No. 20-55941

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LA POSTA BAND OF DIEGUENO MISSION INDIANS OF THE LA POSTA RESERVATION,
Plaintiffs-Appellants,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, in his official capacity; MARK T. ESPER, U.S. SECRETARY OF DEFENSE, in his official capacity; CHAD F. WOLF, ACTING U.S. SECRETARY OF HOMELAND SECURITY, in his official capacity; AND LIEUTENANT GENERAL TODD T. SEMONITE, COMMANDING GENERAL OF THE U.S. ARMY CORPS OF ENGINEERS, IN HIS OFFICIAL CAPACITY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

BRIEF FOR THE APPELLEES

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INTRODUCTION

The district court did not abuse its equitable discretion when it declined to grant a preliminary injunction to plaintiff La Posta, an Indian tribe that seeks to halt barrier construction at the southern border. The court recognized that the injunction would be legally identical to a preliminary injunction against barrier construction issued by a different district court in an earlier case, upheld by this Court, and ultimately stayed by the Supreme Court. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (*Sierra Club*). In staying the prior injunction, the Supreme Court explained that the *Sierra Club* plaintiffs likely had no cause of action to sue. The Supreme Court has recently denied a motion to lift that stay, and is currently considering the government's petition for a writ of certiorari to review this Court's decision on the merits.

The district court did not abuse its discretion when it concluded that the Supreme Court's action in *Sierra Club* weighed against granting injunctive relief to La Posta. Rather, the court was rightly reluctant to enter the same type of order, based on the same type of claim, that the Supreme Court stayed in that case. At a minimum, if the court had granted a preliminary injunction, it would have been appropriate for it to stay its own order in light of the *Sierra Club* stay, as other district courts and courts of appeals (including this Court) have acknowledged is an appropriate course in this situation. And because the same equitable factors that govern a stay also apply to a preliminary injunction, it was an appropriate exercise of discretion for the court to

deny the preliminary injunction in the first place. La Posta's burden was to show that it is *likely* to succeed on the merits, and the district court did not abuse its discretion in concluding that when all the relevant factors are weighed, La Posta ultimately fell short.

La Posta also failed to carry its burden of showing irreparable harm, as the district court recognized. The challenged construction is taking place on a strip of federal land set aside in 1907 for the purpose of maintaining the border, and existing barriers are in place along most of the project's length. Moreover, the record demonstrates that the government has evidence refuting every one of La Posta's alleged harms. That evidence shows that no ancient village sites or burial grounds lie in the path of the construction; that no significant artifacts or human remains have been found in the project area; that the government is working closely with tribal cultural monitors to ensure that the work does not harm La Posta's cultural and religious interests, and has reached out to the Kumeyaay tribes from the outset; and that if any culturally significant artifacts or items were to be found during construction, protocols are currently in place for allowing tribal cultural leaders to take appropriate care of those items. The government's evidence also rebuts La Posta's allegations that the construction will interfere with its use of historic trails and the Tribe's ability to perform a sacred annual dance.

Faced with these factual disputes, the district court concluded that La Posta failed to carry its burden of showing that it is likely to suffer irreparable injury.

Without a sound factual basis for crediting La Posta's allegations of harm, the court also could not determine where the balance of the equities and the public interest may ultimately lie. It held that La Posta failed to make any persuasive showing on those elements as well.

Even a plaintiff who satisfies *all* the relevant factors has no right to a preliminary injunction. Rather, that extraordinary form of relief always lies within the sound discretion of the district court. La Posta made none of the showings necessary to support a preliminary injunction, and the district court acted well within the bounds of its discretion in denying La Posta's motions. This Court's review is deferential, and the district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362. It denied plaintiff's motions for a temporary restraining order and preliminary injunction on August 27, 2020. ER 319. Plaintiffs filed their notice of appeal on September 8, 2020. ER 320. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it declined to grant La Posta a preliminary injunction against border barrier construction virtually identical to an injunction recently stayed by the Supreme Court, when the court also determined that La Posta failed to show irreparable harm, or that the balance of equities tips in its favor, or that the public interest favors a preliminary injunction.

STATEMENT OF THE CASE

A. Statutory Background

La Posta argues that it is entitled to a preliminary injunction solely on the ground that this Court concluded in an earlier case that DoD acted unlawfully when it transferred funds among its internal spending accounts to fund construction at the border.

DoD is authorized to support DHS's barrier construction under 10 U.S.C. § 284. Section 284 authorizes DoD to "provide support for the counterdrug activities . . . of any other department or agency," if "such support is requested," including through the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(a), (b)(7).

To provide support under Section 284, DoD has made internal transfers of funds already appropriated to it by Congress. Congress has for over forty years provided in DoD's annual appropriations statutes the authority for DoD to transfer appropriated funds among its internal accounts as military needs and priorities change.[1] In Fiscal Year 2020, Congress provided DoD the same transfer authority as in previous years. *See* Consolidated Appropriations Act of 2020, Pub. L. No. 116-93,

[1] Congress first enacted the transfer provision in 1974. *See* Department of Defense Appropriations Act, 1974, Pub. L. No. 93-238, tit. VII, § 735, 87 Stat. 1026, 1044.

§ 8005, 133 Stat. 2317, 2335 (2019) (FY2020 CAA). Section 8005 authorizes the Secretary of Defense "[u]pon determination . . . that such action is necessary in the national interest," to transfer up to $4 billion from certain "appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes . . . as the appropriation or fund to which transferred," provided that the transfer is "for higher priority items, based on unforeseen military requirements," and the "item for which funds are requested" was not previously "denied by the Congress." *See id.*[2] Congress provided a separate and similar transfer authority in Section 9002, which permits the Secretary to "transfer up to $2,000,000,000 between the appropriations or funds made available" in Title IX of the DoD Appropriations Act. FY2020 CAA, § 9002, 133 Stat. at 2377. That authority is "in addition to any other transfer authority" but is "subject to the same terms and conditions as the authority provided in [S]ection 8005." *Id.*

B. Factual Background

i. In January 2020, DHS requested DoD's assistance under Section 284 with border construction in certain high-priority drug smuggling corridors at the southern border. ER 91-ER 106. DHS explained that the project areas are "home to some of the strongest and most violent drug cartels in the world." ER 91.

[2] The National Defense Authorization Act for Fiscal Year 2020 provides overlapping transfer authority for up to $4 billion, under the same terms as Section 8005. *See* Pub. L. No. 116-92, Title X, § 1001, 133 Stat. 1198, 1570 (2019).

