

**Exhibits To Application To The Hon. Anthony Kennedy
For An Extension Of Time Within Which To File
A Petition For A Writ Of Certiorari To The
United States District Court For The Southern
District of California**

Exhibit	Description
1	Judgment in a Civil Case, <i>Center for Biological Diversity et. al. v. U.S. Dep't of Homeland Sec., et al.</i> , No. 17-cv-12-15-GPC-WVG (March 26, 2018)
2	Order Denying Plaintiffs' Motions for Summary Judgment and Granting Defendants' Motions for Summary Judgment, <i>In re Border Infrastructure Eenvtl. Litig.</i> , No. 17-1215-GPC-WVG (Feb. 27, 2018)
3	Order Granting Joint Motion for Dismissal of FOIA Claims, <i>In re Border Infrastructure Eenvtl. Litig.</i> , No. 17-cv-1215-GPC-WVG (March 26, 2018)
4	Application to the Hon. Anthony Kennedy for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States District Court for the Southern District of California ((17-cv-1873-GPC-WVG)
5	Application Granted by Justice Kennedy Extending the Time to File Until August 23, 2018

Exhibit 1



United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Center for Biological Diversity;
Defenders of Wildlife, a nonprofit
conservation organization; Sierra Club,
a nonprofit public benefit corporation;

Plaintiff,

V.

U.S. Department of Homeland Security;
U.S. Customs and Border Protections;
Elaine Duke, in her official capacity as
Acting Secretary, U.S. Department of

Defendant.

Civil Action No. 17-cv-1215-GPC-WVG

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

ORDER DENYING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT: The Court **DENIES** Plaintiffs' motions for summary judgment and **GRANTS** Defendants' motions for summary judgment

Date: 3/26/18

CLERK OF COURT

JOHN MORRILL, Clerk of Court

By: s/ D. Gilbert

D. Gilbert, Deputy

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

(ATTACHMENT)

Civil Action No. 17-cv-1215-GPC-WVG

People of the State of California, The, by and through Xavier Becerra, Attorney General; California Coastal Commission, The; Animal Legal Defense Fund

(Plaintiffs continued)

v.

Homeland Security; United States of America; Acting Commissioner Kevin K. McAleenan,
in his Official Capacity;

(Defendants continued)

Amicus
Members of the Congressional Hispanic Caucus

In Re
Border Infrastructure Environmental Litigation

Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

**IN RE: BORDER
INFRASTRUCTURE
ENVIRONMENTAL LITIGATION**

Case No.: 17cv1215-GPC(WVG)
Consolidated with:
17cv1873-GPC(WVG)
17cv1911-GPC(WVG)

**ORDER DENYING PLAINTIFFS'
MOTIONS FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

[Dkt. Nos. 18, 28, 29, 30, 35.]

These three consolidated cases involve challenges to Waiver Determinations made by former Secretaries of the Department of Homeland Security on August 2, 2017 and September 12, 2017 pursuant to section 102 of IIRIRA¹ waiving the legal requirements of

¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

1 NEPA,² the ESA,³ the CZMA⁴ and more than 30 additional laws not at issue in these
2 cases. The Waiver Determinations concern two types of border wall construction
3 projects in San Diego County: (1) the “border wall prototype project”; and (2) the
4 replacement of fifteen miles of existing border fence in the San Diego Sector and three
5 miles of existing border fence in the El Centro Sector (“border fence replacement
6 projects”). The Plaintiffs allege variously that (1) the Waivers are ultra vires acts that
7 exceed the authority delegated by Congress; and (2) the Waivers are unconstitutional acts
8 under a variety of legal doctrines.
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11 The Court is aware that the subject of these lawsuits, border barriers, is currently
12 the subject of heated political debate in and between the United States and the Republic
13 of Mexico as to the need, efficacy and the source of funding for such barriers. In its
14 review of this case, the Court cannot and does not consider whether underlying decisions
15 to construct the border barriers are politically wise or prudent. As fellow Indiana native
16 Chief Justice Roberts observed in addressing a case surrounded by political
17 disagreement: “Court[s] are vested with the authority to interpret the law; we possess
18 neither the expertise nor the prerogative to make policy judgments. Those decisions are
19 entrusted to our Nation’s elected leaders, who can be thrown out of office if the people
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26 ² National Environmental Policy Act of 1969.

27 ³ Endangered Species Act.

28 ⁴ Coastal Zone Management Act.

1 disagree with them. It is not our job to protect the people from the consequences of their
2 political choices.” Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012).

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4 Here, the Court will focus on whether Congress has the power under the Constitution to
5 enact the challenged law and whether the Secretary of Department of Homeland Security
6 properly exercised the powers delegated by Congress.

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8 Before the Court are three cross-motions for summary judgment. A hearing was
9 held on February 9, 2018. (Dkt. No. 44.) Michael Cayaban, Esq. and Noah Golden
10 Frasier, Esq. appeared on behalf of Plaintiffs People of the State of California and the
11 California Coastal Commission; Brian Segee, Esq. and Brendan Cummings, Esq.
12 appeared on behalf of Plaintiff Center for Biological Diversity; and Sarah Hanneken, Esq.
13 appeared on behalf of the Plaintiffs Defenders of Wildlife, Sierra Club, and Animal Legal
14 Defense Fund. (Id.) Galen Thorp, Esq. appeared on behalf of Defendants. (Id.) The
15 parties filed supplemental briefs on February 13, 2018. (Dkt. Nos. 46, 47, 48, 49.)

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18 Based on the parties’ briefs, the supporting documentation, the applicable law, the
19 arguments made at the hearing and the supplemental briefing, the Court DENIES
20 Plaintiffs’ motions for summary judgment and GRANTS Defendants’ motions for
21 summary judgment.

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I. BACKGROUND

**A. Section 102 of Illegal Immigration Reform and Immigrant
Responsibility Act**

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which, pursuant to Section 102(a), required the Attorney General 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), 110 Stat. 3009, 3009–554 (1996), codified at 8 U.S.C. § 1103 note. IIRIRA Section 102(c), as originally enacted, authorized the Attorney General to waive the Endangered Species Act of 1973 (“ESA”) and the National Environmental Policy Act of 1969 (“NEPA”) when he determined such waiver “was necessary to ensure expeditious construction of the barriers and roads under this section.” *Id.* § 102(c). The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service and transferred responsibility for the construction of border barriers from the Attorney General to the Department of Homeland Security (“DHS”). Pub. L. No. 107–296, 116 Stat. 2135 (2002). In 2005, the REAL ID Act, Pub. L. No. 109–13, Div. B, Title I, § 102, 119 Stat. 231, 302, 306 (May 11, 2005), amended the waiver authority of section 102(c) expanding the Secretary of DHS’ authority to waive “all legal requirements” that the Secretary, in his or her own

1 discretion, determines “necessary to ensure expeditious construction of the barriers and
2 roads under this section.” Id. It also added a judicial review provision that limited the
3 district court’s jurisdiction to hear any causes or action concerning the Secretary’s waiver
4 authority to solely constitutional claims. Id. § 102(c)(2)(A). Further, the provision
5 foreclosed appellate court review and directed any review of the district court’s decision
6 be raised by petition for a writ of certiorari with the Supreme Court of the United States.
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8 Id. § 102(c)(2)(C).

10 Section 102 consists of three sections: (1) section 102(a) describes the general
11 purpose of the statute; (2) section 102(b) specifies Congress’ mandate for specific border
12 barrier construction; and (3) section 102(c) grants the Secretary the discretion to waive
13 “all legal requirements” he or she “determines necessary to ensure expeditious
14 construction of the barriers and roads” and provides for limited judicial review of the
15 Secretary’s waiver decision to solely constitutional violations. See 8 U.S.C. § 1103 note.
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18 Since its enactment in 1996, IIRIRA section 102 has been amended three times
19 although the general purpose of the statute under section 102(a) has remained the same.
20 When IIRIRA was first enacted in 1996, section 102(b) mandated “construction along the
21 14 miles of the international land border of the United States, starting at the Pacific
22 Ocean and extending eastward of second and third fences, in addition to the existing
23 reinforced fence, and for roads between the fences.” 8 U.S.C. § 1103(b) (1996).
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1 The Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638 (Oct. 26,
2 2006), amended the specific mandates of section 102(b). It directed the DHS to “provide
3 for at least 2 layers of reinforced fencing, [and] the installation of additional physical
4 barriers, roads, lighting, cameras, and sensors” in five specific segments along the U.S.-
5 Mexico border encompassing the states of California, Arizona, New Mexico and Texas.
6 Id. It also set dates of completion for two segments to be completed by certain dates in
7 2008. Id.

10 Fourteen months later, the Consolidated Appropriations Act of 2008, Pub. L. No.
11 110-161, Div. E, Title V § 564, 121 Stat. 2090 (Dec. 26, 2007), again amended the
12 mandates of section 102(b) and they currently remain the operative version of the statute.
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14 In its current version, section 102, codified at 8 U.S.C. § 1103 note, provides,

15 **(a) In general.**--The Secretary of Homeland Security shall take such actions
16 as may be necessary to install additional physical barriers and roads
17 (including the removal of obstacles to detection of illegal entrants) in the
18 vicinity of the United States border to deter illegal crossings in areas of high
19 illegal entry into the United States.

20 **(b) Construction of fencing and road improvements along the border.**--

21 **(1) Additional fencing along southwest border.**--

22 **(A) Reinforced fencing.**--In carrying out subsection (a) [of this
23 note], the Secretary of Homeland Security shall construct reinforced
24 fencing along not less than 700 miles of the southwest border where
25 fencing would be most practical and effective and provide for the
26 installation of additional physical barriers, roads, lighting, cameras,
27 and sensors to gain operational control of the southwest border.
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1 **(B) Priority areas.**--In carrying out this section [Pub. L. 104-208,
2 Div. C, Title I, § 102, Sept. 30, 1996, 110 Stat. 3009-554, which
3 amended this section and enacted this note], the Secretary of
4 Homeland Security shall--

5 (i) identify the 370 miles, or other mileage determined by the
6 Secretary, whose authority to determine other mileage shall expire on
7 December 31, 2008, along the southwest border where fencing would
8 be most practical and effective in deterring smugglers and aliens
9 attempting to gain illegal entry into the United States; and

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

12 **(C) Consultation.**--

13 (i) **In general.**--In carrying out this section, the Secretary of
14 Homeland Security shall consult with the Secretary of the Interior, the
15 Secretary of Agriculture, States, local governments, Indian tribes, and
16 property owners in the United States to minimize the impact on the
17 environment, culture, commerce, and quality of life for the
18 communities and residents located near the sites at which such fencing
19 is to be constructed.

20 (ii) **Savings provision.**--Nothing in this subparagraph may be
21 construed to—

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

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

26 **(D) Limitation on requirements.**--Notwithstanding subparagraph
27 (A), nothing in this paragraph shall require the Secretary of Homeland
28 Security to install fencing, physical barriers, roads, lighting, cameras,
29 and sensors in a particular location along an international border of
30 the United States, if the Secretary determines that the use or
31 placement of such resources is not the most appropriate means to

1 achieve and maintain operational control over the international border
2 at such location.

3 **(2) Prompt acquisition of necessary easements.**--The Attorney General,
4 acting under the authority conferred in section 103(b) of the Immigration
5 and Nationality Act (as inserted by subsection (d)) [subsec. (b) of this
6 section], shall promptly acquire such easements as may be necessary to carry
7 out this subsection and shall commence construction of fences immediately
8 following such acquisition (or conclusion of portions thereof).

9 **(3) Safety features.**--The Attorney General, while constructing the
10 additional fencing under this subsection, shall incorporate such safety
11 features into the design of the fence system as are necessary to ensure the
12 well-being of border patrol agents deployed within or in near proximity to
13 the system.

14 **(4) Authorization of appropriations.**--There are authorized to be
15 appropriated such sums as may be necessary to carry out this subsection.
16 Amounts appropriated under this paragraph are authorized to remain
17 available until expended.

18 **(c) Waiver.**--

19 **(1) In general.**--Notwithstanding any other provision of law, the Secretary
20 of Homeland Security shall have the authority to waive all legal
21 requirements such Secretary, in such Secretary's sole discretion, determines
22 necessary to ensure expeditious construction of the barriers and roads under
23 this section. Any such decision by the Secretary shall be effective upon
24 being published in the Federal Register.

25 **(2) Federal court review.**--

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

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2 **(B) Time for filing of complaint.**--Any cause or claim brought
3 pursuant to subparagraph (A) shall be filed not later than 60 days after
4 the date of the action or decision made by the Secretary of Homeland
5 Security. A claim shall be barred unless it is filed within the time
6 specified.

7 **(C) Ability to seek appellate review.**--An interlocutory or final
8 judgment, decree, or order of the district court may be reviewed only
9 upon petition for a writ of certiorari to the Supreme Court of the
10 United States.”

11 8 U.S.C. § 1103 note (hereinafter “8 U.S.C. § 1103”).

12 **B. Factual Background**

13 On January 25, 2017, President Donald J. Trump issued Executive Order No.
14 13767 entitled “Border Security and Immigration Enforcement Improvements.” (Dkt.
15 No. 30-5, Cayaban Decl., Ex. 7, Executive Order, 82 Fed. Reg. 8793.) Section 4 of the
16 Executive Order No. 13767 concerns “Physical Security of the Southern Border of the
17 United States” and provides, in part,

18 The Secretary shall immediately take the following steps to obtain complete
19 operational control, as determined by the Secretary, of the southern border:

20 (a) In accordance with existing law, including the Secure Fence Act and
21 IIRIRA, take all appropriate steps to immediately plan, design, and construct
22 a physical wall along the southern border, using appropriate materials and
23 technology to most effectively achieve complete operational control of the
24 southern border;

25 (d) Produce a comprehensive study of the security of the southern border, to
26 be completed within 180 days of this order, that shall include the current
27 state of southern border security, all geophysical and topographical aspects
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1 of the southern border, the availability of Federal and State resources
2 necessary to achieve complete operational control of the southern border,
3 and a strategy to obtain and maintain complete operational control of the
4 southern border.

5 (Id. at §§ 4(a) & (d).) “‘Wall’ shall mean a contiguous, physical wall or other similarly
6 secure, contiguous, and impassable physical barrier.” (Id. at § 3(e).)

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8 On August 2, 2017, former DHS Secretary John Kelly issued a Determination
9 Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility
10 Act of 1996, as Amended (“August 2 Waiver Determination” or “San Diego Waiver”) in
11 the Federal Register invoking section 102(c)’s waiver of the application of NEPA, the
12 ESA, the Coastal Zone Management Act (“CZMA”) and more than thirty additional laws
13 not at issue in this lawsuit to “various border infrastructure projects” in the “Project
14 Area,” which is defined as “an approximately fifteen mile segment of the border within
15 the San Diego Sector that starts at the Pacific Ocean and extends eastward,” starting at
16 “the Pacific Ocean and extending to approximately one mile east of Border Monument
17 251.” (Dkt. No. 30-6, Cayaban Decl., Ex. 11, 82 Fed. Reg. 35,984-85.) Secretary Kelly
18 determined that the Project Area “is an area of high illegal entry.” (Id. at 35,985.)
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21 Two projects are specified in the August 2 Waiver Determination. (Id. at 35,984-
22 85.) One project is the replacement of about 15 miles of existing primary fencing near
23 San Diego. (Id.) The second project is the construction of prototype border walls on the
24 eastern end of the secondary barrier near San Diego. (Id. at 35,984; Dkt. No. 18-2, Ds’
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1 Index of Exs., Ex. 14, Memorandum, Construction and Evaluation of Border Wall
2 Prototypes, U.S. Border Patrol, San Diego Sector, California (Sept. 25, 2017).)

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4 On September 12, 2017, former DHS Acting Secretary Elaine Duke, issued a
5 Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant
6 Responsibility Act of 1996, as Amended (“September 12 Waiver Determination” or
7 “Calexico Waiver”) in the Federal Register also invoking section 102(c)’s waiver
8 authority as to compliance with NEPA, the ESA and numerous other statutes not at issue
9 in this lawsuit to the Project Area in the El Centro Sector. (Dkt. No. 30-6, Cayaban
10 Decl., Ex. 12, 82 Fed. Reg. 42,829-30.) Secretary Duke determined that the “El Centro
11 Sector is an area of high illegal entry.” (Id. at 42,830.) The Determination seeks to build
12 a replacement fence in the El Centro Sector “along an approximately three mile segment
13 of the border that starts at the Calexico West Land Port of Entry and extends westward.”
14 (Id.)

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18 Contracts for the prototype project were awarded on August 31 and September 7,
19 2017. (Dkt. No. 39-1, Cal. Ps’ Response to Ds’ SSUF, No. 10.) Construction for the
20 prototypes began on September 26, 2017 and was completed on October 26, 2017. (Dkt.
21 No. 49-4, Enriquez Decl. ¶ 11.) Construction of the Calexico three-mile replacement
22 fence was set to begin on February 15, 2018 while the San Diego Sector replacement
23 fence is scheduled for construction in August 2018. (Id. ¶¶ 10, 36.)

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C. Procedural History

On September 6, 2017, Plaintiff Center for Biological Diversity (“Center Plaintiff”) filed its operative second amended complaint (“SAC”) for declaratory and injunctive relief against U.S. Department of Homeland Security (“DHS”); U.S. Customs and Border Protection (“CBP”); and Elaine Duke, Acting Secretary of U.S. Department of Homeland Security challenging the August 2 Waiver Determination under section 102 of IIRIRA concerning the two border wall construction projects located in the San Diego Sector.⁵ (Dkt. No. 16, SAC.)

On November 21, 2017, Plaintiffs Defenders of Wildlife, Sierra Club and Animal Legal Defense Fund (“Coalition Plaintiffs”) filed their operative first amended complaint (“FAC”) against DHS; Elaine Duke, Acting Secretary of DHS; and United States of America for declaratory and injunctive relief for violations of section 102 and constitutional claims concerning the two border wall construction projects located in the San Diego and El Centro Sectors based on the two Waiver Determinations.⁶ (Dkt. No. 26.)

⁵ Center Plaintiff alleges causes of action for (1) ultra vires violations of section 102(c); (2) violation of the Take Care Clause under Article II, Section 3 of the U.S. Constitution; (3) violation of the separation of powers of the U.S. Constitution; (4) violation of the Presentment Clause under Article I, Section 7 of the U.S. Constitution; (5) violations of NEPA; (6) violations of ESA; and (7) violation of the Freedom of Information Act (“FOIA”), and alternatively, violation of the Administrative Procedure Act (“APA”). (Dkt. No. 16, Ctr. Ps’ SAC.)

⁶ The Coalition Plaintiffs’ FAC alleges (1) ultra vires agency action under section 102(c); (2) violation of sections 102(a) and 102(b)(1)(C); (3) violation of the Presentment Clause under Article I, Section 7

1 On September 20, 2017, People of the State of California (“California”) and the
2 California Coastal Commission (collectively “California Plaintiffs”) filed a complaint
3 against United States of America; DHS; Acting Secretary of DHS Elaine Duke; CBP; and
4 Acting Commissioner of CBP Kevin K. McAleenan. (Dkt. No. 17cv1911, Dkt. No. 1.)
5 The complaint alleges declaratory and injunctive relief based on numerous violations of
6 the U.S. Constitution, and statutes relating to the border wall construction projects in the
7 San Diego and El Centro Sectors based on the two Waiver Determinations.⁷

8 In summary, all Plaintiffs⁸ allege the Secretaries’ Waiver Determinations are ultra
9 vires acts that are not authorized under section 102. Because the Waiver Determinations
10 are void based on the ultra vires acts of the Secretaries, Plaintiffs also assert violations of
11 NEPA, ESA, CZMA and the APA. Plaintiffs also allege the following violations of the
12 U.S. Constitution:

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19 of the U.S. Constitution; (4) violation of non-delegation doctrine under Article I, Section 1 and Article
20 II, Section 1 of the U.S. Constitution; and (5) violations of Article III, the First Amendment right to
21 petition, the Tenth Amendment by removing concurrent jurisdiction of state courts, and due process
22 rights under the Fifth Amendment of the U.S. Constitution. (Dkt. No. 26.)

