IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, *et al.*, Plaintiffs-Appellees, v. DONALD J. TRUMP, *et al.*, Defendants-Appellants.	No. 19-17501

OPPOSITION TO APPELLEES' EMERGENCY MOTION

AND CROSS-MOTION FOR A STAY OF THE MANDATE PENDING PETITION FOR CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' emergency motion rests on the mistaken assumption that the Court's decision requires clarification. But the Court's decision was clear. It explained that both the termination of the district court's stay pending appeal and the dismissal of plaintiffs' motion to dissolve that stay depended on the Court's resolution of the merits of the appeal. And it is well established that the appeal will not be resolved until the mandate issues. Thus, plaintiffs' motion should be understood, not as a request for clarification, but as a request for expedited issuance of the mandate.

This Court should deny plaintiffs' request. It should instead stay the mandate to allow the government to seek certiorari from the Supreme Court. The Acting Solicitor General has authorized the government to petition for certiorari, and the government intends to file that petition within 30 days, no later than November 18, 2020—well before the government's 150-day deadline for doing so and sufficiently early that the Supreme Court could still grant review and decide the case this Term if it so chooses.

At a minimum, this Court should leave the district court's stay in place temporarily by delaying any order issuing the mandate for 21 days, to permit the government to request relief from the Supreme Court to ensure the stay will remain in effect while that Court considers the government's certiorari petition. This appeal was expedited but remained pending for nearly ten months after docketing, and approximately seven months after oral argument. In the circumstances, it would be

inappropriate for this Court to impede the Supreme Court's review by entering an order forcing the government to stop ongoing construction efforts immediately, where those efforts would have to be restarted, at considerable and unnecessary expense, if and when the district court's injunction is again subject to a stay or other relief by the Supreme Court. That is especially so because the Supreme Court previously granted a stay pending certiorari of the prior injunction affirmed by this Court, *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (Mem.), and the Court today granted the government's certiorari petition in that earlier appeal, *Trump v. Sierra Club*, No. 20-138 (Oct. 19, 2020) (Order List).

In these circumstances, this Court should not force the Supreme Court and the parties to deal with the need for an emergency stay application.

STATEMENT

This motion arises from a lawsuit filed by plaintiffs Sierra Club and Southern Border Communities Coalition to enjoin the government from constructing border barriers at several locations.

1. In a prior appeal in this case, the government appealed the district court's decision enjoining the use of funds transferred among internal Department of Defense (DoD) accounts, pursuant to §§ 8005 and 9002 of the DoD Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018), for border-barrier construction under 10 U.S.C. § 284. *Sierra Club v. Trump*, 9th Cir. No. 19-16102 (lead case). A divided panel of this Court denied the government's request for a stay pending appeal,

Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019), but the Supreme Court granted a stay not only pending appeal but through the process of certiorari as well. The Supreme Court held that, "[a]mong the reasons" for granting the stay motion, "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." *Sierra Club*, 140 S. Ct. at 1. This Court subsequently decided the merits of that case in plaintiffs' favor and affirmed the district court's injunction. *Sierra Club v. Trump*, 953 F.3d 874, 891 (9th Cir. 2020); *see also California v. Trump*, 963 F.3d 926, 941 (9th Cir. 2020). The government filed a petition for certiorari in that case in August 2020, well in advance of the 150-day deadline. *Trump v. Sierra Club*, Cert. Pet., No. 20-138 (filed Aug. 7, 2020). The Court granted that petition on October 19, 2020.

