No. _____

In the Supreme Court of the United States

MARKWAYNE MULLIN, ET AL., APPLICANTS

v.

FRIENDS OF THE RUIDOSA CHURCH, ET AL.

APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

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PARTIES TO THE PROCEEDING

Applicants (defendants below) are Markwayne Mullin, in his official capacity as Secretary of Homeland Security; the U.S. Department of Homeland Security; and U.S. Customs and Border Protection.

Respondents (plaintiffs below) are Friends of the Ruidosa Church; Center for Biological Diversity; and Danny William Miller Junior.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

Friends of the Ruidosa Church v. *Mullin*, No. 26-cv-1099 (Oct. 2, 2026)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of Markwayne Mullin, Secretary of Homeland Security, et al., respectfully requests that this Court stay the preliminary injunction issued by the United States District Court for the Western District of Texas (App., *infra*, 202a-203a), pending the timely filing and disposition of a petition for a writ of certiorari in this Court.[1] In addition to a stay, the Solicitor General also respectfully requests that this Court treat this application as a petition for a writ of certiorari, grant the petition, and summarily reverse.

This case involves a baseless injunction that halts a major portion of the construction of the border wall. Decades ago, Congress enacted legislation to make it easier for the Executive Branch to engage in such construction to protect against il-

[1] An appeal to the court of appeals is not available. Under Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as added by the REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 306, the district court's injunction "may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States." See pp. 8, 24, *infra*.

legal entry, and to make it harder for federal judges to block those critical national-security endeavors. Congress specifically granted the Attorney General (and now, the Secretary of Homeland Security) broad authority in the Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to construct border barriers and roads "to deter illegal crossings in areas of high illegal entry," and expressly authorized the Secretary "to waive all legal requirements" that he "determines necessary to ensure expeditious construction of the barriers and roads under this section." Pub. L. No. 104-208, Div. C, Tit. I, § 102(a), 110 Stat. 3009-554; IIRIRA § 102(c)(1), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 102, 119 Stat. 306 (8 U.S.C. 1103 note).[2] To further guard against delays in border-wall construction, Congress stripped federal courts of jurisdiction to hear any non-constitutional challenges to a Secretary's waiver decision. IIRIRA § 102(c)(2)(C).

Pursuant to this authority, the Secretary issued three waivers in 2026 to facilitate expeditious border barrier and road construction in Texas, in the region that U.S. Customs and Border Protection (CBP) has designated the Big Bend Sector. App., *infra*, 2a, 4a, 7a. The Big Bend Sector covers nearly one quarter of the U.S.-Mexico border; these waivers facilitated urgently needed construction of border walls and roads spanning over 300 miles. The Secretary found that the Big Bend Sector "is an area of high illegal entry" requiring additional border barriers, and thus waived the application of a variety of environmental and conservation laws in order to facilitate expeditious border-wall construction in that Sector. *Ibid.* The record amply bears out those concerns: between fiscal years 2021 and 2025, CBP apprehended over

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[2] As discussed below (at 8), Congress amended Section 102(c) of IIRIRA in the REAL ID Act. Unless otherwise indicated, all citations of IIRIRA Section 102(c) or its subprovisions in this application refer to the statute as amended or added by REAL ID Act § 102, 119 Stat. 306 (8 U.S.C. 1103 note).

89,000 aliens attempting to enter here—and those are just the aliens who were detected. App., *infra*, 226a-227a. CBP seized enormous amounts of fentanyl, heroin, methamphetamine, cocaine, and marijuana—and seizures have only grown in fiscal year 2026. *Id.* at 18a, 226a-227a. The Sinaloa and Juarez cartels operate south of this sector across the Mexico border and seek to exploit any vulnerabilities in United States border protection to traffic humans, drugs, and weapons across the border and infiltrate the United States. See *id.* at 227a. Moreover, leaving a 300-plus-mile gap in border defenses would act as a dangerous magnet for cartels and other bad actors to exploit as other routes close off. See *id.* at 226a.

On October 2, 2026, the district court nonetheless issued an unprecedented injunction blocking those waivers and halting associated border-wall construction. The court enjoined the Department of Homeland Security (DHS) from engaging in any border-wall construction in the Big Bend Sector unless and until the government complies with environmental and other laws. The injunction deemed unlawful and stayed the effectiveness of the Secretary's waiver decisions that had enabled that construction. Yet, for nearly two weeks, the district court declined to offer any explanation for that sweeping injunction beyond the unreasoned assertion that respondents were "likely to succeed on the merits of at least one" of their claims, without specifying which one. App., *infra*, 202a; but see Fed. R. Civ. P. 65(d)(1)(A) ("Every order granting an injunction * * * must * * * state the reasons why it issued.").

The court's written opinion, issued October 14, finally divulged some reasoning for its far-reaching shutdown of border-wall construction, see App., *infra*, 204a-217a—but that reasoning is untenable. On the merits, the sole basis for this injunction was the district court's belief that the Secretary lacked "clear congressional authorization," supposedly required by the major-questions doctrine, to issue the waivers.

App., *infra*, 211a. In the court's view, the waivers exceeded the Secretary's authority under IIRIRA to construct barriers and issue waivers for areas of "high illegal entry," because the number of illegal-alien apprehensions in Big Bend is comparatively lower than in other sectors of the border. *Id.* at 214a.

That is exactly the kind of claim that Congress denied district courts jurisdiction to entertain. IIRIRA allows only claims "alleging a violation of the Constitution." § 102(c)(2)(A). But the major-questions doctrine is used to determine "whether Congress in fact meant to confer the power the agency has asserted," *West Virginia* v. *EPA*, 597 U.S. 697, 721 (2022), or whether the agency instead exceeded its statutory authority. As this Court has long held, claims that an agency exceeded its *statutory* authority are not constitutional claims. See *Dalton* v. *Specter*, 511 U.S. 462, 472 (1994).

Beyond that fatal jurisdictional defect, this major-questions claim borders on frivolous. Congress was hardly shy about the major powers it granted the Secretary. IIRIRA addresses head-on whether the Secretary can waive legal requirements such as those found in Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, by expressly authorizing the Secretary to issue waivers like the Big Bend waivers. Nor are the waivers here unusual: the Secretary has issued waivers like these repeatedly for decades. Even the district court acknowledged that Congress granted the Secretary *some* waiver power, see App., *infra*, 212a; the court just effectively rewrote IIRIRA to atextually limit the Secretary's waiver authority to only areas of "*comparative*[*ly*]" high illegal entry, *id.* at 214a (emphasis added).

Compounding its errors, the district court severely misbalanced the equities. In denying a stay pending certiorari, the district court begrudgingly acknowledged

that the government "will experience at least some degree of irreparable harm absent a stay" because the injunction will "continue to prevent[]" the government "from effectuating [its] policies." App., *infra*, 236a. Left unstated, however, is what those harms entail: disruption of the government's ability to secure a quarter of the southern border against cartel incursions, drug trafficking, and illegal entry; creation of a massive vulnerability in border protection that risks funneling illegal entry and trafficking into the unsecured Big Bend Sector; and irreversible delays, costs, and operational harms from halting already-begun construction.

