No. 20-138

In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' MOTION TO VACATE AND REMAND IN LIGHT OF CHANGED CIRCUMSTANCES

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Pursuant to Rule 21.2(b) of the Rules of this Court, the Acting Solicitor General, on behalf of petitioners, President Joseph R. Biden, Jr., et al., respectfully moves that the Court vacate the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case with instructions that the district court's judgment be vacated so that the effects of relevant changed circumstances on this case can be considered by the lower courts in the first instance.

This case concerns actions taken by the then-Acting Secretary of Defense to construct a wall at the southern border of the United States using approximately $2.5 billion in funds transferred between Department of Defense (DoD) appropriations accounts under two provisions of the Department of Defense Appropriations Act, 2019 (2019 Act), Pub. L. No. 115-245, Div. A, 132 Stat.

2982. This Court granted the government's petition for a writ of certiorari to address whether respondents have a valid cause of action to challenge those transfers and, if so, whether the transfers were lawful.

On January 20, 2021, however, President Biden issued a proclamation declaring that "[i]t shall be the policy of [his] Administration that no more American taxpayer dollars be diverted to construct a border wall." Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 27, 2021). In furtherance of that policy, the President directed the Secretary of Defense and the Secretary of Homeland Security to immediately pause work on border-wall construction and to develop a plan "for the redirection of funds concerning the southern border wall." *Id.* at 7225-7226. In light of the President's proclamation, the government moved to remove this case from this Court's February argument calendar and to hold the case in abeyance, and the Court granted that motion.

On June 11, 2021, DoD and the Department of Homeland Security (DHS) announced that they had completed the plans called for in the President's proclamation. See App., *infra*, 1a-18a. DoD's plan confirms a prior announcement on April 30, 2021 that it was canceling all border-wall construction projects and that it would not use the challenged funds for any further border-wall construction. *Id.* at 1a; see Enclosure to Letter from Elizabeth B. Prelogar, Acting Solicitor General, to Hon. Scott S. Harris, Clerk (April 30 Letter Enclosure). DoD's plan further provides for the redirection of border-wall funds. App., *infra*, 1a-8a. As relevant here, DHS's plan specifies that DHS will "close out/remediate barrier projects turned over to DHS by" DoD, *id.* at 15a (capitalization omitted), through efforts

that may include "actions to repair private property damaged by wall construction, remediate damage of natural, historic, or cultural resources, or avert further environmental damage or degradation due to unaddressed site conditions," *id.* at 17a. DHS's plan specifies that "[n]o new barrier construction work will occur on the DoD projects." *Id.* at 16a.

In light of those changed circumstances, this Court should vacate the judgment below and remand the case with instructions that the district court's judgment be vacated, so that the lower courts can consider the impact of those intervening developments in the first instance. Because DoD has unequivocally announced that the challenged funds will not be used for any further construction at the specified border-wall sites, there is no need for this Court to address the questions presented at this time and in the present posture. Because of the changed circumstances, the equitable relief that the district court previously entered and that the court of appeals affirmed—namely, a declaration that the government's "intended" use of the transferred funds for certain border-wall construction projects is unlawful, and a permanent injunction against engaging in that construction using those funds, Pet. App. 187a; see *id.* at 203a—is no longer appropriate. And the close-out and remediation measures provided for in DHS's plan may fundamentally alter whatever disputes remain between the parties. At a minimum, the lower courts should address the impact of the changed circumstances on the issues presented in this case before those issues would warrant this Court's review.

This Court has vacated lower-court judgments in light of changed circumstances, including when those changes were the result of governmental action. *E.g.*,

Kiyemba v. *Obama*, 559 U.S. 131 (2010) (per curiam); *NLRB* v. *Federal Motor Truck Co.*, 325 U.S. 838 (1945) (per curiam). The same result is warranted here. Vacatur ultimately is an equitable disposition, which is appropriate in the interest of sound judicial administration and which this Court has said should account for both fairness and the public interest. Neither of those values would be served by forcing the Executive Branch to maintain border-barrier construction projects that it has formally determined are not in the public interest simply to avoid the future legal consequences of the court of appeals' decision affirming declaratory and injunctive relief that has since been overtaken by events.

STATEMENT

1. a. This case concerns prior actions taken to construct a wall at the southern border of the United States. In 2019, the then-Acting Secretary of Defense transferred approximately $2.5 billion between DoD appropriations accounts in response to a request from DHS for counterdrug assistance at the border under 10 U.S.C. 284. To transfer the appropriated funds, the Acting Secretary invoked Sections 8005 and 9002 of the 2019 Act.

Respondents sued to challenge those internal transfers of funds as well as other governmental actions to construct physical barriers at specific locations along the southern border. The private respondents contended that the construction of fencing and roads in drug-smuggling corridors along the southern border would impair their members' interests in "hiking, birdwatching, photography, and other professional, scientific, recreational, and aesthetic activities." Pet. App. 12a. The state respondents asserted that construction of the projects funded by the transfers in each State would harm

that State's environmental interests and sovereign interests in the enforcement of state environmental laws. *Id.* at 90a, 94a.