23 ⁷ The California Plaintiffs’ complaint seeks declaratory and/or injunctive relief claiming Defendants (1)
24 failed to comply with NEPA and the APA; (2) failed to comply with the CZMA and the APA; (3) the
25 Border Wall Projects are not authorized by section 102 based on ultra vires actions; (4) the Secretary’s
26 waiver authority expired on December 31, 2008; (5) the Waivers are invalid because they fail to satisfy
27 section 102’s requirements; (6) violation of Article III of the U.S. Constitution and the due process
28 clause of the Fifth Amendment; (7) violation of the separation of powers doctrine; (8) violation of Article
I, Section 1 of the U.S. Constitution; (9) violation of Article I, Section 3 of the U.S. Constitution; (10)
violation of Article I, Section 7 of the U.S. Constitution; and (11) violation of the Tenth Amendment of
the U.S. Constitution.

⁸ Center Plaintiff only challenges the August 2, 2017 Waiver Determination while Coalition Plaintiffs
and California Plaintiffs challenge both the August 2, and September 12, 2017 Waiver Determinations.

- Violation of Article I, Section 1 - the Non-Delegation Doctrine/Separation of Powers (by all Plaintiffs)
- Violation of Article II, Section 3 - Take Care Clause (by Center Plaintiff)
- Violation of Article I, Sections 2 & 3 (by California Plaintiffs)
- Violation of Article I, Section 7 - Presentment Clause (by all Plaintiffs)
- Violation of Due Process, Article III, and First Amendment right to petition the government (by Coalition Plaintiffs and California Plaintiffs)
- Violation of the Tenth Amendment - Concurrent State and Federal Jurisdiction (by Coalition Plaintiffs)
- Violation of the Tenth Amendment (by California Plaintiffs)

On October 24, 2017, the Court granted the parties' joint motion to consolidate the three cases and the parties' agreed upon briefing schedule on their cross-motions for summary judgment. (Dkt. Nos. 21, 22.)

Prior to consolidation, on October 6, 2017, Defendants filed a motion to dismiss Center Plaintiff's second amended complaint which was converted to a motion for summary judgment in the Court's consolidation order. (Dkt. Nos. 18, 22.) On November 22, 2017, Center Plaintiff filed a cross-motion for summary judgment⁹ and an opposition

⁹ Center Plaintiff notes that its FOIA claim, Claim 7, is not subject to the cross-motions and will be resolved either via settlement or separate briefing. (Dkt. No. 28-1 at 14 n. 1.) Defendants agree arguing that the FOIA claim is not yet ripe for adjudication but also argue that the alternative APA claim regarding the processing of the FOIA requests should be dismissed since FOIA, itself, provides an

1 to Defendants' motion for summary judgment. (Dkt. No. 28.) On December 20, 2017,
2 Defendants filed an omnibus brief that included their reply in support of their motion for
3 summary judgment and an opposition to Center Plaintiff's motion for summary
4 judgment. (Dkt. No. 35.) On January 5, 2018, Center Plaintiff filed a reply to
5 Defendants' opposition. (Dkt. No. 36.)

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7 On November 22, 2017, Coalition Plaintiffs and the California Plaintiffs filed their
8 motions for summary judgment. (Dkt. Nos. 29, 30.) On December 20, 2017, all
9 Defendants filed an omnibus cross-motion for summary judgment and opposition to
10 Coalition and California Plaintiffs' motions for summary judgment. (Dkt. No. 35.)

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12 On January 5, 2018, the Coalition Plaintiffs and California Plaintiffs separately
13 filed their oppositions to Defendants' cross-motion for summary judgment and replies to
14 their motions. (Dkt. Nos. 38, 39.) On January 23, 2018, Defendants filed their reply to
15 their cross-motion for summary judgment. (Dkt. No. 42.)

16 17 18 **II. ANALYSIS**

19 20 **A. Legal Standard on Motion for Summary Judgment**

21 Federal Rule of Civil Procedure 56 empowers the Court to enter summary
22 judgment on factually unsupported claims or defenses, and thereby "secure the just,
23 speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477

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27 adequate remedy. (Dkt. No. 35-1 at 94-95.) The Court declines to address the alternative APA claim
28 based on the FOIA requests until after the FOIA claim, itself, is resolved.

1 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the “pleadings,
2 depositions, answers to interrogatories, and admissions on file, together with the
3 affidavits, if any, show that there is no genuine issue as to any material fact and that the
4 moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is
5 material when it affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477
6 U.S. 242, 248 (1986). “Where the record taken as a whole could not lead a rational trier
7 of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” Matsushita
8 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

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12 **B. Article III Standing as to the State of California**

13 The State of California argues it has Article III standing because it will suffer
14 injury to its real property that it owns and manages adjacent to the border wall projects.¹⁰
15 It contends that the Waiver Determinations infringe on California’s procedural and
16 sovereign rights in creating and enforcing its own laws and obtaining benefits provided
17 under NEPA and the APA. Defendants respond that California has not carried its burden
18 to establish standing as to each of its numerous claims and has not demonstrated that the
19 Waiver Determinations impact state laws which would be enforceable in connection with
20 the projects at issue.
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26 ¹⁰ Initially, California argued it has a concrete and particularized interest in protecting its natural,
27 recreational, agricultural, historical, and cultural resources for the use, enjoyment and benefit of its
28 residents but did not reassert these interests in its reply.

Article III, Section 2 of the United States Constitution requires that a plaintiff have standing to bring a claim. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In order “to satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (citing Lujan, 504 U.S. at 560–61). The party seeking federal jurisdiction has the burden of establishing its existence. Lujan, 504 U.S. at 561. “A plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” Davis v. Fed. Election Comm’n, 552 U.S. 724, 734 (2008).

States have a “procedural right” and “quasi-sovereign interests” in protecting its natural resources, such as air quality. Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (“EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’”). In Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), the State of Georgia filed an action to protect its citizens from air pollution originating from outside its borders and the Court asserted that a state, in its capacity as a quasi-sovereign, has an “interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether

1 its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

2 Id.

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4 Here, the parties dispute whether California has demonstrated an injury in fact,
5 and whether the injury in fact is traceable to the Waiver Determinations. As held by the
6 U.S. Supreme Court, California has a procedural right and quasi-sovereign right in the
7 environmental protections afforded by NEPA and the APA. See id. California provided
8 declarations from experts detailing the possible harm to the Tijuana Estuary and harm to
9 rare, threatened or endangered species. (Dkt. No. 30-7, Clark Decl.; Dkt. No. 30-8,
10 Vanderplank Decl.; Dkt. No. 30:9, Delaplaine Decl.) Eight prototype walls have already
11 been constructed demonstrating that the injury is actual and the El Centro Sector border
12 fence replacement project, which is currently undergoing consultation and may have
13 already begun construction, is also imminent. The Court concludes that California has
14 demonstrated an injury-in-fact that is concrete and particularized, and actual or imminent.
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18 Moreover, California argues it has a legally protected sovereign interest in creating
19 and enforcing its own laws. The Waiver Determinations will preclude the enforcement of
20 California’s laws which will affect its sovereign interests. Defendants object because
21 Plaintiffs merely string cite to eight state code or regulations without explaining how
22 these provisions apply to the projects at issue. But, as noted by Plaintiff, the Waiver
23 Determinations do not identify which California law or regulation Defendants are
24 waiving and as an example it provides some provisions where the waiver would bar
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1 California's enforcement of its laws as to DHS, its contractors, or to the State's
2 permitting authority or other legal actions.

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4 It is not disputed that the Waiver Determinations waive all legal requirements and
5 include related state laws. (See Dkt. No. 30-6, Cayaban Decl., Ex. 11, 82 Fed. Reg.
6 35,984-85; id., Ex. 12, 82 Fed. Reg. 42,829-30.) Defendants do not deny that California
7 state laws are being waived. The Court agrees with California that a bar to enforcing its
8 own state laws related to the border wall projects is an injury in fact that supports Article
9 III standing. The Court concludes that California has Article III standing.
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12 **C. Whether the Court has Jurisdiction Over Plaintiffs' Non-Constitutional**
13 **Claims based on Ultra Vires Acts of the Secretary of the DHS**

14 Defendants contend that the Court lacks jurisdiction to consider Plaintiffs' non-
15 constitutional claims, including whether the Secretaries' actions concerning the two
16 Waiver Determinations are ultra vires. They explain that section 102 explicitly expresses
17 Congress' intent to bar the district court from exercising jurisdiction over any claims
18 arising from the Secretary of DHS's waiver determination except for a constitutional
19 violation. Plaintiffs argue that the Court may consider whether the Waivers exercised by
20 the Secretaries constitute ultra vires acts as they exceed the authority granted to the
21 Secretaries under section 102; therefore, they contend section 102(c)(2)'s judicial review
22 bar on non-constitutional claims does not apply. For the reasons stated below, the Court
23 finds that it may consider whether the Secretaries have violated any clear and mandatory
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1 statutory obligations set forth in section 102. Finding that there are no such violations,
2 the Court upholds the jurisdictional bar and concludes that it does not have the
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4 jurisdiction to hear any claims other than constitutional claims.

5 Section 102(c)(2)(A) provides that the “district courts of the United States shall
6 have exclusive jurisdiction to hear all causes or claims arising from any action
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8 undertaken, or any decision made, by the Secretary of Homeland Security pursuant to
9 paragraph (1) [the waiver provision]. A cause of action or claim may only be brought
10 alleging a violation of the Constitution of the United States. The court shall not have
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12 jurisdiction to hear any claim not specified in this subparagraph.” 8 U.S.C. §
13 1103(c)(2)(A).

14 As a starting point, there is a “strong presumption that Congress intends judicial
15 review of administrative action.” Bowen v. Michigan Acad. of Family Physicians, 476
16 U.S. 667, 670 (1986); El Paso Natural Gas Co. v. United States, 632 F.3d 1272, 1276
17 (D.C. Cir. 2011) (quoting Bowen, 476 U.S. at 670) (“When considering whether a statute
18 bars judicial review, ‘[w]e begin with the strong presumption that Congress intends
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20 judicial review of administrative action.’”). In order to overcome the strong presumption,
21 there must be “clear and convincing” evidence of a contrary legislative intent. Bowen,
22 476 U.S. at 671-72. The strong presumption may be overcome by “specific language or
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24 specific legislative history that is a reliable indicator of congressional intent,” or a
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1 “specific congressional intent to preclude judicial review that is ‘fairly discernible’ in the
2 detail of the legislative scheme.” Id. at 673.

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4 In this case, the Center Plaintiff does not dispute that the presumption favoring
5 judicial review has been overcome by the express language of section 102(c)(1) and does
6 not challenge Defendants’ argument on this issue. Instead, all Plaintiffs argue that the
7 August 2, 2017 and September 12, 2017 Waiver Determinations constitute ultra vires acts
8 of the Secretary that do not fall under section 102 because the Waivers are not authorized
9 by sections 102(a) or (b) and were not decisions made “pursuant to” section 102(c)(1).
10 Therefore, according to Plaintiffs, section 102(c)(2) does not apply, and the Waiver
11 Determinations are subject to review by the Court. Defendants respond that Plaintiffs
12 cannot bypass the jurisdictional bar by framing their claims as ultra vires challenges
13 when judicial review is expressly prohibited. They argue that the Court should consider
14 the plain meaning of section 102(c)(2) and that should be the end of the matter.
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18 Here, Congress expressly barred the district court’s review of non-constitutional
19 claims under section 102(c)(2), and this provision rebuts the strong presumption favoring
20 judicial review of administrative actions. However, the United States Supreme Court has
21 identified a narrow exception to an express statutory bar on judicial review when there is
22 a claim that an agency acted beyond its statutory authority. See Leedom v. Kyne, 358
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1 U.S. 184 (1958);¹¹ Bd. of Governors of Fed. Reserve Sys. v. MCorp. Fin., Inc., 502 U.S.
2 32 (1991); see also Dart v. United States, 848 F.2d 217 (D.C. Cir. 1988).

3
4 In Kyne, the Supreme Court held that a district court had jurisdiction to review a
5 non-final agency order “made in excess of its delegated powers and contrary to a specific
6 prohibition in the [National Labor Relations Act].” Kyne, 358 U.S. at 188. The Kyne
7 court found that a National Labor Relations Board’s (“NLRB”) determination that a unit
8 involving both professional and non-professional employees was appropriate for
9 collective bargaining purposes was in excess of delegated powers because it was in direct
10 conflict with the provisions of § 9(b)(1) of the National Labor Relations Act (“NLRA”)
11 dictating that it “shall not” do so “unless a majority of such professional employees vote
12 for inclusion in such unit.” Kyne, 358 U.S. at 185. Consequently, the district court had
13 jurisdiction to set aside a certification of the NLRB where that agency had refused to poll
14 professional employees before combining them in a bargaining unit with non-
15 professional employees. Id. at 188-89. In the ordinary case, a decision certifying a
16 bargaining unit is not a final order that can be reviewed but the Court explained that first,
17 the “suit [was] not one to ‘review,’ in the sense of that term as used in the Act, a decision
18 of the Board made within its jurisdiction. Rather, it [was] one to strike down an order of
19 the Board made in excess of its delegated powers and contrary to a specific prohibition in
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27 ¹¹ Plaintiffs note that the ability to bring an ultra vires claim was first recognized by the Supreme Court
28 decades earlier in American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902).

1 the Act.” Id. at 188. Second, because, in the ordinary case, only an employer can initiate
2 an unfair labor practice charge, and ultimately a reviewable final order, by refusing to
3 bargain after an election, the aggrieved employees in this case had “no other means,
4 within their control . . . to protect and enforce” their statutory rights. Id. at 190. In other
5 words, “absence of jurisdiction of the federal courts would mean a sacrifice or
6 obliteration of a right which Congress has given professional employees.” Id. In
7 conclusion, the Court stated it “cannot lightly infer that Congress does not intend judicial
8 protection of rights it confers against agency action taken in excess of delegated powers.”
9 Id.

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13 MCorp Fin., Inc., relied on by Defendants, involved an express bar on judicial
14 review, and the Court found the Fifth Circuit erred when it held that it had jurisdiction to
15 consider the merits of MCorp’s challenge to the Board of Governors of the Federal
16 Reserve System (“Board”) and held that the Financial Institutional Supervisory Act’s
17 (“FISA”) preclusion provision barred judicial review of pending Board administrative
18 actions. MCorp Fin., Inc., 502 U.S. at 43-44.

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21 In its analysis, the Court distinguished its ruling from Kyne noting two differences.
22 First, the Court noted that “central” to its decision in Kyne was “the fact that the Board’s
23 interpretation of the Act would wholly deprive the union of a meaningful and adequate
24 means of vindicating its statutory right.” Id. at 43. In MCorp. Fin., Inc., FISA provided
25 MCorp with a meaningful and adequate opportunity for judicial review by challenging
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1 the Board's findings. Id. at 43-44. Second, the Court emphasized "the clarity of the
2 congressional preclusion of review in FISA" where Congress clearly stated: "no court
3 shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of
4 any [Board] notice or order under this section, or to review, modify, suspend, terminate,
5 or set aside any such notice or order." Id. at 44 (quoting 12 U.S.C. § 1818(i)(1)). In
6 Kyne, the statutory provision implied, by its silence, a preclusion of review. Id. In
7 contrast, FISA provides "clear and convincing evidence that Congress intended to deny
8 the district court's jurisdiction to review and enjoin the Board's ongoing administrative
9 proceedings." Id. The Court reversed the decision by the Fifth Circuit and held that it
10 did not have jurisdiction to consider MCorp's challenge. Id. at 44-45.

14 Next, in Dart, relied on by Plaintiffs, the D.C. Circuit held that the Secretary of
15 Commerce's reversal of the administrative law judge's decision exceeded his authority
16 under the Export Administration Act ("EAA"). Dart, 848 F.2d at 231. The EAA
17 provides two finality clauses that certain "functions exercised under the Act" were
18 excluded from certain sections of the APA and the "Secretary shall, in a written order,
19 affirm, modify, or vacate the decision of the administrative law judge. The order of the
20 Secretary shall be final and is not subject to judicial review." Id. at 221. Because the
21 Secretary did not "affirm, modify or vacate" the ALJ's decision but instead reversed, it
22 was not among the orders placed beyond review of the finality provision. Id. at 227. The
23 D.C. Circuit held that review is available when the Secretary exercises functions that are
24

1 not specified in the statute. Id. at 221. In explaining its ruling, it stated the even “where
2 Congress is understood generally to have precluded review, the Supreme Court has found
3 an implicit but narrow exception, closely paralleling the historic origins of judicial review
4 for agency actions in excess of jurisdiction.” Id. The court’s analysis focused on the
5 plain language of the statute, the structure of the statutory scheme, the legislative history,
6 and the nature of the administrative action involved. Id. at 224-27. It concluded that the
7 presumption of judicial review applied in that case, explaining that the finality clause did
8 not preclude judicial review of facial violations of the statute. Id. at 222 (citing Kyne,
9 358 U.S. 184).

13 The Dart court recognized that “[w]hen an executive acts *ultra vires*, courts are
14 normally available to reestablish the limits on his authority.” Id. at 224. However, the
15 court noted that the “exception for review of facial violations should remain narrow.”
16 Id. at 231. It also explained that “Congress’ finality clause must be given effect, and an
17 agency action allegedly ‘in excess of authority’ must not simply involve a dispute over
18 statutory interpretation or challenged findings of fact.” Id. The court recognized that
19 invoking the exception is “extraordinary” noting “that to justify such jurisdiction, there
20 must be a ‘specific provision of the Act which, although it is [] clear and mandatory, []’
21 was nevertheless violated.” Id. (quoting Council of Prison Locals v. Brewer, 735 F.2d
22 1497, 1501 (D.C. Cir. 1984) (citation omitted)). The court in Dart concluded that the
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1 “requirement that the Secretary of Commerce ‘affirm, modify or vacate’ ALJ
2 enforcement decisions was ‘clear and mandatory’ and was nevertheless violated.” Id.

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4 The exception to the statutory bar on judicial review is an “extremely narrow one”
5 and “extraordinary.” Nat’l Air Traffic Controllers Ass’n AFL–CIO v. Fed. Serv.
6 Impasses Panel, 437 F.3d 1256, 1263 (D.C. Cir. 2006); American Airlines, Inc. v.
7 Herman, 176 F.3d 283, 293 (5th Cir. 1999) (courts “have interpreted Kyne as sanctioning
8 [review] in a very narrow situation in which there is a ‘plain’ violation of an
9 unambiguous and mandatory provision of the statute.”). The D.C. Circuit described that
10 a Kyne claim is “essentially a Hail Mary pass—and in court as in football, the attempt
11 rarely succeeds.” Nyunt v. Chairman, Broad. Bd. of Governors, 589 F.3d 445, 449 (D.C.
12 Cir. 2009).

13
14 In sum, in order for the Kyne exception to apply, a plaintiff must satisfy the
15 following two factors: 1) that the agency acted “in excess of its delegated powers”
16 contrary to “clear and mandatory statutory language” and 2) “the party seeking review
17 must be ‘wholly deprive[d] . . . of a meaningful and adequate means of vindicating its
18 statutory rights.” Pac. Mar. Ass’n v. NLRB, 827 F.3d 1203, 1208 (9th Cir. 2016)
19 (citations omitted); Nat’l Air Traffic Controllers, 437 F.3d at 1263 (the Kyne exception
20 can apply to cases involving “either negative or positive statutory commands.”).

21
22 Courts have cautioned that “review of an ‘agency action allegedly in excess of
23 authority must not simply involve a dispute over statutory interpretation.” Herman, 176
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1 F.3d at 293 (quoting Kirby Corp. v. Pena, 109 F.3d 258, 269 (5th Cir. 1997)); Dart, 848
2 F.2d at 231 (noting that facial challenges to agency action as allegedly “in excess of
3 authority’ must not simply involve a dispute over statutory interpretation or challenged
4 findings of fact.”); see also Nebraska State Legislative Bd., United Transp. Union v.
5 Slater, 245 F.3d 656, 659-60 (8th Cir. 2001). For example, in Baxter Healthcare Corp. v.
6 Weeks, 643 F. Supp. 2d 111 (D.D.C. 2009), the court explained that Health and Human
7 Services (“HHS”) has the “authority under the Medicare statute to determine whether a
8 product is a single source drug, a biological, or a multiple source drug.” Id. at 115 n. 2.
9 Whether HHS made the correct determination about [the drug] is a “dispute over
10 statutory interpretation” that does not rise to the level of an ultra vires claim.” Id.

