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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LA POSTA BAND OF DIEGUENO MISSION INDIANS OF THE LA POST RESERVATION,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

Case No. 3:20-cv-01552-AJB-MSB

DEFENDANTS' OPPOSITION TO PLAINTIFFS' EMERGENCY EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Date: August 27, 2020
Time: 2:00 pm
Courtroom: 4A
Hon. Anthony J. Battaglia

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INTRODUCTION

Last summer, the Supreme Court stayed a preliminary injunction preventing construction of barriers along the southern border entered by a judge in the Northern District of California and affirmed by the Ninth Circuit. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). Ever since, courts have consistently refused requests to enjoin construction projects at the southern border authorized by the Department of Defense (DoD) pursuant to 10 U.S.C. § 284. Undeterred by the weight of these precedents, Plaintiffs seek a temporary restraining order and preliminary injunction "to immediately cease all construction activity" of approximately 20 miles of new border barrier construction—14 miles of which merely replaces existing barriers—in southern California pursuant to § 284. Pls.' Mot. at 25.[1]

Plaintiffs' request should be handled no differently from those that have come before it. Their assertions that Defendants violated restrictions on funding transfers in order to pay for the challenged border barrier projects were squarely encompassed by the stay the Supreme Court issued in *Sierra Club*, which it recently reaffirmed in response to a motion to lift the stay. Meanwhile, Plaintiffs have not shown they are likely to succeed on the merits of any of the other legal theories they advance, including the Consolidated Appropriations Act's prohibition on construction in "historic cemeteries," consultation requirements imposed by statute and Executive Order, the Religious Freedom Restoration Act (RFRA), and the Fifth Amendment. Additionally, the balance of equities tilts just as heavily towards Defendants as it did in *Sierra Club*. As outlined in the attached declarations submitted by officials familiar with the disputed projects, Defendants have made significant efforts to consult with Plaintiffs and other Indian tribes throughout the construction process and to permit access to the construction site for prayer and religious ceremonies. They also have taken steps to protect cultural resources found within the project areas and have committed to working with Plaintiffs if additional cultural resources are discovered. Plaintiffs' dissatisfaction with these efforts is substantially

[1] Plaintiffs filed substantially similar memoranda of law in support of their separate requests for preliminary relief. This opposition responds to both motions, but for ease of reference cites only to the brief requesting a TRO. ECF No. 13.

outweighed by the harms to the Government and the public if construction is halted.

BACKGROUND

I. Congress's Authorization of Border Barrier Construction and DoD's Support for DHS's Border Security Efforts.

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorizes the Secretary of Homeland Security to "take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Pub. L. No. 104-208, Div. C., Title I § 102(a), 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1103 note). In 2005, Congress grew frustrated by "[c]ontinued delays caused by litigation" preventing barrier construction and amended IIRIRA by granting the Secretary of Homeland Security authority "to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." *See* H.R. Rep. 109-72, at 171 (May 3, 2005); Pub. L. No. 109-13, Div. B, Title I § 102 (IIRIRA § 102(c)).

Congress also has expressly authorized DoD to provide a wide range of support to DHS at the southern border. 10 U.S.C. § 284; *see id.* §§ 271-74. For decades, U.S. military forces have played an active role in barrier construction. Military personnel were critical to construction of the first modern border barrier near San Diego, CA in the early 1990s, as well as other more recent border fence projects. *See, e.g.,* H.R. Rep. No. 103-200, at 330-31, 1993 WL 298896 (1993); *See* H. Armed Servs. Comm. Hr'g on S. Border Defense Support (Jan. 29, 2019) (Joint Statement of John Rood and Vice Admiral Michael Gilday) (Davis Decl., Ex. 1).

On January 25, 2017, the President issued an Executive Order directing federal agencies "to deploy all lawful means to secure the Nation's southern border." Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017). The Order required agencies to "take all appropriate steps to immediately plan, design and construct a physical wall along the southern border," including to "[i]dentify and, to the extent permitted by law, allocate all sources of Federal funds" to that effort. *Id.* at 8794.

On April 4, 2018, the President issued a memorandum titled, "Securing the Southern

Border of the United States." Presidential Memorandum, 2018 WL 1633761 (Apr. 4, 2018). The President stated "[t]he security of the United States is imperiled by a drastic surge of illegal activity on the southern border" and pointed to "the combination of illegal drugs, dangerous gang activity, and extensive illegal immigration." *Id.* at *1. The President determined the situation at the border had "reached a point of crisis" that "once again calls for the National Guard to help secure our border and protect our homeland." *Id.* The President directed DoD to support DHS in "securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens into this country." *Id.* at *2.

II. DoD's Support in Fiscal Year 2020 to DHS's Efforts to Secure the Southern Border.

On December 20, 2019, the President signed into law the Consolidated Appropriations Act, 2020 (FY20 CAA), which appropriated funds for the 2020 fiscal year to various federal agencies, including DHS. *See* Pub. L. No. 116-93, 133 Stat. 2317. Section 209 of the DHS Appropriations Act, 2020, *see id.* Div. D, appropriated $1.375 billion to DHS "for the construction of barrier system along the southwest border."

On January 14, 2020, in accordance with the requirements of 10 U.S.C. § 284, DHS requested DoD's assistance to construct 38 discrete border barrier project segments located in drug-smuggling corridors along the southern border. *See* Administrative Record (AR) at 28–43 (Davis Decl., Ex. 2). Section 284 authorizes DoD to "provide support for the counterdrug activities . . . of any other department or agency," if "such support is requested." *Id.* § 284(a). This support explicitly includes the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7). DHS's request sought the construction of new fencing as well as the replacement of existing vehicle barriers and dilapidated fencing, the construction of new and improvement of existing patrol roads, and the installation of lighting. AR at 28–29.

On February 7, 2020, the Secretary of Defense approved construction and funding for 31 project segments. *See id.* at 1–11. Plaintiffs in this case challenge the construction of two

projects, consisting of four discrete segments, in San Diego and Imperial Counties. *See* Pls.' Mot. at 6. "San Diego A" consists of three segments totaling three miles of new primary pedestrian fencing and 14 miles of replacement pedestrian fencing in San Diego County. *See* AR at 30–31. "El Centro A" consists of three miles of new pedestrian fencing in Imperial County. *See id.* at 31–33; Decl. of Paul Enriquez ¶ 16. Both projects are located entirely on federal land. *See* AR at 29; Enriquez Decl. ¶ 11.

