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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE: BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION

Case No. 3:17-cv-01215-GPC-WVG
Consolidated with
Case No. 17-cv-01873-GPC-WVG
Case No. 17-cv-01911-GPC-WVG

Plaintiff Center for Biological Diversity's Memorandum of Points and Authorities in Support of Cross Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment

Date: February 9, 2018, Time: 1:30 p.m.
Courtroom: 2D
Before Hon. Gonzalo P. Curiel

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INTRODUCTION

Nearly a decade after its last use, the Department of Homeland Security ("DHS") Secretary on August 2, 2017 invoked §102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") to waive the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), and more than 30 additional laws intended to protect our Nation's natural resources and federal lands, its water and air, its cultural sites, and even citizens' freedom of religious practice in relation to the San Diego border wall prototype and replacement projects. This August 2 determination is both *ultra vires* to the DHS Secretary's delegated authority and unconstitutional, and thus must be reversed and remanded with instructions to DHS that it may only proceed with the border wall prototype and replacements projects after full compliance with all legal requirements.

As initially enacted in 1996, the IIRIRA §102(c) waiver authority was limited to NEPA and the ESA, but that authority was expanded under the 2005 REAL ID Act to allow the waiver of *any* law. Congress specifically intended the expansion of the waiver authority to speed the completion of the San Diego double and triple layer fence required under §102(b), which the agency expedited through a September 2005 waiver. However, DHS subsequently used §102(c) on four additional occasions between January 2007 and March 2008 to expedite construction of hundreds of additional miles of border barriers required under the 2006 Secure Fence Act, which dramatically expanded the specific border fencing required under §102(b). By 2011, the agency had constructed more than 700 miles of border barriers and considered its statutory border fence obligations fulfilled. Congress has not subsequently required any new or additional border barriers via amendments to IIRIRA or otherwise.

This prolonged period of relative quiescence was shattered when, within days of taking office, on January 25, 2017 President Trump issued the "Border

Security and Immigration Enforcement Improvement" Executive Order ("E.O."), directing DHS to construct a "secure, contiguous, and impassable physical barrier" along the entirety of the nearly 2,000 mile-long U.S.-Mexico border. Although Congress is yet to approve or fund any of the new proposed border wall, the administration has taken steps to implement the E.O. through the two projects at issue in this litigation, both located in San Diego—the border wall prototype project and the border fence replacement project.

DHS did not release any information to the public regarding either of these projects, and when it also did not respond to requests for information pursuant to the Freedom of Information Act ("FOIA"), the Center for Biological Diversity filed suit in June 2017. In light of the many environmental risks of the projects, and the environmental resources that could be impacted—including numerous imperiled species and rare coastal and wetland habitat—the Center amended its lawsuit to add NEPA and ESA claims in July. DHS then issued the August 2 §102(c) waiver.

The Trump administration's attempt to revive the §102(c) waiver authority must be rejected as *ultra vires*. As detailed in this brief, the language, structure, and legislative history of IIRIRA and its amendments demonstrate that the scope of the §102(c) authority must be limited to specific border barriers identified for construction under §102(b), rather than serving as a roving, perpetual, and unchecked license for DHS to waive laws for any border project, anywhere on any border (northern or southern), at any time from now to eternity. Quite simply, the border wall prototype and replacement projects are not *required* under §102(b), and thus are not subject to the §102(c) waiver authority and any such invocation of a waiver is *ultra vires*.

Alternatively, to the degree this Court finds the August 2 waiver to fall within the scope of the §102(c) waiver authority, that waiver and the underlying waiver authority are unconstitutional, as they run afoul of the Take Care and

Presentment clauses of the Constitution, as well the principle of Separation of Powers and the Nondelegation Doctrine.

The Center should be granted summary judgment on its claims that the August 2 waiver was *ultra vires*, and therefore invalid, or in the alternative, that both the August 2 waiver and the underlying statutory waiver authority of §102(c) are unconstitutional.[1]

LEGAL BACKGROUND

A. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

Section 102 of the 1996 IIRIRA was the first legislative enactment under which Congress specifically directed the construction of "physical barriers and roads."[2] P.L. 104-208, div. C., *codified at* 8 U.S.C. §1103 note.[3] IIRIRA §102 remains the primary federal statute specifically addressing border barriers, pursuant to three main provisions: (i) §102(a) (describing the purpose of the statute); (ii) §102(b) (providing specific mandates and deadlines for border barrier construction); and (iii) §102(c) (legal waiver authority).

Section 102(a), which remains substantively the same as originally enacted

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[1] Pursuant to the October 24, 2017 scheduling order (ECF No. 22), DHS's motion to dismiss was converted into a motion for partial summary judgment. This brief is both an opposition to that motion and a cross-motion for partial summary judgment. The Center's FOIA claim (Claim VII) is not subject to these cross-motions and will be resolved either via settlement or separate briefing. However, DHS seeks dismissal of the Administrative Procedure Act ("APA") portion of the FOIA claim that is intertwined with the statutory FOIA claim. DHS Br. at 40. The Center believes that this issue should be addressed by the Court only if the statutory FOIA claim is not otherwise resolved via settlement.

[2] This authority was originally delegated to the Attorney General, but is now delegated to DHS. See Second Amended Complaint (ECF No. 16) at ¶ 57 n. 1.

[3] Prior to IIRIRA's enactment, the authority to construct border barriers derived from the general statutory responsibility of the Attorney General (now the DHS Secretary) to "guard the boundaries and borders of the United States against the illegal entry of aliens." Immigration and Nationality Act, §103(a)(5), 8 U.S.C. §1103(a)(5). That authority continues to exist independent of IIRIRA.

in 1996, gives the DHS Secretary the general directive to "take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Section 102(b), in turn, "carr[ies] out subsection (a)" by identifying specific border barriers to be constructed, establishing deadlines for the construction of such barriers, authorizing the acquisition of easements and the appropriation of necessary funds in relation to the specified border barriers, and other requirements. Finally, §102(c) provides the DHS Secretary with authority to waive legal requirements that the Secretary "determines necessary to ensure expeditious construction of the barriers and roads under this section."

In the one case to consider the scope of the §102(c) waiver authority, the court concluded that the authority is limited to the specific barriers identified at §102(b), which at the time of that decision was the completion of a double and triple layer border fence to further fortify the then existing 14-mile long San Diego "primary" border fence that had been completed in 1993. *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244, *21 (S.D. Cal. Dec. 13, 2005) (finding that "boundaries [of §102(c)] are waiver of laws and regulations which the DHS Secretary determines impede completion of *this particular* 14-mile California border Triple Fence authorized by IIRIRA.") (emphasis in original).

IIRIRA §102 has been amended by three subsequent laws: the 2005 REAL ID Act, the 2006 Secure Fence Act, and the 2008 Consolidated Appropriations Act, the first of which modified the waiver authority of §102(c), while the second and third changed the specific mandates of §102(b).

B. The 2005 REAL ID Act Amendments to IIRIRA §102(c)

Enacted in 2005 as an unrelated legislative rider to the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," ("Supplemental Appropriations Act") section 102 of the

REAL ID Act amended the §102(c) IIRIRA waiver provision, expanding the waiver authority, which was initially limited to NEPA and the ESA, to permit the DHS Secretary "to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." P.L. 109-13, div. B. Section 102 of the REAL ID Act also amended the §102(c) waiver authority to restrict judicial review in the following respects: limiting "all causes or claims" arising from any waiver determination made by the DHS Secretary to alleged constitutional violations; requiring any such constitutional challenge to be filed not later than 60 days after the Secretary's determination; and eliminating appellate court review of the district court's decision on the alleged constitutional violations, instead only permitting review upon a writ of certiorari to the Supreme Court. The focus of §102(b) of IIRIRA solely on the San Diego fence remained unchanged by this amendment.

C. The 2006 Secure Fence Act Amendments to IIRIRA §102(b)

Section 3 of the 2006 Secure Fence Act ("Construction of Fencing and Security Improvements in Border Area from Pacific Ocean to Gulf of Mexico") significantly expanded upon IIRIRA §102(b) and its previous sole focus on the 14-mile San Diego double and triple layer fence construction. P.L. 109-367. Under these amendments, Congress directed DHS to "provide for at least 2 layers of reinforced fencing [and] the installation of additional physical barriers, roads, lighting, cameras, and sensors" in five specific segments along the U.S.-Mexico border totaling approximately 850 miles. IIRIRA, former §102(b)(1)(A)(i)-(v). Section 3 further amended IIRIRA section 102(b) to add the specific requirement that two of these segments be considered "priority areas," with construction deadlines of May 30, 2008 and December 31, 2008. Former IIRIRA § 102(b)(1)(B)(i)-(ii). Congress did not specifically consider the impact of the Secure Fence Act amendments on the scope of the IIRIRA §102(c) waiver.

