

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 LAW 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 DR. DENI J. SEYMOUR, RICK AND
SANDY MARTYNEC, GAYLE HARTMANN,
DR. PAUL R. AND DR. SUZANNE FISH, AND
ARCHAEOLOGY SOUTHWEST AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS**

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INTERESTS OF THE *AMICI CURIAE*

Amici curiae are a coalition of nationally and internationally renowned experts in the field of archaeology, with a specific focus on studying the historical significance of the American Southwest, including Federal lands adjacent to the U.S.-Mexico border. Individual *amici* are also joined by a nonprofit organization devoted to conserving invaluable places that connect modern humanity to its past.¹

Dr. Deni J. Seymour is an archaeologist, ethnographer, and ethnohistorian with more than three decades of personal and professional investment in obtaining knowledge about and interacting with the indigenous tribes of the southern portion of the American Southwest. She is an acclaimed authority on the Spanish colonial period with specialized knowledge about native-European interaction, missions, and presidios. She earned her Ph.D. in anthropology from the University of Arizona, and is a widely published, award-winning author with over 100 scholarly articles and seven books. She applies information gained from the study of human behavior and diversity to understand the past and to shape approaches to issues of concern to modern-day tribes. Her current work focuses on various indigenous groups, including the

¹ No party or its counsel authored this brief in whole or in part. No party, its counsel, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.2(a), all parties were provided timely notice of *amici*'s intent to file this brief and all parties have consented.

O’odham and Apache, where she employs multiple lines of evidence to weave together information relevant to their history, heritage, and identity.

Rick and Sandy Martynec have been working as independent research archaeologists in Arizona’s Sonoran Desert for 41 and 30 years, respectively. They are regarded as two of the foremost experts on the archaeological resources found along the Arizona-Mexico border. Together, they have authored or co-authored over 40 scholarly articles about the ancestral indigenous peoples that inhabited the Sonoran Desert. The Martynecs’ most recent research has focused on a twenty-square-mile stretch of the desert adjoining the U.S.-Mexico border in which they have documented more than 700 archaeological sites. Their discoveries include Paleo-Indian campsites dating back at least 10,000 years; unique O’odham graves, known as “cist burial sites,” that potentially date back to 1000 CE; and a farming village they suspect was inhabited as recently as the mid-1800s. The Martynecs have also been heavily involved in documenting the Las Playas Intaglio, a massive line-drawing that was initially etched into the desert floor by the O’odham’s ancestors approximately 1,000 years ago and has been periodically renewed and utilized by the modern O’odham for use in cultural ceremonies.

Gayle Hartmann has been working in the American Southwest as an archaeologist, archaeological editor, historian, and conservationist for the past 45 years. During her career, she has worked as an archaeological editor and research archaeologist for the Arizona State

Museum, University of Arizona, and various archaeological and environmental consulting firms recording and writing about historically significant sites in southern Arizona. Her research has focused on the history of the Western Papaguería in southwestern Arizona, and the Sierra Pinacate, which is a national park and UNESCO World Heritage site in northwest Mexico. She is the principal author and co-author of numerous publications about the region, primarily focusing on the Cabeza Prieta National Wildlife Refuge and the Barry M. Goldwater Military Range. She also served as the editor of *Kiva: The Journal of Southwestern Anthropology and History*, which is considered the pre-eminent archaeological journal of the southwestern United States. At present she is a research associate for the Arizona State Museum, University of Arizona.

Dr. Paul R. Fish is the Curator of Archaeology at the Arizona State Museum and a Professor Emeritus at the School of Anthropology at the University of Arizona, where he also coordinates the school's Southwest Land, Culture and Society program. Dr. Fish earned his Ph.D. in Anthropology from Arizona State University and he has been studying the pre-contact Hohokam and Trincheras traditions for over 30 years. Dr. Fish has authored over 100 publications on the prehispanic archaeology of the Sonoran Desert. In addition to the U.S. Southwest, Dr. Fish has conducted fieldwork in northwest Mexico, southern coastal Brazil, and the southeastern United States. He has been active in archaeological preservation throughout his career, including as chair of the Cultural Resources Technical

Advisory Committee for Pima County's Sonoran Desert Conservation Plan. With Dr. Suzanne Fish, he received the Arizona Governor's Award for Lifetime Achievement in Public Archaeology and the Arizona Archaeological and Historical Society's Cummings Award for Outstanding Contributions to Archaeology, Ethnology and History.

