No. _____

In the Supreme Court of the United States

AMERICAN EXPLORATION & MINING ASSOCIATION,

Petitioner,

v.

RYAN ZINKE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the Secretary of the Interior's withdrawal of more than 1 million acres in northern Arizona. In 1976, Congress passed the Federal Land Policy and Management Act ("FLPMA") to bring order to what had become a tangled array of laws governing the federal lands. A major component of this effort was to place constraints on the Executive's ability to withdraw lands. One of the most important constraints was a legislative veto embedded in the provision delegating authority to the Secretary to make large-tract withdrawals, *i.e.*, withdrawals of 5,000 acres or more.

As the courts below held, this legislative veto is unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983). Nevertheless, the Ninth Circuit ruled that the unconstitutional legislative veto could be severed from the large-tract withdrawal provision in which it was embedded without violating Congress's intent when it passed that provision. The effects of this ruling are: (1) the Secretary has the same unfettered power to make large-tract withdrawals as existed before FLPMA; and (2) the 1 million-acre withdrawal remains in place.

The question presented is:

Did Congress intend to grant the Secretary the authority to make large-tract withdrawals without the congressional oversight provided by the legislative veto embedded in the delegation of authority?

PARTIES TO THE PROCEEDINGS

Petitioner, American Exploration & Mining Association, was a plaintiff in the District Court and an appellant before the Ninth Circuit.

Respondents, National Mining Association, Gregory Yount, Metamin Enterprises USA, Inc., and the Arizona Utah Local Economic Coalition, were plaintiffs in the District Court and appellants before the Ninth Circuit.

Respondents, Ryan Zinke, Secretary of the Interior; U.S. Department of the Interior; George E. Perdue, Secretary of Agriculture; U.S. Department of Agriculture; Bureau of Land Management; Brian Steed, Acting Director, Bureau of Land Management; and the U.S. Forest Service, were defendants in the District Court and appellees before the Ninth Circuit.

Respondents, Grand Canyon Trust, Sierra Club, National Parks Conservation Association, Center for Biological Diversity, and Havasupai Tribe, were defendant-intervenors in the District Court and appellees before the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner, American Exploration & Mining Association ("AEMA") (f/k/a Northwest Mining Association), is a non-profit, non-partisan, national trade association that has represented hard-rock mining interests for more the 120 years. AEMA certifies that it is privately held, has no parent

corporation, and has never issued any public stock, and, thus, no publicly held company owns 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

AEMA respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 877 F.3d 845 and reproduced at App. 1a–65a. The district court order denying AEMA's motion for partial summary judgement regarding the legislative veto is reported at 933 F. Supp. 2d 1215 and reproduced at App. 66a–108a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its opinion on December 12, 2017. App. 4a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

Pertinent statutory provisions are reproduced at App. 272a–84a.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. The Mining Law.

The Property Clause of the Constitution vests solely in Congress the power to manage federal lands. U.S. Const. Art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). Pursuant to that power, Congress passed the long-enduring Mining Law, 30 U.S.C. § 22 *et seq*., for the purpose of increasing the Nation's wealth by facilitating the development of the Nation's minerals. *See Deffeback v. Hawke*, 115 U.S. 392, 401 (1885) (recognizing that the Mining Law was passed "to promote the development of the mining resources of the United States"); *see also Castle v. Womble*, 19 Pub. Lands Dec. 455, 457 (1894) (In passing the Mining Law, Congress intended explorers to "risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth[.]"). To accomplish this purpose, the Mining Law provides:

> [A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States ….

30 U.S.C. § 22. This language grants all citizens a statutory right to go upon unreserved and unappropriated federal lands to, *inter alia*, prospect, explore, and mine.[1] *Union Oil Co. of California v. Smith*, 249 U.S. 337, 346 (1919) (The Mining Law "extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits ...."). It goes without saying, that Congress's purpose can be accomplished only if federal lands remain open to operation of the Mining Law, unless lawfully withdrawn.

B. *Midwest Oil*.

As the Property Clause vests solely in Congress the power to manage federal lands, the Executive may only exercise power over such lands if Congress delegates a portion of its Property Clause power. *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it ...."). Prior to 1976, there was no single act defining the extent of the Executive's power over federal lands. With respect to the power to withdraw federal lands

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[1] A person who makes a "discovery" of a "valuable mineral deposit" and satisfies the procedures required for "locating" a mining claim becomes the owner of a constitutionally protected property interest. 30 U.S.C. §§ 22, 23, 26; *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 317–18 (1930) (a perfected mining claim "is property in the fullest sense of that term"); *see United States v. Shumway,* 199 F.3d 1093, 1103 (9th Cir. 1999) ("The owner of a mining claim owns property, and is not a mere social guest of the Department of the Interior to be shooed out the door when the Department chooses.").

from operation of the Mining Law, Congress occasionally passed legislation that delegated such power in limited circumstances.[2] *See* 1 Charles F. Wheatley, Jr., *et al.*, *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* 55–62, 86–104 (1969). In the absence of statutory authority, the President would occasionally make temporary withdrawals in aid of future legislation with respect to specific federal lands. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 479–81 (1915). In *Midwest Oil*, this Court ruled that congressional acquiescence to this type of action provided the President with implied authority to make such withdrawals. *Id.* at 479–81; *but see id.* at 490–91, 510–12 (Day, J., dissenting). Importantly, however, this Court acknowledged that Congress could revoke that implied authority through subsequent legislation. *Id.* at 481.

In 1910, Congress passed the Pickett Act, which delegated to the Executive Branch limited authority to make temporary withdrawals "for waterpower sites, irrigation, classification of lands, or other public purposes …." 36 Stat. 847 (1910). Section 2 of the Pickett Act, however, provided that the lands withdrawn would remain open to the operation of the Mining Law, except as to "coal, oil, gas, and

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[2] Historically, the term "withdrawal" and the term "reservation" were not synonymous. *See*, *S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 784 (10th Cir. 2005). A withdrawal made "land unavailable for certain kinds of private appropriation under the public land laws[,]" such as the Mining Law. *Id.* A reservation, on the other hand, went "a step further: it not only withdr[ew] the land from the operation of the public land laws, but also dedicate[d] the land to a particular public use[,]" such as a national park. *Id.*

phosphates[.]" *Id*. Because the controversy in *Midwest Oil* pre-dated the Pickett Act, and because there was no evidence Congress intended for the Pickett Act to have retroactive effect, this Court refused to consider whether that Act repealed the Executive's implied authority. *Midwest Oil,* 236 U.S. at 481–83. Thus, following *Midwest Oil*, there remained uncertainty about whether the Pickett Act revoked the implied authority of the Executive to make withdrawals.