11
12 Contrary to Defendants’ argument that the Court cannot even consider whether the
13 two Waivers were ultra vires acts, courts have consistently conducted judicial review of
14 facial, ultra vires claims despite a statutory bar on judicial review.¹² See Lindahl v. OPM,
15 470 U.S. 768, 789, 791 (1985) (statutory bar did not bar review of alleged errors of law
16 or procedure but it did bar review of factual determinations); Dart, 848 F.2d at 225;
17 Staacke v. U.S. Sec’y of Labor, 841 F.2d 278, 281 (9th Cir. 1988) (noting review is

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25 ¹² The parties dispute the origins of ultra vires review. Coalition Plaintiffs claim courts have inherent
26 authority to review ultra vires jurisdiction, (Dkt. No. 29-1 at 19; Dkt. No. 38 at 7), while Defendants
27 argue that ultra vires review is an application of the rebuttable presumption of congressional intent in
28 favor of judicial review. (Dkt. No. 35-1 at 35; Dkt. No. 42 at 20.) A decision on the origins of ultra
vires review is not dispositive and the Court declines to resolve this issue.

1 available “where defendant is charged with violating a clear statutory mandate or
2 prohibition” even where a statute “absolutely bars judicial review”); Oestereich v.
3 Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968) (despite an express
4 preclusion of pre-induction review, the Court reversed the plaintiff’s draft classification);
5 Spencer Enters., Inc. v. United States, 345 F.3d 683, 689 (9th Cir. 2003) (courts retain
6 jurisdiction to review whether a particular decision of the Attorney General is ultra vires
7 despite the discretion granted to the Attorney General).

10 Even the cases relied upon by Defendants fail to support their position. In Staacke,
11 the Ninth Circuit stated that on a claim that the defendant violated a clear statutory
12 mandate or prohibition, the court may consider the claim despite a judicial bar but its
13 “task is limited to determining whether the statute in question contains a clear command
14 that the Secretary has transgressed.” Staacke, 841 F.2d at 282. After determining there
15 was no violation of a clear statutory mandate, the Ninth Circuit upheld the bar on judicial
16 review. Id. Similarly, in Gebhardt v. Nielson, 879 F.3d 980, 989 (9th Cir. 2018), the
17 Ninth Circuit affirmed a judgment of the district court, which dismissed an action based
18 on a judicial bar on the Secretary’s discretion in making “no risk” determinations. Id. at
19 989. The Secretary of DHS denied the plaintiff’s petitions for permanent resident status
20 filed on behalf of his wife and his wife’s three children pursuant to the Adam Walsh
21 Child Protection and Safety Act of 2006 based on the plaintiff’s prior state conviction for
22 committing a “lewd and lascivious act with a child under the age of fourteen.” Id. at 983-
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84. The Ninth Circuit stated that it may review the plaintiff's claims to the extent he challenged the scope of the Secretary's discretion. Id. After determining that the claimed action did not exceed the Secretary's discretion, the Ninth Circuit, upheld the judicial bar on the Secretary's discretionary "no risk" determination. Id. at 5. These cases demonstrate that the Court may consider whether there has been a plain violation of an unambiguous and mandatory provision of law despite a statutory bar on judicial review.

The Court concludes that it may conduct judicial review of facial, ultra vires claims despite a statutory bar on judicial review. Accordingly, the Court next considers whether the Secretaries acted in excess of their delegated powers.

D. Whether the Waiver Determinations Are Ultra Vires Acts under Section 102(c)'s Waiver Authority

Defendants contend that the DHS Secretaries' actions are ultra vires only if they are in excess of delegated powers that are contrary to "clear and mandatory" statutory language as required in Kyne.¹³ Plaintiffs reply that the Kyne line of cases do not apply and, instead, the Dart test applies so that the government has the burden to show "clear and convincing" evidence that Congress foreclosed its jurisdiction over their case. Dart, 848 F.3d at 224. However, Plaintiffs are confusing the standard that is required to

¹³ A Ninth Circuit panel has also referred to the "clear and mandatory" standard as "unambiguous and mandatory" provision of a statute. See Charlie Rossi Ford, Inc. v. Price, 564 F.2d 372, 373 (9th Cir. 1977).

1 overcome the presumption that Congress intends judicial review of administrative
2 actions, a “clear and convincing” standard, with the “clear and mandatory” statutory
3 language requirement for application of the Kyne exception to the statutory bar of
4 judicial review. In fact, the court in Dart applied the Kyne test when it held that the
5 Secretary of Commerce facially violated a specific provision of the EAA which was
6 “clear and mandatory.” Dart, 848 F.2d at 231. An agency’s action is ultra vires if it
7 contravenes “clear and mandatory” statutory language. Pac. Mar. Ass’n, 827 F.3d at
8 1208 (quoting Kyne, 358 U.S. at 188); Dart, 848 F.2d at 231; Staacke, 841 F.2d at 281.
9 In order to make that determination, courts look to the language of the statute and its
10 legislative history. See Int’l Ass’n of Tool Craftsmen v. Leedom, 276 F.2d 514, 516
11 (D.C. Cir. 1960) (“statutory language itself and the legislative history” support invoking
12 district court’s equity jurisdiction to consider whether Board violated a “clear and
13 mandatory” statutory prohibition); Teamsters, Chauffeurs, Helpers and Delivery Drivers,
14 Local 690 v. NLRB, 375 F.2d 966, 971 (9th Cir. 1967) (a court looks to statutory text and
15 legislative history to determine if the Board violated a “clear and mandatory” statutory
16 provision).

17 Here, in order for the narrow exception of Kyne to apply, Plaintiffs must show that
18 Secretaries Kelly and Duke acted in excess of their delegated powers by showing that the
19 issuance of the two Waiver Determinations was in contravention of “clear and
20 mandatory” language contained in section 102. See Pac. Mar. Ass’n, 827 F.3d at 1208;
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1 Dart, 848 F.2d at 222 (The question “whether an agency has acted ‘in excess of its
2 delegated powers’ has alternatively been phrased as whether the agency action ‘on its
3 face’ violated a statute.”). Plaintiffs must also show that barring judicial review would
4 deprive them of a “meaningful and adequate means of vindicating [their] statutory
5 rights.” Id.
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8 **1. Violation of a “Clear and Mandatory” Statutory Provision**

9 The Court now turns to whether Plaintiffs have established that the Secretaries
10 facially violated a specific provision of section 102 which was “clear and mandatory.”
11

12 **a. Whether Section 102(c) Waiver Provision Applies Only to**
13 **Projects Identified in Section 102(b)**

14 Plaintiffs argue that that the statutory authority to waive laws under section 102(c)
15 does not apply to the two border wall projects because they were not specifically
16 mandated by Congress under section 102(b). Further, when construed as a whole, the
17 two projects fall outside the limits of the waiver authority because Congress did not
18 intend section 102(c) to apply to projects beyond those specifically mandated in section
19 102(b). Defendants disagree arguing that the waiver provision applies to section 102 as a
20 whole, and is not limited to only Congress’ priorities identified in section 102(b). Upon
21 review of the statute and legislative history, both interpretations are plausible. As such,
22 there is no violation of “clear and mandatory” language with respect to the application of
23 the waiver.
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Statutory construction always begins with the “language of the statute itself” or “plain meaning of the statute” and if unambiguous, that meaning controls. Brock v. Writers Guild of America, West, Inc., 762 F.2d 1349, 1353 (9th Cir. 1985); Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cnty., 627 F.3d 1268, 1271 (9th Cir. 2010). If the language is not clear, then a court looks at the legislative history. Brock v. Writers Guild of America, West, Inc., 762 F.2d 1349, 1353 (9th Cir. 1985); Avendano-Ramirez v. Ashcroft, 365 F.3d 813, 816 (9th Cir. 2004). Legislative history is also looked at if the statutory language is clear but there is “clearly expressed legislative intention” which is contrary to the plain meaning of the statute. Heppner v. Alyeska Pipeline Serv. Co., 665 F.2d 868, 871 (9th Cir. 1981).

Section 102(c) states,

(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**. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

8 U.S.C. § 1103(c) (emphasis added).

Defendants argue that the words “under this section” refer to section 102 as a whole and are not limited to subsection 102(b). This includes actions under any part of section 102 that meet section 102(c)(1)’s criteria. In support, they cite to the Guide to Legislative Drafting which explains that section 102(a) is a “subsection”; section

1 102(b)(1) is a “paragraph” and section 102(b)(1)(A) is a “sub-paragraph.” See House
2 Office of the Legislative Counsel, Guide to Legislative Drafting. Therefore, “this
3 section” in section 102(c)(1) cannot be read to refer exclusively to 102(b) but applies to
4 the entirety of section 102.
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6 Plaintiffs respond that the waiver authority must be interpreted as limited to
7 specific border barriers specified in section 102(b) because Defendants’ reliance on the
8 standardized format interpretation of “this section” is flawed. They argue that
9 Defendants’ position produces an absurd result in interpreting sections 102(b)(2)-(4).
10 These sections address the procedures for obtaining easements and appropriations, and
11 refer to and apply only to “this subsection” which is section 102(b). According to
12 Defendants’ interpretation, the procedures and directives regarding easements and
13 appropriations would not apply to section 102(a) border projects and without those
14 provisions, a border barrier could not be built. Moreover, the terms “section” and
15 “subsection” are used inconsistently as section 102(b)(1)(A) uses the phrase “[i]n
16 carrying out subsection (a)” while section 102(b)(1)(B) & (C) uses the phrase “[i]n
17 carrying out this section” under section 102(b).
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22 Defendants reply that “when Congress identifies certain specific applications of a
23 general grant of authority, those specific requirements cannot generally be understood to
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1 prohibit all other applications of the general authority.” (Dkt. No. 18-1 at 30.¹⁴) Second,
2 a reading that limits section 102(c) to section 102(b) would render section 102(a)
3 superfluous. Third, the subsequent amendments demonstrate that section 102(b)(1)
4 merely identified Congress’ shifting priorities and specific areas for action. Finally,
5 Defendants argue that Plaintiffs cannot overcome the plain meaning of the statute by
6 pointing out that Congress, in passing section 102 in 1996 and the amendment to section
7 102(c) in 2005, was primarily focused on portions of fencing near San Diego. Congress
8 could have limited the provision to construction near San Diego; instead, it established a
9 broad general mandate in section 102(a) that is not geographically limited and used the
10 words “under this section” to extend section 102(c) to the entire section.
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14 Certainly, section 102 is not a model of legislative precision. Given the
15 inconsistencies in the use of “this section”, the Court looks to the legislative history for
16 further guidance. The parties rely on the legislative history that supports their respective
17 positions. Defendants cite to Conference Report 109-72 to support their interpretation
18 because the Report broadly states it “provides for construction and strengthening of
19 barriers along U.S. land borders.” (Dkt. No. 18-2, Ds’ Index of Exs., Ex. 2, H.R. Rep.
20 109-72 at p. 170 (May 3, 2005). However, the Conference Report also references section
21 102(b) as to the waiver’s application to the 14 miles of barriers and roads, mandated by
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27 ¹⁴ Pages numbers to the docket are based on the CM/ECF pagination.

1 1996 IIRIRA along the border near San Diego that had been halted due to environmental
2 challenges. Id.

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4 Defendants argue that the breadth of section 102(c) is noted by comments made by
5 representatives who were opposed to the 2005 REAL ID Act which were not contradicted
6 by its sponsors. (See Dkt. No. 18-2, Ds' Index of Exs., Ex. 6, 151 Cong. Rec. H459 (Feb.
7 9, 2005) (statement of Cong. Jackson-Lee) (“[The waiver provision is] so broad that it
8 would not just apply to the San Diego border fence that is the underlying reason for this
9 provision. It would apply any other barrier or fence that may come about in the future.”);
10 id., 151 Cong. Rec. H454 (Feb. 9, 2005) (statement of Cong. Conyers) (“waiving all
11 Federal laws concerning construction of barriers and fences anywhere within the United
12 States”); id., 151 Cong. Rec. H554 (Feb. 10, 2005) (statement of Cong. Harman) (“[T]he
13 reach is beyond the San Diego border. According to the language in this legislation, it is
14 all areas along and in the vicinity of our international borders with Mexico and
15 Canada.”); id., 151 Cong. Rec. H556 (Feb. 10, 2005) (memorandum by Cong. Farr)
16 (“[waiver authority] seem[s] to apply to all the barriers that may be constructed under the
17 authority of § 102 of IIRIRA (i.e., barriers constructed in the vicinity of the border and
18 the barrier that is to be constructed near the San Diego area)”); id., 151 Cong. Rec. H559
19 (statement of Cong. Udall) (objecting to bill because “the language of the bill is not
20 limited to the construction of a fence in [San Diego]” but instead includes “all laws for all
21 U.S. borders”). Defendants note the concerns of the breadth of section 102 repeated by
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1 opponents at least five times in two days were not merely “fears and doubts of the
2 opposition” that can be dismissed.

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4 Defendants also point to a comment made by a member of Congress in 1996
5 addressing concern that section 102(c) extended beyond San Diego. (See Dkt. No. 18-2,
6 Ds’ Index of Exs., Ex. 4, 142 Cong. Rec. H11076 (Sept. 25, 1996), (statement of Rep.
7 Saxton) (“[Section 102(c)] is intended to address an issue that has to do with the
8 California-Texas-Mexico border; however, the way this section is written, the exemption
9 applies to the entire border of the United States, not just the California-Mexico border
10 near San Diego.”).

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13 On the other hand, Plaintiffs rely on the legislative history which shows the
14 sponsor’s and supporters’ intent to limit the expanded waiver authority to the San Diego
15 fencing under section 102(b). The bill’s author, Representative Sensenbrenner, described
16 the amendment as “the REAL ID Act will waive Federal laws to the extent necessary to
17 complete gaps in the San Diego border security fence, which is still stymied 8 years after
18 congressional authorization. Neither the public safety nor the environment are
19 benefitting from the current stalemate.” (Dkt. No. 18-2, Ds’ Index of Exs., Ex. 6, 151
20 Cong. Rec. H454 (Feb. 9, 2005).) Supporters of the bill also made statements limiting
21 the amendment to the fence in San Diego. (Id., 151 Cong. Rec. H453-471 (Feb. 9, 2005)
22 (Statement of Rep. Hoekstra) (“H.R. 418 provides the Secretary of Homeland Security
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1 with authority to waive environmental laws, so that the border fence running 14 miles
2 east from the Pacific Ocean at San Diego may finally be completed.”.)

3
4 “The fears and doubts of the opposition are no authoritative guide to the
5 construction of legislation. It is the sponsors that we look to when the meaning of the
6 statutory words is in doubt.” NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964) (citing
7 Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951)). “In their
8 zeal to defeat a bill, they understandably tend to overstate its reach.” Id. In this case,
9 even though the Court has looked at the sponsors’ comments to determine the meaning of
10 the statute, the sharp contrast in the legislative history statements and plausible
11 interpretations on both sides do not provide the Court with definitive guidance as to the
12 breadth of section 102(c).

13
14 Each side offers additional plausible interpretations to support their position. For
15 example, since 2005, the waiver provision has been invoked five times in order to comply
16 with the specific mandates of the various amendments to section 102(b). See 70 Fed.
17 Reg. 55,622-02 (Sept. 22, 2005)¹⁵ (concerning completion of section 102(b) mandated in
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24 ¹⁵ In the 2005 waiver determination, former DHS Secretary Michael Chertoff noted that nine years had
25 passed since Congress specifically sought the construction of 14 miles of building second and third
26 fences to the existing reinforced fence under section 102(b). Therefore, in order to expedite the
27 completion of section 102(b) of IIRIRA, he invoked the waiver provision in section 102(c) for “all
28 federal, state, or other laws, regulations and legal requirements” related to the construction. See 70 Fed.
Reg. 55,622-02 (Sept. 22, 2005). The impetus for broadening section 102(c) to all legal requirements
was the lengthy delay caused by challenges made by environmental groups.

1 1996); 72 Fed. Reg. 2,535-01 (Jan. 19, 2007); 72 Fed. Reg. 60,870-01 (Oct. 26, 2007); 72
2 Fed. Reg. 10,077-01 (Apr. 8, 2008); 72 Fed. Reg. 19078-01 (Apr. 8, 2008). These
3
4 waivers indicate that their use was limited to the mandates of section 102(b). However,
5 Defendants point out that section 102(a)'s general mandate is broad and geographically
6 includes "the United States border." This was confirmed by a district court in Save Our
7 Heritage where it concluded that even though Congress did not include San Diego when
8 section 102(b) was amended by the 2006 Fence Act, the Secretary's general authority to
9 construct border barriers under section 102(a) is broad, does not include any geographical
10 restrictions and authorized the San Diego barrier project even though it was included in
11 the prior version of section 102(b) of the 2005 REAL ID Act. Save Our Heritage Org. v.
12 Gonzalez, 533 F. Supp. 2d 58, 61 (D.D.C. 2008). Even though San Diego was included
13 in section 102(b) in the REAL ID Act, the district court's reasoning to conclude that the
14 Secretary had authority to construct the San Diego barrier was based on the broad
15 provision of section 102(a), not because it was mandated in the prior version. Id.
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20 Plaintiffs also cite to Judge Burns's decision in Sierra Club v. Ashcroft, Case No.
21 04cv272-LAB(JMA), 2005 WL 8153059 (S.D. Cal. Dec. 13, 2005) where the plaintiffs
22 challenged the Secretary's waiver determination in September 2005 invoked pursuant to
23 the 2005 REAL ID Act for the border fence construction of the Triple Fence Project.
24 They note that the court repeatedly emphasized the limitation of the waiver to the
25 "narrow purpose of expeditious completion of the Triple Fence authorized by the
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1 IIRIRA.” Id. at 5. However, Plaintiffs were challenging the waiver determination to
2 complete the project that was specifically authorized in section 102(b), and therefore, the
3 Court’s language focused on section 102(b). As such, the Sierra Club case is not as
4 helpful as Plaintiffs propose.
5

6 The parties’ varying plausible interpretations concerning the scope of section
7 102(c) demonstrate the lack of a clear statutory mandate. See Staacke, 841 F.2d at 282
8 (“Where, as here, the statute is capable of two plausible interpretations, the Secretary’s
9 decision to adopt one interpretation over the other cannot constitute a violation of a clear
10 statutory mandate.”). In view of the competing plausible interpretations, the Court
11 cannot conclude that the Secretaries acted in excess of their delegated powers contrary to
12 a “clear and mandatory” provision in section 102.
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16 **b. Whether Key Statutory Terms Preclude the Waiver**
17 **Determinations**

18 **i. “additional barriers and roads”**
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20 Section 102(a) grants the Secretary the authority to “to install additional physical
21 barriers and roads.” 8 U.S.C. § 1103(a). Coalition Plaintiffs and California Plaintiffs
22 argue that section 102 only allows for the installation of “additional” barriers and roads
23 and does not authorize the replacement of existing fences. Plaintiffs cite to the dictionary
24 that defines “additional” as “more”, “extra” and “added” while “replacement” is defined
25 as resulting in no net gain or addition and because the new barrier is a substitute or
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1 successor to the fence, it is replacing, not adding. Moreover, they argue that the
2 construction of additional barriers through various amendments since 1996 focused solely
3 on adding mileage to the existing fencing such as adding fencing where none existed or
4 adding new layers of fencing to supplement the existing primary fence. Section 102 does
5 not address on-going maintenance or replacement of existing barriers. They contend that
6 none of the prior waivers were initiated for the purpose of replacing, repairing, or
7 enhancing existing barriers.
8

9
10 In response, the government argues Plaintiffs' narrow interpretation of "additional"
11 is not supported by the statutory language nor the legislative history. According to
12 Defendants, the installation of "lighting, cameras and sensors", 8 U.S.C. § 1103(b)(1)(A),
13 falls under "additional barriers and roads" under section 102(a) which indicate a broader
14 definition of "additional." Defendants also cite the legislative history of the 2005 REAL
15 ID Act where representatives described section 102 as providing for "construction and
16 strengthening of barriers along U.S. land borders" suggesting a broad definition of
17 "additional." (Dkt. No. 18-2, Ds' Index of Exs., Ex. 2, H.R. Rep. 109-72 at 170 (May 3,
18 2005).) In 2006, Senator Kyl discussed section 102 and explained the project as
19 "replacing the so-called landing mat fencing, which does look like a wall, with chain
20 link-type fencing that you can see through." (Dkt. No. 18-2, Ds' Index of Exs., Ex. 9,
21 152 Cong. Rec. S9871 (Sept. 21, 2006).) He explained that the current fencing is
22 deteriorating and difficult to repair because of its age. (Id.) Moreover, DHS has used
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1 section 102 to replace fencing in 2011 in Arizona, the Nogales Fence Replacement
2 Project, and invoked section 102(c)'s waiver authority.¹⁶ (Dkt. No. 42-2, Ds' Index of
3 Exs., Ex. 23.) The authority for the project was derived from sections 102(a) and
4 102(b)(1)(A). (Id. at 5.) The Nogales Fence Replacement Project was to remove and
5 replace about 2.8 miles of existing primary fence along the United States/Mexico
6 international border, the repair and maintenance of a 20 foot wide construction road
7 parallel to the fence and replacement of a 20-foot-wide gate at a port of entry. (Id. at 4.)

