No. 19-975

In The
Supreme Court of the United States

CENTER FOR BIOLOGICAL DIVERSITY, ANIMAL LEGAL DEFENSE FUND, DEFENDERS OF WILDLIFE, AND SOUTHWEST ENVIRONMENTAL CENTER,

Petitioners,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY AND CHAD WOLF, ACTING SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.

On Petition For Writ Of Certiorari To The United States District Court For The District Of Columbia

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BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENTS IN SUPPORT OF PETITIONERS

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New York v. United States, 505 U.S. 144 (1992) 9

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Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 13

United States v. State of New Mexico, 438 U.S. 696 (1978) 13

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OTHER AUTHORITIES

83 Fed. Reg. 3012, 3013 (Jan. 22, 2018) 2, 11, 24

84 Fed. Reg. 21,798, 21,799 (May 15, 2019) 2, 11, 19, 20, 24

Brady McCombs, *Rain Washes Away 40 Feet of US-Mexico Border Fence*, Arizona Daily Star (Aug. 10, 2011), available at https://tucson.com/news/local/border/rain-washes-away-feet-of-us-mexico-border-fence/article_9eaead31-14eb-5474-a5c5-564a980049b2.html 26

H.R. Rep. No. 109-72 (2005) 10

Michael Colaianni, *Arizona, Pima County Report Record Year for Tourism*, KOLD (July 24, 2019), available at https://www.kold.com/2019/07/25/arizona-pima-county-report-record-year-tourism/ 14

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National Park Service, *Effects of the International Boundary Pedestrian Fence Within the Vicinity of Lukeville, Arizona, on Drainage Systems and Infrastructure, Organ Pipe Cactus National Monument, Arizona* (2008), available at https://www.nps.gov/orpi/learn/nature/upload/FloodReport_July2008_final.pdf....................25, 26

Officials Sign Multi-Species Conservation Plan, Pima County (Oct. 14, 2016), available at https://webcms.pima.gov/cms/One.aspx?portalId=169&pageId=307646 17

Pima County Attractions and Tourism, Visit Tucson, available at https://www.visittucson.org/business/pima-county-attractions-tourism (last visited Mar. 2, 2020) 15

Pima County, *Multi-Species Conservation Plan for Pima County, Arizona: Final* (2016), available at https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Office%20of%20Sustainability%20and%20Conservation/Conservation%20Sciece/Multi-species%20Conservation%20Plan/MSCP_Final_MainDoc_w_Cover.pdf 18

Pima County, *Pima County MSCP: Frequently Asked Questions* (2016), available at https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Office%20of%20Sustainability%20and%20Conservation/Conservation%20Sciece/Multi-species%20Conservation%20Plan/MSCP_FAQs_Update_January_2016_Final.pdf.......17

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Public Water Systems Program, Pima County, available at https://webcms.pima.gov/environment/water/public_water_systems_program/ (last visited Mar. 2, 2020) 13

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The Federalist No. 39 (James Madison) (Clinton Rossiter ed., 1961) 3, 6

The Federalist No. 51 (James Madison) (Clinton Rossiter ed., 1961) 9

INTEREST OF *AMICI CURIAE*[1]

Amici are three local governments near the United States-Mexico border. Pima County is Arizona's second most populous county with over 980,000 residents. It contains parts of the Tohono O'odham Nation, as well as all of the San Xavier Indian Reservation, the Pascua Yaqui Indian Reservation, Organ Pipe Cactus National Monument, Ironwood Forest National Monument and Saguaro National Park. For over 120 miles, Pima County's southern boundary is the United States-Mexico border. The City of Tucson sits at the heart of Pima County. It is the largest city located within 100 miles of the Arizona-Mexico Border, with a population of over 520,000 residents. The City of Las Cruces is the second largest city in New Mexico at over 100,000 residents, and the principal city of Doña Ana County and southern New Mexico.