By eliding the government's harms, the court illogically concluded that respondents' aesthetic and recreational harms "outweigh" the government's extraordinarily strong border-security and operational interests in ensuring that 25% of the U.S.-Mexico border has adequate protective barriers. The notion that respondents' interest in "'escap[ing] from modern life'" in the "wild spaces in the Big Bend Sector" and preserving "the spiritual, recreational, and aesthetic value of the area," App., *infra*, 216a, surpasses the United States' paramount interest in preventing a quarter of the border from becoming a magnet for cartel exploitation defies credulity. Indeed, this Court has already rejected a similar misbalancing of the equities when it previously granted a stay of a preliminary injunction that prevented border-wall construction. *Trump* v. *Sierra Club*, 588 U.S. 930 (2019). Though that injunction did not involve Secretarial waivers, the same equities were in play: the government objected to the devastating national-security effects of preventing it from constructing a border wall, while the *Sierra Club* plaintiffs asserted countervailing aesthetic and recreational interests. In granting that stay, the Court necessarily concluded that the equities balanced in the government's favor. So too here, the government's sovereign

interests in protecting the border and effectuating Congress's mandate to engage in border-wall construction to deter illegal entry vastly outweighs respondents' harms.

The end result is a district-court injunction that is both unlawful and unprecedented. Until now, no court has ever sustained a challenge to the substance of a Secretary's Section 102(c) waiver decision. Many judges have rejected such challenges. See *Center for Biological Diversity* v. *McAleenan*, 404 F. Supp. 3d 218 (D.D.C. 2019) (K.B. Jackson, J.), cert. denied, 591 U.S. 1015 (2020). Only this district court has seen fit to trample Congress's clear authorization of waivers to facilitate border-wall construction and its equally clear judicial-review bar by repackaging a statutory-authority argument in constitutional garb. Such judicial usurpation of Congress's commands and the Secretary's authority amply warrants a stay. Given the manifest errors in the district court's decision, this Court should also grant certiorari and summarily reverse the order of the district court granting a preliminary injunction.

STATEMENT

A. Legal Background

DHS is responsible for securing our Nation's borders and detecting and preventing illegal entry into the United States. See 6 U.S.C. 202(1) and (2). In the Secure Fence Act of 2006 (Secure Fence Act), Pub. L. No. 109-367, 120 Stat. 2638, Congress expressly directed DHS to "take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land * * * border[] of the United States." § 2(a) (8 U.S.C. 1701 note). The statute defines "'operational control'" to mean "the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband." § 2(b).

1. Among other means of carrying out that mission, Congress granted DHS broad authority to construct border barriers and roads under Section 102 of IIRIRA. That provision works as follows:

Section 102(a) directs the Secretary 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." IIRIRA § 102(a), 110 Stat. 3009-554 (8 U.S.C. 1103 note).[3]

Section 102(b) directs DHS to construct barriers in specific geographic areas that Congress deemed to be a priority. As originally enacted in 1996, Section 102(b) required the construction of certain "fences" and "roads" in a 14-mile section of the border near San Diego. 110 Stat. 3009-554. Later amendments focused on other areas of illegal entry. In 2006, for example, Congress struck the reference to San Diego and instead required construction of at "least 2 layers of reinforced fencing" and other construction in five locations along the southern border. Secure Fence Act § 3(2)(A), 120 Stat. 2639. Most recently, in December 2007, Congress replaced its 2006 directive with a broader, currently operative mandate to construct "reinforced fencing along not less than 700 miles of the southwest border." Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, Div. E, Tit. V, § 564(a)(2)(B)(ii), 121 Stat. 2090. The Secretary retains the discretion to determine that the use or placement of "fencing, physical barriers, roads, lighting, cameras, and sensors in a particular loca-

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[3] IIRIRA initially tasked the Attorney General with implementing Section 102. See 110 Stat. 3009-554. When Congress created DHS, it transferred the Attorney General's powers and duties to "control and guard the boundaries and borders of the United States against the illegal entry of aliens" to the Secretary. 8 U.S.C. 1103(a)(1) and (5); see 6 U.S.C. 251, 291.

tion" is not "the most appropriate means to achieve and maintain operational control over the international border" at that location. 121 Stat. 2091.

Section 102(c) expressly vests the Secretary with the waiver authority at issue here. Recognizing that compliance with certain laws can slow the pace of federal construction projections, Section 102(c) grants the Secretary "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." IIRIRA § 102(c)(1). As originally enacted in 1996, Section 102(c) authorized the waiver of two statutes' legal requirements: "the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969." 110 Stat. 3009-555. In the REAL ID Act of 2005, Congress expanded the Secretary's waiver authority to include "all legal requirements." § 102, 119 Stat. 306; see H.R. Rep. No. 72, 109th Cong., 1st Sess. 171 (2005) (Conf. Rep.) (explaining intent to extend the Secretary's waiver authority "to any local, state or federal statute, regulation, or administrative order that could impede expeditious construction of border security infrastructure").

Section 102(c) also expressly limits judicial review of such waivers. Congress provided that the federal district courts have "exclusive jurisdiction" over a claim arising from the Secretary's exercise of the waiver authority, but a "claim may only be brought alleging a violation of the Constitution of the United States." IIRIRA § 102(c)(2)(A). Congress added that "[t]he court shall not have jurisdiction to hear any claim not specified in this subparagraph,"—that is, any claim that does not allege a constitutional violation. *Ibid.* Congress further provided that any claim authorized under Section 102(c)(2)(A) must be brought within 60 days after the Secretary's waiver decision, and that any district court decision is reviewable only through a writ of certiorari from this Court. IIRIRA § 102(c)(2)(B) and (C); see p. 1 n.1, *supra*.

2. Since the transfer of waiver authority from the Attorney General to DHS in 2005, the Secretary has repeatedly issued waiver determinations under IIRIRA Section 102(c) to ensure the expeditious construction of barriers and roads along the southern border. See, *e.g.*, 90 Fed. Reg. 23,946 (June 5, 2025); 84 Fed. Reg. 21,798 (May 15, 2019); 82 Fed. Reg. 35,984 (Aug. 2, 2017); 73 Fed. Reg. 19,078 (Apr. 8, 2008); 72 Fed. Reg. 60,870 (Oct. 26, 2007); 70 Fed. Reg. 55,622 (Sept. 22, 2005). CBP informs this Office that there have been over 60 such waiver determinations since 2005. To date, every attempted constitutional challenge to the Secretary's Section 102(c) authority to issue waiver determinations has failed.[4]

B. The Big Bend Waivers

In 2026, the Secretary issued three waivers to expedite barrier construction along the southern border in Texas, in CBP's Big Bend Sector. The Big Bend Sector spans 165,154 square miles and includes 517 miles of riverfront on the Rio Grande separating the United States from Mexico—almost one quarter of the southwest border. U.S. Customs and Border Protection, *Big Bend Sector Texas*, https://perma.cc/CCX2-ZXY2.

Then-Secretary Noem issued the first of these "Big Bend waivers" on February 17, 2026, for a project area in which CBP is planning to construct about 164 miles of border barrier system. 91 Fed. Reg. 7297 (Feb. 17, 2026), as amended by 91 Fed. Reg.

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[4] See, *e.g.*, *Center for Biological Diversity* v. *Mullin*, No. cv-25-365, 2026 WL 836278 (D. Ariz. Mar. 26, 2026); *Center for Biological Diversity* v. *McAleenan*, 404 F. Supp. 3d 218 (D.D.C. 2019) (K.B. Jackson, J.), cert. denied, 591 U.S. 1015 (2020); *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal.), cert. denied sub nom. *Animal Legal Def. Fund* v. *Department of Homeland Sec.*, 586 U.S. 1035 (2018); *County of El Paso* v. *Chertoff*, No. 08-CA-196, 2008 WL 11417030 (W.D. Tex. Sept. 11, 2008), cert. denied, 557 U.S. 915 (2009); *Save Our Heritage Org.* v. *Gonzalez*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 554 U.S. 918 (2008); *Sierra Club* v. *Ashcroft*, No. 04-CV-272, 2005 WL 8153059 (S.D. Cal. Dec. 13, 2005).

