No. 20-685

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

REPLY BRIEF FOR THE PETITIONERS

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Significant developments since the filing of the petition for a writ of certiorari have fundamentally altered the underpinnings of this case—just as occurred in a parallel case, *Biden* v. *Sierra Club*, No. 20-138 (the Section 8005 case), which arose out of the same district court proceedings and which this Court recently vacated and remanded. On January 20, 2021, the President terminated the national emergency giving rise to the reprioritization of funds under 10 U.S.C. 2808 for border-wall construction, directed an immediate pause to border-wall construction, and ordered the development of a plan "for the redirection of funds concerning the southern border wall." Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225-7226 (Jan. 27, 2021). As the government previously informed the Court in the parallel case—which involved funds that were transferred for border-wall construction under Sections 8005 and 9002

of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tits. VIII, IX, 132 Stat. 2999, 3042—that plan was announced in two steps, in April and June 2021. See Enclosure to Letter from Elizabeth B. Prelogar, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, *Biden* v. *Sierra Club*, No. 20-138 (Apr. 30, 2021) (April 30 DoD Memo); App. to Gov't Mot. to Vacate, *Biden* v. *Sierra Club*, No. 20-138 (June 11, 2021) (June 11 Plan). As relevant here, the plan provided that all border-wall construction projects would be canceled and that unobligated military construction funds that had been made available for Section 2808 projects, totaling $2.2 billion, would instead be released to fund 66 military construction projects that had been deferred. June 11 Plan at 1a, 6a; see *id.* at 8a.

In light of those developments, the declaratory and permanent injunctive relief that the district court entered, and the court of appeals affirmed, is no longer appropriate. Nevertheless, were it not for those developments, the decision below would have warranted this Court's plenary review—or, at a minimum, appropriate action in light of its disposition of the Section 8005 case, in which this Court had granted the government's petition for a writ of certiorari.

Accordingly, consistent with this Court's disposition of the Section 8005 case, see July 2, 2021 Order, *Biden* v. *Sierra Club*, No. 20-138, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand with instructions that the district court's judgments be vacated.

A. Significant Developments Have Fundamentally Altered The Underpinnings Of This Case

Respondents brought this litigation to halt the use of funds reprioritized under Section 2808 for border-wall

construction in eleven specific areas along the southern border, alleging that the construction caused environmental, aesthetic, and recreational injuries, see Pet. App. 28a, and that the deferral of other projects in favor of border-wall construction caused economic injuries, see *id.* at 37a. After this Court granted a stay of the district court's injunction in the Section 8005 case, the district court stayed its own judgments in this case pending appeal. See *id.* at 169a, 172a. The government thus continued using the challenged funds for border-wall construction during the pendency of proceedings in the court of appeals and in this Court.

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." 86 Fed. Reg. at 7225. The President directed the Secretaries of Defense and Homeland Security to pause both border-wall construction and "the obligation of funds related to construction of the southern border wall, to the extent permitted by law." *Ibid.* The President also directed the Secretaries, in consultation with the Attorney General and others, to "develop a plan for the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law." *Id.* at 7226.

In April 2021, the Deputy Secretary of Defense directed the Secretary of the Army to "take immediate action" to cancel all border-wall construction projects. April 30 DoD Memo at 4-5. As relevant here, the Deputy Secretary ordered that Section 2808 funds be used "only to pay contract termination costs" and not "costs associated with any further construction." *Id.* at 4. The Deputy Secretary also directed that "unobligated"

funds be "release[d]" for use in "military construction projects that were deferred to finance section 2808 border barrier construction." *Ibid.* In June, the Department of Defense (DoD) announced that $2.2 billion of such unobligated military-construction funds would be released to fund 66 projects that had been deferred. June 11 Plan at 1a, 6a; see *id.* at 8a.

The plan also enumerated measures that the Department of Homeland Security (DHS) will undertake to "close out/remediate barrier projects." June 11 Plan at 15a (capitalization omitted). Under the plan, 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. The plan specified that "[n]o new barrier construction work will occur on the DoD projects." *Id.* at 16a.

Those formal actions of the President, DoD, and DHS have fundamentally altered the basis and posture of this case, and require that the district court's orders of declaratory and injunctive relief be revisited. Using language materially identical to that in the Section 8005 case, the district court entered a declaratory judgment that the government's "*intended* use of military construction funds under Section 2808 for the eleven border barrier construction projects" in the listed areas "is unlawful." Pet. App. 171a (emphasis added); cf. Pet. App. at 187a, 203a, *Biden* v. *Sierra Club*, No. 20-138 (declaratory judgment in Section 8005 case). And again using language materially identical to that in the Section 8005 case, the district court permanently enjoined petitioners "and all persons acting under their direction

* * * from using military construction funds appropriated for other purposes to build a border wall in th[os]e areas." Pet. App. 172a; cf. Pet. App. at 188a, *Biden* v. *Sierra Club*, No. 20-138 (injunction in Section 8005 case).

