No. 07-1180

IN THE

Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,
Petitioners,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

On Petition for a Writ of Certiorari to
The United States District Court for
The District of Columbia

BRIEF OF THE NATIONAL ADVOCACY CENTER OF THE SISTERS OF THE GOOD SHEPHERD, CENTER FOR BIOLOGICAL DIVERSITY, ENDANGERED SPECIES COALITION, GREENPEACE, INC., NATIONAL AUDUBON SOCIETY, INC., NATIONAL TRUST FOR HISTORIC PRESERVATION, NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION, SOCIETY FOR AMERICAN ARCHAEOLOGY, THE TOHONO O'ODHAM NATION, THE WILDERNESS SOCIETY, WORLD WILDLIFE FUND, AND UNITED CHURCH OF CHRIST AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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April 17, 2008

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BRIEF OF *AMICI CURIAE* NATIONAL PUBLIC INTEREST AND RELIGIOUS ORGANIZATIONS, A FEDERALLY RECOGNIZED TRIBE, AND A CHURCH

INTERESTS OF *AMICI*

The organizations listed in the appendix, including a federally recognized tribe, a church, and nonprofit organizations supporting work in the fields of religion, environmental protection, historic and archaeological protection, submit this *amicus curiae* brief in support of the petition for a writ of *certiorari* filed by Defenders of Wildlife and Sierra Club ("Defenders").[1] A*mici* have substantial experience and interest in the laws that are the subject of the waiver exercised in this case, and in laws waived by the respondent under the same statute before and since the District Court's ruling in this case. *Amici* also have demonstrated interest and expertise regarding the natural and historic resources and religious interests protected by the laws waived.

This case raises the significant question of whether Congress can delegate to an executive branch official the authority to waive all laws – except for the Constitution – if that official finds in his or her sole discretion that such a waiver is necessary to ensure expeditious construction of barriers and

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[1] Counsel for respondent received timely notice of the intent to file this brief under Rule 37.2(a) and consented to it. All parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution in the brief's preparation or submission.

roads in the vicinity of the U.S. border with Mexico. Secretary of the Department of Homeland Security Michael Chertoff has now utilized such authority embedded in 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1103 note, five times. Secretary Chertoff's most recent waiver covered thirty-six laws for hundreds of miles of the border area, underscoring amici's concerns. The majority of the laws waived by Secretary Chertoff have as their purpose protection of the environment, wildlife, and historic and archaeological sites, as well as protection of Native American sacred sites, religious practices of Native American tribes, and religious practices of all faiths. But the waiver provision is not limited to such laws – it gives the Secretary unfettered discretion to waive any law.

Amici's brief is intended to give the Court a fuller understanding of the values and legal rights, including the rights of private property owners, that are at risk from the exercise of this extraordinary power to override all law, to highlight the societal interests protected by these laws and to describe some of the resources, places and practices that are directly threatened because of the waiver authority bestowed on the Secretary by a Congress abdicating its legislative responsibilities.

SUMMARY OF THE ARGUMENT

Amici believe this Court's review of Defenders' petition is critical to resolve the question of whether Congress has overstepped the Constitution's boundaries with regard to the separation of powers. Congress has put the executive branch in a position

to act in the role of a legislative body in a way that affects U.S. citizens' religious freedoms and their ability to protect and preserve our Nation's environmental and historic resources. Such a grant of authority is too broad, and violates the plain intention of the Framers of the Constitution in devising a system that separates the powers between the branches of government.

Over the past few decades, Congress has enacted an integrated set of statutes that reconcile the public interest in religious freedom, tribal practices and resources, and environmental protection and conservation with myriad other interests secured by governmental and private action. *Amici's'* purpose in submitting this brief is to provide this Court with a fuller understanding of the repercussions of giving an executive branch official the unfettered discretion and authority to waive these laws.

ARGUMENT

I. THIS CASE DEMONSTRATES WHY THE CONSTITUTIONALLY MANDATED SEPARATION OF POWERS IS ESSENTIAL TO THE RULE OF LAW IN THE UNITED STATES

Separation of powers is enshrined in the first three articles of the U.S. Constitution and virtually defines American governance. Over two hundred years of American jurisprudence have addressed the finer points of the legal relationship between the legislative and executive branches of government, but have not altered Congress's most fundamental role as the legislative body that enacts statutory law. The

virtue of this system rests, as Justice Marshall observed early in the country's history, on the proposition that, "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, (5 U.S.) 137 (1803). Inherent in this system is the concept that Congress legislates on particular subject matter, narrow or broad as it may be, that the laws are accessible to those affected by them, and that citizens can anticipate what laws will apply in a given situation.

