

ORAL ARGUMENT TO BE SCHEDULED FOR DECEMBER 2026

No. 26-5306

United States Court of Appeals
for the District of Columbia Circuit

TOHONO O'ODHAM NATION,

Plaintiff/Appellant,

v.

MARKWAYNE MULLIN, in his official capacity as Secretary of the
U.S. Department of Homeland Security, et al.,

Defendants/Appellees.

On Appeal from the United States District Court for the District of
Columbia, No. 4:26-cv-2127-RJL (Hon. Richard J. Leon)

BRIEF OF AMICI CURIAE SALT RIVER PIMA-MARICOPA INDIAN
COMMUNITY AND AK-CHIN INDIAN COMMUNITY
SUPPORTING PLAINTIFF/APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici: Except for amici Salt River Pima-Maricopa Indian Community and Ak-Chin Indian Community, all other parties appearing in this Court and amici appearing below are listed in the Opening Brief.

B. Rulings Under Review: References to the rulings at issue appear in the Opening Brief.

C. Related Cases: Counsel for amici curiae are not aware of any related cases.

Dated: September 23, 2026.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, counsel states and certifies as follows:

Salt River Pima-Maricopa Indian Community and Ak-Chin Indian Community are federally recognized tribes located in the metropolitan Phoenix area. Neither tribe has any parent companies, and no publicly held companies have an ownership interest in either tribe.

Dated: September 23, 2026.

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STATEMENT REGARDING CONSENT TO FILE AND NECESSITY OF SEPARATE BRIEFING

All parties have consented to the filing of this amicus brief.

Under D.C. Circuit Rule 29(d), counsel certifies that this separate brief is necessary because the construction of a border wall affects the citizens of the Salt River Pima-Maricopa Indian Community and Ak-Chin Indian Community.

This brief focuses on two interrelated issues: (1) the irreparable harm that the proposed border wall will inflict upon both amici's sister tribe, Appellant Tohono O'odham Nation, and the broader O'odham people whose heritage is shared by amici's members; and (2) whether the public interest in building the wall outweighs those harms.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No other party's counsel authored this brief in whole or in part, no other party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person, party, or party's counsel contributed money to fund the preparation and submission of the brief.

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GLOSSARY

DHS U.S. Department of Homeland Security

IIRIRA Illegal Immigration Reform and Immigrant Responsibility Act

STATUTES & REGULATIONS

All applicable statutes and regulations are contained in the briefs of the parties.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae Salt River Pima-Maricopa Indian Community and Ak-Chin Indian Community are federally recognized Indian tribes under Section 16 of the Indian Reorganization Act of June 18, 1934. Together with the Tohono O’odham Nation and the Gila River Indian Community, amici make up the Four Southern Tribes, sometimes referred to as “Sister Tribes,” whose shared Hohokam ancestry and O’odham heritage give them deep ties to the Sonoran Desert and to one another. “All four tribes are predominantly O’odham-speaking” and “trace their heritage through oral tradition to the Hohokam.” Lynn S. Teague, *The Four Southern Tribes and the Hohokam of the Phoenix Basin* at 5 (2000), <https://tinyurl.com/f8r2bpc9>.

There are other O’odham groups that are not recognized by any form of official jurisdiction but are known and respected by other O’odham people on both sides of the United States-Mexico border. The O’odham homeland straddles international boundaries, and the O’odham people have called the Sonoran Desert home “since time immemorial.”

National Park Service, *Native Peoples of the Sonoran Desert: The O'odham*, <https://tinyurl.com/bdcpy77m>.

Because of their common heritage, the Four Southern Tribes collaborate regularly on matters of heritage preservation, intertribal collaboration, traditional cultural practices, repatriation efforts, and other issues of common concern. They have a shared interest in the lands and traditions that are integral to their cultural identity.

Amici tribes' shared cultural and religious traditions transcend tribal and national boundaries. The O'odham people have always appreciated, respected, and revered the natural environment. The Four Southern Tribes teach their people to share the landscape with the plants and animals and to respectfully harvest, hunt, and give thanks when taking any of the natural resources for their needs.

