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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 Reply Memorandum of Points and Authorities in Support of Cross Motion for Summary Judgment** Date: February 9, 2018, Time: 1:30 p.m. Courtroom: 2D Before Hon. Gonzalo P. Curiel

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R. Craig Kitchen, "Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text."
40 Hastings Const. L.Q. 525 (2013) 18-19

Thomas W. Merrill, "Separation of Powers in American Constitutionalism: Delegation and Judicial Review"
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INTRODUCTION

As demonstrated in plaintiff Center for Biological Diversity's opening brief, the August 2, 2017 waiver of the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), and more than 30 additional laws in relation to the San Diego border wall prototype and replacement projects was *ultra vires* to the Department of Homeland Security ("DHS") Secretary's claimed authority under § 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), as well as unconstitutional under the Take Care and Presentment Clauses, and the broader Separation of Powers and Nondelegation doctrines. Although several district courts have rejected constitutional challenges to past uses of the § 102(c) waiver authority, the DHS Secretary's August 2 invocation of § 102(c) was done more than a decade after the provision's last use, and comes long after the agency fulfilled its border fence obligations under § 102(b). As the August 2 waiver and DHS's briefing makes clear, the current administration is now attempting to transform § 102(c)—an unwise and dangerous abdication of lawmaking authority to the executive branch to begin with—into a perpetual and roving license to cast aside any legal obligations pertaining to any border infrastructure project.

This unbounded interpretation is without merit, and the Trump administration's attempt to revive the § 102(c) waiver authority must be rejected as *ultra vires* and unconstitutional. As detailed in the Center's opening brief and this reply 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 required by Congress pursuant to § 102(b), which does not include the border wall prototype or replacement projects. Alternatively, if the Court finds that the August 2 waiver was not *ultra vires*, the waiver inescapably violates the U.S. Constitution's fundamental separation of powers principles, and thus, the Center's summary judgment motion should be granted.

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ARGUMENT

I. The Court Has Jurisdiction to Determine Whether the August 2 Waiver Was Properly Within the Scope of § 102(c)(1)

As detailed in the Center's opening brief (ECF No. 28-1), 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. Much of DHS's opposition/reply brief largely rehashes arguments from its opening brief, including lengthy discussions of undisputed issues. The Center, for example, does not dispute that "Congress plainly intended to bar all judicial review of non-constitutional claims," DHS Br. at 11-14, that "[t]he legislative history and statutory context support the plain meaning of the jurisdictional bar," DHS Br. at 14-16, or that Congress intended to overcome the presumption favoring judicial review, DHS Br. at 11, *but only for those actions properly within the scope of the § 102(c) waiver*. As again detailed in section II below, the August 2 waiver is not authorized by § 102(b) 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.

DHS continues to incorrectly assert that the Center's arguments run "against the plain reading of the statutory language," and that the Center "identifies no support" for its' allegedly "aggressive interpretation" of § 102(c). DHS Br. at 19. To the contrary, the Center's interpretation *is* a plain language argument, and is necessary to define the scope of the waiver authority. Without this inquiry, it would be impossible to abide by Ninth Circuit precedent holding that, "in interpreting IIRIRA, 'we should construe narrowly restrictions on jurisdiction.'" *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683 (9th Cir. 2003); *see also El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1276 (D.C. Cir. 2011) (where statute expressly prohibits judicial review, presumption of

judicial review "dictates that such provisions must be read narrowly.").[1] Under that plain language, the waiver authority under § 102(c)(2) only applies to decisions made by the DHS Secretary "pursuant to" § 102(c)(1), which in turn limits the waiver authority to the expeditious construction "of the barriers and roads under this section." The Center's opening brief demonstrated in detail that the scope of this provision must be interpreted as limited to the specific projects mandated by Congress in § 102(b).

DHS's argument that the court cannot consider this *ultra vires* argument is also undermined by the primary cases it relies upon. In *Spencer Enterprises,* for example, the Ninth Circuit considered a preclusive provision under IIRIRA, 8 U.S.C. § 1252(a)(2)(B)(ii), that is, in the government's words, "strikingly similar" to § 102(c). DHS Br. at 12. Far from cutting against plaintiffs, however, the court specifically held that "[e]ven if a statute gives the Attorney General discretion … the courts retain jurisdiction to review whether a particular decision is *ultra vires* the statute in question," 345 F.3d at 689, precisely the claim the Center has brought in this case.

