

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 A Writ Of Certiorari
To The United States District Court
For The District Of Columbia**

**BRIEF OF *AMICI CURIAE* NORTH
AMERICAN BUTTERFLY ASSOCIATION
AND NATIONAL BUTTERFLY CENTER
IN SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICI CURIAE*¹

Amici Curiae are non-profit organizations with longstanding interests in conserving habitat and biodiversity of native flora and fauna along the United States-Mexico border. The North American Butterfly Association (“NABA”) is a non-profit organization that conserves and studies wild butterflies in their natural habitats, takes part in scientific research on butterfly populations across North America, and educates the public about these species and the ecosystems on which they depend. NABA has over 4,500 members in 30 chapters across the United States. It is concerned about the enormous adverse environmental effects construction of the United States-Mexico Border Wall (“Border Wall”) will have on these fragile ecosystems, including the negative impacts that are already occurring from current construction in Organ Pipe Cactus National Monument, an International Biosphere Reserve located in New Mexico, where the United States’ only colony of Howarth’s White butterflies exists.

Amicus National Butterfly Center (“NBC”) operates as a project of NABA. It is a 100-acre wildlife center located in Mission, Texas, that serves as a wildlife center and native species botanical garden. NBC supports the education and conservation mission of NABA

¹ Timely notice was given and all parties have provided written consent to the filing of this brief. Pursuant to this Court’s Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person, other than *Amici* or counsel has made a monetary contribution to the preparation and submission of this brief.

in a multitude of ways, including through collaboration with the National Park Service to ensure the survival of mass migrations of Monarch butterflies across the United States-Mexico border. It also works in partnership with the United States Fish and Wildlife Service to plant rare and endangered native flora. In addition, NBC protects and preserves many other species of flora and fauna that live in the refuge and the surrounding ecosystem.

Thousands of local residents, school children, tourists, and scientists visit NBC each year. Initially, the Border Wall was designed to bisect NBC, cutting off nearly 70% of NBC's refuge from its visitor pavilion. To date, Congress passed an appropriations bill that specifically exempts NBC from the construction of "pedestrian fencing," or construction of a Border Wall, through the refuge. *Making Further Continuing Appropriations for the Department of Homeland Security for Fiscal Year 2019, and for Other Purposes*, 116 Cong. 1, Conference Report (2019), available at <https://www.appropriations.senate.gov/imo/media/doc/Bill%20FY19%20Consolidated%20Appropriations%20Act.pdf>. However, the Border Wall construction will still have devastating environmental impacts on the land immediately adjacent to the refuge and on which the species who live there greatly depend. Moreover, despite the appropriations language, the federal government still claims to have the authority to build the Wall directly through NBC and, of course, if the statute is upheld in this case as constitutional, the Secretary may waive the current appropriations restriction as well. Therefore, *Amici*

have grave concerns about the construction of the Wall so close to this important refuge without any consideration of environmental impacts, alternatives, or the implementation of mitigation measures that would normally apply to such massive construction projects under long-standing environmental and other laws that have already been, and could continue to be, waived pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 (“IRRIRA”). *See* Addendum at App. 1. (Map showing locations of the NBC and proposed Border Wall construction).



SUMMARY OF ARGUMENT

The petition for certiorari should be granted in this case because enormous and devastating environmental consequences will flow from the decision by the Secretary of Homeland Security to waive all environmental and other laws to allow the expeditious building of the proposed Border Wall. This includes irreparably harming dozens of rare animal and plant species that inhabit the Lower Rio Grande Valley, and forever destroying the already extremely fragile ecosystems on which they depend. Compliance with the environmental laws—which Congress enacted decades ago in the overall aesthetic and economic interests of the nation and future generations—would have required the Secretary, at a minimum, to examine the environmental consequences of such a decision, explore viable alternatives, and implement much-needed

mitigation measures to ameliorate the irreparable damage that will inevitably ensue.

The waiver provision of the IIRIRA is an unconstitutional infringement upon important Separation of Powers principles. It allows an unelected official of the Executive Branch, who is not accountable to the people, to make these critical policy choices that are inherently legislative in nature. Moreover, because the waiver provision establishes no limits whatsoever on the exercise of this authority by the Secretary, this provision cannot possibly satisfy the “intelligible principle” rule for proper delegation of legislative authority. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). Should the Court nevertheless find that the challenged provision meets that test, it should revisit and revise the test to ensure that such momentous policy decisions are made by our elected representatives in *Congress*, rather than by unelected officials of the Executive Branch.