D. The 2008 Consolidated Appropriations Act Amendments to IIRIRA §102(b)

Just over a year after enactment of the Secure Fence Act, Section 564 of the 2008 Consolidated Appropriations Act again amended §102(b) of the IIRIRA to scale back DHS's duties with respect to border barriers and roads that had been mandated under the 2006 Secure Fence Act amendments. P.L. 110-161, div. E. These amendments—which remain the law today—include: (1) eliminating the requirement that border barriers be built in any specific locations, and instead specifying that such barriers be placed "along not less than 700 miles of the southwest border where fencing would be most practical and effective"; (2) eliminating the requirement of double-layered fencing; and (3) amending the "priority areas" requirement to direct that DHS identify and construct 370 miles of border barriers by December 31, 2008. IIRIRA § 102(b)(1)(A)-(B).[4] Congress did not specifically consider the impact of the Consolidated Appropriations Act amendments on the scope of the IIRIRA §102(c) waiver.

FACTUAL BACKGROUND

A. Prior IIRIRA §102(c) Waivers to Expedite Construction of Border Barriers Required Under IIRIRA §102(b)

In response to IIRIRA and its amendments, DHS has greatly increased the extent of border barriers and roads along the U.S.-Mexico border. The overwhelming majority of border fence construction was approved during the second term of the George W. Bush Administration, and was facilitated by five "notices of determination" in the *Federal Register* invoking the IIRIRA §102(c)

[4] In addition, the 2008 Appropriations Act also added a new consultation requirement to §102(b), directing that DHS "shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites where" border barriers are constructed. IIRIRA §102(b)(1)(C).

authority to waive in their entirety a total of more than 35 laws[5] that would have otherwise applied to construction of border fencing and roads.[6]

Collectively, the five waivers applied to approximately 624.5 miles of border barrier and road construction. As of February 2017, DHS had constructed a total of 654 miles of "primary" border barriers, an additional 50 miles of double and triple-layered border barriers (for a total of 704 miles of barriers), and approximately 5,000 miles of roads along the U.S.-Mexico border. *See* "Southwest border security: Additional actions needed to better assess fencing's contributions to operations and provide guidance for identifying capability gaps." U.S. Government Accountability Office ("GAO") Report 17-331, a report to congressional requesters (February 2017).[7]

Regardless of whether the total mileage of existing barriers is calculated as 654 or 704 miles, DHS has taken the position that IIRIRA §102(b) allows less than 700 miles of fencing to be constructed in the agency's discretion, and that it

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[5] All five of these determinations waived application of NEPA and the ESA, as well as the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; National Historic Preservation Act, Pub. Law 89-665; Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*; Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Archeological Resources Protection Act, 16 U.S.C. § 470aa et seq.; Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*; Wilderness Act, 16 U.S.C. § 1131 *et seq.*; National Forest Management Act, 16 U.S.C. § 1600 *et seq.*; Native American Graves Protection and Repatriation Act, 42 U.S.C. § 2000bb; and American Religious Freedom Act, 42 U.S.C. § 1996, as well as numerous additional laws.

[6] These waivers applied to border barrier and road construction in the following areas: (i) San Diego, 70 *Fed. Reg.* 55,622 (Sept. 22, 2005)(13.9 miles); (ii) Barry M. Goldwater Range, Arizona, 72 *Fed. Reg.* 2,535 (Jan. 19, 2007)(37.3 miles); (iii) San Pedro Riparian National Conservation Area (administered by U.S. Bureau of Land Management), Arizona, 72 *Fed. Reg.* 60,870 (Oct. 26, 2007)(5.5 miles); (iv) Hidalgo County, Texas, 73 *Fed. Reg.* 19,077 (April 3, 2008)(corrected on April 8, 2008)(21 miles); (v) Various Areas in Texas, New Mexico, Arizona, and California, 73 *Fed. Reg.* 18,293 (April 3, 2008)(546.5 miles).

[7] Available at http://www.gao.gov/assets/690/682838.pdf.

has met its statutory mandate for border barrier construction:

> From fiscal years 2005 through 2015, CBP increased the total miles of primary border fencing on the southwest border from 119 miles to 654 miles—including 354 miles of primary pedestrian fencing and 300 miles of primary vehicle fencing. With 654 miles of primary fencing currently deployed, CBP officials have stated that CBP is in compliance with its legal requirements for the construction of the southwest border fencing on the substantial discretion provided to the Secretary of Homeland Security to determine the appropriate placement of fencing.

Id., at p. 8. In short, DHS has completed the construction mandates of §102(b).

B. The January 25, 2017 Executive Order on Border Security and Immigration Enforcement Improvement

The January 25, 2017 E.O. directs DHS to construct a "secure, contiguous, and impassable physical barrier" along the entirety of the nearly 2,000 mile-long U.S.-Mexico border, and defines that structure to mean "a contiguous, physical wall or similarly secure, contiguous, and impassable physical barrier." By its plain terms, the E.O. breaks with the previous and longstanding DHS position that additional border barrier construction is unnecessary and that DHS had already fulfilled its statutory obligations under IIRIRA §102(b).

C. The San Diego Border Wall Prototype and Border Fence Replacement Projects

The border wall prototype project is the culmination of two Requests for Proposals ("RFPs") issued pursuant to the E.O. in March 2017—one for a "Solid Concrete Border Wall Prototype" and the second for an "Other Border Wall Prototype." The core of the "threshold requirements" is that the wall design "shall be physically imposing in height," with a preference for a 30-foot high wall. Eight prototypes were recently constructed, and according to the Center's information and belief, are currently being tested. The prototype location is within or in close proximity to seasonal wetland vernal pool habitat, and other occupied

endangered species habitat.

The border wall replacement project would replace the existing 14-mile primary and secondary fencing in San Diego County, within habitat for numerous ESA-listed endangered and threatened species, and their designated critical habitat. The proposed 30-foot high replacement wall is notably higher than the existing border fencing, and may be constructed of impermeable concrete, both of which would exacerbate environmental impacts of the existing border fencing. Even though this region is impacted by prior border fence construction and other activities and infrastructure, the border wall replacement project is a major construction project with significant environmental impacts.

D. The August 2, 2017 IIRIRA §102(c) Waiver for "Various Border Infrastructure Projects" in a Fifteen Mile "Project Area"

On August 2, 2017, the DHS Secretary issued the first determination purporting to invoke IIRIRA § 102(c) in nearly a decade, waiving the application of NEPA, the ESA, and more than 30 additional laws not at issue in this lawsuit to "various border infrastructure projects" in the "project area." 82 Fed. Reg. 35,984-85. The determination defines the "project area" as "an approximately fifteen mile segment of the border within the San Diego Sector that starts at the Pacific Ocean and extends eastward … to approximately one mile east of Border Monument 251." 82 Fed. Reg. at 35,985. DHS did not provide any prior notice, conduct any public meetings, or consult with any stakeholders prior to issuing the August 2 waiver.

The border wall prototype and replacement projects are only listed as "examples" of the "various border infrastructure projects" DHS "will immediately implement" within the fifteen mile segment in the waiver determination. *Id*. at 35984. It thus appears that DHS intends to apply the waiver to projects which are not described in the determination, and for which plans may not even yet exist. Although existing border fencing covers much of the "project area," the

easternmost portion is unfenced and within habitat for several endangered species.

E. Procedural History

In May 2017, the Center made requests pursuant to FOIA, 5 U.S.C. § 552, from DHS and CBP for records related to the border wall prototype and replacement projects and agency compliance with NEPA and the ESA. When the agencies failed to provide a timely response, the Center filed the present case (ECF No. 1), and subsequently amended the complaint to add NEPA claims (ECF No. 6). Following the August 2, 2017 §102(c) waiver, the parties entered a scheduling stipulation under which the Center filed its second amended complaint, which alleges *ultra vires* and constitutional claims against the August 2 waiver, and also adds ESA claims (ECF No. 16). The Center's case has now been consolidated with subsequent challenges to the August 2 waiver by Defenders of Wildlife, *et al*., and the State of California (ECF No. 22).

