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**Pro Hac Vice* Pending

Attorneys for Applicant Defendant-Intervenors

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL DIVERSITY,	)	No. 3:17-cv-00091-JWS
Plaintiff,	)	

v.	)	
	)	**DEFENDANT-INTERVENORS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM AND LACK OF SUBJECT-MATTER JURISDICTION (FRCP 12(b)(1) & 12(b)(6))**
RYAN ZINKE, et al.,	)	
	)	
Defendants,	)	
	)	
PACIFIC LEGAL FOUNDATION; ALASKA OUTDOOR COUNCIL; BIG GAME FOREVER; KURT WHITEHEAD; and JOE LETARTE,	)	
	)	
Applicant Defendant-Intervenors.	)	
	)	

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Introduction

Center for Biological Diversity's (CBD) Complaint should be dismissed for failure to state a claim upon which relief can be granted and for lack of subject-matter jurisdiction. Fed R. Civ. P. 12(b)(1), 12(b)(6). The Complaint presents only two claims: (1) that Congress and the President violated the separation of powers by enacting Public Law No. 115–20 under the procedures established by the Congressional Review Act; and (2) that Congress misapplied its internal rules in passing Public Law No. 115–20 under the Congressional Review Act.

The first claim fails to state a separation of powers violation. The complaint alleges that Public Law No. 115–20 was passed by a majority of both Houses of Congress and was signed by the President. Compl. ¶ 39. Therefore, Congress' and the President's enactment of Public Law No. 115–20 fully complied with the Constitution's bicameralism and presentment requirements. *See I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

The second claim should be dismissed for lack of subject-matter jurisdiction. This Court lacks jurisdiction over the claim for two reasons. First, Congress' adoption and application of its internal rules are not judicially reviewable unless they violate constitutional constraints or fundamental rights, which CBD does not allege. *See United States v. Ballin*, 144 U.S. 1, 5 (1892). Second, the Congressional Review Act expressly bars judicial review of Congress' use of its internal rules to disapprove agency rules under the statute. 5 U.S.C. § 805. Alternatively, the second claim should be dismissed for failure to state a claim because, even taking all of the allegations as true, Congress and the President's adoption of Public Law No. 115–20 fully complied with the Congressional Review Act.

Background

The Constitution's Property Clause gives Congress the authority to regulate federally owned lands. U.S. Const. art. IV, § 3, cl. 2. Through the Alaska National Interest Lands Conservation Act, the National Wildlife Administration Act of 1966, and the National Wildlife Refuge System Improvement Act of 1997, Congress has delegated authority to the Department of Interior to manage Alaskan refuge areas.

Compl. ¶¶ 18–20; *see* 16 U.S.C. §§ 410hh–3233; 16 U.S.C. §§ 668dd–668ee; 42 U.S.C. §§ 1602–1784. Pursuant to this delegated authority, the Department of Interior adopted a regulation prohibiting a variety of hunting and conservation activities in Alaskan refuge areas. Compl. ¶¶ 32–37; *see* 81 Fed. Reg. 52,248 (Aug. 5, 2016) (Refuges Rule).

Under the Congressional Review Act, all rules adopted by an administrative agency must be submitted to Congress and generally cannot go into effect until then. Compl. ¶¶ 21–22; *see* 5 U.S.C. § 801(a). Once a rule is submitted, each House of Congress has 60 legislative days to pass a joint resolution disapproving the rule using fast-track procedures, including a suspension of the filibuster and limited debate. Compl. ¶¶ 22–23; 5 U.S.C. § 802. Like any other legislation, if a majority of both Houses of Congress approves the joint resolution, it is presented to the President for his signature or veto. *See* Compl. ¶ 39; U.S. Const. art. I, § 7. If the President signs it, the joint resolution becomes a law that has the effect of invalidating the rule.

The Department of Interior submitted the Refuges Rule to Congress in accordance with the Congressional Review Act. 163 Cong. Rec. S6346 (Nov. 15, 2016); 163 Cong. Rec. H6169 (Nov. 14, 2016). On February 7, 2017, the House introduced a joint resolution to disapprove the Refuges Rule. Compl. ¶ 38. On February 16, 2017, a majority in the House passed that joint resolution. *Id*. ¶ 39. On March 21, 2017, a majority of the Senate also passed the joint resolution without amendment. *Id*. 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." Compl. ¶¶ 39–40. The Congressional Review Act also provides that, once Congress and the President enact a law disapproving a rule, the agency is barred from promulgating any rule that is "substantially the same" as the disapproved rule. Compl. ¶ 40; *see* 5 U.S.C. § 801(b)(2).