The two projects challenged in this case, known as "El Centro Sector" and "San Diego A," include four noncontiguous segments of border barrier construction, three segments in San Diego County and one in Imperial County. ER 94. The Office of National Drug Control Policy has identified the El Centro Sector project area as a High Intensity Drug Trafficking Area. ER 94. Transnational criminal drug smuggling organizations operate there, including "one of the most dangerous cartels" in Mexico. ER 94-ER 95. In 2019 alone, the Border Patrol seized over 2,600 pounds of methamphetamine in this area as well as hundreds of pounds of other drugs, including heroin and cocaine. ER 95.

The adjacent San Diego sector is also a recognized High Intensity Drug Area, and transnational criminal organizations are active in this area as well. ER 93. Four major drug cartels, including the Sinaloa cartel, operate here and "constant internal and territorial disputes involving these cartel" lead to violence. ER 93. In 2019, the Border Patrol seized over 3,985 pounds of methamphetamine in the sector, as well as over 1,200 pounds of cocaine, 293 pounds of heroin and over 107 pounds of fentanyl. ER 93.

ii. In February 2020, the Secretary of Defense approved DHS's request for counter-narcotics assistance in these areas. ER 64-ER 73. El Centro Sector currently calls for the construction of approximately three miles of new pedestrian fencing, a reduction in scope from the ten miles originally authorized. ER 139-ER 140. The San Diego A project has three discrete segments of barrier under construction.

Segment 1 will replace approximately 14 miles of dilapidated pedestrian fencing, while Segments 2 and 3 will create a total of approximately four miles of new fencing. *See* ER 138-ER 139. Both projects are occurring "within the federal Roosevelt Reservation, a 60-foot strip of land established in 1907 that parallels the international border" and "functions primarily as a law enforcement zone." ER 138, ER 140; *see also* ER 138-ER 139. Part of the land in the El Centro section has been previously disturbed by "illegal crossing and off road activity," while the land in the San Diego sections is already occupied by existing fencing and by "an existing border road that has been there for at least 30 years." ER 139, ER 140.

iii. The Secretary of Defense funded the projects by transferring appropriated funds into DoD's "Drug Interdiction and Counter-Drug Activities, Defense" appropriations account under DoD's Section 8005 general transfer authority ($2.2 billion), and its Section 9002 special transfer authority ($1.6 billion). *See* ER 80. The funds identified for transfer were all "above the Department's 2020 budget request," and "excess or early to current programmatic needs." ER 76, ER 128. *See* ER 80-ER 84 (reprogramming action identifying specific sources of funds, and explaining why they are not a military priority). The Secretary determined that the statutory requirements for transfer were satisfied: the transfer was in the national interest; the projects were a higher priority than those from which the funds were derived; DHS's January 2020 request for support with these projects was an unforeseen military

requirement; and Congress has not previously denied funding for these projects. ER 76-ER 77.

iv. In March, Customs and Border Protection (CBP), which is working with DoD on the project, sent out a letter to over 25 tribes, including La Posta, "requesting their input" regarding the barrier construction proposed for San Diego A and the El Centro Sector. ER 144. On May 7, CBP held a tribal coordination briefing, providing the tribal members plans for the barrier enhancements and maps of the proposed project, and sharing CBP's "understanding of known biological and cultural resources" in the areas. ER 144. CBP and the tribes "discussed the possibility of having tribal cultural monitors present during construction." ER 145.

CBP hosted a second tribal coordination briefing in May, but no tribes attended. ER 145. CBP made that briefing available online. ER 145.

In June, when construction began, CBP held a coordination briefing specifically with the Kumeyaay tribes. ER 145. La Posta attended. ER 145. Again, CBP shared design plans and maps of the proposed construction and surrounding area. ER 145. CBP told the tribes what it knew about cultural resources in the area, and the tribes and CBP discussed best management practices for protecting those resources, including "the possibility of having tribal cultural monitors affiliated with the Kumeyaay Tribes on site during construction." ER 145.

In early July, CBP wrote to La Posta and other Kumeyaay tribes to follow up on concerns the tribes had raised at the June briefing. ER 146. A conference call a

few days later addressed the tribes' remaining "concerns regarding insufficient survey data and the need for tribal cultural monitors to be on site during construction." ER 146. CBP gave the tribes access to its archeological contractor's online database, and asked the tribes to provide appropriate protocols for some soil sampling they had requested. ER 146.

On July 10, CBP "secured the services of a tribal cultural monitor to monitor certain construction activities associated with San Diego A." ER 148. It hosted another webinar to address Kumeyaay tribal concerns about the adequacy of CBP's surveys of cultural resources. ER 148. The Kumeyaay tribes "identified areas within the San Diego Project Area that they believed had a high probability for cultural artifacts and other sensitive sites," and they requested additional surveys in those areas. ER 148. They also requested that CBP provide tribal cultural monitors, at CBP's expense. ER 148.

CBP responded to all these concerns. It directed its archeological consultant to re-survey the areas the Kumeyaay tribes had identified as culturally sensitive. ER 148. Tribal cultural monitors were present at the new survey, which revealed only "the possible presence of individual or isolated archeological or cultural resources that do not appear to be significant." ER 149-ER 150.

CBP also hired Kumeyaay tribal cultural monitors, including monitors from La Posta. ER 149. These cultural monitors "have been on-site during construction since July 10, 2020." ER 149. Each morning CBP details the plans for the day's work, and

the four tribal cultural monitors can individually choose, "based on the location and type of planned construction activity, which construction activities they prefer to observe that day." ER 149.

CBP has also taken steps to minimize any effects of construction on unknown cultural or religious resources. It has established protocols for "notifying project personnel and tribal representatives if any historical or cultural artifacts are identified" during construction. ER 150. "In such an event, work would be immediately halted and the Protocol and Communication Plan procedures would be implemented, to include repatriating artifacts to the affiliated tribe." ER 150. CBP will first try to avoid any area where cultural resources are found, but if it cannot, "work will be halted immediately within 100 feet of the resource." ER 150. CBP and the tribes will work together to "complete culturally appropriate repatriation efforts to address" any sensitive discovery. ER 150. As of late August 2020 CBP was still finalizing the protocols, but CBP is implementing them during the interim period. *See* ER 150.

