No. 20-685

In the Supreme Court of the United States

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

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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QUESTIONS PRESENTED

After Congress considered and rejected a request from President Trump to appropriate $5.7 billion to construct a wall on the southern border, he declared a national emergency at the border and asserted that the emergency required the use of the armed forces. Invoking 10 U.S.C. § 2808, the Secretary of Defense subsequently announced the diversion of $3.6 billion from various military construction projects to fund eleven barrier construction projects in California, New Mexico, and other border States. The questions presented are:

1. Whether the respondent States have a cause of action under the Administrative Procedure Act to challenge the Secretary's diversion of military construction funds.

2. Whether the Secretary's diversion of military construction funds was lawful.

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STATEMENT

A. Factual Background

1. During budget negotiations for the 2019 fiscal year, Congress and President Trump had sharply different views on the appropriate level of funding for the construction of border barriers along the Nation's southern border. *See* 20-138 Pet. App. 80a-81a.[1] Congress declined to provide the $5.7 billion requested by the President, and budget negotiations reached an impasse, triggering a partial government shutdown lasting more than a month. *Id.* at 81a.

The impasse was resolved when Congress adopted, and the President signed into law, the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019) (CAA). *See* 20-138 Pet. App. 81a. That act provided $1.375 billion for the construction of fencing in Texas. CAA, Div. A, Tit. II, § 230(a)(1), 133 Stat. at 28. It also imposed certain procedural and substantive requirements related to the environmental impact of that construction and potential infringements on state and local government interests. *See id.* §§ 230(b), 231, 232, 133 Stat. at 28-29.

2. The same day that President Trump signed the CAA, he issued a proclamation under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, "declar[ing] that a national emergency exists at the southern border of the United States[.]" Proclamation No. 9844, Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg.

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[1] Citations to "20-138 Pet. App." are to the appendix to the petition for a writ of certiorari in *Biden v. Sierra Club*, No. 20-138. Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in this case.

4949, 4949 (Feb. 15, 2019). The proclamation stated that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." *Id.* The proclamation declared it "necessary for the Armed Forces to provide additional support to address the crisis" and authorized the Secretary of Defense to use the construction authority provided in 10 U.S.C. § 2808 to support the federal government's response. 84 Fed. Reg. at 4949. That statute provides that, in the event of a declaration by the President of a national emergency that requires use of the armed forces, "the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The statute allows such projects to be undertaken with military construction funds that are "unobligated" and "available because the military construction project for which the funds were appropriated . . . has been canceled" or has reduced costs. *Id.* § 2808(b).

On the same day as the President's proclamation, the White House announced that it had identified up to $8.1 billion that it would use to build the border wall. Fact Sheets: President Donald J. Trump's Border Security Victory (Feb. 15, 2019).[2] Of that total, $1.375 billion was the amount Congress appropriated in the CAA. *Id.* The remaining $6.7 billion was to be drawn from three different sources of funds that Congress had appropriated for other purposes, including:

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[2] Available at https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-border-security-victory (last visited July 16, 2021).

up to $3.6 billion diverted from Department of Defense (DoD) military construction projects under the asserted authority of 10 U.S.C. § 2808; more than $600 million from the Treasury Forfeiture Fund; and up to $2.5 billion of DoD counter-narcotics assistance funds under 10 U.S.C. § 284. 20-138 Pet. App. 315a; *see also* Pet. 6-7. To fill a large gap in DoD's existing Section 284 counter-narcotics support account, the Acting Secretary of Defense transferred funds from other DoD accounts into the Section 284 account, claiming authority to do so under Sections 8005 and 9002 of the 2019 Department of Defense Appropriations Act. 20-138 Pet. App. 84a. Those provisions (collectively, "Section 8005") allow the Secretary of Defense to transfer certain DoD funds to address unforeseen military requirements so long as the funds are not used for an item for which Congress previously denied funding. Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. 2981, 2999 (2018); *see also* Pub. L. No. 115-245, Div. A, Tit. IX, § 9002, 132 Stat. at 3042 (allowing certain transfers subject to same terms and conditions as Section 8005).

