No. 19-16102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, ET AL.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 4:19-cv-00892
The Honorable Haywood S. Gilliam, Jr., Judge

AMICUS BRIEF OF THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WISCONSIN IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTERESTS OF AMICI

The Amici States have a significant interest in the outcome of Defendants' emergency motion for a stay. As detailed in Amici States' June 6, 2019 letter to the Court, that interest is heightened by the unique posture of this case and the Amici States' status as parties to the district court proceeding and beneficiaries of the injunction issued by that court. The district court denied the Amici States' motion for injunctive relief because it had already "enjoined the relevant Defendants in the [*Sierra Club*] action from proceeding with . . . construction" in Plaintiff State New Mexico, and therefore "no irreparable harm [would] result from the denial (without prejudice) of the States' duplicative requested injunction." Exh. 1, Order Denying Prelim. Inj. 32, *California, et al. v. Trump, et al.*, Case No. 19-00872 (N.D. Cal.) ("*States* case") (ECF No. 165). Thus, the resolution of the pending motion will almost certainly impact the Amici States' case, both practically (because the State of New Mexico will be exposed to the harm in its preliminary injunction motion if the stay motion is granted) and as a precedential matter (because Defendants' arguments in support of their motion implicate the Amici States' claims).

ARGUMENT

The Amici States address three factors: 1) whether Defendants have made a strong showing that they are likely to succeed on the merits, 2) whether issuance of the stay will substantially injure the Amici States as a party "interested in the

proceeding," and 3) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Because the Amici States are governmental entities, factors 2 and 3 effectively merge and will be addressed together. All three factors weigh in favor of Plaintiffs-Appellees ("*Sierra Club* plaintiffs") and against Defendants-Appellants' ("Defendants") motion.

I. DEFENDANTS HAVE NOT MADE A STRONG SHOWING THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS

A. The *Sierra Club* Plaintiffs Have a Valid Claim Challenging Defendants' Actions under § 8005

Defendants' argument that the transfers enjoined by the district court are not subject to challenge because there is no private cause of action under § 8005 of the Fiscal Year 2019 Department of Defense Appropriations Act, Mot. 8-11, fails for two reasons. First, as the district court correctly recognized, it ignores the well-established principle that an equitable ultra vires cause of action is available when the executive acts in excess of statutory authority. Order 28-31 (Dkt. No. 7-2)[1]; *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). Second, that claim can be construed as an Administrative Procedure Act (APA) claim, 5 U.S.C. § 706(2)(C), as the *Sierra Club* plaintiffs stated to the district court in their pleadings and at the preliminary injunction hearing. *See* Exh. 2, Reply Br.

[1] Citations including "Dkt." refer to filings in the appellate docket.

3 n.1 (ECF No. 91)[2] (citing, inter alia, *Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013); *Clouser v. Espy*, 42 F.3d 1522, 1533 (9th Cir. 1994)); Exh. 3, Hr'g Tr. 109:3-6.

B. The *Sierra Club* Plaintiffs' Claims Satisfy the Generous Zone of Interests Test

Defendants also erroneously argue that even if a cause of action existed under § 8005, the *Sierra Club* plaintiffs would not be able to sue to enforce § 8005 because they fall outside that provision's zone of interests. Mot. 10-13. This argument is premised on the mistaken view that the only action at issue here is "DoD's mere transfer of funds." Mot. 9. Leaving aside the question of whether such a transfer would be, standing on its own, final agency action for APA purposes (and the Amici States submit that it would),[3] Defendants improperly seek to split a single action into two parts for their litigation purposes. The *Sierra Club* plaintiffs' challenge is to Defendants' action transferring money under § 8005 to make funds available under 10 U.S.C. § 284. This is a single agency action to divert DOD funding and resources for the president's border wall, as Defendants'

[2] Citations including "ECF" refer to filings in the *Sierra Club* district court case, unless the citation refers to the *States* case.

[3] The § 8005 transfer would meet the final agency action requirement, as it "amounts to a definitive statement of the agency's position" as to the funds at issue, *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006), and "legal consequences flow from [DOD's] decision" to make them available, *Multnomah Cty. v. Azar*, 340 F. Supp. 3d 1046, 1056 (D. Or. 2018).

own documents make clear. *See* Rapauno Decl. (Dkt. No. 7-3) Exh. D (DOD reprogramming treating use of § 8005 and § 284 as components of same action), Exh. C (DOD memorandum stating that § 284 "support will be funded through a transfer of $1B" under § 8005).

