



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

April 30, 2021

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Biden, et al. v. Sierra Club, et al.*, No. 20-138

Dear Mr. Harris:

On February 3, 2021, this Court granted the government’s unopposed motion to hold the above-captioned case in abeyance and to remove the case from the February argument calendar. The purpose of this letter is to advise the Court of recent factual developments in the case—although we do not believe those developments warrant further action by the Court at this time.

This case concerns actions taken by the then-Acting Secretary of Defense pursuant to 10 U.S.C. 284 to construct a wall at the southern border of the United States during the prior Administration, using funds transferred between Department of Defense (DoD) appropriations accounts under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019 (2019 Act), Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999. The questions presented are whether respondents have a valid cause of action to challenge those transfers and, if so, whether the transfers were lawful. Following the change in Administration, however, this Court granted the government’s motion to hold the case in abeyance in light of President Biden’s January 20, 2021, Proclamation directing the Secretary of Defense and the Secretary of Homeland Security to “pause work on each construction project on the southern border wall, to the extent permitted by law, as soon as possible” and to “pause immediately the obligation of funds related to construction of the southern border wall, to the extent permitted by law.” Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 27, 2021). The Proclamation also directed the Secretaries, in consultation with the Attorney General and other officials, to develop a plan “for the redirection of funds concerning the southern border wall.” *Id.* at 7226. “After the plan is developed,” the Secretaries “shall take all appropriate steps to resume, modify, or terminate projects and to otherwise implement the plan.” *Ibid.*

Although the Secretaries have not yet completed their development of such a plan, DoD now has announced a significant step it has taken as part of the review process called for by the President’s Proclamation. On April 30, 2021, the Deputy Secretary of Defense issued a memorandum directing the Secretary of the Army to “take immediate action to cancel all section 284 construction projects.” Encl. 5. The memorandum authorizes the Department of the Army to use any funds transferred for construction “to pay contract termination costs,” which include “suspension costs” and “costs associated with activities necessary for contractor demobilization.” *Ibid.* “The Department of the Army also may use such funds for activities necessary to make

permanent any measures that were taken to avert immediate physical dangers during the pause.” *Ibid.*; see 86 Fed. Reg. at 7226 (authorizing “an exception to the pause” for “urgent measures needed to avert immediate physical dangers”). Otherwise, because those transferred funds “were available for obligation only during the fiscal year in which they were transferred,” they “have expired and are no longer available for current requirements.” Encl. 20; see 2019 Act § 8003, 132 Stat. 2982. The memorandum also explains that “[a]ny unexpended expired funds will remain in the Operation and Maintenance, Army, account, and remain available to liquidate obligations properly chargeable to the fiscal year during [which] the funds were available for obligation (*e.g.*, contract termination costs, including suspension costs), and, after five years, the account will be closed and any remaining balance in the account will be cancelled.” Encl. 20. Finally, the Deputy Secretary of Defense issued a memorandum to the Secretary of Homeland Security reflecting that the Department of Homeland Security “will accept custody of border barrier infrastructure constructed pursuant to section 284, account for such infrastructure in its real property records, and operate and maintain the infrastructure (including undertaking any necessary further construction, consistent with applicable law).” Encl. 7.

As a result of those actions, DoD has now made clear that it will not undertake any further Section 284 border-barrier construction, and that any funds transferred under Sections 8005 or 9002 and obligated for such construction instead will be used for contract termination costs and the costs of certain safety measures. Those changes in factual circumstances may ultimately have a bearing on the Court’s review of the questions presented in this case. But because the Secretaries have not yet completed the plan that is being developed in response to the President’s Proclamation, and the completion of that process may affect the proper disposition of this case, we respectfully submit that it would be premature for this Court to take any action at this time. We will promptly advise the Court of any further material developments that would support action by the Court.

I would appreciate if you could circulate this letter to the Members of the Court.

Sincerely,

Elizabeth B. Prelogar
Acting Solicitor General

cc: See Attached Service List

encl.: Department of Defense Action Memo and Attachments

20-0138

BIDEN, JOSEPH R. , JR., PRESIDENT OF THE
UNITED STATES, ET AL.,
SIERRA CLUB, ET AL.