40,550 (July 2, 2026) (App., *infra*, 4a-5a); see D. Ct. Doc. 38-1, ¶¶ 18-20 (Aug. 24, 2026) (First Enriquez Decl.). On May 15, 2026, Secretary Mullin issued a second waiver for another project area in which CBP is planning to construct roads and about 17 miles of non-contiguous vehicle barrier system in Big Bend National Park. 91 Fed. Reg. 27,969 (May 15, 2026), as amended by 91 Fed. Reg. 34,831 (June 9, 2026) (App., *infra*, 1a-3a); see First Enriquez Decl. ¶ 9. On July 27, 2026, Secretary Mullin issued a third waiver for a project area in which CBP is planning to construct about 160 miles of barrier system in the Big Bend Sector and the nearby Del Rio Sector. 91 Fed. Reg. 46,939 (July 27, 2026) (App., *infra*, 6a-8a); see First Enriquez Decl. ¶ 22; see also U.S. Customs and Border Protection, *Del Rio Sector Texas*, https://perma.cc/NAM6-8SR4.

In each of these waiver decisions, the Secretary found that the Big Bend Sector "is an area of high illegal entry," and that constructing additional barriers and roads is necessary to fulfill DHS's statutory mandate to achieve operational control of the border. App., *infra*, 2a, 4a, 7a. The waiver decisions explained that between 2021 and 2025, the U.S. Border Patrol "apprehended over 89,000 illegal aliens attempting to enter the United States between border crossings in the Big Bend Sector," and during that same period "seized over 87,574 pounds of marijuana, over 867 pounds of cocaine, over 1,156 pounds of methamphetamine, over 12 pounds of heroin, and over 94 pounds of fentanyl." *Ibid.* The Secretary found that each specified project area within the Big Bend Sector is itself "an area of high illegal entry." *Ibid.* The Secretary thus waived the applicability of "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" specified federal statutes in the covered project areas. *Ibid.*

C. Proceedings Below

In April 2026, respondents—an individual Big Bend river guide, an environmental nonprofit, and a nonprofit organization dedicated to preserving a historic church in Ruidosa, Texas—filed a complaint challenging the lawfulness of the Big Bend waiver decisions. See D. Ct. Doc. 1 (Apr. 16, 2026). Respondents' complaint, as subsequently amended and supplemented, alleges that the waivers violate the major questions doctrine, the nondelegation doctrine, the Take Care Clause, the Fifth Amendment's Due Process Clause, and the Presentment Clause. See D. Ct. Doc. 26, ¶¶ 76-113 (Aug. 11, 2026) (Am. Supp. Compl.). The parties and the court agreed to resolve the case on cross-motions for summary judgment. See D. Ct. Doc. 16 (June 23, 2026). In August 2026, while those motions were pending, respondents moved for a preliminary injunction or temporary restraining order that would enjoin the government from constructing border barriers in Big Bend Sector pursuant to the challenged waivers. D. Ct. Doc. 34 (Aug. 17, 2026) (P.I. Mot.).

On October 2, 2026, the district court held a hearing on respondents' motion, during which witnesses for respondents presented testimony. See App., *infra*, 26a-201a. The court then issued a preliminary injunction enjoining applicants from "build[ing] border barrier or related infrastructure, or engag[ing] in any construction or ground disturbing activities, in the Big Bend Sector until and unless [applicants] comply with all applicable laws," "notwithstanding the 'Big Bend Waivers.'" *Id.* at 202a. The order further stated that respondents are "likely to succeed on the merits of at least one of the claims in suit," but it did not identify which claim supported the injunction. *Ibid.* The order instead promised that a "memorandum opinion will follow" explaining the court's "rationale in greater detail." *Ibid.*

CBP immediately notified contractors for the Big Bend construction projects to suspend all construction and ground-disturbing activities in the Big Bend Sector, App., *infra*, 219a, despite the lack of any memorandum opinion explaining the basis for the injunction. When the district court still had not issued an opinion six days later, the government filed a motion requesting that the court issue an opinion and stay its injunction pending review in this Court. See D. Ct. Doc. 74 (Oct. 8, 2026). The government's motion explained that the court's unreasoned order violated the Federal Rules of Civil Procedure—specifically Rule 52(a)(2), which requires a court "granting or refusing an interlocutory injunction" to "state the findings and conclusions that support its action," Fed. R. Civ. P. 52(a)(2); and Rule 65(d), which provides that "[e]very order granting an injunction" must "state the reasons why it issued," Fed. R. Civ. P. 65(d)(1)(A). See D. Ct. Doc. 74, at 2-3. The motion further explained that a stay was warranted under the traditional factors for a stay pending a writ of certiorari—including because all of respondents' theories for rejecting the waivers lacked merit, and the injunction causes the government irreparable harm. *Id.* at 3-16.

On October 14, 2026, the district court finally issued a memorandum opinion supplying the reasons for the injunction it had ordered 12 days earlier. App., *infra*, 204a-217a. The opinion stated that the plaintiffs were likely to succeed on the merits of their claim that the Big Bend waivers violated the major-questions doctrine. *Id.* at 214a. The government had argued that the court lacked jurisdiction over the major-questions claim because it does not "alleg[e] a violation of the Constitution of the United States," IIRIRA § 102(c)(2)(A). See App., *infra*, 207a. The court disagreed, holding that "the major questions doctrine is a constitutional clear statement rule grounded in separation of powers," such that respondent's major-questions-doctrine claim "alleges a Constitutional violation." *Id.* at 210a-211a.

The district court then determined that the waivers violated the major-questions doctrine because the Secretary lacked "'clear congressional authorization' to issue the Big Bend" waivers. App., *infra*, 211a. The court interpreted the Secretary's waiver authority to reach "only construction 'to deter illegal crossings in areas of high illegal entry.'" *Id.* at 212a. The court determined that the Big Bend waivers did not qualify on the theory that migrant apprehensions are comparatively lower in the Big Bend Sector than in other sectors along the U.S.-Mexico border. *Id.* at 214a.

The district court further determined that plaintiffs suffered a substantial threat of irreparable harm without a preliminary injunction. App., *infra*, 215a-216a. The court found that border-barrier construction pursuant to the waivers would "restrict" the "livelihoods" of certain respondents, specifically mentioning two river guides and a rancher. *Id.* at 215a. The court also found that construction of a border barrier would cause "harm to the natural ecosystem, including local wildlife," *id.* at 216a, citing, *inter alia*, "a dramatic uptick in roadkill" attributed to contractors' vehicles. *Ibid.* And the court credited testimony that border-barrier construction in Big Bend would "deteriorate the spiritual, recreational, and aesthetic value of the area." *Ibid.* On the other hand, the court asserted that the government would "only suffer a temporary delay while this Court assesses the merits of the pending summary judgment motions." *Id.* at 217a. The court did not acknowledge the harm of shutting down about 340 miles of planned barrier and road construction indefinitely.

