No. 19A60

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

SIERRA CLUB, ET AL.

RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO LIFT THE COURT'S STAY

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The Acting Solicitor General, on behalf of applicant Donald J. Trump, President of the United States, et al., respectfully submits this response in opposition to respondents' motion to lift this Court's July 26, 2019 stay of the permanent injunction entered by the United States District Court for the Northern District of California in this matter (Resp. Mot. App. 188a-198a). When this Court granted the government's application for a stay, it ordered that the injunction be stayed "pending disposition of the Government's [then-pending] appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought." 140 S. Ct. 1, 1. The Court therefore necessarily determined that a stay pending certiorari would be and is appropriate in the event

that the Ninth Circuit affirmed the district court's injunction -- as a divided panel of the court of appeals in fact did, on June 26, 2020 (Resp. Mot. App. 1a-82a).

No sound basis exists for this Court to reconsider its prior order granting a stay. This Court primarily reasoned that "the Government has 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." 140 S. Ct. at 1. Respondents have identified no new arguments in that respect, and their old arguments remain equally flawed, as Judge Collins's powerful dissent demonstrates. See Resp. Mot. App. 57a-82a. Instead, respondents premise their motion on a purported change in factual circumstances -- namely, that the government will delay seeking certiorari in order to benefit from this Court's stay while avoiding plenary review, see, e.g., Resp. Mot. 4-5 -- that is simply false. As respondents would have learned if they had conferred with the government before filing their motion, the government is preparing a petition for a writ of certiorari and presently anticipates filing the petition on Friday, August 7, 2020; in the ordinary course, that schedule would allow the Court to consider the petition at its first conference following the summer recess. Especially given that timing, the stay should remain in effect in the interim, and the motion should be denied.

STATEMENT

1. In Section 8005 of the Department of Defense Appropriations Act, 2019 (DoD Appropriations Act), Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999 (2018), Congress authorized the Secretary of Defense to transfer certain appropriated funds between Department of Defense (DoD) appropriation accounts "[u]pon determination by the Secretary * * * that such action is necessary in the national interest." Section 8005 contains a proviso stating "[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." Ibid. Section 9002 of the DoD Appropriations Act confers similar transfer authority with respect to other funds, subject to the "same terms and conditions as the authority provided in section 8005." Id. § 9002, 132 Stat. 3042.

In 2019, the Acting Secretary of Defense transferred approximately $2.5 billion pursuant to Sections 8005 and 9002 of the DoD Appropriations Act to make funds available for DoD to respond to a request from the Department of Homeland Security (DHS) for counterdrug assistance under 10 U.S.C. 284, including in the form of construction of fences along the southern border of the United States. Resp. Mot. App. 12a. Under 10 U.S.C. 284(a), the

"Secretary of Defense may provide support for the counterdrug activities * * * of any other department or agency of the Federal Government," if "such support is requested * * * by the official who has responsibility for the counterdrug activities." 10 U.S.C. 284(a)(1)(A). Section 284(b) specifies that DoD may provide support in the form of "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7). DoD has used the funds transferred pursuant to Sections 8005 and 9002 to undertake the construction of fences and roads, and the installation of lighting, at several locations along the southern border identified by DHS as drug-smuggling corridors. See Resp. Mot. App. 12a-14a.

2. In February 2019, respondents -- two environmental groups -- brought suit in the United States District Court for the Northern District of California to challenge the above-described internal transfers of DoD appropriations, as well as other actions taken by the government to secure the southern border. Resp. Mot. App. 14a-15a. As relevant here, respondents asserted that construction of the projects funded by the Acting Secretary's transfers would impair their members' asserted interests in "hiking, birdwatching, photography, and other professional, scientific, recreational, and aesthetic activities" in the public lands where the projects are located. Id. at 19a.

