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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION

Case No. 3:17-cv-01215-GPC-WVG

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

NOTICE OF MOTION AND MOTION BY MEMBERS OF THE CONGRESSIONAL HISPANIC CAUCUS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: February 9, 2018
Time: 1:30 PM
Court: 2D
Judge: Hon. Gonzalo P. Curiel

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT the members of the Congressional Hispanic Caucus listed below hereby move the Court for leave to file an *amicus curiae* brief in support of Plaintiffs' motions for summary judgment in these consolidated actions, a copy of which is being concurrently filed herewith. Plaintiffs in all three consolidated actions consent to this filing as long as it does not delay the briefing schedule or affect the motion hearing date. Defendants have not yet indicated a position on this motion.

The Congressional Hispanic Caucus ("Caucus"), founded in December 1976, is organized as a Congressional Member organization, governed under the Rules of the U.S. House of Representatives. The Caucus addresses national and international issues and crafts policies that impact the Hispanic community. The function of the Caucus is to serve as a forum for the Hispanic Members of Congress to coalesce around a collective legislative agenda. The Caucus is dedicated to voicing and advancing, through the legislative process, issues affecting Hispanics in the United States, Puerto Rico, and U.S. Territories. The following members of the Caucus join the filing of this request to file an *amicus curiae* brief on their behalf:

Rep. Michelle Lujan Grisham, Caucus Chair
Rep. Joaquin Castro, Caucus First Vice-Chair
Rep. Ruben Gallego, Caucus Second Vice-Chair
Rep. Pete Aguilar, Caucus Whip
Rep. Adriano Espaillat, Caucus Freshman Representative
Rep. Darren Soto, Caucus Member
Rep. Filemon Vela, Caucus Member
Rep. Nydia M. Velázquez, Caucus Member
Rep. Juan Vargas, Caucus Member
Rep. Vicente Gonzalez, Caucus Member
Rep. Raúl Grijalva, Caucus Member
Rep. Grace F. Napolitano, Caucus Member
Rep. Linda T. Sánchez, Caucus Member
Rep. Salud O. Carbajal, Caucus Member
Rep. J. Luis Correa, Caucus Member
Rep. José E. Serrano, Caucus Member

Rep. Tony Cárdenas, Caucus Member
Rep. Luis V. Gutiérrez, Caucus Member
Rep. Jimmy Gomez, Caucus Member
Rep. Nanette Diaz Barragán, Caucus Member
Rep. Lucille Roybal-Allard, Caucus Member
Rep. Ben Ray Luján, Caucus Member
Rep. Albio Sires, Caucus Member
Rep. Ruben J. Kihuen, Caucus Member

These members have a deep and abiding interest in issues related to immigration, national security, homeland security, and the impacts of border infrastructure and operations on border communities. The Caucus is profoundly engaged in the public policy and legislative issues implicated by resolution of these consolidated cases, and its members have a strong interest in offering their unique perspective on the constitutional issues raised by Defendants' recent actions purporting to exercise delegated waiver authority under section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act, as amended. The concurrently filed amicus curiae brief provides that perspective for the Court's consideration.

District courts have wide discretion to grant leave to participate as *amicus curiae*. Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982) (abrogated on other grounds by Sandin v. Conner,515 U.S. 472 (1995)). This discretion is liberally applied when the legal issues in a case "have potential ramifications beyond the parties directly involved." NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005). The Ninth Circuit has described the "classic role" of an *amicus* to include "assisting in a case of general public interest." Funbus Sys., Inc. v. State of Cal. Pub. Util. Comm'n., 801 F.2d 1120, 1125 (9th Cir. 1986).

In the absence of specific rules governing *amicus* appearances at the district court level, as here, district courts may look to the rules governing amicus participation in appellate courts. See Ass'n of Am. Physicians & Surgeons, Inc. v.