ARGUMENT

I. The Court Has Jurisdiction to Hear the Center's *Ultra Vires* Claim

As demonstrated in Section II below, the August 2 waiver is *ultra vires* as it exceeds the authority granted to DHS under IIRIRA §102. However, DHS asserts that this Court can never reach the Center's *ultra vires* claims because §102(c) precludes judicial review. DHS Br. at 9-15. Defendants are simply wrong. While §102(c) may define certain limits on the timing and process of judicial review, it cannot be read to preclude review of claims that DHS acted beyond the bounds of its delegated authority.

Interpreting the scope of the IIRIRA §102(c) waiver provision "begin[s] with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).[8] Critically, this strong presumption applies even to a

[8] Ignoring this clearly articulated and longstanding Supreme Court precedent, DHS asserts a presumption of *nonreviewability* based on *Columbia Riverkeeper v.*

provision such as §102(c)(2), "where the statute expressly prohibits judicial review—in other words, the presumption dictates that such provisions must be read narrowly." *El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1276 (D.C. Cir. 2011); *cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (APA exception for judicial review of actions "committed to agency discretion" is "a very narrow exception").[9]

Here, the Center does not dispute that Congress has demonstrated its intent to overcome the presumption favoring judicial review of non-constitutional claims regarding a waiver issued *pursuant to* IIRIRA §102(c)(1):

> (2) Federal Court Review. (A) In General. The district courts . . . shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the [DHS Secretary] *pursuant to paragraph (1)*. A cause of action or claim may only be brought alleging a violation of the Constitution . . . The Court shall not have jurisdiction to hear any claim not specified in this subparagraph.

IIRIRA §102(c)(2) (emphasis added). But as detailed in section II below, the August 2 waiver was not authorized by §102 and therefore is not a decision made "pursuant to" IIRIRA §102(c)(1). Accordingly, the August 2 waiver is *ultra vires* and subject to review by this court, and the §102(c)(2) judicial review restrictions are simply inapplicable.

Stated another way, DHS cannot hide behind the judicial review restrictions of §102(c)(2) in order to escape review of whether the August 2 waiver was in fact properly within the scope of §102(c)(1) to begin with. As the D.C. Circuit explained in upholding jurisdiction for an *ultra vires* claim in *Dart v. United States*, 848 F.2d 217 at 224 (D.C. Cir. 1988), "the Veterans' Administrator cannot issue oil drilling permits—nor can the Secretary of Labor rescind television

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U.S. Coast Guard, 761 F.3d 1084, 1091 (9th Cir. 2014). That case, however, involved plaintiffs' attempt to invoke original jurisdiction at the appellate level, not whether any jurisdiction existed to begin with. DHS Br. at 9-10.

[9] Unless stated otherwise, internal citations and quotations within cases are omitted.

licenses—and expect to escape judicial review by hiding behind a finality clause."

In *Dart*, the court considered whether a citizen charged with violating an export law could bring a claim challenging the enforcement action notwithstanding a preclusive statutory review provision. In holding that *ultra vires* review was available, the court found that the "presumption of judicial review is *particularly strong* where an agency is alleged to have acted beyond its authority." 848 F.2d at 223.

The necessity of *ultra vires* judicial review of agency action was recognized by the Supreme Court long before *Dart*, in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (upholding jurisdiction over claim that postmaster acted *ultra vires*). The doctrine was reaffirmed during passage of the Administrative Procedure Act. *See* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945) (Senate Judiciary Committee report accompanying the APA) ("It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified") (*quoted in Dart*, 848 F.2d at 224). And it has been recently invoked to hear the legality of other actions taken by the current administration. *Hawaii v. Trump*, 859 F.3d 741, 768-69 (9th Cir. 2017) ("We do not abdicate the judicial role, and we affirm our obligation 'to say what the law is' in this case") (*quoting Marbury v. Madison*, 5 U.S. 137, 177 (1803)(vacated as moot).

Moreover, courts have repeatedly and specifically applied the presumption of *ultra vires* review to actions purportedly taken pursuant to statutory provisions expressly precluding judicial review such as that in §102(c). In interpreting another provision of IIRIRA limiting judicial review, for example, the Ninth Circuit noted that "[e]ven if a statute gives the Attorney General discretion . . . the courts retain jurisdiction to review whether a particular decision is *ultra vires* [to] the statute in question." *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003); *Trans Alaska Pipeline Rate* Cases, 436 U.S. 631, 638 n. 17

(1978) ("[A]lthough we reaffirm our previous holding that courts may not independently appraise the reasonableness of rates, no such appraisal is involved in inquiring whether the Commission has overstepped the bounds of its authority. Therefore, we conclude that Congress did not mean to cut off judicial review for such limited purposes"); *United States v. Bozarov*, 974 F.2d 1037, 1044 n. 8 (9th Cir. 1992)("claims that an agency acted outside the scope of its delegated authority" are reviewable under the *Dart* standard).[10]

As explained by the D.C. Circuit:

> If a no-review provision shields particular types of [executive] action, a court may not inquire whether a challenged [executive] decision is arbitrary, capricious, or procedurally defective, but it must determine whether the challenged . . . action is of the sort shielded from review. Otherwise, agencies could characterize reviewable or unauthorized action as falling within the scope of no-review provisions whose application to such action Congress did not intend.

Amgen v. Smith, 357 F.3d 103, 113 (D.C. Cir. 2004).

Despite this extensive precedent, DHS asserts that the Center cannot bring an *ultra vires* challenge because §102(c) uses an "unambiguous 'shall not have jurisdiction' formulation," and "Congress could not have been clearer in stating that all non-constitutional claims are barred." DHS Br. at 11-12. In *Bozarov*, however, the Ninth Circuit held precisely the opposite, concluding that a claim

[10] *See also Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation*, 792 F.2d 782, 791-92 (9th Cir. 1986) ("Courts have widely held that claims that an agency has acted outside its statutory authority are reviewable even though its decision on the merits might be unreviewable as committed to agency discretion."); *Nadler v. Civil Aeronautics Bd.*, 657 F.2d 453, 456 (D.C. Cir. 1981) ("Where, as here, the claim is that it was beyond the province of the agency to adopt as a rule a certain suspension policy, the reviewability-of-suspension orders doctrine is simply inapplicable"); *Owens v. Hills*, 450 F. Supp. 218, 221 (N.D. Ill. 1978) ("Concepts of 'separation of powers' and 'unlawful delegation of legislative power' mandate judicial review of certain agency action even in the face of a judicial review preclusion statute to insure that an agency has not clearly violated its statutory duty.")

that an agency acted outside the scope of its delegated authority would be reviewable despite a judicial review provision even more preclusive than IIRIRA §102(c), stating simply that the Secretary of Commerce's denial of a validated export license "shall be final and is not subject to judicial review." 974 F.2d at 1039 (*quoting* 50 U.S.C. § 2412(e)). In that case, the court rejected plaintiff's constitutional claim that the law in question violated the nondelegation doctrine, but noted that "we believe that claims that the Secretary acted in excess of his delegated authority under the EAA are … reviewable." *Id*. at 1044-45.

As detailed in *Dart*, numerous courts in addition to *Bozarov* have consistently permitted judicial review of facial and *ultra vires* claims despite provisions even more preclusive than §102(c). In the disability rights case *Lindahl v. OPM*, for example, the Supreme Court found that judicial review was available to determine whether there had been "a misconstruction of the governing statute," despite a finality provision stating that the decisions at issue "shall be final and conclusive and shall not be subject to review." 470 U.S. 768, 791 (1985)(*quoting* 5 U.S.C. § 8347(c)). The *Dart* court further noted that several Circuits have held veterans' benefit law permits review of regulations that allegedly violate the statute despite "sweeping preclusion language" providing that any decision involving benefits "shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise." 848 F.2d at 225. The same applies here, and §102(c)(2) cannot be held to bar the Center from alleging an *ultra vires* claim in this case.

In another variation on the "plain language" argument, DHS states that "Plaintiff cannot evade this clear jurisdictional limitation by citing the series of cases applying *Leedom v. Kyne*," because "*Kyne* does not apply where 'Congress has spoken clearly and directly' to preclude review." DHS Br. at 12 (*quoting Leedom v. Kyne*, 358 U.S. 184 (1958)). In doing so, DHS places great emphasis

on *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin. Inc.*, 502 U.S. 32 (1991), in which the court found that "the clarity of the congressional preclusion of review" contrasted with implied review at issue in *Kyne*.

