No. 19A60

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Applicants,

v.

SIERRA CLUB, *et al.*,

Respondents.

ON APPLICATION FOR STAY PENDING APPEAL
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATES OF CALIFORNIA AND NEW MEXICO AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE

The States of California and New Mexico respectfully move this Court for leave to file the enclosed brief as amici curiae in support of respondents and in opposition to the application for a stay.[1] The brief seeks to bring to the Court's attention material information not addressed in the application.

The amici States are plaintiffs in a separate case that was litigated in tandem with this one in the district court, and recently consolidated with it for proceedings on appeal. In the States' case, California and New Mexico sought and obtained a declaratory judgment that the Executive Branch applicants here do not have the legal authority to use transferred funds to construct border barriers in those States. Those proposed new border barriers are also at issue in the *Sierra Club* case that is before this Court. However, in the States' case, the district court declined to decide whether the States were entitled to an injunction running directly in their favor, in part on the ground that any such injunction would be "duplicative" of the relief the court was granting to the respondents in this case. The States thus have a strong interest in the present proceeding, because the district court viewed the injunction at issue here as protecting the States from harm.

In the proposed amicus brief, the States offer distinct arguments not asserted by the private respondents here. Most importantly, the sovereign interests of

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[1] Due to the expedited briefing schedule set by the Court, it was not feasible to give the ten-day notice ordinarily required by Rule 37.2(a). All parties have consented to the filing of the brief without that notice.

California and New Mexico in the enforcement of their laws, as well as their direct interests in the protection of sensitive environmental areas within their territorial jurisdictions and their residents' public health, would be irreparably harmed if the Executive Branch applicants were allowed to proceed with construction of border barriers, in derogation of state law, in a manner never authorized by Congress and contrary to the Constitution. This Court should have the benefit of that perspective in deciding how to rule on the present application for a stay.

CONCLUSION

The Court should grant leave to file the enclosed amicus brief in support of respondents' opposition to the application for stay.

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QUESTION PRESENTED

Whether this Court should grant a stay pending appeal, which would allow the Executive Branch applicants to proceed immediately with the construction of new border barriers using funds they have diverted from other purposes.

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INTERESTS OF AMICI CURIAE

After rejecting the Executive Branch's request for billions of dollars in funding toward a border wall to extend across the southern border of the United States, Congress made a limited $1.375 billion appropriation in the Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019), for the construction of border barrier fencing in a specific area of Texas, subject to enumerated conditions. On the same day that President Trump signed the 2019 Act into law, he directed the diversion of $6.7 billion beyond what Congress had appropriated to be used for the construction of additional barriers. These diverted funds were not subject to the geographic limitations or conditions of the 2019 Act. President Trump's direction culminated in a plan by the Executive Branch applicants here to spend the diverted funds to build border barriers in additional locations not approved by Congress, including California and New Mexico.

Like the respondents here, California and New Mexico filed suit in the Northern District of California alleging that these transfers of funds exceeded the Executive Branch applicants' statutory authority and violated the constitutional separation of powers. The cases were not formally consolidated, but were litigated together in the district court. On June 28, the district court granted partial summary judgment both to respondents and to California and New Mexico. In each case the court entered a declaratory judgment that the Executive Branch applicants acted unlawfully in diverting $2.5 billion in Department of Defense funds appropriated for other purposes by Congress toward the construction of border barriers.

In the *Sierra Club* case, the district court also granted respondents' request for a permanent injunction barring the diversions. But in the States' case, the court denied, without prejudice, the States' motion for injunctive relief. The court reasoned in part that it had already "enjoined the relevant Defendants in [respondents'] action from proceeding with . . . construction," and that therefore "no irreparable harm to California and New Mexico [would] result from the denial (without prejudice) of their duplicative requested injunction." Order of June 28, 2019, ECF No. 185, at 8, *California v. Trump,* No. 19-00872 (N.D. Cal.) (*California* MSJ Order); *see also* Stay App. 22a n.9.

