Gloria D. Smith (CA No. 200824)
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Telephone: (415) 977-5532

Brett M. Paben (FL No. 0416045)
Defenders of Wildlife
535 16th Street
Denver, CO 80202
Telephone: (720) 943-0457
Pro hac vice

Anthony T. Eliseuson (IL No. 6277472)
Sarah K. Hanneken (OR No. 165104)
Animal Legal Defense Fund
919 SW Taylor Street, #400
Portland, OR 97205
Telephone: (707) 795-2533
Pro hac vice

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION,

Case No. 17-cv-01215-GPC-WGV

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

Coalition Plaintiffs' Combined Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply to Defendants' Motion for Summary Judgment

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

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Adamski v. Hart, 14-cv-0094, 2015 WL 4624007 (D.D.C. July 31, 2015) 1

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17 *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993) 8

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151 Cong. Rec. H559 (daily ed. Feb. 10, 2015) 10
152 Cong. Rec. S10520 (daily ed. Sept. 29, 2006)... 13
158 Cong. Rec. H3238 (daily ed. May 30, 2012).. 13
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82 Fed. Reg. 35,984 (Aug. 2, 2017)... 11
82 Fed. Reg. 42,829 11
82 Fed. Reg. 8,793, 8,794 (Jan. 25, 2017) (Executive Order 13,767)............................ 13
H.R. 418, 109th Cong. § 102 (2005).. 10
H.R. Rep. 109-72 (2005) (Conf. Rep.) 10
Merriam-Webster, https://www.merriam-webster.com/dictionary 12
Michael John Garcia, Cong. Research Serv., R43975, Barriers Along the U.S. Borders: Key Authorities and Requirements (2017) 6

INTRODUCTION

The Governments' Response confirms the vastly broad reading it seeks to give to section 102. That reading, however, cannot be squared with the clear statutory limits imposed by congress, which renders the waivers here ultra vires, a conclusion this Court has the authority to reach. Section I. And even if the Government's broad reading of section 102 were adopted by this Court, it would simply mean the statutory scheme lacks the "clearly delineated general policy" or "boundaries of the delegated authority" required to survive constitutional scrutiny under the non-delegation doctrine. Section II-A. Either way, the Coalition Plaintiffs are entitled to summary judgment, because either the Secretary's conduct exceeds the clear statutory mandates or those statutory mandates are essentially illusory rendering section 102 unconstitutional.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER PLAINTIFFS' NON-CONSTITUTIONAL CLAIMS

A. The Government's Response demonstrates why this Court must exercise its *ultra vires* jurisdiction.

The Government's Response fails to identify *any* case that adopts the result it seeks to compel here: complete elimination of all judicial review of even facially *ultra vires* actions in excess of an agency's statutory grant of authority. Whether as a matter of inherent judicial authority[1] or statutory construction, in every case where a court faced

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[1] The Government takes issue with the Coalition Plaintiffs' characterization of this authority as an inherent judicial power. Defs.' Cross-Mot. for Summ. J. (ECF No. 35-1) (hereinafter "Defs. Br.") at 18 n.10. Yet, the Ninth Circuit has repeatedly authorized such power even in the face of "absolute" bars on judicial review, *infra*, strongly suggesting the authority was an inherent judicial one. The *ultra vires* claim itself stems from inherent judicial authority rather than statute. *See Hawaii v. Trump*, Case No. 17-17168, 2017 WL 6554184, at *9 (9th Cir. Dec. 22, 2017). The Ninth Circuit also has followed the D.C. Circuit in this context, where courts have recognized this inherent judicial power. *E.g., Adamski v. Hart*, 14-cv-0094, 2015 WL 4624007, at *6 (D.D.C. July 31, 2015) (an "ultra

clear *ultra vires* conduct, such as the situation here, some avenue of judicial relief was identified. The Ninth Circuit, for example, has repeatedly held it has such jurisdiction and authority even in the face of "absolute" bars on judicial review. *E.g.*, *Markham v. United States*, 434 F.3d 1185, 1187 (9th Cir. 2006) ("The courts have fashioned two narrow exceptions to this *absolute* jurisdictional bar. Courts retain jurisdiction to consider constitutional challenges or claims for violation of a clear statutory mandate or prohibition," emphasis added); *Staacke v. U.S. Sec'y of Labor*, 841 F.2d 278, 281 (9th Cir. 1988) ("Even where the statutory provision *absolutely* bars judicial review . . . jurisdiction exists where defendant is charged with violating a clear statutory mandate or prohibition," (emphasis added)).

This result is not surprising. There is simply no credible reason to conclude that Congress would intend to shield from judicial review conduct that clearly violated Congress's own statutorily imposed limits. Indeed, if Congress did intend such a result—as the Government asserts—it would render the statutory scheme unconstitutional as an essentially unlimited and unbridled grant of authority. *See, infra,* Section II.