The Secretary of Defense concluded that DHS identified each project location as a drug-smuggling corridor in accordance with § 284(b)(7). *See* AR at 1–7, 9. The United States Border Patrol (USBP) collectively had over 480 separate drug-related events in fiscal year 2019 between border crossings in the San Diego an El Centro border patrol sectors where the barriers will be built. *See id.* at 30–33. These encounters resulted in the seizure of approximately 3400 pounds of marijuana, 1300 pounds of cocaine, 400 pounds of heroin, 6500 pounds of methamphetamine, and 107 pounds of fentanyl. *See id.*

The construction of new fencing in these areas is required to add needed barriers in locations where none currently exist. *See id.* at 30–33. The replacement of existing pedestrian fencing is necessary because the older designs are easily breached and have been damaged to such an extent that they are ineffective. *See id.* Further, drug cartels operating in these areas have adapted their tactics to evade the existing barriers. *See id.* DHS thus requires new barriers to impede and deny illegal narcotics smuggling. *See id.* at 28–29.

To fund the projects, the Secretary of Defense authorized the transfer of $3.831 billion to the counter narcotics support line of the Drug Interdiction and Counter-Drug Activities, Defense, appropriation. *See id.* at 1–7, 13–14. The Secretary directed the transfer pursuant to DoD's general transfer authority under § 8005 of the DoD Appropriations Act, 2020 (a component of the FY20 CAA), *see* Pub. L. No. 116-93, Div. A, and § 1001 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA), *see* Pub. L. No. 116-92, Title X, and DoD's special transfer authority under § 9002 of the FY20 DoD Appropriations Act and § 1520A of the FY20 NDAA. *See* AR at 1–7, 13–14. These provisions collectively authorize DoD to transfer up to $6 billion between appropriations in fiscal year 2020 provided "[t]hat

the authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." FY20 CAA, Div. A, § 8005. The Secretary concluded the transfer met these requirements. *See* AR at 6, 13–14.[2]

On March 16, 2020, the Acting Secretary of Homeland Security exercised his authority under § 102(c)(1) of IIRIRA, as amended, to waive the application of various federal and state laws, "in their entirety," to ensure expeditious construction of the San Diego and El Centro projects. *See* Determinations Pursuant to Section 102 of IIRIRA, as Amended, 85 Fed. Reg. 14958–61 (Mar. 16, 2020). As relevant here, the waived laws include the Native American Grave Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*) (NAGPRA) along with "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of, the [listed] statutes." *Id.*

LEGAL STANDARD

Requests for temporary restraining orders and preliminary injunctions are governed by the same standard. *See Mata v. U.S. Bank Nat'l Ass'n as Tr. for C-Bass Mortg. Loan Asset-Backed Certificates, Series 2006-CB1*, 2011 WL 13356103, at *5 (S.D. Cal. May 23, 2011). A preliminary injunction is "an extraordinary and drastic remedy" that should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). A plaintiff must show that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). "Likelihood of success on the merits is the most important factor" and if a plaintiff fails to meet this "threshold inquiry," the court "need not consider the other factors." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018). Alternatively, "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support

[2] Because § 1001, § 1520A, and § 9002 incorporate § 8005 by reference or are subject to the same requirements as § 8005, this brief refers to these requirements collectively by reference to § 8005. *See Sierra Club v. Trump*, 929 F.3d 670, 682 n.7 (9th Cir. 2019).

issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits.

A. Plaintiffs Lack a Cause of Action to Challenge DoD's Internal Transfer of Funds.

Plaintiffs contend that DoD has not complied with the statutory requirements of § 8005, *see* Pls.' Mot. at 8–12, but Plaintiffs lack a cause of action to assert that claim based on a decision from the Supreme Court in related litigation addressing § 8005.

In *Trump v. Sierra Club*, the Supreme Court stayed a permanent injunction issued by the Northern District of California against a different set of border barrier projects because, "[a]mong other reasons," the Government had sufficiently shown that "the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." 140 S. Ct. at 1. The Supreme Court's decision to stay an injunction is guided by the same factors that inform the issuance of an injunction. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Thus, when the Supreme Court stayed the injunction, it necessarily concluded that the Government was likely to succeed on the merits of the claim that the *Sierra Club* plaintiffs "have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Sierra Club*, 140 S. Ct. at 1. There is no basis for this Court to contradict that decision from the Supreme Court, particularly in light of the fact that the Supreme Court recently denied a motion to lift the stay. *See Trump v. Sierra Club*, 2020 WL 4381616, at *1 (U.S. Jul. 31, 2020); *see also CASA de Md., Inc. v. Trump*, 2020 WL 4664820, at *1 (4th Cir. Aug. 5, 2020) (declining "to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so.").

Plaintiffs in this case cannot escape the force of the Supreme Court's decision by asserting religious and cultural interests. As was the case with the environmental interests

asserted by the plaintiffs in the *Sierra Club* litigation, Plaintiffs cannot invoke any express or implied cause of action because their asserted interests are not even arguably within the zone of interests protected by § 8005. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" authorized by Congress. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129-130 (2014). It reflects the common-sense intuition that Congress does not intend to extend a cause of action to "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions" they seek to enforce. *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 178 (2011). "Congress is presumed to legislate against the background of the zone-of-interests limitation," which excludes putative plaintiffs whose interests do not "fall within the zone of interests protected by the law invoked." *Lexmark*, 572 U.S. at 129.

Section 8005 governs DoD's internal transfers of appropriated funds as part of Congress's regulation of DoD's budget. Section 8005 thus protects the interests of DoD and Congress, not users of federal lands. Nothing in § 8005 suggests that Congress intended to permit suit by parties who, like Plaintiffs here, assert that a transfer of funds from one DoD budget account to another would indirectly harm their religious and cultural interests based on how the transferred funds are ultimately spent.

Plaintiffs argue that they have a cause of action to enforce § 8005 based on the Ninth Circuit's decisions in *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020) and *California v. Trump*, 963 F.3d 926 (9th Cir. 2020), but those decisions adopted the same flawed cause of action and zone-of-interests analysis as the Ninth Circuit motions panel that denied the Government's initial stay application. *See Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019). The Supreme Court rejected that rationale when it granted a stay and there is no basis for this Court to act contrary to the Supreme Court's order simply because the merits panel reached the same incorrect conclusion as the motions panel.

