

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.,

Respondents,

REPLY IN SUPPORT OF MOTION TO LIFT STAY

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Defendants' Opposition scarcely responds to the arguments made in Plaintiffs' Motion. As Plaintiffs explained, in the year since the Court entered a temporary stay, circumstances have substantially changed: Defendants have spent the past year rushing construction of a border wall—even as the equities have shifted decisively against a stay, and as decision after decision has added support to the district court's injunction. At this stage, the stay offers Defendants a complete victory without having prevailed in any court, despite the fact that Defendants' asserted justification for a stay has substantially diminished since last July. Defendants do not meaningfully contest any of these points. And while they now commit to petitioning for certiorari by August, that still means that they will complete the very border wall construction in dispute before this Court can hear argument on the case, much less render a decision. Only by lifting the stay will the Court ensure that it will have the opportunity to resolve Plaintiffs' claims on the merits before the wall is built.

First, Defendants do not dispute that they will take advantage of the stay to complete the contested wall sections long before the Court can decide the merits of this case. In July of last year, the pace of construction was unknown; today it is an undisputed fact. Defendants do not deny that if the stay remains in place they will continue to rush construction. *See* Mot. to Lift Stay 21. Instead, they state that they intend to file a petition for certiorari next month. *See* Opp. to Mot. to Lift Stay 14. But even if Defendants petition for certiorari in August, the combination of expedited construction and the Court's stay ensures that, should the Court grant review, the project will be fully completed before this Court decides the merits. Defendants thus

offer no response to Plaintiffs’ argument that the stay now threatens to “be tantamount to a decision on the merits in favor of the applicants,” *Nat’l Socialist Party of Am. v. Village of Skokie*, 434 U.S. 1327, 1328 (1977) (Stevens, J., in chambers). Defendants’ rush to construct the wall means that the stay could imminently “conclusively determine the rights of the parties,” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

Second, Defendants do not dispute the facts demonstrating that the balance of equities has shifted strongly against their asserted need for a stay. Defendants do not contest that their previously claimed need to obligate the enjoined funds by a date certain has evaporated. *Cf.* Stay Appl. 35–36, July 12, 2019 (arguing that without a stay, the injunction “may effectively operate as a final judgment” because “[a]ccording to DoD, the funds at issue ‘will no longer remain available for obligation after the fiscal year ends on September 30, 2019’”). Nor do they contest the court of appeals’ conclusion that Defendants have failed to come forward with evidence of the benefits of wall construction, and that this failure is “particularly significant given that Congress determined fencing to be a lower budgetary priority and the Department of Justice’s own data points to a contrary conclusion.” Mot. to Lift Stay 23 (quoting Mot. App. 44a–45a.). Defendants point to a single possible harm if the stay is lifted before the wall is complete: the Defense Department may “be required to reimburse its contractors for the additional expenses that such a delay causes them to incur.” Opp. to Mot. to Lift Stay 12. Defendants provide no detail on this point, citing only their

July 2019 application. They provide no explanation of how these potential expenses have been affected by construction having now proceeded for a year.

At the same time, the stay has proven substantially more injurious to both Plaintiffs and the public interest than was apparent in July 2019. Defendants do not deny that they have increased the pace and destructiveness of wall construction far beyond what could have been known at that time. Defendants told this Court then that “the record contradicts respondents’ suggestions that the environment in the construction areas is so fragile that any disturbance from construction would be practically impossible to undo,” and represented that the land at issue was already “heavily disturbed.” Defs.’ Reply in Supp. of Stay Appl. 15, July 22, 2019 (quotations and citations omitted). But as Plaintiffs pointed out in their Motion, Defendants have since dispensed with protections used during previous wall construction and destroyed irreplaceable environmental, historical, and tribal resources. *See* Mot. to Lift Stay 18–19, 21–22; *see also, e.g., Sacred Native American Site in Arizona Blasted For Border Wall Construction*, USA Today (Feb. 7, 2020), <https://www.usatoday.com/story/news/nation/2020/02/07/tohono-oodham-sacred-site-monument-hill-blasted-border-wall/4698174002>; *Donald Trump’s Border Wall Construction Crew Just Bulldozed Through the Iconic Cacti This National Park Was Created to Protect*, Newsweek (Oct. 7, 2019), <https://www.newsweek.com/donald-trump-border-wall-construction-saguaro-cacti-organ-pipe-cactus-national-monument-1463559>. And contrary to Defendants’ representations last July, the harm from Defendants’ construction has not been limited to “heavily disturbed” areas.