The Executive Branch applicants have appealed in both cases, and California and New Mexico have cross-appealed from the denial of injunctive relief in the States' case. The Executive Branch applicants moved to consolidate the appeals from both cases, acknowledging among other things that there would be no need to address the States' cross-appeal so long as the injunction granted in *Sierra Club* remained in effect, and that "consolidation would permit [the States] to address their interests in the injunction directly." ECF No. 7, *Sierra Club v. Trump*, No. 19-16102 (9th Cir.), at 3. On July 15, the court of appeals granted that motion and consolidated the appeals. ECF No. 78, *Sierra Club v. Trump*, No. 19-16102 (9th Cir.).

For the same reasons that led to consolidation in the court of appeals, the States have a plain interest in the outcome of this stay proceeding. The district court viewed the injunction at issue here as protecting the States from harm, and denial of a stay would continue that protection. Conversely, granting a stay would cause the States distinct injuries, injuries

which this Court must take into account as it considers the application. Rather than repeating the legal arguments that the direct respondents are already making here, this brief brings the States' parallel case to the Court's attention, focusing on the States' particular harms as they affect the balance of equities and the public interest.

ARGUMENT

The Executive Branch applicants ask the Court to grant a stay pending appeal, severely disrupting the status quo by allowing them to begin construction of disputed border barriers while the court of appeals considers (on an expedited basis) the district court's conclusion that their proposed funding is unlawful. Stay Appl. 1, 40.

This Court should deny the stay for the reasons explained by the direct respondents here. Briefly, the Executive Branch applicants lack authority to spend the funds at issue on border barrier construction because, among other reasons: (a) Congress denied the Executive Branch's request for those funds; (b) the planned construction is not an "unforeseen" need; and (c) building the border barriers is not a "military requirement." Additionally, respondents are correct that they have an independent constitutional cause of action which is not foreclosed by *Dalton v. Specter*, 511 U.S. 462 (1994). Further, the Executive Branch applicants cannot evade judicial review of their unlawful conduct here. Even if the zone of interests test applies (which it does not), respondents (as well as the States) would easily satisfy it. Finally, the Executive Branch applicants have not shown irreparable injury, and the balance of harms and public interest weigh heavily in respondents' favor, particularly given the significant environmental harms they stand to incur.

As this brief will show, the unique sovereign interests of California and New Mexico—two of the states where the disputed barriers would be built—further tip the balance of the equities against the application for a stay. The Executive Branch applicants make no mention of those interests, the States' separate but closely related lawsuit, or the separate declaratory judgment issued in favor of California and New Mexico on identical legal grounds. *See* Stay Appl. 38-40. But this Court must consider the possibility that a stay of the injunction would "substantially injure" California and New Mexico, who are manifestly "other parties interested in the proceeding." *Nken v. Holder*, 556 U.S. 418, 434 (2009); s*ee also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers).

The Executive Branch applicants seek to proceed with their proposed El Centro Project 1 and El Paso Project 1 without complying with California's and New Mexico's environmental laws that would otherwise apply to proposed federal projects. To do so they would invoke extraordinary waiver authority. But the Executive Branch applicants can only practically exercise that authority if they have the funds available to proceed with a project. And here, as the district court concluded, Congress provided only limited funding for border barriers in a select area of Texas in the 2019 Act, and no funding to construct barriers in California or New Mexico. What the Executive Branch applicants seek through their stay application is permission to change the status quo—in direct contravention of that judicial conclusion—without first convincing the court of appeals or this Court, after full briefing and argument, that the district court erred. That would irreparably harm the States and the public interest by undercutting the States' sovereign interests in enforcing their environmental laws protecting their water

quality, air quality, wildlife, and public health. The Court should reject any such request.

