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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:20-cv-01494-HSG

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: None per Court Order (ECF No. 15)

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TABLE OF AUTHORITIES

Cases:

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GAO Opinion B-330862,
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Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,
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INTRODUCTION

As explained in Defendants' cross-motion for summary judgment, the Department of Defense's (DoD) transfer of funds pursuant to § 8005 of the fiscal year 2020 DoD Appropriations Act and use of 10 U.S.C. § 284 to support the Department of Homeland Security's (DHS) counter-drug border barrier construction is lawful. *See generally* Defs.' Mot., ECF No. 30. The Court should reject Plaintiffs' arguments to the contrary. *See generally* Pls.' Reply, ECF No. 32.

Plaintiffs continue to assert that they have an implied equitable cause of action to enforce § 8005, but they cannot overcome the Supreme Court's order granting a stay of this Court's prior injunction because of the absence of that very cause of action. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019). Plaintiffs also lack a cause of action to enforce § 284 because that statute does not protect or regulate the aesthetic and recreational interests that Plaintiffs advance in this case. On the merits, DoD lawfully exercised its authority under § 8005 and § 284 in accordance with the required elements of both statutes. Plaintiffs' efforts to limit the scope of DoD's statutory authority conflicts with the text, structure, and history of those provisions.

Plaintiffs also have not carried their burden to establish that the extraordinary remedy of a permanent injunction is warranted in this case. The equities tip strongly in favor of Defendants because an injunction would harm Defendants' compelling interests in stopping cross-border drug smuggling, prevent DoD from obligating approximately $2.2 billion that will lapse at the end of the fiscal year, and impose millions of dollars in unrecoverable costs. These compelling interests far outweigh Plaintiffs' recreational and aesthetic interests in such activities as hiking, camping, and birdwatching in drug-smuggling corridors directly adjacent to the international border. Even if the Court were to grant an injunction, however, it should stay any injunction pending appeal. The Supreme Court's stay of this Court's prior § 284 injunction reflects a determination that the balance of the harms and the public interest support a stay. The identical equitable balance that the Supreme Court determined warranted a stay is presented again in this case. Accordingly, ongoing funding and construction of the fiscal year 2020 § 284 projects should be permitted to proceed.

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ARGUMENT

I. Plaintiffs Cannot Satisfy the Zone-of-Interests Requirement for § 8005.

Plaintiffs contend that no court has agreed with Defendants' zone-of-interests arguments, *see* Pls.' Reply at 1–2, but they fail to acknowledge the one court that has accepted Defendants arguments: the Supreme Court. When the Supreme Court stayed this Court's prior § 284 injunction, it necessarily concluded that Defendants were likely to succeed on the merits of the claim that Plaintiffs "have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *See Trump*, 140 S. Ct. at 1. As the Supreme Court has made clear, "a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). Unlike other recent stay orders issued by the Supreme Court that contain no discussion of the merits, *see, e.g.*, *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019), here the Supreme Court explained its reasoning and expressly noted the absence of a cause of action to enforce § 8005 as "among the reasons" for granting the stay. *Trump*, 140 S. Ct. at 1.

Plaintiffs cannot escape the force of the Supreme Court's decision by citing to decisions of lower district courts. *See* Pls.' Reply at 2. None of those decisions concluded that the plaintiffs fell within the zone of interests of § 8005 and Plaintiffs in this case do not even attempt to argue that their alleged aesthetic and recreational interests are protected by the limitations on DoD's internal budget transfers in § 8005. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) ("The interest he [the plaintiff] asserts must be arguably within the zone of interests to be protected or regulated by the statute that he says was violated."). Instead, those decisions concluded that the plaintiffs did not need to satisfy *any* zone-of-interest requirement to assert an equitable cause of action. As Defendants have previously explained, that conclusion conflicts with Supreme Court precedent and basic separation-of-powers principles. *See Sierra Club et al. v. Trump et al.*, 4:19-cv-00872-HSG (*Sierra Club I*) (ECF Nos. 64, 146, 181, 236, 247); *Sierra Club et al v. Trump et al.*, Nos. 19-16102 *et al.*, 19-17501 *et al.* (9th Cir.); *Trump v. Sierra Club*, 19A60 (S. Ct.). In *El Paso Cty. v. Trump*, 408 F. Supp. 3d 840 (W.D. Tex.), the court addressed the zone-of-interests issue in a brief footnote without

