IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Plaintiffs, v. KEVIN McALEENAN in his official capacity as Acting Secretary of the U.S. Department of Homeland Security, *et al.*, Defendants.	Case No.: 1:19-cv-02085-KBJ

PLAINTIFFS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION REGARDING BORDER WALL CONSTRUCTION IN THE ORGAN PIPE CACTUS NATIONAL MONUMENT, CABEZA PRIETA NATIONAL WILDLIFE REFUGE, AND SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA

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Declaration No. 1	Dr. Aaron D. Flesch
Declaration No. 2	Michele M. Girard
Declaration No. 3	Sky Jacobs
Declaration No. 4	Laiken Jordahl
Declaration No. 5	Robert J. Luce
Declaration No. 6	Taylor McKinnon
Declaration No. 7	Louise Misztal
Declaration No. 8	Dr. H. Ronald Pulliam
Declaration No. 9	Dr. Philip C. Rosen
Declaration No. 10	Dr. Robin D. Silver, M.D.
Declaration No. 11	Dr. Juliet C. Stromberg
Declaration No. 12	Dr. Elizabeth Walsh

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INTRODUCTION

Plaintiffs Center for Biological Diversity, Defenders of Wildlife, and Animal Legal Defense Fund ("Plaintiffs") respectfully seek a preliminary injunction to halt impending border wall construction at three federally protected wildland areas: the Organ Pipe Cactus National Monument, the Cabeza Prieta National Wildlife Refuge, and the San Pedro National Conservation Area (collectively, "Federally Protected Lands"). This tryptic of Congressionally-protected areas exemplifies the extraordinary public value placed in conserving the nation's natural resources—which now face the unprecedented pursuit of a president's border wall. These areas include the first unit of our National Park System to face border wall construction (Organ Pipe), a wildlife refuge that directly abuts and is essential to the preservation of a World Heritage site in Mexico (Cabeza Prieta), and the last free-flowing river in Arizona (San Pedro). They are recognized as essential pieces of the region's binational conservation efforts, in large part due to their ecological connectivity with protected lands in Mexico.

The Department of Homeland Security's ("DHS") proposed border wall construction—consisting of the erection of impenetrable steel bollard walls reaching 30-feet high and several feet deep—will result in significant, irreversible impacts to these lands. The Federally Protected Lands serve as refuges to some of the last remaining populations of endangered species whose continued existence and recovery rely on the freedom of cross-border migration. Construction of border walls in these areas will not only directly damage their critical habitat, but even more importantly, will sever ecological connectivity with Mexico, undermining the very reasons for which these area (and their sister conservation parks on the Mexican side) were designated.

Border wall construction at the Federally Protected Lands is imminent. On July 26, 2019, the Supreme Court granted a stay of a separate preliminary injunction issued by the Northern

District of California, which had blocked the expenditure of (as the district court found) illegally transferred Department of Defense funds for border wall construction at the Federally Protected Lands. *Trump v. Sierra Club*, No. 19A60, 2019 U.S.LEXIS 4491 (July 26, 2019). Consequently, the erection of new border walls and associated construction at the Federally Protected Lands is scheduled to begin August 21, 2019. DHS Counsel Correspondence (Su Decl. Ex. 1).[1]

Absent injunctive relief from this Court, Plaintiffs' members will suffer irreparable harm to their conservation and aesthetic interests in the Federally Protected Lands and the imperiled species they safeguard. Further, the equities and public interest weigh heavily in favor of temporarily halting the border wall construction on the Federally Protected Lands until the Court has an opportunity to resolve the case on a full record. The weight of the public interest to prevent border wall construction on the Federally Protected Lands is substantial, as these areas have been explicitly set aside from development by Congress in order to preserve their ecological health, beauty, contribution to science, and essential role in protecting irreplaceable imperiled species—the very public values that ground Plaintiffs' interests in this case.

Finally, Plaintiffs are likely to succeed on the merits of their underlying claims challenging DHS Acting Secretary McAleenan's unlawful waiver determination to disregard compliance with 37 federal laws that would otherwise apply to the Federally Protected Lands pursuant to §102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[2] 84 Fed. Reg. 21,798 (May 15, 2019) (Tucson, AZ) ("Arizona Waiver") (Su Decl.

[1] Each exhibit referenced in this memorandum is attached to and described in the Declaration of Anchun Jean Su, filed herewith in support of Plaintiffs' motion.

[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, §102, 110 Stat. 3009-554 (1996) (codified at 8 U.S.C. §1103 note), *as amended by* REAL ID Act of 2005, Pub. L. No. 109-13, §102, 119 Stat. 231 (2005), *as amended by* Secure Fence Act of 2006, Pub. L. No. 109-367, §3, 120 Stat. 2638 (2006), *as amended by* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, §564, 121 Stat. 2090-91 (2007). (Addendum ("Add."), Ex. A.) All subsequent undesignated statutory references herein refer to IIRIRA (codified at 8 U.S.C. §1103 note) unless otherwise designated.

Ex. 2). The Arizona Waiver must be invalidated as *ultra vires* because the §102(c) waiver authority is expired. As Congress enacted the broad §102(c) waiver authority to apply narrowly to its border wall project priorities laid out in §102(b), the §102(b) project mandate of 700 miles of border construction has been completed. The §102(c) waiver authority is thus expired and cannot be exhumed post-mortem for Secretary McAleenan's impermissible Arizona Waiver.

However, should the Court find the Arizona Waiver statutorily permissible, then it must also deem IIRIRA §102 unconstitutional. Under Defendants' interpretation, IIRIRA transfers quintessential Legislative functions—including (1) the authority to unilaterally choose which competing protected interests should be sacrificed for border wall construction, and (2) the power to repeal the laws protecting such interests—to the Executive Branch. This accretion of Legislative power in the Executive Branch is further exacerbated by IIRIRA's jurisdiction-stripping provision that largely shields the Executive's actions from judicial review. Simply put, Defendants' interpretation of IIRIRA §102 thwarts the essential checks on the Executive by the Legislative and Judicial Branches, undermining the separation of governmental powers that is "essential to preservation of [our] liberty." *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989). This cannot be countenanced. For these reasons and those set forth below, this is a case that warrants the extraordinary relief of a preliminary injunction.

RELEVANT STATUTORY BACKGROUND

A. Immigration and Nationality Act. Enacted in 1953, the Immigration and Nationality Act ("INA") grants DHS the general "power and duty to guard the boundaries and borders of the United States against the illegal entry of aliens." 8 U.S.C. §1103(a)(5) (2018) (Add. Ex. A). DHS has relied on §1103(a)(5) to construct barriers at the southern border under Congress's direction prior to ever invoking the IIRIRA waiver authority.

B. IIRIRA §102 and Amendments. IIRIRA §102 was enacted in 1996 as Congress's vehicle to direct DHS to construct additional border barriers in accordance with Congress's priorities. Pub. L. 104-208, §102, codified at 8 U.S.C. §1103 note. (Add. Ex. B).[3]

IIRIRA §102 contains three main sections. *First*, §102(a) states the provision's general purpose; the DHS Secretary is to "take such actions as may be necessary to install additional physical barriers and roads" "in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." *Id*. §102(a). *Second*, §102(b) is the directive clause in which Congress mandates DHS to "carr[y] out" §102(a)'s purpose by identifying specific construction projects and their parameters that Congress—and not DHS—prioritizes. *Id*. §102(b)(1)(A). Reflecting Congress's rapidly evolving priorities, §102(b) has been amended three times over almost as many years. *See* IIRIRA Amendments Chart (Su Decl. Ex. 3). In its current form, §102(b) directed DHS to build barriers "along not less than 700 miles of the southwest border where fencing would be most practical and effective," *id*. Section 102(b) also contains a consultation provision that requires the DHS Secretary to consult with multiple stakeholders "in carrying out this section." *Id*.

Third, Section 102(c) contains two clauses that serve to expedite the DHS Secretary's achievement of Congress's priorities in §102(b). First, §102(c)(1) grants the DHS Secretary the authority to choose to waive any law that he "determines necessary to ensure expeditious construction *under this section*," which encompasses the projects that Congress prioritized in §102(b). *Id*. This waiver authority has been amended only once; it originally allowed the DHS Secretary to choose to waive compliance solely of two environmental laws—the National

[3] In light of the provision's multiple amendments, Plaintiffs attach a chart that outlines the relevant amendments at issue in this case. *See* IIRIRA Amendments Chart (Su Dec. Ex. 3).

Environmental Policy Act ("NEPA"), 42 U.S.C. §4231 *et seq*. and the Endangered Species Act ("ESA"), 16 U.S.C. §1531 *et seq*.—but it later expanded to include *all* laws, including federal, state, local, and tribal laws. Pub. L. No. 109-13, §102, 119 Stat. 231 (2005) (Su Decl. Ex. D). Section §102(c)(2) contains judicial review restrictions on DHS's waiver issuances by (i) limiting challenges to waiver decisions to constitutional claims; (ii) requiring such constitutional claims challenging a waiver be brought within 60 days; (iii) removing the courts of appeals' jurisdiction to review any such district court decision under 28 U.S.C. §1291, and limiting appellate review to a petition for a writ of certiorari to the Supreme Court. §102(c)(2)(C).

RELEVANT FACTUAL BACKGROUND

A. President Trump's 2017 Executive Order On Border Construction and Waivers

President Trump has catapulted the construction of the U.S.-Mexico border wall into the spotlight as the signature issue of his presidential campaign and current presidency. *See, e.g*., Trump Campaign Announcement ("I would build a great wall, and nobody builds walls better than me").[4] Weeks after his inauguration, President Trump issued an executive order directing DHS to construct a "secure, contiguous, and impassable physical barrier" along the entirety of the U.S.-Mexico border. 82 Fed. Reg. 8,793 (Jan. 25, 2017) ("Trump Executive Order") (Su Decl. Ex. 4). Prior to the Trump Executive Order, *all* previous seven waivers invoked under IIRIRA §102(c) were for projects *required* under §102(b), with the last waiver issued in 2009.

Subsequent to the Trump Executive Order, Trump's multiple DHS Secretaries have issued a total of 13 waivers as of this filing's date—all for construction projects *outside* the scope

[4] C-SPAN, Donald Trump Presidential Campaign Announcement (June 16, 2015), *available at* https://www.c-span.org/video/?326473-1/donald-trump-presidential-campaign-announcement.

of §102(b).[5] *See* DHS Waivers (Su Decl. Ex. 5). As a result, in the past two years alone, these 13 waivers amount to over 230 miles of executed and planned construction at the U.S.-Mexico border. *See* Trump DHS Waivers (Su Decl. Ex. 6). When added to previously built barriers, the coverage of border construction by state is staggering; nearly 86% of Arizona's border is or will soon be walled (notwithstanding the efforts of this motion), along with nearly 75% of California's border and 63% of New Mexico's border. *See* DHS Waivers (Su Decl. Ex. 5).

