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 12 Commission

13 IN THE UNITED STATES DISTRICT COURT  
 14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

15  
 16 **THE PEOPLE OF THE STATE OF**  
**CALIFORNIA, BY AND THROUGH**  
 17 **XAVIER BECERRA, ATTORNEY**  
**GENERAL; THE CALIFORNIA COASTAL**  
 18 **COMMISSION,**

19 Plaintiffs,

20 v.

21  
 22 **UNITED STATES OF AMERICA; UNITED**  
**STATES DEPARTMENT OF HOMELAND**  
 23 **SECURITY; ACTING SECRETARY**  
 24 **ELAINE DUKE, IN HER OFFICIAL**  
**CAPACITY; UNITED STATES CUSTOMS**  
 25 **AND BORDER PROTECTION; AND**  
 26 **ACTING COMMISSIONER KEVIN K.**  
**MCALLENAN, IN HIS OFFICIAL**  
**CAPACITY,**

27 Defendants.  
 28

Case No. '17CV1911 W BLM

**COMPLAINT FOR  
 DECLARATORY AND  
 INJUNCTIVE RELIEF**

1 Plaintiffs, the People of the State of California, by and through Attorney  
2 General Xavier Becerra (“People”), and the California Coastal Commission  
3 (“Commission”) (collectively referred to as “Plaintiffs”), allege as follows:

4 **INTRODUCTION**

5 1. The People bring this action to protect the State of California’s residents,  
6 natural resources, economic interests, procedural rights, and sovereignty from  
7 violations of the United States Constitution, the National Environmental Policy Act  
8 and the Administrative Procedure Act occurring as a result of the actions of the  
9 United States of America, the United States Department of Homeland Security  
10 (“DHS”), former DHS Secretary John Kelly in his official capacity, Acting DHS  
11 Secretary Elaine Duke in her official capacity, the United States Customs and  
12 Border Protection (“CBP”), and Acting CBP Commissioner Kevin K. McAleenan  
13 in his official capacity (together “Defendants”), with respect to the planning and  
14 construction of a border wall and related border barrier projects along the southern  
15 border of the United States, including significant projects in California (“Border  
16 Wall” or “Border Wall Projects”). The Commission brings this action to protect  
17 natural resources within California’s coastal zone, land and water uses within the  
18 coastal zone, and the Commission’s procedural rights from violations of the Coastal  
19 Zone Management Act and other statutes resulting from Defendants’ actions  
20 relating to the Border Wall.

21 2. As a presidential candidate, and subsequently as President, President  
22 Trump repeatedly has stated his intent to build a wall across the entire United States  
23 border with Mexico. On January 25, 2017, he issued Executive Order No. 13767  
24 concerning “Border Security and Immigration Enforcement Improvements”  
25 (“Executive Order”). The Executive Order directs the Secretary of DHS to identify  
26 and “allocate all sources of Federal funds for the planning, designing and  
27 construction of a physical wall along the southern border.”  
28

1           3.    The Executive Order cites the Illegal Immigration Reform and Immigrant  
2 Responsibility Act (“IIRIRA”) (Pub. L. 104–208; 8 U.S.C. § 1103 note) as  
3 authority for the construction of the Border Wall. As amended by the Real ID Act  
4 of 2005 (Pub. L. 109–13), the Secure Fence Act of 2006 (Pub. L. 109–367), and the  
5 Department of Homeland Security Appropriations Act, 2008 (Pub. L. 110-161),  
6 Section 102 of IIRIRA authorizes the Secretary of DHS to install “additional”  
7 physical barriers along the United States border to deter illegal crossings in “areas  
8 of high illegal entry” into the United States “along not less than 700 miles of the  
9 southwest border.” 8 U.S.C. section 1103 note. IIRIRA also required the Secretary  
10 to identify 370 miles of “priority areas” and it imposed a deadline to construct  
11 reinforced fencing in those areas by no later than December 31, 2008. 8 U.S.C.  
12 section 1103 note.

13           4.    Since 2006, under the Congressional authority granted to it, DHS  
14 installed hundreds of miles of reinforced fencing along the US-Mexico border.  
15 There are currently 702 miles of primary, secondary and tertiary fencing along  
16 approximately 654 miles of the border. This includes primary pedestrian and/or  
17 vehicle barriers along most of the 140.4-mile-long border within California, and  
18 multiple layers of reinforced fencing along a 14-mile segment of the western end of  
19 the border in San Diego County. The Secretary of DHS also identified “priority  
20 areas” for expedited construction pursuant to the requirements of the provision. In  
21 April 2008, the Secretary last exercised his authority to waive federal laws. DHS  
22 completed all of the “priority areas” projects authorized by Congress under Section  
23 102. By doing so, the DHS completed its task as envisioned and authorized in  
24 Section 102 of IIRIRA. 8 U.S.C. § 1103 note, subdivision (b)(1).

25           5.    In 2017, DHS announced that initial construction of Border Wall projects  
26 will occur in Naco, Arizona; Sunland Park, New Mexico; San Diego County,  
27 California; Imperial County, California; El Paso, Texas; and, the Rio Grande  
28 Valley, Texas. With respect to San Diego County, DHS announced that, pursuant

1 to the Executive Order, it intends to replace 14 miles of existing primary fencing  
2 with new fencing and to replace 14 miles of existing secondary fencing with a solid  
3 wall or other barrier. DHS has also solicited and received design bids from  
4 contractors seeking to design and build the Border Wall, and has announced that  
5 selected contractors will build prototypes of their Border Wall designs in San Diego  
6 County, as part of the bidding process.

7 6. Section 102 of IIRIRA contains a provision that allows the Secretary of  
8 DHS to waive any law he or she deems necessary to expeditiously construct  
9 reinforced fencing authorized under that section. 8 U.S.C. § 1103 note, subdivision  
10 (c). On August 2, 2017, former Secretary John Kelly attempted to exercise this  
11 waiver authority by publishing a Notice of Determination in the Federal Register.  
12 Determination pursuant to Section 102 of [IIRIRA], as Amended, 82 Fed. Reg. 35  
13 984 (August 2, 2017) (“San Diego Waiver”). The San Diego Waiver states “DHS  
14 will immediately implement various border infrastructure projects” within the  
15 “Project Area.” *Id.* The Project Area is described as a fifteen-mile segment of the  
16 border within the United States Border Patrol’s San Diego Sector beginning at the  
17 Pacific Ocean and extending eastward. The only infrastructure projects specifically  
18 identified in the San Diego Waiver are the replacement of 14 miles of existing  
19 primary fencing and the construction of prototype border walls (hereinafter “San  
20 Diego Project”). *Id.* The San Diego Waiver purports to waive more than 30 federal  
21 laws, as well as all state and local laws derived or related thereto, to expedite the  
22 construction of all of the “various border infrastructure projects” that DHS intends  
23 to build within the Project Area.

24 7. On September 12, 2017, Acting DHS Secretary Elaine Duke attempted to  
25 exercise Section 102’s waiver provision with respect to the proposed replacement  
26 of fencing in another area of California by publishing a Notice of Determination in  
27 the Federal Register. Determination Pursuant to Section 102 of IIRIRA, as  
28 Amended, 82 Fed. Reg. 42829 (September 12, 2017) (“Calexico Waiver”). The

1 Calexico Waiver states that “DHS will take immediate action to replace existing  
2 primary fencing” along a segment of the border that starts near the Calexico West  
3 Land Port of Entry and extends three miles to the west. (“Calexico Project”). The  
4 Calexico Waiver purports to waive 27 federal laws, as well as all state and local  
5 laws derived from or related thereto, to expedite the fence replacement project.

6 8. In this action for declaratory and injunctive relief, Plaintiffs challenge  
7 Defendants’ failure to comply with the requirements of the National Environmental  
8 Policy Act, 42 U.S.C. § 4321 et. seq. (1970) *as amended* (“NEPA”) the  
9 Administrative Procedure Act, 5 U.S.C. § 551 et. seq. (1946) *as amended* (“APA”),  
10 and the Coastal Zone Management Act, 16 U.S.C. § 1451 et. seq. (1972) *as*  
11 *amended* (“CZMA”). The Plaintiffs request the Court enjoin DHS from engaging  
12 in any and all planning, design and construction activities related to installing  
13 barriers along the United States-Mexico border, including the construction of  
14 prototypes, and all other infrastructure plans referenced in the San Diego and  
15 Calexico Waivers, until DHS fully complies with these laws.

16 9. Plaintiffs also seek a judicial declaration by this Court that Section 102 of  
17 IIRIRA, the provision cited in the Executive Order, does not apply to DHS’s  
18 proposed construction of a Border Wall, which includes but is not limited to the  
19 construction of prototype walls and fences, the construction of barriers and roads  
20 that are not in areas of high illegal entry, the construction of barriers that are not in  
21 areas where the fencing would be most practical and effective, and the replacement  
22 of existing walls and fencing along the United States-Mexico border.

23 10. Plaintiffs also seek a judicial declaration by this Court that the San Diego  
24 and Calexico Waivers fail to meet the requirements of Section 102 of IIRIRA, that  
25 former Secretary DHS Kelly and Acting DHS Secretary Duke acted outside of their  
26 statutory authority in issuing the waivers, and that both waivers are invalid and  
27 ineffective. The waivers are invalid because the described projects do not involve  
28 the installation of “additional” fencing or the construction of barriers in areas of

1 high illegal entry, and are not located where additional fencing would be most  
2 practical and effective. The San Diego and Calexico waivers are also invalid  
3 because Defendants are attempting to rely on a provision relating to expeditious  
4 construction 10 years after the statute was last amended and nine years after the  
5 authority to waive laws for expedited construction in priority areas expired.

6 11. Additionally, Plaintiffs seek an order declaring the San Diego and  
7 Calexico Waivers are improper and unconstitutional in that they attempt to waive  
8 laws to expedite the construction of undisclosed projects, denying Plaintiffs and  
9 other parties a reasonable opportunity to determine if the undisclosed projects are  
10 authorized by Section 102 and how the undisclosed projects might impact their  
11 interests.

12 12. Finally, Plaintiffs seek an order declaring Section 102 to be  
13 unconstitutional on both its face and as applied, and invalidating Section 102, the  
14 portion of the Executive Order that authorizes the use of Section 102 to build the  
15 Border Wall and the San Diego and Calexico Projects, and the San Diego and  
16 Calexico Waivers.

### 17 **JURISDICTION AND VENUE**

18 13. This Court has jurisdiction because this action arises under the United  
19 States Constitution pursuant to Article I, Article III, and the Fifth and Tenth  
20 Amendments of the United States Constitution, and also pursuant to 28 U.S.C. §§  
21 1331 and 1346, and 5 U.S.C. §§ 701 to 706.

22 14. An actual, present and justiciable controversy exists between the parties  
23 within the meaning of 28 U.S.C. § 2201(a), and this Court has authority to grant  
24 declaratory and injunctive relief under 28 U.S.C. §§ 1651, 2201 and 2202, and 5  
25 U.S.C. §§ 705 and 706.

26 15. The People have been granted a right to sue under the APA and NEPA  
27 because they fall within the APA's broad definition of a "person . . . adversely  
28 affected or aggrieved by agency action. . . ." 5 U.S.C. § 702; see also 5 U.S.C. §

1 551(2). The People and the Commission have also been granted the right to sue for  
2 violations of the CZMA. 5 U.S.C. § 702; see also, *State of California v. Norton*,  
3 311 F.3d 1162, 1170 (9th Cir. 2002).

4 16. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)  
5 because all parties have offices within this district and therefore reside in this  
6 district, because a substantial part of the events or omissions giving rise to the  
7 claims occurred in this district, and/or a substantial part of the property that is the  
8 subject of the action is situated in this district. Moreover, other cases that relate to  
9 Defendants' Border Wall projects have been filed in this judicial district.

### 10 **PARTIES**

11 17. The People of the State of California, as plaintiff, bring this action by and  
12 through Xavier Becerra, Attorney General of the State of California. Attorney  
13 General Becerra is the chief law officer of the State of California and has the  
14 authority to file civil actions in order to protect the People's rights and interests, the  
15 environment, and the natural resources of this State. Cal. Const., art V, § 13, Cal.  
16 Gov. Code §§ 12600-12612, 12511-12512. This challenge is brought pursuant to  
17 the Attorney General's independent constitutional, common law, and statutory  
18 authority. In this case, the interest the Attorney General seeks to advance and  
19 protect is not limited to a *parens patriae* interest in the general welfare of  
20 California's citizens, but rather encompasses California's procedural interests,  
21 interests in the specific natural resources of this State - such as wildlife, fish, and  
22 water - that are held in trust by the State for the People, economic interests in  
23 maintaining tourism and trade with Mexico, economic interests relating to the  
24 management of real property adjacent to the border, and sovereign interests in  
25 enacting and enforcing its own laws.

