

SAN DIEGO BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION: RETURN OF THE WALKING DEAD

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The Secretary of Homeland Security waived numerous environmental laws in 2017 that allowed the construction of new barrier fences and border wall prototypes on the U.S.–Mexico border in California. The Federal district court and Ninth Circuit upheld the Secretary’s waivers in In re Border Infrastructure Environmental Litigation. This Article argues that the federal courts’ decisions were erroneous because the waivers were ultra vires and unconstitutional. The Secretary’s waiver authority was limited to the border fencing specifically authorized in the Immigration Reform and Immigrant Responsibility Act. This fencing was completed in 2013. At this point the Secretary’s waiver authority ended, so the 2017 waivers were ultra vires. Furthermore, the Secretary’s waiver authority was unconstitutional. The unlimited scope of the waiver authority and constrained judicial review violated the non-delegation doctrine. Congress should terminate the Secretary’s waiver authority and enact legislation that balances national security and environmental protection along the border.

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I. INTRODUCTION

On January 25th, 2017, President Donald Trump issued Executive Order 13,767, Border Security and Immigration Enforcement Improvements, which instructed the Department of Homeland Security (DHS) to construct a wall¹ along much of the 2000 mile-long U.S.–Mexico border.² DHS began to consider proposals for two border wall prototypes. DHS also planned to replace the existing fourteen-mile primary and secondary border fences in the San Diego (SD) sector³ and two miles of border fences in the El Centro sector.⁴ In August 2017, Secretary of Homeland Security (SHS) John Kelley determined that the San Diego Project Area “is an area of high illegal entry”⁵ and exercised his authority under section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁶ (IIRIRA) to waive National Environmental Protection Act⁷ (NEPA), Endangered Species Act⁸ (ESA), Coastal Zone Management Act⁹ (CZMA) and thirty additional laws not at issue in *In Re Border Infrastructure Environmental Litigation*

¹ Wall is defined as “a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.” Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017); *see also In re Border Infrastructure Env'tl. Litig. (Curiel)*, 284 F. Supp. 3d 1092, 1106 (S.D. Cal. 2018).

² Exec. Order No. 13,767, 82 Fed. Reg. at 8793–8794.

³ Press Release, CBP Public Affairs, San Diego Secondary Wall Construction to Begin (Feb. 18, 2019), <https://perma.cc/BAV9-GSYW> (modified on Feb. 19, 2019).

⁴ DHS also proposed the construction of 24 miles of additional border walls in Rio Grande Valley sector in Texas. *FY19 Rio Grande Valley Levee/Border Wall System Construction Projects*, U.S. CUSTOMS & BORDER PROT., <https://perma.cc/96TH-RDGQ> (last modified Sept. 27, 2019); *see also Curiel*, 284 F. Supp. 3d at 1107.

⁵ *Curiel*, 284 F. Supp. 3d at 1106.

⁶ IIRIRA, 8 U.S.C. §§ 1101–1363a. Section 102(c) states: “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.” *Id.* § 1103(c)(1).

⁷ NEPA, 42 U.S.C. §§ 4321–4370h (2012).

⁸ ESA, 16 U.S.C. §§ 1531–1544 (2012).

⁹ CZMA, 16 U.S.C. §§ 1451–1466 (2012).

(*Curiel*).¹⁰ Two projects specified in the waiver determination included the replacement of approximately fifteen miles of existing primary fencing near San Diego and the construction of border-wall prototypes on the eastern end of the secondary barrier near San Diego.¹¹

In September 2017, acting SHS Elaine Duke declared that the “El Centro Sector is an area of high illegal entry” and waived compliance within NEPA, ESA, and numerous other statutes.¹² DHS planned to build a replacement fence in the El Centro Sector “along an approximately three mile segment of the border that starts at the Calexico West Land Port of Entry and extends westward.”¹³

The State of California, the California Coastal Commission, and several environmental groups brought suits, challenging the SHS waivers.¹⁴ The claimants alleged that the waivers were ultra vires because they were not authorized by Congress in section 102(b) of IIRIRA.¹⁵ Other statutory and constitutional violations were also asserted.¹⁶ In February 2018, the U.S. District Court for the Southern District of California in *Curiel* held that SHS waivers that allowed the aforementioned projects to proceed were not ultra vires.¹⁷ The court also held that the section 102(c) waivers did not violate the non-delegation doctrine.¹⁸ The Ninth Circuit upheld the district court decision.¹⁹

This Article asserts that the district court and Ninth Circuit decisions were erroneous. It traces the history of the conflict regarding California’s border fencing and the evolution of IIRIRA sections 102(b) and (c). The Article demonstrates that the courts should have found the SHS two waivers for the three projects were ultra vires because the SHS waiver authority under section 102(c) is limited to the fencing authorized in section 102(b). The waivers also violated the non-delegation doctrine. Several post-litigation developments are discussed,

¹⁰ *Curiel*, 284 F. Supp. 3d at 1106. The San Diego project Area is defined as “an approximately fifteen mile segment of the border within the San Diego Sector,” Determination Pursuant to section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 35,984 (Aug. 2, 2017), “starting at the Pacific Ocean and extending to approximately one mile east of Border Monument 251.” *Id.* at 35,985.

¹¹ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. at 35,984–35,985.

¹² *Id.* at 42,829, 42,830.

¹³ *Id.* at 42,830.

¹⁴ *In re* Border Infrastructure Envtl. Litig., 915 F.3d 1213 (9th Cir. 2019). The environmental groups included Defenders of Wildlife, Sierra Club, Animal Legal Defense Fund, and Center for Biodiversity.

¹⁵ Section 102(b)(1)(A) states: “In carrying out subsection (a), the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.” 8 U.S.C. § 1103(b)(1)(A) (2012).

¹⁶ *Curiel*, 284 F. Supp. 3d 1092, 1130–46 (S.D. Cal. 2018).

¹⁷ *Id.* at 1119.

¹⁸ *Id.* at 1137.

¹⁹ *In re* Border Infrastructure Envtl. Litig., 915 F.3d 1213, 1218 (9th Cir. 2019).

particularly the ongoing controversy over border wall funding. The Article concludes that Congress should terminate the SHS waiver authority, reconsider the costs of the border walls and enact legislation that balances environmental protection and national security along the southwest border.

II. PRIOR HISTORY AND EVOLUTION OF THE STATUTORY FRAMEWORK

The U.S.–Mexico “[b]order was established with the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Purchase in 1853.”²⁰ Numerous fences were proposed and constructed along the southwest border from 1924 through 1955.²¹ The Immigration and Naturalization Service (INS) in 1977–1978 approved funding for constructing border fences in El Paso, Texas; San Ysidro, California (on the border south of San Diego); and San Luis, Arizona (on the border south of Yuma).²² The new fences would replace the older dilapidated fences and divert illegal immigrants away from the cities into the desert where they could easily be captured.²³ In October, 1978, INS announced that the new twelve-foot high fences would be capped with barbed wire. These fences became known as the “Tortilla Curtain.”²⁴

The North American Free Trade Association negotiations in the early 1990s focused attention on environmental concerns along the southwest border.²⁵ Programs and institutions were created to deal with binational environmental issues, including Border XXI and the Border Environmental Cooperation Commission.²⁶ The North American Development Bank funded efforts for environmental improvements along the border.²⁷ However, the U.S. Border Patrol (USBP), which was part of DHS, was reluctant to comply with environmental statutes in its interdiction efforts.²⁸

²⁰ Andrea C. Sancho, *Environmental Concerns Created by Current United States Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security Under the REAL ID Act of 2005*, 16 SE. ENVTL. L.J. 421, 422 (2008) (citing Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922; Gadsden Purchase Treaty, U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031).

²¹ Oscar J. Martinez, *Border Conflict, Border Fences, and the “Tortilla Curtain” Incident of 1978–1979*, 50 J. SW. 263, 267–68 (2008).

²² *Id.* at 270.

²³ *Id.*

²⁴ *Id.*

²⁵ STEPHEN P. MUMME, *THE REAL ID ACT AND SAN DIEGO-TIJUANA BORDER FENCING: THE NEW POLITICS OF SECURITY AND BORDER ENVIRONMENTAL PROTECTION 2* (2005) (presented at Annual Conference of the Association for Borderlands Studies 2006).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 9; see also BRIAN P. SEGEE & JENNY L. NEELEY, *DEFS. OF WILDLIFE, ON THE LINE: THE IMPACTS OF IMMIGRATION POLICY ON WILDLIFE AND HABITAT IN THE ARIZONA BORDERLANDS* 28–30 (2006) (“In several instances, the Border Patrol has made

The USBP completed the construction of the primary fence in the San Diego sector in 1993.²⁹ The fence cut across the first fourteen miles of the southwest border, “starting from the Pacific Ocean, and was constructed of 10-foot-high welded steel.”³⁰ The USBP in 1994 began an aggressive effort to stop illegal immigration through major urban areas. The USBP’s Southwest Border Strategy stressed “prevention through deterrence” and was designed to “make it so difficult and so costly to enter this country illegally that fewer individuals would try.”³¹ The Clinton administration launched “Operation Gatekeeper” south of San Diego in October 1994, which involved more agents and technology in specific areas.³² These measures and the primary fence proved to be successful, but “fiscally and environmentally costly.”³³ President Clinton in his January 1996 State of the Union message declared, “[a]fter years and years of neglect, this administration has taken on a strong stand to stiffen protection on our borders.”³⁴ The INS noted, “[t]he border is harder to cross now than at any time in history.”³⁵

Congress strengthened border security by enacting the IIRIRA in 1996,³⁶ which was attached as a rider on an appropriation bill.³⁷ The IIRIRA was the first legislative enactment, which specifically mandated the construction of “physical barriers and roads.”³⁸ Section 102(a)

commitments to protect natural resources and wildlife affected by its operations, but failed to fulfill them.”)

²⁹ BLAS NUÑEZ-NETO & STEPHEN R. VIÑA, CONG. RESEARCH SERV., RS22026, BORDER SECURITY: FENCES ALONG THE U.S. INTERNATIONAL BORDER 2 (2005).

³⁰ *Id.*

³¹ SEGEE & NEELEY, *supra* note 28, at 10 (quoting U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-842, INS’ SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS (2001)).

³² Peter Andreas, *The Escalation of U.S. Immigration Control in the Post-NAFTA Era*, 113 POL. SCI. Q. 591, 594–96 (1998–1999).

³³ CONG. RESEARCH SERV., RS22026, BORDER SECURITY: THE SAN DIEGO FENCE 1 (2007).

³⁴ Andreas, *supra* note 32, at 598.

³⁵ *Id.* (quoting “Operation Gatekeeper: Two Years of Progress,” Immigration and Naturalization Service (Washington DC: INS, October 1996)).

³⁶ IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1103 (2012) (Improvement of Barriers at Borders)). Section 102(a)–(b)(1) directed:

The Attorney General . . . shall take such actions as may be necessary to install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry into the United States. . . . [including specifically] the construction along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward, of second and third fences, in addition to the existing reinforced fence, and for roads between the fences.

³⁷ For critical analysis of problems with appropriation riders, see Edward A. Fitzgerald, *Alliance for Wild Rockies v. Salazar: Congress Behaving Badly*, 25 VILL. ENVTL. L.J. 351, 391–98 (2014).

³⁸ IIRIRA § 102(a). Prior to IIRIRA, the authority to construct border barriers was derived from AG’s statutory authority to “guard the boundaries and borders of the United States against the illegal entry of aliens . . .” Immigration and Nationality Act (INA), ch. 477, § 103(a), 66 Stat. 163, 173–74 (1952) (codified at 8 U.S.C. § 1103(a)(5) (2012)).

granted the U.S. Attorney General (AG) authority to construct border barriers.³⁹ Section 102(b) authorized the building of secondary and tertiary fences and roads between the fences in the San Diego sector.⁴⁰ The concept of the three-tiered fence came from a 1993 study prepared by Sandia Laboratories.⁴¹ Section 102(c) allowed the AG to waive only NEPA and ESA requirements for the construction of fourteen miles of fencing along the San Diego sector.⁴²

After 9/11, Congress intensified its effort to improve border security. In 2002, the newly created DHS assumed responsibility for border security.⁴³ The Homeland Security Act specifically addressed the San Diego fencing, stating it was “the sense of the Congress that completing the 14-mile border fence project required to be carried out under section 102(b) of the [IIRIRA] should be a priority for the Secretary.”⁴⁴ INS was dissolved and its duties were transferred to the Bureau of Customs and Border Protection (CBP).⁴⁵ Binational efforts to protect and manage the environment along the southwest border suffered during the Bush Administration.⁴⁶

Efforts to complete the San Diego fencing were halted because of environmental concerns. The first 9.5 miles from east of the San Ysidro border crossing was finished shortly after 2001, but completion of the remaining 4.5 miles west of San Ysidro to the Pacific proved controversial.⁴⁷ The remaining fence extension would have to traverse the south side of the Tijuana River National Wildlife Refuge, the Tijuana River National Estuarine Research Reserve, Border Field State Park, and the San Diego County Regional Park.⁴⁸ The construction of the secondary fence and twenty-four-foot wide patrol road required the

³⁹ IIRIRA § 102(a). The AG delegated this authority to the INS, which housed the USBP. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43975, BARRIERS ALONG THE U.S. BORDERS: KEY AUTHORITIES AND REQUIREMENTS 4 n.20 (2017).

⁴⁰ IIRIRA § 102(b).

⁴¹ The Sandia study asserted that, “[t]he illegal aliens have shown that they will destroy or bypass any single measure placed in their path.’ The study concluded that, ‘A three-fence barrier system with vehicle patrol roads between the fences and lights will provide the necessary discouragement.’” Andreas, *supra* note 32, at 595 (quoting SANDIA NAT’L LABORATORIES, SYSTEMATIC ANALYSIS OF THE SOUTHWEST BORDER ES-5 (1993)).

⁴² IIRIRA § 102(c).

⁴³ Homeland Security Act of 2002, Pub. L. 107-296, § 402(2), 116 Stat. 2135, 2177 (2002) (codified at 6 U.S.C. § 202 (2012)).

⁴⁴ *Id.* § 446 (citation omitted); *see also* GARCIA, *supra* note 39, at 4 (stating that § 102 “requires a specified amount of fencing in priority areas along the southwest border”).

⁴⁵ GARCIA, *supra* note 39 (stating “the INS was abolished and its enforcement functions were generally transferred to DHS, along with Border Patrol”); 6 U.S.C. § 251 (2012) (providing a transfer of functions to Under Secretary for Border and Transportation Security).

⁴⁶ *See* MUMME, *supra* note 25, at 3, 14.

⁴⁷ *See* April Reese, *Border Fence Pits Homeland Security Against Environmental Protection*, E&E NEWS: LAND LETTER (Feb. 19, 2004).

⁴⁸ MUMME, *supra* note 25, at 10.

movement of 2.1 million cubic feet of solid fill into Smugglers Gulch.⁴⁹ Opponents pointed out that soil erosion from the construction would adversely affect 2,531 acres of federal estuary at the mouth of the Tijuana River, which is a stopover for 370 species of migratory birds, including six endangered species.⁵⁰

The California Coastal Commission (CCC) halted construction of the remaining 4.5 miles of San Diego fencing in 2004. The CCC, utilizing its consistency authority under the CZMA,⁵¹ determined that the planned fencing was not consistent “to the maximum extent practicable” with the federally approved California Coastal Zone Management Act.⁵² The CCC was specifically concerned with potentially significant adverse effects on 1) the Tijuana River National Estuarine Research and Reserve; 2) state and federally listed threatened and endangered species; 3) lands set aside for protection within California’s Multiple Species Conservation Program; and 4) other aspects of the environment.⁵³ The CCC alleged that the CBP failed to show that other less environmentally damaging alternatives, which were rejected, would have prevented compliance with the IIRIRA.⁵⁴ Representative Filner (D. Cal.), declared, “[t]he waiving of all environmental rules for this is just criminal. It’s just too extensive a trade-off for the limited security advantage.”⁵⁵ Environmental groups also opposed the construction.⁵⁶

⁴⁹ Elliot Spagat, *Border Fence Divides Security, Environmental Proponents*, ASSOCIATED PRESS, Oct. 19, 2003.

⁵⁰ *Id.*; John M. Broder, *With Congress’s Blessing, a Border Fence May Finally Push Through to the Sea*, N.Y. TIMES (July 4, 2005), <https://perma.cc/MVG2-LYFJ>. The United Nations designated the estuary as a RAMSAR wetland of international importance in April 2005. MUMME, *supra* note 25, at 10.

⁵¹ The CZMA requires “[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone [to] be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of an approved State management program.” 16 U.S.C. § 1456(c)(1)(A) (2012). If a federal court finds a federal activity to be inconsistent with an approved state program and the SHS determines that compliance is unlikely to be achieved through mediation, the President may allow the activity to go forward “if the President determines that the activity is in the paramount interest of the United States.” *Id.* § 1456(c)(1)(B); *see also* Edward A. Fitzgerald, *California Coastal Commission v. Norton: A Coastal State Victory in the Seaweed Rebellion*, 22 UCLA J. ENVTL. L. & POLY 155, 183 (2004) (describing this presidential authority as “a limited exemption for consistency”).

⁵² Fitzgerald, *supra* note 51, at 155–56; 16 U.S.C. §§ 1451–1464.

⁵³ BLAS NUÑEZ-NETO & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RS2026, BORDER SECURITY: THE SAN DIEGO FENCE 5 (2007).

⁵⁴ *Id.*

⁵⁵ Erica Werner, *Immigration Bill Could Settle Fight Over California-Mexico Border Fence*, ASSOCIATED PRESS, Feb. 5, 2005, <https://perma.cc/NQ54-3P2U>.

⁵⁶ Center for Biodiversity stated, “[w]e already have one fence that goes all the way to the ocean. The fact that crime and arrests have dropped so low only proves our point. They have solved the problem.” Annual arrests have dropped to 3,000 from 25,000 over the past three years. *California, Feds At Odds Over Border Fence*, UP INT’L (Apr. 20, 2004), <https://perma.cc/DGU8-UT7L>.

Legislative efforts to complete the San Diego border fencing continued.⁵⁷ The Real ID Act of 2005 (RIDA) expanded the SHS waiver authority under section 102(c) to cover all barriers constructed under the IIRIRA.⁵⁸ The SHS is allowed to waive, not only NEPA and ESA requirements, but “all legal requirements [the Homeland Security] Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads”⁵⁹

RIDA also limits judicial review. Federal district courts only have the authority to review claims “alleging a violation of the Constitution of the United States,” and “[a]ny cause or claim brought . . . shall be filed not later than 60 days after the date of the action.”⁶⁰ Furthermore, it removes the appellate jurisdiction of the Circuit Courts of Appeal, declaring that district court decisions regarding the use of the waiver “may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.”⁶¹

Sierra Club had brought suit in February 2004 to block the construction of the San Diego fences until SHS complied with NEPA.⁶² Subsequently, RIDA was enacted, which allowed the SHS to waive all laws that impeded construction of border fencing.⁶³ On September 13, 2005, Secretary Chertoff waived eight statutes to permit the expeditious construction of fourteen miles of border fence in San Diego.⁶⁴

Sierra Club amended its complaint, alleging that 1) the waiver violated the non-delegation doctrine; 2) application of waiver to this case violated the Constitution by enabling SHS to abolish the district court’s jurisdiction; and 3) application of the waiver to the pending case was an impermissible retroactive application of the waiver legislation.⁶⁵ The U.S. District Court for the Southern District of California in 2005 rejected all the allegations and dismissed the case.⁶⁶ Nevertheless, the court noted that:

Congress [in RIDA] simply broadened the scope of the waiver authority of the pre-existing delegation to ‘all laws,’ but again only for the narrow purpose of expeditious completion of the Triple Fence authorized by the IIRIRA. Thus, the Waiver Legislation effected no change in the already

⁵⁷ NUÑEZ-NETO & GARCIA, *supra* note 53, at 5–6.

