No. 19-16102

United States Court of Appeals for the Ninth Circuit

SIERRA CLUB, et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR *AMICUS CURIAE* SLSCO LTD. IN SUPPORT OF DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* SLSCO Ltd. ("SLS") states that it is a nongovernmental limited partnership organized and existing under the laws of the State of Texas. SLS is not a subsidiary of any corporation, and no publicly traded corporation owns 10% or more of SLS's stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

SLSCO Ltd. ("SLS") has a direct interest in this matter because, ultimately, this action seeks to divest the U.S. Army Corps of Engineers ("Army Corps") of funding to carry out a procurement contract awarded to SLS for the construction of a barrier along a portion of the southwest border with Mexico. On April 9, 2019, the Army Corps awarded SLS a contract to perform the work that is the direct subject of Defendants' Emergency Motion Under Circuit Rule 27-3 for Stay Pending Appeal, ECF No. 7-1 ("Defendants' Motion for Stay"). SLS was also a party to a prior proceeding before the U.S. Court of Federal Claims involving this same work. In that case, the Court of Federal Claims denied injunctive relief and entered final judgment in favor of the Government and SLS. Or. for J. at 2, *Fisher Sand & Gravel Co. v. United States*, No. 19-cv-615C (Fed. Cl. May 21, 2019, reissued in public form May 29, 2019) (copy attached hereto as Exhibit 1).

SLS submits this *amicus* brief to provide the Court with additional facts regarding the federal government procurement action that is at the heart of this dispute and to alert this Court to a jurisdictional provision that grants the Court of

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), SLS states that no one, except for SLS and its counsel, authored this brief in whole or in part, or contributed money towards the preparation of this brief. Defendant-Appellants and Plaintiffs-Appellees have, through counsel, consented to the filing of this brief.

Federal Claims exclusive jurisdiction over this federal procurement matter and that ultimately divested the District Court of jurisdiction to enter its injunction.

ARGUMENT

As Defendants have explained, the District Court's preliminary injunction is fundamentally flawed. SLS strongly supports Defendants' motion for stay of that order pending appeal. But SLS respectfully submits that there is another, even more fundamental, reason why the District Court erred in granting a preliminary injunction: the District Court lacked subject matter jurisdiction to issue the injunction. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998).

A. Procurement History And Prior Proceedings

On April 9, 2019, the Army Corps awarded a federal government contract to SLS to construct the forty-six miles of border fencing in New Mexico known as the El Paso Sector Project 1. On April 25, 2019, one of the disappointed bidders involved in the procurement, Fisher Sand & Gravel Co. ("Fisher"), filed a lawsuit at the Court of Federal Claims seeking, *inter alia*, to enjoin work on the El Paso Sector Project 1. After expedited briefing and oral argument, the Court of Federal Claims denied Fisher's request for injunctive relief and granted final judgment in favor of the Government and SLS. *See* Exhibit 1 at 2, 10.[2]

[2] On June 3, 2019, the U.S. District Court for the District of Columbia also issued an opinion explaining its decision denying an injunction in a separate case that would have also had the effect of enjoining work on the El Paso Sector Project 1.

The Opinion of the Court of Federal Claims was originally issued under seal on May 21, 2019. It is common for opinions by the Court of Federal Claims to be initially issued under seal to afford the parties an opportunity to propose the redaction of procurement-sensitive or other protected information. On May 29, 2019, the Court of Federal Claims Opinion was re-issued publicly after all parties advised the Court of Federal Claims that no redactions were necessary. *Id.* at 1 n.1.

In that decision regarding this procurement, the Court of Federal Claims referenced the government's identification of the need for the construction of border fencing through the President's February 15, 2019, "proclamation declaring a national emergency concerning the security of the southern border of the United States." *Id.* at 2. Moreover, the Court of Federal Claims specifically went through the steps taken by the government to identify funding and authority to support the procurement.[3] The Court of Federal Claims further explained: "[T]he Assistant Secretary of Defense for Homeland Defense and Global Security sought and received authority from the Acting Secretary of Defense to immediately shift funds

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Mem. Op., *United States House of Reps. v. Mnuchin*, No. 19-cv-0969 (D.D.C. June 3, 2019), ECF No. 54.