The authors of the Constitution had very strong views about the necessity of separating the authorities of the three branches of government, as a direct result of their experience of the "History of repeated Injuries and Usurpations" amounting to an "absolute Tyranny" over the colonies, Declaration of Independence ¶2.. As grounds for forming a new nation, the first ten specific grievances enumerated in the Declaration of Independence as grounds for forming a new nation spelled out King George III's failure to respect either the legislative or judicial branches of government. Thus, in drafting the new nation's constitution, the founders were adamant that, "where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted . . . 'When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner." *The Fed-*

eralist No. 47, at 303 (James Madison) (C. Rossiter ed., 1961) (emphases in original).

The statutory provision at issue here epitomizes the mix of governmental functions that the founders tried to guard against. Indeed, Section 102 of IIRIA is unprecedented. The Congressional Research Service has not been able to identify any other provision in American history this broad and sweeping. See Memorandum from Stephen R. Viña & Todd Tatelman, Legislative Attorneys, Am. Law Division, Cong. Research Serv. On Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2-4 (Feb. 9, 2005).

This unprecedented grant of legislative authority to an executive branch official is exacerbated by the lack of judicial review typically afforded citizens who are concerned about a federal agency's compliance with a statute. As Justice Thomas observed in his dissent in *Shalala v. Illinois Council on Long Term Health Care, Inc.*: "Our constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates or constitutional rights." 529 U.S. 1, 44 (2000) (Thomas, J. dissenting)." The long presumption of the availability of judicial review of agency actions was reinforced by this Court's interpretation of the Administrative Procedure Act. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In this case Secretary Chertoff's waiver includes the Administrative Procedure Act. The lack of judicial review afforded to citizens and tribal, state, or local entities by Section 102(c) of the IIRIRA eliminates accountability over the Secretary's actions. Such a broad, sweeping grant of authority undercuts the "considerations of accountability and legislative supremacy,

ideas embodied in article I, and also to rule of law considerations, embodied in the due process clause . . . ." *See* S. Breyer, *et al.,* Administrative Law and Regulatory Policy 985 (5TH ed.. 2002).

II. PRIOR AND SUBSEQUENT USES OF SECTION 102 WAIVER AUTHORITY DEMONSTRATE THE WIDE-RANGING POTENTIAL HARM THAT CAN RESULT FROM ITS USE.

Amici wish to draw the Court's attention to the Secretary's waivers both before and after the filing of the Petitioner's lawsuit. These instances further illuminate the breadth and scope of the harm that derives from the unprecedented authority in Section 102(c) of the IIRIRA.

Secretary Chertoff first used Section 102(c) to waive seven environmental and historic preservation laws, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* and "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" those laws for a fourteen mile stretch of the southern border, beginning at the Pacific Ocean. 70 Fed. Reg. 55,622, 623 (Sept. 22, 2005). He used the waiver authority again to exempt compliance from seven environmental and historic preservation laws, the Administrative Procedure Act, 5 U.S.C. § 551, the Military Lands Withdrawal Act of 1999, Pub. L. 106-65, 113 Stat. 512, 885 (Oct. 5, 1999), and all derivative and related federal, state or other laws, regulations and legal requirements for an area within the Barry M. Goldwater Range in southwestern Arizona. 72 Fed. Reg. 2,535 (Jan. 19, 2007).

On April 1, 2008, the Secretary announced that he was signing two more waivers of law. One pertains to a levee-border barrier project in Hidalgo County, Texas. It waives twenty-two environmental and historic preservation laws, the Administrative Procedure Act, three laws relating to protection of Native American graves, religious practices and religious freedom, and the Federal Grant and Cooperative Agreement Act of 1997, 31 U.S.C. §§ 6303-6305, and all derivative or related Federal, State and other laws, regulations and legal requirements. 73 Fed. Reg. 18,294 (Apr. 3, 2008); 73 Fed. Reg. 19,077 (Apr. 8, 2008) (corrected version including geographic coordinates).