CBD claims that Congress' and the President's enactment of Public Law No. 115–20 violates the separation of powers and the Congressional Review Act. Compl. ¶¶ 43–60. Its first claim alleges that Congress and the President violated the

separation of powers by enacting a law disapproving the Refuges Rule without formally amending the statutes under which that rule was adopted. Compl. ¶ 44. Its second claim alleges that Congress misapplied its internal rules in passing Public Law No. 115–20. Compl. ¶¶ 49–60.

Standard of Review

On a motion to dismiss, the Court accepts a complaint's factual allegations as true and construes them in favor of the plaintiff. *Schueneman v. Arena Pharmaceuticals, Inc.*, 840 F.3d 698, 704–05 (9th Cir. 2016). If those allegations fail to state a plausible claim for relief, the case should be dismissed. *See id.*; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Dismissal is also proper if the Court lacks subject-matter jurisdiction to hear a claim because, for instance, plaintiffs lack standing or a statute deprives the Court of jurisdiction. *See Am. Fed'n of Gov't Employees Local 1 v. Stone*, 502 F.3d 1027, 1034 (9th Cir. 2007) (a claim should be dismissed for lack of subject-matter jurisdiction if Congress has foreclosed judicial review); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

Argument

The Court should dismiss both of CBD's claims. The first claim, asserting that Congress and the President violated the separation of powers by enacting Public Law No. 115–20, fails to state a claim for which relief can be granted. The allegations in the complaint establish that the enactment of this law complied with the Constitution's requirements of bicameralism and presentment and did not intrude on any exclusive power of the President. *See* Compl. ¶ 38; *see also Chadha*, 462 U.S. at 951.

CBD's second claim—that Congress violated its internal rules by enacting Public Law No. 115–20 under the Congressional Review Act—should be dismissed for lack of subject-matter jurisdiction and failure to state a claim. The Court lacks jurisdiction to hear this claim for two reasons. First, each House of Congress' internal rules, and their enforcement, is entrusted to each, respectively. *See* U.S. Const. art. I, § 5, cl. 2; 5 U.S.C. § 802(g) (the adoption of the Congressional Review Act's fast-track procedures is "an exercise of the rulemaking power"). Judicial review of these internal

rules and Congress' application of them is only available for violations of express constitutional constraints or fundamental rights, which CBD has not alleged. *See United States v. Ballin*, 144 U.S. at 5. Second, the Congressional Review Act expressly bars judicial review of any action Congress takes under it. 5 U.S.C. § 805. CBD's second claim also fails to state a claim because, even taking all of the allegations as true, Congress' and the President's adoption of Public Law No. 115–20 fully complied with the Congressional Review Act.

I. CBD Has Failed To State a Separation of Powers Claim

CBD claims that Congress and the President violated the separation of powers by enacting a law using the procedures established by the Congressional Review Act. *See* Compl. ¶¶ 43–45. That claim fundamentally misunderstands both the separation of powers and the legislative process established by the Constitution.

The Constitution divides the powers delegated to the federal government and distributes them among three branches of government. *Chadha*, 462 U.S. at 951. Congress is empowered to create law, using its legislative power. U.S. Const. art. I. The President is empowered to execute the law Congress has created, using his executive powers. U.S. Const. art. II. And the courts have the power to interpret the law and apply it to specific cases, using the judicial power. U.S. Const. art. III. Although the Founders assumed that the branches would defend their powers against encroachment from any other branch and provided them tools for doing so, courts play an important role in enforcing those limits. *See Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

But this is not a case in which those limits have been violated. The allegations in the complaint affirmatively disprove the separation of powers claim and demonstrate that Public Law No. 115–20 enjoys the same constitutional status as any other properly promulgated law. *See Chadha*, 462 U.S. at 919. CBD's claim that the resolution of disapproval is unconstitutional because it withdraws authority from the Department of Interior without amending the statute under which that authority was previously exercised is meritless and has no basis in the Constitution's text or precedent. *See Friends of Animals v. Jewell*, 824 F.3d 1033, 1045 (D.C. Cir. 2016).

