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.*, *Respondents*.

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, *et al.*, *Petitioners*,

v.

STATES OF CALIFORNIA AND NEW MEXICO, *Respondents*.

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

STATES' RESPONSE TO MOTION TO VACATE AND REMAND

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RESPONSE TO MOTION

Respondents brought this action to challenge petitioners' transfers of approximately $2.5 billion to fund the construction of a wall on our Nation's southern border. *See* State Merits Br. 5-14. In the state respondents' case, the district court declared that petitioners' use of the challenged funds for barrier construction was unlawful but declined to enter any injunction. Pet. App. 203a. In the separate case brought by the *Sierra Club* respondents, the district court entered a similar declaratory judgment as well as a permanent injunction barring petitioners "from taking any action to construct a border barrier" using the challenged funds. *Id.* at 187a-188a. After the court of appeals affirmed the district court's partial final judgments, petitioners sought plenary review in this Court, arguing that the case involves "question[s] of significant practical importance to the Executive Branch's national-security efforts at the southern border." Pet. 34; *see id.* at 17.

After the grant of certiorari and following the change in federal administrations, however, the President announced a new policy "that no more American taxpayer dollars be diverted to construct a border wall." Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 20, 2021). The President ordered a pause on border construction projects and on the obligation of funds related to such projects; directed his Administration to "assess[] . . . the legality of the funding and contracting methods used to construct the wall"; and ordered the Secretaries of Defense and Homeland Security to develop a plan "for the redirection of funds concerning the southern border wall." *Id.* at 7225, 7226. On June 11, petitioners announced the completion of that review and planning process. Petitioners

have now confirmed that they are "canceling all border-wall construction projects" and will "not use the challenged funds for any further border-wall construction." Mot. 2; *see* Mot. App. 1a.

The state respondents agree with petitioners that, "in light of the greatly changed circumstances," this case "does not warrant this Court's plenary review[.]" Mot. 11. As petitioners note, "the actions of the President, DoD, and DHS have fundamentally altered the basis and posture of this case." *Id.* at 12. Petitioners report that "the President and DoD" have now agreed to "halt all further border-barrier construction and not . . . use the transferred funds for that purpose." *Id.* at 11. And DHS will "provide for certain remediation measures" to address environmental harms that the construction has caused. *Id.* Given those profound changes in federal policy, petitioners are correct that "there is no need for this Court to address the questions presented at this time and in the present posture." *Id.* at 3.

In this posture, the most appropriate course of action for the Court would be to dismiss the writ—as it has often done when "a change in circumstances since the writ was granted" has "lessened the importance of the case," Shapiro et al., *Supreme Court Practice* § 5.15, at 5-51 (11th ed. 2019), such that plenary review would no longer "be a provident expenditure of the energies of the Court," *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 502 (1971) (Harlan, J., concurring). That approach would seem to be better suited to the present circumstances than petitioners' proposal that the Court vacate the judgment and remand for further proceedings. *See* Mot. 14-19. But regardless of which of those options the Court prefers, petitioners are correct that "there is no longer a

controversy that warrants this Court's plenary review[.]" *Id.* at 12 (capitalization altered).

1. When petitioners originally sought certiorari, they argued that plenary review was warranted because of the "exceptional national importance" of the case. Pet. 17. Although petitioners disagreed with the legal analysis in the decision below, *see id.* at 16-32, they did not allege any lower-court conflict on either of the questions presented, *see* State Opp. 15. Instead, petitioners noted that "[t]his Court regularly grants certiorari to address interference with Executive Branch conduct that is of 'importance . . . to national security.'" Pet. 17 (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 520 (1988)). Plenary review was warranted, they argued, because of the "injunction against the transfer of military funds to assist in the construction of fences on the southern border to stanch the flow of illegal drugs." *Id.* In particular, they contended that "the decisions below would frustrate steps that the Acting Secretary determined to be 'necessary in the national interest'" to block "drug-smuggling corridors, where DHS has seized thousands of pounds of heroin, cocaine, and methamphetamine[.]" *Id.* at 34.

