

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, Acting 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' EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3 FOR CLARIFICATION, IMMEDIATE LIFT OF STAY,
OR EXPEDITED ISSUANCE OF MANDATE**

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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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency.

This motion concerns the unlawful construction of a massive, multibillion-dollar project that is radically altering delicate and unique lands across the border. This Court ruled on October 9, 2020, that the construction violates the Constitution, and recognized the seriousness of “the permanent environmental and economic harms to the Plaintiffs,” Slip Op. 74 (attached). Although the district court injunction that halted construction was previously subject to a district court

stay pending appeal, the Court's October 9, 2020 order stated that "the district court's stay pending appeal is terminated" and that therefore "Sierra Club's emergency motion to lift the stay pending appeal [i]s moot." Slip Op. 75.

On October 13, 2020, Defendants informed Plaintiffs that they do not believe the stay is terminated. Defendants assert that the stay is effective until the Court's mandate issues and informed Plaintiffs that they have no intention of ceasing construction in the meantime. Under FRAP 40(a)(1) and 41(b), if Defendants do not move for rehearing, the mandate will not issue until November 30, 2020. Should Defendants move for rehearing, the mandate could be held up even longer.

Every day of construction causes mounting irrevocable harm. Defendants have and will continue to use the funds at issue to blast and bulldoze dozens of miles of land in western Arizona and central California and raise thirty-foot walls, irreversibly damaging landscapes even if the wall is eventually removed. Most recently, Defendants have greatly accelerated their efforts to complete the wall, increasing the urgency of immediately stopping the irrevocable injuries they are inflicting on Plaintiffs and the environment. As the Washington Post reported two weeks ago, "President Trump's administration is racing to build his border wall as quickly as possible ahead of the Nov. 3 election, with construction crews now adding *nearly two miles per day*. It is an unprecedented pace toward meeting one

of Trump’s signature 2016 campaign promises.” *Trump Administration in An All-Out Push to Build Border Wall Before Election*, Wash. Post (Sept. 29, 2020), <https://wapo.st/3nOxWzT> (emphasis added).

Plaintiffs respectfully request that the Court either clarify that the stay is lifted, lift the district court’s stay, or issue the mandate by October 22, 2020, to provide Plaintiffs protection against further unlawful construction, which is causing “permanent environmental and economic harms to the Plaintiffs.” Slip Op. 74.

(3) Explanation of timeliness, contact with and service on other parties’ counsel, contact with the Court’s emergency motions unit, and proposed schedule.

On October 13, 2020, after counsel for Defendants informed counsel for Plaintiffs that Defendants did not view the stay as terminated and did not intend to cease construction, counsel for Plaintiffs asked for Defendants’ position on a motion to immediately lift the stay. Defendants’ counsel informed Plaintiffs that Defendants opposed the motion. On the morning of October 14, Plaintiffs’ counsel contacted the Court’s emergency motions unit by telephone to advise that Plaintiffs would file this motion. Defendants’ counsel will be served electronically by the CM/ECF system.

(4) Futility of relief before the district court.

This Court has ordered that the district court's stay is terminated, and is the only Court that can control the timing of that order and instruct Defendants to obey the injunction.

/s/ Dror Ladin

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Plaintiffs-Appellees.

/s/ Dror Ladin

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INTRODUCTION AND SUMMARY OF ARGUMENT

On October 9, 2020, this Court determined that Congress has considered, and rejected, the executive branch's plans to spend billions of dollars on construction of the specific barriers at issue in this appeal. This Court further found that the equities and public interest favor a permanent injunction of Defendants' unlawful construction. And the Court explained that the district court's stay of injunction pending appeal was "terminated," and Plaintiffs' emergency motion to lift it was therefore moot.

Instead of ceasing construction, however, Defendants are racing to complete their unlawful wall—regardless of the irreparable harm to Plaintiffs and the public interest. Defendants assert that the district court stay remains active, buying them time to inflict further irreparable injuries. Defendants have accelerated the pace of construction, increasing the urgency for this Court's action.