I. ALLOWING CONSTRUCTION TO BEGIN PENDING APPEAL WOULD SUBSTANTIALLY INJURE CALIFORNIA AND NEW MEXICO

A. Unlawful Diversion of Funds to Construct Border Barriers Allows the Executive to Encroach on State Sovereign Interests in Ways Never Authorized by Congress

States possess undeniable sovereign interests in their "power to create and enforce a legal code," *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*, 458 U.S. 592, 601 (1982), as well as in protecting the natural resources, wildlife, and public health within their borders. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (state has "broad regulatory authority to protect the health . . . of its citizens and the integrity of its natural resources"); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 596 (2011) ("The protection of public health falls within the traditional scope of a State's police powers"). And any time a State is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (state's inability to "employ a duly enacted statute . . . constitutes irreparable harm").

Moreover, the public at large has an interest in ensuring that the States' sovereign interests in enforcing valid state laws are protected from unlawful federal actions that undermine those interests, particularly when those actions are taken by one of the branches

at the expense of another. As the district court correctly recognized, the public "has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." App. 113a (quoting *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)). And as Justice Kennedy observed, "[c]oncentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998). (Kennedy, J., concurring).

Here, the Executive Branch applicants propose to dedicate $2.5 billion of diverted funding to building border barriers throughout the southwest border of the United States, including 52 miles of barriers in California and New Mexico. Notwithstanding its federal character, such construction would ordinarily be subject to substantial state oversight because of its effect on air, water, and biological resources. A number of specific examples are set out below. If, however, the Executive Branch applicants are permitted to proceed with the projects they propose here, they will invoke special waivers issued by the Department of Homeland Security under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 102(c), 110 Stat. 3009 (1996), for construction in the El Paso and El Centro Sectors, overriding "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" federal statutes identified in the waiver. 84 Fed. Reg. 17,185, 17,187 (Apr. 24, 2019); 84 Fed. Reg. 21,800-01 (May 15, 2019).

The legality of those waivers as such is not at issue here. But the waivers cannot practically be exercised unless there are funds lawfully available to build border projects like the ones proposed here. It is only the

unlawful diversion of the funds challenged in this litigation that makes it possible for the Executive Branch applicants to employ that waiver authority to override otherwise applicable state laws, sharply infringing on the States' sovereign interests.

B. Harms to California's Sovereign Interests

California has many laws designed to protect the State's water and air quality; wildlife, land, and other environmental resources; and public health. *See, e.g.*, Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-16104; California Endangered Species Act, Cal. Fish and Game Code §§ 2050-2089. Pursuant to this body of law, California agencies develop air quality, water quality, and wildlife resource management plans intended to accomplish California's environmental protection objectives. And, as described below, federal law normally permits or even requires application of these state laws to federal construction projects like the border barriers at issue here. But the Executive Branch applicants' unlawful diversion of funds to construct El Centro Project 1 and invocation of IIRIRA waivers prevents California from exercising its sovereign right to enforce its (1) water quality; (2) air quality; and (3) species protection laws.

1. Water Quality

Construction of El Centro Project 1 in Imperial County, California will disturb the soil in and near ephemeral streams and the Pinto Wash, tributaries of the New River. *California*, *supra*, Env. App'x in Supp. of Mot. Partial Summ. J. Ex. 2 (Dunn Decl. ¶¶ 8-13), ECF No. 176-2 (Env. App'x). Ordinarily, before such dredge and fill activities can proceed, federal officials would be required to obtain certification of compliance