C. Prior Proceedings

i. La Posta filed its complaint for injunctive relief on August 11, 2020. ER 310. La Posta alleged that it is one of twelve bands of Kumeyaay people who have inhabited the border area for generations. *See* ER 4-ER 5. It described the border area as containing human burial grounds and other culturally significant sites, as well as an ancient trail system. *See* ER 5. The La Posta religious tradition requires access to sacred sites and trails for ceremonies and gatherings, and requires that any human

remains that may come to light must be properly treated at the direction of a "trained and certified Kumeyaay person." ER 5.

La Posta's action for injunctive relief alleged that constructing the border barrier would hinder access to sacred areas and disturb burial sites and other areas of cultural significance. ER 5-ER 6. La Posta asserted that DoD and DHS had failed to engage in adequate consultation with the Tribe or to allow adequate time for La Posta to determine how cultural and other resources might be affected by construction. ER 6. The government responded with declarations and other evidence of its extensive consultations with La Posta and its comprehensive program to address the Tribe's cultural and religious concerns. *See* ER 135-ER 203.

ii. La Posta moved for a temporary restraining order and a preliminary injunction to suspend construction of the border barrier. As relevant here, La Posta's legal claims challenge DoD's internal transfer of funds under Sections 8005 and 9002. La Posta asserts an ultra vires causes of action in equity and a statutory action under the Administrative Procedure Act (APA). See Br. 16-25. After a hearing, the district court denied both motions. *See* ER 12, ER 39; SER2 (district court's ruling from the bench).[3]

In a subsequent written order, the court recognized that in moving for a preliminary injunction, La Posta sought "an extraordinary remedy." ER 11 (quoting

[3] "SER" denotes the supplemental excerpts of record filed with this brief.

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)). It held that the burden was on La Posta to make the showings necessary to support preliminary injunctive relief: that La Posta was likely to succeed on the merits of its case; that it would suffer irreparable harm if the injunction did not issue; that the "balance of equities tips in its favor;" and that the public interest would favor an injunction. ER 11 (quotation marks omitted).

The district court held that La Posta fell short at every step. It ruled first that in light of the *Sierra Club* litigation in this Court and the Supreme Court, La Posta had failed to show that it was likely to succeed on the merits of its claims. The court explained that in *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019) (*Sierra Club I*), a district court in California had enjoined barrier construction, holding that the Section 8005 transfer in that case was unlawful. ER 13. A panel of this Court denied a stay of the district court's injunction. ER 13-14 (discussing *Sierra Club I*, 929 F.3d at 677). But on the government's motion, the Supreme Court granted the stay and allowed barrier construction to resume. ER 14.

The Supreme Court gave reasons for granting the stay. It explained 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." ER 14 (quoting *Sierra Club*, 140 S. Ct. at 1). And the Court acted again after a different Ninth Circuit panel affirmed the *Sierra Club* district court's permanent

injunction on the merits. *See* ER 16 (discussing *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020) (*Sierra Club II*), and *California v. Trump*, 963 F.3d 926 (9th Cir. 2020) (*California*)). Sierra Club moved the Supreme Court to lift the stay of the injunction, and the Supreme Court summarily denied the motion. *See* ER 16 ("[t]he motion to lift stay is denied") (quoting *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020)).

Addressing these rulings in La Posta's case, the district court first determined that La Posta's ultra vires claim is legally indistinguishable from the claim in *Sierra Club* challenging DoD's funds transfers under Section 8005. *See* ER 17. The court concluded that "in the face of an unequivocal statement from the Supreme Court that" the *Sierra Club* 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." ER 17 (quoting *Sierra Club*, 140 S. Ct. 1); *see also* SER 3 (ruling from the bench) ("I think the Supreme Court doesn't always give us insight. But, here, they did. And when they speak, I think we're obligated to listen.").

The district court rejected La Posta's argument that the district court was bound to find a likelihood of success due solely to this Court's *Sierra Club II* decision. *See* ER 18. The court acknowledged this Court's ruling, but nonetheless held that it ought not to enjoin barrier construction on the very same grounds that the Supreme Court had rejected in issuing a stay in *Sierra Club*, when the Supreme Court's *Sierra Club* stay decision would at a minimum warrant a stay of any injunction here as well.

The court pointed to the Fifth Circuit, where a district court entered a preliminary injunction against barrier construction, only to have the injunction stayed on appeal in light of the Supreme Court's stay order. ER 18-19 (discussing Order, *El Paso County v. Trump*, No. 19-51144, (5th Cir. Jan. 8, 2020), SER5-SER7, and *El Paso County v. Trump*, 408 F. Supp. 3d 840, 857 (W.D. Tex. 2019)).

Turning to the remaining requirements for injunctive relief, the district court held that La Posta had failed to carry its burden of showing irreparable harm. ER 37-ER 38; *see also* SER3 ("[T]he plaintiff just doesn't go beyond speculation, for the most part.") The court noted that the barrier construction itself was occurring "on federal land, most of which has previously been disturbed with barrier wall construction." ER 37-ER 38. It added that La Posta's allegations were substantially undercut by evidence that the government is finalizing a cultural resources plan for responding to culturally significant discoveries, and that "stopping construction and repatriating items to the appropriate tribes" are among the procedures being considered. ER 37 (quotation marks omitted). Ultimately, the court held, La Posta had failed to establish irreparable harm warranting injunctive relief because it was "unclear" to the court "whether this factor weigh[ed] in favor of La Posta." ER 38.

The district court held that La Posta also failed to show that the balance of equities and the public interest favored an injunction. The court found it significant that "the Supreme Court has recognized a 'compelling interest[] in safety and in the integrity of our borders.'" ER 38 (quoting *National Treasury Emps. Union v. Von Raab*,

489 U.S. 656, 672 (1989)). And it recognized that in this case, an injunction against border security improvements "would prohibit the Government from taking necessary steps to prevent the continuing surge of illegal drugs from entering the country." ER 38. The evidence further showed that having to suspend construction contracts for work in progress would cost the government dearly, with fees, penalties and other suspension costs estimated at "approximately $29 million per month." ER 38. *See also* SER3 ("[D]isruption of the wall at this point, given funding deadlines with the time of year, [and] the huge influx of drugs that we are facing as a country . . . prevent the plaintiff from predominating here.").