In 1941, the Attorney General opined that the Executive still had implied authority to make withdrawals, even beyond that which was authorized by the Pickett Act. U.S. Attorney General, *Withdrawal of Public Lands*, 40 U.S. Op. Atty. Gen. 73, 81–84 (1941). This conclusion allowed the Executive to avoid the mandate in the Pickett Act that withdrawn lands remain largely open to operation of the Mining Law. *See* Wheatley at 120. As a result, the Executive continued to withdraw lands from operation of the Mining Law without statutory authorization. *See, e.g.*, 6 Fed. Reg. 4,963 (Sept. 27, 1941).

C. The Federal Land Policy and Management Act.

The uncertainty over the Executive's withdrawal authority, among other federal land management issues, led to the creation of the Public Land Law Review Commission ("PLLRC") in 1964. Pub. L. No. 88-606, 78 Stat. 982 (1964). The PLLRC noted there was "concern about problems associated with the 'withdrawal' and 'reservation' of public

domain lands," which were voiced during the deliberations that eventually led to the Commission's creation. PLLRC, *ONE THIRD OF THE NATION'S LAND* 43 (1970) ("PLLRC Report"). Specifically, the PLLRC Report provided that withdrawals "have been used by the Executive in an uncontrolled and haphazard manner." *Id*. As a result of these unchecked withdrawals, by 1970 "virtually all" of the public domain had been withdrawn from entry under one or more of the public land laws. *Id*. at 52. Accordingly, the PLLRC recommended that "Congress assert its constitutional authority by enacting legislation reserving unto itself exclusive authority to withdraw or otherwise set aside public land for specified limited-purpose uses." *Id*. at 2.

Following the recommendations of the PLLRC, Congress passed FLPMA in 1976. Pub. L. No. 94-579, 90 Stat. 2743 (1976), 43 U.S.C. § 1701, *et seq*.; *see* S. Rep. No. 94-583, at 35 (1975) *reprinted in* Senate Comm. On Energy and Natural Resources, 95th Cong., *LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976*, 100 (1978) (providing that the Senate version of FLPMA "is in accordance with over one hundred recommendations of the [PLLRC Report]."); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 875–77 (1990) (recognizing the important role the PLLRC Report played in the passage of FLPMA). In short, FLPMA "addressed [the] lack of a comprehensive statutory mandate" on the extent of the Executive's power to manage federal lands. *See State of Cal. ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1555 (9th Cir. 1992).

FLPMA requires that the Secretary of the Interior ("Secretary") "'manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans ... when they are available.'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 59 (2004) (quoting 43 U.S.C. § 1732(a)). "Multiple use" is defined as, *inter alia*, "[t]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people …." 43 U.S.C. § 1702(c). In passing FLPMA, Congress also declared that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of *minerals*, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 … as it pertains to the public lands …."[3] 43 U.S.C. § 1701(a)(12) (emphasis added); *see* 43 U.S.C. § 1702(l) (defining "principal or major uses" to include

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[3] The Mining and Minerals Policy Act of 1970 provides:

> Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining … industries, (2) the orderly and economic development of domestic mineral resources [and] reserves … to help assure satisfaction of industrial, *security* and environmental needs ….
>
> For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and *uranium*….

30 U.S.C. § 21a (all emphasis added).

"mineral exploration and production"). Congress also expressly acknowledged the continued vitality of the Mining Law:

> Except as provided in [43 U.S.C. § 1744 (recordation requirement for mining claims)], [43 U.S.C. § 1782 (wilderness review)], and [43 U.S.C. § 1781(f) (California Desert Conservation Area)] and in the last sentence of this paragraph, *no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act*, including, but not limited to, rights of ingress and egress. In managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

43 U.S.C. § 1732(b) (emphasis added).

With respect to withdrawals, FLPMA provides that "Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may

withdraw lands without legislative action."[4] 43 U.S.C. § 1701(a)(4); App. 272a. Accordingly, in Section 704(a) of FLPMA, Congress expressly repealed 29 withdrawal statutes, overruled *Midwest Oil*, and revoked any and all implied power the Executive may have had to withdraw federal lands. 90 Stat. at 2792; App. 283a. Although Congress delegated to the Secretary the authority to make withdrawals, that authority may be exercised "*only* in accordance with the provisions and limitations of [Section 204 of FLPMA]." 43 U.S.C. § 1714(a) (emphasis added); *see* 43 U.S.C. § 1712(e)(3) ("[P]ublic lands shall be removed from or restored to the operation of the Mining Law of 1872 ... *only* by withdrawal action pursuant to [Section 204] or other action pursuant to applicable law ...." (emphasis added)).

Section 204 created three types of withdrawals. First, under Section 204(c)(1), the Secretary may withdraw 5,000 acres or more ("large-tract withdrawals") for up to 20 years and, upon making such a withdrawal, the "Secretary shall notify both Houses of Congress of such a withdrawal." 43 U.S.C.

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[4] FLPMA defines "withdrawal" as:

> [W]ithholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program ....

43 U.S.C. § 1702(j).

§ 1714(c)(1).[5] Section 204(c)(1) further contains a legislative veto, which provides that a large-tract withdrawal "shall terminate and become ineffective at the end of ninety days … beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal." *Id*.

Second, under Section 204(d), the Secretary may withdraw "less than five thousand acres" ("small-tract withdrawals") "on his own motion or upon request by a department or an agency head …." 43 U.S.C. § 1714(d); App. 279a–80a. There are three variations of small-tract withdrawals: (1) for a "desirable resource use" that can be of unlimited duration; (2) for "any other use" that is limited to 20 years; and (3) for "a specific use then under consideration by the Congress" that is limited to five years. 43 U.S.C. §§ 1714(d)(1)–(3); App. 279a–80a.