26 18. The Commission is a state agency designated as the agency responsible  
27 for implementing the CZMA within California's coastal zone and developing state  
28 programs designed to meet the goals of the CZMA. *American Petroleum Institute*

1 *v. Knecht*, 609 F.2d 1306 (9th Cir. 1979); Cal. Pub. Res. Code §§ 30008, 30330.

2 The Commission has jurisdictional and procedural interests in ensuring that  
3 activities within or affecting California’s coastal zone will not negatively affect any  
4 land or water uses within the coastal zone or negatively affect any natural resources  
5 within the coastal zone.

6 19. Defendant United States of America is responsible for enacting and  
7 enforcing laws that are consistent with the Constitution of the United States.

8 20. Defendant Department of Homeland Security (“DHS”) is the federal  
9 agency responsible for providing border security along the U.S.-Mexico border in a  
10 manner that is consistent with the laws and Constitution of the United States.

11 21. Defendant Elaine Duke, the Acting Secretary of DHS, is responsible for  
12 the actions and decisions that are being challenged by Plaintiffs in this action and is  
13 sued in her official capacity.

14 22. Defendant U.S. Customs and Border Protection (“CBP”) is a federal  
15 agency within DHS responsible for implementing the actions and decisions being  
16 challenged by Plaintiffs in this action.

17 23. Defendant Kevin K. McAleenan, the Acting Commissioner of CBP, is  
18 responsible for implementing the actions and decisions being challenged by  
19 Plaintiffs in this action and is sued in his official capacity.

20 **SUMMARY OF THE LAW**

21 **I. NATIONAL ENVIRONMENTAL POLICY ACT (“NEPA”)**

22 24. NEPA is the “basic national charter for protection of the environment.”  
23 40 C.F.R. § 1500.1 (a). It was enacted with the ambitious objectives of  
24 “encouraging productive and enjoyable harmony between man and his environment  
25 . . . promoting efforts which will prevent or eliminate damage to the environment  
26 and biosphere and stimulating the health and welfare of man; and enriching the  
27 understanding of the ecological systems and natural resources important to the  
28 Nation. . .” 42 U.S.C. 4321.

1           25. In order to achieve these goals, NEPA contains several “action forcing”  
2 procedures, most significantly the mandate to prepare an environmental impact  
3 statement (“EIS”) on major federal actions “significantly affecting the quality of the  
4 human environment.” *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332,  
5 348 (1989); 42 U.S.C. § 4332 (2)(C).

6           26. The Supreme Court has found that the preparation of an EIS promotes  
7 NEPA's broad environmental objectives in two primary ways: “It ensures that the  
8 agency, in reaching its decision, will have available, and will carefully consider,  
9 detailed information concerning significant environmental impacts; it also  
10 guarantees that the relevant information will be made available to the larger  
11 audience that may also play a role in both the decision making process and the  
12 implementation of that decision.” *Robertson*, 490 U.S. at 349.

13           27. NEPA mandates disclosure and consideration of direct, indirect, and  
14 cumulative environmental effects. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8,  
15 1508.27(b)(7).

16           28. Direct effects are caused by the action and occur at the same time and  
17 place as the proposed project. 40 C.F.R. § 1508.8(a). Indirect effects are caused by  
18 the action and are later in time or farther removed in distance, but are still  
19 reasonably foreseeable. 40 C.F.R. § 1508.8(b). These effects include “ecological  
20 (such as the effects on natural resources and on the components, structures, and  
21 functioning of affected ecosystems), aesthetic, historic, cultural, economic, social,  
22 or health whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.8.

23           29. In determining whether a federal action significantly affects the quality of  
24 the human environment, federal agencies must consider several factors relating to  
25 the “intensity” of the project, including: the “[u]nique characteristics of the  
26 geographic area such as proximity to historic or cultural resources, park lands . . .  
27 wetlands, wild and scenic rivers, or ecologically critical areas” (40 C.F.R. §  
28 1508.27(3)); “[t]he degree to which the effects on the quality of the human

1 environment are likely to be highly controversial” (40 C.F.R. § 1508.27(4));  
2 “[w]hether the action is related to other actions with individually insignificant but  
3 cumulatively significant impacts” (40 C.F.R. § 1508.27(7)); “[t]he degree to which  
4 the action may adversely affect an endangered or threatened species or its habitat  
5 that has been determined to be critical under the Endangered Species Act of 1973”  
6 (40 C.F.R. § 1508.27(9)); and, “[w]hether the action threatens a violation of  
7 Federal, State, or local law or requirements imposed for the protection of the  
8 environment.” 40 C.F.R. § 1508.27(10).

9 30. A proposal subject to NEPA exists where an agency has a goal and is  
10 actively preparing to make a decision on the alternatives in accomplishing that goal,  
11 regardless of whether the agency declares that such a proposal exists: “An agency  
12 shall commence preparation of an environmental impact statement as close as  
13 possible to the time the agency is developing or is presented with a proposal.” 40  
14 C.F.R. § 1502.5. A “Proposal exists at that stage in the development of an action  
15 when an agency subject to the Act has a goal and is actively preparing to make a  
16 decision on one or more alternative means of accomplishing that goal and the  
17 effects can be meaningfully evaluated.” 40 C.F.R. § 1508.23.

18 31. An EIS must include a statement of purpose and need to which the  
19 agency is responding, an analysis of a reasonable range of alternatives and a  
20 comparison of their environmental impacts, an analysis of affected areas and  
21 resources, and an assessment of the environmental consequences of the proposed  
22 action and alternatives (including direct, indirect and cumulative effects on the  
23 environment.) 40 C.F.R. §§ 1502.10-1502.19.

24 32. An EIS is prepared in two stages. A draft EIS must be prepared first and  
25 then published in order to obtain comments from the public and from governmental  
26 agencies. Following a period of public comment, the federal agency must then  
27 prepare a final EIS that responds to all comments received on the draft EIS. 40  
28 C.F.R. § 1503.

1           33. “The purpose of an EIS is to apprise decision makers of the disruptive  
2 environmental effects that may flow from their decisions at a time when they ‘retain  
3 [ ] a maximum range of options.’” *Conner v. Burford*, 848 F.2d 1441, 1446 (9th  
4 Cir. 1988.) Thus, “NEPA requires that the evaluation of a project’s environmental  
5 consequences take place at an early stage in the project’s planning process. *State of*  
6 *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) [citation omitted]. “The  
7 statement shall be prepared early enough so that it can serve practically as an  
8 important contribution to the decision making process and will not be used to  
9 rationalize or justify decisions already made.” 40 C.F.R. § 1502.5.

10           34. The People have a concrete and particularized interest in protecting “the  
11 State of California’s territory and its proprietary interests both from direct harm and  
12 from spill-over effects resulting from action on federal land.” *Sierra Forest Legacy*  
13 *v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011.) The construction of a Border  
14 Wall, prototypes for a Border Wall, and /or replacement fencing of a different type  
15 than the current fencing would have such direct and spill-over effects.

## 16 **II. ADMINISTRATIVE PROCEDURE ACT (“APA”)**

17           35. The APA provides for judicial review of “final agency action for which  
18 there is no other adequate remedy.” 5 U.S.C. § 704. Agency action is defined to  
19 include “the whole or a part of an agency rule, order, license, sanction, relief, or the  
20 equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). The APA  
21 requires that courts “hold unlawful and set aside agency action, findings, and  
22 conclusions” that are arbitrary, capricious, an abuse of discretion, or otherwise not  
23 in accordance with law, or without observance of procedure required by law.” 5  
24 U.S.C. § 706(2)(A), (D).

25           36. In reviewing a challenge to an agency’s failure to act, the APA directs  
26 that the court “shall compel agency action unlawfully withheld or unreasonably  
27 delayed.” 5 U.S.C. § 706(1).

28

1 **III. THE COASTAL ZONE MANAGEMENT ACT (“CZMA”)**

2 37. The Coastal Zone Management Act (“CZMA”) is a federal law intended  
3 to “preserve, protect, develop and where possible, to restore and enhance the  
4 resources of the nation’s coastal zone.” 16 U.S.C. § 1452.

5 38. The CZMA authorizes states to designate a “State Agency” responsible  
6 for implementing the CZMA within that particular state’s coastal zone and to  
7 develop state programs designed to meet the goals of the CZMA. The California  
8 Coastal Act designates the California Coastal Commission (“Commission”) as the  
9 “state agency” responsible for implementing the CZMA over California’s ocean  
10 coastline. Cal. Pub. Resources Code §§ 30300 et seq.

11 39. The Commission developed the California Coastal Management Program  
12 (“CCMP”) in order to achieve that goal. 16 U.S.C. § 1454(c); Cal. Pub. Resources  
13 Code § 30330. The federal government approved the CCMP in 1977 as compliant  
14 with the requirements of the CZMA.

15 40. Federal approval of the CCMP triggered the consistency requirements of  
16 the CZMA. When a federal agency undertakes an activity, occurring inside or  
17 outside the coastal zone, that affects directly or indirectly any land or water uses or  
18 natural resources of the California coastal zone, the CZMA requires that the agency  
19 must provide a “consistency determination” to the Commission. 16 U.S.C.  
20 § 1456(c)(1)(A). The consistency determination must include a statement  
21 indicating that the federal action will be undertaken in a manner that is consistent to  
22 the maximum extent practicable with the CCMP. 16 U.S.C. § 1456(C)(2); 15  
23 C.F.R. 930.32, 930.39. Alternatively, the federal agency may prepare a negative  
24 determination if the agency determines that the project will not affect any coastal  
25 use or resource.

26 41. The federal agency proposing a development project is required to  
27 provide the Commission with a “consistency determination” or “negative  
28 determination” “at the earliest practicable time in the planning” of the development

1 project. 15 C.F.R. § 930.36. “A consistency determination should be prepared  
2 following the development of sufficient information to reasonably determine the  
3 consistency of the activity with the management program, but before the Federal  
4 agency reaches a significant point of decision making in its review process, i.e.,  
5 while the Federal agency has the ability to modify the activity.” 15 C.F.R.  
6 § 930.36(b).

7 42. The Commission is entitled to review the federal agency’s consistency  
8 determination and may file objections to the determination and/or seek additional  
9 information from the agency regarding its determination. 15 C.F.R. §§ 930.39 -  
10 930.42. The Commission is further entitled to request mediation by the Secretary  
11 of Commerce if the dispute cannot be resolved and/or seek judicial review. 15  
12 C.F.R. § 930.116. If a federal agency decides to carry out an activity despite a  
13 Commission objection, the Commission is entitled to seek judicial review pursuant  
14 to the APA. *State of California v. Norton*, 311 F.3d 1162, 1170 (9th Cir. 2002).

#### 15 **IV. SECTION 102 OF IIRIRA**

16 43. Section 4 of the Executive Order relies upon Section 102 of IIRIRA as  
17 the legal basis for replacing border fences. 82 Fed. Reg. 8793.

18 44. Before 1996, there was no express statutory authority that permitted or  
19 required construction of barriers along U.S. borders. That changed when Congress  
20 passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996  
21 (Pub. L. 104-208). Section 102 of IIRIRA authorized the U.S. Attorney General, in  
22 consultation with the Commissioner of Immigration and Naturalization, to “take  
23 such actions as may be necessary to install additional physical barriers and  
24 roads . . . in the vicinity of the United States border to deter illegal crossings in  
25 areas of high illegal entry into the United States.” *Id.* § 102(a). Section 102 also  
26 required construction of second and third fences parallel to a 14-mile segment of  
27 primary fencing installed a few years earlier along the border near San Diego. The  
28 14-mile segment starts at the Pacific Ocean and extends 14 miles east. *Id.* § 102(b).

1 Further, Section 102 contained a provision that permitted the Attorney General to  
2 waive application of the ESA and NEPA “to the extent the Attorney General  
3 determines necessary to ensure expeditious construction of the barriers and roads  
4 under this section.” *Id.* § 102(c).