A. Congressional Review Act Resolutions of Disapproval Satisfy Bicameralism and Presentment

The Constitution sets out the procedure for Congress to make new law. First, a bill or resolution must be introduced in both Houses of Congress and approved by a majority of each. U.S. Const. art. I, §§ 1, 7. The purpose of this bicameralism requirement is to make it more difficult to pass legislation. *See Chadha*, 462 U.S. at 948–51.

To become a law, all legislation must next be presented to the President for his signature or veto. U.S. Const. art. I, § 7. The purpose of this presentment requirement is also to make enacting new laws more difficult. *Chadha*, 462 U.S. at 946–48. The Founders took great care to ensure that Congress could not circumvent the presentment requirement by cleverly describing a proposed law as something else. *See id*. at 947.

Congress' and the President's enactment of Public Law No. 115–20 satisfied both of these requirements. The complaint acknowledges that this law was passed by a majority of both Houses of Congress and was signed by the President. Compl. ¶¶ 38–39. The House and the Senate passed this law pursuant to the internal rules they adopted in the Congressional Review Act, which are fully consistent with the Constitution's bicameralism and presentment requirements. *See* Compl. ¶¶ 21–23, 38–39; 5 U.S.C. § 802; *see also* U.S. Const. art. I, § 5, cl. 2 (authorizing each house of Congress to "determine the Rules of its Proceedings").

The constitutionality of the Congressional Review Act's procedures is confirmed by *I.N.S. v. Chadha*. In that case, the Supreme Court held that a provision of the Immigration and Nationality Act violated the separation of powers because it allowed either House of Congress, on its own, to disapprove an executive action. 462 U.S. at 958–59. This veto provision was unconstitutional because it did not comply with the Constitution's bicameralism and presentment requirements. *See id*. The Congressional Review Act, however, does not suffer these constitutional shortcomings, which should not be surprising since it was enacted with *Chadha* in mind. *See* 142 Cong. Rec. S3683, S3684 (daily ed. Apr. 18, 1996) (statement of Sens.

Nickles, Reid, and Stevens) (discussing *Chadha*). Public Law No 115–20, like all laws enacted pursuant to the Congressional Review Act's procedures, and as required by the Constitution, was passed by a majority of both Houses of Congress and signed by the President. Compl. ¶ 39. It is, therefore, a legally binding law.

B. Congress Can Withdraw Delegated Authority from an Agency as Broadly or as Narrowly as It Wishes

Although conceding that Public Law No. 115–20 satisfies the Constitution's bicameralism and presentment requirements, Compl. ¶ 38, CBD nonetheless asserts that Congress and the President have violated the separation of powers by enacting a law that "restricts Interior's rulemaking authority without amending—through bicameralism and presentment—any of the statutes that authorize Interior to manage national wildlife refuges in Alaska." Compl. ¶ 44. But this does not state a separation of powers claim.

The Constitution vests the power to manage Alaskan wildlife refuges—and all other federal lands—in Congress. 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 has delegated some of this authority, subject to limits it has imposed, to the Department of Interior. 16 U.S.C. §§ 668dd–668ee. But the Department of Interior has no inherent constitutional authority to manage federal lands.

Like all agencies created by Congress, the Department of Interior has no inherent constitutional authority at all. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000). Therefore, any limits Congress places on delegations to agencies raise no separation of powers concerns. *Cf. Zivitofsky ex rel. Zivitofsky v. Clinton*, 566 U.S. 189, 196–97 (2012) (separation of powers forbids Congress infringing a power the Constitution gives exclusively to the President). On the contrary, Congress would violate the separation of powers if it failed to impose significant limits on authority delegated to agencies. *See Mistretta v. United States*,

488 U.S. 361, 371–73 (1989); *see also A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

The Constitution places no constraint on how Congress amends delegations to agencies. It does not require Congress to use any "magic words" or to formally amend the text or structure of a preexisting law. To be sure, Congress may significantly amend a preexisting statute to change an agency's authority. But it may also amend a delegation by disallowing a particular application of an existing authority. *See Friends of Animals*, 824 F.3d at 1045.

In *Friends of Animals*, an environmental group challenged a law that required the Fish and Wildlife Service to reissue a particular regulation, which had previously been struck down under the Endangered Species Act. *See id.* at 1036. The group argued that this law violated the separation of powers by dictating that an agency must issue a particular rule and by exempting it from judicial challenge under the Endangered Species Act. *Id.* at 1042–45. The D.C. Circuit easily rejected the argument, noting that the law satisfied bicameralism and presentment and was a valid exercise of Congress' power to legislate. *See id.* at 1043, 1045.