The district court found the Supreme Court's *Sierra Club* stay decision instructive in this context as well. It explained that "the Supreme Court has already balanced the harm to the Government from an injunction prohibiting border barrier construction against the irreparable environmental interests of the Sierra Club." ER 38-ER 39. In granting the stay, the Court "necessarily had to have concluded that harm to the Government from an injunction prohibiting border barrier construction outweighs" the environmental harms asserted in that case. ER 39. The district court held that La Posta's allegations of cultural and religious harm were not "so dissimilar" from the environmental harms alleged in *Sierra Club* that it could disregard the Supreme Court's guidance. ER 39. In light of these considerations as well, preliminary injunctive relief was unwarranted. ER 39.

The district court accordingly entered an order denying La Posta's motions for a temporary restraining order and a preliminary injunction. *See* ER 39.

SUMMARY OF THE ARGUMENT

The district court exercised sound equitable discretion when it denied La Posta's motion for a preliminary injunction to halt barrier construction. There is no right to the extraordinary remedy of a preliminary injunction, which is always a matter of discretion. But La Posta failed to show that any of the relevant factors were in its favor, and it was entirely appropriate for the district court to deny relief here.

1. The district court considered all the relevant factors and weighed them appropriately when it determined that La Posta had failed to show that it is likely to succeed on the merits of its claims. La Posta contends that the district court had no choice but to grant it relief because this Court has allowed similar claims to proceed in rulings that are binding on the district court.

But this Court's *Sierra Club II* decision did not alter the status of the injunction in that case, which remains subject to the stay entered by the Supreme Court, as the Supreme Court recently reaffirmed. And the district court here was properly cautious about entering the same type of injunctive order when the Supreme Court explained that it had stayed the injunction because the *Sierra Club* plaintiffs had no cause of action, a holding that would apply equally to La Posta.

The Supreme Court's *Sierra Club* stay order would, at a minimum, justify a stay of any preliminary injunction the district court might have decided to award. In

choosing, instead, to deny La Posta extraordinary relief at the outset, the court acted well within the range of permissible alternatives and did not abuse its equitable discretion.

2. The district court also properly concluded that La Posta failed to show that it is likely to suffer irreparable harm because the facts relevant to harm are disputed. La Posta asserts that it will suffer injuries and lack of access to cultural and religious sites, and to human burial grounds and remains. It contends that the government has failed to consult adequately with the Kumeyaay tribes, and that construction will interfere with sacred trails and an important annual Bird Dance.

But as the district court acknowledged, the government's evidence both rebutted La Posta's specific claims of harm and established that comprehensive mitigation protocols are in place to protect cultural and religious resources. Among other things, the government submitted evidence that no significant cultural sites, villages, or burial grounds will be affected by the project. No human remains have been found in the project area. At most, individual artifacts or remains might be encountered, and mitigation protocols are in place to address that eventuality. Nor is there any evidence that the construction is likely to injure the sacred trail system or the annual Bird Dance.

Faced with fundamental disputes about the critical facts, the district court fittingly exercised its discretion when it determined that La Posta fell short of making the showing of *likely* irreparable harm needed to support a preliminary injunction.

3. Without a satisfactory showing of harm, the district court was in no position to conclude that La Posta's disputed claims of harm tipped the balance of the equities and the public interest in favor of injunctive relief. The government's interest, moreover, are weighty, as the Supreme Court's order in *Sierra Club* implicitly acknowledges: border security and tackling drug activity in high-trafficking areas at the border are compelling interests. The district court also weighed the high (and unrecoverable) costs to the government of stopping work while contractors have been hired and are performing their contracts. The court did not abuse its discretion in concluding on the record before it that La Posta had failed to make its showing that the balance of the equities and the public interest favor a preliminary injunction. This Court should affirm the district court's judgment.

STANDARD OF REVIEW

This Court reviews a district court's "denial of a preliminary injunction for abuse of discretion." *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc). The standard is deferential to the district court; this Court asks only "whether the trial court reached a decision that falls within any of the permissible choices the court could have made." *United States v. Hinkson*, 585 F.3d 1247, 1261 (9th Cir. 2009) (en banc). The district court's decision accordingly must be affirmed "unless the decision was 'illogical, implausible, or without support in inferences that may be drawn from facts in the record.'" *Davidson v. O'Reilly Auto Enters., LLC*, 968 F.3d 955, 963 (9th Cir. 2020) (quoting *Hinkson*, 585 F.3d at 1264).

ARGUMENT

La Posta principally contends on appeal that it was entitled to a preliminary injunction because this Court ruled on the merits in favor of a different plaintiff in another case raising similar legal issues. That argument is squarely refuted by decades of precedent in the Supreme Court and this Court. "A preliminary injunction is 'an extraordinary remedy never awarded as of right.'" *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Even if a plaintiff has satisfied the elements required to meet the preliminary injunction standard, the decision whether or not to grant relief remains within the sound discretion of the district court. *See, e.g. Evans v. Shoshone-Bannock Land Use Policy Comm'n,* 736 F.3d 1298, 1307 (9th Cir. 2013). Indeed, this Court has done just what La Posta suggests it cannot. In *California*, this Court affirmed the judgment in plaintiffs' favor on claims identical to La Posta's, and also affirmed as a sound exercise of discretion the district court's order denying injunctive relief on those same claims. *California v. Trump*, 963 F.3d 926, 949 (9th Cir. 2020).

The district court here denied La Posta preliminary injunctive relief only after carefully weighing the relevant factors and concluding that La Posta had failed to satisfy *any* of the preliminary injunction elements. It acted well within the range of its permissible choices, and its judgment should be affirmed.

I. The District Court Did Not Abuse Its Discretion In Concluding That La Posta Failed To Show A Likelihood of Success On The Merits

La Posta does not seek relief on the basis of any claim other than its claim that the "funding scheme" for border construction is "unlawful" under Section 8005, Br. 1, the same issue that was before this Court and the Supreme Court in the *Sierra Club* litigation. La Posta takes the view that it could not have been denied relief in district court without an abuse of judicial discretion, because for the district court to deny a preliminary injunction "flies in the face of binding Ninth Circuit precedent[.]" Br. 13.

That argument fundamentally misunderstands the governing standard for an injunction. This Court's precedents, while important, are only one of the factors the district court was required to consider in evaluating La Posta's ultimate likelihood of success in this case, and that element itself is not dispositive of the equitable determination whether an injunction should issue. The district court here was properly respectful of this Court's decisions, but those decisions do not by themselves dictate a determination that La Posta is likely to succeed on the merits.