In the months that followed the President's emergency declaration, Congress passed two joint resolutions to terminate the declaration. Pet. App. 5a. The President vetoed each one, and Congress failed to override his vetoes. *Id.* President Trump also renewed his emergency declaration. *Id.*

3. In September 2019, the Secretary of Defense decided to authorize eleven border wall construction projects under Section 2808. Pet. App. 6a, 111a-112a. Two of those projects were to be located on the Barry M. Goldwater Range, an existing military installation in Arizona. *Id.* at 6a. The remaining nine would be built in non-military areas in California, Arizona, New

Mexico, and Texas. *Id.* at 6a, 140a-141a. Those areas included federal public domain land under the Department of the Interior's jurisdiction and non-public land that would need to be acquired through purchase or condemnation. *Id.* at 6a. The Secretary administratively assigned those nine sites to Fort Bliss—an Army base with its headquarters in El Paso, Texas. *Id.* at 6a, 141a.

The Secretary subsequently identified 128 military construction projects that DoD would defer in order to fund the border wall projects. Pet. App. 6a. Of those defunded projects, more than a dozen were within the territories of respondent States, accounting for over $500 million in re-directed funds. *Id.* at 6a-7a, 7a n.1. He also instructed that the wall construction projects should proceed without compliance with state and other environmental laws that would otherwise apply. *See id.* at 7a, 18a.

B. Proceedings Below

In February 2019, a coalition of States sued to challenge petitioners' anticipated diversions of funds under the claimed authority of Section 2808, Section 8005, and the Treasury forfeiture program. Pet. App. 115a.[3] Their complaint alleged that the diversions exceeded petitioners' statutory authority and violated the Appropriations Clause, among other claims. 20-138 Pet. App. 86a. The Sierra Club and

[3] The first amended complaint includes 20 state plaintiffs. Pet. App. 7a n.2. Nine States—California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Wisconsin, and Virginia—sought to enjoin petitioners' diversion of funds under Section 2808 and are the only state respondents before the Court in this proceeding. *See id.* at 8a.

Southern Border Communities Coalition (also respondents here) subsequently filed suit asserting similar claims, and the cases were assigned to the same district court judge. *Id.* at 7a-8a, 86a-87a.

The courts below considered respondents' legal claims on separate tracks: they first considered the challenges to the Section 8005 transfers, which were the subject of the petition for a writ of certiorari in *Biden v. Sierra Club*, No. 20-138. *See* Pet. App. 7a-9a. They later considered respondents' claims regarding the Section 2808 diversions, which are at issue in this proceeding, after petitioners had reached a final decision on the specific wall projects to be funded using that authority. *See id.*

1. *Section 8005 litigation.* As to the Section 8005 transfers that were at issue in No. 20-138, the district court initially entered a preliminary injunction in favor of the Sierra Club respondents. 20-138 Pet. App. 8a. The Sierra Club respondents and respondents California and New Mexico then filed separate motions for partial summary judgment, which the district court granted in part. *Id.* at 187a, 203a. In both cases, the court issued a declaration that petitioners' transfers were unlawful. *Id.* at 187a, 203a. In *Sierra Club*, the court entered a permanent injunction prohibiting petitioners from using the transferred funds for wall construction. *Id.* at 187a-188a. The court denied the States' request for similar injunctive relief in light of the injunction in *Sierra Club*. *Id.* at 200a, 203a. It entered partial final judgments under Federal Rule of Civil Procedure 54(b) in both cases, allowing for immediate appeals while the separate claims regarding the Section 2808 diversions continued to be litigated. *See id.* at 8a-9a, 88a.

Petitioners appealed both judgments and sought an emergency stay of the *Sierra Club* injunction. 20-138 Pet. App. 225a-228a. A motions panel of the court of appeals denied the stay. *Id.* at 273a. Petitioners then filed a stay application in this Court, which this Court granted. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). The Court explained that, "[a]mong the reasons" for entering the stay, "the Government has made a sufficient showing at this stage" that the *Sierra Club* respondents "have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Id.* at 1.

The court of appeals then affirmed the district court's partial final judgments. 20-138 Pet. App. 1a-40a, 78a-119a. In *California*, the court determined that California and New Mexico could challenge petitioners' transfers under the Administrative Procedure Act. *Id.* at 100a-106a. On the merits, it held that Section 8005 did not authorize DoD's transfers. *Id.* at 106a-118a. In *Sierra Club*, the court ruled in favor of the private respondents on their constitutional and *ultra vires* claims. *Id.* at 16a-34a. It also affirmed the district court's entry of a permanent injunction in that case. *Id.* at 34a-39a.