⁵⁸ REAL ID Act of 2005, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 302, 306 (2005).

⁵⁹ *Id.*

⁶⁰ *Id.* § 102(c)(2)(A)–(B).

⁶¹ *Id.* § 102(c)(2); *see also* David Fisher, *The U.S.-Mexico Border Wall and the Case for “Environmental Rights,”* 50 TEX. INT’L L.J. 145, 160 (2015).

⁶² *Sierra Club v. Ashcroft*, No. 04-CV-0272-LAB, 2005 WL 8153059 at *1 (S.D. Cal. Dec. 12, 2005).

⁶³ *Id.*

⁶⁴ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005, 70 Fed. Reg. 55,622–55,623 (Sept. 22, 2005).

⁶⁵ *Sierra Club*, WL 8153059 at *1.

⁶⁶ *Id.* at *2.

plenary scope of the delegated discretion to waiver NEPA provisions that existed before plaintiffs filed their Complaint in this case.⁶⁷

The demand for additional border fencing continued. The Secure Fences Act of 2006 (SFA), which was enacted as a separate piece of legislation, amended IIRIRA, section 102(b).⁶⁸ The SHS was directed to “provide for least [sic] 2 layers of reinforced fencing, [and] the installation of additional physical barriers, roads, lighting, cameras, and sensors” along 700 miles in five specific segments along the U.S.–Mexico border, across the states of California, Arizona, New Mexico, and Texas.⁶⁹ Dates were set for the completion for two segments of priority fencing.⁷⁰ Prominent Democrats, who later opposed President Trump’s border wall, supported the SFA, including Senator Barbara Boxer (D. Cal.), Senator Barak Obama (D. Ill.), Senator Joe Biden (D. Del.), Senator Dianne Feinstein (D. Cal.), and Representative Chuck Schumer (D. N.Y.).⁷¹

DHS predicted that the fourteen-mile San Diego border fence would cost \$127 million, approximately \$9 million per mile.⁷² Construction of the first 9.5 miles of fencing had cost \$31 million, approximately \$3 million per mile.⁷³ While construction for the last 4.5 miles of fencing was projected to cost \$96 million, approximately \$21 million per mile.⁷⁴ Complex construction in Smugglers Gulch accounted for vast disparity in costs.⁷⁵ Congress provided \$35 million for San Diego border fence construction in FY2006.⁷⁶ Congress recommended \$30.5 million for San

⁶⁷ *Id.* at *5.

⁶⁸ Secure Fence Act of 2006, Pub. L. 109-367, § 3, 120 Stat. 2638 (codified as amended at 8 U.S.C. 1103 note) (2006).

⁶⁹ *Id.* § 3(2). Section 3 of the Secure Fence Act mandates fences along 698 miles in five areas:

- (i) extending from 10 miles west of the Tecate, California, port of entry to 10 miles east of the Tecate, California port of entry [22 miles]; (ii) extending from 10 miles west of Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry [361 miles]; (iii) extending from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas [88 miles]; (iv) extending from 5 miles northwest of the Del Rio, Texas, port of entry to 5 miles southeast of the Eagle Pass, Texas, port of entry [51 miles]; and (v) extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry [176 miles].

Id. (amending IIRIRA § 102(b)(1)). The CBP estimated that because of topographical features, the SFA mandated fencing amounted to 850 miles. GARCIA, *supra* note 39, at 8.

⁷⁰ GARCIA, *supra* note 39, at 8–9 (fencing near Calexico, CA, and Douglas, AZ, by May 30, 2008 and fencing near Laredo, TX, by December 31, 2008).

⁷¹ Cameron Cawthorne, *Flashback: Democrats Supported the U.S. Border Fence Before They Were Against It*, GOP (Aug. 24, 2017), <https://perma.cc/W4BP-9WF4>.

⁷² NUNEZ-NETO & GARCIA, *supra* note 53, at 6.

⁷³ *Id.* at 5.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

Diego border fence construction for FY2007.⁷⁷ Furthermore, since 1990 Congress had provided funding to the Defense Department to assist federal agencies in counter-drug activities, which included construction of fencing and roads along the border to stop flow of illegal narcotics into the country.⁷⁸

There was, however, little support for the aspirational goal of 700 miles of double layered fencing. President Bush, Secretary Chertoff, the Senate, and democratic congresspersons only planned for 370 miles of priority fencing and 330 miles of vehicle barriers and/or virtual fencing.⁷⁹ Former Representative Jim Kolbe (R. Az.) commenting on the SFA, stated, “[t]his administration has never shown any real interest, and who’s going to push for it [border fence]?”⁸⁰ His successor, Democratic Representative Gabby Giffords, noted, “[i]t’s a lot smarter to have high-tech enforcement than thinking that a fence is going to solve the problem.”⁸¹

After the Democrats took control of Congress in 2007, they abandoned the aspirational goal and loosened the SFA mandate with the Consolidated Appropriations Act of 2008.⁸² Congress scaled back the DHS duties under section 102(b). First, it eliminated the specific locations for barriers. Fencing was only required across 700 miles of the southwest border, but only if and where the SHS determined it would be “most practical and effective.”⁸³ Second, double-layered fencing was no longer required. Third, 370 miles of “priority areas” for border fences had to be identified by December 31, 2008.⁸⁴ Finally, the SHS was required to consult with Secretaries of Interior and Agriculture, state and local governments, Native American tribes, and property owners to minimize the impact on the environment, culture, commerce, quality of life for communities and residents where barriers would be constructed.⁸⁵ The only remnant of the SFA mandate that remained was

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Bush Reportedly Wants to Build Only Some Portions of Border Fence*, THE FRONTRUNNER (Apr. 3, 2007), <https://perma.cc/XQX5-FJCF>; Juan Lozano, *Cities Along Texas-Mexico Border Block Access New Fence Site*, ASSOCIATED PRESS, Oct. 2, 2007, <https://perma.cc/K4H7-GE6G>; Alicia A. Caldwell, *Border Fence Could Cut Through Backyards, Create a No-Man’s-Land*, ORANGE CTY. REG. (Nov. 8, 2007), <https://perma.cc/A5SD-F3SU>.

⁸⁰ Arthur H. Rotstein, *Prospects of Huge Border Fence Doubtful*, TUCSON.COM (Jan. 15, 2007), <https://perma.cc/W9LP-WDUJ>.

⁸¹ *Id.*

⁸² Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 564, 121 Stat. 1844, 2090 (2007) (codified at 8 U.S.C. 1103 note (2012)).

⁸³ The Secretary was not required to construct fences or other border barriers “in a particular location along an international border of the United State, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.” *Id.* § 564, 121 Stat. 1844, 2090.

⁸⁴ Consolidated Appropriations Act of 2008, § 564(2)(B)(ii).

⁸⁵ *Id.*

the 700 miles of fencing, while the composition and location of such was left up to the SHS discretion.⁸⁶

Federal district courts continued to support the SHS waiver authority. Save Our Heritage Organization (SOHO) brought suit, seeking an injunction to halt the construction of two portions of physical barriers and roads along the U.S.–Mexico border, one near San Diego, California and the other near Yuma, Arizona.⁸⁷ SOHO alleged the SHS action violated numerous statutes and the waiver of these statutory requirements was unconstitutional.⁸⁸ Further, the construction of the San Diego barrier was no longer authorized under section 102(b) of the SFA.⁸⁹ However, the Yuma section remained in one of the five mandated areas under the SFA.⁹⁰

The U.S. District Court for the Southern District of California in 2008 upheld the Secretary’s waiver. The court held that even though the San Diego barrier had not been designated in the SFA, San Diego had been previously identified in the IIRIRA.⁹¹ Furthermore, the general purpose of section 102(a) provided the SHS with “general authority to construct border barriers.”⁹² The court also held that SHS waiver authority under section 102(c) did not violate the non-delegation doctrine.⁹³

There were unsuccessful efforts to create the virtual fence. The Bush Administration was awarded \$67 million in 2005 to establish a virtual fence, consisting of radar, infrared devices, and cameras.⁹⁴ Sensors were designed to distinguish people from animals and allow the border patrol to pursue intruders.⁹⁵ However, the GAO in 2008 reported that after the DHS had spent more than \$20 million experimenting and developing virtual fence, the technology had not proven to be successful.⁹⁶ The GAO estimated that the \$2.4 billion virtual fence

⁸⁶ *Id.*

⁸⁷ *Save Our Heritage Org. v. Gonzalez*, 533 F. Supp. 2d 58, 60 (D.D.C. 2008); *see also* 71 Fed. Reg. 55,622–55,623 (Sept. 22, 2005); 72 Fed. Reg. 2535 (Jan. 19, 2007).

⁸⁸ *Save Our Heritage Organization*, 533 F. Supp. 2d at 60.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 61.

⁹³ *Id.* at 63–64.

⁹⁴ *Obama Administration Ends High-Tech Border Fence*, CBS NEWS (Jan. 14, 2011), <https://perma.cc/NF5Y-KV2Q>.

⁹⁵ Arthur H. Rotstein, *Work on ‘Virtual Fence’ to Start Soon*, TUCSON.COM (May 8, 2009), <https://perma.cc/R2PZ-VB6B>.

⁹⁶ *\$20 Million ‘Virtual’ Border Fence Scrapped*, NBC NEWS (Apr. 23, 2008), <https://perma.cc/K7X4-ZR87>.

would cost \$6.5 billion to maintain over next 20 years.⁹⁷ Representative Hunter (R. Cal.) called the virtual fence a waste of taxpayer dollars.⁹⁸

Most border barriers were constructed during second term of Bush Administration. Secretary of Homeland Security Michael Chertoff exercised the section 102(c) authority five times, waiving 35 laws: 1) San Diego⁹⁹ (14 miles); 2) Barry Goldwater Range in Arizona¹⁰⁰ (37.3 miles); 3) San Pedro Riparian National Conservation Area (BLM) in Arizona¹⁰¹ (5.5 miles); 4) Hidalgo County, Texas¹⁰² (21 miles); and 5) Texas, New Mexico, Arizona, California¹⁰³ (546.5 miles). The DHS in September 2008 revised its goal of completing 670 miles of fencing by December 31, 2008. Instead, DHS promised to have 661 miles either built or under construction by December 31, 2008.¹⁰⁴ As of December 31, 2008, DHS had constructed 578 miles of fencing.¹⁰⁵

President Obama was not a proponent of border fencing. During a presidential debate in 2008, candidate Obama stated, "I think that the key is to consult with local communities, whether it's on the commercial interest or the environmental stakes of creating any kind of barrier."¹⁰⁶ SHS Janet Napolitano, while governor of Arizona, often voiced her skepticism of border fencing stating, "You show me a 50-foot wall, and I'll show you a 51-foot ladder at the border."¹⁰⁷ Nevertheless, Secretary Napolitano decided to allow border fence projects already contracted

⁹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-1013T, SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ADDRESSED 1, 5 (2009).

⁹⁸ Rep. Duncan Hunter, R. Cal. (52nd Cong. Dist.), *Virtually De-Fenceless*, U.S. FED. NEWS (Mar. 3, 2008).

⁹⁹ Determination Pursuant to Section 102 of the IIRIRA as Amended by Section 102 of the RIDA, 70 Fed. Reg. 55,622–55,623 (Sept. 22, 2005).

¹⁰⁰ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 2535 (Jan. 19, 2007).

¹⁰¹ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended by Section 102 of the REAL ID Act of 2005 and as Amended by the Secure Fence Act of 2006, 72 Fed. Reg. 60,870 (Oct. 26, 2007).

¹⁰² Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19,077 (Apr. 3, 2008) (corrected April 8, 2008).

¹⁰³ 73 Fed. Reg. at 18,293.

¹⁰⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-896, SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED 9 (2009).

¹⁰⁵ *Id.*

¹⁰⁶ April Reese, *U.S.-Mexico Fence Building Continues Despite Obama's Promise to Review Effects*, N.Y. TIMES (Apr. 16, 2009), <https://perma.cc/J9XF-66Q3>.

¹⁰⁷ Marc Lacey, *Arizona Officials, Fed Up with U.S. Efforts, Seek Donations to Build Border Fence*, N.Y. TIMES (July 19, 2011), <https://perma.cc/9P75-P6LX>; see also April Reese, *DHS Commits \$50M for Projects to Offset Environmental Damage*, E&E NEWS (Jan. 22, 2009), <https://perma.cc/7NGA-FACG>.

under the Bush administration to continue.¹⁰⁸ However, CBP decided to disregard Chertoff's waiver for a segment of vehicle barrier on the Tohono O'odham Nation in southwest Arizona and proceed with the standard environmental and cultural reviews.¹⁰⁹

California officials continued to complain that the border fence was damaging the Tijuana River and its estuary. The estuary, which encompasses a national wildlife refuge, and state parklands, is also the home of number of endangered bird species, including the light-footed clapper, the California least tern, the least Bell's vireo and the American peregrine falcon.¹¹⁰ The CCC declared, "this project was just a disaster. . . . Not only is it a wall of shame, but to override the protections after the state spent tens of millions of dollars to restore the estuary and to just come in and blast the place . . . it's just shameful."¹¹¹ CBP promised to address the problems.¹¹²

President Obama in 2011 declared that fencing along the U.S.–Mexico border is "now basically complete."¹¹³ The Obama Administration also ended efforts to create a virtual fence in 2011. SHS Napolitano stated "independent, quantitative, science-based review made clear" the virtual fence "cannot meet its original objective of providing a single, integrated border security technological solution."¹¹⁴ Funds provided for the high-tech virtual fence would go to other proven technology.¹¹⁵

As of May 2015, DHS installed 353 miles of primary pedestrian fencing, 300 miles of vehicle fencing (total 653 miles), 36 miles of secondary fencing behind the primary fencing, and 14 miles of tertiary pedestrian fencing behind the secondary fence.¹¹⁶ CBP had identified a total of 653 miles of border as appropriate for fencing and barriers.¹¹⁷

III. *IN RE BORDER INFRASTRUCTURE ENVIRONMENTAL LITIGATION*

President Trump came to office committed to building a wall across the U.S.–Mexico border. President Trump did not see the need for border wall that will stretch across the 2,000 miles of the U.S.–Mexico

¹⁰⁸ April Reese, *Lawmakers Ask Napolitano to Restore Environmental Safeguards*, E&E NEWS (June 25, 2009), <https://perma.cc/CMV2-UQ5Y>.

¹⁰⁹ *Id.*; see also April Reese, *Smuggler's Gulch Project a 'Disaster' for Estuary*, *Critics Say*, E&E NEWS (Jan. 15, 2009), <https://perma.cc/5CAN-5BUM>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Robert Farley, *Obama Says Border Fence is 'Now Basically Complete'*, POLITIFACT (May 16, 2011), <https://perma.cc/698C-ZBYV>.

¹¹⁴ *Obama Administration Ends High-Tech Border Fence*, CBS NEWS (Jan. 14, 2011), <https://perma.cc/9BXF-FH4Y>.

¹¹⁵ *Id.*

¹¹⁶ CARLA N. ARGUETA, CONG. RESEARCH SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 19 (2016).

¹¹⁷ *Id.* at 15.

border, but envisioned “anywhere from 700 (1,126 km) to 900 miles (1,448 km) of see-through wall.”¹¹⁸ President Trump promised that Mexico will fund the wall, but Mexico has refused to pay for the wall.¹¹⁹

Environmental groups are particularly concerned about adverse effects of the proposed wall on wildlife.¹²⁰ Border fences, walls, and barriers cause numerous environmental problems. First, barriers fragment wildlife habitat and territory on the border, which create negative impacts on the distribution, movement, and abundance of animals.¹²¹ Second, barriers stop wildlife migration and dispersion between the two countries. This prevents the genetic exchange between populations, which is necessary for species health.¹²² Third, barriers allow for the proliferation of exotic and noxious fauna, such as rats and birds, which can adversely affect wildlife.¹²³ Fourth, electric lighting affects the behavior and movement of nocturnal animals.¹²⁴ Fifth, noise pollution generates stress that can cause harmful metabolic, hormonal, and behavior problems.¹²⁵ Sixth, barriers hamper the collaborative efforts with Mexico regarding wildlife and natural resource management.¹²⁶

DHS notified Congress in February 2017 that it planned to reprogram \$20 million from other CBP program funding in previous

¹¹⁸ *Trump says Mexico Wall Doesn't Need to Cover the Whole Border*, THE GUARDIAN (July 13, 2017), <https://perma.cc/TG6J-DWC5>.

¹¹⁹ Rebecca Morin, *Mexico Denies it Will Pay for Border Wall After Trump Repeats Claim*, POLITICO (Aug. 28, 2018), <https://perma.cc/N9K8-69DA>.

¹²⁰ Leah Donnelly, *The Environmental Consequences of a Wall on the U.S.-Mexico Border*, NAT'L PUB. RADIO (Feb. 17, 2017), <https://perma.cc/ZJ8L-FHMJ>. The Center for Biological Diversity determined that the wall would have the following detrimental impacts: 1) 93 threatened, endangered and candidate species would potentially be affected by the construction and related infrastructure across the entire border, including jaguars, Mexican wolves and Quino checkerspot butterflies; 2) The critical habitat for 25 species that occur within 50 miles of the border, including the jaguar, arroyo toad, and Peninsular bighorn sheep, would be degraded or destroyed; and 3) Studies demonstrate that the wall precludes the movement of some wildlife, including the low-flying cactus ferruginous pygmy owl. NOAH GREENWALD ET AL., CTR. FOR BIOLOGICAL DIVERSITY, A WALL IN THE WILD: THE DISASTROUS IMPACTS OF TRUMP'S BORDER WALL ON WILDLIFE 1 (2017).

¹²¹ Héctor Moya, *Possible Impacts of Border Fence Construction and Operation on Fauna: Specialist Discussion*, in A BARRIER TO OUR SHARED ENVIRONMENT: THE BORDER FENCE BETWEEN THE U.S. AND MEXICO 65, 65–66 (Ana Cordova & Carlos A. de la Parra eds., Trans-Lang, Inc., trans., 2007).