Earlier this year, the Supreme Court reaffirmed that the district court injunction there should remain stayed. In July 2020, shortly after this Court issued its decision but before the government filed its petition for certiorari, plaintiffs asked the Supreme Court to lift the stay pending appeal. Plaintiffs' motion was premised principally on their argument that the stay equities have shifted over time. Plaintiffs accused the government of seeking to "expedite construction" of border-barrier construction, *Trump v. Sierra Club*, Mot. to Lift Stay 17, No. 19A60 (filed July 22, 2020), and emphasized that several of the projects at issue had already been completed, *id.* at 18. Plaintiffs stated that, "if the stay remains in place, Defendants will complete the entire wall" by the end of 2020. *Id.* at 18. The Supreme Court nevertheless denied

plaintiffs' motion, leaving the stay in place to allow the Court to consider the government's then-forthcoming petition for further review. *Trump v. Sierra Club*, No. 19A60 (July 31, 2020) (Mem.).

2. This appeal involves the same plaintiffs' challenge to the government's construction of border barriers under a different statutory provision, 10 U.S.C. § 2808. The district court enjoined the government's use of military-construction funds for eleven border-barrier projects, holding that 10 U.S.C. § 2808 did not authorize the use of those funds. The district court then *sua sponte* stayed its injunction pending appeal. The court recognized that a stay was supported by several factors, including "the lengthy history of this action; the prior appellate record; and the pending appeal before the Ninth Circuit on the merits of Plaintiffs' Section 8005 claim, which will address several of the threshold legal and factual issues raised in this order." Order 45. The court also recognized that "the Supreme Court's stay of this Court's prior injunction order appears to reflect the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits." *Id.*

In December 2019, plaintiffs filed an emergency motion in this Court to lift the district court's stay of its injunction pending appeal. The Court denied that motion without prejudice, citing the Supreme Court's order and the injunction issued by a district court in a parallel Fifth Circuit case. Order, Dec. 30, 2019, at 2. Plaintiffs

renewed their emergency motion in January 2020. This Court took plaintiffs' motion under advisement. Order, Jan. 24, 2020.

3. On October 9, 2020, a divided panel of this Court affirmed the district court's injunction. Judge Collins dissented. The panel majority held that plaintiffs have both standing and a cause of action to challenge the military construction projects at issue, and that § 2808 did not authorize the government to engage in such construction. The panel majority then stated that, because the Court "ha[s] resolved the merits of this appeal, the district court's stay pending appeal is terminated," and the majority indicated that plaintiffs' emergency motion to lift the stay pending appeal is "dismiss[ed] . . . as moot." Slip Op. 75.

4. After the Court issued its decision in this appeal, plaintiffs requested the government's position on the question whether the district court's stay had been terminated. The government informed plaintiffs that, because the mandate in this case has not yet been issued, the stay remains in effect. Plaintiffs then filed this emergency motion requesting that the Court clarify that the stay is terminated, or issue an order lifting the stay, or issue its mandate by October 22.

ARGUMENT

1. Plaintiffs' emergency motion for clarification should be denied because no clarification is required. This Court's decision clearly states that, because "the merits of this appeal" have been "resolved," "the district court's stay pending appeal is terminated" and plaintiffs' "emergency motion to lift the stay" is "dismiss[ed] . . . as

moot." Slip Op. 75. But that statement must be construed in light of the well-established principle that a decision resolving an appeal does *not become effective* until the Court issues its mandate. *See Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009) ("No opinion of this circuit becomes final until the mandate issues"); Fed. R. App. P. 41(c), Advisory Comm. Notes, 1998 Amendment ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed."). To protect the parties' ability to seek additional review, the mandate will not ordinarily issue until "7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for . . . rehearing . . . or [a] motion for stay of mandate, whichever is later." Fed. R. App. P. 41(b). Because the Court's mandate has not yet issued, the Court's decision resolving the appeal, and thereby terminating the stay pending appeal, is not yet effective.

This commonsense conclusion is confirmed by a similar situation that recently arose in the D.C. Circuit. In that case, the court of appeals vacated a nationwide injunction barring the government from enforcing a policy with regard to transgender individuals in the military; denied a motion to stay the injunction as moot; and remanded the matter to the district court for further proceedings. *Doe 2 v. Shanahan*, 755 Fed. App'x 19 (D.C. Cir. 2019). Following that decision, the district court confirmed that its injunction would remain in effect—notwithstanding the court of appeals decision vacating that injunction and dismissing the stay motion as moot—until the court of appeals' mandate had issued. *Doe 2 v. Shanahan*, Dkt. No. 195, No.