Defendants cannot evade judicial review by chopping what is, practically speaking, a single agency action into two parts and ignoring the second part. "The [agency's] challenged act must be examined as a whole, not in its pieces." *Inv. Co. Inst. v. FDIC*, 606 F. Supp. 683, 684 (D.D.C. 1985), *aff'd*, 815 F.2d 1540 (D.C. Cir. 1987). Further, Defendants' artificial separation of DOD's transfers under §§ 8005 and 284 fails to "adequately place § [8005] in the overall context . . . " of defense appropriations and spending law. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987) (examining the broad "statutory scheme" of federal banking law for zone of interests purposes).

Without this artificially narrow approach, Defendants' argument falls apart. Notably lacking from Defendants' motion is any challenge to the *Sierra Club* plaintiffs' ability to bring a claim alleging violations of § 284, including whether their challenge falls within *that* provision's zone of interests. This is not surprising, as it is evident that the *Sierra Club* plaintiffs have significant interests in preventing or minimizing the environmental impact of the "[c]onstruction of roads

and fences and installation of lighting" in which Defendants propose to engage under this statute.

In any event, the *Sierra Club* plaintiffs fall within § 8005's zone of interests even when these are viewed separately from § 284. As the Supreme Court has recognized, the zone of interests is a "generous" test, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014), that is "not meant to be especially demanding," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224-25 (2012). "[A]gency action [is] presumptively reviewable," and a party's interest need only be "*arguably* within the zone of interests to be protected or regulated by the statute." *Id.* (emphasis added). Indeed, courts "have always conspicuously included the word 'arguably' in the test to indicate that *the benefit of any doubt goes to the plaintiff*." *Id.* at 225 (emphasis added).[4]

The *Sierra Club* plaintiffs satisfy this test. Congress enacted § 8005 to "tighten congressional control of the re-programming process." Mot. 10 (citing H.R. Rep. No. 93-662, at 16-17 (1973)). It makes no difference that Congress

[4] Defendants half-heartedly argue that a heightened zone-of-interests standard "*might*" apply for non-APA cases. Mot. 10 (stating that "the Supreme Court has *suggested*" such a standard) (emphases added). However, as discussed above, the *Sierra Club* plaintiffs' claims can be construed as APA claims, depriving this weak argument of any force it might have.

failed to discuss the precise types of harm alleged by the *Sierra Club* plaintiffs in § 8005. As this Court has expressly recognized, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1200 (9th Cir. 2004) (internal quotation marks omitted). Because the *Sierra Club* plaintiffs' injuries are "causally related" to Defendants' attempt to skirt those restrictions, they fall within § 8005's zone of interests. *Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979).

Defendants' position appears to be that *no party* could bring a claim to enforce § 8005; they complain that "[t]he court enjoined DoD at the behest of private parties who have no express cause of action to enforce this internal appropriations-transfer statute," Mot. 1, and that "there is no indication that Congress intended to authorize judicial enforcement of Section 8005 at all . . . ." Mot. 10.

Not only is this position constitutionally problematic,[5] it turns the legal standard on its head. This Court has held—without requiring any express cause of action or other indication that Congress intended to authorize judicial enforcement of a statute—that private parties may challenge executive spending under the

[5] *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (discussing "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (internal punctuation omitted).

Appropriations Clause "when government acts in excess of its lawful powers." *United States v. McIntosh*, 833 F.3d 1163, 1174 (9th Cir. 2016) (collecting cases); *see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970) ("The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review"). Indeed, there is a "strong presumption favoring judicial review" of agency actions, which imposes a "heavy burden" upon assertions that agency actions are unreviewable. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). This presumption may be overcome only with "clear and convincing evidence" to preclude judicial review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Defendants do not—and cannot—present such evidence.

C. The *Sierra Club* Plaintiffs Have Shown a Likelihood of Success and Raised Serious Constitutional Questions

On the merits, the district court concluded that the *Sierra Club* and *State* plaintiffs were likely to succeed in showing that Defendants exceeded their authority under § 8005 and that Defendants' interpretation of § 8005 and § 284, at minimum, "raises serious constitutional questions" that the provisions should be construed to avoid. Order at 36-42; Exh. 1, *States* Order at 18-24. Defendants fail to offer any persuasive rebuttal to the district court's analysis of the provision, and they gloss over constitutional questions, asserting (with little analysis) that their

interpretation raises "no constitutional concerns." Mot. 17. That argument is mistaken.

