

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
et al., Petitioners,

v.

SIERRA CLUB, *et al., Respondents.*

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
et al., Petitioners,

v.

STATES OF CALIFORNIA AND NEW MEXICO, *Respondents.*

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

**UNOPPOSED JOINT MOTION OF RESPONDENTS
FOR DIVIDED ARGUMENT TIME**

Pursuant to Supreme Court Rules 21 and 28.4, respondents respectfully move for divided oral argument time. This case arises from two different judgments of the United States Court of Appeals for the Ninth Circuit: one involving an action brought by respondents the States of California and New Mexico, and the other involving an action brought by respondents the Sierra Club and the Southern Border Communities Coalition. Respondents respectfully request that the time at oral argument be divided equally between the two sets of respondents, with fifteen minutes allotted to the *California* respondents and fifteen minutes to the *Sierra Club* respondents. This Court has regularly divided argument time in circumstances similar to those here, which involve both sovereign governments and private parties on the same side of the case. Counsel for petitioners has informed us that petitioners consent to respondents' request.

STATEMENT

This case involves two different challenges to petitioners' transfer and use of funds—that Congress appropriated for other purposes—to finance construction of physical barriers on the southern border of the United States. In one of the challenges (*California*), respondents the States of California and New Mexico (along with other States that are not parties to the present proceeding before this Court) brought suit alleging, among other things, that petitioners' actions violated Section 8005 of the Department of Defense Appropriations Act of 2019 and the Appropriations Clause and were *ultra vires*.

In the second challenge (*Sierra Club*), respondents the Sierra Club and the Southern Border Communities Coalition alleged, among other things, that petitioners violated the Consolidated Appropriations Act of 2019 and the Appropriations Clause and were *ultra vires*.

The district court entered partial final judgments in both *California* and *Sierra Club*. Pet. App. 8a-9a, 87a-88a. In *California*, the district court granted in part the States' motion for partial summary judgment and issued a declaration that petitioners' transfers of funds were unlawful. *Id.* at 87a, 195a. It denied the States' request for injunctive relief in light of the injunction the court issued in *Sierra Club*. *Id.* at 200a. In *Sierra Club*, the district court granted in part the organizations' motion for partial summary judgment and issued a declaratory judgment and a permanent injunction barring petitioners from taking action to construct border barriers in specified areas using improperly transferred funds. *Id.* at 187a-188a.

The court of appeals affirmed in both cases and entered two different judgments. In *California*, the court held that the States had Article III standing, Pet. App. 88a-99a; that the States could challenge petitioners' transfers under the Administrative Procedure Act, *id.* at 100a-106a; and that Section 8005 did not authorize the transfers, *id.* at 106a-118a. The court did not address the States' alternative claims that petitioners' transfers were *ultra vires* and unconstitutional. *Id.* at 100a n.12, 119a.

In *Sierra Club*, the court of appeals issued a separate opinion in which it held that the organizations had established standing, Pet. App. 10a-16a; reaffirmed its conclusion in *California* that Section 8005 did not authorize petitioners' transfers, *id.* at 16a-17a; and concluded that petitioners' transfers violated the Appropriations Clause, *id.* at 17a-18a. It also held that the *Sierra Club* respondents had both a constitutional and an equitable *ultra vires* cause of action. *Id.* at 18a-30a.

Petitioners filed a single petition for a writ of certiorari seeking review of both judgments of the court of appeals, reasoning that the “judgments . . . sought to be reviewed’ are from ‘the same court and involve identical or closely related questions.” Pet. 1 (quoting Sup. Ct. R. 12.4) (ellipses in petition). This Court granted the petition. ___ S. Ct. ___, 2020 WL 6121565 (Oct. 19, 2020) (mem.). The *California* and *Sierra Club* respondents have each filed separate briefs on the merits arguing in support of affirmance of the judgments entered in their respective cases below.

ARGUMENT

This case involves the important question whether petitioners violated federal law in transferring and spending billions of dollars to construct physical barriers along the southern border of the United States that Congress had appropriated for other purposes. It also presents the question whether respondents have statutory or equitable causes of action to pursue their challenges.

Respondents in the *California* and *Sierra Club* cases have distinct perspectives and arguments on those questions. Among other things, respondents in the two cases are suffering distinct harms from petitioners' conduct. The Executive took unilateral action to transfer funds to construct a border wall within the sovereign territory of respondents California and New Mexico. That construction harms species within the two States and interferes with the States' sovereign interests in enforcing their environmental laws within their jurisdictions. Respondents in *Sierra Club* are organizations whose members own nearby property and regularly use the lands designated for barrier construction. That construction injures the property interests of members of the *Sierra Club* respondents as well as those members' interests in studying, conserving, fishing, hiking, and otherwise using protected lands.

In addition, the decisions below addressed different issues and claims. In *California*, the court of appeals held that the States were proper parties to bring an APA claim and that petitioners' transfers violated Section 8005 of the Defense Appropriations Act. The court did not reach the States' alternative claims that petitioners' conduct was *ultra vires* and unconstitutional. In *Sierra Club*, the court of appeals held that petitioners' transfers violated the Constitution; and it concluded that the organizations could pursue equitable claims to challenge petitioners' actions. Although both sets of respondents have briefed both their respective APA and equitable claims before this Court, the *California* respondents have focused their brief on the APA claim on which

they prevailed below, and the *Sierra Club* respondents have focused their brief on the equitable claim on which they prevailed.

Dividing argument time as proposed will ensure that each set of respondents may fully present their distinct interests and that the Court will receive the benefit of respondents' distinct perspectives and arguments. This is particularly true in the circumstances of this case, where one set of respondents includes sovereign governments with unique interests that private parties cannot adequately represent. This Court has regularly divided argument when governmental and private parties appear on the same side of the case. *See, e.g., Trump v. New York*, __ S. Ct. __, 2020 WL 6811251 (Nov. 20, 2020) (mem.); *Fulton v. City of Philadelphia*, 141 S. Ct. 230 (2020) (mem.); *Dep't of Homeland Security v. Regents of the Univ. of California*, 140 S. Ct. 398 (2019) (mem.); *Dep't of Commerce v. New York*, 139 S. Ct. 1543 (2019) (mem.); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 466 (2017) (mem.).

Counsel for petitioners has informed us that petitioners consent to respondents' request.

CONCLUSION

The Court should grant respondents' joint motion and divide argument time equally between the *California* respondents and the *Sierra Club* respondents.

Respectfully submitted,

/s/ Aimee Feinberg

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