On October 21, 2026, the district court denied applicants' motion to stay the injunction pending disposition of a petition for a writ of certiorari in this Court. App., *infra*, 233a-238a. The district court acknowledged that "because they will continue to be prevented from effectuating their policies," the government defendants "have demonstrated that they will experience at least some degree of irreparable harm ab-

sent a stay." *Id.* at 236a. But the court concluded that the other factors under *Nken* v. *Holder*, 556 U.S. 418, 426 (2009), counseled against a stay. App., *infra*, 236a. The court determined that the government's "likelihood of success on appeal is low." *Id.* at 235a. And the court found that the government's injuries were outweighed by the "irreversible environmental, aesthetic, economic, and recreational harms" that respondents would supposedly suffer without an injunction. *Id.* at 236a.

ARGUMENT

Under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, to obtain a stay of an injunction pending appellate proceedings, an applicant must show a likelihood of success on the merits, a reasonable probability of obtaining certiorari, and a likelihood of irreparable harm. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). All of those factors strongly favor a stay here.

I. THE GOVERNMENT IS HIGHLY LIKELY TO SUCCEED ON THE MERITS

The district court enjoined the government's border-wall construction in the Big Bend Sector on the ground that the Secretary lacked the "clear congressional authorization" required under the major-questions doctrine to issue the Big Bend waivers. App., *infra*, 211a. That order is comprehensively flawed. First, the court lacked jurisdiction over this claim. IIRIRA limits federal jurisdiction in challenges to Section 102(c) waivers to claims "alleging a violation of the Constitution of the United States," IIRIRA § 102(c)(2)(C), but the major-questions doctrine is a tool for evaluating alleged *statutory* violations. Further, respondents' major-questions claim is plainly wrong on the merits. The Secretary's waiver authority reflects a crystal-clear, indisputably valid express delegation from Congress that the Executive has used for decades to expedite border-wall construction.

A. The District Court Lacked Jurisdiction Over Respondents' Major-Questions Claim

1. Congress granted the Secretary broad authority to "waive all legal requirements" that he deems necessary "to ensure expeditious construction" of border barriers and roads, IIRIRA § 102(c)(1), and then strictly limited federal-court jurisdiction over challenges to such waiver decisions. Specifically, a "cause of action or claim" arising from a Secretary's waiver decision "may only be brought alleging a violation of the Constitution of the United States." IIRIRA § 102(c)(2)(A). Further, a "court shall not have jurisdiction to hear any claim not specified in this subparagraph." § 102(c)(2)(C). Taken together, those provisions deprive federal courts of jurisdiction over all challenges to IIRIRA waiver decisions except those "alleging a violation of the Constitution." See *Center for Biological Diversity* v. *McAleenan*, 404 F. Supp. 3d 218, 235, 237 (D.D.C. 2019) (K.B. Jackson, J.) ("Congress has * * * expressly deprived the federal courts of jurisdiction over non-constitutional claims that challenge DHS's section 102(c) waiver decisions."), cert. denied, 591 U.S. 1015 (2020).

That express jurisdictional bar on non-constitutional claims should have doomed respondents' major-questions claim, and the district court seriously erred in holding otherwise. App., *infra*, 214a. The major-questions doctrine helps determine whether Congress "meant to confer" on the Executive Branch "the authority it claims" under a particular statute. *West Virginia* v. *EPA*, 597 U.S. 697, 725 (2022). Though animated in part by "separation of powers principles," *id.* at 723, the doctrine operates to resolve whether the Executive Branch has exceeded its statutory authority.

This Court's recent major-questions cases illustrate how the doctrine works:

- *West Virginia*, 597 U.S. at 735, applied the major-questions doctrine to determine that an emissions-reduction system adopted by EPA fell outside "the authority granted to the Agency in Section 111(d) of the Clean Air Act."
- *Alabama Ass'n of Realtors* v. *HHS*, 594 U.S. 758, 764 (2021) (per curiam), applied the doctrine to reject the government's argument that "§ 361(a) [of the Public Health Services Act] gives the CDC the authority to impose [an] eviction moratorium."
- *NFIB* v. *OSHA*, 595 U.S. 109, 117 (2022) (per curiam), applied the doctrine to conclude that the "authority that Congress has provided" to the Secretary of Labor in the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, likely did not include the power to mandate that certain workers be vaccinated or regularly tested for COVID-19.
- *Biden* v. *Nebraska*, 600 U.S. 477, 506 (2023), applied the doctrine to confirm that the "HEROES Act provides no authorization for the" Secretary of Education's student-loan cancellation plan.
- *Learning Resources, Inc.* v. *Trump*, 607 U.S. 229, 255 (2026), applied the doctrine to determine that "IEEPA [International Emergency Economic Powers Act] does not authorize the President to impose tariffs."

In each case, the major-questions doctrine guided the Court's inquiry into whether the government had exceeded its authority under a *statute*, not the Constitution.

Here too, respondents invoke the major-questions doctrine in service of alleging a statutory—not constitutional—violation. The count of their operative complaint alleging a "violation of the major questions doctrine" claims that the Secretary's use of waivers to build a border wall exceeds his authority *under IIRIRA*. See Am. Supp. Compl. ¶ 85 (contending that border-wall construction "exceeds Congress's grant of

authority"); see *id.* ¶ 81 ("[T]he text of IIRIRA contains no clear grant of authority for such a significant project."). The district court's opinion confirms the statutory nature of respondents' claim. See App., *infra*, 211a. The court found that respondents were likely to succeed on their major-questions-doctrine claim on the theory that the Secretary lacked "clear *congressional* authorization" to issue the Big Bend waivers. *Ibid.* (emphasis added); see *id.* at 214a. The court concluded that the Secretary exceeded his powers under IIRIRA by authorizing waivers in a sector that the court determined not to be an area of "high illegal entry" within the meaning of the statute. *Id.* at 214a.

As this Court has long held, a claim that alleges that an Executive Branch official acted "in excess of his statutory authority" is not a claim alleging a "violation of the Constitution." *Dalton* v. *Specter*, 511 U.S. 462, 472 (1994). *Dalton* thus rejected the court of appeals' theory that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Id.* at 469, 471. The Court explained that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review under the exception recognized in" *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992). *Dalton*, 511 U.S. at 473-474. Otherwise, "if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception" permitting review of only constitutional claims "would be broadened beyond recognition." *Id.* at 474.

The same principle applies here: Claims that the Secretary has exceeded his waiver authority under IIRIRA—whether grounded in the major-questions doctrine or any other principle of statutory interpretation—are not claims "alleging a violation of the Constitution of the United States," IIRIRA § 102(c)(2)(A). Treating them that way would "eviscerat[e]" the limitations on federal jurisdiction of waiver decisions

that Congress carefully drew in Section 102(c). *Dalton*, 511 U.S. at 474. The district court thus did "not have jurisdiction" to hear such a claim. IIRIRA § 102(c)(2)(C).

2. The district court resisted that straightforward analysis. Instead, the court reasoned that because the major-questions doctrine has constitutional underpinnings, respondents had alleged a constitutional claim. App., *infra*, 209a-211a. That conclusion does not follow. Many canons and rules of statutory interpretation reflect constitutional principles, from the federalism canon to the clear-statement rule for abrogations of sovereign immunity. See *Learning Resources*, 607 U.S. at 279 (Gorsuch, J., concurring). But relying on those commonplace rules of statutory interpretation does not mean a court has adjudicated a constitutional claim. Indeed, that is the whole point of the canon of constitutional avoidance, which also shares constitutional underpinnings but has as a key purpose "to *avoid* the decision of constitutional questions." *Clark* v. *Martinez*, 543 U.S. 371, 381-382 (2005). Respondents have similarly characterized the major-questions doctrine as an avoidance doctrine that "protect[s] the Constitution" by avoiding an interpretation that, if adopted, "'would deal a severe blow to the Constitution's separation of powers.'" D. Ct. Doc. 77, at 15 (Oct. 20, 2026) (Stay Opp.) (quoting *Utility Air*, 573 U.S. at 327). But invoking constitutional avoidance is "not a method of adjudicating constitutional questions by other means"; instead, when a litigant invokes that canon "he seeks to vindicate his own *statutory* rights." *Clark*, 543 U.S. at 381. The same is true when a litigant invokes the major-questions doctrine.