Even in the Government's primary case, *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32 (1991), the Supreme Court was careful to emphasize its holding was based on the critical fact that Congress had provided MCorp "an unquestioned right to review of both the regulation and its application," in the Circuit Court of Appeals. *Id.* at 43-44. In other words, there was an express affirmative grant of

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vires claim derives from the contention that the agency has acted without the authority to do so, and *it is based on the inherent power of the federal courts 'to reestablish the limits on [executive] authority'*") (emphasis added) (quoting *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988)); *see also Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (it "is clear that judicial review is available when an agency acts *ultra vires*," even where Congress seeks to bar all review, because the claim derives from historic judicial authority). Regardless, whether as a matter of inherent judicial authority or statutory construction, the result is the same, and this Court has the authority to strike down the Secretary's *ultra vires* acts.

judicial review, which rendered an *ultra vires* claim in the district court unnecessary. And it was because the statute "expressly provides MCorp with a meaningful and adequate opportunity for judicial review of the validity of the source of strength regulation," that the Court held the district court lacked jurisdiction to enjoin the ongoing proceedings. *Id.*

Thus, *MCorp* does *not* stand for the proposition that Congress is empowered to eliminate all judicial review of agency conduct even where, as here, it exceeds the clear limits of statutory authority. If that were so the existence of another avenue of meaningful and adequate judicial review would have been an unnecessary component of the Court's analysis, not a central one.

There can be no clearer statutory mandate than the one included in section 102(c)(1): Congress only intended the extraordinary waiver authority to be used when it was actually "*necessary* to ensure *expeditious* construction of the barriers and roads under this section." (emphasis added); *see generally* Coal. Pls.' Mem. in Supp. of Summ. J. (ECF No. 29-1) (hereinafter "Coal. Pls. Br.") at 13-20. The Government's Response recognizes that Congress spoke explicitly on multiple occasions between 2005 and 2008 when it believed key portions of the border wall project were not being completed with sufficient expediency. Defs. Br. at 32-33. It was as part of this specific exigent time period that Congress granted the extraordinary waiver authority to the Secretary to allow her to complete the specific projects mandated by Congress.

Yet, the Government must also concede that no similar congressional action has occurred for nearly a decade during which time the projects now sought to be conducted could have been performed. The lack of similar congressional action—demanding these projects be completed—for such a significant period of time is a significant factor cutting against the Government's interpretation. Notably, the Government relies exclusively on the Secretary's *ipse dixit* assertion regarding necessity: it points to no actual evidentiary support that would suggest the waiver was necessary. Defs. Br. at 38. That lack of evidence can be coupled with the obvious political reality: the *only* reason these waivers were issued was due to campaign promises made by the current Administration. And the

Administration has admitted it is political, not security, considerations that are driving this process.[2] This political context further shows there is no basis to assert the waivers are *necessary* to complete these projects expeditiously. Rather, they are *ultra vires* acts that facially exceed that plain statutory mandate.

The nature of the projects themselves further demonstrate the waivers are not necessary. Unlike the prior projects that were addressing critical gaps in the border infrastructure, *see* Coal. Pls. Br. at 18-20, the current projects are, at most, minor improvements to already existing effective barriers. As the Government notes, the "replacement" barriers are somewhat "taller" with "other features making them more operationally effective." Defs. Br. at 42. Neither the Secretary nor the Government offer any explanation as to why those minor improvements require expedited construction that cannot follow the ordinary course of environmental review processes. *See also*, *infra*, 10-14; CBD's Reply at 2-15.

B. The Secretaries' actions under subsections 102(a) and (b) are final agency actions reviewable under the APA and not precluded by the review limiting language in 102(c)

1. Review under the APA is available for the Secretaries' actions pursuant to subsections 102(a) and (b).

While "Congress has the constitutional authority to define the jurisdiction of the lower federal courts," *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993), courts restrict access to judicial review "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (citation omitted). Defendants attempt to frame

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[2] *See* Greg Miller *et al.*, *'This deal will make me look terrible': Full transcripts of Trump's calls with Mexico and Australia*, Wash. Post (Aug. 3, 2017), https://www.washingtonpost.com/graphics/2017/politics/australia-mexico-transcripts (President Trump explaining to Mexican President Enrique Peña Nieto that the border wall "is the least important thing that we are talking about, but politically this might be the most important [to] talk about.").

Plaintiffs' arguments supporting traditional judicial review as simply relying on "the strong presumption that Congress intends judicial review of administrative action." Defs. Br. at 10 (quoting *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). Such simplification, however, ignores the canons of statutory construction and the absence of "clear and convincing evidence" that Congress intended to preclude judicial review of the non-waiver requirements it placed in section 102.

2. Actions taken under subsections 102(a) and (b) are final agency actions.

The Government brushes aside Plaintiffs' Second Claim for Relief, alleging the Secretary's actions pursuant to subsection 102(a) and subparagraph 102(b)(1)(C) are final agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and without observance of procedure required by law. 5 U.S.C. § 706(2)." Coal. Pls.' 1st Am. Compl. (ECF No. 23) at ¶ 93. The totality of Defendants' response to this argument is that "the only final agency actions that Plaintiffs challenge are the issuance of the waivers." Defs. Br. at 14, n. 5. Other than this conclusory footnote, Defendants fail to provide a basis for the assertion that no other final agency action can occur under section 102. The Secretary's actions taken pursuant to subsections 102(a) and (b), however, are reviewable, final agency actions.