Although DHS attempts to distinguish *Spencer Enterprises* by claiming that "here, nothing in the text demonstrates an intent to narrow the jurisdiction-limiting provision," DHS Br. at 20, § 1252(a)(2)(B)(ii) is in fact even *more* preclusive than § 102(c), stating that "*no court* shall have jurisdiction to review" the specified decisions by the Attorney General. Just as the court in *Spencer Enterprises* looked beyond the preclusive language in order to determine the scope of that provision, an *ultra vires* inquiry to determine whether the August 2 waiver was within the scope of § 102(c) is proper here.

DHS also reiterates its argument that the Center "cannot evade Congress' clear jurisdictional limitation" by alleging an *ultra vires* claim, again heavily

[1] Unless indicated otherwise, case law citations omit internal citations.

relying on *Leedom v. Kyne*, 358 U.S. 184 (1958),[2] and the Supreme Court's subsequent consideration of that decision in *Bd. of Governors of Fed. Res. Sys. v. MCorp Fin. Inc.*, 502 U.S. 33 (1991).[3] DHS Br. at 17-18. *MCorp*, however, is of no help to DHS, and bears little resemblance to the Center's *ultra vires* claim.

In that case, the Court reviewed the validity of an injunction requiring the Federal Reserve Board to halt an enforcement action it had instituted against a bank under the Federal Reserve Act. Although plaintiff MCorp's action was not authorized under that law, the Court of Appeals invoked *Kyne* for the principle that the district court has jurisdiction because plaintiff alleged that the Board was enforcing a regulation that exceeded its statutory authority. 502 U.S. at 42-43. The Supreme Court reversed and found that an *ultra vires* claim was not authorized. Contrary to DHS's claims that "Congressional intent to prohibit *ultra vires* review is at least as clear here as it was in *MCorp*," the Court's rejection of an *ultra vires* claim in that case was premised instead on the availability of judicial review under a separate statute, the Financial Institutions Supervisory Act of 1966 ("FISA"):

> The cases before us today are entirely different from *Kyne* because FISA expressly provides MCorp with a meaningful and adequate opportunity for judicial review of the validity of the source of strength regulation. If and when the Board finds that MCorp has violated that regulation, MCorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application.

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[2] Contrary to DHS's characterization, DHS Br. at 17-18, *Kyne* is not "the seminal *ultra vires* decision." The ability to bring such an *ultra vires* claim was first recognized by the Supreme Court decades earlier in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).

[3] As stated in the Center's opening brief, it is not primarily relying on "*Kyne* and its progeny," DHS Br. at 18, involving inferred preclusion, but *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988) and related cases addressing explicit preclusion provisions similar to § 102. *See McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States*, 264 F.3d 52, 63 (D.C. Cir. 2001) (addressing two claims, one brought pursuant to *Kyne* and one brought pursuant to *Dart*). The Center's right to *ultra vires* review of the DHS August 2 waiver, however, exists under either line of cases.

Id. at 43-44. Although the Court also noted the "clarity of congressional preclusion of review in FISA," as a secondary rationale, it described that factor as inextricably "related" and bound up with the dominant reasoning underlying its decision, the availability of review through administrative proceedings that plaintiff sought to bypass. *Id*. ("As we have explained, however, in this case the statute provides us with clear and convincing evidence that Congress intended to deny the District Court jurisdiction *to review and enjoin the Board's ongoing administrative proceedings*.") (emphasis added). In contrast, there are no alternative avenues of judicial or administrative review available here to determine whether the August 2 waiver is *ultra vires* to the scope of authority delegated to the DHS Secretary pursuant to IIRIRA § 102.

In sum, *MCorp* was a timing case, distinct from the *ultra vires* considerations here, where plaintiffs have no avenues of judicial or administrative review by which to challenge the August 2 waiver as outside the scope of authority provided to the DHS Secretary pursuant to § 102(c). Although the appellate court framed its decision as *ultra vires* in *MCorp*, the Supreme Court's holding was in fact a rejection of plaintiff's attempt to avoid exhausting the extensive administrative and judicial remedies available to it. *See MCorp Fin., Inc. v. Bd. of Governors of Fed. Res. Sys.*, 900 F.2d 852, 859 (5th Cir. 1990) ("Because we conclude that MCorp is not required to exhaust its administrative remedies in this circumstance, we turn to the merits of whether the Board has authority to [take the challenged action.]").[4]