engaging with these arguments or the Supreme Court's decision. *Id.* at 856 n.1.[1] Further, the district court's decision in *Ctr. for Biological Diversity v. Trump*, 2020 WL 1643657 (D.D.C. Apr. 2, 2020), that the plaintiffs survived a motion to dismiss at the early stage of proceedings was not an endorsement of Plaintiffs' position here that the zone-of-interests test is inapplicable to equitable claims. Indeed, the court stated that it "doubts that Plaintiffs can bring an equitable claim when a statutory cause of action is available to it" and favorably cited Judge Smith's dissent in *Sierra Club v. Trump*, 929 F.3d 670, 716 (9th Cir. 2019), that courts should not take "the extraordinary step of implying an equitable cause of action" when "an avenue for challenging" the transfer of funds exists under the Administrative Procedure Act. *See Ctr. for Biological Diversity*, 2020 WL 1643657, at *25.

Defendants acknowledge that this Court and a majority of the Ninth Circuit motions panel have previously concluded otherwise, but respectfully submit that Plaintiffs cannot evade the zone-of-interests requirement by pleading an implied equitable claim when their recreational and aesthetic concerns fall outside the zone of interests of § 8005. *See* Defs.' Mot. at 6–8. Plaintiffs' inability to cite any authority upholding ultra vires claims by plaintiffs who could not satisfy the zone-of-interests requirement is powerful evidence that such claims are impermissible. And even if there was any doubt about that question, the Supreme Court's stay order is fatal to Plaintiffs' position and further reinforces that Plaintiffs lack a cause of action to enforce § 8005.

II. Section 8005 Authorized DoD's Transfer of Funds.

Defendants have previously explained that this Court and the Ninth Circuit motions panel erred in concluding that DoD exceed its statutory authority under § 8005 in fiscal year 2019. *See* Defs.' Mot. at 8–11. Contrary to those decisions, the transfer of funds supported a military requirement that was "unforeseen" and was not for an "item" that had been previously "denied" by Congress. *See id.* That same rationale applies equally to the Secretary of Defense's conclusion that § 8005 authorized the transfer of funds in fiscal year 2020. *See id.*

Defendants' interpretation of § 8005 is consistent with the conclusions of the Government

[1] In any event, the Fifth Circuit has stayed this decision pending appeal. *See El Paso County v. Trump*, No. 19-51144 (5th Cir. Jan. 8, 2020) (concluding that, "among other reasons," a stay was warranted because of "the substantial likelihood that [plaintiffs] lack Article III standing").

Accountability Office (GAO), a nonpartisan agency within Congress. *See* GAO Opinion B-330862, 2019 WL 4200949 (Sept. 5, 2019). Plaintiffs attack a strawman by arguing that the Court is not bound by the GAO opinion, but that point is not in dispute. *See* Pls.' Reply at 2–3. Instead, the Court should "give special weight to GAO's opinions due to its accumulated experience and expertise in the field of government appropriations." *See Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005).

The GAO's expert analysis of fiscal law principles illustrates why there is no merit to Plaintiffs' argument that Congress denied the relevant "item" at issue here—DoD's counter-narcotics support to DHS under § 284. *See* Pls.' Reply at 3. Section 8005's reference to an "item for which funds are requested" cannot be understood at the level of generality used by Plaintiffs, to refer to border barrier construction generically and colloquially, untethered to any particular DoD authority or spending program. Section 8005 is a provision in DoD's annual appropriations statute, and its statutory terms must be understood in that context. *See Home Depot U.S.A. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). Accordingly, the GAO correctly concluded that Congress's appropriations to DHS for border barrier funding do not constitute a "denial" of appropriations to DoD for its counter-drug activities under § 284. *See* GAO Opinion B-330862, 2019 WL 4200949 at *8 ("a reduction from the amount requested is not tantamount to a denial of the item by Congress"). The relevant "item" for purposes of § 8005 was not "denied by Congress" because DoD had not requested funds to provide § 284 support to DHS, and there was thus "nothing for Congress to deny with respect to" DoD. *Id.* The fact that the GAO had "reached similar conclusions in prior opinions" further undermines Plaintiffs' position here. *Id.* at *9.