[3] The District Court similarly focused on these funding and authority provisions. *See* Order (ECF No. 144) at 9 ("To fund the Section 284 diversion, Defendant Shanahan simultaneously invoked Section 8005 of the most-recent DoD appropriations act to 'reprogram' $1 billion from Army personnel funds to the counter-narcotics support budget.") and 41-42 ("the Court finds that Plaintiffs have shown a likelihood of success as to their argument that the reprogramming of $1 billion under Section 8005 to the Section 284 account for border barrier construction is unlawful.").

for the implementation of Option One, which called for construction of fencing along … 46 miles near El Paso." *Id.* at 3.

On May 24, 2019, the U.S. District Court for the Northern District of California issued an injunction that is the subject of Defendants' Motion for Stay. While the Plaintiffs' complaint alleged violations of environmental laws, the District Court made clear that its preliminary injunction decision was not founded on the Plaintiffs' environmental allegations: "Plaintiffs are not likely to succeed on their [National Environmental Policy Act ("NEPA"), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4370b)] argument because of the waivers issued by [the Department of Homeland Security]." Order at 47, *Sierra Club v. Trump*, No. 19-cv-0872 (N.D. Cal. May 24, 2019),ECF No. 144 ("Order"). Rather, the District Court based its decision on Plaintiffs' other claims, which were all related to the appropriation of funding for the contracts to construct the border barriers. *See, e.g.*, Order at 32 (finding likelihood of success regarding whether Congress denied funding), 41-42 (finding likelihood of success as to argument that reprogramming of funds is unlawful); 49-50 (finding irreparable harm regarding alleged violations of 10 U.S.C. § 284 and Section 8005).[4]

[4] With regard to their claims regarding 10 U.S.C. § 2808 and its limitation of construction authority to presidential declarations requiring the use of the armed forces, the District Court found "Plaintiffs have not yet met their burden of showing irreparable harm in the absence of a preliminary injunction." Order at 53.

Finding a likelihood that Plaintiffs would succeed on the appropriations law issues, the District Court enjoined the Secretaries of the Departments of Defense, Homeland Security and Treasury, and all persons acting under their direction, "from taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and **El Paso Sector Project 1** using funds reprogrammed by [the Department of Defense] under Section 8005 of the Department of Defense Appropriations Act, 2019." Order at 55, ECF No. 144 (emphasis added).[5] The District Court's injunction related to the same El Paso Sector Project 1 regarding which the Court of Federal Claims previously held should not be enjoined.

As a direct result of the District Court's injunction, the Army Corps issued a notice of suspension of work on the El Paso Sector Project 1 to SLS within hours of the District Court issuing its injunction. This notice stated:

> SLSCO, Ltd. is hereby directed to suspend all work pursuant to FAR Clause 52.242-14, SUSPENSION OF WORK (APR 1984), under Contract No. W912PP19C0018, Design-Build Construction Project for El Paso Sector FY18 Primary Pedestrian Wall Replacement. This suspension of work is issued as a result of the preliminary injunction from the U.S. District Court, Northern District of California notification on May 24, 2019 that all work shall be suspended.

[5] Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018) ("Section 8005").

May 24, 2019 Letter from L. Molina, Army Corps, to W. Sullivan, SLS (attached as Exhibit 2).

In addition, the Commanding Officer for Task Force Barrier, Army Corps, South Pacific Division, submitted a declaration explaining that, under the suspension of work order, SLS is required to incur substantial costs under its contract including costs to keep equipment ready at multiple locations, security costs to avoid equipment and materials from being stolen or vandalized, and labor costs during the period of contract suspension. *See* McFadden Decl. ¶¶ 12-13, ECF No. 7-6. The Army Corps estimates that SLS will have to incur $195,000 per day so long as the work under the El Paso Sector Project 1 Contract is suspended, and that the Army Corps will eventually have to reimburse SLS for these costs. Defendants' Motion for Stay at 22; McFadden Decl. ¶¶ 13-15.