The legal ramifications of these waivers are also profound; the Trump Administration has waived over 50 federal laws, and innumerable state, local, and tribal laws, with respect to border construction. These laws range widely in the liberties they were enacted to protect, including safe drinking water, clean air, endangered species, Native American graves, and now the integrity of the national parks system. Additionally, notwithstanding Trump's recent bid for emergency border funding, over $3 billion in taxpayer monies have been dedicated to the construction of Trump's border wall. *See* Border Wall Appropriations (Su Decl. Ex. 7).

On May 15, 2019, Secretary McAleenan issued the three waivers at issue in this case: 84 Fed. Reg. 21,798 (May 15, 2019) in Tucson, AZ ("Arizona Waiver"); 84 Fed. Reg. 21,800 (May 15, 2019) in El Centro, CA; and 84 Fed. Reg. 21,801 (May 15, 2019) in Tecate, CA (collectively, the "2019 Waivers") (Su Decl. Ex. 2, 8, 9). These waivers invoke §102(c) to sweep aside 39 federal laws "in their entirety" that would otherwise have applied to approximately 100 miles of border wall construction. Significantly, the 2019 Waivers identify the source of funding as 10 U.S.C. 284(b)(7), from which Secretary McAleenan requested and was approved funds through the Department of Defense. *See* 84 Fed. Reg. 21,798, at 21,799.

[5] Three of those waivers, concerning construction projects in New Mexico, 83 Fed. Reg. 3,012 (Jan. 22, 2018), and Texas, 83 Fed. Reg. 50,949-50,951 (Oct. 10, 2018) and 83 Fed. Reg. 51,472-51,474 (Oct. 11, 2018), are challenged before the Court in a related case that is fully briefed and argued. *See Ctr. for Biological Diversity v. Nielsen*, No. 18-cv-00655-KBJ (D.D.C. Jun. 14, 2019).

B. The Arizona Waiver, Organ Pipe Cactus National Monument, Cabeza Prieta National Wildlife Refuge, and San Pedro Riparian National Conservation Area

The Arizona Waiver purports to waive a total of 37 laws that would otherwise apply to the 68.4 miles of border wall construction ("Arizona Border Wall Project") located in Cochise and Pima Counties, Arizona. 84 Fed. Reg. 21,798 (May 15, 2019). Specifically, the Arizona Border Wall Project will impact three federally-protected wildland areas (collectively, the "Federally Protected Lands"): (1) the Organ Pipe Cactus National Monument ("Organ Pipe Cactus NM"), encompassed in Tucson Projects 1 and 2; (2) the Cabeza Prieta National Wildlife Refuge ("Cabeza Prieta NWR"), encompassed in Tucson Project 1; and; (3) the San Pedro River in the San Pedro Riparian National Conservation Area ("San Pedro NCA") encompassed in Tucson Project 3. *See* Border Projects Sector Map (Su Decl. Ex. 10); *see also* Enriquez Decl. (June 19, 2019), ECF No. 181-7, *Sierra Club v. Trump*, No. 4:19-cv-892 (N.D. Cal.). The Arizona Border Wall Project seeks to replace a system of existing "vehicle barriers"—open steel barriers that block vehicles but allow for wildlife crossing—with impermeable "30 foot barriers" on the southern boundaries of the these conservation zones. 84 Fed. Reg. 21,798, at 21,799.

Organ Pipe Cactus National Monument. Established in 1937 by presidential proclamation and later Congressionally-designated as protected wilderness area, the Organ Pipe Cactus NM spans 30 miles of Arizona's southern border, preserves 330,000 acres of sensitive Sonoran Desert ecosystem, and protects a representative part of the Desert that contains organ pipe cactus (*Stenocereus thurberi*), a rare large, columnar cactus after which the Monument is named. *See* OPCNM Foundation Document, 3 (Su Decl. Ex. 11). By federal law, the Organ Pipe Cactus NM is a unit of the National Parks System and must be managed to "conserve the scenery, natural and historic objects, and wild life" and "to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as *will*

leave them unimpaired for the enjoyment of future generations[,]" 54 U.S.C. § 100101(a) (emphasis added). Significantly, the Organ Pipe Cactus NM abuts Mexico's El Pinacate y Gran Desierto de Altar Biosphere Reserve ("El Pinacate"), which was listed as a World Heritage site pursuant to the World Heritage Convention in order to protect the area's extraordinary biodiversity and threatened species.[6] Although the northern border of El Pinacate aligns with the U,S,-Mexico border, the broader Sonoran Desert and its extraordinary habitat extend far into the U.S. Thus, the U.S. border areas have been deemed critical to El Pinacate's "integrity and ecological connectivity" and to the survival and recovery of many Sonoran species.[7]

In conflict with these statutory mandates and international treaty purposes, the proposed Arizona Border Wall Project will result in myriad significant harms in the Monument and the El Pinacate World Heritage site. The erection of impenetrable bollard walls will truncate the cross-border movement of the endangered Sonoran pronghorn, ferruginous pygmy owl, and Bighorn sheep, which rely on connectivity to other adjacent populations for genetic variability and their continued survival. The construction will also likely destroy the habitat and nests of the highly imperiled Sonoyta mud turtle, which may contribute to its ultimate extinction.

Moreover, in 1976, the Organ Pipe Cactus NM was independently designated an International Biosphere Reserve by the United Nations Educational, Scientific and Cultural Organization ("UNESCO"). Together with Cabeza Prieta NWR, Sonoran Desert National Monument, and El Pinacate in Mexico, these "areas collectively comprise the largest multiagency, international protected area in the Sonoran Desert Region of North America."

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[6] *See* World Heritage Committee Decision 37 COM 8B.16, *Decisions Adopted by the World Heritage Committee at its 37th Session (Phnom Penh, 2013)*, WHC-13/37.COM/20, Paris, 5 July 2013 ("WHC Decision 37 COM 8B.16"), available at: http://whc.unesco.org/en/list/1410/documents/.

[7] *See* IUCN, *World Heritage Nomination – IUCN Technical Evaluation: El Pinacate y Gran Desierto de Altar Biosphere Reserve (Mexico) – ID No. 1410* (Apr. 2013), available at: http://whc.unesco.org/en/list/1410/documents/.

OPCNM Foundation Document, 3 (Su Decl. Ex. 11). The Arizona Border Wall Project risks irreparable harm being done to international collegial relationships on the border.

***Cabeza Prieta National Wildlife Refuge*.** Located directly to the west of Organ Pipe Cactus NM, Cabeza Prieta NWR spans across 56 miles of the Arizona border and is the nation's third largest wildlife refuge encompassing 860,000 acres. In 1939, the area was first created as a federal game refuge in order to primarily protect the desert bighorn sheep. 4 Fed. Reg. 437 (Jan. 27, 1939). In 1975, the area was federally designated as a national wildlife refuge to become part of a "national network of lands and waters [established] for the conservation . . . of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2). The Refuge specifically focuses on protection of the endangered Sonoran pronghorn, bighorn sheep, and lesser long-nosed bat. The Arizona Border Wall Project will prevent the cross-border migration that is essential to these species' survival, causing significant harm to these precarious populations.

San Pedro Riparian National Conservation Area. The San Pedro River near the San Pedro NCA is the last free-flowing, undammed desert river in the southwestern United States. Under the Arizona-Idaho Conservation Act of 1988, Congress created the 56,431-acre San Pedro NCA as the country's first National Conservation Area in order to protect one of the most biologically diverse watersheds in the United States, providing habitat for wildlife and millions of songbirds that migrate through the area each year. 100 P.L. 696, 102 Stat. 4571. Under the NCA designation, the area must be managed "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area." 16 U.S.C. § 460xx-1(a).

A binational River, the San Pedro flows from its headwaters in Sonora, Mexico, before crossing the U.S.-Mexico border and into the San Pedro NCA, and ultimately joins the Gila River in Arizona. The Arizona Border Wall Project, if built across the San Pedro River and floodplain, would create a debris dam that would block the essential habitat corridor that the NCA provides for genetic exchange for imperiled wildlife between source populations in Mexico and populations north of the border. *See* Coalition Comments 14 (Su Decl. Ex. 12).

C. President Trump's Emergency Declaration and Diversion of Funds, Subsequent District Court Injunction, and Supreme Court Stay

After repeatedly rejecting President Trump's specific demands for border wall funding, Congress on February 14, 2019 enacted the Consolidated Appropriations Act of 2019 ("CAA"), 2019, H.R.J. Res. 31, 116th Cong. div. A, tit. II, §§ 230-232 (2019), which accorded $1.375 billion for border wall construction, a fraction of the $5.7 billion that the President originally requested. On February 15, 2019, President Trump signed the appropriations bill and declared a national emergency at the southern border, 84 Fed. Reg. 4,949-4,950 (Feb. 20, 2019) ("Emergency Declaration") (Su Decl. Ex. 13), announcing that his administration had identified $6.7 billion in additional emergency and non-emergency appropriated funds and claiming the legal authority to divert these funds to border wall construction. Subsequently, the Department of Defense ("DoD") identified, transferred, and obligated $2.5 billion in "non-emergency" military DoD funds to border wall construction. These military funds are planned for five border wall projects located on federal public lands in California, Arizona, and New Mexico—including the Federally Protected Lands for which this Motion seeks a preliminary injunction.

In response, several lawsuits were filed challenging the Trump Administration's emergency declaration and diversion of unauthorized funds, including *Sierra Club v. Trump*, No.

19-cv-892-HSG (N.D. Cal. July 26, 2019).[8] On May 24, 2019 and June 28, 2019, the Northern District Court of California granted Plaintiffs' two injunctive relief motions, whereby the Arizona Border Wall Project and other projects in the 2019 Waivers were enjoined from going forward. At that point, no immediate relief was necessary in this case. On July 3, 2019, the Ninth Circuit appellate court denied an emergency appeal of the district court decisions. However, on July 26, 2019, the Supreme Court stayed the injunctions granted by the Northern District of California Court, allowing DHS to commence the Arizona Border Wall Project and other construction. *Trump v. Sierra Club*, No. 19A60, 2019 U.S.LEXIS 4491 (July 26, 2019).

D. Status of Impending Construction at the Federally Protected Lands

In light of the Supreme Court's stay decision, construction is planned to shortly commence at the Organ Pipe NCA, Cabeza Prieta NWR, and San Pedro NCA. If not enjoined by this Court, the erection of new barriers will commence August 21, 2019. *See* Defendants' Counsel Correspondence (Su Decl. Ex. 1).[9]

STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

To obtain a preliminary injunction, Plaintiffs must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). These "four factors have typically been evaluated on a 'sliding scale.'" *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) It is, however, "not clear whether this Circuit's sliding-scale approach to assessing the four preliminary factors survives the Supreme Court's decision in *Winter*." *Huntco Pawn*

[8] Plaintiffs also filed suit in the D.C. District Court. *See Ctr. for Biological Diversity v. Trump*, No. 19-cv-00408-TNM (D.D.C. June 17, 2019). A motion to dismiss has been fully briefed, and parties are awaiting a hearing date.