DoD's actions under President Biden's proclamation, however, now establish that the government will not "us[e] military construction funds appropriated for other purposes to build a border wall" in those areas, and that the "intended use" of those funds is not for further border-barrier construction. Pet. App. 171a-172a. And as part of its own close-out activities, DHS contemplates undertaking remediation measures that may further fundamentally alter whatever disputes remain between the parties.

In light of those developments, the relief that respondents were previously granted and that is now before this Court is unjustified. 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, the challenged conduct—constructing a border wall using the reprioritized 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).

B. The Court Should Grant Certiorari, Vacate The Judgment Below, And Remand With Instructions That The District Court's Judgments Be Vacated

1. In light of the actions by the President, DoD, and DHS set forth above, the Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions that the district court's judgments be vacated, so that the lower courts can consider the impact of the changed circumstances on this case.

Because of those changed circumstances, the government moved for a similar vacatur and remand in the Section 8005 case, in which this Court had already granted review. See Gov't Mot. to Vacate at 14-19, *Biden* v. *Sierra Club*, No. 20-138 (June 11, 2021) (Section 8005 Motion); Gov't Reply in Support of Mot. to Vacate at 4-11, *Biden* v. *Sierra Club*, No. 20-138 (June 22, 2021) (Section 8005 Reply). In that motion, the government observed that this Court has "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."'" Section 8005 Motion at 14 (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam) (in turn quoting 28 U.S.C. 2106)). And this Court has often vacated lower-court judgments in light of changed circumstances, even when the government was responsible in whole or in part for the change. See *id.* at 15-18 (citing examples); Section 8005 Reply at 6-9. That practice reflects the equitable nature of vacatur, see *Lawrence*, 516 U.S. at 167-168, which considers both fairness and the public interest, see *id.* at 175; *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). As the government explained, "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." Section 8005 Motion at 19; see Section 8005 Reply at 11.

The Court granted that motion, stating: "The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court to vacate its judgments. The District Court should consider what further proceedings are necessary and appropriate in light of the changed circumstances in this case." July 2, 2021 Order, *Biden* v. *Sierra Club*, No. 20-138.

The same result is warranted here. The district court's declaratory judgment and permanent injunction use language materially identical to that in the Section 8005 case. Compare Pet. App. 171a-172a with Pet. App. at 187a-188a, 203a, *Biden* v. *Sierra Club*, No. 20-138. Just as the Executive Branch's formal acts rendered the declaratory and injunctive relief in the Section 8005 case no longer appropriate, so too do they make clear that the declaratory and injunctive relief in this case—which originated from the same district-court proceedings involving the same plaintiffs—is no longer appropriate.

2. Notwithstanding this Court's disposition of the Section 8005 case, respondents resist vacatur and remand here on several grounds. None has merit. Respondents first attempt to distinguish the Section 8005 case by observing (States Br. in Opp. 16-17; ACLU Br. in Opp. 18-19) that unlike in this case, the Court had already granted certiorari. But as the government explained (Section 8005 Motion at 15; Section 8005 Reply at 6)—and contrary to private respondents' assertion

(ACLU Br. in Opp. 15-18)—this Court has vacated lower-court judgments in light of changed circumstances even when it had not previously granted certiorari. *E.g.*, *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996); *NLRB* v. *Federal Motor Truck Co.*, 325 U.S. 838 (1945) (per curiam). The key question is thus whether the case would warrant certiorari but for the changed circumstances. Cf. Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-29 n.34 (11th ed. 2019).

Respondents identify no sound reason why this case would not merit review as the Section 8005 case did. Both cases involve substantially overlapping issues related to border-wall construction, including whether respondents have a cognizable cause of action to challenge military spending. The district court itself recognized that overlap, staying its own injunction pending this appeal precisely because this Court had stayed the district court's injunction in the Section 8005 case. Pet. App. 169a. For the same reason, the court of appeals denied respondents' motion to lift that stay. *Id.* at 176a. Indeed, both this case and the Section 8005 case arose out of the same complaints filed by the same sets of plaintiffs. See 19-cv-892 D. Ct. Doc. 26 (Mar. 18, 2019); 19-cv-872 D. Ct. Doc. 47 (Mar. 13, 2019). It would be highly anomalous to vacate the lower-court judgments in the Section 8005 case but not in this one.

