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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE: BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION,	**17cv1215-GPC(WVG)** **Consolidated with Case No. 17cv1873 GPC (WVG) Case No. 17cv1911 GPC (WVG** **CALIFORNIA'S REPLY IN SUPPORT OF CALIFORNIA'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** Date: February 9, 2018 Time: 1:30 p.m. Dept: 2D Judge: The Hon. Gonzalo P. Curiel Trial Date: None set

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Plaintiffs, the People of the State of California and the California Coastal Commission (referred to collectively as "California") submit the following argument in reply to Defendants' opposition to California's motion for summary judgment and in opposition to Defendants' cross-motion for summary judgment.

ARGUMENT IN REPLY AND OPPOSITION

I. CALIFORNIA HAS STANDING TO ASSERT EACH OF ITS CLAIMS

In their opposition, Defendants vaguely assert that California fails to tie its standing theories to claims asserted in its complaint and insinuate, incorrectly, that California's standing rests solely on parens patriae theories. Defs.' Opp'n Summ. J. (hereinafter Opp'n), Doc. 35-1[1] at 9–10. Defendants ignore the clear standing California has in defending its procedural rights under National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. Plaintiff California Coastal Commission's unique regulatory role under the Coastal Management Act (CZMA), 16 U.S.C. § 1451 *et seq*., and the undisputed evidence of California's concrete interests in the resources that those procedural rights are intended to protect. In addition, Defendants' sole defense to NEPA, APA, and CZMA violations rests on the validity of waivers that preclude California from enforcing its own laws.

In *Massachusetts v. EPA*, the Court concluded Massachusetts had standing to sue the EPA because the state had both procedural rights and concrete, quasi-sovereign interests in protecting its natural resources. 549 U.S. 497, 519–24 (2007). Similarly, in *Sierra Forest Legacy v. Sherman*, the Ninth Circuit held that California had standing to assert NEPA challenges because it has ownership and trusteeship over "wildlife, water, State-owned land, and public trust lands." 646 F.3d 1161, 1178 (9th Cir. 2011). And, the Supreme Court has held that Plaintiff California Coastal Commission, which is designated as the "state agency" responsible for implementing the CZMA over California's ocean coastline, "clearly

[1] All references to "Doc." are to the ECF document number.

does have standing" to sue the federal government for violations of the CZMA. *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984) *superseded in part by statute as stated in California v. Norton*, 311 F.3d 1162, 1173 (9th Cir. 2002).

Here, California has standing to assert its first and second claims for relief and to attack all affirmative defenses to those claims because it is being denied procedural protections guaranteed by NEPA, the CZMA, and the APA, and California presented unrebutted evidence of its "concrete" interests at stake due to Defendants' failure to comply with those statutes. *See* Cal. Br. at 14–16; Doc. 30-5, Ex. 23; Docs. 30-7, 30-8, 30-9, 32. California provided evidence of possible harm to the Tijuana Estuary and to numerous rare, threatened or endangered species absent adequate environmental review. *Id.* California also demonstrated potential harm to the coastal environment. *Id.* In addition, California presented unrefuted evidence that it owns property adjacent to the proposed Border Wall Project and will be financially responsible for managing any effects the Border Wall Project has on that real property. *Id.*

California further has standing because states have legally protected sovereign interests in creating and enforcing their own laws, and Article III standing exists when federal action interferes with those sovereign interests. *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (state had standing because "a state clearly has a legitimate interest in the continued enforceability of its own statutes").[2] Here, Secretaries Kelly and Duke executed waivers that purport to waive and prevent the enforcement of California's laws and regulations–interfering directly with

[2] *See also Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, . . . the State has the kind of 'direct stake' . . . in defending the standards embodied in that code."); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 601 (1982) (a state's "easily identified sovereign interests" include "the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal").

California's sovereign interests. Doc. 30-5, Exs. 11–12.[3] Therefore, California has standing as to all its claims.

II. DEFENDANTS' ADMISSIONS AND FAILURE TO OFFER A COMPLETE DEFENSE ENTITLES CALIFORNIA TO SUMMARY JUDGMENT ON ITS FIRST AND SECOND CLAIMS FOR RELIEF

California is entitled to at least partial summary judgment on its NEPA and CZMA claims because the San Diego and Calexico Waivers do not provide a defense to the larger Border Wall Project, which contemplates construction of walls and other infrastructure at various points along the entire 2000-mile southern border. Cal. Compl., ¶¶ 1–2, 8, 68, 71–72, 104–10; Cal. Br., Doc. 30-2, at 1, 14–16, 40; Doc. 30-6, Exs. 7, 9; Doc. 30-6, Ex.11; Doc. 35-3 at 2, Fact #2. Defendants also concede the San Diego Waiver does not provide a defense to California's NEPA and CZMA claims concerning Defendants' publicized plans to replace a secondary fence in San Diego. Opp'n at 6-7; Doc. 30-5, Ex. 9 at 099; Doc. 35-3 at 34, Fact #2. Both NEPA (in the form of an environmental impact statement) and the CZMA (in the form of a consistency determination) mandate public review of a project's potential impacts at the earliest possible stage of the planning process. *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 348–49 (1989); 42 U.S.C. § 4332(2)(C); 16 U.S.C. § 1456(c)(2); 15 C.F.R. § 930.36; 40 C.F.R. § 1501.2. Because the undisputed record proves Defendants have engaged in the planning of infrastructure projects that fall outside the scope of any waiver and failed to comply with either act, California is entitled to partial summary judgment on its first and second claims as a matter of law.

[3] While the scope of the waivers' impact on California's sovereignty is obscured by the Secretaries' failure to identify each California law or regulation covered, the waivers jeopardize California's enforcement of laws that would subject DHS or its contractors to the state's permitting authority or to other legal actions. *See, e.g.*, Cal. Water Code § 13000 *et. seq.*; Cal. Integrated Waste Mgmt. Act of 1989, Cal. Pub. Res. Code § 4000 *et seq.*, 14 Cal. Code Regs. § 17380 *et seq.*; Cal. Hazardous Waste Control Law, Cal. Health and Safety Code § 25100 *et seq.*; Cal. Gov. Code § 12600 *et seq.*; Cal. Civ. Code § 3840.