Dr. Suzanne K. Fish is the Curator Emerita of Archaeology at the Arizona State Museum and a Professor Emerita at the University of Arizona in the School of Anthropology. Dr. Fish received her Ph.D. from the University of Arizona in Arid Lands Resource Sciences. She specializes in Hohokam archaeology, political and social organization in non-state societies, regional settlement patterns, and the past and present ethnobotany and traditional agriculture of the Sonoran Desert, including recognition of prehispanic agave cultivation in the U.S.-Mexico borderlands. Dr. Fish has published over 100 articles on the archaeology and ethnobotany of the U.S. Southwest, northwest and central Mexico, and coastal shell mound cultures of southern Brazil.

Archaeology Southwest is a 501(c)(3) nonprofit organization headquartered in Tucson, Arizona. Founded in 1989, Archaeology Southwest has 17 full-time employees and over 2,000 members around the country. For over three decades, Archaeology Southwest has practiced a holistic, conservation-based approach to exploring the places of the past—a concept it calls “Preservation Archaeology.” By exploring what makes a place unique and sharing this knowledge in

innovative ways, Archaeology Southwest seeks to foster meaningful connections to the past and respectfully safeguard its irreplaceable resources. A key element of the Preservation Archaeology mission, therefore, is to connect the places and stories of the past to the people and values of the present. Archaeology Southwest achieves its mission by supporting low-impact research, educating the public about the invaluable archaeological resources within its study areas, and protecting historically inimitable places through conservation easements so that these places may be shared by future generations of Americans.

Amici are uniquely situated to apprise the Court of the tremendous wealth of archaeologically significant resources that lie along the U.S.-Mexico border, as well as the irretrievable devastation of those resources attributable to the unbounded discretion vested in the Secretary of the Department of Homeland Security (“Secretary”) by Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note (“IIRIRA”).²

Having worked extensively under the constellation of Federal laws and regulations that govern the study and maintenance of sensitive archaeological sites on Federal lands, *amici* are well-positioned to

² Since its enactment in 1996, IIRIRA, Pub. L. No. 104-208, Div. C., Title I, § 102, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1103 note), has been amended several times. For this reason, and because the provisions at issue are codified in a note to 8 U.S.C. § 1103, *amici* cite to the provision at issue as “IIRIRA § 102,” unless otherwise indicated.

inform the Court of the long-held congressional preference towards preserving these sites for future generations to study and develop connections to our nation's shared heritage.



SUMMARY OF THE ARGUMENT

The American Southwest is considered one of the richest, most important areas of cultural development in the United States. Its historical resources, sites, and tribal ancestry are among the most valued, visited, and studied by the American public and archaeological community. Nearly perfectly preserved by the arid climate, a stunning wealth of information about the historic and prehistoric people who have called this unforgiving environment home for millennia may be found throughout the Sonoran Desert and its surroundings. The stories to be told by the archaeological sites in the American Southwest are ones of unimaginable resilience and adaptation in the face of unthinkable adversity. These rare and fragile places have the capacity to capture the human imagination, connect modern humanity to its ancient roots, and guide the direction of future progress.

For hundreds of years, Congress has recognized the value of such places. Through express language, it has routinely reaffirmed a commitment to safeguarding historically significant sites and cultural resources in the American Southwest. Ever mindful of the need to accommodate future growth, however, Congress set

forth its policy in a manner that envisions a carefully calibrated balance between historical preservation and contemporaneous development.