Brown, Case No. 2:16-cv-02441-MCE-EFB, 2017 WL 4351766, at *2 (E.D. Cal. Sept. 29, 2017) (granting motion for leave to file as *amicus curiae* pursuant to Fed. R. App. P. 29). Rule 29 allows officers of the United States, including presumably members of Congress, to file an amicus brief without the consent of the parties or leave of court. Nevertheless, the signatory members of the Caucus have sought consent of the parties and hereby seek leave of the Court to file its friend of the court brief.

Date: January 5, 2018

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: _____
Deborah A. Sivas

Attorneys for Amicus Curiae Applicants

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I electronically filed **NOTICE OF MOTION AND MOTION BY MEMBERS OF THE CONGRESSIONAL HISPANIC CAUCUS TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** with the Clerk of Court, using the Court's CM/ECF Electronic Filing System, which will generate and serve a Notice of Electronic Filing (NEF) to the parties and registered CM/ECF users in the case. Under said practice, all parties to this case have been served electronically. Also, I further certify that I have mailed the foregoing document via the United States Postal Service to any non-CM/ECF participants indicated in the Manual Notice List.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: January 5, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES BY MEMBERS OF THE CONGRESSIONAL HISPANIC CAUCUS IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

> "When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner."
>
> – James Madison, The Federalist Papers: No. 47 (Feb 1, 1788) (quoting Montesquieu's The Spirit of Laws)

Separation of powers in our tripartite system of government is the cornerstone of American democracy. The courts assure fidelity to this foundational concept, in large part, through the nondelegation doctrine, which permits congressional delegation of legislative power to the executive only where the delegating statute lays down an "intelligible principle" to direct executive branch activity. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). On its face, section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act ("Section 102") – the statutory provision at issue in this case – pushes the very outer limits of the separation of powers framework embedded in the U.S. Constitution.[1] In particular, Section 102, first adopted in 1996 and subsequently amended, provides the Secretary of the Department of Homeland Security ("Department") with authority to waive all legal requirements, including state and local laws, "to ensure expeditious construction of barriers and roads" along the U.S. border. Consistent with an express sunset provision added to the law in 2008, the Department last exercised Section 102's waiver authority a decade ago. 73 Fed. Reg. 19,078 (Apr. 8, 2008).

The Department's recent invocation of Section 102 to grant sweeping new

[1] Indeed, "'[t]he power to 'waive all [legal requirements]' that impede construction of U.S.-Mexico border infrastructure is broader than any delegated power heretofore upheld by the Supreme Court." Bryan Clark, Refining the Nondelegation Doctrine in Light of Real Id Act Section 102(c): Time to Stop Bulldozing Constitutional Barriers for A Border Fence, 58 Cath. U. L. Rev. 851, 868 (2009) (citing Stephen R. Viña and Todd Tatelman, Congressional Research Service Memorandum on Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2-4 (2005)).

environmental, cultural, and historic preservation law waivers along the Southern California border raises serious separation of powers concerns.[2] In resurrecting Section 102's waiver authority, the Department essentially claims for itself the unilateral and unchecked power to waive all federal, state, and local laws for border construction activities in perpetuity. This interpretation and application of Section 102 is, constitutionally speaking, a bridge too far.

To set the balance of powers right again, however, the Court need not go so far as invalidating Section 102. It need only find that the San Diego and Calexico waivers issued on August 2, 2017 and September 12, 2017, respectively ("2017 Waivers"), exceeded the Department's delegated authority under Section 102. Such a conclusion is both faithful to the statutory text and legislative intent of the law and consistent with the long-established judicial principle that courts should read legislative enactments narrowly to avoid constitutional infirmity.[3] Accordingly, 24 members of the Congressional Hispanic Caucus joining this amicus brief respectfully urges the Court to grant Plaintiffs' motions for summary judgment.

ARGUMENT

I. Judicial Faithfulness to the Nondelegation Doctrine Is Critical to Preserving the Separation of Powers Principles that Lie at the Heart of American Democracy.