The Center, however, is not primarily relying upon the *Kyne* line of cases, which generally involve "implied rather than express" preclusive language. *Nyunt v. Chairman, Broad Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). Instead, plaintiff traces its *ultra vires* claim of jurisdiction to *American School of Magnetic Healing*, as well as *Dart* and related cases that are specific to situations in which Congress has expressly restricted judicial review. The *Dart* standard of review was specifically endorsed by the Ninth Circuit in *Bozarov*, in which the court also specifically stated that *MCorp* does *not* preclude claims that an agency acted outside the scope of its delegated authority under statutory provisions precluding judicial review:

> The government suggested at oral argument that the Court's recent decision in [*MCorp]* means that claims that an agency acted outside the scope of its delegated authority are not reviewable if the statute precludes judicial review. We do not believe that *MCorp* precludes this type of claim under the EAA. The Court emphasized that preclusion of review was acceptable in part because the petitioner had a meaningful and adequate opportunity for judicial review of the regulation that he argued was promulgated in excess of the agency's statutory authority. The EAA presents an entirely different situation; petitioners have no other opportunity to challenge regulations or their applications. We therefore believe that *Dart* still sets out the correct standard to be applied to the EAA.

Bozarov, 974 F.2d at 1045 n. 8; *see also Hanauer v. Reich*, 82 F.3d 1304, 1309 (4th Cir. 1996) (*citing Bozarov*) ("The Ninth Circuit has explicitly rejected the argument that under *MCorp*, a statute that generally precludes judicial review necessarily precludes judicial review of claims that an agency exceeded the scope of its delegated authority."). In light of the above, the court has jurisdiction to hear the Center's *ultra vires* claim.

II. The IIRIRA §102(c) Waiver Authority Does Not Extend to the Border Wall Prototype and Border Fence Replacement Projects, and thus the August 2 Waiver is *Ultra Vires*

The core dispute between the parties is whether the waiver authority contained in §102(c) is limited to those specific projects mandated by Congress in §102(b) (and which have already been completed), as the Center contends, or whether it is applicable to a much broader, unbounded and perpetual grant of authority purportedly contained in §102(a), as DHS asserts. The plain language and structure of the statute, its purpose and legislative history, as well as legal precedent all dictate that the narrow reading advanced by the Center is the only permissible interpretation of the statute. DHS's interpretation, and consequently the August 2 waiver issued based on that interpretation, must be rejected *as ultra vires*.

A. IIRIRA §102's Language and Structure Demonstrate that the Scope of the §102(c) Waiver Authority is Limited to Specific Border Barriers Required Under §102(b)

"Statutory construction is a holistic endeavor." *Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50, 60 (2004). In order to determine how Congress has spoken to the question at issue, a court should read the words of the statute "in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). In addition, courts "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Id*. Guided by these principles, the authority granted to the DHS Secretary under IIRIRA §102(c) to waive all legal requirements the Secretary "determines necessary to ensure expeditious construction of the barriers and roads under this section" must be interpreted as limited to specific border barriers mandated pursuant to §102(b).

In the sole judicial decision to address the scope of §102(c), a court in this district reached precisely this conclusion, finding that the waiver's reach was limited to the completion of the San Diego 14-mile double and triple layer border fence—the only specific fence segment required under §102(b) at that time. As

stated in that case, which involved a challenge to the DHS Secretary's first use of the waiver authority:

> [T]he 'barriers and roads' alluded to are in the same in both articulations [as originally enacted in 1996 and as amended by the REAL ID Act of 2005] of Section 102(c): the Triple Fence project located along the U.S.-Mexico border in the vicinity of San Diego . . . Congress simply broadened the scope of the waiver authority of the pre-existing delegation to 'all laws,' but again *only for the narrow purpose of expeditious completion of the Triple Fence authorized by the IIRIRA*.

Sierra Club v. Ashcroft, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 13, 2005) at *19-20 (emphasis added). The court repeatedly and definitively emphasized this limitation throughout the opinion. *Id*. at *20 ("[t]hose boundaries are waivers of laws and regulations which the DHS Secretary determines impede construction of *this particular* 14-mile California Triple Fence authorized by IIRIRA") (emphasis in original); *id*. at 37 n. 7 ("this legislation since its inception is highly specific to a particular project in a specific location.").[11] The Court was so certain of its interpretation that it declined to review legislative history. *Id*. at *32-33 ("congressional intent in the revision is clear from the subject matter of Section 102(c): expedite completion of the [San Diego] Triple Fence … the language of the congressional enactment cannot be construed otherwise than as specifically targeting the subject matter of this case.").

Notwithstanding *Sierra Club's* repeated and emphatic language limiting the scope of the §102(c) waiver authority to construction required under §102(b) (which at that time was only the San Diego Triple Fence), DHS describes the projects covered by its August 2 waiver as falling "within the scope of § 102(a), which gives the Secretary authority 'to take such actions as may be necessary to install additional physical barriers and roads.'" DHS Br. at 23. DHS further asserts that the §102(c) waiver authority applies to the projects because the authority "by

[11] As discussed in Section III, *infra*, the court also relied on this narrow interpretation in finding that the waiver did not violate the nondelegation doctrine.

its plain terms . . . extends to any construction" proposed under §102 and that the term "this section" under §102(c) "unambiguously refers to IIRIRA §102 as a whole." DHS Br. at 17. In doing so, DHS places particular emphasis on its assertion that "[w]hen Congress wanted to identify a specific unit within §102, it did so in the standardized format." *Id*.

Presuming that Congress has intentionally adhered to the standardized format for making internal references within §102, an analysis of the broader "plain language" structure of §102 shows that DHS undermines its own argument. For example, §102(b)(2)-(4), which address easements, safety features, and appropriations, respectively, all specifically refer to "this subsection" (*i.e.* subsection (b)). *See* §102(b)(2) (directing Attorney General[12] to "promptly acquire such easements as may be necessary to carry out this subsection"); §102(b)(3) (directing Attorney General to "while constructing the additional fencing under this subsection, incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity"); §102(b)(4) (authorizing the appropriation of "such sums as may be necessary to carry out this subsection.").

Because Congress has provided these authorizations specific to §102(b), it must be presumed that it did not provide those authorizations for actions taken beyond §102(b). *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). Without appropriations, easements, or safety measures, border barriers cannot be constructed, and DHS's attempt to justify its expansive reading of §102(c) solely on that provision's reference to 'this section' collapses.

[12] As these portions of §102(b) were not amended in the 2005 amendments they refer to the Attorney General rather than the DHS Secretary.

Other aspects of IIRIRA show that it is not the model of plain language clarity that DHS represents it to be, further undermining the DHS's contention that §102(c)'s reference to "barriers and roads *under this section*" is "unambiguous" and must be interpreted to apply to all actions taken under §102. As one example of this legislative imprecision, the terms "section" and "subsection" are used inconsistently under §102, with §102(b)(1)(A) addressing "reinforced fencing" required to "carry[] out subsection(a)," while §102(b)(1)(B) and §102(b)(1)(C) address "priority areas" of "carry[] out this section."[13]

In addition to its plain meaning argument, DHS asserts that limiting the §102(c) waiver authority to specific barriers identified in §102(b) is "highly implausible" for four reasons, the first being that "when Congress identifies certain specific applications of a general grant of authority, those specific requirements cannot generally be understood to prohibit all other applications of the general authority," and the second and third related arguments that such a reading would render §102(a) superfluous and that §102(b) does not foreclose other applications of §102(a). DHS Br. at 18-21.[14]

DHS mischaracterizes the Center's claim. The Center alleges, simply, that the scope of the §102(c) waiver authority does not apply to the border wall prototype or replacement projects, or to any other actions that are not mandated by Congress pursuant to §102(b). The Center, however, does not claim that DHS lacks authority to construct border barriers in San Diego or elsewhere.

Prior to IIRIRA's enactment, the authority to construct border barriers derived from the general statutory responsibility of the Attorney General (now the

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[13] One court interpreting IIRIRA bemoaned the "various jurisdictional Gordian knots" created by the law, and noted that the analysis was "further complicat[ed]" by the REAL ID Act amendments. *Baeta v. Sonchik*, 273 F.3d 1261, 1263 (9th Cir. 2001) (*quoted in Sissko v. Rocha*, 412 F.3d 1021, 1029 (9th Cir. 2005)).

[14] The fourth (pertaining to legislative history) is addressed in Section II.B., below.

