No. 20-55941

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LA POSTA BAND OF DIGUENO MISSION INDIANS,

Plaintiff-Appellant,

v.

DONALD TRUMP, *et al.*

Defendants-Appellees.

On Appeal from the United States District Court

for the Southern District of California, No. 3:20-cv-01552-AJB-MSB

The Honorable Anthony J. Battaglia

APPELLANT'S OPENING BRIEF

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INTRODUCTION

On June 26, 2020, in concurrent opinions, this Court held that the funding scheme that Defendants-Appellees ("Defendants") employed in Fiscal Year 2019 ("FY19") for the construction of a barrier along the southern border was unlawful. The La Posta Band of Diegueño Mission Indians of the La Posta Reservation ("Tribe") subsequently brought suit against the Defendants for employing the identical funding scheme in Fiscal Year 2020 ("FY20"), and sought a preliminary injunction on its claim. The Southern District of California denied the injunction, finding that the Tribe was unlikely to succeed on the merits of its claim, and failed to demonstrate irreparable injury or that the balance of equities and public interest tip in its favor. In doing so, the district court ruled in direct contravention to binding precedent in this circuit. This Court should reverse the district court for abuse of discretion, and direct the court to preliminarily enjoin construction of the border barrier.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. §1331, 1346(a)(2), and 1362. The district court denied the Tribe's motions for a temporary restraining order and preliminary injunction by written order dated September 9, 2020. ER 3-39. Appellant filed a timely notice of appeal on September 8, 2020.

This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. §1292(a)(1).

PERTINENT STATUTORY AUTHORITY

Consolidated Appropriations Act, 2020, PL 116-93, 133 Stat 2317 (December 20, 2019)

SEC. 8005. Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: Provided, That such 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: Provided further, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this Act: Provided further, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, 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 reprogramming is requested has been denied by the Congress: Provided further, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2020: Provided further, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.

SEC. 9002. Upon the determination of the Secretary of Defense that such action is necessary in the national interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,000,000,000 between the appropriations or funds made available to the Department of Defense in this title: *Provided*, That the Secretary shall notify the Congress promptly of each transfer made pursuant to the authority in this section: *Provided further*, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by failing to adhere to this Court's precedent holding that a plaintiff has an *ultra vires* cause of action to challenge DoD's reprogramming of funds in violation of the CAA.

2. Whether the district court abused its discretion by failing to adhere to this Court's precedent holding that a plaintiff has an APA cause of action to challenge DoD's reprogramming of funds in violation of the CAA.

3. Whether the district court abused its discretion in finding that the Tribe failed to demonstrate irreparable injury in the absence of an injunction.

4. Whether the district court abused its discretion in finding that the balance of the equities and the public interest tip in the Defendants' favor.

STATEMENT OF THE CASE

I. Factual Background

A. Unlawful Border Wall Funding and Construction

President Trump's U.S-Mexico border wall began as a campaign promise in 2015. ER210-ER212 (June 16, 2016 Presidential Announcement Speech) ("I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively, I will build a great, great wall on our southern border. And I will have Mexico pay for that wall."). Since taking office in 2017, the President repeatedly sought appropriations from Congress for border barrier construction, yet

Congress repeatedly denied his requests. *See Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) ("*Sierra Club I"*).

In FY19, the President requested $5.7 billion in border wall funding, which Congress refused to appropriate. *Id*. at 678. The impasse triggered the nation's longest partial government shutdown, and ultimately, Congress appropriated only $1.375 billion for border wall funding. *Id*. at 678-79. To ensure funding for the wall, the Defendants reprogrammed $1.5 billion of Department of Defense ("DoD") funds toward border wall construction, citing § 8005 of the Consolidated Appropriations Act, PL 116-6, February 15, 2019, 133 Stat 1 ("2019 CAA") as authority for the transfer. *Id*. at 682.

Section 8005 authorized the Secretary of Defense to transfer up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction)." The Secretary must first determine that "such action is necessary in the national interest" and the transfer may only be used "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." In June 2020, this Court held that the DoD lacked authority to reprogram the $1.5 billion because the Section 8005 requirements were not met. *Sierra Club v. Trump* ("*Sierra Club II*"), 963 F.3d 874 (9th Cir. 2020). This Court

affirmed a permanent injunction preventing the Defendants from using the funds for border wall construction. *Id.*

Similar to FY19, the FY20 budget negotiations were contentious regarding the border wall. President Trump requested $5 billion for construction of the border wall. ER213-ER216. Congress rejected both the President's and DoD's FY20 budget requests and again allocated only $1.375 billion for border wall construction. *See* 2020 Consolidated Appropriations Act ("CAA"), Pub. L. No. 116-93, § 209, 133 Stat. 2317, 2511–12 (2020).