As recognized in *Save Our Heritage Organization*, the Secretary's authority to construct border barriers under section 102 is "derived from subsection (a)." 533 F. Supp. 2d at 61. Further, subsection 102(b) provides the Secretary the means to "carry[] out" Congress's directive set forth in subsection (a), and imposes additional specific requirements as well. *Id.* at 60; IIRIRA § 102(b)(1)(A). Paragraph 102(c)(1) merely provides the Secretary a tool she may employ when she deems waiving laws is "necessary to ensure expeditious construction," not the authority for the construction of border infrastructure itself. That authority is found in sections (a) and (b) alone. These two sections provide all the Secretary's authority to construct border infrastructure under

section 102.[3] DHS does, in fact, undertake border construction projects without employing the supplemental waiver authority, which the Secretary has done, particularly "more recently." Michael John Garcia, Cong. Research Serv., R43975, Barriers Along the U.S. Borders: Key Authorities and Requirements 21 (2017).[4]

Given that subsections 102(a) and (b) are available to the Secretary independently from 102(c)—which does not affect (a) and (b), *see* Part I.B.II.2 *infra*—the question is simply whether they are final agency actions subject to review under the APA. Plaintiffs assert they are, and the Government's contradictory conclusion does not withstand scrutiny. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Since no other statute makes the actions in subsections 102(a) and (b) at issue in this case reviewable, they are reviewable directly under the APA as final agency actions. "Agency action" includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The scope of judicial review prescribed requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be" in violation of the requirements of 5 U.S.C. § 706(2).

Whether these acts are final "is determined not 'by the administrative agency's characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed.'" *Adenariwo v. Fed. Mar. Comm'n*, 808 F.3d 74, 78 (D.C. Cir. 2015) (citation omitted). "Finality," moreover, "is a pragmatic, flexible concept," *Assiniboine & Sioux Tribes of Ft. Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Mont.*, 792 F.2d 782, 789 (9th Cir. 1986). In general,

two conditions must be satisfied for agency action to be "final": First, the

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[3] At least prior to December 31, 2008. See Pub. L. No. 110-161, Div. E, Tit. V § 564.

[4] Prior to August 2, 2017, the last waiver was issued on April 8, 2017. *See* 73 Fed. Reg. 19,078 (Apr. 8, 2008).

> action must mark the "consummation" of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow,"

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted).

These requirements are met here. First, pursuant to subsection 102(a), the Secretary found it "necessary to install additional physical barriers and roads." Second, these actions "alter the legal regime to which the action agency is subject," *id.* at 178, by allowing the Secretary to pursue "[c]onstruction of fencing and road improvements along the border" in accordance with subsection (b). The decision to invoke waivers pursuant to 102(c)(1) is irrelevant to the agency actions that result in actual construction. The Waivers are distinct final actions for which Congress has provided judicial review limited to constitutional claims, albeit improperly. Regardless, since subsections 102(a) and (b) are final agency actions and outside the scope of subparagraph 102(c)(2)(A), the Court may review these actions pursuant to 5 U.S.C. § 706(2).[5]

3. The jurisdictional-restricting provision in subparagraph 102(c)(2)(A) is limited to subsection 102(c).

By claiming subsections 102(a) and (b) are subject to the (c) judicial review, the Government also contradicts its conclusion that actions under subsections 102(a) and (b) are not final agency actions. Such a reading of the statute contravenes legal precedent. Coalition Plaintiffs agree with the Government's Response "the statutory text is plain enough to dispose of the question," Defs. Br. at 10-11, of whether intended to bar all judicial review of non-constitutional claims, but it presents the incorrect conclusion under pretext of ordinary interpretation. Quite simply, if Congress intended to limit judicial review to apply to all of section 102, it would have said so explicitly or created a new

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[5] If the Court does find APA review is precluded, the arguments that follow should be considered "through the lens of *ultra vires* review." Defs. Br. at 41 n. 32. *See also Hawaii v. Trump*, No. 17-17168, 2017 WL 6554184, at *9 (9th Cir. Dec. 22, 2017) (if no APA "final agency action … courts are allowed to review *ultra vires* actions").

subsection 102(d). The attempt to extend reach of subparagraph 102(c)(2)(A) beyond subsection 102(c) is an exercise of artful distraction.

As an example, to support the notion that the court is stripped of jurisdiction over the entirety of section 102, Defendants must read the final sentence of subparagraph (2)(A) in isolation. *See* Defs. Br. at 12. Statutory language, however, "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea–Land Services, Inc.*, 132 S.Ct. 1350, 1357 (2012); *see also Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005) ("Statutory language has meaning only in context."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context").