In the two cases at issue in this petition, the district court rejected Petitioners' separation-of-powers claims, finding that the nondelegation doctrine does not prevent the wholesale abdication of Congress' lawmaking authority to the Secretary of Homeland Security under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Of

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of the *amici*'s intent to file this brief, and all parties consented to the filing.

most concern to *amici* is the Secretary's unfettered and unreviewable power to waive – that is, to effectively preempt – not only any otherwise applicable federal law, but also all state and local requirements related to waived federal laws. Such a far-reaching grant of legislative authority to the Executive branch undermines the federalism protections built into the structure of the U.S. Constitution. On behalf of themselves and the communities they represent, *amici* respectfully submit that the sweeping constitutional implications of IIRIRA warrant the Court's intervention.

SUMMARY OF ARGUMENT

IIRIRA gives the Secretary of Homeland Security the "sole discretion" to waive "all legal requirements" that the Secretary "determines necessary to ensure expeditious construction of" physical barriers and roads "in the vicinity of the United States border." 8 U.S.C. § 1103 note. Over the last three years, the Secretary has exercised this authority numerous times to waive not only dozens of specific federal laws, but also all "state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" those federal laws. *See*, *e.g.*, 84 Fed. Reg. 21,798, 21,799 (May 15, 2019) ("Arizona Waiver"); 83 Fed. Reg. 3012, 3013 (Jan. 22, 2018) ("New Mexico Waiver").

Congress' grant of unbridled Supremacy Clause power to a single unelected Executive branch official has grave constitutional implications for the "residuary and inviolable sovereignty" of the states and the

local communities within them. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citing *The Federalist No. 39*, at 245 (James Madison) (Clinton Rossiter ed., 1961)). The federalism principle of "dual sovereignty" sown into the U.S. Constitution is preserved, to a great extent, through the document's structural separation of powers. The fact that only Congress can make or preempt laws ensures that states and the local communities they represent have a voice in their own governance. When an unelected administrative official wields the extraordinary preemption power of the Supremacy Clause instead of Congress, the voices of local communities can be silenced. Unsurprisingly, the Department of Homeland Security (Department) has used IIRIRA's sweeping delegation of preemption power in precisely this way, trampling with impunity on the interests of communities like Pima County, Tucson, and Las Cruces.

The damage inflicted by IIRIRA is more than theoretical. *Amici* have expended years of effort and millions of local taxpayer dollars to carefully manage their water, wildlife, and other natural resources in a way that balances development with ecological sustainability in the fragile arid Southwest. With the stroke of a pen, the Secretary can upend those efforts and wreak havoc on the local landscape. Indeed, such havoc has already occurred. The Department's failure to hear and incorporate the concerns of local experts with first-hand knowledge of local weather patterns and topography already has caused millions of dollars of flood damage along certain stretches of the border wall in

Arizona. The far-reaching new Arizona and New Mexico Waivers promise more of the same.

Even Congress recognized IIRIRA's potential to undercut constitutional federalism in the most directly affected communities when it amended the statute in 2007 to add a "consultation" requirement. Sadly, this amendment does nothing to remedy IIRIRA's serious federalism implications because the consultation command, like the statute's waiver provision, contains no guiding standards. As a result, the Secretary simply ignored this consultation requirement when issuing the Arizona and New Mexico Waivers; the Department did not consult with any of *amici* before waiving a wide swath of federal, state, and local requirements designed to protect natural and economic resources in these communities. And the court below held that IIRIRA shields such blatantly *ultra vires* conduct from any judicial challenge. In the end, IIRIRA allows an administrative agency to brandish the power of the Supremacy Clause without any accountability to Congress, the courts, or the people most directly affected.

ARGUMENT

I. IIRIRA's Broad Delegation of Congressional Lawmaking Authority to Executive Branch Officials Undermines the Basic Federalism Principles Embedded in Our Constitution.

The U.S. Constitution establishes an intricate system of checks and balances. These checks operate

horizontally through the separation of power between three co-equal branches of the national government. And they operate vertically through an architecture of "dual sovereignty," which reserves to the states all power not specifically delegated to the federal government. *Printz v. United States*, 521 U.S. 898, 918-19 (1997). As the Court has recognized, however, these core structural components do not work in isolation. Rather, "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). In particular, the Constitution ensures that the federal branch most reflective of and responsive to the interests of the states – Congress – is the same branch charged with making the laws that affect those interests.