Tragically, the evidence of our nation’s shared heritage—repeatedly safeguarded by Congress through statutory enactments—is being rapidly erased by the Secretary’s exercise of the waiver authority in IIRIRA § 102(c). This boundless authority, which was enacted as a rider to a wartime appropriations bill, Pub. L. No. 109-13, Div. B, Title I, § 102, 119 Stat. 231, 306 (2005), permits the Secretary to summarily abandon the protections afforded to the country’s most important archaeological sites. Whether such authority, untethered from any criteria by which it may be evaluated, can be squared with the Constitution’s fundamental separation of powers presents an exceptionally important question for this Court to decide.

For these reasons, *amici* respectfully request that the Court grant the petition for certiorari.



ARGUMENT

This Court has long recognized that certiorari is warranted where a petition raises “important, recurring questions of law that should be decided by this Court.” *Hamilton v. Texas*, 498 U.S. 908, 909 (1990) (Stevens, J., dissenting from denial of certiorari); Sup. Ct. R. 10(c).

The issues at stake in this petition raise just such a question. Section 102(c) of IIRIRA, and the unbridled discretion to jettison Federal law that it vests in the Secretary, is antithetical to the “tripartite system of Government” envisioned by our constitutional structure. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Secretary’s exercise of that authority is actively demolishing irreplaceable archaeological resources along the U.S.-Mexico border and, in the process, subverting Congress’s long-held commitment to protecting the places that shed light on our national legacy.

I. THE SECRETARY’S EXERCISE OF WAIVER AUTHORITY UNDER IIRIRA § 102(c) UNDERMINES CONSTITUTIONAL PRINCIPLES, CONGRESSIONAL POLICY, AND THE ARCHAEOLOGICAL VALUE OF THE AMERICAN SOUTHWEST.

A. Congress Has Long Evinced a Policy of Safeguarding the Nation’s Archaeological Resources.

Congress’s commitment to preserving the archaeological riches of the American Southwest, particularly those belonging to Native Americans, dates back to the early 20th century. The fragile archaeological evidence found within America’s Federal lands has been safeguarded under a constellation of laws, which seek to permit development while respecting the vestiges of our nation’s shared heritage. Although not exhaustive, *amici* present below the most relevant laws that evince

longstanding congressional intent to preserve historic and cultural resources.

1. The Antiquities Act

In December 1888, a pair of American ranchers, Richard Wetherill and Charles Mason, stumbled upon a “spectacular, many-roomed [cliff] dwelling” that had seemingly been carved out of the canyon wall. Ronald F. Lee, *The Antiquities Act of 1906*, at 30 (1970), <http://bit.ly/2TkoqWG>. As it would come to be known, Cliff Palace, the foremost example of the cliff-dwelling communities inhabited by Ancestral Puebloans, “had survived [in the arid climate of the Southwest] almost undisturbed for seven centuries.” *Id.*

The pristine condition of the Ancient Puebloan communities in Mesa Verde, however, did not last. As word of the discovery spread, Cliff Palace attracted artifact-hunters and explorers alike. *Id.* They set about excavating Mesa Verde, removing its culturally significant artifacts, and eventually conveying many of them to collectors in Europe. *Id.* at 30–31. Fueled by the international demand for objects of antiquity, “[t]he vandalism so conspicuously illustrated at Mesa Verde spread all over the Southwest, to small ruins and large, in eaves and in the open.” *Id.* at 32. Unable to prevent the plunder of historic sites throughout the Southwest, American archaeologists began to demand action from Congress in the late 1890s. *Id.*

Recognizing the need to protect the nation’s cultural and archaeological heritage, Congress responded by enacting the Antiquities Act of 1906, Pub. L. No.

59-209, 34 Stat. 225, 225 (codified at 54 U.S.C. §§ 320301–320303). The Act’s straightforward yet profound language provides in relevant part that “[t]he President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.” 54 U.S.C. § 320301.

Congress intended that the Antiquities Act serve two principal aims: (1) “the creation of a criminal prohibition against the removal of antiquities from federal lands without first obtaining a permit”; and (2) “the establishment of a regulatory apparatus through which the United States government could identify sites on its vast land holdings, administer permits for archaeological fieldwork, record findings, and establish site specific collections of artifacts.” Robert H. McLaughlin, *The Antiquities Act of 1906: Politics and the Framing of American Anthropology & Archaeology*, 23 Okla. City U. L. Rev. 61, 67 (1998).