5 45. The Real ID Act of 2005 (Pub. L. 109-113 Div. B) amended Section 102  
6 of IIRIRA by transferring the waiver authority from the Attorney General to the  
7 Secretary of Homeland Security, and expanding the waiver authority to include “all  
8 legal requirements such Secretary, in such Secretary’s sole discretion, determines  
9 necessary to ensure expeditious construction of the barriers and roads under this  
10 section.” Section 102 did not specify the laws that Congress authorized the  
11 Secretary to waive. It also limited legal challenges to any waiver decision to  
12 constitutional claims, and eliminated appellate court review.

13 46. The Secure Fence Act of 2006 (Pub. L. 109-367) amended Section 102 of  
14 IIRIRA again by removing the provisions referring specifically to the 14-miles of  
15 fencing in San Diego, and instead directing DHS to construct two layers of  
16 reinforced fencing along five separate segments of the border, totaling more than  
17 800 miles.

18 47. The Department of Homeland Security Appropriations Act, 2008 (Pub.  
19 L. 110-161) (“2008 Amendment”) amended Section 102 a third and final time by  
20 removing requirements for doubled-layered fencing in specific locations, and by  
21 directing the Secretary of Homeland Security to construct reinforced fencing along  
22 not less than 700 miles of the border where it would be most practical and effective.  
23 The 2008 Amendment also amended the statute by striking the phrase “Security  
24 Features” from the heading for subdivision (b)(1) and replacing it with the phrase  
25 “Additional Fencing Along Southwest Border.”

26 48. The 2008 Amendment also amended the statute by compelling the  
27 Secretary of Homeland Security to designate “Priority Areas” for 370 miles of  
28 additional fencing, and by compelling the Secretary to expedite the construction of

1 said fencing in these “priority areas,” requiring the completion of construction by  
2 not later than December 31, 2008. (Pub. L. 110-161.). Thus, Congress imposed a  
3 December 31, 2008 deadline for the expedited construction of additional barriers  
4 and roads in priority areas under Section 102.

5 49. There have been no amendments to Section 102 of IIRIRA since the  
6 2008 Amendment was signed into law.

7 Subsections (a) and (b) of Section 102 currently state that:

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

13 (b) Construction of Fencing and Road Improvements Along the  
14 Border.—

15 (1) Additional fencing along southwest border.—

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

22 (B) Priority areas. — In carrying out this section, the Secretary  
23 of Homeland Security shall —

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

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

50. Subsection (c) of Section 102 further states “Notwithstanding any other  
provision of law, the Secretary of Homeland Security shall have the authority to  
waive all legal requirements such Secretary, in such Secretary’s sole discretion,  
determines necessary to ensure expeditious construction of the barriers and roads

1 under this section.” The section is limited to the installation of “additional barriers  
2 and roads . . . in areas of high illegal entry.” Section 102(a).

3 51. Section 102 of IIRIRA does not authorize the replacement of existing  
4 barriers or roads along the southwest border.

5 52. Section 102 of IIRIRA does not authorize the construction of temporary  
6 prototype walls along the southwest border.

7 53. Section 102 of IIRIRA does not authorize the construction of barriers and  
8 roads along the southwest border other than in “areas of high illegal entry into the  
9 United States” and in areas where the barriers would be most practical and  
10 effective.

11 54. Section 102 of IIRIRA imposed a deadline on the Secretary’s authority to  
12 identify and construct reinforced fencing in “priority areas” by no later than  
13 December 31, 2008.

## 14 **FACTUAL ALLEGATIONS**

### 15 **I. EXISTING INFRASTRUCTURE ALONG THE U.S.-MEXICO BORDER**

16 55. Between 1990 and 1993, the United States constructed 10-foot-high solid  
17 steel fencing along a 14-mile segment of the border in San Diego County, with its  
18 western end beginning at the Pacific Ocean. This section of fencing, which was  
19 placed directly on the U.S.-Mexico border, is referred to as the San Diego primary  
20 fence.

21 56. In 1994, USBP enacted a program known as “Operation Gatekeeper,”  
22 which included a large increase in the number of border patrol agents and other  
23 resources deployed to the San Diego Sector. Over a four-year period, the number  
24 of agents assigned to the San Diego sector increased by 150% and the number of  
25 seismic sensors increased by 171%.

26 57. In 1996, former INS began construction of a multi-tiered fencing project  
27 in the western-most portion of the San Diego sector. The project, which was  
28 initially referred to as the Triple-Fence Project and later known as the 14-Mile

1 Border Infrastructure Project (“14-Mile BIS”), called for the construction of new  
2 secondary and tertiary fencing that would parallel the existing, San Diego primary  
3 fence.

4 58. The entire 14-Mile BIS fell within the watershed of the Tijuana River, a  
5 river that culminates in the United States where the Tijuana River estuary meets the  
6 Pacific Ocean. The western-most 4.5 miles of the 14-Mile BIS abuts the Tijuana  
7 River National Estuarine Research Reserve (“Tijuana Reserve”), the County of San  
8 Diego’s Tijuana Valley Regional Park, and the State of California’s Border Field  
9 State Park. The United States Fish and Wildlife Service and other federal, state and  
10 local governmental entities reported that the 14-Mile BIS would result in the taking  
11 of several endangered plant and animal species, the destruction of critical habitat  
12 and the degradation of impaired bodies of water.

13 59. In September 2005, former DHS Secretary Michael Chertoff executed a  
14 waiver, pursuant to subsection (c) of Section 102 of IIRIRA, seeking to waive all  
15 federal and state “legal requirements deriving from or related to the subject of”  
16 several laws, including NEPA, the Endangered Species Act, the APA, the CZMA,  
17 and the Clean Water Act. The waiver referred specifically to the expedited  
18 construction of a “second and third fence” extending eastward from the Pacific  
19 Ocean as set forth in the original version of IIRIRA. 70 Fed. Reg. 55622.

20 60. The 14-Mile BIS Project was completed in 2009, approximately,  
21 consisting of secondary fencing that parallels the pre-existing primary fencing  
22 installed in the early 1990s. The 14-Mile Border Infrastructure Project also  
23 includes tertiary fencing to the north of the secondary fence in selected locations.  
24 Currently, as a result of the 14-Mile BIS, there are at least two fences along a 14-  
25 mile segment of the border beginning at the Pacific Ocean and extending eastward.  
26 In 2009, the Government Accountability Office projected that the cost of the final  
27 4.5 miles of the project was \$96 million, roughly \$21 million per mile.

28

1           61. Construction of the 14-Mile BIS resulted in the destruction of sensitive  
2 upland and wetland habitats, the taking of endangered plant and animal species, the  
3 spread of invasive plant species, and the increase in sedimentation within Border  
4 Field State Park and the Tijuana Reserve. These areas have also been designated as  
5 Federally critical and/or sensitive habitats.

6           62. DHS relied on Section 102's waiver provision to expedite the  
7 construction of additional primary pedestrian fencing and primary vehicle fencing  
8 in other parts of California, as well as in Arizona, New Mexico and Texas.

9           63. The Secretary of DHS invoked the waiver authority conferred in Section  
10 102 five times during the period of September 2005 through April 2008, in  
11 relatively close succession following amendments to Section 102 of IIRIRA during  
12 that same time period. 70 Fed. Reg. 55622; 72 Fed. Reg. 2535; 72 Fed. Reg.  
13 60870; 73 Fed. Reg. 19077; 73 Fed. Reg. 19078.

14           64. Each waiver related to particular border infrastructure projects at specific  
15 areas along the border and was used to expedite the construction of additional  
16 fencing or roads that did not previously exist; none was used to authorize the  
17 expedited replacement of pre-existing barriers. 70 Fed. Reg. 55622; 72 Fed. Reg.  
18 2535; 72 Fed. Reg. 60870; 73 Fed. Reg. 19077; 73 Fed. Reg. 19078.

19           65. Former DHS Secretary Chertoff waived 36 federal laws as well as state  
20 laws and regulations derived from or relating to several federal statutes. These laws  
21 included NEPA, ESA, Coastal Zone Management Act, Resource Conservation and  
22 Recovery Act and the Clean Water Act. 70 Fed. Reg. 55622; 72 Fed. Reg. 2535;  
23 72 Fed. Reg. 60870; 73 Fed. Reg. 19077; 73 Fed. Reg. 19078. Two of the waivers  
24 were used to waive laws enacted by the State of California. 70 Fed. Reg. 55622; 73  
25 Fed. Reg. 19078.

26           66. In 2008, before the December 31, 2008 deadline established by the 2008  
27 Amendment, former Secretary Chertoff identified more than 370 miles of priority  
28 areas for expedited construction and committed DHS to completing a total of 661

1 miles of border fencing by the first half of 2009. Former Secretary Chertoff issued  
2 waivers April 2008 to complete this construction. 73 Fed. Reg. 19077; 73 Fed.  
3 Reg. 19078.

4 67. Currently, there are 702 miles of fencing along 654 miles of the U.S.-  
5 Mexico border. This includes CBP's installation of 37 miles of secondary fencing  
6 and 14 miles of tertiary fencing, completing the goal of 700 miles as contemplated  
7 in IIRIRA.

8 **II. THE EXECUTIVE ORDER AND DESCRIPTIONS OF THE BORDER WALL**  
9 **PROJECT INCLUDING THE CONSTRUCTION OF PROTOTYPES, THE**  
10 **REPLACEMENT OF EXISTING FENCES AND THE CONSTRUCTION OF**  
11 **ADDITIONAL BARRIERS IN SELECTED LOCATIONS**

12 68. On January 25, 2017, President Trump issued Executive Order No.  
13 13767 authorizing the Secretary of Homeland Security to "take all appropriate steps  
14 to immediately plan, design, and construct a physical wall along the southern  
15 border, using appropriate materials and technology to most effectively achieve  
16 complete operational control of the southern border." The Executive Order defines  
17 the term "wall" as "a contiguous, physical wall or other similarly secure,  
18 contiguous, and impassable physical barrier." The Executive Order does not  
19 distinguish between "areas of high illegal entry" and other areas of the southwest  
20 border, nor does it direct the Secretary of Homeland Security to identify "priority  
21 areas" for construction. 82 Fed. Reg. 8793. The Executive Order cites the  
22 Immigration and Nationality Act (8 U.S.C. 1101 et seq.) and Section 102 of IIRIRA  
23 as authority for the project. 82 Fed. Reg. 8793.

24 69. In March 2017, DHS solicited design proposals for two different types of  
25 barriers, one a reinforced concrete wall and the other an unspecified barrier. DHS  
26 announced that it selected contractors to construct prototypes of their designs in the  
27 Otay Mesa area of San Diego County, in an area approximately 120 feet from the  
28 U.S. border. Construction of these prototypes is scheduled to commence in the fall  
of 2017.

1           70. On May 2, 2017, at a joint White House press briefing featuring former  
2 Secretary Kelly and Office of Management and Budget Director Mick Mulvaney,  
3 Mr. Mulvaney stated that DHS is complying with the Executive Order and fulfilling  
4 President Trump’s promise to build a Border Wall by replacing existing border  
5 fence in selected locations with a “steel wall.” He acknowledged that these  
6 replacement activities did not constitute the installation of “new” barriers.

7           71. DHS has already determined the location of portions of the proposed  
8 Border Wall project. On May 3, 2017, former White House Press Secretary Sean  
9 Spicer stated that as part of President Trump’s commitment to “building a wall,”  
10 the administration is currently engaged in projects to replace existing fencing with  
11 new “bollard walls” in Naco, Arizona and Sunland Park, New Mexico. Mr. Spicer  
12 further stated that the administration would begin its replacement of existing fences  
13 in “San Diego, El Paso and Rio Grande Valley.”

14           72. On June 13, 2017, Border Patrol chief Carla Provost testified at a  
15 Congressional hearing that four to eight prototypes will be built in the San Diego  
16 and Rio Grande Valley areas beginning in late summer 2017. Ms. Provost also  
17 confirmed that forty miles of fencing will be replaced in San Diego, El Paso, and El  
18 Centro.

19           73. In addition to these publicized aspects of the Border Wall project,  
20 Plaintiffs are informed and believe that DHS is currently engaged in the grading of  
21 and widening of dirt roads in areas along the border, including areas containing  
22 sensitive biological resources in east San Diego County, as part of the Border Wall  
23 project. DHS is engaged in this activity despite the fact that DHS failed to comply  
24 with the requirements of NEPA.