The practical implications of the district court's ruling confirm that the court's decision is sound. Had the court granted La Posta preliminary relief, it would likely have stayed its ruling in light of the Supreme Court stay, as other courts have done in similar circumstances. This Court itself has invoked the Supreme Court's stay order in refusing to lift a district court's stay of a permanent injunction against border barrier construction, in a second round of *Sierra Club* litigation involving barrier construction

under different statutory authority. *See* Order, *Sierra Club v. Trump*, No. 19-17501 (9th Cir. Dec. 30, 2019). The district court can hardly be said to have abused its discretion in adopting that same approach.

A. The district court did not abuse its discretion when it considered the full range of information implicating La Posta's likelihood of success on the eventual merits of its claims here. La Posta contends that the district court should have looked no further than this Court's decision in *Sierra Club*, ignoring the Supreme Court's two orders entered in the *Sierra Club* stay litigation and the stay decisions issued by other courts in other cases challenging border barrier construction. That argument has no merit.

The district court pointed out, ER 14, that the Supreme Court in *Sierra Club* stayed a preliminary injunction almost identical to the one La Posta seeks, because the government had "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." *Sierra Club*, 140 S. Ct. 1 (2019). The government's "showing" to the Supreme Court included establishing that the government was likely to succeed in defending against Sierra Club's Section 8005 claims. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Winter*, 555 U.S. at 22.

The district court here recognized sound legal reasons why it should not issue the very same type of preliminary injunction the Supreme Court stayed in *Sierra Club*. It explained that "when the Supreme Court issues a stay of an injunction, it necessarily

concludes that there is a likelihood of success on the merits of the appeal, and accordingly, a likelihood of reversal of the injunction." ER 19. And because "the Supreme Court expressly declared that the Government had sufficiently shown there is no cause of action to obtain review of the Acting Secretary's compliance with Section 8005," La Posta's identical "Section 8005 arguments are likely barred by the Supreme Court's ruling." ER 19. Further, while the Supreme Court's stay ruling in *Sierra Club* vacated a preliminary injunction based upon an implied cause of action in equity, *see Sierra Club I*, 929 F.3d 670, 689 n.16 (9th Cir. 2019), the Court "was clear . . . in stating that the *Sierra Club* plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." ER 21. The district court was entitled to conclude, for purposes of considering injunctive relief, that the Court's broad statement casts doubt on the ultimate likelihood of success on La Posta's APA claim, as well as its claim in equity.

La Posta agrees that its suit is "legally identical" to *Sierra Club*. Br. 18. But it argues that because this Court resolved the merits of the Section 8005 issue against the government in *Sierra Club II*, 963 F.3d 874 (9th Cir. 2020), after the Supreme Court issued its stay order, the district court "openly defied controlling precedent," and "resisted this Court's ruling" when the court denied La Posta the same type of injunction that was stayed in *Sierra Club*. Br. 15, 20.

That is incorrect. The district court was tasked not with determining whether La Posta was likely to succeed on the merits of its claims *in the Ninth Circuit*, but

whether La Posta would ultimately likely succeed on the merits at the end of the litigation. In that broader inquiry into ultimate success on the merits, the district court appropriately found it instructive first, that the Supreme Court had stayed an order identical to the order La Posta seeks because the *Sierra Club* plaintiffs likely lack a cause of action, and second, that the Supreme Court later declined to lift that stay, even after this Court's decision on the merits.

The district court correctly recognized that the Supreme Court's stay decision was relevant to the ultimate question of success on the merits. *See* SER3 ("when [the justices] speak, I think we're obligated to listen."). This Court has similarly acknowledged that Supreme Court dicta, for example, must be given weight as a "prophecy of what that Court might hold." *McCalla v. Royal MacCabees Life Ins. Co.,* 369 F.3d 1128, 1132 (9th Cir. 2004). And when the Supreme Court gives reasons for a ruling, the courts of appeals and district courts must "not blandly shrug them off because they were not a holding." *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc). Here, where La Posta seeks the very same type of injunctive relief that the Supreme Court stayed in *Sierra Club*, the district court appropriately gave careful consideration to the Supreme Court's stay orders and its legal reasoning. *See* ER 19 (declining to "take the aggressive step of ruling that plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so.") (quoting *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020)).

The district court correctly concluded that La Posta's reliance on *Doe v. Trump*, 284 F. Supp. 3d 1182, 1185 (W.D. Wash. 2018), and *Durham v. Prudential Ins. Co. of Am.*, 236 F. Supp. 3d 1140, 1147 (C.D. Cal. 2017), is misplaced. *See* ER 18. Both decisions were issued by district courts and have no precedential effect. In any event, in *Doe* the district court noted that it was unable to discern any legal principle animating the Supreme Court's stay order. *See Doe*, 284 F. Supp. 3d at 1185 ("it is impossible for this court to discern the Supreme Court's rationale"). Here, by contrast, the Supreme Court gave a reason for the stay—that plaintiffs lacked a cause of action to challenge DoD's internal funds transfers, *see* 140 S. Ct. at 1—and the district court was responsible in this case for heeding that pronouncement. *See* SER3 ("[W]hen [the Justices] speak, I think we're obligated to listen."). The district court decision in *Durham* did not involve a preliminary injunction at all, and casts no light on how the court here should have evaluated La Posta's likelihood of success on the merits.

Nor did the district court abuse its discretion when it noted that the government has petitioned for certiorari in *Sierra Club*, and in the companion case brought by California and other States. *See* ER 11, 12 (noting the filing of the petition seeking further review in *Sierra Club II* and in *California*). The possibility of Supreme Court review and reversal in *Sierra Club* is relevant to La Posta's ultimate likelihood of success on the merits, and it was entirely reasonable for the court to recognize as much. *See Benisek*, 138 S. Ct. at 1945 (district court did not abuse its discretion when it

refrained from "'charging ahead'" with a preliminary injunction, when the case was pending in the Supreme Court and "firmer guidance" from that Court "might have been forthcoming.").

La Posta's reasons for disregarding the Supreme Court's *Sierra Club* stay order are unpersuasive. La Posta argues that the Supreme Court's statement that the Sierra Club plaintiffs likely lack a cause of action "reflected merely an early assessment of the [cause-of-action] issue that turned out to be mistaken" in light of this Court's subsequent ruling on the merits of the claim for injunctive relief. Br. 19. And it adds that because of this Court's merits decision in *Sierra Club II*, "whatever persuasive value the stay order may once have had is now gone." *Id.* But the Supreme Court also declined to lift the stay following this Court's decision on the merits, and both decisions are relevant to the district court's reasoned determination that there is reason to doubt that the Supreme Court would reach the same result as this Court in *Sierra Club*.