Similarly, Plaintiffs interpretation of § 8005's "unforeseen" requirement would expand the meaning of that term far beyond its specific context within the DoD budget. *See* Pls.' Reply at 4. The question is not whether DoD "foresaw the needs for border wall funding" as a general matter because there was an ongoing public debate about the issue. *Id.* Rather, "the question under Section 8005 is whether [the requirement] was unforeseen at the time of [DoD's] budget request," and "while the President requested funds for border fencing as part of DHS's budget," DoD's "authority to support DHS by constructing fences at the southern border under section 284 only materialized when DHS requested" DoD's assistance pursuant to § 284, and DoD "accepted that request." GAO Opinion B-

330862, 2019 WL 4200949 at *6; *see* 10 U.S.C. § 284(a) (DoD may undertake support only if "such support is requested" by another agency). Section 8005 is intended to give DoD "financial flexibility during a given year" to respond to changing circumstances after its budget has been finalized, *see* H.R. Rep. No. 93-662, at 17 (1973), and DoD did not receive a request from DHS for the fiscal year 2020 § 284 projects until 10 month months after DoD submitted its budget request to Congress. *See* Defs.' Mot. at 11. The transfer of funds at issue here thus satisfies the "unforeseen" statutory requirement, as the GAO agrees.

Plaintiffs contend that this interpretation of "unforeseen" would render the requirement meaningless, *see* Pls.' Reply at 4, but the facts of this case illustrate why that is not so. Two of the projects in DHS's request for support in fiscal year 2020 (Tucson C-Segment 2 and Tucson B-Segment 2) were previously included in DHS's request for support in fiscal year 2019. *See* Administrative Record at 4 (ECF No. 19). Accordingly, these projects were not "unforeseen" within the meaning of § 8005 and the Secretary did not authorize DoD's support for them. *See id.* The unforeseen requirement thus acts as a meaningful constraint on any requested § 284 projects that DoD was aware of when it made its budgeting request to Congress.

Defendants' interpretation of § 8005 is further confirmed by the fact that Congress voted to reauthorize § 8005 without change in fiscal year 2020. *See* Defs.' Mot. at 9–10. Congress was aware of DoD's use of § 8005 in fiscal year 2019 and had a legal opinion from its own expert fiscal law agency concluding that DoD's use of § 8005 was lawful. That evidence is more compelling than Plaintiffs' claim that Congress was silently ratifying the decisions from this Court and the Ninth Circuit in the prior § 284 litigation. *See* Pls.' Reply at 3–4.[2] Congress could have changed the law if it disagreed

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[2] Plaintiffs rely on the presumption that when "Congress reenacts statutory language that has been given a consistent judicial construction, [court] often adhere to that construction in interpreting the reenacted statutory language." *See* Pls.' Reply at 4 (quoting *Cent. Bank of Denver, N.A. v. First Interstate Back of Denver, N.A.*, 511 U.S. 164, 185 (1994)). But that presumption does not apply here because a divided decision by a motions panel addressing an emergency stay motion is not the type of "judicial consensus so broad and unquestioned that [courts] must presume Congress knew of and endorsed it." *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349–51 (2005) (holding that the presumption did not apply where "the supposed judicial consensus . . . boils down to the decisions of two Courts of Appeals").

with DoD's use and interpretation of § 8005, but instead it gave DoD the same transfer authority in fiscal year 2020. *See* Pub. L. No. 116-93, 133 Stat. 2317. The Court should reject Plaintiffs' attempt to achieve through this litigation what they could not accomplish through the political process.

III. Section 284 Expressly Authorizes DoD's Border Barrier Construction.

Plaintiffs continue to assert that DoD's construction of border barrier projects is not authorized by § 284, *see* Pls.' Reply at 5–6, but they offer no response to Defendants' argument that the Court need not address these issues if the Court once again rules on the basis of § 8005. *See* Defs.' Mot. at 11.

In the event the Court reaches the § 284 issues, Defendants have explained why Plaintiffs fall outside the zone of interests of § 284 and the Court should otherwise reject their merits arguments. *See* Defs.' Mot. at 12–16. With respect to the zone of interests, Plaintiffs' recreational and aesthetic interests are not "protected or regulated" by § 284. *Bennett v. Spear,* 520 U.S. 154, 175 (1997). Nor are they aligned with the fiscal and counter-narcotics interests that Congress sought to promote in authorizing DoD to engage in border barrier construction pursuant to § 284. *See Nw. Requirements Utilities v. FERC*, 798 F.3d 796, 809 (9th Cir. 2015). Indeed, Plaintiffs concede that Congress did not intend for § 284 to protect environmental interests. *See* Pls.' Reply at 5.