8
9 The legislative history and the prior projects invoking section 102(c) for the
10 replacement of border fences support the position that building "additional barriers" has a
11 broad meaning and can include replacement of fencing. To the extent that this
12 interpretation is plausible, Plaintiffs have not demonstrated the replacement fence clearly
13 falls outside the scope of "additional physical barriers" to show that the Secretary
14 violated a "clear and mandatory" statutory provision. See, e.g., Staacke, 841 F.2d at 281
15 (noting that both parties' construction of "in addition" were plausible where one party
16 asserted it meant "concurrent with" and the other party maintained it meant "subsequent
17 to").
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27 ¹⁶ 73 Fed. Reg. 19078 (Apr. 8, 2008).

1 **ii. “areas of high illegal entry”**

2 Plaintiffs argue that the Waiver Determinations’ conclusions that the San Diego
3 and El Centro sectors are “areas of high illegal entry,” are improperly based on sector-
4 wide data which are not good indications of whether the Project Areas are areas of high
5 illegal entry. Moreover, sector wide data are not reliable because the amount of drugs
6 seized in a sector usually occur far from the Mexican border at highway checkpoints,
7 during vehicle searches at the points of entry or when border patrol agents discover a
8 drug-smuggling boat or drone. Sector wide data do not demonstrate that the project areas
9 themselves are areas of high illegal entry and the data are less probative when the facts
10 show that the San Diego Project Area has fewer illegal border crossings than the San
11 Diego Sector as a whole. However, even if the Court were to consider sector-wide data,
12 Plaintiffs argue DHS’s apprehension records show that these two sectors are no longer
13 areas of high illegal entry.

14 Defendants argue that Congress has set no specific threshold for “high illegal
15 entry” but Congress has expressly stated that one of the statute’s purposes is “to achieve
16 and maintain operational control over the international border.” 8 U.S.C. §
17 1103(b)(1)(D). “Operational control” “means the prevention of all unlawful entries into
18 the United States, including entries by terrorists, other unlawful aliens, instruments of
19 terrorism, narcotics, and other contraband.” Pub. L. No. 109-367 § 2(b), 120 Stat. 2638
20 (2006) (codified at 8 U.S.C. § 1701 note). Moreover, they note that the number of
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1 apprehensions had fallen from more than 480,000 to less than 150,000 by 2006. But
2 when Congress amended section 102 in 2006 and 2008, it did not suggest there was no
3 longer “high illegal entry” along the border. Lastly, Congress frequently refers to sector-
4 wide data when discussing the needs for such projects; therefore the use of sector-wide
5 data is not misplaced. (Dkt. No. 35-1 at 65 (citation to legislative history using sector-
6 wide data).)

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8
9 The August 2, 2017 Waiver Determination states that the San Diego Sector is one
10 of the busiest and in 2016, the CBP apprehended over 31,000 illegal aliens and seized
11 about 9,167 pounds of marijuana and about 1,317 pounds of cocaine in the San Diego
12 Sector. (Dkt. No. 30-6, Cayaban Decl., Ex. 11, 82 Fed. Reg. 35984.) Based on this, the
13 Secretary determined that the San Diego Project Area, “is an area of high illegal entry.”
14 (Id. at 35985.) The September 12, 2017 Waiver Determination states that the El Centro
15 Sector is an area of high illegal entry. (Id., Ex. 12, 82 Fed. Reg. 42,830.) In 2016, the
16 CPB apprehended over 19,000 illegal aliens and seized about 2,900 pounds of marijuana
17 and about 126 pounds of cocaine. (Id.)

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21 Congress did not define “area of high illegal entry” so as to provide “clear and
22 mandatory” metrics. Similarly, the government’s use of sector wide data to support its
23 “area of high illegal entry” determination is not a clear violation of the statute. See Key
24 Med. Supply, Inc. v. Burwell, 764 F.3d 955, 964 (8th Cir. 2014) (Congress did not
25 instruct the Agency as to how to ensure or achieve category-wide cost savings and the
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1 use of pre-existing scheduled prices as maximum bid caps was not “a clear departure
2 from [the] statutory mandate”). As a result, the Court cannot conclude the Secretaries
3 violated their mandate to deter crossings in areas of “high illegal entry” when they
4 determined that apprehension of 31,000 undocumented aliens in the San Diego Sector in
5 2016, and 19,000 apprehended illegal entries in El Centro Sector in 2016 “remain[]
6 area[s] of high illegal entry.” (Dkt. No. 30-6, Cayaban Decl., Ex. 11, 82 Fed. Reg.
7 35984; *id.*, Ex. 12, 82 Fed. Reg. 42,830.)

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10 The parties present certain facts and data in varying forms, based on geographic
11 locations or years, to support their respective positions. Plaintiffs focus on the dramatic
12 improvement over the years on the number of apprehensions. Again, the Court finds that
13 both sides offer conflicting plausible interpretations of section 102(a). As a result, the
14 Secretary’s decision to adopt one interpretation over the other cannot constitute an ultra
15 vires act.
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18 **iii. “deter illegal crossings”**

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20 Coalition Plaintiffs contend that the border wall prototype project, to evaluate
21 various design features for potential inclusion in a future border wall, is outside the scope
22 of section 102 because it has no deterrent effect since there are gaps between each of the
23 eight prototypes built. They also contend that DHS has already spent more than \$2
24 billion to install 705 miles of fencing along the border and the two projects are not
25 “necessary . . . to deter illegal crossings.” (Dkt. No. 29-1 at 17.) The government argues
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1 that Coalition Plaintiffs cannot second-guess the Secretary's conclusion that the projects
2 "will further Border Patrol's ability to deter and prevent illegal crossings." (Dkt. No. 35-
3 1 at 66.)

4
5 Section 102(a) provides that the Secretary must take actions "necessary to install
6 additional physical barriers and roads" . . . "to deter illegal crossings." 8 U.S.C. §
7 1103(a). In the Waiver Determinations, the Secretaries determined that the prototypes
8 are "intended to deter illegal crossings" and "necessary for future border wall design and
9 construction." (Dkt. No. 30-6, Cayaban Decl., Ex. 11, 82 Fed. Reg. at 35,985, *id.*, Ex. 12,
10 82 Fed. Reg. at 42,830.)

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12
13 Once again, the issue of what constitutes "deter[ing] illegal crossings" comes down
14 to statutory interpretation. The Secretary is granted broad discretion in determining how
15 to "achieve and maintain operational control" of the border. Plaintiffs have not identified
16 "clear and mandatory" statutory language that the Secretary violated to establish the
17 claimed ultra vires conduct.
18

19
20 **iv. "most practical and effective"**

21 California Plaintiffs argue that Defendants exceeded their authority by constructing
22 fencing where the barriers would not be "most practical or effective." See 8 U.S.C. §
23 1103(b)(1)(A). The facts show that the project area sites are no longer high priority sites.
24 According to a CBP document, the California border was rated as "moderate" compared
25 to "high" or "very high" when it came to geographic/investment priorities. (Dkt. No. 30-
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1 5, Cayaban Decl., Ex. 9 at 45.) Moreover, in a television interview, Secretary of DHS
2 Kelly stated that the existing fencing is “very, very effective” and “remarkably effective
3 in keeping down the amount of illegal movements across” the border. California
4 Plaintiffs argue that most of California’s 140 miles border already has fencing including
5 the Project Areas covered by the Waivers. (Dkt. No. 30-4, Cayaban Decl., Ex. 1 at 10-
6 14.)
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9 Defendants respond that the Secretary’s decision to assess where fencing “would
10 be most practical and effective”, 8 U.S.C. § 1103(b)(1)(A), did not limit the broad
11 mandate of section 102(a). Moreover, section 102 also provides that the Secretary is to
12 determine whether the “use or placement of such resources is not the most appropriate
13 means to achieve and maintain operational control over the international border.” 8
14 U.S.C. § 1103(b)(1)(D). They also argue that the facts to support Plaintiffs’ conclusions
15 are misplaced as the CBP document relied upon was dated March 27, 2017 which was
16 five months prior to the Secretary’s first waiver determination. Also, Secretary Kelly’s
17 comments did not specifically address the San Diego Sector or El Centro Sector.
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21 The Secretary of DHS has discretion to determine “where fencing would be the
22 most practical and effective” and California Plaintiffs’ facts do not demonstrate that the
23 Secretary contravened a “clear and mandatory” provision in the statute.
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v. “consultation”

Coalition Plaintiffs argue that the waiver is unavailable unless the Secretary has consulted with the parties identified in section 102(b)(1)(C) which she has not done. Defendants argue that the waiver provision does not expressly or implicitly depend on the completion of the consultation requirement. Nonetheless, Defendants assert that they have and are still in the process of complying with the consultation provision.

Based on the parties’ briefing and arguments at the hearing, it did not appear that the Secretary had complied with the consultation provision as to the border wall prototype project and the evidence provided did not support compliance with the consultation provision regarding the two replacement fences. Therefore, at the hearing, the Court directed the parties to file supplemental briefs on the consultation issue and how the lack of consultation affects ultra vires and the constitutional claims, if at all.¹⁷

The consultation provision states, “[i]n 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

¹⁷ Defendants note and the Court recognizes that that Coalition Plaintiffs are the only plaintiffs to have raised the consultation issue in their summary judgment motion. To the extent all Plaintiffs raise similar arguments in their supplemental briefs, the Court considers them.

1 for the communities and residents located near the sites at which such fencing is to be
2 constructed.” 8 U.S.C. § 1103(b)(1)(C). This provision is mandatory.

3
4 According to Real Estate and Environmental Branch Chief for the Border Patrol
5 and Air and Marine Program Management Office (“BPAM”)¹⁸, an office within the CBP,
6 the prototype project began on September 26, 2017 and was completed on October 26,
7 2017. (Dkt. No. 49-4, Ds’ Index of Exs., Ex. 31, Enriquez Decl. ¶ 11.) The prototype
8 project area is located on Federal government property and used as an enforcement zone
9 for border security purposes and is heavily disturbed. (Id. ¶ 15.) CBP did not meet with
10 USDA, the State of California, local government or Indian Tribes as it determined they
11 were not stakeholders. (Id.) However, CBP met with one adjacent landowner and in
12 response to the landowner’s concerns, installed temporary fencing to prevent
13 unauthorized construction access across the landowner’s property. (Id.) Prior to the San
14 Diego Waiver, on July 13, 2017, CBP met with U.S. Department of Interior, (“DOI”),
15 U.S. Fish and Wildlife Service, (“USFWS”), and Bureau of Land Management
16 (“BLM”)’s staff, toured the project area and discussed potential environmental impacts.
17 (Id. ¶ 16.) Before the waiver, CBP also met with General Service Administration
18 (“GSA”) to discuss potential environmental impacts and routing of construction traffic as
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26 ¹⁸ The BPAM is responsible for constructing and maintaining facilities, tactical infrastructure and border
27 infrastructure which also includes environmental planning and compliance associated with these
28 activities. (Dkt. No. 49-4, Ds’ Index of Exs., Ex. 31, Enriquez Decl. ¶ 3.)

1 it manages an access road in the project area. (Id. ¶ 17.) CBP also conducted a field
2 survey concerning natural and biological resources and the results are summarized in a
3 final Biological Resources Survey Report dated October 2017. (Dkt. No. 49-5, Ds' Index
4 of Exs., Ex. 31.A, Enriquez Decl., Ex. A.) It also conducted a field survey and records
5 search to identify any cultural and historical resources in the project area and the results
6 are summarized in a final Cultural Resources Survey Report dated October 2017. (Dkt.
7 No. 49-6, Ds' Index of Exs., Ex. 31.B, Enriquez Decl., Ex. B.) After the surveys were
8 completed, CBP conducted additional consultation with DOI. (Dkt. No. 49-4, Ds' Index
9 of Exs., Ex. 31, Enriquez Decl. ¶ 19.) In September 2017, CBP sent USFWS the results
10 of the biological survey and asked for input from USFWS concerning potential impacts
11 from the project but no response was provided. (Id.) Based on the resource surveys,
12 CBP prepared a Memorandum for the Record ("MFR") dated September 25, 2017
13 analyzing the potential environmental impacts. (Id. ¶ 21; Dkt. No. 49-7, Ds' Index of
14 Exs., Ex. 31.C, Enriquez Decl., Ex. C.) The Memorandum concluded that the prototype
15 project would have no impact on cultural or historic resources and would not have a
16 significant impact on any endangered species as there are no threatened and endangered
17 species in the project area, and no vernal pools, wetlands, or other surface water located
18 within the project area. (Dkt. No. 49-4, Ds' Index of Exs., Ex. 31, Enriquez Decl. ¶ 22.)
19 Further, CBP mandated its contractors to follow certain Best Management Practices
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1 (“BMPs”). (Id. ¶ 23.) CBP made adjustments to the prototype project based on the
2 results of the resource surveys and consultation with stakeholders. (Id. ¶ 20.)

3
4 The Calexico fence replacement project is located primarily on federal land that is
5 managed by CBP or GSA and used primarily for border enforcement or port operations.
6 (Id. ¶ 37.) The project also includes a Media and First Amendment area on land owned
7 by the City of Calexico. (Id.)

8
9 Prior to the Calexico Waiver Determination, on July 13, 2017, CBP met with DOI
10 representatives including USFWS and BLM to provide information to them, (id. ¶ 38),
11 and consulted with the California State Historic Preservation Officer (“CASHPO”) and
12 Native American Tribes to make sure the geo-technical testing did not impact historic or
13 cultural resources. (Id. ¶ 39.)

14
15
16 After the Waiver Determination, CBP conducted field surveys to identify natural
17 and biological resources which were summarized in a Biological Survey Report dated
18 January 2018, (Dkt. No. 49-9, Ds’ Index of Exs., Ex. 31.E, Enriquez Decl., Ex. E),
19 conducted field surveys of cultural and historical resources which are summarized in a
20 Cultural Resources Survey dated January 5, 2018, (Dkt. No. 49-10, Ds’ Index of Exs.,
21 Ex. 31.F, Enriquez Decl., Ex. F), and conducted surveys to document and delineate
22 potential wetlands and waters in the project area which are summarized in a Wetland
23 Delineation Report dated January 2018. (Dkt. No. 49-11, Ds’ Index of Exs., Ex. 31.G,
24 Enriquez Decl., Ex. G.) After the surveys were completed, CBP conducted additional
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1 outreach and sent consultation letters, on January 18 and 19, 2018, to USFWS, the
2 California Department of Fish and Wildlife, CASHPO, two Native American tribes, the
3 Colorado River Basin Regional Water Quality Control Board ("CRBRWQCB"), the U.S.
4 Army Corps of Engineers Regulatory Division ("USACE"), the Imperial Irrigation
5 District ("IID"), Imperial County Air Pollution Control District, and the City of Calexico.
6 (Dkt. No. 49-4, Ds' Index of Exs., Ex. 31, Enriquez Decl. ¶ 41; Dkt. No. 49-12, Ds'
7 Index of Exs., Ex. 31.H-Q, Enriquez Decl., Exs. H-Q.) To date, CBP received responses
8 from three entities, IID, CRBRWQCB, and USACE. (Dkt. No. 49-13, Ds' Index of Exs.,
9 Ex. 31.R-T, Enriquez Decl., Exs. R-T.) The CBP concluded that the USDA and private
10 property owners were not stakeholders in the Calexico replacement fence project. (Id.)
11 Based on this information, CBP prepared the Calexico MFR. (Dkt. No. 49-8, Ds' Index
12 of Exs., Ex. 31.D, Enriquez Decl., Ex. D.)

13 The San Diego fence replacement project will occur on federal land. (Dkt. No. 49-
14 4, Ds' Index of Exs., Ex. 31, Enriquez Decl. ¶ 26.) On July 13, 2017, prior to the Waiver,
15 CBP conducted an on-site meeting with DOI, USFWS and BLM officials to discuss the
16 project, and USFWS provided CPB with data and information concerning vernal pools
17 and areas occupied by burrowing owls and the possible presence of habitat for the quino
18 checkerspot butterfly and the California gnatcatcher. (Id. ¶ 27.)

19 CBP has conducted resource surveys, including biological, cultural and wetlands
20 within the project area and is currently preparing these reports. (Id. ¶ 28.) Based on
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1 these surveys, CBP has made adjustments to the San Diego fence replacement project.
2 (Id. ¶ 29.) For example, CBP identified two historic sites that will be avoided during
3 construction and is planning on plant and topsoil salvage and making arrangements to
4 have full time environmental and historic/cultural monitors on-site during construction.
5 (Id.) Prior to the start of construction, CBP will send out letters to stakeholders including
6 Federal, State, and local agencies and Native Americans in the Spring of 2018 to solicit
7 more information. (Id. ¶ 30.) Once that is completed, it will prepare an Environmental
8 Stewardship Plan (“ESP”) for public review which will include its assessment of
9 potential impacts, BMP’s, and if necessary, mitigation or conservation measures. (Id.)
10 Because of the project’s location, CBP determined that the USDA and private property
11 owners “are not likely to be stakeholders for this project.” (Id. ¶ 31.)
12

13 Consistent with Defendants’ prior argument that “carrying out this section” applies
14 to section 102 as a whole, the Court concludes that the consultation provision applies to
15 any border construction project under section 102.
16

17 As to the prototype project, it appears that the consultation requirement was met.
18 Prior to the Waiver Determinations, CBP met with representatives of the DOI, including
19 USFWS and BLM, as well as GSA, as these are agencies that would be affected by the
20 project. (Dkt. No. 49-4, Ds’ Index of Exs., Ex. 31, Enriquez Decl. ¶¶ 16, 17.) They also
21 met with one landowner but it is not clear when that occurred; however, CBP responded
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1 by installing temporary fencing due to the landowner's concern. (Id. ¶ 15.) Defendants
2 did not believe that any other agencies would be affected by the prototype project. (Id.)
3

4 Next, as to the Calexico replacement fence which may have begun construction on
5 February 15, 2018, the CBP met with representatives of DOI, including USFWS and
6 BLM, as well as the CASHPO and Native American tribes before the Waiver
7 Determination. (Id. ¶¶ 38, 39.) But it did not consult with the City of Calexico prior to
8 the Waiver Determination. Instead, it sent a consultation letter on January 19, 2018 with
9 a requested response date by February 2, 2018. (Dkt. No. 49-12, Ds' Index of Exs., Ex.
10 31.O, Enriquez Decl., Ex. O at 15.) It also sent consultation letters to nine additional
11 identified stakeholders. (Id., Exs. H-Q.) To date, only three entities responded with one
12 entity seeking additional time. (Id., Exs. R-T.) While the consultation letters were sent
13 less than a month before construction is to begin, it is not clear that the consultation
14 provision was violated.
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18 As to the San Diego replacement project, so far, CBP had a meeting with
19 representatives of DOI, USFWS and BLM, prior to the Waiver Determination and
20 subsequently conducted surveys but has not yet consulted with other stakeholders.
21

22 Plaintiffs argue that the consultation should occur prior to any waiver
23 determinations as that information is critical in determining whether to waive certain
24 laws. In contrast, Defendants argue the consultation provision does not expressly specify
25 the subject matter for consultation, when the consultation should happen, or the degree of
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1 consultation required. Its purpose is to minimize the impact of construction once a
2 project has been selected. They also assert Congress intended the consultation provision
3 to be enforced through its appropriations power but then note that for the appropriations
4 for the projects at issue, Pub. L. No. 115-31, 131 Stat. 135, 434 (May 5, 2017), Congress
5 did not require consultation. They further claim that the saving clause precludes a private
6 right of action concerning the consultation requirement.
7
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9 Plaintiffs' argument that the consultation should occur prior to any waiver
10 determinations so that the Secretary is fully informed when the determination is made is
11 logical. In addition, it makes sense that consultation should occur before contracts are
12 drafted and executed so that the information can have a practical influence on the
13 decision making process and to permit environmental and mitigation measures to be
14 incorporated into the contract. The question is whether such timing is mandatory.
15
16 Section 102 does not provide any specific limitation or guidance concerning when or how
17 consultation is to occur except expressly stating who shall be consulted.
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20 Consultation on the Calexico replacement wall is on-going and responses may be
21 forthcoming despite the fact that construction on the project may have already begun. In
22 the Court's opinion, the belated contact with stakeholders reduces the practical benefit of
23 the consultation process. But given the lack of a "clear and mandatory" mandate
24 regarding the timing of consultation, the Court cannot conclude that the Secretaries acted
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1 in excess of their delegated powers by approving the waivers or executing construction
2 contracts prior to completing the consultation process.

