No. 18-35629

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,
Plaintiff – Appellant,

v.

RYAN K. ZINKE, et al.,
Defendants – Appellees,

PACIFIC LEGAL FOUNDATION; et al.,
Intervenor-Defendants – Appellees.

On Appeal from the United States District Court
for the District of Alaska
Honorable Sharon L. Gleason, District Judge

ANSWERING BRIEF OF INTERVENOR-DEFENDANTS – APPELLEES PACIFIC LEGAL FOUNDATION, ALASKA OUTDOOR COUNCIL, BIG GAME FOREVER, KURT WHITEHEAD, AND JOE LETARTE

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney for Intervenor-Defendants–Appellee Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, certifies that Pacific Legal Foundation has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney for BigGame Forever certifies that BigGame Forever has no parent companies, subsidiaries, or affiliates which have any outstanding securities in the hands of the public.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney for Alaska Outdoor Council certifes that Alaska Outdoor Council has no parent companies, subsidiaries, or affiliates which have any outstanding securities in the hands of the public.

Dated: January 18, 2019.

s/ Jonathan Wood
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Introduction

Plaintiff, the Center for Biological Diversity (CBD), challenges Congress's and the President's constitutional authority to limit the power of administrative agencies. It does so under a theory that flips the Constitution on its head and enjoys no support whatsoever in this or any other court's precedent.

The Constitution requires legislation to pass through bicameralism and presentment procedures. As CBD admits, Public Law No. 115–20 did so. Therefore, as the district court correctly held, it is a valid law that disapproves a Department of Interior rule and forbids the future adoption of substantially similar rules.

Contra CBD, the Constitution does not require Congress and the President to formally amend any earlier statute to make newly enacted laws binding on administrative agencies. *See All. for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012). CBD's constitutional claims are entirely dependent on this theory, yet it cites no constitutional text, no precedent from this or any other court, nor any other authority to support its theory. Therefore, CBD's constitutional claims fail.

CBD's statutory claim—that the Congressional Review Act (CRA) does not permit Congress and the President to disapprove this rule in this manner—fares no better. Both the Constitution and the Congressional Review Act bar judicial review of Congress's interpretation and application of its internal rules during Public Law No. 115–20's enactment. Thus, CBD's statutory claim is not justiciable. Even if it were, a plain analysis of the CRA's text and the passage of Public Law No. 115–20 reveals no procedural defect.

Therefore, this Court should affirm the decision below dismissing CBD's action.

Background

As *Schoolhouse Rock!* has explained to generations of schoolchildren,[1] the process by which a bill or resolution becomes law is straightforward: both houses of Congress must pass the legislation (the bicameralism requirement) and the President must sign it, or his veto must be overridden (the presentment requirement). U.S. Const. art. I, §§ 1, 7. Administrative agencies have no formal role in this process.

[1] https://www.youtube.com/watch?v=FFroMQlKiag.

Because Congress and the President have delegated so much of their constitutional authority to agencies, they have long sought effective means to supervise agencies' exercise of this authority and check overreach. *Cf.* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2250 (2001) (noting the implausibility of true presidential oversight of the huge administrative state). One way Congress endeavored to do so was by including legislative vetoes in statutes delegating authority to agencies, which allowed either House of Congress to unilaterally disapprove certain actions taken by agencies. *See* James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 Ind. L.J. 323, 324 (1977) (noting that more than 160 such legislative vetoes were adopted between 1970 and 1975). In *I.N.S. v. Chadha*, the Supreme Court ruled this practice unconstitutional, since it gave a single House of Congress authority to *de facto* legislate without complying with the Constitution's bicameralism and presentment requirements. 462 U.S. 919, 945–46 (1983).

After *Chadha*, Congress was left without a formal process to review agencies' exercise of delegated authority. To rectify this problem,

Congress and the President enacted the CRA in 1996. As the bipartisan sponsors of the CRA noted, the act restored the "delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws." 142 Cong. Rec. S3683, S3683 (daily ed. Apr. 18, 1996) (joint statement of Sens. Nickles, Reid, and Stevens). It did so by giving Congress and the President a convenient means to disapprove rules adopted by agencies.

The CRA compels agencies to submit every rule to Congress for review before it can go into effect. 5 U.S.C. § 801(a)(1)(A). Once a rule is submitted, our elected representatives have a window of time during which to review the rule and, if they wish, pass a joint resolution voiding the rule using expedited procedures. 5 U.S.C. § 802(a). If the rule is submitted fewer than 60 days before the end of a legislative session, the review and privileged disapproval period extends to the next session. 5 U.S.C. § 801(d)(1).