¹²² *Id.*

¹²³ *Id.* at 66.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Ana Cordova & Carlos A. de la Parra, *Introduction* in A BARRIER TO OUR SHARED ENVIRONMENT: THE BORDER FENCE BETWEEN THE U.S. AND MEXICO, *supra* note 121, at 17; Lindsay Eriksson & Melinda Taylor, *The Environmental Impacts of the Border Wall Between Texas and Mexico 5–9* (undated) (unpublished manuscript) (on file with University of Texas Law) (<https://perma.cc/956D-D8VB>); Jeffrey P. Cohn, *The Environmental Impacts of a Border Fence*, BIOSCIENCE 96 (2007); Aaron D. Fleisch et. al., *Potential Effects of the United States-Mexico Border Fence on Wildlife*, 24 CONSERVATION BIOLOGY 171, 177–79 (2010).

years to fund the planning and design of barriers along the southwest border, including the construction and testing of barrier prototypes.¹²⁷ CBP requested proposals for border wall prototypes in March 2017. One proposal was for prototypes made of concrete.¹²⁸ The other was for prototypes made of different materials.¹²⁹ CBP awarded contracts of \$3 million to six companies to design and construct eight prototypes in September and October 2017.¹³⁰

Congress provided limited funding for President Trump's border wall. The Consolidated Appropriations Act of 2017 provided \$341.2 million for the replacement of "40 miles of existing primary pedestrian and vehicle border fencing" in high priority areas, "using previously deployed and operationally effective designs, such as currently deployed steel bollard designs, that prioritize agency safety; and to add gates to existing barriers."¹³¹ CBP planned to spend the funds in part to replace fourteen miles of primary pedestrian fencing in the San Diego sector and two miles of primary pedestrian fencings in the El Centro sector.¹³² Representative Ron DeSantis (R. Fla.), chair of National Security Subcommittee of the House Committee on Oversight and Government Reform stated, "we're not talking about a 2000 mile wall. It's going to be basically finishing the job of the 2006 Secure Fence Act."¹³³

After SHS Kelley and Acting SHS Duke invoked their authority under section 102(c) to waive numerous statutes, construction of the San Diego and El Centro replacement fencing and border wall prototypes proceeded.¹³⁴ Construction of the prototypes began on September 26, 2017 and was completed on October 26th, 2017.¹³⁵ Construction of the Calexico three-mile replacement fence and the San Diego replacement fencing were scheduled to begin in 2018.¹³⁶

The State of California, DOW, and CBD brought suits challenging SHS waiver of numerous statutes regarding the three border wall construction projects. CBD stated, "Trump is willing to throw

¹²⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-614, SOUTHWEST BORDER SECURITY: CBP IS EVALUATING DESIGNS AND LOCATIONS FOR BORDER BARRIERS BUT IS PROCEEDING WITHOUT KEY INFORMATION 13 (2018).

¹²⁸ *Id.* at 14.

¹²⁹ *Id.*

¹³⁰ *Id.* at 13--14.

¹³¹ Consolidated Appropriation Act of 2017, Pub. L. No. 115-31, 131 Stat. 135, 434. The bill also provided \$78.8 million for acquisition and deployment of border security technology and \$77.4 million for new border road construction. *Id.*

¹³² U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 127, at 9--11.

¹³³ Press Release, House Comm. on Oversight and Gov't Reform, President's Promised 2,000 Mile Border Wall, Hearing Wrap-Up: Chairman Dismisses President's Promised 2,000-Mile Border Wall (Apr. 27, 2017), <https://perma.cc/YW3Q-7UB7>.

¹³⁴ *Curiel*, 284 F. Supp. 3d 1092, 1106-07 (S.D. Cal. 2018).

¹³⁵ *Id.* at 1107.

¹³⁶ *Id.*

environmental protections out the window to fulfill his divisive and destructive campaign promise.”¹³⁷

In February 2018, the U.S. District Court for Southern District of California, in *Curiel*, held that SHS waivers of numerous laws that allowed the three projects to proceed were not ultra vires, outside the scope of the Secretary’s statutory authority.¹³⁸ The court also determined that the SHS waiver authority under section 102(c) did not violate the Constitution.¹³⁹

A. Ultra Vires-Step One

The district court acknowledged that there is “strong presumption” regarding judicial review of administrative action.¹⁴⁰ This “strong presumption may be overcome by ‘specific language or specific legislative history that is a reliable indicator of congressional intent,’ or a ‘specific congressional intent to preclude judicial review that is ‘fairly discernible’ in the detail of the legislative scheme.”¹⁴¹ The court recognized that Congress had precluded judicial review of non-constitutional violations, but held it still retained authority to determine whether the SHS waiver decisions were “ultra vires.”¹⁴² However, this exception is an “extremely narrow one” and “extraordinary.”¹⁴³ It has been described as “essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds.”¹⁴⁴ In order to prevail, the plaintiffs must first demonstrate that SHS acted in excess of their delegated powers by demonstrating the issuance of the two waivers contravened the “clear and mandatory” language in section 102. Plaintiffs must also show that precluding judicial review would deprive them of any “meaningful and adequate means of vindicating its statutory rights.”¹⁴⁵

The district court correctly determined that despite curtailment of judicial review in 102(c), it still retained authority to determine whether the SHS waivers were ultra vires.¹⁴⁶ Congress acknowledged the court’s ultra vires authority when it enacted the Administrative Procedure

¹³⁷ Press Release, Brian Segee, Ctr. for Biological Diversity, Lawsuit Challenges San Diego Border-wall Waiver as Unconstitutional (Sept. 6, 2017), <https://perma.cc/XA2U-G36P>.

¹³⁸ *Curiel*, 284 F. Supp. 3d at 1115, 1128.

¹³⁹ *Id.* at 1130–46.

¹⁴⁰ *Id.* at 1111 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)); *El Paso Natural Gas Co. v. United States*, 632 F.3d 1272, 1276 (2011).

¹⁴¹ *Curiel*, 284 F. Supp. 3d at 1111 (quoting *Bowen*, 476 U.S. at 673).

¹⁴² *Id.* at 1111, 1114–15.

¹⁴³ *Id.* at 1113 (quoting *Nat’l Air Traffic Controllers Ass’n. AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006); *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999)).

¹⁴⁴ *Id.* (quoting *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009)).

¹⁴⁵ *Id.* at 1113–14.

¹⁴⁶ *Id.* at 1110, 1114.

Act¹⁴⁷ (APA). The Senate Committee report on the APA declared, “[i]t has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified.”¹⁴⁸

The Supreme Court recognized its authority to declare an administrative action ultra vires even when judicial review was precluded.¹⁴⁹ The Supreme Court in *Leedom v. Kyne*¹⁵⁰ held the district court retained jurisdiction to review a non-final agency order “made in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations] Act.”¹⁵¹ The Court declared that it “cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.”¹⁵²

The Court qualified the ultra vires doctrine in *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*,¹⁵³ when it upheld a statute that precluded judicial review. The Court distinguished *Kyne* on two grounds. First, the plaintiffs in *Kyne* were deprived of any way of vindicating their statutory right, but *MCorp* plaintiffs were provided the opportunity for judicial review.¹⁵⁴ Second, the preclusion of judicial review was inferred by silence in *Kyne*, but there was clear and convincing evidence in *MCorp* that precluded judicial review.¹⁵⁵

Numerous federal circuit courts have relied on analogous reasoning to *Kyne* and *MCorp* to review agency actions taken pursuant to statutory provisions expressly prohibiting judicial review.¹⁵⁶ For example, the D.C. Circuit in *Dart v. United States*¹⁵⁷ held judicial review is available when the Secretary exercises functions that are not specified in statute.¹⁵⁸ The court stated that even “where Congress is understood generally to have precluded [judicial] review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of [its] jurisdiction.”¹⁵⁹ The court noted that “[w]hen an executive acts ultra

¹⁴⁷ Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 5335, 5372, 7521 (2012).

¹⁴⁸ *Dart v. United States*, 848 F.2d 217, 224 (D.D.C. 1988) (quoting S. REP. NO. 752, 79TH CONG., 1ST SESS. 26 (1945)).

¹⁴⁹ *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).

¹⁵⁰ 358 U.S. 184 (1958).

¹⁵¹ *Id.* at 188.

¹⁵² *Id.* at 190.

¹⁵³ 502 U.S. 32 (1991).

¹⁵⁴ *Id.* at 43–44.

¹⁵⁵ *Id.* at 44.

¹⁵⁶ *See, e.g., Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689, 700 (9th Cir. 2003); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978); *United States v. Bozarov*, 974 F.2d 1037, 1045 n.8 (9th Cir. 1992); *Amgen Inc. v. Smith*, 357 F.3d 103, 117 (D.C. Cir. 2004).

¹⁵⁷ 848 F. 2d 217 (D.C. Cir. 1998).

¹⁵⁸ *Id.* at 221.

¹⁵⁹ *Id.*

vires, courts are normally available to reestablish the limits on his authority.”¹⁶⁰

The district court, relying on *Kyne* and *Dart*,¹⁶¹ held that plaintiffs must show clear and convincing evidence of contrary legislative intent regarding the scope of the SHS jurisdiction. The district court upheld SHS waivers because it could not find any specific textual references that constrained the SHS waiver authority.¹⁶² The court dismissed the plaintiff’s arguments as plausible, but not definitive.¹⁶³

The district court failed to recognize that the parameters of the SHS actions are determined not only by the “express language, but also from the structure of the statutory scheme, its objectives, its legislative history and the nature of the administrative action involved.”¹⁶⁴ The court’s assessment of these factors was incorrect. An analysis of the text, intent, and purposes of section 102 provide clear and convincing evidence that the SHS waivers of numerous environmental statutes regarding the replacement fencing and border wall prototypes were ultra vires because they were not authorized under section 102(b).

1. Text

Statutory interpretation begins with the text.¹⁶⁵ The district court did not find the text determinative.¹⁶⁶ The text, however, confines the SHS authority in two ways. Section 102 (b)(1)(B), regarding “priority areas,” instructs the SHS to:

- (i) [I]dentify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and (ii) not later than December 31, 2008,

¹⁶⁰ *Id.* at 224.

¹⁶¹

‘[O]nly upon a showing of []clear and convincing evidence[] of a contrary legislative intent should the courts restrict access to judicial review.’ This standard has been invoked time and again when considering whether the Secretary has discharged ‘the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision.’

Id. at 221 (quoting *Bowen*, 476 U.S. 667, 671–72 (1986)) (alterations in original).

¹⁶² *Curiel*, 284 F. Supp. 3d 1092, 1105 (S.D. Cal. 2018).

¹⁶³ *Id.* at 1115, 1119.

¹⁶⁴ *Dart*, 848 F.2d at 224 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

¹⁶⁵ *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 627 F.3d 1268, 1270 (9th Cir. 2010); *Brock v. Writers Guild of Am., W., Inc.*, 762 F.2d 1349, 1353 (9th Cir. 1985).

¹⁶⁶ *Curiel*, 284 F. Supp. 3d at 1118.

complete construction of reinforced fencing along the miles identified under clause (i).¹⁶⁷

Secretary Chertoff identified the 370 miles of priority areas for border fencing and 300 miles of vehicle barriers, executed the relevant waivers, and committed DHS to 661 miles of fencing by December 31, 2008.¹⁶⁸

If “the other mileage” in section 102(b)(1)(B) only refers to “priority areas,” there is another constraint in section 102(b)(1)(A), which states “[i]n carrying out subsection (a), the [SHS] shall construct reinforced fencing along not less than 700 miles of the southwest border”¹⁶⁹ This language grants the SHS authority to build at least 700 miles of fencing, the aspirational goal previously articulated in the 2006 SFA. This defines the maximum, not the minimum, amount of fencing authorized. Once this congressional mandate was met, the SHS waiver authority ended. This was accomplished in 2013.¹⁷⁰ If the SHS retained unlimited authority to waive any law, at any time, pursuant to section 102(a), the restrictions in section 102(b)(1)(A) and (B) become superfluous.¹⁷¹

Other requirements in section 102 (b)(2) and (4) reinforce this view. These sections assume present action regarding the designated areas, not future actions ten years later or in perpetuity. Section 102(b)(2) calls for prompt acquisition of necessary easements.¹⁷² Section 102(b)(4) authorizes appropriations “as may be necessary to carry out this subsection.”¹⁷³ These easements and appropriations refer to areas designated under section 102(b), the 370 miles of priority fencing and the 700 miles of fencing authorized under the SFA.

2. Legislative History

Since the district court did not find the text to be clear, it examined the legislative history.¹⁷⁴ The district court held that “[t]he parties’

¹⁶⁷ Department of Homeland Security Appropriations Act, Pub. L. No. 110-161, § 564(2)(B)(i), 121 Stat. 2090 (2008) (codified at 8 U.S.C. 1103 note (2012)) (amending IIRIRA §102(b)(1)(B)).

¹⁶⁸ Memorandum in Support of Motion for Summary Judgment by Plaintiffs at 22, *Curiel*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018) (No. 17cv1215-GPC(WVG)), 2017 WL 5760186 at *16 [hereinafter California Memo].

¹⁶⁹ Department of Homeland Security Appropriations Act § 564(2)(B)(ii).

¹⁷⁰ *Curiel*, 284 F. Supp. 3d at 1127.

¹⁷¹ The Ninth Circuit noted that “[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous” *Hooks v. Kitsap Tenant Support Servs. Inc.*, 816 F.3d 550, 560 (9th Cir. 2016) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (internal quotations omitted).

¹⁷² Department of Homeland Security Appropriations Act § 564(2)(B)(ii).

¹⁷³ *Id.* § 564(2)(C).

¹⁷⁴ See *Brock v. Writers Guild of Am., W., Inc.*, 762 F.2d 1349, 1353, 1355–57 (9th Cir. 1985) (showing the importance of legislative history). For a full discussion of the

varying plausible interpretations concerning the scope of section 102(c) demonstrate [the lack of a clear statutory mandate].”¹⁷⁵ The legislative history, however, demonstrates that Congress specified the location and amount of fencing in section 102(b); consequently, confined the SHS use of the section 102(c) waiver authority. The IIRIRA and the RIDA limited the use of waiver under section 102(c) to the San Diego border fence.¹⁷⁶ The SFA expanded the fencing authorized under section 102(b) to five specific locations across 700 miles of the southwest border.¹⁷⁷ The Consolidated Appropriations Act of 2008 limited the amount of border fencing to 370 miles of priority fencing and at least 700 miles of fencing overall, which was the amount of fencing designated in the SFA.¹⁷⁸

IIRIRA was specifically enacted to complete the construction of border fencing in the San Diego sector. The AG was granted authority to construct border barriers¹⁷⁹ and waive NEPA and ESA requirements to facilitate the construction of fourteen miles of border fencing along the San Diego sector.¹⁸⁰

While the bill was being considered, AG Janet Reno stated that the bill was “unnecessary, and we strongly oppose it.”¹⁸¹ President Clinton signed the bill, but registered his skepticism stating:

I am, however, extremely concerned about a provision in this bill that could lead to the Federal Government waiving the [ESA] and [NEPA] in order to expeditiously construct physical barriers and roads on the U.S. Border. I know the Attorney General shares my commitment to those important environmental laws and will make every effort, in consultation with environmental agencies, to implement the immigration law in compliance with those environmental laws.¹⁸²

Secretary of Interior Bruce Babbitt “informed Congress that full compliance with the ESA would not be an impediment to the timely and effective construction of border infrastructure contemplated by this provision.”¹⁸³ The INS declared that “we will not seek the Attorney

importance of legislative history, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV., 621, 630–40 (1990).

¹⁷⁵ *Curiel*, 284 F. Supp. 3d at 1127.

¹⁷⁶ *Id.* at 1103–04.

¹⁷⁷ *Id.* at 1104.

¹⁷⁸ *Id.*

¹⁷⁹ This authority is now delegated to DHS under the Homeland Security Act (HSA). Pub. L. No. 107-296, 116 Stat. 2135, 2195 (2002) (codified at 6 U.S.C. § 256).

¹⁸⁰ *Id.*

¹⁸¹ Dinah Bear, *Border Wall: Broadest Waiver of Law in American History 2* (2009) (unpublished manuscript) (on file with the Center for International Environmental Law).

¹⁸² *Id.* (quoting President Bill Clinton, Statement (Oct. 1, 1996)).

¹⁸³ *Id.* (quoting Dep’t of the Interior, Secretary Babbitt, Statement on Objections to New Environmental Waivers Included in Immigration Bill (Oct. 1, 1996)).

General's use of this waiver, and the INS will continue to abide by all environmental laws."¹⁸⁴

After completion of the San Diego fencing was delayed by the California Coastal Commission, Representative Sensenbrenner (R. Wisc.), chair of the House Judiciary Committee, building on an earlier effort,¹⁸⁵ inserted a provision into the RIDA that amended section 102(c) to allow the completion of the San Diego fence in 2005.¹⁸⁶ Statements by the sponsors of the legislation are "an authoritative guide to the statute's construction" because they "know what the proposed legislation is all about, and other Members can be expected to pay special heed to their characterizations of the legislation."¹⁸⁷ Representative Sensenbrenner stated: "[T]he REAL ID Act will waive Federal laws to the extent necessary to complete gaps in the San Diego border security fence, which is still stymied 8 years after congressional authorization. Neither the public safety nor the environment are benefiting from the current stalemate."¹⁸⁸ Comments by other U.S. Representatives confirmed that section 102(c) was designed to complete the San Diego fence.¹⁸⁹

The Congressional Budget Office's (CBO) budget estimate regarding the impact of the waiver authority in HR 418 (RIDA) also demonstrated its narrow scope. The CBO estimate stated:

[IIRIRA] provided for the construction of a series of roads and fences along the U.S.-Mexico border near San Diego to deter entry of illegal immigrants. All but about 3 miles of this barrier have been completed. Since February 2004, completion of the barrier has been delayed because of environmental conflicts with the Coastal Zone Management Act

¹⁸⁴ *Id.* at 3 (quoting David A. Yentzer, Assistant INS Commissioner, Memorandum (Feb. 24, 1997)).

¹⁸⁵ *San Diego Border Fence*, CITY NEWS SERV. (Oct. 8, 2004); MUMME, *supra* note 25, at 5.

¹⁸⁶ The Supreme Court stated that statements by bill sponsors during the floor debate "deserve to be accorded substantial weight in interpreting the statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

¹⁸⁷ Eskridge, *supra* note 174, at 638.

¹⁸⁸ 151 CONG. REC. 1,908 (2005) (statement of Rep. Sensenbrenner).

¹⁸⁹ Representative Bono: "The San Diego fence is a project that was started several years ago, but a 3.5-mile section of that fence was not completed due to environmental concerns This legislation puts those priorities front and center." 151 CONG. REC. H453 at H471 (daily ed. Feb. 9, 2005). Representative Lungren: "H.R. 418 will remove impediments to completing the fence along the San Diego corridor of our southern border." *Id.* at H457. Representative Hastings: "H.R. 418 allows SHS to waive all laws necessary for the construction of the San Diego border wall. None of us are of a mind to believe that the completion of the 3-mile gap in that wall should not be undertaken." 151 CONG. REC. H527 at H529 (daily ed. Feb. 10, 2005). Memorandum of Points and Authorities in support of Plaintiffs Def. of Wildlife, Animal Legal Def. Fund, and Sierra Club's Motion for Summary Judgement at 18–19, *In Re Border Infrastructure Environmental Litigation*, 284 F. Supp. 3d 1092 (S.D. Cal. Feb. 9, 2018) (No. 17cv1215–GPC–WVG), 2017 WL 5760040 [hereinafter DOW Memo].

