more than 2.1 million people from Brownsville to El Paso.”<sup>24</sup> The Texas Border Coalition has long opposed the current border policy's disproportionate emphasis on fencing and infrastructure, and has strongly urged DHS to focus on securing ports-of-entry rather than the areas between ports of entry.<sup>25</sup> The Coalition describes the Congressional mandate for more fencing as an “ineffective, anachronistic strategy that has not kept pace with developments at the border or with the risk assessments made by the criminal cartels.”<sup>26</sup>

Section 102(c) has made the situation for communities along the border even worse because, by allowing the agency to skirt all legal requirements, it destroys any incentive for DHS to consult with communities. Public officials from several Texas border cities have publicly complained that DHS ignored their concerns while fast-tracking fence construction, and have accused the agency of refusing to consult with local officials prior to construction.<sup>27</sup> Arizona public officials voiced similar complaints after the April 2008 waiver, accusing the agency of not consulting with any state or local officials, and not alerting Arizona's two border-area congressional representatives that the multi-state waiver was being considered, despite the fact that it applied to hundreds of miles of Arizona's border.<sup>28</sup>

In addition to ignoring community concerns and refusing to consult with those directly affected by the border wall authorized under § 102(c), DHS has also been repeatedly criticized for its seemingly arbitrary decisions regarding the placement of fencing.<sup>29</sup> One of the most egregious examples was the initial plan to construct a portion of the fence across the University of Texas-Brownsville campus, literally splitting the campus in two and leaving **\*146** 180 acres of it south of the fence.<sup>30</sup> The

plan was later dropped, but only after the University filed a federal lawsuit and DHS agreed to a settlement.<sup>31</sup> However, most landowners have not been as successful as the university when trying to prevent DHS from taking their land; as of June 2008, over 400 south Texas landowners have had property condemned for fence construction, with little recourse available due to the waiver's severe limitations on appellate review.<sup>32</sup>

## *ii. Tohono O'odham Nation*

The Tohono O'odham Nation's ancestral lands stretch across the Sonoran Desert from central Arizona, south into Mexico, and west to the Gulf of California.<sup>33</sup> Today, the Nation's lands are bisected by the U.S.-Mexico border, and many O'odham communities lie south of the international line.<sup>34</sup> Enrolled members of the Nation who live in these communities rely on the freedom to cross into the United States in order to receive necessary tribal benefits such as education and health care, as well as to visit family members and practice their customs and religion.<sup>35</sup>

The infrastructure buildup to the east and west of the Nation over the last fifteen years has funneled an overwhelming amount of border traffic onto Tohono O'odham lands, causing severe consequences across the community.<sup>36</sup> Growing restrictions on crossing the border, including new infrastructure and increasing U.S. Border Patrol (USBP) presence, have had severe consequences on the Nation's 1500 members who live south of the international line, as well as many others who routinely travel back and forth. Crossing has become increasingly difficult, and tribal members have been wrongly detained and deported to Mexico "on countless occasions."<sup>37</sup> In an interview with *The New York Times*, Tribal Chairman Norris stated that even he had been stopped and questioned by border agents. Commenting on the heavy USBP presence, Chairman Norris said, "Quite frankly, the people are getting sick of it."<sup>38</sup>

**\*147** The tribe has long been an outspoken opponent against wall construction across its land.<sup>39</sup> Shortly after the multi-state waiver was invoked in April 2008, Chairman Norris testified to Congress about the severe impacts of § 102(c) and the resulting barrier construction on the Nation, describing past waivers for projects across ancestral lands that resulted in damage to archeological sites, as well as instances of human remains being dug up and run over by construction equipment.<sup>40</sup> Norris further testified that the multi-state waiver, which included fifty-five of the Nation's seventy miles of border, was invoked without any consultation with the tribe, despite its historic cooperation with DHS on border enforcement.<sup>41</sup> Norris expressed his extreme disappointment with "DHS's inflexible desire to move forward within an unreasonable timeframe," which "unnecessarily damaged the environment and cultural resources," and concluded by stating that the agency's failure to consult with the tribe prior to waiving laws across their land had "undermined [their] partnership."<sup>42</sup>

## ***B. Impacts to the Environment***

Commonly depicted as barren wastelands, the southern border of the United States crosses some of the most unique and diverse landscapes on the planet. Arizona's border is a showcase of desert parks and federally protected lands, containing national forests, wilderness areas, monuments, and wildlife refuges stretching from the Colorado River to the New Mexico border.<sup>43</sup> The Sky Island region encompasses the southeastern corner of Arizona, southwestern New Mexico and the northern portion of Mexico, and is habitat for an exceptionally rich diversity of plants and animals. The region, so named because of its towering mountains rising out of the surrounding desert "sea," is located at the confluence of four distinct ecosystems--the Sonoran Desert, the Chihuahuan Desert, the Rocky Mountains and the Sierra Madre Occidental--and is considered one of the most diverse ecosystems on the planet.<sup>44</sup> The region is home to an array of species found nowhere else, **\*148** and even serves as the northernmost range for tropical species such as the jaguar and the thick-billed parrot.<sup>45</sup>

Once remote and tranquil, the natural areas lining Arizona's border are now inundated with border activity, a direct result of fencing elsewhere that funnels border traffic into the region's most remote lands, tearing apart the landscape.<sup>46</sup> After the § 102(c) waiver authority was expanded, many groups concerned with the environmental impacts of current U.S. border policy feared the situation would only become worse, considering that DHS is no longer required to assess potential impacts prior to constructing fencing and other infrastructure.<sup>47</sup>

Evidence that border infrastructure authorized under § 102(c) is directly harming the environment is mostly anecdotal thus far, due to its relatively recent implementation. However, several of the projects that proceeded under the authority of the waiver have confirmed many people's fears about what would happen if DHS was given unfettered discretion to waive

environmental laws along the border. These projects, which include fencing within the Organ Pipe Cactus National Monument in Arizona and within California's Otay Mountains, illustrate the dangers of the broad authority granted under § 102(c).

### *i. Organ Pipe Cactus National Monument*

On July 12, 2008, Organ Pipe Cactus National Monument (OPCNM) received almost two inches of rain in about an hour and a half, during a rainfall event considered "typical of monsoon thunderstorms" that occur regularly in the desert monument during the summer.<sup>48</sup> The flood event provided the National Park Service (NPS) an opportunity to measure the impacts of a new 5.2-mile pedestrian fence constructed that spring along the monument's border with Mexico.<sup>49</sup> Prior to construction, NPS had expressed their concerns regarding potential impacts the fence may have on the monument, specifically impacts on the area's natural drainage systems, which flow from north to south across the international boundary during flood events.<sup>50</sup> NPS worried that the fence would impede floodwaters and cause the drainages to become blocked with debris, which in turn would force floodwater to \*149 flow laterally along the fence, resulting in damage both upstream and downstream on both sides of the border.<sup>51</sup>

In response to these concerns, DHS assured NPS that "[t]he pedestrian fence would not impede the natural flow of water and would allow proper conveyance of floodwater ... eliminat[ing] the potential to cause backwater flooding on either side of the U.S.-Mexico border."<sup>52</sup> However, in a report issued after the July 12th rainfall event, NPS confirmed that their predictions had been confirmed, and the fence had indeed "impeded the natural flow of water and did not properly convey floodwaters."<sup>53</sup> Despite DHS's promises, the fence failed to meet hydrologic performance standards set by the U.S. Army Corps of Engineers, as well as DHS's own standards, which they had set in an environmental assessment completed for the project prior to the 2008 multi-state waiver.<sup>54</sup> After invoking that waiver, which included the Lukeville fence project, DHS did not comply with the scientifically-based standards they had originally agreed to follow.

