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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLIGICAL DIVERSITY,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 17cv1215 GPC (WVG)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

Date: December 15, 2017
Time: 1:30 pm
Courtroom: 2D
Hon. Gonzalo P. Curiel

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INTRODUCTION

Congress has repeatedly identified the construction of border infrastructure to prevent illegal entry of people and contraband as a significant priority. In addition to the Executive Branch's inherent authority over immigration policy, foreign affairs, and national security, Congress has called on the U.S. Department of Homeland Security ("DHS") to construct physical barriers and roads along the border to deter illegal crossings in areas of high illegal entry. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA" or "Act"), Pub. L. No. 104-208, Div. C, Title I § 102, 110 Stat. 3009-554 (Sept. 30, 1996), as amended. In order to speed construction of these border infrastructure projects, Congress gave the DHS Secretary specific authority to waive any legal requirement necessary to ensure expeditious construction, and strictly limited judicial review of such determinations—only constitutional challenges are permitted and the only appellate review is a petition of certiorari to the Supreme Court. The Act has been repeatedly upheld in the face of legal challenges.

In this suit, Plaintiff challenges DHS's recent exercise of this waiver authority for border infrastructure projects along a 15-mile stretch of the international border south of San Diego that the DHS Secretary determined remains an area of high illegal entry. Plaintiff's constitutional claims are meritless, largely retreading theories rejected by every court to consider the constitutionality of the statute. And its non-constitutional challenges to the waiver determination are barred by the Act. Its challenges under the environmental statutes have been mooted by the waiver determination, and its Administrative Procedure Act ("APA") claim must be dismissed because the Freedom of Information Act ("FOIA") provides an adequate remedy.[1] Accordingly, the Court should dismiss Counts 1-6 in full and Count 7 in part for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

[1] Defendants do not seek dismissal of Count 7 to the extent it asserts a claim under the FOIA, 5 U.S.C. § 552. That claim is based on two FOIA requests submitted in May 2017, which are currently being processed by Defendants.

BACKGROUND

I. STATUTORY FRAMEWORK

Among its responsibilities, DHS is responsible for border security and the detection and prevention of illegal entry into the United States. *See*, *e.g.*, 6 U.S.C. § 202(a)(1)-(2). Congress has ordered DHS to achieve and maintain operational control of the international land border. *See* Secure Fence Act of 2006, Public Law 109-367, § 2(a), 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. § 1701 note). "Operational control" means "prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband." *Id.* § 2(b). Consistent with that mandate, the President has directed DHS to take immediate steps to prevent all unlawful entries into the United States, including the immediate construction of physical infrastructure to prevent illegal entry. *See* Exec. Order 13767 §§ 2(a), 4(a), 82 Fed. Reg. 8793 (Jan. 25, 2017).

Among the statutory authorities provided to DHS to carry out its border security mission is the IIRIRA. *See* Pub. L. No. 104-208, Div. C, Title I § 102, 110 Stat. 3009-554 (Sept. 30, 1996). Codified at 8 U.S.C § 1103 note (and included as an appendix at the end of this memorandum), IIRIRA § 102 has been amended several times. *See* Dep't of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Title V § 564, 121 Stat. 2090 (Dec. 26, 2007); Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638 (Oct. 26, 2006); REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I §102, 119 Stat. 231, 302, 306 (May 11, 2005). The IIRIRA directs the Secretary of Homeland Security to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Pub. L. No. 104-208, Div. C., Title I § 102(a), as amended.[2]

[2] In 1996, responsibility for border enforcement lay with the Attorney General. The Homeland Security Act of 2002, Pub. L. No. 107-296, created DHS and transferred

In § 102(b), Congress provided certain requirements for implementing the broad mandate laid out in § 102(a). These requirements have varied over the years. For example, in 1996, Congress specified that, in "carrying out subsection (a), the [agency] shall provide for the construction . . . of second and third fences, in addition to the existing reinforced fence, and for roads between the fences" in a 14-mile section near San Diego. Pub. L. No. 104-208, Div. C., Title I § 102(b)(1). In 2006, Congress struck the reference to San Diego and required construction of "at least 2 layers of reinforced fencing, [and] the installation of additional physical barriers, roads, lights, cameras, and sensors" in five specified locations along the southern border, with deadlines for certain of the projects. Pub. L. No. 109-367, § 3. In the most recent amendment, Congress removed the specifications set out in 2006 and instead required "construct[ion of] reinforced fencing along not less than 700 miles of the southwest border" but gave the Secretary discretion to determine "where fencing would be most practical and effective" with the goal "to gain operational control of the southwest border." Pub. L. No. 110-161, Div. E, Title V § 564; *see also* IIRIRA § 102(b)(1)(D) (as amended) (stating that the Secretary is free to determine that the use or placement of "fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location" is not "the most appropriate means to achieve and maintain operational control over the international border" at that location).

Section 102(c) seeks to ensure expeditious construction pursuant to the mandate laid out in § 102(a) in two ways. First, it permits waiver of legal impediments:

> Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

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border enforcement authority to it. In 2005, IIRIRA § 102 was amended to refer to the DHS Secretary. *See* H.R. Rep. 109-72 at 171 (May 3, 2005) (Conf. Rep.).

Id. § 102(c)(1). This provision had originally been limited to the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"), *see* Pub. L. No. 104-208, Div. C, Title I § 102(c), but the REAL ID Act expanded it to its current breadth. *See* H.R. Rep. 109-72, at 171-72 (May 3, 2005) (Conf. Rep.) (attached as Ex. 2) (explaining "Congress' intent that the Secretary's discretionary waiver authority extends to any local, state or federal statute, regulation, or administrative order that could impede expeditious construction of border security infrastructure"); *see also* H.R. Rep. 104-828, at 200 (Sept. 24, 1996) (Conf. Rep.) (attached as Ex. 1) (explaining that the original waiver of two environmental laws was intended "to facilitate a uniform construction of necessary fences and roads").

Second, § 102(c) provides for limited and streamlined judicial review of the Secretary's exercise of this waiver authority. Federal district courts have "exclusive jurisdiction" to hear such claims, and the only "cause of action or claim" that may be brought is one "alleging a violation of the Constitution of the United States" that is filed within sixty days of the Secretary's action. *Id.* § 102(c)(2)(A)-(B). The only appellate review is a certiorari petition to the U.S. Supreme Court. *Id.* § 102(c)(2)(C). This provision was adopted by the conference committee for the appropriations bill of which the REAL ID Act was a part. The House bill would have entirely barred judicial review, *see* 109th Cong., H.R. 1268, Div. B § 102 (engrossed in House, Mar. 16, 2005) (attached as Ex. 3), but some had expressed concern about the constitutionality of such a total bar on review. *See*, *e.g.*, 151 Cong. Rec. H553, 556-57 (Feb. 10, 2005) (attached as Ex. 7) (Statement of Cong. Farr) (introducing Congressional Research Service letter observing that Congress does not clearly have "authority to prevent courts . . . from addressing and remedying issues arising under the United States Constitution"). Ultimately, the conference report explained that Congress was providing "federal judicial review for claims alleging that the actions or decisions of the Secretary violate the United States Constitution," and that the strict

limits on judicial review reflected the "Conferees' intent [] to ensure that judicial review of actions or decisions of the Secretary not delay the expeditious construction of border security infrastructure, thereby defeating the purpose of the Secretary's waiver." H.R. Rep. 109-72 at 172.

II. THE SECRETARY'S EXERCISE OF WAIVER AUTHORITY

Pursuant to the IIRIRA, the Secretary has repeatedly issued waiver determinations as necessary to ensure expeditious construction of barriers and roads along the border. *See* 73 Fed. Reg. 19078 (Apr. 8, 2008); 73 Fed. Reg. 19077 (Apr. 8, 2008); 72 Fed. Reg. 60870 (Oct. 26, 2007); 72 Fed. Reg. 2535 (Jan. 19, 2007); 70 Fed. Reg. 55622 (Sept. 22, 2005). Every judicial challenge to these determinations has been dismissed. *See County of El Paso v. Chertoff*, No. 08-196, 2008 WL 4372693 (W.D. Tex. 2008), *cert. denied*, 557 U.S. 915 (2009); *Save Our Heritage v. Gonzalez*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 554 U.S. 918 (2008); *Sierra Club v. Ashcroft*, No. 04-272, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 13, 2005).

On July 26, 2017, the Secretary issued another waiver determination under the IIRIRA. The Secretary determined that a fifteen-mile stretch of border in the U.S. Border Patrol's San Diego Sector (the "Project Area") is an area of high illegal entry. 82 Fed. Reg. 35984, 35984-85 (Aug. 2, 2017). The Secretary also 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. Finally, the Secretary concluded that exercise of his waiver authority under the IIRIRA was necessary "to ensure the expeditious construction of the barriers and roads in the Project Area." *Id.* Accordingly, the Secretary announced the waiver of certain laws "with respect to the construction of roads and physical barriers . . . in the Project Area." *Id.* As relevant here, the waived laws include the NEPA, 42 U.S.C.

4321 *et seq.*, and the ESA, 16 U.S.C. 1531 *et seq.*[3]

Two specific projects that will be conducted pursuant to the waiver determination are currently in the contracting process. One project involves replacement of the existing primary fencing in the Project Area, which was primarily constructed in the early 1990s using a design that is "no longer optimal for Border Patrol operations." *Id.* at 35984-85. Contracts have not yet been solicited or awarded for this project, and construction is not expected to begin until early 2018. The second project involves construction of border wall prototypes at the eastern end of the secondary barrier in the Project Area. *Id.* at 35985. The border wall prototypes are intended both to deter illegal entry at that location and to assist DHS in evaluating various design features for inclusion in a border wall standard to be used in future construction. *Id.* Contract solicitations for both reinforced solid concrete ("concrete") and alternatives to reinforced solid concrete ("other materials") prototypes were issued in March 2017, and amended several times before contract award. *See* Solicitation Nos. HSBP1017R0022, HSBP1017R0023 (as amended Apr. 1, 2017) (attached as Exs. 12-13. Contracts were awarded for concrete prototypes on August 30, 2017 and for other materials prototypes on September 7, 2017. *See* Press Release (Sept. 7, 2017) (link); Press Release (Aug. 30, 2017) (link) (attached as Exs. 16-17). Prototype construction began on September 26, 2017 and is expected to be completed within 30 days. *See* Press Release (Sept. 26, 2017) (link) (attached as Ex. 15).