Finally, under Section 204(e), "the Secretary may make a withdrawal when an "emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost" ("emergency withdrawals"). 43 U.S.C. § 1714(e); App. 280a. Such withdrawals are effective when made and may not exceed three years. *Id*.

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[5] Concurrently, the Secretary must provide Congress information explaining, *inter alia*, why the withdrawal is necessary, the mineral potential of the area, and the economic impact of the withdrawal. 43 U.S.C. § 1714(c)(2).

Importantly, Congress limited only the large-tract withdrawal authority with a legislative veto. This demonstrates that Congress intended to have oversight and control with respect to large-tract withdrawals.

II. FACTUAL BACKGROUND.

Northern Arizona contains some of the highest-grade uranium deposits in the United States. *See*, *e.g.*, AEMA C.A. E.R. 375 (the average grade of uranium deposits in northern Arizona "is significantly higher than almost all of the other uranium reserves in the United States ...."); *id*. 221 (the lands in northern Arizona contain "some of the highest uranium potential in the country"). These deposits are concentrated in "breccia pipes," "which are cylinder-shaped deposits of broken sedimentary rock stretching thousands of feet underground ...." App. 16a. These breccia pipes allow operators to "produce more uranium" with "less [of an] environmental footprint" than conventional uranium deposits. AEMA C.A. E.R. 438.

These valuable mineral deposits are located in northern Arizona outside of the 1.2 million-acre Grand Canyon National Park. In 1984, Congress passed legislation designating 250,000 acres of federal lands outside of the Park as wilderness, while releasing 600,000 acres of land for multiple use, including mining. Arizona Wilderness Act, Pub. L. 98–406, Title III, 98 Stat. 1485 (1984). The 1984 Arizona Wilderness Act was the result of historic compromise between environmental groups, uranium mining

interests, the livestock industry, and others that established which areas in northern Arizona should be preserved, and which areas should be open to mining. *See, e.g.*, *The Northern Arizona Mining Continuity Act of 2011: Hearing on H.R. 3155 Before the H. Subcomm. On National Parks, Forests and Public Lands*, 112th Cong. 6–7 (2011) (statement of Sen. John McCain); *id.* at 53 (statement of Buster Johnson, Supervisor, Mohave County, Arizona). Importantly, the subsequent administrations respected the intent and spirit of the 1984 Arizona Wilderness Act, by leaving the 600,000 acres open to operation of the Mining Law. *See*, *e.g.*, *Grand Canyon Watershed Protection Act of 2008: Hearing on H.R. 5583 Before H. Subcomm. On National Parks, Forests and Public Lands*, 110th Cong. (testimony of Undersecretary Mark Rey, U.S. Dep't of Agriculture).

As the lands outside of Grand Canyon National Park remained open to location and entry under the Mining Law, AEMA members actively engaged in exploration and/or development programs designed to explore for, discover, and produce the breccia pipe deposits in the area. *See* App. 215a–20a, 287a. To this end, the AEMA members spent millions of dollars exploring and locating hundreds of mining claims in northern Arizona with the expectation to develop these high-grade uranium deposits. App. 218a–19a (DIR Exploration located more than 600 mining claims and spent roughly $2.9 million); *id.* (Vane Minerals located 678 mining claims and spent more than $8.5 million); *id*. 285–90 (Dr. Karen Wenrich spent approximately $108,000 "exploring, locating acquiring and developing mining claims ....").

On July 21, 2009, notice was published in the *Federal Register* that the Secretary proposed to withdraw more than 1 million acres in northern Arizona from operation of the Mining Law. 74 Fed. Reg. 35,887 (July 21, 2009). Upon publication of this notice, these lands were immediately segregated from operation of the Mining Law for two years. *Id.* at 35,888; *see* 43 U.S.C. § 1714(b)(1).

In January 2012, following completion of the process required by the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, the Secretary issued Public Land Order ("PLO") 7787, which withdrew, subject to valid existing rights, 1,006,545 acres of federal lands in northern Arizona from location and entry under the Mining Law for twenty years. 77 Fed. Reg. 2,563 (Jan. 18, 2012). PLO 7787, however, did not withdraw the lands "from the mineral leasing, geothermal leasing, mineral materials or other public land laws ...." *Id*. In short, with a stroke of the pen, the Secretary barred AEMA members from exploring for and locating new mining claims, effectively precluded development of their existing claims, and rendered their substantial investment of time and money essentially worthless. *See* App. 210a–14a, 217a–20a (District Court describing effects of the withdrawal on AEMA's members); *see also* App. 285a–90a.

III. PROCEDURAL BACKGROUND.

On March 6, 2012, AEMA filed the underlying action seeking judicial review of the massive withdrawal. AEMA alleged that the Secretary

exceeded his authority in making the 1 million-acre withdrawal because FLPMA's large-tract withdrawal provision, 43 U.S.C. § 1714(c)(1), contains an unconstitutional legislative veto. App. 23a. The District Court ultimately consolidated AEMA's case with three other cases. *See* App. 67a.

AEMA and others then sought partial summary judgment with respect to the authority of the Secretary to make large-tract withdrawals. App. 67a. AEMA argued that the legislative veto in Section 204(c)(1) of FLPMA, was unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983). *See* App. 67a, 70a–71a. AEMA further argued that the unconstitutional legislative veto could not be severed from the provision in which it was embedded. *See* App. 71a. As a result, the entire provision, Section 204(c)(1) had to be severed from FLPMA, rendering the Secretary's 1 million-acre withdrawal *ultra vires*. *See* App. 67a.

The District Court agreed with AEMA that the legislative veto was unconstitutional. App. 71a ("Section 204(c), which allows Congress to void the Secretary's decisions without presentment to the President, is clearly unconstitutional under *Chadha*."). Yet, instead of voiding Section 204(c)(1) in its entirety, the District Court only severed the unconstitutional legislative veto from that provision, leaving the Secretary's authority to make large-tract withdrawals intact. App. 107a; *see* App. 109a–27a (District Court denying motion for reconsideration regarding the legislative veto); *see also* App. 128a–36a (District Court denying motion for entry of final judgment regarding AEMA's legislative veto claim).