Context, plain meaning, and legislative history confirm the limited applicability of 102(c)(1). Subparagraph (c)(2)(A) of provides:

> In general.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

The reference to "paragraph (1)" concerning exclusive jurisdiction is a reference to the waiver authority in paragraph 102(c)(1), and the reference to this "subparagraph" is to (c)(2)(A). Both references are clear and unambiguous. In subparagraph 102(c)(2)(A), Congress was very specific about its reference to "paragraph (1)" and used the phrase "this subparagraph" within subparagraph (c)(2)(A), the only topic of which is the waiver authority. Had the Congress intended to limit judicial review to decisions under other subsections, it needed to do so explicitly and would have added new subsection (d) that would cover 102(a), (b), and (c). *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993) (courts "find an intent to preclude" judicial review "only if presented with

1 'clear and convincing evidence.'" (citations omitted)).

2 Moreover, the third sentence of (c)(2)(A)—"The court shall not have jurisdiction
3 to hear any claim not specified in this subparagraph"—should not be read out of context
4 to broadly preclude all causes of action under section 102. When read with the preceding
5 two sentences, this sentence is an affirmative statement regarding the scope of a court's
6 jurisdiction to review waiver decisions. The third sentence serves only as a limitation on
7 the grant of jurisdiction in the two previous sentences—for courts to hear causes of action
8 concerning waivers—and does not impliedly limit causes of actions unrelated to waiver
9 decisions. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (Congress
10 presumed to have knowledge of rules of statutory construction and the "well-settled
11 presumption favoring interpretations … that allow judicial review").

12 Legislative history reinforces this conclusion. The original, limited subsection
13 102(c) waiver enacted in 1996 contained no judicial review restrictions. When Congress
14 expanded the waiver in the REAL ID Act and limited judicial review, it did so in the
15 same subsection (c). Its failure to add a new subsection indicates that subparagraph
16 (2)(A) applies only to waiver decisions. Amendments to section 102 made by the
17 Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Title V § 564
18 (Dec. 26, 2007), further undermine the judicial review restrictions extending beyond the
19 waivers. When Congress added the consultation requirement in 102(b)(1)(C)—two years
20 after expanding the waiver provision in the REAL ID Act of 2005, Pub. L. No. 109-13,
21 Div. B—it also included a savings provision, which, in part, states: "Nothing in this
22 subparagraph [regarding consultation] may be construed to—"(I) create or negate any
23 right of action for a State, local government, or other person or entity affected by this
24 subsection." IIRIRA § 102(b)(1)(C)(ii). If judicial review of 102(a) and (b) was barred or
25 limited to constitutional challenges, this language would be unnecessary. Such a
26 construction must be avoided. *Burrey v. Pac. Gas & Elec. Co.*, 159 F.3d 388, 394 (9th
27 Cir. 1998) (court "must avoid any construction that renders some of its language
28 superfluous."); *see also McDonnell v. United States*, 136 S. Ct. 2355, 2359 (2016)

(presumed "that statutory language is not superfluous.").

The origins of the subsection 102(c) in REAL ID Act and deliberations in the House of Representatives are yet further support for this interpretation. As passed by the House, paragraph 102(c)(2) would have required allowed "no judicial review," and was explicitly limited to waivers. H.R. 418, 109th Cong. § 102 (2005) (prohibition limited to "any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1)"), an understanding expressed by House representatives. *See, e.g.*, 151 Cong. Rec. E243 (daily ed. Feb. 15, 2005) (statement of Rep. Udall (bill "removes any judicial review of the waiving of these laws."); 151 Cong. Rec. H556 (daily ed. Feb, 10, 2015) (Cong. Research Serv. mem. (bill "removes judicial review from such waiver decisions")); *id.* at H559 (statement of Rep. Jackson-Lee ("bill also removes any judicial review of the waiving of these laws.

The Senate never took up discussion of section 102, as the REAL ID Act was included as part of an emergency appropriations bill. In conference, the 102(c) that passed the House was revised in several respects, including not mandating the Secretary to use waivers and providing for some judicial review of waivers. *See* H.R. Rep. 109-72, at 171-72 (2005) (Conf. Rep.). Given that every change to subsection 102(c) moderated the Secretary's authority and restrictions on review, concluding that the Conferees meant to broaden the scope of 102(c)(2)(A) is illogical, and the language amended in conference should not be read to restrict review more so than that of H.R. 418.

The Secretary, therefore, cannot seek to evade the consequences of this language by seeking to indirectly preclude judicial review by waiving the applicability of the APA.

4. The Secretary's action under subsections 102(a) and (b) are unlawful and must be set aside.

Once the Secretary decides to use the authority of subsections 102(a) and (b), she must comply with those requirements and procedures Congress set forth. *See Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (courts "cannot abdicate their responsibility to insure compliance with congressional directives setting the

limits on that discretion."); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("agency must cogently explain why it has exercised its discretion in a given manner"); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1095 (9th Cir. 2005) (exercising discretion must be "consistent with the statutory requirements"). Thus, under this claim, Coalition Plaintiffs are not challenging the waivers, but the validity of the final action that *was* taken pursuant to the authority of 102(a) and (b). *See Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1119 (9th Cir. 2010) ("reviewing the validity of the final agency action that was taken, not—as in *SUWA*—demanding that the agency take some action that it has not taken.").