California also satisfied its burden of demonstrating that Defendants violated NEPA and the CZMA concerning the prototype and primary fence replacement projects described in the San Diego and Calexico Waivers. Thus, California is entitled to summary judgment on its NEPA and CZMA claims unless Defendants meet their "burden of proving their affirmative defense." Albino v. Baca, 747 F.3d 1162, 1176 (9th Cir. 2014). The only defense Defendants offer is an affirmative one: that Defendants are excused from NEPA and CZMA compliance because former Secretaries Kelly and Duke executed waivers under Section 102 of the Illegal Immigration and Immigrant Responsibility Act (referred to herein as "IIRIRA" or "Section 102"). Thus, Defendants must prove that Section 102 authorizes the projects DHS seeks to build and that the San Diego and Calexico Waivers are valid. Because Defendants have not met their burden, summary judgment should be granted to Plaintiffs on their first and second claims.

III. CALIFORNIA'S THIRD, FOURTH AND FIFTH CLAIMS

A. This Court has Jurisdiction to Hear California's Non-Constitutional Claims

Defendants attempt to extend the limitation on district courts' jurisdiction in Section 102(c)(2)(A) to all non-constitutional claims. However, their effort fails for three reasons. First, Section 102(c)(2)(A) applies only to claims arising from the Secretary's actions "pursuant to paragraph (1)," which is the waiver provision in Section 102(c)(1). 8 U.S.C. § 1103(c) note. Therefore, Section 102(c)(2)(A)'s limitation on judicial review does not apply to this Court's jurisdiction over California's claims concerning Sections 102(a) and (b).

Second, Defendants provide no response to California's argument that courts retain jurisdiction to address threshold issues governing the application of a statute to the circumstance at issue—even where a statute purports to limit their jurisdiction. *Iasu v. Smith*, 511 F.3d 881, 891 (9th Cir. 2007); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1135 (9th Cir. 2000). Therefore, this Court has jurisdiction

over California's relevant threshold questions, including whether Sections 102(a) and (b) authorize the San Diego and Calexico Projects.

Finally, despite Defendants' arguments to the contrary (Opp'n at 13–14), this Court has jurisdiction to determine whether DHS exceeded its statutory authority by issuing the challenged waivers. *Leedom v. Kyne*, 358 U.S. 184, 188–90 (1958). California meets both prongs of the *Kyne* exception because Section 102 does not authorize the Secretary's actions, and the absence of district court jurisdiction will deprive Plaintiffs of a means of vindicating their rights.[4] The Ninth Circuit recently reaffirmed its jurisdiction to conduct *ultra vires* review of the Executive's actions because "[i]t is the duty of the courts . . . to say where [the] statutory and constitutional boundaries [of authority conferred by Congress] lie." *Hawaii v. Trump*, No. 17-17168, 2017 WL 6554184, at *6 (9th Cir. Dec. 22, 2017) (finding *ultra vires* review available to address claims the Executive exceeded statutory authority). The court held that courts "necessarily" retain jurisdiction to review whether executive actions are "*ultra vires*" and within "the limits of the President's power." *Id*. at *7.

Without authority, Defendants attempt to distinguish Section 102 from the overwhelming Supreme Court and Ninth Circuit caselaw allowing for *ultra vires* review, claiming that those cases "cannot overturn plainly expressed congressional intent to prohibit all review other than constitutional claims." Opp'n at 17. But this argument ignores that such review is required so an agency does "not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 485

[4] Defendants now argue that Plaintiffs have not satisfied the second prong of the *Kyne* exception—that, without jurisdiction, Plaintiffs would be wholly deprived of adequate means of vindicating their statutory rights. However, without *ultra vires* review, Plaintiffs would be unable to prevent the Secretary from taking unchecked actions that exceed statutory authority. As Defendants previously conceded, "[t]hat prong is not in dispute here because Congress barred judicial review of all non-constitutional claims." Defs. Mot. to Dismiss, Doc. 18-1 at 16 n.10.

(2001). Under Defendants' argument, DHS could simply ignore Section 102's provisions limiting its authority. None of the cases Defendants cite preclude courts from determining if an agency has acted within the limits of its discretion.[5]

For the three reasons stated above, this Court has jurisdiction to consider whether the Secretary exceeded his or her statutory authority by issuing waivers for projects not authorized by Section 102.

B. Section 102 Does Not Authorize the Projects Described in the 2017 Waivers (Third Claim)

1. The San Diego and Calexico Projects are Not Located in "Areas of High Illegal Entry"

Section 102 authorizes DHS to "install additional physical barriers . . . to deter illegal crossings in areas of **high** illegal entry" (emphasis added). While Congress did not set a numeric threshold to define "areas of high illegal entry," the rules of statutory construction require a reading that gives these words—including the word "high"—meaning. *Setser v. United States*, 566 U.S. 231, 239 (2012) (courts "must give effect" to "every clause and word" of a statute).

Supreme Court and Ninth Circuit precedent also direct lower courts to consider several factors such as the statutory framework, legislative history, and prior executive practice to construe statutory text. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000); *Hawaii*, 2017 WL 6554184 at *10. Significant here, courts must also construe statutes to avoid serious constitutional problems. *Hawaii*, 2017 WL 6554184 at *15–16.

The uncontroverted record demonstrates "the southwest land border is more difficult to illegally cross today than ever before" (Doc. 30-5, Ex. 8 at 080) and that this is particularly true in the California sectors where DHS now seeks to waive

[5] Defendants rely on cases that are distinguishable from the case at bar, for instance: *Kerr v. Jewell*, 836 F.3d 1048, 1058 (9th Cir. 2016) (upholding dismissal because statute required claim to first be heard by an "administrative body"); and, *Moller-Butcher v. U.S. Dep't of Commerce, Bureau of Exp. Admin.*, 12 F.3d 249, 252 (D.C. Cir. 1994) (Court elected not to review issue concerning whether Secretary acted *ultra vires* because she was "well within her authority.")

laws in order to expedite the replacement of existing fences. Defendants seek to side-step this overwhelming evidence by asking the Court to adopt an interpretation of the phrase "areas of high illegal entry" that would render those words meaningless. Defendants contend the limiting phrase "areas of high illegal entry" should be interpreted by turning to the larger Act's overall purpose "to achieve and maintain operational control over the international border." Opp'n at 44. Further, Defendants contend that "operational control" means "the prevention of all unlawful entries into the United States . . ." Opp'n at 2.