Private respondents observe (ACLU Br. in Opp. 20) that funds-transfer provisions similar to the one at issue in the Section 8005 case are invoked more frequently than is Section 2808, suggesting that this case is less important and thus presents a weaker case for certiorari. But that does not diminish the importance of Section 2808 or the lower courts' rulings in this case. Section 8005 and other similar provisions are specific to

their respective appropriations laws, and generally apply only to the funds appropriated by those laws. By contrast, Section 2808 is in Title 10 of the United States Code and generally can be invoked upon the declaration of any applicable national emergency to reprioritize unobligated military-construction funds in any fiscal year. Indeed, Presidents have invoked Section 2808 at critical moments in our Nation's history. See Exec. Order No. 12,734, 55 Fed. Reg. 48,099, 48,099 (Nov. 19, 1990) (invoking Section 2808 in connection with the national emergency "caused by the invasion of Kuwait by Iraq"); Exec. Order No. 13,235, 66 Fed. Reg. 58,343, 58,343 (Nov. 20, 2001) (invoking Section 2808 in connection with the national emergency declared "because of the terrorist attacks on the World Trade Center and the Pentagon"). And as the state respondents acknowledge (States Br. in Opp. 2-3), the funds reprioritized for border-wall construction under Section 2808 exceeded those that were transferred under Sections 8005 and 9002 by more than a billion dollars, further illustrating the importance of Section 2808.

Private respondents are also incorrect in contending (ACLU Br. in Opp. 13-14) that the government has "repudiated" or "abandoned" certain arguments in support of certiorari in this case. The government continues to believe that the reasons supporting certiorari in the Section 8005 case support certiorari here and that the lower court's decision, if left in place, could frustrate executive prerogatives. To be sure, *plenary* review is no longer appropriate in light of the substantially changed circumstances resulting from the formal acts of the President, DoD, and DHS to cancel border-wall construction using the challenged funds and to preclude the use of those funds for further border-wall construction.

But just as the inappropriateness of plenary review did not cause the Court to *dismiss* its grant of certiorari in the Section 8005 case, it does not preclude the Court from granting certiorari to vacate and remand here, as the Court determined was appropriate in the Section 8005 case.

Indeed, barring the changed circumstances, this Court would likely have at least held the petition in this case pending its decision in the Section 8005 case, cf. Pet. 33—and in such circumstances, the Court frequently grants, vacates, and remands following final resolution of the related case. In the Section 8005 case, the Court vacated the judgment of the court of appeals and remanded with instructions that the district court's judgments be vacated. Fairness and equity—in particular, the principle that like cases should be treated alike—counsel the same result here. Cf. *Straight* v. *Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan, J., dissenting) ("The Court's 'hold' policy represents the conviction that like cases must be treated alike.").

As they did in the Section 8005 case, see States Resp. to Mot. to Vacate at 8, *Biden* v. *Sierra Club*, No. 20-138 (June 18, 2021); ACLU Resp. to Mot. to Vacate at 10, *Biden* v. *Sierra Club*, No. 20-138 (June 18, 2021), respondents suggest in passing (States Br. in Opp. 17; ACLU Br. in Opp. 16, 19) that the government should have to resort to seeking relief in the district court under Rule 60(b)(5) of the Federal Rules of Civil Procedure, which permits a court to "relieve a party * * * from a final judgment, order, or proceeding" when "applying it prospectively is no longer equitable." But as in the Section 8005 case, there is no sound basis to require the government to pursue that course—which would be unfair and in contravention of judicial economy—when the

district court's judgment here is not yet final and is still on direct review. See Section 8005 Reply at 5-6.

Finally, to the extent private respondents suggest (ACLU Br. in Opp. 19-20) that there are no equitable reasons for granting the petition for a writ of certiorari and vacating the lower-court judgments, that suggestion is mistaken. As in the Section 8005 case, leaving those 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 less equitable than a standard "grant, vacate, and remand" order. At the same time, respondents have identified no concrete harm to *their* interests that would result from a vacatur. As the state respondents recognize (cf. States Br. in Opp. 18), they would remain free to press before the district court all of their arguments about how to proceed in light of the changed circumstances.

* * * * *

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded with instructions to direct the district court to vacate its judgments and to consider what further proceedings may be necessary and appropriate in light of the changed circumstances in this case.

Respectfully submitted.

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