The second waiver covers large segments of the border area in California, Arizona, New Mexico and Texas, "encompassing roughly 470 total miles." Press Release, Dept. of Homeland Security, DHS Exercises Waiver Authority to Expedite Advancements in Border Security, (April 1, 2008), *available* at www.dhs.gov/xnews/releases/pr_1207080713748.shtm. The actions covered by this waiver include the construction of roads, fixed and mobile barriers, detection equipment of all types including radar and radio towers and lighting, and upkeep of these objects once constructed. 73 Fed. Reg. 18,293 (Apr. 3, 2008). And as the number of miles covered by the waiver increases, so too does the list of laws waived; to wit:

> The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
>
> The Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

The Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 *et seq.*

The National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*

The Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*

The Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*

The Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*

The Noise Control Act, 42 U.S.C. § 4901 *et seq.*

The Solid Waste Disposal Act, as amended by the Resources Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*

The Comprehensive Environmental Response, Compensation And Liability Act, 42 U.S.C. § 9601 *et seq.*

The Archaeological and Historic Preservation Act, 16 U.S.C. § 469 *et seq.*

The Antiquities Act, 16 U.S.C. § 431 *et seq.*

The Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 *et seq.*

The Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*

The Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.*

The Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*

The Wilderness Act, 16 U.S.C. § 1131 *et seq.*

The Federal Land Policy and Management Act, 42 U.S.C. § 1701 *et seq.*

The National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd-668ee

The Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

The California Desert Protection Act, Pub. L. No. 103-433, 108 Stat 4471 (1004), Title I §§ 102(29) and 103

The Otay Mountain Wilderness Act of 1999, Pub. L. 106-145, 102(29) and § 103 of the California Desert Protection Act, Pub. L. 103-433

The National Park Service Organic Act, 16 U.S.C. §§ 1, 2-4

The National Park Service General Authorities Act, 16 U.S.C. §§ 1a-1 *et seq.*

The National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, §§ 401(7), 403, and 404

The Arizona Desert Wilderness Act, Pub. L. 101-628, 104 Stat. 4469 (1990) § 301(a)-(f)

The Rivers and Harbors Act of 1899, 33 U.S.C. § 403

The Eagle Protection Act, 16 U.S.C. § 668 *et seq.*

The Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*

The American Indian Religious Freedom Act, 42 U.S.C. § 1996

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb

The National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*

The Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528-531

The Secretary has now swept aside virtually the entire panoply of the nation's environmental laws. From the safety and security of communities' drinking supplies in the Rio Grande to toxic leaching in groundwater in California – the law is gone. Historic and archaeological laws fare no better. The Administrative Procedure Act, a basic tool in the daily lives of federal institutions, purportedly no longer applies. And shockingly, laws passed to protect the religious freedom, sacred sites and graves of Native American tribes and the religious freedom of practitioners of all faiths, are waived. All of these laws are important. Below are a few examples.

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, one of the statutes waived in parts of California, Arizona, New Mexico and Texas, requires that the government not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. The government may overcome this prohibition only through a showing that the burden it wishes to impose is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.* at § 2000bb-1(b). This Court had occasion to underscore the fun-

damental centrality of the compelling interest test to the interpretation of this Act ("Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated application of the test, including at the preliminary injunction stage." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S.418,430(2006). This Court also observed in *Gonzales* that "We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one . . . . But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." *Id.* at 439.

Neither *amici* represented here nor the public at large has been informed as to particular religious practices that compelled the Secretary to waive the RFRA. That, of course, is the problem. By granting the Secretary the enormous and unbounded authority to waive "all laws", Congress has transformed a cabinet post into a one man quasi-legislative body, able to eliminate the application of a law encompassing Constitutional standards without any specific explanation as to the rationale.

Laws protecting the country's historic heritage are also included in several of the waivers. Congress enacted the National Historic Preservation Act (NHPA) of 1966 in recognition that "historic properties significant to the Nation's heritage are being lost or substantially altered," and that "the preservation of this irreplaceable heritage is in the public interest." 16 U.S.C. §§ 470(b)(3), (b)(4). Section 106 of the NHPA is aimed at ensuring that federal agencies "take into account" the potential effects of their ac-

tions on historic properties. *Id.* § 470f. Although Section 106 is a procedural requirement, the fundamental goal of the Section 106 process is to "seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R. § 800.1(a).