For her use of the authority under subsection 102(a), she made the determination that these border infrastructure projects were "necessary," but has failed to articulate a basis for this, making the determination arbitrary, capricious, and not in accordance with law. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs.*, 463 U.S. at 50. "Thus, while formal findings are not required, the record must be sufficient to support the agency action, show that the agency has considered the relevant factors, and enable the court to review the agency's decision." *Beno v. Shalala*, 30 F.3d 1057, 1073-74 (9th Cir. 1994).

> If the record … does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record …, the proper course … is to remand to the agency.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

In the present case, the only agency record regarding the findings are the Secretary's mere assertions in the Federal Register notices. *See* 82 Fed. Reg. 35,984 (Aug. 2, 2017); 82 Fed. Reg. 42,829 (Sept. 12, 2017). Defendants may be correct that "nothing in the Act requires the Secretary to publish more granular data to prove that the finding committed to his or her 'sole discretion' was warranted." Defs. Br. at 40. However, "[e]ven where statutory language grants an agency 'unfettered discretion,' its

1 decision may nonetheless be reviewed if [there is] a '"meaningful standard' by which this
2 court may review its exercise of discretion.'" *Spencer Enterprises, Inc. v. United States*,
3 345 F.3d 683, 688 (9th Cir. 2003) (citation omitted).
4 Despite the lack of definitions in section 102, there are meaningful standards for
5 the Court to apply to the requirements of 102(a) and (b), such as the "areas high illegal
6 entry" and "vicinity of the United States border." When a statute does not define a term,
7 courts "interpret that term by employing the ordinary, contemporary, and common
8 meaning of the words." *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 556 (9th Cir.
9 2016) (citation omitted)); *see also, e.g.*, *Crawford v. Metro. Gov't of Nashville &*
10 *Davidson Cty*., 555 U.S. 271, 276 (2009) (words undefined in statutes carry their ordinary
11 meaning). This is just what the court in *United States v. 1.16 Acres of Land, More or*
12 *Less, Situate in Cameron County., Texas* did to interpret IIRIRA provision authorizing
13 acquisition of lands "adjacent to" and "in the vicinity of" the border. 585 F.Supp.2d 901,
14 907 (S.D. Tex. 2008) (analyzing terms in subsection 102(a) and 8 U.S.C. § 1103(b)(1)).
15 Here, the meaning of "high" as used in "areas of high illegal entry" connotes a
16 relative description, such as "high illegal entry" as compared to other "areas." *See*
17 Merriam-Webster, *high* (updated Jan. 1, 2018), https://www.merriam-webster.com/
18 dictionary/high ("1a: rising or extending upward … c: … passing above the normal level
19 … 2a(1): advanced toward the acme or culmination … 8: of greater degree, amount …
20 than average, usual, or expected"). Thus, "areas of high illegal entry" must at least mean
21 the opposite of "areas of low illegal entry" in comparison. *See Fisher v. Tucson Unified*
22 *Sch. Dist.*, No. CV-74-00090-TUC-DCB, 2017 WL 5167238, at *3 (D. Ariz. Nov. 8,
23 2017) (Court assuming that "a 'high-achieving' school … to be the opposite of 'schools
24 in which students are underachieving academically.')
25 Defendants' insist, however, on interpreting the phrase "areas of high illegal entry"
26 to be equivalent to those areas over which Border Patrol lacks "operational control." *See,*
27 *e.g.*, Defs. Br. at 44-45. "Congress has expansively defined 'operational control' of the
28 border—'the prevention of *all unlawful entries* into the United States …'" *Id.* at 45

(emphasis in original) (quoting Pub. L. No. 109-367 § 2(b)).[6] If this were the standard Congress intended, however, there would be no need for the specific barrier construction authority in section 102 because of Secretary's general authority to build border control facilities found in 8 U.S.C. § 1103. Supposing Congress did intend to grant the Secretary authority to waive laws virtually anywhere along the borders, there would also be no need for including any limiting language.[7]

Further, once the Secretary made the decision to use the authority of subsection 102(a), she was bound to follow the procedure and limitations set forth by Congress in subsection 102(b). The record does not document that the Secretary complied with the requirements set forth in (b). Specifically, subparagraph 102(b)(1)(C) requires the Secretary to consult not only with other federal agencies but "States, local governments, Indian tribes, and property owners" as well. The only evidence the Government provides are conclusory statements "CBP consulted with relevant stakeholders, including the U.S. Fish and Wildlife Service," Defs. Br. at 7, references to decade-old testimony of its commitment to "continued consultation," *id.*, and its consultants conducted site surveys near the prototype walls three weeks after the waiver was issued, Defs. Ex. 14, ECF No.

