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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB and SOUTHERN BORDER COMMUNITIES COALITION,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States, in his official capacity; MARK T. ESPER, Secretary of Defense, in his official capacity; and CHAD F. WOLF, Acting Secretary of Homeland Security, in his official capacity,

Defendants.

Case No.: 4:20-cv-01494-HSG

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTION 284 PROJECTS AND IN OPPOSITIONTO DEFENDANTS' MOTION

Judge: Hon. Haywood S. Gilliam, Jr.
Trial Date: None Set
Action Filed: February 28, 2020

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INTRODUCTION

Having failed again to persuade Congress to allocate billions to a border wall, Defendants argue that this Court must allow them to divert billions from the military to make up the shortfall. Defendants' chief argument, again, is that they have invoked statutory authorities that effectively shield their actions—however unlawful—from any challenge. No court has embraced this premise. On the merits, Defendants rehash arguments that this Court and the Ninth Circuit have rejected. Defendants' implausible theory remains that a combination of transfer authorities and 10 U.S.C. § 284 ("Section 284") provide the Department of Defense ("DoD") with unlimited discretion to divert enormous sums to a Department of Homeland Security ("DHS") initiative that Congress rejected. As to the equities, Defendants once again fail to establish that the public interest supports permitting them to illegally usurp Congress's power of the purse. They likewise fail to obscure the inevitable impact of a multibillion-dollar construction project on the unique environments that lie along the border, and the many people who use and protect those lands.

ARGUMENT

I. Defendants' Actions Are Not Beyond This Court's Review.

Every Court to examine the question, including this Court, the Ninth Circuit, and courts in Texas and the District of Columbia, has found that Defendants cannot evade review by relying on their constricted view of the zone of interests of sections 8005 and 9002 of the DoD Appropriations Act, 2020 ("Section 8005") and Section 284.

Defendants concede that under "the reasoning of Ninth Circuit motions panel's decision and the Court's prior decision addressing the border barrier projects undertaken pursuant to 10 U.S.C. § 2808 . . . Plaintiffs may challenge Defendants' fiscal year 2020 transfer of funds pursuant to § 8005 through an implied equitable action to enjoin an alleged violation of the Appropriations Clause and Plaintiffs' fall within any zone of interests required to enforce that Clause's provisions." Def. Br. 8. And they acknowledge that their arguments against this Court's conclusion were "previously presented." Def. Br. 8. The Court should reject them once again.

In fact, no court has accepted Defendants' theory that a statutory zone of interests prohibits *ultra vires* review of their wall-funding scheme. It is striking that Defendants fail to note—despite

citing the decision several times for other propositions—that just last month, a court in the District of Columbia found that environmental plaintiffs could proceed on "*ultra vires* claims for violations of §§ 2808 and 8005," as well as Section 284 and Section 739 of the Consolidated Appropriations Act, 2019. *Ctr. for Biological Diversity v. Trump*, No. 1:19-cv-00408 (TNM), 2020 WL 1643657, at *25 (D.D.C. Apr. 2, 2020). As the D.C. court explained, a plaintiff that "plausibly alleges that Defendants used § 8005 to fund border wall construction and that Congress denied funds for this border wall project, . . . has stated a claim that Defendants' actions were ultra vires." *Id.* at *26. The court found that it would make no sense to apply a zone-of-interests restriction to such a claim:

> If the Government were to use a Medicare statute, for example, to justify building the border wall on someone's property, it would make little sense to require that person to show that he was a Medicare beneficiary or provider to argue that the Medicare statute did not permit border barrier construction. It is no different here where Plaintiffs claim they are injured by the Government's use of statutes that, they say, it had no right to use for these purposes.

Id. at *25. Along the same lines, last year a court in the Western District of Texas agreed with this Court that "when a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is inapposite." *El Paso Cty. v. Trump*, 408 F. Supp. 3d 840, 856 n.1 (W.D. Tex. 2019).