(CZMA). HR 418 would permit DHS to waive this act and any other laws as necessary to complete construction of the barrier.¹⁹⁰

The CBO concluded that the waiver authority would not impose significant additional costs because it merely authorized

[T]he Secretary of [DHS] to waive any laws necessary to complete construction of a physical barrier between the United States and Mexico near San Diego, California, and prohibit any court from having jurisdiction to hear claims or ordering relief for damage resulting from the waiver of such laws. This provision would preempt state authority.¹⁹¹

Democrats in House tried to strip the provision from bill, but lost on a largely party line vote of 179–243.¹⁹² Republican congressmen implored the Senate to pass the bill to fortify border fence.¹⁹³ The Senate showed little interest in the waiver provisions, so the House Rules Committee attached the bill to a must pass supplemental appropriation bill.¹⁹⁴

Senate Democrats sought to remove the provision in conference, but again were unsuccessful.¹⁹⁵ The conference report on the bill specifically referenced the completion of San Diego border fence.¹⁹⁶ The conference committee report is important because it is the “best evidence of bicameral agreement” and “explicates the chambers’ resolution of differences.”¹⁹⁷ The committee stated that

[C]onstruction of San Diego area barriers has been delayed due to a dispute involving other laws. The California Coastal Commission has prevented completion of the San Diego border security infrastructure because it alleges that plans to complete it are inconsistent with California Coastal Management Program . . . notwithstanding the fact that the San Diego border security infrastructure was designed to avoid and/or

¹⁹⁰ DOW Memo, *supra* note 189, at 19 (quoting 151 CONG. REC. H438 (daily ed. Feb. 9, 2005)).

¹⁹¹ *Id.*

¹⁹² Ben Geman, *Democrats to Fight Against DHS Waivers in House Immigration Bill*, ENV'T & ENERGY DAILY (Feb. 10, 2005), <https://perma.cc/5ABR-WE2N>; *see also* Press Release, Jane Harman, Harman Calls California Border Fence Waiver “Irresponsible Legislating” (Feb. 10, 2018) (on file with Congressional Quarterly, Inc.); Alex Kaplun, *Border Bill with Environmental Exemptions Passes House*, ENV'T & ENERGY DAILY (Feb. 11, 2005), <https://perma.cc/NSF9-ZKSD>.

¹⁹³ Seth Hettner, *Congressmen Call on Senate to Pass Bill to Fortify Border Fence*, ASSOCIATED PRESS, Mar. 29, 2005.

¹⁹⁴ Brian Stempeck, *Controversial Enviro Exemption Hitches Ride on Supplemental*, ENV'T & ENERGY DAILY (Mar. 16, 2005), <https://perma.cc/GM63-NNDE>.

¹⁹⁵ Dianne Feinstein, *Senator Feinstein Urges Removal RIDA from Supplemental Spending Bill Conference*, STATES NEWS SERV. (Apr. 28, 2005); *see also* Brian Stempeck, Allison A. Freeman & Dan Berman, *Senate Sends \$82B Supplemental to the White House*, ENV'T & ENERGY DAILY (May 11, 2005), <https://perma.cc/C2LD-ULFC>.

¹⁹⁶ H.R. REP. NO. 109–72, at 170 (2005) (Conf. Rep.).

¹⁹⁷ Eskridge, *supra* note 174, at 637.

minimize adverse environmental impacts, and Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security testified before the California Coastal Commission that the plans for completion were consistent with the Coastal Management Plan to the maximum extent practical without sacrificing the effectiveness of the border security infrastructure. Continued delays caused by litigation have demonstrated the need for additional waiver authority with respect to other laws that might impeded the expeditious construction of security infrastructure along the border, such as the Coastal Zone Management Act.¹⁹⁸

Conferees did make changes to allow constitutional challenges to waivers, including takings.¹⁹⁹

After the House passed the supplemental appropriation bill by a bipartisan vote 368–58,²⁰⁰ Representative Sensenbrenner stated, “the REAL ID bill strengthens our border security by shutting down ‘Smugglers Gulch,’ a canyon along the westernmost California–Mexico border frequently used for illegal entrance into the U.S., so law-abiding Americans are better protected from terrorists, drug smugglers, alien gangs, and violent criminals seeking to operate here.”²⁰¹

President Bush signed the RIDA into law, which was an unrelated rider on the “Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005.”²⁰² The RIDA expanded the SHS waiver authority under section 102(c) to cover “all legal requirements [the Homeland Security] Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads.”²⁰³ The RIDA also severely constrains judicial review.²⁰⁴

Additional border fencing was authorized through the SFA, which was introduced before the midterm election year in 2006.²⁰⁵ Many House Democrats opposed the measure.²⁰⁶ Environmental groups opposed the

¹⁹⁸ H.R. REP. NO. 109–72, at 171.

¹⁹⁹ MUMME, *supra* note 25, at 5.

²⁰⁰ Press Release, Jim Sensenbrenner, House Passes REAL ID (May 5, 2018) (on file with Congressional Quarterly, Inc.).

²⁰¹ *Id.*

²⁰² Press Release, Deutsche Presse-Agentur, Short Fence on Long U.S.-Mexico Border Draws Fire (Jun. 10, 2005) (on file with author); *see also* Jenny Neeley, *Over the Line: Homeland Security’s Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure*, 1 AZ. J. ENVTL. L. & POL’Y 140, 144 (2011).

²⁰³ REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 302, 306 (2005).

²⁰⁴ *Id.* § 102; *see also* David Fisher, *The U.S.–Mexico Border Wall and the Case for “Environmental Rights,”* 50 TEX. INT’L L.J. 145, 160 (2015).

²⁰⁵ *See US–Mexico Border Fence / Great Wall of Mexico Secure Fence*, GLOBALSECURITY.ORG, **Error! Hyperlink reference not valid.** <https://perma.cc/ZEU5-U3PV> (last visited Jan. 25, 2020); *see also* Press Release, U.S. Fed. News, Reps. Hunter, Dreier Sponsored Fence Amendment Approved by House (Dec. 16, 2005) (on file with LexisNexis); Hil Anderson, *Commentary: State vs. Feds in Fence Debate*, UNITED PRESS INT’L (Feb. 14, 2005), <https://perma.cc/WP62-BYWF>.

²⁰⁶ Rep. Neil Abercrombie (D. Haw.) stated:

SFA.²⁰⁷ DOW stated that the additional fencing “would damage numerous protected lands and break up the habitat of many imperiled animals, including jaguars, desert bighorn sheep, and Sonoran pronghorn . . . the [SFA] is an inflexible approach that fails to consider a fence’s potential impact on wildlife, natural resources, and communities.”²⁰⁸

Native American tribes also opposed the SFA.²⁰⁹ At least four of the twenty-seven Native American tribes that inhabit the border region have lands directly abutting the U.S.–Mexico border.²¹⁰ Two of the tribes have lands that straddle the southwest border, the Tohono O’Odham in southern Arizona and the Kickapoo in Texas. Tohono O’Odham land, which is the size of Connecticut and the second largest Native American landholding, shares a 75-mile border with Mexico.²¹¹ The proposed border fence would separate their land and preclude them from visiting their sacred sites in Mexico. The Kickapoo have been granted free passage across the border pursuant to a 1983 statute.²¹² Federal trust responsibility requires the federal government to consult with the tribes whenever federal actions affect them.²¹³ Tohono O’Odham Nation declared that the SFA “as proposed and ensuing

If House Republicans really want to solve the immigration and border security situation, they would be negotiating with their colleagues in the Senate, who have already passed a comprehensive approach. Sadly, they’d rather try to hide their failure behind a fence. Their problem is that the public can see right through the fence.

Press Release, Neil Abercrombie, Republican Majority Tries to Hide Immigration Reform Behind Chain Link Fence (Sept. 8, 2006) (on file with U.S. Fed. News); *see also* Press Release, Joseph Crowley, Rep. Crowley Opposes Purely Political Border Fence Bill (Sept. 14, 2006) (on file with U.S. Fed. News).

²⁰⁷ Press Release, Def. of Wildlife, Defenders of Wildlife Calls on Lawmakers to Protect Sensitive Border Lands, Wildlife as They Secure Our Borders (Sept. 20, 2006) (on file with Targeted News Service).

²⁰⁸ *Id.*

²⁰⁹ David Roche, *Environmental Impacts of the Border Wall*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10,477, 10,482 (2017).

²¹⁰ MUMME, *supra* note 25, at 14.

²¹¹ *Id.* at 13; *see also* Sam Levin, ‘Over My Dead Body’: Tribe Aims to Block Trump’s Border Wall on Arizona Land, *GUARDIAN* (Jan. 26, 2017), <https://perma.cc/9D5B-A8L7>.

²¹² Christina Leza, *For Native Americans, US–Mexico Border is an ‘Imaginary Line,’* CONVERSATION (Mar. 19, 2019), <https://perma.cc/9CC3-J7AU>.

²¹³ MUMME, *supra* note 25, at 14. Under current law, the Secretary of Interior may grant rights-of-way over and across tribal land, provided the Secretary receives prior written consent of the tribe. 25 U.S.C. § 324 (2012). If the tribe does not consent, DHS may utilize its new waiver authority to construct a fence across tribal lands. It is unclear, however, whether the expanded waiver that was given SHS would allow DHS to override the statutory authority given to another federal agency. Ultimately, the federal government holds Indian lands in trust, and Congress may take such lands for public purposes, as long as it provides just compensation as required by the Fifth Amendment. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 408–09, 416 (1980); CHAD C. HADDAL ET AL., CONG. RESEARCH SERV., RL-33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 10, 30–31 (2009).

construction of walls would effectively nullify in its entirety the collaborative approach.”²¹⁴

The House passed the bill by a vote of 283–138, with the support of 64 Democrats.²¹⁵ It moved over to Senate, where it had bipartisan support.²¹⁶ The Senate passed the SFA with 54 of 55 Republicans and 26 of 44 Democrats voting in favor of the bill.²¹⁷ The SFA, which was enacted as a separate piece of legislation, amended section 102(b).²¹⁸ The SHS was instructed to construct two layers of reinforced fencing along 700 miles in five specific segments along the U.S.–Mexico border.²¹⁹

President Bush signed the SFA, noting that “a combination of fencing and technology [will] make it easier for the border patrol to enforce our border.”²²⁰ Republicans praised the bill.²²¹ However, doubts were raised regarding the construction of 700 miles of border fencing because of the lack of funding. The CBO estimated that addition fencing would cost \$3.2 million per mile, totaling over \$2 billion,²²² but only \$1.2 billion had been appropriated in FY 2007.²²³ This would only cover 370 miles, not 700 miles, of fencing.²²⁴

Democrats regained control of Congress after the November 2006 election and promised to revisit border fencing.²²⁵ This angered House Republicans.²²⁶ However, President Bush and Senate Republicans were

²¹⁴ Arthur Rotstein, *Tohono O’odham Nation Opposes Border Fence Bill Before Senate*, ASSOC. PRESS STATE & LOCAL WIRE (Sept. 23, 2006) (on file with publisher).

²¹⁵ Annie Linskey, *In 2006, Democrats Were Saying ‘Build That Fence!’*, BOS. GLOBE (Jan. 26, 2017), <https://perma.cc/RHZ2-THY7>.

²¹⁶ Senator Kennedy (D. Mass.) opposed the bill, pointing out that Secretary Chertoff had testified that only 370 miles of fencing and 461 miles of vehicle barriers in targeted urban areas were needed. Press Release, U.S. Fed. News, Sen. Kennedy Issues Statement in Opposition to Secure Fence Act of 2006 (Sept. 26, 2006) (on file with LexisNexis). The Senate had already appropriated \$1.8 billion to meet this goal. *Id.* Any longer fence would be a waste of money. *Id.*

²¹⁷ Press Release, Deutsche Presse-Agentur, US Congress Agrees to Fence on Large Section of Mexico Border (Sept. 30, 2006) (on file with LexisNexis).

²¹⁸ Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, 2638–39 (2006).

²¹⁹ *Id.*

²²⁰ Press Release, President Bush 14 (Oct. 11, 2006) (on file with States News Service).

²²¹ Press Release, Rep. Hensarling Applauds Signing of Secure Fence Act (Oct. 26, 2006) (on file with U.S. Fed. News).

²²² Press Release, Sen. Kennedy Issues Statement in Opposition to Secure Fence Act of 2006, at 2–4 (Sept. 26, 2006) (on file with U.S. Fed. News).

²²³ Press Release from Paula Wolfson, U.S. Fed. News, Bush Authorizes Fence for U.S.–Mexico Border 1 (Oct. 4, 2006) (on file with Westlaw).

²²⁴ Press Release, Language in Secure Fences Act Raises Questions About Whether Border Fence Will Be Built (Oct. 10, 2006) (White House Bull.).

²²⁵ Press Release, Rep. Sensenbrenner Lashes out at Democrat Leaders for Waffling on Border Fence (Jan. 17, 2007) (on file with U.S. Fed. News); Press Release, Suzanne Gamboa, Assoc. Press Int’l, Democrats in No Rush to Build Mexico Border Fence (Jan. 18, 2007) (on file with Westlaw).

²²⁶ Representative Sensenbrenner stated,

Majority leader Steny Hoyer is wrong to say that Democrats in House will revisit the planned border fence to help secure our Southern border with Mexico. The ink is

not strong supporters of the aspirational goal of 700 miles of double layered fencing, but only wanted 370 miles of fencing, 200 miles of vehicle barriers, and 300 miles of electronic surveillance.²²⁷ SHS Chertoff only planned to construct 370 miles of priority fencing and 330 miles of vehicle barriers.²²⁸ Representative John Shadegg (R. Az.) stated, "It would be my belief or opinion that the 700 miles of fence authorized by the last Congress will not be built, period."²²⁹ He noted that "there's a belief among Democrats that that was a political maneuver and that that will not accomplish anything."²³⁰ The only remnant of the aspirational goal of 700 miles of double layered fencing in the SFA that remained was the 700 miles of fencing, the composition and location of which was left up the SHS discretion.

Proponents of additional border fencing opposed any weakening of the SFA mandate.²³¹ Rejected proposals are informative because "it is direct evidence that Congress considered an issue and agreed not to adopt a specified policy."²³² Senator Graham (R. N.C.) introduced the "Border Security First Act of 2007" as an amendment to the DHS appropriation bill.²³³ The Act amended section 102(b) to require 700 miles of fencing and 300 miles of vehicle barriers along the southwest border in two years and other immigration changes.²³⁴ The proposed amendment was rejected because it was outside the scope of the appropriation bill. Senator Graham then introduced a new amendment, which retained the 700 miles of fencing and 300 miles of vehicle barriers within two years and provided the necessary funding.²³⁵ The amendment was accepted by a vote of 89–1 and included in the Senate

barely dry from President Bush signature on the Secure Fence Act, passed by Republicans with strong Democratic support last year to protect the homeland. It is vital to our homeland security that Congress fully fund the border fence so that it can be built.

Press Release, U.S. Fed. News, Rep. Sensenbrenner Lashes Out at Democrat Leaders for Waffling on Border Fence (Jan. 17, 2007) (on file with Westlaw).

²²⁷ Press Release, Frontrunner, Bush Reportedly Wants to Build Only Some Portions of Border Fence 1 (Apr. 3, 2007) (on file with LexisNexis).

²²⁸ Juan Lozano, *Cities Along Texas-Mexico Border Block Access to New Fence Site*, ASSOCIATED PRESS, Oct. 2, 2007; Alicia Caldwell, *Border fence Could Cut Through Backyards, Create a No-man's Land*, ASSOCIATED PRESS, Nov. 8, 2007; Arthur Rotstein, *Environmentalists Worry Border Fence Will Threaten Arizona River*, ASSOCIATED PRESS, Dec. 8, 2007.

²²⁹ Arthur Rotstein, *AZ Congressmen Doubt Border Fence Will Be Built as Envisioned*, ASSOCIATED PRESS, Jan. 15, 2007.

²³⁰ *Id.*

²³¹ *Rep Hunter: Build the Border Fence*, U.S. FED. NEWS (May 22, 2007); *Hunter Criticizes Democratic Omnibus Spending Bill*, STATES NEWS SERV. (Dec. 17, 2007); Suzanne Gamboa, *Massive Spending Bill Could Alter Fence Law*, ASSOCIATED PRESS Dec. 18, 2007; *Sen. Graham Opposes Omnibus Spending Legislation*, U.S. FED. NEWS, Dec. 19, 2007, 2007 WLNR 25089044.

²³² Eskridge, *supra* note 174, at 638.

²³³ GARCIA, *supra* note 39, at 10–12.

²³⁴ *Id.* at 10.

²³⁵ *Id.* at 11.

passed DHS appropriation bill.²³⁶ However, many of the FY 2008 appropriation bills were combined into the omnibus appropriation bill.²³⁷ The competing House and Senate versions had to be reconciled in conference.²³⁸ The Graham Amendment was not included in the final Consolidated Appropriation Act of 2008.²³⁹

Congress loosened the SFA mandate in the Consolidated Appropriations Act of 2008.²⁴⁰ Congress scaled back the DHS duties. The double layered fencing and specific locations for border barriers were eliminated. The DHS was only required to construct 700 miles of border fencing, but only if and where it would be “most practical and effective.”²⁴¹

Proponents of the SFA mandate were disappointed.²⁴² Representative Peter King (R. N.Y.), the sponsor of the SFA, noted, “[t]his is either a blatant oversight or a deliberate attempt to disregard the border security of our country . . . the omnibus language guts the Secure Fence Act almost entirely . . . it is unacceptable.”²⁴³

There were numerous unsuccessful efforts to restore the SFA mandate to construct 700 miles of double layered pedestrian fencing.²⁴⁴ Senator DeMint (R. S.C.) introduced the Finish Fence Act (FFA) in 2009.²⁴⁵ The FFA was added as an amendment to the FY 2010 DHS appropriation bill, but was later dropped by the conference committee.²⁴⁶ Senator DeMint’s amendment mandated “fencing that does not effectively restrain pedestrian traffic (such as vehicle barriers and virtual fencing) may not be used to meet the 700-mile fence requirement.”²⁴⁷ Senator DeMint stated, “[a] strong bipartisan Senate majority voted to finish the fence by end of 2010 and it’s very

²³⁶ *Id.*

²³⁷ *Id.* at 12.

²³⁸ *Id.*

²³⁹ *Id.* at 11–12.

²⁴⁰ Consolidated Appropriations Act of 2008, Pub. L. No 110-161, § 564, 121 Stat. 2090 (2007).

²⁴¹ *Id.* § 564(2)(B).