Unhappy with the result, Defendants replicated the FY 2019 conduct that this Court ultimately found to be illegal. The Department of Homeland Security ("DHS") initiated a request to DoD for funds for wall construction across "approximately 271 miles." ER221. On February 13, 2020, Secretary of Defense Esper announced that DoD would transfer and spend $3.831 billion in funds Congress had appropriated for other purposes on border wall construction. ER222. This funding was intended for other purposes but transferred into DoD's Drug Interdiction and Counter-Narcotics Activities ("Drug Interdiction") fund to assist DHS with border wall construction pursuant to 10 U.S.C. § 284 and then subsequently transferred for use by the Army Corps to construct the border wall. ER223-226. DoD again pointed to § 8005 of the CAA as authority for the transfer, which contains identical conditions to that in the 2019 CAA. ER222.

These unlawfully reprogrammed funds are funding the construction of approximately fourteen miles of a replacement border wall and seven miles of new border wall (the "Project") in San Diego County and Imperial Counties (the "Project Area"). ER227, ER268-ER269. Despite there being questions over the legitimacy of his appointment to the vacancy created by the departure of Secretary Kirstjen Nielsen,[1] Acting Secretary of Homeland Security Wolf invoked section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, codified at 8 U.S.C. § 1103 note ("IIRIRA"), as authority for construction of the Project. 85 Fed. Reg. 14958-60. To avoid having to account for the significant cultural, historical, religious, and environmental impacts of the Project, Acting Secretary Wolf waived multiple federal laws designed to protect historical, religious, and cultural resources, the environment, and Indian tribes. *Id*. ("IIRIRA Waiver")

While the Defendants have justified the transfer of funds and the construction of the Project as a way to stop illegal drugs and illegal immigrants from entering the United States, *see* Presidential Memorandum, 2018 WL 1633761 (April 4, 2019), evidence abounds that the Project is not an effective way to address those problems. A recent audit from the Office of the Inspector General ("OIG") concluded that CBP

[1] *See CASA De Maryland, Inc. v. Chad F. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020) ("Plaintiffs are likely to demonstrate . . . Wolf filled the role of Acting Secretary without authority").

has not adequately justified the need for the Project. ER231. CPB failed to analyze and consider alternatives to a physical barrier and did not adequately justify its decisions to prioritize "certain southern border locations over others for wall construction"—citing the Project as an example of particularly arbitrary decision making. ER241. The audit concludes that CBP's failure to analyze alternatives to a border barrier or adequately prioritize locations for construction diminishes "the likelihood that CBP will be able to obtain and maintain complete operational control of the southern border with mission effective, appropriate, and affordable solutions." ER238. And this Court has previously recognized that most illegal drugs cross at ports of entry, not along the open border. *Sierra Club II*, 963 F.3d at 897 n. 16.

B. Effects of the Project on the Tribe

The Tribe is one of twelve bands of Kumeyaay people. ER285. Although United States policy has restricted Kumeyaay bands to their respective current reservations, the Kumeyaay people lived for over 12,000 years between the Pacific Ocean, including the Channel Islands, to the Colorado River and the San Luis Rey River south to Baja California and the Sea of Cortez, including the Project Area. ER285-ER286. The Tribe's current reservation lies 56 miles east of San Diego, 46 miles west of El Centro, and 8 miles from the U.S.-Mexico border. ER284-ER285.

As a result of inhabiting the land within and around the Project Area for

millennia, the Tribe imbues much of the land affected by the Project with religious, cultural, and historical significance. Because of the Tribe's complex relationship with the land, the land-altering Project has caused and will continue to cause existential injury to the Kumeyaay landscape and cosmology. *See* ER43.

Of primary concern, the Project is excavating and literally pulverizing ancestral burials that are culturally affiliated with the Tribe. The Tribe has traditional tribal knowledge that Kumeyaay burials lie that within the Project Area and path of destruction. *See* ER275; ER280-ER281; ER285. Existing archaeological evidence supports the Tribe's knowledge of burial grounds in the Project Area. The Project crosses through two documented Kumeyaay village sites. ER45-ER46; ER48. Comprehensive surveys of other Kumeyaay village sites in San Diego County have regularly revealed human burials and associated funerary features. ER49. This traditional and archaeological knowledge is borne out by the discovery of human remains (verified by a medical examiner) within the Project Area during construction. ER49; ER398-ER399. While CBP's review of existing archaeological records within the project area did not reveal burial grounds, ER153, the Project Area has not been previously comprehensively surveyed for human remains. ER48. And while CBP conducted a pedestrian survey in which they "visually inspected the ground for evidence of cultural resources," ER141, this method is unlikely to reveal underground burials, not least

because it lacked tribal involvement. ER48. CBP's records review and survey do not contradict the Tribe's traditional knowledge.

The injury of disinterring the Tribe's ancestors is sufficiently irreparable on its own, but even more injurious is the Defendants' refusal to allow the Tribe to properly care for the disinterred remains. The Kumeyaay religion, like most religions, prescribes a specific burial protocol in terms of timing, cleansing, specific prayers, and keeping the body together. ER273-ER274. Yet Defendants refuse to allow La Posta citizens to exercise this most sacred rite. First, Defendants refuse to properly survey the Project Area, with designated tribal representatives, for burials prior to construction to ensure that human remains are not pulverized before they can be properly reburied. ER48. Second, while Defendants have recently allowed cultural monitors to observe construction on the San Diego Project (although after four months of construction with no tribal monitors, and none on new barrier construction within the El Centro sector), ER150, monitors have no ability to stop construction and provide for repatriation of any remains that are discovered. ER281. 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." ER150. Without such a protocol, Defendants effectively prohibit La Posta citizens from exercising their religious obligation to provide their ancestors a proper reburial.

