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' REPLY IN SUPPORT OF MOTION TO VACATE AND REMAND IN LIGHT OF CHANGED CIRCUMSTANCES

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Respondents acknowledge (States Resp. 2; ACLU Resp. 4) that changed circumstances—namely, the formal acts of the President, Department of Defense (DoD), and Department of Homeland Security (DHS) to cancel border-wall construction projects and bar using the challenged funds for further border-wall construction—have "fundamentally altered the underpinnings of this case." Gov't Mot. 11. Respondents notably do not dispute that those changes have rendered the declaratory and injunctive relief that the district court entered "no longer appropriate." *Ibid.*

Yet respondents suggest (*e.g.*, States Resp. 5-6; ACLU Resp. 1) that the Court should simply dismiss the petition for a writ of certiorari rather than vacating the decision below and remanding. But that would leave

the court of appeals' rulings on both the cause-of-action issue and the merits in place as precedent for future cases, despite the Court's granting of a stay and then certiorari to review those rulings. The state respondents suggest that vacatur and remand would serve no "practical utility" given the changed circumstances, States Resp. 8, but the changed circumstances are actually a reason *in favor* of vacatur and remand, so that the district court can determine in the first instance what impact those developments have on this case. And while the private respondents largely resist vacatur (ACLU Resp. 1, 5-10) on the ground that the changed circumstances are the result of governmental action, this Court has never adopted a categorical rule that vacatur is inappropriate in that situation, and has instead applied a flexible and fact-specific approach rooted in equity. See *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam); Gov't Mot. 14-19.

Under that approach, the case for vacatur is clear. In a proclamation issued on his first day in office, the President determined "that no more American taxpayer dollars [should] be diverted to construct a border wall" and ordered an immediate pause to all further border-wall construction. Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 27, 2021). And after a months-long process, DoD and DHS have implemented that policy by canceling all construction projects and taking steps to ensure that none of the challenged funds will be used for any further border-wall construction. See Gov't Mot. 8-11. Respondents do not dispute that those actions were taken solely for policy reasons based on the President's determination of what would be in the best interests of the United States, and not to thwart further review of the legal issues presented in

this case. In no way does equity demand that, as a consequence of those formal decisions by the Executive Branch, the declaratory and injunctive relief entered and affirmed by the lower courts must be left in place despite their potentially harmful effects in the future. The Court should vacate the decision below and remand the case with instructions that the district court's judgments be vacated and the case remanded to that court for further proceedings as appropriate, so that the district court can consider the impact of the changed circumstances on this case in the first instance.

A. Vacatur Is Warranted

As this Court has long made clear, injunctive and declaratory relief is inappropriate if there is no reasonable possibility that the actions enjoined or declared to be unlawful will occur in the future. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983); *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 127 (2007). Respondents do not dispute that the government has no intention of using the challenged funds for further border-wall construction, and that accordingly there is no reasonable possibility that additional construction using those funds will occur. It follows that the declaratory and injunctive relief the lower courts entered is no longer appropriate. See Gov't Mot. 12-14. Neither set of respondents contends otherwise.

Because the relief the lower courts entered is no longer appropriate, the judgments below should be vacated and the case remanded to the district court for further proceedings, including to determine the nature and extent of any remaining dispute between the parties and what relief, if any, would now be appropriate. See *Brown* v. *Plata*, 563 U.S. 493, 542 (2011) (explaining that federal courts generally have "the authority, and

the responsibility," to modify equitable relief in light of changed circumstances); 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."). This Court has vacated lower-court judgments in light of a variety of changed circumstances, see *Lawrence*, 516 U.S. at 166-167, and that course is again warranted here. See Gov't Mot. 14-19.

B. Respondents Offer No Sound Basis For Dismissal Of The Petition Rather Than Vacatur And Remand

Despite not defending the propriety of the declaratory and injunctive relief that the lower courts entered and affirmed, and despite agreeing that the recent actions by the President, DoD, and DHS have fundamentally changed the posture of this case, respondents argue that the Court should simply dismiss the petition for a writ of certiorari rather than vacate and remand. Respondents' reasoning is unpersuasive.

1. The state respondents do not argue that vacatur would be inappropriate, but they question (States Resp. 8) the "practical utility" of vacating the judgment and remanding for the district court to consider whether any equitable relief might be warranted "when the federal government has independently decided that it is no longer pursuing" border-wall construction. The private respondents similarly suggest (ACLU Resp. 9) that vacating the relief entered below is unnecessary because it will not "impede [the government's] ability to lawfully

transfer funds or engage in any other anticipated action" in the future. Contrary to respondents' suggestions, however, those are reasons *in favor* of vacatur and remand. When a declaratory judgment or injunction targets conduct that has no reasonably foreseeable chance of occurring, a federal court's duty is to vacate that relief—not leave it in place. Cf. *Lyons*, 461 U.S. at 111; *MedImmune*, 549 U.S. at 127. Even if some sort of relief could still be appropriate, this Court should not effectively make that determination in the first instance by retaining the lower-court judgments while dismissing the case in light of the greatly changed circumstances.

