No. 15-2130

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE, WILDEARTH GUARDIANS, and NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs-Appellants,

v.

SALLY JEWELL, U.S. BUREAU OF LAND MANAGEMENT, and NEIL KORNZE,

Defendants-Appellees,

and

WPX ENERGY PRODUCTION, LLC, ENCANA OIL & GAS INC., BP AMERICAN CO., CONOCOPHILLIPS CO., BURLINGTON RESOURCES OIL & GAS CO. LP, ANSCHUTZ EXLORATION CORP., and AMERICAN PETROLEUM INSTITUTE,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of New Mexico
No. 1:15-cv-00209-JB-LF, Honorable James O. Browning, District Judge

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***AMICI CURIAE* BRIEF BY COALITION OF CONSERVATION ORGANIZATIONS IN SUPPORT OF PLAINTIFFS' REHEARING PETITION**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amici Curiae* hereby state that they are non-governmental, non-profit public interest organizations. None of them issues stock of any kind, nor has parent or subsidiary corporations. Pursuant to Fed. R. App. P. 25(a)(5) and Tenth Circuit Rule 25.5, undersigned counsel also certifies that all required privacy redactions have been made.

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae ("*Amici*") file this brief in support of rehearing pursuant to Federal Rule of Appellate Procedure 29(b) and Tenth Circuit Rule 29.1. *Amici* are a broad-based coalition of non-profit conservation organizations that regularly litigate in federal courts throughout the country, including the Tenth Circuit and district courts within this Circuit.

On behalf of millions of Americans, *Amici* seek to protect public lands, wildlife and animals, and natural resources, which frequently requires *Amici* to challenge governmental activities pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, and which often necessitates seeking preliminary injunctions on the basis of an incomplete (or non-existent) administrative record due to the time-sensitive nature of many federally authorized activities. Thus, the Tenth Circuit's standard for obtaining preliminary injunctive relief in order to temporarily maintain the status quo and to avoid irreparable harm until a court can hear the case on a full record is a matter of great interest to *Amici*, especially because the panel's decision makes obtaining an injunction significantly more difficult in the Tenth Circuit than in the majority of its sister circuits and also erects

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No persons other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. No party objects to the filing of this brief.

a far more stringent standard than the longstanding test this Court applied before the panel's recent decision. The specific interests of *Amici* are as follows:

- Alliance for the Wild Rockies is a non-profit environmental organization that seeks to secure the ecological integrity of the Wild Rockies Bioregion through citizen empowerment and the application of conservation biology, sustainable economic models, and environmental law.

- The American Wild Horse Preservation Campaign ("AWHPC") is a national wild horse advocacy organization whose grassroots mission is endorsed by a coalition of more than sixty horse advocacy, public interest, and conservation organizations. AWHPC works to protect wild horses and burros by defending their freedom, protecting their habitat, and promoting humane standards for treatment and management of these national icons.

- Animal Legal Defense Fund ("ALDF") is a national non-profit animal protection organization that uses education, public outreach, investigations, legislation, and litigation to protect the lives and advance the interests of animals, including those raised for food. ALDF's work is supported by more than 110,000 members nationwide, including in the Tenth Circuit, where ALDF regularly litigates cases and seeks injunctive relief.

- Center for Biological Diversity ("CBD") is a national non-profit membership organization that strives to secure a future for animals and plants hovering on the brink of extinction. On behalf of its more than 225,000 members and supporters, CBD is actively involved in species and habitat protection advocacy throughout the United States, including in states located within the Tenth Circuit.

- Defenders of Wildlife is a national non-profit organization with over one million members and supporters across the country, including thousands of members within the Tenth Circuit. Defenders is dedicated to the protection and restoration of all native wild animals and plants in their natural communities.

- Friends of Animals is a non-profit, international animal advocacy organization founded in 1957. Friends of Animals works on behalf of more than 200,000 members and supporters to cultivate a respectful view of nonhuman animals, free-living and domestic, with a primary goal of freeing animals from cruelty and institutionalized exploitation around the world.