However, the phrase "areas of high illegal entry" must be given effect. Defendants' strained interpretation violates this principle because it would authorize the expedited installation of barriers (by waiving federal and state laws) anywhere along the southern border as long as the barrier promoted "operational control," regardless of whether the barrier was in an area of high illegal entry. Defendants' interpretation strips the limiting phrase "areas of high illegal entry" of any meaning and, for that reason, must be rejected.[6]

Further, when read in the context of a statutory framework that has long allowed the Executive Branch to construct barriers in select areas of the southern border (*see* 8 U.S.C. § 1103(a)(5); Def. Opp. at 31, n.22),[7] the phrase "areas of high illegal entry" must be read as a geographic limitation on DHS's ability to install

[6] The absurdity of Defendants' argument that the Secretary is entitled to unfettered deference to define "high illegal entry" and "most practical and effective" is made clear by simply contrasting the photos of the Border Wall prototypes built pursuant to the 2017 Waivers, which contain huge gaps in between them, with Defendants' arguments the prototypes are intended to deter illegal crossings. *Compare* Opp'n at 6, 48–49 *with* images of prototypes (Cal. Br. at 16 n.11).

[7] The installation of the primary fence in San Diego, which preceded the enactment of Section 102 of IIRIRA, serves as a prime example of that general authority. California does not dispute that the Executive Branch has authority, subject to direction and limitations imposed by Congress, to construct new barriers and to repair, maintain or replace existing barriers where appropriate. The dispute lies with Defendants' assumption that Section 102 is the statute that authorizes them to do so and that Section 102 authorizes them to expedite barrier projects across the entire southern border, without limitation.

new barriers through Section 102's expedited procedures.[8] Given this statutory framework and legislative history, Congress's inclusion of the phrase "areas of high illegal entry" indicates an intent to limit the provision's use to areas where there is an exceptional need for additional barriers based on the number of illegal entries.[9]

Section 102 must also be read in a manner that avoids serious constitutional problems. *See Hawaii*, 2017 WL 6554184 at *15–16. The Court therefore should reject Defendants' interpretation of "areas of high illegal entry" because it confirms that Section 102 does not provide an intelligible principle concerning the Secretary's use of the waiver provision, is unconstitutionally vague, and does not survive the heightened scrutiny required for waiving criminal laws. In particular, Defendants adopt a reading of Section 102 that exposes their mistaken belief that the Secretary may infringe on state sovereignty in a disparate and unequal fashion regarding actual levels of illegal entry. The Court should avoid this unconstitutional invitation.

Finally, despite the relatively low number of illegal entries in comparison to sectors in other states, Defendants contend that the 31,000 apprehensions in the San Diego sector and the 19,000 in the El Centro sector in 2016 do not meet "Congress' definition of 'operational control'" (which equates to zero illegal entries), and that

[8] When Congress enacted Section 102 in 1996, it was initially concerned with the extremely high rate of illegal entries in San Diego, which at the time accounted for nearly one-third of the apprehensions along the southern border. Congress never indicated that fencing should be constructed across the entire southern border or in areas that are not areas of high illegal entry.

[9] As noted in California's moving papers, the sector-wide apprehension data and sector-wide drug seizure data cited in the 2017 Waivers are irrelevant in determining whether the Calexico and San Diego projects are "in areas of illegal entry." In Defendants' opposition, these arguments are largely ignored. Defendants contend simply that members of Congress have cited to DHS sector-wide data and that California cited data from an outdated report. The most current data publicly available, however, demonstrates Defendants are seeking to expedite a fence replacement in an area already heavily fortified and where apprehensions are the lowest within the sector. Despite having access to more current data concerning apprehensions in the specific locations of the Projects, and despite having the burden of proving their affirmative defense to California's NEPA and CZMA claims, Defendants offer nothing. Further, since most drug seizures occur at the ports of entry or vehicle checkpoints (Doc. 30-6, Ex. 19), Defendants' reliance on sector-wide drug seizure data to justify the need for a border wall is disingenuous.

the number of entries would "certainly exceed whatever lower threshold could be set for 'high illegal entry'." Opp'n at 46. But the legislative history reveals that Congress did not consider areas with these apprehension levels to be "areas of high illegal entry" when it enacted Section 102. For example, in 1996 all but three of the southern sectors recorded more than 100,000 apprehensions, but Congress only targeted the San Diego Sector for a 14-mile triple-fence project. Doc. 29-3, Ex. 1 at 1. In 2006, the year preceding Section 102's last amendment, sectors with much higher apprehension levels (Del Rio – 42,636 and Laredo - 74,840) compared to San Diego's current apprehensions were not identified as problem areas by Congress or the subsequent target of waivers by DHS. Doc. 29-3, Ex. 1 at 1; Doc. 30-4, Ex. 1 at 018-019; Doc. 30-6, Ex. 10 at 117-8. Thus, the legislative history and prior executive practice in applying Section 102 demonstrate that the San Diego and El Centro Sectors are no longer areas of high illegal entry within the meaning of the statute.

2. Section 102 Does Not Authorize Replacement Fencing

Section 102 authorizes the "installation of additional physical barriers." This Court should apply a plain and ordinary meaning to that text and reject Defendants' tortured interpretation of the word "additional."

Section 102 authorizes the Executive Branch to install expedited, additional barriers under exceptional circumstances; Section 102 does not address on-going maintenance or replacement of existing barriers. This interpretation is supported by the express language of Section 102 (a) and (b), which instructs DHS in "carrying out" the general requirements of subsection (a). The 2007 Amendments to Section 102 focus solely on adding mileage to the existing inventory of fencing and meeting mileage goals. Defendants' interpretation of the term "additional" is therefore inconsistent with subsection (b) because the replacement of existing fences does not aid DHS in meeting those mileage requirements. Defendants' interpretation is also inconsistent with their prior practice in carrying out the statute.