DOUGLAS W. ALEXANDER
ALEXANDER DUBOSE & JEFFERSON LLP
515 CONGRESS AVENUE
SUITE
AUSTIN, TX 78701-3562
512-482-9300
DALEXANDER@ADJTLAW.COM

BENJAMIN DANIEL BATTLES
SOLICITOR GENERAL
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER , VT 05609-1001

JACOB CAMPION
JULIANNA F. PASSE
445 MINNESOTA STREET
ST. PAUL, MN 55101
651-757-1459
JACOB.CAMPION@AG.STATE.MN.US

MARGARET Q. CHAPPLE
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL -
CONNECTICUT
55 ELM STREET
PO BOX 120
HARTFORD , CT 06106

SAMUEL F. DAUGHETY
TOHONO O'ODHAM NATION
1900 K STREET, NW
WASHINGTON, DC 20006
202-408-6427
SAMUEL.DAUGHETY@DENTONS.COM

JEFFREY PAUL DUNLAP
OFFICE OF THE ATTORNEY GENERAL
200 ST. PAUL PLACE
FLOOR 20
BALTIMORE, MD 21202
913-449-5049
JDUNLAP@OAF.STATE.MD.US

JEREMY M. FEIGENBAUM
OFFICE OF THE NJ ATTORNEY GENERAL
25 MARKET ST.
FIRST FLOOR
TRENTON, NJ 08625-0080
609-376-2690
JEREMY.FEIGENBAUM@NJOAG.GOV

AIMEE ATHENA FEINBERG
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I STREET
SACRAMENTO , CA 95514
916-210-6003
AIMEE.FEINBERG@DOJ.CA.GOV

JOHN A. FREEDMAN
ARNOLD & PORTER, LLP
601 MASSACHUSETTS AVENUE, NW
WASHINGTON, DC 20001
202-942-5000
JOHN.FREEDMAN@ARNOLDPORTER.COM
202-942-5999(Fax)

BRIANNE JENNA GOROD
CONSTITUTIONAL ACCOUNTABILITY
CENTER
1200 18TH ST., NW
SUITE 501
WASHINGTON, DC 20036
202-296-6889
BRIANNE@THEUSCONSTITUTION.ORG

SUSAN P. HERMAN
DEPUTY ATTORNEY GENERAL
STATE OF MAINE
6 STATE HOUSE STATION
AUGUSTA, GA 04333
207-626-8814
SUSAN.HERMAN@MAINE.GOV

D. ALICIA HICKOK
DRINKER BIDDLE & REATH LLP
ON LOGAN SQUARE
SUITE 2000
PHILADELPHIA, PA 19103
215-988-2700
ALICIA.HICKOK@DBR.COM

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
THE RONALD REGAN LEGAL CENTER
3100 BROADWAY
SUITE 1210
KANSAS CITY, MO 64111
816-931-5559
PETE.HUTCH@LANDMARKLEGAL.ORG

GABE JOHNSON-GARP
WISCONSIN DEPARTMENT OF JUSTICE
17 WEST MAIN STREET
MADISON, WI 53707

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE., NW
SUITE 700-1A
WASHINGTON, DC 20036
202-355-9452
LJ@LARRYJOSEPH.COM

MICHELLE SHANE KALLEN
OFFICE OF THE ATTORNEY GENERAL
202 NORTH NINTH STREET
RICHMOND, VA 23219
804-786-7704
MKALLEN@OAG.STATE.VA.US

JOSHUA A. KLEIN
CALIFORNIA DEPT. OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
1515 CLAY STREET
SUITE 2000
OAKLAND, CA 94612-1413
JOSHUA.KLEIN@DOJ.CA.GOV

DROR LADIN
ACLU FOUNDATION
125 BROAD STREET
NEW YORK, NY 10004
212-549-2500
DLADIN@ACLU.ORG

DAVID JAY LYONS
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
820 N. FRENCH STREET
WILMINGTON, DE 19801

TANIA MAESTAS
DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
PO DRAWER 1508
SANTA FE, NM 87504-1508
TMAESTAS@NMAG.GOV