Similarly, the Archaeological Resources Protection Act (ARPA) of 1979 seeks "to protect archaeological resources on public lands and Indian lands," in part because "these resources are increasingly endangered," and "existing Federal laws do not provide adequate protection to prevent the loss and destruction of those archaeological resources and sites resulting from uncontrolled excavations and pillage." 16 U.S.C. §§ 470aa *et seq.* Enforced by criminal or civil penalties, ARPA prohibits "excavat[ion], remov[al], damage, or attempt to excavate, remove, damage, or otherwise alter[ation] or deface[ment] [of] any archaeological resource on public lands or Indian lands" unless authorized by a permit issued pursuant to Section 4 of ARPA. *Id.* § 470ee. ARPA applies to "any officer, employee, agent, department, or instrumentality of the United States, of any Indian tribe, or of any State or political subdivision thereof." *Id.* § 470bb(6).

Congress passed the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. §§ 3001 *et seq.*, in recognition of the significance and loss of Native American human remains and other objects of funerary or cultural significance. Section 3 of NAGPRA sets forth requirements for regulating the intentional or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are discovered on Federal or tribal lands, including a process for ceasing activities when human remains or ob-

jects identified in the statute are discovered and a process for consulting with potentially interested Tribes. 25 U.S.C. § 3002(d).

Important historic, cultural, and archaeological resources within the area of the proposed border fence are at risk of being lost or irreparably destroyed by the fence's construction and on-going activities associated with the border fence. For example, in New Mexico, dozens of archaeological sites of both prehistoric Native American and Anglo-European origin have been identified in a one hundred foot wide corridor stretching more than 123 miles along the border between Anapra and Antelope Wells. The New Mexico State Historic Preservation Officer has examined forty-eight of these sites and determined that ten of them are eligible for listing in the National Register of Historic Places. Of even greater concern, however, are the estimated hundreds, if not thousands, of historic and cultural resources that have not yet been identified. Waiving historic preservation laws, such as NHPA, ARPA, and NAGPRA, will have the effect of potentially destroying or damaging known and as yet unknown historic, cultural, and archaeological resources without any consideration of their importance and/or effort to identify and protect such resources.

The Tohono O'odham Nation has extremely strong interests in the seventy-five mile construction zone along its southern border with Mexico. In this area, the Nation exercises governmental authority over the land and resources within its reservation. The latest waiver issued by Secretary Chertoff allows construction to proceed without compliance with the environmental requirements that the Nation has enacted into tribal law, requirements that

are in support of the federal laws which have just been waived.

The type of harm that can occur as a result of these waivers has already been suffered by the Nation. After issuance of the Goldwater Range waiver in 2007, a Boeing Company subcontractor widened a fifteen-mile stretch of the El Camino del Diablo Road without first performing an archaeological clearance and without informing the federal land management agency.[2] Two known Hohokam archaeological sites were damaged from the blading.

In areas where the latest 470-mile waiver has been issued, known archaeological sites of importance to the Nation are threatened. For example, in the area between Naco and Douglas in eastern Arizona, there are identified archaeological sites. However, the effect of the waiver is to remove requirements that these sites be cleared and excavated before construction proceeds. Damage from construction equipment is already known to have occurred. In a field visit in October, 2007, fragments of human remains were observed in the tire tracks of the heavy construction equipment.[3] If archaeological clearance had been performed in advance, as required by federal law, such human remains would have been retrieved before the construction equipment arrived.

Virtually all of the nation's protection for wildlife, air, and water, protection from toxics and other

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[2] The El Camino del Diablo Road is listed on the National Register of Historic Places.

[3] Personal communication with Peter Steere, Cultural Resources Manager, Tohono O'odham Nation, April 10, 2008.

forms of pollution, is eradicated by this later waiver. For example, by waiving the Endangered Species Act, Homeland Security is free to construct fences without consulting with the U.S. Fish and Wildlife Service, and without adding needed protective measures for countless endangered or threatened species. A fence divides populations and prevents species from reaching needed sources of water. It will, for example, prevent the small remaining population of ocelots in the U.S. from swimming across the Rio Grande to mate. Mexican grey wolves, peninsular bighorn sheep, Sonoran pronghorn, and lesser long-nosed bat, to name, are likely to be adversely affected. The future of migratory animals, such as a free-ranging bison herd that grazes in the Chihuahuan Desert grasslands and migrates between Mexico and New Mexico, may be compromised. Black bears blocked by a border fence may suffer loss of genetic diversity. Other identified problems include reduction in aquifer recharge capacity, modification of drainages, public health problems, soil compaction, introduction of non-native species and a myriad of other concerns. A. Cordova, C.A. de la Parra, A Barrier to our Shared Environment, (1st Ed. 2007).