3. On May 24, 2019, the district court issued a preliminary injunction forbidding federal officials from using any of the funds transferred pursuant to Section 8005 for "border barrier" construction in a subset of the project areas. Resp. Mot. App. 253a. On June 28, 2019, the court incorporated the same reasoning into an order granting a permanent injunction covering all the project areas. See id. at 188a-198a. In pertinent part, the court held that it had "authority to review" challenges to the Acting Secretary's transfers pursuant to an equitable power to enjoin governmental officials from violating federal law, rather than under a specific grant of statutory authority, such as the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. Resp. Mot. App. 226a. The court concluded, on that basis, that respondents need not demonstrate that their claims "fall within the 'zone of interests'" protected by Section 8005, because the court viewed that requirement as applicable only "to statutorily-created causes of action." Id. at 227a. The court also held that the Acting Secretary had violated certain conditions in Section 8005 when transferring the funds. Id. at 229a-234a. The court declined to stay its injunction pending appeal. Id. at 198a.

4. A divided panel of the court of appeals also declined to stay the injunction pending appeal. 929 F.3d 670, 676-677. The panel majority stated that respondents were not required to demonstrate that their members' putative recreational and

aesthetic interests fall within the zone of interests protected by Section 8005 because, in the majority's view, respondents' claim "is, at its core, one alleging a constitutional violation." Id. at 688-689. In particular, respondents alleged that any use of DoD funds transferred improperly under Section 8005 would "cause funds to be 'drawn from the Treasury' not 'in Consequence of Appropriations made by Law,'" in violation of the Appropriations Clause. Id. at 694 (quoting U.S. Const. Art. I, § 9, Cl. 7). The panel majority accepted that theory and reasoned that the relevant question is whether respondents' asserted interests "fall within the zone of interests of the Appropriations Clause," id. at 703 -- a test it found satisfied, see id. at 703-704.

Judge N.R. Smith dissented, explaining that when respondents' "claim is properly viewed as alleging a statutory violation" of Section 8005, respondents have "no mechanism to challenge [DoD's] actions." 929 F.3d at 709.

5. On July 26, 2019, this Court stayed the district court's injunction "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought." 140 S. Ct. 1, 1. The Court stated that "[a]mong the reasons is that the Government has 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. Justice Breyer concurred in part and dissented in part. Id. at 1-2. He would have stayed the injunction to the extent it prohibited the government from finalizing the contracts at issue. Id. at 2. Justices Ginsburg, Sotomayor, and Kagan would have denied a stay. Id. at 1.

6. On June 26, 2020, a divided (and different) panel of the court appeals affirmed. Resp. Mot. App. 1a-82a. The panel majority first concluded that Section 8005 did not authorize the transfers at issue, based on the reasoning of a decision the same panel issued on the same day in a companion case brought by a group of States. Id. at 23a-24a; see California v. Trump, 963 F.3d 926 (9th Cir. 2020) (Resp. Mot. App. 83a-184a). Having found that "the transfer of funds here was unlawful," the majority turned to addressing "whether Sierra Club is a proper party to challenge the Section 8005 transfers." Resp. Mot. App. 25a. Notwithstanding this Court's prior order, the majority held that respondents have "both a constitutional and an ultra vires cause of action" to challenge the Acting Secretary's compliance with Section 8005, ibid., and that, "[i]f the zone of interests test applies at all, the Appropriations Clause of the Constitution defines the zone of interests," id. at 39a, not Section 8005.

Judge Collins dissented. Resp. Mot. App. 46a-82a. Like Judge N.R. Smith at the stay-panel stage, Judge Collins would have held that respondents "lack any cause of action to challenge the

transfers." Id. at 47a. He explained that respondents' "asserted recreational, aesthetic, and environmental interests clearly lie outside the zone of interests protected by § 8005," which "does not mention" such interests or "require the Secretary to consider" them before transferring funds. Id. at 65a. And he would have rejected respondents' efforts to "evade" that limitation by invoking an implied constitutional or equitable cause of action rather than the APA. Id. at 79a. In his view, respondents lack any distinct constitutional claim because their putative Appropriation Clause claim "is effectively the very same § 8005-based claim dressed up in constitutional garb." Id. at 70a. Alternatively, he would have held that any implied constitutional or equitable cause of action "would still be governed by the same zone of interests defined by the relevant limitations in § 8005." Ibid. In all events, Judge Collins concluded that the "challenged transfers did not violate § 8005." Id. at 81a.