As every American child learns in school:

> The Constitution divides the National Government into three branches – Legislative, Executive and Judicial. This 'separation of powers' was

[2] 82 Fed. Reg. 35,984 (Aug. 2, 2017) (with respect to San Diego border fence, waiving 37 federal environmental, cultural, and historic protection laws, as well as "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the waived laws); 82 Fed. Reg. 42,829 (Sept. 12, 2017) (similar with respect to Calexico border fence).

[3] As discussed further below, it is a "well-established principle that statutes will be interpreted to avoid constitutional difficulties." Frisby v. Schultz, 487 U.S. 474, 483 (1988). "'[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1222 (9th Cir. 2012) (quoting Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989)).

> obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:
>
> > 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'
>
> The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is not to be performed by a given branch.

United States v. Brown, 381 U.S. 437, 442-43 (1965) (citations omitted).

These consolidated cases implicate the proper role of all three branches, but the relationship between the legislative and executive branches is of paramount concern here. Article I of the Constitution mandates that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.," U.S. Const., Art. I, § 1, while Article II provides that "[t]he executive Power shall be vested in a President" and that the President "shall take Care that the Laws be faithfully executed." Id., Art. II, § 3. The Supreme Court "long [has] insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." Mistretta v. United States, 488 U.S. 361, 371-72 (1989) (quoting Field v. Clark, 143 U.S. 649, 692 (1892)). This is so because "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

Under Article III, of course, it falls to the courts to ensure that the other two branches faithfully adhere to the separation of powers principles enshrined in the Constitution. Among the interpretive tools that the judiciary employs to police our constitutional form of representative democracy is the nondelegation doctrine,

which "is rooted in the principle of separation of powers that underlies our tripartite system of Government." Mistretta, 488 U.S. at 371. Although the doctrine has only rarely been invoked to actually invalidate legislative grants of authority to the executive, it nevertheless provides a critical constitutional check on our democratic form of government. E.g., Field, 143 U.S. at 692 (declaring that the nondelegation principle is "vital to the integrity and maintenance . . . of government ordained by the Constitution"); Buckley v. Valeo, 424 U.S. 1, 123 (1976) (noting that the Court "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it").

At the core of the nondelegation doctrine is the requirement that any congressional delegation of authority to the executive be accompanied by "intelligible principles" to which the implementing agencies must conform their discretionary actions. E.g., Touby v. United States, 500 U.S. 160, 165 (1991). For a legislative delegation to pass constitutional muster, Congress must clearly delineate "the boundaries of this delegated authority" and must ensure "access to the courts to test the application of the policy in the light of these legislative declarations." Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946). Section 102, as originally drafted and subsequently amended, pushed the outer limits of constitutionality by providing the Department with open-ended discretion to waive otherwise applicable laws, but the exercise of that waiver authority was tethered to geographic and temporal implementing principles embedded in the delegation. As now revived and interpreted in the Department's new 2017 Waivers, Section 102 would truly become the most far-reaching delegation of legislative authority ever enacted. The Department's new interpretation does grievous violence to the separation of powers principles that undergird the American system of government and to the ideal of representative democracy that has made this country a beacon of light for the rest of the world. It is the proper role of this Court to restore the

constitutional balance consistent with congressional intent.

II. The Department's Invocation of Section 102 in the 2017 Waivers Violates Separation of Powers Principles and the Nondelegation Doctrine.

Defendants' legal interpretation of Section 102 here takes a dagger to the heart of the American constitutional system. The Department claims that (1) Section 102 conveys indefinite and unlimited discretion to waive any and all laws related to border construction activities that the Secretary deems "necessary" and (2) the courts may never review such "necessity" determinations, no matter how far afield of the statutory language and intent. As interpreted by the Department in the 2017 Waivers and in these consolidated cases, Section 102's delegation of legislative authority to act outside and beyond the constraints of all law is essentially unbounded in either time or scope. Read in this way, Section 102 is unprecedentedly broad – and unprecedented in the history of laws challenged on nondelegation grounds.[4]