B. The District Court Lacks Subject Matter Jurisdiction To Issue The Injunction

1. Jurisdiction Is A Threshold Issue Properly Before This Court

All federal courts have an independent obligation to assure subject matter jurisdiction exists, even if the parties themselves do not raise a jurisdictional objection. *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 415 (9th Cir. 2018) ("Although Chavez did not contest jurisdiction below, we have an independent obligation to ensure subject matter jurisdiction exists."). Federal District Courts are

courts of limited jurisdiction and only have the authority to hear cases (and take action) to the extent that they are granted that authority by the Constitution and Congress. *See Gunn v. Minton,* 568 U.S. 251, 256 (2013); *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). Indeed, the presumption is that a federal district court does not have jurisdiction. *See Kokkonen,* 511 U.S. at 377; *United States v. Hill,* 694 F.2d 258, 260 (D.C. Cir. 1982).

"The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). "[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Accordingly, because the District Court lacked subject matter jurisdiction to issue the injunction at issue (as explained below), this Court should address this issue now.

2. Congress Specifically Removed Federal District Court Jurisdiction Over "Any Alleged Violation Of Statute Or Regulation In Connection With A Procurement"

Prior to the Administrative Disputes Resolution Act of 1996, Pub. L. No. 104-320, § 12, 100 Stat. 3870, 3874–75 ("ADRA of 1996"), District Courts

shared jurisdiction with the Court of Federal Claims "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract **or any alleged violation of statute or regulation in connection with a procurement** or a proposed procurement." 28 U.S.C. § 1491(b)(1) (emphasis added). In Section 12 of the ADRA of 1996, however, Congress provided that the concurrent District Court jurisdiction over such actions would expire on January 1, 2001. *See* ADRA of 1996 at § 12(d), 100 Stat. at 3874–75 ("SUNSET - The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001, unless extended by Congress."). Congress has not given 28 U.S.C. § 1491(b)(1) jurisdiction back to District Courts.

In *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071 (Fed. Cir. 2001), the U.S. Court of Appeals for the Federal Circuit explained that Congress terminated this district court jurisdiction to, among other things, "prevent forum shopping and to promote uniformity in government procurement award law." 264 F.3d at 1079. The Federal Circuit stated that it "is clear that Congress's intent in enacting the ADRA with the sunset provision was to vest a single judicial tribunal with exclusive jurisdiction to review government contract protest actions." *Id.*; *see*

also id. at 1080 ("[I]t is clear that the Court of Federal Claims is the only judicial forum to bring any governmental contract procurement protest.").

Thus, since January 1, 2001, the Court of Federal Claims has held exclusive jurisdiction over "any alleged violation of statute or regulation in connection with a procurement or proposed procurement." 28 U.S.C. § 1491(b)(1); *see also Emery*, 264 F.3d at 1080. District courts have routinely dismissed actions involving procurements since January 1, 2001 because of the sunset provision in the ADRA of 1996. *See, e.g.*, *Sigmatech, Inc. v. United States Dep't of Def.*, 365 F. Supp. 3d 1202, 1205 (N.D. Ala. 2019) (dismissing allegations related to a federal procurement because of the sunset provision in the ADRA of 1996); *Labat-Anderson, Inc. v. United States*, 346 F. Supp. 2d 145, 151 (D.D.C. 2004) (same).

3. The Exclusive Jurisdiction Of The Court Of Federal Claims Is Expansive

The statute, relevant regulations, and case law all support an expansive reading of § 1491(b)(1)'s grant of exclusive jurisdiction of the Court of Federal Claims over "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

a. Both Statute And Regulation Broadly Define "Procurement"

Congress has defined the term "procurement" in an expansive manner. "[T]he term 'procurement' includes all stages of the process of acquiring property or

services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111 (as incorporated by 10 U.S.C. § 2302(3)(A)); *see also Rothe Dev. v. United States Dep't of Def.*, 666 F.3d 336, 339 (5th Cir. 2011) (citing statutory definition of "procurement"); *Distrib. Sols., Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (same).