Judge Collins dissented in both cases. 20-138 Pet. App. 40a-77a, 119a-173a. He concluded that respondents had no cause of action to challenge petitioners' transfers under Section 8005 and that, in any event, Section 8005 authorized petitioners' actions. *Id.* at 52a-76a, 131a-173a.

2. *Section 2808 litigation.* While petitioners' appeal in the Section 8005 litigation was pending, and after the Secretary of Defense announced the specific projects to be funded pursuant to Section 2808, nine States and the Sierra Club respondents separately

moved for partial summary judgment on their challenges to the Section 2808 diversions. Pet. App. 117a.

a. The district court granted those motions in part. Pet. App. 104a-172a. It held that respondents had causes of action to obtain judicial review of their claims (*id.* at 118a-124a, 151a) and that petitioners' diversion of funds under Section 2808 was unlawful (*id.* at 124a-151a). The court entered a declaratory judgment to that effect. *Id.* at 171a. It also entered a permanent injunction, in the *Sierra Club* case, prohibiting petitioners from using military construction funds appropriated for other purposes to build a border wall in the specified areas. *Id.* at 157a, 172a. But it stayed that injunction pending appeal, citing (among other things) this Court's stay of the Section 8005 injunction and the then-pending Section 8005 appeal. *Id.* at 168a-169a. The court entered a partial final judgment under Rule 54(b). *Id.* at 169a-172a.

b. The court of appeals affirmed. Pet. App. 1a-64a. The court first held that respondents had established Article III standing, an issue that petitioners did not challenge. *Id.* at 12a-13a, 26a. The court explained that California and New Mexico would suffer environmental injuries and injuries to their quasi-sovereign interests as a result of border construction within their territories and that the other respondent States would suffer economic injuries caused by the cancellation of specific military construction projects within their boundaries. *Id.* at 13a-26a.

The court next held that the APA provided a cause of action for the state respondents to challenge petitioners' diversions under Section 2808. Pet. App. 34a-38a. The court recognized that, under this Court's precedents, the States were required to show that

their interests fall within the "zone of interests" of Section 2808. *Id.* at 34a-36a (discussing, *e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)). It explained that Section 2808 "constrain[s] DoD's ability to fund emergency military construction projects while deferring other military construction projects." *Id.* at 36a. Accordingly, as parties that previously "stood to benefit significantly from federal military construction funding" that petitioners were now diverting, the States fell within the statute's zone of interests and were "suitable challengers" to enforce its limitations. *Id.* at 37a.

With respect to California and New Mexico, where border construction would occur, the court observed that *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), provided a further basis for establishing that the States were in the relevant zone of interests. Pet. App. 38a. The court reasoned that under *Patchak*, a statute addressing land use issues—including a construction-related statute like Section 2808—brings within its regulatory ambit the economic, aesthetic, and environmental interests of neighboring property users. *Id.* With respect to the *Sierra Club* respondents, the court held that they had a cause of action to press their claim under the Appropriations Clause. *Id.* at 38a-40a.

On the merits, the court held that the challenged construction projects violated two of Section 2808's requirements. Pet. App. 41a-58a. First, the projects were "not necessary to support the use of the armed forces." *Id.* at 42a; *see also id.* at 41a-49a. The administrative record showed that the projects were "intended to support and benefit [the Department of Homeland Security]—a civilian agency—rather than

the armed forces." *Id.* at 42a. Likewise, petitioners did "not even allege[], let alone establish[] as a matter of fact, that the border wall construction projects are 'necessary' under any ordinary understanding of the word." *Id.* at 43a. Although petitioners argued that the construction would make DoD's support more efficient and effective, that argument did not satisfy the statutory requirement that the projects be "necessary" to support use of the armed forces. *Id.* at 43a-46a; *see also id.* at 48a.