Defendants suggest that a number of legislative delegations similar to Section 102(c)'s waiver language have survived constitutional scrutiny. Defs. Mot. at 35 (citing specifically Whitman, Touby, and Loving). None of these cases is even remotely analogous, however. In Whitman v. Am. Trucking Associations, 531 U.S. 457, 473 (2001), the Court found that section 109 of the Clean Air Act, which empowers the Environmental Protection Agency to set ambient air quality standards, fell within the outer limits of nondelegation doctrine precedents because "for a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge," the statute, at a minimum, requires the agency to "establish uniform national standards at a level that is requisite to protect health from the adverse effects of the pollutant in the ambient air." These concrete limits

[4] See Jenny Neeley, Over the Line: Homeland Security's Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure, 1 Ariz. J. Envtl. L. & Pol'y 139, 154 (2011) (surveying and discussing prior nondelegation cases).

on EPA's discretion, the Supreme Court found, provide the requisite "intelligible principles" to guide action, and they closely resemble provisions of the Occupational Safety and Health Act upheld in Industrial Union Dep't, AFL-CIO v. Am. Petroleum Institute, 448 U.S. 607, 646 (1980) – a case in which the statute directed the agency to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health." Whitman, 531 U.S. at 473. Unlike such delegations, which involved the setting of scientifically-based public health standards by expert agencies through an administrative process subject to judicial review, Section 102 allows the Department to waive all laws otherwise applicable to any construction activities in the vicinity of the U.S. border, which stretches along 2,000 miles in the south and another 4,000 miles in the north – and to do so without any scientific or evidentiary showing, without any public input or administrative record, and without any judicial oversight.

In Touby, which the Court found "strikingly similar" to the situation in Whitman (531 U.S. at 473), the statute delegated to the Attorney General the authority to temporarily add to the schedule of controlled substances. The legislation set forth intelligible principles, required normal administrative processes, and provided judicial accountability:

> When adding a substance to a schedule, the Attorney General must follow specified procedures. First, the Attorney General must request a scientific and medical evaluation from the Secretary of Health and Human Services (HHS), together with a recommendation as to whether the substance should be controlled. A substance cannot be scheduled if the Secretary recommends against it. . . . Second, the Attorney General must consider eight factors with respect to the substance, including its potential for abuse, scientific evidence of its pharmacological effect, its psychic or physiological dependence liability, and whether the substance is an immediate precursor of a substance already controlled. . . . Third, the Attorney General must comply with the notice-and-hearing provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, which permit comment by interested parties. . . . In addition, the Act permits any aggrieved person to challenge the scheduling of a substance by the Attorney General in a court of appeals.

500 U.S. at 162–63. Justice Marshall emphasized in his concurring opinion that "an

opportunity to challenge a delegated lawmaker's compliance with congressional directives" is critical to the constitutional inquiry because "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." Id. at 170 (Marshall, J., concurring). The delegation in Touby was thus nothing like the unbounded delegation in Section 102.

Likewise, the statutory delegation at issue in Loving v. United States, 517 U.S. 748 (1996), was entirely unlike Section 102's waiver provision. Loving upheld a congressional delegation of authority to the President to establish aggravating factors that permit application of statutory penalties in military court-martial proceedings. In those circumstances, the Court explained,

> the question to be asked is not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority. First, the delegation is set within boundaries the President may not exceed. Second, the delegation here was to the President in his role as Commander in Chief. . . . The President's duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply "where the entity exercising the delegated authority itself possesses independent authority over the subject matter.

517 U.S. at 772. Reiterating that "Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes," the Court noted: "Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight." Id. at 771-72. In contrast, the waiver of all laws under Section 102, unlimited by any principle other than the Secretary's "sole discretion" to determine "necessity," is far beyond the traditional homeland security authority of the Department.