Cognizant of *Chadha*, Congress ensured that any CRA resolution would comply with the Constitution's bicameralism and presentment requirements. The CRA requires the exact same joint resolutions to be approved by both houses of Congress, after which they go to the President

for signature. The CRA's chief innovation is that it simplifies or temporarily suspends other procedures that Congress ordinarily requires for legislation—*e.g.*, committee review, floor debates, and the Senate filibuster—none of which are required by the Constitution. 5 U.S.C. § 802 (describing the procedures that apply to CRA resolutions); *see* U.S. Const. art. I, § 5, cl. 2 (giving each house of Congress authority to determine the rules of its own proceedings).

If Congress and the President enact a joint resolution disapproving an agency rule under the CRA, the rule cannot take effect (or, if already effective, cannot continue) and the agency is barred from issuing any new rule "that is substantially the same" as the disapproved rule unless "specifically authorized" by Congress. 5 U.S.C. § 801(b).

In accordance with the CRA's procedures, Interior submitted for Congress's review a regulation known as the Refuges Rule, *see* 81 Fed. Reg. 52,248 (Aug. 5, 2016). 162 Cong. Rec. S6339, S6346 (daily ed. Nov. 15, 2016); 162 Cong. Rec. H6160, H6169 (daily ed. Nov. 14, 2016). Because the rule was submitted fewer than 60 legislative or session days before either House of Congress adjourned, an additional period of review under the CRA began five days after the start of Congress's next session.

On February 7, 2017, the House introduced a joint resolution to disapprove the rule. Compl. (ER Tab 4) ¶ 40. On February 16, 2017, a majority in the House passed that joint resolution and, a month later, a majority of the Senate did so too. *Id.* ¶ 41. The bill was then presented to the President, who signed it on April 3, 2017. *Id.* The resulting law, Public Law No. 115–20, disapproves the Refuges Rule and provides that it "shall have no force or effect." *Id.* ¶¶ 40–41.

CBD claims that Congress's and the President's enactment of Public Law No. 115–20 violates the Constitution and the CRA. Its constitutional arguments are based on the separation of powers. CBD contends that Congress may not restrict an agency's exercise of delegated authority without amending the underlying statutes that granted the authority in the first place. Compl. (ER Tab 4) ¶¶ 52–54. Because Congress did not alter these underlying statutes through bicameralism and presentment, CBD asserts, it has infringed on the executive branch's constitutional duty to take care that the laws are faithfully executed. *Id.* ¶¶ 53–54; *see* U.S. Const. art. II, § 3 (the Take Care Clause). The district court correctly pointed out that both the CRA and Public Law No. 115–20 were passed in accordance with the constitutional mandates of

bicameralism and presentment. It also noted that CBD "does not provide persuasive authority" to support its claim that Congress may not restrict a particular exercise of agency authority without first amending the underlying enabling statute. 313 F. Supp. 3d 976, 988–89 (D. Alaska 2018) (ER Tab 3 at 18–20). Finally, the court pointed out that the CRA and Public Law No. 115–20 are themselves laws which the executive must take care to faithfully execute. *Id.* at 990 (ER Tab 3 at 22–23). Thus, the district court held that CBD's arguments under the Take Care Clause failed to state a claim for relief. *Id.*

CBD also argues that the CRA violates the nondelegation doctrine because its bar on regulations "substantially the same form" as those disapproved under the act is impermissibly vague and leaves Interior without an intelligible principle. Compl. (ER Tab 4) ¶ 72. The district court did not reach this argument, having found that CBD lacked standing to challenge that portion of the CRA. 313 F. Supp. 3d at 986 (ER Tab 3 at 15–16).

CBD's third claim is statutory in nature and alleges that Congress misapplied its internal rules when enacting Public Law No. 115–20. Compl. (ER Tab 4) ¶¶ 75–91. The district court found, over Federal

Defendants' and PLF's arguments, that it did have subject matter jurisdiction to review CBD's statutory claims. Nevertheless, the court held that CBD's interpretation could not be supported by the plain language of the statute, and thus, that CBD had failed to state a cognizable claim for relief. 313 F. Supp. 3d at 993 (ER Tab 3 at 27).

Standard of Review

On appeal, a district court's order dismissing a complaint is subject to *de novo* review. *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (dismissal for failure to state a claim); *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1039 (9th Cir. 2011) (dismissal for lack of subject matter jurisdiction).

Argument

CBD contends that the Constitution forbids Congress from limiting an agency's delegated authority without formally amending every earlier statute concerning that authority. But it presents no authority to support this contention. Nor could it, since the Constitution imposes no such requirement. *See All. for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012); *see also I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983).