Even where the Secretary has waived environmental and other laws, U.S. Customs and Border Protection ("CBP") still consults with relevant stakeholders pursuant to § 102(b)(1)(C). And CBP explained at a congressional hearing, it does not "turn[] its back on environmental stewardship or continued consultation with

[3] On September 12, 2017, DHS published a separate waiver determination for replacement of three miles of primary border fencing near Calexico, California in the El Centro Sector. *See* 82 Fed. Reg. 42829 (Sept. 12, 2017) ("El Centro Waiver"). Plaintiff's Second Amended Complaint does not challenge this decision.

stakeholders." *Walls & Waivers: Expedited Construction of the Southern Border Wall and Collateral Impacts to Communities and the Environment: Joint Oversight Field Hearing Before Subcommittees to H. Comm. on Natural Resources* (hereinafter "*Walls & Waivers Hearing*"), 110th Cong. 25 (2008) (attached as Ex. 10) (statement of Ronald D. Vitiello, CBP Chief Patrol Officer, Rio Grande Valley Sector); *see also id.* at 19 (statement of Rick Shultz, Nat'l Borderland Coordinator, U.S. Dep't of the Interior ("DOI")) (explaining that when the DHS Secretary issued two waivers "he reaffirmed DHS's commitment to environmental stewardship" and that "[t]his commitment, as it applies to DOI-administered lands and programs, included mitigation funding up to $50 million for threatened and endangered species"). For the prototypes project currently under construction, CBP has consulted with relevant stakeholders, conducted site surveys for environmental and endangered species concerns, and required the contractors to comply with best practices designed to mitigate any environmental harm. *See* Memorandum, Construction and Evaluation of Border Wall Prototypes, U.S. Border Patrol, San Diego Sector, California (Sept. 25, 2017) (attached as Ex. 14).

III. PROCEDURAL HISTORY

Plaintiff initially filed this action to challenge Defendants' response to several requests under the FOIA, 5 U.S.C. § 552. (ECF No. 1). It later amended the complaint to allege violation of NEPA. (ECF No. 6). Pursuant the schedule set at the joint request of the parties, Plaintiff filed a second amended complaint on September 6, 2017. (ECF Nos. 14, 16). Plaintiff's second amended complaint alleges that the waiver determination is *ultra vires* (Count 1), that the waiver determination violates the Take Care Clause, Non-Delegation Doctrine, and Presentment Clause of the Constitution (Counts 2, 3, 4), that Defendants have failed to comply with NEPA and the ESA (Counts 5, 6), and that the processing of certain FOIA requests violates the FOIA and APA (Count 7). *See* 2d Am. Compl. ¶¶ 122-185.

Two other lawsuits have been filed in this district that raise claims regarding the same waiver determination (along with the El Centro waiver that is not at issue here). *See People of the State of California v. United States*, No. 3:17-cv-1911-TJW-BLM (Sept. 20, 2017) (brought by California and the California Coastal Commission); *Defenders of Wildlife v. Duke*, No. 3:17-cv-1873-GPC-WVG (Sept. 14, 2017) (brought by Defenders of Wildlife, Sierra Club, and Animal Legal Defense Fund).

ARGUMENT

I. STANDARD OF REVIEW

"[W]hen a federal court lacks subject-matter jurisdiction, the court must dismiss the complaint, *sua sponte* if necessary." *Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015). Subject matter jurisdiction "refers to the courts' statutory or constitutional power to adjudicate the case." *Id.* Plaintiffs have the burden to establish jurisdiction. *See Washam v. Rabine*, No. 3:13-2433, 2013 WL 1849233, at *1 (S.D. Cal. May 1, 2013). In resolving a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), the Court "may consider evidence outside the complaint and ordinarily need not presume the truthfulness of the plaintiff's allegations." *Osgood v. Main Street Marketing, LLC*, No. 16-2415, 2017 WL 131829, at *4 (quotation marks omitted).[4]

A claim may be dismissed under Fed. R. Civ. P. 12(b)(6) for either the "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Review is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metlzer Inv. GMBH v. Corinthian*

[4] Hereinafter, internal quotation marks, alterations, and citations are omitted from quotations unless otherwise noted.

Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008).[5]

II. PLAINTIFF'S NON-CONSTITUTIONAL CLAIMS REGARDING THE WAIVER DECISION MUST BE DISMISSED FOR LACK OF JURISDICTION (COUNT 1)

A. The Court Lacks Jurisdiction to Consider Plaintiff's Non-Constitutional Claims Regarding the Waiver Decision

It is axiomatic that federal courts "are courts of limited jurisdiction possessing only that power authorized by Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256 (2013). Accordingly, "district courts may not exercise jurisdiction absent a statutory basis." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005); *see also Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts."). Because district court jurisdiction is a creature of statute, the extent of that jurisdiction depends on congressional intent. "Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency action." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670, 672-73 (1986). Thus a court must find that it lacks jurisdiction to review agency action upon a showing of "specific language or specific legislative history that is a reliable indicator of congressional intent, or a specific congressional intent to preclude judicial review that is fairly discernible in the detail of the legislative scheme." *Id.* at 673. It is Plaintiff's burden, as the party asserting jurisdiction, to overcome the

[5] Judicial notice is appropriate for many government documents. *See Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203, 207 n.5 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 548 (1996) ("Judicial notice is properly taken of orders and decisions made by other courts or administrative agencies."); *Parks v. Wells Fargo Bank, N.A.*, No. 3:15-2558, 2016 WL 411674, at *2 (S.D. Cal. Feb. 3, 2016) (taking judicial notice of "information appearing on and printed from official government websites"); *United States v. Walt Disney Co.*, No. 12-8036, 2013 WL 12131741, at *4 n.5 (C.D. Cal. Aug. 9, 2013) (taking judicial notice of Congressional Research Service report as "a government publication and a matter of public record"); *In re Tourism Assessment Fee Litig.*, No. 08-1796, 2009 WL 10185458, at *4 (S.D. Cal. Feb. 19, 2009) ("[A] court may take judicial notice of records and reports of administrative bodies.").

"presum[ption] that a cause lies outside [of federal courts'] limited jurisdiction." *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1091 (9th Cir. 2014) (quoting *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)).

Here, Congress has expressly withdrawn district court jurisdiction to review non-constitutional challenges to the Secretary's exercise of waiver authority:

> 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.

IIRIRA § 102(c)(2)(A). This specific statutory language expansively encompasses "all causes or claims arising from any action undertaken, or any decision made" pursuant to § 102(c)(1). *Id.* The Act both expressly identifies the sort of suits that may be brought: "only . . . alleging a violation of the Constitution," and expressly removes court jurisdiction over "any claim not specified in this subparagraph." *Id.*

There is no reason to doubt the import of this plain language. A court in this district found the Act straightforward, declaring that the provision "itself restricted judicial review of any claims to constitutional claims." *See Sierra Club*, 2005 U.S. Dist. LEXIS 44244, at *28; *see also id.* (holding that Congress "circumscribed the judicial review available for decisions of the Secretary in the exercise of delegated authority to expedite construction"); *id.* at *38 ("The only justiciable controversies Congress left for the courts to decide in this connection are constitutional claims."). The Ninth Circuit has observed that "many . . . provisions of the IIRIRA . . . do in fact specify that particular decisions are within the *sole* or *unreviewable* discretion of the Attorney General." *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 690 (9th Cir. 2003). Section 102(c) is strikingly similar to another provision of the IIRIRA, 8 U.S.C. § 1182(a)(9)(B)(v), which states:

> The Attorney General has sole discretion to waive [§ 1182(a)(9)(B)(i)] in the case of an immigrant who [meets certain conditions], if it is

> established to the satisfaction of the Attorney General that [certain conditions are met]. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Courts have dismissed challenges to exercise of such waiver authority because the provision "specifically precludes judicial review and vests DHS with sole authority to waive inadmissibility bars." *De Carreon v. Mukasey*, No. 08-0501, 2008 WL 11336922, at *3 (S.D. Cal. Oct. 28, 2008); *Lugo-Miramontes v. Holder*, 464 F. App'x 639 (9th Cir. 2011) ("We lack jurisdiction to review the agency's decision [under 8 U.S.C. § 1182(a)(9)(B)(v)] . . . ."); *Herrera-Castillo v. Holder*, 573 F.3d 1004, 1010 (10th Cir. 2009) (holding that the court "lacks jurisdiction to review the BIA's decision [under § 1182(a)(9)(B)(v)]").

There are many other examples of Congress using similarly unambiguous "shall not have jurisdiction" formulations to partially or completely bar judicial review. *See, e.g.*, 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."); *Upper Deck Int'l B.V. v. Upper Deck Co.*, No. 11-1741, 2012 WL 1713453, at *7 (S.D. Cal. May 15, 2012) (acknowledging that § 1359 "denies a district court jurisdiction" under the specified circumstances).[6] Further, the Act's jurisdictional bar of "any claim not specified in this subparagraph" cannot be confused with narrower statutory limitations which merely specify the scope of jurisdiction pursuant to a particular statute. *Cf.* 28 U.S.C. § 1346(d) ("The district courts shall not have jurisdiction *under this section* of any

[6] *See also*, *e.g.*, 8 U.S.C. § 1226a(b)(1) (providing for "mandatory detention of suspected terrorist" but strictly limiting judicial review: "Judicial review of any action or decision relating to this section . . . is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision."); 22 U.S.C. § 6450 ("No court shall have jurisdiction to review any Presidential determination or agency action under this chapter or any amendment made by this chapter." (adopted by the Int'l Religious Freedom Act of 1998, Pub. L. No. 105-292, § 410, 112 Stat. 2787 (Oct. 27, 1998))).

civil action or claim for a pension." (emphasis added)). In sum, Congress could not have been clearer in stating that all non-constitutional claims are barred. Accordingly, Plaintiff's attempt to challenge the Secretary's action on non-constitutional grounds must be dismissed for lack of jurisdiction. *See, e.g.*, *Kerr v. Jewell*, 836 F.3d 1048, 1058 & n.7 (9th Cir. 2016) (upholding dismissal for lack of jurisdiction "because it is fairly discernible that Congress intended the statute's review scheme to provide the exclusive avenue to judicial review").

