

No. 13-15227

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

DRAKES BAY OYSTER COMPANY and KEVIN LUNNY,

Plaintiff-Appellants,

v.

KENNETH L. SALAZAR, in his official capacity as Secretary,  
U.S. Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR;  
U.S. NATIONAL PARK SERVICE; and JONATHAN JARVIS, in his official  
capacity as Director, U.S. National Park Service,

Defendant-Appellees.

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On Appeal from the United States District Court  
for the Northern District of California  
(Hon. Yvonne Gonzales Rogers, Presiding)  
District Court Case No. 12-cv-06134-YGR  
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**PLAINTIFF-APPELLANTS' [PROPOSED] RESPONSE TO  
AMICI CURIAE BRIEF**

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Amici curiae's brief does nothing to show why the motion for an injunction pending appeal filed by Drakes Bay Oyster Company and Kevin Lunny (together, "DBOC") should not be granted. Instead, it demonstrates two reasons why amici's motion for leave to file their brief should not be granted.

First, "the filing of multiple amici curiae briefs raising the same points in support of one party is disfavored." Circuit Advisory Committee Note To Rule 29-1. But the amici's brief raises the same points in favor of Defendants that amici raised in the district court.

Second, "amici briefs should not repeat arguments or factual statements made by the parties." Circuit Advisory Committee Note To Rule 29-1. But every argument of substance, and much of the evidence, cited by amici are the same as those offered by Defendants.

DBOC's motion should be granted.

## **I. THE BALANCE OF THE EQUITIES FAVORS GRANTING THE INJUNCTION**

Amici's main argument is that "the environmental harm resulting from continuing [DBOC's] operations far outweighs any short-term impacts." Amici Curiae Brief [etc.] (doc. 18-3) ("Amici Brief") at 7. Amici made this same argument below. Abbasi Decl. Ex. 5 ("Amici PI Opp.") at 14:18-20:17.

Defendants also make this same argument here. *See* Defendants' Opposition [etc.] (Docket No. 17-1) ("Opp.") at 19 ("the public interest in the quality of the Drakes Estero environment weighs against an injunction"). But the district court did not accept this argument. *See* Order at 24:10-12 (science is "mixed" and "cannot be

resolved at this stage”), 30:17-19 (court cannot determine whether “the adverse environmental consequences of denying an injunction . . . weigh more strongly than the environmental consequences of enjoining that removal”). DBOC also shows why this argument is wrong, and why the equities favor an injunction pending appeal, in part D of the Argument section of their reply brief.

## **II. THE PUBLIC INTEREST FAVORS GRANTING THE INJUNCTION**

Amici first state, without argument, that “there is no merit to the contention that the district court ‘misapprehended’ Section 124 and [other laws].” Amici Brief at 8. Amici argued this same point below. Amici PI Opp. at 7:10-12 (“there is no likelihood that DBOC will succeed on the merits of any of its arguments”). Defendants also make the same argument here. Department of the Interior’s Opposition to Plaintiffs’ Emergency Motion for Injunction Pending Appeal, Docket No. 17-1 (hereinafter “E. Opp.”) at 14-16. DBOC shows why this argument is wrong in part C of the Argument section of their reply brief.

Amici next argue that “there is no indication” that Section 124 superseded the laws Defendants had claimed prohibited DBOC’s continuing operations. Amici Brief at 8; *see also id.* at 10 (arguing that “there is no basis to conclude that Section 124 ‘explicitly overruled’ the 1976 Acts). Amici argued this same point below. Amici PI Opp. at 7-8. But as even Defendants admit, Section 124 was designed to make it easy to issue DBOC the permit notwithstanding those laws. *See* E. Opp. at 10-11 (“the Park Service had advised DBOC that . . . existing constraints . . . would preclude a new [permit] . . . [but] by enacting Section 124, Congress removed those constraints”). Amici are thus wrong.

Finally, amici cite *Alliance for the Wild Rockies v. Salazar* for the proposition that “a rider passed with no debate to benefit a private party” may not reflect the public interest. Amici Brief at 8 n.1. But amici conveniently ignore the holding of *Alliance*: that a rider whose plain terms and legislative history evince Congress’s intent to apply it asymmetrically, must be applied asymmetrically. *See Alliance for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123, 1125, 1127 (D. Mont. 2011) (rider enacted “without regard” to other laws is “limited in its application” to overriding those laws).

### III. CONCLUSION

DBOC’s motion should be granted.

DATED: February 21, 2013

Respectfully submitted,

CAUSE OF ACTION

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 21, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: February 21, 2013

Respectfully submitted,

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