No. 20-55941

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LA POSTA BAND OF DIEGUEÑO 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 REPLY BRIEF

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ARGUMENT

The district court correctly found that the Tribe faces irreparable harm as a result of the Project. However, it made an error of law in its analysis of the Tribe's likelihood of success on the merits and concluded that an injunction would not be in the public's interest without basis in the record. These errors require reversal with instructions to issue an injunction. At the very least, the Tribe's certain success on the merits requires a remand to re-balance the other factors according to this court's sliding scale approach. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

I. The Tribe's likelihood of success on the merits comes down to a purely legal question that the district court got wrong.

The Defendants suggest that the district court's conclusion that the Tribe would not succeed on the merits was within its discretion. But the conclusion came down to a purely legal question: whether the Tribe has a cause of action to challenge the Defendants' unlawful funding scheme. ER 16 ("Now, the question this Court is called upon to answer is what effect the Supreme Court's stay order has on La Posta's ability to assert a Section 8005 claim."); Brief for the Appellees ("Response") at 28, n. 4 ("the district court's ruling relates to whether La Posta has a cause of action, rather than to the merits of La Posta's challenge to DoD's use of its appropriated funds"). Accordingly, this Court reviews that conclusion *de novo*.

See Douglas v. Beneficial Fin. Co. of Anchorage, 469 F.2d 453, 454 (9th Cir. 1972) ("Ordinarily, the grant or denial of a preliminary injunction is a matter within the discretion of the district court, and it will not be reversed absent an abuse of that discretion. An exception to this rule applies when such grant or denial is based upon an erroneous legal premise; the order is then reviewable as is any other conclusion of law."). Under binding Ninth Circuit precedent, the Tribe has a cause of action and is thus likely to succeed on the merits. *See Sierra Club v. Trump* ("*Sierra Club II*"), 963 F.3d 874 (9th Cir. 2020); *California v. Trump*, 963 F.3d 926 (2020).

The Defendants suggest that the district court could rely on the Supreme Court's stay instead of subsequent precedent from this Circuit because "[t]his Court's precedents, while important, are only one of the factors the district court was required to consider." Response at 20 (citing no authority). Actually, this Court's precedents are not only a factor that district courts should consider when determining the law—"[d]istrict courts are bound by the law of their own circuit." *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981).[1] Moreover, district courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'" *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). This Circuit has a well-established test for determining when a district court may instead follow the

[1] Defendants suggest that *Sierra Club II* and *California* are less binding because they are "non-final." Response at 25. The decisions are final and affirm final judgments of the district court.

analysis of a Supreme Court stay order: "when, *but only when*, the earlier decision is clearly irreconcilable with the holding or reasoning of intervening authority from our court sitting en banc or the Supreme Court." *Aleman Gonzalez v. Barr*, 955 F.3d 762, 765 (9th Cir. 2020) (emphasis added).

The exception does not apply here because the Supreme Court's stay order is not "intervening authority"— *Sierra Club II* and *California* came *after* the Supreme Court's stay. While the Supreme Court's refusal to lift the stay was an intervening order, the district court could not treat it as irreconcilable intervening authority when it was issued without 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 decide the questions answered by appellate stay panels or to upset a circuit's "settled law." 845 F.3d 217, 221 (6th Cir. 2016) (per curiam).

In another attempt to side-step stare decisis, the Defendants propose that the district court did not have to decide whether the Tribe would have a cause of action "*in the Ninth Circuit*," Response at 22 (emphasis added), but could forecast how the case would turn out in the Supreme Court, under its own understanding of Supreme Court precedent. *Id*. Defendants again cite no authority for this proposition. To the contrary, the likelihood of success on the merits analysis is meant to be done "under the existing law of the Circuit." *Purse Seine Vessel Owners Ass'n v. U. S. Dep't of*

State, 584 F.2d 931, 934 (9th Cir. 1978); *see also Alley v. Little*, 181 F. App'x 509, 513 (6th Cir. 2006) (holding that "the prospect of a change in that feature of existing jurisprudence is as speculative as any other claim about possible future changes in governing law" and "does not impact our assessment as to the likelihood of [the plaintiff's] success on the merits under existing law").[2] Moreover, this Court has already assessed relevant Supreme Court precedent, including the stay order, and decided that plaintiffs like the Tribe have a cause of action for the Defendants' unlawful funding scheme in this case. *See Sierra Club II*, 963 F.3d at 888;