²⁴² Eleanor Stables, *Border Fence Construction Not Moving Fast Enough for Rep. Hunter*, N.Y. TIMES (July 11, 2007), <https://perma.cc/QHN2-QPT7>; Suzanne Gamboa, *Spending Bill Could Alter Fence Law*, HOUS. CHRON. (Dec. 17, 2007), <https://perma.cc/Y8PY-CSYW>; Press Release, Office of Senator Lindsey Graham, Graham Opposes Omnibus Spending Legislation (Dec. 19, 2007).

²⁴³ Michelle Malkin, *The Incredible Disappearing Border Fence*, NAT’L REV. (Dec. 19, 2007), <https://perma.cc/ZC6C-F6GE>.

²⁴⁴ H.R. 4987, 110th Cong. (2008); Press Release from Rep. Duncan Hunter, Representative Hunter Introduces Legislation to Reinstate Secure Fences Act (Jan. 23, 2008).

²⁴⁵ James Rosen, *Senate Defeats DeMint’s Bid to Finish U.S.-Mexico Border Fence*, MCCLATCHY NEWSPAPERS (May 27, 2010), <https://perma.cc/7G99-RAPN>.

²⁴⁶ April Reese, *New Fight Erupts Over GOP Amendment Requiring 700-mile Pedestrian Barrier*, E&E NEWS: LAND LETTER (July 23, 2009), <https://www.eenews.net/landletter/stories/80697>; Sara Goodman, *Lawmakers Strip GOP Amendment Requiring 700-mile Barrier*, ENV’T & ENERGY DAILY (Oct. 8, 2009), <https://perma.cc/BNR7-G2MA>.

²⁴⁷ Goodman, *supra* note 246.

disappointing that Democrat leaders are thwarting the will of the American people behind closed doors.”²⁴⁸ Representative David Price (D. N.C.) countered that “[t]he DeMint amendment was dropped because it was cost-prohibitive and counterproductive to the Border Patrol’s plan for securing the border.”²⁴⁹ Senator DeMint’s second effort to restore the SFA mandate in 2010 was also defeated.²⁵⁰

President Obama in 2011 declared that the southwest border fence is “now basically complete.”²⁵¹ DHS reported that 649 of 652 miles described in the SFA had been finished.²⁵² The vast majority of the SFA mandated fencing consisted of vehicle barriers and single-layered pedestrian fence.²⁵³ There were only 36.3 miles of double layered fence.²⁵⁴

Nevertheless, President Obama noted that many of his Republican opponents will not be satisfied, stating:

We have gone above and beyond what was requested by the very Republicans who said they supported broader reform as long as we got serious about enforcement. . . . All the stuff they asked for, we’ve done. But even though we’ve answered these concerns, I’ve got to say I suspect there are still going to be some who are trying to move the goal posts on us one more time.²⁵⁵

President Obama warned, “They’ll want a higher fence Maybe they’ll need a moat. Maybe they want alligators in the moat. They’ll never be satisfied. And I understand that. That’s politics.”²⁵⁶

Senator DeMint countered that the Obama Administration has “not done its job to finish the border fence that is a critical part of keeping Americans safe and stopping illegal immigration.”²⁵⁷ The SFA mandated “a 700-mile double-layer border fence along the southwest border . . . This is a promise that has not been kept. Today . . . just 5 percent of the double-layer fencing is complete, only 36.3 miles.”²⁵⁸

Attempts to restore double layered fencing across 700 miles of the southwest border continued during the Obama administration. Representative McCaul (R. Tex.) in 2015 introduced Secure Our Borders First Act.²⁵⁹ Representative Ross (R. Fla.) in 2016 reintroduced the

²⁴⁸ *Id.*; *Gov’t Dismisses Call for More Texas Border Fencing*, CBS NEWS, Oct. 9, 2009, <https://perma.cc/X7M3-HAPN>.

²⁴⁹ CBS News, *supra* note 248.

²⁵⁰ Rosen, *supra* note 245.

²⁵¹ Farley, *supra* note 113.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Secure Our Borders First Act of 2015, H.R. 399, 114th Cong. (1st Sess. 2015).

FFA.²⁶⁰ These unsuccessful efforts indicate that congressional authorization of additional fencing is necessary to justify the exercise of the SHS waiver authority. Otherwise these subsequent congressional efforts to restore the SFA mandate and create additional miles of border fence were unnecessary.

3. *Statutory Purposes*

The district court held that the general purpose of section 102(c) of the IIRIRA²⁶¹ granted the SHS unlimited authority to waive any and all laws related to border fence construction in perpetuity.²⁶² The court read too much into general statutory purposes and ignored the specific limitations present in text and legislative history. Section 102(a) states the SHS “shall take such actions as may be necessary to install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry into the U.S.”²⁶³ In so far as this is “a discrete, judicially reviewable command,”²⁶⁴ it is limited to fencing authorized by section 102(b). This in turn, confines the SHS waiver authority under section 102(c) to construction of fencing designated in section 102(b).

Section 102(a), which is entitled a “General” provision, is followed by section 102(b), which provided the DHS with express instructions on where to construct and the extent of southwest border barriers.²⁶⁵ Section 102(b) constrains section 102(a).²⁶⁶ It is a cardinal rule of “statutory construction that the specific governs the general,” especially where “Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.”²⁶⁷ This prevents the specific provision from being “swallowed by the general one.”²⁶⁸ Furthermore, section 102 must be construed so that “no clause, sentence, or word shall be superfluous, void, or insignificant.”²⁶⁹ If section 102(a) granted the SHS unbridled authority to construct border

²⁶⁰ H.R. 4391, 114th Cong. (2016).

²⁶¹ IIRIRA, Pub. L. No. 104-208, § 102, 110 Stat. 3009-554, as amended by Pub L. 110-361, § 564(a), 121 Stat. 2090 (2007) (codified as amended at 8 U.S.C. § 1103 note) (“The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United State border to deter illegal crossings in areas of high illegal entry into the United States.”).

²⁶² *Curiel*, 284 F. Supp. 3d 1092, 1116–27 (S.D. Cal. 2018).

²⁶³ IIRIRA § 102.

²⁶⁴ GARCIA, *supra* note 39, at 5.

²⁶⁵ IIRIRA § 102.

²⁶⁶ Appellants’ Opening Brief at 42–43, *In re Border Infrastructure Environmental Litigation*, 915 F.3d 1213 (2019) (No. 18-55474), 2018 WL 2234360 at *42–43.

²⁶⁷ *RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (first quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)) (then quoting *Varity Corp v. Howe*, 516 U.S. 489, 519 (1996)).

²⁶⁸ *Id.*

²⁶⁹ *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

barriers, it would render section 102(b) “insignificant, if not wholly superfluous.”²⁷⁰ This would violate the principle that “effect shall be given to every clause and part of a statute.”²⁷¹ Statutory terms should not be treated “as surplusage in any setting.”²⁷²

B. *Ultra Vires-Step Two*

The district court, following the ultra vires dictate in *Keyn* and *Dart*, held plaintiffs must also demonstrate that barring judicial review would deprive them of a “meaningful and adequate means of vindicating” their statutory rights to prevail on the ultra vires claim.²⁷³ The district court found that plaintiffs had not “conducted a meaningful analysis on this prong.”²⁷⁴ Even if they had, the plaintiffs still failed to meet the requirements of step one to “establish a plain violation of an unambiguous and mandatory provision of section 102.”²⁷⁵

The court failed to acknowledge that SHS waived 37 federal laws—including NEPA, ESA, CZMA, and APA—as well as “all federal, state, or other laws” related to the San Diego replacement fencing and border wall prototypes.²⁷⁶ The SHS waived twenty-seven federal laws, and all state laws related to the El Centro project.²⁷⁷ Section 102(c) limits judicial review to constitutional claims,²⁷⁸ so plaintiffs are deprived of any means to question SHS violation of numerous federal statutes.

Granted, section 102(c) allows plaintiffs to raise constitutional issues. When the revision of section 102(c) was initially proposed in RIDA, federal courts were deprived of all jurisdiction regarding border barriers.²⁷⁹ This was properly changed in the final version.²⁸⁰ Congress

²⁷⁰ *Id.* (quoting *Duncan*, 533 U.S. at 174).

²⁷¹ *RadLAX*, 566 U.S. at 645 (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)).

²⁷² *TRW*, 534 U.S. at 31 (quoting *Duncan*, 533 U.S. at 174).

²⁷³ *Curiel*, 284 F. Supp. 3d 1092, 1128 (S.D. Cal. 2018) (citing *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991)).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 35,984 (Aug. 2, 2017).

²⁷⁷ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42,829, 42,830 (Sept. 12, 2017).

²⁷⁸ Section 102(c)(2)A states:

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

8 U.S.C. § 1103 note (2012).

²⁷⁹ See MUMME, *supra* note 25, at 5.

²⁸⁰ *Id.* at 5–6.

cannot deprive federal courts jurisdiction over constitutional questions.²⁸¹ Professor Eisenberg explained that “it is clear that jurisdictional statutes are subject to constitutional limitations . . . When their effect is to abrogate constitutional rights, they are no more valid than any other statute violating the Constitution.”²⁸² Congress has the authority to “withdraw jurisdiction from all cases except those in which a particular outcome is mandated by the Constitution.”²⁸³ Jurisdictional statutes “which have substantive impact must be subject to constitutional scrutiny. The conclusion is also inescapable that Congress cannot withdraw federal jurisdiction to hear cases in which constitutional rights are at stake.”²⁸⁴ However, limiting judicial review solely to constitutional issues does not allow plaintiffs to question SHS adherence to substantive issues protected by environmental statutes.

Section 102(c) also deprived federal circuit courts the ability to hear any appeals from the district courts regarding the SHS exercise of waiver authority. Section 102 only allows appeal by writ of certiorari to the Supreme Court, which has discretion regarding the few cases it will consider.²⁸⁵ This further limited the plaintiff’s ability to adjudicate their statutory rights. Appellate courts are essential to defining and clarifying the legal questions. Professor Eisenberg pointed out that “the framer’s aspirations for the national judiciary cannot be fulfilled today without lower federal courts.”²⁸⁶ Federal courts are essential to check other branches, provide uniformity, and counteract local bias.²⁸⁷ The Supreme Court cannot do the job alone. Lower federal courts are necessary to protect constitutional rights and implement Supreme Court decisions.²⁸⁸

Judicial review is furthered hampered because the plaintiffs only have 60 days “after the date of the action or decision” made by the SHS to raise their objections.²⁸⁹ This is a very short time to assert a constitutional claim, particularly in light of the SHS broad waiver authority. Furthermore, some potential claims might not be ripe within 60 days.²⁹⁰ The Supreme Court has stated, “it is essential that such

²⁸¹ See Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 504 (1974); Fitzgerald, *supra* note 51, at 387–91, 418.

²⁸² Eisenberg, *supra* note 281, at 527.

²⁸³ *Id.* at 527–28.

²⁸⁴ *Id.* at 532.

²⁸⁵ Section 102(c)(2)(c), entitled “*Ability to seek appellate review*,” states: “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.” 8 U.S.C. § 1103(c)(2)(C) (2012).

²⁸⁶ Eisenberg, *supra* note 281, at 504.

²⁸⁷ *Id.* at 505–06; Martin H. Redish et al., *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and New Synthesis*, 124 U. PA. L. REV. 45, 68–75 (1975).

²⁸⁸ Eisenberg, *supra* note 281, at 511–13.

²⁸⁹ 8 U.S.C. § 1103(c)(2)(B) (2012).

²⁹⁰ Sancho, *supra* note 20, at 450–53.

statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action”²⁹¹

Section 102(c) represents an extreme example of positive political theory, which posits that government institutions behave as rational actors, seeking to have their policy preferences prevail.²⁹² Congress granted the SHS unlimited authority and constrained the federal courts ability to check the SHS discretionary authority. Congress clearly did not want any judicial interference in the construction of border fences.

C. Non-Delegation Doctrine

Despite the jurisdictional constraint posed on statutory violations, section 102(c) grants federal district courts jurisdiction to hear constitutional arguments regarding the SHS waivers. The district court did not find that the section 102(c) violated the non-delegation doctrine,²⁹³ which posits “Congress may not constitutionally delegate its legislative power to another branch of Government.”²⁹⁴

The non-delegation doctrine is based on Article I, section 1, of Constitution, which provides “all legislative Powers herein granted shall be vested in a Congress of the U.S.” The non-delegation doctrine serves three purposes: 1) ensures that important social policy is made by Congress, the branch responsive to public will; 2) requires Congress to articulate an intelligible principle to guide the exercise of delegated authority; and 3) facilitates judicial review to test agency action against ascertainable standards.²⁹⁵

The district court held section 102(c) sets forth a general policy, which is to stop illegal crossing by the construction of roads and barriers.²⁹⁶ The SHS is clearly granted waiver authority.²⁹⁷ The intelligible principle limiting the delegation of authority is that the SHS may do whatever is necessary for the expeditious construction of border barriers to stop illegal entry.²⁹⁸ Greater specificity is not required because immigration, border control, and national security fall under the Executive’s constitutional authority.²⁹⁹ The district court, however, failed to recognize the unprecedented scope of authority delegated in

²⁹¹ *Id.* at 451 (quoting *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902)).

²⁹² William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 L. & CONTEMP. PROBS. 75, 82 (1994); Daniel A. Farber & Phillip P. Frickey, *Forward: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462 (1992); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 700–03 (1992).

²⁹³ *Curiel*, 284 F. Supp. 3d 1092, 1136 (S.D. Cal. 2018).

²⁹⁴ *Touby v. United States*, 500 U.S. 160, 165 (1991).

²⁹⁵ *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980).

²⁹⁶ *Curiel*, 284 F. Supp. 3d at 1103.

²⁹⁷ *Id.* at 1146.

²⁹⁸ *Id.* at 1104.

²⁹⁹ *Id.* at 1135.

section 102(c) and the lack of any intelligible principles limiting the exercise of such authority.

Only two Supreme Court decisions in 1935 have struck down statutes for violating of the non-delegation doctrine.³⁰⁰ Since then the Court has consistently upheld broad delegations of congressional authority.³⁰¹ The Court declared that Congress may delegate its authority, as long as the statute contains “an intelligible principle to which the person or body authorized to [act] is directed to conform.”³⁰² A statute meets the intelligible principle standard if it “clearly delineates the general policy, the public agency which is to apply it, and the boundaries of the delegated authority.”³⁰³

The U.S. District Court for the District of Columbia in *Defenders of Wildlife v. Chertoff*³⁰⁴ upheld the SHS waiver of environmental laws that allowed the construction of border fencing in Arizona. The court acknowledged the unprecedented scope of SHS waiver authority, but recognized it was constrained by the “intelligible principle” in section 102(b).³⁰⁵ The court upheld the waiver because “the Secretary may only exercise the waiver authority for the ‘narrow purpose’ prescribed by Congress: ‘expeditious completion’ of the border fences authorized by IIRIRA in areas of high illegal entry. Thus, the scope of the Secretary’s discretion is expressly limited.”³⁰⁶

³⁰⁰ *Pan. Refining Co. v. Ryan*, 293 U.S. 388, 414 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935). Recently, Justice Gorsuch, in dissent, pointed out that even though the nondelegation doctrine has only been invoked in two cases, the Court has continued to police broad delegations under different guises, such as the major questions doctrine, the void for vagueness doctrine, and separation of powers doctrine. *Gundy v. United States*, No. 17-6086, slip op. at 20–22 (June 20, 2019) (Gorsuch, J. dissenting).

³⁰¹ The Supreme Court has noted that “even in sweeping regulatory schemes we have never demanded...that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’” *Whitman v. Am. Trucking Ass’n Inc.*, 531 U.S. 457, 475 (2001) (alterations in original) (quoting *Am. Trucking Ass’n v. U.S. Env’tl. Prot. Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999)). Supreme Court has noted that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

³⁰² *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

³⁰³ *Id.* at 372–73. Justice Gorsuch in dissent, pointed out that the “intelligible principle” remark in *J.W. Hampton* “has no basis in the original meaning of the Constitution.” *Gundy* No. 17-6086, slip op. at 17. It is based on “misunderst[ood] historical foundations.” *Id.* (alteration in original). When some judges “claimed to see ‘intelligible principles’ many ‘less discerning readers [have been able only to] find gibberish.’” *Id.* (alteration in original) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 329 (2002)). “Even Justice Douglas, one of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when intelligible principle ‘test’ began to take hold.” *Id.* at 17–18.

³⁰⁴ 527 F. Supp. 2d 119, 129 (D.D.C. 2007).

³⁰⁵ *Id.* at 128–29.

³⁰⁶ *Id.* at 128.

There is an ongoing academic debate regarding the non-delegation doctrine.³⁰⁷ Critics argue that responsible administrative decision making can only be insured by precise legislative directives.³⁰⁸ Proponents counter that broad delegation promotes accountability and public responsiveness.³⁰⁹

Professors Barron and Rakoff, proponents of the non-delegation doctrine, point out that Congress has created the “Big Waiver,” which is “the delegation of power to unmake law Congress has made rather than to make law Congress has not.”³¹⁰ The “Big Waiver” inverts the traditional approach to delegation. It allows Congress to enact laws that service narrow partisan or ideological interests with the understanding that the laws will never take effect.³¹¹ Congress can put into place policy choices that might not be possible, knowing that the policy choices will be altered and monitored in the administrative process. The “Big Waiver” grants Congress and the Executive the means to avoid partisan gridlock. Congress provides agencies with policy guidance without limiting agency policymaking. Congress permits agencies to address problems and update policy without having to overcome legislative hurdles. The “Big Waiver” transfers blame to the president, who will incur the political costs resulting from the execution of waiver. Professors Barron and Rakoff assert that the “big waiver functions less to undermine congressional lawmaking than to facilitate it.”³¹²

Professors Barron and Rakoff specifically noted that the SHS waiver authority under section 102(c) “may be the biggest Congress has yet passed.”³¹³ The statute grants limitless power to SHS to waive any and all statutes that interfere with border fence construction.³¹⁴ It grants a single agency, DHS, the ability to waive “the entire U.S. Code.”³¹⁵ Furthermore, the SHS is provided with “no standards for picking and choosing among laws to cancel.”³¹⁶

³⁰⁷ Lisa Schultz Bressman, Schechter Poultry at the Millennium: Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1406–08 (2000) (explaining the different analyses of the delegation doctrine).

³⁰⁸ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1693–98 (1975); THEODORE J. LOWI, THE END OF LIBERALISM 197–98, 300–01 (1969); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732, 756 (1999).

³⁰⁹ Bressman, *supra* note 307, at 1408; JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152–56 (1997); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 776 (1999).

³¹⁰ David J. Barron & Todd D. Rakoff, *In Defense of the Big Waiver*, 113 COLUM. L. REV. 265, 267 (2013).

³¹¹ *Id.* at 271.