Next, CBD claims that Congress and the President have violated the nondelegation doctrine because the CRA's bar on rules substantially similar to one that has been disapproved is ambiguous. However, this fundamentally misunderstands the nondelegation doctrine, which prevents Congress from delegating too much legislative authority to an agency without providing an "intelligible principle." *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). CBD does not contend that Congress has delegated too much. Instead, it complains that Congress and the President have delegated *too little* authority to Interior. The phrase "substantially the same as" is not unconstitutionally ambiguous; but, even if it were, the only remedy would be to strike down the delegated authority. In no circumstances could a nondelegation violation be cured by the relief CBD seeks—to expand a delegation further by revoking the limit Congress imposed on it.

CBD also raises statutory claims, arguing that Congress did not follow the CRA's procedures in passing Public Law No. 115–20. These are not justiciable, because the Constitution bars judicial review of internal congressional rules and procedures. Though careful to frame its claims as against Interior's action, CBD identifies no violation by that agency.

Instead, the gravamen of CBD's complaint is that Interior is complying with a law that CBD asserts Congress passed in violation of its own rules and procedures. Yet the Constitution prohibits courts from second-guessing Congress's interpretation and application of its internal rules, absent a constitutional violation (which CBD does not allege). U.S. Const. art. 1, § 5, cl. 2. Further, the CRA itself prohibits inquiry into whether Congress has followed that Act's procedures. 5 U.S.C. § 805. The Constitution's and CRA's bar on judicial review of Congress's application of its own rules cannot be circumvented by cleverly framing a challenge as against an agency's compliance with the law.

But even if the district court did have subject matter jurisdiction to review those claims, it was correct to dismiss them. The CRA unambiguously requires every rule adopted by agencies to be submitted to Congress. It also generally prohibits those rules from going into effect until after Congress has had time to review the rule. Section 808 of the CRA contains an exception to this latter requirement, allowing rules like the Refuges Rule to go into effect in anticipation of Congress's review, but it does not alter the requirement that agencies must submit rules for congressional review, nor does it preclude Congress's and the President's

authority to disapprove them. Complying with the submission requirement, Interior submitted the rule for congressional review. In response, Congress and the President enacted a law, Public Law No. 115–20, that unambiguously forbids the rule from continuing in effect.

Thus, this Court should affirm the district court's dismissal of CBD's action.

I.

Neither the Congressional Review Act nor Public Law 115–20 Violate the Separation of Powers

CBD raises two constitutional challenges to the CRA and to Public Law No. 115–20. It first argues that Congress hampers an agency's constitutional duty to "take care" that the laws are faithfully executed by attempting to limit an agency's delegated authority without explicitly amending the underlying enabling statutes. It further argues that the CRA's bar on substantially similar rules violates the nondelegation doctrine. Both claims were properly dismissed.

A. Congress may withdraw delegated authority from an agency however it wishes

1. Congress does not violate the Constitution's separation of powers by reclaiming authority that the Constitution vests in Congress

The Department of Interior has no inherent constitutional authority; thus, Congress and the President cannot violate the separation of powers by intruding on the agency's authority. Instead, Interior's authority to regulate federal lands, including those subject to the Refuges Rule, is derived entirely from Congress's authority—authority that has been delegated to Interior and can be retaken freely by Congress.

This is not a case in which Congress is seizing authority that the Constitution confers on the President, such as the power to appoint and oversee officers of the United States; nor is it a case where Congress is imposing restrictions on the President's exercise of that authority. *See Bowsher v. Synar*, 478 U.S. 714, 722-27 (1986); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-98 (2010). Thus, every case CBD cites is inapposite to this one because here there is no "dange[r] of congressional usurpation of Executive Branch functions." *Morrison v.*

Olson, 487 U.S. 654, 694 (1988) (quoting *Bowsher v. Synar*, 478 U.S. at 727).

Instead, the Constitution vests *Congress* with the power to manage federal lands, including the Alaskan wildlife refuges at issue here. U.S. Const. art. IV, § 3, cl. 2; *see Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) ("[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress."); *United States v. City & County of San Francisco,* 310 U.S. 16, 29 (1940) ("The power over the public land thus entrusted to Congress is without limitations."). Congress created Interior and delegated some of its Property Clause authority, subject to limitations it has imposed, to Interior. 16 U.S.C. §§ 668dd–668ee. But the constitutional authority is nonetheless retained by Congress. Through Public Law No. 115–20, disapproving the Refuges Rule, Congress has expunged "one particular exercise" from the authority it previously delegated. Resp. at 3–4, 10, *CBD v. Zinke*, 313 F. Supp. 3d 976 (Dkt. No. 119). This was, without question, constitutionally permissible.