Plaintiff cannot evade this clear jurisdictional limitation by citing the series of cases applying *Leedom v. Kyne*, 358 U.S. 184 (1958). *Kyne* involved a National Labor Relations Board determination that was in "direct conflict with a provision of the National Labor Relations Act." *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc.*, 502 U.S. 32, 42 (1991). The *Kyne* Court rejected the argument that it lacked jurisdiction where the statutory review provision did not expressly authorize judicial review of such determinations. *See id.* at 42-43. *Kyne* stands for the proposition that courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *MCorp Fin.*, 502 U.S. at 43 (quoting *Kyne*, 358 U.S. at 190); *see also id.* at 44 ("*Kyne* stands for the familiar proposition that 'only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967))). But *Kyne* does not "authoriz[e] judicial review of *any* agency action that is alleged to have exceeded the agency's statutory authority." *MCorp Fin.*, 502 U.S. at 43 (emphasis added). Instead, *Kyne* and its progeny address only whether *ultra vires* review is impliedly barred by the statutory scheme. *Kyne* does not apply where "Congress has spoken clearly and directly" to preclude review. *Id.* at 44; *see also Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011) (stating that presumption of judicial review for administrative action "is overcome" when "Congress expressly bars review by

statute"); *Nyunt v. Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (holding that the *Kyne* exception "applies . . . only where . . . the statutory preclusion of review is implied rather than express").

Here, just as in *MCorp Financial*, Congress "has spoken clearly and directly" to preclude judicial review. In *MCorp Financial*, the relevant statute stated that "except as otherwise provided in this section or under [two other sections] of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section." 12 U.S.C. § 1818(i)(1); *see* 502 U.S. at 44. The Supreme Court held that *ultra vires* review under *Kyne* was unavailable because "the clarity of the congressional preclusion of review" in this statute stood in marked contrast to the statute at issue in *Kyne*, in which it had only been argued that a judicial review statute "implied, by its silence, a preclusion of review of the contested determination." 502 U.S. at 44; *see also United States v. Spiegel*, 995 F.2d 138, 140 (9th Cir. 1993) (noting that the "statutory language [of § 1818(i)(1)] leaves no room to doubt that Congress provided only one avenue for challenging" agency action under that section). The IIRIRA, like 12 U.S.C. § 1919(i)(1), does not raise the issue of an implied preclusion of review. Congress has expressly barred judicial review of non-constitutional claims—"The court shall not have jurisdiction to hear any claim not specified in this subparagraph." IIRIRA § 102(c)(2)(A). The only avenue for challenging agency action here is a constitutional claim. As another court has noted, the presumption in favor of judicial review cannot be employed "where, as here, Congress has been so *explicit* in stating a prohibition against judicial review—federal courts are not, after all, superlegislatures entitled to invoke a generalized presumption to trump an express 'hands off' direction from Congress." *Am. Soc'y of Anesthesiologists v. Shalala*, 90 F. Supp. 2d 973, 975 (N.D. Ill. 2000), *aff'd*, 279 F.3d 447 (7th Cir. 2002) (addressing 42 U.S.C. § 1395w–4).

The plain meaning of the Act should be the end of the matter. *Aragon-Salazar*

v. Holder, 769 F.3d 699, 704 (9th Cir. 2014) ("[Courts] must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992))); *Santiago Salgado v. Garcia*, 384 F.3d 769, 771 (9th Cir. 2004) ("In construing federal statutes, we presume that the ordinary meaning of the words chosen by Congress accurately express its legislative intent."). But if the Court finds any ambiguity in the text, the legislative history also supports the government's reading. The limitation on judicial review was adopted as part of the REAL ID Act of 2005. The underlying bill that passed the House of Representatives would have gone even farther, entirely barring judicial review, *see* 109th Cong., H.R. 1268, Div. B § 102 (engrossed in House, Mar. 16, 2005) (attached as Ex. 3),[7] which was a significant concern to opponents of the bill.[8] Because the Senate passed a substitute version of the bill that differed substantially from the House version (and did not include any provision regarding IIRIRA § 102), the bill was finalized by a conference committee. *See* H.R. Rep. No. 109-72 (May 3, 2005) (Conf. Rep.). The conference committee noted that the House bill "would prohibit judicial review" and explained that the committee had "revised the House provision in the following respects," including "provid[ing] federal judicial review for claims alleging that the actions or

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[7] "[N]o court, administrative agency, or other entity shall have jurisdiction—(A) to hear any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1); or (B) to order compensatory, declaratory, injunctive, equitable, or any other relief for damage alleged to arise from any such action or decision."

[8] *See, e.g.*, 151 Cong. Rec. H557 (Feb. 10, 2005) (statement of Congresswoman Davis) (objecting to provision because it "bars judicial review of any claim arising from the construction of barriers and roads at borders"); 151 Cong. Rec. H559 (Feb. 10, 2005) (statement of Congressman Mark Udall) ("The bill also removes any judicial review of the waiving of these laws."); *id.* at E247 (attached as Ex. 8) (statement of Congressman James Langevin) ("This overly broad provision would give unprecedented power to the Secretary to undertake large construction projects without any accountability or judicial review.").

decisions of the Secretary violate the United States Constitution." *See* H.R. Rep. No. 109-72 at 171-72. The report further explained that "[t]he Conferees' intent is to ensure that judicial review of actions or decisions of the Secretary not delay the expeditious construction of border security infrastructure, thereby defeating the purpose of the Secretary's waiver." *Id.* at 172. Thus, the conference report makes clear that the House's complete bar on judicial review was modified only to permit judicial review of constitutional claims, and that strictly limited judicial review was fundamental to the statutory scheme. *Cf. NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 130-133 (1988) (holding that "prosecutorial" decisions of the General Counsel of the NLRB are not subject to judicial review, in part because review "would involve lengthy judicial proceedings in precisely the area where Congress was convinced that speed of resolution is most necessary").[9]

In sum, "the clear terms of the statute" control here, and no "policy arguments" Plaintiff may wish to make can "override Congress's clear choice." *Spiegel*, 995 F.2d at 140. Plaintiff's non-constitutional challenges to the waiver determination must be dismissed for lack of jurisdiction.

B. To the Extent the Court Conducts *Ultra Vires* Review, It Must Conclude that the Secretary Did Not Exceed His Statutory Authority

In the alternative, to the extent the Court determines that—despite the plain text

[9] Indeed, environmental groups and the prior challenges to the exercise of § 102(c) waiver authority have accepted as a given that the only available legal challenges are constitutional claims. *See, e.g.*, *County of El Paso*, 2008 WL 4372693 (pressing only nondelegation, Presentment Clause, and Tenth Amendment constitutional claims); *Save Our Heritage*, 533 F. Supp. 2d 58 (pressing only a nondelegation constitutional claim); *Defenders of Wildlife*, 527 F. Supp. 2d 119 (pressing only nondelegation, Presentment Clause, and separation of powers constitutional claims); *Sierra Club*, 2005 U.S. Dist. LEXIS 44244 (pressing only nondelegation and Article III constitutional claims, along with a retroactivity claim with constitutional implications); *see also Walls & Waivers Hearing*, 110th Cong. 122 (statement of Sandra Purohit, Defenders of Wildlife) (observing that the withdrawal of "judicial review with the exception of Constitutional challenges, thus preclud[es] any independent review of whether the DHS Secretary has only waived the laws 'necessary' for the expeditious construction of border walls").

of the statute and Congress' clear intent—courts retain jurisdiction to determine whether a waiver determination is *ultra vires*, the Secretary's decision here must be upheld. Under the extraordinarily deferential *ultra vires* review standard, the Court must conclude that the Secretary did not exceed his statutory authority.

Under the "narrow exception" carved out in *Leedom v. Kyne*, where a court otherwise lacks authority to review an agency action, it may determine that the agency has exceeded its statutory authority only if the challenged action "contravene[s] 'clear and mandatory' statutory language." *Pacific Maritime Ass'n v. NLRB*, 827 F.3d 1203, 1208 (9th Cir. 2016) (quoting *Kyne*, 358 U.S. at 188).[10] The agency must be "charged with violating a clear statutory mandate or prohibition." *Staacke v. U.S. Sec'y of Labor*, 841 F.2d 278, 281 (9th Cir. 1988). *See also Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999) ("Courts . . . generally have interpreted *Kyne* as sanctioning the use of injunctive powers only in a very narrow situation in which there is a plain violation of an unambiguous and mandatory provision of the statute."); *Greater Detroit Resource Recovery Auth. v. EPA*, 916 F.2d 317, 323 (6th Cir. 1990) ("[I]t must be shown that the action of the agency was a patent violation of its authority" and it is "not automatically invo[cable] whenever a challenge to the scope of an agency's authority is raised"); *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988) ("[R]eview may only be had when the agency's error is patently a misconstruction of the Act, or when the agency has disregarded a specific and unambiguous statutory directive, or when the agency has violated some specific command of a statute."). A court's jurisdiction under the *Kyne* exception is "one of the narrowest known to the law." *Horizon Air Indus., Inc. v. Nat'l Mediation Bd.*, 232 F.3d 1126, 1131 (9th Cir. 2000); *see also Nyunt*, 589 F.3d at 449 (holding that

[10] For a court to grant relief under *Kyne* and its progeny, the challenged action must also be one for which the plaintiff is "wholly deprive[d] . . . of a meaningful and adequate means of vindicating its statutory rights." *Id.* at 1208 (quoting *MCorp Fin.*, 502 U.S. at 44). That prong is not in dispute here because Congress barred judicial review of all non-constitutional claims.