As summarized by one commentator who has surveyed the landscape of nondelegation cases, some statutes delegate broad authority based on concrete

principles (Mistretta) and some statutes delegate specific regulatory authority based on vaguer principles (Whitman), but Section 102 fits neither of these categories. Clark, supra fn.1, at 875-76. As applied here, Section 102(c) delegates unbounded legislative authority based on virtually no principles. Indeed, the sweeping and untethered delegation in Section 102(c)'s waiver language, as that provision is currently interpreted in the 2017 Waivers and defended by Defendants in these cases, is more akin to – and, in fact, even more expansive than – the statutory grants found to violate the nondelegation doctrine in Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (unlimited delegation to President to prohibit interstate and foreign commerce in petroleum, with no requirement for factual findings or conditions for prohibition), and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (sweeping delegation of "unfettered discretion" to the President to adopt "whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry").[5]

Thus, to the extent that the Court accepts Defendants' untethered, unfettered, and unaccountable interpretation of Section 102's waiver provision, it must find that the statute violates separation of powers principles and is unconstitutional.[6]

[5] Notably, none of the leading Supreme Court nondelegation cases involved an expansive waiver of all other laws; instead, they challenged the scope of, and constraints on, particular delegated authority to take specific actions. With respect to delegated authority to waive other laws, the Congressional Research Service was unable to locate another legislative waiver provision as broad and unconstrained as Section 102(c). More typically, legislative waivers: "(1) exempt an action from other requirements contained in the Act that authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar laws." Viña and Tatelman, supra fn.1, at 3.

[6] Although some district courts have previously upheld Section 102 against constitutional challenge, the waivers at issue in those cases were issued more than a decade ago, shortly after Congress revised the law to direct specific actions, and the courts did not fully evaluate the constitutionality of the perpetual waiver authority that Defendants urge here. Neely, supra fn.3, at 156-58 (explaining why prior challenges did not fully and adequately address the constitutional issues); Clark, supra fn.1, at 867-75 (explaining flaws in prior judicial analysis of Section 102).

III. The Court May and Should Read Section 102 to Avoid Constitutional Infirmity by Finding that the 2017 Waivers Exceed the Department's Delegated Authority.

The Court may, however, avoid constitutional invalidity by narrowly interpreting Section 102 consistent with the intent of Congress and the limits of the Constitution. Two canons of statutory construction are relevant and applicable here: "First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . . Second, if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems." I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001) (citations omitted). These canons have regularly been applied in nondelegation doctrine cases to interpret a challenged law in a way that avoids constitutional problems. See, e.g., Mistretta, 488 U.S. at 373, n.7; Industrial Union, 448 U.S. at 646; National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974). The Court should apply them here, as well, to avoid constitutional infirmity under separation of powers principles.

In applying the nondelegation doctrine, the Court must decide whether "there is an absence of standards for the guidance of the [Secretary's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." Yakus v. United States, 321 U.S. 414, 426 (1944). As Plaintiffs describe at length in their summary judgment motions, Congress originally adopted the Section 102(c) waiver language in 1996 as part of a more specific and limited directive regarding a 14-mile segment of border fence in the San Diego area; at that time, the waiver applied only to two specific environmental laws, the National Environmental Policy Act and the Endangered Species Act, that Congress perceived as potentially slowing implementation of its narrow legislative directive. Twenty years later, Congress revisited the law and, in a quick succession of three

amendments over as many years, used the existing statute as the legislative vehicle to implement other, related border infrastructure priorities. The legislative amendments adopted in 2005, 2006, and 2007 evidence legislative tinkering in real time, as Congress attempted to better tailor and more specifically express its intended priorities. As part of that effort, Congress broadened the scope of the Section 102(c) waiver to ensure expeditious action by the Department, but also imposed a firm sunset date of December 31, 2008 to incentivize the Department's timely action. And, indeed, the Department did quickly exercise this delegated authority, waiving a number of laws in order to meet the statutory deadline.