with California's water quality standards from a California regional water quality agency. Cal. Water Code § 13260 (imposing requirements on "persons" prior to discharging waste); *id.* § 13050 (defining "person" to include "the United States, to the extent authorized by federal law"); *see also* 33 U.S.C. § 1341(a)(1) (state water quality certification required as part of federal permit). Indeed, federal officials have previously sought such certifications for construction projects in this area. Dunn Decl. ¶¶ 9-13. Further, pursuant to the federal Clean Water Act, the Executive Branch applicants would need to adopt water pollution mitigation measures in the course of obtaining a permit and state certification from the California regional water board. *Id.* ¶¶ 18-20. However, by effectuating the IIRIRA waiver through this funding diversion, the Executive Branch applicants would, if allowed to do so, bypass these requirements. This would undermine California's sovereign interests "in the conservation, control, and utilization of the water resources of the state" and in protecting "the quality of all the waters of the state . . . for use and enjoyment by the people of the state." Cal. Water Code § 13000. Their proposals are particularly injurious to California given that El Centro Project 1 "poses a high risk for storm water run-off impacting on water quality during the construction phase." Dunn Decl. ¶ 19. But due to the IIRIRA waiver, California is precluded from requiring the Executive Branch applicants to obtain the relevant permit through its regional water quality agency, and from ensuring that they implement best management practices for the preservation of water quality when constructing the border barriers.

2. Air Quality

As with water quality, applicants would ordinarily

be required to ensure El Centro Project 1 conforms with California's air quality standards by complying with the federal Clean Air Act as set forth in California's State Implementation Plan (SIP). 42 U.S.C. § 7506(c)(1). The Clean Air Act prohibits federal agencies from engaging in, supporting, or financing any activity that does not conform to a SIP. 40 C.F.R. § 93.150. "Conformity" violations include "increas[ing] the frequency or severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard . . . in any area." 42 U.S.C. § 7506(c)(1)(B)(ii)-(iii). These safeguards prevent federal agencies from interfering with states' abilities to comply with the Clean Air Act, which is meant to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Id.* § 7401(b)(1).

If not for the funding diversion and accompanying waiver, the local air district would enforce a rule (part of California's SIP) to reduce the amount of fine particulate matter generated from applicants' construction and earth-moving activities. *California, supra,* Request for Jud. Not. in Supp. of Partial MSJ Ex. 4 (Imperial County Air Pollution Control Dist. R. 801), ECF No. 176-3 (RJN). That rule requires the development and implementation of a dust-control plan for construction projects to prevent, reduce, and mitigate particulate matter emissions. 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 52.220(c)(345)(i)(E)(2); 75 Fed. Reg. 39,366 (July 8, 2010); R. 801. In addition to protecting Californians by supporting federal health standards, these rules help mitigate blowing dust that can cause additional acute regional or local health problems. RJN Ex. 5. Thus, by proceeding with the unlawfully funded construction without complying with California's

laws, the Executive Branch applicants would impair not only California's sovereign interest in protecting its environment, but also its interest in protecting public health.

3. Endangered Species

Finally, but for Executive Branch applicants' diversion of funds and use of the IIRIRA waiver, Executive Branch applicants could not build El Centro Project 1 without first ensuring the project "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2); Env. App'x Ex. 1 (Clark Decl. ¶ 15). Compliance with this provision would protect species that are threatened or endangered under California law and allow California to continue to implement habitat conservation agreements with federal agencies that impose limitations on habitat-severing projects like El Centro Project 1. Clark Decl. ¶¶ 17-19; RJN Ex. 6 ("Flat-tailed Horned Lizard Rangewide Management Strategy"). Executive Branch applicants' plan to exercise their waiver of these requirements protecting such threatened and endangered species to build border barriers with unlawfully diverted funds undermines California's ability to enforce the California Endangered Species Act and accomplish "the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species." Cal. Fish & Game Code § 2052.

C. Harms to New Mexico's Sovereign Interests

New Mexico also has enacted and enforces a variety of environmental laws to protect its air quality and wildlife. By using the funds at issue here to construct El Paso Project 1 in Doña Ana and Luna Counties

without complying with these laws, Executive Branch applicants would impair New Mexico's "protection of the state's beautiful and healthful environment" which is "of fundamental importance to the public interest, health, safety and the general welfare." N.M. Const., art. XX, § 21.