³¹² *Id.*

³¹³ *Id.* at 290.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

Prior delegations to administrative agencies involved directions to waive particular provisions of specific laws and were subject to judicial review. The Congressional Research Service recognized the unprecedented scope of discretion granted to the SHS, stating:

After a review of federal law . . . we were unable to locate a waiver provision identical to that of §102 of H.R. 418—i.e., a provision that contains “notwithstanding language,” provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws. Much more common, it appears, are waiver provisions that (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.³¹⁷

Other waivers have relied on agency expertise and specialized knowledge.³¹⁸ Agencies develop “subsidiary rules under the statute.”³¹⁹ This “diminishes the risk that the agency will use the breadth of a grant of authority as cloak for unreasonable or unfair implementation.”³²⁰ The SHS is the sole arbiter of his waiver authority under section 102(c). Congress did not limit the SHS waiver authority in any way. When Congress delegates such broad power, it must establish parameters—intelligible principles—that define the scope of delegated power. Section 102(c) lacks any such restrictions. There is no limitation regarding the scope of waiver authority, the duration of waiver, and the geographical area over which the waiver applies. SHS can waive any and all substantive and procedural rules, including environmental, public health, religious, and other laws, which are outside the SHS authority and beyond the SHS expertise.³²¹

Congress recognized the unprecedented scope of the section 102(c) waiver. During the House floor debate on RIDA, Representative Blumenauer (D. Or.) speculated that the SHS has authority to

³¹⁷ 151 CONG. REC. H525, H556 (daily ed. Feb. 10, 2005).

³¹⁸ The Supreme Court noted:

Such delegations of power permit the legislature to declare the end sought and leave technical matters in the hands of experts, or to leave to others the task of devising specific rules to carry out congressional policy in a variety of factual situations. Where, as is often the case, even major policy decision may turn on specialized knowledge and expertise beyond legislative [knowledge], delegation of rulemaking power may be made under broad standards to a body chosen for familiarity with the subject matter to be regulated.

McGautha v. California, 402 U.S. 183, 276 (1971) (Brennan, J., dissenting).

³¹⁹ Clinton v. City of New York, 524 U.S. 417, 489 (1998) (Breyer, J., dissenting).

³²⁰ *Id.* (citing 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 207–08 (2d ed. 1978)).

³²¹ Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENVTL. L. REV. 257, 290 (2010)

‘give a contract to his political cronies that had no safety standards, using 12-year-old illegal immigrants to do the labor, run it through the site of a Native American burial ground, kill bald eagles in the process, and pollute the drinking water of neighboring communities.’ . . . The unbridled discretion granted to the executive branch to suspend laws under the REAL ID Act is truly extraordinary.³²²

Furthermore, “no member of Congress, no citizen could do anything about [such a waiver] because you waive all judicial review.”³²³

The broad delegation of authority in section 102(c) undermines the separation of powers.³²⁴ Congress legislates, the Executive implements, and the judiciary adjudicates.³²⁵ Justice Kennedy noted that the structure of the Constitution “requires a stability which transcends the convenience of the moment.”³²⁶ Justice Kennedy cautioned that allowing political branches to “reallocate their own authority” threatens the liberties of citizens.³²⁷ The delegation of unlimited discretion to the SHS in section 102(c) allows Congress to avoid its constitutional responsibility to make hard policy choices regarding the balance between national security and environmental protection. Justice Kennedy noted that “abdication of responsibility is not part of constitutional design.”³²⁸ Section 102(c) grants the SHS, an executive official, the power to reprioritize policy goals, the balance between national security and environmental protection, which is a legislative function. Section 102(c) also allows the SHS to pick winners and losers. Justice Kennedy observed that the “undeniable effects” of such a law “gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress.”³²⁹

The absence of congressional standards in section 102(c) allows the SHS to determine policy, so which interest groups will prevail. The exercise of SHS waiver authority reflects organized interest groups pressure. However, all interest groups do not stand on an equal footing. Environmental groups are at a strategic disadvantage in the DHS,

³²² *Id.* at 288 (quoting 151 CONG. REC. H466 (daily ed. Feb. 9, 2005) (statement of Rep. Blumenauer)).

³²³ *Id.* at 288 n.225 (quoting 151 CONG. REC. H466) (statement of Rep. Blumenauer) (alteration in original)).

³²⁴ Tana M. Sanchez, *Waiving Good-Bye to Environmental Laws Along the Arizona Borderlands: Defenders of Wildlife v. Chertoff*, 1 MO. ENVTL. L. & POL’Y REV. 281, 296–97 (2009).

³²⁵ *All. for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123, 11227 (D. Mont. 2011). Justice Gorsuch in dissent declared that the nondelegation is designed to protect the separation of powers. *Gundy*, No. 17-1686, slip op. at 22 (2019) (Gorsuch, J., dissenting).

³²⁶ *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring).

³²⁷ *Id.*

³²⁸ *Id.* at 452.

³²⁹ *Id.* at 451.

which prioritizes national security, border barrier construction, and anti-immigrant measures over environmental protection.³³⁰

Section 102(c) reflects public choice theory, which views Congress as a legislative market place where congresspersons parcel out public goods to private interests to enhance their opportunity for reelection.³³¹ Organized economic interests utilize their influence to have Congress establish exceptions and bridges around environmental laws.³³² This allows project, like border fences and walls, to go forward that benefit particular interest groups. While environmental laws that protect the public interest are sacrificed on the administrative altar to special interests.

Professors Barron and Rakoff, proponents of the “Big Waiver,” noted that the unrestrained waiver authority in RIDA “seems poorly thought out.”³³³ Granting the SHS broad discretionary power to waive the entire U.S. Code without providing any explanation or procedural protections and precluding judicial review exceed the limits of the non-delegation doctrine. The RIDA “exemplifies bad statutory design.”³³⁴ Congress was solely concerned with building the fence, while ignoring all other important statutory goals. Professors Barron and Rakoff suggest that “perhaps there should be a constitutional doctrine that says that Congress cannot provide for the big waiver and at the same time completely evade the processes that would help make it legitimate.”³³⁵

1. *Judicial Review and the Non-Delegation Doctrine*

The district court in *Curiel* held that judicial review is not an essential component of the non-delegation doctrine.³³⁶ The district court noted that prior case law “recognize that judicial review allows for the enforcement of the intelligible principle requirement and the separation of powers.”³³⁷ The Supreme Court, however, has never held that judicial review is an essential element of non-delegation doctrine.³³⁸

The district court failed to recognize the Supreme Court and appellate courts have intimated that judicial review is an essential component of the non-delegation doctrine. Judicial review is essential to determine whether administrative action adheres to the “intelligible

³³⁰ Bowers, *supra* note 321, at 298.

³³¹ William N. Eskridge, Jr., *Politics Without Romance: Implications for Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988) (discussing the quid pro quo dynamic between legislators and interest groups).

³³² Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1583–84 (1988).

³³³ Barron & Rakoff, *supra* note 310, at 337.

³³⁴ *Id.* at 339.

³³⁵ *Id.* at 338.

³³⁶ *Curiel*, 284 F. Supp. 3d 1092, 1137 (S.D. Cal. 2018).

³³⁷ *Id.*

³³⁸ *Id.*

principle” established by Congress, so stays within the parameters of the delegated authority. Furthermore, judicial review protects “the coherence and the integrity of the regulatory process.”³³⁹ Professor Sunstein noted that the mere availability of judicial review plays a salutatory role because it “increases the likelihood of fidelity to substantive and procedural norms.”³⁴⁰

Judicial review is particularly important because executive agencies lack direct electoral accountability.³⁴¹ Justice Harlan noted:

[Judicial review] insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.³⁴²

Lower courts have reached conflicting conclusions regarding the need for judicial review regarding non-delegation doctrine. The Ninth Circuit held judicial review is not an essential component of the non-delegation doctrine.³⁴³ While the D.C. District Court,³⁴⁴ the Eighth Circuit,³⁴⁵ and the Tenth Circuit³⁴⁶ held judicial review is essential to determine if an intelligible principle is present.³⁴⁷

The Supreme Court has never held that judicial review is an essential requirement of the non-delegation doctrine, but has suggested that judicial review is necessary.³⁴⁸ The Court in *Mistretta v. United States*³⁴⁹ noted that delegation of authority to the Executive is allowed so long as Congress “[L]ays down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.”³⁵⁰ The Court stressed that the existence of an intelligible principle may be tested “in a proper proceeding.”³⁵¹ The Court in *Skinner v. Mid-America Pipeline Co.*³⁵² declared that the broad delegation of authority to the executive branch

³³⁹ Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 656 (1985).

³⁴⁰ *Id.*

³⁴¹ *Clinton*, 524 U.S. 417, 490 (1997) (Breyer, J., dissenting).

³⁴² *Arizona v. California*, 373 U.S. 546, 626 (1963).

³⁴³ *Bozarov*, 974 F.2d 1037, 1042 (9th Cir. 1992).

³⁴⁴ See *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally*, 337 F. Supp. 737, 760 (D.D.C. 1971).

³⁴⁵ See *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878, 885 (8th Cir. 1995).

³⁴⁶ See *United States v. Widdowson*, 916 F.2d 587, 589 (10th Cir. 1990).

³⁴⁷ However, these circuit court decisions were subsequently vacated by the Supreme Court, so they cannot be cited as controlling precedent. *U.S. Dep't of Interior v. South Dakota*, 519 U.S. 919, 919 (1996); *United States v. Widdowson*, 502 U.S. 801, 801 (1991).

³⁴⁸ *Yakus v. United States*, 321 U.S. 414, 426 (1944).

³⁴⁹ 488 U.S. 361 (1989).

³⁵⁰ *Id.* at 372 (quoting *J.W. Hampton*, 276 U.S. 394, 409 (1928)).

³⁵¹ *Id.* at 379 (quoting *Yakus*, 321 U.S. at 425–26).

³⁵² 490 U.S. 212 (1989).

was permitted “so long as Congress provides an administrative agency with standards guiding its actions such that a court could ‘ascertain whether the will of Congress has been obeyed.’”³⁵³ Justice Marshall in *Touby v. United States*³⁵⁴ noted that “judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds.”³⁵⁵

2. Foreign Affairs

The district court held that judicial review is not essential because the issues of immigration and foreign policy fall within the Executive’s inherent constitutional authority.³⁵⁶ The district court held that “Congress can confer more discretion when that entity already has significant, independent authority over the subject matter.”³⁵⁷ The court failed to recognize that Congress had restricted the president’s authority to construct border fencing in section 102(b).

Congress can delegate broad authority to the President regarding matters within his constitutional authority,³⁵⁸ but this power is not unlimited. The Supreme Court in *Japan Whaling Ass’n v. Cetacean Society*³⁵⁹ held that “interpreting congressional legislation is a recurring and accepted task for the federal courts.”³⁶⁰ The Court must determine the “nature and scope” of the statutory mandate, “which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below.”³⁶¹ The Court acknowledged Congress and Executive premier authority over foreign affairs, but emphasized that “under the Constitution, one of the judiciary’s characteristic roles is to interpret statutes.”³⁶² The Court cannot avoid this responsibility simply because its decision “may have significant political overtones.”³⁶³

The Ninth Circuit reiterated the Supreme Court’s conclusion in *Center for Biodiversity v. Mattis*.³⁶⁴ The Ninth Circuit stated, “[w]hen confronting a statutory question touching on subjects of national security and foreign affairs, a court does not adequately discharge its duty by pointing to the broad authority of the President and Congress

³⁵³ *Id.* at 218 (quoting *Mistretta*, 488 U.S. 361, 379 (1989)).

³⁵⁴ 500 U.S. 160 (1991).

³⁵⁵ *Id.* at 170.

³⁵⁶ *Curiel*, 284 F. Supp. 3d 1092, 1135–37 (S.D. Cal. 2018).

³⁵⁷ *Id.* at 1135.

³⁵⁸ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (discussing how Congress can delegate matters of foreign policy to the Executive branch because it is within its scope of constitutional authority).

³⁵⁹ 478 U.S. 221 (1986).

³⁶⁰ *Id.* at 320.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ 868 F.3d 803, 821 (9th Cir. 2017).

and vacating the field without considered analysis.”³⁶⁵ When reviewing executive compliance with statutes dealing with foreign affairs, the court is “not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy . . . should be.”³⁶⁶ “Instead, a court must engage in the ‘familiar judicial exercise’ of reading and applying a statute, conscious of the purpose expressed by Congress.”³⁶⁷ Furthermore, precluding judicial review of a statute affecting foreign policy “turns on its head the role of courts and our core respect for a co-equal political branch, Congress.”³⁶⁸

The Supreme Court in *Zivotofsky ex rel. v. Kerry*³⁶⁹ (*Zivotofsky II*) acknowledged the President’s broad authority over foreign affairs, but held this power is not “unbounded.”³⁷⁰ The Court did not find that “the President is free from Congress’ lawmaking power in field of international relations.”³⁷¹ The Court recognized that “whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law,” and “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”³⁷²

The Supreme Court in *Dames & Moore v. Reagan*³⁷³ held that the Executive is at his weakest when acting against express intent of Congress.³⁷⁴ Congress delegated the SHS unbridled discretion regarding statutory waivers under section 102(c), but only regarding the specific border barriers identified in section 102(b).³⁷⁵ The district court should not have allowed the SHS to hide behind their shield of foreign policy when they exceeded their authority by authorizing replacement fencing and border wall prototypes that were never authorized by section 102(b).³⁷⁶

³⁶⁵ *Id.* at 827; *see, e.g.*, *Conservation Council for Haw. v. Nat’l Marine Fisheries Serv.*, 97 F. Supp. 3d 1210, 1222 (D. Haw. 2015).

³⁶⁶ *Mattis*, 868 F.3d at 823 (quoting *Zivotofsky v. Clinton (Zivotofsky I)*, 566 U.S. 189, 196 (2012)).

³⁶⁷ *Id.* (citing *Zivotofsky I*, 566 U.S. at 196).

³⁶⁸ *Id.* at 825–26.

³⁶⁹ No. 13-628, slip op. (June 8, 2015).

³⁷⁰ *Id.* at 17.

³⁷¹ *Id.* at 18.

³⁷² *Id.*

³⁷³ 453 U.S. 654, 669 (1981).

³⁷⁴ *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See generally* Mark D. Rosen, *Revisiting Youngstown: Against the View That Jackson’s Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1711 n.22 (2007) (describing the Court’s adoption and modification of Justice Jackson’s framework).

³⁷⁵ DOW Memo, *supra* note 189, at 5.

³⁷⁶ *Id.* at 26–27.

IV. POST-LITIGATION DEVELOPMENTS

A. *General Accounting Office Criticism*

President Trump's border wall continued to be criticized.³⁷⁷ The General Accounting Office (GAO), utilizing DHS criteria, analyzed and found fault with border wall prototypes.³⁷⁸ GAO concluded that DHS is proceeding without evaluating such factors as "cost, acquisition baselines, and the contributions of previous barrier and technology deployments."³⁷⁹ This means that DHS does not know if its limited resources are being utilized in the most cost effective manner and whether less expensive barriers might provide better border security. GAO warned that by proceeding in the absence of key information, "DHS faces an increased risk that the Border Wall System Program will cost more than projected, take longer than planned, or not fully perform as expected."³⁸⁰ Since DHS failed to develop acquisition plans for the San Diego barrier, "DHS may not establish cost, schedule, and performance goals by which it can measure the program's progress."³⁸¹

B. *Scientific Criticism*

Over 2,500 scientists across the globe have criticized the border wall.³⁸² Scientists point out that President Trump's border wall "threaten[s] some of the continent's most biologically diverse regions. Already-built sections of the wall are reducing the area, quality, and connectivity of plant and animal habitats and are compromising more than a century of binational investment in conservation."³⁸³ Environmental laws are not being enforced. Wildlife populations are being harmed because the border wall eliminates, degrades, and fragments habitats. Conservation investments and scientific research are being set aside.³⁸⁴ Scientists made the following recommendations: First, Congress must mandate that "the DHS follows the sound scientific and legal frameworks of US environmental laws, including the ESA and NEPA."³⁸⁵ Second, rigorous preplanning and pre-implementation surveys must be implemented "to identify species, habitats, and ecological resources at risk" from any barrier construction

³⁷⁷ E.g., *Editorial: GAO Report Shows Just How Reckless Trump is with a Border Wall*, SAN DIEGO UNION TRIB. (Aug. 7, 2018).

³⁷⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 127, at 17–18 (2018).

³⁷⁹ *Id.* at 33.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² See Robert Peters et al., *Nature Divided, Scientists United: US-Mexico Border Wall Threatens Biodiversity and Binational Conservation*, 68 BIOSCIENCE 740, 743 (2018).

³⁸³ *Id.*

³⁸⁴ *Id.* at 742.

³⁸⁵ *Id.*

or security operations.³⁸⁶ DHS “should work closely with pertinent Mexican and US government agencies, tribes, private landowners, the scientific community, and other stakeholders to gather such information.”³⁸⁷ Third, any resulting environmental harm from border construction must be mitigated “as completely as possible.”³⁸⁸ Fourth, scientific research in the borderlands should be expanded to “complement and assist environmental evaluations and mitigation efforts.”³⁸⁹ Over 2,500 scientists across the globe have endorsed these findings.³⁹⁰

C. Congressional Opposition

Several bills have been introduced in the House that would address some of the scientific concerns. Representative Grijalva introduced Border Security and Accountability Act of 2015.³⁹¹ The bill required the DHS, together with relevant departments, to develop a border protection strategy that address the ecological and environmental impacts of the security infrastructure and improves the cooperation and coordination among government agencies to protect national security along the southwest border.³⁹² The IIRIRA should be amended to accommodate this border security strategy.³⁹³

Representative Grishman (D. N.M.) introduced the Build Bridges Not Walls Act that “prohibit[s] construction of a continuous wall or fence between the United States and Mexico.”³⁹⁴ The bill recognizes that, “[a] continuous border wall would likely harm wildlife, destroy sensitive habitat for endangered species, damage the environment and the natural flow of floodwaters, and lead to costly litigation with landowners, the Native American community, and stakeholders.”³⁹⁵

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 743.

³⁹⁰ *Id.*

³⁹¹ H.R. 4303, 114th Cong. (1st Sess. 2015).

³⁹² *Id.* § 5.

³⁹³ *Id.* § 4 (proposed amendment to § 102 of the IIRIRA). Representative Grijalva stated, “Our shared goals of protecting endangered species, building a resilient border economy, and securing the border are not mutually exclusive. In fact, border security is at its best when it is built on a healthy economy and a healthy environment.” *The Consequences of Federal Land Management Along the U.S. Border to Rural Communities and National Security: Oversight Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Nat. Res.*, 114th Cong. 7 (2016) (statement of Rep. Raúl M. Grijalva).

³⁹⁴ Build Bridges Not Walls Act, H.R. 837, 115th Cong. (1st Sess. 2017).

³⁹⁵ *Id.* § 2. Representative Grisham stated:

The people who know the border the best, . . . all agree that building a wall is unnecessary, impractical, ineffective, and a complete waste of time and taxpayer money. . . . This bill protects taxpayers by stopping the funding for a wall that is not needed and from any other attempts by the President to fund similar orders.