JONA J. MAUKONEN
OREGON DEPARTMENT OF JUSTICE
1162 COURT STREET, NW
SALEM, OR 97301

DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
PO BOX 7482
CHARLOTTESVILLE, VA 22906-7482
434-978-3888
DOUGLASM@RUTHERFORD.ORG

ROBERT TADAO NAKATSUJI
OFFICE OF THE HAWAII ATTORNEY
GENERAL
425 QUEEN STREET
HONOLULU, HI 96813

MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 DEERFIELD AVE.
SUITE 312
LEESBURG, VA 20176
703-554-6105
MIKE@LANDMARKLEGAL.ORG

ERIC R. OLSON
OFFICE OF THE ATTORNEY GENERAL
1300 BROADWAY
10TH FLOOR
DENVER, CA 80203
720-508-6548
ERIC.OLSON@COAG.GOV

BERNARD ERIC RESTUCCIA
ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
670 LAW BUILDING
525 W. OTTAWA
LANSING, MI 48913

CALEB RUSH
OFFICE OF THE ATTORNEY GENERAL
100 WEST RANDOLPH STREET
12TH FLOOR
CHICAGO, IL 60601

JASON C. RYLANDER
DEFENDERS OF WILDLIFE
1411 K STREET, NW
SUITE 1300
WASHINGTON, DC 20005
202-849-8401
BSEGEE@BIOLOGICALDIVERSITY.ORG

JAY ALAN SEKULOW
AMERICAN CENTER FOR LAW AND JUSTICE
201 MARYLAND AVE., NE
WASHINGTON, DC 20002
202-546-8890
SEKULOW@ACLJ.ORG

ILYA SHAPIRO
CATO INSTITUTE
1000 MASSACHUSETTS AVE., NW
WASHINGTON, DC 20001
202-218-4600
ISHAPIRO@CATO.ORG

LEE I. SHERMAN
STATE OF CALIFORNIA DEPARTMENT OF
JUSTICE
1300 I STREET
SACRAMENTO, CA 95814
916-210-6003
AIMEE.FEINBERG@DOJ.CA.GOV

SAM SPIEGELMAN
CATO INSTITUTE
1000 MASS. AVE. NW
WASHINGTON, DC 20001
202-789-5242
SSPIEGELMAN@CATO.ORG

HEIDI PARRY STERN
OFFICE OF THE NEVADA ATTORNEY
GENERAL (LAD VEGAS)
555 EAST WASHINGTON AVENUE
LAS VEGAS, NV 89101
HSTERN@AG.NV.GOV

JUSTIN JAMES SULLIVAN
SPECIAL ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
150 SOUTH MAIN STREET
PROVIDENCE, RI 02903

ABIGAIL TAYLOR
OFFICE OF THE MASSACHUSETTS
ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MA 02108

MAXWELL WEISS
PATTERSON BELKNAP WEBB & TYLER LLP
1133 AVENUE OF THE AMERICA
NEW YORK, NY 10036

JONATHAN CALVIN WOOD
PACIFIC LEGAL FOUNDATION
3100 CLARENDON BLVD.
SUITE 610
ARLINGTON, VA 22201-5330
202-888-6881
JWOOD@PACIFICLEGAL.ORG

STEVEN C. WU
NEW YORK STATE OFFICE OF THE
ATTORNEY GENERAL
28 LIBERTY STREET
23RD FLOOR
NEW YORK, NY 10005

JAMES FRED ZAHRADKA, III
DEPUTY ATTORNEY GENERAL
1515 CLAY STREET
SUITE 2000
OAKLAND, CA 94612
JAMES.ZAHRADKA@DOJ.CA.GOV

STEVEN A. ZALESIN
PATTERSON BELKNAP WEBB &
TYLER LLP
1133 AVENUE OF THE AMERICAS
NEW YORK , NY 10036
212-336-2000
SAZALESIN@PBWT.COM