- Great Old Broads for Wilderness is a national grassroots organization, led by elders, that engages and inspires activism to preserve and protect wilderness and wild lands. Conceived by older women who love wilderness, Broads gives voice to the millions of older Americans who want to protect their public lands as Wilderness for this and future generations.

- Public Employees for Environmental Responsibility ("PEER") is a national non-profit organization based in Washington, D.C. with field offices and supporters throughout the United States. PEER serves and protects current and former federal and state employees of land management, wildlife protection, and pollution control agencies who seek to promote an honest and open government and help hold agencies accountable for faithfully implementing and enforcing the environmental laws entrusted to them by Congress. In service of this mission, PEER frequently litigates in federal courts, including in the Tenth Circuit, concerning environmental issues.

- Rocky Mountain Wild ("RMW") is a non-profit organization that protects, connects, and restores wildlife and wild lands in the Southern Rocky Mountain region. RMW utilizes science, activism, and legal procedures to protect rare and imperiled plant and species in Colorado, Wyoming, Utah, and New Mexico. Along with our 4,000 members and supporters, we are working for a biologically healthy future for the mountains, plains, and deserts of our region.

- San Luis Valley Ecosystem Council ("SLVEC") is a Colorado-based non-profit organization working to protect and restore the biological diversity, ecosystems, and natural resources of the Upper Rio Grande region, balancing ecological values with human needs. SLVEC achieves these objectives through education, stewardship practices, community investment, and public policy advocacy efforts.

- Southern Utah Wilderness Alliance ("SUWA") is a non-profit organization that seeks to preserve the outstanding wilderness at the heart of the Colorado Plateau, and to maintain these lands in their natural state for the benefit of all Americans. SUWA promotes local and national recognition of the region's unique character through research and public education; supports both administrative and legislative initiatives to permanently protect the Colorado Plateau wild places within the National Park and National Wilderness Preservation Systems, or by other protective designations where appropriate; builds support for such initiatives on both the local and national level; and provides leadership within the conservation movement through uncompromising advocacy for wilderness preservation.

- The Cloud Foundation ("TCF") is a Colorado-based non-profit organization dedicated to the preservation of wild horses and burros on our nation's public lands. TCF is a recognized leader in educating the American public about the existence of wild horses and burros, involving Americans in protecting them on their legally designated Western ranges.

- Western Watersheds Project is a West-wide non-profit environmental group working to protect watersheds and wildlife, principally on public lands, including through litigation in federal courts such as the Tenth Circuit.

- Wilderness Workshop is a grassroots, place-based, public lands conservation organization working to protect the ecological integrity of the White River National Forest and surrounding public lands.

ARGUMENT

Amici emphatically support Plaintiffs' rehearing request because this case presents an exceptionally important question requiring further review to avoid unnecessary conflicts with precedent from the Supreme Court, sister circuits, and even this Court. Over Judge Lucero's forceful dissent, the panel held that the Supreme Court's ruling in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), invalidated the "serious questions" standard for preliminary injunctions, despite *Winter's* total silence on this standard, which this Court and most sister circuits have long employed. For over fifty years, the "serious questions" standard has afforded district courts equitable discretion to issue injunctions where factors of irreparable harm, the balance of equities, and the public interest tip strongly in a plaintiff's favor and the plaintiff raises serious questions on the merits, even if the court cannot find that the plaintiff is likely to succeed. *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1285-86 (10th Cir. 2016) (Lucero, J., dissenting). Rehearing is imperative to address this critically important issue and avoid an unnecessary circuit split, which threatens to frustrate judicial review of federal agency actions proceeding on rapid schedules.