The Sabal Palm Grove Audubon Sanctuary in Texas is a privately owned but publicly accessible treasure that will be significantly affected by the proposed construction. Harboring one of the few remaining stands of the palm forests that greeted Spanish explorers in the sixteenth century (the Rio Grande was originally named the "Rio de las Palmas"), all of the Audubon Sanctuary's 527 acres lies south of the planned fence. Over 280 species of birds, mammals and other animals, including two federally endangered and nineteen state threatened species

live in the Sanctuary. And the impacts will not be limited to wildlife. This Sanctuary and other special places in the Rio Grande Valley have stimulated a flourishing ecotourism business, attracting birders from the world. Barry, Dan, *A Natural Treasure That May End Up Without a* Country, N.Y. Times, April 7, 2008. The private property interests of the Sanctuary and the economy of the region will be badly affected by Congress' willingness to allow the Secretary of Homeland Security waive laws designed to protect these interests.

Further, the purported scope of these waivers cannot be accurately defined. While federal statutes are named, all of the waivers also purport to include "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of those laws." It is impossible to know in advance what this provision is supposed to cover. Does it include sanitation disposal laws in Del Rio, Texas? Does it purport to waive government-to-government relationships with the numerous federally and state recognized tribes whose lands and interests are adjacent to the southern border? What of the rights of over 80,792 individual Native Americans who live on the U.S. side of the border region, and their rights under U.S. treaties and laws? U.S. Census, 2000, *available at* http://factfinder.census.gov. The Secretary's sweeping use of this unprecedented authority makes it impossible for a citizen to know which laws are being waived. This unsettling result dramatically demonstrates the difficulty with Congress' grant of legislative-like authority to the Secretary of Homeland Security.

III. THE LAWS WAIVED IN THIS CASE PROTECT IMPORTANT SOCIETAL INTERESTS

A. THE RESOURCES AT RISK IN THIS CASE ARE HIGHLY SIGNIFICANT TO THE REGION AND THE NATION

The San Pedro River, one of the last free-flowing rivers in the Southwest, cuts a narrow, undulating swath of green and gold through the Sonoran desert. Within the last 150 years, more than 80 species of mammals have been identified in the area, "one of the richest assemblages of land mammal species in the world."[4] The San Pedro also provides habitat for approximately three hundred and ninety bird species, including about a hundred species that use the area for nesting purposes, and millions of migrating songbirds. Thomas Leskiw, "River Lost, River Found: The Colorado & San Pedro Rivers," Terrain.org., No. 16, Spring/Summer 2005, *available at* http://www.terrain.org/essays/16/leskiw.htm.

These characteristics have made the San Pedro riparian area one of the country's most important birding areas. It has been designated as the National Audubon Society's first Globally Important Bird Area and a world heritage natural area. A wide variety of mammals, reptiles and amphibians also in-

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[4] San Pedro Expert Study Team Report: Sustaining and Enhancing Riparian Migratory Bird Habitat on the Upper San Pedro River, Executive Summary (March 1999), in Secretariat of the Commission on Environmental Cooperation, *Ribbon of Life: An Agenda for Preserving Transboundary Migratory Bird Habitat on the Upper San Pedro River* (June 1999), at 16, *available at* http://www.cec.org/files/pdf/SP-ENGL_EN.PDF.

habit the area, with some mammals apparently traversing the border back and forth between Mexico and the United States. Christine C. Hass, *Landscape fragmentation and connectivity for carnivores in the Upper San Pedro Basin*, Fort Huachuca Wildlife Office, Fort Huachuca, Arizona. The wildlife values of the San Pedro riparian area have stimulated a robust business in ecotourism, with estimates of the total economic impacts to the local economy ranging into millions of dollars. Julia Leones, "*Tourism in Rural Arizona*", Community Development Issues (University of Arizona College of Agriculture, Tucson, AZ), Apr 1993 *available at* http://www.ag.arizona.edu/arce/pubs/cdnews/VOl1No.1.pdf.