But the injury related to burials is not the only irreparable injury at issue. The Project goes directly through Jacumba Valley, "the central location of a Kumeyaay origin story, which describes the creation of all things, including Kumeyaay people." ER286. Jacumba Valley contains historical Kumeyaay village sites, sacred areas, plant gathering resources, culturally and historically important trails, and other significant resources. ER286; ER44. Construction of a wall through this area will irreparably diminish its sacred character.

In addition to containing burial grounds, the two village sites that the Project intersects, Tecate and Jacumba, contain other archaeological artifacts. ER287; ER49. The villages hold significance as "cultural sites reflecting [the Tribe's] deep and abiding ties to the area." ER286. The construction of a 30-foot steel fence and associated infrastructure through these significant sites will cause undeniable injury.

Additionally, the Project threatens to diminish the integrity of many of the Tribe's spiritually and culturally significant trails. ER286-ER287; ER45. Historically, the Kumeyaay moved through their ancestral territory via a system of trails, many of which are still known and used by the Kumeyaay today. *Id*. While most of these trails served commercial and social purposes, some trails have religious significance. *Id.* Many of these trails lie within the Project Area. *Id*.

Boundary Mountain is located just north of the San Diego A-1 segment of the Project. ER43-ER44. The southern flanks of the mountain are within between 650 and 780 feet of the border wall segment. ER43. One archaeological site, P-37-004466, is recorded just north of the Project and southwest of Boundary Mountain. *Id*. Kumeyaay believe this prominent peak was a resting place for native runners as they traveled east/west from the mountains to the desert and also north/south along trails through adjacent Jewell Valley and south into what is now Mexico. *Id*. The peak is also known to the Kumeyaay as Lookout Point because of the panoramic view offered from the summit. *Id*. The Project will cause adverse visual effects to this important site and threatens to destroy unrecorded archaeological sites. ER43.

Finally, the Project will cause irreparable damage to the Tribe's ability to engage in one of its most important religious ceremonies—the Bird Dance. Rooted in the Tribe's creation story, the Bird Dance is an annual ceremony that recreates the Kumeyaay peoples' journey from creation to today. ER274-ER275. Kumeyaay people traditionally dance on both sides of the border. ER274. The Project disrupts this ancient and important tradition. *Id*.

II. Procedural Background

The Tribe filed its complaint in this matter on August 11, 2020 in the Southern District of California. The Tribe sought an injunction against Project construction based on violations of CAA §§ 8005, 9002, 739, 210 and 8129, IIRIRA Section

102(C), the Appropriations Clause, Presentment Clause, the Free Exercise Clause, RFRA, and the Due Process Clause of the Fifth Amendment. On August 17, 2020, the Tribe filed motions for a temporary restraining order and preliminary injunction. At a hearing on August 27, 2020, the district court denied both motions from the bench. ER319 (Dkt. No. 24). The Tribe filed its notice of appeal on September 8, 2020. The district court issued its written order the following day, on September 9, 2020.[2]

The Tribe now asks this Court to reverse the district court and direct it to enter a preliminary injunction against construction of the Project.

SUMMARY OF ARGUMENT

The district court's order denying the Tribe's preliminary injunction must be reversed for abuse of discretion. The district court held that the Tribe is unlikely to succeed on the merits of its claim that the Defendants lacked authority to reprogram funds for construction of the Project because the Tribe lacks a viable cause of action. That holding flies in the face of binding Ninth Circuit precedent, which has recently held that private plaintiffs have an ultra vires cause of action to challenge unlawful reprogrammings of funds, *Sierra Club II*, 963 F.3d 874, and state plaintiffs have a

[2] "A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry." Fed. R. App. P. 4(a)(2).

cause of action under the APA to challenge the same. *California v. Trump*, 963 F.3d 926 (2020). While the district court looked to an order from the Supreme Court staying an injunction pending appeal in *Trump v. Sierra Club*, 140 S. Ct. 1 (2019), that order does not override subsequent Ninth Circuit precedent.

The district court also abused its discretion when it held that the Tribe failed to demonstrate a likelihood of irreparable harm in the absence of an injunction, and that the balance of the equities tip and public interest in the Defendants' favor. The Tribe provided ample evidence that the Project is destroying and will continue to destroy tribal sacred sites and the remains of Kumeyaay ancestors. The court's conclusion that the Defendants' interest in preventing drug trafficking with a wall that will not likely reduce drug trafficking outweighs the Tribe's injuries is not grounded in the evidence and is foreclosed by this Court's holding *Sierra Club II*.

The district court's order must be reversed, and a preliminary injunction stopping construction on the Project must issue.