IIRIRA's capacious grant of authority to the Executive branch undermines both the horizontal and vertical safeguards embedded in the Constitution. As Petitioners convincingly demonstrate, IIRIRA violates basic separation-of-powers principles by impermissibly delegating legislative authority to an unelected Cabinet Secretary. Pet. 21-25. But the statute also raises serious federalism concerns. By granting an administrative agency official unfettered discretion to override "all legal requirements," without any direction from Congress or review by the courts, IIRIRA turns the Supremacy Clause into a battering ram against states and local governments. Because IIRIRA imposes neither horizontal nor vertical limits on the

exercise of Executive authority and then effectively immunizes the exercise of that authority from judicial scrutiny, the Court should be especially concerned about its implications for the constitutional balance of power.

A. Constitutional Separation of Powers Provides a Check on Federal Overreach and Helps Protect State and Local Interests.

Federalism is woven into our constitutional structure. Article I, section 8 enumerates the limited set of national powers to be exercised only by Congress. The Tenth Amendment, enacted shortly thereafter "to allay lingering concerns about the extent of the national power," put to rest "[a]ny doubt regarding the constitutional role of the States." *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). This structure reserves to the states "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in th[eir] status" as independent sovereign entities. *Id.* at 714 (citing *The Federalist No. 39*, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

The federal system established by the Constitution gives Congress "vast power but not all power." *Id.* at 758. "When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations," but instead must accord them "the esteem due to them as joint

participants in a federal system" and "must respect" their sovereign status. *Id.* This "federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Bond v. United States*, 564 U.S. 211, 221 (2011).

But federalism is more than a boundary-setting exercise to preserve the respective integrity of state and national legislative institutions; it also "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.' " *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). In short, constitutional federalism "preserves to the people numerous advantages," *Gregory*, 501 U.S. at 458, and enables "States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond*, 564 U.S. at 221.

Despite the benefits of federalism, the national government "holds a decided advantage in this delicate balance" in the form of the Supremacy Clause, which confers on Congress the power to "impose its will on the States" and "legislate in areas traditionally regulated by the States." *Gregory*, 501 U.S. at 460. It is the role of the courts, therefore, to ensure that Congress does not lightly exercise this "extraordinary power." *Id.* Where a law alters the traditional constitutional

balance between the states and the federal government, this Court has demanded an "unmistakably clear" statement evincing a clear and manifest congressional intent to preempt historic state powers. *Id.* at 460-61 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Put differently, federal legislation that threatens to "trench" on traditional state authority "should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power" in the absence of a clear congressional statement to the contrary. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

Given the ultimate hammer of the Supremacy Clause, the delicate constitutional balance between state and national governments is preserved, in significant measure, through the robust separation of powers at the federal level. In particular, exercise of Supremacy Clause authority to override traditional state and local police powers is within the purview of Congress, the branch most responsive to state and local interests and most directly accountable to the people. As James Madison explained:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

The Court has embraced Madison's logic, holding that "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." *Garcia*, 469 U.S. at 551. But if the interests of sovereign states and the benefits of federalism "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power," *id.*, courts must be willing to closely scrutinize congressional efforts to shed those safeguards.

The Court should be especially concerned when Congress purports, as here, to delegate open-ended preemption authority to administrative agencies, which "[u]nlike Congress, . . . are clearly not designed to represent the interests of the States, yet with relative ease . . . can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting).

In short, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution for the crisis of the day." *New York v. United States*, 505 U.S.

144, 188 (1992). As discussed below, the law at issue here does precisely what the constitutional structure was designed to prevent. IIRIRA dismantles the Constitution's core federalist principles by delegating unchecked lawmaking power to the Secretary of Homeland Security, who has repeatedly used that power to preempt all state or local laws that the current administration finds inconvenient or bothersome in its rush to expedite hugely impactful construction projects in *amici's* backyard.

B. IIRIRA Allows an Administrative Official to Exercise Congress' Supremacy Clause Authority Without Any Direction or Limit.

