

August 6, 2019

Via CM/ECF

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: No. 18-36082, *Juliana v. United States*
July 26 Stay Order in *Sierra Club v. Trump*, S. Ct. No. 19A60

Dear Ms. Dwyer,

On August 1, 2019, Appellants filed a letter noting the Supreme Court granted a stay in *Sierra Club v. Trump*, 588 U.S. ____ (2019) (No. 19A60). Doc. 143. Contrary to Appellants' contentions, the Supreme Court's order did not "cast doubt" on the established availability of equitable causes of action directly under the Constitution, such as presented here.

In *Sierra Club*, the plaintiffs claim the Executive Branch's transfer of funds for use in constructing a border wall did not comply with the criteria Congress set under Section 8005 of the Department of Defense Appropriations Act of 2019 and, therefore, violated the Appropriations Clause. *Sierra Club v. Trump*, 929 F.3d 670, 689 (9th Cir. 2019). Denying a request to stay the orders enjoining the funds transfers, this Court rejected the argument that the plaintiffs conflated an act in excess of statutory authority with an *ipso facto* constitutional violation and, therefore, lacked a cause of action under *Dalton v. Specter*, 511 U.S. 462 (1994). *Id.* at 696.

In their application to the Supreme Court, the defendants argued the challenged injunction "rests entirely on the premises that . . . the Acting Secretary exceeded his statutory authority . . ." Application for Stay at 3, *Sierra Club*, 588 U.S. ____ (No. 19A60). Granting the requested stay, the Supreme Court spoke only to this issue under *Dalton* of availability of review for compliance with *statutory command*, merely noting the defendants "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*." 588 U.S. ____, slip op. at 1 (No. 19A60) (emphasis added).

Molly C. Dwyer
August 6, 2019
Page 2

Unlike *Sierra Club*, the instant case presents claims directly under the Fifth Amendment, and is *not based on statutory violations*. As such, the Supreme Court's order has no effect on this Court's rejection of the same APA arguments made by Defendants in the instant case. As this Court confirmed: "*Navajo Nation* and *Presbyterian Church* clearly contemplate that claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA." *Sierra Club*, 929 F.3d at 699.

Respectfully submitted,

s/ Philip L. Gregory
PHILIP L. GREGORY
(CSB No. 95217)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062

JULIA A. OLSON
(OSB No. 062230, CSB No. 192642)
Wild Earth Advocates
1216 Lincoln Street
Eugene, OR 97401

ANDREA K. RODGERS
(OSB No. 041029)
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117

Attorneys for Plaintiffs-Appellees

cc: All Counsel of Record (via CM/ECF)