On September 30, 2014, the District Court rejected all of the remaining claims asserted by AEMA and the other plaintiffs and entered final judgment in favor of the Secretary. App. 137a–201a, 271a. AEMA then timely appealed, as did other plaintiffs. *See* App. 24a.

On December 12, 2017, the Ninth Circuit affirmed. App. 35a–65a. As to the legislative veto, the Ninth Circuit had "little difficulty concluding the legislative veto provision violates the presentment requirement ...." App. 25a. Yet, like the District Court before it, the Ninth Circuit refused to invalidate the large-tract withdrawal provision in which the veto was embedded. App. 24a–35a. In refusing to do so, the Ninth Circuit relied heavily on the fact that FLPMA contains a severability clause,[6] and that the "offending" provision was merely a legislative veto, which "the ordinary process of legislation" could replace. App. 26a–27a; *id*. 33a ("Congress has the opportunity to pass timely and informed legislation reversing any withdrawal—legislation that would then be submitted for presidential approval (or veto, followed by a potential override)."). Importantly, the Ninth Circuit conceded that "[i]t is possible—perhaps even likely—that had Congress known in 1976 that the legislative veto provision was unconstitutional, a somewhat different legislative bargain would have been struck." App. 32a. Yet the Ninth Circuit chose to go against the weight of the evidence to save the

[6] The severability clause is in Section 707 of FLPMA. 90 Stat. at 2794; App. 284a.

Secretary's large-tract withdrawal authority, by significantly overstating the strength of FLPMA's other limitations on the Secretary's large-tract withdrawal authority, *see* App. 28a–30a, and by searching the legislative history for ambiguity rather than considering that Congress passed FLPMA, in part, to solve a particular problem of unfettered Executive discretion vis-à-vis large-tract withdrawals. *See* App. 30a–32a.

AEMA now seeks this Court's review to ensure that Congress's intent to limit the Executive's authority to withdraw large areas of federal lands from operation of the Mining Law is not ignored. The importance of this issue cannot be understated considering that Congress—not the Executive— is the body entrusted by the Constitution with the "Power to dispose of and make all needful Rules and Regulations respecting" federal lands.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S FLAWED SEVERABILITY ANALYSIS PERPETUATES THE EVIL THAT CONGRESS SOUGHT TO REMEDY IN PASSING FLPMA.

This Court has long held that the question of whether an invalid provision may be severed from the rest of the statute ultimately turns on discerning the intent of Congress, *see Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936), and that "[u]nless it is evident that the Legislature would not have enacted those

provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *INS v. Chadha*, 462 U.S. at 931–32 (quotation omitted). While lower courts have often focused their analysis on the phrase "fully operative as a law," this Court has also stated, particularly in the context of a legislative veto, "the independent operation of a statute in the absence of a legislative-veto provision thus could be said to indicate little about the intent of Congress regarding severability of the veto." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). Instead, "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* (emphasis in original).

Here, the Ninth Circuit's revised version of Section 204(c)(1) sans the legislative veto not only fails to function in a manner consistent with the intent of Congress, but actually results in a situation where the Secretary has nearly unfettered discretion to make land withdrawals of practically infinite size—the exact evil Congress was attempting to address when it enacted FLPMA.[7] *See Mountain States Legal*

[7] While there are several purported limitations on large-tract withdrawals in addition to the legislative veto, they are either merely procedural, such as the notice requirement, 43 U.S.C. § 1714(c)(1), or entirely toothless, such as the twenty-year maximum duration, *id.*, which is endlessly renewable. *See* 43 U.S.C. § 1714(f); App. 280a–81a; *see also* 59 Fed. Reg. 39,701 (Aug. 4, 1994) (PLO 7070 withdrawing 769,543 acres from operation of the Mining Law for 20 years); 79 Fed. Reg. 49,535 (Aug. 21, 2014) (PLO 7828 extending PLO 7070 for another 20 years).

Foundation v. Andrus, 499 F. Supp. 383, 395 (D. Wyo. 1980) ("[I]t was the intent of Congress with the passage of FLPMA to limit the ability of the Secretary … to remove large tracts of public land from the operation of the public land laws ...."). In fact, the primary purpose of Section 204 of FLPMA was to reassert meaningful congressional control over large-tract withdrawals, with the legislative veto playing an important role:

> One of the principal goals in enacting FLPMA was to limit the executive discretionary authority over the public lands. At the same time, Congress felt a need to delegate some of its own authority over the public lands, to avoid being overly burdened with making routine administrative decisions. Congress reconciled these potentially conflicting objectives by delegating to the executive authority subject to various substantive and procedural constraints. *The legislative veto provisions of the Act are the most significant of those constraints. Invalidation of the veto provisions will unavoidably upset the balance of power which Congress preferred.*

Robert L. Glicksman, *Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Land Management Act*, 36 HASTINGS L.J. 1, 66 (1984) (emphasis added) (footnotes omitted). Reading

FLPMA's legislative history and examining the historical and political context in which it was enacted, reveals that the legislative oversight provided by the veto was one of Congress's central concerns and that "removal of all of section 204(c) from the statute—seems closest to the scheme Congress itself would have chosen had it known that the legislative veto was invalid." *Id*. at 82.

A. FLPMA Was Passed In Response To Decades Of Unfettered Executive Discretion In Withdrawing Federal Lands.

To understand Congress's intent with regard to the severability of the legislative veto, it is helpful to examine the historical and political context that led Congress to enact FLPMA in the first place. Toward the end of the Nineteenth Century, federal policy toward the vast amounts of federal lands throughout the West began to shift from the focus on transferring ownership to private parties for productive economic use to a focus on conservation. *See* Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 350–59 (1994). This shift in focus became more pronounced as "Congress and the executive responded to growing concerns for the protection of the remaining public domain by making massive 'withdrawals' of public lands—preventing certain uses on them, and by establishing 'reservations'—dedicating lands to particular uses." David Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT.