Throughout its venerable history, the Act has served as a safeguard against the wholesale destruction of the most important archaeological sites in the American Southwest. Examples include: (1) the Aztec Ruins National Monument, created “to preserve the remarkable remnants of a large ancestral Puebloan community, which flourished from 1050 to 1150 CE,” Nat’l Park Serv., *Aztec Ruins National Monument: Geologic Resources Inventory Report*, at v (2016), <http://bit.ly/2PNOk4n>; (2) the Tumacácori National Historical

Park, originally designated as a National Monument to protect “one of the oldest mission ruins in the southwest,” Proclamation No. 821, 35 Stat. 2205, 2205 (1908), which was established in 1691 by Father Eusebio Kino, the famous Jesuit missionary currently under consideration for sainthood by the Vatican, Nat’l Park Serv., *Tumacácori General Management Plan*, at 134–35 (2012), <http://bit.ly/2vnAtug>; and (3) the Organ Pipe Cactus National Monument, Proclamation No. 2232, 50 Stat. 1827, 1827 (1937), which preserves an overwhelming number of sites that are both archaeologically significant and sacred to the O’odham Nation. See Nat’l Park Serv., *Foundation Document: Organ Pipe Cactus National Monument* (“Foundation Plan”), at 3, 5–6 (2016), <http://bit.ly/2I1bVdt>.

2. The National Historic Preservation Act

As the country matured, Congress found it wise to expand the scope of protections afforded archaeological resources outside of Federal lands. Congress ultimately achieved this policy objective in 1966 by enacting the National Historic Preservation Act (“NHPA”), Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 54 U.S.C. §§ 300101–307108), which sets forth a comprehensive “series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108 n.1 (1978). The Act declares that:

It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to . . . use measures, including financial and technical assistance, to foster conditions under which *our modern society and our historic property can exist in productive harmony* and fulfill the social, economic, and other requirements of present and future generations, [and to] administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations.

54 U.S.C. § 300101 (emphasis added).

Thus, Congress specifically envisioned a pragmatic approach to protecting archeologically significant places—one in which the policy of preserving the remnants of our past is balanced against and permitted to coexist with development designed to modernize the nation. Congress sought to achieve that balance through two principal provisions. First, in Section 110, Congress created the “National Register of Historic Places,” which serves as a centralized inventory of the “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.” *Id.* § 302101.

Second, in Section 106, *id.* § 306108, Congress provided an efficient vehicle for the Advisory Council on Historic Preservation—an expert panel created by statute, *id.* § 304101—to inform an agency of the

historic and cultural values affected by a proposed action, and to propose methods “to avoid, minimize or mitigate any adverse effects on historic properties.” 36 C.F.R. § 800.1(a); *see also City of Tacoma v. FERC*, 460 F.3d 53, 69 (D.C. Cir. 2006) (Section 106 “requires federal agencies to consider the effect of their actions on certain historic or culturally significant sites and properties (expressly including those of Indian tribes) and to seek ways to mitigate those effects.”).

Rather than interpreting it as a substantive impediment to development, courts “have held that Section 106 of NHPA is a ‘stop, look, and listen’ provision,” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (citation omitted), which allows decisionmakers to benefit early in the planning process from the wisdom of experts with specialized knowledge about the historic and archaeological value of a particular site. Early engagement thus affords Federal agencies “a broad range of alternatives,” that “avoid, minimize or mitigate the undertaking’s adverse effects on historic properties.” 36 C.F.R. § 800.1(c).