### 25 **III. THE SAN DIEGO AND CALEXICO WAIVERS**

26           74. The San Diego Waiver was published in the Federal Register on August  
27 2, 2017. 82 Fed. Reg. 35,984. The summary of the San Diego Waiver states that  
28 “[t]he Secretary of Homeland Security has determined, pursuant to law, that it is

1 necessary to waive certain laws, regulations and other legal requirements in order to  
2 ensure the expeditious construction of barriers and roads in the vicinity of the  
3 international land border of the United States near the city of San Diego in the state  
4 of California.” *Id.*

5 75. The San Diego Waiver further states the Secretary’s finding that the area  
6 “[s]tarting at the Pacific Ocean and extending to approximately one mile east of  
7 Border Monument 251” is “an area of high illegal entry,” that “[t]here is presently a  
8 need to construct physical barriers and roads, including the infrastructure projects”  
9 described earlier in the waiver, and that he has determined it necessary to “exercise  
10 the authority that is vested in me by Section 102(c) of IIRIRA as amended.” *Id.*

11 76. The San Diego Waiver purports to waive “in their entirety, with respect  
12 to the construction of roads and physical barriers . . . in the Project Area, the  
13 following statutes, including all federal, state, or other laws, regulations and legal  
14 requirements of, deriving from, or related to the subject of, the following statutes,  
15 as amended: The National Environmental Policy Act (Pub. L. 91–190, 83 Stat. 852  
16 (Jan. 1, 1970) (42 U.S.C. 4321 et eq.)), the Endangered Species Act (Pub. L. 93–  
17 205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 et seq.)), the Federal Water  
18 Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C.  
19 1251 et seq.)), the National Historic Preservation Act (Pub. L. 89–665, 80 Stat. 915  
20 (Oct. 15, 1966), as amended, repealed, or replaced by Pub. L. 113–287 (Dec. 19,  
21 2014) (formerly codified at 16 U.S.C. 470 et seq., now codified at 54 U.S.C.  
22 100101 note and 54 U.S.C. 300101 et seq.)), the Migratory Bird Treaty Act (16  
23 U.S.C. 703 et seq.), the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.),  
24 the Clean Air Act (42 U.S.C. 7401 et seq.), the Archeological Resources Protection  
25 Act (Pub. L. 96–95 (16 U.S.C. 470aa et seq.)), the Paleontological Resources  
26 Preservation Act (16 U.S.C. 470aaa et seq.), the Federal Cave Resources Protection  
27 Act of 1988 (16 U.S.C. 4301 et seq.), the National Trails System Act (16 U.S.C.  
28 1241 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Noise

1 Control Act (42 U.S.C. 4901 et seq.), the Solid Waste Disposal Act, as amended by  
2 the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.), the  
3 Comprehensive Environmental Response, Compensation, and Liability Act (42  
4 U.S.C. 9601 et seq.), the Archaeological and Historic Preservation Act (Pub. L. 86–  
5 523, as amended, repealed, or replaced by Pub. L. 113–287 (Dec. 19, 2014)  
6 (formerly codified at 16 U.S.C. 469 et seq., now codified at 54 U.S.C. 312502 et  
7 seq.)), the Antiquities Act (formerly codified at 16 U.S.C. 431 et seq., now codified  
8 54 U.S.C. 320301 et seq.), the Historic Sites, Buildings, and Antiquities Act  
9 (formerly codified at 16 U.S.C. 461 et seq., now codified at 54 U.S.C. 3201–  
10 320303 & 320101–320106), the Wild and Scenic Rivers Act (Pub. L. 90–542 (16  
11 U.S.C. 1281 et seq.)), the Farmland Protection Policy Act (7 U.S.C. 4201 et seq.),  
12 the Coastal Zone Management Act (Pub. L. 92–583 (16 U.S.C. 1451 et seq.)), the  
13 Wilderness Act (Pub. L. 88–577 (16 U.S.C. 1131 et seq.)), the Federal Land Policy  
14 and Management Act (Pub. L. 94–579 (43 U.S.C. 1701 et seq.)), the National  
15 Wildlife Refuge System Administration Act (Pub. L. 89–669 (16 U.S.C. 668dd–  
16 68ee)), the National Wildlife Refuge System Improvement Act of 1997 (Pub. L.  
17 105–57), National Fish and Wildlife Act of 1956 (Pub. L. 84–1024 (16 U.S.C.  
18 742a, et seq.)), the Fish and Wildlife Coordination Act (Pub. L. 73–121 (16 U.S.C.  
19 661 et seq.)), the Wild Horse and Burro Act (16 U.S.C. 1331 et seq.), an Act of Oct.  
20 30, 2000, Pub. L. 106–398, § 1, 114 Stat. 1654 (enacting into law § 2848 of Part II  
21 of Subtitle D of Title XXVIII of Division B of H.R. 5408 (114 Stat. 1654A–426),  
22 as introduced on Oct. 6, 2000), the Administrative Procedure Act (5 U.S.C. 551 et  
23 seq.), the Otay Mountain Wilderness Act of 1999 (Pub. L. 106–145), Sections  
24 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103–  
25 433), the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Eagle Protection Act  
26 (16 U.S.C. 668 et seq.), the Native American Graves Protection and Repatriation  
27 Act (25 U.S.C. 3001 et seq.), the American Indian Religious Freedom Act (42  
28 U.S.C. 1996), and the Religious Freedom Restoration Act (42 U.S.C. 2000bb).” *Id.*

1           77. The Calexico Waiver was published in the Federal Register on September  
2 12, 2017. 82 Fed. Reg. 42,829. Relying on language that mimics the San Diego  
3 Waiver, the summary of the Calexico Waiver states that “[t]he Secretary of  
4 Homeland Security has determined, pursuant to law, that it is necessary to waive  
5 certain laws, regulations and other legal requirements in order to ensure the  
6 expeditious construction of barriers and roads in the vicinity of the international  
7 land border of the United States near the city of Calexico in the state of California.”  
8 *Id.*

9           78. The Calexico Waiver states that the El Centro Sector, which includes the  
10 portion of the border near the City of Calexico, “remains an area of high illegal  
11 entry for which there is an immediate need to construct border barriers and roads.”  
12 The Calexico Waiver further states that “[t]o begin to meet the need for enhanced  
13 border infrastructure in the El Centro Sector, DHS will take immediate action to  
14 replace existing primary fencing” along a three-mile segment of the border  
15 extending westward from the Calexico West Land Port of Entry.

16           79. The Calexico Waiver purports to waive “in their entirety, with respect to  
17 the construction of roads and physical barriers . . . in the Project Area, the following  
18 statutes, including all federal, state, or other laws, regulations and legal  
19 requirements of, deriving from, or related to the subject of,” 27 federal statutes, the  
20 majority of which were also included in the San Diego Waiver.

21 **IV. THE FENCE REPLACEMENT AND PROTOTYPE CONSTRUCTION PROJECTS**  
22 **DO NOT CONSTITUTE “ADDITIONAL BARRIERS,” WILL NOT BE**  
23 **INSTALLED IN “AREAS OF HIGH ILLEGAL ENTRY,” AND WILL NOT BE**  
24 **INSTALLED IN AREAS WHERE ADDITIONAL FENCING WOULD BE MOST**  
25 **PRACTICAL OR EFFECTIVE**

26           80. The CBP divides the southwest border into nine sectors. The United  
27 States Border Patrol (“USBP”), which is responsible for securing the border  
28 between ports of entry, maintains data on the number of deportable migrants  
apprehended crossing the border (between the ports of entry) in each of the nine  
sectors. The apprehension data is regarded as the primary indicator of immigration

1 enforcement and the number of apprehensions is widely understood to correlate  
2 with the number of unauthorized entries.

3 81. President Trump’s assertion that there has been a “recent surge of illegal  
4 immigration along the southwest border” is inaccurate. Apprehension data  
5 published by the USBP indicates that the number of migrants apprehended by  
6 USBP while crossing the southwest border without authorization has fallen sharply  
7 since 2000, and particularly since 2006.<sup>1</sup> In a September 2017 report published by  
8 DHS and the Office of Immigration Statistics, DHS admits that the number of  
9 southwest border apprehensions in 2016 was 75% lower than it was in 2000.<sup>2</sup> The  
10 report also estimates that there was a 91% reduction in the number of successful  
11 illegal entries during that same time period. *Id.* According to DHS, “the southwest  
12 land border is more difficult to illegally cross today than ever before.” *Id.* In fact,  
13 DHS admits that illegal entries along the southwest border are at their lowest levels  
14 “since 2000, and likely since the early 1970s.” *Id.*

15 82. In particular, from FY 2000 to FY 2016, there have been sharp declines  
16 in the number of deportable migrants apprehended by the USBP in the San Diego,  
17 El Centro and other sectors. The San Diego and El Centro sectors are located  
18 within California’s geographic boundaries and the most western of the CBP’s nine  
19 border sectors. The USBP’s apprehension data indicates there were 151,681  
20 deportable migrants apprehended in the San Diego sector during FY 2000  
21 compared with 31,891 apprehended during FY 2016, a reduction of 79%. In the El  
22 Centro sector there were 238,126 deportable migrants apprehended in FY 2000  
23 compared with 19,448 in FY 2016, a reduction of nearly 92%. Of the total number  
24 of deportable migrants that were apprehended by the USBP along the southwest

25 \_\_\_\_\_  
26 <sup>1</sup> Official website of the Department of Homeland Security,  
<https://www.cbp.gov/newsroom/media-resources/stats>, U.S. Border Patrol Monthly  
Apprehensions (FY 2000 – FY 2016) (last visited August 25, 2017).

27 <sup>2</sup> <https://www.dhs.gov/southwest-border-security> (last visited September 18,  
28 2017).

1 border during FY 2016, less than 8% occurred in the San Diego Sector and less  
2 than 5% occurred in the El Centro sector.<sup>3</sup>

3 83. According to the DHS's website, the San Diego Sector encompasses  
4 56,831 square miles including 931 miles of coastal border from the California  
5 border with Mexico north to Oregon. The San Diego Sector's primary operational  
6 area of responsibility consists of 7,000 square miles, including 60 linear miles of  
7 international boundary with Mexico and 114 coastal border miles along the Pacific  
8 Ocean. USBP admits that there have been significant declines in the number of  
9 undocumented entries in the San Diego Sector over the last three decades.<sup>4</sup>

10 84. On April 20, 2017, former Secretary Kelly stated that CBP has observed  
11 sharp reductions in the number of unauthorized entries across the southwestern  
12 border over the last several months, before the construction of any new border  
13 barriers or the replacement of any existing barriers.

14 85. The San Diego Waiver describes a "Project Area" that includes an area  
15 where multiple layers of primary, secondary and tertiary fencing already exist.  
16 During a televised interview on April 20, 2017, former Secretary Kelly admitted  
17 that in locations along the border where fencing already exists, that fencing is  
18 "very, very effective" and "remarkably effective in keeping down the amount of  
19 illegal movement across" the border.

20 86. In an infrastructure planning document prepared by CBP relating to the  
21 Border Wall Project, dated March 27, 2017, CBP rated its nine sectors along the  
22 southwest border according to infrastructure needs within each sector. CBP  
23 admitted that there are no "high priority" areas for the construction of border  
24 barriers in California, Arizona, or west Texas.

25 <sup>3</sup> Official website of the Department of Homeland Security,  
26 <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california> (last visited August 25, 2017).

27 <sup>4</sup> Official website of the Department of Homeland Security,  
28 <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california> (last visited August 25, 2017).

1 87. The proposed San Diego Project, Calexico Project, and the larger Border  
2 Wall Project include the replacement of existing primary and secondary fencing in  
3 areas that are neither “areas of high illegal entry,” nor areas where additional  
4 barriers will be most practical or effective.

5 88. There have been no amendments to Section 102 of IIRIRA since the  
6 2008 Amendment was signed into law authorizing any legal waivers for additional  
7 construction projects outside those projects specifically authorized and  
8 contemplated when it was enacted. Congressional authority under Section 102  
9 provided for a December 31, 2008 completion date for those specified projects  
10 involving construction and reinforcement of fencing. The proposed Border Wall  
11 Project, the San Diego Project and the Calexico Project include the replacement of  
12 existing primary and secondary fencing in areas that were not identified as  
13 “priority” areas before the 2008 completion date set forth in Section 102 of IIRIRA.