Plaintiffs nonetheless contend that they fall within § 284's zone of interests based on the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). *See id.* at 5. But that case does not stand for the broad proposition that a statute contemplating land use is subject to a limitless zone of interests authorizing suit by anyone who asserts any injury based on how the land will be used. *Patchak* was careful to identify the particular category of plaintiffs whose interests were sufficiently related to the context and purpose of the statute at issue to allow litigation to enforce the statute's provisions. Because the "context and purpose" of the Indian Reorganization Act served "to foster Indian tribes' economic development," it required the Secretary of the Interior to "take[] title to properties" on behalf of Indian tribes "with at least one eye directed toward how tribes will use those lands to support economic development." *Patchak*, 567 U.S. at 226. In light of that statutory purpose, the Supreme Court emphasized the governing regulatory regime that "require[d] the Secretary to consider . . . the 'potential conflicts of land use which may arise.'" *Id.*

(quoting 25 C.F.R. § 151.10(f)). For that reason—the obligation of the Government, before acquiring land to benefit Indian tribes, to consider potential conflicts that could result from the range of possible land uses—the Supreme Court concluded that "a neighboring landowner" was within the zone of interests "to bring suit to enforce the statute's limits." *Id.* at 227.

Unlike the plaintiff in *Patchak*, Plaintiffs are not neighboring landowners whose own property might be affected by construction on a nearby federal land. Plaintiffs' interests are far more attenuated, and nothing in *Patchak* suggests that the Supreme Court would have permitted suit by an organization whose members merely wished to recreate or observe wildlife on what would become the Indian tribe's land. Further, nothing in § 284 requires the Secretary of Defense to consider the potential external impacts of border barrier construction—such as fewer recreational opportunities or diminished aesthetic pleasure—in deciding whether to provide counter-narcotics support to DHS. Accordingly, plaintiffs who assert aesthetic and recreational injuries from the collateral effects § 284 construction are not "reasonable or "predictable" challengers of the Secretary's decision to authorize counter-drug support to DHS. *Id.*

On the merits, Plaintiffs' objection focuses on the amount of funding DoD is providing to DHS, *see* Pls.' Reply at 5–6, but the "support" authorized by § 284 is limited only by the *types* of assistance permitted, not by the *degree* of such assistance. Indeed, no monetary restrictions appear in the list of support-activities permitted under § 284. *See* 10 U.S.C. § 284(b)–(c). The statute broadly approves numerous forms of support, including border barrier fencing, without regard to the project's scale or budget. *Id.* § 284(b)(7). Additionally, § 284's congressional notification requirement for "small scale construction" costing less than $750,000 does not expressly prohibit larger construction, and it also provides no basis to infer that Congress intended to limit the support authorized under § 284 to "small scale construction." *See* Defs.' Mot. at 14. That conclusion is reinforced by the fact that Congress has recommended that DoD spend millions of dollars on border barrier projects pursuant to its counter-narcotics support authority. *See* Defs.' Mot. at 14–15.

Plaintiffs argue that the projects at issue here cost far more than those earlier projects, *see* Pls.' Reply at 6, but § 284 does not provide DoD with limitless authority to provide support to DHS. DoD is bound by the funds Congress appropriates to the counter-drug account as supplemented by the

additional transfer authority that Congress provides to DoD to reprogram funds between appropriation accounts. Here, DoD has acted within those financial constraints and there is no basis for the Court to re-write § 284 to impose an arbitrary monetary cap on the amount of support DoD can provide. And unlike *Util. Air Regulatory Grp. v. E.P.A*, and other cases on which Plaintiffs rely, *see* Pls.' Reply at 6, there is nothing about DoD providing support to DHS to construct barriers in drug-smuggling corridors that is "inconsistent with" or that would "overthrow" § 284's "structure and design." 573 U.S. 302, 321 (2014). Far from being an elephant hidden in a mouse hole, *see* Pls.' Reply at 6, Congress is well aware of DoD's historical and recent use of § 284 to support border barrier construction, but has not taken any action to limit that authority. *See* Defs.' Mot. at 3.

Nor does DoD's use of § 284 somehow "sidestep" the political process that resulted in funding to DHS in its appropriations act. *See* Pls.' Reply at 6. Whether and how much Congress chooses to appropriate to DoD or DHS in a given fiscal year, and whether and under what circumstances Congress authorizes DoD to transfer funds between internal appropriation accounts, does not change the scope of DoD's underlying statutory authority set forth in the text of § 284.