Place is important for these teachings. For amici, everything is connected. The land, the environment, the people, and the stories all tie together. Access to sites and trails is needed for their ceremonies to continue. For example, men of the Four Southern Tribes participate in a camp at a sacred site just south of the U.S.-Mexico border. This camp is used as a place to strengthen their cultural and spiritual knowledge and

to teach young O'odham men their responsibilities to their tribe and people. The stories and lessons tied to that area are taught to the younger generation of males. They have trails used throughout the history of their people leading into Mexico and back. During the Salt Pilgrimage, men of the tribes used the trails to connect to the sea where they would harvest salt crystals and shells to bring back to the community to be used in trade with other tribes. Quitobaquito Spring, a site being affected by the wall, is and was a stopping point for the men. O'odham men still walk the old trails, and the how and why of the trails are taught repeatedly to new generations of tribal members. Areas of importance are shown on the walks as well as stories shared that transfer knowledge so that amici's tribal history and culture continue forward.

Another trail is used for what tribal members call the Ma:lina Pilgrimage. Cedagi Vehai is the starting point for many. In the area is a special ceremonial site where everyone would first pay respect before starting their journey. Members walk hundreds of miles on old trails carrying healing prayers for their families, themselves, or their communities. They also walk to continue the tradition. It is not an easy desert stroll; it is a walk of sacrifice. Many tribal members say that this

pilgrimage is healing to one's soul. Elders tell stories, and young ones listen. In doing so, the culture continues.

Youth from the Four Southern Tribes join in the annual Unity Run, which begins in the original O'odham homelands in Mexico. Participants run from one community to the next, traveling through the Tohono O'odham Nation to the Ak-Chin Indian Community, then to the Gila River Indian Community, and, finally, ending their run when they reach the Salt River Pima-Maricopa Indian Community. Each night, they rest and listen to the history of their people told through stories and songs. They run to unite the tribes and strengthen their bond, and to pray for the health of their communities. They learn respect for one another, for the history of their tribe and culture, and, of course, for the act of running itself, which was a big part of the O'odham way of life. It is a grueling trek that takes strength and endurance, not only physically but mentally and spiritually. Youth aged 13 and up choose to accept this challenge despite the pain because the meaning of participating is more important.

Amici do not question the importance of protecting international borders. But the border's protection should not sacrifice the Four

Southern Tribes’ irreplaceable cultural resources, knowledge, sacred sites, and traditions.

Amici are affected by the U.S. Department of Homeland Security’s planned construction of a wall along the portion of the U.S.-Mexico border that is the subject of the Tohono O’odham Nation’s lawsuit. Despite comprising “one cultural group” along with the Tohono O’odham Nation and the Gila River Indian Community, Notice of Intended Repatriation: Arizona State University, School of Human Evolution and Social Change, Tempe, AZ, 91 Fed. Reg. 55901, 55902 (Aug. 31, 2026), amici were not consulted before DHS announced its plan to build a border wall, the construction of which will thwart the continued practice of centuries-old O’odham religious rituals and cultural traditions while forever altering—if not outright destroying—the sacred O’odham landforms and flora that lie along the U.S.-Mexico border.

For these reasons, amici have a significant interest in the issues in this appeal. The legal issues implicate core issues of tribal sovereignty and jeopardize the lands, culture, sacred sites, and traditions of the O’odham people. Amici, therefore, submit this brief supporting the

Tohono O’odham Nation and urging the Court to reverse the denial of a preliminary injunction.

SUMMARY OF ARGUMENT

This is a case about whether a district court may deny a preliminary injunction against construction that will irreparably harm tribal sovereignty, destroy and obstruct sacred tribal sites, and interfere with sacred religious and cultural rituals while serious questions about that construction’s legality remain unresolved. The United States has committed itself—as trustee, by statute, and by executive order—to protect tribal sovereignty, to preserve sites of religious and cultural importance to American Indians, and to safeguard Native peoples’ free exercise of their traditional religions. Those commitments define the equities a court must weigh before permitting an agency to build a border wall through O’odham ancestral lands while the Tohono O’odham Nation’s challenge to that project remains pending.