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ARGUMENT

I. INTRODUCTION

Amici address below the environmental importance of the area where the proposed Border Wall is being built, and the serious and irreparable harm that will be caused to native butterfly species and other fauna and flora that inhabit the area, without any adherence to the federal, state, local, and tribal environmental and other laws that would normally

apply to such projects but have been waived in this case by respondent Secretary of the Department of Homeland Security. The Lower Rio Grande Valley (“LRGV”), where NBC is located, and where the Border Wall is being built, currently serves as a critical federally-protected wildlife corridor—the LRGV Wildlife Conservation Corridor—and supports thousands of unique and native species of plants and animals. The LRGV is already a highly biologically imperiled area due to the destruction of habitat from urban and agricultural sprawl. The Border Wall as proposed will have additional devastating impacts on approximately 13,000 acres of habitat crucial to the survival of endangered and other native species, without requiring any consideration of alternatives or the implementation of any mitigation measures to ameliorate such harm to these precious natural resources.

This brief also explains that the limitless waiver provision of the IRRIRA impermissibly encroaches on the Constitution’s carefully crafted Separation of Powers.

II. CONSTRUCTION OF THE BORDER WALL WILL HAVE DEVASTATING IMPACTS ON THE FRAGILE ECOSYSTEM OF THE LOWER RIO GRANDE VALLEY.

Amicus NBC is located in the fragile ecosystem of the LRGV. The construction of the proposed 36-foot concrete and steel Border Wall through and near the

federally-protected LRGV Wildlife Conservation Corridor will segment habitat vital for wildlife foraging and reproduction; trap terrestrial wildlife, such as the highly imperiled ocelot, between the wall and Rio Grande River; restrict natural seed distribution of native flora; exacerbate the spread of invasive species; eliminate access to water by many species of wildlife; cut off seasonal migratory routes for some wildlife, and eliminate vital native host plants upon which butterflies and moths rely for reproduction. *See, e.g.*, North American Butterfly Association & National Butterfly Center, *We Must Battle the Border Wall: How Trump's Barrier Threatens the Wild Creatures & Features of the Rio Grande Valley of Texas* (July 2019) ("NABA Report"), available at https://indd.adobe.com/view/1655c7d7-5bf6-4187-9c32-1123f2dca7cf?fbclid=IwAR19P4rPsI2UIQEEKBGI9EnkGd-l-XRhNpXLj0LUe_WTtdOng8hpcqbWjtk.

The LRGV is home to a remarkable array of wildlife, including many endangered and threatened species found nowhere else in the country. Over 530 species of birds, 300 species of butterflies, and dozens of different species of bees, dragonflies, reptiles and mammals, including the endangered Jaguarundi, Texas Horned Lizard, and South Texas Ocelot depend on this habitat for survival. *See* NABA Report. In fact, the LRGV contains eleven biologically-distinct ecosystems, making it one of the most diverse regions in the country. *Id.*

At present, the Congressionally-approved two billion dollars allotted for construction of the Border Wall

equates to 92 miles of new structure that will separate the entire LRGV region from the Rio Grande River, which, without appropriate mitigation measures, will result in devastating impacts to native flora and fauna. NABA Report. Even without the wall's construction, over 95% of the habitat in the LRGV has already been destroyed to make way for urban, agricultural, and industrial development, *id.*, which makes protection of the remaining habitat absolutely crucial to the preservation of these species. *Id.*

Indeed, in an effort to counter the already devastating impacts on this area, the LRGV Corridor was established by Congress in 1979 with over 80 million taxpayer dollars, in addition to nearly 10 million dollars donated by *amicus* NABA members and donors, that in turn is used to preserve critical habitat through land acquisition, conservation easements on private property, and collaboration with non-profits. *Id.*; see also John Burnett & Marisa Peñaloza, *Border Wall Threatens National Wildlife Refuge That's Been 40 Years in the Making*, NATIONAL PUBLIC RADIO (Jan. 14, 2020), available at <https://www.npr.org/2020/01/14/795215639/border-wall-threatens-national-wildlife-refuge-thats-been-40-years-in-the-making>.