Since the last amendment of Section 102 in 2007 (enacted through the 2008 Appropriations Act for the Department's budget), however, Congress has not adopted any legislative revision of the law to express new or additional exigencies concerning border infrastructure. Indeed, as the State of California explains, the unlawful border entries with which Congress was concerned in 1996 have plummeted over the last two decades. Thus, the question of appropriate new border infrastructure – and how to pay for it – remains one very much at the center of our national debate. It is the purview of Congress to take up that question and ultimately set policy priorities to guide executive branch action. Whether and what new border infrastructure construction should occur and whether any such activities should be exempted from existing environmental or other laws and/or subject to judicial review is a matter for Congress to determine in the first instance. Ignoring the most basic functioning of our constitutional governance system, the new Administration wants to jump ahead of Congress by dusting off and invoking an old legislative delegation, enacted in response to localized and particularized concerns, that was intended to be both geographically constrained and time-limited. The Administration's recent effort to revive Section 102's long-dormant waiver provisions rather than work with Congress to craft a national policy is the very definition of ultra vires action.

Defendants erroneously argue that, given the language in Section 102 limiting judicial review to constitutional claims, this Court does not have jurisdiction to reach the ultra vires issue. That circular argument is wrong, and not borne out by judicial precedent. Plaintiffs raise a number of constitutional claims, including claims related to separation of powers principles and the nondelegation doctrine, as expressly allowed under Section 102. Under applicable canons of statutory construction, however, courts must strive to avoid constitutional concerns by interpreting the statute narrowly. Thus, in reviewing Plaintiffs' legitimate constitutional claims, this Court may and should evaluate whether a narrower reading of the Secretary's delegated authority under Section 102 would save the provision from constitutional infirmity. That is, the Court should determine whether, in issuing the 2017 Waivers, the Department exceeded its delegated authority under Section 102, thereby avoiding constitutional difficulties.

In a convoluted argument that defies logic, Defendants argue that the Court may not engage in ultra vires review because Section 102 precludes judicial review of any non-constitutional claim, including ultra vires review. This argument makes no sense; if the Department acted in excess of its statutory authority under Section 102, as Plaintiffs persuasively argue, then the Court is not constrained by the judicial review prohibition of Section 102. To defend their circular logic, Defendants take some pains to distinguish Leedom v. Kyne, 358 U.S. 184 (1958), which held that the absence of judicial review for a National Labor Relations Board decision did not deprive the district court of jurisdiction to determine if the Board's actions were ultra vires. Defendants claim the Supreme Court's subsequent decision in Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32 (1991), limits Kyne to those situations, unlike Section 102, where the statute is silent as to judicial review. But Defendants fail to mention that the Ninth Circuit has already considered and rejected this very argument in the context of a nondelegation doctrine challenge. United States v. Bozarov, 974 F.2d 1037 (9th Cir. 1992). In

declining to find a nondelegation problem with respect to the Secretary of Commerce's authority under the Export Administration Act, the Bozarov court held that, notwithstanding the statutory directive that the Secretary's denial of an export license "shall be final and not subject to judicial review," "we believe that claims that the Secretary acted in excess of his delegated authority under the EAA are . . . reviewable." Id. at 1045 (citing Kyne and rejecting Defendants' argument under MCorp. because, unlike the EAA and Section 102, the statute at issue in MCorp, did provide "a meaningful and adequate opportunity for judicial review").[7]

Indeed, Defendants' tortured argument would lead to untenable results. According to Defendants, a court cannot review whether the Department properly invoked Section 102 because the Department's invocation of Section 102(c) precludes any judicial review. Under this tautological argument, the Department not only has unfettered discretion to take action under Section 102, but also has unreviewable discretion to determine that any action it takes falls within Section 102. Such a reading would mean, for instance, that the Department could invoke Section 102's waiver of all laws in connection with the construction of a new road in Los Angeles County by claiming that the road is "in the vicinity" of the border and is "necessary . . . to deter illegal crossings" and no court would have jurisdiction to review whether the Department had exceeded its Section 102 authority. If Defendants' unprecedented interpretation is correct, then Section 102 goes much further than even the outermost limits of the nondelegation doctrine; no court has

[7] Somewhat surprisingly, after ignoring this analysis in Bozarov (Defs. Mot. 9-15), Defendants subsequently cite the case in a later section of their brief with a misleading parenthetical about its actual holding: "*See United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (rejecting the argument that "a delegation of legislative power that is statutorily exempt from judicial review violate[s] the nondelegation doctrine")." Defs. Mot. at 34. In fact, Bozarov acknowledged that "the availability of judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge," 974 F.2d at 1042, and held that "[b]ecause these two types of review [constitutional and ultra vires] are available, we believe that the EAA's preclusion of judicial review does not violate the nondelegation doctrine." Id. at 1045 (emphasis added).

come close to condoning a legislative delegation that does such damage to our constitutional system of checks and balances.