The district court concluded that the transfers were unlawful and entered partial summary judgment in favor of both sets of respondents. Pet. App. 187a-188a, 203a. The court entered a permanent injunction enjoining petitioners "and all persons acting under their direction * * * from taking any action to construct a border barrier in the areas [that the government had] identified as El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1-3 using funds reprogrammed by DoD under Sections 8005 and 9002." *Id.* at 188a. The court also entered a declaratory judgment stating that the government's "intended use of funds reprogrammed under Sections 8005 and 9002 * * * for border barrier construction in El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1-3, is unlawful." *Id.* at 187a; see *id.* at 203a (similar declaratory relief for the state respondents).

After the district court and the court of appeals declined to stay the permanent injunction, this Court stayed the district court's injunction pending appeal and, if necessary, the disposition of a petition for a writ of certiorari. 140 S. Ct. 1 (No. 19A60). The Court stated that "[a]mong the reasons" for issuing the stay was "that the Government ha[d] 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." *Ibid.* The Court later denied respondents' motion to lift the stay. 140 S. Ct. 2620.

After a divided panel of the court of appeals affirmed the district court's judgments, see Pet. App. 1a-77a, 78a-173a, this Court granted the government's petition

for a writ of certiorari, 141 S. Ct. 618, which presents the questions whether respondents have a cognizable cause of action to challenge the transfers of funds and, if so, whether those transfers were lawful, Pet. I. The Court set the case for argument on February 22, 2021.

b. In a parallel set of proceedings, respondents also challenged the construction of border-wall projects under 10 U.S.C. 2808. Section 2808 authorizes the Secretary of Defense to reprioritize appropriated military construction funds that "have not been obligated" to undertake certain military construction projects when the President declares a "national emergency * * * that requires use of the armed forces." 10 U.S.C. 2808(a). In February 2019, President Trump declared a national emergency requiring the use of the armed forces at the southern border, and specifically made Section 2808 available to the Secretary of Defense to undertake military construction as necessary. 84 Fed. Reg. 4949 (Feb. 20, 2019). In response, the Secretary determined that undertaking 11 barrier-construction projects along the southern border was necessary to support the use of the armed forces in connection with that national emergency. See *California* v. *Trump*, 407 F. Supp. 3d 869, 880 (N.D. Cal. 2019).

The district court determined that use of the challenged funds for those projects violated Section 2808. See *California*, 407 F. Supp. 3d at 898-899. The court permanently enjoined DoD and DHS from "using military construction funds appropriated for other purposes to build a border wall in the" specified project areas. *Id.* at 908. The court stayed its own injunction, and a divided panel of the court of appeals affirmed the injunction. See *Sierra Club* v. *Trump*, 977 F.3d 853, 864, 890 (9th Cir. 2020). The government has filed a petition

for a writ of certiorari, which remains pending. Pet. for Cert., *Biden* v. *Sierra Club*, No. 20-685 (filed Nov. 17, 2020).

2. On January 20, 2021, President Biden issued a Proclamation declaring that "[i]t shall be the policy of [his] Administration that no more American taxpayer dollars be diverted to construct a border wall." 86 Fed. Reg. at 7225. In furtherance of that policy, the President directed the Secretary of Defense and the Secretary of Homeland Security to "pause work on each construction project on the southern border wall, to the extent permitted by law, as soon as possible." *Ibid.* The President also directed the Secretaries to "pause immediately the obligation of funds related to construction of the southern border wall, to the extent permitted by law." *Ibid.* The proclamation permitted an exception to the pause in construction "for urgent measures needed to avert immediate physical dangers or where an exception is required to ensure that funds appropriated by the Congress fulfill their intended purpose." *Id.* at 7226.

The President also directed the Secretaries, in consultation with the Attorney General and other officials, to develop a plan "for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law." 86 Fed. Reg. at 7226. "After the plan is developed," the proclamation continued, the Secretaries "shall take all appropriate steps to resume, modify, or terminate projects and to otherwise implement the plan." *Ibid.*

On January 23, 2021, the Deputy Secretary of Defense issued a memorandum to various DoD officials, including the Commander of the U.S. Army Corps of En-

gineers (the Corps), to begin implementing the President's January 20 proclamation. Gov't Abeyance Mot. App. 4a-6a. As relevant here, the Deputy Secretary ordered the Corps to "pause work on all projects" undertaken under Sections 284 and 2808, "to the extent permitted by law, as soon as possible." *Id.* at 5a. Consistent with the presidential proclamation, the Deputy Secretary's memorandum authorized an exception to the pause in construction "for urgent measures needed to avert immediate physical dangers." *Ibid.* The Deputy Secretary also ordered the Corps to "cease exercising the authority provided by [Sections 284 and 2808] to award contracts or options on existing contracts, incur new obligations that advance project performance, or incur new expenses unrelated to existing contractual obligations." *Ibid.*

3. In light of those developments, the government moved to hold further briefing in abeyance and to remove this case from this Court's February argument calendar. Gov't Abeyance Mot. 1-2. Counsel for respondents consented to the motion. *Id.* at 2, 6. The motion stated that the government would "advise the Court of material developments that would support further action by the Court." *Id.* at 6. On February 3, 2021, this Court granted the motion.