"extreme error" is required to rely on the *Kyne* exception, and that this is a "very stringent standard" under which a claim "rarely succeeds"); *Am. Airlines*, 176 F.3d at 294 (concluding that "the narrow *Kyne* exception" is a "rarely invocable precedent"); *Greater Detroit*, 916 F.2d at 323-24 (affirming that the *Kyne* exception "is a narrow anomaly reserved for extreme situations").

Plaintiff cannot carry that burden here. None of its arguments establishes that DHS violated a "clear statutory mandate or prohibition." *Staacke*, 841 F.2d at 281.

1. Plaintiff cannot show that § 102(c)'s waiver authority excludes actions and decisions under § 102(a)'s general mandate

Plaintiff primarily argues that § 102(c) waiver authority "is limited to the specific border barriers and roads required to be constructed pursuant to IIRIRA section 102(b)." 2d Am. Compl. ¶ 124. This theory finds no support in the Act's text:

> Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.

IIRIRA § 102(c)(1), as amended. By its plain terms, the waiver authority extends to any construction "under this section," upon determinations made in the Secretary's "sole discretion." *Id.* "[T]his section" unambiguously refers to IIRIRA § 102 as a whole. *See, e.g.*, House Office of the Legislative Counsel, *Guide to Legislative Drafting*, Section III. Organization within a bill (link) (explaining that "sections" are the numbered "basic unit[s] of a bill, and thus of an enacted statute" and that "terminology for referring to units within a section has become highly standardized"). When Congress wanted to identify a specific unit within § 102, it did so in the standardized format.[11] Accordingly, the reference to "this section" in § 102(c)(1)

[11] As the *Guide to Legislative Drafting* explains, § 102(a) is a "subsection," § 102(b)(1) is a "paragraph," and § 102(b)(1)(A) is a "subparagraph." *See id.* Congress followed this approach throughout § 102, both as originally enacted and as amended. *See, e.g.*, IIRIRA § 102(b)(1) ("subsection (a)"); *id.* § 102(b)(1)(C)(ii) ("this subparagraph"); *id.* § 102(b)(1)(C)(ii)(I) ("this subsection"); *id.* § 102(b)(1)(D) ("this

cannot reasonably be read to refer exclusively to subsection 102(b). Instead, the waiver authority plainly includes actions pursuant to any part of § 102 that meet § 102(c)(1)'s criteria.[12]

Plaintiff attempts to disregard the breadth of the plain text by arguing that § 102(b) limits and interprets § 102(a). 2d Am. Compl. ¶ 124. Congress gave DHS the responsibility to

> take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

IIRIRA § 102(a). Plaintiff concedes that this provision "provid[es] general authority to construct border fences and other border barriers." 2d Am. Compl. ¶ 61; *see also id.* ¶¶ 62, 66, 87, 124 (acknowledging this "general authority"). But Plaintiff appears to argue that § 102(b)(1), by identifying specific requirements for the agency "[i]n carrying out subsection (a)," limits the general authority set out in § 102(a). *See id.* ¶ 124 (claiming that § 102(b) "identifies the specific 'construction of fencing and road improvements along the border' necessary to 'carry[] out subsection(a)'"). This theory is highly implausible and must be rejected for four reasons.

First, when Congress identifies certain specific applications of a general grant of authority, those specific requirements cannot generally be understood to prohibit all other applications of the general authority. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("We do not read the enumeration of one case to exclude another

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paragraph" "subparagraph (A)"); *id.* § 102(b)(2) ("subsection (d)" "this subsection"); *id.* § 102(b)(3) ("this subsection"); *id.* § 102(b)(4) ("this subsection" "this paragraph"); *id.* § 102(c)(2)(A) ("paragraph (1)" "this subparagraph"); *id.* § 102(c)(2)(B) ("subparagraph (A)").

[12] Even if it were ambiguous, DHS' consistent interpretation that the § 102(c) waiver authority includes the Act as a whole would be entitled to *Chevron* deference. *See, e.g.*, 70 Fed. Reg. 55622, 55623 (Sept. 22, 2005) (explaining that § 102(c) grants "authority to waive all legal requirements . . . necessary to ensure the expeditious construction of barriers and roads under section 102 of IIRIRA").

unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."). It is not unusual for Congress to provide non-exclusive instructions for "carrying out" a general mandate.[13] Arguments similar to Plaintiff's are routinely rejected. *See, e.g.*, *FTC v. Tarriff*, 584 F.3d 1088, 1091 (D.C. Cir. 2009) (rejecting argument "that the term 'shall' is a mandate not only to do one thing but to cease and refrain from doing all others" as a claim that "borders on sophistry"); *Otsuka Pharm. Co. v. Burwell*, No. 15-852, 2015 WL 1962240, at *7 (D. Md. Apr. 29, 2015) ("[Plaintiff] ignores the critical fact that [the statutory provision] sets forth circumstances where FDA cannot *deny* approval for a labeling carve-out; it does not, as [plaintiff] contends, address situations where FDA can or cannot *grant* approval."); *Sidney Coal Co. v. SSA*, 427 F.3d 336, 348 (6th Cir. 2005) ("[T]he statute's explicit reference to two types of employment need not preclude [the agency from] adding another to the list."). As for the IIRIRA, a court specifically rejected the notion that "the 2006 amendment to section 102(b) . . . narrow[ed] the Secretary's authority [under § 102(a)]," because "[t]he statute's explicit language does not support such an interpretation." *Save our Heritage Org.*, 533 F. Supp. 2d at 61; *id.* ("[T]he Court finds that section 102(a), on its face, authorizes construction of barriers such as the San Diego Barrier in areas that the Secretary determines are areas of high illegal entry.").[14]

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[13] *See, e.g.*, 8 U.S.C. § 1443 (requiring Attorney General to "broadly distribute information concerning the benefits of [naturalization]" and specifying that "[i]n carrying out this subsection, the Attorney General shall seek the assistance of . . . relevant organizations"); 33 U.S.C. § 2326(a)(1)(A), (f) (giving Secretary of the Interior general responsibility to "develop . . . regional sediment management plans" and specifying that "[i]n carrying out this section, the Secretary shall give priority to [projects] in the vicinity of [eleven specific locations]"); 42 U.S.C. § 18352 (giving NASA general responsibility to "maximize the productivity and use of the [International Space Station]" and specifying that "[i]n carrying out subsection (a), NASA shall, at a minimum, undertake the following [three specific tasks]").

[14] DHS has never countenanced such a narrow reading; it constructed border infrastructure in locations other than San Diego well before 2005 and referenced its IIRIRA authority in doing so. *See, e.g.*, CBP Finding of No Significant Impact for Infrastructure (Nov. 19, 2003) (attached as Ex. 19) (explaining that "the proposed

Second, the specific terms of the IIRIRA as originally enacted cut sharply against such a reading. It is not apparent how the broad mandate to "install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry," § 102(a), could be fulfilled by the narrow instruction to construct "second and third fences" "along the 14 miles of the international land border . . . starting at the Pacific Ocean." Pub. L. No. 104-208, Div. C, Title I § 102(b)(1). Plaintiff's effort to force such a reading would render § 102(a) largely superfluous. *See Hooks v. Ktsap Tenant Support Servs., Inc.*, 816 F.3d 550, 560 (9th Cir. 2016) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."). Section 102(a)'s broad mandate to identify "areas of high illegal entry" would not only become empty, but also create substantial confusion if Congress only intended to address a single 14-mile stretch near San Diego. *See Pacific Mut. Life Ins. Co. v. Am. Guaranty Life Ins. Co.*, 722 F.2d 1498, 1500 (9th Cir. 1984), *overruled on other grounds by In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) ("Interpretative constructions of a statute which would render some words surplusage, defy common sense, or lead to mischief or absurdity are to be avoided."); *see also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 929 (9th Cir. 2004) ("[C]ourts are especially reluctant to discard as surplusage the 'pivotal' words of a statute." (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

Third, subsequent amendments to § 102(b)(1), which adopted significantly different requirements within a fourteen month span in 2006 and 2007, *see supra*, Background § I (discussing differences between Dec. 26, 2007 and Oct. 26, 2006 approaches to § 102(b)), further demonstrate that this subsection merely identifies

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border infrastructure system [for Cochise County, Arizona] has been planned in compliance with the IIRIRA"); Cong. Research Serv., RL33659, *Border Security: Barriers Along the U.S. Int'l Borde*r at 19 (Mar. 16, 2009) (attached as Ex. 11) (noting that appropriations for fiscal years 1998-2000 included "fencing, light, and road projects in El Centro, Tucson, El Paso, and Marfa").

certain areas for action and reflects Congress' shifting priorities. These requirements do not foreclose many other applications of § 102(a).[15]

Finally, Plaintiff cannot overcome the plain meaning of the statutory text by pointing out that Congress, in passing § 102 in 1996 and amending § 102(c) in 2005, was primarily focused on portions of fencing near San Diego. *See* 2d Am. Compl. ¶¶ 73-75.[16] *See Aragon-Salazar*, 769 F.3d at 704 ("When the words of a statute are unambiguous . . . judicial inquiry is complete."). Congress could easily have crafted language that simply mandated the relevant construction near San Diego. Instead, Congress adopted a far broader approach by establishing a general mandate in § 102(a) that is not geographically limited and by extending § 102(c)'s waiver authority to any actions or decisions "under this section." The conference report—generally considered the best evidence of legislative intent, *see Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996)—confirms that § 102 applied beyond San Diego by explaining that it "provides for construction and strengthening of barriers along U.S. land borders." H.R. Rep. 109-72 at 170 (May 3, 2005); *see also id.* at 171 (describing both the original and amended waiver authority as "ensur[ing] expeditious construction of barriers and roads" and "the expeditious construction of security infrastructure along the border"). The breadth of § 102(c) was repeatedly noted by opponents of the bill and was not contradicted by its sponsors. *See, e.g.*, 151 Cong. Rec. H459 (Feb. 9, 2005) (attached as Ex. 6) (statement of Cong. Jackson-Lee)

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[15] Plaintiff's claim that the § 102(b)(1) requirements stemming from the 2006 and 2007 amendments "have already been fulfilled," 2d Am. Compl. ¶ 132; *id.* ¶¶ 88-91, 130-132, is irrelevant because DHS does not ground its waiver determination in § 102(b). Defendants do not concede that these requirements have no current significance, but do not address the matter further here because nothing turns on it.