Through IIRIRA, Congress handed the Secretary a preemption sledgehammer, not a scalpel by which to craft policy. The law grants the Secretary "sole discretion" to waive "all legal requirements" that he or she "determines necessary" for construction of physical barriers and roads "in the vicinity of the United States border." 8 U.S.C. § 1103 note; *see also* H.R. Rep. No. 109-72, at 171 (2005) (noting that "the Secretary's discretionary waiver authority extends to any local, state, or federal statute, regulation, or administrative order that could impede expeditious construction of border security infrastructure"). In effect, IIRIRA transfers the Supremacy Clause's "extraordinary" preemption power to an unelected Executive branch official, who may waive all state, local, and tribal requirements of

any kind without a shred of congressional guidance or judicial oversight.

Over the last three years, the Secretary has exercised this authority fifteen times to waive dozens of federal laws and all "state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" those waived federal laws. *See*, *e.g.*, 84 Fed. Reg. 21,798, 21,799 (May 15, 2019); 83 Fed. Reg. 3012, 3013 (Jan. 22, 2018). These waivers broadly cover all state and local laws "with respect to the construction of roads and physical barriers (including, but not limited to, accessing the project area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, and safety features) in the project area." *See*, *e.g.*, 84 Fed. Reg. at 21,799; 83 Fed. Reg. at 3013.

But under our constitutional structure, it is not the Secretary's job to pick and choose whether, when, or how to exercise Supremacy Clause authority. That job belongs to Congress. Indeed, careful crafting of clear statutory parameters to override traditional state and local interests is precisely the type of "critical policy decision" that Congress should "hammer out in the legislative forge." *See Indus. Union Dep't v. Am. Petrol. Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). By granting the Secretary sole, unfettered discretion to preempt any state or local law as he sees fit, Congress has written a blank check to curtail the

"dual sovereignty" that undergirds our federalist system.

This blank check allows the Department to trample on traditional state authority and local interests with impunity, so long as the Secretary determines it "necessary" to achieve "expeditious" project construction "in the vicinity" of the border. And unsurprisingly, the Department has stretched IIRIRA's open-ended language to arrogate to itself maximum control over the most basic state and local government functions of border communities. Under the sweeping language of the Arizona and New Mexico Waivers at issue here, the Department has effectively negated all state and local laws in undefined "project areas" that are "related to the subject" of clean air, clean water, endangered species, toxic waste, and archeological resources, among others.

The IIRIRA waivers could mean that *amici* cannot enforce basic local ordinances designed, for instance, to prevent public nuisances, regulate traffic, or curtail trespass for any activity that the Department declares to be necessary for the construction or "upkeep" of border infrastructure. For example, the Secretary could exempt encampments to house construction workers from fundamental zoning codes and public health and safety laws, leaving local communities helpless to protect and promote their own welfare.

Equally troubling are IIRIRA's implications for the use and long-term preservation of natural resources. Take, for example, the allocation and regulation of

precious water resources. As the Court has recognized, "no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976). "As southwestern populations have grown, conflicting claims to this scarce resource have increased." *Id.*

The Court has also acknowledged that "[t]o meet these claims, several Southwestern States have established elaborate procedures for allocation of water and adjudication of conflicting claims to that resource." *Id.* The allocation and regulation of water use is a quintessential state function, aspects of which are delegated to local government entities. *See*, *e.g.*, *Public Water Systems Program*, Pima County (explaining that Pima County is authorized under Arizona state law to oversee local water supply systems).[2] Indeed, "a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens . . . is at the core of its police power." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982). Thus, unless Congress has specifically reserved federal water rights in connection with the withdrawal of federal public lands (e.g., national forest land, national park land, etc.), the United States "acquire[s] water in the same manner as any other public or private appropriator." *United States v. State of New Mexico*, 438 U.S. 696, 701 (1978).

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[2] Available at https://webcms.pima.gov/environment/water/public_water_systems_program/ (last visited Mar. 2, 2020).