IV. The Court Should Not Issue a Permanent Injunction.

The Court should not issue a permanent injunction because the balance of the harms and the public interest strongly favor Defendants. *See* Defs.' Mot. at 16–23; *Trump*, 140 S. Ct. at 1.

Plaintiffs do not dispute that Defendants and the public have a compelling interest in protecting the integrity of the nation's border and stopping the flow of illegal drugs from entering the country. And they make no effort to dispute that that those interests are directly served by constructing barriers in drug-smuggling corridors with known vulnerabilities between border crossings, and that enjoining construction activity therefore threatens public safety.

Plaintiffs attempt to distinguish the Supreme Court's stay order in the prior § 284 litigation by pointing to the fact that Defendants asserted in that litigation that an injunction would result in the permanent loss of funds. *See* Pls.' Reply at 7. But that same permanent loss of funding will happen in this case—indeed, on an even bigger scale—if the Court permanently enjoins the transferred funds. Here, a permanent injunction would prevent DoD from obligating approximately $2.2 billion dollars in transferred funds that will permanently lapse at the end of the fiscal year. *See* Defs.' Mot. at 17;

1 Declaration of Andrew J. Short ¶¶ 6, 8 (ECF No 30-4); *see also id.* ¶¶ 9–22 (explaining that an injunction
2 would impose millions of dollars in unrecoverable costs that would be drawn from the finite funds
3 available for § 284 construction).[3]

4 Plaintiffs also cannot escape the force of Supreme Court's order by noting that the order did
5 not expressly say anything about the balance of the equities. *See* Pls.' Reply at 7. The decision to stay
6 an injunction is guided by essentially the same factors that inform the issuance of an injunction. *See*
7 *Nken v. Holder*, 556 U.S. 418, 434 (2009) (stay factors include irreparable injury, the balance of
8 hardships, and the public interest). Thus, in granting the extraordinary relief of a stay pending appeal
9 that allowed border barrier construction to continue, the Supreme Court necessarily determined that
10 the balance of the equities tipped in Defendants' favor. This case involves the same competing
11 equities that were before the Supreme Court when it granted Defendants' stay request and there is no
12 basis for this Court to deviate from the Supreme Court's order by issuing a contrary permanent
13 injunction. Here again, Plaintiffs' interests in hiking, birdwatching, and taking scenic drives in drug-
14 smuggling corridors along the border do not outweigh the irreparable harm to the Government and
15 the public from interfering with efforts to stop the flow of drugs entering the country.

16 Plaintiffs fail to meaningfully distinguish *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S.
17 7, 23-31 (2008). *See* Pls.' Reply at 7–8; Defs.' Mot. at 17–18. Plaintiffs contend that *Winter* did not
18 address "separation-of-powers-principles" and argue that this interest is present in this cause because
19 Defendants lack "any constitutional or statutory" authority. *See* Pls.' Reply at 7. But that is a merits
20 argument under the guise of an equitable argument, and contrary to *Winter*'s reasoning that the balance
21 of equities cut in the Government's favor even if the Government had violated the statute at issue
22 there. *See* 555 U.S. at 32–33. Plaintiffs cannot show that the equities weigh in their favor by assuming
23 that they will prevail on the merits. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).
24 Rather, courts "must balance the competing claims of injury and must consider the effect on each
25 party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell*, 480
26 U.S. 531, 542 (1987). Here, that balance tips decidedly in favor of Defendants, just as it did in *Winter*.
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[3] *See Sierra Club I*, ECF No. 181 at 23 (explaining that a permanent injunction of the fiscal year 2019 projects would prohibit use of $1.1 billion in unobligated funds).

Plaintiffs invoke Congress's power of the purse as a basis for an injunction based on separation of powers principles, *see* Pls.' Reply at 8, but Congress has also long recognized that border fencing is an important means to address cross-border drug trafficking. Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (and its amendments) (IIRIRA) directed DHS to expeditiously undertake construction to build barriers and roads at the border to prevent illegal entries, including the illegal entry of narcotics. *See In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1220, 1224 (9th Cir. 2019). And when Congress authorized DoD to provide support to the counter-drug activities of other agencies, it explicitly included the construction of fencing at international borders among the list of activities authorized for counter-drug support. 10 U.S.C. § 284(b)(7). Accordingly, Plaintiffs' attempt to analogize this case to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), misses the mark. *See* Pls.' Reply at 7–8. Defendants have acted pursuant to the express authority Congress has provided the Executive Branch and there is no basis to conclude that Defendants have violated the Constitution's separation of powers or usurped the law making function of Congress by acting in accordance with the statutory requirements of § 8005 and § 284.