Recognizing the limited significance of the Court's *ultra vires* discussion

[4] Indeed, contrary to DHS's claim that "just as in *MCorp Financial*, Congress has spoken clearly and directly to preclude all judicial review," DHS Br. at 18, the FISA provisions considered in *MCorp* are not preclusive at all when read as a whole. Although 12 U.S.C. § 1818(i)(1) limits jurisdiction "except as provided in this section," the preceding subparagraph, *id*. § 1818(h)(1)-(2) ("Hearings and judicial review") provides aggrieved parties with extensive and specific rights to both administrative and judicial review. These provisions starkly contrast with the utter lack of procedure or review available under IIRIRA § 102.

in *MCorp*, the Ninth Circuit in *United States v. Bozarov*, 974 F.2d 1037, 1044 n.8 (9th Cir. 1992), specifically rejected the same type of expansive interpretation of that case urged by DHS here. ("The government suggested at oral argument that [*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 judicial review of this type of claim under the [Export Authorization Act] EAA."). DHS weakly attempts to limit the language of *Bozarov*, incorrectly asserting that the Ninth Circuit "expressly limited its holding" to that law, DHS Br. at 21. To the contrary, the court's language broadly distinguished *MCorp* not only in relation to the EAA, but any other statute that provides no other avenue of judicial review (such as § 102(c)):

> The Court [in *MCorp*] 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.

Id. Accordingly, the *Bozarov* court did indeed "narrowly cabin[] *MCorp*" in the Ninth Circuit. DHS Br. at 20. In addition, the Ninth Circuit has in the past month affirmed the availability of *ultra vires* review, stating that "[t]his cause of action, which exists outside the APA, allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority." *Hawai'i v. Trump*, 2017 U.S. App. LEXIS 26513, *35-36 (9th Cir. Dec. 22, 2017) (*citing McAnnulty*, 187 U.S. at 108, 110, and *Kyne*, 358 U.S. at 188-189).

Finally, DHS argues that the Center "cannot make expansive use of *Dart*" because that case "stands for the exceedingly narrow proposition that a statute precluding review is limited by its language." DHS Br. at 22 (*quoting McBryde*, 264 F.3d at 63). However, as detailed in the Center's opening brief and Section

II, *supra*, the Center's *ultra vires* argument is in fact rooted in the language of § 102(c), and is closely analogous to the factual circumstances in *Dart*. As stated in that case, "Dart's claim of agency error rests on an assertion about the plain requirements of the EAA: that the statutory authority to 'modify' an ALJ decision regarding export sanctions does not include the power to *reverse* that decision." *Dart*, 848 F.2d at 222. Similarly here, the Center's claim of agency error rests on an assertion about the plain requirements of IIRIRA § 102: that the statutory authority to waive laws under § 102(c) does not include the border wall prototype or replacement projects, because neither of those projects was specifically mandated by Congress pursuant to § 102(b).

DHS further attempts to distinguish *Dart* on the grounds that "the EAA's language is quite dissimilar from the language at issue here." DHS Br. at 22. Indeed, the EAA and statutory provisions at issue in other cases are *more* preclusive than § 102, and as the government concedes, these finality provisions "have often been found to reflect an intent to preclude merits review but not *ultra vires* review," DHS Br. at 22. As explained in *Ralpho v. Bell*, 569 F.2d 607, 624 (D.C. Cir. 1977) (*quoted in Dart*, 848 F.2d at 222) (emphasis added):

> In neither [line of cases] … was the demarcation of reviewability set by the Court [i.e. between 'facial' and other statutory violations] adumbrated by Congress. Rather, *Congress had expressed an unqualified intent to shut off review*, to which exception was made on ground that the legislature would not be deemed to have barred judicial comparison of agency action with plain statutory commands unless such a ban was clearly articulated.

Although DHS insists that Congress "has employed far more unambiguous and comprehensive language" here, that simply is not the case. As detailed in *Dart*, numerous courts have permitted *ultra vires* review under statutes with far more unambiguous and unqualified finality provisions than § 102(c), yet those courts found such preclusion clauses to be "less than absolute." *Dart*, 848 F.2d at 221. The fact that Congress chose to provide for limited constitutional review under § 102 does not in any way translate to the requisite "absolute" intent to bar *ultra*

vires review. *See* DHS Br. at 16 ("Standing alone, this express provision for constitutional review but no other review indicates that *ultra vires* review was intentionally excluded."). Because Congress did not express any specific intent to bar *ultra vires* review, let alone an "unqualified intent," the Center's claim is not precluded.