### *ii. Otay Mountain Wilderness*

In fall 2009 DHS completed construction on a 3.6-mile stretch of 18-foot tall steel fencing across the Otay Mountains east of San Diego.<sup>55</sup> Included as a project under the April 2008 multi-state waiver, the construction proceeded despite objections from conservationists, who worried about impacts to Otay Mountain Wilderness, where a portion of the project was sited.<sup>56</sup> In order to cut roads and install the fence across the rough mountain terrain, hillsides had to be bulldozed and over 530,000 cubic yards of rock had to be removed, resulting in significant landscape alteration.<sup>57</sup>

After the waiver was signed, the massive earthmoving project commenced, and resulted in barren hillsides devoid of water-slowing vegetation, widely expected to cause significant problems with erosion in the area.<sup>58</sup> In addition, construction activities and the resulting dust have caused problems for the rare Tecate cypress in the Otay Mountain Wilderness, and for the imperiled Thorne's hairstreak butterfly, which relies on the Tecate cypress as a host plant.<sup>59</sup> Some scientists working in the area believe that if DHS had \*150 followed federal requirements instead of waiving environmental laws, the impacts could have been mitigated, but the agency refused to follow the advice of experts.<sup>60</sup>

Because of the massive landscape alteration it required, the fencing project across the Otay Mountains was the priciest stretch of fencing ever built on the U.S.-Mexico border, costing \$57.7 million, or \$16 million per mile, four times as much as similar fencing.<sup>61</sup> Many have questioned the need for fencing across such rugged terrain, and in 2006 a Border Patrol spokesman dismissed any need for a fence in this exact area, stating "you simply don't need a fence. It's such harsh terrain it's difficult to walk, let alone drive ... there's no reason to disrupt the land when the land itself is a physical barrier."<sup>62</sup>

## **IV. SECTION 102(C) IS UNCONSTITUTIONAL.**

The waiver authority found in § 102(c) likely violates the Constitution in several ways. First, by allowing an executive official to waive, in their entirety, all legal requirements in order to construct border infrastructure, the waiver bypasses constitutional requirements for enacting and repealing laws. Second, this waiver violates the non-delegation doctrine because of the unprecedented scope of the authority it delegates to a single executive official. However, the waiver's scope remains unexamined. The district court has repeatedly mischaracterized its sweeping nature, finding the waiver constitutional

primarily based on incorrect assumptions that the waiver is somehow limited either geographically or in the types of laws that can be waived. Third, the waiver violates the non-delegation doctrine because it bars judicial review of whether the congressional authority delegated is being used in conformance with the wishes of Congress, or whether that authority is being exceeded. This type of judicial review is a critical factor in determining whether a delegation is constitutional.

### ***A. Section 102(c) Violates the Presentment Clause***

As compellingly argued by plaintiffs in *Defenders of Wildlife v. Chertoff*, § 102(c) violates the Constitution's Presentment Clause because, by delegating to the Secretary the unilateral authority to void any law, the provision bypasses the constitutional requirements for enacting and repealing laws.<sup>63</sup> Plaintiffs relied on *Clinton v. City of New York*, where the U.S. Supreme Court held that President Clinton violated the Presentment Clause when he exercised his authority under the Line Item Veto Act to cancel provisions of the Balanced Budget Act and the Taxpayer Relief Act.<sup>64</sup> The Court found that the cancellation of a provision and the repeal of the provision are the same, because both prevent the decision "from having legal force or effect."<sup>65</sup> Thus, the Court held that the president's cancellation \*151 of provisions under the Line Item Veto Act violated the Constitution because "repeal of statutes, no less than enactment, must conform with Art[icle] I."<sup>66</sup>

Relying on *Clinton*, plaintiffs in *Defenders of Wildlife* argued that the power to waive any otherwise applicable law in order to expedite border wall construction "is unmistakably the power partially to repeal or amend such laws ...."<sup>67</sup> The U.S. District Court rejected this argument, finding that the waiver authority does not amount to a partial repeal because, according to the court, the waiver does not render the laws waived without "legal force or effect under any circumstance."<sup>68</sup>

However, the U.S. Supreme Court in *Clinton* did not say that the action must render a provision without legal force or effect "under any circumstance" in order to amount to a repeal. In fact, the Court in *Clinton* noted that it was irrelevant if the cancelled items at issue continued to have budgetary effects elsewhere, because the cancellation had rendered those provisions "entirely inoperative as to appellees."<sup>69</sup> The Court made clear that "the cancellation of one section of a statute may be the functional equivalent of a partial repeal even if a portion of the section is not canceled."<sup>70</sup>

Despite the clear similarities of the waiver authority in § 102(c) and the authority to cancel provisions under the Line Item Veto Act, the court in *Defenders of Wildlife* dismissed the comparison between the waiver and a "partial repeal," instead, pointing out that the laws are only rendered inapplicable in the areas specified by the waivers, and still apply elsewhere.<sup>71</sup> The court went on to cite "myriad examples of waiver provisions in federal statutes [where plaintiffs] have not questioned Congress's ability to confer the waiver power," implying that the § 102(c) waiver power deserves similar deference.<sup>72</sup>

However, as pointed out by plaintiffs in their petition of certiorari to the Supreme Court, every one of the delegations cited by the court has a considerably narrower scope than the waiver authority here.<sup>73</sup> For example, the Intelligence Authorization Act only allows the Secretary of Defense to waive laws "pertaining to the management and administration of Federal agencies" in connection with certain commercial activities.<sup>74</sup> Similarly, the waiver authority in the Toxic Substances Control Act is restricted to only provisions within the Act itself, and requires the Administrator to "maintain a written record of the basis upon which such waiver was granted."<sup>75</sup> The waiver authority in the No Child Left Behind Act only allows the waiver of a "regulation, policy, or procedure promulgated by that department \*152 [responsible for providing education and related services provided to Indian students]."<sup>76</sup> The Trade Sanctions Reform and Export Enhancement Act waiver is also limited in scope, permitting the President to only waive restrictions on aid to Iran, Libya, North Korea, and Sudan for national security or humanitarian reasons.<sup>77</sup> In sum, all of the statutes cited by the district court either specify the statutes to be waived, require some sort of reporting requirements from the executive, or provide for judicial review in order to ensure that the authority delegated is not exceeded. § 102(c) contains no such limitations.

### ***B. Section 102(c) Violates the Non-Delegation Doctrine***

#### ***i. Overview of the Non-Delegation Doctrine***

The principle of separation of powers is at the foundation of a tripartite government.<sup>78</sup> It was thought that "if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."<sup>79</sup> Separation of powers was never considered a way to

promote efficiency within the government, but was instead looked to as a “bulwark against tyranny.”<sup>80</sup>

The non-delegation doctrine is one element of the separation of powers principle, prohibiting the delegation of legislative power to executive agencies.<sup>81</sup> The Constitution requires that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States,” and authorizes Congress “to make all Laws which shall be necessary and proper for carrying into Execution” its general powers.<sup>82</sup> The Constitution prohibits Congress from “abdicat[ing] or ... transfer[ing] to others the essential legislative functions with which it is thus vested.”<sup>83</sup>

The U.S. Supreme Court has interpreted the non-delegation doctrine broadly over the years, allowing Congress to delegate rulemaking authority to agencies in order to promote government efficiency.<sup>84</sup> However, the Court recently warned that “[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional \*153 principles of separation of powers and checks and balances.”<sup>85</sup> To prevent agencies from having unbridled discretion, the Supreme Court requires that when delegating authority, Congress must include an intelligible principle “to which the person or body authorized to act is directed to conform.”<sup>86</sup>