1:17-cv-01597 (D.D.C. Mar. 19, 2019). Here, the panel majority's decision affirming the district court injunction, and thereby terminating the stay pending appeal, likewise will not take effect until the Court's mandate issues. As in *Doe 2*, the Court's recognition that a pending motion "is . . . moot" merely means that the Court has decided it need not consider the motion because it has disposed of the appeal, effective upon issuance of the mandate.

Plaintiffs do not appear to contest any of these principles. Plaintiffs instead assert, relying on a single footnote in a prior decision of this Court, that an order "terminat[ing] a stay pending appeal . . . takes effect immediately rather than when the mandate issues." Mot. 6 (citing *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1174 n.7 (9th Cir. 2007)). But plaintiffs misunderstand the decision in that case, which has nothing to do with a decision like the one here, where the resolution of the merits also has the effect of terminating a district court's stay of its own injunction pending resolution of the appeal. The quotation plaintiffs rely on referred instead to this Court's practice of terminating interim relief entered by a motions panel at an earlier stage of the appeal.[1] In *Consejo*, a district court denied plaintiffs' request for declaratory and injunctive relief against the government. *Consejo*,

[1] That practice is also reflected in a more recent decision, *Hernandez Roman v. Wolf*, No. 20-55436, 2020 WL 6040125, at *8 n.7 (9th Cir. Oct. 13, 2020), where this Court likewise vacated, effective immediately, a stay issued by the Court's motions panel. *See Hernandez Roman v. Wolf*, No. 20-55436, 2020 WL 5683233, at *2 (9th Cir. Sept. 23, 2020).

482 F.3d at 1162. Plaintiffs appealed, and a motions panel of this Court granted plaintiffs' request for an injunction pending appeal. *Id.* The merits panel subsequently agreed with the government that plaintiffs' claims should be dismissed, and "vacate[d] the injunction pending appeal previously entered by the motions panel." *Id.* at 1174. The court then stated:

> Because [the motions panel's injunction pending appeal] is an interlocutory order pending appeal, *see* Fed. R. App. P. 8(a), our order vacating the injunction pending appeal shall become effective immediately upon the filing of this opinion, regardless of when the mandate issues.

482 F.3d at 1174 n.7.

The circumstances of *Consejo* are significantly different from those of this case. In *Consejo*, the Court vacated its *own* order imposing an injunction pending appeal, issued by a motions panel, after ordering plaintiffs' claims to be dismissed in their entirety upon remand. The mandate rule does not apply to this Court's disposition of its own interim orders.

Here, by contrast, the panel majority recognized that the Court's resolution of the merits of the appeal from an injunction would also affect other relief entered by the district court in the very same order, where the district court also determined as an exercise of its own "discretion" that "a stay of the permanent injunction pending appeal" was "warrant[ed]". *See* Dkt. No. 257, at 45. Unlike this Court's disposition of its own interim orders, when this Court noted that the district court's stay pending appeal was terminated by virtue of this Court's "resol[ution of] the merits of this

appeal," Slip Op. 75, that observation must be understood in light of the settled background rule that the resolution of the appeal is not effective until the mandate issues.

Moreover, the Court in *Consejo* explicitly differentiated the timing of its decision vacating the motions panel's interim injunction from the timing of the issuance of the mandate to the district court. 482 F.3d at 1174 n.7 ("[O]ur order vacating the injunction pending appeal shall become effective immediately upon the filing of this opinion, regardless of when the mandate issues."). That express direction made clear what otherwise might have been uncertain—whether the mandate rule should apply to the Court's decision concerning its own motions panel's earlier interim decision. Here, by contrast, the Court did not articulate any different time for the effectiveness of its decision on the merits—which is indisputably subject to the mandate rule—as compared to the effect of that decision on the district court's stay pending appeal, thus confirming the default applicability of the mandate rule.