4. On April 30, 2021, DoD announced a substantial step in its development of the plan called for by the President's January 20 proclamation. See April 30 Letter Enclosure. Specifically, the Deputy Secretary of Defense issued a memorandum directing the Secretary of the Army to "take immediate action" to cancel all of the border-wall construction projects under Section 2808 and Section 284, including the ones at issue in this case. April 30 Letter Enclosure 4-5.

With respect to the Section 284 projects, the Deputy Secretary authorized the Department of the Army to use any funds transferred for construction "to pay contract termination costs," which include "suspension costs" and "costs associated with activities necessary for contractor demobilization." April 30 Letter Enclosure 5. "The Department of the Army also may use such funds for activities necessary to make permanent any measures that were taken to avert immediate physical dangers during the pause." *Ibid.*; see 86 Fed. Reg. at 7226 (provision of the President's January 20 proclamation authorizing "an exception to the pause" for "urgent measures needed to avert immediate physical dangers"). Otherwise, because those transferred funds "were available for obligation only during the fiscal year in which they were transferred," any unobligated funds "have expired and are no longer available for current requirements." April 30 Letter Enclosure 20; see 2019 Act § 8003, 132 Stat. 2998. DoD has explained that "[a]ny unexpended expired funds will remain in the Operation and Maintenance, Army, account, and remain available to liquidate obligations properly chargeable to the fiscal year during w[hic]h the funds were available for obligation (e.g., contract termination costs, including suspension costs), and, after five years, the account will be closed and any remaining balance in the account will be cancelled." April 30 Letter Enclosure 20.

The Deputy Secretary of Defense also issued a memorandum to the Secretary of Homeland Security stating that "DHS will accept custody of border barrier infrastructure constructed pursuant to Section 284, account for such infrastructure in its real property records, and operate and maintain the infrastructure (including un-

dertaking any necessary further construction, consistent with applicable law)." April 30 Letter Enclosure 7.

With respect to the Section 2808 projects, the Deputy Secretary of Defense authorized the Department of the Army to "expend military construction funds made available for section 2808 border barrier construction only to pay contract termination costs, including suspension costs." April 30 Letter Enclosure 4. "Such costs may include expenses of activities necessary for contractor demobilization, but may not include costs associated with any further construction or construction-related activities of any kind." *Ibid.* The Deputy Secretary also directed that any "unobligated" funds should be "release[d]" for use in "military construction projects that were deferred to finance section 2808 border barrier construction." *Ibid.*

5. On June 11, 2021, the date that this motion is being filed, DoD and DHS announced the completion of their respective plans called for by the President's January 20 proclamation. App., *infra*, 1a-18a. DoD explained that its "plan is composed of two parts: (1) cancellation of projects" in accordance with the April 30, 2021 memorandum, and "(2) redirection of funds." *Id.* at 1a. With respect to the redirection of funds, DoD announced that $2.2 billion of unobligated military construction funds that had been made available for Section 2808 border-wall projects would instead be released to fund 66 military construction projects that had been deferred. *Id.* at 1a, 6a, 8a.

DHS's plan, as relevant here, enumerates measures that DHS will undertake to "close out/remediate barrier projects turned over to DHS by" DoD. App., *infra*, 15a

(capitalization omitted). DHS's plan expressly contemplates that DHS will conduct environmental and other remediation efforts, which may include "actions to repair private property damaged by wall construction, remediate damage of natural, historic, or cultural resources, or avert further environmental damage or degradation due to unaddressed site conditions." *Id.* at 17a. DHS's plan specifies that "[n]o new barrier construction work will occur on the DoD projects." *Id.* at 16a.

ARGUMENT

This Court granted the government's petition for a writ of certiorari to review the questions whether respondents had a cognizable cause of action to challenge the Sections 8005 and 9002 fund transfers and, if so, whether those transfers were lawful. Although the government continues to disagree with the court of appeals' decision, that decision does not warrant this Court's plenary review at this time in light of the greatly changed circumstances. The decisions by the President and DoD to halt all further border-barrier construction and not to use the transferred funds for that purpose, and by DHS to provide for certain remediation measures, have fundamentally altered the underpinnings of this case. The declaratory and permanent injunctive relief that the district court entered, and which the court of appeals affirmed, is no longer appropriate in light of those developments. Accordingly, the Court should vacate the judgment below and remand with instructions that the district court's judgment be vacated, so that the lower courts can consider the impact of the changed circumstances on this case and other related pending cases in the first instance.

A. There Is No Longer A Controversy That Warrants This Court's Plenary Review With Respect To The Relief Granted By The Courts Below

Respondents brought these suits to challenge the transfer of funds under Sections 8005 and 9002 of the 2019 Act for use in certain border-wall construction projects, premised on injuries resulting from alleged recreational, aesthetic, and environmental harms. The district court entered declaratory and injunctive relief barring use of those funds for such construction at specific sites. The government sought this Court's review of the Ninth Circuit's decision affirming that judgment, contending that respondents do not have a cognizable cause of action to challenge such fund transfers, and that in any event those transfers were lawful. But DoD's decision to cancel all border-wall construction projects, and to prevent the use of any funds transferred under Section 8005 or 9002 for further border-wall construction, has removed the basis for relief granted by the lower courts.