II. The Scope of the § 102(c) Waiver is Limited to the Specific Border Barriers Required Under § 102(b)

The Center's opening brief demonstrates that IIRIRA § 102's purpose, statutory language and structure, and legislative history all dictate that the scope of § 102(c) is limited to specific border barrier projects mandated under § 102(b). *See Hawai'i v. Trump*, 2017 U.S. App. LEXIS 26516, *37-47 (engaging in analysis of statutory text, statutory framework, and legislative history in concluding President had exceeded constitutionally delegated authority). In accordance with the presumption favoring judicial review—and of narrowly interpreting exceptions to such review—the court in *Dart* placed the burden on the government to show "'clear and convincing evidence' that Congress foreclosed [its] jurisdiction over Dart's claim." *Dart*, 848 F.3d at 224. DHS, in contrast, insists under the *Kyne* line of cases that the Center carries the burden of showing that the challenged action contravenes "'clear and mandatory' statutory language." *Pacific Maritime Association v. NLRB*, 827 F.3d 1203, 1208 (9th Cir. 2016) (*quoting Kyne*, 358 U.S. at 188).[5] While the Center believes that the *Dart* test governs here, the August 2 waiver is *ultra vires* regardless of which party bears the burden, and under even the most stringent of statutory tests.

[5] In *Pacific Maritime Association*, the court concluded "it appears likely that [the decision at issue] violated the 'clear and mandatory' language of the Act." 827 F.3d at 1209-1210. It declined to exercise *ultra vires* jurisdiction, however, after finding that plaintiffs had two alternative paths of judicial review available to them. *Id.* at 1210 ("Nonetheless, because we conclude that the district court's exercise of jurisdiction was improper under [*Kyne's*] second prong, we leave it to the Board to render a final decision on its own jurisdiction in the first instance.").

DHS goes to great lengths to argue against the Center's "narrow reading," DHS Br. at 28, asserting that "the better reading is that § 102(a) remains available to address locations not prioritized by Congress." DHS Br. at 32-33. Notably, however, DHS never squarely acknowledges the ramifications of its proposed interpretation: that the DHS Secretary would be granted perpetual authority to waive any laws she deems to interfere with any border infrastructure project, even where such projects have not been mandated by Congress. This pugnacious assertion of unchecked executive power is based on an implausible interpretation of § 102(c), as well as § 102 as a whole, and must be rejected.

DHS's errors begin with its insistence that the "plain terms" of the phrase "this section" under § 102(c) "unambiguously refers to IIRIRA § 102 as a whole," DHS Br. at 27, and that § 102 "as a whole" contains an essentially unlimited grant of authority under § 102(a) to build border barriers anytime and anywhere. As detailed in the Center's opening brief, this argument is flawed for at least three reasons: 1) in the only judicial decision to address the scope of the § 102(c) waiver authority, the court repeatedly and emphatically held that the scope is limited to the specific projects identified under § 102(b), *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 13, 2005); 2) the text of § 102 shows that Congress provided the necessary authorizations for DHS to build border barriers under § 102(b), not under the broader policy directives of § 102(a); and 3) the inconsistent usage of "section" and "subsection" under § 102, undermines DHS's argument that the reference to "this section" under § 102(c)(1) "unambiguously" refers to any border project undertaken by the agency, not just specific border barriers mandated under § 102(b). DHS's halfhearted responses, largely in footnoted asides, are wholly inadequate to counter these arguments.

In addressing the *Sierra Club* decision, for example, DHS proclaims that the court was not in fact addressing the scope of the § 102(c) waiver authority, but instead "merely referenc[ing] that fact … that the delegated authority was only

being used for a construction that Congress has specified." DHS Br. at 30 n. 21. This interpretation is irreconcilable with the decision's language. *See 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.").[6] The fact that the only court to consider the scope of § 102(c) reached a conclusion directly at odds with DHS's interpretation casts far more doubt on its "plain meaning" argument than the government acknowledges.[7]

DHS is also unduly dismissive of the Center's argument that presuming DHS is correct in asserting that Congress carefully adhered to the standardized format for making internal references within § 102, such a presumption undermines the government's argument. Sections 102(b)(2)-(4), which address easements, safety features, and appropriations, respectively, all specifically refer to "this subsection" (*i.e.* subsection (b)), and thus it must be presumed that Congress did not intend to provide these authorizations for actions taken beyond § 102(b). *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (inclusion of language in one section but omission in other presumed purposeful). Since

[6] As a fallback, DHS alleges the court's holding in *Sierra Club* did not track the parties' arguments, and thus must be "mistaken" because it was made "without the benefit of briefing on the subject." DHS Br. at 31. DHS provides no authority for this assertion other than citation to the government's briefing in that case, which has no precedential or persuasive significance here.