"Seeking to avoid this conclusion," the group argued that the new law was nonetheless unconstitutional because it "makes no change, not even the most minor addition or subtraction, to the [preexisting] ESA" under which the rule had previously been adopted. *Id.* at 1045. This is precisely the theory CBD asserts in its constitutional claim. *See* Compl. ¶¶ 43–45. As the D.C. Circuit held in *Friends of Animals*, that theory is "meritless." 824 F.3d at 1045. Congress may limit an agency's power broadly or narrowly, including by requiring or forbidding an agency to adopt a particular regulation. If enacted pursuant to the Constitution's bicameralism and presentment requirements, such laws "easily pass[] muster under established law." *Id.*

The Ninth Circuit has also held that Congress has the constitutional authority to amend the law by requiring or disallowing a particular regulation. *See Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012). "[W]hen Congress so directs an agency action . . . Congress has amended the law." *Id.*; *see also Consejo*

de Desarrollo Economico de Mexicali v. United States 482 F.3d 1157, 1169 (9th Cir. 2007) (upholding a statute that exempted a single project from several environmental laws without formally amending those laws). Just as Congress may amend an agency's delegation by passing a narrow law that requires it to adopt a particular regulation or exempting a particular project from environmental review, it may amend a delegation by passing a law disapproving a particular rule.

Therefore, the allegations in the complaint show that Congress and the President acted within their constitutional authority in enacting Public Law No. 115–20 to disapprove the Refuges Rule and restrict the Department of Interior's delegated authority. *See Alliance for the Wild Rockies*, 672 F.3d at 1174. CBD's first claim should be dismissed for failure to state a claim.

II. CBD's Second Claim for Relief Should Be Dismissed for Lack of Subject-Matter Jurisdiction and Failure To State a Claim

In its second claim for relief, CBD asserts that Congress misapplied its internal rules in disapproving the Refuges Rule under the Congressional Review Act. Compl. ¶¶ 57, 59. The contours of CBD's statutory claim are murky, perhaps purposefully so, but two things are clear: first, the Court does not have jurisdiction to hear the claim; and, second, CBD fails to state a claim because nothing in the Congressional Review Act forbids Congress from passing a law disapproving a rule after any period of time.[1]

The Congressional Review Act makes it easier for both Houses of Congress to quickly pass legislation disallowing a rule. 5 U.S.C. § 802. In particular, it suspends the filibuster and limits the time for debate. *Id*. Although CBD doesn't quite say so, its statutory claim appears to be that the Senate should not have applied its internal rules suspending the filibuster and limiting debate to Public Law No. 115–20 and, perhaps, if the law had been eligible for a filibuster, it might not have been enacted.

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[1] Indeed, CBD concedes that Public Law No. 115–20 would have been properly subjected to the Congressional Review Act's expedited procedures if introduced and considered in the preceding session of Congress. *See* Compl. ¶ 59 ("[T]he Refuges Rule was not eligible for disapproval under Section 801(d)(1) in the *new session* of Congress.") (emphasis added).

There are at least three reasons why that claim must be dismissed. The first two are jurisdictional bars to judicial review of the claim. The third is that the procedures applied to the consideration of Public Law No. 115–20 were entirely proper under the Congressional Review Act.

A. This Court Lacks Subject-Matter Jurisdiction Over CBD's Second Claim

1. The Constitution's Rules Clause Forbids Courts From Second Guessing Congress' Application of Their Internal Rules Unless They Violate a Constitutional Constraint or a Fundamental Right

The Constitution provides that "Each House [of Congress] may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. A necessary corollary is that the courts cannot second-guess how those rules of proceeding operate unless they violate some other express provision of the Constitution or a fundamental right. *United States v. Ballin*, 144 U.S. at 5, *cited favorably in N.L.R.B. v. Noel Canning,* 134 S. Ct. 2550, 2574 (2014); *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.").

Thus, for example, the House could not use a simple majority vote to override a presidential veto and the Senate could not ratify a treaty with a simple majority vote, since both conflict with an express provision of the Constitution. *See* U.S. Const. art. I, § 7, cl. 2; U.S. Const. art. II, § 2, cl. 2. But aside from a few such exceptions in the Constitution, no court may question the application of each House of Congress' internal rules.