Plaintiffs emphasize that this Court described the relief it was entering in the present tense. Mot. 6. But courts of appeals routinely and ordinarily use the present tense in their decisions even when those decisions will not take effect until the mandate has issued. And plaintiffs cannot reasonably dispute that, notwithstanding the routine use of the present tense in appellate decisions, those decisions ordinarily do not take effect until the mandate is issued. The *Consejo* case on which plaintiffs rely illustrates the point. In that case, the Court said "[w]e remand"—not "we will

remand"—with instructions to dismiss, although there was no dispute that the remand itself would await issuance of the mandate, as the dockets in both this Court and the district court there reflect. *Consejo*, 482 F.3d at 1174.

Indeed, the Court also used the present tense to describe its holding on the merits of this case. Slip Op. 78 ("We affirm the judgment of the district court. We hold that the States and Sierra Club both have Article III standing and a cause of action to challenge the Federal Defendants' border wall construction projects."). The Court likewise recognized—by using the past participle "resolved"—that the decision's *eventual* effect as a judgment is the basis for the conclusion that the stay will then be terminated. Slip Op. 75 ("Given that we have resolved the merits of this appeal, the district court's stay pending appeal is terminated . . . ."). Nothing distinguishes the Court's use of the present tense in relation to the merits of the district court's injunction from the Court's use of the present tense, in the same paragraph, in relation to the district court's stay pending appeal. There is no dispute that the Court's disposition of the merits of the district court's injunction will not take effect until the mandate is issued. It follows that the Court's disposition of the district court's stay pending appeal also will not take effect until the mandate is issued, the Court's use of present tense notwithstanding.

2. For these reasons, plaintiffs' motion cannot properly be understood as a request for clarification. Because of the importance of the mandate rule, and the Court's express linkage of its disposition of the stay pending appeal to the effects of

its decision on the merits, plaintiffs' motion should instead be treated principally as a request for expedited issuance of the mandate. This Court should deny that request.

The government intends to seek review by the Supreme Court, and will do so promptly. The Acting Solicitor General has authorized the government to petition for certiorari from this Court's decision. The government will file that petition no later than November 18, 2020—30 days from now—well before the government's 150-day deadline for doing so, and sufficiently early that the Court could still grant review and decide the case this Term if it so chooses. Instead of issuing the mandate on the precipitous schedule that plaintiffs demand, this Court should accommodate the Supreme Court's consideration of this case by staying or delaying the mandate's issuance pending disposition of the government's petition for certiorari, as set forth by the cross-motion below. In no circumstance, however, should the Court grant plaintiffs' request that the mandate be issued by October 22, more than 30 days before the ordinary deadline set forth in Appellate Rule 41(b).

Expedited issuance of the mandate would be particularly unwarranted given the high likelihood of further review of this Court's decision. The Supreme Court already has granted, and then refused to lift, a stay of an injunction prohibiting border-barrier construction. *Sierra Club*, 140 S. Ct. 1; *Trump v. Sierra Club*, No. 19A60 (July 31, 2020) (Mem.). In so doing, that Court implicitly concluded that the government is likely to obtain review and reversal of the injunction, and that the harm from interfering with the government's construction outweighs the aesthetic, recreational, and

environmental interests advanced by these plaintiffs. *See Nken v. Holder*, 556 U.S. 418, 435-36 (2009) (stay of injunction pending appeal may issue only if the applicant satisfies all four stay factors, including that the balance of the harms and the public interest favors a stay). The Court reached those determinations over similar objections from these same plaintiffs and despite two recorded dissents. *See Trump v. Sierra Club*, 140 S. Ct. 1, 1-2 (2019) (Mem.) (Breyer, J., concurring in part and dissenting in part from grant of application for stay pending appeal); *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020) (Mem.) (Breyer, J., dissenting from denial of motion to lift stay). With all respect to the panel majority, there is every reason to believe that the Court would reach the same determination here, as Judge Collins persuasively explained.