There is also no dispute that Congress and the President followed the Constitution's procedural requirements in restricting the power delegated to Interior. Resp. (Dkt. No. 119) at 9. Both Public Law No. 115–

20 and the CRA are validly enacted laws adopted through bicameralism and presidential presentment. *See I.N.S. v. Chadha*, 462 U.S. 919 (1983).

2. Congress can restrict an agency's delegated authority without formally amending every other statute concerning that authority

CBD's constitutional claim depends on the principle that Congress and the President may only alter an agency's previously delegated authority if they explicitly amend every earlier statute concerning that authority. But as the district court observed, CBD "does not provide persuasive authority to support that assertion." *CBD v. Zinke*, 313 F. Supp. 3d 976, 989 (D. Alaska 2018) (ER Tab 3 at 20). In fact, CBD does not cite *any* constitutional text, judicial precedent, or any other authority in its brief to support the principle on which its constitutional argument entirely rests. Instead, on this central point, CBD relies solely on unsupported assertions. Appellant's Br. (Dkt. No. 10–1) at 24 ("Congress cannot effectuate such a withdrawal without amending the underlying statutes themselves. [no citation]"); *id.* at 26 ("To lawfully restrict Interior, Congress would need to amend ANILCA and the other statutes that delegated authority to Interior. [no citation]").

For good reason: this Court and every other court to consider CBD's theory has rejected it. In *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), for example, the Supreme Court held that Congress is free to change an agency's existing delegated authority however it wishes, including "without repealing or amending" an earlier law delegating authority to the agency. *Id.* at 436, 441. This Court, too, has rejected the theory, holding that Congress can instruct an agency to take an action inconsistent with the Endangered Species Act without formally amending that statute. *See All. for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012). Similarly, in *Friends of Animals v. Jewell*, the D.C. Circuit rejected this theory as "meritless." 824 F.3d 1033, 1045 (D.C. Cir. 2016). There, the court upheld legislation directing an agency to issue a regulation notwithstanding that the legislation made "no change, not even the most minor addition or subtraction" to any earlier statute, which "remain[ed] exactly as they were before [the legislation] was enacted." *Id.* As the district court recognized, *All. for the Wild Rockies* and *Friends of*

Animals show that CBD's assertions are "misplaced."[2] 313 F. Supp. 3d at 989 n.84 (ER Tab 3 at 21 n.84).

The few citations in CBD's brief provide no support for its argument. For instance, CBD cites to *INS v. Chadha* for the proposition that "once Congress confers power on the executive branch, it must 'abide by its delegation of authority until that delegation is legislatively altered or revoked.'" Appellant's Br. (Dkt. No. 10–1) at 25 (quoting *Chadha*, 462 U.S. at 954–55). This principle is undeniably true. But it does not aid CBD because Congress *has* legislatively altered Interior's authority. It has done so by adopting Public Law No. 115–20 through bicameralism and presentment, thereby satisfying all constitutional requirements under *Chadha*. *See* 462 U.S. at 945–46.

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[2] CBD attempts to distinguish *All. for the Wild Rockies* and *Friends of Animals* on two grounds: (1) the separation-of-powers dispute in those cases was between Congress and the Judiciary, not between Congress and the Executive; and (2) those cases concerned laws mandating an agency issue a rule, rather than (as here) disapproving a rule. Appellant's Br. (Dkt. No. 10–1) at 25–26. But neither distinction provides a relevant difference. In both cases, the courts held that Congress did not intrude on the Judiciary's authority because the Constitution permits Congress to amend an agency's prior delegation without formally amending an earlier statute. That principle clearly applies here. Additionally, the Constitution does not distinguish between Congress's authority to direct an agency to take a particular action or to refrain from a particular action.

CBD also cites principles of statutory construction that provide no support for its argument. For instance, CBD emphasizes that later and more specific statutes typically trump older, more general ones. Appellant's Br. (Dkt. No. 10–1) at 20 n.6. But Public Law 115–20 is the latest, most specific statute concerning Interior's authority to issue the Refuges Rule, as it explicitly and exclusively forbids it. Thus, under the statutory interpretation principles offered by CBD, its argument fails. *Cf. Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (meaning of a statute may be affected where Congress "has spoken subsequently and more specifically to the topic at hand").

