Michelle LaPena (SBN 201018)
Robert A. Rosette (SBN 224437)
Simon W. Gertler (SBN 326613)
ROSETTE, LLP
1415 L Street, Suite 450
Sacramento, CA 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
borderwalllitigation@rosettelaw.com

Counsel for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LA POSTA BAND OF DIEGUEÑO MISSION INDIANS OF THE LA POSTA RESERVATION, Plaintiff, v. DONALD J. TRUMP, *et al.* Defendants.	Case No.: 3:20-cv-01552-AJB-MSB **PLAINTIFF'S REPLY IN SUPPORT OF EMERGENCY EX PARTE APPLICATION FOR RESTRAINING ORDER** Date: August 27, 2020 Time: 2:00 p.m. Courtroom: 4A Hon. Anthony J. Battaglia

I. Ninth Circuit precedent binds this Court with respect to § 8005 of the CAA.

La Posta is within the zone of interests that § 8005 seeks to protect for the same reasons that the Ninth Circuit held the Sierra Club and California to be in *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020) and *California v. Trump*, 963 F.3d 926 (9th Cir. 2020). *See* Consolidated Appropriations Act ("CAA"), Pub. L. No. 116-93, 133 Stat. 2317 (2020). The Supreme Court stayed the district court's injunction pending appeal of the Ninth Circuit decision in *Sierra Club* with merely one sentence of analysis: "Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with § 8005."

Trump v. Sierra Club, 140 S. Ct. 1, 204 L. Ed. 2d 1170 (2019). The Supreme Court's stay order does not erase the binding effect of the Ninth Circuit's decision, however.

As district courts in this circuit have recognized, if the court of appeals resolves an issue in a published decision, courts within this circuit may not "ignore this binding precedent because the Supreme Court stayed the Ninth Circuit's decision." *Doe v. Trump*, 284 F. Supp. 3d 1182, 1185 (W.D. Wash. 2018); *see also id*. (noting that "this court is not at liberty to simply ignore binding Ninth Circuit precedent based on Defendants' divination of what the Supreme Court was thinking when it issued the stay orders"); *Durham v. Prudential Ins. Co. of Am.*, 236 F. Supp. 3d 1140, 1147 (C.D. Cal. 2017) ("[I]t appears that a stay of proceedings pending Supreme Court review does not normally affect the precedential value of the circuit court's opinion."). As the Sixth Circuit observed in *Dodds v. United States Department of Education*, a Supreme Court stay decision "does nothing more than show a possibility of relief," and thus cannot be read to upset a circuit's "settled law." 845 F.3d 217, 221 (6th Cir. 2016) (*per curiam*).

Bound by the Ninth Circuit's analysis in *Sierra Club v. Trump*, and *California v. Trump*, this Court must conclude that La Posta is within the zone-of-interests that § 8005 seeks to protect.

Additionally, Defendants concede their transfer pursuant to § 8005 is similar to that which the Ninth Circuit held violated the terms of § 8005 in FY 2019. Dkt. 20 at 9. In fact, they do not argue that the circumstances of the FY 2020 transfer differ at all in terms of priority, foreseeability, prior denial by Congress, or military requirements, from those analyzed in *California v. Trump*, 963 F.3d at 944–49. Instead, Defendants urge this Court not to follow the Ninth Circuit's analysis because it "is inconsistent with the text, purpose, and context of § 8005," and based on a GAO report published prior to the Ninth Circuit opinion that made contrary conclusions about the FY 2019 transfer. Dkt. 20 at 9. That the Defendants find error in the Ninth Circuit's analysis and prefer the GAO Report's conclusions is of no consequence here. This Court is bound by the Ninth Circuit.

II. Kumeyaay burial grounds are historic cemeteries.

Defendants are wrong to challenge La Posta's traditional knowledge that the Project is excavating Kumeyaay burial grounds, and split hairs to suggest these burial grounds are not historic cemeteries to avoid scrutiny.

The Defendants' response that their records review and pedestrian survey did not reveal human remains, Dkt. 20 at 11, does not contradict La Posta's traditional knowledge that Kumeyaay burials lie within the Project Area. *See* Mercado Decl. ¶ 11-13. The Project Area has not been previously comprehensively surveyed for human remains. Declaration of Richard Carrico ("Carrico Decl.") ¶ 27. This explains why CBP's records review came up short. And while CBP conducted a pedestrian survey in which they "visually inspected the ground for evidence of cultural resources," Dkt. 20-2 ¶ 20, this method is unlikely to reveal underground burials, especially when it lacks tribal input, which is essential for site identification without excavation. Carrico Decl. ¶ 28. Existing archaeological evidence in fact supports La Posta's knowledge of human remains in the Project Area. The Project crosses through two documented Kumeyaay village sites. *Id*. ¶¶ 20, 27. Comprehensive surveys of other Kumeyaay village sites in San Diego County have regularly revealed human burials and associated funerary features. *Id*. ¶ 30. It is no surprise, then, that human remains have been uncovered within the Project Area since construction began. *Id*. ¶ 32; Dkt. 13-8 ¶ 13.