II. Section 8005 Does Not Authorize Defendants' Scheme.

Defendants do not attempt to grapple with this Court's or the Ninth Circuit's conclusions that Section 8005 did not authorize them to aggrandize wall construction beyond what Congress provided for in the 2019 Consolidated Appropriations Act. Instead, they argue that the result should be different with respect to their fiscal year 2020 diversions because of the subsequent issuance of a Government Accountability Office ("GAO") opinion, and because, in their view, Congress has "acquiesce[d] in DoD's use of § 8005." Def. Br. 9–10. Defendants also attempt to evade the damning fact that, unlike last year's diversions, this time DoD itself requested wall funding from Congress and was rejected. Def. Br. 10–11. These arguments fail.

First, the GAO opinion cannot override this Court's and the Ninth Circuit's analysis. Courts are unanimous that there is "no obligation to defer" to GAO assessments. *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (Kavanaugh, J.); *see also Delta Chem. Corp. v. West*, 33 F.3d 380, 382 (4th Cir. 1994) ("Opinions of the GAO . . . are not binding on this

court or the executive branch."). "It is for the courts to determine the intent of Congress as expressed in its legislative enactments," *Greene Cty. Planning Bd. v. Fed. Power Comm'n*, 559 F.2d 1227, 1239 (2d Cir. 1976), and courts "should not shrink from exercising [their] power," *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201–02 (D.C. Cir. 1984) (alteration and quotation marks omitted). "[A]lthough [courts] consider the Comptroller General's reasoning to the extent it is persuasive, it is the court that has the last word." *U.S. Dep't of Navy*, 665 F.3d at 1349 (citation and quotation marks omitted).

The GAO opinion Defendants cite is inconsistent with the record and unpersuasive. For example, although the GAO asserts that "there was no denial of fences at the southern border," U.S. Gov't Accountability Off., B-330862, *Department of Defense—Availability of Appropriations for Border Fence Construction* 10 (Sept. 5, 2019), https://www.gao.gov/assets/710/701176.pdf, "real-world events in the months and years leading up to the 2019 appropriations bills leave no doubt that Congress considered and denied appropriations for the border barrier construction projects that DoD now seeks to finance." *Sierra Club v. Trump*, 929 F.3d 670, 691 (9th Cir. 2019). While the GAO blithely asserts that "there was no denial," the record instead establishes "Congress's clear decision to deny the border barrier funding sought here when it appropriated a dramatically lower amount in the CAA." *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 913 (N.D. Cal. 2019).

Second, Defendants' wishful claim that Congress has "acquiesce[d] in DoD's use of § 8005," Def. Br. 10, bears little resemblance to reality. Defendants propose that Congress must have implicitly approved of DoD's use of Section 8005 to fund border wall construction because of its "reauthorization of § 8005 without change." Def. Br. 10. But, of course, as Defendants concede, at the time that Congress reauthorized § 8005, every single judicial decision interpreting that provision found that it did not authorize Defendants' wall-funding scheme. *See* Def. Br. 10 ("Defendants acknowledge that this Court and the Ninth Circuit concluded that § 8005 did not permit the transfer of funds in fiscal year 2019." (citing *Sierra Club*, 379 F. Supp. 3d at 912–15; *Sierra Club v. Trump*, No. 19-cv-00892-HSG, 2019 WL 2715422, at *3 (N.D. Cal. Jun. 28, 2019) (slip op.); *Sierra Club*, 929 F.3d at 689–92)). Defendants do not attempt to explain why Congress's reauthorization of Section 8005 against this uniform backdrop should be interpreted to represent Congress's

disagreement with judicial interpretation of Section 8005. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language."). Nor do Defendants attempt to explain why it is reasonable to assume that Congress agrees with them when the House of Representatives is simultaneously litigating against Defendants, *see House v. Mnuchin*, No. 19-5176 (D.C. Cir., argument held Apr. 28, 2020), supporting Plaintiffs in this Court, *see* Amicus Br. of House of Representatives (Apr. 14, 2020), ECF No. 25-1, and when "both the House Committee on Armed Services and the House Committee on Appropriations formally disapproved of DoD's section 8005 reprogramming," *Sierra Club*, 929 F.3d at 681.