14 **V. DEFENDANTS’ BORDER WALL PROJECT THREATENS THE STATE OF**  
15 **CALIFORNIA’S ECONOMIC, PROCEDURAL AND SOVEREIGN INTERESTS,**  
16 **AND WILL HARM THE STATE’S NATURAL RESOURCES**

17 89. California owns real property and is financially responsible for the  
18 management of environmentally sensitive lands that are adjacent to the US-Mexico  
19 border, including areas where DHS seeks to replace primary and secondary fencing  
20 as part of the Border Wall project. These properties include the 777-acre park  
21 known as Border Field State Park, and the Tijuana River National Estuarine  
22 Research Reserve which are located in the most southwestern portion of the  
23 continental United States and home to more than two dozen endangered and/or  
24 specially listed plant and animal species. These properties are located within  
25 California’s coastal zone.

26 90. California incurs ongoing costs relating to the management and  
27 maintenance of Border Field State Park and the Tijuana Reserve. These include  
28 expenses relating to the management of sensitive wetland and upland habitats  
within the reserve, the upkeep of roads, trails and recreational areas, and the

1 removal of invasive species. California is also financially responsible for removal  
2 and disposal of sediment from the “Goat Canyon Sediment Basins,” sediment  
3 basins that were constructed in Border Field State Park to reduce the impacts of  
4 sedimentation from tributaries to the Tijuana River and upland areas along the  
5 border.

6 91. California will suffer direct injuries to its proprietary interests caused by  
7 the proposed Border Wall’s negative impacts on biological resources within  
8 California’s areas of responsibility, increases in invasive species, and/or increased  
9 sedimentation.

10 92. Further, the Executive Order and the threat of the Border Wall has had  
11 and will have a “chilling effect” on California tourism from Mexico. California  
12 prides itself on its open and welcoming nature to citizens and non-citizens alike. It  
13 is this nature that helps drive the State’s strong tourism economy, especially from  
14 Mexico, our neighbor to the South. Tourism from Mexico and other countries is a  
15 “lead economic driver” of the State. Mexicans made 7.9 million trips to California  
16 in 2016 and in total visitors from Mexico spent more than 3 billion dollars in  
17 California in 2015.<sup>5</sup> An estimate from the global research firm Tourism Economics  
18 estimates Mexican tourism will drop by 7% in 2017, with a continuing downward  
19 trend in 2018.<sup>6</sup>

20 93. California also has concrete and particularized interests in protecting its  
21 natural, recreational, agricultural, historical and cultural resources for the use,  
22 enjoyment and benefit of California’s residents. *Massachusetts v. EPA*, 549 U.S.

23  
24  
25 <sup>5</sup> Visitcalifornia.com, [http://industry.visitcalifornia.com/media/uploads/files/editor/California%20Internat  
26 \[http://industry.visitcalifornia.com/Find-  
27 \\[http://www.latimes.com/world/mexico-americas/la-fg-  
28 \\\[mexico-us-travel-20170414-story.html\\\]\\\(http://www.latimes.com/world/mexico-americas/la-fg-mexico-us-travel-20170414-story.html\\\)\\]\\(http://www.latimes.com/world/mexico-americas/la-fg-mexico-us-travel-20170414-story.html\\)\]\(http://industry.visitcalifornia.com/Find-Research/California-Statistics-Trends/\)](http://industry.visitcalifornia.com/media/uploads/files/editor/California%20International%20Visitor%20Volume%20and%20Spend%202015Final%2012-6-16.pdf) (last visited September 10, 2017); [http://industry.visitcalifornia.com/Find-  
27 \[http://www.latimes.com/world/mexico-americas/la-fg-  
28 \\[mexico-us-travel-20170414-story.html\\]\\(http://www.latimes.com/world/mexico-americas/la-fg-mexico-us-travel-20170414-story.html\\)\]\(http://www.latimes.com/world/mexico-americas/la-fg-mexico-us-travel-20170414-story.html\)](http://industry.visitcalifornia.com/Find-Research/California-Statistics-Trends/) (last visited September 10, 2017).

<sup>6</sup> Los Angeles Times, [http://www.latimes.com/world/mexico-americas/la-fg-  
28 \[mexico-us-travel-20170414-story.html\]\(http://www.latimes.com/world/mexico-americas/la-fg-mexico-us-travel-20170414-story.html\)](http://www.latimes.com/world/mexico-americas/la-fg-mexico-us-travel-20170414-story.html)

1 497, 518 (2007); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir.  
2 2011).

3 94. The U.S.-Mexico border includes a 140-mile segment that also forms the  
4 southern border of California. Within California, the border extends west from the  
5 Colorado River at the State's southeastern corner, across the low-lying  
6 Colorado/Sonoran Desert and farmland in the Imperial Valley, over the rugged  
7 Otay Mountains, and all the way to the sands of Imperial Beach and the Pacific  
8 Ocean. These regions are home to several endangered and/or specially listed plant  
9 and animal species.

10 95. Pursuant to the public trust doctrine and other state laws, California has a  
11 duty to protect and preserve these natural and biological resources within its  
12 boundaries.

13 96. Construction of the Border Wall will negatively impact sensitive  
14 biological habitats near the border as well as endangered and/or specially listed  
15 plant and animal species.

16 97. Construction of the Border Wall will involve the use of heavy machinery,  
17 trucks and other equipment that will emit greenhouse gases. These emissions will  
18 not be quantified or analyzed with respect to their impact on climate change.  
19 Additionally, potential alternative border security projects will not be considered  
20 and mitigation measures will not be addressed pursuant to the normal NEPA review  
21 process. The Border Wall construction will also involve the discharge of pollutants  
22 through storm water runoff and the discharge of waste water from the project to  
23 state lands and state waters. The Border Wall construction and the Border Wall  
24 itself will therefore have significant negative impacts on California lands, air and  
25 water.

26 98. California will suffer direct injuries to its proprietary interests caused by  
27 the proposed Border Wall's negative impacts on biological resources within  
28 California's areas of responsibility, increases in invasive species, and/or increased

1 sedimentation resulting from and/or caused by construction of the Border Wall.

2 99. The areas along California's southern border contain recreational,  
3 historical, and cultural resources enjoyed by California's residents and visitors to  
4 California. These resources include, but are not limited to beaches, hiking and  
5 mountain-bike trails, off-road vehicle recreational areas, historical monuments  
6 marking the Treaty of Guadalupe and cultural gathering places such as Friendship  
7 Park. These resources attract visitors to California and help to stimulate California's  
8 economy.

9 100. The proposed Border Wall project will negatively impact the ability of  
10 California residents and visitors to obtain access to and enjoy these recreational,  
11 historical and cultural resources.

12 101. DHS has injured and continues to injure California by failing to disclose  
13 and consider the direct, indirect, and cumulative environmental effects that the  
14 Border Wall project will have on the resources of California.

15 102. In addition, California suffered and continues to suffer an injury to its  
16 procedural rights under the deliberation-forcing requirements of NEPA, which  
17 mandates that DHS evaluate various alternatives, the direct and indirect impacts  
18 that each alternative will have on the surrounding environment, and the means by  
19 which those impacts may be mitigated. California also suffered and continues to  
20 suffer an injury to its procedural rights under the consistency requirements of the  
21 CZMA. California's procedural rights in this regard are related to the protection of  
22 the concrete and particularized interests within its territory, as alleged above.  
23 *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178-1179 (9th Cir. 2011).

24 103. Defendants' reliance on Section 102 of IIRIRA as authority for  
25 construction of a Border Wall and issuance of a purported waiver of state laws  
26 infringes upon California's sovereign right "to create and enforce a legal code, both  
27 civil and criminal." *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982);  
28 *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011).

**FIRST CLAIM FOR RELIEF**

(For Declaratory and Injunctive Relief Against Each Defendant Based on Defendants' Failure to Comply with NEPA and the APA)

104. Plaintiffs hereby reallege and incorporate each and every paragraph above.

105. NEPA compels federal agencies to evaluate and consider the direct, indirect and cumulative effects that a proposed development project or program will have on the environment by requiring the agency to prepare an environmental impact statement (EIS) that analyzes a reasonable range of alternatives and compares each alternative's environmental impacts. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.27(b)(7). The EIS must also include an analysis of the affected areas and resources and the environmental consequences of the proposed action and the alternatives. 40 C.F.R. §§ 1502.10 - 1502.19.

106. The preparation of an EIS not only forces the federal agency to consider these impacts on the environment but it also guarantees that the relevant information will be made public so that interested parties may play a role in both the decision making process and the implantation of that decision. *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 348 (1989); 42 U.S.C. § 4332 (2)(C).

107. The agency must commence preparation of the EIS "as close as possible to the time that the agency is developing or is presented with a proposal" so that the environmental effects of each alternative can be evaluated in a meaningful way. 40 C.F.R. § 1502.23.

108. Defendants are in violation of NEPA because they failed to prepare an EIS concerning a construction project that will span hundreds of miles in four states and in areas that either contain or are adjacent to environmentally sensitive natural resources.

109. California has concrete and particularized interests in the protection of its

1 own proprietary interests near the border as well as the protection of natural,  
2 historical, cultural, economic and recreational resources within its jurisdictional  
3 boundaries. Defendants' failure to comply with NEPA injures and denies  
4 California's procedural rights necessary to protect these interests.

5 110. The People seek a judicial declaration that Defendants violated NEPA  
6 and further seeks an order enjoining DHS, requiring it to comply with NEPA before  
7 taking any further action related to the construction of the Border Wall project,  
8 including but not limited to the replacement of existing fences, the building of any  
9 prototypes, and the grading and widening of dirt roads.

## 10 **SECOND CLAIM FOR RELIEF**

11 (For Declaratory Relief and Injunctive Relief as to Each Defendant Based on  
12 Defendants' Failure to Comply with the CZMA and the APA)

13 111. Plaintiffs hereby reallege and incorporate each and every paragraph  
14 above.

15 112. The western portions of the San Diego Project fall within the coastal zone  
16 and, pursuant to the CZMA, California Coastal Act and the CCMP, are subject to  
17 the jurisdiction of the Commission.

18 113. The San Diego Project will affect, directly and indirectly, land and water  
19 uses within the coastal zone. The San Diego Project will also affect, directly and  
20 indirectly, natural resources within the coastal zone.

21 114. Under the CZMA, California Coastal Act and the CCMP, DHS is  
22 required to provide the Commission with a consistency determination  
23 demonstrating that their proposed Border Wall/fence replacement project will be  
24 undertaken in a manner that is consistent to the maximum extent practicable with  
25 the CCMP.

26 115. The failure of DHS to submit a timely consistency determination violates  
27 the CZMA, the California Coastal Act and the CCMP.

28 116. DHS' conduct caused and will continue to cause an injury to Plaintiffs'

1 procedural rights under the CZMA.

2 117. Plaintiffs seek a judicial declaration that DHS violated the CZMA and for  
3 an order enjoining DHS from taking any further action relating to the construction  
4 of the Border Wall/fence replacement project until it complies the requirements of  
5 the CZMA.

6 **THIRD CLAIM FOR RELIEF**

7 (For Declaratory Relief Against Each Defendant on the Grounds that the San  
8 Diego Project, Calexico Project and Larger Border Wall Project Are Not  
Authorized by Section 102 of IIRIRA (Ultra Vires Violations))

9 118. Plaintiffs hereby reallege and incorporate each and every paragraph  
10 above.

11 119. The Executive Order and the San Diego and Calexico Waivers cite  
12 Section 102 of IIRIRA as authority for construction of the Border Wall and the San  
13 Diego and Calexico Projects. 8 U.S.C. § 1103 note.

14 120. Section 102 of IIRIRA requires the Secretary of Homeland Security to  
15 take actions to install specified miles of “additional barriers and roads” or  
16 “additional fencing” along United States’ southwest border. The 2008 Amendment  
17 to Section 102 of IIRIRA reflects both Congress’ recognition that fences already  
18 existed along portions of the border and its intent to better secure the border by  
19 installing additional fencing in areas where none existed at the time. 8 U.S.C.  
20 § 1103 note, subdiv. (a).

21 121. However, Section 102 of IIRIRA does not authorize or direct the  
22 Secretary of Homeland Security, or any other person or entity, to replace already  
23 existing fencing.

24 122. In addition, Section 102 of IIRIRA authorizes the Secretary of DHS to  
25 take actions as may be necessary “to install additional physical barriers and roads”  
26 in “areas of high illegal entry into the United States.” 8 U.S.C. § 1103 note, subdiv.  
27 (a).