[9] Construction-related activities, including site grading for project trailers and delivery of panels, in the Federally Protected Lands will begin the week of August 12, 2019. *Id.*

Holdings, LLC v. United States DOD, 240 F. Supp. 3d 206, 217 (D.D.C. 2016). When moving for a preliminary injunction, plaintiffs "bear the burdens of production and persuasion." *Qualls v. Rumsfeld*, 357 F.Supp.2d 274, 281 (D.D.C.2005). "To meet these burdens, [they] may rely on 'evidence that is less complete than in a trial on the merits,' but the evidence [they] offer[] must be 'credible'." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 173 (D.D.C. 2015) (internal citations omitted).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

In issuing the Arizona Waiver, Secretary McAleenan unlawfully invoked the expired IIRIRA §102(c) waiver authority in order to sweep aside compliance with 37 federal laws whose purposes range from the protection of public health and safety to the integrity of the country's National Parks system, to the preservation of species. The Arizona Waiver must be struck down on two alternative grounds. *First*, the Arizona Waiver is *ultra vires* as a matter of law. Section 102(c) is a broad waiver authority that Congress enacted to apply narrowly to specific, mandated projects in §102(b). Because the §102(b) project mandate of 700 miles of border construction has been completed, the §102(c) waiver authority has expired. Thus, the Arizona Waiver has been issued outside the carefully-crafted boundaries of IIRIRA §102 and must be invalidated.

Second, in the alternative, should the Court view the Arizona Waiver as statutorily permissible, then IIRIRA §102 is unconstitutional. IIRIRA violates the separation of powers by unconstitutionally transferring to the Executive Branch the Legislature's Article I responsibility to not only make the laws regarding the Nation's prioritization of national interests but to *repeal* those laws when Congress deems it appropriate to do so, and then largely shielding these

Executive Branch decisions from judicial review. Although the Court may invoke the canon of constitutional avoidance to abstain from striking down IIRIRA on constitutional grounds by adopting Plaintiffs' narrow reading of §102(c), if the Court finds the current waivers are allowed under IIRIRA, the only alternative is to deem IIRIRA unconstitutional.

A. The Arizona Waiver is Ultra Vires.

The Arizona Waiver must be struck down as *ultra vires* because it exceeds the statutory bounds of IIRIRA §102. Further, this Court has jurisdiction to hear Plaintiffs' *ultra vires* claims.

1. The §102(c) Waiver Authority Is Expired.

In the related case *Center for Biological Diversity v. Nielsen*, No. 18-cv-00655-KBJ, Defendants ultimately claimed that two separate sub-sections granted them authority to issue §102(c) waivers: (1) §102(a), the general purpose provision; and (2) §102(b), the operative provision enumerating Congress's border priorities.[10] Assuming DHS relies on the same authorities with respect to the Arizona Waiver, Secretary McAleenan impermissibly invokes §102(c). The §102(c) authority has expired and is thus unavailable for two reasons: (1) the §102(c) waiver authority is restricted to the border projects that Congress specified in §102(b), and (2) the §102(b) project mandate is complete, thus invalidating the Arizona Waiver.

a. The §102(c) Waiver Authority is restricted to the border projects that Congress specified in §102(b).

IIRIRA §102(c) states that the DHS Secretary has the discretion to waive any laws of his choosing "to ensure expeditious construction of the barriers and roads *under this Section*." §102(c)(1) (emphasis added). Defendants, by issuing the Arizona Waiver, assert that the Arizona Border Wall Project falls within the scope of projects permitted "under this Section." However,

[10] In fact, it was not until oral argument in the related case regarding New Mexico and Texas waivers that DHS, when asked by this Court, abruptly changed its position and stated that it was relying on §102(b) to leverage the §102(c) waiver authority. *See* Transcript of Motion Hearing (ECF No. 32) 77, No. 18-cv-655-KBJ (D.D.C. June 14, 2019).

the §102(c) waiver authority only applies narrowly to the Congressionally-mandated projects in §102(b), which exclude the Arizona Border Wall Project, for the following reasons.

First, the plain term "this Section" in §102(c) refers to the whole of §102. However, it is only §102(b) that is the operative provision to which the §102(c) waiver authority is applied. This direct relationship between §102(b) and §102(c) is clear when examining the "history [and] purpose" of IIRIRA to divine the meaning of the statute's language. *Maracih v. Spears*, 570 U.S. 48, 76 (2013). IIRIRA is Congress's—and *not* DHS's—vehicle to express Congress's priorities for border wall construction and direct DHS to execute those priorities swiftly.

Enacted in 1996, IIRIRA was the first-ever statute that Congress passed with the explicit purpose of directing the DHS Secretary to undertake border wall construction to "deter" "illegal entry" at the U.S. border. §102(a). IIRIRA is distinct from the Immigration and Nationality Act ("INA"), which was enacted in 1953 to grant DHS the independent discretion to pursue border construction through its "power and duty to guard" U.S. borders "against the illegal entry of aliens." 8 U.S.C. §1103(a)(5) (2018) (Add. Ex. B). DHS relied on the INA as its "primary authority" to construct border barriers before Congress started directing the agency to construct border barriers, and accordingly issue §102(c) waivers under IIRIRA. *See*, *e.g.*, Ex. No. 21-5 of Defs Opp. Brief (ECF No. 21-1) 1, No. 18-cv-655-KBJ (D.D.C. June 14, 2019) (NEPA impact statement citing INA as "[t]he primary source of authority" for CBP's border construction). The INA contains no waiver provision, thus DHS must comply with all applicable laws.

Particularly given this vital distinction between the two statutes, it is evident that IIRIRA was enacted for a specific purpose—ensuring that DHS fulfills Congress's specific border priorities. In light of the fact that those priorities have been completed, *see* Sec. I(A)(1)(b) *infra*, the Trump Administration's persistent and unrelenting issuance of §102(c) waivers appears

especially disingenuous in light of the fact that it maintains the independent authority to construct border barriers under the INA. Accordingly, Acting Secretary McAleenan's efforts to shoehorn the projects prioritized by *DHS* into IIRIRA—a statute enacted to carry out *Congress*'s, and not *DHS*'s, priorities—to take advantage of the statute's waiver provision should be rejected.

Second, since IIRIRA functions as *Congress*'s vehicle to direct border construction activity, IIRIRA's statutory structure makes clear that §102(b) is the section's operative provision and the target of the §102(c) waiver authority. *See UARG v. EPA*, 573 U.S. 302, 321 (2014) (Courts "must account both the specific context in which . . . . language is used and the broader context of the statute as a whole"). Thus, under a common sense reading, §102(a) only sets forth Congress's "[g]eneral" purpose for enacting the whole section: to direct the DHS Secretary to undergo border wall construction "in the vicinity" of the U.S. border to "deter illegal crossings in areas of high illegal entry" into the U.S. §102(a).[11] In turn, §102(b) details the precise means by which Congress intends DHS to "carry out" §102(a)'s general purpose by specifically identifying the construction projects that Congress desires to be expeditiously completed. Finally, §102(c) assures that DHS executes Congress's prioritized projects with deliberate speed by granting the Secretary a waiver authority to choose laws to waive in pursuit of ensuring "the expeditious construction" of these projects, and shielding these projects from certain litigation challenges. This logical statutory structure demonstrates that the broad §102(c) wavier authority is designed to narrowly apply to §102(b) projects.

[11] §102(a)'s general statement of purpose is no different from that commonly found in other statutes with purpose provisions that do not contain a separate grant of authority. *See, e.g.*, 16 § 1531(c)(1) (In the ESA, federal agencies "shall seek to conserve endangered species and threatened species"); *see also Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 987-988 (9th Cir. 2015) (rejecting argument that interpreting this ESA provision as only a broad policy directive would render it superfluous).

Third, the legislative history further affirms that §102(c) is limited in application to §102(b) projects. In the Conference Report for the REAL ID Act, which expanded the scope of §102(c) to its current incarnation, the bill's sponsors emphasized that the authority's massive expansion was intended to address alleged "continued delays" in the completion of the then §102(b) project, the San Diego triple fence wall. H.R. Rep. No. 109-72, at 171 (2005) (emphasis added) (Su Decl. Ex. 14). *See also Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) (S. Sotomayor, concurring) (Conference reports constitute a "particularly reliable source . . . to ensure fidelity to Congress's intended meaning.").

Fourth, the flurry of Congressional amendments to §102(b) solidifies Congress's view that §102(b) is the operative provision to which the §102(c) waiver authority narrowly applies. While §102(b) was originally limited to a 14-mile segment of border fence in the San Diego area, Congress revisited the law ten years later and, in a quick succession of three amendments over as many years, reshaped §102(b) to address its then-priorities for border infrastructure work, imposing both geographic and temporal limits on what DHS could do.[12] As part of that effort, Congress broadened the scope of the §102(c) waiver to ensure expeditious action by the Department (as described above), but at the same time imposed a firm sunset date of December 31, 2008 to incentivize the Department's timely action. *See* Pub. L. No. 109-13, §102(c), 119 Stat. 231 (2005) (Add. Ex. D) (broadening the waiver authority); Pub. L. No. 110-161, §564, 121 Stat. 2090-91 (2007) (Add. Ex. F) (imposing the sunset date on priority areas). The waiver authority must be viewed in this context for what it plainly is: a short duration of a grant of discretion to the Executive in order to achieve immediate, expeditious results that Congress prioritized. The §102(c) waiver authority does not permit the Arizona Waiver.

[12] This history further suggests that if Congress wanted to construct additional border construction under IIRIRA, it would legislate in a specific mandate in §102(b) to effectuate that construction.

b. Because the Congressionally-mandated projects in §102(b) are completed, the §102(c)Waiver Authority is expired; thus, the Arizona Waiver must be vacated.

As Plaintiffs have demonstrated above, the extremely broad §102(c) waiver authority is narrowly confined to apply to §102(b) projects because that latter sub-section enumerates Congress's priorities for border wall construction. In turn, §102(b) directs the DHS Secretary to "construct reinforced fencing along not less than 700 miles of the southwest border". §102(b). To date, DHS has constructed more than 700 miles of border wall at the U.S.-Mexico Border.[13]

First, the legislative history of the 2008 Consolidated Appropriations Act demonstrates that Congress intended to mandate that DHS complete 700 miles of border barrier construction—and not to grant DHS unlimited power to waive all laws for an indefinite amount of border construction. Indeed, there is *no* legislative history even suggesting that Congress contemplated that, by amending §102(b), it sought to consciously push IIRIRA's constitutional limits in the way Defendants claim. "[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *INS v. St Cyr*, 533 U.S. 289, 299 (2001). No such indication is present here.