Along the U.S.-Mexico border, specifically, the NHPA protects El Camino del Diablo, which was placed on the National Register of Historic Places in 1978. Nat’l Park Serv., *National Register of Historic Places Inventory—Nomination Form* (1978), <http://bit.ly/2T5DIzI>. This 250-mile-long road winds through some of the Sonoran Desert’s most brutal terrain and has been in use for at least 1,000 years. Travelers on the road included ancestral Native Americans, Spanish explorers, Jesuit missionary Father Kino, and prospectors

in search of gold in California during the latter portion of the 19th century. *Id.*

3. The Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001–3013, sets forth the rights of Native Americans as they relate to the treatment and disposition of Native American remains, sacred and funerary objects, and objects of cultural patrimony. At its core, NAGPRA “represents the culmination of ‘decades of struggle by Native American tribal governments and people to protect against grave desecration, to [effect the repatriation of] thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired cultural property.’” *Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs*, 83 F. Supp. 2d 1047, 1054 (D.S.D. 2000) (quoting Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. L.J. 35, 36 (1992)).

As relevant here, NAGPRA prohibits the “intentional removal from or excavation of Native American cultural items from Federal or tribal lands. . . .” 25 U.S.C. § 3002. NAGPRA, however, does not operate as a complete bar to development on Federal lands. Cultural items may be removed when excavation or removal is conducted pursuant to a permit issued under the relevant provision of the Archaeological Resources

Protection Act, 16 U.S.C. § 470cc, and those “items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization.” 25 U.S.C. § 3002(c).

In this way, NAGPRA seeks to respect both the dignity of Native American tribes and the need, under certain circumstances, for the relocation of culturally significant items on Federal land. As with the NHPA, NAGPRA involves expert voices (in this case, Tribal members) early in the planning process to balance the interests at stake, and to prevent the “uncontrolled disturbance” of Native American graves and cultural artifacts on Federal lands. *See* Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 Nat. Res. J. 133, 160 (1995).

4. The Archaeological Resources Protection Act

Recognizing that “archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation’s heritage,” and that “existing Federal laws d[id] not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage,” 16 U.S.C. § 470aa(a), Congress enacted the Archaeological Resources Protection Act (“ARPA”) in 1979. Pub. L. No. 96-95, § 2,

93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa–470mm). In doing so, Congress declared that ARPA’s animating purpose “is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands. . . .” 16 U.S.C. § 470aa(b).

Building upon the preservation mandate set forth in the Antiquities Act, ARPA specifically provides that “[n]o person,” including officers of the United States, 16 U.S.C. § 470bb(6), “may excavate, remove, damage, or otherwise alter or deface . . . any archaeological resource located on public lands or Indian lands unless such activity is” conducted pursuant to a permit issued under the Act. 16 U.S.C. § 470ee. Although ARPA does not apply to activities that “are entirely for purposes other than the excavation or removal of archaeological resources,” *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 888 (D. Ariz. 2003), its provisions, at minimum, highlight the United States’ long-held dedication to safeguarding resources that provide a glimpse into our common legacy.

B. Those Areas Affected By the Waivers Contain a Wealth of Irreplaceable Archaeological Resources.

The story of the people inhabiting the lands along the U.S.-Mexico border is one of resilience and adaptation to the austere conditions of the Sonoran and Chihuahuan Deserts. Archaeological sites that reveal this story are scattered throughout these desert

landscapes. However, *amici* wish to bring to the Court’s attention those sites within the Roosevelt Reservation, the 60-foot-wide tract adjoining the southern border of the Organ Pipe Cactus National Monument, that are jeopardized by the waiver authority of IIRIRA § 102(c). As a recent survey by the National Park Service (“NPS”) found, this area is teeming with “an abundance [of] natural and cultural resources unique to the Sonoran Desert.” Nat’l Park Serv., *Archaeological Survey of 18.2 Kilometers (11.3 Miles) of the U.S.-Mexico International Border* (“NPS Survey”), at 1 (2019), <http://bit.ly/2TppQPO>. NPS’s survey uncovered “[n]umerous previously unrecorded archaeological resources,” including “35 isolated occurrences, 20 isolated features, and 5 archaeological sites,” *id.* at 2, each of which NPS proposed or is continuing to evaluate for designation under the National Register of Historic Places, *id.* at 58. These sites are both fragile and rare; once destroyed, the stories they impart will be lost to the archives of history. For this reason, NPS considers each of these newly discovered sites “imperiled” by the frenetic construction of the border wall. *Id.*