In addition to § 8005, Plaintiffs seek to enforce § 739 of the FY20 CAA, Pub. L. No. 116-93, 133 Stat. 2494, which limits an agency's authority to increase funding for a "program, project, or activity as proposed in the President's budget request for a fiscal year"

until such a change is enacted in a subsequent appropriations act or made pursuant to an agency's reprogramming or transfer authority. But as with § 8005, this provision regulates the relationship between Congress and the Executive Branch regarding federal spending, and in no way protects the interests that Plaintiffs assert in this case.

B. DoD Complied with the Requirements of § 8005 and § 739.

Even assuming Plaintiffs have a cause of action to enforce § 8005 and § 739, those claims fail on the merits. The Secretary of Defense correctly concluded that the requirements of § 8005 were satisfied in directing the transfer of funds at issue here. The Secretary determined that the transfers to provide DHS counter-drug support in constructing border barriers were for a "higher priority item" than the purposes for which the funds were originally appropriated. *See* AR at 3–4, 6, 13, 17–21. The Secretary further found that the military requirements to be funded as a result of the transfers were "unforeseen" because the need to provide support for the approved § 284 projects was not known at the time of DoD's fiscal year 2020 budget request. *Id.* at 4, 7, 14. The Secretary also concluded that the item for which the funds were transferred—barrier construction under § 284 in the specific project areas requested by DHS in fiscal year 2020—"has not been denied by Congress." *Id.* at 4, 6, 14.

The Secretary's decision is consistent with the views of the Government Accountability Office (GAO), the independent legislative agency charged with overseeing Executive Branch spending on behalf of Congress. The GAO concluded that DoD acted consistently with § 8005 in transferring and using its "fiscal year 2019 appropriations for the purpose of constructing fences at the southern border of the United States" to support DHS's drug-interdiction efforts. *See* GAO Op. B-330862, 2019 WL 4200949 (Sept. 5, 2019). The GAO found that DoD's transfer was for an "unforeseen military requirement" under § 8005 because DHS's § 284 request "was unforeseen at the time of [DoD's] budget request and appropriations." *Id.* at *6. The GAO also concluded that the item had not been "denied by Congress" because DoD had not requested funds to support DHS, "so there was nothing for Congress to deny with respect to DOD." *Id.* at *8–9.

Defendants acknowledge that the Ninth Circuit recently concluded that § 8005 did not permit a similar transfer of funds in fiscal year 2019 to fund § 284 border barrier construction. *See California*, 963 F.3d at 944–49. The Ninth Circuit's analysis is inconsistent with the text, purpose, and context of § 8005, as set forth more fully in the Government's recently filed petition for a writ of *certiorari*. *See Trump v. Sierra Club*, Case No. 20-138 (S. Ct.) (petition filed Aug. 7, 2020). The "item" to which § 8005 refers cannot be a generic "border wall" or general policy goal, untethered to any particular DoD authority or spending program. Instead, it can only be an "item" for which DoD could request funding during the process of negotiating the defense budget with Congress. Here, however, the relevant "item for which funds are requested" is DoD's counter-narcotics support to DHS under § 284 pursuant to DHS's fiscal year 2020 request for support. That "item" was not "denied by the Congress." At no point in the budgeting process did Congress deny a DoD funding request for border-barrier construction under DoD's counter-narcotics support authority.

Similarly, the "item" at issue here was "unforeseen." An expenditure is "unforeseen" under § 8005 if DoD was not aware of the specific need when it made its budgeting request and Congress finalized the DoD appropriation. DoD submitted its budget request in March 2019 and Congress enacted DoD's fiscal year 2020 appropriations on December 20, 2019. *See* Pub. L. No. 116-93. DHS did not request DoD's assistance with the § 284 projects until January 2020, ten months later. *See* AR at 28–43. That timing is significant because DoD cannot undertake § 284 support until it receives a request from another agency. 10 U.S.C. § 284(a). Therefore, the need for DoD to provide support to DHS for these projects was not known at the time of DoD's budget request in 2019.

Additionally, the provision of a response to a request from DHS for counterdrug assistance under § 284 also qualified as a "military requirement" under § 8005 because Congress specifically assigned that task to the military. There is no basis for the judiciary to second-guess the judgment of Congress and DoD that the military may be, and here is, required to assist in combatting drug smuggling along the southern border.

Plaintiffs also contend that the transfer of funds violated § 739 of the FY20 CAA, but

they provide no analysis to support that position. *See* Pls.' Mot. at 9–12. The claim fails because § 739 does not prohibit DoD from using its own appropriations to build border barrier projects under its statutory authorities. Section 739's limitations apply only to a "program, project, or activity," which is a unique term of art in the appropriations context and refers to a particular item funded in an appropriations act for a particular agency. *See* U.S. Gov't Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 80 (2005) (defining "program, project, or activity" as an "element within a budget account"); 31 U.S.C. § 1112 (requiring GAO to publish standard budget terms). Here, none of the § 284 projects that DoD is undertaking pursuant to its own statutory authority increases funding for an item within any budget account that belongs to DHS.

C. Section 210 Does Not Prohibit Construction of the Projects.

Plaintiffs incorrectly allege that the projects are being constructed through their ancestral burial sites in violation of § 210 of the FY20 CAA, Pub. L. No. 116-93, 133 Stat. 2512, which prohibits the use of federal fund "for the construction of fencing . . . within historic cemeteries," among other locations. This restriction is inapplicable, however, because the barrier projects are not being built within "historic cemeteries" as that term is commonly understood. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (courts give undefined statutory term "its ordinary meaning"). The term cemetery generally refers to a defined "place or area set apart . . . for the purpose of [interring] the dead." *See* 14 Am. Jur. 2d Cemeteries § 1. California law similarly defines the term by reference to a specific site: a "burial park," "mausoleum," or "crematory and columbarium" "used or intended to be used and dedicated for cemetery purposes," or a "place" containing six or more buried human bodies. Cal. Health & Safety Code § 7003; *see Cemetery Bd. v. Telophase Soc'y of Am.*, 87 Cal. App. 3d 847, 855 (Ct. App. 1978) (holding that related code section "contemplates a cemetery in the traditional sense"). This understanding is consistent with the character of the other areas Congress exempted from construction in § 210, all of which are specifically defined locations. *See* FY20 CAA § 210(1) ("the Santa Ana Wildlife Refuge"); *see Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("a word is known by the company it keeps"). Indeed, that § 210 prohibits use of

funds for construction "within" the areas listed supports the conclusion that Congress intended the common understanding of cemetery—as an identifiable area set apart for burial—to apply.