28 123. The proposed San Diego Project and the proposed Calexico Project are

1 not in areas of high illegal entry and, therefore, are not authorized by Section 102 of  
2 IIRIRA. In fact, multiple layers of fencing already exist in the San Diego Project  
3 area and DHS has given no facts to suggest that rebuilding an existing fence will  
4 further secure the border, especially as compared to areas without any fencing.  
5 DHS has admitted the existing fences are effective in reducing unlawful entries into  
6 the United States, and specifically within the San Diego Project area.

7 124. Additionally, the proposed San Diego Project and proposed Calexico  
8 Project are not located in areas where the fencing would be most practical and  
9 effective. DHS has made no findings that rebuilding an existing fence in the San  
10 Diego area will reduce the number of illegal entries in the area. Further, DHS  
11 admits that the most practical and effective areas to build fencing to further secure  
12 the border, would be in areas where no fence exists and where the fence would have  
13 a deterrent effect. The DHS has made no such findings here and, therefore, the  
14 replacement of existing fencing and construction of prototypes are not authorized  
15 by Section 102 of IIRIRA.

16 125. Further, the larger proposed Border Wall Project, as reflected in the  
17 Executive Order, is not authorized by Section 102 of IIRIRA because it fails to  
18 distinguish between different areas of the border and whether a particular area is an  
19 area of high illegal entry into the United States.

20 126. Section 102 also does not authorize the construction of prototype barriers  
21 that are to be used for the purpose of planning and not for the purpose of preventing  
22 illegal entries. The prototypes fall outside the “additional physical barriers”  
23 contemplated by Section 102 of IIRIRA.

24 127. Plaintiffs seek a judicial declaration that Defendants’ Border Wall  
25 Project, which includes but is not limited to the construction of prototypes in San  
26 Diego County, the construction of the San Diego Project and the Calexico Project,  
27 the replacement of existing fences with alternative fencing, barriers, and/or walls,  
28 the installation of barriers in areas that are not areas of high illegal entry, as well as

1 the construction of over 1,000 miles of new barriers along the southern border that  
2 were not identified or constructed prior to the deadline specified in the statute, are  
3 not authorized under Section 102 of IIRIRA.

#### 4 **FOURTH CLAIM FOR RELIEF**

5 (For Declaratory Relief Against Each Defendant on the Grounds that the  
6 Secretary’s Waiver Authority Expired on December 31, 2008 (Ultra Vires  
Violations Relating to The Waiver Provision))

7 128. Plaintiffs hereby reallege and incorporate each and every paragraph  
8 above.

9 129. Section 102 required the DHS Secretary to construct reinforced fencing  
10 along not less than 700 miles of the southwest border where fencing would be most  
11 practical and effective.

12 130. Section 102 also required the DHS Secretary to identify the 370 miles or  
13 other mileage as determined by the Secretary of “priority areas . . .where fencing  
14 would be most practical and effective in deterring smugglers and aliens attempting  
15 to gain illegal entry into the United States,” and to complete the construction of  
16 fencing in those priority areas, by not later than December 31, 2008. 8 U.S.C. §  
17 1103 note, subdiv. (b)(1)(B).

18 131. DHS identified “priority areas” pursuant to Section 102 before the  
19 December 31, 2008 deadline and completed its construction of barriers in those  
20 areas shortly after the deadline. Currently, there are 702 miles of border primary,  
21 secondary, and tertiary fencing along the border. Thus, DHS satisfied the mileage  
22 requirements set by Congress and it did so within, or shortly after, the time frame  
23 set by Congress.

24 132. DHS did not include the project areas described in the San Diego or  
25 Calexico Waivers as part of its obligation to identify and construct necessary  
26 barriers in Priority Areas prior to the December 31, 2008, deadline.

27 133. The authority of the Secretary to identify “priority areas” for construction  
28 and to expedite the construction of barriers or roads in these areas under Section

1 102 expired on December 31, 2008.

2 134. Plaintiffs seek a judicial declaration that Defendants’ authority to  
3 expedite the construction of barriers and roads through the use of Section 102’s  
4 waiver provision expired on December 31, 2008, and, that the San Diego Waiver  
5 and the Calexico Waiver are ineffective and invalid.

6 **FIFTH CLAIM FOR RELIEF**

7 (For Declaratory Relief Against Each Defendant on the Grounds that the San  
8 Diego and Calexico Waivers Are Invalid Because Each Waiver Fails to Satisfy the  
Requirements of Section 102 of IIRIRA)

9 135. Plaintiffs hereby reallege and incorporate each and every paragraph  
10 above.

11 136. In order to exercise the waiver authority expressed at subsection (c) of  
12 Section 102 of IIRIRA, the Secretary of DHS must satisfy the prerequisites for  
13 expedited construction as set forth in the other provisions of Section 102.

14 137. Here, the San Diego Waiver is invalid because former Secretary Kelly  
15 failed to present findings and cannot support findings sufficient to establish that the  
16 fence replacement and the prototype construction projects described in the waiver  
17 constitute “additional” barriers for the purpose of deterring illegal crossings, as  
18 required by subdivision (a) of Section 102 of IIRIRA. Similarly, the Calexico  
19 Waiver is invalid because Acting Secretary Duke failed to present findings and  
20 cannot support findings sufficient to establish that the fence replacement project  
21 described in the waiver constitutes “additional” barriers for the purpose of deterring  
22 illegal crossings, as required by subdivision (a) of Section 102 of IIRIRA.

23 138. The San Diego and Calexico Waivers are also invalid because former  
24 Secretary Kelly and Acting Secretary Duke failed to present findings and cannot  
25 support findings sufficient to establish that the San Diego Project and Calexico  
26 Project are being constructed in areas of “high illegal entry,” as required by  
27 subdivision (a) of Section 102 of IIRIRA. While the San Diego Waiver states that  
28 the San Diego sector is one of the busiest in the nation and refers to the number of

1 apprehensions and drug arrests in the sector as a whole, reports published by DHS,  
2 USBP and statements made by former Secretary Kelly, establish that the 15-mile  
3 sector described in the San Diego Waiver is not an area of high illegal entry.

4 Similarly, reports published by DHS and the USBP indicate that the number of  
5 apprehensions in the El Centro Sector is low when compared to other border patrol  
6 sectors.

7 139. The San Diego and Calexico Waivers are also invalid because former  
8 Secretary Kelly and Acting Secretary Duke, respectively, failed to present findings  
9 and cannot support findings sufficient to establish that the project areas are located  
10 in areas where the additional barriers will be the “most practical and effective,” as  
11 required by subdivision (b) of Section 102 of IIRIRA.

12 140. Further, the San Diego Waiver is invalid because former Secretary Kelly  
13 failed to describe the “various border infrastructure projects” that DHS intends to  
14 install in the Project Area. In other words, DHS seeks to waive federal, state and  
15 local laws for projects that it fails to describe and that it may seek to construct at  
16 some time in the future, without any time limitation. As a result, Defendants are  
17 denying Plaintiffs and other parties with a reasonable opportunity to assess whether  
18 said undisclosed projects, that may be included within the San Diego Project area,  
19 comply with the prerequisites of the statute and whether the projects will impact  
20 their interests within the time frame established by subdivision (c) of Section 102 of  
21 IIRIRA.

22 141. The San Diego and Calexico Waivers are also invalid because  
23 Defendants seek to waive federal, state, and local laws for the continued and  
24 indefinite “upkeep of physical barriers, roads, supporting elements, drainage,  
25 erosion controls and safety features. . .” The San Diego and Calexico Waivers lack  
26 any definition or time limitations with respect to any of these terms. As a result,  
27 Defendants cannot satisfy their burden of establishing the waivers are needed for  
28 the expedited construction of barriers or roads, or that, at the time the upkeep

1 eventually occurs, the infrastructure is located in an area of high illegal entry.

2 142. The San Diego and Calexico Waivers are also invalid because the project  
3 areas described in each waiver were not identified as “priority areas,” and the  
4 projects were not constructed before December 31, 2008, the deadline to designate  
5 and construct fencing in priority areas.

6 143. Plaintiffs seek a judicial declaration that the waiver of laws articulated in  
7 the San Diego Waiver and the Calexico Waiver is ineffective and invalid.

8 **SIXTH CLAIM FOR RELIEF**

9 (The San Diego Waiver Violates Article III of the United States Constitution and  
10 the Due Process Clause of the Fifth Amendment)

11 144. Plaintiffs hereby reallege and incorporate each and every paragraph  
12 above.

13 145. Article III of the United States Constitution safeguards both the powers  
14 of the judicial branch and litigants’ rights to have their claims decided by a  
15 judiciary that is independent of pressures from the legislative and executive  
16 branches. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848  
17 (1986). Article III also ensures the federal judiciary is empowered to resolve  
18 claims brought by the states and controversies in which the United States is a party.  
19 (Article III, Sec. 2.)

20 146. The Due Process Clause of the Fifth Amendment and principles of  
21 fundamental fairness further guarantee that judicial proceedings will be conducted  
22 in a manner that ensures parties reasonable notice of matters impacting their  
23 interests and a meaningful opportunity to present grievances or defenses under the  
24 procedures prescribed by law. *Turner v. Rogers*, 564 U.S. 431, 444-445 (2011); see  
25 also, *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

26 147. Subdivision (c) of Section 102 of IIRIRA provides that the district courts  
27 of the United States shall have exclusive jurisdiction to hear all causes or claims  
28 arising from any action or decision made by the Secretary of DHS pursuant to the

1 waiver provision. Subdivision (c) further provides that any such cause or claim  
2 shall be filed within 60 days of the Secretary's decision under the waiver provision.  
3 Under this process, the Secretary's publication of the waiver in the Federal Register  
4 is intended to place potential litigants on notice of the need to sue.

5 148. The Attorney General is the chief law officer of the State of California,  
6 who by the California Constitution has the authority to file civil actions in order to  
7 protect the People's rights and interests, the environment, and the natural resources  
8 of this state. Cal. Const., art V, § 13, Cal. Gov. Code §§ 12600-12612, 12511-  
9 12512. The People have jurisdictional, procedural, economic, and sovereign  
10 interests that are being impacted, and will continue to be impacted, by the San  
11 Diego Waiver and San Diego Project.

12 149. The Commission is a state agency designated as the agency responsible  
13 for implementing the CZMA within California's coastal zone and developing state  
14 programs designed to meet the goals of the CZMA. *American Petroleum Institute v.*  
15 *Knecht*, 609 F.2d 1306 (9th Cir. 1979); Cal. Pub. Res. Code §§ 30008, 30330. The  
16 San Diego Project is planned to take place, in part, within the coastal zone. Thus,  
17 the Commission has jurisdictional and procedural interests that are being impacted,  
18 and will continue to be impacted, by the San Diego Waiver and the San Diego  
19 Project.

20 150. Plaintiffs have a right to sue under subdivision (c) of Section 102 of  
21 IIRIRA and are entitled a judicial process that is fundamentally fair, which includes  
22 reasonable notice of the projects for which federal and state laws are being waived  
23 and a meaningful opportunity concerning whether those projects are authorized by  
24 Section 102 of IIRIRA.

25 151. The San Diego Waiver states that DHS intends to install "various border  
26 infrastructure projects" within the "Project Area," a 15-mile segment of the border.  
27 While the San Diego Waiver identifies two examples of infrastructure projects,  
28 specifically the replacement of primary fencing and the construction of temporary

1 barrier prototypes, DHS' waiver is not limited to those examples. DHS seeks to  
2 waive the application of more than 30 federal laws, as well as county and state laws,  
3 in order to expedite the construction of "various border infrastructure projects"  
4 without providing any description of all the projects DHS intends to construct. The  
5 waiver fails to provide reasonable notice of the projects that DHS intends to  
6 construct.

7 152. The San Diego Waiver also fails to provide reasonable notice of when  
8 any of these undisclosed projects will be constructed. While the San Diego Waiver  
9 includes the statement that the various projects will be "immediately implemented,"  
10 DHS and Trump Administration officials have admitted that DHS does not have  
11 sufficient funding in its current budget to construct all of the projects that it wants  
12 to build, including the replacement of secondary fencing. The funding of this  
13 secondary fencing and other undisclosed projects is dependent on the availability of  
14 funding in future budgets. Thus, DHS is attempting to apply Section 102's  
15 expedited construction provision to projects that it cannot construct in an  
16 expeditious manner, if ever.