The intelligible principle requirement first emerged in *J.W. Hampton, Jr. & Co. v. United States*, where the Court found that “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized ... is directed to conform, such legislative action is not a forbidden delegation of legislative power.”<sup>87</sup> The purpose of requiring an intelligible principle is to establish “a principle of accountability under which compatibility with the legislative design may be ascertained not only by Congress but by the courts and the public.”<sup>88</sup>

The Court has twice found Congressional delegations unconstitutional. Both were challenges to the National Industrial Recovery Act of 1933 (NIRA), a key piece of Franklin D. Roosevelt’s New Deal legislation. In *Panama Refining Co. v. Ryan*, the Court struck down a congressional delegation to the President allowing him to prohibit interstate and foreign commerce of petroleum that had been produced in violation of state law.<sup>89</sup> The Court found the delegation unconstitutional because it provided no limits to the President’s discretion when deciding under what circumstances or conditions such commerce would be prohibited, nor did it require him to make any factual determinations or to outline the conditions that called for prohibition.<sup>90</sup>

In *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down a congressional delegation to the President that allowed him to approve “codes of fair competition” for a trade or industry upon application by an association related to that trade or industry, which, once approved, would be binding.<sup>91</sup> In its decision, the Court stated that the broad scope of the delegation allowed “the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry,” something that Congress cannot do.<sup>92</sup> In light of the unreasonably broad scope of the delegation, and the absence of limits on the President’s discretion, the Court held that “[s]uch a sweeping delegation of legislative power finds no support ....”<sup>93</sup>

\*154 *Panama Refining* and *A.L.A. Schechter* remain good law today and continue to be cited as such in the Court’s most current non-delegation cases.<sup>94</sup> For example, in *Whitman v. American Trucking Association*, the Court was asked to review rules promulgated by the Environmental Protection Agency (EPA), pursuant to the Clean Air Act. While finding that the authority of the EPA to set air quality standards under the Act was a constitutional delegation, the Court nevertheless acknowledged that the “nondelegation precedents” set the “outer limits” of the doctrine, specifically citing *Panama Refining* and *A.L.A. Schechter*.<sup>95</sup>

In both of these non-delegation precedents, the Court struck down delegations because the authority delegated was impermissibly broad, and because the delegation allowed the executive to exercise unfettered discretion, with no mechanism by which that official could be held accountable for exceeding the authority delegated by Congress. For these same reasons, the delegation found in § 102(c) is also unconstitutional. The waiver authority in § 102(c) is the broadest Congressional delegation ever made, and it precludes any review of claims that the authority asserted under the waiver oversteps the limits intended by Congress.

## ***ii. The Waiver’s Unprecedented Scope Exceeds the Outer Limits of the Non-Delegation Doctrine, But Remains Unexamined By the Courts***

**a. The unprecedented scope of Section 102(c) exceeds the ‘outer limits’ of the nondelegation doctrine.**

As the Court found in *Panama Refining* and *A.L.A. Schechter*, the nondelegation doctrine imposes a limit on the permissible scope of a congressional delegation. The Court in *Whitman*, the most recent Supreme Court ruling on the non-delegation doctrine, implicitly recognized that there are “outer limits” set by nondelegation precedents.<sup>96</sup> However, the scope of the congressional delegation in § 102(c) has no discernible limit. It is in fact considered the most sweeping delegation ever made by Congress,<sup>97</sup> granting a single executive official the authority to waive virtually any law, anywhere “within the vicinity of the border,” as long as that official unilaterally decides it is “necessary” for construction of border infrastructure.<sup>98</sup>

Prior to its passage, attorneys at the U.S. Congressional Research Service (CRS) conducted an extensive review of federal law and found that “the breadth of the waiver authority granted by § 102 ... does not appear to be common in federal law searched.”<sup>99</sup> \*155 Waiver provisions generally contain qualifying language that (1) exempts an action from other requirements found in the same act; (2) specifies which laws are to be waived; or (3) waives a group of similar laws.<sup>100</sup> There are no such limitations on this waiver. Here, the DHS Secretary has the authority to waive an untold number of laws or legal requirements, including those outside the statute containing the waiver, and those outside the agency’s scope of authority or area of expertise, with no requirement to consult with other agencies or experts. The Secretary has this authority despite the fact that the need to defer to experts is often a primary reason for congressional delegations of power to federal agencies.<sup>101</sup>

The waiver also contains no requirement to provide even a cursory explanation of decisions made under the waiver authority. “Generally, Congress’s ‘intelligible principle’ includes a congressional statement of policy in the area, standards to govern the delegation of authority, and a requirement for findings made by the agency in its exercise of authority.”<sup>102</sup> In addition, the APA mandates not only that the agency make written findings describing the regulation’s basis and purpose, but also mandates publication of, and comment upon, the proposed rule.<sup>103</sup> Here, the APA and all associated legal requirements were waived every time the § 102(c) waiver authority was used.<sup>104</sup>

The original purpose of the § 102(c) waiver was to allow the DHS Secretary to bypass two environmental laws in order to build a specific, fourteen-mile fence. However, former Secretary Chertoff repeatedly used the unprecedented authority in the amended waiver to bypass not only a multitude of environmental laws, but also cultural preservation laws, laws meant to protect public health and safety, and laws meant to protect procedural due process and public transparency. As the April 2008 multi-state waiver demonstrated, there is simply nothing in the language of the waiver to prevent the Secretary from waiving any conceivable law, as long as the Secretary alone believes it is necessary.

**\*156 b. The true scope of the delegation remains unexamined by the courts.**

As discussed previously, the district court in *Defenders of Wildlife* ignored the true scope of the waiver authority when examining the constitutionality of § 102(c), analogizing it to other waivers that are in fact considerably narrower. Dismissing arguments surrounding its unprecedented scope, the court posited that “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.”<sup>105</sup> However, an impermissibly broad scope is exactly why the delegations in *A.L.A. Schechter* and *Panama Refining Co.* were struck down, and, as the Court only recently noted in *Whitman*, the “outer limits” of the permissible scope of congressional delegations established by those two cases is still good law today.<sup>106</sup> Considering this waiver’s unprecedented scope, it must be examined with that limit in mind.

Unfortunately, the U.S. district courts, the only courts that have reviewed the constitutionality of the waiver authority, have failed at every opportunity to take a closer look at the waiver’s reach. Instead, these courts have repeatedly and mistakenly inferred that the authority is either limited in its geographic scope or in the types of laws that can be waived, neither of which is the case. The first court decision addressing the constitutionality of the REAL ID waiver was expressly based on the demonstrably false assumption that the amended waiver authority only applied to the fourteen-mile construction project in the San Diego area specified in the original IIRIRA § 102(c) waiver.<sup>107</sup> The court’s assumption grew out of the fact that the original waiver’s exclusive geographic scope was the fourteen-mile fencing project in San Diego, however, by the time *Sierra Club v. Ashcroft* was heard, the waiver had been amended to include the entire international border. Basing its decision on this significant misunderstanding, the court soundly rejected plaintiff’s arguments that the waiver was unconstitutionally broad, repeatedly asserting that the delegation remained narrow specifically because it only applied to the San Diego project:

The ‘barriers and roads’ alluded to are the same in both articulations of Section 102(c): the Triple Fence project

located along the U.S-Mexico border in the vicinity of San Diego ... Congress simply broadened the scope of the waiver authority of the preexisting delegation to “all laws,” but again only for the narrow purpose of expeditious completion of the Triple Fence authorized by the IIRIRA.<sup>108</sup>

Unfortunately, the judges who have reviewed the waiver challenges subsequent to the *Sierra Club* ruling relied heavily on the reasoning of the court in *Sierra Club*, the first challenge to the waiver.<sup>109</sup> In *County of El Paso*, the U.S. District Court for the Western \*157 District of Texas goes so far as to specifically reference the *Sierra Club* court’s mistaken comparison between the original waiver and the amended waiver:

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.<sup>110</sup>

Similarly, the court in *Defenders of Wildlife* also cited *Sierra Club* as a basis for its finding that the waiver authority is narrow, noting that even if the waiver authority is unprecedented because it allows the Secretary to waive an unlimited number of laws, “the Secretary may only exercise the waiver authority for the ‘narrow purpose’ prescribed by Congress.”<sup>111</sup> The court in *Defenders of Wildlife* did note the *Sierra Club* court’s mistake regarding the waiver’s scope, but insisted that the court’s focus in *Sierra Club* was on the “necessity” standard, not the belief that the geographic scope was limited.<sup>112</sup> However, this is not supported by the numerous references made by the *Sierra Club* court regarding the “narrow” geographic scope of the waiver.<sup>113</sup>

Since its decision in *Sierra Club*, the District Court has compounded its mistake and enshrined it in precedent, severely distorting the legitimacy of the very limited review that this waiver has been subjected to. As discussed below, the decisions of the U.S. District Court on this matter are not subject to appellate review, leaving the district court’s flawed rulings as the final word. Because of this unreviewable error, no court has ever considered the actual scope of the authority delegated under § 102(c).

### ***iii. The Waiver’s Restrictions on Judicial Review Violate the Non-Delegation Doctrine.***

#### **a. The restrictions on judicial review make it impossible to determine whether the will of Congress is being obeyed.**

The waiver authority in § 102(c) grants the U.S. district courts exclusive jurisdiction to hear claims arising from the Secretary’s decisions, and limits review to only those causes or claims “alleging a violation of the Constitution of the United States.”<sup>114</sup> The provision strips federal appellate courts of jurisdiction, leaving no path for appeals of the district courts’ opinions other than “upon petition for a writ of certiorari to the Supreme Court of the United States.”<sup>115</sup> Generally, it is constitutional for Congress to limit the jurisdiction of courts to hear certain cases, as all courts other than the Supreme Court exist at the pleasure of the legislative branch.<sup>116</sup> However, because Supreme Court review is discretionary, parties \*158 are left with no right to appeal the district court decisions. In light of the fact that only about four percent of the petitions for certiorari filed with the Supreme Court are granted,<sup>117</sup> the waiver’s language virtually ensures that the waiver authority will avoid any meaningful review.

The most troublesome aspect of the waiver’s restrictions on judicial review is the bar on review of all claims other than those made on constitutional grounds, including claims that the Secretary has overstepped the authority delegated by Congress. Barring judicial review of these claims violates the non-delegation doctrine because, even if congressional will is expressed in the requisite intelligible principle, without review it is “impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed.”<sup>118</sup>

#### **b. Availability of judicial review to ensure that the delegated authority is not exceeded is a critical factor in determining whether a delegation is constitutional.**

Despite the broad nature of the non-delegation doctrine, it has never been disputed that a congressional delegation must at least contain an intelligible principle, the purpose of which is to guide the executive’s use of the delegated authority, and

provide a congressional standard against which the executive can be held accountable, “not only by Congress but by the courts and the public.”<sup>119</sup> A court is justified in striking down a delegation if “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.”<sup>120</sup>

The Court has acknowledged that the complexities of implementing policy may at times require broad delegations, acknowledging that Congress cannot address every detail in every statute.<sup>121</sup> But, the Court has repeatedly noted that an opportunity to review the agency’s use of the delegated authority is critical in order to ensure that the boundaries of that authority--however broad they may be--are not breached:

Necessity ... fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.<sup>122</sup>

**\*159** In *Touby v. United States*, the Court was asked to review the constitutionality of the congressional delegation contained in the 1984 amendments to the Controlled Substances Act, which granted the Attorney General authority to temporarily schedule substances “necessary to avoid an imminent hazard to the public safety.”<sup>123</sup> The amendment also precluded judicial review, a point directly challenged by the petitioners.<sup>124</sup> The Supreme Court did not disagree that judicial review is necessary; instead, they rejected petitioners’ argument on the grounds that the statute did not in fact preclude judicial review, it merely suspended it only as long as the scheduling order was temporary (up to eighteen months).<sup>125</sup> The Court also noted that anyone facing criminal charges could challenge the temporary scheduling order as part of his or her defense.<sup>126</sup> Finding that these two avenues for review were “sufficient to permit a court to ‘ascertain whether the will of Congress has been obeyed,’” the Court ruled that opportunities for additional review were not required.<sup>127</sup> In his concurring opinion, Justice Marshall reinforced the importance of judicial review by stating that it “perfects a delegated lawmaking scheme by assuring that the exercise of such power remains within statutory bounds.”<sup>128</sup>

When upholding broad congressional delegations, federal appellate courts regularly point to the availability of judicial review as a factor--if not the deciding factor--in their decision to find broad delegations constitutional, recognizing that without the opportunity for review, there is no way to determine whether the delegated authority has been exceeded. For example, both the Second and Fifth Circuit Courts of Appeals have held that the delegation in the Comprehensive Drug Abuse Prevention and Control Act (allowing the Attorney General to add or reschedule substances according to the Act’s restrictions) is constitutionally valid because the procedures outlined by Congress, “coupled with the availability of judicial review ... assure that the delegatee will not act capriciously or arbitrarily.”<sup>129</sup>

Reviewing a provision found in the same statute at issue in *Touby*, the Eighth Circuit noted in its opinion that judicial review “is a factor weighing in favor of upholding a statute against a non-delegation challenge.”<sup>130</sup> The Court found the provision constitutional because it “imposes similar, if not greater, restraints than those imposed by [the provision at issue] in *Touby*.”<sup>131</sup> The Tenth Circuit considered the exact same provision at issue in *Touby* and initially found it to be unconstitutional precisely because of the lack of judicial review; **\*160** however, after finding that the statute contained sufficient opportunities for review, the Supreme Court vacated and remanded the Tenth Circuit’s decision.<sup>132</sup>

In contrast, the Ninth Circuit Court of Appeals found that precluding judicial review of decisions related to the Secretary of Commerce’s delegated authority to control exports does not violate the non-delegation doctrine.<sup>133</sup> However, the court’s ruling rested in part on the express assumption that “claims that the Secretary acted in excess of his delegated authority under the [statute] are ... reviewable.”<sup>134</sup> Because this type of review is available, as well as review of constitutionally-based claims, the court held that “the EAA’s preclusion of judicial review does not violate the non-delegation doctrine.”<sup>135</sup> The court did not directly answer the question of whether it is unconstitutional to bar review of claims that the authority delegated by Congress has been exceeded, and in fact, made an effort to limit their holding’s precedential value.<sup>136</sup>

The waiver found in the statute authorizing construction of the Trans-Alaska pipeline<sup>137</sup> is considered the most analogous to the § 102(c) waiver because of its similar broad scope and significant limitations on judicial review.<sup>138</sup> Like § 102(c), the statute authorizes the Secretary of Interior to waive all procedural requirements related to the pipeline’s construction, and it also precludes most judicial review.<sup>139</sup> However, unlike § 102(c), the statute expressly allows not only for judicial review of constitutional claims, but also for review of claims that “the action is beyond the scope of authority conferred by this

chapter.”<sup>140</sup>

The authority at issue in *Webster v. Doe* is somewhat analogous to this waiver authority in that it provides the director of the Central Intelligence Agency the power to “terminate the employment of any employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States,” and it precludes judicial review of such decisions.<sup>141</sup> However, the Court in *Webster* did not consider the provision under the non-delegation doctrine; instead it was analyzed under § 702(a)(2) of the APA, which precludes judicial review “where agency action is committed to the discretion of the agency by law.”<sup>142</sup> The Court held that judicial review was precluded under this provision of the APA, which “applies where a statute is drawn in such broad terms that in a given case \*161 there is no law to apply, and the court would have no meaningful standard against which to judge the agency’s exercise of discretion.”<sup>143</sup>