[7] The decision in *Save Our Heritage v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008) is distinguishable. Plaintiffs in that case attempted to argue that DHS did not have the authority to finalize the last segment of the San Diego triple layer fence because the Secure Fence Act amendments to § 102(b) removed reference to that segment. Both IIRIRA as originally enacted and the 2005 REAL ID Act expansion of the § 102(c) waiver primarily focused on the completion of that precise 14-mile fence, however. In contrast, Congress has not directed the construction of the border wall prototype or replacement project at issue in this case, and DHS has previously declared its current statutory barrier obligations under § 102(b) as complete.

easements, safety features, and appropriations are all essential elements of border barrier construction, DHS's attempt to expansively read the waiver authority of § 102(c) beyond the specific projects mandated under § 102(b) must fail.

DHS responds to this argument in conclusory fashion, characterizing it as "another meritless textual argument." DHS Br. at 32 n. 23. DHS cannot have it both ways—it cannot simultaneously insist that the reference to "this section" under § 102(c)(1) "plainly" means that the agency enjoys a perpetual and unbounded authority to waive any laws in sees fit in relation to any border infrastructure project that it deems to be within its § 102 authority, while summarily dismissing the significance and specificity of references to "this subsection" elsewhere in the provision.

DHS further misstates the law when it claims that "§ 102(a) can logically be implemented without relying on the instructions in § 102(b)(2)-(4)" because DHS "has authority to acquire easements through 8 U.S.C. § 1103(b), and thus need not rely on § 102(b)." DHS Br. at 32 n. 23. Section 102(b), however, specifically references that provision, directing DHS to use its authority under § 1103(b) to acquire the easements. Section 102(a), in contrast, does not. Judicial decisions addressing eminent domain disputes consistently cite to § 102(b) as the statutory authorization for border wall construction, not § 102(a). *See*, *e.g.*, *United States v. 1.04 Acres*, 538 F. Supp. 2d 995, 998 (S.D. Tex. 2008) ("The authority to secure the border is set out in … Section 102(b)(1) and (b)(3) … The authority for the acquisition is then set out in 8 U.S.C. § 1103(b)(2)-(3)."); *id.* at 995 (noting that the U.S. "filed a complaint in condemnation … under the authority granted by 8 U.S.C. § 1103(b)(3) and 40 U.S.C. § 3113."); *United States v. 1.16 Acres of Land*, 585 F. Supp. 2d 901, 907 n. 3 (S.D. Tex. 2008) (court declining to reach argument that "no provision in 8 U.S.C. § 1103 or [IIRIRA § 102] limits the Government to only taking land for the construction of fencing pursuant to Section 102(b).").

DHS also asserts that the Center's reading is incompatible with the terms of

IIRIRA as originally enacted and would render § 102(a) "largely superfluous." DHS Br. at 31. Neither assertion is correct. First, the Center's interpretation is perfectly consistent with the specific terms of IIRIRA § 102 as originally enacted in 1996. Prior to IIRIRA, Congress had never provided the legacy Immigration and Naturalization Service ("INS") with direction to construct border barriers and roads, so the general policy directive under § 102(a) (which remains the same language today) "to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants)," while then "carrying out" that goal through the specific identification of required barriers under § 102(b), is a perfectly logical and straightforward interpretation. *See, e.g. Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 987-88 (9th Cir. 2015) (rejecting argument that interpreting statutory provision similar to § 102(a) as only a broad policy directive would render it superfluous); *id.* at 988 ("But here, Section 2(c)(2) [despite a "shall" directive] merely announces a general policy goal that is reflected in the substantive and procedural requirements of Section 4").

Finally, DHS claims that the amendments made to § 102(b) under the 2006 Secure Fence Act and 2008 Consolidated Appropriations Act "further demonstrate that this subsection merely [] reflects Congress' shifting priorities," and that § 102(a) remains available to address locations not prioritized by Congress." DHS Br. at 32-33. DHS further accuses the Center of "wild hypotheticals" concerning potential uses of the § 102(c) waiver authority. DHS's own argument concerning the scope of § 102(c)—that it can bypass any laws for any border barrier or road construction project in perpetuity and without specific authorization from Congress—shows that there is nothing "wild" about the Center's hypotheticals. Indeed, DHS makes no effort to address the Center's contention in its opening brief that under the agency's interpretation, it could rely on the provision to waive laws in relation to wall construction along the northern Canadian border.