The state respondents' brief in opposition, filed in September 2020, noted that petitioners had failed to substantiate their arguments about "the practical significance of the case." State Opp. 15. Petitioners did not identify "how much of the money has been spent" and how much money remained "subject to th[e] injunction." *Id.* They did "not discuss how depletion of the transferred funds would affect the continuing importance of the particular judgments below[.]" *Id.* at 16. Nor did "they address the possibility of changes in the spending priorities of the Executive Branch." *Id.* And "the realistic prospect of significant developments

in one or more of those areas in the coming months" counseled "against further review . . . in this case." *Id.* The state respondents accordingly argued that the Court should "deny the petition . . . and avoid embarking on plenary review of questions that could diminish in practical significance over the course of this Term." *Id.* at 17.

Petitioners' response to those arguments was that "construction of the projects financed by the funds at issue remains ongoing and would be disrupted if the *Sierra Club* injunction were to take effect." U.S. Cert. Reply 11; *see id.* ("[A]s of August 14, 2020, more than 25% of the total contracted miles of fencing to be constructed using these funds had not yet been completed."). On that basis, petitioners contended that "[t]he judgments below, and the underlying questions presented, are of ongoing significance to the government's efforts to secure the southern border of the United States." *Id.* at 11-12 (footnote omitted).

Recent developments have eliminated that premise underlying petitioners' request for plenary review. After an inter-agency review process, which considered (among other things) "the legality of the funding and contracting methods used to construct the wall," 86 Fed. Reg. at 7225, petitioners have publicly announced and committed that they are "canceling all border-wall construction projects" using the challenged funds and that they will "not use the challenged funds for any further border-wall construction." Mot. 2. There is thus no longer any basis for petitioners to argue that the "injunction against the transfer of military funds to assist in the construction of fences on the southern border" will interfere with federal efforts "to stanch the flow of illegal drugs," Pet. 17, or that it will otherwise "frustrate

steps that the Acting Secretary" of Defense had "determined to be 'necessary in the national interest,'" *id.* at 34. Nor are the questions presented in the petition of "ongoing significance to the government's efforts to secure the southern border," U.S. Cert. Reply 12, now that the federal government has determined that the challenged funds should not—and *will* not—be used for that purpose.

Under these circumstances, petitioners are correct that there is "no longer a controversy that warrants this Court's plenary review[.]" Mot. 12 (capitalization altered). The fact that petitioners have now "unequivocally announced that the challenged funds will not be used for any further construction at the specified border-wall sites" (*id.* at 3) has eliminated the practical significance of this case that prompted petitioners to seek plenary review.

2. Where "a change in circumstances since the writ was granted [has] lessened the importance of the case," the Court has often ordered dismissal of the writ. Shapiro, *supra*, § 5.15, at 5-51. Sometimes, of course, the Court dismisses a writ when it discovers a defect in the case that leads it to conclude that certiorari was "improvidently granted." *Id.*; *see, e.g.*, *id.* at 5-53 ("[a] hitherto unsuspected jurisdictional defect"). But a change in factual circumstances or government policy after the grant of review can also make dismissal appropriate by diminishing the importance of the case such that plenary review would no longer "be a provident expenditure of the energies of the Court." *Triangle Improvement Council*, 402 U.S. at 502 (Harlan, J., concurring); *see also* Shapiro, *supra*, § 5.15, at 5-52 ("'certworthiness' of a case must be evident to the Court not only at the initial screening stage but also in all subsequent phases of a proceeding").

For example, the Court has dismissed the writ where, among other things, the President announced that the United States would satisfy its obligations under a ruling of the International Court of Justice, which an inmate was seeking to enforce through federal habeas proceedings, *see Medellin v. Dretke*, 544 U.S. 660, 663-664 (2005) (per curiam); where a State represented that a petitioner's capital sentence would not be carried out by the challenged method of execution (unless that method was chosen by petitioner), *see Bryan v. Moore*, 528 U.S. 1133 (2000); and where "a new statute has been enacted by the Congress that alters drastically the potential impact of any decision [the Court] might reach," *Triangle Improvement Council*, 402 U.S. at 498-499 (Harlan, J., concurring); *see generally* Shapiro, *supra*, § 5.15, at 5-51, 5-54 (collecting additional cases).