It was for all of these reasons and more – "to protect the riparian area and the aquatic, wildlife, archaeological, paleontological, scientific, cultural, education, and recreation resources of the public lands surrounding the San Pedro River" – that Congress established the San Pedro Riparian National Conservation area. In the Arizona-Idaho Conservation Act of 1988, Congress directed the Secretary of the Department of the Interior to allow only uses of the area that would "further the primary purposes for which the conservation area is established." 16 U.S.C. § 460xx-1(b).

The San Pedro river valley is also within the aboriginal territory of the Tohono O'odham Nation and other Indian tribes in Arizona. The archaeological sites encountered during the construction of the fence in this area contain prehistoric artifacts and human remains of the Hohokam, who are the ancestors of the Tohono O'odham, and of the Mogollon culture to the north.

B. THE UNDERLYING LAWS AT ISSUE IN THIS CASE DO NOT PREVENT THE *REALIZATION OF BORDER SECURITY*, AND THEIR PROCEDURES GUARD AGAINST UNINTENDED CONSEQUENCES

This case demonstrates the serious effects of Section 102(c) of the IIRIRA. The federal action at issue is the transfer of a perpetual right of way from the Bureau of Land Management (BLM), an agency within the Department of the Interior, to the Department of Homeland Security (DHS), for construction of a barrier at the border within the San Pedro Riparian National Conservation Area. After pursuing administrative remedies, petitioners filed this action, challenging the Bureau of Land Management's compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* and the Arizona-Idaho Conservation Act of 1988, 16 U.S.C. § 460xx-1

In their initial pleadings, Petitioners articulated extensive damage that could occur if DHS proceeded with its proposed actions of clearing and grading a sixty-foot-wide strip of land along the southern boundary of the San Pedro Riparian National Conservation Area, constructing new roads, and building permanent and temporary vehicle barriers and pedestrian fencing. These proposed actions were to cross sixty-six ephemeral drainages, as well as the San Pedro River BLM's limited environmental analysis predicted impacts including erosion, alteration in stream channel morphologic stability and impacts on the San Pedro River's hydrology and stabil-

ity, as well as a variety of adverse effects on wildlife, including species listed under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* Bureau of Land Management, Tucson Field Office, Border Fence Environmental Assessment, Aug. 2007 (EA) at 6-13. Petitioners argued that under NEPA, these types of impacts merited a comprehensive and careful analysis before proceeding.

Petitioners also argued that a broader, comprehensive analysis was required under NEPA to assess the effects, including the cumulative effects, of the barriers that were simultaneously being constructed or proposed for construction elsewhere along the entire Arizona-Mexico border. Petitioners pointed to this Court's articulation in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), defining a "proposal" for purposes of NEPA as a "regional plan of development . . . [which] define[s] fairly precisely the scope and limits of the proposed development of the region." 427 U.S. at 401-02. The Council on Environmental Quality's implementing regulations similarly directs that a single course impact statement be prepared for "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action . . . " 40 C.F.R. § 1502.4(a).

District Court Judge Huvelle found that plaintiffs had demonstrated a substantial likelihood of success on the merits with respect to the NEPA claim and issued a temporary restraining order (TRO). Specifically, she found that BLM's discussion of cumulative impacts suffered from both factual and legal flaws, and that the agency's failure to even acknowledge the potential cumulative impacts of anything outside of the San Pedro watershed rendered

the environmental assessment inadequate. TRO Hr'g Tr. 92-94, Oct. 10, 2007.

Sixteen days later, Secretary Chertoff waived not only the laws upon which plaintiffs' lawsuit was based, but seventeen other statutes. 72 Fed. Reg. 60,870 (Oct. 26, 2007). His notice specifically referenced Judge Huvelle's Order although neither he nor the Department were parties to the lawsuit. The district court's decision to uphold the constitutionality of his action preceded Petitioners' pending petition for *certiorari*. Under Section 102(c) of the IIRIRA, this Court is the only venue for review of an interlocutory or final judgment, decree or order of a federal district court. 8 U.S.C. § 1103 note.