DHS Secretary) to "guard the boundaries and borders of the United States against the illegal entry of aliens." Immigration and Nationality Act, §103(a)(5), 8 U.S.C. §1103(a)(5). Pursuant to such authority, various fences and barriers were constructed in the San Diego area well before §102 came into existence. That authority continues to exist independent of §102. Consequently, the broad directives of §102(a) cannot be interpreted as *providing* DHS with the authority to build border barriers as that authority *already exists* independent of §102(a). What IIRIRA did was to *require* specific border barriers under §102(b), and provide authority to waive laws that might delay the expeditious construction of those barriers. But that authority to issue waivers does not extend beyond those specific border barrier projects required by §102(b). So while DHS may have the authority to construct the border wall prototype and replacement projects, the §102(c) waiver authority is not applicable to such projects, and DHS may instead only legally proceed with these proposals after complying with all applicable legal requirements, including those of NEPA and the ESA.

DHS claims that this construction of IIRIRA renders §102(a) "largely superfluous." DHS Br. at 20. This is simply not the case. While many statutes have introductory provisions titled "In General" that consist largely of non-binding pronouncements of policy, §102(a) actually contains meaningful provisions. Through its plain language it limits the barriers and roads DHS may construct under §102(b) to those areas "in the vicinity of the United States border" and which are erected "to deter illegal crossings in areas of high illegal entry into the United States." There is nothing superfluous about these requirements, and in fact the limitation of such projects to "areas of high illegal entry" is central to certain claims in this case.

DHS's claim that the Center's interpretation would lead to "absurd results" also crumbles under the slightest scrutiny. DHS Brief, at p. 24. DHS asserts that limiting the waiver authority to projects under §102(b) would preclude

maintenance, repair or improvement of existing barriers. *Id*. However, as described above, DHS has authority for such activities outside of §102; it simply would not be allowed to waive environmental and other laws under §102(c) to carry out such measures. However, this is not a heavy burden, as it is hard to imagine how repairing a hole in a fence would trigger the requirement to prepare a lengthy Environmental Impact Statement or a prolonged analysis under the ESA. DHS's strawman arguments simply do not carry any weight. That DHS may wish that the broad waiver authority of §102(c) was applicable to every project and action it may decide to undertake, does not make it so.

While DHS decries the Center's "cramped reading," DHS's expansive and unbounded interpretation of the §102(c) waiver authority would bestow a truly extraordinary and unprecedented "free pass" upon DHS to bypass any laws for any border barrier or road construction project at any time, with such authority to persist into the future in perpetuity. If DHS is permitted to utilize the authority in 2017, then what is to prevent future administrations from waiving legal requirements in 2027, or 2057? Yet this is just one aspect of the ramifications flowing from DHS's breezy claim of authority to waive all laws pertaining to all border infrastructure projects now and in the future.

For example, under DHS's interpretation, the waiver authority would apply not only to border barrier construction, and not only prototypes and replacements such as the projects at issue here, but barrier and road projects constructed away from the immediate border and any other project DHS deems is within the scope of §102(a). Under this interpretation, the scope of this authority would apply to any area of proposed border wall construction, regardless of whether such construction is proposed within the boundaries of a National Park, Monument, Wildlife Refuge, Forest, Wilderness, or other area of protected federal, state, or local, land, or on a citizen's private lands. If DHS's interpretation were accepted, the agency could propose a wall along the length of the Canadian border, waive

all applicable laws, and build it without any further authorization from Congress. It is DHS's interpretation that leads to absurd results.[15]

DHS's sweeping claim of legal waiver authority cannot be upheld. Reading IIRIRA's provisions together, and considering the presumption favoring judicial review and requiring a narrow interpretation of waivers, the most reasonable interpretation of IIRIRA §102 as a whole is that the §102(c) waiver authority is limited to specific barriers which Congress has identified in §102(b). *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) ("When a statute is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.").

B. IIRIRA's Legislative History Demonstrates that Congress Intended to Limit the Scope of the §102(c) Waiver Authority to Specific Border Barriers Required Under §102(b)

Section 102 of the 2005 REAL ID Act (H.R. 418) amended the §102(c) waiver provision to its current language. P.L. 109-13, div. B. There were no Committee hearings held on H.R. 418 in either chamber of Congress, and the bill's debate was limited to portions of two days in the House on February 9, 2005 (151 Cong. Rec. H453-471) and February 10, 2005 (151 Cong. Rec. H527-566).

H.R. 418 was never specifically considered in the Senate, as it was added as an unrelated legislative rider to the Supplemental Appropriations Act during that bill's conference committee. As stated by one Senator, the REAL ID Act "was simply grafted onto the emergency supplemental appropriations bill that provides

[15] Given §102(a) speaks only of "the United States border" without specifying the southern border, under DHS's interpretation of the scope of the waiver authority. the agency could theoretically invoke a waiver to build a dam across the Bering Strait to separate the United States from Russia without any further authorization of Congress and such action would be unreviewable by the courts as within the "discretion" of the DHS Secretary. IIRIRA cannot be so interpreted.

funding for our military operations and our troops, without debate or participation by the conferees." 151 Cong. Rec. S4820 (daily ed. May 10, 2005) (Statement of Senator Byrd).

Although the REAL ID Act's legislative history is relatively sparse, it unequivocally shows the sponsor's and supporters' intent to limit the expanded IIRIRA §102(c) waiver authority to the San Diego fencing under IIRIRA section 102(b). This intent, in fact, was specified in the bill's title: "To establish and rapidly implement regulations for State driver's license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States, to unify terrorism-related grounds for inadmissibility and removal, *and to ensure expeditious construction of the San Diego border fence*." Although titles "cannot limit the plain meaning of the text," they are "of use . . .when they shed light on some ambiguous word or phrase." *Northstar Financial Advisors, Inc. v. Schwab Invs.*, 615 F.3d 1106, 1120 (9th Cir. 2010). Here, the title helps shed light on the scope of the IIRIRA §102(c) waiver.

In addition, throughout the limited House Floor debate on the REAL ID Act, the bill's author and co-sponsors repeatedly made plain their intent that the expansion of the IIRIRA §102(c) waiver authority was specific to the border barrier segment identified under §102(b)—at that time, the completion of the San Diego double and triple layer fence. An explanation provided by bill sponsors during floor debate always "deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).[16] In circumstances where legislative consideration is rushed or truncated, such as the case with the REAL ID Act, courts will give even

[16] DHS looks past the clear statements of supporters to instead rely on statements made by opponents of the bill, but "[t]he fears and doubts of the opposition are no authoritative guide to construction of legislation. It is the sponsors that we look to when the meaning of statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

"greater weight than [they] otherwise might to the statements of the individual legislators who spoke on behalf of the legislation." *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453-54 (9th Cir. 1992).

In his Floor Statement on the legislation, for example, the bill's author summarized the bill as including "four of the most important border and document security provisions" that had been included in a previous House bill, including the amendment of the §102(c) waiver authority. 151 Cong. Rec. H454 (daily ed., Feb. 9, 2005)(Statement of Rep. Sensenbrenner).[17] His description of that amendment makes clear that it was limited to completion of the San Diego fence under §102(b):

> [T]he REAL ID Act will waive Federal laws to the extent necessary to complete gaps in the San Diego border security fence, which is still stymied 8 years after congressional authorization. Neither the public safety nor the environment are benefitting from the current stalemate.

Id. Supporters of the H.R. 418 expansion of the §102(c) waiver authority made similar statements. *See, e.g.,* 151 Cong. Rec. H453-171 ("H.R. 418 provides the Secretary of Homeland Security with authority to waive environmental laws, *so that the border fence running 14 miles east from the Pacific Ocean at San Diego may finally be completed*.") (daily ed., Feb. 9, 2005) (Statement of Rep. Hoekstra)(emphasis added). Following inclusion of the bill in the Supplemental Appropriations Act, the bill's sponsor issued a press release praising the inclusion of "his REAL ID Act" legislation, and noting the "closing [of] the 3-Mile Hole in the fortified U.S./Mexico Border Fence Near San Diego" as one of the bill's highlights. U.S. Fed News, "Rep. Sensenbrenner Praises REAL ID Act's Inclusion in Supplemental Conference Report." May 4, 2005.