3. The Take Care Clause does not change the analysis

Attempting to conjure up a separation of powers problem where there is none, CBD claims that Public Law No. 115–20 and the CRA intrude on Interior's obligation to "faithfully execute" the laws it administers. Appellant's Br. (Dkt. No. 10–1) at 22–26. This argument fails for two reasons. First, Congress is not intruding on the President's or Interior's executive authority. Enacting Public Law No. 115–20 was a legislative action, not an executive one. *See Chadha*, 462 U.S. at 953–54. Responsibility for executing that legislation—by not implementing the

Refuges Rule or adopting any substantially similar rule—remains with the President and Interior.

Second, and relatedly, Public Law No. 115–20 is itself part of the law that Interior must faithfully execute. The Take Care Clause is not limited to the laws that CBD may prefer in a particular case. Here, too, CBD provides no support whatsoever for the legal proposition on which its argument hinges—that Interior need not faithfully execute laws that do not formally amend earlier laws. As in *Alliance for the Wild Rockies*, Congress has decided for itself this narrow issue and, thereby, barred Interior from acting to the contrary. *See* 672 F.3d at 1174–75. This is the law that Interior must faithfully execute.

B. CBD's nondelegation argument is misguided and without merit

CBD's other constitutional argument is that Public Law No. 115–20 violates the nondelegation doctrine because it provides no "intelligible principle" to guide Interior's exercise of its delegated authority. Appellant's Br. (Dkt. No. 10–1) at 27–31. CBD's argument fundamentally misunderstands the nondelegation doctrine and the appropriate remedy for its violation. Besides, the CRA's ban on substantially similar rules is not unconstitutionally ambiguous.

Congress has provided an intelligible principle to guide Interior's exercise of its delegated authority. As CBD explains in their brief,[3] Congress has directed Interior to "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States . . . ." Appellant's Br. (Dkt. No. 10–1) at 4 (quoting 16 U.S.C. § 668dd(a)(2)). After Public Law No. 115–20, Interior's charge remains exactly the same *except* that it may not accomplish these ends using the Refuges Rule or any rule substantially similar.

1. An unconstitutionally excessive delegation cannot be cured by expanding it further

The nondelegation doctrine limits Congress's ability to delegate power to administrative agencies. The Supreme Court's prevailing test for a constitutional delegation is whether Congress has provided an

[3] CBD identifies three statutes that delegate authority to interior: The National Wildlife Refuge System Administration Act, Pub. L. No. 89–669, 80 Stat. 926 (1966), the National Wildlife Refuge System Improvement Act, Pub. L. No. 105–57, 111 Stat. 1252 (1997), and the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 410hh–3233, 43 U.S.C. §§ 1602–1784. Appellant's Br. (Dkt. No. 10–1) at 4–5. Each provides an intelligible principle, which has now been qualified by Public Law No. 115–20's ban on pursuing that principle through the Refuges Rule or substantially similar rule.

"intelligible principle" to guide the agency's exercise of delegated power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). *See also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Thus, the constitutional issue is whether Congress has delegated *too much* policy-making discretion to an agency. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1241–45 (2015) (Thomas, J., concurring in judgment).

Yet CBD asserts that Congress has violated the nondelegation doctrine by bestowing *too little* power on Interior—a funhouse mirror version of the doctrine. CBD identifies no authority supporting its contention that Congress can violate the Constitution by not giving away enough of its legislative power to administrative agencies. Nor does any such authority exist.

CBD's argument fails for another fundamental reason: the relief it seeks would worsen, rather than cure, the alleged violation. Because the nondelegation doctrine is a limit on Congress's ability to delegate power to agencies, the remedy for its violation is to strike down the unconstitutional delegation. Congress has delegated authority to Interior to "administer a national network of lands and waters for the

conservation, management, and . . . restoration of the fish, wildlife, and plant resources and their habitats within the United States," except that it may not implement the Refuges Rule or substantially similar rule. *See* Appellant's Br. (Dkt. No. 10–1) at 4 (quoting 16 U.S.C. § 668dd(a)(2)). If this delegation is unconstitutionally broad, the remedy is to strike it: Interior may not administer the wildlife network as Congress has directed.

But CBD does not seek that result. Instead, it asks this Court to expand Interior's power beyond what Congress has delegated by striking down the new limit Congress has imposed. Excessive delegation cannot be cured by striking down the limitations Congress imposed on that delegation. Thus, CBD's nondelegation doctrine argument is incomprehensible.

2. Interior's delegated authority remains clear and understandable

Through Public Law No. 115–20, Congress has directed Interior to continue to exercise its existing authority to regulate national refuges *except* that it may not enforce the Refuges Rule or adopt any substantially similar rule. CBD asserts that this is unconstitutional because there is some ambiguity in the phrase "substantially the same as." However, CBD

provides no support[4] for the proposition that the nondelegation doctrine is violated any time there is ambiguity in Congress's direction to an agency.