Specifically, the actions of the President, DoD, and DHS have fundamentally altered the basis and posture of this case. In particular, the declaratory and injunctive relief that the district court ordered warrants revisiting in light of the changed circumstances. The court entered a declaratory judgment that the government's "*intended* use of funds reprogrammed under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, for border barrier construction in El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1-3, is unlawful." Pet. App. 187a (emphasis added); see *id.* at 203a (similar). The court also permanently enjoined petitioners "and all persons acting under their direction * * * from taking

any action to construct a border barrier" in the listed areas "using [those] funds." *Id.* at 188a. DoD's actions pursuant to the President's January 20 proclamation, however, now make clear that the government will not use the transferred funds to "tak[e] any action to construct a border barrier" in the listed areas, and that its "intended use" of those funds is not for further border-barrier construction. *Id.* at 187a-188a. And as part of its close-out activities, DHS's plan contemplates undertaking environmental and other remediation measures that may further fundamentally alter whatever disputes remain between the parties.

To be sure, respondents might contend that the district court could grant them *some* form of relief, notwithstanding the halt to any further construction of a wall and use of the transferred funds for that purpose. Cf. 19A60 Gov't Reply Br. 14-15. But the plans adopted by DoD and DHS pursuant to the President's proclamation establish that the relief respondents were previously granted (and that is now before this Court) is unwarranted. Federal courts generally have both "the authority, and the responsibility," to modify equitable relief in light of changed circumstances. *Brown* v. *Plata*, 563 U.S. 493, 542 (2011); see *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956, 967 (2d Cir.) (Friendly, J.), cert. denied, 464 U.S. 915 (1983). Given the actions of the President, DoD, and DHS, and the resulting changed circumstances on the ground, the challenged conduct—constructing a border barrier using the transferred funds—is not of "sufficient immediacy and reality" to warrant declaratory relief, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation omitted), and is not sufficiently "real

or immediate" to warrant injunctive relief, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983).

In light of those official actions and changed circumstances, the district court might well decide that no equitable relief would be merited, or might at least determine that only substantially modified relief would be appropriate, if given the opportunity to do so. Cf. *Winter* v. *NRDC, Inc.*, 555 U.S. 7, 32-33 (2008) (explaining that equitable relief, including a permanent injunction, "does not follow from success on the merits as a matter of course"). Those possibilities and the further developments that will occur as DHS undertakes its close-out and remediation efforts underscore that, in lieu of plenary review at this time, the Court should afford the lower courts the opportunity to determine in the first instance whether any relief would be appropriate and, if so, what kind. Cf. *Trump* v. *New York*, 141 S. Ct. 530, 534-535 (2020).

B. This Court Should Vacate The Judgment Below

In light of the actions by the President, DoD, and DHS set forth above, the Court should vacate the judgment below and remand so the lower courts can consider the impact of those changed circumstances on this case. This Court has explained that Congress has granted the Court a "broad power" to vacate "'any judgment, decree, or order'" of a lower court and to remand for proceedings "'as may be just under the circumstances.'" *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam) (quoting 28 U.S.C. 2106). Although mootness is a common reason for vacatur, see, *e.g.*, *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court has vacated judgments "in light of a wide range of developments," *Lawrence*, 516 U.S. at 166. Such developments include "[this Court's] own decisions, State

Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general." *Id.* at 166-167 (citations omitted).

One relevant example, cited by the *Lawrence* Court, is *NLRB* v. *Federal Motor Truck Co.*, 325 U.S. 838 (1945) (per curiam), and its companion case, *NLRB* v. *Jones & Laughlin Steel Corp.*, 325 U.S. 838 (1945) (per curiam). There, the NLRB had approved a bargaining unit that included militarized personnel at a factory. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 146 F.2d 718, 722 (6th Cir. 1944), vacated, 325 U.S. 838 (1945) (per curiam). The court of appeals had denied the NLRB's petition for a decree enforcing its order on the ground that the NLRB should not have authorized militarized guards to join the bargaining unit. *Id.* at 722-723. But after the NLRB filed a petition for a writ of certiorari, the guards were demilitarized by the War Department. The Court granted the NLRB's petitions for writs of certiorari, vacated the judgment of the court of appeals, and remanded the case "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." *Federal Motor Truck Co.*, 325 U.S. at 839; accord *Jones & Laughlin Steel Corp.*, 325 U.S. at 839 (same); *NLRB* v. *E.C. Atkins & Co.*, 325 U.S. 838, 839 (1945) (per curiam) (same, in a case presenting the same issue arising out of a different court of appeals). The Court eventually granted plenary review of the decisions following the remands. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947); *NLRB* v. *E.C. Atkins & Co.*, 331

U.S. 398 (1947). But the key point is that the Court vacated the judgments and remanded the cases so that the lower courts could address the changed circumstances in the first instance.