[16] Plaintiff's citation of the title of House bill H.R. 1268 is entitled to no weight because the language Plaintiff emphasizes does not appear in the final legislation, and therefore does not represent the intent of Congress as a whole. *See* Pub. L. No. 109-13, Div. B. *See also Northstar Financial Advisors, Inc. v. Schwab Investments*, 615 F.3d 1106, 1120 (9th Cir. 2010) ("[T]he Supreme Court has cautioned that the title of a statute and the heading of a section cannot limit the plain meaning of the text.").

("[The waiver provision] so broad that it would not just apply to the San Diego border fence that is the underlying reason for this provision. It would apply any other barrier or fence that may come about in the future.").[17] Thus, there is no reason to conclude that the triggering events for passage of the waiver—litigation delaying San Diego border infrastructure construction—should be interpreted to limit the otherwise plain text of the Act. *See Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ.*, 272 F.3d 1155, 1165 (9th Cir. 2001) ("[L]egislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations.")

2. Plaintiff cannot show that § 102(a) and (c) unambiguously apply only to the "initial construction of border barriers," not their enhancement

Plaintiff also argues that the § 102(c) waiver authority applies only "to the initial construction of border barriers," not the "border wall replacement or border wall prototype projects" at issue here. 2d Am. Compl. ¶ 134. Plaintiff's cramped reading of the Act is not the best reading, let alone the exclusive reading—as would be necessary to meet the *ultra vires* review standard here.

While Plaintiff argues that the "plain language" of § 102(c) limits its scope to "initial construction," 2d Am. Compl. ¶ 134, nothing in that subsection independently

[17] *See also id.* H454 (Feb. 9, 2005) (Statement of Cong. Conyers) ("waiving all Federal laws concerning construction of barriers and fences anywhere within the United States"); 151 Cong. Rec. H554 (Feb. 10, 2005) (statement of Cong. Harman) ("[T]he reach is beyond the San Diego border. According to the language in this legislation, it is all areas along and in the vicinity of our international borders with both Mexico and Canada."); *id.* H556 (Feb. 10, 2005) (Cong. Farr submitting memorandum which observed that the waiver authority "seem[s] to apply to all the barriers that may be constructed under the authority of §102 of IIRIRA (i.e., barriers constructed in the vicinity of the border and the barrier that is to be constructed near the San Diego area)"); *id.* H559 (statement of Cong. Udall) (objecting to bill because "the language of the bill is not limited to the construction of a fence in [San Diego]" but instead includes "all laws for all U.S. borders"). Indeed, members of Congress similarly noted that the 1996 version of § 102(c) also extended beyond San Diego. *See* 142 Cong. Rec. H11076 (Sept. 25, 1996) (attached as Ex. 4) (statement of Rep. Saxton) ("[T]he way this section is written, the exemption applies to the entire border of the United States, not just the California-Mexico border near San Diego.").

qualifies the "barriers and roads" that fall within its scope. *See* IIRIRA § 102(c)(1) (permitting waiver of legal requirements the Secretary "determines necessary to ensure expeditious construction of the barriers and roads under this section"). Both the wall replacement project and the prototypes project essentially concern "construction of . . . barriers." *See, e.g.*, Oxford English Dictionary, 2d ed. 1989 (defining construction as "[t]he action of framing, devising, or forming, by the putting together of parts; erection, building."); *Columbia Riverkeeper*, 761 F.3d at 1091 ("[W]e interpret these words according to their ordinary, contemporary, common meaning."). Thus, these projects are consistent with the text of § 102(c).

The projects are also within the scope of § 102(a), which gives the Secretary authority "to take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants)." With regard to the replacement project, Plaintiff appears to suggest that "additional physical barriers" must mean new barriers in locations where no barrier currently exists. But Plaintiff cannot show that such a narrow construction is required. Dictionary definitions of "additional," include flexible words such as "more," "extra," and "added." *See, e.g.*, Oxford English Dictionary, 2d ed. 1989 ("Existing in addition, coming by way of addition; added"); Websters New World College Dictionary, 3rd ed. 1988 ("added, more, extra"); Random House College Dictionary, revised ed. 1980 ("added, supplementary"). Thus the term readily includes not only locations where no barrier currently exists on the border, *see* H.R. Rep. 104-828, at 200 (Sept. 24, 1996) (Conf. Rep.) (calling "for extension of the new fencing" for the full 14 miles near San Diego); but also new barriers parallel to existing ones, *see id.* (calling for construction of "second and third fences" near San Diego), and adding "more" to an existing barrier, e.g., making it higher or more resistant to illegal entry. *See Griffith*, 842 F.2d at 494 (rejecting *ultra vires* challenge where agency's approach was "not the only possible interpretation of the statutory language" but "surely a colorable one"). The

legislative history for later amendments support this flexibility. *See* H.R. Rep. 109-72 at 170 (May 3, 2005) (explaining that § 102 "provides for construction and strengthening of barriers along U.S. land borders"); 152 Cong. Rec. S9871 (Sept. 21, 2006) (attached as Ex. 9) (statement of Sen. Kyl) (discussing "replacing" existing fencing, in part because it "is deteriorating"). And § 102(b) suggests that part of the § 102(a) mandate can be fulfilled by adding "lighting, cameras, and sensors" to existing barriers. *See, e.g.*, § 102(b)(1)(A) (instructing DHS to carry out § 102(a), in part, by "constructing reinforced fencing" and "provid[ing] for the installation of additional physical barriers, roads, lighting, cameras, and sensors").

The prototypes project involves "initial construction," 2d Am. Compl. ¶ 134, so the basis for Plaintiff's objection is not apparent. In any event, the Act makes clear that the Secretary's authority encompasses more than the "physical barriers and roads" themselves, both by including whatever "actions . . . may be necessary" for their installation and by illustrating the point with an action that is not installation or construction at all—"removal of obstacles to detection." *Id.* The prototypes project meets two aspects of this language—(1) the prototypes are "physical barriers" that are intended "to deter illegal crossings" in the area, *see* 82 Fed. Reg. at 35985 (stating that the location and "robust physical characteristics" of the prototypes "are intended to deter illegal crossings"), and (2) they are actions the Secretary deemed necessary to prepare for future installation of barriers. *See id.* ("to evaluate various design features for potential inclusion in a border wall standard . . . [to be] utilized as a part of border wall construction going forward").

But perhaps the best ground for rejecting Plaintiff's theory is that it would produce absurd results that conflict with clear congressional intent. Plaintiff, to the extent it seeks a narrow construction of § 102(a), would leave DHS without express authority to repair or replace a section of wall damaged by illegal immigrants or a natural disaster. Similarly, CBP could not replace or improve a barrier that proved

operationally ineffective, even if the defect was discovered shortly after it was put up. Such actions would not be "initial construction." And to the extent Plaintiff suggests § 102(c) alone is limited to "initial construction," it can identify no textual basis for the distinction. Nor would it be consistent with Congress' goal to "gain operational control" of the border, § 102(b)(1)(A), (D), for barriers built using waiver authority to fall back under legal requirements that could require their removal or prevent their repair. *See, e.g.*, *Walls & Waivers Hearing*, 110th Cong. 17 (explaining that in "national wildlife refuges and wilderness areas," other statutes prohibit the Department of the Interior from "permitting the construction of certain border security infrastructure" in the absence of a waiver).

3. Plaintiff cannot show that § 102(c) unambiguously requires that the Federal Register notice of a waiver determination include a detailed "rationale"

Plaintiff next argues that the Secretary did not include "any rationale demonstrating that" the 15-mile project area "is necessary to 'deter illegal crossings in areas of high illegal entry into the United States.'" 2d Am. Compl. ¶ 135 (quoting IIRIRA § 102(a)). But nothing in § 102(c) requires explaining the basis for the determination. Instead, the Act requires only that the Secretary's decision be "published in the Federal Register," § 102(c)(1), which has been done here. Congress explained that the limited purpose of the publication requirement was to "ensur[e] appropriate public notice of such determinations," H.R. Rep. 109-72, at 170 (May 3, 2005) (Conf. Rep.), without any suggestion that the notice need include a detailed rationale or facilitate judicial review. Indeed, two aspects of the IIRIRA compel the conclusion that, unlike ordinary actions subject to review under the APA, *see, e.g.*, *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1150 (9th Cir. 2016), the agency need not provide a rationale sufficient to enable arbitrary and capricious review. First, Congress barred all non-constitutional claims. *See supra* Arg. § I. Challenges to the Secretary's application of the statutory criteria are not

constitutional claims, thus the rationale for that application is not necessary to facilitate the limited judicial review available. Second, the Act makes clear that the determination is made "in [the] Secretary's sole discretion." IIRIRA § 102(c)(1); *see also Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 690 (9th Cir. 2003) (observing that "many of the other provisions of the IIRIRA . . . do in fact specify that particular decisions are within the *sole* or *unreviewable* discretion of the Attorney General"). Even if review were permitted under the APA,[18] agency action under this provision would not be subject to judicial review because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *cf. Great Old Broads For Wilderness v. Kempthorne*, 452 F. Supp. 2d 71, 81 (D.D.C. 2006) (concluding § 701(a)(2) applied "where Congress provided for "determin[ation of] the priority and timing for completing required environmental analysis of grazing allotments" "in [the Secretary's] sole discretion"). It is clear that Congress intended the Secretary's rationale to be unreviewable.