In fact, Congress anticipated this concern, and the CRA's bipartisan sponsors answered it in a joint statement roughly contemporaneous with the CRA's enactment. The statement explains the scope and effect of CRA resolutions, and it provides additional clarity to guide future agency decision-making. 142 Cong. Rec. S3683, S3686 (daily ed. Apr. 18, 1996) (joint statement for the record of co-sponsors Sens. Nickles, Reid, and Stevens).[5] This joint statement explains that, when a rule is disapproved, an agency should look to the underlying law that authorized the rule:

> If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any

[4] The only authority CBD cites in support of this argument are law professors who have criticized the CRA on several policy grounds, including that the bar on substantially similar rules may be interpreted to broadly limit agency authority. *See* Appellant's Br. (Dkt. No. 10–1) at 28-29 n.9. Needless to say, the Constitution does not forbid Congress from enacting laws that some law professors think are wrongheaded.

[5] The same statement was submitted by Representative Hyde for the House sponsors of the CRA. 142 Cong. Rec. E571, E577 (Congressional Record — Extension of Remarks Apr. 19, 1996).

> rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule.

Id.

Congress provided further guidance here, in the legislative history of Public Law No. 115–20, just as the CRA's sponsors intended. *See* 142 Cong. Rec. at S3686 ("The authors [of the CRA] intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval.").

During consideration of the joint resolution to overturn the Refuges Rule, Representative Bishop of Utah explained the reasoning for passing the joint resolution: the Refuges Rule was "an illegal rule" because the Statehood Act "granted Alaska full authority to manage fish and game on all lands in the State of Alaska, including all Federal lands." *See* 163 Cong. Rec. H1259, H1260 (daily ed. Feb. 16, 2017).[6] "The Alaska National

[6] Congress's belief that the Refuges Rule exceeded Interior's existing authority renders CBD's constitutional arguments even more tenuous. If the rule was not authorized by earlier statutes, no amendment of those

Interest Lands Conservation Act in 1980 further, in fact, verified what the Statehood Act did: protecting the right of the State to manage fish and game." *Id.* The floor debate in the Senate reflected a similar purpose. *See* 163 Cong. Rec. S1864-05, S1864 (daily ed. Mar. 21, 2017).

Thus the effect of Public Law No. 115–20 is clear, and Interior has guidance about what rules it can and cannot adopt in the future. And because Interior has several options for achieving the management goals set out in the delegating statutes,[7] it can promulgate a new regulation that is substantially different from the Refuges Rule. Ultimately, CBD's protestations ring hollow because Interior has itself acknowledged that it "knows precisely what not to do going forward." Fed. Defendants' Mem.

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statutes was required to exclude the power to issue this or substantially similar rules.

[7] CBD may believe that the Refuges rule is the only means by which Interior may achieve the management goals stated in "ANILCA, the Administration Act, the Improvement Act and other authorities." Compl. (ER Tab 4) ¶ 61. However, there are many different ways to manage the refuges in order to conserve fish and wildlife populations and habitats in their natural diversity. *See* Decl. of Ryan Benson in Supp. of Big Game Forever's Motion to Intervene ¶ 8, *CBD v. Zinke*, 313 F. Supp. 3d 976 (Dkt. No. 22). Even if the Refuges Rule were the only way to implement that authority, Public Law No. 115–20 would nonetheless control (and effectively fully repeal the authority).

in Supp. of Renewed Mtn. to Dismiss at 19, *CBD v. Zinke*, 313 F. Supp. 3d 976 (Dkt. No. 108).

II.

CBD's Statutory Claims Are Not Justiciable

CBD also raises statutory arguments. While the district court rejected these arguments—and rightly so—the court should not have reached their merits because it lacked subject matter jurisdiction over CBD's statutory claim.

First, the Rules Clause of the Constitution forbids courts from second-guessing Congress's application of its internal rules unless those rules violate some independent constitutional constraint. *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 571 (9th Cir. 1989) ("In the absence of express constitutional direction, we defer to the reasonable procedures Congress has ordained for its internal business."); *see* U.S. Const. art. I, § 5, cl. 2.