A similar example is *Kiyemba* v. *Obama*, 559 U.S. 131 (2010) (per curiam). There, the Court had granted a petition for a writ of certiorari to address the lawfulness of the detention of certain individuals held at Guantanamo Bay. See *ibid.* But seven weeks before the scheduled oral argument, the parties filed separate letters informing the Court that "each of the detainees at issue in th[e] case ha[d] received at least one offer of resettlement in another country" and that "[m]ost of the detainees ha[d] accepted an offer of resettlement." *Ibid.* The Court did not suggest that the case was moot—"five detainees" had "rejected two such offers" and were thus "still being held at Guantanamo Bay"—yet the Court recognized that the "change in the underlying facts may affect the legal issues presented," and that "[n]o court ha[d] yet ruled in th[e] case in light of the new facts." *Ibid.* Accordingly, the Court vacated the judgment and remanded the case to the court of appeals to "determine, in the first instance, what further proceedings in that court or in the District Court [we]re necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Id.* at 132.

The same result is warranted here. The changed circumstances here are no less significant than were the demilitarization decisions in the *NLRB* cases or the resettlement offers in *Kiyemba*; and no court has had a chance to rule on the legal issues raised by the actions of the President, DoD, and DHS, including whatever disputes remain between the parties and what potential

relief (if any) would be appropriate in light of those intervening events and new circumstances. Moreover, in issuing a stay of the district court's permanent injunction under the All Writs Act, 28 U.S.C. 1651, the Court necessarily found at least "a fair prospect" that it would reverse the judgment below. 140 S. Ct. 1 (No. 19A60) (Breyer, J., concurring in part and dissenting in part) (citation omitted); see *ibid.* (majority opinion) (granting stay because, among other reasons, "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action"). That is generally a *more difficult* standard than that required to obtain the lesser disposition of vacatur and remand to allow further consideration by the lower courts in the first instance. See *Lawrence*, 516 U.S. at 168 (observing that "the standard that [the Court] appl[ies] in deciding whether to GVR is somewhat more liberal than the All Writs Act standard, under which relief is granted only upon a showing that a grant of certiorari and eventual reversal are probable").

This Court has observed that absent "exceptional circumstances," vacatur of a court of appeals' judgment in light of mootness may be unwarranted when "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari," such as when "mootness results from settlement." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25, 29 (1994); cf. *id.* at 25 n.3. But that proposition does not undermine the government's request for a vacatur and remand here. As exemplified by the *NLRB* cases and *Kiyemba*, this Court has vacated lower-court judgments against the government, and remanded for further consideration by the lower courts in the first instance, even when the intervening developments that

made plenary review inappropriate or premature resulted from governmental action. Cf. *Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms* v. *Galioto*, 477 U.S. 556, 560 (1986) (finding the issues before the Court to be moot in light of an intervening statutory enactment, and vacating and remanding because the "complaint appears to raise other issues best addressed in the first instance by the District Court"). Indeed, this Court has granted vacatur of judgments against the government even when governmental action caused a case to become moot. *E.g.*, *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (per curiam); *Alvarez* v. *Smith*, 558 U.S. 87, 96 (2009); *Board of Regents of the University of Texas System* v. *New Left Education Project*, 414 U.S. 807, 807 (1973) (Mem.); cf. *Munsingwear*, 340 U.S. at 39-40 (indicating that vacatur would have been available had the government requested it after the case was mooted by the Executive Branch's decision to annul the price regulation at issue).

Moreover, the Court has explained that whether vacatur "is ultimately appropriate depends further on the equities of the case." *Lawrence*, 516 U.S. at 167-168. For example, the Court considers whether vacatur would "further[] fairness," *id.* at 175, and has explained that "[a]s always when federal courts contemplate equitable relief," the decision whether to grant vacatur "must also take account of the public interest," *Bancorp*, 513 U.S. at 26. That equitable inquiry calls for vacatur here. As in the *NLRB* cases and *Kiyemba*, changed circumstances—which the lower courts have not yet had a chance to address—have altered the basis and posture of this case, including the appropriateness of the equitable relief entered by the district court.

That those changed circumstances are the result of formal actions taken by the President, DoD, and DHS following the change in Administration further counsels in favor of having the lower courts revisit the equitable relief they previously granted and sustained. Cf. *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 622 (1974) ("Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor.").

Finally, neither fairness nor the public interest would be served by forcing the Executive Branch to continue border-barrier construction projects that it has formally determined are not in the public interest simply to avoid the future legal consequences of the decision entered by the court of appeals affirming declaratory and injunctive relief that has since been overtaken by events.

CONCLUSION

The Court should vacate the judgment below and remand the case with instructions that the district court's judgment be vacated and the case remanded to that court for further proceedings as appropriate.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

JUNE 2021

APPENDIX A

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

[JUN 10 2021]

MEMORANDUM FOR DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

SUBJECT: Department of Defense Plan for the Redirection of Border Wall Funds

On January 20, 2021, President Biden issued Proclamation 10142, "Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction" (the Proclamation). Section 2 of the Proclamation directed the Department of Defense (DoD) and the Department of Homeland Security to develop a plan for redirecting funds and repurposing contracts as appropriate and consistent with applicable law.

