

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

**REPLY IN SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR A STAY OF THE MANDATE
PENDING PETITION FOR CERTIORARI**

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The government explained in its cross-motion that this Court should stay the mandate to ensure that the Supreme Court has an opportunity to consider the government's forthcoming petition for a writ of certiorari in an orderly manner, instead of forcing the parties and the Supreme Court to litigate and resolve an emergency stay application. Denial of the government's cross-motion would work a disruption of the status quo that has been in place since the Supreme Court granted a stay of the district court's earlier injunction in this same litigation, which permitted construction to continue while the courts consider the government's appeal and further review of that initial injunction, and which prompted the district court similarly to permit construction to continue while this appeal proceeds. As the government explained, staying the mandate now would be appropriate because, until the mandate issues, this Court's decision would not become effective in resolving the appeal and thereby terminating the stay pending appeal that the district court entered as an exercise of discretion to stay its own injunction in light of the Supreme Court's earlier stay pending appeal and certiorari.

Plaintiffs' response offers no justification for their request that this Court should now, more than ten months after the district court entered its stay, force the Supreme Court to consider an extraordinarily expedited application to stay the mandate or grant any other appropriate relief to continue the stay of the injunction here.

To begin, plaintiffs effectively suggest that the Court should not, or perhaps need not, extend the mandate because the panel decision should be understood to have terminated the district court's stay effective immediately, irrespective of the mandate rule. But plaintiffs cite no case where this Court or another circuit has divorced the effect of an appellate court's decision on a district court injunction from its effect on a stay entered by the district court in the same order. That dearth of authority is unsurprising, because it would fly in the face of the mandate rule, which ordinarily provides a meaningful opportunity for a party to seek further relief before a panel's decision takes effect in district court. That background mandate rule is particularly appropriate in the circumstances of this case, where the Court's opinion did not differentiate between the timing of the decision's resolution of the merits and its effect on the district court stay. Cf. *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1174 n.7 (9th Cir. 2007) (expressly giving immediate effect to vacatur of motions panel injunction, and differentiating "when the mandate issues"). A stay of the mandate is appropriate here in order to give effect to that rule, and to give the Supreme Court an opportunity to consider the government's petition for a writ of certiorari without disruption.

Plaintiffs also suggest that maintaining the status quo pending certiorari is unimportant because the Supreme Court is unlikely to grant further review. But the Supreme Court just this week granted the government's petition for a writ of certiorari to review this Court's decision in an earlier appeal concerning an injunction

entered by the district court in the same case. And contrary to plaintiffs' further suggestion, the Supreme Court's stay pending appeal and certiorari in that case—which was a significant factor in the district court's exercise of discretion to stay its injunction here—was not based solely on concerns about the availability of a cause of action to pursue the legal theory at issue in that case. Instead, the Supreme Court observed that the cause of action issue was “[a]mong the reasons,” not the only reason, that the Court granted a stay. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (Mem.). And in any event, the government's merits position independently warrants further review, for the reasons Judge Collins persuasively explained. Dissent 23-38.

Finally, plaintiffs provide no reasonable response to why this Court should not, at a minimum, stay the mandate for at least 21 days to allow the Supreme Court consider whether to stay the mandate—and thereby maintain the district court's stay of the injunction—pending certiorari. Even if plaintiffs may be correct that the Supreme Court might view this appeal differently from the last one, plaintiffs fail to explain why this Court should force the Supreme Court to make that evaluation in the rushed posture of an emergency stay application to restore the status quo, especially where this appeal was pending for several months. Respect for the Supreme Court militates in favor of at least a modest stay of the mandate to facilitate further review in an orderly manner.

CONCLUSION

For these reasons, 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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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 793 words according to the count of Microsoft Word.

/s/ H. Thomas Byron III
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