Instead of analyzing irreparable harm on its own, as this Court’s precedent requires, the district court found the Nation’s claimed injuries unlikely to materialize and speculated that future consultation might mitigate any alleged harm. That was error. The uncontroverted record

evidence shows that, absent a preliminary injunction, the wall's construction will invade the Nation's sovereign authority over its own land, permanently degrade or destroy sacred O'odham monuments—including the O'odham holy site of Shee'e Naggiak, as well as other sacred shrines and trail sites that lie along the U.S.-Mexico border—and foreclose the O'odham people's ability to complete centuries-old religious ceremonies, including the annual run to Baboquivari Mountain, which depends upon borderland access for its performance. None of these harms can be undone by money damages, mitigation, or after-the-fact consultation.

That is not the balance that the equities require. Although the government's and the public's interests are considered synonymous where the government is the opposing party, the public retains an interest in the government's compliance with the law, including upholding the strong federal policy to honor tribal nations. But the district court did not credit that interest. Although the government's alleged interests will, at most, be delayed by a preliminary injunction pending final judgment, the harms to the Nation and the O'odham

people, once inflicted, are indelible. This Court should reverse the district court’s denial of the Nation’s motion for preliminary injunction.

ARGUMENT

I. Federal law establishes a strong policy of protecting the sovereignty, monuments, and ceremonies of American Indians.

The U.S. Constitution vests Congress with “broad general powers to legislate in respect to Indian tribes.” *United States v. Lara*, 541 U.S. 193, 200 (2004). Incident to the exercise of those powers is the government’s “distinctive obligation of trust.” *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); accord *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (confirming “general trust relationship between the United States and the Indian people”). Indeed, “the Federal Government has charged itself with moral obligations of the highest responsibility and trust toward Indian tribes.” *Haaland v. Brackeen*, 599 U.S. 255, 275 (2023) (citations omitted and cleaned up). Courts thus judge government conduct toward tribes—here, DHS’s decision to construct a border wall that threatens to obstruct, impede, or destroy sacred O’odham monuments, traditions, and ceremonies—“by the most exacting fiduciary standards.” *Navajo Nation v. U.S. Dep’t of Interior*, 852 F.3d 1124, 1129–30 (D.C. Cir. 2017) (quoting *Seminole Nation*, 316 U.S. at 297).

Federal law reinforces that responsibility with respect to the sacred monuments, objects, traditions, and ceremonies of American Indians.

The American Indian Religious Freedom Act makes it

the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996. Section 101(d)(6) of the National Historic Preservation Act aims to protect “[p]roperty of traditional religious and cultural importance to an Indian tribe,” 54 U.S.C. § 302706(a), by compelling federal agencies “to consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking.” 36 C.F.R. § 800.2(c)(2)(ii). That obligation turns on whether tribes attach religious and cultural significance to the affected properties, regardless of the properties’ location.

Executive Order No. 13007, in turn, instructs federal agencies, “to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions,” to “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred

sites” on federal land. 61 Fed. Reg. 26771 (May 24, 1996). Thus, even on the government’s own contested theory of the Roosevelt Reservation, the 60-foot strip where it proposes to build is subject to these protections.¹ It is terrain that, according to the record, encompasses sacred O’odham sites, including Shee’e Naggiak, a sacred and prominent peak that sits “right on the international border.” JA0240–41 ¶ 29.

This strong federal policy of protection underscores the irreparable harm the Tohono O’odham Nation will suffer if this project proceeds.

The Secretary’s purported waiver here does not nullify the governing congressional policy. *See* Determination Pursuant to Section 102 of the Illegal Immigr. Reform and Immigrant Resp. Act of 1996, as Amended, 91 Fed. Reg. 45823 (July 21, 2026) (waiving certain statutory protections for border wall project). Nor does the authority to waive “legal requirements” under IIRIRA § 102(c)(1), 8 U.S.C. § 1103 note, undo the government’s well-established trust obligation. Both remain critical to the equitable calculus.

¹ Even if the government prevails on that theory, the Roosevelt Reservation itself notably states that the land subject to the reservation “may be used for public highways *but for no other purpose whatever*, so long as the reservation of same under this proclamation shall continue in force.” JA0649 (emphasis added).