This claim of unencumbered executive branch authority is all the more

unsupportable in light of legislative history. As DHS acknowledges, the expansion of the § 102(c) waiver authority under the 2005 REAL ID Act was catalyzed by, and intended to address the delay in the completion of the San Diego triple layer fence. DHS attempts to brush this fact away by saying that "the catalyst for Congressional action often does not define the outer limits of that action" and that "Congress could easily have crafted language that simply mandated the relevant construction near San Diego." DHS Br. at 34. In the limited debate on REAL ID Act that did occur on the House Floor, however, the statements of its sponsor and supporters repeatedly and unambiguously described the waiver authority as specific to the San Diego wall. *See, e.g.*, 151 Cong. Rec. H454 (daily ed., Feb. 9, 2005) (Statement of Bill Author Rep. Sensenbrenner) ("[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."). DHS's argument would take this small wedge of waiver authority specific to completion of the San Diego triple layer fence—passed more than a dozen years ago under rushed and truncated legislative procedures—and expand that authority to any border project undertaken at any time along any U.S. borders. DHS is correct that the Center is "simply incredulous," DHS Br. at 33, that such an interpretation could be correct, as it utterly lacks credulity.

III. The Doctrine of Constitutional Avoidance Compels a Holding that the August 2 Waiver Is *Ultra Vires* to IIRIRA § 102

The Ninth Circuit has recently confirmed that "[i]t is a bedrock principle of statutory interpretation that where 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." *Hawai'i v. Trump*, 2017 U.S. App. LEXIS 26513, *52. Here, DHS's unbounded assertion of waiver authority under § 102(c) would

provide an unelected cabinet official with the perpetual power to sweep aside any law deemed to have even the remotest connection to any proposal characterized as a border security project (although the government magnanimously suggests that perhaps not "*all* border infrastructure construction requires a waiver") (emphasis in original). DHS Br. at 36-37. Indeed, DHS argues that it can waive laws that are not applicable to the proposed project. *See* DHS Br. at 60 n. 48 (arguing the waiver of Otay Mountain Wilderness Act of 1999, Pub. L. No. 106-145, does not violate Presentment Clause in part because "the San Diego project area does not include any portion of this designated area.").[8]

If the government's interpretation is correct, it raises serious Constitutional questions, as described in section IV, *supra*, while the Center's interpretation does not. Although DHS is correct that previous courts have upheld the constitutionality of § 102(c), these cases were all premised on the understanding that the power granted was temporally limited and specific to the border fencing required by Congress under § 102(b). As stated by one commenter nearly a decade ago:

> In the end, it is likely that the cumulative weight of the problems with recognizing a constitutional right of review proved too much for the Court to take on. IIRIRA *was* an extreme measure, suggesting the potential need for such a doctrine. *But the border fence is nearing completion* under the oversight of a new administration that (for now) is less given the extravagant claims of inherent authority than its predecessor. Sometimes important constitutional questions are best left unresolved *when the urgency of the problem is likely to expire of its own course*. Or so the Court may have concluded in its lengthy deliberations about whether to hear *County of El Paso*.

Thomas W. Merrill, "Separation of Powers in American Constitutionalism: Delegation and Judicial Review" 33 Harv. J. L. & Pub. Pol'y 73, 85 (2010) (emphasis added). DHS's claim that it can utilize § 102(c) to waive laws long after statutory deadlines for the construction of barriers has passed, and in relation to the

[8] The August 2 waiver applied to environmental laws, as well as laws protecting archeological and paleontological sites, trails, historic sites and buildings, and Native American gravesites and religious freedom. 82 Fed. Reg. 35,984.

construction of additional barriers (or other border infrastructure) that have not been specifically directed by Congress, stretches the already expansive assertion of unfettered prerogative from a decade ago into clearly unconstitutional territory. In order "[t]o avoid the inescapable constitutional concerns raised by the broad interpretation the Government urges us to adopt," the Court must instead interpret § 102(c) as "containing meaningful limitations." *Hawai'i v. Trump*, 2017 U.S. App. LEXIS 26513, at *55-56.

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

In the event the Court concludes that it either lacks jurisdiction to hear a non-constitutional *ultra vires* claim, or that the August 2, 2017 waiver is not *ultra vires*, then the Court can, and must, strike down the waiver and/or § 102(c) itself as unconstitutional.