One of the most serious separation of powers questions raised by Defendants' interpretation of § 8005 and §284 relates to violation of the Appropriations Clause. The Appropriations Clause is a

> bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.

U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (internal quotations omitted); *McIntosh*, 833 F.3d at 1175 ("The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them.").

A valid appropriation must satisfy 31 U.S.C. § 1301, known as the "Purpose Statute," which "codified what was already required under the Appropriations Clause of the Constitution." Gov't Accountability Off. (GAO), *Principles of Federal Appropriations Law* 3-10 (4th ed. 2017)

https://www.gao.gov/assets/690/687162.pdf ("GAO Red Book").[6] To comply with § 1301(a), and hence the Appropriations Clause, agencies must follow the "necessary expense rule," which prohibits them from relying on a *general* appropriation for an expenditure when that expenditure falls *specifically* "within the scope of some other appropriation or statutory funding scheme." GAO Red Book 3-14-15, 3-16-17, 407-10. "Otherwise, an agency could evade or exceed congressionally established spending limits," *id.* at 3-408, which the Appropriations Clause forbids. *See Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990) (Appropriations Clause is violated if "the President or Executive Branch officials [who] were displeased with . . . restriction[s] . . . imposed by Congress" sought to "evade" those restrictions).

This "well-settled" restriction is supported by a "legion" of GAO decisions "from time immemorial." GAO Red Book 3-409. For example, one DOD subagency was prohibited from using a general appropriation for dredging where a *different* subagency of DOD had funds appropriated for that function. *Id.* at 3-408 to -09. And Congress's appropriation of $1 million expressly for Nevada for nuclear waste disposal activities "indicate[d] that is all Congress intended Nevada

[6] *See Dep't of the Navy*, 665 F.3d at 1349 (treating GAO's view of agency order's consistency with Appropriations Clause and § 1301(a) as "expert opinion") (quoting *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 & n.1 (D.C. Cir. 1984) (Scalia, J.)).

to get [for that fiscal year]," and executive officials could not use a more general appropriation to fund such activities. *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005).

This "general/specific" doctrine is not only a core tenet of appropriations law; it is a bedrock principle of statutory construction and separation of powers more generally. "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and *more specifically* to the topic at hand." *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 133 (2000) (emphasis added); *Benda v. Grand Lodge of Int'l Assoc. of Machinists & Aerospace Workers*, 584 F.2d 308, 313 (9th Cir. 1978) ("[A]n expression of specific congressional intent should prevail over the conflicting general policy implications of a prior federal statute.").

As Justice Frankfurter reasoned in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the executive branch's exertion of general statutory authority where Congress has spoken specifically on a subject would also do violence to the Constitution's separation of powers:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find that authority so explicitly withheld is not merely to disregard a particular instance the clear will of Congress. It is to disrespect the

> whole legislative process and the constitutional division of authority between President and Congress.

Id. at 609 (Frankfurter, J., concurring). Sections 284 and 8005 cannot be read so broadly as to run afoul of this constitutional principle. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

The application of these separation of powers and appropriations principles here is straightforward. Congress specifically appropriated $1.375 billion to fund a barrier for a specific and limited segment of the southwest border in Texas's Rio Grande Valley in the 2019 Consolidated Appropriations Act, Pub. L. No. 116-6, 133 Stat. 13, § 230 (2019). Defendants seek to supplement that appropriation by using funds that were more generally appropriated for "drug interdiction and counter-drug activities," FY 2019 Department of Defense Appropriations Act, Pub. L. No. 115, 245, 132 Stat. 2981, 2997 (2018), in order to fund additional portions of Defendants' border wall project that Congress chose not to fund in its specific appropriation. Because "a specific appropriation exists for a particular item"—i.e., the $1.375 billion for a border barrier in Texas—"then that appropriation must be used and it is improper to charge any other appropriation for that item." GAO Red Book 3-409.