The district court, however, incorrectly used the federal government's obligations against the Nation, finding that the Nation had not established irreparable harm due in part to "the possibility of mitigating plaintiff's injuries" "through consultation with the Nation and accommodations." JA0960. This speculation about what the government might do in the future cannot negate the irreparable harm to the Nation if this project is permitted to proceed.

The United States has committed itself—as trustee, by statute, and by executive order—to respect tribal sovereignty, to protect Native religious exercise, to preserve properties of traditional religious and cultural importance, and to avoid impairing the physical integrity of sacred sites. These commitments are not mere aspirations; they define the equities to be balanced when determining whether a preliminary injunction should have been granted in this case. In weighing the equities of allowing such monuments, traditions, and ceremonies to be obstructed, impeded, or destroyed, this Court may not proceed as though those commitments were never made.

II. Constructing the border wall before final judgment on the merits will irreparably harm the Nation and the O’odham people.

The district court never conducted a proper irreparable harm analysis before denying the Nation’s request for a preliminary injunction. Instead of “assum[ing], without deciding, that [the Nation] has demonstrated a likelihood that [DHS’s] conduct violates the law” as this Court has instructed, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006)—and, indeed, as the district court itself had done in other cases, *see, e.g., A.B.-B. v. Morgan*, 548 F. Supp. 3d 209, 221 (D.D.C. 2020) (Leon, J.) (“[T]he Court must assume plaintiffs’ likelihood of success on the merits when assessing whether irreparable harm exists.”)—the district court simply said the Nation’s claimed harms “are not likely to materialize” because the Roosevelt Reservation’s likely existence meant the Nation was unlikely to prevail on the merits. JA0960. This was error.

A proper irreparable harm analysis would have identified at least three harms that are likely, if not certain, to occur if the border wall project proceeds. Each of which “could not be adequately compensated for in the form of monetary damages.” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001); *accord Burgess v. Fed.*

Deposit Ins. Corp., 871 F.3d 297, 304 (5th Cir. 2017) (harm irreparable “if it cannot be undone through monetary remedies”) (citations omitted); *see also In re NTE Conn., LLC*, 26 F.4th 980, 990 (D.C. Cir. 2022) (“[F]inancial injury can be irreparable where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.”) (citation omitted and cleaned up).

A. The border wall will violate the Nation’s sovereignty.

The first such harm is the invasion and diminution of the Nation’s sovereignty. If the district court had not improperly conflated the likelihood of success analysis with the irreparable harm analysis, then the resulting irreparable injury would have been impossible to ignore.

“As a general rule, interference with the enjoyment or possession of land is considered ‘irreparable’ since land is viewed as a unique commodity for which monetary compensation is an inadequate substitute.” *Bad River Band of the Lake Super. Tribe of Chippewa Indians of the Bad River Rsrv. v. Enbridge Energy Co.*, 184 F.4th 874, 898–99 (7th Cir. 2026) (citation omitted); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing “power to exclude” as “one of the most treasured strands in

an owner’s bundle of property rights”). This rule “applies with extra force” where, as here, the Nation’s presumptive control of the site of the wall’s construction “implicates its sovereign power.” *Bad River Band*, 184 F.4th at 899. To that end, courts have repeatedly recognized that “an invasion of tribal sovereignty can constitute irreparable injury.” *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015) (Gorsuch, J.); accord *Poarch Band of Creek Indians v. Hildreth*, 656 F. App’x 934, 944 (11th Cir. 2016) (same); *Kewadin Casinos Gaming Auth. v. Draganchuk*, 584 F. Supp. 3d 468, 475–76 (W.D. Mich. 2022) (same). This case is no exception.

The Nation “exercise[s] inherent sovereign authority over [its] members and territories.” *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); accord *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 n.12 (1982) (“Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.”) (citation and emphasis omitted). This includes the Nation’s “inherent sovereign authority to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; and

to expel those who enter the reservation without proper authority.” *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1153 (9th Cir. 2020) (citation omitted and cleaned up).

The construction of a border wall on the Nation’s land without its permission unquestionably violates its sovereignty and jurisdiction over the affected tracts of tribal land. More precisely, allowing the wall’s construction to proceed over the Nation’s objection will undermine its sovereign right to decide for itself who may enter its territory and the uses to which its lands are to be put.