The DoD plan is composed of two parts: (1) cancellation of projects and (2) redirection of funds. Part 1 of the plan is documented by the attached April 30, 2021, memorandum, "Department of Defense Actions Implementing Presidential Proclamation 10142," in which the Deputy Secretary of Defense directed the cancellation of all projects authorized pursuant to title 10, U.S. Code, sections 284 and 2808 (TAB A). Part 2 of the plan is documented by the attached funding plan, which describes how the Department will use the $2.2 billion of available

unobligated military construction appropriations to restore funding for 66 projects in 11 States, 3 territories, and 16 countries in FY 2021 (TABB). These two documents taken together constitute the full and complete DoD plan directed in section 2 of the Proclamation.

As required by section 2 of Proclamation 10142, this plan was fully coordinated with the Attorney General, the Director of the Office of Management and Budget, and the heads of other appropriate executive departments and agencies, and in consultation with the Assistant to the President for National Security Affairs.

This Plan is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable by law or in equity by any party against the United States, its departments, agencies, or entities, its officers, or agents, or any person.

/s/ KATHLEEN H. HICKS
KATHLEEN H. HICKS

APPENDIX B

OFFICE OF THE UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1111

COMPROLLER

ACTION MEMO

June 8, 2021

FOR: DEPUTY SECRETARY OF DEFENSE

/s/ MICHAEL McCORD

FROM: Michael McCord, Under Secretary of Defense (Comptroller)/Chief Financial Officer

SUBJECT: Plan for the Use of Funding from Projects Authorized Pursuant to Sections 284 and 2808 of Title 10, U.S. Code

PURPOSE: Obtain your approval of the funding plan at **TAB A** in accordance with Presidential Proclamation 10142.

BLUF: The proposed funding plan meets the President's direction to develop a plan for redirecting funding related to barrier construction at the southern border by using $2.2 billion of unobligated military construction (MILCON) funds that were previously made available for 11 border barrier projects authorized pursuant to Section 2808 of Title 10, U.S. Code, to fund 66 previously deferred MILCON projects. This amount includes $0.1 billion for a Navy project in Washington State that was deferred to make funds available for Section 2808

construction, but, pursuant to a court order that is on appeal, the funds were released to the Navy.

The Department has no mechanism to recapture funds made available for border barrier projects under 10 U.S.C. 284. The funds were reprogrammed into the Drug Interdiction and Counter-Drug Activities, Defense, account and then transferred to the Operation and Maintenance, Army, appropriation through an Internal Reprogramming action. Those funds have expired, and they are not available for new obligations or transfer back to the original source accounts (e.g., National Guard and Reserve Equipment Account (NGREA), other multi-year congressional adds).

BACKGROUND:

- On January 20, 2021, President Biden terminated the national emergency initially declared in Proclamation 9844, and directed that authorities invoked in that Proclamation no longer be used to construct a wall at the southern border **(TAB B).**
  - Proclamation 10142 directed an immediate pause in construction projects and obligation of funds related to border barrier construction and called for various assessments regarding the legality of funding, contracting methods, and consequences of ceasing construction.
  - The Proclamation also directed the Secretary of Defense and the Secretary of Homeland Security to develop a plan for redirecting funding and repurposing contracts, in coordination with the heads of other Executive departments and agencies, and in consultation with the Assistant to the President for National Security Affairs.

The President required that this plan be developed within 60 days from the date of the Proclamation.

- On January 23, 2021, the then-Deputy Secretary of Defense issued more detailed guidance for moving forward in developing the plan **(TAB C).**
- On April 30, 2021, you directed cancellation of all projects authorized pursuant to Sections 284 and 2808 of Title 10, U.S. Code, and issued additional direction regarding the release of unobligated military construction funding **(TAB D).**

- Amounts from 123 military construction projects (including 6 previously canceled projects and 1 unauthorized project) plus planning and design, totaling $3.6 billion, were identified to fund the 11 approved border barrier construction projects undertaken pursuant to Section 2808.
  - The U.S. Army Corps of Engineers (USACE) awarded contracts for 7 of the 11 approved projects, leaving 4 unawarded due to land acquisition challenges. Of the total $3.6 billion made available, $2.2 billion is currently unobligated.
  - This amount includes $0.1 billion for a Navy project in Washington State that was deferred to make funds available for Section 2808 construction but, pursuant to a court order that is on appeal, the funds were released to the Navy with the requirement to notify the OUSD (Comptroller) 90 days prior to obligating the funds.

The Navy has provided notice that it expects to obligate the funds in June 2021.