Second, the court determined that nine of the eleven authorized projects (all except the two projects on the military's Goldwater Range) were not "military construction projects" within the meaning of Section 2808. Pet. App. 49a-58a. As relevant here, Congress defined "military construction" as used in Section 2808 to include construction "carried out with respect to a military installation." 10 U.S.C. § 2801(a). A "military installation" means "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department[.]" *Id.* § 2801(c)(4).

Analyzing these statutory terms, the court held that nine of the projects were not "carried out with respect to a military installation" because they were not physically or functionally part of any military installation. Pet. App. 49a-52a. Although the wall construction projects had been "assigned" for real-property accounting purposes to Fort Bliss, none was "physically connected to Fort Bliss," and most were "hundreds of miles away." *Id.* at 51a. Petitioners likewise cited "no operational ties between the projects and any of the military activities conducted at Fort Bliss." *Id.*

The court also determined that the nine projects could not be regarded as "other activity under the jurisdiction of the Secretary of a military department[.]" 10 U.S.C. § 2801(c)(4); *see also* Pet. App. 54a-58a. It observed that "'other activity'" under the statute does not mean *any* activity. Pet. App. 54a. Rather, "'other activit[ies]'" are those activities that are "similar to" the preceding statutory terms—"bases, camps, posts, stations, yards, or centers"—which the border wall projects "are not." *Id.* at 54a-55a. The court noted that petitioners' contrary reading of the statute "would grant them 'essentially boundless authority to reallocate military construction funds to build anything they want, anywhere they want, provided they first obtain jurisdiction over the land where the construction will occur.'" *Id.* at 56a-57a. Although petitioners did not contend that the entire southern border qualifies as a military installation, they "cite[d] no limit to their interpretation that would prevent them from making it one." *Id.* at 57a. Based on these conclusions, the court of appeals affirmed the district court's partial final judgment, including the permanent injunction in *Sierra Club*. *Id.* at 59a-64a.

c. Judge Collins again dissented. Pet. App. 65a-103a. He would have held that petitioners' diversions complied with the terms of Section 2808, but he concluded that the APA provided a cause of action for California, New Mexico, and the Sierra Club respondents to obtain judicial review of their claims. *Id.* at 66a. He acknowledged that he had reached a different conclusion with respect to the availability of a cause of action in the Section 8005 appeal. *Id.* at 82a. But he concluded that "§ 2808 differs from that statute in a critical respect that warrants a different conclusion" because Section 2808, on its face, allows the Secretary

of Defense to undertake military construction "'without regard to any other provision of law.'" *Id.* "[A]lthough environmental laws are not specifically mentioned, they are one of the most familiar potential obstacles to carrying out construction projects, and such laws are thus within the contemplation of this language." *Id.* at 82a-83a. "Because an invocation of § 2808 . . . *itself* sets aside the environmental laws that protect the interests asserted," Judge Collins reasoned, "the *limitations* in § 2808 on the exercise of that authority arguably protect the [Sierra Club respondents'] environmental interests and the States' sovereign interests in enforcing their environmental laws." *Id.* at 83a.

d. The court of appeals subsequently granted petitioners' request to stay the mandate. Pet. App. 173a-174a. That order left in place the district court's stay of its injunction pending further proceedings in this Court. *See* Pet. 15-16.

C. Further Developments

1. In August 2020, petitioners filed the petition in No. 20-138, seeking review of the court of appeals' judgments with respect to the Section 8005 transfers. The Court granted plenary review in October 2020, *see Trump v. Sierra Club*, 141 S. Ct. 618 (2020), and later set the case for argument in February 2021. In November 2020, petitioners filed the petition in this case.

2. On January 20, 2021, President Biden issued a proclamation terminating the national emergency declaration and ordering a pause in wall construction. *See* Proclamation No. 10142, Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7225 (Jan. 27,

2021). That proclamation determined that the February 2019 emergency declaration "was unwarranted" and announced as "the policy of [the new] Administration that no more American taxpayer dollars [should] be diverted to construct a border wall." *Id.* at 7225.

Consistent with these determinations, the President directed that the authorities "invoked in [the national emergency declaration] will no longer be used to construct a wall at the southern border." 86 Fed. Reg. at 7225. He ordered a "pause" in work on each construction project and in the obligation of funds related to those projects. *Id.* He also directed an "assessment of the legality of the funding and contracting methods used to construct the wall" and ordered DoD and the Department of Homeland Security (DHS), in coordination with other agencies, to develop a plan "for the redirection of funds concerning the southern border wall." *Id.* at 7225, 7226.