Respondents also suggest (States Resp. 8; ACLU Resp. 10) that the government can ask the district court to reconsider the relief that it previously entered. As the States acknowledge (States Resp. 8), such a request probably would have to be made under Federal Rule of Civil Procedure 60(b)(5), which permits a court to "relieve a party * * * from a final judgment, order, or proceeding" when "applying it prospectively is no longer equitable." Although that standard is satisfied, it would be unfair and in contravention of judicial economy to require the government to seek relief under Rule 60(b)(5) when the judgment is still on direct appeal and the Court has granted certiorari.

If, for example, a change in circumstances that fundamentally altered the basis for a district court's judgment were to arise after the entry of that judgment but before the court of appeals had completed its review, the proper disposition would not be to force the appellant to seek post-judgment relief under Rule 60(b)(5). Cf. *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (appellate courts must apply intervening

law that arises "subsequent to the judgment and before the decision of the appellate court"); *Griffith* v. *Kentucky*, 479 U.S. 314, 322-323 (1987) (new constitutional rules in criminal cases apply to all similar cases pending on direct review). Instead, the appellate court would vacate the lower court's judgment and remand. There is no reason to take a different course when, as here, the changed circumstances arise after the court of appeals has entered its judgment and this Court has granted certiorari.

2. Private respondents heavily rely (ACLU Resp. 1, 5-10) on the fact that the changed circumstances here are the result of governmental action. But as the government has explained (Gov't Mot. 14-19), this Court has never adopted a categorical rule that vacatur is unavailable in that situation. To the contrary, this Court has vacated judgments in light of changed circumstances even when the government was responsible in whole or in part for the change. *E.g.*, *Kiyemba* v. *Obama*, 559 U.S. 131 (2010) (per curiam); *Department of the Interior* v. *South Dakota*, 519 U.S. 919, 919-920 (1996); *NLRB* v. *Federal Motor Truck Co.*, 325 U.S. 838 (1945) (per curiam).

Indeed, this Court has even vacated lower-court judgments when governmental action contributed toward causing the case under review to become moot—and thus to be *dismissed* on remand. *E.g.*, *Mayorkas* v. *Innovation Law Lab*, No. 19-1212 (June 21, 2021); *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. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). It follows *a fortiori* that

vacatur and remand not for dismissal, but merely for further proceedings, is appropriate when, as here, formal action taken by the Executive Branch for policy reasons independent of the litigation contributes to changed circumstances that fundamentally alter the underpinnings of the case and the propriety of the lower courts' equitable relief. See Gov't Mot. 17-19.

Respondents' attempts (ACLU Resp. 8-9) to distinguish the *NLRB* cases and *Kiyemba* are unavailing. Respondents argue that the *NLRB* cases "presented an 'intervening development' that revealed 'a reasonable probability that the decision below rested upon a premise that the lower court would reject if given the opportunity for further consideration,'" but that this case supposedly does not. *Id.* at 8 (brackets omitted) (quoting *Lawrence*, 516 U.S. at 167). But in so arguing, respondents simply assume that the lower courts will ultimately rule in their favor on a remand, and circularly rely on that assumption to justify keeping the existing judgments in place. Instead of predicting what the lower courts would do, this Court should follow its usual course and allow them to decide whether any remaining relief would be warranted in light of the changed circumstances. Gov't Mot. 14.

As for *Kiyemba*, respondents suggest that vacatur there relied on the fact that "the question the Court granted certiorari to resolve"—namely, "'whether a district court may order the release of an unlawfully held prisoner into the United States where no other remedy is available'"—was rendered "effectively" moot by resettlement offers and thus "gave rise to a reasonable probability that the lower court would decide the case on different terms." ACLU Resp. 8-9 (citation and emphasis omitted). But as the government has noted

(Gov't Mot. 16), not all of the detainees in *Kiyemba* had accepted resettlement offers, so the question presented was not moot (either "effectively" or formally) as to those petitioners, yet this Court vacated and remanded the case nonetheless. As in *Kiyemba*, the changed circumstances that have fundamentally altered this case should be addressed in the first instance by the lower courts, not this Court.