*Webster* is one of only a few cases where APA § 702(a)(2) has been found applicable. In cases where there is “no law to apply,” there is essentially no intelligible principle, and this would seem to violate the non-delegation doctrine. However, a review of Supreme Court and appellate decisions regarding APA § 702(a)(2) found that the provision only applied in cases where not only is there “no law to apply,” but also where the action falls within the inherent independent authority of the executive branch.<sup>144</sup> For example, the Court in *Webster* not only found “no law to apply,” but also explicitly cited the overall structure of the statute and the inherent authority of the director as strong indications that the “agency action is committed to the discretion of the agency by law.”<sup>145</sup>

In contrast, the non-delegation doctrine and its intelligible principle requirement applies to the § 102(c) waiver, as repeatedly recognized by the district court in its review of the waiver’s constitutionality, indicating that there is, or should be, law to apply in this case.<sup>146</sup> And, as mentioned above, the scope of the waiver authority extends far outside the DHS Secretary’s expertise or inherent, independent authority. Thus, unlike the authority at issue in *Webster*, APA § 702(a)(2) does not apply here.

The purpose of requiring an intelligible principle is to provide a Congressional standard against which the executive can be held accountable, “not only by Congress but by the courts and the public.”<sup>147</sup> Here, claims that the Secretary has acted in excess of the delegated authority are completely barred, and the executive can be held accountable by no one. It is precisely this kind of review that is required under the non-delegation doctrine in order to “ascertain whether the will of Congress has been obeyed.”<sup>148</sup>

## V. POLICY INTERESTS CANNOT JUSTIFY THE SWEEPING AUTHORITY OF SECTION 102(C).

### A. The Waiver Contains No Check on the Secretary’s Authority and Bars Accountability.

The political branches of government generally have broad authority over the country’s foreign policy, immigration policy and national security.<sup>149</sup> However, this authority is not absolute; congressional delegations that allow executive officials to waive laws in the furtherance of these interests typically retain some check on the executive’s power as a way to ensure that congressional will is being followed. For example, under the Toxic Substances Control Act, the EPA Administrator can waive provisions of the Act if the waiver is deemed \*162 “necessary in the interest of national defense.”<sup>150</sup> However, the Administrator cannot act unilaterally. He or she must request the waiver, and the final determination is made by the President.<sup>151</sup> Similarly, the Trans-Alaska pipeline waiver, considered most analogous to the § 102(c) waiver authority in part because of its similar limitations on reviewing decisions to waive laws in “the national interest,” still expressly provides for review of claims that the Secretary has exceeded the authority delegated by Congress.<sup>152</sup>

Even the authority at issue in *Webster* is more limited than the waiver authority in § 102(c). As explained earlier, the waiver authority in *Webster* is generally not analogous to non-delegation precedents, but it is similar to this waiver in that the authority granted is grounded in “national security interests,” and that authority is similarly shielded from review. However, the authority at issue in *Webster*, to terminate CIA employees if it is deemed in the interest of national security, is extremely narrow, merely “commit[ting] individual employee discharges to the Director’s discretion.”<sup>153</sup> In contrast, the waiver here gives the Secretary the authority to waive an untold number of laws, impacting untold agencies and administrative processes far outside the scope of the Secretary’s authority. Thus, even without judicial review, the authority in *Webster* is checked by virtue of the narrowness of the executive official’s actual discretion.

Unlike similar provisions, all checks and balances have been removed from § 102(c). The Secretary has unfettered discretion when deciding which laws are “necessary” to waive, and the Secretary’s decisions are unilateral.<sup>154</sup> The Secretary is not even required to provide a cursory explanation for the decisions made under the waiver authority, unlike most other similar grants of waiver authority.<sup>155</sup> Under § 102(c), the executive official to whom congressional authority is being delegated is the same official who unilaterally decides the scope of that authority. In other words, the Secretary of Homeland Security has been delegated legislative, judicial and executive authority under § 102(c). As James Madison stated, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>156</sup>

### ***B. The Purpose of the Waiver Does Not Justify Its Sweeping Delegation of Authority and Lack of Accountability.***

This complete absence of accountability here is not only unusual, but also it is unjustified by the policy this waiver is meant to further. The purpose of the waiver is to “ensure expeditious construction of the barriers and roads” along U.S. borders in an effort to curb illegal immigration. The waiver is specifically in place to further a border policy that **\*163** emphasizes buildup of tactical infrastructure along U.S. borders, a policy that has been in place along the southern border for twenty years. However, the costs of this policy seem to outweigh its benefits, calling into question the wisdom of a waiver that grants the Secretary such sweeping authority to continue to implement it completely free from oversight or accountability.

The question of the utility of the waiver is particularly pressing because of the staggering economic costs of the policy. A September 2009 report by the U.S. Government Accountability Office (GAO) estimated that the total costs for border infrastructure currently installed and planned through fiscal year 2011, including deployment, operations and maintenance costs for twenty years, will be roughly \$6.5 billion.<sup>157</sup>

But not all border infrastructure costs the same. For example, the GAO reported that the average cost of border fencing constructed in 2007, which was mostly constructed by government agencies, was approximately \$2.8 million per mile.<sup>158</sup> However, the fencing constructed in 2008, mostly by private contractors, was approximately \$5.1 million per mile, or almost double.<sup>159</sup> In addition, the placement of fencing can affect costs as well. For example, the fencing project across the Otay Mountains near San Diego cost the agency \$16 million a mile, considered the most expensive stretch of fencing ever built along the border.<sup>160</sup>

Despite the costs, installing barriers along the southern border has not had a discernable impact on the effort to curb illegal immigration, the overarching goal of the waiver and the specific border policy it is meant to further. In fact, available evidence generally shows that border walls and accompanying infrastructure contribute little to the efforts to address illegal immigration. One reason for this is that roughly 50% of the undocumented immigrants present in the United States do not enter the country by illegally crossing the border; they instead enter with valid visas through legal ports of entry, and overstay.<sup>161</sup>

For those who do cross into the United States outside legal ports-of-entry, evidence is scant that border fencing does anything other than shift where they cross. U.S. Border Patrol (USBP) apprehension statistics show that over the twelve-year period from 1992 to 2004, apprehensions in the San Diego sector decreased by 76 percent, while apprehensions in the Tucson Sector increased by 591%.<sup>162</sup> Notably, the overall number of apprehensions remained virtually unchanged, with approximately 1.2 million migrants apprehended in 1992, and 1.2 million migrants apprehended in 2004.<sup>163</sup> There has been a recent drop in **\*164** apprehensions, but many, including the current DHS Secretary, consider this primarily a result of the worsening economic conditions in the United States.<sup>164</sup>

The USBP acknowledges that, at best, walls merely slow down migrants. In a 2008 interview, USBP Spokesman Mike Scioli characterized the fencing as “a speed bump in the desert.”<sup>165</sup> The ineffectiveness of this “speed bump” is on full display in a video posted on the internet in January of 2011, which documents two young women scaling a section of the border fence in just eighteen seconds.<sup>166</sup> The USBP has also acknowledged the significant funneling impact of fencing, stating that channeling traffic into unfenced communities and natural areas is done on purpose, as part of the agency’s overall strategy.<sup>167</sup>

Border fencing is also routinely breached, with 3363 breaches recorded as of May 2009, which impacts its effectiveness.<sup>168</sup> In addition, there is a notable rise in the number of tunnels discovered under fencing after it is constructed, prompting the