3
4 **vi. “necessary to ensure expeditious construction”**

5 Section 102(c) provides that the Secretary of the DHS “shall have the authority to
6 waive all legal requirements” that the Secretary, in his or her “sole discretion” determines
7 “necessary to ensure expeditious construction of the barriers and roads under this
8 section.” 8 U.S.C. § 1103(c)(1). This mandatory language gives the Secretary of the
9 DHS discretion to make this determination.
10

11 Coalition Plaintiffs argue that section 102(c)’s waiver is subject to the Secretary’s
12 determination that it is “necessary to ensure expeditious construction of the barriers and
13 roads under this section”, 8 U.S.C. § 1103(c)(1), but the government has failed to provide
14 any information or bases to support the conclusion that these waivers are necessary.
15

16 Meanwhile, Center Plaintiff contends that section 102(c)’s requirement that waivers be
17 “necessary to ensure expeditious construction” demonstrates that Congress intended to
18 limit the scope of the section 102(c) waiver to specific border barriers under section
19 102(b). They contend that a logical interpretation of “expeditious construction” is that
20 Congress provided the DHS Secretary with the authority to waive laws in order to build
21 the specific border barriers required under section 102(b) as soon as possible after the
22 law’s enactment and not to the wall replacement project or the prototype project started a
23 decade later. Also, the text of the statute indicates that the waiver authority was intended
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1 to apply only for specific projects mandated by section 102(b) which have long been
2 completed.

3
4 Here, the words used by Plaintiffs in their argument such as “logical interpretation”
5 “intended” and “[i]t is far more reasonable to limit the 102(c) waiver authority to those
6 barriers that have been specifically mandated by Congress under §102(b) than to adopt
7 the government’s boundless interpretation”, (Dkt. No. 28-1 at 39), demonstrate that a
8 determination that a waiver is “necessary to ensure expeditious construction of barriers
9 and roads” is one of statutory interpretation. The Court cannot conclude that the Waiver
10 Determinations are in contravention of clear and mandatory language in section 102(c).
11
12 See Staacke, 841 F.2d at 282 (where the statute is subject to two plausible interpretations,
13 the Secretary of Labor’s interpretation cannot constitute a “violation of a clear mandatory
14 mandate” and noting that the Secretary’s statutory discretion to make policy choices with
15 disability decisions is “virtually limitless”).
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18 **c. Whether Section 102(c)’s Waiver Authority has Expired**

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20 Center Plaintiff argues that there is no evidence in the text or the legislative history
21 that Congress intended the waiver authority to exist in perpetuity or even that Congress
22 intended the waiver authority to be extended beyond the initial San Diego fence. They
23 argue that expeditious construction refers solely to section 102(b) projects as there are
24 time constraints limiting DHS’s authority to determine “other mileage” to expire on
25 December 31, 2008. California Plaintiffs similarly argue that the 2008 amendment
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1 imposed deadlines for the expedited construction of fencing in priority areas. In 2008,
2 former Secretary of DHS Chertoff identified more than 370 miles of priority areas and by
3 April 2013, DHS reported it had completed all but a one-mile stretch of these projects
4 which involved 705 miles of fencing. (Dkt. No. 30-4, Cayaban Decl, Ex. 5; id., Ex. 6.)

5
6 Defendants contend that Plaintiffs' argument that the December 31, 2008 deadline
7 in section 102(b)(1)(B) applies generally to section 102(c) or section 102 as a whole is
8 implausible. Nothing in the statute demonstrates that Congress intended the waiver
9 authority to sunset and that expeditious construction is limited to section 102(b). When
10 Congress amended section 102(b) in December 2007, it mandated that about half of the
11 "not less than 700 miles" be completed within a year, by December 31, 2008. Because
12 Congress did not provide a deadline for the remaining miles, they argue that there is no
13 expiration date on building additional fencing. Moreover, they assert that the section
14 102(c) waivers would be applicable to the remaining miles to be built.

15
16 In 2008, Congress amended section 102(b) requiring DHS to construct reinforced
17 fencing "along not less than 700 miles of the southwest border where fencing would be
18 most practical and effect." 8 U.S.C. § 1103(b)(1)(A). As to priority areas, section 102(b)
19 mandated that the DHS Secretary "identify 370 miles, or other mileage determined by the
20 Secretary" and the authority to determine "other mileage" would expire on December 31,
21 2008 and Congress imposed a deadline of December 31, 2008 to complete construction
22 of the fencing. Id. § 1103(b)(1)(B).
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1 In United States v. Arizona, No. CV 10-1413-PHX-SRB, 2011 WL 13137062, at
 2 *8 (D. Az. Oct. 21, 2011), the district court addressed section 102(b)(1)(A)'s mandate
 3 directing the Secretary to construct 700 miles of fencing. In that decision, the district
 4 court stated that there are no deadlines requiring completion of the fencing and
 5 infrastructure projects by a specific time. Id. at 8. It explained that section 102 uses
 6 mandatory language but grants the Secretary "substantial discretion" in determining
 7 "how, when, and where to complete the construction." Id.

10 This argument is similar to Plaintiffs' earlier argument that section 102(c)'s waiver
 11 provision applies only to projects identified in section 102(b) which was previously
 12 rejected by the Court. The parties' varying plausible interpretations concerning the scope
 13 of section 102(c) demonstrate that the statutory language is not clear and unambiguous
 14 and the parties' argument is essentially a dispute regarding statutory interpretation. As
 15 such, Plaintiffs have not demonstrated that the Secretaries violated a clear and mandatory
 16 statutory provision.

19 **d. Whether Section 102 Requires that the Waiver Determinations**
 20 **Include Findings**

21 California Plaintiffs assert that the Waivers are invalid because the Secretaries
 22 failed to make the requisite findings to demonstrate the requirements of section 102 and
 23 only used boiler plate language copied from section 102 without providing reasons
 24 behind each Waiver Determination. (Dkt. No. 30-2 at 34-35.) Defendants respond that
 25

1 nothing in section 102(c) requires that the Secretaries explain the factual basis of their
2 Waiver Determinations in the Federal Register.

3
4 California Plaintiffs cite to Dickson v. Sec'y of Defense, 68 F.3d 1396, 1404-05
5 (D.C. Cir. 1995) and Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 967
6 (9th Cir. 2015) in support of their argument. These cases involve agency determinations
7 that were found to be arbitrary and capricious under the APA where an agency failed to
8 provide a reasoned explanation for its decision. Unlike the current case, the challenged
9 agency rulings in those cases were subject to judicial review. In this case, the APA's
10 standard of review and requirement for findings concerning an agency's decision are
11 inapplicable.
12

13
14 Section 102 only requires that the Secretary's decision be "published in the Federal
15 Register." 8 U.S.C. § 1103(c)(1). While the Waiver Determinations use predicate terms
16 in section 102 such as "areas of high illegal entry", "necessary", "deter and prevent
17 illegal crossings" and "most practical and effective", Plaintiffs have not demonstrated
18 that more is mandated under section 102 to support an ultra vires claim. Accordingly, the
19 Court concludes that California Plaintiffs' argument lacks merit.
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22 In view of the foregoing, the Plaintiffs have failed to demonstrate that the waivers
23 violated a clear and mandatory provision of section 102. Consequently, the Court lacks
24 jurisdiction to hear any non-constitutional claim.
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2. Whether Barring Review Deprives Plaintiffs of a Meaningful and Adequate Means of Violating Their Statutory Rights

The second step in an ultra vires analysis requires that Plaintiffs demonstrate that barring review would deprive them of a “meaningful and adequate means of vindicating” their statutory rights. See MCorp., 502 U.S. at 43. Analogizing to 42 U.S.C. § 1983 cases and private right of actions cases, Defendants argue that California Plaintiffs have not identified a statutory right in section 102 as opposed to a statutory obligation. See California Sportfishing Prot. Alliance v. U.S. Bureau of Reclamation, 15cv912 LJO BAM, 2015 WL 6167521, at *11 n. 8 (E.D. Cal. Oct. 20, 2014) (water quality standards are better described as “statutory obligations” rather than “statutory rights.”).

Meanwhile, no Plaintiff has conducted a meaningful analysis on this prong. Instead, California Plaintiffs generally assert that the absence of district court jurisdiction will deprive them of adequate means to vindicate their statutory rights. (Dkt. No. 30-2 at 24.) Assuming for argument's sake that Plaintiffs satisfied the second prong, they have failed to establish the first prong. That is, the Court concludes that Plaintiffs have not established a plain violation of an unambiguous and mandatory provision of section 102, and, therefore, the Court lacks jurisdiction to hear non-constitutional claims under section 102(c)(2)(A).

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E. Whether the Secretaries' Decisions under Sections 102(a) & (b) are Subject to APA Review

In order to invoke judicial review under the APA, Coalition Plaintiffs present an alternative argument starting with a strong presumption of judicial review of agency action.¹⁹ They argue that the judicial review limiting provision of section 102(c) is distinct from sections 102(a) & (b) because the Secretary must comply with the requirements of sections 102(a) and (b) prior to invoking the waiver provision. Therefore, because sections 102(a) and (b) are separate determinations from section 102(c), and the waivers constitute final agency decisions reviewable by a district court, the Secretaries' decisions on the two projects are subject to APA review and under the APA, the two Waivers are "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law." See 5 U.S.C. § 706(2)(A).

Specifically, Coalition Plaintiffs contend that the language "notwithstanding any other provision of law" which is contained in section 102(c)(1) "demonstrates an intent to limit the waiver authority solely to laws other than the one in which the waiver is contained, meaning the requirements of the section itself are not waivable." (Dkt. No. 29-1 at 13.) Accordingly, the requirement of "high illegal entry" and the "consultation"

¹⁹ In contrast, Center Plaintiff conceded that the strong presumption of judicial review is rebutted by the express statutory language of section 102(c). (Dkt. No. 28-1 at 22.)

1 requirements of sections 102(a) and (b) must be satisfied before the Secretary can invoke
2 section 102(c)'s waiver authority.

3
4 Defendants counter that the section 102(c) waiver determination arises from "any
5 action undertaken" pursuant to section 102(c)(1) and cannot be separated from sections
6 102(a) or (b). They contend that Plaintiffs improperly seek to challenge findings that are
7 integral to the waiver determination itself. Even if the phrase "pursuant to paragraph (1)"
8 in section 102(c)(2)(A), refers to the waiver determination in isolation, the terms "any
9 action undertaken . . . pursuant to paragraph (1)" and "all clauses or claims arising from"
10 such actions or decision, broadens the judicial review provision to include more than just
11 the waiver determination, itself. Next, they contend that Plaintiffs' reading that provides
12 sections 102(a) and (b) are subject to APA review would frustrate Congress' purpose in
13 enacting the jurisdictional limitation and waiver provisions which were intended to
14 prevent litigation delays since any invocation of the waiver would be subject to APA
15 review to determine whether the waiver was justified in the first place.

16
17 In reply, Coalition Plaintiffs argue that the Secretaries' decisions under section
18 102(c)(1) to waive any laws as "necessary to ensure expeditious construction" do not
19 address whether there is authority to construct the border projects themselves. The
20 authority to construct the border projects are in sections 102(a) and (b). They also argue
21 that these decisions are final agency decisions as they mark the "consummation" of the
22 agency's decisionmaking and "alter[] the legal regime to which the action agency is
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1 subject". (Dkt. No. 38 at 13.) "[S]ince subsections 102(a) and (b) are final agency
2 actions and outside the scope of subparagraph 102(c)(2)(A), the Court may review these
3 actions pursuant to 5 U.S.C. § 706(2)." (Id.)

4
5 Under the APA, "[a] person suffering a legal wrong because of agency action, or
6 adversely affected or aggrieved by agency action within the meaning of the relevant
7 statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Court are limited to
8 review of a final agency action. Or. Nat'l Desert Ass'n v. U.S. Forest Serv., 465 F.3d
9 977, 982 (9th Cir. 2006). Under the APA, the court determines whether the agency
10 actions are "arbitrary, capricious, or an abuse of discretion." 5 U.S.C. § 706(2)(A).
11 However, judicial review is not available "to the extent that statutes preclude [it]." 5
12 U.S.C. § 701(a)(1); see also Pinnacle Armor, Inc. v. United States, 648 F.3d 708, 719
13 (9th Cir. 2011) (citing 5 U.S.C. § 701(a)(2)).

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16
17 Section 102(c)(2)(A) provides that

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

24 8 U.S.C. § 1103(c)(2)(A). This is an express statutory bar on judicial review of non-
25 constitutional claims and APA review is not allowed. However, the question is whether
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1 the express statutory bar applies solely to section 102(c) decisions or to the entirety of
2 section 102, including sections 102(a) and (b).

3
4 The judicial review provision under section 102(c)(2)(A) states that the district
5 courts have exclusive jurisdiction to “hear all causes or claims arising from any action
6 undertaken” . . . “pursuant to paragraph (1).” While paragraph (1) refers to the
7 Secretary’s waiver authority, the language “all causes or claims arising from any action
8 undertaken” is broad enough to encompass the determination under section 102(a) that
9 the two projects are “necessary” to “deter illegal crossings in areas of high illegal entry
10 into the United States.” See 8 U.S.C. § 1103(a); U.S. Dept. of Energy v. Ohio, 503 U.S.
11 607, 626 (1992) (describing “arising under Federal law” in the case as a “broad” and
12 “seemingly expansive phrase”); Ford Ord Toxics Project, Inc. v. Cal. E.P.A., 189 F.3d
13 828, 832 (9th Cir. 1999) (statutory language that district courts have exclusive
14 jurisdiction over “all controversies arising under” CERCLA, indicated “Congress used
15 language more expansive than would be necessary if it intended to limit exclusive
16 jurisdiction to ‘those claims created by CERCLA’”); North East Ins. Co. v. Masonmar,
17 Inc., No. 13cv364 AWI SAB, 2014 WL 1247604, at *6 (E.D. Cal. Mar. 25, 2014)
18 (California courts gives terms such as “arising out of” and “arising from” expansive
19 meanings); Nova Biomedical Corp. v. Moller, 629 F.2d 190, 195 n. 9 (1st Cir. 1980)
20 (noting that other courts have adopted an expansive view of “arising from” language).

1 Based on the statutory language, the Court declines to adopt Coalition Plaintiffs'
 2 argument that APA review is available for decisions made solely under sections 102(a)
 3 and (b). The judicial review bar of non-constitutional challenges applies to any action
 4 taken to invoke the section 102(c) waiver authority which includes actions under sections
 5 102(a) and (b).
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7
 8 In conclusion, the Court GRANTS Defendants' motions for summary judgment on
 9 non-constitutional claims alleging violations of NEPA, the ESA, the CZMA and the
 10 APA, and DENIES Plaintiffs' motions for summary judgment on these claims. Next, the
 11 Court considers Plaintiffs' constitutional challenges which are subject to review by this
 12 Court. See 8 U.S.C. § 1103(c)(2)(A).
 13

14 **F. Constitutional Violations**

15 **1. Article I, Section 1 - Non-Delegation Doctrine & Separation of Powers²⁰**

16
 17 All Plaintiffs allege a violation of the non-delegation doctrine arguing that section
 18 102 allows the DHS Secretary to pick and choose among enacted laws and determine,
 19 with unfettered discretion, which ones shall be waived without specifically stating which
 20 laws will be waived or why. In essence, Plaintiffs contend, section 102(c) has granted the
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23
 24 ²⁰ California Plaintiffs separate their separation of powers and violation of the non-delegation doctrine
 25 into two causes of action despite similar arguments on both claims. The Court also notes that Coalition
 26 Plaintiffs have not sufficiently briefed the issue of separation of powers. They raise the issue of
 27 "separation of powers" in a heading, but their analysis consists of essentially one sentence. (Dkt. No.
 28 29-1 at 34-35.) Because the non-delegation doctrine is rooted in the principle of separation of powers,
 the Court considers the two claims together. See Mistretta v. United States, 488 U.S. 361, 371 (1989).

1 Executive Branch a blanket waiver which is a violation of the non-delegation doctrine
2 and separation of powers.

3
4 “The nondelegation doctrine is rooted in the principle of separation of powers that
5 underlies our tripartite system of Government.” Mistretta v. United States, 488 U.S. 361,
6 371 (1989). Article I, Section 1 of the Constitution vests all legislative powers in
7 Congress. U.S. Const. art. I, § 1. Generally, Congress cannot delegate or transfer the
8 legislative functions with which it is vested. Panama Refining Co. v. Ryan, 293 U.S.
9 388, 425-26 (1935). The Supreme Court has recognized, however, “that the separation-
10 of-powers principle, and the nondelegation doctrine in particular, do not prevent
11 Congress from obtaining the assistance of its coordinate Branches.” Mistretta, 488 U.S.
12 at 372. “In our increasingly complex society, replete with ever changing and more
13 technical problems, Congress simply cannot do its job absent an ability to delegate power
14 under broad general directives.” Id. (citing Opp Cotton Mills, Inc. v. Adm’r of Wage and
15 Hour Div. of Dept. of Labor, 312 U.S. 126, 145 (1941)).

16
17 As a result of this broad constitutional standard, the Supreme Court has upheld all
18 Congressional delegations of power since 1935.²¹ See Mistretta, 488 U.S. at 373 (noting
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24 ²¹ Notably, although the Court has not since struck down a challenged statute, it has narrowly construed
25 statutory delegations. See, e.g., Indus. Union Dep’t, AFL-CIO v. American Petroleum Inst., 448 U.S.
26 607, 646 (1980) (standard promulgated by Occupational Safety and Health Act (“OSHA”) limiting
27 occupational exposure to benzene held to be invalid); Nat’l Cable Television Ass’n. v. United States,
28 415 U.S. 336, 342 (1974) (challenge to revision of fee schedule by the Federal Communications
Commission was remanded to Commission to use the proper standard in setting annual fee).

1 that since 1935, “. . . we have upheld, again without deviation, Congress’ ability to
2 delegate power under broad standards”); Loving v. United States, 517 U.S. 748, 771
3 (1996) (affirming that “. . . we have since upheld, without exception, delegations under
4 standards phrased in sweeping terms”). Meanwhile, in 1935, the Supreme Court struck
5 down two statutes on delegation grounds. See A.L.A. Schechter Poultry Corp. v. United
6 States, 295 U.S. 495 (1935) (invalidating the delegation of code-making authority
7 contained in the National Industrial Recovery Act as unconstitutional because of the
8 Act’s failure to impose limitations on discretion); Panama Refining Co., 293 U.S. at 388
9 (invalidating the delegation of power to the President to “prohibit the transportation . . .
10 of petroleum” as exceeding constitutional limits because Congress failed to articulate a
11 policy to limit the President’s discretion).

12
13 The Supreme Court has held that Congress may delegate its authority so long as it
14 provides, by legislative act, “an intelligible principle to which the person or body
15 authorized to [act] is directed to conform.” Id. (citing J.W. Hampton, Jr. & Co. v. United
16 States, 276 U.S. 394, 406 (1928)). Under the intelligible principle standard, a statute
17 delegating authority is constitutional if it “clearly delineates [(1)] the general policy, [(2)]
18 the public agency which is to apply it, and [(3)] the boundaries of the delegated
19 authority.” Mistretta, 488 U.S. at 372-73 (citing American Power & Light Co. v. SEC,
20 329 U.S. 90, 105, (1946)).
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1 In addition, while courts have recognized limits on Congress' authority to delegate
 2 its legislative power, those limits are less rigid where the entity "itself possesses
 3 independent authority over the subject matter." Loving, 517 U.S. at 772 (quoting United
 4 States v. Mazurie, 419 U.S. 544, 556-57 (1975)); see also United States v. Curtiss-Wright
 5 Export Corp., 299 U.S. 304, 319-22 (1936).