IIRIRA's broad waiver authority threatens long-standing water rights and water use regimes in arid states like Arizona and New Mexico, where local communities rely on careful management of surface water flows and groundwater. For example, the City of Las Cruces is perched on the banks of the Rio Grande River at the edge of the Chihuahuan Desert. Flows from the river are the subject of a contentious water rights lawsuit pitting Texas against the states of New Mexico and Colorado. To avoid becoming embroiled in that dispute, Las Cruces has developed a local long-term strategy for maintaining a sustainable water supply that avoids the need for any Rio Grande flow allocation in favor of 72 widely-spaced deep groundwater wells, careful groundwater monitoring, and active conservation. *See* Suzanne Michaels, *Las Cruces: Our Water Future Is Safe*, KRWG (Dec. 9, 2018).[3] The Secretary could upend those meticulous efforts, and the millions of dollars expended by the community to support them, by overriding water rights and local water allocation requirements and installing new, competing groundwater wells to supply border infrastructure construction and maintenance needs.

Or consider IIRIRA's potential impacts on hard-earned land use planning by Pima County and its largest municipality, Tucson. The city and county have experienced tremendous population growth in the last few decades, as well as a booming tourist industry. *See* Michael Colaianni, *Arizona, Pima County Report*

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[3] Available at https://www.krwg.org/post/las-cruces-our-water-future-safe.

Record Year for Tourism, KOLD (July 24, 2019) (noting that tourism in Pima County generated $2.5 billion in 2018).[4] A significant part of the region's attraction is tethered to its unique desert ecosystem:

> The county lies at an ecological crossroad where habitats and species from the neo-tropics meet the Rocky Mountains and the Sonoran Desert. The diversity in flora, fauna, and geology is spectacular. It contains one of North America's longest inhabited areas – the Santa Cruz River valley. It is rich in pre-Columbian archeology, history and historic routes such as the De Anza Trail, as well as the living cultures of Native American tribes.

Pima County Attractions and Tourism, Visit Tucson.[5]

Because rapid population growth puts these unique cultural and natural attributes at risk, Pima County has engaged in protracted and expensive efforts to balance the demand for more development against the preservation of ecological resources. Much of that effort was conducted in the shadow of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, which can restrict development where listed species are present. Once a species is listed under the Act, any "take" of that species by a private party is unlawful unless authorized by permit. *Id.* § 1538(a). The term "take" is broadly defined "to mean harass, harm, pursue, hunt,

[4] Available at https://www.kold.com/2019/07/25/arizona-pima-county-report-record-year-tourism/.

[5] Available at https://www.visittucson.org/business/pima-county-attractions-tourism (last visited Mar. 2, 2020).

shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). Thus, development activities by property owners that harm listed species could constitute an unlawful take under the statute. Landowners can protect themselves from liability for unauthorized take by obtaining an "incidental take permit." *Id.* § 1539(a)(1)(B). To obtain such a permit, the landowner must submit a habitat conservation plan that addresses the impact of the take, as well as mitigation measures to avoid those impacts, and the Secretary of the Interior must find, after an opportunity for public comment, that the proposed incidental take will be minimized and mitigated to the extent practical. *Id.* § 1539(a)(2).

Because the habitat conservation planning process can be lengthy and costly, local governments often take a lead role in preparing a regional plan for multiple species. Once approved by the U.S. Fish and Wildlife Service, such a plan serves as a blueprint for all future development in the region. Regional multispecies habitat conservation plans take an integrated approach to land management. These plans identify areas for conservation and, at the same time, allow certainty for future development. There is no need for individual federal permits; the local government entity holds the federal incidental take permit and approves individual development through its normal zoning/building code process.

Pima County has followed precisely this approach in balancing the need for species conservation with the demand for both local development and recreational

opportunities. *See* Pima County, *Pima County MSCP: Frequently Asked Questions* at 1 (2016) (explaining that, without the plan, "Pima County and its development community would have to continue to rely on an inefficient species-by-species and project-by-project compliance process").[6] In particular, Pima County's Multi-Species Conservation Plan, approved in 2016, is the culmination of "[n]early two decades of research, planning, and cooperation." *Officials Sign Multi-Species Conservation Plan*, Pima County (Oct. 14, 2016).[7]

As the County explained at the time of adoption:

> The [Multi-Species Conservation Plan] is the keystone of the broader Sonoran Desert Conservation Plan, which seeks to balance the conservation and protection of Pima County's cultural heritage and natural resources with the economic needs of a growing population. . . . Under the terms of the agreement, Pima County receives a federal permit that streamlines [the Endangered Species Act] process, thereby providing a simpler, faster and less-expensive way to move public and private projects into construction.