La Posta cites no authority that the non-final decision of a court of appeals requires a district court assessing likelihood of success to disregard a legal ruling of the Supreme Court in the same case. *Cf.* U.S. Const. art III, § 1 (vesting "[t]he judicial Power" in "one supreme Court, and in such other inferior Courts as the Congress may from time to time ordain and establish"). And although, to be sure, the panel majority that affirmed the permanent injunction in *Sierra Club* did so after the Supreme Court issued its stay ruling, the Supreme Court subsequently denied the

Sierra Club plaintiffs' motion to lift the stay. *See* 140 S. Ct. at 2620. The district court correctly took note of both Supreme Court orders in deciding whether to issue a preliminary injunction in this case. ER 16, ER 18.

B. The soundness of the district court's exercise of discretion is confirmed by the fact that if the court had granted La Posta a preliminary injunction, it would likely also have stayed the injunction in light of the Supreme Court's *Sierra Club* stay. The same equitable factors that govern the grant of a preliminary injunction apply to a stay. *See Winter*, 555 U.S. at 22; *Nken*, 556 U.S. at 434. And if the district court had granted La Posta a preliminary injunction in a case "legally identical" to *Sierra Club*, Br. 18, the government would have had a good chance of obtaining a stay, as it did in *Sierra Club*. The district court correctly recognized as much. *See* ER 19.

Moreover, there is precedent in this Court supporting the district court's reasoning. In a second round of *Sierra Club* litigation challenging border barrier construction authorized under a different statute, this Court declined to lift a stay pending appeal of a district court's order permanently enjoining DoD from proceeding with construction. Order, *Sierra Club v. Trump*, No. 19-17501 (9th Cir. Dec. 30, 2019). The district court in that case (consolidated with a companion case) stayed its own injunction. *See California v. Trump*, 407 F. Supp. 3d 869, 907 (N.D. Cal. 2019). In declining to lift the district court's stay, this Court adopted the court's reasoning that the Supreme Court's stay of the earlier injunction "appears to reflect the conclusion of a majority of that Court that the challenged construction should be

permitted to proceed pending resolution of the merits." Order at 2, *Sierra Club v. Trump*, No. 19-17501. This Court has thus endorsed the very reasoning that the district court adopted here, confirming that the district court did not stray beyond the bounds of its permissible choices.

Additionally, this Court in its decision on the merits in *California*, decided together with *Sierra Club II*, affirmed the district court's denial of permanent injunctive relief "given the totality of the considerations at issue," even though the district court had denied the injunction as duplicative of the *Sierra Club* injunction. *California*, 963 F.3d at 949. The Supreme Court's intervening stay order meant that "the injunction in *Sierra Club* no longer affords the States protection," but this Court nonetheless saw "no abuse of discretion in the district court's order" denying injunctive relief. *Id.* This Court thus recognized that a ruling in a plaintiff's favor on the merits of the same claim La Posta presents here—a challenge to DoD funds transfers under Section 8005—does not entitle plaintiff to injunctive relief.

The Fifth Circuit has also relied on the Supreme Court's *Sierra Club* stay order in granting a stay of district court's injunction against border barrier construction. *See* SER5-SER6. The district court in this case noted the Fifth Circuit's order, and explained that the injunction stayed by the Fifth Circuit involved a DoD statutory funding authority not at issue in *Sierra Club*. *See* ER 18-19. Here, where a preliminary injunction would be based on the very same claim that was before the Supreme Court in *Sierra Club*, a stay would be even more plainly warranted.

Thus, given the *Sierra Club* stay order, a preliminary injunction order granting La Posta relief would have been a futile gesture. The district court did not abuse its discretion in choosing to deny the injunction, rather than granting La Posta an injunction that would only trigger immediate additional litigation over a stay.[4]

II. The District Court Correctly Held That La Posta Failed to Demonstrate Irreparable Harm

The district court correctly recognized that La Posta failed to show that it would likely suffer irreparable harm if no injunction were granted. La Posta argues for a lesser standard, contending that it has shown such a high degree of success on the merits that "the other factors require little mention." Br. 15; *see also* Br. 33 (urging this Court to overlook the shortcomings in its evidence on irreparable harm because "the Tribe's showing of certain success on the merits of its claims makes up for any weaknesses on this element").

But "[a]s a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek*, 138 S. Ct. at 1943-44; *see also Evans v. Shoshone-Bannock Land Use Policy Comm'n,* 736 F.3d 1298, 1307 (9th Cir. 2013) (remanding a claim for injunctive relief "[n]otwithstanding [plaintiff's] overwhelming likelihood of success on the

[4] La Posta argues that it should prevail on its statutory construction argument under section 8005. *See* Br. 26-29. But 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. La Posta's statutory arguments are irrelevant and this Court should disregard them.

merits" because an injunction is "never awarded as of right" (quotation marks omitted)); *California*, 963 F.3d at 949 (affirming the district court's judgment in favor of plaintiffs and its denial of injunctive relief). La Posta was required not only to make each of the necessary showings, but also to satisfy the district court that extraordinary relief was warranted, before it could obtain preliminary injunctive relief.

In any event, the Supreme Court in *Winter* rejected an argument that a strong likelihood of success on the merits could reduce the plaintiff's burden on irreparable harm, and its ruling squarely forecloses La Posta's argument here. *See Winter*, 555 U.S. at 21. The correct rule, the Court held, is that "plaintiffs seeking preliminary relief" must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* at 22. That requirement applies irrespective of the plaintiff's likelihood of success. The district court correctly applied this standard in holding that La Posta had failed to show irreparable harm because the facts relevant to La Posta's allegations of injury are in dispute. *See* ER 11.[5]

La Posta acknowledges "factual disputes in the record." Br. 33. The district court recognized that because of these disputes, La Posta has failed to show a likelihood of irreparable harm. The court in its oral ruling commented that La Posta

[5] Although this Court has applied a "sliding scale" test to allow plaintiff to make a less rigorous showing of likelihood of success on the merits if it makes an exceptionally strong showing on other factors, *see, e.g., Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1132 (9th Cir. 2011), *Winter* unambiguously requires all plaintiffs to establish a *likelihood* of irreparable harm.