1. Air Quality

First, the federal border barrier construction project normally would be required to comply with a dust control plan that New Mexico adopted under the Clean Air Act. RJN Ex. 7; 40 C.F.R. § 51.930; N.M. Admin. Code §§ 20.2.23.108-113. The purpose of this plan is "to limit human-caused emissions of fugitive dust into the ambient air by ensuring that control measures are utilized to protect human health and welfare." N.M. Admin. Code § 20.2.23.6. As a result of Executive Branch applicants' unlawful funds transfer and IIRIRA waiver, New Mexico's ability to vindicate its sovereign interest in protecting human health and welfare by applying this plan to El Paso Project 1 is impaired.

2. Wildlife Corridors and Endangered Species

The funding diversion, waiver of all laws under IIRIRA, and resulting construction also 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. The Act requires New Mexico state agencies to create a "wildlife corridors action plan" to protect species' habitat. Env. App'x Ex. 6 (Traphagen Decl. ¶ 27). Several important wildlife corridors run through, or adjacent to, the El Paso Project 1 site. *Id.* ¶¶ 27-28. Pronghorn antelope,

mule deer, mountain lions, and bighorn sheep are included within the definition of "large mammals" that are specifically protected under the Act. 2019 N.M. Laws Ch. 97. El Paso Project 1 will completely block habitat corridors for these species. Traphagen Decl. ¶¶ 17, 27-31. New Mexico will be limited in its ability to "engag[e] in investigation and examination" to protect these important wildlife corridors if the stay is granted, thus undermining New Mexico's ability to enforce its laws. *New Motor Vehicle Bd.*, 434 U.S. at 1351.

Further, 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; 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. Traphagen Decl. ¶¶ 14-24, 26-27. Endangered plant species also likely would be harmed by the construction of El Paso Project 1, including two cactus species that are endangered under New Mexico law. N.M. Stat. Ann. § 75-6-1(D); Env. App'x Ex. 3 (Lasky Decl. ¶ 14). Applicants' proposed El Paso Project 1 would directly impair New Mexico's ability to protect these interests.

D. The Harms to Amici States' Sovereign Interests Are Significant, Irreparable, and Weigh Against the Executive Branch Applicants' Stay Application

These harms to the States' "sovereign interests and public policies" cannot be remedied by monetary damages, and are the type of irreparable harm that can

justify the imposition of injunctive relief against federal executive actions. *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001); *see also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("intangible injuries" that cannot be remedied by monetary damages "qualify as irreparable harm"). Moreover, because the public interest is served by the implementation of duly enacted state laws, *New Motor Vehicle Bd.*, 434 U.S. at 1351, the Executive Branch applicants' interference—by their funding diversions and waivers—with the States' ability to enforce their laws tips the scales further toward denying the stay application. *Nken*, 556 U.S. at 426 (identifying "where the public interest lies" as a factor in the stay analysis).

While Executive Branch applicants' assertion that the private respondents' interests here would be "largely protected . . . by the removal of any barriers found to be unlawful," Stay Appl. 39, is questionable even on its own terms, it is a non sequitur when applied to California's and New Mexico's sovereign interests. These would clearly still be irrevocably harmed even if the border wall were removed after construction, as the States would have permanently incurred the harm to their sovereign interests of being prevented from enforcing their own laws.

