JAMES S. BURLING, Alaska Bar No. 8411102
E-mail: jsb@pacificlegal.org
OLIVER J. DUNFORD*, Ohio Bar No. 0073933
E-mail: ojd@pacificlegal.org
JEFFREY W. McCOY*, Colo. Bar No. 43562
E-mail: jwm@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

JONATHAN WOOD*, Cal. Bar No. 285229
E-mail: jw@pacificlegal.org
TODD F. GAZIANO*, Tex. Bar No. 07742200
E-mail: tfg@pacificlegal.org
Pacific Legal Foundation
3033 Wilson Blvd., Suite 700
Arlington, Virginia 22201
Telephone: (202) 888-6881

ZACHARIA OLSON*, D.C. Bar No. 1025677
E-mail: zolson@dc.bhb.com
Birch, Horton, Bittner & Cherot, P.C.
1156 15th Street, NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 659-5800

**Pro Hac Vice*

Attorneys for Defendant-Intervenors

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v.	)	No. 3:17-cv-00091-JWS **DEFENDANT-INTERVENORS PACIFIC LEGAL FOUNDATION, ET AL.'S BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

RYAN ZINKE, et al.,	)
	)
Defendants,	)
	)
PACIFIC LEGAL FOUNDATION; ALASKA OUTDOOR COUNCIL; BIG GAME FOREVER; KURT WHITEHEAD; and JOE LETARTE,	)
	)
Defendant-Intervenors,	)
	)
STATE OF ALASKA,	)
	)
Defendant-Intervenor,	)
	)
SAFARI CLUB INTERNATION, *et al.*,	)
	)
Defendant-Intervenors,	)
_____	)

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Introduction

Pursuant to this Court's order granting the motion to intervene by Defendant-Intervenors Pacific Legal Foundation, Alaska Outdoor Council, Big Game Forever, Kurt Whitehead, and Joe Letarte (collectively "the PLF Intervenors"), they submit this brief supporting dismissal of the Center for Biological Diversity's (CBD) complaint. These arguments were addressed more fully in the PLF Intervenors' Proposed Motion to Dismiss, Dkt. 27, and have since been largely adopted by the U.S. Department of Interior and Secretary of Interior Ryan Zinke (collectively "Interior").

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. 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.

I. CBD Has Failed To State a Separation of Powers Claim Because Congress Has the Constitutional Authority To Withdraw Delegated Authority from an Agency

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.

As CBD's complaint concedes, Congress and the President complied with the Constitution's requirements to enact Public Law No. 115–20. *See* Compl. ¶ 38. It was passed by a majority of both Houses of Congress, thus satisfying the Constitution's bicameralism requirement. U.S. Const. art. I, §§ 1, 7. After which, it was signed by the President, satisfying the Constitution's presentment requirement. U.S. Const. art. I, § 7. This is all that is required for Congress and the President to enact a new law, consistent with the separation of powers. *See I.N.S. v. Chadha*, 462 U.S. 919, 946–48 (1983).

Nonetheless, CBD insists that Congress and the President 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 allegation does not state a separation of powers claim.

Congress and the President did not violate the separation of powers because Interior has no independent constitutional authority on which to intrude. The Constitution vests *Congress* with the power to manage Alaskan wildlife refuges—and all other federal lands—not Interior. 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 Interior. 16 U.S.C. §§ 668dd–668ee. But Congress no more violates the separation of powers by amending a Property Clause delegation than the President does in firing or giving an order to an executive official to whom he previously delegated discretionary authority. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496–97 (2010) ("[T]he President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." (internal quotations omitted)).

Like all agencies created by Congress, 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. Zivotofsky ex rel. Zivotofsky 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. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

Thus, the separation of powers places no constraint on Congress' power to amend prior delegations to agencies. The Constitution 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 All. for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012); *see also Friends of Animals v. Jewell*, 824 F.3d 1033, 1045 (D.C. Cir. 2016).

The theory CBD presents in this case is indistinguishable from *Friends of Animals*. In that

case, an environmental group challenged a law that required the Fish and Wildlife Service to reissue a particular regulation previously 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 All. for the Wild Rockies*, 672 F.3d at 1174. "[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.

CBD's allegations 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 All. for the Wild Rockies*, 672 F.3d at 1174. Therefore, CBD's first claim should be dismissed for failure to state a claim.

II. This Court Lacks Subject-Matter Jurisdiction Because the Congressional Review Act Prevents Litigants from Challenging Congress' and OMB's Actions Under the Act

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 what is clear is that this Court lacks subject-matter jurisdiction over the claim. First, this Court lacks subject-matter jurisdiction because the Rules Clause of the Constitution forbids courts from second-guessing Congress' application of its internal rules unless those rules violate some independent constitutional constraint. U.S. Const. art. I, § 5, cl. 2; *see also* Def. Memo. In Support of Motion to Dismiss, Dkt. 63, at 20–23. Secondly, the Congressional Review Act itself prevents litigants from challenging congressional action taken pursuant to the Act.