7 Accordingly, there are two inquiries this Court must consider when determining
 8 whether section 102(c) is a constitutional delegation of power: (1) whether section 102
 9 meets the three requirements of the intelligible principle standard; and (2) whether the
 10 degree of discretion granted to the DHS Secretary in section 102(c) is appropriate
 11 considering the Secretary's independent authority over the subject matter. See Mistretta,
 12 488 U.S. at 372-72; Loving, 517 U.S. at 772.

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 16 a. Prong One: Whether Section 102 Clearly Delineates a
 17 "General Policy"

18 Coalition Plaintiffs claim that section 102 fails to identify a general policy because
 19 prior courts identified different general policies. They cite to two recent cases, Sierra
 20 Club, 2005 WL 8153059, and Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119
 21 (D.D.C. 2007), cert denied, 554 U.S. 918 (2008), where the courts stated different policy
 22 goals in section 102. Coalition Plaintiffs assert "[w]hen courts cannot identify a common
 23 statutory policy goal, and the policy some did point to was incorrect, the statutory scheme
 24 cannot survive Mistretta scrutiny." (Dkt. No. 29-1 at 30.)

1 Defendants argue that Congress defined a “general policy” to guide the DHS
2 Secretary on how to exercise its delegated authority, satisfying the first prong of the
3 intelligible principle standard. That policy is install necessary barriers and roads to “deter
4 illegal crossings in areas of high illegal entry into the United States” through, under
5 section 102(c) “expeditious construction of barriers and roads under this section.” (Dkt.
6 No. 35-1 at 71.) Defendants further contend that there is no conflict between the
7 statements of general policy by the Sierra Club and the Defenders of Wildlife courts.
8 Rather, one is just more specific than the other. Id. Furthermore, later courts found no
9 conflict in the prior courts’ conclusions as to the general policy.
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13 Under section 102(a), the general policy states the Secretary of DHS shall take
14 actions as necessary to “deter illegal crossings in areas of high illegal entry into the
15 United States.” 8 U.S.C. § 1103(a). To carry out this policy, Congress authorizes the
16 DHS Secretary to “take such actions as may be necessary to install additional physical
17 barriers and roads.” Id.
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20 The first district court to address whether the amended section 102 contains a
21 “general policy” was in this district. In Sierra Club, the court held that “improvement of
22 U.S. border protection is the ‘clearly delineated general policy.’” Sierra Club, 2005 WL
23 8153059, at *6. Two years later, the District of Columbia District Court addressed this
24 same question and similarly found that the general policy was clearly delineated as “to
25 expeditiously ‘install additional physical barriers and roads . . . to deter illegal crossings
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1 in areas of high illegal entry.” Defenders of Wildlife, 527 F. Supp. 2d at 127. Notably,
2 the court further held that this identification of the statute’s general policy was not
3 contrary to that recognized by the Sierra Club court, but rather “in accord with the only
4 other decision to address the question of whether [IIRIRA’s] waiver provision is a
5 constitutional delegation.” Id. (citing Sierra Club, 2005 WL 8153059, at *6).

7
8 While using slightly different language, both courts identified the general policy as
9 border protection. Both courts identified deterrence of illegal crossing as a motivating
10 factor in this policy. And both courts recognized that in articulating this policy, Congress
11 permitted the construction of physical barriers and roads.

13 Moreover, the District Court for the Western District of Texas noted the general
14 policy of section 102 to be “construction of a border fence” which is consistent with the
15 general policy asserted in Sierra Club and Defenders of Wildlife. Cnty. of El Paso v.
16 Chertoff, No. EP-08-CA-196-FM, 2008 WL 4372693, at *3 (W.D. Tex. Aug. 29, 2008).

18 Thus, while prior courts have used different language to articulate Congress’s stated
19 policy goal, they do not provide contradictory interpretations of section 102’s general
20 policy.
21

22 Therefore, the Court finds that Congress clearly delineated the “general policy” of
23 section 102 as deterrence of illegal crossings through construction of additional physical
24 barriers to improve U.S. border protection, 8 U.S.C. § 1103, and has satisfied the first
25 prong of the intelligible principle standard.
26
27

1 **b. Prong Two: Whether Section 102 Clearly Delineates a Public**
2 **Agency**

3
4 It is undisputed that IIRIRA satisfies the second prong of the intelligible principle
5 standard because “the Secretary of Homeland Security” is to apply the general policy.
6 See 8 U.S.C. § 1103(c)(1).
7

8 **c. Prong Three: Whether Section 102 Clearly Delineates “the**
9 **Boundaries of Delegated Authority”**

10 All Plaintiffs challenge section 102(c) on the third factor of the intelligible
11 principle standard, arguing that the boundaries of the delegated authority are not clearly
12 delineated. They distinguish the Waivers from past waivers found to be constitutional.
13 Past waivers focused solely on building new fencing pursuant to the specific mandates of
14 Congress in section 102(b) which limited the DHS Secretary’s waiver authority to the
15 initial border construction. However, the Waivers at issue concern projects not
16 previously identified by section 102. Therefore, they argue that the grant of waiver
17 authority does not apply to these new projects.
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21 Defendants argue that Congress provided specific boundaries for its delegated
22 authority, satisfying the third prong of the intelligible principle standard. This authority
23 may only be exercised to “waive all legal requirements [the] Secretary . . . determines
24 *necessary* to ensure expeditious construction of the barriers and roads *under this section.*”
25 (Dkt. No. 35-1 at 72.) The boundaries, they contend, are both geographic, DHS can only
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1 waive laws in connection with construction of a physical barrier at the U.S. border, and
 2 temporally necessary, DHS can only waive laws necessary to quickly construct a wall.
 3
 4 Contrary to Plaintiffs' demand for specificity, the boundary need not include specific
 5 criteria or guidelines.²² In short, Congress has the power to be flexible and broad when
 6 delegating authority.

7
 8 Here, section 102(c) provides boundaries that limit the Secretary's authority to
 9 waive all laws that are "necessary to ensure expeditious construction of the barriers and
 10 roads." See Defenders of Wildlife, 527 F. Supp. 2d at 127 (boundaries clearly defined by
 11 Congress' requirement that Secretary may only waive laws that he determines are
 12 "necessary to ensure expeditious construction"); Sierra Club, 2005 WL 8153059, at *6
 13 (boundary of authority was limited to actions "necessary to install additional barriers and
 14 roads" and specifically, the construction of the Triple Fence in San Diego); Cnty. of El
 15 Paso, 2008 WL 43726993, at *4 (boundaries clearly defined relying on reasoning in
 16 Sierra Club and Defenders of Wildlife).
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22 ²² California Plaintiffs argue that Defendants fail to address their argument that while the non-delegation
 23 doctrine applies to cases where Congress provides the Executive power to decide which laws could be
 24 modified or terminated and under what circumstances, it has not authorized the Secretary to pick and
 25 choose among enacted laws and decide, which legislation to waive. Section 102 does not provide the
 26 Secretary with guidance as to which laws are to be waived or why. Because Defendants failed to
 27 address this argument, California Plaintiffs argue section 102(c) is unconstitutional and must be
 28 invalidated. However, Defendants addressed the boundaries of the Secretary's authority to waive laws
 limited to construction along the U.S. border and only those laws "necessary to ensure expeditious
 construction." (Dkt. No. 42 at 37.)

1 While it is true that section 102(c) contains considerably fewer details than other
 2 challenged statutes,²³ the Supreme Court does not demand that Congress outline specific
 3 factors or criteria when delegating authority.²⁴ Rather, Congress need only delineate the
 4 boundaries of the delegated authority in broad and general terms. See Opp Cotton Mills,
 5 Inc., 312 U.S. at 145. For example, in upholding Congress's broad delegation of power
 6 to the EPA Administrator, the Whitman Court noted that "even in sweeping regulatory
 7 schemes we have never demanded . . . that statutes provide a 'determinate criterion' for
 8 saying 'how much [of the regulated harm] is too much.'" Whitman v. American
 9 Trucking Ass'ns, 531 U.S. 457, 475 (2001). This is consistent with prior Supreme Court
 10 precedent holding that "[o]nly if we could say that there is an absence of standards for the
 11 guidance of the Administrator's action, so that it would be impossible in a proper
 12 proceeding to ascertain whether the will of Congress has been obeyed, would we be
 13 justified in overriding [Congress's] choice of means for effecting its declared purpose. . .
 14 .'" Yakus v. United States, 321 U.S. 414, 426 (1944).

23 In Mistretta, for example, the statute in question authorized an independent Sentencing Commission to
 24 formulate sentencing guidelines for federal offenses. Mistretta, 488 U.S. at 367. Congress identified
 25 three goals, four purposes, numerous guidelines, eleven factors for sentencing consideration, a
 26 prohibition on certain factors for sentencing consideration. Mistretta, 488 U.S. at 374-78.

24 In fact, the Court in Mistretta even recognized that the Act in question set forth "*more than* merely an
 27 'intelligible principle.'" Mistretta, 488 U.S. at 379 (emphasis added).

1 Section 102 of IIRIRA is easily distinguishable from the statutes in Panama
2 Refining Co. and A.L.A. Schechter Poultry Corp. The statute at issue in Panama
3 Refining Co. “provided literally no guidance for the exercise of discretion,” while the
4 statute challenged in A.L.A. Schechter Poultry Corp. “conferred authority to regulate the
5 entire economy on the basis of no more precise a standard than stimulating the economy
6 by assuring ‘fair competition.’” Whitman, 531 U.S. at 474.

9 Here, however, Congress expressly limits the DHS Secretary’s discretion to waive
10 laws to those “necessary to ensure expeditious construction of the barriers and roads
11 under this section.” 8 U.S.C. § 1103(c)(1). Congress’s use of the word “necessary” to
12 define the scope of discretion is well with the limits of non-delegation precedents. In
13 Touby, for example, the Supreme Court upheld a provision of the Controlled Substances
14 Act that permitted the Attorney General to schedule a drug when doing so is “necessary
15 to avoid an imminent hazard to the public safety.” Touby v. United States, 500 U.S. 160,
16 165 (1991). Similarly, in Indus. Union Dep’t, the Supreme Court upheld a provision of
17 the Occupational Safety and Health Act that empowered the Secretary of Labor to
18 promulgate standards that are “reasonably necessary or appropriate to provide safe or
19 healthful employment and places of employment.” Indus. Union Dep’t., AFL-CIO v.
20 American Petroleum Inst., 448 U.S. 607, 646 (1980). Finally, in Whitman, the Supreme
21 Court upheld a provision of the Clean Air Act that directed the EPA Administrator to set
22 standards that are “requisite to protect the public health” with “an adequate margin of
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1 safety.” Whitman, 531 U.S. at 475. “Requisite,” in this context, “mean[s] sufficient, but
2 not more than necessary.” Id. at 473. Furthermore, this limit on authority is the same
3 limit that was approved by the court in Sierra Club.
4

5 Both Congress and the Executive share responsibilities in protecting the country
6 from terrorists and contraband illegally entering at the borders. Border barriers, roads,
7 and detection equipment help provide a measure of deterrence against illegal entries.
8 With section 102, Congress delegated to its executive counterpart, the responsibility to
9 construct border barriers as needed in areas of high illegal entry to detect and deter illegal
10 entries. In an increasingly complex and changing world, this delegation avoids the need
11 for Congress to pass a new law to authorize the construction of every border project.
12 Similarly, Congress enacted a law which attempts to avoid delays caused by lawsuits
13 challenging the construction of barriers by allowing the Secretary to waive the
14 application and enforcement of federal, state and local laws during the construction of a
15 border barrier as necessary. The Court concludes that Congress has clearly delineated the
16 “boundaries of delegated authority” in terms previously upheld by the Supreme Court,
17 thereby satisfying the third prong of the intelligible principle standard.
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22 **d. Whether Congress’s Grant of Authority Constitutes “Unfettered**
23 **Discretion”**
24

25 Coalition Plaintiffs cite to Zivotofsky to suggest that the DHS secretary does not
26 have exclusive control over foreign affairs, and thus the statutory grant of discretion
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1 should be more limited. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089-90 (2015).

2 Defendants argue that the Executive Branch has significant, independent control over
3 immigration, foreign affairs, and national security, and therefore broad waiver authority
4 is justified. (Dkt. No. 35 at 74.) They attack Coalition Plaintiffs' reliance on Zivotofsky
5 and cite to binding precedent in support of their position. See Knauff v. Shaughnessy,
6 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of
7 sovereignty . . . [and] is inherent in the executive power to control the foreign affairs of
8 the nation.").

9 Congress can confer more discretion to an entity when that entity already has
10 significant, independent authority over the subject matter. See Loving, 517 U.S. at 772-
11 73. Here, Congress delegated broad authority to the DHS Secretary, an agent of the
12 Executive Branch. See 8 U.S.C. § 1103(c).

13 As stated in Sierra Club, the Executive Branch has independent and significant
14 constitutional authority in the area of "immigration and border control enforcement and
15 national security." Sierra Club, 2005 WL 8153059, at *6 (citing Knauff, 338 U.S. at 542-
16 43). Additionally, the court in Save Our Heritage confirmed that the construction of San
17 Diego barriers relate to "foreign affairs and immigration control—areas over which the
18 Executive Branch traditionally exercises independent authority." Save Our Heritage, 533
19 F. Supp. 2d at 63 (citing Defenders of Wildlife, 527 F. Supp. 2d at 129).

1 Nothing about DHS's authority has changed since prior rulings. The only
2 difference between this case and prior cases is the type of barrier being constructed. This
3 distinction is not relevant under this analysis.
4

5 Coalition Plaintiffs' reliance on Zivotofsky is not persuasive. The power
6 contemplated in Zivotofsky was the President's power to recognize foreign nations and
7 governments and the issue was whether the President has exclusive power to recognize
8 nations. Zivotofsky, 135 S. Ct. at 2084.
9

10 Here, the issue is not whether the President has exclusive power over foreign
11 affairs, but whether the DHS Secretary, acting as an agent of the Executive, has
12 significant, independent control over immigration. Therefore, because the DHS
13 Secretary, acting as an agent of the Executive Branch, has significant, independent
14 authority over immigration, Congress is justified in delegating broad authority. The
15 Court concludes that section 102 does not violate the non-delegation doctrine.
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18 California Plaintiffs also present a separate argument that the lack of judicial
19 review under section 102 violates the non-delegation doctrine and essentially imports a
20 fourth requirement to the intelligible principle standard. (Dkt. No. 30-2 at 45.) By
21 limiting review to only constitutional challenges, California Plaintiffs argue, Congress is
22 preventing the judicial branch from reviewing Congress's delegation of authority.
23
24 California Plaintiffs further contend that judicial review is the only way to ensure that the
25 DHS Secretary adheres to the intelligible principle Congress provided. California cites to
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1 three Supreme Court cases in support of this argument.²⁵ In none of these cases,
 2 however, did the Court strike down the statute for lack of judicial review.²⁶

3
 4 Defendants argue that Plaintiffs' argument has been expressly rejected by the
 5 Ninth Circuit. United States v. Bozarov, 974 F.2d 1037, 1041-45 (9th Cir. 1992).
 6 In Bozarov, the Ninth Circuit held that the nondelegation doctrine was not violated
 7 because the EAA precluded judicial review. "In sum, we believe that the Supreme Court
 8 cases upholding judicial preclusion of agency decisions, the language of the APA, and
 9 the fact that the EAA involves foreign policy issues support our conclusion that the
 10 EAA's preclusion of judicial review is constitutional." Id. at 1044. Furthermore, the
 11 Ninth Circuit also noted that its conclusion that the preclusion of judicial review did not
 12 violate the nondelegation clause was "bolstered" by the availability of judicial review for
 13 constitutional claims and ultra vires claims. Id. at 1044-45. Similarly, in Cnty. of El
 14 Paso, the same argument concerning whether judicial review was a requirement of the
 15 intelligible principle standard was rejected by the court. Cnty. of El Paso, 2008 WL
 16 4372693 at *4-6.

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 22
 23 ²⁵ A.L.A. Schechter Poultry Corp., 295 U.S. at 533; American Power & Light Co. v. SEC, 329 U.S. 90,
 106 (1946); and Touby, 500 U.S. at 165.

24 ²⁶ In A.L.A. Schechter Poultry, the Court struck down the statute not on the grounds that it lacked
 25 judicial review, but because of the Act's failure to impose limitations on discretion. 295 U.S. at 533. In
 26 American Power, the plaintiffs challenged the statute not on the grounds that it lacked judicial review,
 27 but rather because it lacked "ascertainable standards," thereby granting the SEC unfettered discretion.
 329 U.S. at 104. In Touby, the dispositive issue was not judicial review, rather whether the delegation
 28 afforded too much discretion. 500 U.S. at 165.

1 It is true that the Supreme Court has recognized that judicial review provides an
2 important check on the power delegated by Congress. See Touby, 500 U.S. at 167-69;
3 A.L.A. Schechter Poultry Corp., 295 U.S. at 533; Yakus, 321 U.S. at 426 (recognizing
4 the importance of judicial review by observing that one of the purposes of requiring
5 Congress to provide intelligible principles was so that a tribunal “in a proper proceeding
6 [may] ascertain whether the will of Congress has been obeyed.”). These cases recognize
7 that judicial review allows for the enforcement of the intelligible principle requirement
8 and the separation of powers. At the same time, a Supreme Court nondelegation doctrine
9 case has never turned on the presence or absence of judicial review.

13 While unlimited judicial review would assure compliance with all legal
14 requirements, it would defeat the purpose of the law to expedite the construction of
15 border barriers and roads in areas where they are needed. In this case, as in Bozarov,
16 section 102 allows judicial review of constitutional claims as well as ultra vires claim
17 which bolsters the conclusion that section 102 does not violate the nondelegation
18 doctrine. Accordingly, the California Plaintiffs’ argument concerning violation of the
19 non-delegation doctrine based on lack of judicial review is unsupported by law.

22 In conclusion, the Court GRANTS Defendants’ motions for summary judgment
23 and DENIES Plaintiffs’ motions for summary judgment on the Non-Delegation Doctrine
24 and separation of powers claims.

26 ///

1 **2. Article II, Section 3 of the U.S. Constitution - Take Care Clause**

2 Center Plaintiff alleges that the August 2 Waiver Determination violates the Take
3
4 Care Clause contending that it applies to Executive Officers, including the Secretary of
5 DHS. First, it claims that the DHS exceeded the authority delegated to it by issuing the
6 August 2 Waiver under section 102 even though it was not authorized by section 102(b).
7 (Dkt. No. 28-1 at 42-43.) Second, it asserts that even if section 102(c) waiver provision
8 is not limited to those barriers mandated under section 102(b), the August 2 Waiver
9 Determination does not comply with the direction in section 102(a) that the barriers be
10 built in “areas of high illegal entry.” (*Id.* at 43.) Therefore, Center Plaintiff argues, the
11 August 2 Waiver Determination violated the Executive’s duty to faithfully execute the
12 statutory mandate. (*Id.*) The Center Plaintiff’s SAC alleges that “[a]mong the laws the
13 Take Care Clause mandates be ‘faithfully executed’ are NEPA and the ESA, as well as
14 the conditions and limitations of IIRIRA section 102 itself.” (Dkt. No. 16, SAC ¶ 145.)
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18 Defendants argue that the Take Care Clause only applies to the actions of the
19 President and not the Secretary, that no court has treated the Take Care Clause as a basis
20 for affirmative relief, and that it is an improper attempt by Center Plaintiff to recast its
21 ultra vires challenge under the Take Care Clause.
22
23

24 Article II, Section 3 of the United States Constitution states that the President
25 “shall take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 2, cl. 3.
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1 First, the Court disagrees with Defendants' argument that the Take Care Clause
 2 applies only to the President, and not his cabinet members. "The vesting of the executive
 3 power in the President was essentially a grant of power to execute the laws. But the
 4 President alone and unaided could not execute the laws. He must execute them by the
 5 assistance of subordinates." Myers v. United States, 272 U.S. 52, 117 (1926); see also
 6 Printz v. United States, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to
 7 speculation who is to administer the laws enacted by Congress; the President, it says,
 8 "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through
 9 officers whom he appoints") Moreover, when the Supreme Court granted certiorari
 10 in United States v. Texas, it, *sua sponte*, asked for additional briefing on "Whether the
 11 Guidance²⁷ violates the Take Care Clause of the Constitution, Art. II, 3." United States v.
 12 Texas, 136 S. Ct. 906 (2016). The issue was whether the Secretary of DHS' actions
 13 establishing Deferred Action for Parents of Americans and Lawful Permanent Residents
 14 ("DAPA") violated the Take Care Clause, an issue not addressed by the district court.²⁸
 15 Texas v. United States, 86 F. Supp. 3d 591, 607 (2015). Therefore, the Supreme Court's

22 ²⁷ The government described Deferred Action for Parents of Americans and Lawful Permanent
 23 Residents ("DAPA") as "Deferred Action Guidance." Texas v. United States, 86 F. Supp. 3d 591, 667
 24 (2015).