STANDARD OF REVIEW

A district court abuses its discretion denying a preliminary injunction when it relies "on an erroneous legal standard or clearly erroneous finding of fact." *Arc of California v Douglas*, 757 F.3d 975, 983–84 (9th Cir. 2014) (internal citations omitted). The underlying issues of law are reviewed de novo. *Id*. A factual finding constitutes clear error if it is "'illogical, implausible, or without support in inferences

that may be drawn from the facts in the record.'" *M.R. v. Dreyfus,* 697 F.3d 706, 725 (9th Cir. 2012) (quoting *United States v. Hinkson,* 585 F.3d 1247, 1263 (9th Cir.2009) (en banc)).

ARGUMENT

By every measure, the Tribe satisfied this Court's standard for issuing preliminary injunctive relief. It has proven that it is likely to succeed on its claims; that it will suffer irreparable harm absent preliminary injunctive relief; that the public interest weighs in favor of issuing an injunction; and that the balance of equities tips in its favor. In fact, the Tribe's has demonstrated such a high likelihood of success on its claims, that the other factors require little mention. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another"). The district court abused its discretion in finding otherwise, and this Court should reverse that error.

I. The Tribe is likely to succeed on the merits.

In finding that the Tribe did not meet the likelihood-of-success standard, the district court openly defied controlling precedent. Under the law of this circuit, the Tribe plainly has a cause of action against the Defendants—both as an *ultra vires* claim, or alternatively, as an APA claim. And because the Defendants' actions failed to comply with statutory requirements applicable to budgetary reprogramming, the

Tribe would clearly prevail on the merits of those claims. The district court erred in finding otherwise.

A. The Tribe has an ultra vires and APA cause of action.

1. Under circuit precedent, the Tribe has an *ultra vires* cause of action.

The issue of whether the Tribe, as a private party, may bring an *ultra vires* claim to challenge the Defendants' budgetary reprogramming can be resolved by straightforward application of *Sierra Club II*. Just as this Court held in *Sierra Club II* that a nonprofit organization had an equitable *ultra vires* cause of action to challenge budgetary reprogramming in violation of provisions of the 2019 CAA, so too does the Tribe.

Sierra Club II involved a similar factual background. Two nonprofit organizations (Sierra Club and the Southern Border Communities Coalition)[3] challenged DoD's budgetary transfers to fund construction of a border wall, alleging that the transfers were not authorized by Section 8005[4] of the FY19 CAA (which is phrased identically to the FY20 CAA). Sierra Club's complaint, filed in the Northern District of California, presented several claims relating to the alleged violation of Section 8005, including an *ultra vires* action. The district court ruled in

[3] As in *Sierra Club II*, this brief refers to the two organizations together as "Sierra Club." *See* 963 F.3d at 879 n.1.

[4] *Sierra Club II* used "Section 8005" as shorthand for both Section 8005 and 9002, as Section 9002 incorporates the requirements of Section 8005. This brief does the same.

favor of Sierra Club and issued a permanent injunction to enjoin the government from using the transferred funds to construct a border barrier, holding *inter alia* that *ultra vires* review was available. That judgment, however, was later stayed by the Supreme Court. The Supreme Court's stay order noted that "[a]mong 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 Section 8005." *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

Following the stay order, this Court proceeded to adjudicate the matter. The panel majority noted that the stay order "suggests that Sierra Club may not be a proper challenger here," but it nonetheless exercised its duty to "carefully analyze Sierra Club's arguments." 963 F.3d at 887. And upon closer analysis, this Court concluded that Sierra Club *does*, indeed, have an *ultra vires* cause of action.

This Court noted that the *ultra vires* claim is an "equitable" cause of action, and thus, whether Sierra Club can assert such a claim would turn on "whether the relief it requests was traditionally accorded by courts of equity." *Id.* at 890 (quoting *Grupo Mexicano de Desarrollo S.A. v. All Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)) (alterations omitted). Equitable principles, this Court explained, have long recognized such causes of action. *Id.* at 891.

As historical precedent supporting its analysis, this Court looked to the landmark case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In

that case, the Supreme Court expressed no doubt that it had the authority to enjoin the President from seizing most of the nation's steel mills in violation of statutory conditions. A number of decisions from the lower courts, most notably the D.C. Circuit, supported this analysis. *See* 963 F.3d at 891–92 (discussing *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) and *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988)). This Court concluded that "[w]here it is alleged that DoD has exceeded the statutory authority delegated by Section 8005, plaintiffs like Sierra Club can challenge this agency action" by means of an equitable *ultra vires* cause of action. 963 F.3d at 892. Importantly, this holding was issued *after*—and with complete acknowledgement of—the Supreme Court's previous stay order.

This Court's holding in *Sierra Club II* should apply with equal force in this proceeding. As even the district court acknowledged, aside from the fact that the Tribe relies on the FY20 CAA (as opposed to the FY19 CAA at issue in *Sierra Club II*), "[n]othing else about La Posta's case distinguishes it from Sierra Club's case from the standpoint of whether plaintiffs may challenge the Government's compliance with Section 8005." ER17 (Doc. 26 at 15.). Thus, the Tribe's ability to raise an *ultra vires* claim for the defendants' failure to comply with the CAA should be considered settled law.