By contrast, the San Diego A and El Centro A projects are being constructed on a 60-foot strip of federally-owned land set aside in 1907, which functions as a law enforcement zone and contains existing roads and 14-miles of pedestrian fencing constructed between 2008 and 2010. Enriquez Decl. ¶¶ 11, 14, 17. The surrounding areas are "largely rural, undeveloped desert and mountains" and "federally protected wilderness that is devoid of any development." *Id.* ¶¶ 14, 17 & Ex. B, D. "CBP's surveys and record searches . . . do not indicate the presence of any known burial sites or historical villages" within the project areas. *Id.* ¶¶ 47; 51 (recent surveys indicate only "the presence of isolated archeological resources within the San Diego Project Area," which "are generally not considered significant under the National Historic Preservation Act"). Accepting Plaintiffs' claims (which Defendants dispute), they allege at most that remains may be buried at unspecified locations in or around the project areas or, in one alleged instance, what they call a "previously unrecorded archaeological site." Pls.' Mot. at 3. Even a cursory comparison markedly illustrates that the project land at issue is not akin to the cemeteries that are part of historical landmarks recognized by the state of California. *See, e.g.*, Office of Historical Preservation, California Historical Landmark No. 55 (Ft. Rosecrans National Cemetery), No. 68 (El Campo Santo), No. 369 (Chapel of Santa Ysabel (Site of)), https://ohp.parks.ca.gov/?page_id=21478.

Applying state law definitions, courts have rejected attempts by Native American tribes to classify ancestral burial sites as cemeteries. *See Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001) (holding that land historically used as tribal burial ground was not a cemetery under Texas law and dismissing suit alleging damages from construction of golf course); *see also Wana the Bear v. Cmty. Constr., Inc.*, 128 Cal. App. 3d 536, 543 (Ct. App. 1982) (rejecting claim that land previously used as tribal burial ground had protectable status as public cemetery and dismissing suit to enjoin excavation of land). Because the project areas are not within "historic cemeteries," according to the ordinary meaning of the term, Plaintiffs' § 210 claim is likewise unlikely to prevail.

D. The Projects Do Not Contravene Executive Order 13175.

Plaintiffs' claim that Defendants' use of funds to construct the projects violates § 8129 of the FY20 DoD Appropriations Act fares no better. Section 8129 prohibits "funds made available by th[e] Act" from being "used in contravention of—(1) Executive Order No. 13175." Pub. L. No. 116-93, 133 Stat. 2367. That Order directs federal agencies to consult and coordinate with Native American tribal governments as they develop policy on issues that impact tribal communities. *See* Consultation and Coordination with Indian Tribal Governments, Exec. Order 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000). Among other things, the Order sets forth "Fundamental Principles" (Sec. 2) and "Policymaking Criteria" (Sec. 3) for "formulating" and/or "implementing policies," *id.*, and "Consultation" procedures (Sec. 5) for "developing proposed . . . regulation[s]," *id.* at 67250, that have tribal implications.

Plaintiffs do not identify a single part of Executive Order 13175 that Defendants have allegedly contravened, nor could they because the challenged actions do not directly implicate the guidance and requirements. For example, Defendants' decisions to fund and construct border barriers do not purport to "establish Federal standards," such that consultation with tribal officials under the Order is necessary. *Id.* at 67250 (Sec. 3(c)(3)). Nor do such decisions constitute "regulatory policies" for which the Order directs "meaningful and timely input by tribal officials." *Id.* (Sec. 5(a)); *see id.* (Sec. 5(b), (c)) (requiring consultation prior to "promulgat[ing] any regulation that has tribal implications" and "that imposes substantial direct compliance costs on Indian tribal governments" or "preempts tribal law"). Rather, construction of the projects at issue is analogous to individual actions to which courts have found the Order's requirements inapplicable. *Sisseton-Wahpeton Oyate of the Lake Traverse Res. v. U.S. Corps of Engineers*, 2016 WL 5478428, at *10 (D.S.D. Sept. 29, 2016) (permits granted by Army Corps of Engineers relating to property adjacent to tribal reservation); *Carattini v. Salazar*, 2010 WL 4568876, at *7 (W.D. Okla. Nov. 3, 2010) (Interior Department decision upholding validity of tribal government election). Because Defendants have not contravened Executive Order 13175's requirements, they have not by extension violated § 8129.

Even assuming the consultation requirements were implicated in this context, Executive

Order 13175 does not create any judicially enforceable rights because the Order expressly provides that it was "intended only to improve the internal management of the executive branch" and does not "create any right, benefit, or trust responsibility" "enforceable at law." 63 Fed. Reg. at 67252 (Sec. 10); *see Sisseton-Wahpeton Oyate*, 2016 WL 5478428, at *10; *Navajo Nation v. U.S. Dep't of Interior*, 2018 WL 6506957, at *5 (D. Ariz. Dec. 11, 2018).[3]

E. Plaintiffs' IIRIRA Consultation Claim Fails.

Plaintiffs likewise cannot show a substantial likelihood of success on their claim that Defendants violated IIRIRA's consultation requirement because Congress expressly denied a private right of action for such claim. "In carrying out" § 102, IIRIRA requires that DHS "shall consult with," *inter alia*, "States, local governments, Indian tribes, and property owners" regarding "minimiz[ing] the impact" of construction "on the environment, culture, commerce, and quality of life for the communities and residents located near [barrier project] sites." IIRIRA § 102(b)(1)(C)(i). In the next subparagraph, Congress set forth a "savings provision," expressly providing that "[n]othing in this subparagraph may be construed to—(I) create . . . any right of action for a State, local government, or other person or entity affected by this subsection." *Id.* § 102(b)(1)(C)(ii). The savings provision's explicit limitation on judicial review disposes of any attempt to infer a private cause of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (statutory intent to create a private remedy "is determinative"); *Texas Border Coal. v. Napolitano*, 614 F. Supp. 2d 54, 62-63 (D.D.C. 2009). There can be no doubt that Congress intended to foreclose review in these circumstances.