These ancestral burials are historic cemeteries. La Posta agrees that "historic cemetery" should be given its "ordinary meaning." Dkt. 20 at 10. The Supreme Court looks to the dictionary to determine the ordinary meaning of a term. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012); *Bostock v. Clayton Cnty. Georgia*, 140 S.Ct. 1731, 1740 (2020). Merriam-Webster defines "cemetery" as a "burial ground," and "historic" as "dating from or preserved from a past time or culture."[1] Burial grounds from historic

[1] Merriam-Webster Dictionary, (https://www.merriam-webster.com/dictionary/, last accessed on August 24, 2020).

Kumeyaay village sites are certainly historic cemeteries under this ordinary meaning. *See* Carrico Decl. ¶ 33. The burial grounds even meet the Defendants' definition of "an identifiable area set apart for burial." Dkt. 20 at 11. CBP's refusal to identify the burial grounds does not make them unidentifiable.

The cases Defendants cite are inapposite as they both concern "public" cemeteries under state law. *Wana the Bear v. Cmty. Constr., Inc*., 128 Cal. App. 3d 536, 543 (Ct. App. 1982) defines "public cemetery" within the meaning of the California Health and Public Safety Code and, in fact, resulted in significant legislative changes that provide protection for Native American human remains and tribal cultural sites.[2] In *Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001), the court dismissed the plaintiff's complaint, in part, because it had not alleged that the tribal burial ground was "publicly dedicated as a cemetery." While state law could inform the ordinary meaning of the term "historic cemetery" in the CAA, the court need not look to these cases because they involve "public cemeteries".

III. Defendants' minimal notice of the Project is not consultation.

Defendants omit a key term from their reproduction of the IIRIRA § 102 savings provision: "Nothing in this subparagraph may be construed to—(I) create ***or negate*** any right of action." § 102(b)(1)(C)(ii) (emphasis added). Reading the sentence without omission makes untenable the Defendants' assertion that "Congress intended to foreclose review in these circumstances." Dkt. 20 at 13. Additionally, Congress' omission of tribes from the list of entities to which the savings provision applies suggests that the savings provision does not apply to La Posta.[3] *See Keene Corp. v. United States*, 508 U.S. 200, 208

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[2] A comprehensive list of the state laws passed since the *Wana the Bear* case is found at http://nahc.ca.gov/codes/state-laws-and-codes/.

[3] While IIRIRA § 102 requires DHS to "consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States," the savings provision clarifies that it neither creates nor negates a "right

(1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

La Posta thus has no less of "private" or "statutory right" that warrants ultra vires review for IIRIRA violations than they do for CAA violations, which the Ninth Circuit has firmly recognized. *See* Dkt. 13-2 at 8.

The mandatory requirements of § 102(b)(1)(C)(i) are clear. In arguing otherwise, Defendants rely exclusively on a four-part test of their invention with no citation to legal authority. Dkt. 20 at 14. Defendants' test actually supports judicial review of DHS' actions. § 102(b)(1)(C)(i) expressly provides the subject matter of consultation, i.e., ways to mitigate impacts on the "environment, culture, commerce, and quality of life;" and to whom it must occur, i.e., Indian tribes and the others listed. The timing of consultation may be inferred easily from the text. Despite Defendants unexplained contention to the contrary, *see* Dkt. 20 at 14,[4] consultation obviously must precede the construction whose impacts it is intended to address. *See Pirani v. Slack Techs., Inc.*, No. 19-CV-05857-SI, 2020 WL 1929241, at *8 (N.D. Cal. Apr. 21, 2020) (statutory "interpretation need not be adopted if it would lead to absurd or futile results . . . plainly at variance with the policy of the legislation as a whole.'" (quoting *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 120 (1988) (Marshall, J.) (plurality opinion)). Defendants erroneously suggest that this Court approved of post-construction consultation in *In re Border Infrastructure Envtl.*

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of action for a State, local government, or other person or entity affected by this subsection." It does not include the term "Indian tribes" in the savings provision.