Yet, despite acknowledging that the cases are legally identical, the district court refused to recognize *Sierra Club II* as controlling. Instead, without making

any attempt to grapple with *Sierra Club II*'s reasoning, the district court deferred to the one-paragraph stay order issued by the Supreme Court almost a year earlier.

The district court's reliance on the Supreme Court's stay order was in error. Binding precedent from this Court makes it clear that the stay order reflected merely an early assessment of the issue that turned out to be mistaken. Indeed, this Court acknowledged the stay order and interpreted it not to foreclose Sierra Club's *ultra vires* cause of action. *Sierra Club II*, 963 F.3d at 887 ("We heed the words of the Court, and carefully analyze Sierra Club's arguments. Having done so, we conclude that Sierra Club has both a constitutional and an *ultra vires* cause of action."). Hence, whatever persuasive value the stay order may have once had is now gone, as *Sierra Club II* has unequivocally held that private plaintiffs have a cause of action to obtain review of compliance with Section 8005. Put simply, *Sierra Club II* is the law of this circuit. The district court was bound to follow it, regardless of whether it perceived tension between this Court's reasoning and the stay order. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court").

To be sure, after this Court's opinion in *Sierra Club II*, the Supreme Court issued a one-sentence order denying Sierra Club's request to lift the stay, stating simply: "The motion to lift stay is denied." *Trump v. Sierra Club*, 2020 WL 4381616

(U.S. July 31, 2020). But the Supreme Court's refusal to lift the stay plainly did not give the district court authority to stray from binding circuit precedent. *Cf. Doe v. Trump*, 284 F. Supp. 3d 1182, 1185 (W.D. Wash. 2018) (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"); *see also Durham v. Prudential Ins. Co. of Am.*, 236 F. Supp. 3d 1140, 1147 (C.D. Cal. 2017) ("[A] stay of proceedings pending Supreme Court review does not normally affect the precedential value of the circuit court's opinion.").

And yet, the district court still resisted this Court's ruling. Consider this line from the district court's order: "[I]n the face of an unequivocal statement from the Supreme Court that the plaintiffs likely 'have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005,' La Posta appears likely precluded from bringing suit based on Section 8005 as well." ER17. The district court even looked for support to a decision by the District Court for the Western District of Texas, issued prior to the *Sierra Club II* decision, rejecting a Section 8005 claim based on the Supreme Court stay order. ER18-ER19 (citing *El Paso County v. Trump*, 408 F. Supp. 3d 840, 857 (W.D. Tex. 2019)). Obviously, what the district court failed to acknowledge is that *this Court* has already addressed the "unequivocal statement" from the Supreme Court and explicitly held that Sierra Club *did* have a

cause of action to enforce compliance with Section 8005. *See Sierra Club II*, 963 F.3d at 887–93.

In refusing to follow *Sierra Club II*, the district court plainly committed an abuse of discretion. The district court should be reversed.

2. The Tribe can alternatively bring a claim under the APA.

This Court can also resolve, through straightforward application of circuit precedent, the issue of whether the Tribe has a cause of action under the APA. In *California v. Trump*, 963 F.3d 926 (2020), issued the same day as *Sierra Club II*, this Court expressly held that states may vindicate their budgetary reprogramming challenge through the APA. *California* applies with equal force to the Tribe, and it was error for the district court to find otherwise.

Like *Sierra Club II*, the *California* case was a challenge to the government's reprogramming of FY19 CAA funds pursuant to Section 8005. The distinction was that *California* was brought by a group of states, and that one of their claims was brought under the APA. The government argued that the states (California and New Mexico) could not bring their challenge under the APA because they were not within the "zone of interests" protected by Section 8005. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (recognizing that "a person suing under the APA . . . must be arguably within the zone of interests to be

protected or regulated by the statute that he says was violated") (internal quotation marks omitted). This Court sided with the states.

In ruling in favor of the states, this Court noted that "the zone of interests test is not especially demanding." 963 F.3d at 941 (citation omitted). The test can be satisfied so long as the plaintiff "is a suitable challenger to enforce the statute—that is, if its interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further statutory objectives." *Id.* at 942 (citation and ellipsis omitted). The leniency in the zone-of-interests test is a reflection of Congress's "evident intent" in enacting the APA that agency action be "presumptively reviewable." *Id.* (citing *Patchak*, 567 U.S. at 225). Because the plaintiff need only show that he or she is "arguably" within the zone of interests, all doubts must be resolved in the plaintiff's favor. *Patchak*, 567 U.S. at 225.

Of course, the most obvious beneficiary of Section 8005 was Congress, as the statutory provision tightens congressional control over appropriations. But as this Court noted, the states' interests were congruent with those of Congress. First, California and New Mexico's challenge actively furthered Congress's intent to "tighten congressional control of the reprogramming process." *Id.* Second, the states' challenge sought to "reinforce the same structural principle Congress sought to protect through Section 8005: congressional power over appropriations." *California*, 963 F.3d at 942. This Court explained that this separation of powers

principle is intended not only "to protect each branch of [the federal] government from incursion by the others," but the "allocation of powers in our federal system [also] preserves the integrity, dignity, and residual sovereignty of the States[.]" *Id*. at 943 (quoting *Bond v. United States*, 564 U.S. 211, 221–22, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011)). The sovereignty of the state plaintiffs was particularly relevant because "the use of Section 8005 here impacts California's and New Mexico's ability to enforce their state environmental laws," which are an important aspect of state sovereignty. *Id*. This Court concluded that Section 8005's limitations protect the states' sovereign interests "just as they protect Congress's constitutional interests, because they ensure that, ordinarily, Executive action cannot override these interests without congressional approval and funding." *Id*. at 943.