Because the government is pursuing additional review of this case in the Supreme Court with dispatch, this Court should not compel the parties to brief a request for a stay before the Supreme Court on an exceptionally expedited basis. Granting plaintiffs' request would force the Supreme Court to decide, on an unnecessarily foreshortened schedule, whether to itself grant a stay of the mandate or otherwise stay the effect of the district court's injunction.

If the mandate were issued before the government has an opportunity to pursue Supreme Court review, the government would be required to cease work on the military construction projects at issue—only for such construction to be restarted if the Supreme Court again intervenes. Any such delay would impose significant costs

on the Department of Defense, which can be required to reimburse contractors for the additional expenses that such a delay causes them to incur. An injunction that would stop ongoing construction would force DoD to incur potentially millions of dollars of unrecoverable fees and penalties to its contractors for each day that ongoing work is suspended—costs that DoD would not have to pay but for an injunction. See Declaration of Antoinette Gant 5-8 (attached). Construction on several of the eleven border barrier construction projects at issue in this case remains ongoing in various states of partial completion; one project has been completed and five remain in the planning phase. See Gant Decl. 1-3. Stopping construction and other efforts midstream would impose suspension costs estimated at approximately $36 million per month. *Id.* at 6; see also *id.* at 7 (penalties for failure to make prompt payment, and acceleration costs); *id.* at 8-9 (explaining additional costs associated with potential termination and reprocuring contracts). DoD would have to pay these additional, unnecessary costs from the funds available for § 2808 military construction, thus diminishing the money available for construction. See *id.* at 5, 8. No cause exists for imposing these burdens on the government and the public by disrupting construction operations in this manner, and plaintiffs cannot demonstrate that a temporary disruption would alleviate any of the harms they assert.

3. For similar reasons, the Court should deny plaintiffs' alternative request for an order immediately lifting the district court's stay pending appeal. As the panel decision observed, plaintiffs' earlier motion to lift the stay will be moot once the

mandate issues and the Court's judgment takes effect. There are good reasons to respect the ordinary operation of the mandate rule here, especially in light of the government's forthcoming petition for certiorari. Moreover, plaintiffs' alternative request would have the same disruptive effect on ongoing military construction projects as issuing the mandate on an expedited basis. Plaintiffs' requested order is therefore unnecessary and inappropriate for the same reasons as their request that the mandate be issued immediately. Indeed, as we explain in our cross-motion below, the Court should stay the mandate pending the government's petition for certiorari.

4. If the Court determines either to expedite the issuance of the mandate or to issue an order lifting the district court's stay pending appeal, the Court should delay the effectiveness of that order for 21 days. Such a brief delay—to give the Supreme Court an opportunity to consider whether to grant relief—is particularly appropriate in the circumstances here, especially in light of the pendency of this appeal for many months, and would avoid unnecessary and costly disruption to the operations of government contractors engaged in barrier construction.

APPELLANTS' CROSS-MOTION TO STAY THE MANDATE PENDING THE GOVERNMENT'S PETITION FOR CERTIORARI

Pursuant to Appellate Rules 27(a)(3)(B) and 41(d)(2), the government appellants hereby cross-move for an order staying the mandate pending the government's forthcoming petition for a writ of certiorari. As noted above, the Acting Solicitor General has authorized the filing of such a petition, and the

government commits to filing it no later than November 18, 2020. Pursuant to Appellate Rule 41(d)(2)(B), such a stay would then remain in effect until the Supreme Court's final disposition of the case.