The district court's digressions into whether the major-questions doctrine is "'a substantive clear-statement rule' or 'a purely linguistic canon of construction,'" are thus irrelevant to whether a major-questions-based objection to the waivers is a constitutional claim. App., *infra*, 210a (citation omitted). Under no theory does respond-

ents' major-questions claim "alleg[e] a violation of the Constitution of the United States." IIRIRA § 102(c)(2)(C). Even separate writings by Members of the Court that the district court cited as adopting a "constitutional clear statement rule" theory of the major-questions doctrine still treat the doctrine as a tool for evaluating an alleged statutory violation. App., *infra*, 210a. For example, Justice Gorsuch's concurrence in *Learning Resources* explained that the "central question in any major questions case" is whether the Executive Branch's claimed power is "supported by clear *statutory* authority." 607 U.S. at 283 (emphasis added).

This Court thus need not resolve "heady question[s]" about the theoretical underpinnings of the major-questions doctrine, App., *infra*, 208a (citation omitted), to reject the district court's analysis. Under any theory, the government is likely to succeed on the merits because respondents' major-questions claim alleges a statutory violation, not a constitutional claim. See *Dalton*, 511 U.S. at 474. The district court accordingly lacked jurisdiction to grant relief to respondents on that claim.

B. The Major-Questions Doctrine Does Not Preclude These Waivers

1. Even setting that dispositive jurisdictional defect aside, respondents' major-questions claim is meritless. The major-questions doctrine prescribes that in "extraordinary cases" involving assertions of "vast economic and political significance" or "'extravagant statutory power over the national economy,'" courts must look for a "'clear'" indication that Congress actually intended to delegate the broad statutory authority asserted. *West Virginia*, 597 U.S. at 716, 723-724 (citations omitted). An agency's assertion of an "unheralded" or newfound power "representing a 'transformative expansion'" in its "'regulatory authority'" thus warrants skepticism. *Id.* at 724 (quoting *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014)).

This is no major-questions case. Even assuming that the Secretary's waiver authority implicates a question of "vast economic and political significance," Congress *did* clearly authorize the Secretary both to build border barriers and to waive legal requirements in order to facilitate their expeditious construction. IIRIRA Section 102(a) instructs DHS to "take such actions as may be necessary to install additional physical barriers and roads * * * in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a), 110 Stat. 3009-554. Section 102(b) further directs the agency to "construct reinforced fencing along not less than 700 miles of the southwest border." IIRIRA § 102(b), as amended by Consolidated Appropriations Act of 2008 § 564(a)(2)(B)(ii), 121 Stat. 2090. And Section 102(c) expressly authorizes the Secretary to "*waive all legal requirements* [the] Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." IIRIRA § 102(c)(1) (emphasis added). Congress's delegations of authority could not be more express.

Nor is DHS's reliance on its waiver authority to construct border barriers some "'newfound'" power "outside its wheelhouse." *Biden*, 600 U.S. at 518-519 (Barrett, J., concurring). The Secretary has repeatedly exercised his waiver authority to construct border barriers for over 20 years. See pp. 8-9, *supra*. And that authority falls squarely within DHS's border-security mission. That long history of agency action, pursuant to an express statutory delegation, does not remotely resemble cases that have triggered the major-questions doctrine, such as the CDC's imposition of an eviction moratorium or OSHA's imposition of a vaccine mandate. See *Alabama Ass'n of Realtors*, 594 U.S. at 764; *NFIB*, 595 U.S. at 113.

2. Tellingly, given Congress's express delegation, neither the district court nor respondents have suggested that the major-questions doctrine precludes the Secretary from constructing border barriers or issuing waiver decisions altogether. Instead, respondents' major-questions claim challenges only *these specific* Big Bend waivers on the theory that the Big Bend Sector is not an "area[] of high illegal entry" as the statute requires. IIRIRA § 102(a), 110 Stat. 3009-554; see P.I. Mot. 10. That is not even a major-questions argument; it is a minor question about the scope of statutory provisions that unquestionably authorize waivers writ large. Respondents insist that the Big Bend waivers supposedly differ from prior waivers in "magnitude," if not in kind. Stay Opp. 18 (quoting *Biden*, 600 U.S. at 501). But respondents do not actually contend that any Big Bend waiver is meaningfully greater in scope than prior waiver decisions, only that DHS has not previously found the entire Big Bend Sector to be an area of "high illegal entry." *Id.* at 17. That just underscores that respondents' claim rests on an anodyne interpretive question about how a broad delegation of authority applies to a particular case, not whether the agency possesses a major power at all.

Regardless, this argument fails on its own terms. IIRIRA assigns to the Secretary the authority to determine whether it is "necessary to install additional physical barriers and roads" near the border "to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a), 110 Stat. 3009-554. That authority necessarily implies the corresponding authority to determine which border segments are "areas of high illegal entry." In each of the three waiver decisions at issue, the Secretary appropriately exercised that discretion by finding that Big Bend Sector as a whole and each specified project area within Big Bend Sector were areas of "high illegal entry." App., *infra*, 2a, 4a, 7a. That determination was supported by

the Secretary's findings that massive quantities of drugs were seized in Big Bend Sector between fiscal year 2021 and fiscal year 2025, and that 89,000 illegal aliens were apprehended in the region during that period. *Ibid.*

The district court nevertheless held that the Secretary's waiver decisions violated IIRIRA. The court did not dispute that there had been a high volume of apprehensions and "similarly large quantities of drugs seized" in the Big Bend Sector. App., *infra*, 214a. But in the court's view, that was not enough to make the Big Bend Sector an area of "high illegal entry" under the statute, because illegal-alien crossings and drug trafficking are *comparatively* less common in the Big Bend Sector than in other sectors along the U.S.-Mexico border. *Id.* at 213a-214a.

That conclusion amounts to a judicial rewrite of Congress's words in Section 102. Instead of authorizing the Secretary to construct barriers and issue waivers in all "areas of high illegal entry," the court read the statute to cover only areas of *comparatively* high illegal entry, as measured against nearby areas on the same border. But courts "may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax* v. *Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). Nothing in the language that Congress actually wrote precludes the Secretary from determining that a segment of the U.S.-Mexico border is an "area[] of high illegal entry," even if other nearby segments have even *higher* illegal entry. See *In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1224 (9th Cir. 2019) ("IIRIRA does not dictate that 'high illegal entry' is a comparative determination."). Even the lowest rates of entry along the southern border are extraordinarily "high" in both an absolute and an historical sense, given the massive scale of illegal entries in recent years. See generally Proclamation 10,886, *Declaring a National Emergency at the Southern Border of the United States*, 90 Fed. Reg. 8327 (Jan. 29, 2025).