None of the previously issued waivers called for the waiver of laws so that DHS could replace a pre-existing barrier. Doc. 30-6, Exs. 13–17. For these reasons, California is entitled to Declaratory Relief on its Third Claim for Relief.

C. The 2017 Waivers are Invalid Because the Secretary's Waiver Authority Expired on December 31, 2008 (Fourth Claim)

Defendants argue that the power granted to DHS in Section 102(a) "provides a general mandate to take action, and that § 102(b) (which contains IIRIRA's 2008 deadlines) identifies particular congressional priorities to be pursued." Opp'n at 28. Under Defendants' theory, Section 102(b) "merely identifies [sic] reflects Congress's shifting priorities." *Id.* at 32. Defendants further argue the sunset date was only meant to apply to "priority areas." *Id*. at 37, 38. Defendants read subsections (a) and (b) as separate grants of delegated authority.

But that argument ignores the express statutory language and renders the deadlines in Section 102(b)(1)(B)(i) and (ii) superfluous. Because subsection (b) begins with the phrase "in carrying out subsection (a)," the two subsections cannot be read as two separate grants of authority. Further, by imposing a deadline, Section 102(b)(1)(B)(i) is better understood as providing an outright limitation on the Secretary's authority to use the waiver provision. If, as Defendants argue, the Secretary could always identify additional fencing and issue waivers to expeditiously construct that fencing, it would violate the well-established rule that, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

The more consistent way to read the amended statute is that Congress in Section 102(b) directs DHS in how it must carry out Section 102(a) and under what circumstances the waiver authority may be used to further the goal of expeditious construction contemplated in Section 102(b)(1)(B)(ii). This is supported by Defendants' historical practice, such as Secretary Chertoff's actions to comply with the congressional mandate and intent by identifying more than 370 miles of priority

areas for expedited construction, issuing waivers for this expedited construction, and committing DHS to a total of 661 miles of border fencing by the first half of 2009. Doc. 30-4, Ex. 5 at ECF pp. 49-51. No Secretary has issued any waivers since that date until the current 2017 Waivers. Significantly, in each of the previous waivers the Secretary was following the instructions set-forth in subsection (b); none strayed outside those specific directives.[10] Unlike the previous waivers, former Secretaries Kelly and Duke did not issue waivers in response to Congressional direction set forth in subsection (b) and, in fact, have issued waivers that conflict with deadlines expressed in that subsection.

The limitation on the Secretary's authority in Section 102(b) is unique because it only has meaning if applied to fencing projects under the section as a whole. It reflects congressional intent that Section 102 was not intended to operate in perpetuity. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Congress would have no reason to limit the Secretary's authority by imposing deadlines under Section 102(b), if it intended the statute to last in perpetuity. This interpretation is further consistent with language in Section 102(c)(1) that a waiver may only be used when "necessary to ensure expeditious construction of the barriers and roads under this section." Defendants' interpretation robs the statute of all urgency, eviscerating any limitations on the Secretary's authority under Section 102(b)(1)(B)(i) and (ii).

California is entitled to summary judgment on its Fourth Claim and Defendants' sole defense to California's NEPA and CZMA claims should be rejected because the waiver authority expired.

[10] For example, the September 2005 waiver followed the directions set forth in subsection (b) of the initial version of Section 102. The January and October 2007 waivers were issued in response to subsection (b) as amended by the Secure Fence Act of 2006. And, the April 2008 waivers were issued in direct response to the subsection (b) deadlines expressed in the current version of Section 102, which had been amended a few months earlier. Doc. 30-6, Exs. 13–17.

D. The Secretary's Failure to Make Sufficient Findings Renders the 2017 Waivers Invalid.

The Secretary must make sufficient findings to demonstrate the San Diego and Calexico Projects satisfy Section 102's requirements that the Projects are "necessary," limited to "additional physical barriers and roads," and in "areas of high illegal entry" (Section 102(a)). The Projects must also be located where they would be "most practical and effective" (Section 102(b)). 8 U.S.C. § 1103 note.

Defendants do not dispute that the Secretary failed to determine the Projects were located where fencing would be "most practical and effective." They argue instead that the Secretary adequately met the statutory requirements by making conclusory statements that simply restate the statutory language that require findings. Opp'n at 38–41. However, conclusory statements that merely parrot the statute are inadequate. *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995). Absent findings that support those conclusions, courts cannot conduct a meaningful review of the Secretary's actions. *Id.*; *cf. Hawaii*, 2017 WL 6554184 at *9. This is especially true here, where DHS and its Secretary have made public statements contradicting any claim that fencing in San Diego or El Centro is necessary, a priority, or most practical and effective.[11] In arguing that the Secretary need not provide a rationale, Defendants rely on the jurisdictional limitation in Section 102(c)(2)(A) and the "sole discretion" language in Section 102(c). Opp'n at 39. But those provisions do not address the findings necessary for adequate judicial review of whether Section 102 authorizes the Projects. The 2017 Waivers' lack of those findings renders them invalid.

[11] DHS asks the court to ignore a March 27, 2017 report (Cal. Ex. 9), claiming it is "privileged" and "not part of the administrative record." Opp'n at 50 n. 40. But this case is not an appeal of an administrative decision for which a record is required, and DHS waived any (non-existent) privilege by sharing this report externally. *See* https://www.revealnews.org/blog/senate-democrats-answer-questions-raise-concerns-with-trumps-wall/

IV. SECTION 102 AND THE 2017 WAIVERS INTERFERE WITH CALIFORNIA'S EQUAL SOVEREIGNTY AND POLICE POWERS IN VIOLATION OF THE TENTH AMENDMENT (ELEVENTH CLAIM)

The state sovereignty principles enshrined in the Tenth Amendment require that federal action which burdens a disfavored subset of states or invades states' traditional police powers must be "sufficiently related to the problem that it targets." *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2622 (2013). Defendants do not seriously engage with this requirement. Instead, they assert that no Tenth Amendment violation occurs where Congress acts pursuant to powers provided by the Constitution and, in turn, that the 2017 Waivers are a valid delegation of congressional powers. But the Tenth Amendment is not nearly so anemic, nor are Congress's powers so expansive as Defendants claim.