ARGUMENT

This Court has already determined that the district court's nationwide injunction should be stayed pending the disposition of a timely petition for a writ of certiorari filed by the government. 140 S. Ct. 1, 1. Respondents offer no sound basis to reconsider that decision now, while the government is preparing such a petition. Indeed, respondents identify no prior instance in which this Court has ever granted a contested motion to lift a stay

entered by the full Court. Cf. Order, DHS v. New York, No. 19A785 (Apr. 24, 2020) (denying such a request). Much of respondents' motion instead merely repeats the prior arguments that respondents presented to this Court in opposing a stay, which the Court already found insufficient to warrant allowing the injunction to take effect pending certiorari. Compare, e.g., Resp. Mot. 24-34, with Resp. Stay Opp. 15-42. To the extent respondents seek to identify any bona fide "intervening events" (Resp. Mot. 4), they point to nothing that would warrant reconsidering this Court's prior order. Accordingly, respondents' motion to lift the stay should be denied.

First, respondents argue (Resp. Mot. 20) that "numerous intervening decisions" support their request to lift the stay. Since this Court granted a stay, however, the question whether these particular plaintiffs have a "cause of action to obtain review of the Acting Secretary's compliance with Section 8005," 140 S. Ct. at 1, has been addressed by only a single additional court: the Ninth Circuit panel that affirmed the district court's injunction in a sharply divided 2-1 decision. The panel majority found that respondents have an implied equitable or constitutional cause of action to challenge the Acting Secretary's transfers and that, "[i]f the zone of interests test applies at all, the Appropriations Clause of the Constitution defines the zone of interests," Resp. Mot. App. 39a, not Section 8005. That reasoning is not materially different from the prior reasoning of the Ninth

Circuit motions panel that declined to stay the injunction. The motions panel likewise concluded that respondents have "an equitable cause of action to enjoin a constitutional violation," 929 F.3d 670, 676, and that, "[t]o the extent any zone of interests test applies" to respondents' claim, "it requires [the court] to ask whether [respondents] fall within the zone of interests of the Appropriations Clause, not of section 8005," id. at 703. Cf. Resp. Mot. 24-30; Resp. Stay Opp. 27-40. Judge N.R. Smith dissented from the denial of a stay, just as Judge Collins dissented from the merits panel's affirmance. In each case, the dissenting judge would have held that respondents lack a cause of action to challenge the Acting Secretary's compliance with Section 8005 -- the very reasoning cited by this Court in its prior order granting a stay of the injunction. Compare 140 S. Ct. at 1, with Resp. Mot. App. 57a-81a (Collins, J., dissenting), and 929 F.3d at 709-717 (N.R. Smith, J., dissenting from denial of stay).

A single decision from a divided panel of the Ninth Circuit, adopting reasoning that this Court previously found wanting, is hardly the sort of intervening development that would warrant reconsidering a prior order of this Court. Indeed, in granting the stay, this Court already determined that the district court's injunction would remain stayed even in the event that the court of appeals affirmed on the merits in the government's then-pending appeal. See 140 S. Ct. at 1 (granting a stay "pending * * *

disposition of the Government's petition for a writ of certiorari, if such writ is timely sought").

The other "intervening" authorities that respondents identify are equally unpersuasive or inapposite. Respondents point to the same panel's divided decision in the companion case brought by the States (Resp. Mot. 28-29); a number of district-court decisions addressing other challenges brought by other parties (id. at 27-28); and decisions of this Court and the Seventh Circuit addressing unrelated separation-of-powers questions (id. at 25-26). None of those cases calls into question this Court's prior determination that, for stay purposes, the government has sufficiently demonstrated that these particular plaintiffs lack a cause of action to challenge the Acting Secretary's internal transfers of DoD funds. The government has also previously demonstrated that the challenged "transfers were lawful" in any event. Resp. Mot. App. 47a (Collins, J., dissenting). Notably, the Government Accountability Office -- headed by the Comptroller General, an "agent of the Congress," Bowsher v. Synar, 478 U.S. 714, 731 (1986) (citation omitted) -- reached that same conclusion during the pendency of the litigation, in response to an inquiry from lawmakers. See Department of Defense -- Availability of Appropriations for Border Fence Construction, B-330862, 2019 WL 4200949, at *1 (Comp. Gen. Sept. 5, 2019). Any suggestion that

respondents' view of the merits has been uniformly vindicated since this Court's prior order is therefore incorrect.