The resulting “loss of sovereign authority over the Tribe’s historic lands” “is not one that can be calculated in terms of money.” *Mashpee Wampanoag Tribe v. Bernhardt*, Civil Action No. 18-2242 (PLF), 2020 WL 3034854, at *3 (D.D.C. June 5, 2020) (citations omitted). It follows that “[t]he harm to the Nation’s sovereignty cannot be remedied by any other relief other than an injunction precluding the [wall’s construction] from proceeding.” *Tohono O’odham Nation v. Schwartz*, 837 F. Supp. 1024, 1034 (D. Ariz. 1993); accord *N. Arapaho Tribe v. LaCounte*, 215 F. Supp. 3d 987, 1000 (D. Mont. 2016) (“Harm to a tribe’s sovereignty

‘cannot be remedied by any other relief other than an injunction.’”) (citation omitted).

B. The border wall will degrade or destroy sacred O’odham sites.

The proposed border wall’s unavoidable degradation or destruction of sacred O’odham monuments and landforms likewise would be “beyond remediation.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297.

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987); *accord Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (same). This includes the destruction of “wildlife habitat, air and water quality, natural beauty, and other environmental and aesthetic values and interests.” *Nat’l Wildlife Fed. v. Burford*, 835 F.2d 305, 323 (D.C. Cir. 1987); *see also Nat’l Tr. for Historic Pres. in the U.S. v. Nat’l Park Serv.*, 185 F.4th 1185, 1221 (D.C. Cir. 2026) (collecting cases finding irreparable harm requirement met by permanent environmental or “aesthetic” injuries). “Damage to or destruction of” tribal sites of “cultural and religious significance” “easily” fits into this category. *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep’t of Interior*, 755

F. Supp. 2d 1104, 1120 (S.D. Cal. 2010); *accord Hualapai Indian Tribe v. Haaland*, 755 F. Supp. 3d 1165, 1197 (D. Ariz. 2024) (similar). So too here.

The environmental devastation likely to occur absent a preliminary injunction is vast. Record evidence shows that construction of the border wall “will have permanent and lasting impacts on the natural landscape and the drainage on the Reservation.” JA0126 ¶ 13. Constructing the planned “30-foot-tall barriers” will cause “substantial and long-lasting disturbances to soils, hydrology, desert pavement, and vegetation communities, and these impacts are unlikely to be fully reclaimed for centuries in the arid environment of the Reservation.” JA0140 ¶ 43a. The “[n]umerous construction access roads” required to transport materials for the wall’s construction “would permanently alter desert pavement, natural drainage patterns, and landscape features.” *Id.* ¶ 43b. And the “rugged and mountainous terrain” of the construction site will require “substantial earthwork, blasting, [and] mountaintop removal” that will make “permanent and irreversible alterations to the natural landscape and topography of the Reservation.” *Id.* ¶ 43c.

The O’odham people “attach[] cultural and religious significance” to the landforms, sacred sites, and flora and fauna likely to be degraded or

destroyed by the wall's construction. *Quechan Tribe*, 755 F. Supp. 2d at 1120. It would eviscerate many of the “sacred plants documented on or around the Nation’s border with Mexico” with which the O’odham people “over millennia” have cultivated “spiritual relationships,” JA0271 ¶ 16; JA0276 ¶ 28, and whose restoration would not occur “within our lifetime.” JA0275–76 ¶ 26. It would destroy Shee’e Naggiak, a volcanic peak that “sticks up prominently right on the international border,” JA0240–41 ¶ 29, and which record evidence shows has been identified as “a holy place and locus for summit ritual offerings, a critical landmark for one leg of the Salt Pilgrimage.” JA0332 ¶ 28; *see also* JA0044 ¶ 30 (describing “a mountainous peak along the border, a place that is sacred to our people” that the construction of a border wall would “completely destroy”). The same fate would likely befall the spiritually significant “shrines, petroglyphs, camp remnants, and trail treads” lining the Salt Pilgrimage trails, JA0330 ¶ 25, left behind by O’odham ancestors “to inspire and guide future generations.” JA0333 ¶ 31.