Defendants mistakenly assume that the only way to violate the Tenth Amendment is by passing laws that exceed Congress's limited constitutional powers. But where, as here, the federal government intrudes upon "state sovereignty," such intrusion violates the Tenth Amendment "even where Congress has the authority under the Constitution to pass laws." *New York v. United States*, 505 U.S. 144, 166, 177, 188 (1992); *Shelby Cty.*, 133 S. Ct. at 2622–23, 2629 (federal law enacted pursuant to the Fifteenth Amendment and Article I of the Constitution that violates states' "equal sovereignty" nonetheless unconstitutional); *Printz v. United States*, 521 U.S. 898, 923–24 & n.13 (1997) (federal law enacted pursuant to the "Commerce Clause [that] violates the principle of state sovereignty" nonetheless unconstitutional).

The Supreme Court has expressly rejected the same cramped interpretation of the Tenth Amendment that Defendants advance here, holding that even where Congress has power to "enact legislation" and "pre-empt state regulation," it must use a "method" that does not impinge on states' "inviolable sovereignty." *New York*, 505 U.S. at 188. None of the cases Defendants cite are to the contrary or even

address the equal sovereignty doctrine, and several expressly disclaim the Tenth Amendment as a basis for their ruling.[12]

Defendants also attempt to avoid Shelby County, which expanded the Tenth Amendment's protection of state sovereignty in response to federal action, by mischaracterizing California's case and the 2017 Waivers' scope. Defendants claim Shelby County "does not stand for the general proposition that constitutionally enacted statutes become vulnerable whenever there are 'changed circumstances.'" Opp'n at 73 (selectively quoting Cal. Br. at 26). But Defendants do not dispute the proposition for which Shelby County does stand (and for which it was cited): that "a validly enacted federal statute that burdens a subset of states but not others will become unconstitutional if progress is made curbing the problem the statute seeks to prevent." Cal. Br. at 25 (citing 133 S. Ct. at 2628–29). Nor do Defendants cite a single case construing Shelby County otherwise.

Defendants do not dispute that illegal crossings in the San Diego and El Centro Sectors have been substantially reduced and admit that the rates of illegal entry are "far less" in California than other southern border states. Doc. 35-3 at 28. As California explained, such progress "cannot be ignored" and shows that continued federal interference with state sovereignty is no longer justified. *Shelby Cty.*, 133 S. Ct. at 2628. In response, Defendants simply assert that the steep declines in illegal crossings do not "undermine the legitimacy" of Congress's "goal of operational control" or DHS's "authority [that] Congress delegated to pursue that goal."[13] Opp'n at 73. But a legitimate goal cannot justify federal intrusion into states' sovereignty—if it did, the legitimate goal of racial equality would have

[12] *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1042 (9th Cir. 2007).

[13] Defendants' contention that the border "need not be the crisis it was in the 1990s" to justify the 2017 Waivers is similarly unavailing. Opp'n at 73 (citing *Cty. of El Paso v. Chertoff*, 2008 WL 4372693, at *8 (W.D. Tex. Aug. 29, 2008)). The case Defendants rely upon did not address the equal sovereignty doctrine and was decided before *Shelby County* made clear that the constitutional inquiry focuses on whether "progress has been made"—not whether the problem "still exists." *Shelby Cty.*, 133 S. Ct. at 2619, 2625.

saved the statute in *Shelby County*. Rather, a legitimate goal must be pursued using a "method" that does not impinge on states' "inviolable sovereignty." *New York*, 505 U.S. at 188.

Here, the method DHS adopted—based on the Secretary's unfettered discretion and not on apprehension data—results in the "deprivation of a State's sovereign powers." *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (holding state could not be prevented from "vindicating its sovereign authority through enforcement of its laws"). Defendants' conjecture that Congress could theoretically treat border states differently from non-border states (Opp'n at 72) is beside the point because that is not what happened. The constitutional violation here is the singling out of California, and such a "departure from the fundamental principle of equal sovereignty" among the states requires Defendants to prove that DHS's "disparate geographic coverage is sufficiently related to the problem that it targets." *Shelby Cty.*, 133 S. Ct. at 2622. Defendants have not made that showing here.

Moreover, the 2017 Waivers far exceed Congress' limited powers under the Constitution. While Defendants invoke Congress's inherent power to determine immigration policy, no case holds that such power permits the Executive to waive laws of general application—such as California's environmental, work place safety, and anti-graft laws—that apply regardless of immigration status. *See Hawaii*, 2017 WL 6554184 at *21 (Executive "lacks independent constitutional authority" to act because "control over the entry of aliens is a power within the exclusive province of Congress"); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

Finally, Defendants "resort[] to the last, best hope of those who defend ultra vires" federal action: the Necessary and Proper Clause, which—when coupled with the Commerce Clause—authorizes Congress to regulate interstate commerce. *Printz*, 521 U.S. at 923–24. But Defendants cannot rely on the Commerce Clause because the 2017 Waivers do not purport to regulate "economic activity" and lack the requisite nexus to interstate commerce. *United States v. Morrison*, 529 U.S.

598, 613 (2000). Nor is the Necessary and Proper Clause of any help; the 2017 Waivers violate California's sovereignty, and a law that "violates the principle of state sovereignty . . . is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause." *Printz*, 521 U.S. at 923–24.[14]

V. SECTION 102(C)'S HURDLES AND THE VAGUE 2017 WAIVERS DEPRIVE CALIFORNIA OF FAIR NOTICE AND ACCESS TO THE COURTS (SIXTH CLAIM)

Defendants attempt to deflect from the 2017 Waivers' deficiencies by faulting California for not identifying all state "laws that have actually been waived." Opp'n at 72 n.61. But the 2017 Waivers' failure to specify which laws they waive (leaving DHS apparently uncertain as to what it has done) only proves that the 2017 Waivers are unconstitutionally vague. Because they purport to waive more than just the listed laws, the 2017 Waivers' scope is unknown.[15] Californians and the courts need more to know "where to draw the line between what is permissible and what is forbidden." *Hirschkop v. Snead*, 594 F.2d 356, 371, 375 (4th Cir. 1979) (code barring activity that "relates to" specified matters was unconstitutionally vague).