The LRGV Corridor creates a 275-mile pathway for native flora and fauna to thrive in their natural habitat. NABA Report. Building 92 additional miles of Border Wall will require decimating large swaths of the remaining 5% of natural habitat. *Id.* In fact, the Wall as proposed will directly bisect the LRGV Corridor, greatly reducing the value of the taxpayer dollars

and donations used to preserve the only strip of land in the world that is home to multiple distinctive native plant and animal communities, including, for example, the endangered Tamaulipan kidneypetal and critically endangered jaguarundi. *Id.* In fact, as proposed, collectively, over 13,000 additional acres of habitat will be destroyed or damaged through construction of the Wall. *Id.*

Amicus NBC, one of several refuges in the area, serves as a host for a variety of pollinators, including butterflies, bees, dragonflies, and damselflies, many of which can only be found in the LRGV, and is located at the funnel-point of the Central United States Flyway for migratory birds. NABA Report. The LRGV is also home to Bentsen-Rio Grande Valley State Park which houses the headquarters of the World Birding Center, El Morillo Banco, and La Parida Banco National Wildlife Refuge Tracts. Collectively, these areas make up approximately 2,000 acres of habitat dedicated to species conservation, outdoor recreation, and environmental education. *Id.* These collective areas have been specifically identified by the Good Neighbor Environmental Board, an independent federal advisory committee to the President and Congress, as “characterized by high overall species richness and high richness of species at risk from existing barriers and the construction of potential new barriers.” Eighteenth Report of the Good Neighbor Environmental Board to the President and Congress of the United States, *Environmental Quality and Border Security: A 10-Year Retrospective*, ENVIRONMENTAL PROTECTION AGENCY (2017).

In addition, the Rio Grande River was recently named one of America's most endangered rivers. American Rivers, *Lower Rio Grande River Named One of America's Most Endangered Rivers of 2018* (2018), available at <https://www.americanrivers.org/conservation-resource/lower-rio-grande-named-one-of-americas-most-endangered-rivers-of-2018/>.

NBC has worked for over a decade to become a haven for endangered and vulnerable species in the LRGV region. Over the last 16 years, NABA and NBC have planted over 300 species of native plants on the refuge to provide much needed habitat for butterflies and other insects. NABA Report. NBC also serves as a stop on the Monarch butterfly's transcontinental migration. *Id.* These pollinators are vitally important to the continued vitality of ecosystems, and to the agricultural interests in the region. NBC alone hosts 238 species of butterflies, 200 species of bees, and 85 species of dragonflies. In addition to pollinators, NBC hosts 17 species listed as threatened and endangered under the Endangered Species Act on or near its property. *Id.*

Of particular concern is that the proposed Border Wall will be far more harmful than any existing barriers. Thus, unlike previous border barriers, the proposed Wall will have no sloped escape route for terrestrial animals in the event of wild fire or flood—both of which are happening with much more frequency. Previously, steel or concrete walls were 18-20 feet tall. However, the proposed Wall will be more than 30 feet high. Moreover, the proposed “enforcement

zone,” which consists of a clear-cut area on either side of the Border Wall, will be expanded from an average of 40 feet wide to a minimum of 150 feet wide, meaning that for each mile of wall constructed, an estimated 20 miles of habitat will be decimated. In addition, this area will be patrolled by high speed vehicles, which will further endanger wildlife, contribute to erosion, and decrease air quality.

Additionally, the enforcement zone will employ all-night bright lighting situated on 22 foot poles every 150 feet along the wall. These sources of strong, unnatural light are scientifically shown to be extremely disruptive to terrestrial insects, such as bees and moths, to water dependent insects, such as dragonflies, and to birds. Liz Perkin, *A Surprising Effect of Light Pollution: It Disrupts Aquatic Insects*, THE REVELATOR (Mar. 7, 2019); NBA Report. Artificial light affects insects in every part of their lives, with some insects becoming trapped in the lights’ orbit, exposing them to predators, and hindering mating and reproduction. Damian Carrington, *Light Pollution Is Key ‘Bringer of Insect Apocalypse,’* THE GUARDIAN (Nov. 22, 2019). Light pollution also contributes to sleep deprivation and declining health, and even death, for birds. *See, e.g.*, <https://www.darksky.org/light-pollution-poses-threat-to-migratory-birds>. Because NBC is home to 200 species of bees, 300 species of butterflies, 85 species of dragonflies, and 286 species of birds, the projected light pollution from the Border Wall will cause grave ecological and biological damage to these species. NABA Report. Further, the enforcement zone will be maintained with

herbicide—poison that will be sprayed on the ground, travel through the air, and negatively affect the surrounding areas and potentially leach into the soil and water table on the banks of the Rio Grande River.