25 ²⁸ The district court in Texas noted that the issue was whether the Secretary of DHS has the power to
 26 establish DAPA stating that the President had not issued any executive orders or presidential
 27 proclamation or communique concerning DAPA but that it was solely established by the Secretary.
 28 Texas, 86 F. Supp. 3d at 607. In contrast, in this case, President Trump issued an Executive Order on
 January 25, 2017 directing the Secretary of DHS to take steps to "obtain complete operations control . . .
 of the southern border." (Dkt. No. 30-5, Cayaban Decl., Ex. 7, Executive Order, 82 Fed. Reg. 8793.)

1 decision to *sua sponte* address the Take Care clause in relation to an act of the Secretary
2 of DHS indicates that the Take Care clause applies not only to the President but also his
3 Executive officers.
4

5 As to whether the August 2 Waiver Determination violates the Take Care clause,
6 Center Plaintiff cites to three cases to support the assertion that the Executive is required
7 to “execute the laws, not make them.” First, it cites to a sentence in the conclusion of
8 Medellin v. Texas, 552 U.S. 491, 532 (2008) stating that the Take Care clause that laws
9 be faithfully executed requires the Executive to “execute the law, not make them.” Id. at
10 532. But Medellin dealt with the legal effect of an international treaty on domestic law.
11 Id. at 504. In fact, the Court mentioned that the Take Care clause did not apply in the
12 case since the International Court of Justice’s decision was an international judgment. Id.
13 at 532. Medellin did not concern a statute enacted by Congress and is not helpful in the
14 Take Care analysis.
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18 Next, Center Plaintiff cites to Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S.
19 579, 587 (1952) in support of its argument that the President’s power is to faithfully
20 execute the laws, not make them. Due to an impending nation-wide strike of the steel
21 mills, the President, on his own, issued an Executive Order directing the Secretary of
22 Commerce to take possession of most of the country’s steel mills and keep them running.
23 Id. at 583. The steel mill owners filed suit alleging that the seizures were not authorized
24 by Congress or any other constitutional provision. Id. The Court agreed explaining that
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1 the President's power must come from either an act of Congress or from the Constitution.
2 Id. at 585. However, in the case, the Executive Order "did not direct that a congressional
3 policy be executed in a manner prescribed by Congress—it directs that a presidential
4 policy be executed in a manner prescribed by the President." Id. at 588. Such conduct to
5 make laws is only delegated to Congress, and not the President. Id. The Supreme Court
6 affirmed the district court's preliminary injunction restraining the Secretary from
7 enforcing the Executive Order. Id. at 584. In contrast, in this case, Congress enacted
8 section 102(c), which grants the Secretary of DHS not only the discretion to waive all
9 laws when "necessary to ensure expeditious construction of the barriers and roads" but
10 also discretion to determine whether it is necessary to install barriers to deter "illegal
11 crossings in areas of high illegal entry." See 8 U.S.C. §§ 1103(a) & (c). Therefore,
12 Youngstown Sheet & Tube Co. does not support Center Plaintiff's position.

13
14 Finally, in Myers v. United States, 272 U.S. 52 (1926), the question presented to
15 the Supreme Court was "whether under the Constitution the President has the exclusive
16 power of removing executive officers of the United States whom he has appointed by and
17 with the advice and consent of the Senate." Id. at 60. The case dealt with the power of
18 the President to appoint and remove executive officers as opposed to the discretion of the
19 Secretary of the DHS to carry out section 102, a provision enacted by Congress.

20
21 The cases cited by Center Plaintiff do not address the application of the Take Care
22 clause. It merely cite to these cases for the assertion that the President's duty under the
23

1 Take Care clause is to execute laws, not make them. However, none of the cases cited by
 2 Center Plaintiff address an executive head's exercise of his or her discretionary authority
 3 to carry out the mandates of Congress. As a result, they provide no guidance as to how
 4 the Take Care clause would or should apply in this case. Moreover, given that the
 5 challenged steps taken by the Secretary are ones that are plausibly called for by an act of
 6 Congress, a Take Care challenge in this case would essentially open the doors to an
 7 undisciplined and unguided review process for all decisions made by the Executive
 8 Department.

9
 10 Consequently, Center Plaintiff has not demonstrated that the Take Care clause in
 11 this case has been violated. Thus, the Court GRANTS Defendants' motion for summary
 12 judgment and DENIES Center Plaintiff's motion for summary judgment on the Take
 13 Care Clause claim.

14 **3. Article I, Sections 2 & 3 of the United States Constitution**

15 California Plaintiffs argue that section 102(c) violates Article I, Sections 2 and 3 of
 16 the U.S. Constitution by allowing the Secretary to waive numerous criminal laws
 17 concerning the border wall projects without providing a specific list of criminal laws that
 18 are waived.²⁹ Defendants contend that California Plaintiffs have provided no legal
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 25 ²⁹ For example, California Plaintiffs argue the Secretary waived the Resource Conservation Recovery
 26 Act, 42 U.S.C. § 6928, which makes it a crime to knowingly dump hazardous waste that puts another
 27 person in imminent danger of death or serious bodily injury, and waived the Clean Water Act, 33 U.S.C. §
 28 1319(c) making it a crime to knowingly pollute a river, stream or other water.

1 authority to support their argument that Article I, Sections 2 and 3 address Congress'
2 delegation of power to waive criminal law to the Executive.
3

4 Article 1 Section 3 provides,

5 Judgment in Cases of Impeachment shall not extend further than to removal
6 from Office, and disqualification to hold and enjoy any Office . . . but the
7 Party convicted shall nevertheless be liable and subject to Indictment, Trial,
8 Judgment and Punishment, according to Law.

9 U.S. Const. art. I, § 3, cl. 7. This section concerns impeachment and punishment of
10 conviction and is “an attempt by the framers to anticipate and respond to questions that
11 might arise regarding the procedural right of the accused during the impeachment
12 process.” United States v. Claiborne, 727 F.2d 842, 846 (9th Cir. 1984) (quoting United
13 States v. Hastings, 681 F.2d 706, 710 (11th Cir. 1982)). California Plaintiffs also cite to
14 Article I, Section 2 which states that the President “shall have Power to grant Reprieves
15 and Pardons for Offenses against the United States, except in Cases of Impeachment.”
16

17 U.S. Const. art I, § 2, cl. 1.
18

19 California Plaintiffs invoke these two constitutional provisions arguing that
20 Congress cannot grant the Executive Branch sweeping powers to waive federal criminal
21 laws without specifically listing the criminal laws to be waived and that it places the
22 Executive Branch above the law. However, California Plaintiffs provide no legal
23 authority to support their argument that Article I, Sections 2 & 3 supports their
24 proposition. None of their cited cases concern the application of Article I, Sections 2 or 3.
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1 of the U.S. Constitution. California Plaintiffs have not demonstrated they are entitled to
2 judgment as a matter of law that section 102 and the Waiver Determinations violate
3 Article I, Sections 2 and 3 of the U.S. Constitution. The Court GRANTS Defendant's
4 motion for summary judgment and DENIES California Plaintiffs' motion for summary
5 judgment on this claim.
6

7
8 **4. Article I, Section 7 of the U.S. Constitution - Presentment Clause**

9 All Plaintiffs assert that the DHS Secretaries' waiver of more than thirty
10 environmental laws through section 102(c) violates Article I, Section 7 of the U.S.
11 Constitution. They rely heavily on Clinton v. City of New York, 524 U.S. 417 (1998)
12 arguing that allowing DHS to waive laws through section 102(c) amounts to an
13 amendment or repeal of statutes. Section 102 gives the DHS Secretary "nearly unbridled
14 discretion" to waive laws and would waive laws in which DHS has no expertise. (Dkt.
15 No. 30-2 at 49.) Since Congress provides no guidance as to which laws to waive, the
16 Secretary's actions will solely reflect the Executive's will. (Id. at 50.)
17
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20 Defendants argue that the waiver of the environmental laws through section 102(c)
21 does not amount to an amendment or repeal of statute and only select statutes are waived
22 in an effort to build roads and barriers next to portions of the border. Defendants liken
23 the waiver to an "executive grant of immunity or waiver of claim" which "has never been
24 recognized as a form of legislative repeal." Id. (quoting In re Nat'l Sec. Agency
25 Telecomm. Records Litig., 671 F.3d 881 (9th Cir. 2011)). Defendants argue that here,
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1 like in Telecomm., there is no constitutional violation of the Presentment Clause because
2 the partially waived statutes remain the same from when Congress approved the statute
3 and the President signed it. Defendants contend that here, unlike Clinton, there is no
4 separation of powers issue because Congress gave DHS authority to partially waive
5 statutes for a border wall when Congress amended section 102. Defendants distinguish
6 the situation here from Clinton by noting that DHS Secretary is implementing
7 congressional intent rather than rejecting it.

10 According to the Presentment Clause, “[e]very Bill which shall have passed the
11 House of Representatives and the Senate, shall, before it become a Law, be presented to
12 the President of the United States: If he approve he shall sign it, but if not he shall return
13 it, with his Objections to that House in which it shall have originated, who shall enter the
14 Objections at large on their Journal, and proceed to reconsider it.” U.S. Const. art I., § 7.
15 The Constitution does not allow the Executive “to enact, to amend, or to repeal statutes.”
16 Clinton v. City of New York, 524 U.S. 417, 438 (1998). “‘Amendment and repeal of
17 statutes, no less than enactment, must conform with’ the bicameralism and presentment
18 requirements of Article I.” Defenders of Wildlife, 527 F. Supp. 2d at 123-24 (quoting
19 INS v. Chadha, 462 U.S. 919, 954 (1983)).

22 In Clinton, the U.S. Supreme Court invalidated the Line Item Veto Act because
23 “[i]n both legal and practical effect,” the Line Item Veto gave the President the power to
24 amend “Acts of Congress by repealing a portion of each.” Clinton, 524 U.S. at 438. In

1 Clinton, cancellation of legal provisions altered the statute's "legal force or effect." Id. at
2 437. In essence, the Line Item Veto Act replaced the once legally-passed bills with
3 truncated replacements. Id. at 438. The Supreme Court considered this alteration a
4 disruption of the bicameralism and presentment requirements of the Presentment Clause.
5 Id.

6
7 This situation, however, is distinguishable from Clinton. Here, the Waivers are
8 narrow in scope and only for the purpose of building border barriers something that is
9 permitted by section 102(c). In Clinton, the Line Item Veto Act rendered the cancelled
10 legal provisions powerless and effectively changed the law entirely. Id. at 437. Here, the
11 statutes largely retain legal force and effect because the §102(c) waivers only disturb the
12 waived statutes for a specific purpose and for a specific time.

13
14 In Defenders of Wildlife, the district court addressed the plaintiffs' presentment
15 clause challenge to section 102(c) and stated,

16
17 The REAL ID Act's waiver provision differs significantly from the Line
18 Item Veto Act. The Secretary has no authority to alter the text of any
19 statute, repeal any law, or cancel any statutory provision, in whole or in part.
20 Each of the twenty laws waived by the Secretary on October 26, 2007,
21 retains the same legal force and effect as it had when it was passed by both
22 houses of Congress and presented to the President.

23 527 F. Supp. 2d at 124; see also Cnty. of El Paso, 2008 WL 4372693, at *6-7. The court
24 also explained that the waiver did not constitute an unconstitutional "partial repeal"
25 because this was not an instance in which "any waiver, no matter how limited in scope,
26

1 would violate Article I because it would allow the Executive Branch to unilaterally
 2 ‘repeal’ or nullify the law with respect to the limited purpose delineated by the waiver
 3 legislation.” Defenders of Wildlife, 527 F. Supp. at 124. The Court concludes that the
 4 Secretaries’ Waiver Determinations made pursuant section 102(c) do not violate the
 5 Presentment Clause. The Court GRANTS Defendants’ motions for summary judgment
 6 and DENIES Plaintiffs’ motions for summary judgment on this issue.
 7
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9 **5. Access to the Courts**

10 **a. Due Process/First Amendment Right to Petition/Article III³⁰**

11 Coalition Plaintiffs argue in their motion, but not in their reply, in one paragraph,
 12 that section 102(c)(2) deprives them of their due process rights and impairs their First
 13 Amendment right to petition the government. (Dkt. No. 29-1 at 36-37.) They argue they
 14 have a property and liberty interest in ensuring environmental laws and interests are
 15 protected and section 102(c)(2) removes any procedure that would protect their interests
 16 from arbitrary and capricious conduct by the Secretary.
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22 ³⁰ In reply, California Plaintiffs appear to assert a void-for-vagueness challenge under the First
 23 Amendment in response to an argument made in Defendants’ brief. (Dkt. No. at 25; Dkt. No. 35-1 at 84
 24 n.53.) The void-for vagueness argument, raised initially in California Plaintiffs’ reply, morphed into a
 25 claim based on the parties’ argument. California Plaintiffs did not raise the issue of void for vagueness
 26 under the First Amendment in their moving papers, and in fact, is not a claim alleged in their complaint.
 27 Instead, their complaint and their moving brief claim that section 102(c) is vague and therefore a
 28 violation of their due process rights under the Fifth Amendment which is distinct from a void-for-
 vagueness claim. The Court declines to address the void-for-vagueness challenge, an issue not raised in
 California Plaintiffs’ complaint or moving brief.

1 California Plaintiffs argue that section 102(c)'s unreasonable procedural hurdles
2 violate Californians' Article III and due process rights and the rights to potential parties'
3 ability to petition the Court. They argue that the 2017 Waivers fail to identify the state
4 laws that are purportedly waived. They also argue that the San Diego Waiver is vague
5 when it states that DHS intends to install "various border infrastructure projects" within
6 the "Project Areas" but fails to describe these other projects. Next, they argue that the
7 San Diego Waiver does not provide reasonable notice as to when undisclosed projects
8 will be constructed and purports to waive federal and state laws for the on-going
9 maintenance of these structures. These uncertainties leave California unable to determine
10 whether the projects will be the types of projects authorized by section 102, whether the
11 areas will be considered areas of high illegal entry at the time they are installed and
12 whether California should file a claim to protect their individual rights. Also, by barring
13 all non-constitutional claims, the California Plaintiffs contend section 102(c)(2)(A)
14 interferes with its right of access to the courts.³¹ California claims it has an interest in
15 enforcing its own state laws and to preserve state property adjacent to the Projects.
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23 ³¹ California Plaintiffs also summarily argue that the 60 day statute of limitations from the date of
24 publication in the Federal Register creates the risk that Californians will not learn about the full extent of
25 the 2017 Waivers as it lacks clarity and fails to provide adequate notice which violates Article III of the
26 U.S. Constitution. Defendants respond that this challenge is an irrelevant hypothetical as their
27 complaint was timely filed. California Plaintiffs do not reply to Defendants' argument. The Court
28 agrees that California Plaintiffs are asserting an argument that has no application to them as they filed
their complaint timely; moreover, they provide no case law to support their argument.

1 Defendants claim that Plaintiffs have not demonstrated that they have a cognizable
 2 life, liberty or property interest for a due process violation. They contend that California
 3 Plaintiffs' assertion of Article III standing is distinct from a liberty or property interest
 4 protected by the Fifth Amendment.
 5

6 The Fifth Amendment's Due Process Clause states "[n]o person shall . . . be
 7 deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.
 8 As a threshold, a plaintiff must show a liberty or property interest protected by the
 9 Constitution. Ching v. Mayorkas, 725 F.3d 1149, 1155 (9th Cir. 2013).
 10

11 Coalition Plaintiffs summarily state they have property and liberty interests in
 12 ensuring environmental laws and interest are protected.³² California also claims it has an
 13 interest in enforcing its own state laws and to preserve state property adjacent to the
 14 Projects. However, Coalition Plaintiffs and California have not provided any case law
 15 supporting the claim that their property and/or liberty interests are protected by the
 16 Constitution and have failed to provide any meaningful analysis on the due process
 17 violation claim. Moreover, the Court notes that many of California Plaintiffs' arguments
 18 are speculative and concern issues that may arise in the future with future border wall
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 25 ³² In their reply, Coalition Plaintiffs dispute Defendants' argument that they failed to identify a liberty or
 26 property interest to support a due process claim and argued they asserted their right to access the courts
 27 and to enforce environmental and animal-protection laws. (Dkt. No. 38 at 26 n.10.) However, in their
 28 moving papers, Coalition Plaintiffs do not assert an interest in their right to access the courts in their due
 process analysis but solely an interest in "environmental laws and interests." (Dkt. No. 29-1 at 36-37.)

1 construction projects and do not address the current projects. The Court declines to
2 address any issues concerning future projects as California Plaintiffs have not provided
3 legal support for their arguments.
4

5 California Plaintiffs also claim that the 2017 Waivers do not identify which
6 specific state laws are purportedly waived as the waiver language waives a specific list of
7 over 30 federal statutes, “including all federal, state, or other laws, regulations and legal
8 requirements of, deriving from, or related to the subject of, the following statutes.” (Dkt.
9 No. 30-6, Cayaban Decl., Ex. 11, 82 Fed. Reg. 35985; id., Ex. 12, 82 Fed. Reg. 42830.)
10 California Plaintiffs broadly interpret the provision to include numerous state laws which
11 Defendants argue are inapplicable to the Projects at issue. Once again, California
12 Plaintiffs fail to provide any legal authority on whether a statute that permits the waiver
13 of laws requires specificity as to which laws are implicated. The one case cited, FCC v.
14 Fox Television Stations, Inc., 567 U.S. 239, 253 (2012), deals with a statute that either
15 requires or forbids conduct, but does not involve the waiver of laws.
16

17 Lastly, Coalition Plaintiffs, in one paragraph, and not addressed in their reply,
18 (Dkt. No. 29-1 at 36), and California Plaintiffs, raised in a paragraph, and not in their
19 reply, (Dkt. No. 30-2 at 41), further claim that their First Amendment Right to Petition
20 the government has been abridged by the judicial review bar in section 102(c)(2).
21

22 The First Amendment guarantees “the right of the people . . . to petition the
23 Government for a redress of grievances.” U.S. Const. amend. I.
24

1 A one paragraph argument, by Coalition Plaintiffs and California Plaintiffs, is not
 2 sufficient to meaningfully address a First Amendment challenge. The Court declines to
 3 address an issue not properly briefed by the parties.
 4

5 Therefore, the Court GRANTS Defendants' motions for summary judgment and
 6 DENIES Coalition and California Plaintiffs' motions for summary judgment on these
 7 issues.
 8

9 **6. Violation of the Tenth Amendment³³ - Concurrent State and**
 10 **Federal Jurisdiction**
 11

12 Coalition Plaintiffs argue that Congress lacks the power to eliminate the concurrent
 13 jurisdiction of state courts unless it vests that power exclusively with a federal court.
 14 (Dkt. No. 29-1 at 35-36.) They contend that section 102 eliminates both federal and state
 15 jurisdiction by "vesting 'exclusive jurisdiction' over issues into a federal court only then
 16 to also remove that judicial power from the very federal court it just vested with that
 17 power." (*Id.* at 36.) Defendants respond that Congress has specifically displaced state
 18 court jurisdiction when it enacted section 102(c)(2)(A), and expressly made federal
 19 jurisdiction exclusive for challenges to the waiver determinations.
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25
 26 ³³ In their papers, Coalition Plaintiffs do not allege whether the concurrent federal and state jurisdiction
 27 argument is premised on a Tenth Amendment violation. However, their complaint alleges a Tenth
 28 Amendment violation based on this argument. (Dkt. No. 26, FAC ¶ 115.)