Id. Altogether, the County held over 600 public meetings, *id.*, convened an 80-member citizens' Steering

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[6] Available at https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Office%20of%20Sustainability%20and%20Conservation/Conservation%20Sciece/Multi-species%20Conservation%20Plan/MSCP_FAQs_Update_January_2016_Final.pdf.

[7] Available at https://webcms.pima.gov/cms/One.aspx?portalId=169&pageId=307646.

Committee and 12 technical and advisory teams, and incorporated research and review from more than 150 scientists, as well as from locally- and nationally-recognized conservation biology experts. Pima County, *Multi-Species Conservation Plan for Pima County, Arizona: Final* at 11-12 (2016).[8] Eight drafts of the document were made available to the public and stakeholders over a period of ten years. *Id.*

The resulting final Multi-Species Conservation Plan covers 44 listed and at-risk species over a planning area of 5.8 million acres. *Id.* at 6. The accompanying federal incidental take permit authorizes approximately 36,000 acres of habitat disturbance over the next 30 years, for which Pima County has committed to provide 116,000 acres of mitigation. *Id.* at 46. Since 2004, the County has spent $159 million on acquiring mitigation land, funded primarily through voter-approved bonds. *Id.* at 109.

But the Secretary's Arizona Waiver, which covers the "Tucson Sector" that includes Pima County, threatens to undermine and potentially unravel this two-decade public-private effort, which balanced ecological needs, Endangered Species Act compliance, and development demands. Without any input from affected stakeholders or the local community, the Secretary waived the Endangered Species Act in its "entirety" and all "other laws, regulations, and legal

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[8] Available at https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Office%20of%20Sustainability%20and%20Conservation/Conservation%20Sciece/Multi-species%20Conservation%20Plan/MSCP_Final_MainDoc_w_Cover.pdf.

requirements of, deriving from, or related to the subject of" the Endangered Species Act. 84 Fed. Reg. at 21,799. A border wall, associated roads, and other physical infrastructure will divide and destroy important public land habitat on which the Multi-Species Conservation Plan relies, causing the kind of landscape fragmentation that the plan was designed to avoid.

In working cooperatively with federal agencies during the lengthy conservation planning process, the County could not have anticipated that the federal government would shirk its obligations under its own laws. The double standard created by IIRIRA's blanket waivers breaks faith and trust with local communities like Pima County and Tucson, which have committed substantial taxpayer funds to ensure that the objectives of the federal law are met. The resulting habitat loss and fragmentation could well lead to the listing of additional species; and it will unquestionably shift even more of the compliance burden onto local communities that have had no voice in whether or how these massive border projects are completed.

To add insult to injury, the spatial and temporal extent of the Secretary's waiver is entirely unclear, sowing uncertainty into a planning process undertaken primarily to ensure certainty. The Secretary's directive waives Endangered Species Act requirements "with respect to physical barriers and roads . . . in the project areas." 84 Fed. Reg. at 21,799. The waiver does not define "project areas" or even suggest any limiting

principle.[9] The Arizona Waiver extends the Secretary's preemption of state and local law such that it includes, but is "not limited to," the "installation and upkeep" of physical barriers, roads, and undefined "supporting elements." *Id.* This language suggests that the Secretary's waiver of the Endangered Species Act and dozens of other federal, state, and local laws and requirements may continue indefinitely for the "upkeep" of whatever the Department believes are necessary "supporting elements." *Id.*

As these examples illustrate, IIRIRA permits the Secretary to wield sprawling waiver power. The Secretary has brandished this power frequently in the last few years to cast a wide preemption net. The result is that local communities have been deprived of any voice in significant activities that directly impact their economic sustainability and the local resources they steward. As the Framers might have predicted, Congress' wholesale abdication of its lawmaking responsibilities to the Executive branch has dramatically undermined the federalist principles at the heart of our republic.