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[6] This definition was adopted in Executive Order 13,767 § 3(h), 82 Fed. Reg. 8,793, 8,794 (Jan. 25, 2017), and also may be impossible to meet. *See, e.g.*, 158 Cong. Rec. H3238 (daily ed. May 30, 2012) (statement of Rep. Thompson (it may be "a laudable goal, it is also extraordinarily ambitious")). 152 Cong. Rec. S10520 (daily ed. Sept. 29, 2006) (statement of Sen. Kennedy ("Trying to gain operational control of the borders is impossible…" (quoting DHS Secretary Tom Ridge).

[7] Should it be necessary to find congressional language to determine the meaning of phrases in section 102, the Court may look to Immigration Enforcement Account established in 8 U.S.C. § 1330. In the Immigration Act of 1990, Pub. L. No. 101-649 § 542 (Nov. 29, 1990), Congress authorized the use of these funds "for the repair, maintenance, or construction on the United States border, in areas experiencing high levels of apprehensions of illegal aliens, of structures to deter illegal entry into the United States." *Id.* at § 542(a) (codified at 8 U.S.C. § 1330(b)(3)(A)(iii). Pre-dating IIRIRA, this phrase is more valuable for determining Congress's intent for "areas of high illegal entry" than the dissimilar, post-REAL ID Act language suggested by the Defendants.

18-2 (PageID.452). Ongoing discussions with CPB's limited, agency-selected "relevant" stakeholders, however, falls short of the duties under subparagraph 102(b)(1)(C).

C. Judicial review of the subsections 102(a) and (b) is necessary to avoid serious constitutional problems.

If there is ambiguity in the reach 102(c), the canon of constitutional avoidance directs that the more limited restriction on judicial review prevails. *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (when "statute is found to be susceptible of more than one construction … the canon functions as a *means of choosing between them*." (emphasis in original)). "When deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Id.* at 380-81.

Constitutional avoidance also explains why federal courts have not "struck down a challenged statute on delegation grounds" since 1935. *Mistretta v. United States*, 488 U.S. 361, 373 & n.7 (1989) ("nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). Accordingly, every previous court upholding the delegation of the Secretary's waiver authority read subsection 102(c) narrowly and relied on phrases such as "necessary," "in the vicinity of the … border," and "areas of high illegal entry" as expressly limiting the Secretary's authority. *See Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 128 (D.D.C. 2007) ("Secretary may only exercise the waiver authority for the 'narrow purpose' prescribed by Congress" (quoting *Sierra Club*, No. 04-cv-272, p. 10, 2005 U.S. Dist. LEXIS 44244, at *20)); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58, 63 (D.D.C. 2008) (agreeing with analysis in *Defenders* and noting "the Secretary is only authorized to seek 'expeditious construction' of barriers and roads 'to deter illegal crossing in areas of high illegal entry'" (citations omitted)); *Cty. of El Paso v. Chertoff*, No. EP-08-cv-196-FM, 2008 WL 4372693, at *4 (W.D. Tex. Aug. 29, 2008) (adopting analysis of *Sierra Club*, *Defenders*, and *Save Our Heritage*).

As the court in *Defenders of Wildlife v. Chertoff* summarized,

> to exercise the waiver authority…, Congress has required the Secretary to determine if the waiver is "necessary to ensure expeditious construction of the barriers and roads under …" … he is directed to construct fencing only "in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry…" This … meets the requirements of the Supreme Court's nondelegation cases. The "general policy" is "clearly delineated"—*i.e.* to expeditiously "install additional physical barriers and roads ... to deter illegal crossings in areas of high illegal entry." And, the "boundaries" of the delegated authority are clearly defined by Congress's requirement that the Secretary may waive only those laws … "necessary to ensure expeditious construction."

527 F. Supp. 2d at 127 (citations omitted).

These courts expected section 102's limiting requirements to "meaningfully constrain" the Secretary's discretion by creating "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Touby v. United States*, 500 U.S. 160, 165 (1991). Defendants, on the other hand, maintain that "[n]one of the statutory phrases unambiguously preclude the use of § 102(c) waiver authority for the construction projects." Defs. Br. at 41; *see also id.* at p. 29, 31-32, 41-51. Under their argument, the Court can neither look to the facts surrounding these statutory phrases to determine whether the Secretary acted within the confines set by Congress in the statutory, nor apply them as constraints on Congress's delegation of authority.

The Government should not be permitted to have its cake and eat it too. The Court must have jurisdiction over Defendants' compliance with the restrictions Congress placed on the Secretary in subsections 102(a) and (b), or Congress violated nondelegation principles by granting the Secretary "unrestrained freedom of choice." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1437 (9th Cir. 1996) (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)). Thus, "[t]he responsibility of enforcing the limits of statutory grants of authority is a judicial function; ... [w]ithout judicial review, statutory limits would be naught but empty words." *Bowen*, 476 U.S. 667 at 672 n.3 (1986) (citation omitted)).

II. PLAINTIFFS' CONSTITUTIONAL CLAIMS SUCCEED

A. Section 102 delegates "forbidden legislative authority" in violation of Article I, section 1 of the U.S. Constitution.