Instead, in the floor debates regarding amendments to §102(b), sponsors repeatedly characterized the §102(b)'s proposed amendments as a 700-mile requirement for border construction—and *not* an open-ended grant of construction authority to DHS. According to sponsor Senator Graham, the §102(b) amendments "allow us to appropriate . . . 700 miles of border fencing." 153 Cong. Rec. S9871 (daily ed., July 25, 2007) (Su Decl. Ex. 15). Similarly, co-sponsor Senator Sessions described the amendments as "fully fund[ing] the 700 linear miles

[13] U.S. Government Accountability Office, *Southwest Border Security*. *Report No. 17-331* (2017) http://www.gao.gov/assets/690/682838.pdf ("GAO Report") (Su Decl. Ex. 16). Thus, as acknowledged by U.S. Customs and Border Protection ("CBP"), a component agency of DHS, in a Government Accountability Office February 2017 report: "*CBP is in compliance with its legal requirements* for the construction of the southwest border fencing on the substantial discretion provided to the Secretary of Homeland Security to determine the appropriate placement of fencing" (with footnote at end of sentence referencing IIRIRA §102). *Id*. at 8.

of border fencing *required.*" *Id*. at S9890 (emphasis added). Further, the legislative history reveals that Congress intended DHS to complete 700 *linear* miles of border construction, which Congress understood could require more mileage of construction only as necessary to complete 700 miles due to topographical circumstances[14]; hence, the language "not less than 700 miles" is not intended as a blank check for indefinite border construction as DHS now claims.

Second, this circumspect reading of §102(b) as a 700-mile mandate is precisely the one embraced by DHS since the provision's 2008 enactment. Thus, prior to the Trump Administration, every single §102(c) waiver explicitly relied on §102(b) as the authority to construct projects, including those published in 2008 in fulfillment of the 700-mile mandate, which is now finished. *See, e.g.*, 70 Fed. Reg. 55,622-55,623 (Sep. 22, 2005), 55,623 (ECF No. 16-16, No. 18-cv-655-KBJ (June 14, 2019)) (emphasis added) (projects described as "prescribed in section 102(b) of the IIRIRA"); *see also* 72 Fed. Reg. 2,535-2,536 (Jan. 19, 2007), 2,535 (ECF No. 16-17, No. 18-cv-655-KBJ (June 14, 2019)) (similar language). In stark contrast, that language of explicit reliance on §102(b) is entirely absent from the Arizona Waiver and all other IIRIRA waivers issued in the Trump Administration, signaling the tacit recognition that DHS is not relying on §102(b). It is therefore entirely reasonable for the Court to conclude—particularly in order to avoid rendering IIRIRA unconstitutional—that Secretary McAleenan had no authority to issue the Arizona Waiver under §102(b) because the Arizona Border Wall Project exceeds the completed 700-mile mandate; any effort to assert otherwise is *ultra vires*.

[14] According to Senator Sessions, DHS had informed him that the "700 linear miles [of southern border fencing] . . . will actually require *more miles topographically*." 153 Cong. Rec. S9890 (daily ed., Jul. 25, 2007) (Su Decl. Ex. 15) (emphasis added). This demonstrates that, by including the term "not less than 700 miles" in the 2008 §102(b) amendment, Congress simply intended for DHS to complete fencing that would account for its interest in securing 700 linear miles of the southwest border, even if it may take more than 700 miles of fencing to reach that result due to topographical obstacles. *See also* 153 Cong. Rec. S10059 (daily ed., July 26, 2007) (Su Dec. Ex. 17) (Sen. L. Graham) ("Why 700 miles? Seven hundred miles would allow us to control crossings where you can literally walk across the street.")

c. Any broader interpretation of §102(c)'s scope that would allow the Arizona Waiver is impermissibly unbounded.

Defendants assert that the §102(c) waiver authority vests in the DHS Secretary the power to (1) unilaterally choose to disregard compliance with <u>*any and all laws*</u>, not only all federal, state, and local laws, but also future laws that do not yet exist, in order to pursue (2) <u>*any kind*</u> of border construction (3) at <u>*any*</u> time (4) <u>*in perpetuity*</u>; (5) <u>*anywhere*</u> within the "vicinity" of the border. Statutes must be construed "so as to avoid [] absurdity." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). It would be absurd to conclude that Congress intended to provide DHS with such unlimited authority, in the absence of any "clear indication" that "Congress intended that result." *Solid Waste Agency of N. Cook Cty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).[15]

DHS's interpretation permits the Secretary to single-handedly decide to elevate border construction above all other protected interests indefinitely and permanently. While Congress's delegation of such legislative power to the Executive itself is constitutionally problematic, *see* I(B)(1) *infra*, this blanket permission would mean that the Secretary could waive laws he himself is required to comply with. These include labor laws, sexual discrimination laws, civil rights laws, on top of the myriad environmental and public health laws he has already swept aside. This result impermissibly unites "the "legislative and executive powers . . . in the same person," *The*

[15] In addition, the Arizona Waiver should be struck down as *ultra vires* because DHS failed to comply with the consultation provision in §102(b)(1)(C), which mandates that—as a poor substitute for compliance with environmental and other laws—*prior* to issuing a waiver, DHS must at minimum engage in meaningful consultation with federal land management agencies, relevant state and local officials, and local landowners to "minimize the impact" of border projects "on the environment, culture, commerce, and quality of life" of the area. §102(b)(1)(C)(i). The plain language of the consultation provision provides that the Secretary's mandatory consultation with relevant stakeholders shall apply to *all* the Secretary's actions taken "in carrying out this *section*"—which includes the issuance of a waiver under §102(c). §102(b)(1)(C). Here, DHS notified public stakeholders in a letter dated May 6, 2019 and provide a comment deadline of July 5, 2019. However, they nonetheless issued the Arizona Waiver and executed the construction contract on May 15, 2019, violating the mandate of consulting with stakeholders prior to the Waiver's issuance. *See* CBP Notice (Su Decl. Ex. 18).

Federalist No. 47 (James Madison) (Clinton Rossiter ed., 1961) at 302, thus abolishing the meaningful enforcement of laws when the enforcer and law-maker are one.

Further, under Defendants' broad reading, Secretary McAleenan may waive laws for projects *anywhere* in the "vicinity of the United States border"—a phrase that is defined nowhere in IIRIRA and leaves entirely open to the Secretary's interpretation what the appropriate distance from a U.S. border to execute border construction. Thus, even CBP operates anywhere within 100 miles of all U.S. borders—where nearly two out of three people in this country reside.[16] It would therefore appear that DHS could claim the power to waive all laws to unilaterally build roads and erect walls anywhere inside the 100-mile border zone—which includes through Washington, D.C.–so long as it invokes the §102(c) waiver authority.

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As explained below, *see* Sec. B *infra*, Defendants' boundless interpretation of the §102(c) waiver authority in fact amounts to that rare case where a statute runs afoul of the Constitution's separation of powers principles. Nonetheless, the Court can avoid this result by narrowly interpreting §102 in a manner that is most faithful to Congressional intent while also avoiding constitutional concerns. As the Supreme Court has explained, "[w]here the literal reading of a statutory term would compel an odd result," *Public Citizen v. DOJ*, 491 U.S. 440, 443 (1989), it is appropriate for a reviewing court to determine whether "the text fairly admits a less problematic construction." *Id.* at 455-56. Applying those principles here, the Court can and should find that, in context, the reference to "barriers and roads *under this section*" in IIRIRA

[16] *See* "Guidance for Federal Law Enforcement Agencies, Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity," U.S. Department of Justice (Dec. 2014), https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf; American Civil Liberties Union, et al., Death, Damage, and Failure: Past, Present and Future Impacts of Walls on the U.S.-Mexico Border (2018), 8-9, https://www.aclu.org/sites/default/files/field_document/aclu-report-updates_0.pdf.

§102(c)(1) (emphasis added) refers to the precise activities *encompassed by §102(b)*, rather than *any* border construction activities generally referred to in §102(a). Moreover, rather than concluding that "not less than 700 miles" means anything *greater* than 700 miles, the Court can read §102(b) as a 700-mile mandate, which has since been completed. The statute's text, statutory structure, legislative history, and even DHS's past agency behavior provide the weighty evidence in favor of this narrow interpretation that §102(c) is expired. This is more than a "permissible" reading; it is, in fact, the correct one.

2. Separately, the Court has Jurisdiction to Hear Plaintiffs' *Ultra Vires* Claims.

This Court possesses jurisdiction to hear *ultra vires* claims. Indeed, all recent decisions concerning IIRIRA have held that courts may consider Plaintiffs' *ultra vires* claims.[17] There is no reason this Court should reach a different conclusion.

The plain language of §102(c)(2)(A) *preserves ultra vires* review. By its plain terms, the provision simply precludes statutory review of the DHS Secretary's actions made "*pursuant to paragraph (1)*"—referring §102(c)(1). Because the waiver authority applies exclusively to the Congressionally-mandated border wall construction articulated in §102(b), and the Arizona Waiver is squarely outside §102(b)'s scope, the Arizona Waiver is not an action *lawfully made* "pursuant to" §102(c)(1) and thus can be judicially reviewed here. When faced with a substantially similar judicial review bar, the D.C. Circuit in *COMSAT Corp. v. FCC* found that a provision in the Federal Communications Act—which provides that any amendments made "*pursuant to* [that section] shall not be subject to judicial review"—did not deprive the court of

[17] This includes decisions regarding the 2018 San Diego Waiver (*In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018), *affirmed In re Border Infrastructure Envtl. Litig.*, __F.3d__, 2019 WL 509813 (9th Cir. Feb. 11, 2019)); as well as Judge Leon's recent decision concerning the construction on the National Butterfly Center in Texas (*N. Am. Butterfly Ass'n v. Nielsen*, No. 1:17-cv-02651, 2019 WL 634596 (D.D.C. Feb. 14, 2019)). Although Judge Leon ultimately rejected plaintiffs' *ultra vires* and constitutional arguments, the only overlap between that decision and these cases concerns the consultation requirements, for that case concerned different constitutional concerns than those at issue here.

ultra vires review. 114 F. 3d 223, 224 (1997) (citing 47 U.S.C. §159(b)(3) (1994) (emphasis added)). So too should the Court permit *ultra vires* review here too.[18]

B. Defendants' Invocation of IIRIRA §102(c) is Unconstitutional Because It Violates the Separation of Powers.

Section 102(c)'s waiver and jurisdiction-stripping provisions unconstitutionally transfer Congress' Article I responsibility to make and repeal laws to the Executive Branch—violating the foundational separation of powers embedded in the Constitution's tripartite system of government. Specifically, under Defendants' interpretation of IIRIRA, Congress, through §102(c) effectively: (1) permits an unelected Executive official to exercise the quintessentially legislative power of deciding when to repeal laws in the service of national priorities, including when to subjugate legally protected interests to border wall construction; (2) grants the Executive the authority to unilaterally repeal existing laws without complying with bicameralism procedures, thus surpassing even Congress's own power authorized in the Constitution; and (3) largely shields the Executive's unilateral lawmaking from meaningful oversight by the Judiciary. Indeed, the Supreme Court's recent ruling suggests that even Congressional appropriations may not serve as a check on Executive power. *Trump v. Sierra Club*, No. 19A60, 2019 U.S.LEXIS 4491 (July 26, 2019). This result further highlights that DHS's interpretation of Congress's extraordinary conferral of waiver authority to the Executive Branch fundamentally distorts the allocation of power among the three branches, resulting in the "accumulation of all powers,

[18] Moreover, if the Court rejects hearing Plaintiff's *ultra vires* claims, then there is no way to ensure that the Secretary is acting in accordance with whatever limitations Congress has placed on his discretion in §102. Under DHS's reading, Congress has provided no limits at all—geographic, temporal, or otherwise—on the Secretary's unfettered ability to insulate his conduct from outside review. Without judicial review of statutory or *ultra vires* claims, DHS is empowered to claim that *every* project is within the §102(c) waiver authority, in perpetuity—regardless if the project does in fact serve the §102(a) purpose of addressing areas of high illegal entry or is part of the prioritized projects in §102(b). This fundamentally flaunts the role of the Judiciary: "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby v. U.S.*, 500 U.S. 160, 170 (1991) (Marshall, J., joined by Blackmun, J., concurring).

legislative, executive, and judiciary, in the same hands [that] may justly be pronounced the very definition of tyranny." *The Federalist No. 47* (Clinton Rossiter ed., 1961) at 301.