RESOURCES J. 280, 285 (1982). During this period, Congress occasionally delegated withdrawal authority to the President, but failed to establish a comprehensive federal land policy to guide executive discretion until the passage of the Pickett Act in 1910, which was largely ignored by the Executive. *Id.* at 292–93.

In *Midwest Oil*, this Court upheld the President's asserted implied withdrawal authority, in the absence of a specific statutory authorization, based on Congress's longstanding failure to repudiate past *ultra vires* withdrawals. 236 U.S. at 483. While the Property Clause of the Constitution grants authority over the federal lands to Congress alone, this Court held that the "acquiescence of Congress" to a long line of executive branch withdrawals lacking statutory authorization impliedly delegated such authority to the Executive. *Id.* FLPMA was a direct attempt to clarify the Executive's withdrawal authority, as the Executive continued to make statutorily unauthorized withdrawals following the Pickett Act and *Midwest Oil*. *See, e.g.*, 30 Fed. Reg. 12,076 (Sept. 22, 1965) (withdrawing 33,112 acres); 32 Fed. Reg. 11,876 (Aug. 17, 1967) (withdrawing 52,000 acres).

In fact, Congress specifically created the PLLRC to investigate possible solutions to this problem, and the PLLRC concluded that Congress needed to "assert its constitutional authority" to rein in the Executive's use of withdrawals "in an uncontrolled and haphazard manner." PLLRC Report at 2, 43. The PLLRC did not merely recommend a

consolidation or streamlining of the laws regarding withdrawals; it railed against Congress's abdication of its responsibilities, described past executive withdrawals as being made without sufficient study or public input, and urged Congress to strictly limit the Executive's ability to withdraw federal lands. *Id.* at 1 ("[W]e find that, generally, areas set aside by executive action … have not had adequate study and there has not been proper consultation with people affected …."); *id.* ("[W]e believe that in many cases there was hasty action based on preconceived determinations instead of being based on careful land use planning."); *id.* at 2 ("[T]he need for administrative flexibility … does not justify failure to legislate the controlling standards, guidelines, and criteria under which public land decisions should be made."); *id.* ("We conclude that Congress should not delegate broad authority for these types of actions.").

B. FLPMA's Legislative History Demonstrates Congress's Intent To Constrain The Executive's Ability To Withdraw Federal Lands.

FLPMA's legislative history also proves that the main purpose of Section 204 was to reassert meaningful congressional control over large-tract withdrawals. *See* Glicksman, 36 HASTINGS L.J. at 72 ("Throughout the legislative process leading to the enactment of FLPMA, Congress repeatedly stressed the need to restrain the executive's authority to make withdrawals."); *see also Mountain States Legal Foundation*, 499 F. Supp. at 395 ("[I]t is clear that Congress intended with the passage of FLPMA to

reassert control over the use of federal lands."). FLPMA's legislative history further demonstrates how integral the legislative veto was to the "delicate balance of power over the public lands" Congress was seeking to establish. *See* Glicksman, 36 HASTINGS L.J. at 1, 4.

In its report on the bill that would eventually become FLPMA, the House Committee on Interior and Insular Affairs stated "[t]he Executive Branch of the Government has tended to fill in missing gaps in the law, not always in a manner consistent with a system balanced in the best interests of all the people," and listed as one of its four major objectives to "[e]stablish procedures to facilitate Congressional oversight of public land operations entrusted to the Secretary of the Interior." H.R. Rep. No. 94-1163, at 1–2 (1976). Congress expressly included the legislative veto to ensure "the integrity of the great national resource management systems will remain under the control of Congress." *Id.* at 9; *see also* PLLRC Report at 44 ("In short, the excessive use of Executive withdrawals has become a source of increasing controversy.").

In addition to the evidence in the Committee Reports, statements by individual members of Congress reaffirm this conclusion.[8] *See* 122 Cong. Rec.

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[8] Although AEMA uses individual statements to support its argument, it recognizes that the Committee Reports are more indicative of Congress's intent, *Garcia v. United States*, 469 U.S. 70, 76 (1984), and that the text of FLPMA is most authoritative. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005).

23,434–57 (July 22, 1976); *id.* at 23,436–37 (Rep. Skubitz) ("One of the most important reasons for adopting this bill is that it provides for congressional oversight and control over an executive agency which, at present, is free to act mostly of its own accord."); *see also id.* at 23,454 (Rep. Johnson) ("I think it has been proven time after time that granting authority to the executive branch …. tends to result inevitably in the abuse of the authority."). The legislative veto in particular was seen as a vital and "principal means of limiting executive discretion." Glicksman, 36 HASTINGS L.J. at 5; *see* 122 Cong. Rec. 23,436–37 (Rep. Skubitz) ("We must end what often has been a historic pattern of casual or even reckless withdrawal of public lands. It is essential that Congress be informed of, and able to oppose if necessary, withdrawals which it determines not to be in the best interest of all the people."); 122 Cong. Rec. 23,452 (Rep. Melcher) ("Since there is now no system of congressional review and congressional oversight of withdrawals, this is the first positive step that Congress has taken to make that responsibility felt and to exercise that responsibility.").

In sum, the Ninth Circuit's severability analysis results in unbridled Executive discretion over large-tract withdrawals. Yet, this is the exact evil Congress sought to remedy when it passed Section 204(c)(1) of FLPMA. Because Section 204(c)(1), as re-written by the Ninth Circuit, cannot possibly "function in a *manner* consistent with the intent of Congress[,]" *Alaska Airlines*, 480 U.S. at 685, this Court's review is warranted.

II. THE NINTH CIRCUIT FAILED TO PROPERLY ANALYZE FLPMA'S TEXT AND STRUCTURE, WHICH PROVE CONGRESS WOULD NOT HAVE GRANTED THE SECRETARY LARGE-TRACT WITHDRAWAL AUTHORITY WITHOUT THE VETO.

The Ninth Circuit was only able to reach a result so antithetical to Congress's intent because it failed to properly consider all indicia of Congress's intent, most importantly FLPMA's text and structure. *See Alaska Airlines*, 480 U.S. at 684–97 (analyzing multiple aspects of the statute's text, structure, and history in order to determine congressional intent regarding a legislative veto). Yet, when properly considered, FLPMA's text and structure prove that severing the entirety of Section 204(c)(1) is the solution most consistent with Congress's intent.