Plaintiffs respectfully request that the Court require Defendants to immediately cease their unlawful conduct, rather than permit them to run the clock. The Court should either (a) clarify that the stay was terminated immediately on October 9, 2020, (b) order the stay be immediately lifted now, or (c) issue the mandate. Neither the balance of equities nor the public interest support Defendants' continued efforts to violate the Constitution and inflict serious and permanent injuries on Plaintiffs.

BACKGROUND

This motion concerns Defendants' ongoing efforts to evade Congress's enacted appropriations judgment. This Court affirmed the district court's determination that Defendants have no legitimate authority to circumvent Congress, and that Defendants' unconstitutional actions inflict irreparable injuries on Plaintiffs and are contrary to the public interest. Defendants have nonetheless indicated that they will continue to rush completion of their unlawful wall construction absent further action from this Court.

Plaintiffs sought the injunction at issue here on October 11, 2019, just over a month after Defendants announced the eleven projects at issue in this appeal. On December 11, 2019, Plaintiffs prevailed on their claims and the district court granted Plaintiffs a permanent injunction. "However, the district court *sua sponte* stayed the Sierra Club permanent injunction pending appeal pursuant to Fed. R. Civ. P. 62(c)." Slip. Op. 11. On December 16, 2019, Plaintiffs filed an emergency motion to lift the district court's stay of the injunction. ECF No. 2-1. On December 30, 2019, this Court denied without prejudice Plaintiffs' motion to lift the stay. ECF No. 12 at 2. Plaintiffs subsequently renewed their motion before this Court for an order lifting that stay. ECF No. 18-1.

This Court ruled on October 9, 2020, that Defendants' massive and ongoing construction project violates the Constitution. *See* Slip. Op. 49 ("Because the

diversion of funds was not authorized by the terms of Section 2808, it is unconstitutional.”). The Court further recognized the seriousness of the “the permanent environmental and economic harms to the Plaintiffs,” Slip Op. 74, and affirmed the permanent injunction, *see* Slip Op. 75. As for the district court’s stay, the Court explained: “Given that we have resolved the merits of this appeal, the district court’s stay pending appeal is terminated, and we dismiss Sierra Club’s emergency motion to lift the stay pending appeal as moot.” Slip Op. 75.

On October 12, 2020, Defendants informed Plaintiffs that they do not believe the district court stay is actually terminated until the Court’s mandate issues, and that they have no intention of ceasing construction before that date. Under FRAP 40(a)(1) and 41(b), if Defendants do not move for rehearing, the mandate will not issue until November 30, 2020. Should Defendants move for rehearing, the mandate could be held up even longer.

In the meantime, Defendants are rushing to complete as much of their unlawful wall as they possibly can before a court forces them to stop. They have recently accelerated those efforts: as the Washington Post reported, “President Trump’s administration is racing to build his border wall as quickly as possible ahead of the Nov. 3 election, with construction crews now adding *nearly two miles per day*. It is an unprecedented pace toward meeting one of Trump’s signature 2016 campaign promises.” *Trump Administration in An All-Out Push to Build*

Border Wall Before Election, Wash. Post (Sept. 29, 2020),
<https://wapo.st/3nOxWzT> (emphasis added).

Reporting published since this appeal was briefed and argued 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>; *'Planning For the Worst': Groundwater Pumping for Border Wall Construction Threatens Border Refuge*, Ariz. Republic (Aug. 20, 2020), <https://www.azcentral.com/story/news/politics/border-issues/2020/08/20/border-wildlife-refuge-risk-drying-up-wall-construction/5587027002>; *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>.