Congressional Research Service in their March 2009 report on border security to “reason that even if border fencing is constructed over a significant portion of the land border, the incidences of fence breaches and underground tunnels would increase.”<sup>169</sup>

As the available evidence suggests, the benefits of border fencing and its contribution to efforts to curb illegal immigration is highly questionable. However, it is impossible to determine whether infrastructure contributes to the goal of preventing illegal entry or not because DHS has done nothing to measure its effectiveness. The September 2009 GAO study found that DHS has no evaluation mechanisms in place to measure the impact that tactical infrastructure has on efforts to control the border; the only current performance measure is number of miles constructed.<sup>170</sup> Without any meaningful evaluation measures, CBP has no way of knowing whether the infrastructure is working, whether it may \*165 have been more effectively deployed elsewhere, or whether construction of more tactical infrastructure is even appropriate.<sup>171</sup>

The costs and benefits of current U.S. border policy that emphasizes tactical buildup are only indirectly related to the use of the waiver authority under § 102(c). However, the specific purpose behind the waiver authority is to further this policy by ensuring “the expeditious construction of the barriers and roads” along U.S. borders. In light of its staggering costs and questionable benefits, the buildup of tactical infrastructure along the border as a way to curb illegal immigration seems like bad policy, calling into question the wisdom of a waiver that grants the Secretary unilateral authority to continue to implement such a policy, free from any oversight or accountability.

## VI. CONCLUSION

The waiver authority in § 102(c) is directly contrary to public policy. It delegates to a single executive official the sweeping authority to unilaterally and with unfettered discretion waive all legal requirements across up to 6000 miles of U.S. international border, potentially affecting millions of people who live in the U.S. borderlands, with no available recourse. That a single, unelected official with such sweeping power could be shielded from all accountability is simply abhorrent to the idea of separation of powers, an essential part of democracy.

For the reasons outlined above, the § 102(c) waiver authority should be repealed immediately. Because of the severe limitations on judicial review, it is unlikely that the courts will ever properly review this provision. In light of this, Congress should take immediate action to correct the mistake they made when the waiver authority was granted, by repealing the waiver authority in § 102(c) and reestablishing the rule of law along the border.

### Footnotes

<sup>a1</sup> Jenny Neeley is a 2010 graduate of the James E. Rogers College of Law and also holds a Masters of Public Administration degree with a concentration in natural resources policy from the University of Arizona. She is a licensed attorney and currently works as the conservation policy director for Sky Island Alliance, a non-profit organization based in Tucson.

<sup>1</sup> Notice of Determination for Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 73 Fed. Reg. 19078, 19079-80 (Apr. 8, 2008).

<sup>2</sup> 42 U.S.C. § 300f (2006).

<sup>3</sup> 42 U.S.C.A. § 6901 (West 2010).

<sup>4</sup> 42 U.S.C.A. § 4901 (West 2010).

<sup>5</sup> 5 U.S.C. § 551 (1946).

- 6 8 U.S.C. § 1103 note 102(c) (2006).
- 7 Determination Pursuant to Section 102 of IIRIRA as Amended by Section 102 of the REAL ID Act of 2005, 70 Fed. Reg. 55622 (Sept. 22, 2005).
- 8 Determination Pursuant to Section 102 of IIRIRA as Amended by Section 102 of the REAL ID Act of 2005, 72 Fed. Reg. 2535 (Jan. 19, 2007).
- 9 Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act, 72 Fed. Reg. 60870, 60871 (Oct. 26, 2007).
- 10 *See id.*
- 11 *See* Notice of Determination for Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 73 Fed. Reg. 19077, 19078 (Apr. 8, 2008); 72 Fed. Reg. 2535 (Jan. 19, 2007); 70 Fed. Reg. 55622, 55623 (Sept. 22, 2005).
- 12 *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244, \*16 (Dec. 13, 2005).
- 13 *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124 (D.D.C. 2007).
- 14 *Cnty. of El Paso v. Chertoff*, 2008 WL 4372693, at \*4 (W.D. Tex. Aug. 29, 2008).
- 15 8 U.S.C. § 1103, note 102(c)(2) (2006).
- 16 *Id.*
- 17 Congressional Research Service (CRS), *Border Security: Barriers Along the U.S. International Border*, RL 33659, 2-3 (Mar. 16, 2009), available at <http://www.fas.org/sgp/crs/homsec/RL33659.pdf> [hereinafter *CRS Border Security Report*].
- 18 *Id.* at 4.
- 19 REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 302, 306.
- 20 *Id.*
- 21 Tana Sanchez, *Waiving Good-bye to Environmental Laws Along the Arizona Borderlands*, 16 MO. ENVTL. L. & POL'Y REV. 281, 289 (2009); Andrea C. Sancho, Note, *Environmental Concerns Created by Current U.S. Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security under the REAL ID Act of 2005*, 16 S.E. ENVTL. L.J. 421, 426 (2008).
- 22 Consolidated Appropriations Act, Pub. L. No. 110-161, Div. E, Title V, § 564(a), 121 Stat. 1844, 2090 (2007) (codified as amended at 8 U.S.C. § 1103 note 102(b) (2006)).
- 23 U.S. Gov't Accountability Office (GAO), *Secure Border Initiative: Technology Deployment Delays Persist and the Impact of Border Fencing Has Not Been Assessed*, REPORT TO CONG. REQUESTERS, 20 (2009), <http://>

[www.gao.gov/new.items/d09896.pdf](http://www.gao.gov/new.items/d09896.pdf) [hereinafter *GAO Border Technology Report*].

- 24 Texas Border Coalition, *Who We Are*, [http:// www.texasbordercoalition.org/Who\\_We\\_Are.html](http://www.texasbordercoalition.org/Who_We_Are.html) (last accessed Apr. 21, 2010).
- 25 Texas Border Coalition, *Resources, White Paper on Border Security* (Nov. 13, 2009), [http://www.texasbordercoalition.org/Resources\\_files/Texas%20Border%CC20Coalition%CC20White%CC20Paper%CC20on%CC20Border%CECURITY.PDF](http://www.texasbordercoalition.org/Resources_files/Texas%20Border%CC20Coalition%CC20White%CC20Paper%CC20on%CC20Border%CECURITY.PDF).
- 26 *Id.*
- 27 *See, e.g.*, Michelle Mittelstadt, *Texans Seek Delay on Border Fence*, HOUSTON CHRON., May 30, 2007, available at <http://www.chron.com/disp/story.mpl/politics/4848747.html> (“[Brownsville Mayor Eddie] Treviño, [Eagle Pass Mayor Chad] Foster, Hidalgo County Judge J.D. Salinas and Laredo Mayor Raul Salinas complain[ed that] Homeland Security officials are moving behind the scenes to finish fence construction plans despite promises to consult with local authorities first.”).
- 28 Dick Kamp, *Two of Arizona’s Members of Congress Condemn Use of Border Waivers*, DOUGLAS DISPATCH (Apr. 2, 2008), available at [http:// www.douglasdispatch.com/articles/2008/04/02/news/doc47f3ea3adb157769155876.txt](http://www.douglasdispatch.com/articles/2008/04/02/news/doc47f3ea3adb157769155876.txt).
- 29 *See, e.g.*, Kevin Sieff, *Breaks in Border Fence Have Residents Suspicious of DHS’s Plans*, BROWNSVILLE HERALD, June 22, 2008, [http:// www.brownsvilleherald.com/news/border-87851-fence-pedro.html](http://www.brownsvilleherald.com/news/border-87851-fence-pedro.html).
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- 31 Lynn Brezosky, *Pact Lifts Threat of Border Fence From UT-Brownsville*, SAN ANTONIO EXPRESS-NEWS, July 31, 2008, available at [http:// www.chron.com/disp/story.mpl/metropolitan/5917962.html](http://www.chron.com/disp/story.mpl/metropolitan/5917962.html).
- 32 McLemore, *supra* note 30.
- 33 Tohono O’odham Nation, *History and Culture*, Official Web Site of the Tohono O’odham Nation, [http://www.tonation-nsn.gov/history\\_culture.aspx](http://www.tonation-nsn.gov/history_culture.aspx) (last visited Apr. 17, 2010).
- 34 *Id.*
- 35 *Id.*
- 36 Erik Eckholm, *War Without Borders: In Drug War, Tribe Feels Invaded by Both Sides*, N.Y. TIMES (Jan. 24, 2010), <http://www.nytimes.com/2010/01/25/us/25border.html?scp=1&sq=tohono&st=cse>.
- 37 Tohono O’odham Nation, *supra* note 33.
- 38 Eckholm, *supra* note 36.
- 39 *See* John Dougherty, *One Nation, Under Fire*, HIGH COUNTRY NEWS (Feb. 19, 2007), available at <http://www.hcn.org/issues/340/16834> (“[T]ribal leadership opposes the Secure Fence Act of 2006 ... the fence, tribal officials say, would prevent the free flow of O’odham across their traditional lands, as well as restrict migration of animals.”).