1. The Arizona Waiver Violates the Non-Delegation Doctrine.

"All legislative powers" are vested in Congress alone. U.S. Const., art. I, §1. Congress "may not transfer to another branch powers which are strictly and exclusively legislative." *Gundy v. U.S.*, 588 U.S. __, 4 (2019) (internal citations omitted). Critically, Congress may *not* abdicate its constitutionally-vested powers without "lay[ing] down by legislative act an intelligible principle" which makes clear the "general policy" he must pursue and the "boundaries of [his] authority." *Mistretta v. U.S.*, 488 U.S. at 372-73.

IIRIRA §102(C)(1) impermissibly transfers to the Executive the legislative power to *choose* which federal laws to waive, and *which* legally protected interests to subjugate to border wall construction—without any discernible intelligible principle to guide the DHS Secretary. Under IIRIRA §102(c)(1), Congress has vested in Secretary McAleenan the "authority to waive all legal requirements such Secretary, *in [his] sole discretion*, determines *necessary* to *ensure expeditious construction* of the barriers and roads under this section." §102(c)(1) (emphasis added). This sweeping provision grants the Executive the quintessentially legislative functions of: (1) weighing the interest of constructing the border wall expeditiously against other legally protected interests, which are largely outside the DHS Secretary's zone of expertise in border security (e.g., civil rights, discrimination, public health, environmental), and which span not only across federal, but also state, local, and tribal jurisdictions[19]; (2) making the policy decision

[19] There is good reason for the Court to view the Secretary's arrogation of power to waive state, local, and tribal laws with a particularly skeptical eye. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 43-44 (2007) (Stevens, J., joined by Roberts, C.J., and Scalia, J., dissenting) (noting that the scope of "an administrative agency's power to pre-empt state law . . . affects the allocation of powers among sovereigns"). The waiver authority comes from §102(c)(1)'s generic reference to the authority to waiving "all legal requirements," which hardly constitutes a clear delegation of the authority to waive state and local law. Combined with the bar on judicial review, *see* Sec.

establishing the prioritization of border wall interests in relation to competing protected interests; and (3) executing this policy decision by choosing which laws to disregard in their entirety, which liberties to unprotect. This staggering discretion of Executive authority epitomizes the strictly legislative power of "establish[ing]" the "relative priority [of policies] for the Nation," a function that is the "exclusive province of the Congress." *TVA. v. Hill*, 437 U.S. 153, 194 (1978) (emphasis added). Indeed, under DHS's view of IIRIRA, Congress has abdicated to Secretary McAleenan the legislative power to "[d]ecid[e] when competing values will or will not be sacrificed to the achievement of a particular objective [the border wall]", which is "the very essence of *legislative choice*." *Rodriguez v. U.*S., 480 U.S. 522, 525-26 (1987).

Critically, Plaintiffs do not dispute that Congress possesses the legal authority to enact legislation that prioritizes border wall construction above all other laws and nationally protected interests. However, Congress did not legislate that blanket prioritization here. IIRIRA§102(c) does *not* state, for example, that "All legal requirements that would otherwise impede expeditious construction of border barriers are hereby waived." Instead, Congress delegated that distinctive legislative function—*the act of choosing* which protected interests are to be sacrificed for the sake of building the border wall—to the Executive alone. The §102(c) waiver authority amounts to a Congressional "delegation of power to make the law, which . . . cannot be done." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892) (citation omitted); *see also Gundy*, 588 U.S. (Gorsuch, J., dissenting) ("[D]id Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.").

I(B)(3) *infra*, this means the Secretary is free to preempt any state law he or she chooses, with no check to assure that the agency's actions are consistent with Congress's delegation of authority.

Congress's delegation of legislative power to the DHS Secretary is unconstitutional because Congress failed to provide any discernible intelligible principle to guide the Secretary's choice of prioritizing and subjugating competing public interests. The plain language of the §102(c) waiver provision states that the DHS Secretary shall make the waiver choice based on whatever he "*determines necessary* to ensure expeditious construction" and in the "*Secretary's sole discretion*." §102(c)(1). But these phrases do not guide the Secretary in his choice-making. The phrase "necessary to ensure expeditious construction" lacks meaning because the Secretary's compliance with any existing law arguably can impact the speed of construction. And Congress explicitly punts the hard choice-making when it allows the Secretary to use his "*sole* discretion" to make waiver decisions.

How should the Secretary determine which laws to waive to expeditiously build the border wall? Absent in the §102(c) delegation are guiding policies like: (1) any enumerated factors and criteria to consider when weighing competing protected interests against border construction interests, *cf. Touby v. U.S.*, 500 U.S. 160, 166-67 (1991) (intelligible principle for setting drug designations included Congressional mandate that agency to consider at least three of eight codified factors); (2) any limitations or restrictions on the kinds of laws that the Secretary can consider in the balance analysis in spite of the Secretary's utter lack of expertise over the majority of those interests,[20] *cf. Mistretta*, 488 U.S. at 374-75 (intelligible principle for

[20] The lack of intelligible principle in the waiver provision is exacerbated by the fact that the determination it entails—the decision of whether to waive any or all applicable legal requirements, regardless of their source or subject matter—falls well outside the ordinary responsibilities of the DHS Secretary. Indeed, where a delegation "call[s] for the exercise of judgment or discretion that lies beyond the traditional authority of" an official, the nondelegation doctrine requires more granular guidance. *Loving v. U.S.*, 517 U.S.748, 772 (1996). Although the government has insisted that the "subject matter" of this delegation is immigration, *see* Def. Op. Br. (ECF No. 21-1) 39, 18-cv-655 (D.D.C. June 14, 2019), a topic at least generally within the Secretary's purview, the subject matter of the challenged *waiver provision* involves balancing competing policy interests across a broad array of substantive areas—a fundamentally legislative function. This matter falls well outside the "traditional authority" of the Secretary, and the delegation requires substantially more guidance than Congress has provided.

establishing sentencing guidelines included Congress's setting of explicit restrictions on range of minimum and maximum sentences, grade of offense, nature and degree of harm, and demographics of offender); or (3) any mandate to seek expert guidance and input through fact-finding hearings, robust public comment processes, intra-agency consultation, or other mechanism to meaningfully inform the Secretary's waiver decision, *cf. Whitman v. American Trucking Ass'n*, 531 U.S. 457, 475 (2001) (constitutional delegation as Congress required agency to undertake an extensive technical expert consultation and robust public administrative rulemaking process for agency's setting of air pollutant standards). With respect to this final piece, though Plaintiffs disagree with their statutory interpretation, Defendants have consistently maintained that the consultation provision in §102(a)(1)(C) does not apply *prior* to the DHS Secretary's issuance of the waiver decision, thus stripping even that consultation of its utility to inform the Secretary of his choice of waiving laws and weighing competing interests. [21] *See* Def. Opposing Brief (ECF No.21-1) 28, No. No. 18-cv-655 (D.D.C. June 14, 2019) ("Congress did not require that consultation be completed 'before'" the waiver issuance.).[22]

In short, §102(c) lacks the intelligible principle that undergirds other constitutional delegations. Instead, the §102(c) waiver delegation is tantamount to the unconstitutional delegations that the Supreme Court did not hesitate to strike down in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935).

[21] Even though §102(b)(1)(C) requires that the Secretary consult with multiple stakeholders in carrying out border construction, DHS has repeatedly defended its actions of failing to initiate and complete consultation prior to the issuance of the waiver itself, silencing any input about the protected interests that may be threatened due to the Secretary's waiver of laws. *See, e.g.*, Def. Op. Br. (ECF No. 21-1), 28-29, No. 18-cv-655 (D.D.C. June 14, 2019) (DHS represents that consultation not required prior to waiver issuance).

[22] To the extent the Court considers the general purpose of §102(a) as providing a piece of an intelligible principle, Congress has stated that the DHS Secretary shall do what is "*necessary*" to "deter illegal crossings in areas of high illegal entry," but this too faces the same problem of the §102(c)(1) text of lacking any criteria, principles, or mandated outside input that can meaningfully guide the Secretary's choice of what is "necessary" with respect to disregarding protected interests.

In *Panama Refining*, Congress delegated to the President the decision of whether and how to prohibit the interstate transportation of "hot oil," but Congress "left the matter to the President *without standard or rule*, to be dealt with as he pleased." 283 U.S. at 418 (emphasis added). Similarly, in *Schechter Poultry*, Congress transferred to the President the power "to approve 'codes of fair competition'" for slaughterhouses and other industries, but again failed to provide "standards to guide and restrict [the] President's action" or a "procedure for making determinations." 295 U.S. 495, 521-22. Here, Congress has similarly given the Secretary the "sole discretion" to determine whether and which laws to invalidate for the purposes of expeditiously building the border wall, amounting to the type of "unfettered discretion" that the Supreme Court has nullified. *Id.*at 537.[23] If permitting the President to draft a "cod[e] of fair competition" for slaughterhouses was "delegation running riot," *Id.* at 552-53 (Cardozo, J., concurring), then it is hard to see how giving the DHS Secretary the power to disregard laws in their entirety based on his personal policy choices might be permissible.

Finally, to the extent the Court considers §102(b) as part of an intelligible principle, under Defendants' interpretation, that sub-section offers no bounds as to the application of the §102(c) waiver authority, with which Plaintiffs disagree. Should the Court accept Defendants' interpretation that §102(b) does not restrain Defendants from issuing the Arizona Waiver, then the Court must necessarily strike down §102 as unconstitutional. Such a result would be consistent with prior ruling that premised findings of §102(c)'s constitutionality on the waiver's

[23] The dormancy of the non-delegation doctrine is not reason alone to foreclose this Court's use of the doctrine to strike down the Arizona Waiver. In fact, the Supreme Court's recent decision in *Gundy v. U.S.* signals the high court's openness to revisit the non-delegation doctrine when rightfully warranted. *Gundy v. U.S.*, 588 U.S.__ (2019) (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years I would support that effort."); (Gorsuch, J., dissenting) (in response to Justice Alito's abeyance, "Respectfully, I would not wait."). The §102(c) waiver authority, as invoked by Secretary McAleenan, is so broad in the scope of laws that may be waived, so unbounded in the types of projects such waiver authority applies to, and so extraordinary in the lack of guidance directing this legislative decision-making power that it exceeds Congress power to delegate legislative power to the Executive.

narrow application to specific Congressionally-identified border projects in §102(b). *See Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 13, 2005), *20 (holding the otherwise sweeping §102(c) waiver authority was constitutional because it was bounded by the "*narrow purpose* of completion of the [San Diego] Triple Fence authorized by the IIRIRA [§102(b)].") (emphasis added); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 128 (D.D.C. 2007) (the §102(c) waiver is "unique insofar as the number of laws that may be waived is theoretically unlimited, [but] the Secretary may only exercise the waiver authority for the '*narrow purpose'* prescribed by Congress. . . . Thus, *the scope of the Secretary's discretion is expressly limited*.") (emphasis added).