Finally, Defendants have no meaningful response to the fact that DoD itself explicitly foresaw the needs for border wall funding, requested it, and was denied. Defendants argue that it is irrelevant that Congress specifically rejected a DoD budget request for border wall construction. Def. Br. 10–11. They maintain that this rejection "says nothing about whether Congress denied funding to DoD" for a border wall under Section 284 because "DoD's military construction program is distinct from its counter-drug support to other agencies." Def. Br. 11. But as this Court has already observed, Defendants' arguments have no support: "Defendants point to nothing in the language or legislative history of the statutes in support of their assertion that only explicit congressional denial of funding for '[Section] 284 projects,' or even DoD projects generally, would trigger Section 8005's limitation." *Sierra Club*, 379 F. Supp. 3d at 913. The Court has similarly rejected Defendants' crabbed theory of "unforeseen" requirements, which would render any Section 284 expenditure unforeseeable until the very moment DHS requests DoD money. *See* Def. Br. 11. As the Court has explained,

> [b]y Defendants' logic, every request for Section 284 support would be for an "unforeseen military requirement," because only once the request was made would the "need to exercise authority" under the statute be foreseen. . . . Nothing presented by the Defendants suggests that its interpretation is what Congress had in mind when it imposed the "unforeseen" limitation, especially where, as here, multiple agencies are openly coordinating in an effort to build a project that Congress declined to fund.

Sierra Club, 379 F. Supp. 3d at 914–15.

III. Defendants' Wall-Funding Scheme Is Not Authorized by Section 284.

As discussed above, Plaintiffs need not satisfy any zone-of-interests test with respect to Defendants' *ultra vires* wall-funding scheme, which is outside the scope of any Section 284 authority. *See* Section I, *supra.* But even if a zone-of-interests test applied, Defendants are wrong that Plaintiffs must show "that Congress intended to provide environmental organizations with a remedy for protecting against the alleged negative externalities of barrier construction." Def. Br. 12. As the Supreme Court has explained, this argument "is beside the point." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 n.7 (2012). "The question is not whether [the statute] seeks to benefit [the plaintiff]; everyone can agree it does not. The question is instead . . . whether issues of land use (arguably) fall within [the statute's] scope—because if they do, a neighbor complaining about such use may sue to enforce the statute's limits." *Id.*; *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987) ("The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."). Defendants assert that Section 284 is distinct from the statute at issue in *Match-E-Be-Nash-She Wish* because Section 284 "does not protect or regulate Plaintiffs' asserted environmental, aesthetic, or recreational interests." Def. Br. 13. But this was precisely the case with respect to the statute at issue in *Match-E-Be-Nash-She-Wish*, which said nothing at all about construction and did not mention or require consideration of any recreational, aesthetic, or environmental interests. The Supreme Court nonetheless found "environmental" and "aesthetic" interests sufficient. 567 U.S. at 227–28.

On the merits, Defendants offer no argument beyond their position that Section 284 provides essentially unlimited authority for the Secretary of Defense to decide, in his discretion, whether or not the United States will construct a massive wall along the border with Mexico. Defendants' position is that any commonsense limit on what Congress authorized by permitting small-scale construction and fencing of drug smuggling corridors through Section 284 would be "arbitrary." Def. Br. 15. According to their logic, because the statute does not "define[] any upper limit," they are free to spend as many billions as it takes to wall up the entire Southern border. Def. Br. 15. But there is no reason to adopt such an unbounded theory of Section 284. In fact, the Supreme Court has

repeatedly cautioned against reading statutes to quietly provide agencies with the expansive power that Defendants claim here. *See, e.g.*, *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (quotation marks omitted)); *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (Interpretation of statutes "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude . . . ."); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes.").