Defendants' attempts to moot the issue are unfounded. They now claim that DHS will "construe" the 2017 Waivers more narrowly. Opp'n at 70. But such post-hoc interpretations by counsel cannot cure the admitted constitutional violation here. See *Washington v. Trump*, 847 F.3d 1151, 1165–66 (9th Cir. 2017) (counsel's

[14] Defendants also fail to distinguish *City of Boerne v. Flores*, which struck down a federal statute that, like Section 102, interfered with states' traditional police powers by enabling the nullification of laws that did not impede the statute's object. 521 U.S. 507, 532–36 (1997). It is no answer to note that the case addressed "Congress's power under § 5 of the Fourteenth Amendment" (Opp'n at 73) because the "scope of Congress' power under § 5 is equivalent to that under the necessary and proper clause" upon which Defendants rely. *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982); *Laro v. New Hampshire*, 259 F.3d 1, 6 (1st Cir. 2001). Nor are Defendants correct that *City of Boerne* is limited to claims of "sovereign immunity" (Opp'n at 73), as the case cited does not stand for that proposition and *City of Boerne* never even mentions the term.

[15] We do know, however, that the 2017 Waivers purport to waive unspecified state and federal laws "related to the subject of" more than two dozen listed laws that run the gamut from protections against religious discrimination, 42 U.S.C. § 2000bb, to requirements for gravesite preservation, 25 U.S.C. § 3001 *et seq.*, to a ban on an agency's unauthorized use of funds, 54 U.S.C. § 320106. 82 Fed. Reg. 35,984 (Aug. 2, 2017); 82 Fed. Reg. 42,829 (Sept. 12, 2017).

"interpretation" of prior order, even if "binding," might not "persist past the immediate stage of these proceedings" and so could not moot challenge). Nor are Defendants correct that few state laws apply to these Projects. Opp'n at 70. In fact, courts routinely apply California law to federal construction projects. See, e.g., *Harper/Nielsen-Dillingham, Builders, Inc. v. United States*, 81 Fed. Cl. 667, 679 (2008) (applying California contract law to suit against federal government).

Defendants also incorrectly assert that a void-for-vagueness challenge requires a plaintiff to identify a property or other interest under the Due Process Clause and that California has failed to do so. But, as Defendants concede (Opp'n at 66 n.53), California's challenge is not grounded solely in the Due Process Clause, as a "regulation may also violate the First Amendment if it is unconstitutionally vague." *O'Brien v. Welty*, 818 F.3d 920, 930 (9th Cir. 2016). The "establishment of a vested property right is irrelevant" to a challenge that implicates the First Amendment. *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2007). Regardless, California has established a Due Process interest in the enforcement of its state laws and the preservation of the "property that it owns and manages adjacent to DHS's Border Wall Projects." Cal. Br. at 13; *see Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577–78 (1972).

Finally, Defendants contend that the Petition Clause poses no limit on the ability to restrict access to the courts in this case, but the authorities cited fail to support this proposition.[16] Those cases do not address the harm here, which is the complete deprivation of any judicial forum for numerous claims. Moreover, the

[16] *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997), relates to a prisoner's challenge to "filing fee requirement" under "equal protection" clause and did not address the Petition Clause. *Wilbur v. Locke*, 423 F.3d 1101, 1116 (9th Cir. 2005) (addressing dismissal for failure to join indispensable party where plaintiffs "never sought to amend their complaint" to include party to the contract that they tried to void), *abrogated by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), concludes that the plaintiffs' own error deprived them of a federal forum. And, *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1137–38 (9th Cir. 2013), the court determined that judicial review was merely delayed, not denied.

Supreme Court abrogated *Wilbur v. Locke*, upon which Defendants rely, because the expansion of federal jurisdiction solely to extinguish state court jurisdiction must be questioned and statutes must give "proper respect for state functions." *Levin*, 560 U.S. at 420–23 ("Statutes conferring federal jurisdiction, we have repeatedly cautioned, should be read with sensitivity to 'federal-state relations.'").

VI. SECTION 102(C) AND THE 2017 WAIVERS VIOLATE ARTICLE I, SECTION 3, OF THE UNITED STATES CONSTITUTION (NINTH CLAIM)

Defendants assert that Plaintiffs identify no constitutional provision or case demonstrating that the Executive Branch's power in the area of criminal law is more restrained than when it acts concerning civil law. Opp'n at 57. However, the Constitution carefully delineates and limits the power of the Executive to act in the criminal law sphere. Article I §§ 2, 3. Supreme Court cases also have constrained the Executive's power to pardon individuals prior to committing a criminal act and the power of the Executive to circumvent criminal law and procedure. *United States v. Nixon*, 418 U.S. 683, 707–08 (1974); *Ex Parte Grossman*, 267 U.S. 87, 119–20 (1925).

Further, contrary to Defendants' allegations, the Supreme Court has recognized constraints on congressional delegations in the criminal sphere. In *Fahey v. Mallonee*, 332 U.S. 245, 249–50 (1947), *United States v. L. Cohen Grocery*, 255 U.S. 81, 89–92 (1921), and *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989), the Court recognized that more may be needed from Congress when a criminal statute is involved. In addition, in *Whitman*, 531 U.S. at 475, the Supreme Court recognized that in congressional delegations the "degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." If Congress wishes to waive a criminal law, it has the power to do so and can provide the Executive the power to carry out the waiver under certain circumstances. But Congress cannot circumvent the Constitution and allow the Executive to choose, in advance, which criminal laws to waive and when

to waive them.[17] Here, where Congress is delegating the power to waive a criminal law, Congress must at least state which criminal laws can be waived and when.[18]

VII. THE 2017 WAIVERS VIOLATE THE SEPARATION OF POWERS DOCTRINE THE NON-DELEGATION DOCTRINE, AND THE PRESENTMENT CLAUSE (SEVENTH, EIGHTH AND TENTH CLAIMS)

Although Defendants allegedly address California's Separation of Powers claim in their argument related to the non-delegation doctrine, they ignore the additional constitutional problems with Section 102 related to Separation of Powers. The Supreme Court does articulate the non-delegation doctrine to cover most instances of delegation of legislative power to the Executive, but it limits that doctrine in cases where Congress provides the Executive power to decide which tariffs, or laws, could be modified or terminated and under what circumstances. *Field v. Clark*, 143 U.S. 649 (1892); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). In those instances, delegation does not violate Separation of Powers if the Executive is "the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." *J.W. Hampton*, 276 U.S. at 411. The Supreme Court has therefore upheld statutes where Congress legislated in the "contingency." *Id*. at 410.