The public's interest in the enforcement of state laws that are designed to protect environmental resources from harm also weighs toward preserving the permanent injunction. *See* Cal. Gov't Code § 12600(b) ("[i]t is in the public interest to provide the people of the State of California . . . with adequate remedy to protect the natural resources of the state of California from pollution, impairment or destruction"); N.M. Const. art. XX, § 21 ("[t]he legislature shall provide for

control of pollution and control of despoilment of the air, water and other natural resources of this state"); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (recognizing the significance of a state exercising its police power to "protect the public interest in health [and] the environment"). This is even more so because many of the state laws are in furtherance of federal environmental laws and policies, and thus, advance a public interest recognized by the federal government. Pertinent here, California's SIP ensures compliance with the federal Clean Air Act, *see* 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 93.150, and California's regional water board requires compliance with the federal Clean Water Act, Dunn Decl. ¶¶ 18-19. Thus, if enforcement of these laws is improperly compromised, federal, as well as state, interests are harmed. And the Executive Branch applicants' "remedy" of removing border barriers *post*-construction would utterly fail to protect these interests, as it obviously would not prevent or reverse the environmental impacts associated with *construction in the first place*, including harms to water quality, air quality, and endangered species. Indeed, later demolition activities might well cause additional environmental harm.

As discussed above, applicants contend that Congress has given them the authority to waive all of these laws when building barriers at the border. But state law's displacement by federal law depends upon the federal government—in this case, the executive branch—acting in accordance with the Constitution, including separation of powers principles. *See City of New York*, 524 U.S. at 450 (Kennedy, J., concurring) ("when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny

without a sufficient check from the other two"). At the very least, to maintain the proper structural balance that our Constitution demands, the Executive Branch applicants should not be allowed to impose harm on the States' sovereign interests unless and until they can secure reversal of the district court's judgments on appeal.

II. A STAY WOULD DISRUPT THE STATUS QUO IN THE STATES' PARALLEL LITIGATION

A stay of the injunction that the district court granted to respondents would be particularly inappropriate because of the interrelationship between this case and the parallel litigation brought by the amici States. As described above, the district court denied injunctive relief to California and New Mexico, without prejudice, based in part on its view that an injunction running directly in favor of the States would be "duplicative" of the one it granted to respondents. *California* MSJ Order at 8; *see also* Stay App. 22a n.9. The States cross-appealed that denial, while making clear that the cross-appeal would not need to be adjudicated if the *Sierra Club* injunction remained in place. The Executive Branch applicants now seek a stay that they might interpret as in effect also precluding relief for the States (although they do not currently urge this point).

Notably, while the district court did not enter an injunction running specifically in favor of the States, it did grant a declaratory judgment in their favor on their claim that applicants' "use of funds . . . is unlawful" for border barrier construction in California and New Mexico. *California* MSJ Order at 10. Whether and to what extent the Executive Branch applicants would treat that judgment as binding on their rela-

tions with California and New Mexico—despite the absence of an injunction—is unclear given the government's statements in recent litigation. *See, e.g.,* Tr. of 9/5/2018 Hrg., ECF No. 228, at 103, *Texas v. United States*, No. 18-167 (N.D. Tex.) (Deputy Assistant Attorney General's statement that a declaratory judgment against the Government "operates in a similar manner as an injunction" because "[t]he government is presumed to comply with the law"); Resp. to Mot. for Expedited Consideration, Clarification or Stay at ECF p. 6-7, *Texas v. United States*, *supra*, (Dec. 21, 2018), ECF No. 216 (federal defendants' statement that "a declaratory judgment is the functional equivalent of an injunction against the federal government," but such defendants need not "immediately . . . comply with [a] declaratory judgment" that is not a final order).

Thus, while denying a stay here will clearly preserve the status quo while the expedited appellate process proceeds, granting a stay of the injunction entered only in *Sierra Club* could, under the unusual circumstances here, lead to uncertainty and further requests for relief in the parallel *California* case.

III. THE COURT'S DECISION IN *WINTER* DOES NOT SUPPORT THE STAY APPLICATION

While the Sierra Club respondents' interests alone were sufficient for the district court to grant an injunction to maintain the status quo, the interests of the amici States discussed above even more decidedly tip the balance of the harms toward denying the request for a stay under the factors listed in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The court of appeals conducted a thorough assessment of the Executive Branch applicants' purported harms and of the public interest, and concluded that they

failed to produce sufficient evidence that their asserted interests would be irreparably harmed in the absence of a stay. App. 69a-72a. Although the outcome of the Ninth Circuit's analysis was unfavorable to the Executive Branch applicants, that does not mean that the balancing was done incorrectly. *Cf. Winter*, 555 U.S. at 26 ("Of course, military interests do not always trump other considerations, and we have not held that they do.").