"just doesn't go beyond speculation, for the most part," and it has "[n]o real evidence" of injury. SER3. "In no way" did the court "seek to minimize the seriousness of La Posta's allegations of harm." ER 37. But in light of the government's evidence, "many questions exist as to the likelihood of this injury, especially in the face of the alleged mitigation efforts by Defendants," and La Posta had accordingly failed to make the required showing. ER 37.

La Posta's brief on appeal only confirms that the government's evidence addresses and undercuts each of the allegations of irreparable harm. La Posta asserts three general types of harms: harms to items and sites of cultural significance, *see* Br. 9-11, 32; harms associated with human remains, *see id.*; and harms associated with a purported failure by the government to allow for cultural monitoring, *see id.* at 10. On every point, the government submitted evidence that demonstrates La Posta's failure to show that irreparable harm is *likely*.

A. La Posta has not shown likely harm to sacred areas and items of cultural significance

La Posta makes numerous assertions about injuries to sacred areas and sites, contending, for example, that the proposed construction "crosses through" documented village sites, and "goes directly through Jacumba Valley." Br. 9, 11. But the government introduced evidence showing that no sites of cultural significance will be affected by the project. Notably, as the district court pointed out, the entire

project is taking place on set-aside "federal land, most of which has already been previously disturbed with barrier wall construction." ER 37-ER 38.

At the most fundamental level, the basic geography of the project as it relates to La Posta's claims is in dispute. La Posta contends that the construction project "goes directly through Jacumba Valley," Br. 11, but there is evidence that the Jacumba Valley lies *between* two segments of the San Diego project, and will not be affected. ER 43. And while La Posta claims irreparable harm related to Boundary Mountain, Br. 12, La Posta itself agrees that the mountain lies to the north, outside the project area, *see id.* *See also* ER 43.[6] La Posta's claims of lack of access to culturally significant areas and sacred sites are also disputed: Tecate Peak, Jacumba Hot Springs and Table Mountain are located outside the project area, "will be unaffected by construction, and will remain accessible to [La Posta] after construction is complete." ER 157.

La Posta's contention that "two documented Kumeyaay village sites," Br. 9, Tecate and Jacumba, Br. 11, lie within the project boundaries, is also disputed. CBP's "surveys and record searches . . . do not indicate the presence of any known . . . historical villages," including Tecate and Jacumba. ER 151. La Posta did not introduce any surveys, reports or similar relevant evidence to support its claim, relying only on declarations. La Posta represents that scientific findings "do not contradict

[6] La Posta made no assertions about Boundary Mountain until it filed its reply brief in district court. The government accordingly had no opportunity to submit specific rebuttal evidence directed to this point.

the Tribe's traditional knowledge." Br. 10. *See also* Br. 32 (relying on "traditional knowledge" as evidence of the existence of burial sites). But the findings and surveys create a genuine dispute of fact, as the district court recognized.

Further, La Posta's allegation of harm to villages assumes that a village "might comprise a 'rancheria,'" an area that encompasses numerous discrete sites and that "might extend over several square miles" up to thirty square miles, though "a figure of ten square miles is probably more accurate" for Kumeyaay rancherias. ER 46. But La Posta's evidence does not even purport to rely on claims of irreparable harm based on activity *between* distinct historical sites. It is not enough for a showing of irreparable harm that historical sites may be located within the same ten- to thirty-square-mile area as border barrier construction.

B. La Posta has not shown likely harm to burial sites or human remains

La Posta's second broad category of alleged injuries involves burial sites and human remains. La Posta contends that both are likely to be affected by the barrier construction projects at El Centro Sector and San Diego A, and that if they are, inadequate protocols are in place for addressing cultural and religious concerns. The evidence shows otherwise.

La Posta contends that the government is "excavating the Tribe's ancestral burial grounds" and "pulverizing ancestral burials." Br. 9, 32. La Posta bases its claim of harm to culturally significant sites partially on its view that the project sites

have not been adequately surveyed for human remains. *See* Br. 9. But although the area has been surveyed, ER 141, and re-surveyed at the tribes' request, with Kumeyaay cultural monitors present, ER 149, no evidence of ancient villages, burial sites, or significant artifacts has been found. Rather, the result of the new surveys was to "indicate the possible presence of individual or isolated archeological or cultural resources that do not appear to be significant." ER 150. And even though such isolated artifacts are generally not considered significant, CBP has committed to "take steps, in coordination with the Kumeyaay Tribes, to minimize impacts to the artifacts through avoidance, mitigation, or recovery measures, as appropriate." ER 153. These mitigation measures, as well, undermine La Posta's allegations that it faces irreparable harm. *See* ER 37.

La Posta asserts that human remains have actually been discovered within the project area and verified by a medical examiner. Br. 31. But this statement refers to a single alleged piece of cremated bone, and the "precise location of the bone as regards its occurrence in the United States or Mexico" was unclear. ER 49. *See also* ER 280-ER 281 (declarant Javier Mercado's account of finding the item). The government's evidence showed that "[t]he alleged human bone Mr. Mercado claims to have found was located in Mexico, south of the San Diego Project Area," and the Kumeyaay representatives present "walked between a gap in the temporary fencing and traversed into Mexico" to inspect it. ER 154; *see also* ER 155 (Kumeyaay representatives crossed the border again to re-examine the item on a follow-up visit). Because the item was

on the Mexican side of the border, CBP itself "was unable to conduct any further investigation." ER 155. And while La Posta's declarant Mr. Mercado reported that he had consulted with an archaeologist, Antonio Porcayo Michelini, who opined that "both inhumated bone and cremated bone had been encountered" in the general area, ER 49, Mr. Michelini himself submitted no declaration. His hearsay comments do not rebut the government's evidence that no human remains or burial sites have been found at the El Centro Sector and San Diego A project sites.[7] And while La Posta relied in district court on a cultural survey performed for a different project more than 20 miles from the project at issue in this case, the government provided evidence that the survey does not establish the presence of burials or remains in the areas where construction is currently occurring. *See* ER 151-52.

In district court, La Posta asserted that human remains had actually been found in the project area in another instance. But further investigation showed that this was not the case. When CBP investigated a report of human remains it found only a piece of PVC piping. Thereafter, the person who had reported the discovery, but who also claimed to have reburied the item, retracted his statement that the item was human in origin. *See* ER 153-ER 154.

The record evidence also flatly contradicts La Posta's assertion that the government refuses "to allow the Tribe to properly care for the disinterred remains."

[7] La Posta's additional citation is to a source that is not included in the record. *See* Br. 9 (citing pages 398-99 of a 321-page Excerpts of Record).