[4]Instead of providing any support for their position consultation is not required prior to construction, Defendants merely shift the terms of the discussion to whether consultation should precede project *selection* then summarily state that DHS may "determine the appropriate timing," which, apparently, in Defendants' view, includes after construction is already complete. *See* Dkt. 20 at 14.

Litig., 284 F. Supp. 3d 1092 (S.D. Cal. 2018). There, the Court recognized that consultation was "on-going" during construction but did not suggest that consultation began after construction had already started. *Id*. at 1126.

Defendants' remaining confusion over the "degree" and "depth" of consultation required under IIRIRA, *see* Dkt. 20 at 14-16, can be addressed by looking to general standards that govern the United States' relationship with Indian tribes. Due to the "unique trust relationship between the United States and the Indians," "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In addition, Executive Order 13175 recites and embodies the United States' policy that federal agencies "work with Indian tribes on a government-to-government basis," "respect Indian tribal self-government and sovereignty," and "honor tribal treaty and other rights" when "implementing policies that have tribal implications." §§ 2(b), 3(a). Because tribal consultation is preserved in IIRIRA, it must be construed to require DHS to provide a reasonable opportunity for tribes to give meaningful input into the Project to protect their cultural resources and religious rights. *C.f. Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 783 (D.S.D. 2006); *see Cheyenne River Sioux Tribe v. Jewell*, 205 F. Supp. 3d 1052, 1057 (D.S.D. 2016) (consultation inadequate if federal agency "failed to consult with [tribe] in an open, government-to-government discussion regarding the proper means of [achieving policy objective]").

Defendants', self-described "good faith efforts" fall far short of this mark. *See* Dkt. 20 at 15–16. Defendants did not begin providing site-specific information regarding their planned and ongoing construction activities until July 10, 2020, months after they began implementing the Project. Even then, information was limited and went in one direction, and Defendants failed to receive or consider comments from La Posta. Dkt. 13-5 ¶ 6; Dkt. 13-7 ¶ 10. Defendants only recently relay construction plans to cultural monitors—but not tribal governments—at "tailgate meetings", Dkt. 20 at 15, while they ignore letters requesting comprehensive government-to-government consultation regarding the border

wall construction activity. Dkt. 13-7 ¶ 10. Legally sufficient consultation, to the contrary, requires a full and fair opportunity for tribes and their members to identify, reflect, comment upon, and give meaningful input to construction activities that stand to harm the cultural, religious, and property interests of tribal members.

IV. Defendants prohibit La Posta citizens' exercise of religion without justification.

"The sepulture of the dead has, in all ages of the world, been regarded as a religious rite. The place where the dead are deposited all civilized nations, and many barbarous ones, regard, in some measure at least, as consecrated ground. In the old Saxon tongue the burial-ground of the dead was 'God's acre.'" *Dwenger v. Geary* 113 Ind 106 (1888). This is true for La Posta as well. Yet La Posta's RFRA claim does not arise from the Defendants' disinterment of La Posta ancestors; it arises from the Defendants' refusal to allow La Posta citizens to properly rebury their ancestors.

The Kumeyaay religion prescribes a specific burial protocol in terms of timing, cleansing, specific prayers, and keeping the body together. Dkt. 13-4 ¶ 9. Yet Defendants refuse to allow La Posta citizens to exercise this most sacred rite. First, Defendants refuse to properly survey the Project Area for burials to ensure that human remains are not pulverized before they can be properly reburied. Carrico Decl. ¶ 28. Second, while Defendants have allowed only four cultural monitors to observe construction on the San Diego Project for the past several weeks (although none on new barrier construction within the El Centro sector), Dkt. 20-2 ¶ 45, monitors have no ability to stop construction and provide for repatriation of any remains that are discovered. Dkt. 13-5 ¶ 15. In fact, Defendants concede that CBP does not have a protocol in place for "notifying project personnel and tribal representatives if any historical or cultural artifacts are identified within the Project Area." Dkt. 20-2 ¶ 45. Without such a protocol, Defendants effectively prohibit La Posta citizens from exercising their religious obligation to provide their ancestors a proper reburial. Such an "outright prohibition" satisfies the substantial burden requirement of RFRA without reference to an "indirect" effect or "false choice." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017); *Greene v.*

Solano County Jail, 513 F.3d 982, 988 (9th Cir. 2008) ("an outright ban on a particular religious exercise is a substantial burden").

While Defendants propose a substantial burden exception when it comes to government action on the international border, they cite no authority for such an exception. Dkt 20 at 17-18. Defendants could have waived RFRA for the Project, like they did all other applicable statutes, but they did not. 85 Fed. Reg.14958-60. Defendants must demonstrate that their prohibition on La Posta citizens' exercise of reburial rites is the least restrictive way to achieve border security. They have not even attempted to make such a showing.