Plaintiffs also fail in their attempt to rehabilitate their flawed claims of irreparable harm, *see* Pls.' Reply at 9–13, and in any event their allegations of recreational and aesthetic injury are insufficient to outweigh Defendants' compelling interests described above. In the first instance, Plaintiffs do not address at all Defendants' demonstration that Plaintiffs had presented no competent evidence of irreparable harm to their members' interests vis-à-vis alleged harms to the Peninsular bighorn sheep, masked bobwhite, jaguar, Mexican gray wolf, and other wildlife species. *See* Defs.' Mot. at 21-22 & n.7. Plaintiffs thus may be deemed to have waived any such claim of irreparable harm based on alleged harm to wildlife species. *See, e.g.*, *Bolbol v. City of Daly City*, 754 F. Supp. 2d 1095, 1115 (N.D. Cal. 2010) (granting summary judgment where plaintiff failed to address issue in opposition brief).

More generally, the cases that Plaintiffs chiefly rely on in their opposition in support of their claims of irreparable harm to recreational and aesthetic interests are inapposite standing cases. *See* Pls.' Mot. at 9–12 (citing *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001)); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). Defendants, however, have nowhere contested that Plaintiffs fail to meet the low bar for alleging injury-in-fact for standing purposes. While

a mere "identifiable trifle is enough for standing," *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 (1973) (citation omitted), the relevant inquiry here—demonstrating irreparable harm to obtain the "extraordinary and drastic remedy" of injunctive relief, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)—is far more demanding. "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to . . . injunctive relief." *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988); *see also Ctr. for Food Safety v. Vilsack,* 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, . . . a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.").

Plaintiffs' heavy reliance on inapposite standing cases in their attempt to establish irreparable harm is telling. Plaintiffs' aesthetic and recreational harm declarants merely allege that they recreate or use some area near the miles of proposed barrier construction, which they find offensive, and that therefore some portion of each project will diminish their enjoyment of the area. While these allegations may suffice for standing purposes, the declarations present no *evidence* or technical expertise to demonstrate that the declarants' subjective inconveniences will actually occur as alleged, let alone rise to the level of irreparable harm necessary for injunctive relief. As the Supreme Court has repeatedly emphasized, plaintiffs seeking injunctive relief must meet their burden of persuasion "*by a clear showing*," through competent evidence of irreparable harm, for which "the requirement for substantial proof is much higher" than for a motion for summary judgment. *Mazurek*, 520 U.S. at 972. Moreover, to constitute irreparable harm, the injury must be "certain and great." *Williams v. Wells Fargo Bank*, 2013 WL 5444354, at *3 (N.D. Cal. Sept. 30, 2013)(citation omitted)); *see also Kansas by & through Kansas Dep't for Children & Families v. SourceAmerica*, 874 F.3d 1226, 1250 (10th Cir. 2017) ("For an injury to be irreparable it 'must be both certain and great,' not 'merely serious or substantial.'") (citation omitted).

Plaintiffs' declarations are devoid of the evidence and technical analyses necessary to raise the declarants' lay-person assertions from mere allegations of harm that might suffice for purposes of standing to the "clear showing" of "certain and great" irreparable harm required for this Court to issue an injunction. Indeed, while Defendants have volunteered detailed information and maps identifying

the precise locations of the segments of border fencing for each of the challenged projects, *see generally* Declaration of Paul Enriquez (ECF No. 30-1), Plaintiffs fail to present competent evidence demonstrating which precise segments of border barrier construction will diminish their enjoyment of their recreational activities and have not offered proof that the barrier will be visible from many of the locations they allege they visit.[4] Providing such detailed proof is not only required to establish irreparable harm, it is critical to this Court's ability to enter an injunction, even if the Court finds that Plaintiffs have met their burden for any particular segment, because any injunction must be narrowly tailored to those segments only. *See, e.g.*, *Iconix, Inc. v. Tokuda,* 457 F. Supp. 2d 969, 998-1002 (N.D. Cal. 2006) (holding that "an injunction must be narrowly tailored to remedy only the specific harms shown by the plaintiffs rather than to enjoin all possible breaches of the law") (citing *Price v. City of Stockton,* 390 F.3d 1105, 1117 (9th Cir. 2004). Accordingly, even if this Court finds that Plaintiffs have met their burden on all four requirements for an injunction for any segments of the projects, the Court must limit any injunction to construction of the particular segments of border barrier projects that the Court finds Plaintiffs have clearly shown would cause them irreparable harm.