Ultra vires review should, at most, reach no further than confirming that the Secretary made the findings required by the statutory language. *See* IIRIRA § 102(c)(1) (granting the Secretary authority "to waive all legal requirements such Secretary . . . determines necessary to ensure expeditious construction of the barriers and roads under this section"). *See Staacke*, 841 F.2d at 281 (looking only for violation of "a clear statutory mandate or prohibition"); *Am. Airlines*, 176 F.3d at 293 ("a plain violation of an unambiguous and mandatory provision of the statute"). Contrary to Plaintiff's assertion, the Secretary did find specifically that the 15-mile project area "is an area of high illegal entry." 82 Fed. Reg. at 35985 ("I determine that the following area . . . within the United States Border Patrol's San Diego Sector . . . is an area of high illegal entry: Starting at the Pacific Ocean and extending to

[18] APA review is doubly impermissible here because Congress barred such claims, § 102(c)(2)(A), and because the DHS Secretary waived application of the APA to this project. *See* 82 Fed. Reg. at 35985.

approximately one mile east of Border Monument 251.").[19] This is sufficient to satisfy *ultra vires* review and this determination, well within the Secretary's expertise and delegated "sole discretion," should not be subject to judicial second-guessing. While Plaintiff is incredulous that this area could qualify, 2d Am. Compl. ¶ 136, the Secretary further explained that "construction of border infrastructure and other operational improvements have improved border security in the San Diego Sector; however, more work needs to be done," and that the "San Diego Sector remains an area of high illegal entry for which there is an immediate need to construct additional border barriers and roads." 82 Fed. Reg. at 35984.

Congress set no specific threshold for "high illegal entry," and the Secretary's conclusion is reasonable. The Secretary noted publically-available statistics showing that the San Diego Sector remains a problem, with "over 31,000 illegal aliens" apprehended in the sector in fiscal year 2016, and large amounts of illegal drugs seized. *See* 82 Fed. Reg. at 35984. The sector had the fourth-largest number of apprehensions nationwide. *See* U.S. Border Patrol, Sector Profile – Fiscal Year 2016 (link) (attached as Ex. 18) (after the Rio Grande Valley, Tucson, and Laredo Sectors). These facts certainly exceed whatever lower threshold could be set for "high illegal entry," especially when measured against Congress' definition of "operational control" of the border—"the prevention of all unlawful entries into the United States, including . . . unlawful aliens, . . . narcotics, and other contraband." Public Law 109-367 § 2(b). And the legislative history for the Act demonstrates that Congress was well aware that this corridor between San Diego and Tijuana has long been a source of significant illegal entry into the United States. *See, e.g.*, 151 Cong. Rec. H554-555

[19] The Secretary also made several other findings specific to the project area: that there "is presently a need to construct . . . the infrastructure projects described in Section 1," 82 Fed. Reg. at 35985, that these projects involve "physical barriers and roads" as those terms are used in the Act, *id.*, and that it is "necessary that I exercise the authority that is vested in me by section 102(c)" in order to "ensure the expeditious construction of the barriers and roads." *Id.*

(statements of Cong. Hunter, Cong. Sensenbrenner); 150 Cong. Rec. H8899 (Oct. 8, 2004) (statement of Cong. Hunter) (attached as Ex. 5).

Finally, Plaintiff appears to object to the use of sector-wide statistics to support the finding of high illegal entry. *See* 2d Am. Compl. ¶ 135. But Congress itself frequently referred to sector-wide statistics in discussing the need for such projects. *See, e.g.*, 152 Cong. Rec. S9873 (Sept. 21, 2006) (statement of Sen. Kyl) (citing sector wide statistics in support of Secure Fence Act); 151 Cong. Rec. H453 (Feb. 9, 2005) (statement of Cong. Hart) (relying on San Diego Sector-wide statistics to support completion of three mile segment of border barrier under REAL ID Act); *id.* H467 (statement of Cong. Cox) (same); *id.* H471 (statement of Cong. Bono) (same). And nothing in the Act requires the Secretary to publish more granular data to prove that the finding committed to his "sole discretion" was warranted.

4. Plaintiff cannot show that § 102(c) waiver authority has unambiguously expired

Plaintiff's final *ultra vires* theory is that the § 102(c) waiver authority has expired. *See* 2d Am. Compl. ¶¶ 137-140. Plaintiff argues that the phrase "necessary to ensure expeditious construction" must be determined in relation to the date the waiver provision was enacted in 2005. *See id.* ¶ 139 ("as soon as possible after the [2005 REAL ID Act's] enactment"). But nothing in the text of the Act suggests that Congress intended the waiver authority to sunset. Instead, the temporal focus of the waiver provision is on the completion of each construction project under the Act. As long as Congress continues to appropriate money for such projects, it stands to reason that CBP should seek to ensure expeditious construction of them pursuant to the terms of § 102.[20] While not all such construction may require a waiver, § 102(c)(1)

[20] *See, e.g.*, Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Div. F, Title VI, 131 Stat. 135, 434 (May 5, 2017) (appropriating $341 million "to replace approximately 40 miles of existing primary pedestrian and vehicle border fencing along the southwest border . . . and to add gates to existing barriers" and $77 million "for new border road construction"); DHS Appropriations Act, 2015, Pub. L. No. 114-4, 129 Stat. 39, 42 (Mar. 4, 2015) (appropriating $382 million "[f]or expenses for

indicates that waivers are appropriate where "necessary to ensure expeditious construction"—meaning at least that they can be issued when "expeditious construction" would not occur in the absence of a waiver. IIRIRA § 102(c)(1).

Indeed, Plaintiff obliquely acknowledges that this theory falls apart if one accepts that the waiver authority extends to "construction of additional barriers that have not been specifically directed by Congress [in § 102(b)]." 2d Am. Compl. ¶ 140. As discussed above, § 102(c) waiver authority is not limited to the projects identified by Congress in § 102(b). *See supra*, Arg. § II(B)(1). Accordingly, Plaintiff's theory gains no support from the fact that Congress, in 2007, set deadlines under § 102(b)(1) for selection of certain "priority areas" and completion of construction in those areas. *See* 2d Am. Compl. ¶ 139. Instead, the specific deadlines for certain actions undermines Plaintiff's attempt to infer from congressional silence that the authority granted in § 102(c) sunsets at some unspecified date. If Congress intended this authority to sunset, it would have written that in the text.

The Secretary's necessity determination readily meets the textual standard here. Congress crafted the waiver provision because litigation by environmental groups and opposition from California state agencies was preventing "expeditious construction." *See, e.g.*, H.R. Rep. 109-72 at 171 (May 3, 2005) (Conf. Rep.) ("Continued delays caused by litigation have demonstrated the need for additional waiver authority with respect to other laws that might impede the expeditious construction of security infrastructure along the border."); *see also* 151 Cong. Rec. H557 (Feb. 10, 2005) (statement of Congressman Royce); *Walls & Waivers Hearing*, 110th Cong. 8 (statement of Rep. Hunter). The vigorous opposition Plaintiff, other environmental organizations, and the state of California have displayed here in filing three lawsuits likewise suggests that construction today would be substantially delayed in the absence of a waiver. In addition to the delay of litigation, Congress was well aware

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border security fencing, infrastructure, and technology").

that the formal procedures for laws like NEPA and the ESA have been used to significantly delay major infrastructure projects, both public and private, for years even before the commencement of litigation, in the hope of stopping a given project altogether.[21] Plaintiff has not suggested—and cannot—that expeditious construction would occur in the absence of a waiver.

In sum, each of Plaintiff's *ultra vires* theories fails to justify judicial intrusion on a decision Congress committed to the Secretary's "sole discretion."

III. PLAINTIFF'S CONSTITUTIONAL CLAIMS FAIL TO STATE A CLAIM

Congress limited judicial review of the Secretary's exercise of § 102(c) waiver authority to constitutional claims regarding "any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to [§ 102(c)(1)]." Each of the constitutional claims Plaintiff raises in Counts 2, 3, and 4, fails to state a claim upon which relief can be granted.

A. The Secretary's Action Does Not Violate Article II § 3 (Count 2)

Plaintiff argues that exercise of the waiver authority Congress provided in law constitutes failure to "faithfully execute" the waived laws. 2d Am. Compl. ¶ 146. This claim fails for numerous reasons.

Article II, Section 3 of the Constitution states that the President "shall take care that the laws be faithfully executed." This clause creates and vests personally in the President the authority to supervise officers of the Executive Branch in the performance of their duties. *See Free Enterprise Fund v. Public Co. Accounting Bd.*,

[21] As noted above, *see supra* Background § II, Congress did not abandon environmental or resource concerns but gave DHS the responsibility to consult relevant resource agencies and other constituencies under § 102(b)(1)(C). Plaintiff asserts that DHS has failed to comply with § 102(b)(1)(C), *see* 2d Am. Compl. ¶ 84, but does not specifically ground any of its *ultra vires* theories on this claim. *See id.* ¶¶ 123-141. Regardless, this provision is not privately enforceable. *See Texas Border Coal. v. Napolitano*, 614 F. Supp. 2d 54, (D.D.C. 2009) (concluding that "no private right of action or private remedy has been created" to enforce this section).

561 U.S. 477, 495-96 (2010). And it ensures that the President is principally responsible for the actions of the Executive Branch and directly accountable to the people through the political process. *Id.* at 3154-55; *Morrison v. Olson*, 487 U.S. 654, 689-90 (1988); *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring).