Representative Espaillat (D. N.Y.) introduced This Land is Our Land Act, which prohibits the DHS from constructing, or obligating or expending any funds for the construction of any new border barriers, including walls or fences, on federal lands under the jurisdiction of the Department of Interior or Department of Agriculture within 100 miles of international land borders of the United States.³⁹⁶

V. NINTH CIRCUIT APPEAL

The appellants, State of California, California Coastal Commission, and environmental groups brought an appeal to the Ninth Circuit.³⁹⁷ Appellants asserted that the district court's decision was erroneous because the court began its analysis utilizing the conceptual framework of *Kyne*.³⁹⁸ The district court should have first addressed the underlying legal predicate of their claims that the SHS waiver authority had expired after the goals of section 102(b) had been met in 2008 or 2011. The Secretary's decision to proceed with the two projects was arbitrary and capricious because it violated several environmental statutes.³⁹⁹ Finally, even if the *Kyne* standard initially applied, the DHS violated the "clear and mandatory statutory language" because section 102(c) is limited by section 102(b).⁴⁰⁰

Federal-appellees countered that the district court correctly determined that it lacked jurisdiction over the plaintiff's non-constitutional claims.⁴⁰¹ The text of section 102(c) clearly precludes appellate court review of all non-constitutional claims, just like the statute in the *MCorp*.⁴⁰² The SHS waivers were not ultra vires because

Jennifer Yachnin, *Democrats Float Bills to Block Trump's Border Wall*, GREENWIRE, Feb. 6, 2017, <https://perma.cc/6EGH-UFE4>.

³⁹⁶ This Land Is Our Land Act, H.R. 739, 115th Cong. § 1 (2017). Representative Espaillat stated:

Building President Trump's wall would trample on our public lands, potentially put precious endangered species at risk and likely disrupt or destroy environmentally important ecosystems and habitats. . . . We should be building a wall around Trump to stop these irrational executive orders instead of this ludicrous \$25 billion wall between our closest ally.

Yachnin, *supra* note 395.

³⁹⁷ Appellants' Opening Brief, *Ctr. for Biological Diversity v. U.S. Dept. of Homeland Sec.*, No. 18-55474 (9th Cir. May 14, 2018). The appellants did not appeal their constitutional claims, which could only be considered by the Supreme Court under a writ of certiorari. The Court denied certiorari in December 2018. *US Supreme Court Turns Away Challenge to Trump's Border Wall*, VOICE OF AM. (Dec. 3, 2018), <https://perma.cc/7QH9-PJ4B>.

³⁹⁸ Appellants' Opening Brief, *supra* note 397, at 32–33.

³⁹⁹ *Id.* at 22–23.

⁴⁰⁰ *Id.* at 20–22.

⁴⁰¹ Brief for Appellees at 2–3, *Ctr. for Biological Diversity v. U.S. Dept. of Homeland Sec.*, No. 18-55474 (9th Cir. June 25, 2018).

⁴⁰² *MCorp*, 502 U.S. 32, 43–44 (1991).

they did not violate the “clear and mandatory statutory language.”⁴⁰³ The SHS decisions were consistent with text, structure, and legislative history of the section 102 and entitled to *Chevron* deference.⁴⁰⁴

The Ninth Circuit upheld the district court decision.⁴⁰⁵ The court determined that it retained jurisdiction to consider appellants’ arguments regarding issues that did not “arise out of” the Secretary’s waivers.⁴⁰⁶ Ninth Circuit addressed the “predicate legal question” of the appellant’s arguments and found that section 102(b) does not limit the SHS authority to construct border barriers under section 102(a).⁴⁰⁷ The SHS decisions to proceed with the projects did not violate NEPA, CZMA, or APA.⁴⁰⁸ Finally, the SHS waivers under section 102(c) were not ultra vires under the *Kyne* exception because they did not violate any “clear and mandatory statutory language.”⁴⁰⁹

The Ninth Circuit made the same errors as the district court. The Ninth Circuit failed to recognize that section 102(b) limits section 102(a). There is an obvious conflict between section 102(b), which specifies the amount of fencing authorized by Congress, and section 102(a), which is a general statement of statutory purpose. The general/specific canon dictates that specific statutory provision in section 102(b) restricts the general statutory provision in section 102(a). Since the waiver authority had expired with the completion of fencing authorized under section 102(b), the SHS waivers were ultra vires and the SHS failure to comply with mandates of environmental statutes was arbitrary and capricious. Furthermore, the Ninth Circuit relied on a strict textual interpretation and did not acknowledge that the *Kyne* exception is “determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history and the nature of the administrative action involved.”⁴¹⁰

VI. BORDER WALL FUNDING CONTROVERSY

DHS requested \$1.6 billion for border security in FY 2018, but received \$1.33 billion in the Consolidated Appropriations Act of 2018.⁴¹¹ \$445 million was authorized for the replacement and strengthening of

⁴⁰³ Brief for Appellees, *supra* note 401, at 13.

⁴⁰⁴ *Id.* at 12–14.

⁴⁰⁵ *In re* Border Infrastructure Env’tl. Litig., 915 F.3d 1213, 1226–27 (9th Cir. 2019) (Callahan, J., dissenting) (arguing that section 102(c) precluded any appellate court review of the district court’s decision and limited any review of the district court’s constitutional findings to a writ of certiorari in the Supreme Court).

⁴⁰⁶ *Id.* at 1227.

⁴⁰⁷ *Id.* at 1222 (majority opinion).

⁴⁰⁸ *Id.* at 1225–26.

⁴⁰⁹ *Id.* at 1221 n.7.

⁴¹⁰ *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984).

⁴¹¹ David Rogers, *When Congress Debated Border Security Without Having a Total Meltdown*, POLITICO (Jan. 19, 2019), <https://perma.cc/ZSC8-9WM3>.

existing barriers.⁴¹² Customs and Border Patrol received \$251 million for “14 miles of secondary fencing, all of which provides for cross-barrier visual situational awareness, along the southwest border in the San Diego Sector.”⁴¹³ El Centro barriers were funded out of the \$445 million authorized for “replacement of existing border fence along the southwest border.”⁴¹⁴ However, Congress again restricted the funding to “operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017, such as currently deployed steel bollard designs, that prioritize agent safety.”⁴¹⁵ None of the funding could be used to construct any of President Trump’s border wall prototypes.⁴¹⁶

Construction of replacement fencing in San Diego began in June 2018.⁴¹⁷ The existing 14 mile, 8 to 10 foot high barrier built from scrap metal is being replaced with an 18 to 30 foot high by a bollard style wall topped with anti-climbing plate at a projected cost of \$147 million.⁴¹⁸ Construction of the two miles of replacing fencing in Calexico was completed in October 2018.⁴¹⁹

Funding for the border wall remained contentious. President Trump initially requested \$1.6 billion for the border wall in his proposed FY2019 budget, but increased this request to \$5 billion.⁴²⁰ House Republicans approved \$5 billion in funding for the border security.⁴²¹ The Senate only offered \$1.6 billion for border wall construction.⁴²² Congress passed and President Trump signed a short-term spending bill in September 2018, which did not include any funding for the wall.⁴²³ Subsequently, House majority leader Kevin McCarthy (R. Cal.)

⁴¹² *Id.*

⁴¹³ Department of Homeland Security Appropriations Act of 2018, Pub. L. No. 115-141, § 230(a)(1), 132 Stat. 605, 616 (2018).

⁴¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 127, at 11.

⁴¹⁵ H.R.J. Res. 31-16, 116th Cong. § 230(b) (2018) (citation omitted).

⁴¹⁶ Michael Smolens, *Trump’s Push for Border Wall May Cast Shadow Over Election*, SAN DIEGO UNION TRIB. (Aug. 15, 2018), <https://perma.cc/5JXS-QRQZ>.

⁴¹⁷ Kate Morrissey, *Border Fence Replacement Hailed by Trump is Completed in Calexico*, L.A. TIMES (Oct. 11, 2018), <https://perma.cc/ZSV2-JP2R>.

⁴¹⁸ Kim Slowey, *Border Wall Work in San Diego Begins*, SAN DIEGO UNION TRIB. (June 6, 2018), <https://perma.cc/NU2A-QQZT>. CBP declared, “under this president’s leadership, we have a renewed commitment to secure our border. The new primary wall project represents an important milestone in our work to secure the international border.” Press Release, U.S. Customs & Border Patrol, *Border Wall Construction Project Starts in San Diego Sector* (May 31, 2018), <https://perma.cc/8M2Q-S8XU>.

⁴¹⁹ Danny Freeman & R. Stickney, *Renovation Complete on Tallest Portion of Border Fence in Southwest US*, NBC SAN DIEGO (Oct. 26, 2018), <https://perma.cc/B6JV-XXKF>.

⁴²⁰ Kevin Diaz, *Trump’s Border Wall Boast Runs into Budget Maw*, HOUS. CHRON. (Aug. 24, 2018), <https://perma.cc/5BNB-SMMF>.

⁴²¹ Bo Erickson, *House Passes Spending Bill with \$5 Billion Border Wall Funding, Increasing Likelihood of Shutdown*, CBS NEWS (Dec. 20, 2018), <https://perma.cc/RVB5-H95R>.

⁴²² Diaz, *supra* note 420.

⁴²³ See COMM. FOR RESPONSIBLE FED. BUDGET, APPROPRIATION WATCH: FY 2019 (2018), <https://perma.cc/DU7R-U4GC>.

introduced legislation that included \$23 billion to complete President Trump's border wall.⁴²⁴ However, Congress agreed to postpone any consideration of border wall funding until after the November mid-term elections.⁴²⁵

Congress passed a bipartisan continuing resolution in December 2018, which would keep the remaining federal agencies funded through 2019 but included no funding for the border wall. After criticism from conservative commentators, President Trump refused to sign the bill and executed a partial shutdown of the federal government.⁴²⁶ President Trump demanded \$5.7 billion for 234 miles of new steel-slat fencing in sections of the border, which is projected to cost \$24.4 million per mile.⁴²⁷

Democrats took over control of the House of Representatives in 2019 and refused to authorize funding for the wall. After the 35 day partial shutdown of the federal government was temporarily halted, a bipartisan committee was created to reach a compromise.⁴²⁸ The January 2019 compromise provided \$1.375 billion for 55 miles of border fencing, all in the Rio Grande Valley in Texas.⁴²⁹ Funding was limited to type of pedestrian fencing "operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017 . . . such as currently deployed steel bollard designs."⁴³⁰ Construction was also prohibited in certain areas.⁴³¹

President Trump signed the agreement, but declared a National Emergency to get around congressional spending restrictions and transfer military funds to pay for his border wall.⁴³² On February 15, 2019, President Trump announced that he planned to divert \$8.1 billion

⁴²⁴ Dan DeChiaro, *McCarthy Bill Would Fund Border Wall, Boost Speaker Bid* (Oct. 15, 2018), <https://perma.cc/DAN3-KUYQ>.

⁴²⁵ *Id.*

⁴²⁶ Michael Brice-Saddler, *Ann Coulter Justifies Shutdown: A Wall is Worth more than the Yosemite Gift Shop Being Open*, WASH. POST (Jan. 16, 2019), <https://perma.cc/VRJ3-E6VZ>

⁴²⁷ John Burnett, *Border Patrol Makes its Case for an Expanded 'Border Barrier'*, NAT'L PUB. RADIO (Jan. 11, 2019), <https://perma.cc/4W78-RRX6>.

⁴²⁸ Molly E. Reynolds, *Congress is Arguing Over Federal Spending Again. This Explains Why*, WASH. POST (Sept. 27, 2019), <https://perma.cc/TW5B-94SY>.

⁴²⁹ Elliot Spagat & Colleen Long, *Immigration Spending Pact has More than a Border Wall*, ASSOCIATED PRESS, Feb. 14, 2019, <https://perma.cc/QN2R-HM82>.

⁴³⁰ H.R.J. Res. 31-16, 116th Cong. § 230(b) (2018); *see also* *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 894 (N.D. Cal. 2019).

⁴³¹ *Sierra Club*, 379 F. Supp. 3d at 894.

[N]o funds were available for construction within (1) the Santa Ana Wildlife Refuge, (2) the Bentsen-Rio Grande Valley State Park, (3) La Lomita Historical park, (4) the National Butterfly Center, or (5) within or east of the Vista del Mar Ranch tract of the Lower Rio Grande Valley National Wildlife Refuge.

Id.

⁴³² Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://perma.cc/3QWX-QUVV>.

in federal funds for border wall construction.⁴³³ The administration identified three funding sources: \$3.6 billion from military construction projects; \$2.5 billion from other military accounts under counter drug authorities; and the remaining \$601 million from the Treasury Forfeiture Fund.⁴³⁴

Both the House and Senate passed resolutions opposing the national emergency declaration.⁴³⁵ President Trump vetoed the joint resolution. The House failed to override President Trump's veto.⁴³⁶

The Secretary of Defense in March approved the diversion of funds for the New Mexico–El Paso Project 1 and 2 in the Arizona–Yuma Section 1, 2.⁴³⁷ The Secretary relied on sections 8005⁴³⁸ and 284⁴³⁹ of the FY 2019 Department of Defense Appropriation Act.⁴⁴⁰ The Acting SHS utilized IIRIRA section 102(c) to waive laws obstructing the Project in April.⁴⁴¹

The ACLU and Southern Border Communities Coalition (SBCC) brought suit to block the use of funds for wall construction.⁴⁴² On May 24, 2019, the U.S. District Court for the Northern District of California granted a preliminary injunction, halting the transfer of funds for the

⁴³³ Maura Dolan, *Trump May Not Use Military Money for Border Wall, Federal Appeals Court Decides*, L.A. TIMES (July 3, 2019), <https://perma.cc/P5RA-JCNZ>.

⁴³⁴ *Sierra Club*, 379 F. Supp. 3d at 895.

⁴³⁵ Lolita C. Baldor & Robert Burns, *Lawmakers Denounce Plan to Divert Military Money for Wall*, ASSOCIATED PRESS, Mar. 26, 2019, <https://perma.cc/4N77-ZS7Z>.

⁴³⁶ *See generally id.*; Alan Fram, *Trump Border Emergency Survives as House Veto Override Fails*, ASSOCIATED PRESS, Mar. 26, 2019, <https://perma.cc/BQ94-V9NE>.

⁴³⁷ *Sierra Club*, 379 F. Supp. 3d at 896.

⁴³⁸ *Id.* Section 8005 allows the Secretary of Defense to transfer up to \$4 billion “of working capital funds of the Defense Department or funds made available in this Act to the Department of Defense for military functions (except military construction).” *Id.* at 901 (quoting § 8005, 132 Stat. at 2999). The Secretary must first find that “such action is necessary in the national interest.” *Id.* This transfer authority “may only be used 1) for higher priority items than those for which originally appropriated, and 2) based on unforeseen military requirements, but 3) in no case where the item for which the funds are required has been denied by Congress.” *Id.*

⁴³⁹ *Id.* at 896. Section 284 allows the Secretary of Defense to “provide support for the counterdrug activities . . . of any other department or agency of the Federal Government” if “such support is requested . . . by the official who has responsibility for [such] counterdrug activities.” *Id.* at 900 (quoting 10 U.S.C. § 284(a), (a)(1)(A) (2012)). Such permissible “types of support” includes the “construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.” *Id.*

⁴⁴⁰ Department of Defense Appropriations Act, 2019, S. 3159 115th Cong. (2018) (enacted).

⁴⁴¹ *Id.* at 897. Representative Grijalva stated, “the Trump administration consistently stoops to new lows when it comes to building the President’s vanity wall—even if it endangers the public health of our communities and the environment we call home.” Keerthi Vedantam, *Critics Blast DHS Environmental Waivers that Clear Way for Border Wall*, CRONKITE NEWS (Apr. 24, 2019), <https://perma.cc/TW8A-E773>. Grijalva went on to say that the President “is sending a clear message to border residents: his political agenda is more important than their homes, health, and livelihoods.” *Id.*

⁴⁴² Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. TIMES (July 26, 2019), <https://perma.cc/MX29-A5VF>.

project.⁴⁴³ The court held the plaintiffs had standing⁴⁴⁴ and were likely to succeed on the merits of the case because the federal government action was ultra vires, the plaintiffs would suffer irreparable harm, and the balance of equities favored the plaintiffs.⁴⁴⁵ The court determined that the Administration's action did not comply with section 8005 because 1) the items for which funds are requested have been denied by Congress, 2) the transfer is not based on "unforeseen military requirements," and 3) accepting the government's proposed interpretation of section 8005 would raise serious constitutional questions.⁴⁴⁶ However, the court held that the plaintiffs were unlikely to succeed on their NEPA claims.⁴⁴⁷ Plaintiffs alleged that the SHS waiver authority under section 102(c) only extended to DHS funded projects.⁴⁴⁸ The court held that the waiver authority was derivative, so it can be used for Defense Department funded projects that were designed to accomplish DHS goals.⁴⁴⁹

There was another suit, which was brought by California and New Mexico.⁴⁵⁰ The Secretary of Defense in May authorized the transfer of \$1.5 billion to fund four border projects: one in the El Centro sector in California; and three in the Tucson sector in Arizona.⁴⁵¹ The Secretary again relied on section 8005, as well as the "special transfer authority" under section 9002 of the 2019 Defense Department Appropriation Act and section 1512 of John McCain National Defense Authorization Act of 2019.⁴⁵² Section 9002 is subject to the same constraints as section 8005.⁴⁵³ The DHS waived NEPA requirements for the Tucson projects.⁴⁵⁴

⁴⁴³ Jose A. Del Real, *Federal Judge Blocks Part of Trump's Plan to Build Border Wall*, N.Y. TIMES (May 24, 2019), <https://perma.cc/NY23-7LXZ>.

⁴⁴⁴ *Sierra Club*, 379 F. Supp. 3d at 905–07. There was a subsequent case in the U.S. District Court for the District of Columbia brought by Democratic members of the U.S. House of Representatives, challenging the President's authority to reprogram funds. Liptak, *supra* note 442. Judge Trevor N. McFadden held the House lacked standing to bring the suit. *Id.* He stated, "Congress has several political arrows in its quiver to counter perceived threats to its sphere of power," including legislation "to expressly restrict the transfer or spending of funds for a border wall." *Id.*

⁴⁴⁵ *Sierra Club*, 379 F. Supp. 3d at 912–17.

⁴⁴⁶ *Id.* at 916–17; *see also* *California v. Trump*, 19-CV-00872-HSG, 2019 WL 2715421, at *3 (N.D. Cal. June 28, 2019).

⁴⁴⁷ *Sierra Club*, 379 F. Supp. 3d at 922.

⁴⁴⁸ *Id.* at 922–23.

⁴⁴⁹ *Id.*

⁴⁵⁰ Jacqueline Thomsen, *California, New Mexico Ask Judge to Block Trump from Using Military Funds for Border Wall*, THE HILL (June 13, 2019), <https://perma.cc/F27D-DD7N>.

⁴⁵¹ *Sierra Club*, 379 F. Supp. 3d at 898.

⁴⁵² *Id.*

⁴⁵³ *Id.* at 898 n.7.