The district court rejected that interpretation on the grounds that the statutory word "'high'" itself implies a "comparative dimension." App., *infra*, 214a. The court further believed that the statutory limitation to "areas of high illegal entry" would be meaningless if the Secretary could designate the entire U.S.-Mexico border such an area. *Ibid.* But IIRIRA empowers the Secretary to build barriers and issue waivers for any region that he finds to have high illegal entry without remotely suggesting that the Secretary must undertake any kind of comparative assessment. Quite the contrary, Congress made clear that Section 102 is a tool for the Secretary to gain "operational control" over the Nation's borders, IIRIRA § 102(b)(1)(A) and (D), as amended by Consolidated Appropriations Act of 2008 § 564(a)(2)(B)(ii), 121 Stat. 2090-2091—a term that means "the prevention of *all* unlawful entries," Secure Fence Act of 2006 § 2(b), 120 Stat. 2638 (emphasis added).

The district court's statutory overhaul would also produce wildly implausible consequences. In the court's view, Congress permitted the Secretary to build border barriers pursuant to waiver decisions, but not in whatever segment of the U.S-Mexico border currently has the lowest rates of illegal entry. See App., *infra*, 214a. Such a limitation would be self-defeating; any segment where the Secretary is not permitted to build would soon become a funnel point for illegal alien crossings that are thwarted by barriers elsewhere. See App., *infra*, 226a; pp. 28-29, *infra* (further discussing such implications). Not only did Congress not plausibly intend that backwards result; Congress mandated the opposite, directing DHS "to achieve and maintain operational control over the *entire* international land * * * border[] of the United States"—not just part of it. Secure Fence Act of 2006 § 2(a), 120 Stat. 2638 (emphasis added).

Ultimately, these interpretive issues are beside the point. Congress left policy questions about the appropriate and necessary placement of border barriers to the

Secretary, not to the judiciary. Congress conferred on the Secretary the "sole discretion" to determine whether a waiver is necessary to expeditiously build barriers under IIRIRA Section 102. IIRIRA § 102(c)(1). And Congress stripped district courts of jurisdiction over all non-constitutional challenges to a Secretary's waiver decision. The district court transgressed those limits on its authority by adjudicating a statutory challenge that it had no jurisdiction to resolve and then rejecting the Secretary's judgment about where border barriers are needed in favor of its own contrary assessment. That judgment is well beyond the judicial ken—and right in the heartland of the Secretary's authority and competence. The government is overwhelmingly likely to succeed on the merits.

II. THE REMAINING FACTORS SUPPORT A STAY

In evaluating a stay application, this Court also considers the applicant's likelihood of obtaining certiorari; its likelihood of suffering irreparable harm; and, in close cases, the balance of the equities. See *Hollingsworth*, 558 U.S. at 190. Those factors all support a stay here.

A. The Court Would Likely Grant Certiorari

Under Section 102's unusual review scheme, the district court's unlawful injunction "may be reviewed only upon petition for a writ of certiorari to" this Court. IIRIRA § 102(c)(2)(C). The Court is likely to grant such a petition here because the decision below conflicts with decisions of this Court in an unprecedented way that will have severely disruptive consequences, and the government has no other avenue of appellate review.

The decision below is an extreme outlier. As explained above (at 8-9), Secretaries for over 20 years have been relying on their waiver authority under Section 102(c) to secure the Nation's borders. Until now, no court has ever sustained a chal-

lenge to the substance of a Secretary's waiver decision. On the contrary, courts have consistently declined to hear non-constitutional challenges to waiver decisions and have rejected constitutional challenges to the Secretary's waiver authority. See p. 9 n.4, *supra* (collecting cases).[5] In *Center for Biological Diversity*, then-Judge Jackson declined to hear an *ultra vires* challenge to a Secretary's waiver decision in light of IIRIRA's jurisdiction-stripping provision, then rejected the remaining constitutional challenges. 404 F. Supp. 3d. at 237. The district court in this case, by contrast, circumvented the limits on its jurisdiction and then misapplied IIRIRA's text.

Further, the decision below would thwart border-wall construction along a major portion of the southwest border in a highly disruptive way—the kind of significant consequences that heighten the likelihood of this Court's review. If the decision below is left to stand, the Secretary's waiver authority will be subject to inconsistent legal regimes along the Nation's border. Along most of the border, the Secretary can exercise his waiver authority to expedite barrier construction in areas that he finds to have high rates of illegal entry. But under the decision below, the Secretary lacks that authority along hundreds of miles of the border in the Big Bend Sector. That inconsistency is untenable. If the Secretary cannot fully exercise his authority to build adequate border-security infrastructure in certain segments, they will quickly become "funnel points" for illegal alien crossings and the smuggling of contraband. See App., *infra*, 226a; pp. 28-29, *infra* (further discussing this consequence of the injunction). The practical significance of the decision below for the government's efforts

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[5] In *Zapata County* v. *Biden*, No. 20-cv-106, 2023 WL 11915719 (S.D. Tex. Mar. 31, 2023), a court denied the government's motion to dismiss claims that a waiver was unconstitutional and *ultra vires* on the grounds that the Secretary who issued the decision was unlawfully appointed. Those claims did not concern the substance of the waiver, and the court emphasized that the *ultra vires* claim was "not directly assailing a DHS section 102(c) waiver determination" but rather the Secretary's appointment. *Id.* at *21 (brackets and internal quotation marks omitted).

to stem the tide of illegal border crossings and drug trafficking thus counsels strongly in favor of further review.

Additionally, the district court's decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The decision below misconstrues this Court's major-questions precedents, which clearly apply that doctrine to evaluate alleged statutory violations rather than alleged constitutional violations. See pp. 14-19, *supra*. And it conflicts with this Court's decision in *Dalton* distinguishing between claims that an executive officer acted "in excess of his statutory authority" and claims alleging a "violation of the Constitution." 511 U.S. at 472.

B. The Government Will Suffer Irreparable Harm Absent A Stay

1. The district court's order irreparably harms the government and the public by blocking the Secretary's exercise of his statutorily conferred power to waive applicable laws as he "determines necessary to ensure expeditious construction" of border barriers under IIRIRA Section 102. § 102(c)(1). When the government is enjoined from carrying out its responsibilities under a "statute[] enacted by representatives of [the] people, it suffers a form of irreparable injury." *Trump* v. *CASA, Inc.*, 606 U.S. 831, 861 (2025) (citation omitted); see *Trump* v. *California*, No. 26A124 (Aug. 24, 2026), slip op. 8-9 (per curiam) (finding that the government was "likely to suffer irreparable harm" from an injunction that "deal[t] 'a serious setback' to the Executive's 'goals'") (citation omitted); *DHS* v. *League of Women Voters*, No. 26A308 (Sept. 25, 2026), slip op. 5 (per curiam) (finding that the government was "likely to suffer irreparable harm" from an order that "set aside" a federal program). Even the district court, in denying a stay, correctly found that "because they will continue to be prevented from effectuating their policies, [applicants] have demonstrated that they will experience at least some degree of irreparable harm absent a stay." App., *infra*, 221a.