As an initial matter, Plaintiff's attempt to plead a Take Care Clause claim fails because Plaintiff challenges a decision by the Secretary of Homeland Security, not an action of the President. The Clause does not direct the President's subordinate officers in the performance of their duties. *See Free Enterprise Fund*, 561 U.S. at 493 ("It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase."); *cf. Printz v. United States*, 521 U.S. 898, 922-23 (1997) (concluding that if Congress could "simply requir[e] state officials to execute [federal] laws" this would reduce the President's Take Care Clause power). Any claim that might be attempted under the Take Care Clause would necessarily require the courts to evaluate the decisions and actions of the President himself, not others in the Executive Branch. And Plaintiff identifies no cause of action to raise such a claim. The Take Care Clause itself does not furnish a right to sue to challenge the President's action or inaction. *Cf. Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383-84 (2015) (concluding that the Supremacy Clause does not provide a cause of action).

Moreover, a case, such as this one, that seeks relief against an agency rather than the President asks the Court to direct the actions of subordinate officers on the basis of the Take Care Clause, which would require exercising authority that the Clause commits to the President himself rather than to courts. The courts lack jurisdiction over a claim where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *see also Heckler v. Chaney*, 470 US 821, 830 (1985). And even if the suit had been brought

against the President, courts have no authority to second-guess "discretion[ary]" acts taken by the President "in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1867); *see also Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring in part). The courts' refusal to police the President's discretionary acts is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The Supreme Court has held that "the duty of the President in the exercise of the power to see that the laws are faithfully executed" is not judicially enforceable, adding that any attempt by the judiciary to oversee the President's Take Care authority "might be justly characterized . . . as 'an absurd and excessive extravagance.'" *Mississippi*, 71 U.S. at 499 (refusing to review President's enforcement of Reconstruction Acts given the "general principles which forbid judicial interference with the exercise of Executive discretion"). *See also Dalton v. Specter*, 511 U.S. 462, 474-75 (1994) (refusing to address whether President improperly closed a military base because judicial review "is not available" when a statute or constitutional provision "commits the decision to the discretion of the President").

No court has ever treated the Take Care Clause as basis for affirmative relief.[22] But even if this Court entered those uncharted constitutional waters here, Plaintiff's theory is incoherent. Any judicial enforcement of this Clause would necessarily be

[22] Most discussions of the Take Care Clause has emphasized the need to protect the President's Article II power from intrusion by Congress or the courts. *See, e.g.*, *Free Enterprise Fund*, 561 U.S. at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (holding that it would be improper for the courts to take over the President's duty to "take Care that the Laws be faithfully executed"); *Allen v. Wright*, 468 U.S. 737, 761 (1984) (declining to recognize Article III standing where adjudication of claim would interfere with President's Take Care Clause authority); *Franklin*, 505 U.S. at 827-28 (Scalia, J., concurring) (stating that Court cannot order relief that would interfere with President's constitutional responsibility under the Take Care Clause).

driven by separation of powers concerns. But under the IIRIRA, the Executive Branch does not waive laws on its own initiative. Instead, Congress itself instructed that laws be waived under certain conditions and provided the Secretary with "sole discretion" to determine when those conditions had been met. IIRIRA § 102(c)(1). Thus, the waiver itself should be considered "faithful execut[ion]" of an act of Congress, not a breach of any duty to enforce the laws. This is especially the case here because Congress targeted for waiver the very laws Plaintiff wishes had not been waived—NEPA and the ESA. *See* Pub. L. No. 104-208, Div. C, Title I § 102(c) (providing for waiver of "the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969" as originally enacted in 1996); Pub. L. No. 109-13, Div. B, Title I § 102 (expanding waiver authority to "all legal requirements").

Finally, Plaintiff also attempts to recast its *ultra vires* challenge as a claim under the Take Care Clause, suggesting that the "conditions and limitations of IIRIRA section 102 itself" should be enforced on constitutional grounds. 2d Am. Compl. ¶ 145. But a claim that Executive Branch officials have violated a statutory command does not give rise to a constitutional claim. "The distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is . . . well established." *Dalton*, 511 U.S. at 474. "[C]laims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims[] subject to judicial review." *Id.* at 473. Thus, respondents cannot transform their garden-variety *ultra vires* claim into a constitutional one by alleging that the Secretary's specific use of a statutory authority constitutes failure to comply with a statute and amounts to a violation of President's constitutional responsibilities under Article II.

B. The Secretary's Action Does Not Violate the Nondelegation Doctrine (Count 3)

Plaintiff claims that § 102(c) "unconstitutionally delegates legislative power to the DHS Secretary." 2d Am. Compl. ¶ 151. The nondelegation doctrine is rooted in

"the notion of separation of powers," but few laws violate it; the Supreme Court "has only twice invalidated legislation under this doctrine, the last time being [more than] seventy-five years ago." *In re Nat'l Security Agency Telecomm. Records Litig.* (hereinafter "*Telecomm. Records*"), 671 F.3d 881, 895 (9th Cir. 2011). Every court to consider a nondelegation challenge to § 102(c) has rejected it, beginning with a decision in this district. *See Sierra Club*, 2005 U.S. Dist. LEXIS 44244, at *16-25; *see also County of El Paso*, 2008 WL 4372693, at *2-4; *Save Our Heritage*, 533 F. Supp. 2d at 63-64; *Defenders of Wildlife*, 527 F. Supp. 2d at 126-29. Plaintiff's claim must likewise fail.

It is well established that, because Congress could not function without the ability to delegate, Congress may authorize another branch of government to carry out its law-making authority so long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394, 409 (1928). To provide a constitutionally permissible "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). Statutory limitations on judicial review are irrelevant. *See United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (rejecting the argument that "a delegation of legislative power that is statutorily exempt from judicial review violate[s] the nondelegation doctrine").

Section 102(c) meets each of these three requirements and is thus constitutionally sufficient. Section 102(a) delineates a "general policy" of installing infrastructure to "deter illegal crossings in areas of high illegal entry into the United States," which § 102(c) incorporates by tying the waiver authority to "expeditious construction of barriers and roads under this section." This establishes a policy to guide the Secretary: that improving border protection by expediting the construction of necessary barriers and roads is a high Congressional priority. The Act also

specifies who is to "apply" the general policy—"the Secretary of Homeland Security." IIRIRA § 102(c)(1). The "boundaries of this delegated authority" are also clearly delineated. The authority may only be exercised to "waive all legal requirements [the] Secretary . . . determines *necessary* to ensure expeditious construction of the barriers and roads under this section." *Id.* § 102(c)(1) (emphasis added). Thus, the waiver authority is limited to construction along the border for which a necessity determination has been made. The Supreme Court has held that a "necessity" standard "fits comfortably within the scope of discretion permitted by [its] precedent." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475-76 (2001); *see also Touby v. United States*, 500 U.S. 160, 163 (1991) (approving delegation to the Attorney General the authority to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was "necessary to avoid an imminent hazard to the public safety"). And each district court to consider § 102(c) has found the necessity determination to provide a sufficient boundary. *See Sierra Club*, 2005 U.S. Dist. LEXIS 44244, at *21; *County of El Paso*, 2008 WL 4372693, at *3-4; *Save Our Heritage*, 533 F. Supp. 2d at 63-64; *Defenders of Wildlife*, 527 F. Supp. 2d at 127-28.

Moreover, Congress may delegate in even broader terms than generally used where the delegation relates to powers over which the Executive Branch already maintains significant independent control. *See Loving v. United States*, 517 U.S. 748, 772 (1996) (finding that delegations may be broader "where the entity exercising the delegated authority itself possesses independent authority over the subject matter"); *Telecomm. Records*, 671 F.3d at 897 (holding that when the delegation "arises within the realm of national security . . . the intelligible principle standard need not be overly rigid"). The IIRIRA, which relates to matters of immigration policy, foreign affairs, and national security, falls squarely within these areas. *See, e.g., Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . [and] is inherent in the executive power to control the foreign

affairs of the nation."); *Sierra Club*, 2005 U.S. Dist. LEXIS 44244, at *22-23 ("[T]he Executive Branch has independent and significant constitutional authority [over] immigration and border control enforcement and national security.").

In sum, the Act contains a sufficiently intelligible principle to survive constitutional scrutiny and Plaintiff's claims to the contrary should be dismissed.

C. The Secretary's Action Does Not Violate Article I § 7 (Count 4)

Plaintiff argues that § 102(c) and the waiver determination at issue here "are unconstitutional infringements upon the lawmaking procedures required under Article I, § 7 of the Constitution." 2d Am. Compl. ¶ 157. Clauses 2 and 3 of Article I, § 7 are called the "presentment clauses." *See United States v. Scampini*, 911 F.2d 350, 351 (9th Cir. 1990). They "require that all legislation be presented to the President so that he may have the opportunity to exercise his veto power before any legislation becomes law." *Id.* Plaintiff does not argue that IIRIRA did not conform to the Presentment Clauses when it was enacted. Instead it argues that permitting existing statutes to be waived for certain purposes constitutes "amendment and repeal of statutes." 2d Am. Compl. ¶ 155 (quoting *INS v. Chada*, 462 U.S. 919, 954 (1983)). Plaintiff's claim is meritless, and both courts to consider such a challenge to § 102(c) have rejected it. *See County of El Paso*, 2008 WL 4372693, at *6-7; *Defenders of Wildlife*, 527 F. Supp. 2d at 123-26.

The Presentment Clauses require a specific process, prohibiting legislative action that does not conform to it. Thus, the Constitution does not authorize the President "to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). In *Clinton*, the Supreme Court struck down the Line Item Veto Act, which gave the President the authority to "cancel" certain appropriated spending items that had been passed by Congress. 524 U.S. at 438. That statute failed because cancellation prevented the items "from having legal force or effect" and thus in "both legal and practical effect, the President has amended two Acts of Congress by

repealing a portion of each." *Id.*; *see also id.* at 447 (holding it improper to give the President "unilateral power to change the text of duly enacted statutes").

Plaintiff's claim fails because waiver of a legal requirement for a specific purpose is not amendment or repeal of a statute. As *Defenders of Wildlife* explained:

> [t]he Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part. Each of the [] laws waived by the Secretary . . . retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President.