Br. 10; *see also id.* at 32 (repeating the allegation). Not only have no human remains been found in any area where DoD and CBP are working, but CBP has a Cultural Resources Protocol and Communication Plan (the Protocol) for "notifying project personnel and tribal representatives if any historical or cultural artifacts are identified" during construction work. ER 150. Cultural resources subject to the Protocol include human remains. If any resources were to be found, "work would be immediately halted and the Protocol and Communication Plan procedures would be implemented, to include repatriating artifacts to the affiliated tribe." ER 150. Tribes are to be "provided with the opportunity to confer with their tribal cultural leaders to determine appropriate actions." ER 150. These protocols are being followed while the Protocol is being finalized. *See* ER 150; *cf.* Br. 10 (mistakenly suggesting that no protocol is currently being followed). Contrary to La Posta's allegations, therefore, the evidence before the district court showed that CBP is making every effort to allow the Kumeyaay tribes to direct matters pertaining to human remains if any such remains were ever to be encountered.

C. The government has consulted with the tribes and provided access for cultural monitors, and La Posta has not shown likely harm to its ability to use sacred trails or conduct an annual sacred dance

The government's evidence likewise rebuts La Posta's assertion that it is being irreparably harmed by a lack of access to the sites by tribal cultural monitors. CBP held tribal notification and co-ordination meetings between March and June 2020. *See* ER 144-ER 145. The Kumeyaay tribes requested cultural tribal monitoring in July, and CBP retained a tribal cultural monitor for San Diego A. ER 147-ER 148. Four cultural monitors are on the site of the San Diego project every day and are free to observe whatever they wish. ER 149. The record includes unambiguous evidence of CBP's extensive work to notify the tribes of all activities, and to obtain their assistance in mitigating any possible cultural harms. *See* ER 146-50.[8]

La Posta's brief also asserts that the Tribe will suffer irreparable harm to a trail system that has cultural and religious significance.[9] But La Posta's expert acknowledges that "previous wall construction" has already "placed a barrier across trails linking" different Kumeyaay tribes "and, in doing so, impacted such trails." ER

[8] Although La Posta complains that there are no tribal cultural monitors at the El Centro Sector site, Br. 10, the record is devoid of any request from La Posta for cultural monitors for El Centro Sector. La Posta has known about the El Centro Sector project since March 2020. *See* ER 144.

[9] In district court, La Posta did not assert any harms based on the trails until it filed its reply brief, and the government's evidence accordingly does not specifically address Kumeyaay trails.

45. La Posta asserts no facts suggesting that the new construction activity will cause specific additional harms.

Finally, La Posta asserts (Br. 12) that strengthening the border barrier will interfere with the Tribe's ability to engage in an annual Bird Dance. La Posta did not include the Bird Dance among its allegations of irreparable harm in district court (either in its papers or at the hearing), so neither the government nor the district court was asked to address this allegation.[10] But to the extent that La Posta represents that tribal members "traditionally dance on both sides of the border," Br. 12, federal law would prevent an individual who had crossed into Mexico from returning to the United States at a point other than a lawful port of entry. *See* 19 U.S.C. § 1459. Nor does La Posta explain how the new barriers would have a greater impact on the annual dance than the barriers that were in place before the project began. At a minimum, factual disputes remain to be resolved over whether La Posta will suffer irreparable harm related to the Bird Dance, and La Posta has failed to make its showing of likely injury.

La Posta responds that it has suffered irreparable harm because if land is desecrated, "that desecration cannot be undone." Br. 30. But the rigorous standard for an injunction requires more than a mere assertion that harm that might occur would not be easily corrected. "[A]lthough some injuries may usually be irreparable

[10] One of La Posta's declarants mentions the Bird Dance, *see, e.g.,* ER 274, but also asserts that the dance has continued during barrier construction.

and thus a likelihood of *irreparable* injury easily shown, the plaintiff must still make that showing on the facts of his case." *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (emphasis added). La Posta failed to make that showing here. Further, La Posta's harms are no more irreparable than the environmental harms before the Supreme Court when it granted the *Sierra Club* stay.

The district court did not abuse its discretion in denying preliminary relief in the face of fundamental uncertainty about the critical facts relevant to the allegations of irreparable injury.

III The District Court Correctly Held That La Posta Failed To Establish That the Equities And Balance of Harms Tip in its Favor

In light of La Posta's failure to show any likelihood of irreparable harm, the district court determined that La Posta had also failed to establish that the balance of harms and the public interest weigh in favor of a preliminary injunction. *See Nken*, 556 U.S. at 435 (inquiries into the balance of harms and the public interest "merge when the Government" is a party).

The court's reasoning was correct. It pointed out that the interests on the government's side are exceptionally strong, explaining that "the Supreme Court has recognized a 'compelling interest[] in safety and in the integrity of our borders.'" ER 38 (quoting *National Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989)). Equally significantly, halting construction "would prohibit the Government from taking necessary steps to prevent the continuing surge of illegal drugs from entering

the country." ER 38. The high costs to the government and the public interest of implementing an unanticipated work stoppage, including contractor fees, penalties, and other rapidly escalating costs, also weighed against an injunction. *See* ER 38. Evidence before the court showed that "suspension costs for projects would be approximately $29 million per month." ER 38. Plaintiff does not dispute that the resulting harm would itself be irreparable. The court concluded that these imminent and serious harms to the government "prevent the plaintiff from predominating here." SER3.

The district court also appropriately looked to the Supreme Court's *Sierra Club* stay in balancing the harms and determining the public interest, recognizing that the Court in *Sierra Club* "has already balanced the harm to the Government from an injunction prohibiting border barrier construction against the irreparable environmental interests of the Sierra Club." ER 38-ER 39. The court noted that the Supreme Court "necessarily had to have concluded that harm to the Government from an injunction prohibiting border barrier construction outweighs" the Sierra Club's claimed environmental harms. ER 39. And it reasoned that La Posta's cultural and religious interests were not "so dissimilar from" the environmental harms in *Sierra Club* that the Supreme Court's *Sierra Club* stay would "have no value" for calibrating the balance of harms in this case. ER 39.

* * * *

The district court did not abuse its discretion when it concluded that La Posta had established none of the preliminary injunction factors, and it accordingly denied the request for extraordinary equitable relief.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court.

s/ Anne Murphy
Anne Murphy

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9903 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Anne Murphy
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