Congress's preclusion of a private cause of action also undermines any claim that

[3] Plaintiffs likewise cite to the DHS and DoD tribal consultation policies, which implement Executive Order 13175. *See* Pls.' Mot. at 13. In the context of § 284 projects, CBP is the lead agency for purposes of necessary consultation. *See* AR 9-10; Enriquez Decl. ¶ 10. As explained *infra*, CBP has consulted extensively with Plaintiffs as necessary and appropriate. DHS's Tribal Consultation Policy was not intended to modify DHS's statutory consultation obligations and, like the Order, expressly states that it does not create a private right of action. Department of Homeland Security Tribal Consultation Policy ("DHS Policy") § V.B-C, https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consulation%20Policy%20Final%20PDF_0.pdf.

Plaintiffs would be "wholly deprive[d] . . . of a . . . means of vindicating [their] statutory rights" in the absence of *ultra vires* review. *See Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991); *Pacific Mar. Ass'n v. NLRB*, 827 F.3d 1203, 1208 (9th Cir. 2016). Nonstatutory *ultra vires* review is appropriate only as a last resort to protect statutory rights. *MCorp Fin.*, 502 U.S. at 43. Plaintiffs, however, have not established that any "private rights," *Barlow v. Collins*, 397 U.S. 159, 166 (1970), or "rights which [Congress] create[d]" are at stake. *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943); *see also Leedom v. Kyne*, 358 U.S. 184, 189 (1958) ("deprived . . . of a 'right' assured to them by Congress"). This eviscerates the presumption that Congress intended judicial review of *ultra vires* consultation claims. Absent a private right, Plaintiffs cannot meet the elements of an *ultra vires* claim under Ninth Circuit law.

Even assuming arguendo that *ultra vires* review were available, Plaintiffs have not shown that the challenged actions "contravene[s] clear and mandatory statutory language." *Pacific Mar. Ass'n*, 827 F.3d at 1208. The statute does not clearly establish (1) the specific *subject matter* for consultation, (2) *when* such consultation must occur, (3) with *whom* it must necessarily occur, or (4) the *degree* of interaction required to satisfy the requirement. Plaintiffs focus on the timing and degree of consultation, but they cannot show that DHS's application of the requirement here contravenes clear, mandatory statutory language.

Contrary to Plaintiffs' contention, the consultation provision does not clearly state "that consultation must precede *construction*." Pls.' Mot. at 14-15 (emphasis in original). Unlike many other statutory provisions, Congress did not require that IIRIRA consultation be initiated or completed before any specific action. *See, e.g.*, 10 U.S.C. § 2667(g)(3) (requiring consultation with EPA "[b]efore entering into any lease under this subsection"). Instead, § 102 simply requires DHS to consult "[i]n carrying out this section" "to minimize the impact" of construction, suggesting that DHS should initiate discussions centering on mitigation efforts *after* projects have been selected. IIRIRA § 102(b)(1)(C)(ii) (focusing on impacts "near the sites at which such fencing is to be constructed"). The statute leaves to DHS to determine the appropriate timing in light of the myriad considerations implicated by a particular project.

The court agreed with this conclusion in *In re Border Infrastructure Environmental Litigation*,

284 F. Supp. 3d 1092, 1126 (S.D. Cal. 2018), *cert. denied sub nom. Animal Legal Def. Fund v. Dep't of Homeland Sec.*, 139 S. Ct. 594 (2018), *aff'd* 915 F.3d 1213 (9th Cir. 2019), and nothing about this case "demand[s] a different conclusion." Pls.' Mot. at 15. The plaintiffs in *In re Border Infrastructure* challenged DHS's issuance of a waiver under § 102(c) prior to completing the consultation process, but the reasoning of the court's decision was not contingent on whether the consultation claim arose pre- or post-construction. It rejected the plaintiffs' *ultra vires* claim because § 102 "does not provide *any* specific limitation or guidance concerning when or how consultation is to occur." *In re Border Infrastructure*, 284 F. Supp. 3d at 1126 (emphasis added). Indeed, immediately preceding the court's broad holding that IIRIRA "lack[s] a 'clear and mandatory' mandate regarding the timing of consultation," it noted that consultation on one project at issue was still on-going despite that DHS had already begun construction. *Id.*

Additionally, as Plaintiffs concede, Congress did not specify the depth of consultation required under IIRIRA.[4] Pls.' Mot. at 14. It would be improper on *ultra vires* review to reject DHS's good faith efforts to provide tribal authorities, including Plaintiffs, the opportunity to comment on and suggest additional ways to minimize relevant impacts of construction. As detailed by the Customs and Border Protection (CBP) official overseeing environmental planning and compliance, CBP has engaged in extensive stakeholder consultation with respect to San Diego A and El Centro A beginning in March 2020, months in advance of construction. Enriquez Decl. ¶¶ 14, 17, 22, 28. It has shared with Plaintiffs (among numerous other tribes) information about the barrier design and location, surveys for biological and cultural resources within the project areas, and its Best Management Practices (*id.* ¶ 26) to minimize or avoid impacts from construction; has engaged in on-going discussions with the tribes to address concerns; and is finalizing a Cultural Resources Protocol and Communication Plan. *See, e.g.*, *id.*

[4] Plaintiffs argue that "DHS policy on tribal consultation provides a helpful starting point." Pls.' Mot. at 14. As explained above, that policy was developed to implement an Executive Order unrelated to IIRIRA. It does not aid the Court in determining whether there has been a violation of clear and mandatory *statutory* language. *See Teamsters, Chauffeurs, Helpers and Delivery Drivers, Local 690 v. NLRB*, 375 F.2d 966, 971 (9th Cir. 1967). Moreover, the cited policy explicitly states that it "does not replace or change any existing Co-obligations of DHS . . . [under IIRIRA § 102], or any other statute." DHS Policy § V.C.

¶¶ 29-45. These consultations have informed the planning and execution of the projects. *Id.* ¶ 26. CBP has investigated and implemented mitigation measures requested by tribal authorities; secured tribal cultural monitors, including monitors affiliated with the Kumeyaay Tribes and Plaintiffs; and surveyed five additional areas identified by the tribes as potentially containing cultural items or ancestral remains. *See, e.g.*, *id.* ¶¶ 34-45.

For all of these reasons, Plaintiffs are not likely to show that DHS's consultation efforts fall below a clear and mandatory standard provided by the statute. To the contrary, DHS has reasonably complied with the consultation requirement.