2. Defendants' Invocation of IIRIRA §102(c) Violates the Presentment Clause.

The authority to legislate is entrusted solely to Congress. U.S. Const. art I, §§ 1, 7. The Constitution forbids the Executive to "enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). The "[a]mendment and repeal of statutes, no less than enactment, must conform with" the extensive bicameralism and presentment requirements of Article I. *INS v. Chadha*, 462 U.S. 919, 954 (1983). Here, IIRIRA §102(c) grants the DHS Secretary the Legislative authority to unilaterally repeal any existing law without complying with the Constitution's dual presentment and bicameralism procedures, thus surpassing even Congress's lawmaking power authorized under the Constitution.

The DHS Secretary's Federal Register publication of the §102(c) waiver has the effect of a partial repeal or amendment of the underlying law being waived. In the Arizona Waiver, the Secretary has effectively grafted onto the 37 federal laws a new provision stating that "Nothing in this law in its entirety, or any law deriving from or related to the subject of this law, shall apply to border wall construction in Arizona." *See* 84 Fed. Reg. 21798, at 21799 (waiving "in

their entirety" 37 statutes, including "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" the enumerated statutes as applied to the Tucson sector). Such an amendment alters each of those statutes' "legal force or effect" as applied to the construction of border barriers in Arizona. *Clinton*, 524 U.S. at 438.

Any attempt to minimize the §102(c) waivers as narrowly applied to individual border projects must be rejected because the cumulative effect of the §102(c) waivers amounts to significant repeals of the dozens of underlying statutes. It bears emphasizing that §102(c) waivers now apply to approximately one-third of the entire U.S.-Mexico border, with respect to nearly fifty federal laws and innumerable state, local, and tribal laws. Taken together, the DHS Secretary's unilateral decision to invoke the §102(c) waivers—along with the new waivers that are sure to come, especially in light of the Trump administration's unprecedented efforts to finance the border wall—continue to repeal the application of an increasing number of laws as applied to an ever-expanding number of projects. As a concrete example, the existing §102(c) waivers have, collectively, repealed significant swaths of the Endangered Species Act ("ESA") because they have "in both legal and practical effect" denied the Act's vital application and protection of the nearly 100 endangered and threatened species at the borderlands.[24] *Clinton*, 524 U.S. at 438.

The §102(c) waiver power granted to the DHS Secretary is not materially different from the unconstitutional power granted to the President by the Line Item Veto Act. *Clinton*, 524 U.S. 417. There, the Line Item Veto Act granted the President the authority to unilaterally cancel

[24] *See, e.g.*, Center for Biological Diversity, A Wall in the Wild (May 2017), https://www.biologicaldiversity.org/programs/international/borderlands_and_boundary_waters/pdfs/A_Wall_in_the_Wild.pdf (detailing the nearly 100 endangered and threatened species that will be impacted by the construction of roads and walls at the 2,000 mile U.S.-Mexico border, which blocks movement of wildlife species, precluding genetic exchange, population rescue, and movement of species in response to climate change).

entire portions of duly enacted statutes concerning statutory spending and taxes, which effectively permitted the President to "amend" the underlying laws. *Id*. at 438, 448-49. The Constitution prohibits a complete cancellation of a provision, as in the Line Item Veto Act, no less than it prohibits the executive amendment of an enacted law, as is the case with §102(c) waiver and its functional amendment to existing laws.[25] *Chadha*, 462 U.S. at 954.

Finally, under DHS's interpretation, Congress has given Secretary McAleenan even more power than Congress itself possesses. While Congress can only amend or repeal a law through an arduous Article I process, Secretary McAleenan operates under none of these "finely wrought" constitutional constraints, but rather has the power, free from all non-constitutional judicial review, to repeal laws. *Clinton*, 524 U.S. 417. The §102(c) waiver authority defies the Presentment Clause and must be struck down.

3. Section 102(c)'s Jurisdiction-Stripping Provision Exacerbates The Separation of Powers Violation.

The constitutional infirmity inherent in DHS's interpretation of §102(c) is aggravated by the fact that §102(c) not only allows the Secretary to waive all laws per his discretion, but it also largely insulates the Secretary's actions from judicial review. Should this Court rule that *ultra vires* review is not available here, then the only non-discretionary review that remains is that of this Court on constitutional matters. This level of restricted judicial review further amputates any constitutional leg IIRIRA purportedly stands on. As the Supreme Court has explained, "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power

[25] Moreover, if deemed constitutionally permissible, Secretary McAleenan's discretion to waive laws is far broader than that of the President to exercise the cancellation authority in *Clinton*. There, the President's cancellation authority could only be applied narrowly to three specific categories of spending and tax items, such cancellation determinations were required to meet set criteria, and Congress retained the power to reject the line item veto. *Clinton*, 524 U.S. at 436. By contrast, here, the DHS Secretary holds the authority to waive any laws regardless of subject matter or guiding criteria, including laws far outside the Secretary's homeland security expertise, and Congress has retained no authority to reject the waiver.

remains within statutory bounds," and is necessary "in order to save the [statute's] delegation of lawmaking power from unconstitutionality." *Touby v. U.S.*, 500 U.S. 160, 170 (1991) (Marshall, J., joined by Blackmun, J., concurring). Section 102(c)'s wide preclusion of judicial review is acutely dangerous in the context of IIRIRA's unprecedented delegation of power to the Executive. Further truncating avenues of judicial review on these Executive actions, IIRIRA insidiously teeters on the edge of unconstitutionality.

To assuage these concerns about blocking judicial review, the government has repeatedly claimed that Congress's *appropriations power* acts as the "primary check[] on any potential abuse of that [§102(c) waiver] freedom." *See* Def. Reply Br. (ECF No. 27) 16, n. 15, No. 18-cv-655 (D.D.C. June 14, 2019). But these claims have been annihilated by President Trump's Emergency Declaration, and the Supreme Court's recent ruling suggesting that there may be no means for effective judicial review of the Administration's misappropriation of funds either. *See Trump v. Sierra Club*, No. 19A60, 2019 U.S.LEXIS 4491 (July 26, 2019). Thus, contrary to Defendants' assurances, even Congressional appropriations are not a constitutional safeguard against the Executive Branch exercising legislative power. Regardless, as the Supreme Court unequivocally reiterated in *TVA v. Hill*, 437 U.S. at 190, Congressional appropriations are irrelevant to evaluating whether Executive action comports with Congressional directives, and therefore cannot be relied upon as a necessary check on the Executive power that contravenes Congressional commandments.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF

For purposes of preliminary injunctive relief, plaintiffs bear the burden of demonstrating the likelihood (and not certainty) of irreparable harm. *Winter v. Natural Res. Def. Council*, 555

U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." (emphasis in original) (*citing Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)). Once demonstrated, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *New Mexico v. Watkins,* 969 F.2d 1122, 1137 (D.C. Cir. 1992) ("Money damages . . . would not be responsive to the environmental . . . concerns complainant raises."). As addressed below and documented in the 12 declarations submitted in support of this motion,[26] in the absence of an injunction preventing border wall construction within the Federally Protected Lands, Plaintiffs will suffer irreparable harm arising from: (1) significant adverse impacts to specific wildlife populations, including endangered species; (2) significant hydrological adverse impacts, including to the hydrology of desert washes within the Organ Pipe Cactus NM and the free-flowing San Pedro River within the San Pedro NCA; and (3) significant harm to Plaintiffs' conservation, aesthetic, and recreational interests in the lands and wildlife species of the Federally Protected Lands.[27]

The threatened irreparable harm is actual and imminent, not theoretical or speculative. The Arizona Waiver waived keystone environmental laws otherwise applicable to 68.4 miles of border wall construction within the Tucson Sector, including the eastern portion of Cabeza Prieta NWR, the entire southern border of Organ Pipe Cactus NM and San Bernardino NWR, and

[26] Plaintiffs submit declarations from the following persons in support of this Motion: (1) Dr. Aaron Flesch ("Flesch Decl."); (2) Michele Girard ("Girard Decl."); (3) Sky Jacobs ("Jacobs Decl."); (4) Laiken Jordahl ("Jordahl Decl."), (5) Robert J. Luce ("Luce Decl."); (6) Taylor McKinnon ("McKinnon Decl."); (7) Louise Misztal ("Misztal Decl."); (8) Dr. H Ronald Pulliam ("Pulliam Decl."); (9) Dr. Phil Rosen ("Rosen Decl."); (10) Dr. Robin D. Silver, M.D. ("Silver Decl."); (11) Dr. Juliet C. Stromberg ("Stromberg Decl."); and (12) Dr. Juliet Walsh ("Walsh Decl.").

[27] Irreparable harm "should be determined by reference to the purpose of the statute being enforced." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). Here, Plaintiffs seek to enforce NEPA and the ESA through invalidation of the waivers of these laws under the §102 waivers.

across the free-flowing San Pedro River within the San Pedro NCA. 84 Fed. Reg. 21,798 (May 15, 2019). On the same day, DoD awarded a $646,000,000 contract to design and build border wall and associated roads and lighting within the waiver areas.[28] As detailed above, on July 26, 2019, the Supreme Court granted the government's application for an emergency stay of a preliminary injunction, which had blocked expenditure of transferred DoD funds for border wall construction, including the May 15, 2019 contract. *Trump v. Sierra Club*, 19A60, 2019 U.S.LEXIS 4491 (July 26, 2019). Consequently, there is no current impediment to border wall construction within the Federally Protected Lands. The construction of new border walls in replacement of existing vehicle barriers is scheduled to begin on August 21, 2019. DHS Counsel Correspondence (Su Decl. Ex. 1).

The irreparable harm to Plaintiffs' interests that will occur in the absence of injunctive relief meets and exceeds the Supreme Court's likelihood standard, and will in fact be both "certain" and "great." *See Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 674 (D.C. Cir. 1985). As emphasized last week by the D.C. Circuit Court of Appeals, "destroying wildlife habitat, air and water quality, natural beauty, and other environmental and aesthetic values and interests" constitutes irreparable harm. *Alleghany Def. Project v. FERC*, 2019 U.S. App. LEXIS 23147, *29-30 (D.C. Cir. Aug. 2, 2019) *(quoting Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 323-25 (D.C. Cir. 1987)); *see also Brady Campaign to End Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) ("These environmental and aesthetic injuries are irreparable.").