The district court found that the Rules Clause did not apply because CBD's "challenge is to agency action taken pursuant to an official act of Congress, and not the application of an internal rule of Congress." 313 F. Supp. 3d at 991 n.89 (ER Tab 3 at 24). But *Mester* also considered agency action. To defend against an enforcement action brought under the

Immigration Reform and Control Act of 1986, the defendant raised a variety of defenses, including claims that the procedure was inadequate, that the agency had misinterpreted the statute, and that Congress had misapplied its internal rules in passing the statute. *Mester*, 879 F.2d at 565. Although this Court analyzed several of these defenses closely, it nonetheless emphasized that—even in the context of a claim that an agency had acted unlawfully—courts should be careful about scrutinizing Congress's internal procedures. *Id.* at 570–71. Addressing CBD's argument that Interior's reliance on the CRA is *ultra vires* required the district court to consider whether Congress's passage of Public Law No. 115–20 complied with Congress' internal rules set forth in the CRA. Such a question is not justiciable. *See id.*; *Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977).

Second, the CRA itself bars litigants from challenging the procedural steps Congress used to disapprove an agency rule. 5 U.S.C. § 805. Section 805 bars challenges to congressional determinations and actions taken pursuant to the Act. *See, e.g.*, *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 WL 31427523, at *6 (S.D. Ind. Oct. 24, 2002); Paul J. Larkin, Jr., *Judicial Review Under the*

Congressional Review Act, Heritage Found. Legal Mem. No. 202 (Mar. 9, 2017) (Larkin, *Judicial Review*);[8] *see also* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y 187 (2018).

The district court found Section 805 inapplicable by characterizing CBD's complaint as targeting actions taken by Interior. 313 F. Supp. 3d at 991 n.89 (ER Tab 3 at 23–24 n.89). It is true that section 805 does not bar judicial review over agency action in every instance. Courts can and should review whether an agency has wrongfully withheld a rule from Congress's review and, therefore, whether the rule is not lawfully in effect. 142 Cong. Rec. at S3686 (joint statement for the record by Senators Nickles, Reid, and Stevens); 142 Cong. Rec. E571, E577 (Extensions of Remarks Apr. 19, 1996) (statement of Rep. Hyde). *See also* Larkin, *Judicial Review*, *supra*, at 4 ("Section 805 does *not* foreclose judicial review of a claim raised by a private party as a defense in an agency enforcement action that the rule the agency seeks to enforce never went

[8] *Available at* http://www.heritage.org/the-constitution/report/judicial-review-under-the-congressional-review-act.

into effect because the agency failed to comply with the CRA's requirements.").

Yet CBD does not raise such a challenge. Instead, CBD's theory is that Interior acts *ultra vires* by complying with Public Law No. 115–20, because CBD alleges Congress passed in violation of the CRA. Thus, its argument hinges on its claim that Congress violated the CRA. *See* Compl. (ER Tab 4) ¶ 88. This is impermissible because "whether Congress complied with the congressional review procedures in [the CRA]," 142 Cong. Rec. at S3686, is precisely the inquiry that Congress intended to prohibit. *Id.*

The congressional record confirms that Congress intended to prevent second-guessing of its actions under the CRA. 142 Cong. Rec. at S3686; 142 Cong. Rec. at E577. Congress chose language to ensure that litigants could not flyspeck the process of adopting a resolution of disapproval. Larkin, *Judicial Review, supra*, at 3 ("Accordingly, Section 805 would appear to reach every decision or step . . . that could be associated with the CRA."). Specifically, Congress ensured that no court could "review whether Congress complied with the congressional review procedures in this chapter." 142 Cong. Rec. at S3686. The district court

erred in allowing CBD to subvert this clear congressional intent by pleading through a loophole.

III.

CBD's Statutory Claims Are Without Merit

Even if this Court affirms the district court's determination that it had jurisdiction over CBD's third claim for relief, CBD still failed to state a claim on which relief can be granted. CBD claims that Public Law No. 115–20 was untimely because of Section 808 of the CRA. Section 808 allows (1) any rule an agency determines for "good cause" to go into effect immediately, and (2) "any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping" to take effect "at such time as the Federal agency promulgating the rule determines." 5 U.S.C. § 808.

However, as the district court correctly pointed out, this provision does not alter the requirement in Section 801 that agencies submit rules, nor does it eliminate Congress's opportunity to review them. Rather, it merely allows certain rules to go into effect sooner than they otherwise could. *See* 313 F. Supp. 3d at 992–93 (ER Tab 3 at 25–27); 5 U.S.C.

§ 801(a)(1)(A) ("Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report . . . ."). Even assuming the Refuges Rule had been eligible to go into effect prior to submission to Congress (if the agency had so specified, which it did not), subsection 801(a)(1)(A) still mandates that the federal agency promulgating it "shall" submit it to each House of Congress and GAO for review.