The Congressional Review Act expressly states that the procedures it establishes are "an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively." 5 U.S.C. § 802(g)(1). Therefore, the Rules Clause makes Congress' application of the Congressional Review Act's procedures beyond judicial

review unless they violate an express constitutional requirement or a fundamental right.

CBD does not allege that Congress' application of its internal rules governing the filibuster and debate to enact Public Law No. 115–20 violates any express provision of the Constitution or any fundamental right. Nor could it. The Constitution does not require the Senate to maintain the filibuster for all bills or require any minimum time for debate. Therefore, Congress' application of its internal rules in enacting Public Law No. 115–20 is not subject to judicial review.

Instead, CBD raises an extremely technical challenge to how Congress interpreted and applied its internal procedures in passing Public Law No. 115–20. But as the Constitution makes clear, those technical questions are reserved to Congress, and are not for courts to decide. Accordingly, this Court lacks subject-matter jurisdiction over this claim.

2. The Congressional Review Act Also Bars Judicial Review of the Procedures Congress Uses To Enact Any Resolution of Disapproval

This Court also lacks subject-matter jurisdiction over CBD's second claim because the Congressional Review Act bars judicial review of this type of claim. *See* 5 U.S.C. § 805 ("No determination, finding, action, or omission under this chapter shall be subject to judicial review."). Although Section 805 does not preclude all claims or legal theories arising under the Congressional Review Act, it does bar challenges to congressional determinations and actions taken pursuant to the act. *See, e.g.*, *United States v. Southern Ind. Gas and 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*, Legal Memorandum No. 202 (Mar. 9, 2017).[2]

CBD's second claim for relief involves many interrelated provisions of the Congressional Review Act, *see* Compl. ¶¶ 47–55 and discussion *infra* Section II-B. But, boiled down to its essence, CBD argues Congress' application of the procedures

[2] *Available at* http://report.heritage.org/sites/default/files/2017-03/LM202.pdf.

in subsection 802(e) to pass Public Law No. 115–20 violated the Congressional Review Act. Perhaps CBD believes that if Congress had interpreted these rules differently, so that the filibuster and unlimited debate had been allowed, Public Law No. 115–20 may not have passed. But such speculation is precisely why the Congressional Review Act provides that Congress' determinations and actions made pursuant to the Act "shall [not] be subject to judicial review." 5 U.S.C. § 805.

The legislative history confirms that Congress intended to prevent second-guessing of its actions under the Congressional Review Act. 142 Cong. Rec. at S3686 (Joint statement for the record by Senators Nickles, Reid, and Stevens).[3] Congress chose language that ensured litigants could not flyspeck the process of adopting a resolution of disapproval. Larkin, *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 legislative history also explains that the same limitation on judicial review applies to the Office of Management and Budget's actions under the Congressional Review Act. 142 Cong. Rec. at S3686. This limitation is consistent with other parts of the Administrative Procedure Act. Larkin, *supra* at 4 (discussing how actions by Congress and the President are excluded from judicial review under the Administrative Procedure Act).[4]

Although Congress' and OMB's actions under the Congressional Review Act are not subject to judicial review, the legislative history explains that courts do have jurisdiction to determine the legal effect of an agency's failure to submit a rule and to

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[3] The same statement was submitted by Representative Hyde on the same day for the House sponsors of the Congressional Review Act. 142 Cong. Rec. E571-01, E577 (Congressional Record – Extension of Remarks Apr. 19, 1996).

[4] Indeed, the Congressional Review Act is codified as chapter 8 of the Administrative Procedure Act to ensure that it is read consistently with the rest of the Administrative Procedure Act.

determine whether a subsequently adopted rule is substantially similar to a rule that was previously disapproved. 142 Cong. Rec. at S3686 ("The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect.").

Few courts have interpreted the Congressional Review Act's judicial review provision. Some have said that it does not bar review of an agency's failure to comply with the Congressional Review Act. *Southern Ind. Gas*, 2002 WL 31427523, at *6 (Section 805 only precludes challenges to congressional action taken under the Congressional Review Act); *United States v. Reece*, 956 F. Supp. 2d 736, 743 (W.D. La. 2013) (holding that Section 805 does not preclude a criminal defendant from seeking to dismiss an indictment for the Drug Enforcement Agency's alleged failure to comply with the Congressional Review Act). Others have said that it precludes nearly any claim that requires an application of the Congressional Review Act. *See Montanans for Multiple Use v. Barbouletos,* 568 F.3d 225, 229 (D.C. Cir. 2009) (holding Section 805 "denies courts the power to void rules on the basis of agency noncompliance with the Act"); *Via Christi Reg'l Med. Ctr., Inc. v. Leavitt,* 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) ("The Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms.").[5] No court, however, has ever allowed judicial review of Congress' application of its own procedures, which all concede is at the core of what the Congressional Review Act precludes.[6]

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[5] Still others have reviewed the provisions of the Congressional Review Act when an agency has used the Act's requirements as a defense to the agency's actions. *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1370 (Fed. Cir. 2002), *amended on reh'g in part*, 65 Fed. App'x 717 (Fed. Cir. 2003); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004).