[28] CBP uses the term border "wall system" to describe the planned combination of barriers, separated by an enforcement zone; lighting and surveillance technology for the barriers and enforcement zone; and access roads. *See* U.S. Government Accountability Office, *Southwest Border Security: CBP Is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information*, Report No. 18-614 (2018) (Su Dec. Ex. 19).

A. Significant Adverse Impacts to Wildlife Populations

The southern border within the boundaries of the Federally Protected Lands is not unfenced, but instead predominantly contains "vehicle barriers." These barriers are made of steel—typically range from four to six feet in height—and as their name reflects, they block vehicles, but critically, not wildlife. In contrast, the planned "border wall system" will consist of a 30-foot "bollard wall," where "[t]he bollards are steel-filled concrete that are approximately six inches in diameter and spaced four inches apart, and accompanied by lighting." *Sierra Club v. Trump*, 2019 U.S. Dist. LEXIS 88210, *89 (N.D. Cal. May 24, 2019). The environmental impacts of vehicle barriers on wildlife populations are fundamentally distinguishable from that of bollard border walls, as vehicle barriers allow connectivity for wildlife movement between populations in the U.S. and Mexico that are vital to species' survival. By contrast, the proposed bollard border wall will end such movement and connectivity, forever bifurcating the extraordinary Sonoran ecosystem that exists without the pretense of national boundaries. Significantly, the U.S. Fish and Wildlife Service ("FWS") itself stated that the proposed Arizona Border Wall Project "would adversely affect many trust species," including at least 16 ESA-listed species, and urged DHS—in the absence of NEPA and ESA review—to "consider leaving existing vehicle fencing" that permits the cross-boundary migration essential for species' survival. *See* U.S. Fish & Wildlife Letter to CBP at 1 (June 28, 2019) (Su Decl. Ex. 21).

As documented in the Flesch and Rosen Declarations, border wall construction, as well as the completed border wall system, will cause significant harm to specific wildlife populations within Organ Pipe Cactus NM and Cabeza Prieta NWR. This harm to wildlife populations in turn irreparably harms Plaintiffs' interests in wildlife conservation, and aesthetic and recreational interests in studying, observing, and photographing these species. *See* Jacobs Decl. (describing

professional, conservation, aesthetic, and recreational interests in Organ Pipe Cactus NM and Cabeza Prieta NWR, including specific interests in the cactus ferruginous pygmy-owl); Jordahl Decl. (describing professional, conservation, aesthetic interests in Organ Pipe Cactus NM and Cabeza Prieta NWR, including specific interests in Sonoran pronghorn, cactus ferruginous pygmy-owl, and Sonoyta mud turtle); McKinnon Decl. (describing professional, conservation, aesthetic interests in Organ Pipe Cactus NM and Cabeza Prieta NWR, including specific interests in Sonoran pronghorn, bighorn sheep, and cactus ferruginous pygmy-owl).

As a general matter, even "small changes in landscape connectivity and resulting declines in immigration rates can have major implications for persistence of [wildlife] populations." Flesch Decl. ¶ 9. This concern is heightened in the specific context of the "borderlands of Arizona and Sonora," which "are a biogeographical 'melting pot' where the ranges of Neotropical and Nearctic species and Sonoran, Chihuahuan, Rocky Mountain, and Madrean species collide." Flesch Decl. ¶ 10. Due in part to this geography, this region harbors "exceptional biodiversity." Pulliam Decl. ¶ 5. This diversity, however, is also fragile, as "many species reach the margins of their geographical distribution in the region," which in combination with other factors, "predispose[s] [such] populations to greater extinction risks." Flesch Decl. ¶ 10; Pulliam Decl. ¶ 7 (noting 100-300 at-risk populations in region including San Pedro River).

Dr. Flesch provides a specific example of this general principle in relation to ferruginous pygmy-owls (commonly called the cactus ferruginous pygmy-owl), a species that is near the northern extent of its range in southern Arizona.[29] Due to the pygmy-owl's low-flying nature, "border developments including fences and large clearings will reduce landscape connectivity"

[29] The ferruginous pygmy-owl is a highly endangered species that was removed from the protections of the ESA due to a data error. Plaintiffs Center for Biological Diversity and Defenders of Wildlife continue to advocate for the species' protection under the ESA. *See Ctr. for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946 (D. Ariz. 2017) (vacating U.S. Fish and Wildlife Service decision that listing not warranted).

for the species and "result in some degree of physical and perhaps genetic isolation from populations in Mexico." *Id*. at ¶ 13-14. If the border wall is constructed, the U.S. population of pygmy-owls will be separated from the more numerous Mexican population, and its continued presence in the U.S. "will have to rely on captive breeding or facilitated dispersal." *Id*. at ¶14.

In addition, the border wall system "would exacerbate [existing] connectivity issues" in relation to the endangered Sonoran pronghorn," by "effectively isolat[ing] [U.S. and Mexico] population segments from one another unless management actions to translocate individuals are taken." *Id*. at ¶ 15. "Bighorn sheep face a similar threat if a border wall is buil[t]," at Cabeza Prieta NWR and Organ Pipe Cactus NM, and "may well go locally extinct," because "[w]ithout movements from adjacent populations, many of which are across the international boundary, to recolonize vacant patches, entire population networks can be compromised." *Id*.[30]

Border wall construction will also significantly harm the only U.S. population of Sonoyta mud turtle, which is "among the most threatened freshwater turtles in the New World," Rosen Decl. ¶ 6, and was recently listed as endangered under the Endangered Species Act. 82 Fed. Reg. 43,897 (Sept. 20, 2017). The Sonoyta mud turtle is a binational species with a highly restricted range, with its only U.S. population located only 300 feet north of the international border at Quitobaquito Springs within Organ Pipe Cactus NM.

According to the species' leading expert, "the proposed new border wall construction and operations connected to it . . . has a substantial probability of causing immediate and irreparable harm" to the Sonoyta mud turtle that "may contribute to its ultimate extinction." Rosen Decl. ¶ 7.

[30] In part because "studying animal movement is not an easy affair," the impacts of border wall construction on some wide ranging species—such as peccary, mountain lion, and bobcat—are more difficult to assess than species with more restricted ranges. Flesch Decl. ¶ 8, 15. Although movements of these species "will certainly be precluded by a border wall, the potential impacts to populations are not well known and more study is needed to understand them." Flesch Decl. ¶ 15. Because CBP has waived NEPA and other laws under the guise of IIRIRA §102(c) in order to expedite border wall construction on the Federally Protected Lands, these impacts will remain unassessed and unknown if border wall construction does move forward.

This significant harm to this highly imperiled species will occur from construction-related damage, including "direct damage to critical habitat that may be used for terrestrial activities including nesting." *Id*. ¶ 8. The completion of the border wall system will result in additional significant impacts, including "persistent habitat degradation, long-term increase in traffic with [] road upgrading, alteration of nesting habitat, and increased lighting." *Id*. ¶ 9.

Border wall construction across the San Pedro River within the San Pedro NCA will also cause significant harm to wildlife populations. The San Pedro NCA "supports more than 80 species of mammals, two native fish species . . . , more than 40 species of amphibians and reptiles, [] 100 species of breeding birds . . . [and] irreplaceable habitat for at least 240 species of migrant birds." Luce Decl. ¶ 8. The NCA provides an essential habitat corridor for genetic exchange for wildlife between source populations in Mexico and those to the north. Animals found within the forested expanses of the surrounding "Sky Island" mountain ranges use the San Pedro River as an oasis and corridor while dispersing between these ranges, including black bear, bobcat, mountain lion, coati, and Coues white-tailed deer. *Id*. ¶ 11.

Critically, border wall construction spanning across the San Pedro River "will irreparably damage the [wildlife] movement corridor resulting in genetic isolation, fewer individuals, and potential collapse of populations, especially on the U.S. side of the border." *Id*. ¶ 9; Misztal Decl. ¶ 16 ("I]f the proposed border wall is built across the San Pedro River, all of the terrestrial and aquatic species listed above would suffer from direct habitat destruction and lose the ability to move freely along the river to reach food, shelter and mates."). In addition, "[c]onstruction of border walls on public lands involves blading all vegetation and the top layers of soil," which in "delicate desert ecosystems like the San Pedro River . . . permanently changes soil composition and runoff". Misztal Decl. ¶ 15. The harm to wildlife populations within the San Pedro NCA in

turn irreparably harms Plaintiffs' interests in wildlife conservation, and aesthetic and recreational interests, including the study, observation, and photography of specific wildlife populations. *See* Silver Decl. (describing professional, conservation, aesthetic, and recreational interests in the San Pedro NCA); Jordahl Decl. (describing professional, conservation, aesthetic interests in the San Pedro NCA, including wildlife migrations and a functioning hydrological environment).

In sum, absent injunctive relief, border wall construction and the completion of the border wall system within the Federally Protected Lands will result in significant and negative population level impacts to wildlife species including ferruginous pygmy-owls and bighorn sheep, as well as endangered species including the Sonoran pronghorn and Sonoyta mud turtle. Courts within this District have recognized that injury to even relatively small numbers of individual, non-endangered wildlife species can constitute irreparable injury for purposes of injunctive relief. *See, e.g.*, *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C. 1993) (enjoining killing of 10 to 60 bison based on finding that plaintiffs enjoy bison "much the same way as a pet owner enjoys a pet, so that the sight, or even the contemplation, of treatment in the manner contemplated . . . would inflict aesthetic injury upon the individual plaintiffs . . . not compensable in money damages . . . . Thus, the injury experienced and threatened would be irreparable."); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209 (D.D.C. 2003) (issuing preliminary injunction against killing of mute swans).

Critically, the threshold for irreparable harm is *even lower* when the harm involves endangered species, such as this case with respect to the Sonoran pronghorn and Sonoyta mud turtle. *See Humane Soc'y of the United States v. Kempthorne*, 481 F. Supp. 2d 53, 69-70 (D.D.C. 2006), *vacated as moot*, 527 F.3d 181, 182 (D.C. Cir. 2008) ("[a] number of cases assessing irreparable injury in the context of the ESA emphasize that harm to a small number of animals is

sufficient to demonstrate irreparable harm to an endangered, or even a threatened, species."); *see also Fund for Animals v. Turner*, No. 91-2201 (MB), 1991 U.S. Dist. LEXIS 13426, at *8 (D.D.C. Sept. 27, 1991) ("[T]he loss of even of the relatively few [three] grizzly bears that are likely to be taken through a sport hunt during the time it will take to reach a final decision in this case is a significant, and undoubtedly irreparable, harm.") (*quoting TVA v. Hill*, 437 U.S. 153, 174 (1978)). Here, Plaintiffs have provided evidence of certain significant impacts to *entire populations* of wildlife, including *endangered species, on protected public lands*. This showing easily meets the threshold of irreparable harm.