It is, of course, impossible to predict the outcome of the litigation had Secretary Chertoff not waived NEPA and nineteen other laws. All we know is that Judge Huvelle found enough merit in Petitioner's claim under NEPA to issue a TRO. The normal course of litigation was cut off by the Secretary's execution of the waiver.

Because NEPA is the law that was the basis of the TRO, it is worth reflecting on its purpose and process. This Court has long recognized that compliance with NEPA's procedural requirement serves two important purposes: (1) to inform the agency decisionmaker who, as the result of NEPA, "will have available, and will carefully consider, detailed information concerning significant environmental impacts . . . . " before, not after, he or she makes a decision with serious consequences. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989), citing *Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983)

and *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981), and (2) provide a systematic way of engaging the public and other government agencies, whether federal, state, tribal or local, in the analysis of the proposed action. *Id.* As the Court stated in *Robertson*:

> Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. . . .
>
> Publication of an EIS [environmental impact statement], both in draft and final form, also serves a larger information role. It gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process [cite omitted], and, perhaps more significantly, provides a springboard for public comment, see L. Caldwell, Science and the National Environmental Policy Act 72 (1982).

Robertson at 349-50.

Compliance with NEPA would not prevent DHS from achieving its goal of attaining greatly improved security at the U.S.-Mexico border. This is particularly true because of NEPA's requirement to identify and analyze the effects of alternatives to the proposed action. 42 U.S.C. § 4332(c) (iii); 40 C.F.R. § 1502.14 (2007).

The evaluation of reasonable alternative ways of achieving an agency's purpose and need is, in the words of the Council on Environmental Quality's

regulations implementing the procedural requirements of NEPA, "the heart of the environmental impact statement" process. 40 C.F.R. § 1502.14. Without the alternatives requirement, the NEPA process would simply document the anticipated effects of a decision. Admiral James Watkins, Secretary of Energy under President George Herbert Walker Bush, emphasized this quintessential benefit of the NEPA process when he testified before Congress about his decision regarding the selection of a tritium production technology: "Thank God for NEPA because there were so many pressures to make a selection for a technology that might have been forced upon us and that would have been wrong for the country." Testimony of then Secretary of Energy Admiral James Watkins before the House Armed Services Committee, Congress (Apr. 28, 1992) Transcript, p. 15. The systematic opportunity for both private property owners as well as those with interests in public lands along the border to have reasonable alternatives considered by the Secretary are truncated by waiver of the NEPA process.

The application and enforcement of NEPA has, in fact, lead to the use of numerous viable alternatives for constructing vehicle barriers on the 75-mile border within the Tohono O'odham Nation. Customs and Border Protection has estimated that there are more than 7,200 illegal entries on the Nation daily and the Nation has repeatedly supported a range of border security enhancements, including integrated radar-camera systems, tactical checkpoints, and the construction of the vehicle barriers. These strategies have been employed in a manner largely consistent with federal legislation designed to protect natural and cultural resources and human remains. These

measures have not prevented the construction of barriers and roads on the Nation. In this remote desert, which has been identified as one of the most heavily trafficked drug and human smuggling corridors on the border, compliance with the law and alternative measures have not thwarted the DHS mission, but ignoring the law now will certainly expose these resources to significant harm.

Implementation of NEPA to the proposed barriers in the San Pedro Riparian area would not by any means bar DHS from proceeding to what it would consider a successful conclusion. Rather, a comprehensive analysis of alternatives might reveal a less damaging, more efficient means of achieving enhanced border security.

Finally, a concern may be raised about the time necessary to complete the NEPA process in relationship to the goals set by the Secretary for completion of construction by a date certain (although note that there is no statutory deadline). There are several reasons this issue should not unduly concern the Court. First, the goal of enhancing border security has been the subject of government deliberation and action for a number of years. Due diligence would have suggested commencing the NEPA process years ago for these activities. General Accounting Office, *U.S.-Mexico Border: Issues and Challenges Confronting the U.S. and* Mexico, NSIAD-99-190, July 1, 1999. Second, timeframes may be reduced upon "a showing by the lead agency of compelling reasons of national policy". 40 C.F.R. § 1506.10(d). And finally, should the Department believe that it faces emergency circumstances, it may consult with the Council on Environmental Quality about alternative ar-

rangements to the usual procedure. 40 C.F.R. § 1506.11.

CONCLUSION

In sum, *amici* urge this Court to grant the write of certiorari.

Respectfully submitted

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