I. THE PANEL ERRED BY FINDING THE SUPREME COURT OVERRULED A LONGSTANDING EQUITABLE STANDARD *SUB SILENTIO*.

A. The Widely Accepted "Serious Questions" Test Reflects Venerable Equitable Principles.

As Judge Lucero noted, the Tenth Circuit, like "[a] majority of [its] sister circuits," has employed the "serious questions" standard for preliminary injunctions "[f]or more than fifty years." *Dine Citizens*, 839 F.3d at 1286 (citing *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781–82 (10th Cir. 1964)). This widely accepted test reflects longstanding equitable principles. *See Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur*, 53 F. 98, 101 (6th Cir. 1892) (Jackson, J.) (quoting the "learned judge" Lord Cottenham's admonitions that a court issuing an injunction "'must satisfy itself not that the plaintiff has certainly a right, but that he has a fair question" and that "[i]t is quite sufficient if the court finds . . . a proper subject of investigation"); *City of Newton v. Levis*, 79 F. 715, 718 (8th Cir. 1897) ("A preliminary injunction . . . may properly issue whenever the questions of law or fact are grave and difficult" and other factors favor relief); *Massie v. Buck*, 128 F. 27, 31 (5th Cir. 1904) ("grave questions of law" warrant injunctive relief); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 n.2 & 743 n.10 (2d Cir. 1953) (collecting cases supporting the proposition that "it will ordinarily be enough that the plaintiff has raised questions

going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation").

Over eight decades ago, the Supreme Court embraced the "serious questions" test:

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

Ohio Oil Co. v. Conway, 279 U.S. 813, 814 (1929). The Court has routinely emphasized that "[t]he essence of equity jurisdiction has been . . . [f]lexibility rather than rigidity." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("Equity eschews mechanical rules; it depends on flexibility."); *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294, 300 (1955) ("Traditionally, equity has been characterized by a practical flexibility. . . ."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

Moreover, after *Winter*, the Court has continued to "emphasiz[e] the need for 'flexibility.'" *Holland v. Florida*, 560 U.S. 631, 650 (2010) ("follow[ing] a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules"). Accordingly, the "serious questions" test derives not only from decades of this

Court's precedent, but over a century of equitable reasoning in English and American courts.

B. *Winter* Did Not Consider The "Serious Questions" Test Or Critical Distinctions Between That Test and the Invalidated Standard.

In *Winter*, the Supreme Court held that a Ninth Circuit test allowing a preliminary injunction based on a "possibility" of irreparable harm was "too lenient." *Winter*, 555 U.S. at 22. Analyzing *only* this "possibility" standard, the Court did not consider the long accepted "serious questions" standard—despite the Ninth Circuit having articulated this test below. *Natural Res. Def. Council v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008). In dissent, Justice Ginsberg noted that "[t]his Court has never rejected [the sliding scale] formulation, and I do not believe it does so today." *Winter*, 555 U.S. at 51.

The panel's elimination of the "serious questions" standard overlooked three critical distinctions between this test and the one *Winter* invalidated. First, as Judge Lucero noted, the "possibility" of irreparable harm standard was too lenient because it "runs counter to the 'basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'" *Dine Citizens*, 839 F.3d at 1287-88 (quoting *Younger v. Harris*, 401 U.S. 37, 43–44 (1971)). The "possibility" standard eroded the need to show irreparable injury, which the Court

"has repeatedly held [is] the basis for injunctive relief," *Weinberger*, 456 U.S. at 312—unlike the "serious questions" test which *requires* demonstrating likelihood of irreparable harm.

Second, the panel did not consider the "good reasons to treat the likelihood of success differently" than irreparable harm, which District Court Judge Mosman explained when sitting by designation in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1139 (9th Cir. 2011). "[A] district court at the preliminary injunction stage is in a much better position to predict the likelihood of harm than the likelihood of success" due to the "accelerated schedule" and limited record lacking "clarity and development that will come later." *Id.* at 1139–40. The realities of preliminary injunction proceedings thus provide a principled, pragmatic reason to treat likelihood of success differently than irreparable harm.