The better result, and the one that is most consistent with congressional intent, is to narrowly construe Section 102, in the ways that Plaintiffs suggest, to find the Department's 2017 Waivers ultra vires. In a flurry of serial amendments between 2005 and 2007, Congress reshaped Section 102 to address its then-priorities for border infrastructure work, imposing both geographic and temporal limits on the otherwise extremely broad grant of legislative authority. The waiver language must be viewed in this context as a short duration grant of discretion to achieve immediate, expeditious results. Reading the Section 102 waiver authority to grant limitless, unreviewable legislative authority in perpetuity runs smack into serious constitutional difficulties. To accept Defendants' unconstitutionally broad reading of Section 102, the Court must first find a "clear indication" that Congress intended that result. I.N.S. v. St. Cyr., 533 U.S. at 299. No such clear statement exists, in the statutory language or elsewhere. Moreover, "[e]ven if a sufficiently clear statement exists, courts must determine whether 'an alternative interpretation of the statute is 'fairly possible'' before concluding that the law actually" must be read to violate the non-delegation doctrine. Trinidad y Garcia v. Thomas, 683 F.3d 952, 956 (9th Cir. 2012) (quoting I.N.S. v. St. Cyr.). As Plaintiffs discuss at length, an interpretation of Section 102 that properly constrains the scope and duration of its waiver provision is not only fairly possible, but much more likely to have been the intent of Congress.

CONCLUSION

Although the present cases before the Court involve only two discrete projects, their practical and policy implications are considerably broader. Based on the Department's legal arguments, it is clear that the Trump Administration views its delegated authority under Section 102, including its ability to waive any and all laws in connection with border construction activities, as essentially limitless, and

its actions as correspondingly unreviewable. This interpretation undermines our constitutional system of checks and balances and is harmful as a matter of public policy. The construction of a "big, beautiful" border wall – to be paid for, purportedly, by the citizens of Mexico – is an area of serious and vigorous public debate. The outcome of that debate will have significant implications not only for foreign policy, domestic labor practices, and the lives of those who move back and forth across our southern border, but also for U.S. property owners and lawful residents who live in the border region and for the environmental, cultural, and historic resources that exist along the borderlands.

To imagine that executive branch officials can, with impunity and in perpetuity, flout all laws, rules, and requirements applicable to these lands and their people is to imagine an America that would be unrecognizable to the Founders. Members of Congress who voted for Section 102 could not possibly have intended to abdicate their legislative responsibilities in this way, and the U.S. Constitution does not allow it. Accordingly, the 24 members of the Congressional Hispanic Caucus who join this brief support Plaintiffs' efforts to restore the proper balance of power, so deeply rooted in our foundational governance documents, and urge the Court to grant Plaintiffs' pending motions for summary judgment.

Dated: January 5, 2018

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I electronically filed **MEMORANDUM OF POINTS AND AUTHORITIES BY MEMBERS OF THE CONGRESSIONAL HISPANIC CAUCUS IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** with the Clerk of Court, using the Court's CM/ECF Electronic Filing System, which will generate and serve a Notice of Electronic Filing (NEF) to the parties and registered CM/ECF users in the case. Under said practice, all parties to this case have been served electronically. Also, I further certify that I have mailed the foregoing document via the United States Postal Service to any non-CM/ECF participants indicated in the Manual Notice List.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: January 5, 2018

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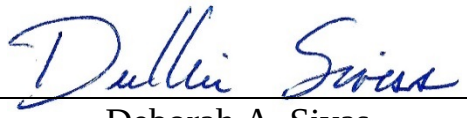
By: 
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