A. Congress Declared Its Intent To Rein In The Executive.

A natural place to start in attempting to determine Congress's intent when it passed FLPMA would be the declaration of policy in 43 U.S.C. § 1701, where Congress lays out the policy goals of the statute. The declaration provides, *inter alia*, that it is "the policy of the United States that ... Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4);

App. 272a. This language unmistakably shows that Congress was particularly concerned with asserting *its own* constitutional authority to withdraw federal lands, while limiting the ability of the Executive to do so. Thus, severing the entirety of Section 204(c)(1) is most consistent with Congress's declared intent.

B. Congress Overruled *Midwest Oil* And Repealed Existing Withdrawal Authorities.

That Congress's primary intent in passing Section 204 of FLPMA was to limit the Executive's authority to withdraw federal lands, rather than "enabling the Executive to act," as the courts below erroneously believed, App. 30a, is perhaps nowhere more apparent than in its express repeal of the Executive's existing withdrawal authority. Section 704(a) of FLPMA expressly provides that "the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) and the following statutes and parts of statutes are repealed …." 90 Stat. at 2792; App. 283a. Section 704(a) goes on to repeal all or a portion of 29 statutes, constituting nearly every delegation of withdrawal authority then in existence, including the withdrawal authority in the Pickett Act.[9] 90 Stat. at 2792. Section 704(a)'s explicit repudiation of *Midwest Oil*'s holding that the President had "implied authority" to withdraw federal lands and its express repeal of

[9] Only the President's authority under the Antiquities Act of 1906 escaped the chopping block. *See* Glicksman, 36 HASTINGS L.J. at 77.

existing statutory authorizations to make withdrawals, proves that FLPMA represents an end to unbridled Executive discretion and the beginning of a new era of legislative primacy in this area. In other words, Congress chose not to just tinker with existing laws, but to wipe the slate clean and rebuild the entire land withdrawal system from scratch to ensure strong legislative oversight.

The Ninth Circuit, however, failed to grasp the significance of Section 704(a) when it simply severed the legislative veto from Section 204(c)(1). In so doing, the Ninth Circuit effectively rendered Section 704(a) a nullity because it bestowed upon the Secretary unfettered large-tract withdrawal authority—the exact authority Section 704(a) expressly revoked. Such a result is untenable. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

C. Congress Mandated That Withdrawals Could Be Made Only In Accordance With All The Statutorily Imposed Limitations.

Congress was even more explicit about its fundamental intent to constrain the Executive in Section 204(a), which specifies that the Secretary may withdraw lands "*only* in accordance with the *provisions and limitations* of this section." 43 U.S.C. § 1714(a) (all emphasis added); App. 275a. Whenever

possible, courts should be guided by the plain meaning of the words in a statute, and not seek ambiguity in clear, unqualified language. *See Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."). Here, Section 204(a) is unequivocal. The Secretary is authorized to make large-tract withdrawals: (1) *only* in the way Congress has prescribed in Section 204(c); and (2) *only* subject to the *limitations* imposed by Section 204(c), including the legislative veto. Section 204(a) means what it says and, in the words of the Fifth Circuit, "'only' means 'only.'" *United States v. Diaz-Gomez*, 680 F.3d 477, 480 (5th Cir. 2012); *Nicklos Drilling Co. v. Cowart*, 907 F.2d 1552, 1554 (5th Cir. 1990) (same); *see Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (quotation omitted)).

Congress did not intend for the limitations placed on the Executive's large-tract withdrawal authority to be hortatory; it intended for the limitations, including the legislative veto, to be followed. Otherwise, Congress would not have delegated any large-tract withdrawal authority. Thus, severing only the legislative veto—the most significant limitation on the authority—as the Ninth Circuit did, both frustrates Congress's intent, and renders Section 204(a) essentially meaningless and

not "fully operative as a law." *Alaska Airlines*, 480 U.S. at 684; *cf. Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ....' (quoting 2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION § 46.06, pp. 181–186 (rev. 6th ed. 2000) (footnotes omitted))).

This conclusion is supported by the fact that the specific nature of the language at issue in this case is similar to the language addressed in *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001). In *Nguyen*, this Court concluded that specific language in the Immigration and Nationality Act ("INA") limiting the ways in which an individual can be naturalized is more dispositive of Congress's intent than the INA's general severability clause. 533 U.S. at 72 ("[I]t is significant that, although the [INA] contains a general severability provision, Congress expressly provided with respect to the very subchapter of the United States Code at issue and in a provision entitled 'Sole procedure' that '[a] person may *only* be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise*.'" (quoting 8 U.S.C. § 1421(d) (all emphasis added) (citations omitted)); *see also Miller v. Albright*, 523 U.S. 420, 457–58 (1998) (Scalia, J., concurring in judgment) (making the same argument that the "clear statement of congressional intent" found in the INA trumps the severability clause, as "the specific governs the general").

According to the Ninth Circuit, however, that FLPMA does not include the additional "and not otherwise" language found in the INA makes this case fundamentally different from *Nguyen* and *Miller*. App. 81a–82a. This is a distinction without a difference, as "only" means the same thing as "and not otherwise." *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (Unabridged, 2d ed. 1979) ("Only, *adv.* 1. In one manner or for one purpose alone …. 2. Solely; no other than."). Both choices of language are obvious attempts to limit the circumstances under which an action may be taken to those explicitly contemplated in the statute. That Congress decided to use a "belt and suspenders" approach when it drafted the INA does not change the plain, ordinary meaning of the word "only." *See King v. Burwell*, 135 S. Ct. 2480, 2498 (2015) (Scalia, J., dissenting) ("Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void).").