In sum, the record evidence shows that a border wall’s construction “would disturb the sacred natural-cultural landscape that is, in effect, the origin, destination, medium, and altar for O’odham religious belief

and practice.” JA0334 ¶ 34. The effects of that disturbance would not be transitory or trivial; they would be deep and lasting, forever scarring the sacred geography that is the O’odham identity.

This is not merely what “may occur” if construction of a border wall is allowed to continue before entry of final judgment on the merits. *Cf. KalshiEX LLC v. Commodity Futures Trading Comm’n*, 119 F.4th 58, 65–66 (D.C. Cir. 2024) (“some possibility of irreparable injury . . . is not enough”) (citations omitted and cleaned up). It is what the O’odham people are “almost certain” to endure, and for which “there can be no do over and no redress.” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8–9 (D.C. Cir. 2016) (citation omitted); *see also Apache Stronghold v. United States*, 782 F. Supp. 3d 756, 768 (D. Ariz. 2025) (holding tribe likely to be immediately and irreversibly harmed by loss of access to “ancestral sacred site” if land transfer to mining company not enjoined).

C. The border wall will interfere with sacred O’odham traditions and religious ceremonies.

The border wall’s likely interference with the religious freedom and associational rights of the O’odham people would be equally irreparable.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Catholic*

Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, “when there is an alleged deprivation of a constitutional right to free speech or freedom of religion, many courts find that no further showing of irreparable injury is necessary.” 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.). It is enough to show that those rights “are either threatened or in fact being impaired at the time relief is sought.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 301 (citations omitted).

The construction of a border wall unquestionably threatens the O’odham people’s ability to freely exercise their religious beliefs and to participate in cross-border O’odham traditions. The record amply demonstrates how a border wall would make it “impossible” for the O’odham people to complete the annual run to Baboquivari Mountain, which follows “the ancient trail from San Juan that has been used for centuries.” JA0195 ¶ 14. It would obstruct “traditional sacred paths marked by important religious landmarks” that O’odham boys follow on the Salt Run, an “ancient tradition and rite of passage.” JA0195–96 ¶ 16. Blocking these paths “would harm the practice and cut [the O’odham’s] relationship to [their] ancestors, [their] spirits, and [their] land.” JA0196

¶ 18. It is not enough to “run through other gates or points of entry.” *Id.* The obstruction or destruction of these paths means the loss of the sacred traditions and rituals that, like the O’odham themselves, are inextricably tied to the land on which they are performed. *See id.*

The wall’s previously discussed obstruction or destruction of sacred plants will also impede the performance of certain religious rituals and ceremonies that incorporate those plants. *See* JA0271–74 ¶¶ 15–21; JA0327–28 ¶¶ 18–19.

Indeed, by interfering with these and other cultural and religious practices, the wall’s construction again strikes at the core of the O’odham identity. The O’odham “do not simply visit” the trails that lead runners to Baboquivari, the forests that grow the sacred sahuaro, or the sites where their ancestors are buried; they “maintain a living relationship” with those places, just as their ancestors’ “footsteps, prayers, songs, and teachings remain connected to these places.” JA0262 ¶ 3. The O’odham “cannot be compensated with damages” for the destruction of this relationship. *Roman Catholic Archbishop of Wash. v. Bowser*, 531 F. Supp. 3d 22, 46 (D.D.C. 2021). And yet, unless the wall’s construction is

enjoined, that irreparable loss is “almost certain” to occur. *League of Women Voters*, 838 F.3d at 8.

* * *

Each of these injuries—loss of tribal sovereignty, destruction of sacred O’odham sites, and interference with the performance of cultural and religious practices—is a distinct injury likely to be suffered by the Nation and the O’odham people if a border wall is constructed before final judgment on the merits is entered. Consistent with this Court’s “high standard,” each injury is “both certain and great,” “actual and not theoretical,” “of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm,” and once inflicted, will be “beyond remediation.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 298 (citations omitted and cleaned up). The district court erred by finding otherwise.

III. The irreparable injury to the O’odham people outweighs any public interest in building a border wall before a final resolution of the Nation’s legal challenges.