However, unlike the legislation involved in *Field* or *J.W. Hampton*, or even the original version of Section 102, the current version of Section 102 authorizes the Secretary to pick and choose among enacted laws and determine, in his or her

[17] Defendants simply brush off as unimportant the Secretary's waiver of two serious criminal laws, which can no longer be used to prosecute criminal actions that harm Californians. While recognizing the two examples mentioned by California, Defendants do not seem to acknowledge that these were simply examples and the Secretary in fact waived more than a half-dozen criminal laws. *See, e.g.*, 16 U.S.C. § 1540(b)(1); 33 U.S.C. § 1321(b)(5); 33 U.S.C. § 401; 42 U.S.C. § 7413(1); 16 U.S.C. § 707; 42 U.S.C. § 300; 16 U.S.C. § 668.

[18] Defendants contend, without support, that only the delegation of *imposing* criminal sanctions concerned the Supreme Court in *Fahey*, not the authority to *lift* criminal sanctions. Opp'n at 58 n.47. The seriousness with which the Supreme Court has treated Presidential immunity from criminal law and procedure and the proposition that no one is above the law, makes clear that whatever distinction exists between those powers, it is without a difference in the case of delegation of power. *Nixon*, 418 U.S. at 707–08; *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803); *United States v. Lee*, 106 U.S. 196, 220 (1882).

sole discretion, which pieces to waive. In enacting Section 102, Congress did not state which laws are to be waived or why, and instead gave the Executive Branch that authority. Section 102 was not legislated in the contingency, and Congress could not know which laws were going to be waived when it enacted the law, nor did the President when he signed the law. Since Defendants have chosen to not even address this additional violation, this waiver authority must be declared unconstitutional and the 2017 Waivers must be invalidated.

With regard to California's remaining Eighth and Tenth Claims for Relief, California agrees with co-Plaintiffs' arguments in their reply briefs that Section 102(c) violates the Non-Delegation Doctrine and the Presentment Clauses. To avoid duplication, California adopts those arguments herein by reference.

CONCLUSION

Based on the foregoing, California is entitled to summary judgment on each of its claims for declaratory relief.

Dated: January 5, 2018

Respectfully Submitted,

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s/ MICHAEL P. CAYABAN
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CERTIFICATE OF SERVICE

Case Name: **In Re: Border Infrastructure Environmental Litigation**

No. **17cv1215-GPC(WVG)**
Consolidated with
Case No. 17cv01873 GPC (WVG)
Case No. 17cv01911 GPC (WVG)

I hereby certify that on **January 5, 2018**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

CALIFORNIA'S REPLY IN SUPPORT OF CALIFORNIA'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

CALIFORNIA'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS AND SUPPLEMENTAL STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT;

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 5, 2018**, at San Diego, California.

Michael Cayaban
Declarant

s/Michael Cayaban
Signature

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE: BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION

Case No. 17cv1215 GPC(WVG)

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

CALIFORNIA'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS AND SUPPLEMENTAL STATEMENT OF FACTS IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Rule 7.1(f)(1), and this Court's Civil Pretrial & Trial Procedures, Plaintiffs, the People of the State of California and the California Coastal Commission (collectively "Plaintiffs" or "California"), submit this response to Defendant's Statement of Material Undisputed Facts submitted in support of Defendant's motion for summary judgment.

Defendants' Statement of Fact	California Plaintiffs' Response
1. On August 2, 2017, the Secretary of the Department of Homeland Security ("DHS") published a waiver determination pursuant to § 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, Title I, 110 Stat. 3009-554 (Sept. 30, 1996), as amended (codified at 8 U.S.C. § 1103 Note). See 82 Fed. Reg. 35984 (Aug. 2, 2017).	Undisputed except as to the legal conclusion that the August 2, 2017, waiver was "pursuant to" § 102. Defendants did not satisfy the statute's requirements.
2. The waiver determination covers a project area comprising a fifteen-mile stretch of border in the U.S. Border Patrol's San Diego Sector extending from the Pacific Ocean eastward. *Id.*	Undisputed.
3. The project area falls within the jurisdiction of three U.S. Border Patrol stations: Imperial Beach, Chula Vista, and Brown Field. See Ex. 21, CBP, Chula Vista Station (Mar. 11, 2014); Ex. 22, CBP, Brown Field Station (Mar. 11, 2014)	Undisputed. However, the vast majority of the project area is in Imperial Beach and Chula Vista. Only a small portion of the project areas falls with the Brown Field Station's jurisdiction and the project area represents a tiny portion of the "approximately 200 square miles of mostly mountainous terrain" subject to the Brown Field Station's jurisdiction, Def's Ex. 22 does not material facts.