At this point, every day counts. "The latest figures from U.S. Customs and Border Protection show the rate of construction has nearly doubled since the beginning of the year, accelerated by the government's ability to cut through

national forests, wildlife preserves and other public lands already under federal control.” *Trump Administration in An All-Out Push to Build Border Wall Before Election*, Wash. Post (Sept. 29, 2020). Officials reported that “[c]rews have been working 24 hours a day, seven days a week, on at least five locations on the border.” *Id.*

ARGUMENT

Every court to address the wall construction at issue here, including the district court and this Court, has found it unlawful. *See* Slip. Op. 71; *see also State v. Trump*, 441 F. Supp. 3d 1101, No. 2:19-cv-01502-BJR, 2020 WL 949934 (W.D. Wash. Feb. 27, 2020); *El Paso County v. Trump*, 408 F. Supp. 3d 840, 857 (W.D. Tex. 2019). Yet as Mark Morgan, the acting CBP commissioner recently stated, Defendants continue to race to complete the wall in the face of “what I refer to as the judicial activism of lower courts that have tried to stop our construction of the wall.” *Trump Administration in An All-Out Push to Build Border Wall Before Election*, Wash. Post (Sept. 29, 2020). Each day that construction continues, Defendants are blasting protected lands, bypassing environmental review and preservation laws, and inflicting irreparable harm. It is past time for the administration to begin abiding by the restrictions the Constitution imposes, and obeying the injunction that the district court ordered and this Court upheld.

Ordinarily, when the Court issues an order that terminates a stay pending appeal, such an order takes effect immediately rather than when the mandate issues. *See Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1174 n.7 (9th Cir. 2007) (“Because it 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.”). This Court’s October 9, 2020 ruling does not order that the stay will be terminated in the future, it instead states that the “stay pending appeal is terminated” and that Plaintiffs’ motion is already “moot.” Slip. Op. 75. But because Defendants do not agree that the order has any immediate effect and are continuing their unlawful actions, the Court should clarify that the stay was terminated on October 9, 2020, and that the district court’s injunction is operative.

In the alternative, this Court has the authority to issue a new order immediately vacating any stay pending appeal. *See Consejo de Desarrollo Economico de Mexicali, A.C.*, 482 F.3d at 1174 n.7. The district court stay should be immediately vacated because both the balance of equities and public interest strongly weigh against allowing Defendants to evade this Court’s review and complete further wall construction before the Court’s mandate issues.

First, as this Court has already concluded, the balance of equities strongly favors stopping Defendants' unconstitutional construction. As the district court correctly held, Plaintiffs "suffered irreparable injury." Slip Op. 72. These injuries include "permanent environmental and economic harms," Slip. Op. 74, and are made worse every that Defendants continue their unconstitutional actions. Defendants, by contrast, "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.")).

Second, the public interest strongly supports stopping the construction: the record "clearly indicate[s] that Congress determined that the interests of the entire country did not favor funding more expansive border wall construction." Slip Op. 75. As this Court observed, the "power to legislate for emergencies belongs in the hands of Congress." Slip Op. 77 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring)). Here, "Congress has clung to this power with both hands," Slip Op. 77, yet Defendants are nonetheless racing to evade Congress's decision and render it moot. The public interest cannot favor allowing Defendants to complete their effort to undermine the separation of powers.

Finally, the Supreme Court’s stay of a separate injunction challenging construction under a different claimed authority cannot support a stay here. The Supreme Court last summer stayed an injunction concerning Defendants’ claim of transfer authority to spend billions of dollars on the wall. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.) As this Court found, the Supreme Court’s order “alludes only to the merits of Sierra Club’s cause of action arguments” and “contains nowhere a suggestion that the district court abused its discretion in balancing the equities and weighing the public interest.” Slip Op. 73 (citing *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.) (stating only that “[a]mong the reasons is that 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.”)).¹

There is no reason for the district court’s stay to remain effective until this Court’s mandate issues. Every day that passes imposes deeply asymmetrical costs on the parties, with Plaintiffs and the public forced to endure ever-increasing

¹ Even if the Supreme Court were to ultimately side with Defendants with respect to their cause of action arguments in the separate injunction, that would have little bearing on the outcome here. As Judge Collins noted in dissent: “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.

irreparable harm while Defendants continue to violate the Constitution. Enough is enough.

CONCLUSION

This Court should put a stop to Defendants' lawless rush to construct a border wall, either by clarifying that the stay is already terminated, issuing an order immediately lifting the stay, or expediting issuance of the mandate.

Dated: October 15, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 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.

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Dated: October 15, 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 1,809 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.

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Dated: October 15, 2020