The government's injury is particularly pronounced in cases implicating the government's "compelling interests in safety and in the integrity of our borders." *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 672 (1989); see *Trump* v. *Sierra Club*, 588 U.S. 930, 930-931 (2019) (granting a stay of a preliminary injunction prohibiting border-wall construction). Congress specifically enacted Section 102(c)'s waiver provision, and its accompanying limits on judicial review, in order to "ensure expeditious construction" of border walls and roads without undue interference. IIRIRA § 102(c)(1); see Conf. Rep. 172 (describing Conferees' "intent to ensure that judicial review of actions or decisions of the Secretary not delay the expeditious construction of border security infrastructure"). Now, the district court's injunction significantly frustrates the government's ability to stop the flow of illegal aliens and drugs across the southern border. The Secretary identified the Big Bend project areas at issue because of the high rates of illegal-alien crossings and drug smuggling in the region over the past several years. See App., *infra*, 2a, 4a, 7a. Between fiscal year 2021 and fiscal year 2025, U.S. Border Patrol apprehended over 89,000 illegal aliens attempting to enter through the Big Bend Sector and seized over 87,574 pounds of marijuana, over 867 pounds of cocaine, over 1156 pounds of methamphetamine, over 12 pounds of heroin, and over 94 pounds of fentanyl. See First Enriquez Decl. ¶ 42; App., *infra*, 223a. During fiscal years 2021 and 2022, unlawful entries spiked to record highs of over 30,000 annual encounters in the Big Bend Sector. See App., *infra*, 21a, 24a-25a. Meanwhile, the quantity of illegal drugs seized in the Big Bend Sector in fiscal year 2026 surpassed the annual totals for each of the previous three fiscal years. See *id.* at 10a-16a, 18a. And those numbers do not even account for the aliens and smugglers who successfully crossed the border undetected. *Id.* at 227a.

The record illustrates the need for additional border-security infrastructure in the area, which transnational criminal organizations have thus far been able to exploit. See App., *infra*, 227a-228a. Specifically, the Sinaloa and Juarez cartels operate on the Mexican side of the border south of the Big Bend Sector and engage in a range of dangerous activity from human smuggling to the trafficking of drugs and weapons around the Big Bend region. *Id.* at 227a. In August 2022, for example, Border Patrol agents executing a search warrant at a ranch house in Van Horn, Texas seized about 13,000 pounds of marijuana that was confirmed to have crossed the border without detection in the Big Bend Sector. *Id.* at 228a. And in August 2023, Border Patrol agents in Texas apprehended the leader of the Juarez Cartel of Ojinaga, Mexico, who admitted that he had illegally entered the United States by wading the Rio Grande River in the Big Bend region. *Ibid.*

Even with the additional enforcement tools and resources available to CBP since January 2025, Big Bend's landscape makes it difficult to police, and aliens have succeeded in illegally crossing the border in the Big Bend Sector and causing harm inside the United States. App., *infra*, 228a. Several recent examples of illegal entries in the Big Bend Sector illustrate those dangers. In May 2026, for example, an alien illegally entered the United States on foot in the Big Bend Sector, stole a car, then drove to a Texas school with young children inside, which he attempted to enter while armed with a high-powered firearm. *Id.* at 229a. Law enforcement pursued the suspect, resulting in a chase and a deadly shootout. *Ibid.* In June 2026, three cartel recruits were apprehended in the Big Bend Sector after crossing the border illegally with firearms. *Id.* at 230a-231a. And in September 2026, three individuals were apprehended in Big Bend National Park as they attempted to engage in human smuggling. *Id.* at 231a-232a.

The Secretary has determined that border barriers are necessary to safeguard the border against such infiltration. App., *infra*, 2a, 4a, 7a; see *id.* at 232a. DHS has further determined that leaving an open segment of the border without barriers in the Big Bend region would create a funnel point for illegal-alien crossings and smugglers. *Id.* at 226a. That conclusion makes sense: Bad actors who might otherwise have crossed the border at a different entry point are likely to target and exploit gaps in the border's barriers where they find them. As the record illustrates, the Big Bend region is vulnerable to such exploitation, notwithstanding its rugged character. Thus, in CBP's view, "not having a border barrier system in this particular area would make it a vulnerable and desirable area" for cartels "to operate along the southwest border." *Id.* at 227a.

The district court's injunction exposes the United States to those dangers. The court stayed the effectiveness of the Big Bend waivers and enjoined applicants from building any "border barrier or related infrastructure," in the Big Bend Sector "until and unless" applicants "comply with all applicable laws." App., *infra*, 202a. Expeditious compliance with all laws waived by the Secretary—such as NEPA, the Endangered Species Act, the National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966), and others—is not feasible. NEPA's procedures alone have historically imposed "[d]elay upon delay," *Seven County Infrastructure Coal.* v. *Eagle County*, 605 U.S. 168, 184 (2025), and still remain time-consuming. See 42 U.S.C. 4336a(g)(1)(A) (Supp. V 2023) (requiring that environmental impact statements under NEPA must be completed within "2 years"). So in practice, the district court's order effectively halts border-barrier construction altogether in the Big Bend Sector pending the resolution of this litigation. As explained above, DHS and CBP anticipate an increase in illegal immigration and drug smuggling across the United States border without a

border barrier in the Big Bend Sector. App., *infra*, 232a. If left to stand, the injunction thus will impede the government's "compelling" interest in protecting "the integrity of our borders." *Von Raab*, 489 U.S. at 672.

2. Beyond those border-security harms, the government faces irreparable operational and financial injuries if the injunction remains in place during this Court's review. The government has awarded contracts for five border-barrier construction projects in the project areas covered by the Big Bend waivers. App., *infra*, 220a. Before the injunction issued, the contractors and their employees had been working on a range of pre-construction and construction activities. See *id.* at 222a-223a. For one of the projects, field personnel had already been deployed and were working 60 hours per week, and heavy equipment had been mobilized to facilitate construction. *Id.* at 221a-222a. Workers there had already constructed about three-quarters of a mile of border barrier, and temporary field offices, supply yards, a water-delivery system, and a temporary concrete batch plant had been installed. *Ibid.* Given the scale of that effort, the injunction imposes significant operational costs on the government, its contractors, and workers. *Ibid.*

Every day that the injunction remains in effect and construction work is suspended, the government's contractors will continue to incur financial liabilities. Even while work is suspended, contractors still need to pay for land leases, offices, and the security necessary to protect equipment and materials from theft while they are not in use, among other expenses. App., *infra*, 222a. CBP estimates that those suspension costs will total over $460,000 per day. *Ibid.* The government remains responsible for reimbursing such costs, which it will have to pay from funds that it would otherwise spend on actual border-barrier construction. *Ibid.* If the injunction is later lifted and construction permitted to continue, the government may also be required

to pay the contractors "acceleration costs" in order to maintain the original project schedules. *Ibid.* These costs cannot be recouped if the government prevails at the end of the litigation. *Ibid.* They, too, support a stay in this case.

3. The district court did not even address the government's compelling border-security interests or its operational concerns in its order granting the injunction or its subsequent opinion. See App., *infra*, 202a, 217a. Instead, it dismissed the government's harms in a single sentence, asserting that "if enjoined," the government will "only suffer a temporary delay while [the district court] assesses the merits of the pending summary judgment motions." *Id.* at 217a. In its opinion denying a stay, the court at least acknowledged that the government "will experience at least some degree of irreparable harm," but continued to minimize that harm as mere "'temporary delay.'" *Id.* at 236a (citation omitted). Left unexamined are the consequences of that "temporary delay": diminished border protections in an area of high illegal entry and drug trafficking, plus significant operational and financial costs. The court's failure to afford "[a] proper consideration" of the government's important interests, *Winter* v. *NRDC*, 555 U.S. 7, 23 (2008), renders the injunction improper and underscores the need for a stay. See *National Park Serv.* v. *National Trust for Historic Pres. in the U.S.*, No. 26A203 (Aug. 31, 2026), slip op. 7-8 (per curiam).

