

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-138

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

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE PETITIONERS
TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE AND
TO REMOVE THE CASE FROM THE FEBRUARY 2021
ARGUMENT CALENDAR

Pursuant to Rule 21.1 of the Rules of this Court, the Acting Solicitor General, on behalf of petitioners, President Joseph R. Biden Jr., et al., provides this notice of a recent Proclamation by the President affecting this case, and respectfully moves to hold the briefing schedule in abeyance and to remove this case from the February 2021 argument calendar.* Petitioners' reply

* President Biden is substituted as a party for his predecessor in office. See Sup. Ct. R. 35.3. Other official-capacity parties have also been substituted for their predecessors, and several further substitutions are likely to

brief is currently due on February 11, 2021, and the case is currently scheduled for argument on February 22, 2021. We are authorized to represent that, in light of the current circumstances, respondents consent to petitioners' request to hold the briefing schedule in abeyance and to remove the case from the February 2021 argument calendar, without prejudice to either side requesting to have the case recalendared should the matter not be resolved.

1. This case concerns actions taken by the then-Acting Secretary of Defense to construct a wall at the southern border of the United States during the prior Administration. In 2019, the Acting Secretary transferred approximately \$2.5 billion between Department of Defense (DoD) appropriations accounts in order to respond to a request from the Department of Homeland Security for counterdrug assistance at the border under 10 U.S.C. 284. To transfer the appropriated funds, the Acting Secretary invoked Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, and a similar provision that is subject to the same terms and conditions as Section 8005.

The questions presented in the government's petition for a writ of certiorari, which this Court granted on October 19, 2020, are (1) whether respondents have a cognizable cause of action to

occur in the near future as current acting officials are succeeded by appointees.

obtain judicial review of the Acting Secretary's compliance with a limiting proviso in Section 8005 in making the transfers described above; and (2) whether the Acting Secretary exceeded his statutory authority under Section 8005 in making those transfers.

2. On January 20, 2021, President Biden issued a Proclamation declaring that "[i]t shall be the policy of [his] Administration that no more American taxpayer dollars be diverted to construct a border wall." App., infra, 1a (Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 27, 2021)). In furtherance of that policy, the President directed 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 but in no case later than seven days from the date of [the] proclamation." Ibid. The President also directed the Secretaries to "pause immediately the obligation of funds related to construction of the southern border wall, to the extent permitted by law." Ibid. The Secretaries may make an exception to the pause in construction "for urgent measures needed to avert immediate physical dangers or where an exception is required to ensure that funds appropriated by the Congress fulfill their intended purpose." Id. at 2a.

The President directed that the pause in construction required by the Proclamation be used to undertake an "assessment of the legality of the funding and contracting methods used to

construct the wall” and of “the administrative and contractual consequences of ceasing each wall construction project.” App., infra, 1a. The President also directed the Secretaries to “compile detailed information on all southern border wall construction projects, the completion status of each wall construction project, and the funds used for wall construction since February 15, 2019,” including specifically funds drawn from the DoD appropriations account used to provide counterdrug assistance under Section 284. Ibid. Finally, the President directed the Secretaries, in consultation with the Attorney General and other officials, to develop a plan within 60 days “for the redirection of funds concerning the southern border wall.” Id. at 2a. “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.

3. On January 23, 2021, the Deputy Secretary of Defense issued a memorandum to various DoD officials, including the Commander of the U.S. Army Corps of Engineers (the Corps), to begin implementing the President’s January 20 Proclamation. App., infra, 4a-6a (Memorandum from David L. Norquist, Deputy Secretary of Defense, to the Chairman of the Joint Chiefs of Staff, et al., Department of Defense Actions Regarding the Proclamation of January 20, 2021 (Jan. 23, 2021)). As relevant here, the Deputy Secretary ordered the Corps to “pause work on all projects”

undertaken under Section 284, “to the extent permitted by law, as soon as possible, but in no case later than 1700 EST, Wednesday, January 27, 2021.” Id. at 5a. Consistent with the Presidential Proclamation, the Deputy Secretary’s memorandum authorizes an exception to the pause in Section 284 construction “for urgent measures needed to avert immediate physical dangers.” Ibid. The Deputy Secretary also ordered the Corps to “cease exercising the authority provided by [Section 284] to award contracts or options on existing contracts, incur new obligations that advance project performance, or incur new expenses unrelated to existing contractual obligations.” Ibid.

4. In light of these recent developments, petitioners respectfully request that the Court hold further briefing in abeyance and remove this case from the February 2021 argument calendar. The government’s reply brief is currently due on February 11, 2021, and the case is currently scheduled for argument on February 22, 2021.

The President has directed the Executive Branch to undertake an assessment of “the legality of the funding and contracting methods used to construct the wall,” including the use of Section 8005 to transfer funds for Section 284 projects, App., infra, 1a, and also to develop a plan within 60 days for “the redirection of funds concerning the southern border wall, as appropriate and consistent with applicable law,” id. at 2a. It would therefore be

appropriate for the Court to hold further proceedings in this case in abeyance to allow for the completion of the process that the President has directed.

5. We have consulted with counsel for respondents, who have informed us that in light of the current circumstances, respondents consent to petitioners' request to hold the briefing schedule in abeyance and to remove the case from the February 2021 argument calendar, without prejudice to either side requesting to have the case recalendared should the matter not be resolved. If this motion is granted, we will advise the Court of material developments that would support further action by the Court.

Respectfully submitted.

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Acting Solicitor General
Counsel of Record

FEBRUARY 2021