

July 21, 2008. After carefully considering the parties' briefs, arguments, and applicable law, the Court concludes it should grant Defendants' Motion to Dismiss.

I. BACKGROUND

On June 2, 2008, Plaintiffs filed their "Complaint for Declaratory and Injunctive Relief" ("Complaint") [Rec. No. 1]. In their Complaint, Plaintiffs raise three constitutional challenges to Chertoff's congressionally-delegated waiver authority:¹ (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment. On June 23, 2008, Plaintiffs filed their "Application for Preliminary Injunction" [Rec. No. 19], requesting the Court to enjoin Defendants from constructing any fencing, walls, or other physical barriers along the United States-Mexico border in Texas, New Mexico, Arizona, and California, unless and until DHS complies with the laws waived by Chertoff on April 3, 2008.² On August 29, 2008, the Court entered its "Memorandum Opinion

¹ In 2005, pursuant to the REAL ID Act, Congress gave the Secretary, "notwithstanding any other provision of law . . . the authority to waive all legal requirements such Secretary . . . determines necessary to ensure expeditious construction of the barriers and roads under this section." ("Waiver Legislation"). Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note ("Section 102").

² On April 3, 2008, Chertoff exercised his authority, pursuant to Section 102, and published two notices in the Federal Register waiving "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" various federal statutes explicitly waived "with respect to the construction of roads and fixed and mobile barriers" along the United States-Mexican border. See Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19077 ("Hidalgo County Waiver") & 19078 ("Multi-state Waiver") (Apr. 8, 2008). Specifically, Chertoff waived twenty-seven laws to facilitate construction of barriers and roads along twenty-two miles of the Texas-Mexico border in Hidalgo County, Texas. *Id.* at 73 Fed. Reg. 19077. Chertoff also waived thirty-seven laws to facilitate construction of barriers and roads along 470 miles of the United States-Mexico border in Texas, New Mexico, Arizona, and California. *Id.* at 73 Fed. Reg. 19078.

and Order Denying Plaintiffs' Application for Preliminary Injunction" ("Memorandum Opinion and Order") [Rec. No. 28].

II. MOTIONS TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted."³

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)⁴

Nonetheless, a "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."⁵ "The task of the court in ruling on a Rule 12(b)(6) motion 'is merely to assess the legal feasibility of the complaint, [and] not to assay the weight of the evidence which might be offered in support thereof.'"⁶ Thus, when considering a Rule 12(b)(6) motion, a court must accept all well-pleaded facts as true, and construe all reasonable inferences in the light most

³ FED. R. CIV. P. 12(b)(6).

⁴ *Vanderbrook v. Unitrin Preferred Ins. Co. (In re Katrina Canal Breaches Litigation)*, 495 F.3d 191, 205 & 205 n.10 (5th Cir. 2007) (internal quotations and citations omitted) (citing *Bell Atl. Corp. v. Twombly*, __ U.S. __, __, 127 S. Ct. 1955, 1974 (2007)) (noting the Supreme Court's clarification of the minimum standard of adequate pleading governing a complaint's survival).

⁵ *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

⁶ *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998) (quoting *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984)).

favorable to the plaintiffs.⁷ Although the Court must accept well-pleaded allegations in a complaint as true, it does not afford conclusory allegations similar treatment.⁸

III. DISCUSSION

In their Complaint, Plaintiffs raise three constitutional challenges to the Waiver Legislation: (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment. In their Motion to Dismiss, Defendants argue "[P]laintiffs' [C]omplaint should be dismissed with prejudice [because] the Waiver Legislation is clearly constitutional and there are no relevant factual disputes that would prevent dismissal."⁹

The Court previously analyzed Plaintiffs' constitutional challenges at length in the Memorandum Opinion and Order it entered on August 29, 2008, in which it denied Plaintiffs' Application for Preliminary Injunction. First, the Court found the Waiver Legislation did not violate the Nondelegation Clause because "Congress constitutionally delegated its authority in the Waiver Legislation [when] it provided the Secretary with an intelligible principle to guide his discretionary waiver of legal requirements to expeditiously complete construction of physical

⁷ See *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *Capital Parks, Inc. v. Se. Adver. & Sales Sys., Inc.*, 30 F.3d 627, 629 (5th Cir. 1994); see also *Jolly v. Klein*, 923 F. Supp. 931, 942 (S.D. Tex. 1996) ("A motion to dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim tests only the formal sufficiency of the statements of the claims for relief. It is not a procedure for resolving contests about the facts or the merits of the case.").

⁸ See *Kaiser*, 677 F.2d at 1050 (citing *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)).

⁹ Defs.' Mot. to Dismiss at 24.

barriers and roads at the nation's borders."¹⁰ The Court also found "the Supreme Court does not require judicial review to satisfy the intelligible principle standard."¹¹

Second, the Court found the Waiver Legislation did not violate the Presentment Clause because "unlike the laws at issue in *Clinton v. City of New York*,"¹² which no longer had any "legal force or effect" whatsoever once the President applied the line-item veto, the laws waived pursuant to Section 102 still overwhelmingly remain in effect outside the limited scope of the Secretary's waiver."¹³ Finally, the Court found the Waiver Legislation did not violate the Tenth Amendment because "Section 102 clearly manifests congressional intent to preempt state and local laws which would interfere with Congress's objective to expeditiously construct the border fence. Moreover, even if Section 102 does not contain explicit preemptive language, the Waiver Legislation still preempts these laws, pursuant to the Supreme Court's explanation of conflict preemption."¹⁴

The Court finds its Memorandum Opinion and Order is dispositive of Plaintiffs' constitutional claims for purposes of Defendants' Motion to Dismiss. Therefore, in construing all reasonable inferences in the light most favorable to Plaintiffs, the Court concludes Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief can be granted.

¹⁰ Mem. Op. & Order Den. Pls.' Applic. Prelim. Inj. at 9.

¹¹ *Id.* at 11.

¹² 524 U.S. 417 (1998). In *Clinton*, the Supreme Court struck down the Line Item Veto Act of 1996 because "[i]n both legal and practical effect," it authorized the President to amend "Acts of Congress by repealing a portion of each" in violation of the Presentment Clause. *Id.* at 438.

¹³ Mem. Op. & Order Den. Pls.' Applic. Prelim. Inj. at 16.

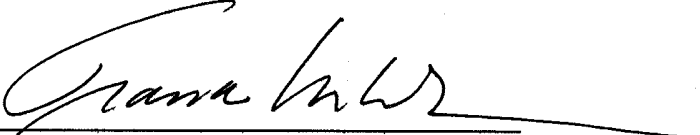
¹⁴ *Id.* at 22.

IV. CONCLUSION AND ORDERS

For the reasons discussed, the Court concludes it should, and hereby does, **GRANT** Defendants' Motion to Dismiss [Rec. No. 21]. The Court **DISMISSES** the above-captioned cause **WITH PREJUDICE**.

SO ORDERED.

SIGNED this 11th day of **September, 2008.**



FRANK MONTALVO
UNITED STATES DISTRICT JUDGE