A few days later, the Deputy Secretary of Defense issued a memorandum to various DoD officials to begin implementing the proclamation. *See* 20-138 Mot. to Hold Briefing Schedule in Abeyance (Feb. 1, 2021) (Abeyance Mot.) App. 4a-6a. With respect to the eleven wall construction projects authorized under the asserted authority of Section 2808, the Deputy Secretary directed that the Army Secretary "shall cease exercising the authority provided by section 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." *Id.* at 5a.

In light of these changes and the pending reviews of border wall construction projects, in February 2021 petitioners filed an unopposed motion to hold the Section 8005 merits case in abeyance and remove it from

the February argument calendar. Abeyance Mot. 5-6. This Court granted the motion. *Biden v. Sierra Club*, 141 S. Ct. 1289 (2021). The Court also granted respondents' unopposed request to extend the time for filing their responses to the petition at issue in this proceeding based on the changed and evolving circumstances.

3. In the months that followed, DoD and DHS announced their plans to implement the President's proclamation. In April 2021, the Deputy Secretary of Defense issued a memorandum directing the Army Secretary to "cancel all section 2808 border barrier construction projects." 20-138 Letter from the Acting Solicitor General (Apr. 30, 2021) Encl. 4. The memorandum explained that the President's "termination of the national emergency with respect to the southern border . . . made the authority provided in section 2808 no longer available" and the projects previously authorized "no longer necessary to support the use of the armed forces." *Id.* It also directed the Army Secretary to transfer "administrative jurisdiction" of lands associated with the Section 2808 projects to DHS. *Id.*

In June 2021, DoD and DHS announced that they had completed the development of their implementation plans. 20-138 Mot. to Vacate and Remand 10 (June 11, 2021) (Mot. to Vacate). DoD explained that its plan contains two elements: (1) the cancellation of projects as outlined in the April 2021 memorandum, and (2) the redirection of $2.2 billion of unobligated military construction funds to restore funding for 66 projects, including for some, but not all, of the projects in the respondent States that had lost funding as a result of the diversions. Mot. to Vacate App. 1a-2a, 6a, 8a-9a. For its part, DHS expressed its expectation

that it would assume responsibility for multiple barrier projects "in various stages of completion." *Id.* at 15a.

4. On the same day as those announcements, petitioners filed a motion asking this Court to vacate and remand in the Section 8005 case. The motion explained that, in light of the unequivocal change in federal policy, plenary review was no longer warranted. Mot. to Vacate 3. The motion did not contend that the change in federal policy had rendered the case moot, but argued that the declaratory and injunctive relief entered by the district court was no longer appropriate and that the Court should therefore vacate the judgments below to allow the lower courts to consider the impact of the changed circumstances in the first instance. *See id.* at 11. This Court granted the motion. *Biden v. Sierra Club*, __ S. Ct. __, 2021 WL 2742775, at *1 (July 2, 2021).[4]

ARGUMENT

When they filed this petition in November 2020, petitioners asked the Court to grant plenary review of the judgment below regarding the Section 2808 diver-

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[4] That same day, the Court also denied a petition for a writ of certiorari before judgment in *El Paso County v. Biden*, No. 20-298, another case involving a challenge to petitioners' diversions of funds to construct barriers along the southern border. *See El Paso County v. Biden*, __ S. Ct. __, 2021 WL 2742797, at *1 (July 2, 2021). In that case, after the petition was filed, the Fifth Circuit held (among other things) that El Paso County lacked Article III standing to challenge petitioners' Section 2808 diversions based on economic injuries that it asserted would result from petitioners' cancellation of a military construction project within the county. *El Paso County v. Trump*, 982 F.3d 332, 338-342 (5th Cir. 2020).

sions or, in the alternative, to hold the petition pending its disposition of the Section 8005 case. Pet. 3, 17. Now that the Court has disposed of the Section 8005 case, there is no basis for the Court to hold this petition. And subsequent developments have fundamentally altered the posture of this case and eliminated any basis for plenary review.

