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Via CM/ECF

The Honorable Scott Harris
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Emergency Application in
***Lopez v. United States, et al.*, No. 25A1008**

Dear Mr. Harris,

Respondents' March 15 letters only confirm that Respondents are attempting to thwart this Court's review and that immediate emergency relief is needed.

The letters admit that sometime between 7:34 p.m. ET Friday night and 2:59 a.m. ET Saturday morning—while on notice that this emergency appeal was imminent—Respondents purported to complete the illegal land exchange. The letters also confirm that, absent emergency relief, Resolution “will mobilize a drill rig to begin exploratory drilling” within Oak Flat *today*. Res.6.

At minimum, a brief administrative stay or injunction is warranted to prevent irreparable harm while this Court considers the monumental questions in the emergency application—and before Respondents take additional actions threatening to frustrate judicial review.

Respondents' counterarguments are meritless.

1. Respondents quibble with whether Applicants have requested a “stay” or an “injunction”—claiming that the latter requires Applicants to satisfy “a significantly more demanding standard” for emergency relief because the request purportedly “alter[s] the status quo.” Gov.1; Res.1 n.1. But that argument fails for two reasons.

First, both when deciding applications for stays pending appeal *and* injunctions pending appeal, this Court has applied the same four factors: (1) likelihood of success

on the merits, (2) irreparable harm, (3) balance of hardships, and (4) public interest. See, e.g., *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16–21 (2020) (applying these factors to grant an injunction pending appeal); *Tandon v. Newsom*, 593 U.S. 61, 62–64 (2021) (same); *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (applying these factors to deny an injunction pending appeal); *id.* at 22 (Gorsuch, J., dissenting) (explaining that the Court applies these factors whenever “granting a stay or injunctive relief” (emphasis added)); *Mirabelli v. Bonta*, 146 S. Ct. 797, 802 (2026) (applying these factors to grant stay pending appeal).

Second, Respondents’ “status quo” argument turns on the notion that the status quo changed via their late-night effort to transfer the land in the shadow of a forthcoming emergency application. But this Court’s precedent has long recognized that “a defendant with notice in an injunction proceeding” cannot change the “status quo” merely by “complet[ing] the acts sought to be enjoined.” See *Porter v. Lee*, 328 U.S. 246, 251 (1946). A rule to the contrary would of course encourage exactly the sort of maneuvering that has occurred here.

In any event, this Court does not apply differing standards for emergency relief depending on whether the applicant’s request would “alter” the “status quo.” Gov.1, Res.1 n.1. That is because “[t]here is no good blanket answer to the question of what the status quo is.” *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 930 (2024) (Kavanaugh, J., joined by Barrett, J., concurring) (detailing the difficulties). Besides, even if a principled definition did exist, a “blanket rule of ‘preserving the status quo’” in all emergency contexts “would not be suitable for this Court’s emergency docket” because its rigid application “would lead to very troubling results.” *Id.* at 930–931. That’s why this Court has instead “throughout its history” “relied on likelihood of success on the merits as an essential factor in determining when to grant emergency relief in individual cases.” *Id.* at 931.

2. Alternatively, the government questions whether this Court has “remedial authority” to void the transfer or halt imminent physical alterations to Oak Flat. Gov.1. But courts have long recognized that when plaintiffs challenge a land transfer from the government to a private party, and both parties have notice, they “act[] at their peril in transferring the land,” “subject to the power of the court” to declare “the legality of the transfer” and “restore the status” of the land prior to the transfer. *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1187 (9th Cir. 2000); see also *Porter*, 328 U.S. 246 at 251 (“court may by mandatory injunction restore the status quo” where “defendant with notice in an injunction proceeding” attempts to

change it). This is particularly true when, as here, “an order declaring void the executive portion of the land exchange” would not “destroy the legal entitlements of absent parties, or return federal lands which have been irrevocably changed by private actions.” *Desert Citizens*, 231 F.3d at 1187. In any event, this Court can at least pause the further destruction that Respondents concede will begin today.