Evidence of continued human occupation of the areas along the U.S.-Mexico border dates back at least 15,000 years to the Pleistocene period, a time when the cooler and wetter climate of the now-American Southwest was dominated by pine and juniper forests. Nat’l Park Serv., *Organ Pipe Cactus National Draft General Management Plan* (“ORPI Draft Plan”), at 8 (1995), <http://bit.ly/2PsRMRF>. The exquisitely crafted stone

spear points utilized by these early inhabitants—namely, the Clovis people—to hunt big-game prey such as mammoths may still be found along areas of the southern border, particularly in places like the Cabeza Prieta National Wildlife Refuge. *Id.* at 80. During the subsequent Holocene period, however, the climate gave way to the increasingly warmer and drier conditions that created the modern Sonoran Desert. *Id.*

For purposes of modern archaeology, the shift towards an extremely arid climate along the border, and in the Sonoran Desert at large, is important for two reasons. First, the arid climate of the borderlands provides the most optimal conditions for preserving ancient artifacts, such as stone tools and ceramic or clay vessels, which might otherwise degrade under damper conditions. Second, the lack of reliable water resources in the Sonoran Desert means that its early inhabitants—and, to some extent, their modern descendants—were forced to adopt a nomadic lifestyle contingent upon moving from one water source to the next. NPS Survey, at 6. Thus, archaeological surveys have largely focused on the areas encompassing those water sources and the routes connecting them.

1. Quitobaquito Springs

One of the most important water sources along the U.S.-Mexico border is Quitobaquito Springs. Found within the borders of the Organ Pipe Cactus National Monument and proposed for listing on the National Register of Historic Places, Foundation Plan, at 44,

Quitobaquito Springs sits within a few hundred feet of the U.S.-Mexico border. This naturally occurring combination of springs and seeps is “a unique desert oasis that has provided a constant source of water for desert travelers and residents for more than 15,000 years.” *Id.* at 6.

Archaeological sites in the vicinity of Quitobaquito Springs demonstrate its prominence throughout history, revealing that “Prehistoric Paleo-Indian, Archaic, and Hohokam groups, as well as [Tohono and Hia C-ed O’odham], Spanish, Mexican, and Anglo groups all interacted with the environment, and in some cases, with each other.” *Id.*

The first documented visitors to the springs occurred in the early 1500s. The historical record indicates that the Spanish soldier Melchior Diaz, a member of the famous Coronado expedition, came through this area in late 1540. Coronado sent a party led by Diaz to the Yuma area to try to connect with a Spanish supply ship on the lower Colorado River. The Diaz party crossed the modern border and traveled along what is known as El Camino del Diablo. Ongoing research by *amicus* Dr. Seymour, moreover, seeks to determine whether Quitobaquito Springs was visited even earlier in 1540 by the main body of the Coronado expedition, or in 1539 by Fray Marcos de Niza—a Franciscan friar commissioned by the Viceroy of New Spain to locate and chart a route to “Cíbola”—one of the rumored Seven Cities of Gold.

2. ‘A’al Waippa Village

An abandoned Hia C-ed O’odham village is found in the vicinity of Quitobaquito Springs and directly abuts the U.S.-Mexico border. NPS Survey, at 31. Pre-historic and historic artifacts have been uncovered in the vicinity of the settlement, indicating that it “may have been built and occupied by precontact Hohokam or later Hia C-ed O’odham.” *Id.* Many living members of the Hia C-ed O’odham trace their lineage back to this village, which “constitute[s] the only known Hia C-ed O’odham village site in the United States.” *Id.* at 31. While the village itself sits on the U.S. side of the border, associated agricultural fields lie on the Mexican side, providing an invaluable glimpse into some of the earliest known farming practices and culture in the area.