That approach would seem to be the most sensible one here, too. Petitioners' change in policy did not merely "lessen[] the importance of the case," Shapiro, *supra*, § 5.15, at 5-51; it eliminated any "controversy that warrants this Court's plenary review," Mot. 12 (capitalization altered). The principal concerns that petitioners invoked when they originally asked this Court to grant review no longer exist. *See* Pet. 17, 34. Petitioners' "unequivocal[] announce[ment]" that the United States will not use any of the challenged funds "for any further construction at the specified border-wall sites" (Mot. 3) means that there is no longer any practical need for this Court to consider the parties' disputes over whether petitioners were permitted to use the challenged funds for border-wall construction. That change in circumstances renders this case "a classic instance of a situation where the exercise of [this Court's] powers of review would be of no signifi-

cant continuing national import," *Triangle Improvement Council*, 402 U.S. at 499 (Harlan, J., concurring)—and thus a classic case for dismissal of the writ. *See, e.g.*, *Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 226 (1970) (per curiam) (dismissing writ where, among other things, "only a bare remnant of the original controversy remains").

3. Petitioners instead propose that the Court should "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[.]" Mot. 1. They point to a few cases in which the Court vacated lower-court judgments in light of changed circumstances. *Id.* at 15-16 (discussing *NLRB v. Fed. Motor Truck Co.*, 325 U.S. 838 (1945) (per curiam); *Kiyemba v. Obama*, 559 U.S. 131 (2010) (per curiam)). And they contend that vacatur is appropriate here "so that the lower courts can consider the impact of [the] intervening developments," *id.* at 3, particularly with respect to "the equitable relief they previously granted and sustained," *id.* at 19.

But it is not clear why vacatur is a superior course of action under the circumstances of this case—or even why vacatur would be necessary to serve petitioners' stated purposes. Petitioners assert a desire for the lower courts to reconsider the equitable relief declaring petitioners' use of challenged funds for border construction to be unlawful and (in the *Sierra Club* case) enjoining petitioners from taking actions to construct a border barrier in identified areas. *See* Mot. 3, 11-14; Pet. App. 187a-188a, 203a. But petitioners' basis for arguing that the equitable relief is now "unwarranted" (Mot. 13) and "no longer appropriate" (*id.* at 3) is that they have recently committed that they will not do the things that the district court declared unlawful and

enjoined them from doing. *See id.* While it is possible that, following a vacatur, the district court might "decide that no equitable relief would be merited, or . . . that only substantially modified relief would be appropriate," *id.* at 14, it is hard to see what the practical utility of that particular exercise would be when the federal government has independently decided that it is no longer pursuing those actions anyway. And in any event, the Federal Rules already authorize petitioners to ask the district court to modify or vacate its judgments, including on the ground that "applying [them] prospectively is no longer equitable[.]" Fed. R. Civ. P. 60(b)(5).

Petitioners also note the possibility that the "district court could grant [respondents] some form of" additional relief, notwithstanding the federal government's change in policy. *See* Mot. 13 (emphasis omitted); *cf.* 19A60 U.S. Reply Br. 14-15 (arguing that *Sierra Club* "respondents' asserted injuries to recreational and aesthetic interests in the areas where construction will occur could be remedied at a later date, if respondents ultimately prevail"); 19A60 U.S. Stay Application 39 (similar). If this Court agrees with petitioners that vacatur is warranted to allow the lower courts to consider the appropriate "equitable relief in light of [the] changed circumstances," Mot. 13, or if petitioners move to modify or vacate the judgments in the district court, the state respondents stand ready to participate in further proceedings in the lower courts on that subject.

CONCLUSION

The writ of certiorari should be dismissed.

Respectfully submitted,

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