

## **Center for Biological Diversity v. Bernhardt**—Ninth Circuit rejects constitutional challenges to the Congressional Review Act and finds claim alleging its violation barred by the Act’s Jurisdiction-Stripping Provision

In 1994, Alaska authorized the State Board of Game “to provide for intensive management programs to restore the abundance or productivity of identified big game prey populations as necessary to achieve human consumptive use goals.” The Fish and Wildlife Service eventually responded in 2016 by “promulgat[ing] an expansive new rule [the “Refuges Rule”] that substantially deviated from the state’s regulations” and “effectively prevent[ing] the Board from implementing Alaska’s intensive management on federal land.” In 2017, the House of Representative and the Senate passed a Joint Resolution under the Congressional Review Act, 5 U.S.C. §§ 801-808, disapproving the FWS rule, and the President signed the Resolution into law. FWS then rescinded the disapproved rule and reverted to the text of the prior rule. The Center for Biological Diversity sued, alleging that the CRA improperly delegated congressional authority and violated the Take Care Clause (U.S. Const. art. II, § 3) and related separation-of-power principles. CBD further alleged that the process used to adopt the Joint Resolution was flawed and that FWS thus “acted *ultra vires* in adhering to the Joint Resolution and rescinding the Refuges Rule.” The district court dismissed the complaint. *Center for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976 (D. Alaska 2018). On appeal, Ninth Circuit affirmed in part and dismissed in part. *Center for Biological Diversity v. Bernhardt*, No. 18-35629, 2019 WL 7287569 (9th Cir. Dec. 30, 2019).

CBD directed its nondelegation challenge to the CRA’s “Reenactment Provision” that precludes issuance of new rule if substantially the same as a disapproved rule “unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.” The panel agreed with the federal defendants that this claim was “legally distinct” from the challenge to the Joint Resolution and that CBD “must separately establish standing for its argument that the Reenactment Provision violates the nondelegation doctrine.” CBD failed to do so because it “alleged no facts raising a plausible inference that [the Department of the] Interior would take … steps [to reenact the disapproved rule], and thus has not ‘nudged’ its claim of injury ‘across the line from conceivable to plausible.’”

Turning to the separation-of-powers challenge, the panel first held that the prohibition in the CRA against judicial review of any “determination, finding, action, or omission under this chapter” did not preclude the claim. “Under the applicable canon of statutory construction,” it stated, “where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.” The “Jurisdiction-Stripping Provision” did not meet this standard given the absence of “explicit language barring judicial review of constitutional claims.” On the merits, however, the claim failed. “Congress complied with the process of bicameralism and presentment in enacting the Joint Resolution, because the Joint Resolution passed both houses of Congress and was signed by the President into law.” The Resolution thus changed “substantive law, even though it did not state that it constituted an amendment to the National Wildlife Refuge System Administration Act, the National Wildlife Refuge System Improvement Act, or ANILCA.”

Lastly, the panel held CBD’s challenge to the process by which the Joint Resolution was adopted was barred by the Jurisdiction-Stripping Provision “[b]ecause enacting a joint resolution of disapproval is an action under the CRA.” It additionally rejected CBD’s contention that FWS’s rescission of the Refuges Rule was a distinct claim outside the reach of the Provision: “CBD challenges Interior’s rescission of the Refuges Rule solely on the ground that Congress did not validly enact the Joint Resolution. Therefore, CBD’s claim necessarily involves a challenge to a

congressional ‘determination, finding, action or omission’ under the CRA, and as such is subject to the Jurisdiction-Stripping Provision.”

Ninth Circuit Decision Link: <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/12/30/18-35629.pdf>