Second, lacking any plausible change on the relative merits of their claims, respondents contend that the stay equities have shifted over time. In particular, they emphasize (Resp. Mot. 22) that "Defendants have now obligated 100% of the $2.5 billion" transferred by the Acting Secretary pursuant to Sections 8005 and 9002 of the DoD Appropriations Act, meaning that the injunction no longer threatens to cause DoD to lose the legal authority to obligate those funds before the end of the fiscal year in which they were appropriated. See Gov't Stay Appl. 35-37. Respondents assert (Resp. Mot. 22) that lifting the stay at this juncture will merely "prevent Defendants from completing [the] construction."

As a threshold matter, that assertion is mistaken. As the government previously explained, halting the construction process during litigation imposes significant costs on DoD, which can be required to reimburse its contractors for the additional expenses that such a delay causes them to incur. Gov't Stay Appl. 37.

More fundamentally, though, this Court already considered and rejected the same relief that respondents now propose. When the government applied for a stay, Justice Breyer would have granted the request "only to the extent that the injunction prevents the Government from finalizing the contracts or taking other preparatory administrative action," while leaving the district

court's injunction in place "insofar as it precludes the Government from * * * beginning construction." 140 S. Ct. at 2. And he would have done so based on exactly the same theory respondents now invoke -- i.e., that the construction process itself allegedly causes "irreparable harm" to respondents, which outweighs the harm to the government so long as the government is at least able to finalize the contracts. Id. at 1; cf. Resp. Mot. 20-22. This Court rejected that halfway measure and stayed the injunction in full, presumably aware that the result would be construction during litigation. Respondents identify nothing to warrant reconsidering that decision now.

Third, respondents' primary motivation for moving to lift the stay appears to be that otherwise the government will seek to "evad[e] this Court's review" by completing as much construction as possible while delaying the filing of a certiorari petition. Resp. Mot. 20 (capitalization altered; emphasis omitted); see id. at 20-23. Their concern is based on the fact that, in light of this Court's order of March 19, 2020 regarding COVID-19 and filing deadlines, a petition for a writ of certiorari to review the judgment of the court of appeals would be timely if filed within 150 days of that court's judgment -- i.e., on or before November 23, 2020. See Sup. Ct. R. 13.1, 13.3; 28 U.S.C. 2101(c). But respondents' fears are misguided. As respondents could have determined by conferring with the government before filing their

motion, the government anticipates filing a petition for a writ of certiorari well in advance of that deadline, on August 7, 2020. If respondents do not seek an extension on their brief in opposition, the government's forthcoming petition could be distributed in time for consideration at this Court's first conference following the summer recess, on September 29, 2020.*

Respondents' suggestion that the government will delay the filing of a petition or otherwise seek to evade this Court's review is therefore entirely unfounded. The government is proceeding with dispatch to ensure that this Court has an opportunity to consider whether to grant review at the earliest conference following the judgment of the court of appeals. Especially in light of that timing, there is no basis to lift this Court's stay during the interim, as there remains a strong likelihood that the Court will grant certiorari and reverse the Ninth Circuit's judgment affirming the injunction.

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* The government plans to file a single petition, pursuant to Rule 12.4 of the Rules of this Court, for a writ of certiorari to review the judgment in this case and the judgment in the related case brought by the States, which also concerns Section 8005 and which was decided by the same panel of the court of appeals on the same day as this case. See p. 7, supra.

CONCLUSION

For the foregoing reasons, respondents' motion to lift the stay should be denied.

Respectfully submitted.

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