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[9] IIRIRA itself uses the even more nebulous phrase "in the vicinity of the United States border." This vast but vague authority raises substantial questions about the limits of the Secretary's lawmaking power. If the Secretary determines it necessary to install infrastructure at the Ports of Los Angeles or Houston to prevent illegal immigration, what prevents the Secretary from invoking an unreviewable IIRIRA waiver?

II. IIRIRA's Vague "Consultation" Provision Does Not Remedy or Mitigate Its Harm to Affected Communities and Local Autonomy.

Perhaps in a belated attempt to rein in IIRIRA's unbounded grant of agency discretion, Congress amended the law in 2007 to require that the Secretary "shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States" in order to "minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed." Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 564, 121 Stat. 2091, § 102(b)(1) (Dec. 26, 2007). But the addition of this consultation provision does not remedy IIRIRA's federalism implications, for at least three reasons.

First, IIRIRA's consultation provision suffers from the same vagueness that infects its waiver provision. The law does not define what Congress meant when it directed that the Secretary "shall consult" with affected stakeholders, nor does it provide guidance on who should be consulted. The Arizona and New Mexico Waivers directly impact the border communities of Las Cruces, Tucson, and Pima County, as well as many private landowners and public property holders in those communities. Yet the Secretary has never consulted – let alone actually listened to the voices of – these vitally affected stakeholders.

In contrast, when Congress wants to ensure meaningful stakeholder consultation, it provides adequate statutory direction for carrying out that mandate. For instance, the National Historic Preservation Act (NHPA) – ironically, one of the laws the Secretary waived in both Arizona and New Mexico – provides a robust framework for engaging in consultation with relevant stakeholders. NHPA Section 106 requires that the head of any agency overseeing a federal or federally-assisted activity "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 54 U.S.C. § 306108. To implement this mandate, Congress directed the Advisory Council on Historic Preservation to draft regulations establishing procedures that "provide for participation by local governments in proceedings and other actions . . . with respect to undertakings referred to in section 106 which affect such local governments." 54 U.S.C. § 304108(b).

These congressionally-mandated regulations set forth in detail the goals of consultation and the parties that must be consulted. *See* 36 C.F.R. §§ 800.1 – 800.2 (2019). They provide, for instance: "A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party." *Id.* § 800.2(c)(3). The regulations go on to provide detailed requirements for initiating consultation, identifying archaeological and historic properties, assessing and resolving adverse effects, coordinating consultation

with environmental review, terminating consultation, documenting the consultation process, and participation by the Advisory Council itself. *See id.* §§ 800.3 – 800.13.

IIRIRA provides no such guidance and no mandate that the Secretary implement procedures for consultation. Instead, the statute leaves entirely to the Secretary's *ad hoc* discretion how the consultation process will be carried out and with whom – a fact that the Department itself touts. Defs.' Opp'n to Pls.' Mot. for Summ. J. at 28, *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218 (D.D.C. 2019) (No. 1:18-cv-00655-KBJ), ECF No. 21-1 (arguing that IIRIRA does not specify "(1) *when* . . . consultation must occur, (2) with *whom* it must necessarily occur, or (3) the *degree* of interaction required to satisfy the requirement" (emphasis in original)). And the Secretary has embraced this unconstrained discretion to exclude the communities that *amici* represent – some of the communities most directly affected by the Secretary's waivers – from any participation in the consultation process. IIRIRA's nebulous consultation provision, therefore, does not remedy any of the federalism problems inherent in the statute's delegation of blanket preemption authority to an administrative agency.

Second, even if IIRIRA's consultation provision did include greater congressional direction to guide the Secretary's obligations with respect to local communities, such direction is meaningless in the absence of judicial review. Although IIRIRA commands that the Secretary "shall consult" with local governments "to

minimize the impact on the environment, culture, commerce, and quality of life," the statute prohibits any judicial enforcement of those mandates: "A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph." 8 U.S.C. § 1103 note. Perhaps to emphasize that the Department's waiver and consultation activities are entirely shielded from any judicial challenge, the Secretary's Arizona and New Mexico Waivers expressly override the Administrative Procedure Act. 84 Fed. Reg. at 21,799; 83 Fed. Reg. at 3013.