Even beyond these shortcomings in Plaintiffs' declarations, Plaintiffs continue to misrepresent the law and the facts relating to their claims of irreparable harm. For example, Plaintiffs assert that the Tucson projects will occur "in the middle of a protected landscape," namely the Coronado National Forest and Buenos Aires National Wildlife Refuge. Pls.' Reply at 11-12. This assertion is simply untrue. At most, some segments of these projects will be located at the southernmost edge of the vast expanses of these lands, which themselves are not protected from development. *See* Enriquez Decl. ¶¶ 62-65; *see also United States v. New Mexico*, 438 U.S. 696, 716 n.23 (1978) (explaining that "the national forests were not to be 'set aside for non-use'") (quoting 30 Cong. Rec. 966 (1897) (Cong.

[4] For example, Mr. LoBello asserts that construction of El Paso A and D will "alter the landscape of his daily life," LoBello Decl. ¶ 8, but those projects involve construction of approximately 41 miles of primary and secondary barrier in a variety of settings, including locations in and around ports of entry. *See* Enriquez Decl. ¶ 28 & Ex. K. Mr. LoBello offers no specifics as to which of the planned barrier segments will be located on portions of the landscape where he recreates. Similarly, Mr. Ardovino claims that he is injured by Tucson A and B and El Paso B and C—projects that collectively total approximately 50 miles—but he does not explain which precise segments of barrier will prevent him from seeing desert species or take away his ability to recreate in these areas. *See* Ardovino Decl. ¶¶ 5, 7, 8, 13, 14.

McRae)). Of course, neither the National Forest nor the Wildlife Refuge, nor any of the other designated areas addressed in this lawsuit, extend across the international border into Mexico, so Plaintiffs' claims that any of the projects bisect these areas are plainly false.

Plaintiffs also continue to urge this Court to misapply *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). *See* Pls.'s Reply at 10. *Cottrell* does not stand for the proposition that a plaintiff establishes irreparable harm simply by asserting that a federal project will disturb an area that the plaintiff recreates in, no matter how small the area and no matter how disturbed the area already is. On the contrary, the plaintiff in *Cottrell* established that the federal project "would prevent the use and enjoyment by [the plaintiff's] members of 1,652 acres of the forest," which the members' wanted to use "in their undisturbed state." 632 F.3d at 1135. Here, in contrast, the border barriers will occur only in an extremely small strip on the very edge of the vast areas that Plaintiffs' members allege they use, and this strip is anything but in an "undisturbed state." *See* Enriquez Decl. ¶¶ 88-89. The facts of *Cottrell* are not analogous to the facts here, and expanding *Cottrell* to hold that any disturbance that is consistent with any already disturbed area, no matter how small that area, would run counter to the large body of case law that irreparable harm must be "certain and great."[5] *See Cottrell*, 632 F.3d at 1135 (stating that "any potential environmental injury" does not warrant an injunction). If Plaintiffs are enjoying these highly-disturbed areas to the degree they allege, it cannot be the case that the modicum of change resulting from the projects—*e.g.*, replacing existing barriers—will so greatly diminish their aesthetic and recreation experiences to the degree necessary to establish irreparable harm.

Plaintiffs' supplemental declarations also fail to establish irreparable recreational and aesthetic injuries. *See* Second Declaration of Paul Enriquez (attached as Exhibit 1). Contrary to Plaintiffs' assertions, *see* Pls.' Reply at 12, none of the projects at issue in this case will be built in the bootheel region of New Mexico or Hidalgo County. *See id.* ¶¶ 6. Further, Plaintiffs overstate the impact of construction on the ability to recreate near Mount Cristo Rey. *See id.* ¶¶ 8. The projects at issue—the construction of a small segment of steel bollard fencing adjacent to existing 18-foot barriers—in no way prohibit Plaintiffs' ability to hike the mountain, and Plaintiffs concede the existing barriers are

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[5] Defendants' respectfully disagree with *Cottrell*'s analysis of the injunction factors and note this objection to preserve it for review by the Ninth Circuit en banc or the Supreme Court.

already visible from mountaintop. *See id.*; *see also* Dash Supp. Decl.¶ 7. Further, Plaintiffs allege that Skull Valley in the Jacumba Mountain Wilderness will be "walled off" as a result of the El Centro Project, *see* Harmon Suppl. Decl. ¶¶ 4, 10, but construction will neither cut off nor prohibit public access to Skull Valley. *See* Second Enriquez Decl. ¶ 10. Plaintiffs' other new assertions regarding the potential impacts of ground water, power installation, and surface damage similarly lack merit. *See id.* ¶¶ 11–17.