Such intervention is particularly warranted here, where once Oak Flat is irreparably damaged, courts may hold that “reversal of the transfer” is “futile.” *Apache Stronghold v. United States*, No. 21-15295, 2021 WL 12295173, at *6 (Bumatay, J., dissenting) (citing *Kettle Range Conservation Grp. v. United States Bureau of Land Mgmt.*, 150 F.3d 1083, 1087 (9th Cir. 1998) (declining to rescind land transfer where the land had already been “denuded” and it would “be impractical to attempt to un-scramble the eggs”)). Resolution’s letter demonstrates that it is already planning to “irrevocably change[.]” the land before this Court can act. *Desert Citizens*, 231 F.3d at 1187. But this Court can intervene to enjoin Resolution from acting in order to “preserve [its] jurisdiction to consider the application.” *AARP v. Trump*, 605 U.S. 91, 93–94 (2025). While “[n]o court can make time stand still,” the Court should not permit Respondents to render judicial review an “idle ceremony” by “irreparably chang[ing]” the status quo “before the correction c[an] be made.” *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9–10 (1942).

3. Next, Resolution claims this “appeal” (but not the case) is moot. Res.3 & n.3. But Resolution is simply wrong that the “only remedy” Applicants sought was a preliminary injunction “*blocking* the land exchange.” Res.3. Instead, Applicants sought an order not just “enjoining Defendants from conveying Oak Flat to the mining company” but also “otherwise allowing or authorizing the company to take any action affecting Oak Flat’s physical integrity.” Application for Prelim. Inj. at 1, *Lopez v. United States*, No. 1:25-cv-02408-TJK (D.D.C. July 25, 2025), Dkt. 15. Such relief is well within this Court’s authority to issue—as is “an order declaring void the executed portion of the land exchange,” *Desert Citizens*, 231 F.3d at 1187—which may be why the government conspicuously doesn’t join Resolution’s mootness argument.

4. As for irreparable harm, Respondents don’t dispute that the transfer and mine “will permanently ‘destroy the Apaches’ historical place of worship, preventing them from ever again engaging in religious exercise’ at Oak Flat.” *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1480 (2025) (Gorsuch, J., dissenting). Nor do they dispute that every judge to consider this issue has found that Applicants will suffer this irreparable harm without an injunction. See Pet.37.

Instead, the government claims Applicants haven't identified "with specificity" what "further development of the mine" they seek to stay and have given "no reason to think" that developing the mine would cause irreparable harm "within the next two weeks." Gov.1–2; cf. Res.4–5. But Resolution admits it plans "to get to work immediately," including beginning "exploratory drilling" *today*. Res.6. And Resolution previously admitted below that within "months" of the transfer, it "plans to disturb" several areas within Oak Flat—constructing "four new drill pads," "two access roads," "equipment storage," "a medical evacuation area," and "data-gathering tunnels" within Oak Flat, along with a new "water treatment plant," "administration building," "cooling facilities," "electrical substations," "pipelines," and "transmission lines" nearby. C.A. Dkt. 61.2 at 5–7, 9–11 (Peacey Decl.). Because "reversal of the transfer" may become "futile" once Resolution irreparably damages Oak Flat, *Apache Stronghold*, 2021 WL 12295173, at *6 (Bumatay, J., dissenting), Resolution is perversely incentivized to accelerate these "irreversible actions" and "significant[ly] modify" the land as quickly as possible, *Kettle Range*, 150 F.3d at 1085–1087.

Resolution's non-binding, carefully hedged statements about the timing of destruction and loss of access solve nothing. See Res.4–5 (citing 25-5186 C.A. Dkt. 81.2). They ignore the EIS's admission that, once Oak Flat becomes "private property," it is "no longer ... subject to [federal law] or Forest Service management that provides for tribal access." 3-EIS-871. They disregard the district court's finding that Applicants will have only "limited access to the post-land exchange version of Oak Flat," which "is no substitute for, and thus does not remediate the irreparable injury" from "the lack of unlimited access" to "Oak Flat in its current form." App.110a. And they downplay the physical harms resulting from the start of construction—harms that will start today. See 3-EIS-892 (admitting harms will be "immediate, permanent, and large in scale").

5. As for likelihood of success, neither Respondent attempts to defend the Ninth Circuit's ruling on the merits. Instead, they claim only that this Court is unlikely to grant certiorari because it denied certiorari in *Apache Stronghold*, 145 S. Ct. 1480. Res.5; Gov.2. But as Justices Gorsuch and Thomas have explained, the Ninth Circuit's ruling on this issue "meets every one of the standards we usually apply when assessing petitions for certiorari: The decision below is highly doubtful as a matter of law, it takes a view of the law at odds with those expressed by other federal courts of appeals, and it is vitally important." *Apache Stronghold*, 145 S. Ct. at 1480 (Gorsuch, J., dissenting from denial of certiorari). And the case for review has only strengthened since *Apache Stronghold*—with this Court rejecting the Ninth Circuit's coercion-

based theory of free exercise burdens in both *Mahmoud v. Taylor*, 606 U.S. 522, 548 (2025) and *Mirabelli*, 146 S. Ct. at 802–803, and with the government conceding there are feasible, alternative mining methods that would allow billions of pounds of copper to be profitably mined without collapsing Oak Flat’s surface. Pet.25. Thus, there is even less reason than usual to read into a denial of certiorari anything about the Court’s views on the merits. Cf. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917–918 (1950) (discussing the variety of reasons, including “technical reasons” that “may lead to denials” of certiorari) (Frankfurter, J., statement respecting the denial of certiorari).