F. Defendants Have Not Violated RFRA.

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person–(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(a), (b). RFRA does not define "substantial burden," so courts look to First Amendment cases decided before *Employment Division v. Smith.* 494 U.S. 872 (1990), to construe the term. 42 U.S.C. § 2000bb(b)(1). Under those cases, "a 'substantial burden' is imposed only when individuals are [either (1)] forced to choose between following the tenets of their religion and receiving a governmental benefit," as in *Sherbert v. Verner,* 374 U.S. 398 (1963), "or [(2)] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions," as in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc). Because Plaintiffs have failed to show a "substantial burden," their RFRA claim fails and there is no need for the Court to reach the question of whether Defendants' actions survive strict scrutiny.

The leading case on the application of the "substantial burden" test to construction on federal land is *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In *Lyng*, the plaintiff Indian tribes alleged that the Government's decision to build roads and harvest timber on federal lands in northern California violated their First Amendment

rights under the then-operative "substantial burden" test, which has since been incorporated into RFRA. The parties did not dispute that "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices." 485 U.S. at 451. Nonetheless, the Court ruled in the Government's favor. It analogized the case to *Bowen v. Roy*, 476 U.S. 693 (1986), in which the Court rejected a claim by religious objectors that a law requiring the States to use Social Security numbers to operate certain benefits programs violated their religious beliefs. 485 U.S. at 448 (discussing *Roy*). Finding that the tribes' claim "cannot be meaningfully distinguished from" *Roy*, the Court held that, "[i]n neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449.

In *Navajo Nation,* the *en banc* Ninth Circuit found *Lyng* to be "on point" when analyzing federal land use challenges under RFRA. *Navajo Nation*, 535 F.3d at 1071. In that case, the plaintiff-tribes claimed that the Government's plan to permit the use of artificial snow for skiing on public lands sacred to the tribes would violate RFRA. "Like the Indians in *Lyng*, the Plaintiffs [challenged] a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment." *Id.* at 1072. The Ninth Circuit rejected the RFRA claims, concluding that, "despite their sincere belief that the use of recycled wastewater on the Peaks will spiritually desecrate a sacred mountain, [plaintiffs] cannot dictate the decisions that the government makes in managing 'what is, after all, its land.'" *Id.* at 1073 (quoting *Lyng*, 485 U.S. at 453) (emphasis omitted).

The concerns articulated by *Lyng* and *Navajo Nation* are particularly acute at the border. Well before the Government began constructing barriers at the southern border, crossing the border at any point other than an authorized port of entry was unlawful. *See* 19 U.S.C. § 1459. Management of the border is a part of the Government's internal operations described by the Supreme Court in *Roy* and reinforced in *Lyng*, and should not,

as a general rule, impose a "substantial burden" on religious beliefs. RFRA, like the First Amendment doctrines that preceded it, is not intended to give religious objectors a mechanism to second-guess wholly internal activities of the government, including activities at the border, even when they deem those "activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion." *Lyng*, 485 U.S. at 452 (emphasis added). The political branches of government are better equipped to address such concerns, as Defendants are doing here. *Id.*

Plaintiffs' request for preliminary relief attempts to circumvent *Lyng* and *Navajo Nation* by framing the RFRA claim as one for "denial of access," including "access to properly treat the exhumed remains" of burials encountered during construction and access to "Kumeyaay sacred sites that lie within and south of the Project Area." Pls.' Mot. at 17–18. These claims fail under Ninth Circuit law for the same reason the claims in *Navajo Nation* failed. For example, in *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008), the plaintiff Indian tribe alleged that the operation of a hydroelectric project would, *inter alia*, "deprive[] [them] of access to the Falls for vision quests and other religious experiences." 545 F.3d at 1213. Applying *Navajo Nation*, the Ninth Circuit rejected this argument. It held that the plaintiff's "arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether" the project "either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch–22 situation: exercise of their religion under fear of civil or criminal sanction." *Id.* at 1214. Other courts within this circuit have rejected similar arguments.[5]

Even if the Court were to admit some type of exception to *Navajo Nation* and *Lyng*

[5] *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior* ("*La Cuna II*"), 2013 WL 4500572 at *10 (C.D. Cal. Aug. 16, 2013) (rejecting claim that plaintiffs were "being denied a government benefit…namely, access to the land," because "Plaintiffs have not provided any evidence that the [Project] is being built in response to Plaintiffs' religious practices"); *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior* ("*La Cuna I*"), 2012 WL 2884992, *7 (C.D. Cal. July 13, 2012) ("Alleging that the Project impedes Plaintiff's access to a religious site is simply not enough to suggest that the Plaintiffs are deprived of the kind of benefit protected by RFRA.").

on "access" grounds, Plaintiffs have failed to allege that the purported access problems created by the barrier projects force them to choose between the tenets of their religion and receiving a government benefit, or that the projects coerce them to take actions contrary to their religious beliefs. The factual record with respect to Plaintiffs' claims regarding (1) Kumeyaay burials and (2) access to Kumeyaay religious sites does not demonstrate a strong likelihood of success on the merits of the RFRA claim required for preliminary relief.

With respect to Kumeyaay burials, Plaintiffs concede they have been allowed to provide a cultural monitor for the projects, but object that the access is not sufficient and that the monitor is "not permitted access to properly treat the remains in a culturally appropriate manner." Pls.' Mot. at 17. Of course, exhumed remains have yet to be identified within the project site. Enriquez Decl. ¶ 50. Even so, Plaintiffs' concern is not with "access" *per se* but with whether access is sufficient, in their view, to "properly treat the remains in a culturally appropriate manner." Pls.' Mot. at 17. There is no meaningful distinction between that claim and those of the plaintiff-tribes in *Lyng* and *Navajo Nation*, where, despite having access to the sites at issue, the plaintiffs asserted that the Government's activities in the area harmed their religious expression. *Lyng*, 485 U.S. at 451; *Navajo Nation*, 535 F.3d at 1073. Defendants certainly recognize the serious nature of Plaintiffs' concerns and have worked with them to arrange for the presence of cultural monitors at the construction site. Enriquez Decl. ¶¶ 38, 40–43. But RFRA does not permit courts to weigh the "adequacy" of Defendants' response in this context through a strict scrutiny lens.