To obtain a stay of the mandate "pending the filing of a petition for a writ of certiorari in the Supreme Court," a movant "must show that the [certiorari] petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). This requires a party to demonstrate a reasonable probability of succeeding on the merits and injury absent a stay. *See, e.g.*, *United States v. Warner*, 507 F.3d 508, 510-11 (7th Cir. 2007) (Wood, J., in chambers); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *see also*, *e.g.*, *California v. American Stores Co.*, 492 U.S. 1301, 1307 (1989) (stay of the mandate pending a petition for certiorari is warranted where "there is both a reasonable probability that at least four Justices would vote to grant the petition for a writ of certiorari and a fair prospect that applicant may prevail on the merits," and where "the equities favor the applicant") (O'Connor, J., in chambers). That standard is easily satisfied here.

1. This case presents a substantial question. There is at least a reasonable probability that the Supreme Court is likely to grant the government's forthcoming certiorari petition, and more than a fair prospect that the government will prevail in that Court. Indeed, that Court has previously indicated that there is reason to believe that "the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). And the

Court has granted the government's petition for a writ of certiorari in that case. *Trump v. Sierra Club*, No. 20-138 (Oct. 19, 2020) (Order List). Although a different statute is involved in this case, *see* 10 U.S.C. § 2808, there is a comparable argument that plaintiffs lack a cause of action to obtain review of military construction undertaken pursuant to that statute.

Section 2808 provides that, when the President declares a "national emergency . . . that requires use of the armed forces," the Secretary of Defense may use funds "appropriated for military construction" to undertake "military construction projects" that the Secretary deems "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The scope of the statute and its purpose—facilitating military construction in the event of war or national emergency—demonstrate that those requirements are not even arguably intended to protect parties who, like plaintiffs here, assert that particular military construction projects would impair recreational, aesthetic, or environmental interests on the land where military construction is occurring.

First, the statute's definition of military construction, 10 U.S.C. § 2801(a), with its focus on the broad needs of the military, suggests that private or state parties' aesthetic, recreational, or environmental interests in military installations are not sufficient to permit plaintiffs to seek to enforce the statute. Second, Congress deferred to the Secretary's judgment to identify the "military construction projects . . . that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a).

Based on that judgment, § 2808 permits the use of unobligated military-construction funds appropriated for other projects instead to be used for projects that are "not otherwise authorized by law." *Id.* The statute is thus analogous to the authority in § 8005 of the DoD Appropriations Act, in that it provides the Secretary with flexibility to reprioritize the use of DoD's budgetary resources. Section 8005 was the statute that was involved in the related appeal, where the Supreme Court issued a stay based on its doubt that the plaintiffs had a cause of action. The same conclusion applies here.

The Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), is not to the contrary. *Patchak* concerned a statute whose "context and purpose" served "to foster Indian tribes' economic development," and authorized the Secretary of the Interior to "take[] title to properties" on behalf of Indian tribes "with at least one eye directed toward how tribes will use those lands." *Id.* at 226. The Court held that, because of that statutory purpose, the Secretary "typically acquire[s] land with its eventual use in mind [and] after assessing potential conflicts that use might create," and therefore "neighbors to the use . . . are reasonable—indeed, predictable—challengers of the Secretary's decisions." *Id.* at 227. Here, by contrast, § 2808 gives the Secretary broad authority to authorize military construction projects, without regard to the kind or context of that construction, when the Secretary determines that the project will meet the needs of

the armed forces, notwithstanding the effect on any third party's aesthetic, recreational, or environmental interests.