DHS encourages the Court to disregard the sponsor and supporter

[17] The previous House bill was H.R. 10, which included an amendment that would have waived 16 laws, with the waiver authority limited to completion of the San Diego border fence. H. Amdt. 800.

statements and instead rely solely on the conference report for the Supplemental Appropriations Act. The conference report, however, does not help DHS. First, the report's isolated and general statement that it "provides for construction and strengthening of barriers along U.S. land borders" is not sufficient to overcome the repeated and clear statements by the bill's s author and co-sponsors that the waiver's reach was specific to completion of the San Diego triple fence. Second, the conference report, in fact, emphasizes that the expansion of the waiver authority was catalyzed by, and intended to address, the delay in completion of the San Diego fence. H.R. Rep. 109-72 at 171 ("Despite the existing waiver provision, construction of the San Diego barriers has been delayed due to a dispute involving other laws.").[18]

The weight of the legislative history thus reinforces the conclusion that Congress intended the REAL ID Act's amendment and expansion of the §102(c) waiver authority, like the § 102(c) waiver authority as originally enacted in 1996, to apply only to the specific border barriers required by §102(b).

C. Section 102(c)'s Requirement that Waivers be "Necessary to Ensure Expeditious Construction" Demonstrates That Congress Intended to Limit the Scope of the §102(c) Waiver to Specific Border Barriers Required Under §102(b)

The waiver provision of §102(c) directs that DHS may only waive laws "necessary to ensure expeditious construction" of barriers and roads. Although the term "expeditious construction" is not defined, the logical and straightforward interpretation is that Congress provided the DHS Secretary with the authority to

[18] Notably, the report cites the Coastal Zone Management Act, 16 U.S.C. § 1541 *et seq.*, which only applies to a portion of the San Diego border fence, as a law causing delay. *Id*. ("Continued delays caused by litigation have demonstrated the need for additional waiver authority with respect to other laws that might impede the expeditious construction of security infrastructure along the border, such as the Coastal Zone Management Act."). Obviously, the Coastal Zone Management Act is not implicated in any border projects in Arizona, New Mexico, or along 99% of Texas's border.

waive laws in order to build the specific border barriers (at that time the San Diego double and triple layer fence) required under § 102(b) *as soon as possible after the law's enactment*.

DHS nonetheless insists that "the temporal focus of the waiver provision is on the completion of each construction project under the Act . . . meaning at least that they can be issued when 'expeditious construction' would not occur in the absence of a waiver." DHS Br. at 28-29. By this circular reasoning, and as illustrated by the August 2, 2017 determination, DHS would have the authority, in perpetuity and untethered to any specific legislative direction from Congress, to waive laws for any project the agency conjures up that involves the construction of border barriers, or even preparation for such construction. This sweeping authority would apply long after the deadlines set by the statute for the construction of any such barriers, and in relation to the construction of additional barriers that have not been specifically directed by Congress. Such an unreasonable construction should be rejected.

DHS further disputes the Center's interpretation by arguing that "nothing in the text of the Act suggests that Congress intended the waiver authority to sunset." DHS Br. at 28. The same could be said of the converse—there is no evidence in either the text or the legislative history that Congress intended the waiver authority to persist in perpetuity, or even that Congress ever intended the waiver authority to be extended beyond the initial San Diego fence. But more importantly, the text of the statute itself *does* indicate that the waiver authority was intended to apply only for specific purposes over a specific period of time, namely until the timely completion of the specific projects mandated by §102(b). Those projects have long since been completed.

The current version of §102(b) was last amended by Section 564 of the 2008 Consolidated Appropriations Act. P.L. 110-161, div. E. These amendments—which remain the law today—include provisions which, when read

together with §102(c) do in fact act as a *de facto* sunset clause on the waiver authority. Through these amendments, Congress changed §102(b) to require DHS to "construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical." §102(b)(1)(A). Then, under the heading "Priority areas," §102(b)(1)(B)(i) tasked DHS to "identify the 370 miles, or other mileage determined by the Secretary," "where fencing would be most practical and effective." *Id*. Critically, this new provision provided that the authority to determine any "other mileage" for priority area fencing "shall expire on December 31, 2008." *Id*. In short, the amendments inserted a sunset clause explicitly constraining DHS's authority regarding the determination of "priority areas". Moreover, these amendments also imposed a deadline of December 31, 2008, for the expedited construction of fencing in priority areas. §102(b)(1)(B)(ii).

Following these amendments, DHS then invoked the §102(c) waiver to meet its mandates under §102(b), and as described *supra* at Factual Background I.A., hundreds of miles of barriers were constructed and DHS has stated that it has now complied with all the requirements of §102(b)(B)(i) & (ii).

If, as DHS now argues, it has unbridled discretion under §102(c) to invoke a waiver at any time to "expeditiously" build projects pursuant to its general authority under §102(a), the explicit constraint on its authority imposed by Congress through the expiration of authority contained §102(b)(2)(i) and the construction deadline in §102(b)(2)(ii) would each be rendered a nullity. Such a result is impermissible. *See, e.g. Hooks v. Ktsap Tenant Support Servs., Inc.*, 816 F.3d 550, 560 (9th Cir. 2016) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").[19]

[19] Regardless of whether the mandate of §102(b), and hence the availability of a wavier to "expeditiously" construct barriers, is tied to the completion of the 700 miles required by (b)(1) or the December 31, 2008 deadline for the 370 miles of

In sum, it is far more reasonable to limit the §102(c) waiver authority to those barriers that have been specifically mandated by Congress under §102(b) than to adopt the government's boundless interpretation.[20]

D. Even if the Waiver Authority is Not Limited to Projects Under §102(b), the August 2 Waiver is Not Authorized by IIRIRA

As demonstrated above, the waiver authority in §102(c) must be read as being limited to those projects mandated by §102(b). Because the August 2 waiver purports to cover projects that clearly fall outside of §102(b), it must be found void by virtue of being *ultra vires*. Moreover, even if the Court finds the waiver authority is not limited to actions under §102(b), the August 2 waiver is still *ultra vires* as it is at odds with the requirements of §102(c) itself, as well as those of §102(a).

First, a waiver under §102(c) is by its terms is allowed only "when necessary to ensure expeditious construction of barriers and roads." As described in Section II.C., *supra*, neither the prototype nor the wall replacement project—started a decade after the most recent amendments to IIRIRA—can be considered to require "expeditious" construction. Second, §102(a) limits barriers to "areas of high illegal entry." As thoroughly documented in the briefing of the State of California,[21] by no rational standard can the project area for the prototypes (north of an existing double fence), nor for the wall replacement itself (already blocked

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priority areas under (b)(2), there can be no reasonable dispute that DHS has fulfilled these obligation under §102(b). Consequently, the waiver authority under §102(c) is no longer available.

[20] Although DHS has fulfilled its statutory duties under §102(b) by constructing all of the specific barriers mandated by Congress, Congress could of course again amend §102(b) to add new specific border barrier requirements, and new time constraints, that could then be subject to the §102(c) waiver authority.

[21] In an effort to reduce redundant briefing, the Center adopts and incorporates by reference the State of California's information and arguments demonstrating that the area subject to the August 2 waiver cannot reasonably be considered an area of "high illegal entry."

by double fence) be considered an area of high illegal entry. Consequently DHS lacked the authority to issue the August 2 waiver, and such waiver is *ultra vires* and void.

E. Because the August 2 Waiver is *Ultra Vires*, it is Void

As demonstrated above, the August 2, 2017 waiver is *ultra vires* as it exceeds the authority delegated by Congress to the DHS Secretary. Moreover, because DHS's broad interpretation of the §102(c) waiver authority raises serious constitutional questions, while the Center's interpretation does not, the Court must construe the statute so as to avoid any such constitutional problems. "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Because, this Court has the authority to set aside the waiver as *ultra vires*, it need never reach the constitutional infirmaries of IIRIRA §102(c) itself. However, in the event the Court rejects the Center's *ultra vires* claim, either on the merits or because it believes it lacks jurisdiction over such a claim, as demonstrated below both the August 2 waiver and the underlying waiver authority of §102(c) are unconstitutional.

III. The August 2 Waiver and the IIRIRA §102(c) Waiver Authority are Unconstitutional

Both the August 2, 2017 waiver as well as the underlying waiver authority contained in IIRIRA §102(c) suffer from several, intertwined constitutional defects. Each of these standing alone is reason to strike down the waiver and/or

the statute; collectively they compel such a result.

A. The August 2 Waiver Violates the Take Care Clause (Article II, §3)

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President," and that he or she "shall take Care that the Laws be faithfully executed." Article II, § 3. As detailed above, the August 2, 2017 waiver is *ultra vires* as it exceeds the authority delegated by Congress to the DHS Secretary in IIRIRA. While the Center believes that this Court clearly has jurisdiction to find the waiver *ultra vires* and set it aside on that basis, DHS argues that the Court cannot reach such a claim because "all non-constitutional claims are barred." DHS Br. at 11-12. Even if this were the case, the Take Care Clause of the Constitution provides a cause of action under the Constitution that DHS cannot possibly argue is precluded by the jurisdictional provision of §102(c). U.S. Constitution Article II, § 3; *cf. Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) ("the President's actions may still be reviewed for constitutionality" even if APA review is unavailable).