The Executive Branch applicants' assertion that *Winter*'s analysis of the balance of harms supports their argument here, Stay Appl. 39-40, fails in three critical respects—each of which justifies the imposition of injunctive relief and denial of the United States' stay application.

First, in *Winter*, the district court's injunction upset the status quo, because the Department of the Navy had been conducting sonar training exercises "for 40 years with no documented episode of harm." *Winter*, 555 U.S. at 33. Here, it is Executive Branch applicants' proposed border wall that would upend the status quo by constructing impenetrable barriers in areas where there currently are none. Thus, the United States' application seeks the *opposite* of what a stay is supposed to achieve. *See Nken*, 556 U.S. at 429 ("[a] stay 'simply suspend[s] judicial alteration of the status quo'").[2]

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[2] Further, the Executive Branch applicants have provided no evidence to justify their entitlement to extraordinary relief, which would allow them to alter the status quo by constructing a border wall while the Ninth Circuit considers this matter on an expedited schedule. The Executive Branch applicants point to their interest in drug interdiction as justification for constructing

Second, the Court's decision in *Winter* turned in part on the fact that more limited relief could have remedied plaintiffs' injuries, which were caused by defendants' alleged violation of the National Environmental Policy Act (NEPA), which is not the case here. NEPA itself "does not mandate particular results," but "imposes only procedural requirements to 'ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" *Winter*, 555 U.S. at 23. Accordingly, in *Winter* the district court could afford complete relief to plaintiffs under NEPA without a broad injunction. *Id.* at 33. Here, in contrast, a permanent injunction preventing the Executive Branch applicants from undertaking border barrier construction in California and New Mexico is the only relief that can effectively remedy the harm caused to the States by the Executive Branch's violation of law. And there is no claim here that the district court failed to "tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976) (internal quotation marks omitted).

Third, *Winter* did not involve the serious separation of powers problems, specifically those surrounding Congress's power of the purse, that the Executive Branch applicants' actions raise here. It is "the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Na-

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the wall, but do not explain why a wall is needed in these particular locations, nor why they are needed *immediately* when, as applicants acknowledge, the alleged number of drug seizures in the relevant sectors to date in FY 2019 is "comparable" to the drug seizures in those same sectors in FY 2018. Stay Appl. 7-8.

tion." *TVA v. Hill*, 437 U.S. 153, 194 (1978). The Appropriations Clause empowers Congress, not the executive branch, to direct these priorities by "assur[ing] that public funds will be spent according to the letter of the difficult judgments reached by the Congress as to the common good, and not according to the individual favor of Government agents." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 428 (1990). The court of appeals was thus correct to conclude that since "Congress did not appropriate money to build the border barriers Defendants seek to build here[,] Congress presumably decided such construction at this time was not in the public interest." App. 74a-75a.

* * *

Executive Branch applicants' complaint that the "funds at issue 'will no longer remain available for obligation after the fiscal year,'" Stay Appl. 35-36, is only a harm to the public interest if Congress intended that these funds be available for barrier construction. But Congress did not appropriate funds for a barrier in the areas where the Executive Branch applicants seek to build, and instead specifically refused to appropriate billions of dollars toward the proposed border wall in multiple states, including California and New Mexico. The Executive Branch applicants may be frustrated by this injunction and its underlying premise that they need congressional approval to take the actions at issue here. But that is a feature, not a bug, of our system of checks and balances. *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983) ("[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government").

CONCLUSION

This Court should deny the application for a stay pending appeal.

Respectfully submitted,

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