A. The August 2 Waiver Violates the Take Care Clause

In its opening brief the Center established that the Take Care Clause of the Constitution provides a cause of action allowing this court to examine whether the Trump administration's issuance of the August 2, 2017 waiver was at odds with its obligation to "take Care that the Laws be faithfully executed." Article II, § 3. In response, DHS contends that a claim the executive branch acted outside its statutory authority can never be a constitutional claim, that claims under the Take Care Clause are not justiciable, and that any such claim can only be brought against the President himself, not DHS. DHS Br. at 63-65. None of DHS's arguments are compelling.

First, this Court need not find, as DHS mischaracterizes the Center's claim, "that every claim that Executive Branch officials have violated a statutory command should give rise to a constitutional claim." DHS Br. at 63. Instead, the Court need only find that the specific and unique circumstances of *this* case provide for such review. Here, § 102(c) itself provides the Court with jurisdiction

to hear the Center's constitutional claim, in stark contrast to *Dalton v. Specter*, 511 U.S. 462 (1994), *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) and other cases cited by DHS where constitutional review was not specifically provided. Consequently, whether or not the Take Care Clause provides a freestanding right of action in the absence of a judicial review provision is not before the Court, and therefore the "sweeping implications" that DHS harkens to are simply not present.[9]

Moreover, *Dalton* did not, as DHS argues, hold that a claim that that an executive official exceeded their statutory authority can *never* be a constitutional claim; rather it simply stated that such an action does not "*always*" (or "ipso facto" or "necessarily") result in a constitutional violation. *Dalton*, 511 U.S. at 473. Again, the Center does not seek a holding that any "garden variety" *ultra vires* or otherwise unlawful agency action automatically gives rise to a justiciable violation of the Take Care Clause. DHS Br. at 64.[10]

Instead, the question here is whether the administration's invocation of a plainly inapplicable waiver to justify non-compliance with over thirty statutory provisions it is otherwise charged with "faithfully executing" runs afoul of the mandate of the Take Care Clause. In other words, the administration is playing lawmaker by invoking authority it lacks (because the § 102(c) waiver authority is not applicable to the August 2, 2017 waiver) to justify refraining from taking

[9] As noted in the Center's opening brief, the Supreme Court has in fact repeatedly found a cause of action for constitutional challenges to federal actions even absent such explicit judicial review provisions. *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); *Free Enterprise Fund v. Public Co. Accounting Bd.*, 561 U.S. 477, 491 (2010) (finding jurisdiction to consider Appointments Clause and separation of powers claims); *id.* at n.2 (collecting cases on the federal courts' broad jurisdiction to consider all types of constitutional claims); *cf. Armstrong* (finding no *implied* cause of action under the Supremacy Clause against *non-federal* defendants).

[10] Notably, *Dalton* involved a separation of powers claim, not a Take Care Clause claim, and therefore cannot reasonably be read to foreclose the Center's claim.

action it is required to take (compliance with NEPA, ESA and other laws). If ever a circumstance implicated the Take Care Clause, this case is it. *Youngstown, Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.); *Myers v. United States*, 272 U.S. 52, 177 (1926) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws."); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838) (rejecting the proposition that "the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution").

Finally, DHS contends that claims under the Take Care Clause can only be brought against the President himself, but the very case DHS cites for this principle actually allowed a constitutional claim to be brought against an Executive Branch agency and officials. *Free Enterprise Fund*, 561 U.S. 477, 491 (2010). Rather than cite any actual authority for the proposition that only the President can be sued under the Take Care Clause, DHS merely strings together quotes from various cases for the uncontested proposition that ultimate authority and responsibility for executive action rests with the President.

As the Center explained in its opening brief, the Supreme Court has repeatedly held that the Take Care Clause applies to executive officers and other subordinates of the President and has allowed suits against such officials to proceed regardless of whether the President was a party. *Youngstown*, 343 U.S. at 582 (suit against Secretary of Commerce); *Myers*, 272 U.S. at 117 ("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*.") (emphasis added).

The Center's Take Care Clause claim is justiciable, and as explained in its opening brief, provides a viable and compelling basis for striking down the August 2, 2017 waiver.[11]

B. The August 2 Waiver Violates the Presentment Clause

DHS asserts that plaintiffs' presentment clause claim "fails because a legal requirement for a specific project is not an amendment or a repeal of a statute." DHS Br. at 60. As explained in the Center's opening brief, DHS's overly formalistic interpretation misreads the holding in *Clinton v. City of New York*, 524 U.S. 417 (1988). That decision did not, as DHS alleges, turn on whether the cancelled provisions remained in the U.S. code, but instead turned on the Court's analysis of the "legal and practical" effects of the veto authority.