DHS contends that claims under the Take Care Clause are not justiciable, and in any event can only be brought against the President himself. DHS Br. at 30-33. But ever since *Marbury v. Madison*, "the courts [have] asserted power to determine and enforce constitutional and other legal obligations of executive officials." 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 7.2(a) (2016). DHS cites *Mississippi v. Johnson*, 71 U.S. 475, 499 (1867), which stands only for the proposition that in certain circumstances an injunction will not lie against the President. But subordinate Executive officers such as the DHS Secretary are "available as an effective target for specific relief." *Id.*; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (suit against Secretary of Commerce).

The Supreme Court has repeatedly held that the Clause applies to executive

officers and other subordinates of the President. *Myers v. United States*, 272 U.S. 52, 117 (1926) ("But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court."); *Printz v. United States*, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints.").

Moreover, the Supreme Court has long recognized a claim for relief against federal officials' unconstitutional acts. *See, e.g., Free Enterprise Fund v. Public Co. Accounting Bd.*, 561 U.S. 477, 491 n.2 (2010) (collecting cases); *United States v. Lee*, 106 U.S. 196, 220-21 (1882). DHS's position is especially hard to reconcile with the seminal *Youngstown* decision. There, too, the Executive argued that its actions were unreviewable. This position was rejected in *Youngstown*, and it must be rejected here. The Take Care Clause provides a cause of action under the Constitution allowing the Center to challenge the August 2 waiver.[22]

The August 2 waiver violates the Take Care Clause in two primary ways. First, by issuing a waiver that invoked §102 of IIRIRA, but that was not authorized by IIRIRA, DHS exceeded the authority delegated to the Executive

[22] The Center readily acknowledges that jurisprudence under the Take Care Clause is less developed than under Presentment Clause, Separation of Powers and Nondelegation Doctrine also at issue in this case. However, in 2014 the Supreme Court breathed new life into the provision in an order granting certiorari where it asked "Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3" *United States v. Texas*, 136 S. Ct. 906 (2016) (order granting certiorari). The Court ultimately did not reach the issue. *See also Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957, 976 (2017) (9th Cir. 2017) (entertaining claim alleging violation of Take Care clause but resolving case on other claim based on constitutional avoidance principle); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835, 1837 (2016) (summarizing cases where the Court found violations of the Take Care Clause).

Branch. *See supra* at section II (describing how the waiver is not authorized under the statute because the waiver authority is only applicable to those barriers required under §102(b)). Courts have long held that the Take Care Clause's mandate to "faithfully execute" the law requires that the executive branch "execute the laws, not make them," and therefore precludes actions beyond the scope of the law at issue. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 532 (U.S. 2008); *Youngstown*, 343 U.S. at 587 ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *Myers*, 272 U.S. at 177 ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws."). Consequently, for the same reasons the August 2 waiver is *ultra vires*, it is also in violation of the Take Care Clause. Article II, § 3.

Additionally, even if the waiver authority under §102(c) is not limited to those barriers required by §102(b), the August 2 waiver otherwise is at odds with the specific directive of §102(a) that any barriers built under IIRIRA be in "areas of high illegal entry," and hence its issuance runs afoul of the duty to faithfully execute that statutory mandate. *See supra* at section II.A.

B. Section 102(c) and the August 2 Waiver Violate the Presentment Clause (Article I, §7)

"Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure" involving bicameral passage followed by presentment to the President. *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1988) (*quoting INS v. Chadha*, 462 U.S. 919, 951 (1983)). "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." *Chadha*, 462 U.S. at 954. The power of DHS under §102(c) to pick and choose which laws to apply—and which to waive application of—has legislative consequences which must be subject to these Article I requirements.

Section 102(c) is closely analogous to the "cancellation" provisions of the Line Item Veto Act struck down in *Clinton*, where the Court considered a provision of that Act granting the President authority to "cancel" certain appropriations that had been passed by Congress, after he had signed bills containing those appropriations into law. The Court struck down the law because "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id*. at 439. Like the Line Item Veto Act, §102(c) authorizes an executive branch official to legislate, by partial repeal or amendment, without observing the requirements of bicameralism and presentment.

As DHS notes, the only decision to analyze a presentment clause claim challenge to §102(c) found the provision constitutional because "the Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision." *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124 (D.D.C. 2017); DHS Br. at 37. The Supreme Court's decision in *Clinton*, however, did not turn on whether or not the cancelled provisions remained in the U.S. Code. Instead, the Court focused on the "legal and practical" effects of the veto authority. Like that authority, the §102(c) waiver provision results in legal and practical effects that must be considered partial repeal or amendment of the waived statutes without observance to required constitutional procedures.

The court's decision in *Defenders* was further flawed in its reliance on the canard that "by [plaintiff's] logic, *any* waiver, not matter how limited in scope, would Violate I." *Defenders of Wildlife*, 527 F.2d at 124 (emphasis in original). The §102(c) authority is *not* just *any* waiver. As noted by one commenter, a "broad reading of the Presentment Clause and the holding in *Clinton* would call into question [IIRIRA §102(c)]. This is not to say, however, that every waiver of law by a member of the executive branch is unconstitutional." Kate R. Bowers, "Saying What the Law Isn't: Legislative Delegations of Waiver Authority in

Environmental Laws," 34 Harv. Envtl. L. Rev. 257, 290-291 (2010). This is because "the scope of the [IIRIRA §102(c)] provision is quite different" from previous laws considered in Presentment Clause challenges, because it "functions as a freestanding authority to waive any legal requirement," its "focus is broader," and "it limits judicial review." *Id*. at 291.

Even if the Court finds *Defenders* persuasive, DHS's August 2 invocation of the §102(c) authority shows that its reach is far broader in scope than presumed by the court in that case. Instead of being limited to border barriers which were specifically mandated by Congress pursuant to §102(b), DHS is purporting to expand that authority to the border wall prototype and border fence replacement project under the claimed "general mandate in §102(a) *that is not geographically limited*." DHS Br. at 21 (emphasis added).

Notwithstanding this aggressive claim of authority, DHS states that "[t]he statutes retain their general legal force and effect because the Secretary's waiver extends to only a tiny fraction of the universe of cases to which NEPA and similar statutes apply." DHS Br. at 37. DHS's concept of a "tiny fraction of the universe" encompasses a significant expanse of U.S. soil. In total, the seven §102(c) determinations issued to date have waived more than 35 laws on nearly 650 miles—approximately one third of the 2,000 mile long southern border. These waivers have already cut a large hole in the fabric of protections provided by NEPA, the ESA, the Clean Water Act, the Clean Air Act, and other waived laws. Accordingly, the August 2 waiver cannot be considered anything other than an unconstitutional partial repeal or amendment of the waived laws.[23]

[23] Moreover, the August 2 determination targets laws with limited geographic reach, most notably the Otay Mountain Wilderness Act of 1999, Pub. L. 106-145. Under that Act, Congress protected 16,885 acres of federal land administered by the Bureau of Land Management ("BLM"), within the U.S. Department of the Interior. This area protects unique and rare ecosystems, including populations of the endangered Quino checkerspot butterfly and Mexican flannel bush, and the only known stand of Tecate cypress in the United States. By waiving the requirements of the wilderness acts, DHS is facilitating the construction of border

C. Section 102(c), as Demonstrated by the August 2 Waiver, Violates the Nondelegation Doctrine

The nondelegation doctrine is "rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). It provides "that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). To abide by this limitation, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized [to act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The intelligible principle standard consists of a three prong test: whether Congress has "clearly delineate[d] (1) the general policy, (2) the public agency which is to apply it, and (3) the boundaries of the delegated authority." *Mistretta*, 488 U.S. at 372-73.

Here, the §102(c) waiver authority plainly fails to meet the third factor, as illustrated by the August 2 determination. Although the prior district courts to consider nondelegation challenges to §102(c) have rejected them, those decisions were all premised on the understanding that the scope of the waiver authority was constrained to completion of specific border barriers mandated by Congress. *See Sierra Club*, 2005 U.S. Dist. LEXIS 44244, at *21 (boundary of delegated authority is waiver of laws "solely in the context of this Triple Fence"); *Defenders of Wildlife*, 527 F.2d at 128; *Save Our Heritage v. Gonzales*, 533 F. Supp. 2d 58, 63 (D.D.C. 2008); *County of El Paso*, 2008 U.S. Dist. LEXIS 83045 (W.D. Tex. Aug. 29, 2008), at *12.