The analysis in *California* applies equally to the Tribe. Just as the interests of California and New Mexico were "congruent with those of Congress," so too are the Tribe's interests. First, just like California and New Mexico's challenge actively furthered Congress's intent to "tighten congressional control of the reprogramming process," *id*. at 942, the effect of the Tribe's legal challenge is the same.

Second, just as state sovereignty is implicated in the separation-of-powers principle embodied by Section 8005, so too is *tribal* sovereignty. Separation-of-powers protects tribes by limiting the executive's power to encroach on tribal sovereignty without Congressional approval. *See McGirt v. Oklahoma*, 140 S. Ct.

2452, 2462 (2020) (explaining that "the Legislature wields significant constitutional authority when it comes to tribal relations, . . . [b]ut that power . . . belongs to Congress alone") (citations omitted). The Tribe here seeks to protect its culture and religious practices, which are integral aspects of tribal sovereignty. *See Mitchell v. United States*, 958 F.3d 775, 794 (9th Cir. 2020), *cert. denied*, No. 20-5398, 2020 WL 5016765 (U.S. Aug. 25, 2020) (Hurwitz, J., concurring) (explaining that "proper respect for tribal sovereignty" requires respecting a tribal nation's "culture and religion").[5] Section 8005 thus aims to protect the Tribe's sovereign interests by ensuring that the executive does not overstep his authority to interfere with the Tribe's ability to exercise its culture and religion, as the Defendants are doing in this case.

In short, under a straightforward application of the *California* case, there can be no doubt that the Tribe is "arguably" within the zone of interests protected by Section 8005. It is therefore a proper plaintiff to bring an APA action challenging the Defendants' transfer of funds.

[5] *See also* Alex Tallchief Skibine, *Towards A Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 273–74 (2012) ("The importance of sacred sites to Indian tribes and Native practitioners is less about individual spiritual development and more about the continuing existence of Indians as a tribal people. The preservation of these sites as well as tribal people's ability to practice their religion there is intrinsically related to the survival of tribes as both cultural and self-governing entities.")

In failing to recognize that the Tribe has a cause of action under the APA, the district court once again deviated from circuit precedent. The district court recognized that *California v. Trump* held that states such as California and New Mexico are within the zone of interests protected by Section 8005, but it provided no reasoning whatsoever as to why *California*'s holding should not apply to the Tribe. All the district court offered was yet another reference to the Supreme Court's stay order in the *Sierra Club* litigation. *See* ER20 ("Again, the question here is whether in light of the Supreme Court's stay order, La Posta would have success on the merits of its alternative APA claim."). Reference to the stay order is even more inappropriate in this context because *Sierra Club* did not involve an APA claim nor a plaintiff whose sovereign interests are protected by the Constitution. Indeed, the district court outright admitted that it could not peg any significance to the stay order, conceding that it "can only speculate as to whether the Supreme Court would similarly bar APA claims based on Section 8005." ER21. But speculation is unwarranted where the Ninth Circuit has squarely addressed the issue.

Essentially, when faced with a choice between binding circuit precedent and outright speculation about what the Supreme Court might think, the district court followed the latter. It was improper for the district court to openly disregard this Court's precedents, and it should be reversed. Under a plain reading of *California v. Trump*, it is clear that the Tribe has a cause of action under the APA.

~~C.~~B. *The Defendants lacked authority to transfer the funds under the CAA.*

"The straightforward and explicit command of the Appropriations Clause means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress. *Sierra Club v. Trump*, 963 F.3d 874, 887 (9th Cir. 2020) (internal quotations and citations omitted). Defendants point to Sections 8005 and 9002 of the CAA as authority for their reprogramming of $3.831 billion to fund Project, ER66, ER76. But the reprogramming was in violation of Sections 8005, 9002, and thus Defendants lack authority to use those funds. Whether framed as an equitable *ultra vires* cause of action or an APA claim, the Tribe is likely to succeed on the merits of its claim that the Defendants are funding the Project unlawfully.

The district court never reached the issue, as it ended its analysis by finding (erroneously) that the Tribe lacked a cause of action. However, once again, the issue has already been decided in this circuit, so this Court may proceed to hold that the Defendants likely violated the CAA.

Pursuant to the plain text of the statute, Section 8005 cannot be invoked "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." Section 9002 authorizes the Secretary to transfer additional funds only with the approval of the Office of

Management and Budget but is subject to the same terms and conditions as Section 8005. Thus, the CAA imposes two limitations: (1) the transfer must be based on an unforeseen military requirement, and (2) the item for which the funds are transferred must not have been denied by the Congress. The Defendants' transfer of funds violates both of these Section 8005 requirements.