DISCUSSION:

- Subsequent to the publication of Proclamation 10142, DoD Components were asked to provide updated execution data for their MILCON projects that had been deferred to fund Section 2808 construction (i.e., 1-N prioritization, design status, and updated cost estimates).
  - Projects that were previously canceled for reasons not related to Section 2808 construction and planning and design funds were not considered for restoral.
- OUSD (Comptroller) has developed a plan, socialized with the Military Departments and Office of the Secretary of Defense stakeholders, to use the $2.2 billion of available unobligated MILCON to restore funding for 66 projects in 11 States, 3 territories, and 16 countries in FY 2021. Within the constraint of the amounts restored to any given account, each Component considered that Component's priorities, as well as design maturity and executability, when selecting projects to receive immediate funding **(TAB A).**
- All other previously deferred projects **(TAB E)** will be 1) considered for future funding; 2) funded or built by partner countries; or 3) cancelled due to changes in operational requirements. The FY 2022 President's Budget includes $661 million for 16 such projects to be funded in accounts where insufficient unobligated balances existed.

RECOMMENDATION: Approve the funding plan at **TAB A** by signing below.

Approved: /s/ KHH Disapprove: _____

[JUN 10 2021]

COORDINATION: OGC, OMB at **TAB F**

Attachments:
As stated

APPENDIX C

FOLDOUT

APPENDIX D

FOLDOUT

APPENDIX E

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

Department of Homeland Security

Border Wall Plan Pursuant to Presidential Proclamation 10142

June 9, 2021

I. PURPOSE

On January 20, 2021, President Biden issued Proclamation 10142, *Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction* (the Proclamation). The Proclamation directed a pause in the construction of the southern border wall and on the obligation of funds for such construction projects to allow the Department of Homeland Security (DHS or the Department) and the Department of Defense (DoD) to:

(1) assess the legality of the funding and contracting methods used to construct the wall;

(2) assess the administrative and contractual consequences of ceasing each wall construction project; and,

(3) develop a plan for redirecting funds and repurposing contracts as appropriate and consistent with applicable law.

DHS has, without deobligating funds,[1] suspended performance of all border barrier contracts and southwest border barrier construction activities, with the exception of activities related to ensuring project sites are safe and secure in accordance with the terms and conditions of the contracts. DHS has also completed the required assessments.

This memorandum outlines DHS's Plan pursuant to section 2 of the Proclamation for the redirection of funds appropriated or received from the Treasury Forfeiture Funds (TFF) for the construction of a border barrier at the southern border of the United States. These activities support the Administration policy to protect national and border security and address the humanitarian challenges at the southern border while remaining consistent with President Biden's commitment that "no more American taxpayer dollars [should] be diverted to construct a border wall."

II. DHS SECRETARY'S EXCEPTIONS

DHS is continuing certain discrete projects because they are urgent measures needed to avert immediate physical dangers. As provided for in Section 1(b) of the Proclamation, the Secretary of Homeland Security granted an exception to the border wall construction pause for activities that are "urgent measures needed to avert immediate physical dangers." DHS has re-initiated activity on two projects to protect life and safety under the Secretary's exception. The first is a project in the Rio Grande Valley of Texas, where DHS will construct

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[1] DHS has continued to pay invoices in accordance with its obligations under existing contracts.

and/or remediate approximately 13.4 miles of compromised levee. The second is an erosion control project in the San Diego area along an approximately 14-mile stretch of recently constructed barrier and associated adjacent road necessary to protect migrants, agents, and residents. DHS will not engage in standard environmental planning for the work described above. Rather, given the urgency with which such work must be undertaken, the work described above is proceeding under previously-issued Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) waivers that are applicable to the projects and activities.

III. PLAN FOR FISCAL YEAR (FY) 2017-2020 DHS APPROPRIATIONS

DHS may prioritize projects other than those described in Section II for completion if they are needed to address life, safety, environmental, or other remediation requirements. DHS will explore use of its appropriated funds to address construction previously funded with Treasury Forfeiture Fund amounts (discussed further below). Examples of work to be performed include grading roads and cutting slopes to resolve drainage and ponding; addressing exposed re-bar; and installing canal crossings. No additional real estate acquisition is required to complete this work. For all other projects funded by the FY 2017 – FY 2020 DHS appropriations, prior to further construction, DHS will undertake a thorough review and replanning process, including the following steps.

A. To the extent DHS, in its discretion, deems it warranted, it may rescind or revise waivers of environmental and other laws issued under IIRIRA by the Secretary of Homeland Security.

For some segments, rescinding or revising prior environmental waivers will not be feasible.

B. For all activities or projects that will continue, with the exception of the projects and activities set forth in Section II above or projects necessary to address life, safety, environmental, or other remediation requirements, regardless of whether an applicable IIRIRA waiver is rescinded or revised, DHS intends to engage in standard environmental planning including taking certain actions consistent with National Environmental Policy Act (NEPA) and other environmental planning and statutes. DHS intends to undertake a multistep environmental planning process, which will include public scoping and comment on potential environmental impacts through the NEPA process.

C. DHS, working with interagency partners such as the U.S. Fish and Wildlife Service, intends to assess the extent to which border wall funds may be used to remediate or mitigate environmental damage caused by past border wall construction. Opportunities for mitigation will be identified through the environmental planning process, including NEPA.

D. DHS intends to enter into robust and substantive consultation with stakeholders, including affected landowners, tribes, border community residents, their elected representatives, and interested non-governmental organizations and advocates. Such consultation will inform environmental planning and execution of the border wall projects.