1. Petitioners sought plenary review in this Court in November 2020. They discussed their merits arguments at length, *see* Pet. 17-32, but they did not identify any lower-court conflict. Instead, they argued that "the decision below, if allowed to stand, would frustrate the goals of both the President's declaration of a national emergency that requires the use of the armed forces and also the reprioritization of military construction funds, which the Secretary determined were 'necessary to support such use of the armed forces.'" *Id.* at 32-33.

Subsequent developments have eliminated that asserted basis for review. The President has terminated the national emergency declaration that petitioners argued would be frustrated by the decision below, and he has directed that no more taxpayer dollars should be diverted for wall construction. 86 Fed. Reg. at 7225. DoD has since recognized that the border wall projects previously undertaken pursuant to Section 2808 are "no longer necessary to support the use of the armed forces." 20-138 Letter from the Acting Solicitor General Encl. 4. DoD has cancelled the eleven border wall projects funded by Section 2808 diversions and restored funding to some military construction projects. Mot. to Vacate App. 1a-2a, 6a. DoD has also transferred "administrative jurisdiction" of the land from Fort Bliss to DHS. 20-138 Letter from the Acting Solicitor General, Encl. 4.

Petitioners asserted in the Section 8005 case that "the actions of the President, DoD, and DHS . . . fundamentally altered the basis and posture" of that case, such that there was "no longer a controversy that warrant[ed] this Court's plenary review[.]" Mot. to Vacate 12 (capitalization altered). The same is true here. Given the fundamental shift in federal policy, there is no longer any persuasive argument for plenary review—let alone the kind of "compelling reason[]" required by this Court. Sup. Ct. R. 10. Under these circumstances, the most appropriate disposition would seem to be for the Court simply to deny the petition.

2. The state respondents recognize that, when the Court was faced with the same intervening executive actions in the Section 8005 case, it granted petitioners' motion to vacate and remand and instructed the district court to consider in the first instance what further proceedings are "necessary and appropriate in light of the changed circumstances[.]" 2021 WL 2742775, at *1. But this case stands on different footing from the Section 8005 merits case in at least two respects.

First, unlike in the Section 8005 case, this Court has not already granted the petition for a writ of certiorari or a stay. In their briefing in support of the motion to vacate in the Section 8005 case, petitioners urged that a decision dismissing the writ and leaving the judgments below in place would be inappropriate where the Court had already granted a stay "and then certiorari to review those rulings." 20-138 Reply in Support of Mot. to Vacate and Remand 1-2 (June 22, 2021) (Reply in Support of Mot. to Vacate). There is

no similar stay or grant of certiorari here—and as explained above, no ongoing dispute of sufficient importance to support certiorari review.

That circumstance also bears on the equities here. In the Section 8005 case, petitioners acknowledged that the relief they sought—vacatur of the district court's judgment, including to allow the district court to revisit the equitable relief it entered—could be sought directly from the district court, likely under Federal Rule of Civil Procedure 60(b)(5). Reply in Support of Mot. to Vacate 5. But they argued that "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." *Id.* That is not the situation here, where the Court has not granted certiorari.

Second, in the Section 8005 case, the Court had preliminarily evaluated the underlying legal questions in ruling on petitioners' stay application and had concluded that petitioners had "made a sufficient showing at [that] stage" that the *Sierra Club* respondents had "no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." 140 S. Ct. at 1. That circumstance informed petitioners' later arguments in support of vacatur. They argued that, "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." Mot. to Vacate 17. And they emphasized that the "fair prospect" standard "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."

Id. (citing *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam)). Here, the Court has had no occasion to consider—preliminarily or otherwise—either of the questions presented. And unlike the Section 8005 case, all three judges below concluded that there was a cause of action under the APA to obtain judicial review of petitioners' compliance with the terms of Section 2808. Pet. App. 34a-38a (majority); *id.* at 83a (Collins, J., dissenting); *see supra* pp. 7-8, 10-11.

In light of these considerations, and under the particular circumstances of this case, the Court should deny the petition. But should the Court instead choose to grant certiorari for the purpose of vacating the judgment below and remanding for further proceedings, the state respondents stand ready to participate in those proceedings. As petitioners have recognized in the context of the Section 8005 case, in any such proceedings, respondents "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." Reply in Support of Mot. to Vacate 11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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