17 153. The San Diego Waiver also fails to provide reasonable notice of where  
18 the undisclosed infrastructure projects will be built. For example, although the San  
19 Diego Waiver describes a 15-mile segment of the border as the "Project Area," the  
20 San Diego Waiver fails to state how far the project area will extend in a northerly  
21 direction or where the undisclosed projects will be placed in relation to real  
22 property owned by the State of California. The San Diego Waiver also leaves open  
23 the possibility that DHS may, in the future, condemn property for the purpose of  
24 constructing projects that are currently undisclosed.

25 154. The San Diego Waiver also attempts to waive laws for the continued  
26 "upkeep of physical barriers, roads, supporting elements, drainage, erosion controls  
27 and safety features . . ." The San Diego Waiver lacks any definition or time  
28 limitations with respect to any of these terms. By applying the waiver provision to

1 the continued and indefinite “upkeep” of undefined “supporting elements” and  
2 “safety features,” the Secretary is attempting to extend his waiver authority to  
3 matters beyond the expedited construction of border barriers and roads.

4 155. The vague and indefinite nature of the San Diego Waiver renders  
5 Plaintiffs’ purported right to sue under subdivision (c) of Section 102 of IIRIRA an  
6 illusory right that fails to satisfy the basic requirements of fundamental fairness. As  
7 a direct result of the failure to describe the “various border infrastructure projects”  
8 that will be covered by the waiver or where and when, with specificity, they will be  
9 constructed, Defendants are denying Plaintiffs and others a reasonable notice and a  
10 meaningful opportunity to formulate and prepare a claim with respect to  
11 undisclosed projects within the 60-day limitations period set forth in subdivision (c)  
12 of Section 102 of IIRIRA with respect to each undisclosed project.

13 156. Defendants’ conduct violates Plaintiffs’ due process rights and Plaintiffs’  
14 rights under Article III of the United States Constitution.

15 157. Further, as a direct result of the failure to describe the “various border  
16 infrastructure projects” that will be covered by the waiver or where and when, with  
17 specificity, they will be constructed, Defendants are also interfering with the United  
18 States District Court’s ability to exercise its authority under Article III of the  
19 Constitution of the United States. The San Diego Waiver is so vague, ambiguous  
20 and overly broad with respect to the undisclosed projects that DHS intends to build  
21 and the continued upkeep of undefined project features, that it has the effect of  
22 denying the District Court an opportunity to assess whether each individual project  
23 satisfies the prerequisites for construction under Section 102 of IIRIRA, and  
24 comports with the United States Constitution.

25 158. Plaintiffs seek a judicial declaration that the San Diego Waiver violates  
26 Article III of the U.S. Constitution, the fundamental fairness doctrine at the heart of  
27 the judicial process, and the Due Process Clause of the Fifth Amendment.  
28

**SEVENTH CLAIM FOR RELIEF**

(Violation of the Separation of Powers Doctrine)

159. Plaintiffs hereby reallege and incorporate each and every paragraph above.

160. The Framers of the Constitution have determined that “within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Mistretta v. U.S.*, 488 U.S. 361, 380-384, 109 S.Ct. 64 (1989).

161. As part of this fundamental doctrine, the Supreme Court “has invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch.” *Id.* For example, in *Clinton v. New York*, 524 U.S. 417 (1998), the Supreme Court overturned an act of Congress, ruling that Congress may not vest its own legislative powers in the Executive Branch, even if Congress intended such a result.

162. Section 102(c) vests unilateral power in the Secretary of the Department of Homeland Security to waive the application of any law in areas along the southwest border if he or she deems it necessary to expeditiously build a border barrier. For example, Section 102 empowers the Secretary with discretion to nullify the application of laws that are intended to protect the environment, prevent unlawful discrimination, promote workplace safety and prevent corruption in the award of government contracts. Under Section 102, the Secretary is authorized to decide which laws to obey or disregard in planning and construction of infrastructure projects along the southwest border without any advanced designation of those particular laws by Congress.

163. Through this Act, Congress has vested its own legislative powers in the Executive Branch in violation of the Separation of Powers doctrine of the U.S. Constitution.

1           164. The statute as written is facially invalid. This claim is asserted against  
2 Defendant United States of America without regard to any action undertaken or  
3 decision made by the Secretary of Homeland Security to invoke the  
4 unconstitutional waiver provision.

5           165. In addition, the San Diego and Calexico Waivers violate the separation of  
6 powers doctrine as applied in this case, because Congress has vested its own  
7 legislative powers in the Executive Branch in violation of the Separation of Powers  
8 doctrine of the U.S. Constitution to allow the waiver of more than 30 federal laws  
9 by the Executive Branch. Congress must designate in advance each law it is  
10 waiving through its legislation, and can then, and only then, provide the Executive  
11 Branch discretion to waive those laws as it sees fit, thus implementing a legislative  
12 action.

13           166. Further, the San Diego and Calexico Waivers violate the separation of  
14 powers doctrine as applied in this case because Defendants are relying on the  
15 waiver provision to divest Congress of its legislative powers 10 years after  
16 Congress imposed a deadline to identify and expedite the construction of border  
17 barriers in priority areas. The waiver provision is being applied in a manner that  
18 divests Congress of its legislative powers, with respect to application of laws in the  
19 border region, in perpetuity.

20           167. Finally, the San Diego and Calexico Waivers violate the separation of  
21 powers doctrine as applied in this case because they provide for the vague and  
22 indefinite, and potentially never-ending, divestment of legislative powers in  
23 violation of the Separation of Powers Doctrine. For example, the San Diego  
24 Waiver does not disclose all of the “various border infrastructure projects” to which  
25 the waiver is being applied nor does it disclose when those undisclosed projects  
26 will be constructed. The San Diego and Calexico Waivers also attempt to waive  
27 laws for the continued “upkeep of physical barriers, roads, supporting elements,  
28 drainage, erosion controls and safety features. . .” but lack any definition or time

1 limitations with respect to these terms. By failing to describe the various projects  
2 that DHS may build within a 15-mile project area, and by applying the waiver  
3 provision to the continued and indefinite “upkeep” of undefined “supporting  
4 elements” and “safety features,” Defendants are attempting to extend the waiver  
5 authority to matters beyond the expedited construction of border barriers and roads.  
6 Defendants are applying Section 102’s waiver provision in a manner that divests  
7 Congress of its legislative powers along a 15-mile and 3-mile segments of the  
8 border indefinitely.

9 168. Plaintiffs seek a judicial declaration that Section 102 of IIRIRA violates  
10 the Separation of Powers doctrine of the U.S. Constitution because it improperly  
11 vests legislative power in the Executive Branch.

#### 12 **EIGHTH CLAIM FOR RELIEF**

13 (Violation of Article I, Section 1 of the United States Constitution)

14 169. Plaintiffs hereby reallege and incorporate each and every paragraph  
15 above.

16 170. Article 1, Section 1 of the U.S. Constitution provides that “[a]ll  
17 legislative powers herein granted shall be vested in a Congress of the United  
18 States . . .”

19 171. This clause of the Constitution has been interpreted to mean that all  
20 lawmaking functions have been vested in the Congress and cannot be delegated to  
21 another branch. *Loving v. U.S.*, 517 U.S. 748, 758 (1996).

22 172. Section 102(c) delegates to the Executive Branch, namely the Secretary  
23 of the Department of Homeland Security, the power to waive the application of any  
24 act of Congress along the entire southwest border. The only guidance Congress  
25 provided to the Executive Branch was to say that the waiver should be exercised as  
26 the Secretary “determines necessary to ensure expeditious construction of the  
27 barriers and roads under this section.” Section 102(c) provides no other guidance  
28 concerning which particular laws should be waived and which laws should be

1 followed. Though the words “necessary” and “expeditious” may have held meaning  
2 when enacted in 2008, they no longer do in light of the time elapsed since their  
3 passage. Additionally, the 2008 Amendment imposed a deadline on DHS to  
4 identify “priority areas” and expedite the construction of additional barriers in those  
5 areas by not later than December 31, 2008. In light of these provisions and the  
6 passage of time, the purpose of the waiver provision cannot be said to continue to  
7 reflect Congressional intent nine years later.

8 173. Thus, Section 102(c) permits the Secretary to make legislative decisions  
9 without an intelligible principle to guide it. This Act therefore violates Article I,  
10 Section 1 of the U.S. Constitution and the non-delegation doctrine.

11 174. Additionally, Congress retained no checks on the actions of the  
12 Executive Branch pursuant to Section 102(c), and removed any opportunity for  
13 judicial review outside of Constitutional issues. This lack of meaningful  
14 reviewability renders the delegation improper. *Amalgamated Meat Cutters and*  
15 *Butcher Workmen of North Am. v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971).

16 175. The statute as written is therefore facially invalid. This claim is asserted  
17 against Defendant United States of America without regard to any action  
18 undertaken or decision made by the Secretary of Homeland Security to invoke the  
19 unconstitutional waiver provision.

20 176. Section 102(c) is also invalid as applied in this case, because, for the  
21 reasons stated above, Congress cannot properly delegate to the Executive Branch  
22 the ability to waive any and all federal laws with no meaningful opportunity for  
23 review of that waiver. Thus, the former Secretary’s waiver of more than 30 federal  
24 laws and the acting Secretary’s waiver of 27 federal laws violate Article I, Section 1  
25 of the U.S. Constitution.

26 177. Further, the San Diego and Calexico Waivers violate the non-delegation  
27 doctrine because Defendants are relying on the waiver provision to divest Congress  
28 of its legislative powers 10 years after Congress imposed a deadline to identify and

1 expedite the construction of border barriers in priority areas. The waiver provision  
2 is being applied in a manner that divests Congress of its legislative powers, with  
3 respect to application of laws in the border region, in perpetuity. Congress did not  
4 delegate its functions with respect to application and/or waiver of laws to the  
5 Secretary of Homeland Security in perpetuity.

6 178. Finally, the San Diego and Calexico Waivers violate the non-delegation  
7 doctrine as applied in this case because the waiver provision is being applied in a  
8 manner that extends the purported delegation of legislative authority, within the  
9 described project areas, indefinitely. For example, the San Diego Waiver does not  
10 disclose all of the “various border infrastructure projects” to which the Waiver is  
11 being applied nor does it disclose when those undisclosed projects will be  
12 constructed. The San Diego and Calexico Waivers also attempt to waive laws for  
13 the continued “upkeep of physical barriers, roads, supporting elements, drainage,  
14 erosion controls and safety features. . .” The San Diego and Calexico Waivers lack  
15 any definition or time limitations with respect to any of these terms. By failing to  
16 describe the various projects and applying the waiver provision to continued and  
17 indefinite “upkeep” of undefined “supporting elements” and “safety features,”  
18 Defendants are attempting to extend the waiver authority to matters beyond the  
19 expedited construction of border barriers and roads. Congress did not delegate its  
20 functions with respect to the application and/or waiver of laws to the Secretary of  
21 Homeland Security without regard to the nature of the border infrastructure project  
22 or whether it would be constructed in an expedited fashion.

23 179. Plaintiffs seek a judicial declaration that Section 102 of IIRIRA violates  
24 Article 1, Section 1 of the U.S. Constitution and is an improper delegation of  
25 legislative power to the Executive Branch.

**NINTH CLAIM FOR RELIEF**

(Violation of Article I, Section 3 of the United States Constitution)

180. Plaintiffs hereby reallege and incorporate each and every paragraph above.

181. Article I, Section 3 of the U.S. Constitution provides that “[j]udgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”

182. The Supreme Court has interpreted Article I, Section 3 to mean there is no immunity provided by the U.S. Constitution to criminal laws or criminal prosecution and that no person is above the law. *O’Shea v. Littleton*, 414 U.S. 488, 503-504, 94 S.Ct. 669 (1974); *Dennis v. Sparks*, 449 U.S. 24, 31-32, 101 S.Ct. 183 (1980); *U.S. v. Lee*, (1882) 106 U.S. 196, 220, 1 S.Ct. 240 (1882).

183. Absent a clear immunity or waiver from a criminal law enacted by Congress and signed by the President, the Executive Branch cannot violate or nullify a criminal law.

184. Section 102(c) vests unilateral power in the Secretary of the Department of Homeland Security to waive the application of any laws that he or she determines is necessary to expeditiously build a border wall, including any criminal laws, such as bribery, racketeering and other anti-corruption laws without a clear, specific waiver of these statutes by an act of Congress that is signed by the President.