1. The border wall was not an "unforeseen military requirement."

This Court has held, as a matter of law, "the requirement to build a wall on the southern border" was neither unforeseen nor a military requirement. *California*, 963 F.3d at 946-48. That holding applies wholesale to this proceeding.

To begin with, nothing about the so-called "requirement" of building the border wall could be considered "unforeseen." The term "unforeseen," though undefined in the statute, was found by this Court to mean something "that DoD did not anticipate or expect." *Id.* at 944. The alleged problem of drug trafficking across the southern border has been present for decades and could not plausibly be considered unanticipated or unexpected. *See California v. Trump*, 963 F.3d at 944–45 ("The smuggling of drugs into the United States at the southern border is a longstanding problem"). The President's proposed solution—building a border wall—also cannot be considered unanticipated or unexpected. Even from the days of the campaign trail back in 2015, President Trump continually opined that there should be a wall along the southern border. *Id.* ("[The President] considered the wall

to be a priority from the earliest days of his campaign.") In any event, given that the "requirement" of building a border wall was found not to be unforeseen in *California* (which concerned the FY19 appropriation), it certainly could not be considered unforeseen one year later. After all, if the same "emergency" occurs every fiscal year, it cannot plausibly be considered unforeseeable.

Nor could the border wall be legitimately considered a "military requirement." Again, the term military is not defined in the statute, but this Court has taken it to generally mean "of or relating to soldiers, arms, or war." *Id.* at 947. Plainly, nothing about a border wall relates to soldiers, arms, or war. The United States is not at war with Mexico, there is no military base in the relevant areas, and in fact, the funds were transferred to an account designated to assist a *civilian* agency—the Department of Homeland Security. *See id.* The military has no involvement.

2. Funding for the border wall was denied by Congress.

In addition to the border wall not being an "unforeseen military requirement," the Defendants' budgetary reprogramming violates Section 8005 for the separate reason that the border wall is an item for which funds were denied by Congress. Again, the *California* decision provides the relevant analysis.

In *California*, this Court pointed out that the President requested $5.7 billion in FY 2019 to construct a border wall. And in response, Congress appropriated less than a quarter of the funds requested, $1.375 billion, for "the construction of primary

pedestrian fencing . . . in the Rio Grande Valley Sector." *See* 963 F.3d at 949. The refusal to provide any additional funding (through a standalone bill or otherwise) was considered a "general denial" of funding for the requested item. *Id*. at 950. For the purposes of Section 8005, the border wall was thus considered an item for which funds were previously denied by the Congress. *Id*. Similarly, in FY 2020, the President requested $5 billion for construction of the border wall. Congress rejected both the President's and DoD's FY 2020 budget requests and again allocated only $1.375 billion for border wall construction. CAA § 209. This was a general denial.

To be sure, the FY20 CAA is phrased slightly differently as compared to the FY19 CAA. As opposed to the FY19 CAA's appropriation of $1.375 billion for "the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector," the FY20 CAA appropriates $1.375 billion "for the construction of barrier system along the southwest border." *See* Pub. L. 116-93, § 209(a)(1). But this distinction has no import as to the issue of whether funds were denied. As *California* makes clear, when Congress makes a "broad and resounding denial" of a funding request, that denial is sufficient to preclude a reprogramming under Section 8005. 963 F.3d at 950. The denial in this case certainly meets that standard.

Because the transfer of funds failed to meet the minimum conditions set forth in Section 8005, the Tribe is likely to succeed on its claim that the Defendants lack authority to use the $3.831 billion to fund the Project.

II. The Tribe will suffer irreparable harm absent a preliminary injunction.

Regardless of how future stages of this litigation may unfold, at this point, one thing is certain. Once the Tribe's sacred lands and ancestral burial grounds are desecrated, that desecration cannot be undone. Thus, because the continuing destruction is irreversible, if the Project is to proceed, the Court will have effectively entered judgment against the Tribe. The district court failed to appreciate the gravity and the permanence of the harm that will befall the Tribe absent preliminary injunctive relief, and in doing so, the district court once again defied this Court's precedent.

Binding circuit precedent makes clear that the Tribe has satisfied the applicable legal standard. "An organization can demonstrate irreparable harm by showing that the challenged action will injure its members' enjoyment of public lands." *Sierra Club II*, 963 F.3d at 895. Sierra Club satisfied this standard by alleging that construction would "acutely injure [recreational, professional, scientific, educational, and aesthetic] interests because DHS is proceeding with border wall construction without ensuring compliance with any federal or state environmental regulations designed to protect these interests." *Id*. at 884. Sierra Club also alleged that construction would disrupt the "desert views and inhibit [members] from fully appreciating [the] area," and cut off access to a member's "fishing spots along the border, where he has fished for more than 50 years," drastically impact [a member's]

cultural identity by fragmenting [her] community," *Id*. at 884–85; and "detract from [a member's] ability to enjoy hiking, camping, and photographing these landscapes," *id*. at 885. This Court concluded that "Sierra Club sufficiently demonstrated that the Federal Defendants' proposed use of funds would harm its members ability to recreate and enjoy public lands along the border such that it will suffer irreparable harm absent injunction." *Id*. at 895.

