No. 19-17501

In the United States Court of Appeals for the Ninth Circuit

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, in his official capacity; MARK T. ESPER, Secretary of Defense, in his official capacity; CHAD F. WOLF, Acting Secretary of Homeland Security, in his official capacity; and STEVEN MNUCHIN, Secretary of the Treasury, in his official capacity,

Defendants-Appellants.

APPELLEES' REPLY IN SUPPORT OF EMERGENCY MOTION AND OPPOSITION TO APPELLANTS' CROSS-MOTION

Relief requested by October 22, 2020

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:19-cv-892-HSG

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TABLE OF CONTENTS

ARGUMENT

Defendants maintain that they should be permitted to continue to inflict irreparable injuries on Plaintiffs and the public because (a) the disposition of district court stays pending appeal is inextricably intertwined with the issuance of the Court's mandate; (b) Defendants have already embarked on an illegal course of action and it might prove expensive to stop; and (c) the Supreme Court stayed a separate injunction for an inapplicable reason and could conceivably stay this injunction as well. None of these arguments can be squared with this Court's guidance.

Defendants begin by asserting that this Court could not have intended to immediately terminate the district court's temporary stay because merits determinations made by appellate courts are finalized when the Court's mandate issues. Opp. Br. 6. Although Defendants assert that it is "commonsense" that the termination date of temporary, interlocutory stays marches in lockstep with the issuance of a court's mandate, Opp. Br. 6, they fail to muster a single case supporting their theory. Instead, they rely entirely on an inapposite Notice issued by a D.C. district court in a case where no stay was ever granted. Opp. Br. 6–7 (citing *Doe 2 v. Shanahan*, Dkt. No. 195, No. 1:17-cv-01597 (D.D.C. Mar. 19, 2019)). Neither the district court nor the court of appeals in *Doe 2* purported to

address the timing of dissolution of a stay pending appeal, as no stay was either issued or terminated in that litigation.

In contrast to the inapposite D.C. decision Defendants cite, this Court has directly instructed that orders terminating stays pending appeal are not bound up with issuance of the mandate: an "order vacating the injunction pending appeal shall become effective immediately upon the filing of this opinion, regardless of when the mandate issues." *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1174 n.7 (9th Cir. 2007); *see also Hernandez Roman v. Wolf*, No. 20-55436, 2020 WL 5683233, at *7 (9th Cir. Sept. 23, 2020) ("Because the substantive provisions of the preliminary injunction are vacated, we dissolve forthwith the stay pending appeal of that order, and we deny Plaintiffs' emergency motion as moot") (citing *Consejo de Desarrollo Economico de Mexicali, A.C.*, 482 F.3d at 1174 n.7)). Defendants maintain that this Court's guidance is inapplicable because the original stay in *Consejo de Desarrollo Economico de Mexicali, A.C.* was issued by a motions panel of this Court rather than a district court. Opp. Br. 7–8. But Defendants cite no caselaw or rule suggesting that a temporary district court stay order is somehow more durable than a stay order issued by a panel of this Court. Nor can Defendants explain their theory that a district court stay should remain effective so long as a disappointed litigant might seek rehearing, while an identical stay issued by judges of this Court

terminates immediately. If anything, a stay issued by members of this Court would seem to indicate a greater, not lesser possibility of rehearing than a stay issued by a district court.

In any event, Defendants fail to justify their continuing entitlement to a stay. Defendants claim that "Plaintiffs' motion should instead be treated principally as a request for expedited issuance of the mandate." Opp. Br. 11. But Plaintiffs have moved for an order lifting a stay, which need not await issuance of the mandate. *See* Mot. 6–8. It is Defendants who seek "continuation of a stay" and therefore "bear[] the burden of showing [their] entitlement to a stay." *Latta v. Otter*, 771 F.3d 496, 498 (9th Cir. 2014). They fail to carry that burden.

Defendants first argue that this Court shouldn't lift the stay because the Supreme Court might come to a contrary conclusion. Opp. 11–12. This argument rests entirely on Defendants' overreading of the Supreme Court stay decision in *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). As this Court has already explained, "the Supreme Court's stay order does not address the appropriateness of injunctive relief." Slip. Op. 73. The order "contains nowhere a suggestion that the district court abused its discretion in balancing the equities and weighing the public interest. . . . We cannot read into the order more than its text supports." *Id.*

Defendants ignore the flaws that this Court has already pointed out, asserting that the Supreme Court's previous stay order all but guarantees their entitlement to

a stay here: "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." Opp. Br. 12. But Judge Collins's reasoning only undercuts Defendants' claim for a stay. The Supreme Court stay order that Defendants rely on "alludes only to the merits of Sierra Club's cause of action arguments" with respect to a claim of transfer authority that is not at issue in this appeal. Slip Op. 73. In contrast to the transfer authority at issue in the Supreme Court stay, Judge Collins agreed with the panel majority that Plaintiffs have a cause of action here: "Although I concluded in the prior appeals that the Plaintiffs were *not* within the zone of interests of the particular appropriations-statute at issue there, § 2808 differs from that statute in a critical respect that warrants a different conclusion here." Slip Op. Dissent 20.

Defendants next argue that "it would be inappropriate for this Court" to require them to cease violating the Constitution, because ceasing the unlawful construction they have already embarked on could prove expensive. Opp. Br. 1–2. According to Defendants, stopping construction could force them to pay costs that they "would not have to pay but for an injunction" and therefore Defendants should not be required to obey the injunction that this Court affirmed. Opp. Br. 13. But as this Court has already explained, "[t]he equitable maxim 'he who comes in equity must come with clean hands' would be turned on its head if unlawful

conduct by one party precluded a court from granting equitable relief to the opposing party." *Sierra Club v. Trump*, 963 F.3d 874, 896 (9th Cir. 2020).

Defendants finally argue that they should have, at a minimum, an additional 21 days of unfettered construction. Opp. Br. 14. In their view, this additional time "is particularly appropriate" because they doubled down on their construction plan while their appeal was pending and do not want to disrupt "the operations of government contractors engaged in barrier construction." Opp. Br. 14. There is no equitable basis for such a delay. Defendants should not be rewarded for months of lawless construction by being granted additional time to race towards completion of the unconstitutional wall sections. This is especially so where Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice." Slip. Op. 74 (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (citing *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.")). Plaintiffs, by contrast, are suffering "permanent environmental and economic harms," Slip. Op. 74, which are rapidly mounting as the pace of construction accelerates.

For substantially the same reasons, Defendants have not shown an entitlement to a stay of this Court's mandate. As this Court has already found, neither the equities nor the public interest favor Defendants' strenuous efforts to

violate the Constitution and inflict irreparable harm. Slip Op. 71–75. There is no justification for additional weeks of crews "working 24 hours a day, seven days a week, on at least five locations on the border" in a race to complete a border wall that Defendants have no authority to build. *Trump Administration in An All-Out Push to Build Border Wall Before Election*, Wash. Post (Sept. 29, 2020), https://wapo.st/3nOxWzT (emphasis added).

CONCLUSION

This Court should either clarify that the stay is already terminated, issue an order immediately lifting the stay, or expedite issuance of the mandate. The Court should deny the cross-motion to stay the mandate.

Dated: October 20, 2020

Respectfully submitted,

/s/ Dror Ladin

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2020 I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Dror Ladin
Dror Ladin
Dated: October 20, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Circuit Rule 27-1(1)(d) and Circuit Rule 32-3 because it contains 1,332 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Dror Ladin
Dror Ladin
Dated: October 20, 2020