Accordingly, the Court in *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), was wrong to find no constitutional infirmity, and to conclude that a waived law "retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President." 527 F. Supp. 2d at 124. As explained recently by one commenter:

> [Under the] REAL ID Act, when the Secretary waives other laws to further the goal of constructing the border fence, each negated portion of other statutory text is a statutory bargain being overridden through a process less rigorous—and thus far easier—than bicameralism and presentment. The groups represented in the negated bargains have no meaningful way to participate in the negative lawmaking process when it is done at the Secretary's 'sole discretion' merely through publication in the Federal Register, and even if they had the ability to participate in the decisionmaking process, they would lack the power to block lawmaking change and thereby obtain compromise from the majority.

R. Craig Kitchen, "Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text." 40 Hastings Const. L.Q. 525, 598 (2013); *id.* at 560 ("[T]e REAL ID Act waiver authority is functionally equivalent to the

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[11] DHS response brief only attacks the justiciability of the Center's Take Care Clause claim, not its merits.

cancellation authority resoundingly struck down by *Clinton*.").

After first claiming that the aggregate use of § 102(c) waivers—now totaling approximately one third of the entire U.S.-Mexico border—only affected a "tiny universe" of NEPA actions in its opening brief, DHS calls the Center "hyperbolic" for characterizing the waivers as cumulatively significant. DHS, however, does not explain at what point the use of such waivers would be conceded to be equivalent to a partial repeal of the law, even though it still remains in the U.S. Code. DHS's inability to acknowledge that the waivers are equivalent to a partial repeal is particularly striking given its claim of perpetual waiver authority, after the agency had previously claimed that it had fulfilled its specific border barrier construction obligations pursuant to § 102(b).

C. The August 2 Waiver Violates the Nondelegation Doctrine

To avoid duplicative briefing, the Center incorporates the Coalition plaintiffs' reply brief addressing DHS's nondelegation doctrine arguments.[12]

V. The Center's ESA Notice Was Adequate

DHS continues to press its meritless argument that the Center failed to provide mandatory notice prerequisite to suit. Contrary to DHS's assertion that 16 U.S.C. § 1540(g)(2)(A) "explicitly" addresses timing, the courts instead look to the notice's "overall sufficiency." Accordingly, an "anticipatory notice" of an ESA violation can be "sufficient and valid." *Cascadia Wildlands v. Scott Timber Co.*, 190 F.3d 1024, 1030 (D. Or. 2016) (remanded on other grounds). Thus, DHS's objection that "the agency may modify or limit the effects of the contemplated action" would not necessarily make the prior notice insufficient. Indeed, the Ninth Circuit has specifically noted that a plaintiff "is not required to

[12] The Center's opening brief asserted that the August 2 waiver was made several years after DHS has fulfilled its border barrier requirements under § 102(b), and is thus distinguishable from past waivers considered in *Sierra Club*, *Defenders*, *Save Our Heritage*, and *County of El Paso*. DHS does not respond to this argument, but instead asserts that "temporal necessity" constitutes a boundary on its delegated authority. DHS Br. at 54. This is obviously no limitation at all.

list every single aspect or detail of every alleged violation." *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002). Moreover, DHS's argument that the citizen suit's reference to "violations" means that no valid notice can be given, and by extension no lawsuit can be filed, until a violation has actually occurred has been specifically rejected by the Ninth Circuit. *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1064 (9th Cir. 1996); *see also Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995) (allowing suit for future violations).[13] Here, the Center's notice letters clearly provided DHS notice of alleged ESA violations under section 7 and 9 related to the San Diego border wall prototype and replacement projects, establishing jurisdiction under the ESA.

CONCLUSION

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

DATED: January 5, 2018 Respectfully submitted,

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[13] *See also Citizens for Better Env't v. Union Oil Co.*, 861 F. Supp. 889, 912 (N.D. Cal. 1994)("[T]he purpose for [the 60-day requirement] is to ensure that the …government enforcement authorities are given some pre-suit notice so that they have an opportunity to address the matter *before* a lawsuit is filed. This purpose is fully served by permitting pre-violation notice. Indeed, such notice may actually *further* this goal, for it affords defendants … an opportunity to attempt to avert or mitigate anticipated violations … The Court holds that notice of a citizen plaintiff's intent-to-sue filed in anticipation of—and prior to—a violation of the Clean Water Act counts as valid and effective notice.") (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2018, I electronically filed the Center for Biological Diversity's Reply Memorandum of Points and Authorities in Support of Cross Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

s/ Brian Segee
Brian Segee