Moreover, although Defendants assert that they are acting within the historical use of Section 284, Def. Br. 14–15, the figures they cite in support of this claim instead serve to refute it. Defendants note that Congress has historically approved of increases ranging from $5 to $10 million for fence construction. Def. Br. 15. But these figures serve only to demonstrate how far Defendants have departed from Congress's understanding of the proper use of Section 284, as they range from 1/760th (0.13%) to 1/380th (0.26%) of the $3.831 billion that Defendants seek to spend here. The Court has pointed out this flaw, observing that "Congress's past approval of relatively small expenditures, that were well within the total amount allocated by Congress to DoD under Section 284's predecessor, speaks not at all to Defendants' current claim that the Acting Secretary has authority to redirect" enormous sums to that account. *Sierra Club*, 379 F. Supp. 3d at 917.

At bottom, in spite of Defendants' claims, Section 284 cannot substitute for the political process that Defendants seek to sidestep. Congress has considered, debated, and declined to fund DHS's wall construction at the level that Defendants desire. Section 284 is not a backdoor way for DoD to just funnel the same sums to DHS. As this Court previously explained with respect to last year's diversion, if Section 284 indeed authorized multibillion-dollar wall construction,

> Defendants do not convincingly explain why the amount now sought to be transferred under Section 8005 could not have been sought directly from Congress as part of the fiscal year 2019 appropriation to the DoD Section 284 account to cover requests for counterdrug support, given that the President has consistently maintained since before taking office that border barrier funding is necessary. If the answer is that the Administration expected, or hoped, that Congress would appropriate the funds to DHS directly, that highlights rather than mitigates the present problem with Defendants' position.

Id. at 916 n.18.

IV. Plaintiffs Have Satisfied the Requirements for a Permanent Injunction.

Defendants make three unconvincing arguments in favor of their claim that—even if they lack any authority to spend billions of dollars—the Court should simply permit them to spend the money anyway. First, Defendants argue that the Supreme Court's stay of this Court's previous injunction silently predetermined the equitable balancing here. Def. Br. 17. Second, Defendants argue that *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), stands for the proposition that the balance of equities necessarily tips against injunctions when the government claims a national security interest against asserted environmental harms. Def. Br. 17. Finally, Defendants once again argue that their multibillion-dollar construction projects would not actually harm Plaintiffs' use and enjoyment of borderlands. Def. Br. 18–23. These arguments fail.

First, there is no basis to hold that the Supreme Court made a final and permanent judgment on the equities here. Defendants received a temporary stay from the Supreme Court after telling the Supreme Court that DoD would permanently lose access to the funds at issue in the previous Section 8005 injunction if that injunction were not stayed pending appeal. *See* Defs.' Reply in Supp. of Stay Appl. 15, *Trump v. Sierra Club*, No. 19A60 (S. Ct. July 22, 2019) (asserting that "declining to stay the injunction could well be tantamount to a decision on the merits in favor of respondents, at least in part" because DoD would be unable to obligate the challenged funds even if it prevailed). The Supreme Court did not purport to balance the equities inherent to a permanent injunction, and said literally nothing on the subject.

Second, Defendants' reliance on *Winter* is entirely misplaced because *Winter* says nothing at all about the public interest in enforcing bedrock separation-of-powers principles. In *Winter*, the issue was not an underlying lack of executive authority, but compliance with a procedural requirement: "the ultimate legal claim [wa]s that the Navy must prepare an [Environmental Impact Statement], not that it must cease sonar training." *Winter*, 555 U.S. at 32–33. Here, by contrast, as this Court has observed, Defendants lack any constitutional or statutory "mechanism by which they may override Congress' appropriations judgment." *California v. Trump*, 407 F. Supp. 3d 869, 906 (N.D. Cal. 2019). Defendants fundamentally ignore this distinction, but because Defendants are acting without any constitutional or statutory authority, the more relevant precedent is not *Winter*,

but *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). And the Supreme Court rejected far more substantial national security claims than Defendants' in upholding the injunction in *Youngstown*, observing that "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." 343 U.S. at 589.