Separation of powers and appropriations principles do not permit the executive branch to evade Congress's limitations on the amount, location, and manner in which a border barrier may be built, 2019 Consolidated Appropriations

Act, §§ 230-32, by redirecting different funds appropriated for more general purposes for construction that Congress declined to fund. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) (rejecting argument that Congress would have "painstakingly described the Attorney General's limited authority to deregister a single physician" while granting "just by implication, authority to declare an entire class of activity outside 'the course of professional practice' . . . ."). Simply put, "[w]here Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

This is especially true where, as here, Congress considered and rejected a request for far greater funding. Order at 4-6, 38-39; Exh. 4, *States* case, RJN in Supp. of Mot. for Preliminary Inj. 117 (ECF No. 59-4) (Office of Management and Budget January 2019 letter requesting $5.7 billion for border barrier construction). In Defendants' view, because Congress did not "deny a DoD funding request for construction in these two project areas [at issue] under its counter-narcotics support line," Mot. 15, the executive branch could divert federal funds from other sources toward specific parts of the larger border wall project that Congress already rejected. Yet again, Defendants turn the analysis on its head here, contravening the heart of the Appropriations Clause. "If agents of the Executive were able, by their

unauthorized [actions], to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Richmond*, 496 U.S. at 428.

To be sure, these constitutional limitations do not render DOD's § 284 authority toothless. If Congress had made no appropriation for barrier funding, and not rejected such an appropriation, then Defendants could have potentially invoked their § 284 authority. Further, if Congress had made clear in the appropriations bill its "intent to make a general appropriation available to supplement or increase a more specific appropriation, or to relieve [DOD] of the need to elect to use a single appropriation," GAO Red Book 3-411, DOD could also have invoked its § 284 authority. Congress chose not to do so here.

Separately, Defendants overlook that in the past, Congress has provided DOD with *specific* appropriations to provide support at the border. *See*, *e.g.*, Pub. L. No. 110-116, 121 Stat. 1295, 1299 (2007) (appropriating hundreds of millions of dollars to DOD for support DHS "including . . . installing fences and vehicle barriers"); Pub. L. No. 109-234, 120 Stat. 418, 480 (2006) (same); Pub. L. No. 101-511, 104 Stat. 1856, 1873 (1990) (appropriating $28 million for drug surveillance program at border). If Congress had intended to provide a specific appropriation to DOD to support DHS's border-barrier-construction activities

despite the existence of a specific appropriation for DHS for that very purpose, it knew how to do that, and it declined to do so for the 2019 fiscal year.

II. THE INTERESTS OF OTHER PARTIES AND THE PUBLIC INTEREST WEIGH AGAINST A STAY

Defendants argue the *Sierra Club* plaintiffs "will suffer little, if any, cognizable harm" from the issuance of a stay. Mot. 8. That is wrong. The district court correctly held that the injuries to the *Sierra Club* plaintiffs' members' "enjoyment of public land" constitute irreparable harm, Order 49 (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)), and this Court has repeatedly held as much. *See, e.g., id.; Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018). Moreover, Defendants simply ignore that a stay of the injunction here will "substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 434. In particular, the Amici States will suffer substantial irreparable harm from a stay in several ways, harms that are also contrary to the public interest.

First, because the district court declined to grant a separate injunction to New Mexico because it had already granted the *Sierra Club* plaintiffs' injunction, a stay would cause substantial harm to the State of New Mexico's sovereign interest in enforcing its laws. Defendants have exercised their authority under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ["IIRIRA"], Pub. L. No. 104-208, § 102(a), 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1103 note)

to waive federal and state environmental laws that would ordinarily apply to the planned border-barrier construction. *See* Determination Pursuant to Section 102 of [IIRIRA], as Amended, 84 Fed. Reg. 17,186 (Apr. 24, 2019) ("N.M. IIRIRA waiver").[7] The unlawful diversion of funding under § 8005 and § 284 provides Defendants with the resources to effectuate the IIRIRA waiver to construct El Paso Project 1, and consequently renders New Mexico unable to enforce its duly enacted environmental laws. *See* N.M. IIRIRA waiver; Rapauno Decl., Ex. A at 8-9 (DHS description of El Paso Project 1 in memorandum to DOD) (Dkt. No. 7-3) ("DHS memo").