527 F. Supp. 2d at 124. Under the waiver, the waived statutes are inapplicable only with respect to the construction of barriers and roads along the relevant portion of the border. The statutes retain their general legal force and effect because the Secretary's waiver extends to only a tiny fraction of the universe of cases to which NEPA and similar statutes apply. Plaintiff has identified no basis to conclude that such waivers violate the Constitution. *See Acree v. Republic of Iraq*, 370 F.3d 41, 64 n.3 (D.C. Cir. 2004) (Roberts, J., concurring) (dismissing constitutional challenge to statute permitting President to make inapplicable to Iraq "any other provision of law that applies to countries that have supported terrorism" because the authorized actions "are a far cry from the line-item veto at issue in *Clinton*, and are instead akin to the waivers that the President is routinely empowered to make in other areas, particularly in the realm of foreign policy").

Indeed, this waiver authority is similar to an "executive grant of immunity or waiver of claim" which "has never been recognized as a form of legislative repeal." *See Telecomm. Records*, 671 F.3d at 895. The Ninth Circuit rejected a Presentment Clause challenge to 50 U.S.C. § 1885a, which permits the Attorney General "to immunize from suit telecommunications companies that had cooperated with the government's intelligence gathering." *Id.* at 891. Even though such grants of immunity prevent civil actions to enforce the otherwise applicable "law governing electronic surveillance," the Circuit found no constitutional defect because "[t]he law

remains as it was when Congress approved it and the President signed it." *Id.* at 894-95. The Circuit also supported its conclusion by noting that the authority for executive officials to "trigger a defense or immunity for a third party," is "not uncommon." *Id.* at 895. Here, similarly, the § 102(c) authority in one statute granting authority to waive application of one or more other statutes is not uncommon. *See Defenders of Wildlife*, 527 F. Supp. 2d at 125 & n.5 (collecting some of the "myriad examples of waiver provisions in federal statutes"); *see also*, *e.g.*, 25 U.S.C. § 3406 (authorizing "Secretary of each Federal agency providing funds" for program to waive "any statutory requirement, regulation, policy, or procedure promulgated by that agency"); Pub. L. No. 109-171, § 5107(a)(2), 120 Stat. 42 (Feb. 6, 2006) (providing for waiver of "such provisions of law . . . as are necessary to implement [specified statutory provision] on a timely basis").

Nor does § 102(c) raise the same separation of powers concerns that were at issue in *Clinton*. There, the Supreme Court was concerned that the President's line-item veto was "rejecting the policy judgment made by Congress and relying on his own policy judgment." 524 U.S. at 444. But here, Congress unmistakably expressed its policy judgment that construction of the barriers and roads along the border was of such importance that it justified waiving application of environmental and other laws to the extent those laws threaten expeditious construction. *See* IIRIRA § 102(c)(1). Thus, in sharp contrast to *Clinton*, there is no question that the Secretary is executing (rather than rejecting) the will of Congress. *Cf. Smith v. Fed. Reserve Bank of N.Y.*, 280 F. Supp. 2d 314, 324 (S.D.N.Y. 2003) (upholding waiver where "[u]nlike in *Clinton*" the President "is carrying out, not rejecting, a policy made by Congress").

Accordingly, each of Plaintiff's constitutional claims should be dismissed.

IV. PLAINTIFF'S NEPA AND ESA CLAIMS MUST BE DISMISSED (COUNTS 5-6)

Because the waiver determination pursuant to IIRIRA § 102(c)(1) is valid and survives any available judicial review as discussed above, see supra, Arg. §§ I-III,

both NEPA and the ESA have been waived as to the challenged projects being conducted by Defendants:

> [P]ursuant to section 102(c)(1) of IIRIRA, I hereby waive in their entirety, with respect to the construction of roads and physical barriers . . . in the Project Area, the following statutes . . . : The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 et seq.)); the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 et seq.)) . . . .

82 Fed. Reg. at 35985. Accordingly, the claims in Counts 5 and 6 have been extinguished and the Court lacks jurisdiction to grant any relief pursuant to those statutes. *See Sierra Club*, 2005 U.S. Dist. LEXIS at *7, 39-40.

In addition, the Court lacks jurisdiction to consider the ESA claims in Count 6 because Plaintiff failed to provide the mandatory notice prerequisite to suit. Plaintiff's ESA claim must be dismissed for lack of jurisdiction because Plaintiff did not provide "written notice of the violation" to the "Secretary [of Interior], and to any alleged violator of any such provision or regulation," prior to filing this suit. 16 U.S.C. § 1540(g)(2)(A); *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998). Plaintiffs can fulfill this sixty-day notice requirement only by sending a notice *after* the alleged violation has occurred. *See Friends of Animals v. Ashe*, No. 13-1607, 2014 WL 2812313, at *7 (D.D.C. 2014) (holding that "pre-violation" notices of intent to sue are "insufficient to satisfy the ESA's 60-day notice requirement"); *Kern Cnty. Farm Bureau v. Badgley*, No. 02-5376, 2002 WL 34236869, at *13 (E.D. Cal. Oct. 10, 2002) ("[O]ne cannot give notice of a violation which has not yet happened."). Here, Plaintiff has not complied with this requirement because it prematurely sent the purported notice letters in June and July 2017, *see* 2d Am. Compl. ¶ 5, before any violation had occurred. These purported notice letters preceded the award of contracts for the challenged projects and the commencement of construction. *See* Press Releases (Sept. 7 & Aug. 31, 2017). In light of the fact that the ESA claim has been extinguished by the waiver, the Court need not reach this

notice issue. However, it does provide an additional ground for dismissal and Defendants can provide more fulsome briefing on the issue if the Court so wishes.

V. PLAINTIFF'S APA CLAIM MUST BE DISMISSED BECAUSE THE FOIA PROVIDES AN ADEQUATE REMEDY (COUNT 7, IN PART)

The APA does not provide jurisdiction or a cause of action for relief related to the processing of Plaintiff's FOIA requests because the FOIA itself provides an adequate remedy. "[F]ederal courts lack jurisdiction over APA challenges whenever Congress has provided another 'adequate remedy.'" *Brem–Air Disposal v. Cohen*, 156 F.3d 1002, 1004 (9th Cir. 1998) (quoting 5 U.S.C. § 704); 5 U.S.C. § 704 (subjecting to judicial review "final agency action for which there is no other adequate remedy in a court"). "If a plaintiff can bring suit against the responsible federal agencies under a citizen-suit provision, this action precludes an additional suit under the APA." *Brem*, 156 F.3d at 1005; *see also Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."). Because the FOIA contains a citizen-suit provision and provides an adequate remedy, a "related APA claim will be precluded." *Bedgood v. Mabus*, No. 15-454, 2015 WL 3647933, at *4-5 (S.D. Cal. June 8, 2015). *See also Animal Legal Defense Fund v. U.S. Dep't of Agriculture*, No. 17-949, 2017 WL 3478848, at *3-4 (N.D. Cal. Aug. 14, 2017); *Lion Raisins, Inc. v. U.S. Dep't of Agriculture*, 636 F. Supp. 2d 1081, 1115 (E.D. Cal. 2009). Accordingly, the APA claims in Count 7 must be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts 1 through 6 in full, and Count 7 in part for lack of jurisdiction.

Dated: October 6, 2017

Respectfully submitted,

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APPENDIX: 8 U.S.C. § 1103 NOTE (IN RELEVANT PART)

(Codifying Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 102, as amended)

IMPROVEMENT OF BARRIERS AT BORDER

Pub. L. 104–208, div. C, title I, § 102(a)–(c), Sept. 30, 1996, 110 Stat. 3009–554, 3009–555, as amended by Pub. L. 109–13, div. B, title I, § 102, May 11, 2005, 119 Stat. 306; Pub. L. 109–367, § 3, Oct. 26, 2006, 120 Stat. 2638; Pub. L. 110–161, div. E, title V, § 564(a), Dec. 26, 2007, 121 Stat. 2090, provided that:

"(a) IN GENERAL.—The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

"(b) CONSTRUCTION OF FENCING AND ROAD IMPROVEMENTS ALONG THE BORDER.—

"(1) ADDITIONAL FENCING ALONG SOUTHWEST BORDER.—

"(A) REINFORCED FENCING.—In carrying out subsection (a), the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

"(B) PRIORITY AREAS.—In carrying out this section [amending this section],* the Secretary of Homeland Security shall—

"(i) identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and

* Each of the brackets in the text reflects editorial notes by Office of Law Revision Counsel in preparing the text for publication in the U.S. Code. *See* Office of Law Revision Counsel, Detailed Guide to the United States Code Content and Features, § II(A) (link) ("The third type of [editorial] change involves inserting bracketed citation information in the text following a cross reference.").

aliens attempting to gain illegal entry into the United States; and

"(ii) not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

"(C) CONSULTATION.—

"(i) IN GENERAL.—In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

"(ii) SAVINGS PROVISION.—Nothing in this subparagraph may be construed to—

"(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

"(II) affect the eminent domain laws of the United States or of any State.

"(D) LIMITATION ON REQUIREMENTS.—Notwithstanding subparagraph (A), nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.

"(2) PROMPT ACQUISITION OF NECESSARY EASEMENTS.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. 1103(b)] (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

"(3) SAFETY FEATURES.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

> **"(4) AUTHORIZATION OF APPROPRIATIONS.**—There are authorized to be appropriated such sums as may be necessary to carry out this subsection. Amounts appropriated under this paragraph are authorized to remain available until expended.

"(c) WAIVER.—

> **"(1) IN GENERAL.**—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section [amending this section]. Any such decision by the Secretary shall be effective upon being published in the Federal Register.
>
> **"(2) FEDERAL COURT REVIEW.**—
>
> > **"(A) 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.
> >
> > **"(B) TIME FOR FILING OF COMPLAINT.**—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.
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> > **"(C) ABILITY TO SEEK APPELLATE REVIEW.**—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States."