Defendants' misunderstanding of *Winter* forms the basis for their extraordinary claim that Congress's absolute power of the purse must give way to Defendants' judgment that a wall is desirable to "protect[] the integrity of the Nation's border and stop[] the flow of illegal drug from entering the country." Def. Br. 23. Defendants' theory is that the Court cannot enjoin wall construction unless Plaintiffs' "aesthetic, recreational, and environmental interests" are held to outweigh Defendants' asserted interests in Section 284 construction. Def. Br. 17, 23. But as Justice Frankfurter wrote in *Youngstown*,

> "Balancing the equities" when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

343 U.S. at 609–10 (Frankfurter, J., concurring). Here, as the Court has repeatedly instructed, "Congress has already engaged in the difficult balancing of Defendants' proffered interests and the need for border barrier construction in passing the CAA." *California*, 407 F. Supp. 3d at 905–06. "[T]he public interest 'is best served by respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction.'" *Id.* at 906 (quoting *Sierra Club*, 929 F.3d at 677).

While Defendants apparently do not believe the public interest is served by respecting the separation of powers, the Founders thought otherwise. "James Madison underscored the significance of that exclusive congressional power, stating, '[t]he power over the purse may [be] the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.'" *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) (quoting The Federalist, No. 58). "Without it, Justice Story explained, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources

at his pleasure.'" *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)). The public interest compels an injunction against Defendants' actions because if "the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring).

Finally, the Court should one again reject Defendants' strenuous efforts to support their dubious claim that a multibillion-dollar construction project will do little to alter the environment or Plaintiffs' enjoyment of the lands they love and protect. Defendants' primary argument is that the wall will be built on land "that is previously disturbed, includes existing barriers and roads, and functions primarily as a law enforcement zone." Def. Br. 19. But as the Court has previously explained in rejecting virtually identical arguments, "Defendants' proposal would significantly alter the existing landscape, and even the proposed changes to the existing infrastructure are substantial." *California*, 407 F. Supp. 3d at 903.[1]

Defendants also place much weight on their assertion that the construction footprint runs largely along the border, arguing that construction therefore "will not impact land uses in the thousands of acres surrounding the limited project areas, where the forms of recreation Plaintiffs enjoy will remain possible." Def. Br. 19. But the relevant question, as this Court has already pointed out, is not whether construction of a 30-foot wall renders recreation in nearby areas literally impossible. Instead, following the Ninth Circuit's guidance in *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001), the Court explained "that plaintiffs may still suffer injury to their aesthetic and recreational interests even when not physically *on* the affected land. Here too, Plaintiffs

[1] Defendants' vague claims that they might mitigate the environmental and archaeological damage of their rushed construction ring hollow. *See, e.g.*, Enriquez Decl. ¶¶ 16, 70 (noting that CBP may take steps, when "feasible," to mitigate environmental and archaeological impacts). As has been widely reported, Defendants are already blasting and bulldozing their way through protected parks and sacred archeological sites in a rush to construct the border wall. *See, e.g.*, Simon Romero, *Tribal Nation Condemns 'Desecration' to Build Border Wall*, N.Y. Times (last updated Mar. 2, 2020), https://www.nytimes.com/2020/02/26/us/border-wall-cactuses-arizona.html; Molly Hennessy-Fiske, *Protected Cactuses Felled to Construct Border Wall*, L.A. Times (Feb. 27, 2020), latimes.com/world-nation/story/2020-02-26/border-wall-saguaro-cactus.

have explained that the proposed projects may be seen from miles away, and affect their recreational and aesthetic interests, even when they are not standing directly on the areas proposed for construction." *California*, 407 F. Supp. 3d at 902 (citation omitted).

Defendants fare no better in trying to show that Plaintiffs' members will not be harmed by construction. Individuals establish meaningful injuries when they show "a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). Plaintiffs' members have lived in and treasured these lands for decades, and easily meet that standard.