In sum, Plaintiffs have failed to meet their heavy burden of adducing evidence to make a clear showing of irreparable harm. And, even if the Court finds that they have made such a showing, Plaintiffs claims of irreparable harm to their aesthetic and recreational interests in these already heavily disturbed linear law enforcement areas are easily outweighed by Defendants' unchallenged interests in securing the international border from illegal drugs. The Court should deny Plaintiffs' request for injunctive relief or, at most, limit any injunction to those specific segments of the projects where Plaintiffs have clearly shown that their irreparable harms outweigh Defendants' compelling interests.

V. The Court Should Stay Any Injunction Pending Appeal.

Plaintiffs make no meaningful effort to distinguish the binding force of the Supreme Court's stay of the Court's prior § 284 injunction. *See* Pls.' Reply at 13. Indeed, the Supreme Court considered the same legal claims and the same aesthetic and recreational interests advanced by these very Plaintiffs, and concluded that a stay pending appeal was warranted. *See Trump*, 140 S. Ct. at 1 ("Among the reasons [for the stay] is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005."). In light of that decision, the Court should follow the same approach it took in the litigation about the projects undertaken pursuant to 10 U.S.C. § 2808 and grant a stay. *See California v. Trump*, 407 F. Supp. 3d 869, 907 (N.D. Cal. 2019).

There is no merit to Plaintiffs' argument that they would be entitled to a stay if this Court issued a ruling on the basis of an alternative legal ground other than § 8005. *See* Pls.' Reply at 13. As explained above, Plaintiffs do not fall within the zone of interests of § 284 and, in any event, § 284 authorizes the border barrier construction at issue here. *See supra* at 6–8. Plaintiffs presented the same arguments about the scope of § 284 to the Supreme Court that they assert again here, but the Supreme

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Court nonetheless granted a stay. *See Trump v. Sierra Club*, No. 19A60 (S. Ct.), Respondents' Opposition to Application for Stay at 22–25 (arguing that § 284 does not authorize construction).

Plaintiffs also contend that "there is no reason to assume that the Supreme Court would not find that Plaintiffs lack a constitutional cause of action," *see* Pls.' Reply. at 13, but Plaintiffs unsuccessfully raised those same arguments to the Supreme Court in the stay litigation. *See Trump v. Sierra Club*, No. 19A60 (S. Ct.), Respondents' Opposition to Application for Stay at 31–35 (arguing that "Plaintiffs have a constitutional cause of action under the Appropriations Clause"). In concluding that Plaintiffs have "no cause of action to obtain review of the Acting Secretary's compliance with Section 8005," *Trump*, 140 S. Ct. at 1, the Supreme Court logically had to reject Plaintiffs' argument and the Ninth Circuit motions panel's conclusion that the Constitution provided Plaintiffs with an equitable cause of action. *See Sierra Club*, 929 F.3d at 695–97.

Finally, Plaintiffs have not established a likelihood of success on their claims under the National Environmental Policy Act to warrant a stay. This Court and every other court to consider the issue have rejected challenges to DHS's waiver authority under IIRIRA.[6] *See Sierra Club v. Trump*, 379 F. Supp. 3d 883, 922 (N.D. Cal. 2019); *Sierra Club v. Trump*, 2019 WL 2715422 at *3 (N.D. Cal. June 28, 2019); *see also e.g., In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018), *cert. denied*, 139 S. Ct. 594 (2018); *County of El Paso* v. *Chertoff*, 2008 WL 11417030 (W.D. Tex. Sept. 11, 2008), *cert. denied*, 557 U.S. 915 (2009); *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 554 U.S. 918 (2008).

CONCLUSION

For the foregoing reasons, the Court should grant partial summary judgment for Defendants on all claims related to the funding and construction of fiscal year 2020 § 284 projects.

[6] On May 13, 2020, the Acting Secretary of Homeland Security issued a corrected waiver that includes the 0.2 mile segment of the Tucson B, segment 4 project that was inadvertently omitted from the prior waiver covering the fiscal year 2020 § 284 projects within the Tucson Sector issued on March 16, 2020. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 85 Fed. Reg. 28660–62 (May 13, 2020); *see also* Defs.' Mot. at 6 & n.4.

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