Plaintiffs' claims that "the border wall has made Kumeyaay sacred sites that lie within and south of the Project Area" inaccessible is also lacking. As a legal matter, Plaintiffs nowhere assert that these are the only places where they can engage in religious ceremonies. That is fatal to a RFRA claim, as Plaintiffs have not met their burden of showing closure of these sites "forces [Plaintiffs] to choose between obedience to their religion and criminal [or civil] sanction." *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016).

Plaintiffs' claim is particularly murky with respect to sites that lie "south of the Project Area" in Mexico and trails that cross the U.S. – Mexico border. Even if it were not unlawful to cross the border outside ports of entry, the construction Plaintiffs are challenging takes place in areas that are already a law enforcement zone and for the most part have been disturbed by either border fencing or a border road for at least a decade. Enriquez Decl. ¶¶ 14, 17, 60 (noting that only four miles of the construction represent new barriers). Ultimately, the new border barrier construction "will not change any of the land uses both within the San Diego Project Area or its surrounding area," and, consistent with its status "as a law enforcement zone . . . Plaintiffs may use the areas in and around the San Diego Project Area in the same manner as they did before San Diego A's construction." *Id.* ¶ 60. Similarly lacking in force is Plaintiffs' claim that construction along the border is denying them access to sacred sites such as "Table Mountain, Jacumba Hot Springs, and Tecate Peak for religious ceremonies." Pls.' Mot. at 17. Construction will not disturb access to any of these sites: Table Mountain and Jacumba Hot Springs are located north of the San Diego Project Area, while Tecate Peak is west of that area. Enriquez Decl. ¶ 61. Plaintiffs' allegations that Defendants "have threatened La Posta citizens with arrest and criminal trespass charges while attempting to access sites to pray and engage in ceremonies within the Project Area" are also overstated. Pls.' Mot. at 17. As outlined in the declaration of the Watch Commander of the Campo Border Patrol Station, USBP has not threatened to arrest Plaintiffs' members praying at the construction site, and has accommodated Plaintiffs' access to the project areas for First Amendment activities to the maximum extent possible while also ensuring border security and public safety. Decl. of Kevin J. Mason ¶¶ 8, 11-12, 14-20.

Defendants "take[] the concerns of the Kumeyaay Tribes, including Plaintiffs, very seriously," and have "tried to respond to their concerns to the best of their abilities." Enriquez Decl. ¶ 46. RFRA does not give courts the authority to second-guess Defendants' efforts to accommodate Plaintiffs' concerns in the context of construction on federal land, as "government simply could not operate if it were required to satisfy every citizen's

religious needs and desires" in carrying out such projects. *Lyng*, 485 U.S. at 532. Accordingly, preliminary relief on Plaintiffs' RFRA claims is not appropriate here.

G. Defendants Have Not Violated Plaintiffs' Fifth Amendment Rights.

Plaintiffs have asserted a constitutionally protected property interest "in their cultural items and ancestral remains," and argue that Defendants' actions violate the substantive and procedural due process rights of their citizens enshrined in the Fifth Amendment with respect to those property interests. Pls.' Mot. at 19–23. "The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment." *Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002). Rather, "'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Id.* (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Because Plaintiffs lack a cognizable property interest in the human remains at issue here, they are unlikely to succeed on the merits of this claim.

There was no right in ancestral remains at common law. *See, e.g.*, *Estate of Duran v. Chavez*, 2015 WL 8011685, at *14 (E.D. Cal. Dec. 7, 2015) ("California courts have been reluctant to find next of kin having property rights in their relative's remains*")*; *Perryman v. Cnty. of Los Angeles*, 63 Cal. Rptr. 3d 732, 739 (Cal. Ct. App. 2007), *review dismissed* 208 P.3d 622 (Cal. 2009) ("It is well settled that there is no property in a dead body in California") (quotation omitted); 22A Am. Jur. 2d Dead Bodies, § 3 ("At common law, there is no property right in the body of a deceased person."); 75 Fed. Reg. 12378, 12398 ("American common law generally recognizes that human remains cannot be owned."). Plaintiffs do not cite any authority to the contrary other than NAGPRA, which they concede has been waived by Defendants. Pls.' Mot. at 20. Instead, they assert that the waiver is "immaterial" "with respect to the known cultural items that have been found by Kumeyaay people and historical preservation professionals since November 16, 1990," the effective date of NAGPRA. *Id.* at 21. Essentially, Plaintiffs are arguing that Defendants *cannot* waive NAGPRA's protections. Congress thought otherwise. As one of the cases Plaintiffs cite

recognizes, "an individual has no property interest in a particular benefit where a governmental agency retains discretion to grant or deny the benefit." *Brenizer v. Ray*, 915 F. Supp. 176, 181 (C.D. Cal. 1996) (collecting Ninth Circuit authority). IIRIRA gives Defendants the discretion to waive NAGPRA, and they exercised that discretion here.

The absence of a substantial property interest means both of Plaintiffs' due process claims must fail. Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). But Plaintiffs do not "even arrive[] at the substantive due process threshold" because they "have asserted no cognizable property or liberty interest" here, much less a "fundamental" one that could ground a substantive due process claim. *Nunez v. City of Los Angeles*, 147 F.3d 867, 874 (9th Cir. 1998). Similarly, procedural due process claims require a deprivation of a protected liberty or property interest that Plaintiffs have failed to show. *Brewster v. Bd. of Educ. Of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). Plaintiffs suggest that "the process due when government actions threaten to destroy tribal cultural property is embodied by NAGPRA and its implementing regulations." Pls.' Mot. at 23. But NAGPRA *was* waived in its entirety, along with the rights it creates in tribal remains. Plaintiffs are unlikely to succeed on the merits of their Fifth Amendment theories.