Because the Refuges Rule was submitted at the end of a congressional term, its submission pursuant to subsection 801(a)(1)(A) triggered Congress's extra period of expedited review in a new session. *See* 5 U.S.C. § 802(e)(2) (providing an extra period of review for rules submitted during the period referred to in Section 801(d)(1)); 5 U.S.C. § 801(d)(1) (referring to rules submitted in accordance with subsection 801(a)(1)(A)). CBD reads "submitted in accordance with subsection [801]" to apply only if that submission was necessary for a rule to go into effect. But nothing in the text of Section 801 supports this interpretation. In fact, the text leads to the opposite conclusion. Congress anticipated that it might pass resolutions of disapproval for rules that are already in effect, stating that "[a] rule shall not take effect (*or continue*), if the

Congress enacts a joint resolution of disapproval." 5 U.S.C. § 801(b)(1) (emphasis added).

CBD's reading of the CRA would have bizarre implications. It would take a minor exception in Section 808 (allowing hunting rules to go into early effect) and convert it into a workaround negating the mandate that rules be sent to Congress. *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes."). It would also allow rules of that type to be disapproved in the session in which they are received (if sent up "voluntarily"),[9] but not in the follow-on session even if they were submitted on the last day of the preceding session. If Congress had wanted to exempt such rules from review, it could have said so. And even if there were any ambiguity in the CRA that

[9] CBD maintains that its argument "does not in any manner implicate the scope of the section 802(a) Congressional disapproval procedure, which authorizes the disapproval of any regulation—including those that fall within CRA section 808—within the *same session of Congress* under which the regulation was issued." Appellant's Br. (Dkt. No. 10-1) at 39. But 802(a) limits congressional disapproval to the period "beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter . . . ." 5 U.S.C. § 802(a). Thus, under CBD's view that rules falling within section 808 are not required to be submitted for congressional approval, an agency could indeed avoid congressional review altogether, even within the same session of Congress, by opting not to submit an 801(a)(1)(A) report at all.

would permit CBD's interpretation, such ambiguity should be resolved in favor of applying the same periods of additional expedited review to hunting rules (once submitted) as to any other covered rule. *See* 142 Cong. Rec. at S3687 (calling for broad interpretation "with regard to the type and scope of rules that are subject to congressional review").

Regardless, an in-depth analysis of the CRA's provisions is not required to determine the merits of CBD's third claim for relief. The Congressional Record demonstrates that the Refuges Rule was required to be—and was—submitted under Section 801. According to the November 14, 2016, House of Representative Congressional Record, Interior sent a letter "transmitting the Department's final rule . . . *pursuant to 5 U.S.C. 801(a)(1)(A).*" 162 Cong. Rec. H6160, H6169 (daily ed. Nov. 14, 2016) (emphasis added); *see also* 162 Cong. Rec. S6339, S6346 (daily ed. Nov. 15, 2016). Regardless of whether the submission was voluntary, it was submitted in accordance with Section 801. Thus, under the CRA, Congress had an additional period of expedited review of the Refuges Rule in its new session.

CBD's argument that the bar on reenactment does not apply to the Refuges Rule because the joint resolution was not validly enacted under

the CRA is thus without merit. But even if CBD's statutory interpretation held up to scrutiny, the title to Public Law No. 115–20 makes absolutely clear that Congress understood and intended that the Joint Resolution was passed "under chapter 8 of title 5, United States Code." Pub. L. No. 115–20, 131 Stat. 86, 86 (2017). *See Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666 (1930) (joint resolutions are construed by applying the rules applicable to legislation in general); *see also* 82 C.J.S. *Statutes* § 364 (joint resolutions must be given a reasonable and sensible construction, and must not be interpreted in a way that obviously fails to effectuate their purpose and intent). CBD suggests that in order to effectuate this clear intent, the 115th Congress (which passed Public Law No. 115–20), needed to comply with CBD's preferred construction of provisions set forth by the 104th Congress (which passed the CRA). Yet it is a basic principle of our government that a past Congress cannot bind a future Congress. *See United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996). Even if CBD's strained interpretation of the statutory provisions at issue were correct, it would have no bearing on the clear intent of the 115th Congress. Interior acted in perfect compliance with that intent. Accordingly, CBD's third claim for relief is

without merit and this Court should uphold the district court's opinion to that effect.

Conclusion

For the foregoing reasons, PLF respectfully requests that this Court affirm the district court's dismissal.

DATED: January 18, 2019.

Respectfully submitted,

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Intervenor-Defendants – Appellees Pacific Legal Foundation, Alaska Outdoor Council, Big Game Forever, Kurt Whitehead, and Joe Letarte

Statement of Related Cases

Plaintiffs-Appellants are aware of no related cases within the meaning of Circuit Rule 28–2.6.

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