The Government's Response acknowledged that if section 102(c) failed to "clearly delineate[] [a] general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," then the delegation is unconstitutional under Article I, section 1 of the U.S. Constitution. Defs. Br. at 52-54; Coal. Pls. Br. at 21; Ctr. Br. at 35 *citing Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Hoping to gloss over the particulars, the Response presented a superficial and circular construction of section 102(c) that eliminates any distinction between the "general policy" and the "boundaries" within which the DHS Secretary must operate, defining the "general policy" as "improving border protection by expediting the construction of necessary borders and roads," and the "boundaries" as waiving legal requirements "necessary to ensure expeditious construction" of walls in the "vicinity" of the border. Defs. Br. at 53- 54. Such circularity evidences an impermissible delegation of legislative authority because the purported boundaries simply reiterate the expansive goal, to build fences quickly, and provide no direction to the DHS Secretary on how to specifically implement that goal.

Each of *Mistretta*'s three requirements serve a distinct purpose. The general policy "guide[s] the [designated agency] in applying the discretion delegated by the Act," *United States v. Cooper*, 750 F.3d 263, 271-72 (3d Cir. 2014), and the "boundaries" are legislative determinations that supply an agency with the "specific tool" to use in carrying out Congress's aim. *Mistretta*, 488 U.S. at 374; *Cooper*, 750 F.3d at 271–72; *see United States v. Richardson*, 754 F.3d 1143, 1145 (9th Cir. 2014) (adopting the reasoning in *Cooper*). This framework safeguards against Congress delegating its authority to an agency to decide "what [the law] shall be," by providing clear instructions as to both the ends and the means. *Mistretta*, 488 U.S. at 418 (quoting *Field v. Clark,* 143 U.S. 649 (1892)). Indeed, "[t]he very choice of which portion of the power to exercise—that is to

say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority." *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 473 (2001).

Pointing to two words, "necessary" and "vicinity," the Government's Response argued that section 102 is "strikingly similar" to Clean Air Act section 109(b)(1), which the Supreme Court upheld as a constitutional delegation in *Whitman*. 531 U.S. at 476; Defs. Br. 54–55. Frankly, there is no comparison between the Clean Air Act's exhaustive complexity and interrelated parts and section 102. The Court's careful analysis in *Whitman* recognized the broader statutory scheme restricting agency discretion: "Since the first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers, we address that issue of interpretation first," in light of the plain meaning of the text, statutory framework, and legislative history. *Id.* at 465–72. Clean Air Act section 109(b)(1) directed the Environmental Protection Agency (EPA) Administrator to set primary ambient air quality standards "based on" the criteria under section 108(a)(2),[8] which described "in detail how the health effects of pollutants in ambient air are to be calculated and given effect." *Whitman*, 531 U.S. at 465, 469. Importantly, Congress required EPA to incorporate the "latest scientific knowledge" and an evaluation of how air pollutants interact. 42 U.S.C. § 7408(a)(2). The Clean Air Act's numerous provisions and its plain language further constrained agency discretion, rendering "implausible," for example, an inference that the Administrator may consider costs. *Whitman*, 531 U.S. at 466-72. In this context, the Court concluded that section 109(b)(1), and its "requisite to protect the public health" standard, provided a sufficient "intelligible principle" for guiding the Administrator. *Id.* at 475-76.

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[8] Section 109(b)(1) directed EPA to set primary ambient air quality standards "the attainment and maintenance of which in the judgment of the Administrator, *based on such criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (emphasis added).

Section 102(c) lacks any such comparative guidance or limits on the Secretary's discretion. Examining the REAL ID Act as a whole, or section 102 in isolation, the legislation still does not provide any criteria to guide her in determining which laws might be "necessary" to waive or what it means to be in the "vicinity" of the border. Instead, the provisions of section 102 simply repeat the broad directive to build "effective" walls quickly. The Response could not delineate where the Secretary's discretion might end, and appear to concede the fact that the DHS Secretary could build walls and prototypes along the U.S.-Canada border, waiving even local public health and safety mandates. Coal. Pls. Br. at 15–16; Ctr. Br. at 21-22. While Congress need not "provide a 'determinate criterion'" strictly bounding agency discretion, "it must provide substantial guidance." *Whitman*, 531 U.S. at 475.[9]

To salvage section 102(c), the Government asks this court to skim over the nondelegation doctrine, directing focus instead on cases that address matters "traditionally designated to the Executive as part of his Commander-in-Chief power." Defs. Br. at 56. In so doing, the Government compares building fences along the southern border to protecting the country after the September 11 terrorist attacks, *In re Nat'l Sec. Agency Telecomm. Records Litig.*, 671 F.3d 881, 897 (9th Cir. 2011), setting court martial penalties, *Loving v. United States*, 517 U.S. 748 (1996), and excluding persons from entry during a declared national emergency, World War II. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). These cases have no application here. Generally, immigration—the target of the border wall—is a matter left to Congress. *See Knauff*, 338 U.S. at 543 ("Normally Congress supplies the conditions of the privilege of entry into the United States"). And, merely because the border wall implicates foreign, as well as

[9] The substance of the guidance must be in proportion with "the scope of the power congressionally conferred." *Whitman*, at 475. Congress provided substantial guidance for setting air standards given the rule's effect on the national economy. Congress likewise was required to provide similar specificity to DHS regarding the waivers given the entire southern border and its "vicinity could be affected.