3. The Salt Pilgrimages

Both the ‘A’al Waippa Village and Quitobaquito Springs have played integral roles as waystations on the Tohono O’odham’s sacred Salt Pilgrimages. These pilgrimages, which date back nearly 1,000 years, require young Tohono O’odham men to travel by foot from their ancestral territories in southern Arizona across the blistering Sonoran Desert to the Gulf of California, where they collect shells and sea salt for use in O’odham cultural ceremonies. Meant primarily as rite of passage into adulthood that would test the young men’s resolve, the Salt Pilgrimages served other purposes as well. They mapped out the scarce water

resources found in the Sonoran Desert and established the basis for a regional economy, which allowed these O'odham to trade salt and shells for much-needed agricultural produce and cotton from the river-dwelling O'odham further east and north. The Salt Pilgrimages continue to this day and the young men that make the trek follow in the footsteps of their ancestors. The routes taken by the Tohono O'odham men still yield valuable archaeological evidence both of the pilgrimage itself and the people who ventured it.

4. Monument Hill

The strained relationship between the O'odham and Apache is well documented throughout the later part of history. The O'odham, who adopted a settled and semi-settled agricultural lifestyle, were frequent targets of Apache raids. Hostile relations between the two groups came to a head during the 1800s, eventually culminating in a bloody battle near the modern U.S.-Mexico border at a place that is now called Monument Hill. Because O'odham view fallen Apache warriors as spiritually powerful and, therefore, extremely dangerous, it seems unlikely that Apache dead were given formal burials on Monument Hill. Thus, there is little surface evidence of those remains. However, oral traditions of the Tohono O'odham preserve the knowledge of the importance of Monument Hill. As a result, the O'odham have long considered Monument Hill to be sacred ground. The sacred traditions tied to Monument Hill touch both O'odham and Apache heritage.

C. The Subversion of Longstanding Congressional Policy Is Having Devastating Consequences for the Archaeological Resources Along the Border.

Section 102(c) of the IIRIRA vests the Secretary of the Department of Homeland Security with the “authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads” prescribed by the statute. That provision, as explained more thoroughly in the petition, Pet. at 21–25, constitutes an unlawful delegation of Congress’s legislative authority, the hallmark of which is the power to make “important choices of social policy . . .” *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

The Secretary’s exercise of “discretion” to waive each and every law he deems “necessary” naturally entails the elevation of certain policy objectives over others. The Secretary may, for instance, choose to solicit expert input on how best to avoid or mitigate degradation to historic sites along the border by declining to waive Section 106 of the NHPA, 54 U.S.C. § 306108, or, alternatively, he may choose—as he has done in the Arizona Waiver, Pet. App. at 101–09—to disregard those impacts entirely. In this way, IIRIRA § 102(c) delegates to the Secretary “an unlimited authority to determine the policy . . . as he may see fit.” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 416 (1935).

The Secretary’s decisions regarding which “competing values will or will not be sacrificed to the achievement of a particular policy objective,” *Rodriguez v. United States*, 480 U.S. 522, 526 (1987), are evident on the ground in the Sonoran Desert. There, the Secretary’s exercise of sweeping, non-delegated legislative authority is having profound and irreversible effects upon the archaeological sites that Congress has long protected. In the Arizona Waiver alone, Pet. App. 101–09, the Secretary abruptly waived no less than thirty-eight Federal laws, including each of those outlined above. *Id.* at 106–09.

The vacuum created by that waiver has, in turn, paved the way for the total desecration of Monument Hill—the sacred ground upon which Tohono O’odham and Apache remains rest. Paulina Firozi, *Sacred Native American Burial Sites Are Being Blown Up for Trump’s Border Wall, Lawmaker Says*, Wash. Post (Feb. 9, 2020), <https://wapo.st/2PvF04Y>. The Federal government’s decimation of ancestral remains on Monument Hill is an assault on the cultural heritage of the O’odham and Apache. Under typical circumstances, traditional cultural places such as this would be protected under NAGPRA, 25 U.S.C. § 3002, which would have required the government, at minimum, to consult with Tribal leaders before disturbing Monument Hill’s revered ground. *Id.* § 3002(c); 43 C.F.R. § 10.5. Consultation would, in turn, allow Federal decisionmakers to strike an adequate balance between its border wall construction objectives and the preservation of sacred Tribal sites.