C. The Balance Of Equities Favors A Stay

Because this is not a close case, the Court need not balance the equities. See *Hollingsworth*, 558 U.S. at 190. But if it does, the government's compelling border-security and operational interests vastly outweigh any aesthetic, recreational, or cultural injuries that respondents may suffer if the Secretary's waiver decisions take effect. This Court has already balanced similar equities in the government's favor

when it granted a stay of a district court's preliminary injunction prohibiting border-wall construction in *Sierra Club*, 588 U.S. at 930. The same balance applies here.

1. The primary harm asserted by respondents is that the construction in the Big Bend region will affect "their enjoyment of the wild spaces in the Big Bend Sector." App., *infra*, 216a. Those subjective, attenuated injuries cannot justify an injunction of the Secretary's waiver decisions. Congress's enactment of Section 102(c)—which permits the Secretary to waive the requirements of environmental-protection laws—reflects an explicit preference for expeditious border construction over the very harms that respondents assert. See IIRIRA § 102(c)(1). A court deciding whether to issue an injunction cannot disregard that legislative "order of priorities." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978); see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."). The environmental interests that Congress permitted the Secretary to subordinate in order to facilitate expeditious border-barrier construction cannot justify enjoining such construction.

This Court, too, has already determined that recreational and aesthetic injuries like the ones asserted by respondents are insufficient to justify enjoining the construction of a border wall. In *Trump* v. *Sierra Club*, the plaintiffs similarly contended that construction at the border would harm their ability to fish, hike, and camp. See Gov't Appl. at 38, *Sierra Club*, *supra* (No. 19A60). The Court granted a stay of district court's preliminary injunction, *Sierra Club*, 588 U.S. at 930, necessarily determining that the plaintiffs' asserted injuries were outweighed by the government's compelling interest in border security.

The Court has also found a plaintiff's asserted aesthetic injuries insufficient to support a preliminary injunction in contexts beyond the border wall. In *National*

Park Service, for example, the Court held that "the offense" that a plaintiff's member "will suffer from having to view" the renovated East Wing of the White House is outweighed by the "national security and other harms that would likely arise" for the government from enjoining its construction. Slip op. 6-7. And in *Winter*, 555 U.S. at 25-26, the Court vacated a preliminary injunction after determining that the plaintiffs' interests in "observ[ing]," "photograph[ing]," and "conduct[ing] scientific research" on marine mammals were "plainly outweigh[ed]" by the Navy's operational needs. The equities in this case cut the same way.

2. In all events, the record shows that any harms to respondents from staying the injunction will be minimal. Again, respondents are primarily concerned with preserving their ability to enjoy the Big Bend wilderness. But the record shows that the construction planned for Big Bend's public recreational areas is limited. CBP has explained that no border-barrier construction whatsoever is planned inside Big Bend Ranch State Park. D. Ct. Doc. 60-1, ¶ 22 (Sept. 9, 2026) (Second Enriquez Decl.). And in Big Bend National Park, the only planned barrier construction is a 17-mile non-contiguous vehicle barrier system that "should have little to no impact" on the "public's ability to access" the park or the Rio Grande River. First Enriquez Decl. ¶ 34. Although CBP plans to construct a 30-foot pedestrian barrier in other areas of the Big Bend Sector, it has disclaimed any intent to construct such a barrier in the state or national park. See CBP, *Statement from CBP Commissioner Rodney S. Scott correcting the record on Big Bend border security projects* (Aug. 13, 2026), https://perma.cc/XW22-HTQJ ("We are NOT building a 30-foot wall or stadium lighting through Big Bend National Park, Big Bend Ranch State Park or the Black Gap Wildlife Management Area.").

In other words, most of the planned construction will not occur in state or national park land, but rather on privately owned land for which CBP will secure a private right of access. See First Enriquez Decl. ¶ 26. Respondents have no compelling interest in preserving the "scenic character" of other people's private property. P.I. Mot. 17. And to the extent that border barriers will be constructed on land owned by a respondent, CBP has a long history of working with landowners to mitigate the impacts of construction through a variety of accommodations. See Second Enriquez Decl. ¶ 19. Respondents' speculative complaints that construction could harm a historic adobe church on the opposite side of the highway from planned barriers, see App., *infra*, 130a, are likewise unsupported by evidence. In all events, the record shows that CBP is taking numerous steps to minimize the risk of the very environmental harms that respondents allege, such as using infrared illuminators instead of stadium lighting in rural areas to minimize light pollution in Big Bend's dark skies, and conducting biological surveys of all project areas to identify plant and animal species for preservation. First Enriquez Decl. ¶¶ 36-40.

The district court mentioned none of those efforts, instead finding that the balance of harms favored respondents because construction of waterborne barriers in the Rio Grande River would "restrict" the "livelihood" of plaintiff river guides. App., *infra*, 215a. But CBP's planned construction does not include waterborne barriers and will have little to no impact on the public's ability to access the Rio Grande River in Big Bend National Park. See First Enriquez Decl. ¶¶ 9, 18-20, 22, 34-35; Second Enriquez Decl. ¶¶ 17, 22. The court also found that construction could affect the livelihood of a local rancher by cutting off irrigation to his crops, App., *infra*, 215a, but neglected to mention CBP's practice of consulting with landowners regarding existing irrigation lines before construction, Second Enriquez Decl. ¶ 19. True, the court

apparently determined that construction in the Big Bend Sector would harm wildlife based on anecdotal reports of increased roadkill from construction vehicles, see App., *infra*, 216a. But when a court elevates alleged harms like an anecdotal increase in roadkill over the very real and far-reaching consequences of halting all construction across hundreds of miles of the southern border and thwarting the government's border-security efforts, the balance of equities has gone unacceptably awry. This Court should stay the district court's unlawful injunction.

III. THE COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE

In addition to granting a stay, this Court should construe this application as a petition for a writ of certiorari, grant the petition, and summarily reverse. See *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam) (granting similar request). In certain cases, "the error in the lower court's decision is so obvious" that the appropriate course of action is to "grant certiorari and simultaneously reverse." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.17, at 280 (10th ed. 2013); see, *e.g.*, *Doe* v. *Dynamic Physical Therapy, LLC*, 607 U.S. 11, 11 (2025) (per curiam) (summarily reversing "incorrect" decision); *Margolin* v. *National Ass'n of Immigration Judges*, 608 U.S. 339, 343 (2026) (per curiam) (summarily reversing decision that "violated the party-presentation principle"). This case manifestly fits that bill. The district court found jurisdiction by flagrantly misreading this Court's major-questions precedents; proceeded to find a major-questions problem where none exists; then rewrote IIRIRA to hamstring the Secretary's waiver analysis. Those errors are so obvious that this Court can swiftly correct them on the merits without further briefing or oral argument.

Summary reversal would be particularly appropriate to quickly put to rest any doubt over the scope of the Secretary's waiver authority under IIRIRA Section 102(c). The Secretary regularly relies on Section 102(c)'s waiver authority to expeditiously construct border barriers across the southern border, not only in the Big Bend Sector. See, *e.g.*, 91 Fed. Reg. 62,739 (Oct. 2, 2026) (IIRIRA waiver decision for a project area in New Mexico). Summarily reversing the district court's order in this case will prevent other courts from repeating its errors and entertaining statutory challenges to Section 102(c) waivers that they lack jurisdiction to consider.

CONCLUSION

This Court should stay the order of the United States District Court for the Western District of Texas. The Court should also construe this application as a petition for a writ of certiorari, grant the petition, and summarily reverse the district court's order.

Respectfully submitted.

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OCTOBER 2026