D. Congress Purposefully Tied The Legislative Veto To The Secretary's Large-Tract Withdrawal Authority.

The structure of Section 204(c)(1) also demonstrates that the legislative veto was an indispensable limit on the delegation of authority to make large-tract withdrawals. Specifically, Congress embedded the legislative veto in the same subsection as the delegation. 43 U.S.C. § 1714(c)(1); App 276a–77a. This indicates that the delegation of authority to make large-tract withdrawals and the legislative veto

are "interwoven" and cannot be separated. *Hill v. Wallace*, 259 U.S. 44, 70 (1922) ("'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not.'" (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875))). In other words, by embedding the legislative veto into the delegation of authority, Congress indicated that the two policies are interwoven and should "stand or fall" together. *Regan v. Time, Inc.*, 468 U.S. 641, 677 (1984) (Brennan, J., concurring in part and dissenting in part) ("[T]he two requirements are so completely intertwined as to be plainly inseverable; they constitute *a single statutory provision* which operates as an integrated whole. They therefore 'must stand or fall as a unit.'" (quoting *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 83 (1976) (emphasis added))). The Ninth Circuit, however, completely frustrated Congress's intent by severing the interconnected legislative veto and allowing the large-tract withdrawal authority to "stand" alone.

E. Congress Intended For There To Be A Distinction Between Large- And Small-Tract Withdrawals.

Section 204 differentiates the Executive's authority to make large-tract withdrawals with the authority to make small-tract withdrawals. *Compare* 43 U.S.C. § 1714(c) *with* 43 U.S.C. § 1714(d); App. 276a–80a. Specifically, Congress delegated almost unrestrained authority to the Executive to make small-tract withdrawals. 43 U.S.C. § 1714(d); *see*

Getches, 22 NAT. RESOURCES J. at 318–19 ("[small-tract withdrawals] may be set aside without restriction so long as they are for a 'resource use.'" (quoting 43 U.S.C. § 1714(d))). On the other hand, Congress subjected large-tract withdrawals to the legislative veto, a notice requirement, and mandated that the Secretary submit information to Congress that addresses twelve topics. 43 U.S.C. §§ 1714(c)(1), (2)(1)–(12); App. 276a–79a. Thus, Congress intended large-tract withdrawals to have much more congressional oversight than small-tract withdrawals. *See* PLLRC Report at 54 (recommending that "[l]arge scale limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress."). Yet, severing only the legislative veto is inconsistent with that intention, because it leaves no meaningful difference between large-tract withdrawals and small-tract withdrawals.

This is especially true considering that the requirements in Section 204(c) of FLPMA other than the legislative veto are not meaningful restraints on the large-tract withdrawal authority. *See* Glicksman, 36 HASTINGS L.J. at 79–83. Nevertheless, the Ninth Circuit held that the requirements to notify and send information to Congress are sufficient to uphold congressional intent to assert its authority over large-tract withdrawals of federal lands. App. 29a–30a. The purpose of these requirements, however, was to give Congress the chance to assess the withdrawal and, if necessary, veto the decision. *See* 122 Cong. Rec. 23,452 (Rep. Melcher) (characterizing the requirement to notify and provide information as providing Congress an opportunity to review and

potentially object to large-tract withdrawals); *see also* 43 U.S.C. § 1714(c)(1) (providing that the notice triggers the 90 days in which Congress must exercise its veto power).

Moreover, exercising a legislative veto to overturn a large-tract withdrawal is much easier for Congress than passing a bill. *See* Getches, 22 NAT. RESOURCES J. at 325. ("Congress's disapproval [of a large-tract withdrawal] can be manifested in a concurrent resolution which may avoid some of the procedures encumbering ordinary legislation …."). Furthermore, the congressional oversight provided by the veto produces a "sobering effect" on the Secretary that "may assure greater responsibility" by the Secretary "in using the authority." *Id.* at 329. Yet, severing only the veto, as the Ninth Circuit did, allows the Secretary to act without any meaningful supervision, just as he may do with respect to small-tract withdrawals. This could not have been Congress's intent when it placed the legislative veto in Section 204(c)(1). *See* 43 U.S.C. §§ 1714(c), (d); App. 276a–80a.

F. FLPMA's Severability Clause Does Not Carry Talismanic Weight.

The Ninth Circuit's analysis essentially began and ended with FLPMA's severability clause. *See* App. 26a–27a (citing *Alaska Airlines*, 480 U.S. at 686). Yet, severability clauses "are hardly precise indicators of a given legislature's specific intention with respect to the removal of particular provisions." Glenn Chatmas Smith, *From Unnecessary Surgery to Plastic Surgery:*

A New Approach to the Legislative Veto Severability Cases, 24 HARV. J. ON LEGIS. 397, 424–25 (1987). In fact, "[t]he habitual inclusion of severability clauses stems from their development as a defensive legislative strategy in the face of the general presumption against severability that courts employed in the early decades of this century." *Id*. at 425.

By placing so much emphasis on FLPMA's severability clause, the Ninth Circuit ignored cases where unconstitutional statutory provisions were found to be not severable, despite the presence of a severability clause. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) ("We have held that a severability clause is an aid merely; not an inexorable command." (quoting *Reno v. ACLU*, 521 U.S. 844, 882–83 (1997) (internal quotations omitted)); *Carter Coal*, 298 U.S. at 312–16 ("The presumption in favor of separability does not authorize the court to give the statute an effect altogether different from that sought by the measure viewed as a whole." (quotations omitted)). The Ninth Circuit also overlooked that, although severability clauses may be relevant in certain circumstances, they are rarely conclusive. *United States v. Jackson*, 390 U.S. 570, 585 n.7 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of [a severability] clause."). In short, by allowing the boilerplate, severability clause to trump all other evidence, the Ninth Circuit reached a result in direct contravention of Congress's intent.

III. THE ISSUES IN THIS CASE HAVE NATIONAL SIGNIFICANCE.

In addition to the flaws associated with the Ninth Circuit's severability analysis, this Court's review is also necessary because of the national significance of the issues involved in this case. If the Ninth Circuit's ruling stands and FLPMA's delegation of large-tract withdrawal authority remains law absent the legislative veto, virtually all federal lands could be withdrawn from operation of the Mining Law through large-scale, twenty-year withdrawals, indefinitely renewable, with no real means for Congress to respond other than to pass legislation. This presents serious separation of powers concerns.