The Secretary’s exercise of IIRIRA § 102(c)’s waiver authority, however, prevents such sensible policy compromises. Indeed, formal consultation with Tribal members has not occurred and, as a result, the devastation of cultural sites along the border is accelerating unabated. *See Hearing on Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration’s Construction of the Border Wall Before the H. Subcomm. for Indigenous Peoples of the United States*, at 7 (Feb. 26, 2020) (statement of Ned Norris, Jr., Chairman, Tohono O’odham Nation of Arizona), <http://bit.ly/3chovmQ>. Not only is this desecration “deeply painful” for the O’odham, *id.* at 5, it forever forecloses the opportunity to study the historical events that transpired there and to share those stories with the public.

Similar losses are being felt elsewhere within the Roosevelt Reservation. Active construction adjacent to Quitobaquito Springs has crushed the fragile sites surrounding the springs, *id.* at 4–5, and threatens to drain the very water that has attracted humankind to its periphery for millennia. Christine Hauser, *Blasting in Construction of Border Wall Is Affecting Tribal Areas*, N.Y. Times (Feb. 11, 2020), <https://nyti.ms/2Tn3sGO>. As a site proposed for designation on the National Register of Historic Places, Quitobaquito would, in the absence of IIRIRA § 102(c), be protected under the NHPA, 54 U.S.C. § 300308, and its special designation would have triggered the consultation requirements of Section 106, *id.* § 306108. That consultation process would have allowed the Advisory Council on Historic

Preservation, an agency with specialized historic preservation expertise, to recommend methods that would “avoid, minimize or mitigate any adverse effects” to Quitobaquito Springs, 36 C.F.R. § 800.1(a), thereby permitting “modern society and our historic property [to] exist in productive harmony,” 54 U.S.C. § 300101.

Sadly, however, the Secretary’s unchecked discretion to reject such practical measures under IIRIRA § 102(c) leaves unique historical places such as Quitobaquito Springs vulnerable to the capricious whims of an unelected Executive branch official. The Secretary’s demonstrated disregard for these culturally and historically irreplaceable sites makes it inevitable that Quitobaquito Springs, which has “endure[d] much as Spanish explorer Melchior Diaz saw it in 1540, a mere half-century after the voyage of Columbus,” ORPI Draft Plan, at 83 (quoting Bill Broyles, Cabeza Prieta: An Austerely Beautiful 860,010 Acre Refuge for Sonoran Desert Wildlife (1989)), will be permanently relegated to history textbooks and the oral traditions of the O’odham.

The loss of invaluable archaeological research and cultural heritage sites along the border, however, is entirely unnecessary. As explained, *supra*, Congress has designed an effective system for preserving vital archaeological resources while allowing well-informed development projects to proceed. Furthermore, *amici*’s direct interaction with construction crews at the border demonstrate the practicality of such common-sense mitigation strategies. While researching cist burial sites abutting the border in the spring of 2008,

individual *amici* had the opportunity to explain the significance of a particular site to a crew erecting the existing vehicle barriers and associated access roads. Understanding the value of this site and the minimal effort required to avoid its destruction, the crew ultimately diverted that small portion of the access road 15 feet to the north, preserving both the burial site and the U.S. Border Patrol’s access to the barrier, as the below photograph depicts—all without delaying the barrier’s construction.



The availability of such sensible avoidance and mitigation measures highlights the absurdity of Section 102(c)’s waiver authority. By rejecting as “necessary,” Pet. App. at 106, common-sense strategies for preserving some of our nation’s most important archaeological sites, the Secretary has expressed a clear policy choice in favor of subjugating *amici*’s interests in derogation of Congress’s repeatedly stated intent to ensure that development projects of this kind proceed

in harmony with preservation of historic and cultural resources. Yet, nothing in Section 102(c), nor in the IIRIRA at large, allows the public or the courts to evaluate the necessity (or wisdom) of that choice. This limitless, roving mandate to destroy our shared legacy must not be permitted to reside in an unelected official and must be checked by this Court if our tripartite system is to have any practical import.

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CONCLUSION

For the foregoing reasons, the Court should grant the petition.

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