Defendants argue first that they have recently reduced the size of the El Centro project (albeit without notifying either the Court or Plaintiffs). Def. Br. 19. As a result, according to Defendants, the El Centro project no longer harms Plaintiffs. Def. Br. 19. But Defendants either fail to recognize or neglect to point out that the revised El Centro Project continues to run through areas Plaintiffs use, such as Skull Valley. *See* Harmon Decl. ¶ 11; Ervin Decl. ¶ 7. As Edith Harmon confirms in her supplemental declaration, she regularly visits Skull Valley, which is her "favorite place in the Jacumbas to visit because it is such an easy walk from [her] house." Suppl. Harmon Decl. ¶ 4. Ms. Harmon has hiked in Skull Valley for decades, alone and with her late husband. Harmon Decl. ¶ 9; Suppl. Harmon Decl. ¶ 10. It is "where some of [her] best memories are" and where she frequently returns. Suppl. Harmon Decl. ¶ 10. As she explains, Defendants' suggestion that she simply "go hike somewhere else is callous and cruel." Suppl. Harmon Decl. ¶ 10. It also flies in the face of Ninth Circuit law: In *Alliance for the Wild Rockies v. Cottrell*, the government argued that because a project "represent[ed] only six percent of the acreage" potentially useable by an organization's members, and those members could "view, experience, and utilize" other areas of the forest," the members could not show harm. 632 F.3d 1127, 1135 (9th Cir. 2011) (quotation marks omitted). The Ninth Circuit found that "[t]his argument proves too much," as "[i]ts logical extension is that a plaintiff can never suffer irreparable injury resulting from environmental harm in a forest area as long as there are other areas of the forest that are not harmed." *Id.*

Defendants next assert that the San Diego projects cannot harm Plaintiffs' enjoyment because a substantial portion of those projects replaces existing fencing. Def. Br. 19. According to Defendants, nearly doubling the height of existing fencing by constructing a 30-foot wall "will not cause significant visual impacts to the existing land." Enriquez Decl. ¶ 73. Defendants offer no support for their theory "that the preexistence of some construction means Plaintiffs here cannot suffer an injury from additional construction," and the Court should once again reject it. *California*, 407 F. Supp. 3d at 903. As the Court observed, "Defendants do not cite a case that warrants such a sweeping limitation." *Id.*

As to the Yuma projects, Defendants offer only nonresponsive arguments. As Plaintiffs explained, a wall would ruin their enjoyment of the "sweeping views of the surrounding mountain ranges visible from [Laura Chamberlin's family] property," Chamberlin Decl. ¶¶ 9–11, and cause Karla Terry to feel "caged in" when she walks with her father near his home, Terry Decl. ¶¶ 9, 11. Instead of addressing these harms, Defendants state that "the footprint of the secondary fencing" will remain the same. Enriquez Decl. ¶ 84. But the "footprint" of the existing, small-scale fencing is not at issue; it is the height and density of the new wall that cuts off the open horizons Plaintiffs treasure. *See, e.g.*, Supplemental Request for Judicial Notice ¶ 1, Ex. 1 at 9, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal., Nov. 1, 2019), ECF No. 239-1 (photograph showing difference in new wall construction compared to existing fencing). With respect to Yuma B, Defendants repeat their faulty logic, maintaining that the wall could not affect the "gorgeous desert views" that Ms. Terry enjoys during her scenic drives in the area, because the project is adjacent to a port of entry and would not physically intrude on surrounding "agricultural fields or undeveloped land." Enriquez Decl. ¶ 86. Again, as the Ninth Circuit has explained, what matters is whether "an area can be observed and enjoyed from adjacent land." *Cantrell*, 241 F.3d at 681. Defendants fail to rebut Ms. Terry's declaration that a new 30-foot wall would be visible during, and harm her enjoyment of, the scenic drives she takes in the vicinity of the Yuma B project.

Defendants concede that the lands surrounding the Tucson wall projects "include large federally-managed or protected lands such as Coronado National Forest and Buenos Aires National Wildlife Refuge." Enriquez Decl. ¶ 88. They nonetheless make the extraordinary claim that

construction of a 30-foot wall and attendant infrastructure in the middle of a protected landscape would not "materially impact[]" it. Def. Br. 20. Defendants do not attempt to explain how a massive wall would blend in with the natural landscapes Plaintiffs hold dear, or leave them unaltered. And while Defendants apparently find it impossible that anyone could view a miles-long, 30-foot-high wall as a "giant scar on the landscape," Def. Br. 20 (quoting Ardovino Decl. ¶ 12), the Ninth Circuit has instructed that "aesthetic perceptions are necessarily personal and subjective," and that these same subjective "aesthetic and recreational interests . . . typically provide the basis for standing in environmental cases" in both the Ninth Circuit and the Supreme Court. *Ecological Rights Found.*, 230 F.3d at 1150.