40 *Walls and Waivers: Expedited Construction of the Southern Border Wall and Collateral Impacts to Communities and the Environment: Joint Oversight Hearing Before the Subcomm. on Fisheries, Wildlife & Oceans, and Subcomm. on Nat'l. Parks, Forests & Pub. Lands., of the H. Comm. on Nat'l. Res., 110th Cong. 1-2 (2008), available at <http://resourcescommittee.house.gov/uploadedfiles/norristestimony04.28.08.pdf> (written testimony of Ned Norris Jr., Chairman, Tohono O'odham Nation).*

41 *Id.* at 4.

42 *Id.* at 2.

43 Brian P. Segee & Jenny L. Neeley, *On the Line: The Impacts of Immigration Policy on Wildlife and Habitat in the Arizona Borderlands*, DEFENDERS OF WILDLIFE 12-13 (2006), [http://www.defenders.org/resources/publications/programs\\_and\\_policy/habitat\\_conservation/federal\\_lands/on\\_the\\_line\\_report.pdf](http://www.defenders.org/resources/publications/programs_and_policy/habitat_conservation/federal_lands/on_the_line_report.pdf).

44 *See* Sky Island Alliance, *Explore Our Sky Islands*, <http://www.skyislandalliance.org/explore.htm> (last visited Apr. 21, 2010).

45 Segee & Neeley, *supra* note 43, at 9-10.

46 *Id.* at 13-14.

47 *See, e.g.*, Christopher Sherman, *Conservationists Warn of Border Fence's Impact*, Associated Press (Aug. 22, 2008), <http://www.dallasnews.com/sharedcontent/APStories/stories/D92NGT502.html> (“Michael Degnan, a Sierra Club representative ... said the border wall was a ‘very compelling example’ of what can happen when rigorous scientific study of potential impacts is not required.”).

48 National Park Service, *Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, Ariz., on Drainage Systems and Infrastructure, Organ Pipe Cactus Natl. Monument, Ariz.*, 1, 4 (Aug. 2008), available at [http://www.nps.gov/orpi/naturescience/upload/FloodReport\\_July2008\\_final.pdf](http://www.nps.gov/orpi/naturescience/upload/FloodReport_July2008_final.pdf).

49 *Id.* at 1.

50 *Id.* at 6-7.

51 *Id.* at 7.

52 *Id.* at 9 (citations omitted).

53 *Id.*

54 *Border Blunder: Security Fence Causes Flooding*, ASSOCIATED PRESS, Aug. 25, 2008, available at <http://www.msnbc.msn.com/id/26396487>.

55 Richard Marosi, *\$57.7 Million Fence Added to an Already Grueling Illegal Immigration Route*, L.A. TIMES (Feb. 10, 2010), <http://articles.latimes.com/2010/feb/15/local/la-me-fence15-2010feb15>.

56 *Id.*

57 *Id.*

58 Rob Davis, *A Barren Promise at the Border*, VOICEOFSANDIEGO.COM,  
[http://www.voiceofsandiego.org/environment/article\\_13330282-1245-5e49-bd68-5a10237c9f44.html](http://www.voiceofsandiego.org/environment/article_13330282-1245-5e49-bd68-5a10237c9f44.html) (last updated Mar. 1, 2010).

59 *Id.*

60 *Id.*

61 *Id.*

62 Marosi, *supra* note 55.

63 527 F. Supp. 2d 119, 124 (D.D.C. 2007).

64 Clinton v. City of New York, 524 U.S. 417 (1998).

65 *Id.* at 438.

66 *Id.* at 438 (quoting INS v. Chadha, 462 U.S. 919, 954 (1983)).

67 527 F. Supp. 2d at 124.

68 *Id.*

69 Clinton v. N.Y.C., 524 U.S. 417, 441 (1998).

70 *Id.*

71 527 F. Supp. 2d at 124.

72 *Id.* at 125.

73 *See id.*; Petition for Writ of Certiorari at 23, Defenders of Wildlife, 554 U.S. at 918 (No. 07-1180).

74 10 U.S.C. § 433 (2006).

75 15 U.S.C. § 2621 (2006).

76 20 U.S.C. § 7426(e) (2006).

77 22 U.S.C. § 7207(a)(3) (2006).

78 *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

79 *United States v. Brown*, 381 U.S. 437, 443 (1965).

80 *Id.*

81 *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

82 U.S. CONST. art I, §§ 1, 8, cl. 18.

83 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

84 *See* *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the Federal Sentencing Reform Act which delegated broad authority to establish sentencing guidelines for federal crimes); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212 (1989) (upholding delegation allowing an agency to establish a pricing structure including “user fees”); *Fed. Power Comm’n. v. Hope Nat. Gas Co.*, 320 U.S. 591, 611 (1944) (upholding delegation to the Federal Power Commission to set “just and reasonable” gas rates under the Natural Gas Act); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation authorizing the Federal Communications Commission to promulgate radio regulations in the “public interest”).

85 *Fed. Comm’n Comm’n. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1823 (2009).

86 *Whitman*, 531 U.S. at 458.

87 276 U.S. 394, 409 (1928).

88 *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (emphasis added).

89 293 U.S. 388, 430 (1935).

90 *Id.* at 418 (“The Congress left the matter to the President without standard or rule, to be dealt with as he pleased”).

91 295 U.S. 495, 529 (1935).

92 *Id.* at 537-38.

93 *Id.* at 539.

94 *See* *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001).

95 *Id.*

96 *Id.*

<sup>97</sup> See *CRS Border Security Report*, *supra* note 18, at 6-7 (“The scope of this waiver authority is substantial ... Congress commonly waives preexisting laws, but the new waiver provision uses language and a combination of terms not typically seen in law.”); Memorandum from Stephen R. Viña and Todd. B Tatelman, Legislative Attorneys, U.S. Cong. Record Serv., § 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders (Feb. 9, 2005) (on file with the author).

<sup>98</sup> 8 U.S.C. § 1103 note 102(c) (2006).

<sup>99</sup> Memorandum from Stephen R. Viña and Todd. B Tatelman, *supra* note 99.

<sup>100</sup> *CRS Border Security Report*, *supra* note 17, at 7.

<sup>101</sup> See *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (finding that the task of “[d]eveloping proportionate penalties for hundreds of different crimes ... is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”).