2. In addition, the government will also present a substantial question in its petition for certiorari in arguing that plaintiffs cannot prevail on the merits of their Section 2808 claim, as Judge Collins' dissent demonstrates. The Supreme Court is likely to grant certiorari, and the government has at least a fair prospect of prevailing on the question of the Acting Secretary's compliance with § 2808, which divided this panel. The panel majority concluded that the projects approved by the Acting Secretary "fail to satisfy two of the statutory requirements: they are neither necessary to support the use of the armed forces, nor are they military construction projects." Slip Op. 49-50. But as Judge Collins persuasively explained in dissent, the construction projects *are* military construction projects. The statute requires that military construction be carried out "with respect to a military installation," 10 U.S.C. § 2801(a), and the term "military installation" means "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2801(c)(4). The two projects at the Goldwater Range are plainly being carried out with respect to a base, and because the other nine projects involve an "'activity under the jurisdiction' of a military Secretary, they constitute 'military construction' within the plain meaning of the statute." Dissent 28; *see also* Dissent 29 (citing *United States v. Apel*, 571 U.S. 359, 368 (2014)).

Moreover, and as Judge Collins further explained, the construction projects, contrary to the panel majority's conclusion, are necessary to support the use of the armed forces. The Acting Secretary determined that the projects are "force multipliers" that will reduce the need for the military at the borders, a determination that demonstrates that the projects are necessary to support the use of the armed forces in connection with the national emergency declared by the President. Judge Collins properly noted that "[b]y requiring that the construction be 'necessary' to the contemplated use of the armed forces, § 2808 does not limit the Secretary to only those projects that are, as the majority contends, 'absolutely needed' or 'required.'" Dissent 35. The Acting Secretary's determination "does not entail an entirely novel use of the armed forces, because Congress has repeatedly recognized a support role for DoD at the border." Dissent 37. In light of the panel majority's contrary conclusion, which shows inadequate deference to military determinations, the Supreme Court is likely to grant the government's petition.

3. The equities justify a stay of the mandate here because halting ongoing military construction projects would irreparably injure the government and the public. The Supreme Court has twice determined that the harm to the government from an injunction prohibiting border-barrier construction outweighs the aesthetic, recreational, and environmental interests that plaintiffs assert. *Supra* pp. 11-12. There is every indication that the Supreme Court will reach the same conclusion here. The district court's injunction directly interferes with the government's ability to advance

its "compelling interests in safety and in the integrity of our borders." *National Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989). The record includes ample evidence of the high rates of drug smuggling between ports of entry at the southern border, as well as recent increases in apprehensions following illegal crossings. ECF No. 236-9 at 3-4. And the Secretary of Defense has concluded, based on advice from the Chairman of the Joint Chiefs of Staff, that the challenged military construction projects are necessary to support the use of the armed forces deployed in connection with the national emergency. ECF No. 206-2 at 9.

The fact that such construction is continuing magnifies the harms of permitting the mandate to issue before the Supreme Court can consider the government's petition for certiorari. As explained, *supra* pp. 13-14, requiring construction to stop would impose significant costs on the Department of Defense, which can be required to reimburse contractors for the additional expenses that such a delay causes them to incur.

4. Alternatively, as already explained, if the Court is unwilling to stay issuance of the mandate pending the filing of a petition for a writ of certiorari, we request that the Court at a minimum set the date for issuance of the mandate at no

sooner than 21 days following the Court's resolution of this motion and cross-motion. *Supra* p. 14.[2]

CONCLUSION

For these reasons, plaintiffs' emergency motion should be denied, and this Court should grant the government's cross-motion to stay the mandate pending the government's petition for certiorari, or at a minimum for 21 days.

Respectfully submitted,

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OCTOBER 2020

[2] This request for a minimum of 21 days before issuance of the mandate would only extend the mandate by 14 days beyond the period set forth in Appellate Rule 41(b) (setting date for issuance of the mandate at "7 days after entry of an order denying a . . . motion for stay of mandate"). And as noted, it would still be more than two weeks earlier than the mandate would have issued in the ordinary course if it were not expedited at all. *Supra* p. 6.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Fed. R. App. P. 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that the foregoing response complies with the requirements of 9th Cir. R. 27-1(1)(d) and 9th Cir. R. 32-3 because it contains 5363 words according to the count of Microsoft Word.

/s/ H. Thomas Byron III
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