Defendants make a series of inaccurate and unsupported claims about the El Paso projects. As with the San Diego projects, Defendants' premise is that nearly doubling the height of existing walls could not affect Plaintiffs. Def. Br. 20. This argument lacks any legal basis and is belied by Plaintiffs' own account of their use of these lands. *See, e.g.*, Suppl. LoBello Decl. ¶ 5; Suppl. Bixby Decl. ¶ 9. As Rick LoBello explains, "these projects will alter the landscape of my daily life." Suppl. LoBello Decl. ¶ 6. While "existing structures do violence to these lands," Defendants' "additional construction, widening roads, adding lighting, and heightening the structures will exacerbate the problems." Suppl. LoBello Decl. ¶ 6. Nor are Defendants correct in their more granular claims. Contrary to their assertion that wall construction will not affect the view from Mount Cristo Rey, Howard Dash explains that the proposed wall would substantially alter his experience of hiking Mount Cristo Rey and the vistas he can see from its peak. Suppl. Dash Decl. ¶¶ 3–8. Kevin Bixby confirms the effects of new construction on Mount Cristo Rey, and refutes Defendants' claim that construction will not affect the bootheel region. Suppl. Bixby Decl. ¶¶ 6–9.

As to the Del Rio projects, Defendants miss the point. They argue that because the new wall will ultimately have the same footprint as an existing barrier, no possible harm could come to the ancestral lands revered by Juan Benito Mancias and studied for their historical value by Jerry Thompson. But both declarants are concerned with the effects of a massive construction project, which, as they explain, threatens to disturb gravesites and alter the landscape. Mancias Decl. ¶ 19; Thompson Decl. ¶ 20. And Defendants do not even address Mr. Thompson's concerns about his

ability to view the Rio Grande through a 30-foot wall. Thompson Decl. ¶ 18.

V. Defendants Are Not Entitled to a Stay.

"The party seeking a stay—or continuation of a stay—bears the burden of showing his entitlement to a stay." *Latta v. Otter*, 771 F.3d 496, 498 (9th Cir. 2014). Defendants' rationale for a stay is that the Supreme Court previously ordered a stay of this Court's injunction of the fiscal year 2019 Section 8005 transfers. Def. Br. 23. But the Supreme Court did not purport to make a general judgment that Defendants must be permitted to rush wall construction while their appeals are pending. Instead, the only explanation in the Supreme Court's stay order concerned whether Plaintiffs have a "cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). If this Court enters an injunction on a ground besides Defendants' "compliance with Section 8005," that concern is inapplicable. Defendants cannot convert the Supreme Court's specific judgment about their likelihood of evading review under Section 8005 into a general prejudgment of all possible injunctions.

To the extent the Court orders an injunction on any ground except for Defendants' lack of authority under Section 8005, Defendants have failed to demonstrate that the Supreme Court would find a "sufficient showing" that Plaintiffs lack a cause of action. For example, Section 284—by contrast to Section 8005—explicitly concerns land use, and the Supreme Court has already decided that if a statute even arguably concerns land use, "neighbors to the use" may sue, and their "interests, whether economic, environmental, or aesthetic, come within [the statute's] regulatory ambit." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 227–28. Similarly, there is no reason to assume that the Supreme Court would find that Plaintiffs lack a constitutional cause of action. And not even Defendants argue that Plaintiffs lack a cause of action under the National Environmental Policy Act. Should the Court enter an injunction on any of these grounds, Defendants have not established their entitlement to a stay.

CONCLUSION

For the reasons stated above and in their previous briefing, Plaintiffs ask that the Court grant their Motion for Partial Summary Judgment and order injunctive and declaratory relief.

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Respectfully submitted,

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