[2] District courts regularly assess the likelihood of success on the merits in the district court, not in some other or future forum. *See, e.g.*, *Daniels v. Bank of New York Mellon*, No. 17-CV-1303-CAB-WVG, 2017 WL 4541756, at *6 (S.D. Cal. Oct. 11, 2017) (determining "likelihood of success on the merits *in this Court*") (emphasis added); *Cook v. One W. Bank FSC*, No. CIV.S-093581MCEEFBPS, 2009 WL 5218054, at *2 (E.D. Cal. Dec. 29, 2009) (same); *M.G.U. v. Nielsen*, 316 F. Supp. 3d 518, 521 (D.D.C. 2018) (same); *B.R.-S.O.H. LLC (Sons of Hemp) v. City of Detroit*, No. CV 17-11093, 2017 WL 2436029, at *3 (E.D. Mich. Apr. 24, 2017), *report and recommendation adopted*, No. 17-11093, 2017 WL 2436025 (E.D. Mich. June 5, 2017) (same); *Caragena v. Indep. Nat'l Mortg. Corp.*, No. 14-60866-CIV, 2014 WL 12862244, at *3 (S.D. Fla. June 12, 2014) (same); *Mamouzette v. Jerome*, No. CV 13-117, 2014 WL 211402, at *4 (D.V.I. Jan. 19, 2014) ("Plaintiff cannot establish a likelihood of success on the merits *in this Court*") (emphasis original); *Ericson v. Magnusson*, No. 2:12-CV-00178-JAW, 2012 WL 3993753, at *3 (D. Me. Aug. 8, 2012), *report and recommendation adopted*, No. 2:12-CV-00178-JAW, 2012 WL 3990140 (D. Me. Sept. 11, 2012) (determining "likelihood of success in *this* court") (emphasis original); *In re Vioxx Prod. Liab. Litig.*, No. MDL 1657, 2008 WL 3285912, at *7 (E.D. La. Aug. 7, 2008), *aff'd sub nom. Avmed Inc. v. BrownGreer PLC*, 300 F. App'x 261 (5th Cir. 2008) ("This Court does not address the likelihood of success in these other jurisdictions but only in the present forum.").

California, 963 F.3d at 942. The district court made a legal error by concluding otherwise.

The fact that the Defendants have petitioned for certiorari in *Sierra Club* does not change this analysis. Even a "grant of certiorari does not change circuit precedent" nor permit a district court to "sweep aside binding circuit law based on [its] speculation about what the Supreme Court may decide in another case." *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297, 1298–99 (11th Cir. 2007). Defendants' citation to *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) is misleading. There, the district court denied injunctive relief in part because the public interest would be served by waiting for the outcome of a case pending (i.e. certiorari had already been granted) in the Supreme Court. *Id*. at 1945. The Supreme Court held that such a conclusion regarding the public interest was in the district court's discretion. Here, district court looked to a *petition* for certiorari (which has not yet been granted) to inform its divergence from Ninth Circuit precedent on a *legal question*. No authority recognizes a district court's discretion to do that.[3]

[3] Instead, district courts look to existing law in the Circuit. See *Randazza v. Cox*, No. 2:12-CV-02040-GMN, 2012 WL 6761919, at *4 (D. Nev. Dec. 14, 2012) (finding a likelihood of success based "the case law in existence"); *Davidson v. Dawson*, No. 1:04-CV-00612-RCT, 2007 WL 9751868, at *7 (D. Idaho Sept. 11, 2007) (finding a likelihood of success on the merits "[i]n light of the existing case law").

Confusingly, the Defendants also argue that the district court's conclusion was acceptable because the district court could have granted the injunction and then stayed the injunction *sua sponte*. Response at 26. The Tribe disagrees that the court could have stayed an injunction *sua sponte* in this case. Regardless, the district court did not grant and stay an injunction here. The Tribe asks this court to review the erroneous legal conclusion the district court made, not an equitable decision it did not make.

Even more questionably, the Defendants bolster their argument by citing an order by this Court in *Sierra Club v. Trump,* No. 19-17501 (9th Cir. Dec. 30, 2019) as "precedent." *Id*. "Unpublished dispositions and orders of this Court are not precedent[.]" CTA9 Rule 36-3 (noting exceptions not relevant here). Even if they were, the Ninth Circuit order is distinguishable because the district court in this case did not *sua sponte* stay an injunction. Moreover, this Court issued the order before the decisions in *Sierra Club II* and *California*, and explicitly stated that it "expresses no views on the merits of the case."