E. DHS intends to review the status of all pending border wall land eminent domain actions commenced between 2016 and 2020 and reassess the extent to which acquiring parcels of land that are the subject of such actions will be necessary after environmental planning activities are completed. This reassessment process will include a review of existing construction plans to determine whether they can be modified to reduce the use of land previously acquired through adverse eminent domain proceedings. If DHS determines that it no longer requires the use of land that is currently the subject of an adverse eminent domain proceeding, DHS will explore options to revest the land with its prior owners.

If DHS determines that additional land acquisition is necessary to complete projects contemplated by this plan, DHS will initiate robust landowner engagement and be guided by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601-4655. It is DHS's preference to obtain real estate interests on a voluntary basis through negotiated offers to sell (OTS). Condemnation action to acquire additional land will be considered only as a last resort, with a focus on life, safety, environmental, or other remediation requirements. In those instances where condemnation action is required in order to obtain a permanent real estate interest, DHS's authorized official will notify the Secretary, or the Secretary's designee, prior to proceeding with the action.

IV. PLAN FOR FY 2021 DHS APPROPRIATIONS

In FY 2021, DHS received funding for construction of border barrier systems along the southwest border.

A. Contingency Funding

Due to unforeseen delay and other costs, several projects may require additional obligations to address necessary changes and/or cost overruns.

i. Levee Wall Described in Section II

DHS estimates up to an additional $275 million in cost overrun due to the existing suspension of contract performance for construction as well as design changes. These will be funded through existing FY 2021 appropriations.

ii. Other

DHS anticipates being able to cover other delay costs and changes as a result of the suspension of contract performance using the appropriated funds from the year in which the project was funded. However, the exact financial impacts of the delay and changes must be negotiated with each contractor. Until final costs are negotiated, DHS cannot preclude the possibility that additional contingency funding may be required to cover delay and change costs. If such funding is required, it will be drawn from existing FY 2021 appropriations.

B. Close out/Remediate Barrier Projects Turned Over to DHS by the Department of Defense (DoD)

DHS expects DoD will turn over multiple barrier projects, previously executed with military construction or counter-drug funding, in various stages of completion.

DHS will need to absorb some potentially significant costs related to DoD's discontinued border wall projects. Many, if not all, of the DoD military construction-funded projects will require additional obligations from existing FY 2021 appropriations, and it is possible that DHS may also need to obligate some additional funds related to the projects funded with DoD counter-drug appropriations. Work on the DoD projects may include but is not limited to the following:

- Completing construction of site drainage features to allow for positive drainage of the sites, ensuring no ponding, including grading sites, and installing and/or completing low water crossings and other drainage structures;
- Installing/completing permanent erosion control/slope stabilization measures to ensure constructed assets are safe and stable for their expected life cycle;
- Finishing the construction of the patrol, maintenance, and access roads to standard to ensure safe ingress/egress including guardrails and signage, and integration with existing roadways;
- Remediating temporary use areas (i.e., laydown yards, haul roads) and project areas impacted by construction; and
- Disposing of residual materials not required for completion of the work as identified above.

No new barrier construction work will occur on the DoD projects. While DHS believes that some of the work described above may comport with the FY 2021 appropriations language, there may be limitations on the type of work that DHS can undertake. The specific amount

of funding required will depend upon the condition of the DoD projects and the amount of work DHS can undertake.

For DHS's work on the DoD military construction funded barrier projects, DHS intends to engage in standard environmental planning including taking certain actions consistent with NEPA. The DoD counter-drug projects were executed under 10 separate waivers issued by the Secretary Homeland Security pursuant to IIRIRA between April 2019 and March 2020. For DHS's work required on the DoD counter-drug projects, DHS intends to apply the criteria outlined in Section III above; however, DHS may forego standard environmental planning and rely on prior IIRIRA waivers where DHS must take timely action to settle pending litigation, including, but not limited to, actions to repair private property damaged by wall construction, remediate damage of natural, historic, or cultural resources, or avert further environmental damage or degradation due to unaddressed site conditions.

C. Planning approach with NEPA for other projects

DHS will use any remaining FY 2021 funding available, after budgets for the activities above are established, to begin the sequential project planning process for the next highest priority barrier segments identified by DHS. Initially, DHS will prioritize projects required for life, safety, environmental, or other remediation requirements. The process will begin with environmental planning that complies with NEPA. In order to facilitate the NEPA process, DHS will seek Rights of Entry from landowners to allow temporary access to perform environmental, cultural, and other survey work. Contract

solicitation would occur after NEPA and real estate acquisition activities have been completed, or are close to completion.

V. TREASURY FORFEITURE FUND

In FY 2019, DHS received $601 million from the TFF for border wall construction. Because Treasury funds were redirected from other law enforcement purposes, DHS will end border wall construction funded with TFF funds; terminate contracts after ensuring tasks needed to protect life, safety, and the environment are completed; and return any excess funds to the TFF. More specifically, DHS has returned unobligated TFF funds (approximately $455 million) to Treasury and will return any recovered amounts to Treasury once those funds become available in DHS's account.

VI. This Plan is not intended to and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, or agents, or any person.