Instead, recent reporting has revealed the mounting danger Defendants' rushed efforts pose to protected lands. *See, e.g., Sacred Arizona Spring Drying Up As Border Wall Construction Continues*, Nat'l Geographic (July 20, 2020), <https://www.nationalgeographic.com/science/2020/07/quitobaquito-springs-arizona-drying-up-border-wall/>; *In Crossing Arizona's Last Free-Flowing River, Border Wall Construction Also Erodes Trust*, Ariz. Public Media (June 22, 2020), <https://cronkitenews.azpbs.org/2020/06/22/arizona-river-border-wall-construction/>; *Trump Accelerates Border Wall Construction Ahead of Election, Despite Pandemic*, L.A. Times (June 30, 2020), <https://www.latimes.com/world-nation/story/2020-06-30/trump-accelerates-border-wall-construction-ahead-of-election-despite-pandemic>.

A stay is “often dependent as much on the equities of a given case as the substance of the legal issues it presents.” *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087 (citations omitted). When the equities shift, it is appropriate to reconsider a stay that may previously have been merited. *See King v. Smith*, 88 S. Ct. 842, 843 (1968) (Black, J., in chambers) (lifting stay where subsequent events made clear that stay would inflict further harm on plaintiffs). Compared to last July, Defendants' asserted harms have greatly diminished while the demonstrable harms the stay inflicts on Plaintiffs have greatly increased. The Court should therefore lift the stay before Defendants cause further irreparable environmental harm. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987) (if environmental injury is “sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment”).

Finally, on the merits, Defendants mischaracterize the numerous intervening decisions confirming the viability of Plaintiffs' claims. Defendants maintain that a different panel of the court of appeals simply "adopt[ed] reasoning that this Court previously found wanting." Opp. to Mot. to Lift Stay 10. It did not. As the dissenting opinion observed, "In its merits analysis, the majority scarcely cites the motions panel's published decision, which addressed the Organizations' likelihood of success on the merits of many of the same issues before us." Mot. App. 58a n.5 (Collins, J., dissenting). Instead, the court of appeals, with the benefit of full briefing and argument, examined precedents from this Court and the D.C. Circuit and concluded that Plaintiffs could seek relief from *ultra vires* and unconstitutional actions by executive officers. See Mot. App. 25a–40a.

Defendants also assert without explanation that intervening decisions concerning "other challenges brought by other parties" and "unrelated separation-of-powers questions" have no bearing on the issues here. Opp. to Mot. to Lift Stay 11. But decisions addressing whether parties challenging border wall construction as *ultra vires* must be within the zone of interests of inapplicable statutes address the identical issue that Defendants raised in their stay application. Compare Appl. for Stay 23, July 12, 2019 ("The government is likely to succeed in demonstrating that respondents are not within the zone of interests protected by Section 8005."), with *Ctr. for Biological Diversity v. Trump*, --- F. Supp. 3d ---, No: 1:19-cv-00408 (TNM), 2020 WL 1643657, at *25 (D.D.C. Apr. 2, 2020) (observing that "it would make little sense to require that person to show that he was a Medicare beneficiary or provider

to argue that the Medicare statute did not permit border barrier construction”). Defendants’ main argument in support of their stay application was that “no claim of a constitutional violation exists in this case” because Defendants had invoked a statute, Section 8005. Appl. for Stay 28, July 12, 2019 (quoting App. 86a (N.R. Smith, J., dissenting)). The Seventh Circuit’s recent decision that a similarly specious claim of statutory authority constituted “an executive usurpation of the power of the purse,” rather than merely “an exercise of authority granted to it by the legislature,” undercuts this rationale, as Plaintiffs explained. Mot. to Lift Stay 25 (quoting *City of Chicago v. Barr*, 961 F.3d 882, 931 (7th Cir. 2020)).

CONCLUSION

This case concerns a protracted and public appropriations debate, irreparable damage to a protected landscape, substantial separation of powers concerns, and the diversion of billions of taxpayer dollars to a project that Congress refused to fund. These are weighty issues, and the Court should have the opportunity to fully consider and decide them, with briefing and argument, *before* Defendants complete construction.

The stay should be lifted.

Respectfully submitted,

/s/ Dror Ladin

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