None of the cases Defendants cite address government actions that completely deny access or outright prohibit religious exercise. In *Snoqualmie Indian Tribe v. FERC,* 545 F.3d 1207, 1215 (9th Cir. 2008), the tribal plaintiff's RFRA claim failed because the FERC license at issue would not "prohibit or prevent the Snoqualmies' access to Snoqualmie Falls, their possession and use of religious objects, or the performance of religious ceremonies." Similarly, in *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, 2013 WL 4500572 at *10 (C.D. Cal. Aug. 16, 2013) and 2012 WL 2884992, *7 (C.D. Cal. July 13, 2012), the plaintiff's RFRA claims failed due to lack of evidence regarding a prohibition on access—not on the failure of the legal theory. Here, the Defendants outright prohibit La Posta citizens' access to properly care for their ancestors. Such a prohibition is more than a "substantial burden."

V. La Posta citizens have property rights in their ancestors' remains.

Defendants completely mischaracterize and, therefore, fail to offer any persuasive arguments against the Fifth Amendment claims of La Posta citizens. Instead of addressing the property interest that NAGPRA recognizes, Defendants argue against a straw man—namely that the common law is the only possible basis for a property interest in cultural

remains. Dkt. 20 at 21.[5] When they do address NAGPRA, they misleadingly restate La Posta's position as "arguing that Defendants *cannot* waive NAGPRA's protections." *Id*. In truth, La Posta's position is that the March 16, 2020 NAGPRA waiver cannot and did not waive property rights which were *created prior to the waiver*, i.e. property rights in those Kumeyaay cultural items "discovered" between the effective dates of NAGPRA and the waiver. La Posta concedes that NAGPRA has been waived, but contrary to Defendants' cavalier and concerning assertion, a federal agency does not retain discretion to retroactively waive pre-existing property rights. *Compare* Dkt. 20 at 22 *with Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir. 2003) ("[Agency] has no discretion to make a decision that is contrary to law.").

VI. The potential irreparable harm to La Posta outweighs the burden of a narrowly tailored injunction.

Whatever the implication of the Supreme Court's single paragraph stay order in *Trump v. Sierra Club*, which is silent with respect to irreparable harm and the balance of equities, the harm to La Posta's constitutionally-protected religious and property interests deserves different treatment. La Posta has demonstrated that numerous burial and sacred sites are at risk of destruction by the Project. La Posta merely seeks an injunction on Project construction until the Defendants meaningfully consult with La Posta regarding its religious and cultural heritage within the Project Area, and develop mitigation measures for impacts to the same.

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[5] The Defendants' argument marks a 180-degree shift in the government's understanding of common law property rights in human remains. *See* Patty Gerstenblith, *Fifth Annual Tribal Sovereignty Symposium: Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 St. Thomas L. Rev. 65, 78-79 (2000) (citing Leonard D. DuBoff, *Protecting Native American Cultures*, 53 Or. St. B. Bull. 9, 10 (Nov. 1992)) ("During the Congressional hearings on NAGPRA, the Justice Department took the position that NAGPRA's provisions concerning disposition of human remains and burial goods were a codification of preexisting common law").

Such an injunction will not "prohibit the Government from taking necessary steps to prevent the continuing surge of illegal drugs from entering the country." Dkt. 20 at 23. There are many alternatives available to the Defendants for the prevention of the illegal entry of drugs, most of which are more efficient than the construction of a physical barrier. *See* Dkt. 13-3 Ex. 8 at 3. And whatever costs Defendants may incur by halting construction cannot constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90, 94 (1974).

Defendants contend that they have adequately mitigated any harm La Posta may experience because "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." Dkt. 20 at 25. La Posta welcomes this cultural resources plan, but recognizes that such a plan will have no mitigating effect until it becomes final, and unless construction is halted to give La Posta time to provide meaningful input. Accordingly, to avoid irreparable harm, this Court must enjoin the Project for the three weeks until this Court can decide La Posta's motion for a preliminary injunction.

RESPECTFULLY SUBMITTED THIS 25th day of August, 2020.

ROSETTE, LLP

/s/ *Michelle LaPena*
MICHELLE LaPENA (SBN 201018)
1415 L. St., Ste. 450
Sacramento, CA 95814
Telephone: (916) 353-1084
Facsimile: (916) 353-1085
borderwalllitigation@rosettelaw.com

Counsel for Plaintiff