If the injuries to Sierra Club's members' enjoyment of the land were sufficient, the harm to the Tribe, which threatens its cultural heritage in a way that goes to its very existence and identity as a people, certainly is. The Tribe has offered evidence that many cultural, religious, and natural resources that are of great importance to the Tribe and its members lie within and around the Project Area and will be irreparably harmed by "replacement of existing fencing, through construction and use of access roads and laydown/staging areas, and installation of related infrastructure or through indirect visual effects." ER43.

The district court responded to the Tribe's allegation of irreparable harm by merely noting that "many questions exist as to the likelihood of this injury, especially in the face of the alleged mitigation efforts by Defendants." ER37. The district court was ostensibly referring to assertions by the Defendants that no burial sites have been uncovered during the construction process. Those assertions, however, are insufficient to make a finding that there will be no irreparable harm to the Tribe.

The Tribe offered traditional knowledge that Kumeyaay burials lie within the Project Area and existing archaeological evidence supports that knowledge. This traditional and archaeological knowledge is borne out by the discovery of human remains within the Project Area during construction, and verification of that discovery by a medical examiner. CBP's records review and surveys do not contradict the Tribe's evidence.

The Project is excavating the Tribe's ancestral burial grounds. Worse, the Defendants refuse to allow Tribal citizens to care for the disinterred remains in a manner that is consistent with their religious obligations. This injury is egregious and irreparable.

And destruction of the Tribe's burial grounds are not the only irreparable injury that the Tribes and its members are suffering because of the Project. The Project has desecrated tribal sacred sites and plant gathering areas, cut off religious and culturally important trails, excavated unrecorded archaeological sites, and disrupted essential religious ceremonies, and will continue to do so in the absence of an injunction. The Project not only injures the Tribe's and its members' "enjoyment of public lands," but threatens their very existence as a people.

In sum, the district court was bound by *Sierra Club II*, and if that Court found irreparable harm when a member of the organization was prevented from experiencing the recreational, professional, scientific, educational, and aesthetic

value of the lands were construction is planned, there should be no dispute that irreparable harm exists when sacred tribal spiritual sites are at risk of being permanently desecrated. Even if the Tribe's injuries were less than certain based on factual disputes in the record, the Tribe's showing of certain success on the merits of its claims makes up for any weaknesses on this element. *All. for the Wild Rockies v. Cottrell*, 632 F.3d at 1131 ("the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another"). It was an abuse of discretion for the district court to deny an injunction on the grounds that the Tribe offered insufficient evidence of irreparable injury.

III. Balance of the equities and public interest.

The district court made errors in law and abused its discretion in balancing the equities and public interest. By failing to address the full extent of the Tribe's irreparable injuries described above, the Court could not adequately balance the equities. Additionally, the district court's reliance on "the continuing surge of illegal drugs from entering the country" is an abuse of discretion because the Defendants offered no evidence that illegal drugs cross the Project Area, and this Court has recognized that most illegal drugs cross at ports of entry, not along the open border. *Sierra Club II*, 963 F.3d at 897 n. 16. In addition, the Defendants have generally failed to provide evidence that the Project is the most efficient means of achieving its border security goals, and the OIG has suggested that other means are available

to the Defendants. In other words, an injunction would have little effect on border security and the entry of illegal drugs in the country.

Finally, the district court again erroneously relied on the Supreme Court's stay order, which was both silent as to the balance of the equities and which has been superseded by *Sierra Club II*. ER39. The Tribe has shown that it faces different and greater harm than that which the Sierra Club offered, and again, *Sierra Club II*, which held that the balance of equities in fact tipped in the Sierra's Club favor, is what binds the district court—not the previous stay order.

The public interest likewise weighs in the Tribe's favor. When the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). By denying the Defendants' request for funding the Project, "Congress presumably decided such construction at this time was not in the public interest." *Sierra Club I*, 929 F.3d at 707. And while the public surely has an interest in border security, the public also has an interest in ensuring that "statutes enacted by [their] representatives are not imperiled by executive fiat." *Sierra Club II*, 963 F.3d at 895 (quotations and citations omitted). Indeed, in legally identical circumstances, this Court has squarely held that the public interest favors injunctive relief:

> Defendants cannot suffer harm from an injunction that merely ends an unlawful practice. . .. Defendants' position essentially boils down to an

> argument that the Court should not enjoin conduct found to be unlawful because the ends justify the means. No matter how great the collateral benefits of building a border wall may be, the transfer of funds for construction remains unlawful. The equitable maxim 'he who comes in equity must come with clean hands' would be turned on its head if unlawful conduct by one party precluded a court from granting equitable relief to the opposing party.

Id. at 895–96 (internal citations and quotations omitted).

The district court abused its discretion by concluding that the public interest and balance of the equities tips in the Defendants' favor.

CONCLUSION

For the foregoing reasons, the district court's denial of the Tribe's motion for preliminary injunction was an abuse of discretion. Applying the proper legal standard to the evidence in the record, this Court should reverse the district court and direct the district court to immediately enjoin construction of the Project.

Dated: September 17, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that: This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,422 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word and Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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