<sup>102</sup> *United States v. Garfinkel*, 29 F.3d 451, 457 (8th Cir. 1994) (citation omitted) (emphasis added). See also *United States v. Pastor*, 557 F.2d 930, 940 (2d Cir. 1977) (“Similarly [to the statute providing opportunities for judicial review], weighing in favor of a delegation is mandated compliance with the APA’s requirements for notice and comment”).

<sup>103</sup> 5 U.S.C. § 553(b)-(c) (2006); *Garfinkel*, 29 F.3d at 459.

<sup>104</sup> See Notice of Determination for Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 73 Fed. Reg. 19077, 19078-80 (Apr. 8, 2008); Determination Pursuant to Sec. 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Sec. 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60870 (Oct. 26, 2007); Potential Revision of Mandatory Ballast Water Management Reporting Requirements, 72 Fed. Reg. 2535, 2536 (Jan. 19, 2007); Determination Pursuant to Sec. 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Sec. 102 of the REAL ID Act of 2005, 70 Fed. Reg. at 55622-55623 (Sept. 22, 2005).

<sup>105</sup> *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 128 (D.D.C. 2007).

<sup>106</sup> *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001).

<sup>107</sup> *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244, 21 (Dec. 13, 2005) (“Those boundaries [of the delegated authority] are waiver of laws and regulations which the DHS Secretary determines impede completion of this particular 14-mile California border Triple Fence authorized by IIRIRA ....”) (emphasis added).

<sup>108</sup> *Id.* at 19-20 (emphasis added).

<sup>109</sup> See *Defenders of Wildlife*, 527 F. Supp. 2d at 127-28; *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 at 63-64 (D.D.C. 2008).

<sup>110</sup> *Cnty. of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693, at \*3 (W.D. Tex. Aug. 29, 2008).

<sup>111</sup> *Defenders of Wildlife*, 527 F. Supp. 2d at 127-28.

112 *Id.* at 128 n. 7.

113 See *Sierra Club*, 2005 U.S. Dist. LEXIS 44244 at 19, 20-21.

114 8 U.S.C. § 1103 note 102(c)(2)(A) (2006).

115 8 U.S.C. § 1103 note 102(c)(2)(C).

116 U.S. Const. art. III, § 1.

117 Peter J. Messitte, *The Writ of Certiorari: Deciding Which Cases to Review*, EJOURNAL U.S.A., Apr. 2005, at 18, 19, available at <http://www.america.gov/media/pdf/ejs/0405.pdf>.

118 *Yakus v. United States*, 321 U.S. 414, 426 (1944).

119 *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (emphasis added).

120 *Yakus*, 321 U.S. at 426 (emphasis added).

121 *Am. Power & Light Co. v. Sec. Exch. Comm'n*, 329 U.S. 90, 105 (1946) (emphasis added).

122 *Id.* (emphasis added).

123 500 U.S. 160, 160 (1991).

124 *Id.* at 168.

125 *Id.*

126 *Id.*

127 *Id.* at 168-69 (citation omitted).

128 *Id.* at 170 (Marshall, J., concurring) (citation omitted).

129 *United States v. Pastor*, 557 F.2d 930, 941 (2d Cir. 1977). *See also* *United States v. Gordon*, 580 F.2d 827, 839 (5th Cir. 1978).

130 *Garfinkel*, 29 F.3d at 459 (citations omitted).

131 *Id.* at 458.

132 *United States v. Widdowson*, 916 F.2d 587, 590 (10th Cir. 1990) (holding that a lack of safeguards on the Attorney General's temporary scheduling power may violate the nondelegation doctrine), *vacated*, 502 U.S. 801 (1991).

133 United States v. Bozarov, 974 F.2d 1037, 1045 (9th Cir. 1992) (holding that precluding the Secretary of Commerce’s delegated authority does not violate the nondelegation doctrine).

134 *Id.* at 1044-45.

135 *Id.* at 1045.

136 *Id.* at 1045 n.6.

137 43 U.S.C.A. § 1652 (West 2010).

138 *CRS Border Security Report*, *supra* note 18, at 7; Memorandum from Stephen R. Viña and Todd B. Tatelman, *supra* note 99.

139 43 U.S.C.A. § 1652(c)-(d) (West 2010).

140 *Id.*

141 486 U.S. 592 (1988).

142 5 U.S.C.A. § 702(a)(2) (West 2010).

143 *Webster*, 486 U.S. at 592.

144 Viktoria Lovei, Comment, *Revealing the True Definition of APA § 701(A)(2) by Reconciling “No Law to Apply” with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1067 (2006).

145 *Webster*, 486 U.S. at 600-01.

146 *See, e.g., Defenders of Wildlife*, 527 F. Supp. 2d at 127-28.

147 *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (emphasis added).

148 *Yakus v. United States*, 321 U.S. 414, 426 (1944).

149 *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

150 15 U.S.C. § 2621 (2006).

151 *Id.*

152 43 U.S.C.A. § 1652(a), (d) (West 2010).

153 *Webster*, 486 U.S. at 601.

154 *See* 8 U.S.C. § 1103 note 102(c) (2006).

155 *See, e.g., Garfinkel*, 29 F.3d at 457.

156 Alexander Hamilton, Jay & Madison, *The Federalist No. 47*, 373-74 (John C. Hamilton ed., 1880).

157 *GAO Border Technology Report*, *supra* note 23, at 23.

158 *CRS Border Security Report*, *supra* note 17, at 27.

159 *Id.*

160 Marosi, *supra* note 55.

161 *Fact Sheet: Modes of Entry for the Unauthorized Migrant Population*, PEW HISPANIC CTR. (2006), <http://pewhispanic.org/files/factsheets/19.pdf>.

162 *CRS Border Security Report*, *supra* note 17, at 14.

163 *Id.* at 15.

164 *See* Mike Levine, *Napolitano: As Recession Deepens, Illegal Immigration from Mexico Declines*, FOXNEWS.COM (Feb. 9, 2009), <http://www.foxnews.com/politics/2009/02/09/napolitano-recession-deepens-illegal-immigration-mexico-declines/>. *See also* Mike Swift, *Illegal Immigration from Mexico at Lowest Level in Decades; Recession Blamed*, MIAMI HERALD (July 23, 2009), available at <http://www.schwartzreport.net/showarticle.php?id=6881>.

165 Sean Holstege, *Longer, Taller Fencing Gives Illegal Migrants a Higher Hurdle*, ARIZ. REPUBLIC, Nov. 13, 2008, <http://www.azcentral.com/arizonarepublic/news/articles/2008/11/13/20081113borderclimb1113.html>.

166 Jorge Rivas, *Two Young Girls Climb U.S./Mexico Border Fence in 18 Seconds*, Color Lines: News for Action (Jan. 4, 2011, 1:45 PM), [http://colorlines.com/archives/2011/01/two\\_young\\_girls\\_climb\\_usmexico\\_border\\_fence\\_in\\_18\\_seconds.html](http://colorlines.com/archives/2011/01/two_young_girls_climb_usmexico_border_fence_in_18_seconds.html).

167 *See* Sieff, *supra* note 29 (“Officials at DHS have made it clear that unfenced stretches of land will become a focal point for undocumented immigrants and illegal activity. ‘These segments will serve as funnels, allowing us to concentrate our resources, like agents, technology and equipment, in these areas,’ said Barry Morrissey, a DHS spokesman. He added that the funneling phenomenon has been well documented in Yuma and Tucson, where the fence has already been constructed”).

168 *GAO Border Technology Report*, *supra* note 23, at 23.

169 *CRS Border Security Report*, *supra* note 17, at 26.

170 *GAO Border Technology Report*, *supra* note 23, at 26.

<sup>171</sup> *Id.* at 27-29.