Third, the panel overlooked the fact that, unlike the longstanding "serious questions" test, the "possibility" of harm test rejected in *Winter* reduced the overall burden for obtaining injunctions. Because the "serious questions" test requires plaintiffs to demonstrate that other factors tip "sharply" in plaintiff's favor—a heavier burden than otherwise would be the case—the "'overall burden is no lighter than . . . under the likelihood of success standard.'" *Dine Citizens*, 839 F.3d

at 1288 (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 36 n.5 (2d Cir. 2010)).[2]

C. Most Circuits Have Held The "Serious Questions" Test Survived *Winter*.

The vast majority of circuits considering this issue have held, as Judge Lucero would have, that the "serious questions" test survived *Winter*. *Cottrell*, 632 F.3d at 1131–35; *Citigroup*, 598 F.3d at 36 n.5; *Hoosier Energy Rural Electric Coop, Inc. v John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *In re Revel AC, Inc.*, 802 F.3d 558 (3d Cir. 2015); *but see Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *vac'd* 559 U.S. 1089 (2010).[3]

In retaining the "serious questions" test, the Ninth Circuit emphasized its practical value, with Judge Mosman explaining that the test "preserves the

[2] The panel stated that the invalidated standard required a "strong likelihood of prevailing on the merits" to balance only a "possibility" of irreparable harm, *Dine Citizens*, 839 F.3d at 1282, but the Ninth Circuit actually required "probable success on the merits and the possibility of irreparable injury," a lightened overall burden, *Winter*, 518 F.3d at 677.

[3] The Fourth Circuit's ruling, issued soon after *Winter*, neither had the benefit of its sister circuits' reasoning nor considered the distinctions discussed above. After vacatur, the Fourth Circuit again rejected its test, which unlike the "serious questions" test before this Court, allowed injunctions to issue based on a *possibility* of irreparable harm and "allowed [district courts] to *disregard* some of the preliminary injunction factors." *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (emphasis added).

flexibility that is so essential to handling preliminary injunctions, and that is the hallmark of relief in equity." *Cottrell*, 632 F.3d at 1139. The court also reasoned that eliminating the "serious questions" test "would be such a dramatic reversal in the law that it should be very clearly indicated." *Id.* at 1134.

The Second Circuit discussed Supreme Court precedent extensively, determining that the Court had not intended to eliminate the "serious questions" test's "venerable standard." *Citigroup*, 598 F.3d at 38. The court carefully reviewed three cases, including *Winter*, before concluding that "[i]f the Supreme Court had meant for [these cases] to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself." *Id.* The Second Circuit also noted the Court's *flexible* indication before *Winter* that a "fair chance" of success was sufficient, *id.* at 37, and its *later* application of a flexible test in an analogous situation, *id.* at 38 n.8 (discussing *Hollingsworth v. Perry*, 558 U.S. 183 (2010)). Ultimately, the Second Circuit found "no command from the Supreme Court that would foreclose the application of our established 'serious questions' standard." *Id.* at 38.

The panel's ruling did not discuss the contrary rulings from sister circuits, the important distinctions between the "serious questions" test and the standard *Winter* invalidated, or the "serious questions" test's deep historical precedent.

Accordingly, this Court should grant panel rehearing and/or rehearing en banc to address these exceptionally important issues.

II. THE PANEL'S RULING CONFLICTS WITH THE TENTH CIRCUIT'S POST-*WINTER* DECISIONS.

Since *Winter*, this Court has issued three rulings discussing the "serious questions" test without suggesting it was problematic. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013); *Newland v. Sebelius*, 542 F. App'x 706, 708–09 (10th Cir. 2013); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 n.3 (10th Cir. 2009). In 2013, this Court upheld a preliminary injunction issued under the "serious questions" test, *Newland*, 542 Fed. App'x at 708–09, where the district court stated that "because the Tenth Circuit has continued to refer to this relaxed standard, I assume it still governs." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1294 n.7 (D. Colo. 2012) (citing *RoDa Drilling*, 552 F.3d at 1209 n.3); *see also San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1239 n.1 (D. Colo. 2009) (applying the serious questions test in reliance on *Roda Drilling*). Other district courts have also continued to apply the serious questions test. *See, e.g., Petrella v. Brownback*, 980 F. Supp. 2d 1293, 1309 (D. Kan. 2013).

The panel's majority opinion did not address the Tenth Circuit and district court rulings continuing to apply the "serious questions" test post-*Winter*.

Accordingly, this unaddressed tension, if not outright conflict, in the Court's post-*Winter* precedents reinforces the propriety of rehearing.