1 domestic, affairs, "[t]he Executive is not free from the ordinary controls and checks of
2 Congress." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015) (holding President has
3 exclusive power to recognize foreign states). "[I]t is still the Legislative Branch, not the
4 Executive Branch, that makes the law." *Id.* at 2090. Thus, the Government cannot escape
5 a meaningful application of *Mistretta*, *Touby*, *Whitman*, and other precedent discussed
6 herein by claiming section 102 falls uniquely within the Commander-in-Chief power.
7 Nevertheless, even under the Response's national security rubric, section 102(c)
8 could not be upheld. Defs. Br. at 56. In each instance, Congress still provided substantial
9 guidance to the Executive. For example, the delegation in *Telecomm. Records* arose in a
10 comprehensive statute and allowed the Attorney General to immunize
11 telecommunications companies from suits related to federal wiretapping only if
12 "assistance was provided in narrowly defined circumstances or … no assistance was
13 offered." 671 F.3d at 900. The delegation in *Loving* allowed the President to set court
14 martial penalties no higher than those allowed by the Uniform Code of Military Justice.
15 517 U.S. at 769. And, the delegation in *Knauff* was effective only for the declared
16 national emergency (World War II) and required the President to find that the person
17 barred from entering the country threatened national security. 338 U.S. at 540-41, 544.
18 Section 102(c) offers no such guidance or boundaries.
19 **B. The Government fails to cite any case supporting Congress's power to**
20 **eliminate both concurrent state and federal jurisdiction.**
21 The Government points to no case that would authorize Congress to both eliminate
22 concurrent state court jurisdiction without affirmatively vesting that judicial power in the
23 federal courts. Indeed, in *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511
24 (1898)—a case the Government asserts is fatal to the Coalition Plaintiffs' theory—the
25 Government's truncated quote fails to include the critical point: Congress may only
26 "revoke[] and extinguish[]" the concurrent jurisdiction of the state tribunes when "the
27 subject-matter can constitutionally *be made cognizable in the federal courts*, and that,
28 without an express provision to the contrary, the state courts will retain a concurrent

jurisdiction in all cases where they had jurisdiction originally over the subject-matter." *Id.* at 517-18 (emphasis added). The Government's reliance on *Tafflin v. Levitt*, 493 U.S. 455 (1990) is similarly misplaced, because the Court there likewise recognized the "deeply rooted presumption in favor of concurrent state court jurisdiction" may only be overcome when Congress expressly "give[s] to the Federal Courts exclusive jurisdiction" over the claim. *Id.* at 458-59 (quotations omitted).

In other words, these cases make clear that it is only when Congress affirmatively vests federal courts with exclusive jurisdiction that it has the power to remove concurrent jurisdiction of the state courts. Here, however, that is not what section 102 does—it seeks to *eliminate both* federal and state jurisdiction—which Congress lacks the power to do. Thus, to the extent this Court holds that this Court lacks jurisdiction over such claims, it would mean concurrent state court jurisdiction must then exist.[10]

CONCLUSION

In sum, for all the foregoing reasons, those in the Coalition Plaintiffs' Opening Brief, and those contained in the briefs filed by the State of California and Center for Biological Diversity, Defendants' conduct here is unauthorized, unconstitutional, and void, and this Court is well within its judicial authority to declare precisely that and invalidate the waivers at issue here by granting the Coalition Plaintiffs summary judgment and denying Defendants' cross-motion.

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[10] The Government asserts that the Coalition Plaintiffs failed to identify any liberty or property interest that would support a Due Process claim. Defs. Br. at 69-70. Yet, Coalition Plaintiffs clearly asserted both their rights to access the Courts and to enforce environmental and animal-protection laws were at issue.

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Respectfully submitted,

/s/Gloria D. Smith

Gloria D. Smith (CA No. 200824)
SIERRA CLUB
2101 Webster Street, Suite 1300
Oakland, CA 94612
Telephone: (415) 977-5532
gloria.smith@sierraclub.org

Attorney for Plaintiff Sierra Club

Brett M. Paben (FL No. 0416045)
DEFENDERS OF WILDLIFE
535 16th Street
Denver, CO 80202
Telephone: (720) 943-0457
bpaben@defenders.org
Pro hac vice

Attorney for Plaintiff Defenders of Wildlife

Anthony T. Eliseuson (IL No. 6277472)
ANIMAL LEGAL DEFENSE FUND
1755 W. Roscoe Street, Unit 3
Chicago, Illinois 60657
Telephone: (707) 795-2533
aeliseuson@aldf.org
Pro hac vice

Sarah K. Hanneken (OR No. 165104)
ANIMAL LEGAL DEFENSE FUND
919 SW Taylor Street, #400
Portland, OR 97205
Telephone: (707) 795-2533
shanneken@aldf.org
Pro hac vice

Attorneys for Plaintiff
Animal Legal Defense Fund