⁴⁵⁴ *Id.* at 897; Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798, 21,799 (May 15, 2019). Center for Biological Diversity stated, "[t]he Trump administration just ignored bedrock environmental and public health laws to plow a disastrous border wall through protected, spectacular wildlands. This senseless wall would rip a scar through the heart of the Sonoran Desert, kill endangered wildlife and cause irreversible damage." Lauren von Bernuth, *Trump Waives 41 Environmental Laws to Build 100 Mile Arizona Border Wall*,

On June 28, the U.S. District Court for the Northern District of California granted the plaintiffs' request for a declaratory judgment, denying the federal government the ability to transfer funds for the designated projects.⁴⁵⁵ The court reaffirmed its earlier decision and held the funds reprogramed under sections 8005 and 9002 for designated projects were unlawful.⁴⁵⁶ The court, however, refused to grant permanent injunction, holding that states had not demonstrated that they are likely to suffer irreparable injury.⁴⁵⁷

The federal government brought an appeal to the Ninth Circuit for a stay of the district court's injunction. On July 3, the Ninth Circuit rejected the federal government's request by a vote of 2–1.⁴⁵⁸ The court held that the federal government was unlikely to succeed on the merits

CITIZEN TRUTH (May 16, 2019), <https://perma.cc/8G29-CLZX>; see also Paul Ingram, *BP Plans 63 Miles of New Border Wall, up to 30 ft. High, in 3 Protected AZ Wilderness Areas*, TUCSON SENTINEL (May 7, 2019), <https://perma.cc/H3WQ-VLB4>.

⁴⁵⁵ California v. Trump, 2019 WL 2715421, at *1, *6 (N.D. Cal. June 28, 2019). Southern Border Communities Coalition stated: “We welcome the court’s decision to block Trump’s attempts to sidestep Congress to build deadly walls that would hurt communities living at the border, endanger wildlife, and have damaging impacts on the environment.” ACLU, *Federal Court Permanently Blocks Billions of Dollars in Border Wall Construction* (June 28, 2019), <https://perma.cc/97NF-XKTB>.

⁴⁵⁶ *Trump*, 2019 WL 2715421, at *3.

⁴⁵⁷ *Id.* at *4–5. California argued that El Centro “barrier construction will threaten various animal and plant species.” *Id.* at *4. Construction could potentially “hinder the migration of Peninsular bighorn sheep across the southern border and that pregnant ewes might be scared away by construction activities.” *Id.* The court rejected the claims, holding states’ line of causation did not pose the requisite “threat of future demonstrable harm to a protected species.” *Id.* California only demonstrated “that Peninsular bighorn sheep . . . crossed the southern border ‘west of project area,’ and that the pregnant ewe populations may seek a critical area ‘adjacent’ to project site.” *Id.* California did not “allege that the protected species cross the southern border where challenged construction would occur.” *Id.* Furthermore, California’s allegation that pregnant ewes may be “adversely affected” does not “explain why temporary construction would pose a threat of demonstrable harm to the species.” *Id.*

The court also held that New Mexico failed to show irreparable injury. *Id.* New Mexico asserted that barrier construction will harm the Mexican wolf by preventing genetic interchange between wolves in the United States and Mexico. *Id.* The court doubted that New Mexico’s interest in the “international travels of a few animals . . . could ever justify a permanent injunction against the U.S. government.” *Id.* Nevertheless, “New Mexico only identifie[d] two instances of Mexican wolves crossing the border, one of which returned to Mexico, and neither of which . . . bred with Mexican wolves on the other side of border.” *Id.* “New Mexico’s speculation that the border barrier *might* prevent interbreeding, which *might* hamper genetic diversity, which *might* render Mexican wolves *more susceptible* to diseases” is not sufficient evidence of irreparable harm to the species. *Id.* California and New Mexico also alleged irreparable injury because the DHS’s waiver interferes with the states’ ability to enforce their laws protecting the environment and natural resources. *Id.* at *5. The court held that “whether the waiver deprives states of their sovereign interests in enforcing state laws . . . or merely deprives states of their ability to bring suit to vindicate those interests is unclear as a legal matter.” *Id.* However, the court did not have to address the harm to the states sovereign interests because the court had earlier enjoined such wall construction. *Id.*

⁴⁵⁸ *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

of the case.⁴⁵⁹ The Trump administration's action violated congressional authority over appropriations.⁴⁶⁰ Furthermore, the transfer of funds did not meet the requirements of section 8005.⁴⁶¹

The federal government appealed to the Supreme Court.⁴⁶² On July 26th, the Supreme Court reversed the lower courts and granted the federal government a stay of district court's preliminary injunction.⁴⁶³ The Court questioned the plaintiff's standing, stating, "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with section 8005."⁴⁶⁴

Justices Ginsburg, Sotomayor, and Kagan voted to deny the petition.⁴⁶⁵ Justice Breyer argued for a partial stay that would allow the government to finalize the contracts, but not begin construction.⁴⁶⁶ The Court's decision opened the door to allow the federal government to spend \$2.5 billion for the construction of bollard fencing on 130 miles along the U.S.–Mexico border in Arizona, California, and New Mexico.⁴⁶⁷

VII. CONCLUSION

SHS waived numerous laws to allow construction of fourteen miles of border barriers in San Diego sector, two miles of border barriers in El Centro sector, and eight border wall prototypes. California and environmental groups brought suit, asserting that the waivers were ultra vires and unconstitutional.⁴⁶⁸ The district court and Ninth Circuit incorrectly concluded SHS waiver of numerous environmental laws pursuant to section 102(c) were not ultra vires. The SHS waiver authority under section 102(c) is limited by section 102(b). Since the San Diego and El Centro replacement fencing and border wall prototypes were not authorized by section 102(b), the SHS waivers under section

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 694.

⁴⁶¹ *Id.*

⁴⁶² Josh Gerstein, *Justice Dept. Asks Supreme Court to Lift Border Wall Ruling*, POLITICO (July 19, 2019), <https://perma.cc/Y7S6-SUQQ>. Sierra Club noted that, "[t]he courts have twice ruled against Trump's request to stay this important court order stopping construction of his ruinous wall. Now he is asking the Supreme Court to step in and save his wall, but we will continue to vehemently fight these tactics." *Id.*

⁴⁶³ *Trump v. Sierra Club*, 19A60, 2019 WL 3369425, at *1 (U.S. July 26, 2019).

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at *1–2.

⁴⁶⁷ Curt Prendergast, *Supreme Court Opens Door to \$1 Billion for Wall on Arizona-Mexico Border*, ARIZ. DAILY START (July 27, 2019), <https://perma.cc/U6ZV-NSJR>. The ACLU stated the administration "lacks authority to spend taxpayer funds on a wall that Congress considered and denied. This was a deliberate decision by Congress . . . Less than 6 months ago, this country endured the longest government shutdown in its history due to Congress's refusal to appropriate funds for the wall construction at issue here." Liptak, *supra* note 442.

⁴⁶⁸ *Curiel*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018).

102(c) were ultra vires. Furthermore, SHS waivers were not authorized under section 102(a), which is non-enforceable statement of policy.

The district court held that section 102(c) did not violate the Constitution.⁴⁶⁹ The court should have found that section 102(c) violates the non-delegation doctrine. Congress delegated unbridled discretion to the SHS to waive any law that impeded border fence construction.⁴⁷⁰ Congress avoided making hard choices regarding the balance between national security and environmental protection. Congress transferred legislative authority to DHS to make policy.⁴⁷¹ Environmental groups do not receive the same consideration in the DHS, which is concerned with national security, border wall construction, and stopping illegal immigration.

The district court also held that judicial review is not an essential component of the non-delegation doctrine.⁴⁷² The court should have found that judicial review is an essential component of the non-delegation doctrine. Judicial review ensures that policy is made by politically accountable institutions, not unelected bureaucrats. Judicial review ensures that agencies act within their statutory parameters. The judicial constraints in section 102(c) allowed the SHS to exceed the statutory parameters set forth in section 102(b).

The “Big Waiver” in section 102(c) indicates that Congress was concerned with erecting border fencing along the southwest border, despite severe environmental damage. Congress clearly did not want federal courts interfering with border security, so it granted SHS unprecedented discretion, deprived federal courts of jurisdiction to question the SHS compliance with statutory mandates, and precluded appellate court jurisdiction. Congressional action represents an extreme manifestation of positive political theory. The broad discretionary authority granted to the SHS undermines the separation of powers in the Constitution. In light of this congressional-executive seizure of power, federal courts must be willing to entertain legal theories, such as ultra vires review and the non-delegation doctrine, to protect the environment, and to preserve their institutional role.

There has been on-going criticism of President Trump’s border wall. GAO pointed out most of border wall prototypes are unsuited for the southwest border.⁴⁷³ Scientists have warned about the severe

⁴⁶⁹ *Id.* at 1147.

⁴⁷⁰ 8 U.S.C. § 1103(a) (2012).

⁴⁷¹ Public choice theory posits that “delegation enables individual legislators to reduce political costs of policies that injure relatively uninterested voters, without losing credit for benefits bestowed on those interest groups intensely enough motivated to trace chain of power.” Donald A. Dripps, *Delegation and Due Process*, DUKE L.J. 657, 688 (1988); Bowers, *supra* note 321, at 302.

⁴⁷² *Sierra Club*, 379 F. Supp. 3d at 927–28.

⁴⁷³ Rafael Carranza, *Trump’s Border Wall Prototypes Fail Design Requirements and are Riddled with Deficiencies*, AZCENTRAL (Aug. 21, 2018), <https://perma.cc/JJ9J-UD4G>.

environmental degradation.⁴⁷⁴ The public opposes the border wall.⁴⁷⁵ Former California Governor Jerry Brown and current Governor Gavin Newsom oppose the border wall.⁴⁷⁶ California residents oppose the wall.⁴⁷⁷ Nine congressmen who represent border districts, including one Republican, do not see any need for the wall.⁴⁷⁸

Congress must reexamine the wisdom of constructing fences and walls along the southwest border and properly assess their costs and benefits.⁴⁷⁹ The fences and walls along limited sections of the southwest border simply create more border tunnels and push migrants to more remote areas where they face a great risk of mortality.⁴⁸⁰ The exorbitant cost of the border fences and walls will be borne by the U.S. taxpayer.⁴⁸¹ Border fences and walls are causing conflicts with state and local governments and landowners, who are losing their property.⁴⁸² Border fences interfere with Native American religious practices.⁴⁸³ Border fences and walls are straining the U.S. relations with Mexico, whose cooperation is necessary for many border functions. Border fences and walls harm the environment and are detrimental to wildlife, particularly to endangered and threatened species.⁴⁸⁴

There is an ongoing battle over funding for the border wall. Congress authorized \$1.7 billion for 124 miles of new and replacement

⁴⁷⁴ Laura Parker, *6 Ways the Border Wall Could Disrupt the Environment*, NAT'L GEOGRAPHIC (Jan. 10, 2019), <https://perma.cc/QWL9-LY9V>.

⁴⁷⁵ Ruth Ellen Wasem, *Trump's Wall Would be a Symbol of Failure*, THE HILL (Jan. 2, 2019), <https://perma.cc/2P2M-9AW5>.

⁴⁷⁶ Stephen Dinan, *Trump Says He'll Rebuild Border Wall in California Despite Gov. Brown*, WASH. TIMES (May 9, 2018), <https://perma.cc/F7E8-KPVB>; Marilyn Icsman, *California Lt. Governor Gavin Newsom Slams President Trump in Twitter Video*, USA TODAY (Mar. 13, 2018), <https://perma.cc/2TFM-NQMJ>.

⁴⁷⁷ Isaac Saul, *The Uncomfortable Truth About Who Really Wants the Border Wall*, A PLUS (Apr. 28, 2018), <https://perma.cc/AKW3-QM8B>.

⁴⁷⁸ Monica Ortiz, *Border Residents Remain Skeptical About the Need For an Expanded Wall*, NAT'L PUB. RADIO (Jan. 9, 2019), <https://perma.cc/67MH-WEDC>. Three replacement projects have been completed in Calexico, El Paso, and Santa Teresa, New Mexico, Arizona Republic, as of December 26, 2018. Rafael Carranza, *Here's Where Trump's Border Barriers Will Be Built in 2019*, USA TODAY (Dec. 26, 2018), <https://perma.cc/A9NN-TTXJ>.

⁴⁷⁹ See CHAD C. HADDAL ET AL., CONG. RESEARCH SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 26–34 (2009).

⁴⁸⁰ See *id.* at 26.

⁴⁸¹ The U.S. Army Corps of Engineers predicted that the costs of constructing a double layered fence consisting of primary fencing and Sandia fencing would range from \$1.2 million to \$1.3 million per mile, excluding the cost of land acquisition. *Id.* at 27. The Corps also predicted that the 25-year life cycle cost of the fence would range from \$16.4 million to \$70 million per mile depending on damage to the fence. *Id.*

⁴⁸² *Id.* at 29–31.

⁴⁸³ Murphy Woodhouse, *Tohono O'odham Group: Border Wall Would Block Sacred Pilgrimage*, AZPM NEWS (July 23, 2019), <https://perma.cc/PBJ7-YSEU>; Tyson Hudson, *Tohono O'odham Nation Opposes Border Wall, Allows Surveillance Towers*, TUSCON.COM (July 29, 2019), <https://perma.cc/9GZS-VGYB>.

⁴⁸⁴ HADDAL ET AL., *supra* note 479, at 31–32.

barrier since President Trump has taken office.⁴⁸⁵ President Trump was not satisfied, so he has reprogrammed \$8.1 billion for border wall construction.⁴⁸⁶ The federal district court issued an injunction, which was upheld by the Ninth Circuit, prohibiting the reprogramming of federal funds.⁴⁸⁷ The Supreme Court granted a stay that allowed the reprogramming to continue.⁴⁸⁸ Environmental groups are continuing their efforts to stop border wall construction.⁴⁸⁹ Congress has begun to take steps to prevent the reprogramming of federal funds.⁴⁹⁰ Nevertheless, the Trump administration to date has not constructed any new border fencing.⁴⁹¹ There has only been 51 miles of replacement fencing, which was authorized in FY 2017 and 2018.⁴⁹²

Border barriers are scheduled to be constructed along the U.S.–Mexico border in California.⁴⁹³ Instead of wasting money on fences and border walls, Congress should authorize more manpower on the border and wait until technology is developed to create a virtual fence. Although earlier efforts were unsuccessful, recent efforts are still underway to construct the virtual fence, employing the technology being used for driverless cars.⁴⁹⁴ Several companies are testing systems in Texas that employ lasers, digital cameras, sensors and artificial

⁴⁸⁵ Laiken Jordahl, Ctr. for Biological Diversity, *Border Wall Semantics: A Dangerous Distraction*, MEDIUM (Jan. 8, 2019), <https://perma.cc/F7AN-Z999>; Lucy Rodgers & Dominic Bailey, *Trump Wall - All You Need to Know About US Border in Seven Charts*, BBC NEWS (Sept. 27, 2019), <https://perma.cc/4DF7-VNFQ>.

⁴⁸⁶ Alexa Díaz, *California Escapes Brunt of Pentagon Funding Deferrals to Pay for Trump's Border Wall*, L.A. TIMES (Sept. 4, 2019), <https://perma.cc/S66T-KSWQ>.

⁴⁸⁷ Liptak, *supra* note 442.

⁴⁸⁸ *Id.*

⁴⁸⁹ Paul Ingram, *Enviros Seek to Block Border Wall Construction Affecting 3 Arizona Wildlife Refuges*, TUCSON SENTINEL (Aug. 6, 2019), <https://perma.cc/V84A-V37G>.

⁴⁹⁰ President Trump requested \$8.6 billion for new border wall construction. The House Appropriation Committee reported a bill that denied any funding for border wall construction. The bill also prohibits the Trump administration from building his wall without funds specifically authorized by Congress. The bill also seeks to claw back \$601 million that Congress provided in February. House Republicans have warned that the border wall provisions could lead to another government shut-down. Gus Bova, *Democrats Finally Play Hardball on Border Wall*, TEX. OBSERVER (June 12, 2019), <https://perma.cc/V665-QYSX>; see also Kenneth T. Walsh, *Trump to Ask for Billions More for the Border Wall While Slashing Spending*, U.S. NEWS (Mar. 11, 2019), <https://perma.cc/J85K-CJFE>.

⁴⁹¹ Miriam Valverde, *Trump Says Another 400 miles of Wall are Coming Soon. But Most Projects Replace Existing Barriers*, POLITIFACT (May 15, 2019), <https://perma.cc/2GSS-MGBK>; Anna Giaritelli, *Trump Has Not Built a Single Mile of New Border Fence After 30 Months in Office*, WASH. EXAMINER (July 20, 2019), <https://perma.cc/8VRP-QJRS>.

⁴⁹² Giaritelli, *supra* note 491; *Trump Touts Effectiveness of New Border Fence in Calexico*, NBC7 SAN DIEGO (Apr. 5, 2019), <https://perma.cc/66RR-2CFQ>.

⁴⁹³ Mark Saunders, *As Wall is Debated, San Diego to see Border Construction Early this Year*, ABC10 NEWS SAN DIEGO, <https://perma.cc/G4LV-XX9H> (last updated Jan. 8, 2019); *Construction Begins on 30-foot-tall Border Wall in San Diego*, WSMV.COM, Feb. 21, 2019, <https://perma.cc/HXU6-3Y36>.

⁴⁹⁴ Cade Metz, *Parts of a 'Virtual' Border Wall, Built With the Tech Behind Driverless Cars*, N.Y. TIMES (Sept. 18, 2018), <https://perma.cc/73PZ-JMWV>.

intelligence to locate and track any person who crosses the border.⁴⁹⁵ Representative Hurd (R. Tex.) stated that “the only way to have operational control of the border is to look at all 2000 miles of it at the same time. And the only way to do that is through technology.”⁴⁹⁶

Congress should enact legislation that terminates the SHS waiver authority and balances national security and environmental protection. The Borderlands Conservation and Security Acts of 2007 and 2015 provide good models for such legislation. These bills require the DHS to 1) develop a Border Protection Strategy that supports border security efforts while also protecting federal lands; 2) allow land managers, local officials, and local communities to have a say in border security decisions; 3) ensure that laws intended to protect air, water, wildlife, culture, and health and safety are fully enforced; and 4) fund initiatives that will help mitigate damage to borderland habitat and wildlife.⁴⁹⁷ Representative Grijalva stated that RIDA and SFA represent a “one fence fits all” solution and impede efforts by local experts to balance national security and environmental protection.⁴⁹⁸ Legislation modeled after the Border Conservation and Security Act will foster cooperation, protect the environment, and strengthen border security.⁴⁹⁹

⁴⁹⁵ *Id.*; see also Kristina Davis, San Diego Union-Tribune, *US Starts Small with ‘Smart Walls’ to Protect Mexican Border*, DAILY REPUBLIC (Mar. 25, 2019), <https://perma.cc/B8GY-NHQ9>; A Virtual Wall May be the Solution to Protect Wildlife at Border, CRONKITE NEWS (Apr. 26, 2019), <https://perma.cc/6YNV-AMV6>.

⁴⁹⁶ Metz, *supra* note 494.

⁴⁹⁷ Press Release, Raúl M. Grijalva, Representative Grijalva Introduces Legislation to Protect and Conserve Land on Border (June 6, 2007), <https://perma.cc/454W-ANYZ>.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*