The Congressional Review Act provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. 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. 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*, Legal Memorandum No. 202 (Mar. 9, 2017).[1]

The legislative history confirms that Congress intended to prevent second-guessing of its actions under the Congressional Review Act. 142 Cong. Rec. S3683, S3686 (daily ed. Apr. 18, 1996) (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). 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

[1] *Available at* http://www.heritage.org/the-constitution/report/judicial-review-under-the-congressional-review-act. In its combined response to motions to intervene, CBD argues that PLF should be prevented from citing to Mr. Larkin's article. *See* Plaintiff's Combined Response to Motions to Intervene, Dkt. 71, at 10. This Court rejected that argument by granting PLF intervention as a matter of right. Dkt. 83 at 6. Furthermore, scholarly articles are consistently cited in briefs for their persuasiveness, and that may be the primary reason CBD does not want this Court to read Mr. Larkin's article.

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. *Id.* This limitation is consistent with other parts of the Administrative Procedure Act. Larkin, *supra* at 4 (explaining how actions by Congress and the President are excluded from judicial review under the Administrative Procedure Act).[2]

Although Congress' and OMB's actions under the Congressional Review Act are not subject to judicial review, courts do have jurisdiction to determine the legal effect of an agency's failure to submit a rule and to determine whether a subsequently adopted rule is substantially similar to a rule that was previously disapproved. *See* 142 Cong. Rec. at S3686 ("The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect."). But CBD has not raised these arguments. Therefore, the text and legislative history of the Congressional Review Act demonstrate that this Court lacks jurisdiction over the claims that CBD has made.

Few courts have interpreted the Congressional Review Act's judicial-review provision. Some have interpreted Section 805 consistently with the legislative history and said that the provision 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."). Still others have reviewed the provisions of the Congressional Review Act when an agency has

[2] 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. 142 Cong. Rec. S3683 ("Subtitle E adds a new chapter to the Administrative Procedure Act").

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 F. App'x 717 (Fed. Cir. 2003); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004). 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.

While this Court should properly interpret Section 805, this Court does not need to define the outer limits of the provision to dismiss CBD's claims. Section 805 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. Section 805 precludes CBD from second-guessing that finding. Accordingly, this Court should dismiss CBD's second claim for lack of subject-matter jurisdiction.

III. This Court Should Dismiss CBD's Second Claim for Relief Because the Department of Interior Submitted the Refuges Rule to Congress Pursuant to Section 801 of the Congressional Review Act

Even if this Court had jurisdiction over CBD's second claim for relief, CBD still fails to state a claim on which relief can be granted. Its argument relies on the intersection of several technical provisions of the Act, almost all of which it misreads, which boils down to an assertion 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.

CBD's claims that Public Law No. 115–20 was untimely as a result of Section 808 of the Congressional Review Act. Section 808 allows (1) any rule an agency determines for "good cause" to go into effect immediately (which mirrors an exception in the APA to notice and comment procedures) 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, 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. *See* 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 containing . . . ."). Even assuming the Refuges Rule fits into 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), section 801(a)(1)(A) still mandated that the federal agency promulgating it "shall" submit it to each House of Congress and GAO for review.

However, an in-depth analysis of the Congressional Review Act's provisions is not required to determine the merits of CBD's second claim for relief. 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, because the additional period is triggered only by reports that were "required" to be submitted under 801 or "in accordance with" section 801. Compl. ¶ 57.

The Congressional Record demonstrates that the Refuges Rule was required to be—and actually was—submitted under section 801. According to the November 14, 2016 House of Representative Congressional Record, Interior sent

> A letter from the Conservation Policy Specialist, U.S. Fish and Wildlife Service, Department of the Interior, transmitting the Department's final rule — Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska . . . received October 5, 2016, *pursuant to 5 U.S.C. 801(a)(1)(A)* . . . .

162 Cong. Rec. H6169 (daily ed. Nov. 14, 2016) (emphasis added). The Senate Congressional Record similarly states that Interior transmitted, "pursuant to law, the report of" the Refuges Rule. 163 Cong. Rec. S6346 (daily ed. Nov. 15, 2016).

Even assuming that submission was voluntary, as CBD seems to imply, 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; 162 Cong. Rec. H6169. Thus, under the Congressional Review Act, Congress had an additional period of expedited review of the Refuges Rule in the new session of Congress this year. Accordingly, CBD's second claim for relief is without merit and should be dismissed.

DATED: August 3, 2017.

Respectfully submitted,

JAMES S. BURLING
OLIVER J. DUNFORD
JEFFREY W. McCOY
JONATHAN WOOD
TODD F. GAZIANO
ZACHARIA OLSON

s/ Jeffrey W. McCoy
Jeffrey W. McCoy

Attorneys for Defendant-Intervenors

Certificate of Service

I hereby certify that on August 3, 2017, a copy of the foregoing document was served electronically through the Court's ECF system on Ann E. Prezyna, Michael B. Baylous, Claire Loebs Davis, Collette L. Adkins, Emily S. Jeffers, and Howard M. Crystal, Scott E. Gant, Aaron E. Nathan, Counsel for Plaintiff Center for Biological Diversity; Stephen M. Pezzi and Richard L. Pomeroy, Counsel for Defendants Ryan Zinke and U.S. Department of the Interior; Brent R. Cole, Counsel for Defendant-Intervenors Safari Club International and National Rifle Association of America; Cheryl Rawls Brooking and Jessica M. Alloway, Counsel for Defendant-Intervenor State of Alaska; and Brent Cole, Anna M. Seidman, Douglas S. Burdin, Misha Tseytlin, and Michael T. Jean, Counsel for Amici Curiae State of Wisconsin, et al.

s/ Jeffrey W. McCoy
Jeffrey W. McCoy