> [I]t is necessary to recognize that the absence of the veto necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government. Thus, it is not only appropriate to evaluate the importance of the veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a veto. Some delegations of power to the Executive or to an independent agency may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism.

Alaska Airlines, 480 U.S. at 685; *see Glicksman*, 36 HASTINGS L.J. at 5 (If the legislative vetoes in FLPMA

are merely invalidated "the allocation of power between the two branches of government could differ dramatically from what Congress intended when the statute was enacted.").

Furthermore, if the Ninth Circuit's ruling stands, it could cripple the Mining Law and the domestic mining industry, both of which are vital to the Nation's economy and security. *See* 43 U.S.C. § 1701(a)(12) (recognizing "the Nation's need for domestic sources of minerals"); App. 274a; 30 U.S.C. § 21a (developing domestic mineral resources is critical for national security); PLLRC Report at 121 ("Our standard of living and our national defense are heavily dependent upon the availability of fuel and nonfuel minerals."). As demonstrated above, the legislative veto was the only significant limitation on the Secretary's large-tract withdrawal authority because Section 204(c)(1)'s notice requirement is merely procedural and the twenty-year maximum term is endlessly renewable. The Ninth Circuit's decision to simply sever the veto and retain the Secretary's large-tract withdrawal authority grants the Secretary carte blanch to lock up virtually all federal land from mining through extremely large, nearly unreviewable withdrawals. *See Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 756–58 (D.C. Cir. 2007) (applying a deferential standard of review to a large-tract withdrawal). This is not mere rhetoric, as AEMA and its members recently "dodged a bullet" when an unprecedented *10 million-acre* withdrawal proposal was cancelled. 80 Fed. Reg. 57,635 (Sept. 24, 2015) (proposal to withdrawal 10 million acres in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming); 82 Fed. Reg. 47,248 (Oct. 11,

2017) (cancelling proposed withdrawal). In short, the Ninth Circuit's decision is directly contrary to what Congress intended when it enacted FLPMA, and bestows upon the Executive nearly unfettered discretion over the use of the Nation's federal lands, despite the fact that the Constitution vests that authority exclusively in Congress.

That this unfettered large-tract withdrawal authority conferred on the Secretary by the Ninth Circuit poses a major risk to the mining industry, and, therefore, the United States' economy and security, cannot be disputed. The mining industry accounts for over 1.6 million direct and indirect jobs and provides approximately $44 billion in tax payments and $103 billion in labor income. *See* National Mining Association, *Economic Contributions of Mining* (Sept. 2017).[10] The mining industry also significantly contributes to the Nation, not only as job creators, but also in locating valuable mineral deposits. The mining industry in northern Arizona is particularly beneficial both to the local communities and the country as a whole. Indeed, "[t]he highest-grade uranium deposits in the United States, and some of the highest in the world, occur in a breccia pipe environment in northwestern Arizona." AEMA C.A. E.R. 434 (Legislative Hearing on H.R. 644, Testimony of Dr. Karen Wenrich). The value of the uranium ore located in these pipes has been estimated to be $14 billion. *Id.* And the presence of such high amounts of high-grade uranium in Arizona provides the United States with a

[10] This document is available at: https://nma.org/wp-content/uploads/2016/09/economic-contributions_2016_twopager.pdf (last visited Mar. 7, 2018).

unique opportunity to produce safe, clean energy. *Id.* 435; *see also* 83 Fed. Reg. 7,065 (Feb. 16, 2018) (draft list providing that uranium is a "critical mineral" "essential to the economic and national security of the United States"); USDA, *Final Report Pursuant to Executive Order 13783 on Promoting Energy Independence and Economic Growth* 9 (2017) (recommending that PLO 7787 be revised in light of the important uranium resources).[11]

Finally, it is important to note that the withdrawal has resulted in very serious hardships to AEMA's members and others reliant on making productive use of the land. For example, prior to the withdrawal, Dr. Wenrich—co-recipient of the Nobel Peace prize as a member of the International Atomic Energy Agency—was actively engaged in an exploration and development program designed to locate, delineate, and develop high-grade breccia pipe uranium deposits located in northern Arizona. App. 258a–87a. To this end, Dr. Wenrich spent approximately $108,000 exploring, locating, acquiring, and developing mining claims in the area. App. 288a. In fact, Dr. Wenrich had acquired an ownership interest in more than 160 mining claims covering approximately 3,000 acres. App. 287a. The withdrawal essentially wiped-out Dr. Wenrich's investment and rendered her mining claims worthless by making it uneconomical to maintain the claims. App. 288a–90a; 30 U.S.C. § 28f (requiring the

[11] This Report is available at: https://www.fs.fed.us/managing-land/energy (last visited Mar. 7, 2018).

payment of an annual fee to maintain a mining claim); *see also* 216a–20a.

In sum, the Ninth Circuit's misguided decision will have a significant negative impact on local stakeholders, the American mining industry, and the economic, environmental, and national security interests of the entire United States. It is unlikely that there will be another opportunity to address the severability of FLPMA's legislative veto, as a majority of federal lands open to operation of the Mining Law are in the States within the Ninth Circuit, and to a lesser extent the Tenth Circuit. *See*, Congressional Research Service, Carol Hardy Vincent, *et al*., *Federal Land Ownership: Overview and Data*, 9–10 (Mar. 3, 2017) (demonstrating that most of the federal lands administered by the Bureau of Land Management and the U.S. Forest Service are located in the 11 contiguous western states and Alaska).[12] Thus, the Ninth Circuit's opinion will likely be the last word on the subject, unless the Ninth Circuit were to change its mind in a subsequent case. AEMA's members—who risk their time and capital in seeking to develop the Nation's mineral resources to benefit all Americans—need more than the fool's hope that the Ninth Circuit may eventually see the error of its ways. Therefore, this Court's review is imperative. *See Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 42 (1983) (granting certiorari because "of the importance of the case to the administration of the more than 33 million acres of land patented under the [Stock-Raising Homestead

[12] This Report is available at: https://fas.org/sgp/crs/misc/R42346.pdf (last visited Mar. 7, 2018).

Act]"); *Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979) (granting certiorari because the decision below "affect[ed] property rights in 150 million acres of land in the Western United States").

♦

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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