185. This power to waive any criminal law to expeditiously build the Border Wall, in the absence of an act of Congress that authorizes the waiver of those criminal laws specifically, violates Article I, Section 3 of the U.S. Constitution.

186. The statute as written is therefore facially invalid. This claim is asserted against Defendant United States of America without regard to any action

1 undertaken or decision made by the Secretary of Homeland Security to invoke the  
2 unconstitutional waiver provision.

3 187. Further, the San Diego and Calexico Waivers waive criminal laws,  
4 including those under the federal Resource Conservation and Recovery Act (42  
5 U.S.C. § 6921), the federal Clean Water Act (33 U.S.C. § 1311) and the  
6 Endangered Species Act (15 U.S.C. § 1540). The former Secretary and Acting  
7 Secretary have therefore waived criminal laws for the illegal disposal of hazardous  
8 waste on land or in our nation’s waters as well as criminal laws concerning the  
9 taking of endangered species. The waivers do not even provide the public with  
10 information concerning which parts of the specified criminal laws may be  
11 disregarded and why.

12 188. The statute is invalid as applied in this case because Congress did not  
13 explicitly authorize the waiver of criminal laws described in the San Diego or  
14 Calexico Waivers, nor did it immunize specific acts from criminal prosecution.

15 189. Plaintiffs seek a judicial declaration that Section 102 of IIRIRA violates  
16 Article I, Section 3 of the U.S. Constitution because it improperly allows the  
17 Executive Branch to violate or nullify criminal laws, including criminal hazardous  
18 waste laws.

19 **TENTH CLAIM FOR RELIEF**

20 (Violation of Article I, Section 7 of the United States Constitution)

21 190. Plaintiffs hereby reallege and incorporate each and every paragraph  
22 above.

23 191. Article I, Section 7 of the U.S. Constitution provides that “Every Bill  
24 which shall have passed the House of Representatives and the Senate, shall, before  
25 it becomes a Law, be presented to the President of the United States; if he approves  
26 he shall sign it, but if not he shall return it.”

27 192. The Supreme Court has stated that this means that the Executive Branch  
28 cannot void any law without Congress passing a law voiding the previous law and

1 presenting it to the President for signature. *Clinton v. City of New York*, 524 U.S.  
2 417 (1998).

3 193. Section 102(c) vests unilateral power in the Secretary of the Department  
4 of Homeland Security to waive the application of any laws in areas along the border  
5 for purposes of building the Border Wall without Congress passing a law to void  
6 the specific laws at issue or limit their application, and presenting it to the President  
7 in violation of Article I, Section 7 of the U.S. Constitution.

8 194. The statute as written is therefore facially invalid. This claim is asserted  
9 against Defendant United States of America without regard to any action  
10 undertaken or decision made by the Secretary of Homeland Security to invoke the  
11 unconstitutional waiver provision.

12 195. The statute is also invalid as applied in this case. Here, former Secretary  
13 Kelly unilaterally decided to waive more than 30 federal laws, and Acting Secretary  
14 Duke unilaterally decided to waive 27 federal laws. In so doing, each unilaterally  
15 chose which laws to waive and which laws to obey, without an act of Congress  
16 specifying which particular law or set of laws could be waived and without the  
17 presentation of said Congressional act to the President.

18 196. Plaintiffs seek a judicial declaration that Section 102 of IIRIRA violates  
19 Article I, Section 7 of the U.S. Constitution because it allows the Executive Branch  
20 to nullify the application of an act of Congress without Congress passing a law and  
21 presenting it to the President.

## 22 **ELEVENTH CLAIM FOR RELIEF**

23 (Violation of the Tenth Amendment of the United States Constitution)

24 197. Plaintiffs hereby reallege and incorporate each and every paragraph  
25 above.

26 198. The Tenth Amendment to the United States Constitution provides, “[t]he  
27 powers not delegated to the United States by the Constitution, nor prohibited by it  
28 to the States, are reserved to the States respectively, or to the people.”

1 199. States, therefore, have “the power to create and enforce a legal code, both  
2 civil and criminal.” *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982);  
3 *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011). Congress may  
4 not infringe on the State of California’s sovereign authority to enforce its own laws.  
5 “[W]hen a federal law interferes with a state’s exercise of its sovereign ‘power to  
6 create and enforce a legal code’ [ ] it inflict[s] on the state the requisite injury-in-  
7 fact.” *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081,  
8 at \*17 (N.D. Cal. Apr. 25, 2017), reconsideration denied, No. 17-CV-00485-WHO,  
9 2017 WL 3086064 (N.D. Cal. July 20, 2017), quoting *Ohio ex rel. Celebrezze v.*  
10 *U.S. Dep’t of Transp.*, 766 F.2d 228, 233 (6th Cir. 1985).

11 200. On its face, Section 102(c) vests the Secretary of the Department of  
12 Homeland Security with the power to waive “all legal requirements” in order to  
13 expeditiously build the border wall. If this phrase is interpreted to allow the  
14 Secretary to waive the application of state and local laws, it would include the  
15 power to waive state laws that are intended to ensure work-place safety, anti-  
16 harassment and discrimination laws, state wage and hour laws, anti-corruption laws,  
17 laws relating to public safety, or any other state law, including criminal  
18 enforcement provisions of state law.

19 201. Although Congress may preempt state and local laws in a particular  
20 legislative field, Congress does not have the power to simply waive all state and  
21 local laws and vest in the Executive Branch the power to waive all such laws.

22 202. Section 102(c), by creating such authority and vesting it in the Secretary  
23 of the Department of Homeland Security, violates the Tenth Amendment of the  
24 U.S. Constitution.

25 203. The statute as written is therefore facially invalid and this claim is  
26 asserted against Defendant United States of America without regard to any action  
27 undertaken or decision made by the Secretary of Homeland Security to invoke the  
28 unconstitutional waiver provision.

1           204. The statute is also invalid as applied in this matter. In their attempts to  
2 exercise Section 102’s waiver provision, former Secretary Kelly and Acting  
3 Secretary Duke issued waivers that purport to waive federal laws and numerous  
4 California laws that are related to the same subjects, including Porter-Cologne  
5 Water Quality Control Act (Cal. Water Code, §§ 13000, et seq.), California  
6 Endangered Species Act (Cal. Fish & Game Code, §§ 2050-2115.5), California  
7 State Historical Resources Act (Cal. Pub. Res. Code, §§ 5020-5029), California  
8 Coastal Act (Cal. Pub. Res. Code, §§ 30000-30900), California Fish and Game  
9 Laws (Cal. Fish & Game Code, §§ 1801 and 4181) and California’s public nuisance  
10 laws (Cal. Gov. Code, §§ 12600 et seq.; Cal. Civ. Code, § 3480; Cal. Pen. Code, §  
11 370.). These state laws do not conflict with any federal law and Congress has not  
12 explicitly stated an intent to preempt state laws in these areas.

13           205. Further, as construed by the Secretaries of DHS, the authority to waive  
14 California laws is indefinite in duration and unlimited, subject to the barest of  
15 findings that a border crossing is an area of high illegal entry, with no standards or  
16 criteria for making this determination. The former Secretary and Acting Secretary  
17 have attempted to apply Section 102’s waiver provision over nine years after its last  
18 amendment in which Congress referenced projects limited to 2008.

19           206. Additionally, the San Diego Waiver attempts to waive state laws with  
20 respect to the construction of “various border infrastructure projects” without  
21 defining what those projects will be or when they will be constructed. As noted  
22 below, this appears to include projects for which funding is not currently available.

23           207. The San Diego and Calexico Waivers also attempt to waive state laws  
24 for the continued “upkeep of physical barriers, roads, supporting elements,  
25 drainage, erosion controls and safety features. . .” The waivers lack any definition  
26 or time limitations with respect to any of these terms. By failing to incorporate  
27 meaningful definitions, the scope of the intrusion by Defendants into areas of  
28 historic state regulation and governance is potentially vast, extending beyond just

1 the expedited construction of border barriers and roads.

2 208. DHS is applying Section 102 in a manner that would grant them an  
3 indefinite and open-ended waiver of state laws in violation of the 10<sup>th</sup> Amendment.

4 209. Plaintiffs seek a judicial declaration that Section 102 of IIRIRA violates  
5 the Tenth Amendment of the U.S. Constitution by vesting in the Executive Branch  
6 the power to waive state and local laws, including state criminal law.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs request the Court to enter a judgment:

9 1. Declaring that DHS violated NEPA and the APA, and continues to  
10 violate NEPA and the APA, by failing to conduct NEPA review prior to engaging  
11 in planning and construction activities concerning the Border Wall and the San  
12 Diego and Calexico Projects.

13 2. Declaring that DHS violated the CZMA and the APA, and continues to  
14 violate the CZMA and the APA, by failing to provide the Commission with a  
15 consistency determination demonstrating that the San Diego Project will be  
16 undertaken in a manner that is consistent to the maximum extent practicable with  
17 the CCMP.

18 3. Declaring that Section 102 of IIRIRA does not authorize the replacement  
19 of existing fencing or barriers and that the San Diego and Calexico Waivers are  
20 therefore inapplicable and invalid with respect to the replacement of existing  
21 fencing or barriers.

22 4. Declaring that Section 102 of IIRIRA does not authorize the replacement  
23 of existing fencing or the construction of new barriers areas within the project areas  
24 described in the San Diego and Calexico Waivers because the project areas are not  
25 located in areas “of high illegal entry” and that the Waivers are inapplicable and  
26 invalid.

27 5. Declaring that Section 102 of IIRIRA does not authorize the construction  
28 of prototype fences, barriers or walls for the purpose of planning and that the San

1 Diego Waiver is inapplicable and invalid with respect to the prototype construction  
2 described in that waiver.

3 6. Declaring that the San Diego and Calexico Waivers are ineffective and  
4 invalid because the authority to waive laws under Section 102 of IIRIRA expired on  
5 December 31, 2008.

6 7. Declaring that the San Diego and Calexico Waivers are ineffective and  
7 invalid because the waivers failed to satisfy the requirements of Section 102 of  
8 IIRIRA and Defendants cannot meet their burden of making and supporting  
9 findings to meet Section 102's requirements.

10 8. Declaring that, as applied in this matter with respect to the San Diego  
11 Waiver, subsection (c) of Section 102 of the IIRIRA violates Article III of the  
12 United States Constitution and the Due Process Clause of the Fifth Amendment.

13 9. Declaring that, on its face and as applied in this matter with respect to the  
14 Border Wall Project, the San Diego Project and the Calexico Project, subsection (c)  
15 of Section 102 of the IIRIRA violates the Separation of Powers doctrine of the  
16 United States Constitution.

17 10. Declaring that, on its face and as applied in this matter with respect to the  
18 Border Wall Project, the San Diego Project, and the Calexico Project, subsection (c)  
19 of Section 102 of the IIRIRA violates Article I, Section 1 of the United States  
20 Constitution.

21 11. Declaring that, on its face and as applied in this matter with respect to the  
22 Border Wall Project, the San Diego Project and the Calexico Project, subsection (c)  
23 of Section 102 of the IIRIRA violates Article I, Section 3 of the United States  
24 Constitution.

25 12. Declaring that, on its face and as applied in this matter with respect to the  
26 Border Wall Project, the San Diego Project, and the Calexico Project, subsection (c)  
27 of Section 102 of the IIRIRA violates Article I, Section 7 of the United States  
28 Constitution.

1           13. Declaring that, on its face and as applied in this matter with respect to the  
2 Border Wall Project, the San Diego Project and the Calexico Project, subsection (c)  
3 of Section 102 of the IIRIRA violates Tenth Amendment of the United States  
4 Constitution.

5           14. Granting injunctive relief to Plaintiffs and enjoining Defendants from  
6 undertaking any activities concerning construction of the Border Wall until DHS  
7 demonstrates compliance with NEPA and the APA.

8           15. Granting injunctive relief to Plaintiffs and enjoining Defendants from  
9 undertaking any activities concerning construction of the Border Wall until DHS  
10 demonstrates compliance with the CZMA and the APA.

11           16. Granting injunctive relief to the Plaintiffs and enjoining the Secretary of  
12 DHS from waiving any laws for the purpose of expeditiously building the Trump  
13 Administration’s Border Wall, the San Diego Project, and the Calexico Project.

14           17. Ordering such other relief as the Court deems just and proper.

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Dated: September 20, 2017

Respectfully submitted,  
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