The construction of the Wall without consideration of any alternatives or mitigation measures will also wield a tremendous blow to the local economy of the area that depends on hundreds of millions of dollars in income from ecotourism. NABA Report. In addition, the Wall will cut off approximately two million LRGV residents from their only source of freshwater—i.e., the Rio Grande River—in addition to blocking access to important recreational lands along its banks. *Id.* Therefore, the cost and consequences of the Wall, on wildlife, plants, and humans simply cannot be overstated. As succinctly summarized by Doctor Jeffrey Glassberg, President and Founder of NABA, when asked what the Border Wall would achieve, “It will transform what is now a vibrant, but endangered ecosystem, *into a biological desert.*” *Id.*

III. COMPLIANCE WITH BASIC REQUIREMENTS OF ENVIRONMENTAL AND OTHER LAWS IS VITAL TO PREVENTING IRREPARABLE DAMAGE TO THE WILDLIFE, PLANTS, ECOSYSTEM, AND ECONOMY OF THIS AREA.

As a result of the challenged grant of authority to the Secretary, over 40 federal, state, local, and tribal laws have been waived in connection with approval of

the proposed Wall. As a consequence, *absolutely no environmental implications have been or will be taken into account* in constructing the Border Wall, despite the fact that LRGV is home to endangered and other unique species of wildlife and plants with much habitat already largely compromised by other human activities.

In approving the Border Wall, the Secretary waived 28 federal and dozens of state, local, and tribal laws, many of which are absolutely critical to protecting the already fragile biodiversity and cultural and historic character of this unique area. These included the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, the National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, the Clean Air Act, 42 U.S.C.A. § 7401, the Archeological Resources Protection Act, 16 U.S.C. § 470(aa) *et seq.*, the Paleontological Resources Preservation Act, 16 U.S.C. § 470(aaa), the Federal Cave Resources Protection Act of 1988, 16 U.S.C. § 4301 *et seq.*, the Safe Drinking Water Act, 42 U.S.C. § 300f, the Noise Control Act, 42 U.S.C. § 4901 *et seq.*, the Solid Waste Disposal Act, 42 U.S.C.A. § 6901, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, the Archeological and Historic Preservation Act, 42 U.S.C. § 9601 *et seq.*, the Historic Sites Buildings and Antiquities Act, 16 U.S.C. § 461 *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 Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, the National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd, the National Fish and Wildlife Act of 1956, 16 U.S.C. § 742(a), 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 River and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*, the Eagle Protection Act, 16 U.S.C. § 668, the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*, and the American Indian Religious Freedom Act, 42 U.S.C. § 1996.

Of the laws waived, one of the most crucial is NEPA, which requires federal agencies to take a “hard look” at the environmental effects of their proposed actions prior to taking such action. *Kleppe v. Sierra Club*, 477 U.S. 390, 410, n.21 (1976) (internal citation omitted). With respect to such a massive federal undertaking as construction of the Border Wall, this would require preparation of an Environmental Impact Statement (“EIS”) to examine the environmental impacts and feasible alternatives, as well as consideration of measures that could be implemented to mitigate the environmental damage. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.27. The purpose of these requirements is to ensure that agencies do not make uninformed decisions that could result in negative unanticipated impacts that are irreparable. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). In preparing an EIS, an agency must “rigorously explore” all reasonable alternatives and

include appropriate mitigation measures. 40 C.F.R. § 1502.14. For example, had the Secretary of Homeland Security been required to comply with NEPA, she may well have been required to establish important mitigation measures, such as preserving particular migration corridors for species, reducing the size of the proposed enforcement zone, limiting vehicle traffic in ecologically-fragile areas, and limiting the location or times of day for bright light illumination.

Similarly, the Secretary's waiver of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, eliminated the need to consider whether construction of the wall is likely to cause the extinction of any species listed as endangered or threatened, or to require any mitigation measures that would avoid such results. *See, e.g.*, 16 U.S.C. §§ 1536, 1539. As explained above, NBC is located in the Rio Grande Valley, one of the most biodiverse areas in the country, and the home to several species that have been designated as threatened or endangered under the ESA, including the critically imperiled jaguar, jaguarundi, and ocelot. Had the Secretary been required to properly comply with the ESA, these species would have been provided some measure of protection in the design and construction of the Border Wall project. Indeed, even if the Secretary determined that including such protective measures was simply not feasible, the decision to nevertheless allow a project that will result in the *extinction* of a listed species would have to be made by a Congressionally-designated high-level Committee, including the Secretaries of Agriculture, the Army, and the Interior, as

well as the Chairman of Economic Advisors, the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, and Presidentially-appointed State representatives—often referred to as the “God Squad” because of the momentousness of such decisions. 16 U.S.C. § 1536(e).