Specifically, the funding diversion and resulting construction will impede New Mexico's ability to implement its Wildlife Corridors Act, which aims to protect large mammals' habitat corridors from human-caused barriers such as roads and walls. 2019 N.M. Laws Ch. 97. Several of these corridors run through, or adjacent to, the El Paso Project 1 site. Pronghorn antelope, mule deer, mountain lions, and desert bighorn sheep are included within the definition of "large mammals" that are specifically protected under the Act. *Id.* El Paso Project 1 will

[7] While Amici States (and the *Sierra Club* plaintiffs) argued that DOD should not have been able to exercise a waiver here, the district court preliminarily ruled otherwise. *See* Order 47-48.

completely block habitat corridors for these species. Exh. 5, *States* case, Traphagen Decl. ¶¶ 17, 27-31 (ECF 59-2).

New Mexico has a compelling interest in enforcing those laws. *See Feldman v. Reagan*, 843 F.3d 366, 394 (9th Cir. 2016). More specifically, New Mexico has a clear sovereign interest in protecting wildlife within its borders, and in enforcing its laws to that end. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) (state has "broad regulatory authority to protect . . . its natural resources"); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994) ("Clearly, the protection of wildlife is one of the state's most important interests"). These interests will be infringed if the stay is granted, preventing New Mexico from enforcing its laws. *Cf. New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (the "[public] interest is infringed by the very fact that the State is prevented from engaging in investigation and examination" pursuant to its own duly enacted state laws).

Second, a stay would harm species that New Mexico's laws were enacted to protect; many (such as the Mexican Wolf) are endangered under both New Mexico and federal endangered species acts. *See* N.M. Stat. Ann. § 17-2-41; Exh. 5, Traphagen Decl. ¶ 18. As noted above, the El Paso Project 1 border wall will bisect important wildlife habitats, impairing the Mexican Wolf and other endangered species' access to those habitats. *Id*. ¶¶ 14-24, 27. Endangered plant species would

also likely be harmed due to construction of El Paso Project 1, including two cactus species that are endangered under New Mexico law. N.M. Stat. Ann. § 75-6-1(A); Exh. 6, *States* case, Lasky Decl. ¶ 14 (ECF No. 59-2).

Although not the subject of this current stay motion, Defendants' proposed construction will also harm the State of California's sovereign and wildlife interests. After Amici States filed their preliminary injunction motion in the district court concerning El Paso Project 1, DOD announced a new project to "support" DHS with construction of 30-foot pedestrian fencing, roads, and lighting for the El Centro Project 1 in Imperial County, California. Exh. 7, *States* case, Second Rapauno Decl., Ex. A (ECF No. 143-1). Defendants have relied on essentially the same statutory authority to divert funding that they did with El Paso Project 1 in New Mexico, *see id.*, and similarly waived compliance with numerous federal and state environmental protection laws that would otherwise apply to the construction. Determination Pursuant to Section 102 of [IIRIRA], as Amended, 84 Fed. Reg. 21,801-03 (May 15, 2019) ("Cal. IIRIRA waiver").

But for the funding diversion, Defendants would not have the resources to effectuate the waiver to: (a) build El Centro Project 1 before a California agency certified Defendants' compliance with California's water quality standards, 33 U.S.C. § 1341(a)(1); (b) skirt California clean air measures, 42 U.S.C. § 7506(c)(1), 40 C.F.R. § 52.220(c)(345)(i)(E)(2); and (c) jeopardize the survival

of—or damage the habitat of—species that are endangered under both federal and California law, 16 U.S.C. § 1536(a)(2). For the reasons discussed above, Defendants' circumvention of California's comprehensive environmental protection legal framework causes irreparable harm to California's sovereignty.

New Mexico's (and, indirectly, California's) interests are currently protected by the preliminary injunction in the *Sierra Club* matter. However, if a stay is issued, DOD will quickly move to construct a border wall along New Mexico's southern border without complying with environmental laws; construction on California's southern border will follow shortly. *See* N.M. & Cal. IIRIRA waivers; DHS Memo 3, 8-9. Thus, a stay of the injunction will immediately subject New Mexico to these harms. And, as explained above, California will be subject to similar harms imminently. These harms are inimical to the public interest.

CONCLUSION

For the reasons stated above, Amici States request that this Court deny Defendants' emergency stay motion.

Dated: June 11, 2019

Respectfully submitted,

s/ James F. Zahradka II

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(c), and this Court's Order of June 5, 2019, because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 4,198 words.

Dated: June 11, 2019

s/ James F. Zahradka II
James F. Zahradka II

CERTIFICATE OF SERVICE

I certify that on June 11, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 11, 2019

s/ James F. Zahradka II
James F. Zahradka

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