The certainty of irreparable harm to wildlife is further heightened in this case, where DHS has waived the applicability of NEPA and numerous other laws that would have otherwise required the agency to analyze, disclose, mitigate, and monitor the environmental impacts of border wall construction, which is a quintessential example of a "major federal action" normally requiring the preparation of an environmental impact statement. 42 U.S.C. § 4332(2)(C). In fact, courts frequently rely upon the results of NEPA analyses and processes—including mitigation and avoidance measures, as well as other project design changes resulting from interagency review by wildlife agencies such as the U.S. Fish and Wildlife Service—to assess whether plaintiffs have shown irreparable harm sufficient to issue an injunction. Such analyses and processes are utterly absent here. *See, e.g.*, *Winter*, 555 U.S. at 23 ("Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures); *Sierra Club v. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 39 (D.D.C. 2013) (considering "extensive mitigation plans" under NEPA in concluding plaintiffs did not demonstrate irreparable harm); *Comm. of 100 on the Fed. City v. Foxx*, 87 F. Supp. 3d 191, 203 (D.D.C. 2015) ("Most importantly, the Committee

offers no evidence to rebut the EIS's conclusion that the incremental effects on the environment will be relatively modest given the urban setting of the construction site and the mitigation measures assumed in the EIS."); *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, No. 15-cv-01582, 2016 U.S. Dist. LEXIS 9322, *33-34 (D.D.C. Jan. 22, 2016) ("Although these environmental improvements [NEPA mitigation measures] will not come to fruition immediately, and will not fully mitigate the loss of the eight feet of soil, they do diminish the harm of which Plaintiffs complain.").

B. Significant Adverse Hydrological Impacts

In addition to the impacts on specific populations of wildlife, border wall construction and completion will also have a significant impact on the hydrology of the Federally Protected Lands, including the free-flowing San Pedro River, which in turn will have cascading and additional significant environmental impacts.[31] Construction of a bollard wall across the San Pedro River "would result in short-term and long-term changes and cause irreparable harm to the San Pedro River and its associated riparian ecosystems." Stromberg Decl. ¶ 4. For example, a border wall would "disrupt[] th[e] vital process of water-borne seed dispersal" for the federally endangered Huachuca water umbel. *Id*. ¶ 7. More generally, the border wall "would irreparably harm the ability of the San Pedro to function as a river that supports a diverse, productive and viable riparian ecosystem." *Id*. ¶ 9. [32]; *see also* Luce Decl. ¶ 9 ("A border wall will act as a dam and radically alter the ecology of the river, especially when the dam breaks, an inevitable outcome as witnessed by flooding caused by the border wall at other locations in Arizona."). The border wall will also have significant hydrological impacts in the more arid landscapes of Organ

[31] Significantly, the Bureau of Land Management ("BLM") highlighted the significant hydrological impacts that construction on the San Pedro River could yield, including impacts to "functionality of the riparian area [and] associated species". *See* BLM Letter to CBP at 2 (July 3, 2019) (Su Decl. Ex. 22).

[32] Dr. Girard predicts similar hydrological effects at San Bernardino National Wildlife Refuge, another federally protected land in the path of the "Tucson 3" project. *See* Girard Decl. ¶¶ 20-26.

Pipe Cactus NM. Dr. Girard concludes—based on years of observing the impact of existing border wall on the hydrology of that park—that "[c]onstruction of additional border barriers such as a bollard wall . . . at Organ Pipe will continue to disrupt the fragile watershed ecosystems of this Sonoran Desert ecosystem, as soils in this part of the Monument are extremely erosive." Girard Decl. ¶ 19.

Although CBP has not designed final plans for the border wall across the San Pedro River, the waiver of laws specific to the river crossing and contracting for construction specific to that location provide sufficient certainty upon which to issue an injunction. *See Brady Campaign to Prevent Gun Violence*, 612 F. Supp. 2d at 25 ("Plaintiffs' injuries are not minimized or eliminated simply because the precise effects of the [agency action] are unknown. . . . This lack of precision is the result of the [agency's] failure to conduct an environmental evaluation prior to [taking the agency action], and it does not constitute an impediment to Plaintiffs' showing of irreparable harm.").

The harm to river hydrology within the San Pedro NCA in turn irreparably harms Plaintiffs' interests in wildlife conservation, and aesthetic and recreational interests, including the study, observation, and photography of specific wildlife populations. *See* Silver Decl. (describing professional, conservation, aesthetic, and recreational interests in the San Pedro NCA); Jordahl Decl. (describing professional, conservation, aesthetic interests in the San Pedro NCA, including wildlife migrations and a functioning hydrological environment).

C. Harm to Plaintiffs' Conservation, Aesthetic and Recreational Interests

Plaintiffs have also submitted declarations documenting how its members' conservation, aesthetic, and recreational interests will be irreparably harmed by construction of a 30-foot tall

bollard border wall system (including road construction, clearing of land for an "enforcement zone," and installation of permanent lighting) on the Federally Protected Lands.

For example, Center staffer and member Taylor McKinnon has regularly visited Organ Pipe Cactus NM and eastern Cabeza Prieta NWR in the past and has specific plans to again visit these areas in the future. *See* McKinnon Decl. at ¶¶ 7-8, 12-13. During these visitations, he has produced stunning visual photographic images taken from these protected areas, looking into the protected sister park El Pinacate y Gran Desierto de Altar Biosphere Reserve in Mexico. *Id*. ¶ 12. As he describes, "[u]nlike vehicle barriers, which are obscured by dominant vegetation, the wall would create a massive visual obstruction across what are now unimpeded views of the desert." *Id.* ¶ 13. Further, "construction of the wall would harm one of [his] favorite and most frequent uses of public land," and would preclude him from photographing similar unspoiled scenes in the future, exemplified by a photograph taken in 2018. *Id.*

Similarly, Center member Sky Jacobs has "worked with, photographed, and enjoyed" the ferruginous pygmy-owl extensively. Jacobs Decl. ¶ 8. As he explains, border wall construction in Organ Pipe Cactus NM and Cabeza Prieta NWR will prevent "any chance of survival of the species in this area," and "[t]his fact will significantly affect [his] well-being and my ability to share [his] enjoyment of these owls with [his] daughter in the future." *Id*. ¶ 9.

Center member and co-founder Robin Silver "first photographed the San Pedro River professionally in 1987," and also "became involved in conservation efforts to save the San Pedro River" at that time. Silver Decl. ¶ 13. Since that time, he has "continued to visit the San Pedro, including the area around the proposed border wall for photography, wildlife observation, research, recreation, educational activities, aesthetic enjoyment, and spiritual and psychic renewal." *Id*. ¶ 14. As he describes, border wall construction across the San Pedro River in the

San Pedro NCA will harm these interests by blocking the migration of specific wildlife and causing hydrological alterations to the river that will adversely affect specific wildlife that he enjoys photographing.

These irreparable harms to Plaintiffs' conservation, aesthetic, and recreational interests in the absence of an injunction are imminent, as they arise from border wall construction in addition to the ultimate completion of the border wall system. *Cf Nat'l Parks Conservation Ass'n v. Semonite*, 282 F. Supp. 3d 284, 288 (D.D.C. 2017) ("Therefore, the source of the plaintiff's alleged irreparable harm—'mammoth towers'—won't begin to be built for at least another six months, leaving the parties ample time to fully brief the merits of the case.").

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF INJUNCTIVE RELIEF

The final two preliminary injunctive relief factors, the balance of equities and public interest, also weigh heavily in favor of granting Plaintiffs' Motion. As a starting point, if Plaintiffs have shown a likelihood of success on the merits, then "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.*, 480 U.S. at 545. In addition, when considering endangered species, "the loss of species is just that—irreplaceable. The American people, through their representatives in Congress, have spoken in the 'plainest of words' making it abundantly clear that the protection and preservation of endangered species is one of the nation's highest priorities." *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 238 (D.D.C. 2003) (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)).

Plaintiffs' conservation, aesthetic, and recreational interests carry particular equitable weight in the specific circumstances of this case, which involve protected federal lands legally set aside for their beauty, their value to wildlife, their contribution to scientific understanding,

and other values consistent with Plaintiffs' demonstrated interests which will be irreparably harmed in the absence of an injunction. *See*, *e.g.*, National Park Service Organic Act of 1916, 39 Stat. 535 (Aug. 25, 1916) (*codified at* 54 U.S.C. § 100101(a))(directing National Park Service to "conserve the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations"); 16 U.S.C. § 668ee(2) (identifying six "wildlife-dependent recreation uses"—hunting, fishing, wildlife observation, wildlife photography, environmental education, and environmental interpretation—on National Wildlife Refuge lands).

Plaintiffs' interests are also consistent with binational conservation agreements and other efforts, further weighing the equities in favor of an injunction. In 1976, for example, Organ Pipe Cactus NM was designated as an UNESCO International Biosphere Reserve. Together with Cabeza Prieta NWR, Sonoran Desert National Monument, and El Pinacate in Mexico, these "areas collectively comprise the largest multiagency, international protected area in the Sonoran Desert Region of North America." OPCNM Foundation Document (Su Decl. Ex. 11). Proposed border wall construction and other border security and immigration policies are damaging these international efforts, including "irreparable harm being done to international collegial relationships on the border," and a "reduction in trust" with key Mexican colleagues. Rosen Decl. ¶ 16, 20. This deterioration in the strength and resiliency of professional and personal relationships is in turn harming "[m]uch needed bi-national cooperation and collaboration involving cross-border species and ecological dynamics." *Id.* ¶ 20.

Providing injunctive relief in this case would also serve the public interest. There is a "strong public interest in meticulous compliance with the law by public officials." *Fund for Animals v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993). Such meticulous compliance is notably

absent here. The proposed border wall construction has not been funded through Congressional appropriations to DHS; instead, the border on the Federally Protected Lands would be erected with DoD funds appropriated to other purposes and transferred through the "284 counterdrug account." One court already made a preliminary finding that this transfer is unlawful, though its injunction prohibiting the transfer was stayed by the Supreme Court pending resolution on the merits of case. *Sierra Club v. Trump*, No. 19-cv-00892, 2019 U.S. Dist. LEXIS 88210 (N.D. Cal. May 24, 2019).

To the extent DHS argues that border wall construction serves the public interest or otherwise weighs the equities in favor of Defendants by allegedly improving border security, there is no objective evidence to support this assertion. Despite repeated requests by both the GAO and Congress, CBP has never provided meaningful metrics regarding the efficacy of existing or planned border walls. In February 2017, GAO reported that CBP has failed to assess the contributions of border fencing to border security, despite the expenditure of $2.3 billion to deploy such fencing from fiscal years 2007 through 2015.[33] As of two weeks ago, CBP's failure continues. *See* GAO, *Border Security: Assessment of DHS's Border Security Improvement Plan*, GAO 19-538R (2019), 18 (Su Decl. Ex. 20) ("Despite these investments, we reported that CBP could not measure the contribution of fencing to border security operations along the southwest border because it had not developed metrics for this assessment.").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to grant the Preliminary Injunction and schedule an expedited hearing.

[33] U.S. Government Accountability Office, *Southwest Border Security: Additional Actions Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying Capability Gaps*, GAO Report No. 17-331 (2017) (Su Decl. Ex. 19).

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