Defendants' Statement of Fact	California Plaintiffs' Response
4. The DHS Secretary determined that both the San Diego Sector and the project area are "an area of high illegal entry." *Id.* at 35985.	This is a legal conclusion; to the extent a response is required, Plaintiffs dispute that the DHS Secretary "determined" the facts Defendants assert. The waiver made no findings, is contrary to the facts, and simply parrots the language in § 102.
5. The DHS Secretary determined that there is "a need to construct physical barriers and roads . . . in the vicinity of the border of the United States to deter illegal crossings in this Project Area." *Id.* at 35985	This is a legal conclusion; to the extent a response is required, Plaintiffs dispute that the DHS Secretary "determined" the facts Defendants assert. The waiver made no findings, is contrary to the facts, and simply parrots the language in § 102.
6. The DHS Secretary determined that exercise of waiver authority under the IIRIRA was necessary "to ensure the expeditious construction of the barriers and roads in the Project Area." *Id.*	This is a legal conclusion; to the extent a response is required, Plaintiffs dispute that the DHS Secretary "determined" the facts Defendants assert. The waiver made no findings, is contrary to the facts, and simply parrots the language in § 102.
7. On the basis of these findings, the Secretary announced the waiver of certain laws "with respect to the construction of roads and physical barriers . . . in the Project Area." *Id.*	Disputed that the DHS Secretary acted on the basis of "findings." Defendants offer no factual support for their assertion. As detailed in Plaintiffs' Motion for Summary Judgment and Reply, the waiver made no findings and is contrary to the facts.
8. Among the waived laws are the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., the Endangered Species Act, 16 U.S.C. §§ 1531 et seq., and the Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq., along with "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of, the [listed] statutes." See 82 Fed. Reg. at 35985	Undisputed except to the extent Defendants assert that the waiver is valid, which is a legal conclusion.

Defendants' Statement of Fact	California Plaintiffs' Response
9. One project conducted pursuant to the waiver determination is the construction of eight border wall prototypes on a two acre plot at the eastern end of the secondary barrier near San Diego. See 82 Fed. Reg. at 35984; Memorandum, Construction and Evaluation of Border Wall Prototypes, U.S. Border Patrol, San Diego Sector, California (Sept. 25, 2017) (included in ECF No. 18-2 as Exhibit 14).	Undisputed except as to the legal conclusion that the project was conducted "pursuant to" the waiver determination. Defendants did not satisfy the requirements of § 102.
10. Contracts for the prototypes project were awarded on August 31 and September 7, 2017. See Press Release (Sept. 7, 2017) (link); Press Release (Aug. 31, 2017) (link) (included in ECF No. 18-2 as Exhibits 16, 17).	Undisputed.
11. Construction for the prototypes project began on September 26, 2017, and was completed within 30 days as scheduled. See Press Release (Oct. 26, 2017) (link) (attached as Exhibit 20); Press Release (Sept. 26, 2017) (link) (included in ECF No. 18-2 as Exhibit 15).	Undisputed.
12. The second project to be conducted pursuant to this waiver determination is the replacement of approximately 14 miles of existing primary fencing near San Diego. 82 Fed. Reg. at 35984-85.	Undisputed except as to the legal conclusion that the project was conducted "pursuant to" the waiver determination. Defendants did not satisfy the requirements of § 102.
13. The existing primary fencing was primarily constructed in the early 1990s using a design that the DHS Secretary has determined is "no longer optimal for Border Patrol operations." *Id.*	This fact is immaterial. Undisputed except as to the legal conclusion that the DHS Secretary "determined" the facts Defendants assert.

Defendants' Statement of Fact	California Plaintiffs' Response
14. On September 12, 2017, the Secretary of the Department of Homeland Security ("DHS") published a waiver determination pursuant to § 102 of the IIRIRA, as amended. See 82 Fed. Reg. 42829 (Sept. 12, 2017).	Undisputed except as to the legal conclusion that the September 12, 2017, waiver was "pursuant to" § 102 because Defendants did not satisfy the statute's requirements.
15. The waiver determination covers a project area comprising a three-mile stretch of border in the U.S. Border Patrol's El Centro Sector near Calexico, California. *Id.*	Undisputed.
16. The DHS Secretary determined that both the El Centro Sector and the project area are "an area of high illegal entry." *Id.* at 42830.	This is a legal conclusion; to the extent a response is required, Plaintiffs dispute that the DHS Secretary "determined" the facts Defendants assert. The waiver made no findings, is contrary to the facts, and simply parrots the language in § 102.
17. The DHS Secretary determined that there is "a need to construct physical barriers and roads . . . in the vicinity of the border of the United States to deter illegal crossings in this Project Area." *Id.*	This is a legal conclusion; to the extent a response is required, Plaintiffs dispute that the DHS Secretary "determined" the facts Defendants assert. The waiver made no findings, is contrary to the facts, and simply parrots the language in § 102.
18. The DHS Secretary determined that exercise of waiver authority under the IIRIRA was necessary "to ensure the expeditious construction of the barriers and roads in the Project Area." *Id.*	This is a legal conclusion; to the extent a response is required, Plaintiffs dispute that the DHS Secretary "determined" the facts Defendants assert. The waiver made no findings, is contrary to the facts, and simply parrots the language in § 102.
19. On the basis of these findings, the Secretary announced the waiver of certain laws "with respect to the construction of roads and physical barriers . . . in the Project Area." *Id.*	Disputed that the DHS Secretary acted on the basis of "findings." Defendants offer no factual support for their assertion. As detailed in Plaintiffs' Motion for Summary Judgement and Reply, the waiver made no findings and is contrary to the facts.

Defendants' Statement of Fact	California Plaintiffs' Response
20. Among the waived laws are the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., the Endangered Species Act, 16 U.S.C. §§ 1531 et seq., along with "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of, the [listed] statutes." See 82 Fed. Reg. at 42830.	Undisputed except to the extent Defendants assert that the waiver is valid, which is a legal conclusion.
21. The project to be conducted pursuant to this waiver determination is the replacement of approximately 3 miles of existing primary fencing near Calexico. 82 Fed. Reg. at 42829-30.	Undisputed except as to the legal conclusion that the project was conducted "pursuant to" the waiver determination. Defendants did not satisfy the requirements of § 102.
22. The existing primary fencing was primarily constructed in the early 1990s using a design that the DHS Secretary has determined is "no longer optimal for Border Patrol operations." *Id.*	Undisputed except as to the legal conclusion that the DHS Secretary "determined" the facts Defendants assert. Moreover, this fact is not material.

Additionally, California hereby incorporates by reference the facts and evidence detailed in the statements of undisputed fact submitted by all Plaintiffs (Doc. 28-2, 30.1, 33) as supplemental facts in opposition Defendants' cross-motion and precluding judgment in Defendants' favor.

Dated: January 5, 2018

Respectfully submitted,

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s/Michael P. Cayaban
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