[6] At a minimum, an individual could raise a justiciable Due Process claim as a defense against a regulatory agency attempting to enforce a rule that is not "in effect" under the terms of the Congressional Review Act. Larkin, *supra* at 5–7; *United States v. Reece*, 956 F. Supp. 2d at 743; 142 Cong. Rec. at S3686. That reading is also strongly supported by the Act's legislative history. *See* 142 Cong. Rec. at S3686.

This Court does not need to define the outer limits of Section 805, however, because it clearly applies to Congress' actions in this case. In passing the resolution of disapproval, Congress made a "determination" or "finding" that the Refuges Rule was eligible for review and disapproval under the terms of the Congressional Review Act. CBD now wishes to second-guess that finding. Compl. ¶¶ 49–60. Under the terms of Section 805, however, this Court cannot entertain CBD's claims. Accordingly, this Court should dismiss CBD's second claim for lack of subject-matter jurisdiction.[7]

B. In the Alternative, This Court Should Dismiss CBD's Second Claim Because It Fails To State a Claim Under the Congressional Review Act

Even if this Court had jurisdiction over CBD's second claim for relief, CBD still fails to state a claim under the Congressional Review Act. Its argument relies on the intersection of several technical provisions of the Act, almost all of which it misreads, but boils down to a conclusion that the Act should not have been read to allow expedited procedures to disapprove the Refuges Rule during the current session of Congress, even if the Act could have applied in the previous session of Congress. Its strained and twisting argument fails to state a claim for multiple reasons.

The first sentence of the Congressional Review Act requires agencies to submit a short report about each regulation they issue, with a copy of the rule, to both Houses of Congress and GAO. That requirement follows a prefatory clause that provides an incentive for most agencies to follow the mandate:

> 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 [who heads GAO] a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.

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[7] Although CBD's complaint asserts that the complaint was filed pursuant to 5 U.S.C. § 706, the complaint does not identify any final agency action being challenged in this case—a necessary predicate to judicial review under the Administrative Procedure Act. *See Bennett v. Spear*, 520 U.S. 154 (1997). Instead, the complaint solely attacks Congress' and the President's actions in passing Public Law No. 115–20.

5 U.S.C. § 801(a)(1)(A). The plain meaning of that provision requires agencies to send reports to Congress and GAO on every rule, and stipulates that unreported rules cannot go into effect.

Subsection 801(a)(1)(A) is the only provision that requires covered rules to be submitted to Congress, but much of the rest of the Act turns on such submission, in particular the opportunity for Congress to review and (if applicable) disapprove submitted rules. The Refuges Rules was submitted to Congress in accordance with section 801 (no other section or law required it to be submitted to the House and Senate officers in question), and CBD seems to concede that it could have been rejected using the Congressional Review Act's expedited procedures during the first session it was submitted. Compl. ¶ 53.

There is an exception that allows certain rules to go into effect prior to submission to Congress if the issuing agency so specifies. Section 808 allows any rule an agency determines for "good cause" should go into effect immediately (which mirrors an exception in the APA to notice and comment procedures) and "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, this provision doesn't alter the requirement that agencies submit rules or Congress' opportunity to review them; it only allows certain rules to go into effect when the federal agency determines. Even assuming the Refuges Rule would have qualified for this exception, the Department of Interior did not try to take advantage of the exception. Instead, the rule was nonetheless published in the *Federal Register* on August 5, 2016,[8] delivered to both Houses of

[8] *See* 81 Fed. Reg. at 52,248–73.