1 “Under our federal system, the States possess sovereignty concurrent with that of
2 the Federal Government, subject only to limitations imposed by the Supremacy Clause.
3
4 Under this system of dual sovereignty, we have consistently held that state courts have
5 inherent authority, and are thus presumptively competent, to adjudicate claims arising
6 under the laws of the United States.” Tafflin v. Levitt, 493 U.S. 455, 458 (1990). “This
7 deeply rooted presumption in favor of concurrent state court jurisdiction is, of course,
8 rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular
9 federal claim.” Id. at 459.
10

11
12 Section 102(c)(2)(A) grants the federal court with exclusive jurisdiction to handle
13 all causes of action arising under section 102(c)(1) alleging a violation of the Constitution
14 but shall not have jurisdiction over any other claim. 8 U.S.C. § 1103(c)(2)(A). By
15 enacting section 102(c), Congress’s authority to grant exclusive jurisdiction to review any
16 waiver determination to the federal district court is undisputed by the parties. Congress
17 specifically granted federal district courts exclusive jurisdiction of any constitutional
18 challenges but barred judicial review of any non-constitutional claim. Coalition Plaintiffs
19 have not provided any legal authority that granting federal court exclusive jurisdiction
20 over waiver determinations for solely constitutional claims violates the federal system of
21 concurrent federal and state jurisdiction.
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25 Accordingly, the Court GRANTS Defendants’ motion for summary judgment and
26 DENIES Coalition Plaintiffs’ motion for summary judgment on this issue.
27
28

1 **7. Violation of California's Equal Sovereignty and Police Powers under**
2 **the Tenth Amendment**

3
4 The Tenth Amendment states that “[t]he powers not delegated to the United States
5 by the Constitution, nor prohibited by it to the states, are reserved to the States
6 respectively, or to the people.” U.S. Const. amend X. The State of California argues that
7 under the authority of Shelby Cnty., Alabama v. Holder, 133 S. Ct. 2612 (2013), section
8 102 violates the Tenth Amendment. California asserts that the Waivers violate the Tenth
9 Amendment by burdening California, but not other states, when progress has been made
10 curbing the problem that section 102 seeks to address, i.e. the dramatic reduction in the
11 number of illegal crossings at the border. California also contends that under City of
12 Boerne v. Flores, 521 U.S. 507, 534-35 (1997), section 102 interferes with California’s
13 police powers by intruding on its state sovereignty by waiving all state and local laws and
14 regulations without any parameters and intruding on every level of government under a
15 grossly broad law. Defendants argue that Shelby and City of Boerne are distinguishable
16 and do not support California’s argument.

17 Shelby involved a challenge to the Voting Rights Act (“VRA”), enacted in 1965.
18 Shelby, 133 S. Ct. at 2619. The Court held that the coverage formula contained in § 4(b)
19 of the VRA, identifying jurisdictions covered by § 5’s preclearance requirement, was
20 unconstitutional. Id. at 2620. If a state was a covered jurisdiction, § 5 required that no
21 changes could be made to a state’s voting procedures unless approved by federal

1 authorities. Id. These provisions were originally meant to be temporary as they were to
2 expire in five years but Congress subsequently reauthorized the Act several times. Id.
3 While the Court recognized the Supremacy Clause, it also noted the States' broad
4 autonomy "in structuring their governments and pursuing legislative objectives" and that
5 the framers of the Constitution "intended the States to keep for themselves, as provided in
6 the Tenth Amendment, the power to regulate elections." Id. at 2623 (citations omitted)
7 (noting that while the Federal Government has significant control over federal elections,
8 states have "broad powers to determine the conditions under which the right of suffrage
9 may be exercised."). The Court also noted the "fundamental principle of *equal*
10 'sovereignty' among the States." Id. (emphasis in original).

11
12 The VRA restriction only applied to nine States and some additional counties
13 thereby violating the principal of equal sovereignty. Id. at 2624. In order to justify
14 violating the equal sovereignty of states, the Court required that the statute's requirement
15 be "sufficiently related to the problem that it targets." Id. at 2622. The Court found that
16 the conditions that originally justified the VRA's passage, entrenched racial
17 discrimination in voting, no longer existed in the covered states and counties as African-
18 American voter turnout exceeded white voter turnout in the majority of the states covered
19 by § 5. Id. at 2618-19. When a law treats one state differently from another, the
20 Supreme Court "requires a showing that a statute's disparate geographic coverage is
21 sufficiently related to the problem that it targets." Id. at 2622 (quoting Nw. Austin

1 Municipal Util. Dist. Number One v. Holder, 557 U.S. 193, 203-04 (2009)). The court
2 held that the coverage formula under § 4 was unconstitutional. Id. at 2631.

3
4 Relying on the principles in Shelby, California argues that section 102 violates the
5 Tenth Amendment because it disparately treats California in imposing waiver of its laws
6 to build additional barriers even though the number of “high illegal entry” of aliens has
7 dramatically decreased in recent years.

8
9 Here, unlike the State’s power to regulate elections in Shelby, the authority vested
10 in the Secretary of DHS concerning immigration and border security is broad. See
11 Arizona, 567 U.S. at 395; Kleindienst, 408 U.S. at 765. Moreover, a court in this district
12 concluded that “Section 102 clearly manifests congressional intent to preempt state and
13 local laws which would interfere with Congress’s objective to expeditiously construct the
14 border fence.” Cnty. of El Paso, 2005 WL 4372693, at *10 (concluding that under
15 section 102(c), state and local laws would be preempted if the state’s enforcement of its
16 statute interfered with federal objective and waiver statute did not violate the Tenth
17 Amendment). California has not demonstrated that it has autonomy or authority in
18 regulating its border with Mexico. Moreover, as to the principal of equal sovereignty,
19 section 102 applies with equal force to any state that borders the United States.
20
21 Inevitably all states are not border states, and section 102 does not single out a particular
22 state in imposing requirements on state powers in a discriminatory manner as the VRA in
23 Shelby.

1 Next, California argues that section 102 interferes with its police powers relying on
2 City of Boerne. In City of Boerne, a local zoning authority denied a church a building
3 permit, and the Supreme Court held that the Religious Freedom Reformation Act
4 (“RFRA”) was unconstitutional as applied to the states because it was beyond Congress’s
5 remedial power to regulate states under Section 5 of the Fourteenth Amendment to the
6 Constitution. City of Boerne, 521 U.S. at 536. Section 5 of the Fourteenth Amendment
7 grants Congress broad authority to remedy and deter constitutional violations. Id. at 518.
8 The Court noted that RFRA was not remedial or preventive legislation but instead an
9 attempt at “substantive change in constitutional protections.” Id. at 532. The scope and
10 reach of RFRA was overly broad, as it applied to every agency and official in federal,
11 state and local governments and to any federal and state law, and was temporally broad
12 with no termination date. Id.

13 The Court does not find City of Boerne supportive of California’s argument. First,
14 City of Boerne did not involve a claim of a Tenth Amendment violation but addressed
15 Congress’ authority under Section 5 of the Fourteenth Amendment, a distinct provision
16 of the Constitution. California claims its police powers, to legislate for the public good,
17 is being curtailed by section 102 and that section 102(c) is grossly overbroad as it allows
18 for the waiver of “all federal and state law.” While the language of section 102(c) is
19 broad since it applies to a waiver of “all legal requirements” the waiver is circumscribed
20 to those the Secretary determines are “necessary to ensure expeditious construction of the
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1 barriers and roads.” 8 U.S.C. § 1103(c). The two waivers at issue are limited to the
 2 “construction of roads and physical barriers . . . in the Project Area.” (Dkt. No. 30-6,
 3 Cayaban Decl., Ex. 11, 82 Fed. Reg. at 35985; *id.*, Ex. 12, 82 Fed. Reg. at 42830.)
 4 Contrary to Plaintiff’s position, section 102’s granting the Secretary authority to waive
 5 state laws is not indefinite in duration and unlimited. Moreover, as noted by a district
 6 court, section 102 does not abrogate the validity of state laws but “merely suspend[s] the
 7 effects of the state and local laws.” Cnty. of El Paso, 2008 WL 4372693, at *8.
 8

9
 10 The Court concludes that California Plaintiff’s Tenth Amendment claim is without
 11 merit, and GRANTS Defendants’ motion for summary judgment, and DENIES California
 12 Plaintiff’s motion for summary judgment on this issue.
 13

14 **G. Whether Constitutional Avoidance Compels a Ruling that the August 2**
 15 **Waiver is Ultra Vires to section 102**
 16

17 In their reply, Coalition Plaintiffs, for the first time, assert that judicial review of
 18 sections 102(a) and (b) is necessary to avoid serious constitutional problems. They argue
 19 that there are serious constitutional concerns because section 102(c) grants an unelected
 20 cabinet official with unbridled power to waive any law that has any remote connection to
 21 border security projects. Center Plaintiff also raises for the first time in its reply that the
 22 doctrine of constitutional avoidance compels a holding that the August 2 Waiver is ultra
 23 vires to section 102. In their reply, Defendants summarily argue that the canon of
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1 constitutional avoidance does not apply since the challenges are not serious enough based
2 on the plain text of section 102.

3
4 “The so-called canon of constitutional avoidance is an interpretive tool, counseling
5 that ambiguous statutory language be construed to avoid serious constitutional doubts.”

6 FCC v. Fox Tel. Stations, Inc., 556 U.S. 502, 516 (2009) (citation omitted). If

7
8 “the statute does not raise constitutional concerns, then there is no basis for employing
9 the canon of constitutional avoidance.” Rodriguez v. Robbins, 715 F.3d 1127, 1140 (9th
10 Cir. 2013) (citation omitted). Moreover, if there is no ambiguity in the statute,
11 constitutional avoidance has no application. Warger v. Shauers, 135 S. Ct. 521, 529
12 (2014) (Federal Rule of Evidence 606(b) is not ambiguous).

14 “It is a bedrock principle of statutory interpretation that ‘where an otherwise
15 acceptable construction of a statute would raise serious constitutional problems, the Court
16 will construe the statute to avoid such problems unless such construction is plainly
17 contrary to the intent of Congress.’” Hawaii v. Trump, 878 F.3d 662, 690 (9th Cir. 2017)
18 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
19 485 U.S. 568, 575 (1988)). The constitutional avoidance doctrine may be invoked only if
20 the court has “grave doubts” about the statute’s constitutionality. Ileto v. Glock, Inc., 565
21 F.3d 1126, 1143 (9th Cir. 2009); Almendarez-Torres v. United States, 523 U.S. 224, 238
22 (1998) (“those who invoke the doctrine must believe that the alternative is a serious
23 likelihood that the statute will be held unconstitutional.”).

1 As discussed above, the Court does not have serious constitutional doubts as to the
2 constitutionality of section 102(c). Moreover, prior challenges to the initial amendment
3 of section 102(c) broadening its waiver authority in 2005 have been upheld as
4 constitutional. Accordingly, the Court declines to apply the doctrine of constitutional
5 avoidance.
6

7 CONCLUSION

8
9 Based on the reasoning above, the Court DENIES Plaintiffs' motions for summary
10 judgment and GRANTS Defendants' motions for summary judgment with the exception
11 of the Center Plaintiff's seventh cause of action for FOIA violations.
12

13 IT IS SO ORDERED.

14 Dated: February 27, 2018

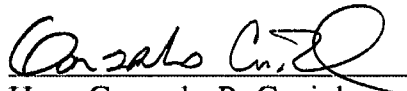
15 
16 Hon. Gonzalo P. Curiel
17 United States District Judge
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Exhibit 3

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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
11 **IN RE: BORDER**
12 **INFRASTRUCTURE**
13 **ENVIRONMENTAL**
14 **LITIGATION**

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

15 **ORDER GRANTING JOINT**
16 **MOTION FOR DISMISSAL OF**
17 **FOIA CLAIMS**

18 Good cause appearing, the parties' joint motion to voluntarily dismiss
19 Plaintiff's Seventh Cause of Action for Freedom of Information Act, 5 U.S.C. §
20 552, violations with prejudice is **GRANTED**.

21 **IT IS SO ORDERED.**

22 Dated: March 26, 2018

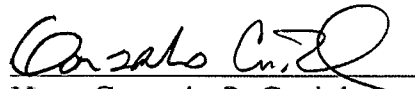
23 
24 Hon. Gonzalo P. Curiel
25 United States District Judge
26
27
28

Exhibit 4

No. _____

IN THE
Supreme Court of the United States

ANIMAL LEGAL DEFENSE FUND, DEFENDERS OF WILDLIFE, AND SIERRA CLUB,
Petitioners,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Respondents.

**APPLICATION TO THE HON. ANTHONY KENNEDY
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA**

Pursuant to Rule 13(5) of the Rules of this Court, Petitioners Animal Legal Defense Fund, Defenders of Wildlife, and Sierra Club (collectively, Petitioners) move for an extension of time of 60 days, to and including August 23, 2018, within which to file a petition for a writ of certiorari.

1. The judgment from which review is sought is *Center for Biological Diversity, et. al. v. U.S. Department of Homeland Security, et. al.*, Case Nos. 17-cv-1215-GPC-WVG, 17-cv-1873-GPC-WVG, 17-cv-1911-GPC-WVG (S.D. Cal. March 26, 2018) (attached as Exhibit 1). The judgment arises from the district court's February 27, 2018 Order granting summary judgment in *In re: Border Infrastructure Environmental Litigation*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018) (attached as Exhibit 2) and the district court's order granting a joint motion to voluntarily dismiss the Center for Biological Diversity's cause of action under the

Freedom of Information Act, 5 U.S.C. § 552, Dkt. No. 53 (March 26, 2018) (attached as Exhibit 3). The date within which a petition for writ of certiorari would be due, if not extended, is June 24, 2018, calculated from the date of judgment pursuant to 28 U.S.C. § 2101(c). Petitioners are filing this Application at least ten days before that date. See S. Ct. R. 13.5. The jurisdiction of this Court is based on Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) § 102(c)(2)(C), codified at 8 U.S.C. § 1103 note. Specifically, IIRIRA § 102(c)(2)(C) provides for this Court’s direct, certiorari review of the district court’s rulings:

(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.

2. This case presents several substantial questions of law meriting this Court’s attention, including: (1) Whether IIRIRA § 102(c), which gives the Secretary of the Department of Homeland Security unfettered discretion to waive “all applicable laws” impeding the construction of barriers along the U.S. border, is an unconstitutional delegation of power to the executive branch in violation of Article I, Section I of the Constitution. (2) Whether IIRIRA § 102(c)’s grant of “authority to waive all legal requirements” authorizes an administrative agency to preempt all state and local laws. (3) Whether a statute that gives the executive branch unfettered discretion to, in effect, selectively repeal privately enforceable laws violates the Presentment Clause, Article I, Section 7 of the Constitution.

3. This case arises from the Administration’s pursuit of a border wall along the U.S.-Mexico border.

a. In 1996, Congress passed § 102 of the IIRIRA, which allowed the Attorney General to waive certain environmental laws when the Attorney General determined such waiver was “necessary to ensure expeditious construction” of a specific section of border barriers. Pub. L. No. 104-208, Div. C., Title I, § 102(c), 110 Stat. 3009, 3009-554 (1996). Congress amended IIRIRA § 102 in 2005, expanding the government’s waiver authority to include “all legal requirements” that the Secretary of Homeland Security deemed “necessary to ensure expeditious construction of the barriers and roads under this section.” REAL ID Act, Pub. L. No. 109-13, Div. B, Title I, § 102, 119 Stat. 231, 302, 306 (May 11, 2005).

b. On August 2, 2017 and on September 12, 2017 the Secretary published two waiver determinations in the Federal Register. *See* 82 Fed. Reg. 35,984-85; 82 Fed. Reg. 42,829-30. The waivers purport to waive the requirements of more than 30 state and federal laws. *Id.*

Petitioners, along with the Center for Biological Diversity, the State of California, and the California Coastal Commission, sued the Secretary and other federal agencies, seeking to set aside the waiver and require the Secretary to comply with all applicable state and federal laws in constructing any border wall. *See* Case Nos. 17-cv-1215-GPC-WVG, 17-cv-1873-GPC-WVG, 17-cv-1911-GPC-WVG. The district court consolidated the three actions. *See* Order Granting Joint Motion to Consolidate, Case No. 17-cv-1215-GPC-WVG, Dkt. 22 (S.D. Cal. Oct. 24, 2017). After briefing and argument, the district court granted summary judgment for the government. *See Border Infrastructure Envtl. Lit.*, 284 F. Supp. 3d at 1103.

4. This Court's review is warranted in light of the important legal issues at stake and IIRIRA § 102(c)'s extraordinary withdrawal of appellate review by the court of appeals. As a practical matter, in light of Congress's decision to displace the normal course of appellate review, only this Court can resolve the important constitutional questions raised by Petitioners. Moreover, questions over the constitutionality of § 102(c) are likely to recur as the Administration issues new waivers; since this case began, the Secretary has issued an additional waiver. *See* 83 Fed. Reg. 3,012 (January 22, 2018). Continued litigation in district courts along the southern border, as well as in the District of Columbia, has the potential to create conflicting precedents, even within the same judicial district or circuit. Because Congress has eliminated normal review by the court of appeals, only this Court can bring uniformity to this area of law.

5. The extension requested is also justified because of ongoing litigation in the Court of Appeals for the Ninth Circuit. In its decision at issue here, the district court in addition to rejecting plaintiffs' constitutional claims also rejected the argument that the Secretary's waivers were ultra vires. Petitioners, along with the Center for Biological Diversity, the State of California, and the California Coastal Commission, have appealed to the Ninth Circuit the district court's determination that the Secretary did not act ultra vires when making the waiver determinations, urging that the Court of Appeals retains appellate jurisdiction with respect to that issue. *See* Case Nos. 18-55474, 18-55475, 18-55476 (9th Cir. April 11, 2018). The Ninth Circuit has consolidated the cases and ordered expedited briefing and

argument. See Order Consolidating Cases, *Ctr. for Biological Diversity v. U.S. Dep't of Homeland Sec.*, No. 18-55474, Dkt. No. 7 (9th Cir. April 19, 2018); Order Expediting Briefing, No. 18-55474, Dkt No. 10 (9th Cir. April 26, 2018). Briefing in court of appeals will be complete by July 16, 2018, with oral argument in August 2018. Extending the deadline for certiorari will allow time for the Ninth Circuit to consider the ultra vires issue and could clarify the appropriate avenue for judicial review of the Secretary's waiver decisions.

6. The request is further justified by counsel's press of business on numerous other matters that currently are pending. Among other matters, the undersigned are responsible for filing post-trial briefing following a five-day bench trial in *Animal Legal Defense Fund v. U.S. Food & Drug Administration* (N.D. Cal. No. 12-cv-04376-EDL) (post-trial briefing due May 1 and May 31), an answering brief in *Idenix Pharmaceuticals LLC v. Gilead Sciences, Inc.* (Fed. Cir. No. 18-1691) (due June 25, 2018), an answering brief in *Blasdell v. Space Exploration Technologies, Corp.* (Cal. App. No. B285998) (due July 2, 2018) and a five-day jury trial in *Bio-Rad Laboratories, Inc. v. 10X Genomics, Inc.* (D. Del. No. 15-152-RGA) (expected trial date in June-July 2018).

For the foregoing reasons, petitioner hereby requests that an extension of time be granted, to and including August 23, 2018, within which petitioner may file a petition for a writ of certiorari.

Respectfully submitted,

/s/ Monte Cooper

Monte Cooper

Counsel of Record

Elizabeth R. Moulton

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May 7, 2018

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners Animal Legal Defense Fund, Defenders of Wildlife, and Sierra Club state that they are not publicly-held corporations, do not issue stock, and do not have any parent corporations.

Exhibit 5

Mowder, Ronica

From: bloomberglaw@bna.com
Sent: Friday, May 11, 2018 4:03 PM
To: PATeam2
Subject: Animal Legal Defense Fund, et al., Applicants vs. Department of Hom 17A1239
(Docket Track) shared by MONIQUE DESSASO

Animal Legal Defense Fund, et al., Applicants vs. Department of Hom 17A1239 (Docket Track) - 05/11/2018

Docket Number: 17A1239 in Supreme Court of United States
Title: Animal Legal Defense Fund, et al., Applicants vs. Department of Homeland Security, et al.
Date Filed: May 8, 2018

Docket Entries

Entry #	Filing Date	Description
BL-4	May 10, 2018	Application (17A1239) granted by Justice Kennedy extending the time to file until August 23, 2018.

For document requests please click case title link to access the full docket and select the desired documents.

This alert was shared by MONIQUE DESSASO with dcmanagingattorneysoffice@orrick.com, emoulton@orrick.com, mcooper@orrick.com, pateam2@orrick.com.

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