Similarly, this Court's affirmance of the district court's denial of injunctive relief in *California* does not support the district court's erroneous legal conclusion. In that case, the district court properly held that the plaintiffs had a cause of action to challenge Defendants' violation of section 8005, found that Defendants violated section 8005, and declared that construction was unlawful. *California v. Trump*, No.

19-CV-00872-HSG, 2019 WL 2715421 (N.D. Cal. June 28, 2019), *aff'd*, 963 F.3d 926 (9th Cir. 2020). The district court denied injunctive relief because it found no irreparable harm. *Id*. at *5. The denial of an injunction in that case on irreparable harm grounds has no relevance to the district court's analysis of the Tribe's likelihood of success on the merits of its Section 8005 claim.

Finally, the Defendants argue that the district court did not abuse its discretion because an opposite legal conclusion would have been a futile gesture: it would trigger an immediate stay from the Supreme Court. Response at 28. A Supreme Court stay is not a foregone conclusion. As the Defendants conceded in *California*, "the precise grounds on which the Supreme Court stayed the permanent injunction" are unknown. *California v. Trump*, 407 F. Supp. 3d 869, 885–89 n. 7 (N.D. Cal. 2019). "[T]he majority could have 'meant there is not a cause of action period, or there's not a cause of action for these plaintiffs because of the zone of interests test' applicable to their claim." *Id*. Here, the Tribe is a different plaintiff, and brings an alternative claim that does not require the zone-of-interest test. Accordingly, it was error to rely on a potential future stay from the Supreme Court to determine the Tribe has no cause of action. The district court made a legal error by concluding that the Tribe would not succeed on the merits for lack of a cause of action. This Court should reverse that error.

II. The district court found irreparable harm.

The district court properly acknowledged that the Tribe faces irreparable harm as a result of the Project. ER39 (noting that there is "irreparable harm on both sides"). The Tribe does not challenge that conclusion. Instead, the Tribe challenges the district court's conclusion that the irreparable harm does not weigh in favor of an injunction.

The irreparable harm factor "focuses on irreparability, 'irrespective of the magnitude of the injury.'" *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019). Accordingly, it was an error of law for the district court to recognize irreparable harm to the Tribe but conclude that it is not substantial enough to weigh in the Tribe's favor. That the Tribe will face irreparable harm from the Project ends the inquiry.

Moreover, the record does not support the district court's conclusion that the some of the Tribe's irreparable injuries are unlikely. It is helpful to view the forest through the trees: The Defendants are constructing a multi-billion dollar, miles-long, border wall only 10 miles from the Tribe's reservation, and squarely within the Tribe's ancestral territory, which it has occupied for over 12,000 years. ER 285-286. While the centerpiece of the Project is a 30-ft steel barrier, construction also includes excavation for underground "linear ground detection system," installation of

lighting, and road construction and improvement. ER138-140. Despite this significant undertaking, Defendants have waived every applicable law that would require them to assess the effects of the project on the environment and cultural resources. *Id*. Defendants rely on perfunctory environmental review and outreach efforts to say that the Tribe's cultural resources and sacred geography will be unaffected by the Project. Response at 29-38. The district court's conclusion that such studies foreclose a likelihood that the Tribe's cultural resources will be harmed by the Project is unthinkable. At a minimum, in light of the extensive archaeological and traditional knowledge the Tribe has offered in evidence, the Court's conclusion is "without support in inference that may be drawn from 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)).

The Defendants attempt to diminish the harm to the Tribe by pointing out that some of the Tribe's most sacred areas are not within the 60-foot strip of land in which the wall is being raised. *See* Response at 31. But the Tribe asserted harm arising from elements of construction that necessarily occur outside of the 60-ft strip, such as "construction and use of access roads and laydown/staging areas, and installation of related infrastructure." ER43. In addition, the Tribe asserts harm from "indirect visual effects." *Id*. This Court held that such visual impacts constituted substantial irreparable harm in *Sierra Club II*. 963 F.3d at 895 ("Sierra Club would

suffer irreparable harm to its recreational and aesthetic interests absent injunction"). The harm is similarly irreparable here and weighs in favor of an injunction.