II. The Balance of Equities and Public Interest Favor Denial of Plaintiffs' Request for Emergency Relief.

The Court should deny Plaintiffs' request for an injunction because the balance of equities tips in favor of Defendants. In staying an injunction issued by the Northern District of California against other § 284 projects, the Supreme Court has already determined that the harm to the Government from an injunction prohibiting § 284 border barrier construction outweighs allegedly irreparable environmental interests. *See Trump*, 140 S. Ct. at 1. Such stays may issue only if the applicant satisfies all four stay factors, including that the balance of the harms and the public interest favors a stay. *See Nken,* 556 U.S. at 434–35. The religious and cultural interests that Plaintiffs assert in this case are no more substantial than the *Sierra Club*

plaintiffs' allegations of irreparable environmental harm from construction projects that would be impossible to undo later. The Supreme Court granted a stay over those objections and there is no basis for this Court to reach a different decision here. Indeed, since the Supreme Court issued its stay in July 2019, courts in this and other circuits have either denied or stayed injunctions prohibiting construction of border barrier projects. *See El Paso County v. Trump*, No. 19-51144 (5th Cir. Jan. 8, 2020) (staying § 2808 injunction); *El Paso Cty., Texas v. Trump*, 407 F. Supp. 3d 655, 665 (W.D. Tex. 2019) (denying § 284 injunction); *California v. Trump*, 407 F. Supp. 3d 869, 907 (N.D. Cal. 2019) (staying § 2808 injunction); *Sierra Club v. Trump*, No. 19-17501 (9th Cir. Dec. 30, 2019) (denying motion to lift stay of § 2808 injunction).

A. An Injunction Will Impose Substantial and Irreparable Harm on Defendants.

DHS identified the barrier projects at issue because of the high rates of drug smuggling between ports of entry in those areas of the border. The record includes ample evidence of the severity of the problem; the limited effectiveness of the outdated barriers in those areas, which transnational criminal organizations have adjusted their tactics to evade; and the need for new barriers in areas where none currently exist. *See supra* at 4. The Supreme Court has recognized that the Government has "compelling interests in safety and in the integrity of our borders," *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989), but an injunction would prohibit the Government from taking necessary steps to prevent the continuing surge of illegal drugs from entering the country. *See United States v. Guzman-Padilla*, 573 F.3d 865, 889 (9th Cir. 2009) (acknowledging the government's "strong interest[]" in "interdicting the flow of drugs").

In addition, an injunction stopping ongoing construction would force DoD to incur potentially millions of dollars of unrecoverable fees and penalties to its contractors for each day that work is suspended—costs that DoD would not have to pay but for an injunction. *See* Decl. of Antionette Gant (explaining the fees and costs that would be incurred from enjoining the San Diego A and El Centro A projects); *see also id.* ¶ 15 (estimating that suspension costs for projects would be approximately $29 million per month). DoD would have to pay these

additional, unnecessary costs from the funds available for § 284 border barrier construction, thus diminishing the money available for construction. *See id.* ¶ 9.

B. Defendants' Interests Outweigh the Alleged Harm to Plaintiffs.

Defendants' harms "plainly outweigh[]" the alleged harm to Plaintiffs' attenuated religious and cultural interests in the San Diego A and El Centro A project areas. *Winter*, 555 U.S. at 26, 33; *see Nken*, 556 U.S. at 435 (the interests of the federal government and the public merge with the federal government is a party). In particular, Plaintiffs allege that construction of these projects cuts off access to sacred sites and trails and threatens to desecrate ancestral remains. Pls.' Mot. at 3-4. These allegations are inaccurate and overstated.

As a general matter, the construction activity and footprints of the projects themselves will occur within a narrow construction corridor on federal land that parallels the international border most of which is previously disturbed, includes existing roads and 14 miles of existing barriers, and functions primarily as a law enforcement zone. *See* Enriquez Decl. ¶¶ 11, 14, 17. In fact, 14 of the 18 barrier miles of San Diego A, which Plaintiffs allege will make sacred trails leading into Mexico inaccessible, will merely replace pedestrian fencing that already impedes border crossings. *Id.* ¶ 60. Construction also will not impact Plaintiffs' access to or use of sacred sites, including Tecate Peak, Jacumba Hot Spring, and Table Mountain, nor will construction disturb these areas, which lie north and west of the projects. *Id.* ¶ 61. And contrary to their claims, USBP has not threatened to arrest Plaintiffs' members protesting or practicing their religion at the project sites. Mason Decl. ¶ 6. To the contrary, USBP has actively accommodated Plaintiffs' access to the project areas for prayer and religious ceremonies. *Id.* ¶¶ 8, 11-12, 14-20.

Further, Plaintiffs have not shown a likelihood of irreparable harm to ancestral remains or cultural items. Although recent surveys have indicated the presence of isolated archaeological resources, which CBP will work in coordination with Kumeyaay Tribes to protect (if necessary), they "do not indicate the presence of any known burial sites or historical villages within the 284 Project Areas," and "[n]o such sites have been revealed during construction or discovered by the tribal cultural monitors." *Id.* ¶ 50. Plaintiffs allege that a

CBP-commissioned report identifies tribal cultural sites in the path of San Diego A, but that survey was related to an entirely different project west of the project area. *Id.* ¶ 48. Equally unfounded are their allegations that human remains have been identified in the project area and destroyed during construction. CBP promptly sent a monitor to investigate Mr. Holm's July 1 report of a potential human bone at the San Diego A project. *Id.* ¶ 53. Although Mr. Holm in a subsequent call with CBP disclaimed stating that the article was a human bone, he nonetheless reburied it the same day he found it. *Id.* ¶ 53. Monitors sent the next day to investigate found only PVC pipe fragments. *Id.* ¶ 53 & Ex. G. Other alleged discoveries of remains or cultural items actually relate to articles that were located *outside* of the project areas and, in two instances, south of the international border in Mexico. *Id.* ¶¶ 55-57. In each case, contrary to their claims, the Government did not prevent Plaintiffs from retrieving the items and consulted with Plaintiffs on how best to respond. *Id.* & Ex. H. CBP has likewise followed-up on all reports of midden soil brought to its attention, and in each instance has determined that "the reported site is not a midden soil." *Id.* ¶ 58. Moreover, in addition to numerous other mitigation efforts, CBP is finalizing a formal cultural resources plan to memorialize procedures for responding to any future discovery of historical or cultural artifacts in the project areas, including stopping construction and repatriating items to the appropriate tribes. *Id.* ¶ 45.

In sum, even if the Court were to conclude that Plaintiffs have asserted valid statutory, non-statutory, or constitutional claims, Plaintiffs have failed to establish that the extraordinary and drastic remedy of an injunction is appropriate here. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted) (plaintiffs must carry their burden of persuasion by making a "*clear showing*" based on "substantial proof"); *see Winter*, 555 U.S. at 22. And, given the lopsided balance of equities in favor of the United States' important interest in protecting the integrity of the Nation's border and stopping the flow of illegal drugs from entering the country, Plaintiffs' claims do not warrant the extraordinary emergency relief they seek.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' requests for a temporary restraining order and preliminary injunction.

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