Congress and GAO on that same day,[9] and not scheduled to go into effect until September 6, 2016.[10]

Even assuming the Refuges Rule fit the exception in section 808 that would have permitted it to go into effect prior to submission to Congress (if the agency had so specified, which it did not), that does not change the mandate in section 801(a)(1)(A) that the federal agency promulgating it "shall" submit it to each House of Congress and GAO for review. Even assuming that submission was voluntary, as CBD seems to imply at Compl. ¶ 56 (alleging that there was no requirement to submit the Refuges Rule), it was submitted in accordance with section 801(a)(1)(A). *See* Compl. ¶¶ 38–39.

Section 802 defines the period when Members of Congress can introduce joint resolutions to disapprove rules submitted to Congress. 5 U.S.C. § 802. It also defines the period when expedited procedures apply to those resolutions. Generally, Congress has 60 legislative or session days after submission to disapprove a proposed rule using the Congressional Review Act's fast-track procedures. *Id.* But if a rule was submitted when fewer than 60 legislative or session days remained in a congressional session, subsections 801(d) and 802(e) provide for the expedited review clock to begin again 15 legislative or session days[11] after the start of a new session of Congress.

CBD essentially concedes that the expedited procedures would have applied in the session the Refuges Rule was submitted, Compl. ¶ 53 ("Section 802 (within a single session) is available broadly for all rules"), but believes the additional period of expedited review in the new session of Congress this year should not have applied, since the additional period is triggered only by reports that were "required" to be submitted under 801 or "in accordance with" section 801. Compl. ¶ 57. CBD claims

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9 *See, e.g.*, GAO Congressional Review Act database, http://www.gao.gov/fedrules/186189.

10 *See* Refuges Rule, *supra* at 81 Fed. Reg. 52,248.

11 The House uses the term "legislative days;" the Senate refers to them as "session days." The Congressional Review Act often references both terms, as in section 801(d).

that the Refuges Rule was not "required" to be submitted or submitted "in accordance with section 801." Compl. ¶¶ 57, 59.

This is doubly wrong. First, as discussed above, the Refuges Rule was required to be submitted under section 801, regardless of its effective date.

Second, the extra period of expedited review in a new session of Congress in section 802(e) does not turn on rule reports that are "required" to be sent to Congress, but on rule reports that were "submitted during the period referred to in section 801(d)(1)." 5 U.S.C. § 802(e)(2). That subsection refers to "a report [that] was submitted in accordance with subsection [801](a)(1)(A)." 5 U.S.C. § 801(d)(1). CBD's reading of "in accordance with subsection [801]" is that a rule is submitted "in accordance with" that subsection only if the rule was required to be submitted *in order for it to go into effect*. That highly artificial reading of "in accordance with" has no textual, linguistic, or other support.

The Refuges Rule was in fact submitted "in accordance with" the terms of section 801. The Department of Interior followed the requirements of section 801 to a tee. And there is no other provision in the Congressional Review Act or other law that the Department was following when it submitted the Refuge Rule to GAO and the two constitutional officers in the House and Senate who received it. There is no sense in which the Refuge Rule was submitted *not* in accordance with section 801. If someone writes, "in accordance with your specifications that I submit X, Y, and Z, I am hereby doing so," one would use the same words regardless of whether the submission was "required" or purely voluntary.

Finally, CBD's reading of the Congressional Review Act would have bizarre implications that Congress could not have intended. It would convert a minor exception in 808 for when hunting, fishing, and camping rules may go into effect into an exception negating the mandate requiring them to be sent to Congress. It would also allow rules of that type to be disapproved in the first session in which they are received by Congress (if sent up "voluntarily") but not in the follow-on session if they were submitted on the last day of the preceding session. If Congress had wanted to exempt such rules from review entirely (or from the subsequent expedited review

periods), there would be much more straightforward ways to write that. If there were any ambiguity in the Congressional Review Act that would permit CBD's interpretation, and there is not, that ambiguity should be resolved in favor of applying the same periods of additional expedited review to hunting, fishing, and camping rules (once submitted) as to any other covered rule under the Congressional Review Act.

Conclusion

CBD's challenge to Congress' and the President's enactment of Public Law No. 115–20 should be dismissed for failure to state a claim and lack of subject-matter jurisdiction. The allegations in the complaint establish that this law was properly enacted pursuant to the Constitution's bicameralism and presentment requirements. The Constitution and Congressional Review Act each independently bar CBD's challenge to Congress' application of its internal rules to pass Public Law No. 115–20. Even if it was not barred from judicial review, CBD's second claim fails to state a claim since Congress and the President properly enacted Public Law No. 115–20 pursuant to the Congressional Review Act's established procedures.

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Respectfully submitted,

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