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barriers, roads, and other infrastructure that will have real, permanent, and far reaching impacts, and directly destroy the "wilderness quality" of much of this relatively small expanse of protected land. Although the Otay Mountain Wilderness Act is still a part of the United States Code, the §102(c) waiver has greatly diminished its intended purpose and protections, and thus constitutes a repeal of that law without observance of the Presentment Clause requirements.

In contrast, the August 2, 2017 determination was made several years after DHS has fulfilled its border barrier mandates under IIRIRA, and without the enactment of any new or additional statutory fence-building mandates. And unlike past waivers considered in *Sierra Club*, *Defenders*, *Save Our Heritage*, and *County of El Paso*, which focused solely on building new fencing specifically mandated by Congress pursuant to §102(b), the August 2 determination applies to "various" border projects along a fifteen mile region, including the border wall prototype and border fence replacement.

DHS's interpretation of actions subject to §102(c) has no meaningful boundaries. According to DHS, IIRIRA "makes clear that the Secretary's authority encompasses more than the 'physical barriers and roads' themselves," and includes projects that "concern" barrier construction, as well as those that "the Secretary deem[s] necessary *to prepare for future installation[s]*." DHS Br. at 23-24 (emphasis added). The scope of actions falling under these umbrellas of generality and vagueness would extend well beyond the prototypes and replacement wall. If DHS's interpretation is true—a contention that the Center strongly disputes—then the boundaries of the delegated authority under §102(c) are far larger and more amorphous than assumed by any of the previous courts considering nondelegation challenges.

By attempting to expand the waiver authority beyond specifically mandated border fencing projects to a larger universe of border security projects such as the prototype and replacement project, DHS also undermines the inherent temporal and geographic limitations on that authority. Instead of the "expeditious construction" constraint of §102(c) directing DHS to build mandated border barriers as quickly as possible following specific Congressional direction, the government asserts that "the temporal focus of the waiver provision is on the completion of each construction project under the Act." DHS Br. at 28. Conveniently, this reading permits DHS to treat *every* border infrastructure project

it proposes under IIRIRA as within the waiver authority, *in perpetuity* and in the absence of specific Congressional mandates or authorization. This limitless discretion is especially problematic in light of the broad scope of authority delegated to the DHS Secretary under §102(c) to waive *any* law, based on a necessity determination, *Whitman*, 531 U.S. at 475 ("the degree of agency discretion that is acceptable varies according to the scope of power congressional conferred."), as well as its limitations on judicial review. *Touby*, 500 U.S. at 170 (Marshall, J. concurring) ("[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds.").

Because the §102(c) waiver authority delegates sweeping authority to the DHS Secretary without establishing a clearly delineated boundary to that delegation—as illustrated by the August 2, 2017 determination—the provision is an unconstitutional delegation of legislative authority to an executive branch official and must be struck down.[24]

IV. Plaintiff Has Standing

The Center and its members have standing in this case pursuant to the familiar three-part test: (1) its members have suffered, and will continued to suffer, "injury in fact" that is concrete and particularized, and the threat must be

[24] Nor can DHS fall back on its assertion that Congress may delegate in even broader terms than normal under *Loving v. United States*, 517 U.S. 748, 772 (1996) (delegations may be broader than "where the entity exercising the delegated authority possesses independent authority over the subject matter."). *Loving*, however, addressed an "internal waiver" pertaining to the agency's expertise. Section 102(c), in contrast, is unprecedented in that it allows DHS broad authority to waive any external law, the vast majority of which have nothing to do with its subject matter. *See* Bowers, 34 Harv. Envtl. L. Rev. 257 at 263 (discussing typology of waivers). As shown by each of the waivers issued to date, DHS has targeted environmental, cultural, and historic protection laws, as well as laws pertaining to religious freedom, Native American gravesites, and farmland protection—none of which are remotely related to DHS's authority and expertise.

actual and imminent, not conjectural or hypothetical; (2) the alleged harm is traceable to defendants' failure to comply with NEPA and the ESA, and its purported waiver of those laws pursuant to §102(c); and (3) a favorable judicial decision that invalidates the waiver and directs compliance with NEPA and the ESA will prevent or redress the injury. *Friends of the Earth, Inc. v. Laidlaw Envt'l Services, Inc.*, 528 U.S. 167, 180-181 (2000).

The Center's affidavits in this case show recreational, professional, aesthetic, and personal interests, for the Center organizationally, and for its members specifically, in the protection and conservation of particular species within a particular place (the fifteen mile project area, including the border wall prototype and border fence replacement projects) which have been and continue to be harmed by defendants' waiver of laws. *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (injury in fact shown through affidavits showing "an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by defendant's conduct."). *See, e.g.*, Declaration of Jill M. Holslin, at ¶ 6 (describing interest in and observation of rare species including Quino checkerspot butterfly, Tecate cypress, and snowy plovers); Declaration of Christopher D. Nagano, at ¶ 8 (describing interest in numerous imperiled species, including San Diego and Riverside fairy shrimp, Quino checkerspot butterfly, Otay Mesa mint, and Otay tarplant); Declaration of Peter Galvin, at ¶ 16 (describing interest in Quino checkerspot butterfly and other species). The affidavits further demonstrate repeated and extensive visitation to the project area, and specific plans to return to those areas. *See, e.g.*, Holslin Decl., at ¶¶ 7-8; Nagano Decl., at ¶¶ 10, 16-17, 30. These interests are more than sufficient to confer standing.

DHS's failure to comply with NEPA and the ESA, as well as its inapplicable and unconstitutional waiver of those laws under the August 2 determination, are clearly the cause of the Center's and its members' injuries. An

order from this Court invalidating the August 2 waiver, and ordering DHS to comply with NEPA, the ESA, and all applicable law would remedy that harm. Accordingly, the Center has established standing.

V. Judgment Should be Entered for the Center on the NEPA and ESA Claims

Because the August 2 waiver is *ultra vires* to IIRIRA §102(c) and is unconstitutional, DHS's waiver of NEPA, the ESA, and the APA, is invalid. Accordingly, DHS may only proceed with the border wall prototype and replacement projects after compliance with those and all other applicable laws, and judgment should be issued for plaintiff on Claim IV (NEPA violations—failure to prepare NEPA analysis) and Claim V (ESA violations-- §7(a)(1) and §7(a)(2)).

DHS's argument that the Center failed to provide the requisite notice prior to bringing its ESA claims should be rejected. The ESA requires written notice of certain violations of the Act to be provided at least sixty days prior to bringing suit, and plaintiff has met these notice requirements here through notice letters pertaining specifically to the border wall prototype project and border wall replacement project on June 1, 2017, and July 7, 2017, respectively. 16 U.S.C. §1540(g)(2)(A)(i). DHS did not remedy the alleged violations, and the Center added those ESA claims to its second amendment complaint filed September 6, 2017 (ECF No. 16), more than sixty days after the notice was provided.

DHS claims that the Center "prematurely" sent its notice letters, because the letters "preceded the award of contracts for the challenged projects and the commencement of construction." DHS Br. at 39. Nothing in the ESA prevents a notice from being valid as to a future action—the analysis instead turns on the notice's "overall sufficiency." *Klamath-Siskiyou Midlands Ctr. v. MacWhorter*, 797 F.3d 645, 651 (9th Cir. 2015); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996) (notice is adequate if it provides defendants with notice of

issues plaintiff intends to pursue in litigation, so that alleged violations may be corrected); *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1219 (D. Colo. 2011)("nothing in the notice statute's language explicitly prevents a notice from being effective as to a future action.").

Here, the Center's notice letters clearly served their purpose of putting DHS on notice of ESA violations for the border wall prototype and replacement projects, regardless of whether that notice was provided before contracts have been issued. Indeed, it is ironic that DHS attempts to fault the sufficiency of the Center's notice given that the lack of information available to the Center and the public generally is due to DHS's decision to waive laws such as the ESA and NEPA. Because the Center's ESA notice letters were more than sufficient to put DHS on notice of the alleged violations, DHS's argument should be rejected.

CONCLUSION

For the foregoing reasons, the Center respectfully requests the Court to grant its motion for summary judgment on its Claims I-VI.

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Respectfully submitted,

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