Not only does precedent support vacatur here, but so do "the equities of the case." *Lawrence*, 516 U.S. at 168. Respondents acknowledge (ACLU Resp. 4) that this "appeal does not merit plenary review at this time" based on the greatly changed circumstances, and they concede (*id.* at 5) that "vacatur is appropriate where circumstances beyond the government's control deprive it of the ability to pursue an appeal." Relying on *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), however, respondents suggest (ACLU Resp. 10) that vacatur is unwarranted because "[n]othing prevent[ed] the government from litigating in this Court its objections to the court of appeals decision." To the extent respondents suggest the Executive Branch should have avoided taking any action that could affect the propriety of plenary review in this case, they ignore that "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." Gov't Mot. 19.

Instead, equity is served by recognizing that, unlike the settling parties in *U.S. Bancorp*, the Executive

Branch is charged with vindicating the public interest both in litigation and in policy decisions, cf. *Nken* v. *Holder*, 556 U.S. 418, 435 (2009), and forcing it to choose one at the expense of the other—especially when there has been an intervening change in Administration—would harm, not further, the public interest. The government recently made that point in *Innovation Law Lab*, *supra* (No. 19-1212), where (as here) the Executive Branch had made a policy determination to terminate the program whose legality this Court had agreed to review, and did so for good-faith reasons external to the litigation rather than "a desire to avoid review," *Alvarez*, 558 U.S. at 97 (2009). This Court granted the government's motion to vacate the court of appeals' judgment and remand the case "with instructions to direct the District Court to vacate as moot [its] order granting a preliminary injunction." June 21 Order, *Innovation Law Lab*, *supra* (No. 19-1212). A similar result is warranted here.

3. Private respondents' remaining objections lack merit. First, respondents assert that the government "has repudiated the claims it made in support of its petition" for a writ of certiorari and has "effectively concede[d] the lower court decision is not cert-worthy." ACLU Resp. 1, 5. Those assertions are incorrect. The government has made clear that it "continues to disagree with the court of appeals' decision." Gov't Mot. 11. The government's position is that this Court's *plenary* review is unnecessary *at this time* in light of fundamentally changed circumstances, and that the effect of those changes is most appropriately addressed in the first instance by the lower courts. Respondents do not even address (much less contest) that point.

Second, respondents state (ACLU Resp. 8) that "there is no factual circumstance that the lower court was unaware of that might have reasonably affected the decision." That is incorrect. When the district court entered declaratory and injunctive relief, the Executive Branch intended to use the challenged funds to construct a border wall and was actively engaged in such construction. That is no longer so, which fundamentally undermines the viability of the relief in this case. Gov't Mot. 12-14. Indeed, had those changes arisen before the district court's order, the court would have been obligated to take them into account. See *Lyons*, 461 U.S. at 111; *MedImmune*, 549 U.S. at 127. That is precisely what it should do on remand.

Third, respondents repeatedly suggest (ACLU Resp. 5, 6, 9-10) that vacatur is inappropriate because this Court granted a stay, leading respondents to assert that all of the challenged funds at issue in this case have been spent and construction of all of the sections of wall at issue has been completed. But both the premise and conclusion are unsound. DoD informs this Office that when the President issued his January 20 proclamation pausing all border-wall construction, more than $240 million of the challenged funds at issue in this case had not yet been expended on border-wall construction; and although bollard placement was complete at each of the challenged sites, the construction and placement of other features, such as poles, lights, cameras, shelters, electrical systems, ground sensors, and patrol roads, remained uncompleted. Even setting that aside, the government should not be disadvantaged in seeking vacatur of the judgments below as a result of this Court's granting of a stay in addition to certiorari, which rested

on a likelihood that the judgments below were erroneous and would be set aside.

Finally, respondents suggest (ACLU Resp. 9) that a remand "would set a dangerous precedent" and allow the government to "prevail, through vacatur," in this case. But the government would not "prevail" were this Court to vacate the decision below and remand for further proceedings. Instead, vacatur would leave all parties in the same positions they occupied before the district court entered its judgments and would clear the path for them to litigate the issues in the context of a concrete case or controversy. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947) (resolving case on plenary review after an earlier vacatur in light of changed circumstances).

By contrast, a decision to leave the lower courts' judgments in place would create a precedent that would force the Executive Branch going forward to choose between pursuing a policy it believes is against the public interest and acquiescing in a judgment that is rendered inappropriate in light of intervening events and could have untoward consequences in future cases. That would be far more "dangerous" a precedent than a standard vacatur and remand. At the same time, respondents have identified no concrete harm to *their* interests from vacatur and remand. As the state respondents recognize (cf. States Resp. 8), they would remain free to press before the district court all of their arguments about what relief, if any, would be appropriate in light of the changed circumstances.

* * * * *

The Court should vacate the judgment below and remand the case with instructions that the district court's

judgments be vacated and the case remanded to that court for further proceedings as appropriate.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

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