The remaining factors—balance of equities and public interest—only underscore what’s at stake for the O’odham people if construction of the border wall is not enjoined pending resolution on the merits. “Where,

as here, the Government is the opposing party, the last two factors merge: the government's interest is the public interest." *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (citation omitted and cleaned up). Yet the public interest is no match for the likely irreparable harm that the wall's construction would inflict both on the Nation and on the O'odham people.

The district court concluded that "the Government's interests in securing the border, enforcing immigration laws, and ensuring public safety outweigh any surviving irreparable harms at this juncture." JA0960. But it did so based upon a fundamental misapplication of the irreparable harm analysis.

As explained above, the district court was required to "assume [the Nation's] likelihood of success on the merits," as the court in other cases has acknowledged it "must" when assessing irreparable harm. *A.B.-B.*, 548 F. Supp. 3d at 221. It didn't. Nor did it credit the settled public interest "in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters*, 838 F.3d at 12; *cf. Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 766 (2021) ("[O]ur system does not permit agencies to act

unlawfully even in pursuit of desirable ends.”). Instead, it arbitrarily weighed the government’s “significant” interests in border security and public safety against what it described as merely “alleged environmental and First Amendment injuries.” JA0960–61 (quoting *Blackie’s House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981)).

But the analysis is not so cut-and-dried. In fact, the undisputedly important public interests in public safety and border security “would be unaffected by issuance of the requested preliminary injunction.” *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 124 (D.D.C. 2018). Wall or no wall, “[t]he Executive Branch remains free to prosecute those who unlawfully enter the United States and institute removal proceedings against them.” *Id.* And the Nation, which has its own “critical interest in eliminating illegal activity at the border,” has long “work[ed] with CBP and Border Patrol” in pursuit of that shared interest. JA0038–39 ¶ 16. There is no evidence to suggest such measures have been ineffective. Exactly the opposite: the record evidence, which includes DHS’s own data, confirms that illegal crossings have plummeted. JA0217–21 ¶¶ 17–21. Put simply: “the security measures being implemented by the Nation and its federal partners have worked.” JA0221 ¶ 21.

Moreover, “the public also has an interest in ensuring that its government respects the rights” of all Americans. *M.G.U.*, 325 F. Supp. 3d at 124. And the record is replete with evidence of the wall’s likely interference with the Nation’s and the O’odham people’s rights to tribal sovereignty, to preservation of their sacred sites, and to the unimpeded exercise of their religious ceremonies and cultural traditions. *See supra* Part II.A–C. The interests touted by the government, conversely, “will . . . not be lost because of an injunction” but, at most, “merely delayed.” *Apache Stronghold*, 782 F. Supp. 3d at 768.

That is the “crucial” distinction here. *Id.* Absent a preliminary injunction, the losses will be numerous, substantial, and irreversible. That means if the Nation “ultimately wins on the merits,” both the Nation and the O’odham people “will have already suffered some or all of its enumerated immediate harms, even despite winning the day in this litigation.” *Id.* The potential toll on the public interest cannot compare. Even in the government’s “riskiest scenario,” the “only harm will have been a delay” of the construction of a wall which, based on DHS’s own data, is not necessary to prevent illegal border crossings. *Id.* The equities thus “tip[] sharply” in favor of a preliminary injunction. *Id.* at 769.

CONCLUSION

Amici respectfully request that the Court reverse the district court's decision denying the Nation's motion for preliminary injunction.

RESPECTFULLY SUBMITTED this 23rd day of September, 2026.

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CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with the type-volume requirement of Fed. R. App. P. 29(d) because this brief contains 5,009 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century font using Microsoft Word.

Dated this 23rd day of September, 2026.

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on September 23, 2026, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated this 23rd day of September, 2026.

s/Matthew J. Stanford

Matthew J. Stanford

CIRCUIT RULE 29(d) CERTIFICATE

Pursuant to Circuit Rule 29(d), I hereby certify that this separate amicus curiae brief is necessary and it was not practicable to join with other amicus briefs filed in this case.

Dated this 23rd day of September, 2026.

s/Matthew J. Stanford
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