In theory, then, the Secretary could waive any federal, state, and local law along the full southern borders of Arizona and New Mexico without input from any of the two states, eight counties, sovereign tribal nations, or the myriad municipalities and private landowners affected. The Secretary started down that path by utterly failing to consult any of *amici* local governments before issuing the broad Arizona and New Mexico Waivers, even though the communities that *amici* represent are on the front lines of border wall construction impacts. Yet the communities of Pima County, Tucson, and Las Cruces have no legal recourse to hold the Secretary accountable for failing to include their voices.

The Secretary's failure to consult with affected local governments and property owners before granting these waivers plainly constitutes an *ultra vires* act, but the lower court in these related cases held that it lacked jurisdiction to hear any *ultra vires* claims regarding the Secretary's waiver decision. *Ctr. for*

Biological Diversity, 404 F. Supp. 3d at 238 (finding *ultra vires* review of consultation requirements to be precluded "*completely*" (emphasis in original)). In effect, IIRIRA creates a right without a remedy.

Third, even where prior Secretaries have conducted some cursory consultation, that engagement was not sufficient to protect local communities or property from harm. For example, in the spring of 2008, the Department of Homeland Security completed construction of a 5.2-mile stretch of pedestrian border fencing in Organ Pipe Cactus National Monument, near the western edge of Pima County. Shortly thereafter a 90-minute flash flooding event – not atypical for the Arizona/Mexican summer "monsoon season" – caused debris to pile up against the new fence, effectively creating a dam that blocked the normal north-to-south water flow and resulted in two to seven feet of lateral water flow along the fence. National Park Service, *Effects of the International Boundary Pedestrian Fence Within the Vicinity of Lukeville, Arizona, on Drainage Systems and Infrastructure, Organ Pipe Cactus National Monument, Arizona* 9-10 (2008) (concluding that the "fence impeded the natural flow of water and did not properly convey floodwaters").[10]

The flooding damaged private and government property on both sides of the border. *Id.* at 12. Officials with first-hand knowledge of the local climate, topography, and environmental conditions had warned the

[10] Available at https://www.nps.gov/orpi/learn/nature/upload/FloodReport_July2008_final.pdf.

Department during consultation about precisely the scenario that came to pass, but the Secretary effectively ignored those concerns. *Id.* at 7-8. The hasty and ill-informed construction failed to meet applicable performance standards. *Id.* at 9-16. A similar flooding event occurred again three years later near the town of Lukeville, flooding several buildings. *See* Brady McCombs, *Rain Washes Away 40 Feet of US-Mexico Border Fence*, Arizona Daily Star (Aug. 10, 2011).[11]

The border structures approved under the Secretary's most recent waivers may well suffer the same fate. Local governments like Pima County have enacted extensive floodplain regulations based on local expertise in preventing and minimizing damage from flooding events. *See* Pima County, Ariz. Code tit. 16 (2019). The regulations recognize that periodic flooding, when not properly managed, can "result in loss of life and property, create health and safety hazards, disrupt commerce and governmental services, [and] require extraordinary public expenditures for flood protection and relief." *Id.* § 16.04.020(B)(1).

For this reason, construction in any floodplain, riparian habitat, or erosion hazard area normally requires a County permit. *Id.* § 16.20.010. Such permits typically impose conditions related to materials, floodproofing measures, and safety restrictions. *Id.* § 16.20.040. Yet the Secretary has effectively waived

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[11] Available at https://tucson.com/news/local/border/rain-washes-away-feet-of-us-mexico-border-fence/article_9eaead31-14eb-5474-a5c5-564a980049b2.html.

all environmental review and permitting requirements for border infrastructure in Pima County – and has not even bothered to consult with the local flood control experts at the County.

CONCLUSION

Perhaps more than any other law in U.S. history, IIRIRA raises both separation-of-powers problems and federalism concerns. By delegating Congress' legislative power of preemption under the Supremacy Clause to an unelected agency official who may override state and local requirements however he chooses, IIRIRA upends the system of horizontal and vertical checks and balances – Madison's "double security" – that was so deliberately knitted into the fabric of the Constitution. *Amici* urge the Court to grant certiorari.

Respectfully submitted,

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