The Clean Water Act, which has also been waived, and would most likely be otherwise implicated by construction of the Border Wall, would similarly require consideration of alternatives and mitigation measures, that would add at least some protection for vulnerable species and their habitat. 33 U.S.C. § 1251 *et seq.* (1972). Indeed, there are wetlands in and adjacent to the NBC that would otherwise implicate the requirements of this important federal statute.

Other federal statutes that were waived that would ordinarily require an examination of alternatives and possible use of mitigation measures to protect this fragile ecosystem include (but are not limited to) the Solid Waste Disposal Act, 42 U.S.C.A. § 6901, Clean Air Act, 42 U.S.C.A. § 7401, and the Safe Drinking Water Act, 42 U.S.C. § 300f. However, because each law was waived in its entirety, information concerning the adverse environmental and societal impacts of the Border Wall are not even completely known, and neither alternatives nor much-needed mitigation measures have been or will be required to ameliorate the devastating impacts of this project

IV. IIRIRA'S GRANT OF AUTHORITY IMPROPERLY DELEGATES LEGISLATIVE AUTHORITY TO THE EXECUTIVE BRANCH AND VIOLATES IMPORTANT SEPARATION OF POWERS PRINCIPLES.

For all of the reasons detailed in the Center for Biological Diversity's Petition, *Amici* agree that IIRIRA violates the Constitution's carefully crafted Separation of Powers, by delegating to an unelected official of the Executive Branch authority that is quintessentially legislative in function—i.e., “[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective”—“the very essence of legislative choice.” *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Indeed, it is difficult to imagine a more expansive delegation of legislative authority than has occurred here, and that is also directly contrary to the public interests Congress long ago exalted through enactment of the various environmental and other laws that have now been waived.

Significantly, *Amici* do not contest that *Congress* could make the policy choice to enact legislation that waives all environmental laws that would otherwise pertain to the building of the Border Wall—although certainly *Amici* and the general public would undoubtedly oppose such legislation and hold their respective legislators accountable for such actions. However, *Amici* respectfully submit that what Congress may *not* do, under our tripartite system of government, is authorize an *unelected* official of the *Executive* Branch to make the decision to waive all of the legislation that

Congress has already enacted to protect the public’s interest in preserving our natural and cultural heritage. Those decisions are inherently legislative in character—they are not the kind of mere “assistance” that this Court has held the Legislature may obtain from the Executive Branch to implement its policy choices under Separation of Powers principles. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Rather, what has occurred here is a complete abdication of legislative authority.

Thus, *Amici* believe that *all* of these national interests—those concerned with Border security and those focused on preserving wildlife, plant life, and the ecosystems on which they depend—can be reconciled by *applying, rather than abandoning* the existing laws that Congress enacted to ensure the consideration and amelioration of otherwise devastating environmental effects.

Amici also agree with Petitioners that, in addition to violating fundamental Separation of Powers concepts, the legislation at issue here violates the non-delegation principle because it fails to establish any “intelligible principle” that “clearly delineates the general policy” as well as “the *boundaries* of that delegated authority.” *Mistretta v. United States*, 488 U.S. at 372-73 (emphasis added) (internal quotations omitted). Authorizing the Secretary of Homeland Security to waive *any and all* environmental and other laws that would otherwise apply to construction and operation of a massive concrete barrier in an extremely environmentally sensitive area of the country simply to achieve

“expeditious construction” of that barrier and the roads leading to it, establishes *no* boundaries for that authority—i.e., it simply establishes an objective that must be attained without *any* limiting principles and in direct contravention of *decades* of laws that our Legislature (and those of the states, localities, and tribes) has enacted in response to many other, at least *equally* important, policy choices. Accordingly, even under the existing “intelligible principle” test, the challenged legislation must fail.

However, *Amici* also agree that should the Court find that the legislation at issue *does* somehow pass muster under the “intelligible principle” test, then it is time to revisit and revise that test, to ensure that this kind of boundless delegation of legislative authority is no longer sanctioned, as suggested in Justice Gorsuch’s analysis in his recent dissent in *Gundy v. United States*, 139 S.Ct. 2116, 2141 (2019). This would include establishing a *new* test that, at an absolute minimum, examines perhaps the most important consideration for purposes of adhering to basic Separation of Powers principles—i.e., “did *Congress*, and not the Executive Branch, *make the policy judgments*” at issue. *Id.* (emphasis added). Here, because *Congress* did not make the policy choice to build the Border Wall without regard to *any* of the requirements of the various environmental and other laws that would otherwise apply to such decisions, any such test could certainly not be satisfied.



CONCLUSION

For all of the foregoing reasons, the Court should grant the Center for Biological Diversity's Petition for Certiorari.

Respectfully submitted,

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