III. THE PANEL'S DECISION IS AN OBSTACLE TO EFFECTIVE JUDICIAL REVIEW OF FEDERAL AGENCY ACTION.

Under the APA, courts review agency action based on an "administrative record" containing all materials before an agency when it made a challenged decision. However, the full record is generally unavailable at the preliminary injunction stage, when plaintiffs—and the court—have only a minuscule fraction of the entire record as contained in publicly available documents. This limited record often lacks evidence on crucial issues, such as whether an agency violated the APA by "entirely fail[ing] to consider an important aspect of the problem [or] offer[ing] an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This limited preliminary injunction record often does not equip courts to realistically assess either party's likelihood of success, aptly illustrating Judge Mosman's concern that it can be "almost inimical to good judging to hazard a prediction about which side is likely to succeed." *Cottrell*, 632 F.3d at 1139–40. In such cases, "the *better* question to ask is whether there are serious questions going to the merits" because "[t]hat question has a legitimate answer" whereas "[w]hether plaintiffs are likely to prevail often does not." *Id.* at 1140; *see also Citigroup*, 598 F.3d at 35 (noting that "the greater uncertainties

inherent at the outset of particularly complex litigation" make requiring likelihood of success "in every case . . . unacceptable as a general rule"). In APA cases, the "serious questions" test is an especially valuable tool for courts deciding whether to maintain the status quo during litigation.

The panel's elimination of the "serious questions" test is an obstacle to effective judicial review of agency action. A rigid requirement to show likelihood of success without access to critical evidence will make obtaining a preliminary injunction significantly more difficult, even where plaintiffs easily establish that other factors tip strongly in their favor and even where the plaintiffs, after obtaining a full record, would have a compelling claim that the government had acted in an unlawful or arbitrary manner. Without preliminary injunctions preserving the status quo where serious questions have been raised, contested agency actions—which often proceed on timelines that overtake the ability of federal judges to issue final merits dispositions—may be complete when the parties brief dispositive motions, threatening to render entirely valid claims moot. *See Revel*, 802 F.3d at 567 ("[T]he District Court *denied* a stay, and the practical effect was to resolve [the plaintiff's] appeal on the merits, as [the completion of the contested action] would have mooted its appeal.").

Furthermore, the panel's creation of an unnecessary circuit split invites the government to forum shop by seeking to transfer cases to the Tenth Circuit to take

advantage of a rigid preliminary injunction standard. Such situations could easily arise from agency actions regarding public lands, wildlife, or other resources that cross state boundaries between the Ninth and Tenth Circuits. Rehearing is thus necessary not only to avoid inflating this Court's workload, but also because "[t]he avoidance of unnecessary circuit splits furthers the legitimacy of the judiciary and reduces friction flowing from the application of different rules to similarly situated individuals based solely on their geographic location." *United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012).

CONCLUSION

In 1944, the Supreme Court cautioned that, when faced with a potential change to "equity practice with a background of hundreds of years," courts should "resolve [] ambiguities . . . in favor of that interpretation which affords a full opportunity for equity courts to treat [] proceedings . . . in accordance with their traditional practices." *Hecht*, 321 U.S. at 329–30. The Court's explanation remains apt today:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. . . . We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.

Id. Here, the panel erred because it too "lightly implied" that *Winter* invalidated, *sub silentio*, over a century of equitable jurisprudence and a half-century of Tenth

Circuit precedent, which continues to be applied by the vast majority of circuits to consider this issue. Accordingly, the Court should grant rehearing on this crucially important question.

Respectfully submitted,

DATED: December 19, 2016

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the type and volume limitations of Fed. R. App. P. 29(b)(4). The brief contains 2,599 words.

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CERTIFICATE OF SERVICE

I, William S. Eubanks II, hereby certify that on December 19, 2016, I served copies of this *amici curiae* brief on all counsel of record in this case by way of electronic mail (ECF filing)—in addition to submitting the requisite number of identical hard copies to the Court—and I further certify that all parties to this case are registered to receive ECF filings in this matter.

DATED: December 19, 2016

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