6. Finally, Resolution (but not the government) claims “it would be deeply unfair for Resolution to face yet another administrative injunction,” because it will “suffer[] irreparably” unless it can “get to work immediately.” Res.6. But before any court ever lifted a finger, the legislative and executive branches voluntarily delayed this land transfer for over twenty years—without Resolution making a peep about supposedly irreparable harm. First, from 2005 to 2013, Congress rejected at least twelve standalone bills proposing the transfer. Second, after the transfer was added as a rider to a must-pass defense spending bill in 2014, the executive branch took another eleven years to begin moving forward with it—waiting seven years to publish the first EIS, only to withdraw it voluntarily (ignoring the 60-day transfer deadline Respondents now tout as a congressional mandate), and then waiting another four years to publish it again. During this entire decade plus, neither the government nor Resolution ever claimed that these legislative- or executive-branch delays caused any harm.

Nor has Resolution shown that any supposed harm would be attributable to an injunction, rather than to the government’s prior delays or Resolution’s own calculated investment decisions. For example, Resolution complains about costs it is “required” to incur “to hold the mine in a ready-state.” Res.6. But as Judge Logan found, Resolution began incurring these very “holding costs” “in 2004”—a full decade before Congress even passed the land-exchange rider, and thus “long before it had any real expectancy interest in the ... land it now hopes to mine.” *Apache Stronghold v. United States*, 782 F. Supp. 3d 756, 768 (D. Ariz. 2025). Thus, “any choice [Resolution] has made to expend its money in anticipation of a transfer [of Oak Flat], is just that—Resolution[’s] voluntary choice.” *Ibid.*

These temporary, self-imposed financial harms, if they are relevant at all, cf. *Hughes v. United States*, 953 F.2d 531, 536 (9th Cir. 1992) (“claim of mere financial

hardship does not establish irreparable harm”), contrast sharply with the permanent and irreparable harm faced by Plaintiffs: the tragic loss of an irreplaceable sacred site that would “end Apache religious existence as we know it.” *Apache Stronghold*, 145 S. Ct. at 1488 (Gorsuch, J., dissenting). If this Court grants emergency relief, but later reverses course and upholds the transfer and mine as lawful, the copper will still be there, and Resolution can still mine every ounce of it. But if the Court allows Resolution to forge ahead with construction of the mine, it may never be able to unscramble the eggs—and the Apaches may never be able to worship at Oak Flat again. That is why every court to consider the question so far has concluded “[t]here is no close question in this matter. It is abundantly clear that the balance of equities ‘tips sharply’ in Plaintiff’s favor.” *Apache Stronghold*, 782 F. Supp. 3d at 770.

* * *

This is now the fourth time Respondents have sought to frustrate judicial review. First, while *Apache Stronghold* was pending in this Court, the government announced it would republish the EIS and immediately convey Oak Flat to Resolution—potentially thwarting this Court’s review. The district court promptly enjoined the conveyance. 782 F. Supp. 3d at 770.

Second, in the *San Carlos* and *Arizona Mining* cases, the government “surprised the Court” by announcing that it would “proceed with the land transfer immediately following the anticipated issuance of the FEIS”—leaving no time for the court to consider the plaintiffs’ claims. *San Carlos Apache Tribe v. United States Forest Serv.*, No. 21-cv-68, 2025 WL 1618410, at *3 (D. Ariz. June 9, 2025). The district court again enjoined the transfer. *Id.* at *10–11.

Third, after the district court’s decision here, Respondents refused to agree to a brief stay of the transfer and instead sought to transfer Oak Flat in the middle of the Ninth Circuit emergency appeal. The Ninth Circuit halted the transfer.

Now, just hours after the Ninth Circuit’s Friday-night ruling, Respondents say they rushed through the land swap, with drilling to start today, and this Court now lacks “remedial authority” to address it. That is not only wrong as a matter of law but creates a terrible incentive for any administration or future litigants who might seek to frustrate this Court’s review.

Respectfully submitted.

/s/ Miles E. Coleman

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