Acknowledging the likelihood of irreparable harm from construction, Defendants argue that they are in the process of drafting a protocol to govern the discovery of human remains. Response at 35 (citing ER150). Construction is now over 50% complete. ER199. The fact that the Defendants have not completed a protocol by now is shocking, and demonstrates the roughshod nature of the Project. While Defendants claim they would implement notification and repatriation measures during the drafting process, the record reveals that has not occurred. Three of the Tribe's declarants attest the discovery of human remains within the Project Area. ER49; ER280-281; ER308-309.[4] Defendants neither notified the tribes on this or any other occasion. *Id*. Moreover, Defendants have conducted inadequate surveys prior to excavation and cultural monitors are largely absent. Response at 36 (conceding there are only four cultural monitors to cover the 14-mile San Diego Project and none in El Centro).[5] Discovery of human remains before they are

[4] The Tribe made a typo in its opening brief when it referred to this account at ER398-399. Appellant's Opening Brief at 9.

[5] Defendants defend the absence of cultural monitors on the El Centro sector by explaining that the Tribe has not requested monitors there. *Id*. n. 8. The Tribe has made its concerns exceedingly clear, but the Defendants have refused input from the Tribe. *See* ER284. Regardless, the absence of cultural monitors creates likelihood of irreparable harm, whether or not the Tribe formally requested their presence.

pulverized by heavy machinery is unlikely, making a notification and repatriation protocol meaningless. The record does not support the Defendants' argument that they have adequately mitigated irreparable harm to Kumeyaay ancestral remains.

III. The record does not support the district court's findings regarding drug smuggling and financial harm.

In its opening brief, the Tribe explained why the court's reliance on drug smuggling concerns was not based in evidence. Appellant's Opening Brief at 34. In response, the Defendants cite to drug related statistics from the Administrative Record. Response at 6. First, such evidence was not properly before the district court. The Administrative Record was attached as the basis of the Secretary of Defense's decision to reprogram funds, ER63, not to provide evidence on questions of public interest. If used for the latter purpose, the statements regarding drug smuggling statistics are hearsay and lack foundation. Fed. R. Evid. 802, 901. While the statistics cite to an Office of National Drug Control Policy (ONDCP) report, the underlying report was not included in evidence. ER93-95. Even if the evidence was properly before the court, it does not support a conclusion that the Project will address the drug related issues it identifies.

The statistics Defendants identify refer to activity of drug cartels and numbers of drugs apprehended within the San Diego and El Centro border sectors, not within the Project Area specifically. *Id*. When Defendants cited the same statistics from the

2018 ONDCP report in *Sierra Club II*,[6] this Court held, "the Federal Defendants cite drug trafficking statistics, but fail to address how the construction of additional physical barriers would further the interdiction of drugs." *Sierra Club II*, 963 F.3d at 897. That remains true here, and it was an abuse of discretion for the district court to make such an inference.

The Defendants also defend the district court's conclusion that millions of dollars of contract suspension fees from an injunction are irreparable and weigh against granting an injunction. The position is not defensible. First, monetary harm cannot constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90, 94 (1974). Second, because the contracts contemplate the use of illegally acquired funds, there is a question as to whether the suspension fees are enforceable. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("illegal promises will not be enforced"). Finally, when the Defendants entered into the contracts from which the suspension costs will allegedly arise, they were fully aware that suspension due to litigation was a high risk. See ER68 (memorandum from DHS to DoD advising that an injunction was granted in the *Sierra Club* case and that "[a]dditional litigation is expected if you decide to undertake additional construction pursuant to Section 284"). The Defendants cannot now hold out these costs as a defense to an injunction.

[6] *See Sierra Club II*, Defendants' Opening Brief, Dkt. 85 at 9-10 (July 31, 2019).

IV. Conclusion

The district court properly recognized that the Project will cause irreparable harm to the Tribe. However, the district court's conclusion that the Tribe is unlikely to succeed on the merits of its unlawful appropriation claim was based entirely on an error of law and it improperly concluded that harms to the Defendants and public outweigh the irreparable harm to the Tribe. In light of both errors, the district court must be reversed and an injunction should issue immediately. At a minimum, the case must be remanded to the district court to re-balance the injunction factors in light of the Tribe's certain success on the merits.

Dated: October 5, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 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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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that: This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,726 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii). This reply 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 reply brief has been prepared in a proportionately spaced typeface using Microsoft Word and Times New Roman 14-point font.

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