The Federal Acquisition Regulation similarly provides that a "procurement":

> begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

48 C.F.R. § 2.101 (defining "procurement" as an "acquisition" and providing the above definition for "acquisition").

b. Case Law Also Establishes Expansive Court Of Federal Claims Jurisdiction Under § 1491(b)(1)

In *RAMCOR Services Group, Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit explained that § 1491(b)(1) applies even beyond the definition of "procurement," because the "in connection with" language "does not require an objection to [an] actual contract procurement"; instead, "[a]s long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction." Section 1491(b)(1)'s

"in connection with" language is "expansive" and "very sweeping in scope." *See, e.g.*, *Labat-Anderson, Inc.*, 346 F. Supp. 2d at 151. In particular, the D.C. District Court has explained that the scope of 28 U.S.C. § 1491(b)(1) is not limited to traditional bid protest jurisdiction: "[I]f Congress intended to confine the statute to bid protests, it could easily have stated so in the statute, instead of using the sweeping 'in connection with a procurement' language it employed." *Id.* at 153. In fact, the D.C. District Court explained in another case addressing this threshold issue that the jurisdictional language of § 1491: "covers even non-traditional disputes arising from the procurement process as long as the violation is 'in connection with a procurement or proposed procurement.'" *Validata Chem. Servs. v. United States Dep't of Energy*, 169 F. Supp. 3d 69, 78 (D.D.C. 2016) (quoting *Pub. Warehousing Co. K.S.C. v. Def. Supply Ctr.*, 489 F. Supp. 2d 30, 40 (D.D.C. 2007).[6]

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[6] The D.C. District Court in *Validata* also explained that the exclusive jurisdiction of the Court of Federal Claims, when premised on the "in connection with a procurement" prong of § 1491(b)(1), is meant to apply broadly to cover all challenges relating to a federal procurement by any party. *See* 169 F.Supp. 3d at 79-82, 84-85 (explaining the intent of Congress in enacting ADRA of 1996 to create a single forum for uniformity and expertise in the development of procurement law regardless of whether the plaintiff is a disappointed bidder or any other party). In *City of Albuquerque v. United States Dep't of the Interior*, the Tenth Circuit concluded that the ADRA is limited to suits by "actual or potential bidder[s]." 379 F.3d 901, 911 (2004). As Judge Moss subsequently explained in *Validata*, however, if the "in connection with" language "were read to apply only to disappointed bidders, it is difficult to imagine what work the 'in connection with' clause would perform . . . ." 169 F3d at 82. Moreover, as Judge Moss further explained, this narrow interpretation of the Court of Federal Claims' jurisdiction is

c. Plaintiffs Cannot Create District Court Jurisdiction By Characterizing Their Claim As An Appropriations Challenge

Through the years, plaintiffs have tried to evade this grant of exclusive Court of Federal Claims jurisdiction by filing complaints in federal district courts that seek to characterize their actions as other than a challenge to the award or performance of a government contract. A body of law has developed against this practice. *See, e.g., Validata Chem. Servs.*, 169 F. Supp. 3d at 71, 89-91 (rejecting plaintiff's "attempt to reframe its claim against SBA-OHA as a constitutional due process challenge," holding the claim was "ultimately premised" on a violation of its rights "in connection with a procurement," and transferring the case to the Court of Federal Claims); *Labat-Anderson*, 346 F. Supp. 2d at 154 (dismissing for lack of jurisdiction a plaintiff's claims that, despite plaintiff's arguments to the contrary, were "in every relevant respect a challenge to the procurement process").

Specifically, the Court of Federal Claim's jurisdiction covers actions that include claims, like Plaintiffs' here, alleging that an agency's contract actions lack requisite funding. For instance, in *Sims v. United States*, 112 Fed. Cl. 808, 818-21 (2013), the Court of Federal Claims considered the plaintiffs' allegation that the government was "contracting in advance of funding availability or appropriations."

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inconsistent with the legislative history of the ADRA as well as other important factors. *See id.* at 82-85.

Similarly, in *Ultimate Concrete, LLC v. United States*, 127 Fed. Cl. 77, 84 (2016), the plaintiff contended that the awardee's proposal would result in a payment to the plaintiff in violation of the Anti-Deficiency Act, 31 U.S.C. § 3324.

4. The Preliminary Injunction Issued By The District Court Is Premised On An "Alleged Violation Of Statute Or Regulation In Connection With A Procurement"

The alleged violation of Section 8005 found by the District Court, *see* Order at 31-41, is "in connection with" a procurement for several independent reasons. First, the challenge was triggered by a procurement—the identification of the need for construction of the barrier at issue, arrangement of funding to meet that need, and procurement of services to construct that barrier. As the Court of Federal Claims analysis makes evident, *see* Exhibit 1 at 2-3, this procurement began with the identification of the need of the border fencing as set forth in the Presidential Proclamation. *See* Presidential Proclamation at 1. And as explained above: "The statute explicitly specifies that the stage where the process 'begin[s]' is the 'process for determining a need for property or services.'" *Fisher-Cal Indus. v. United States*, 747 F.3d 899, 902 (D.C. Cir. 2014).

Second, Section 8005 governs the funding available to the agency to carry out that procurement. The actions of DHS to request assistance and DOD to transfer funds to meet the need identified by the President under the authority of 10 U.S.C. § 284 and Section 8005 was a critical part of the procurement. *See, e.g.,* Notice of

Admin. R. Exhibit 1 at 5, *Sierra Club v. Trump*, No. 19-cv-0872 (N.D. Cal. June 7, 2019), ECF No. 163-1 ("Notice") (determining "that transferring $1B in funds for this support is in the national interest and that the other requirements of [Section 8005] … are met."), *id.* at 16 (DHS requesting DOD support under 10 U.S.C. § 284), and *id.* at 22-23 (identifying the need for the El Paso Project 1).[7]

Third, the District Court's injunction directly impeded that procurement. Indeed, within hours of the District Court's injunction, the Army Corps issued a suspension of work order under the El Paso Sector Project 1 Contract. *See* Exhibit 2. This suspension of work order removes any doubt that the alleged violation of appropriation statutes is "in connection with a procurement."

As the Federal Circuit has explained: "Where an agency's actions under a statute so clearly affect the award and performance of a contract, this court has little difficulty concluding that that statute has a 'connection with a procurement.'" *RAMCOR Servs. Grp., Inc.*, 185 F.3d at 1289 (citation omitted). Here, the District Court's injunction was based on the alleged violation of appropriation statutes closely associated with procurement actions, and the injunction resulted in an immediate stop work order on the procurement at issue here. The District Court therefore lacked jurisdiction to enter its injunction.

[7] This determination was subsequently modified to increase the proposed height of the fence for the El Paso Project 1. *See* Notice at 55-57, ECF No. 163-1.

CONCLUSION

The Court should vacate the District Court's injunction for lack of jurisdiction and, at a minimum, grant Defendants' motion for a stay pending appeal.

June 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I caused the foregoing Brief of *Amicus Curiae* SLSCO Ltd, in support of defendants-appellants' Emergency Motion Under Circuit Rule 27-3 for Stay Pending Appeal to be served by electronic means through the Court's CM/ECF system on counsel for all parties who are registered CM/ECF users.

s/ Gregory G. Garre
Gregory G. Garre

CERTIFICATE OF COMPLIANCE

Counsel for *amicus curiae* SLSCO Ltd. certifies:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), Ninth Circuit Rules 32-1(a), and this Court's Order dated June 7, 2019, ECF No. 11, because this brief contains 3087 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font type.

Dated: June 10, 2019

s/ Gregory G. Garre
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