

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,  
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity,  
et al.,  
Defendants-Appellants.

No. 19-16300  
No. 19-16299

California, et al.,  
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity,  
et al.,  
Defendants-Appellants.

**DEFENDANTS' RULE 27-3 EMERGENCY MOTION FOR STAY  
PENDING APPEAL AND MOTION TO CONSOLIDATE APPEALS**

## CIRCUIT RULE 27-3 CERTIFICATE

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

### **(1) Telephone numbers and addresses of the attorneys for the parties**

#### **Counsel for defendants:**

H. Thomas Byron III (H.Thomas.Byron@usdoj.gov)  
Anne Murphy (Anne.Murphy@usdoj.gov)  
Courtney L. Dixon (Courtney.L.Dixon@usdoj.gov)  
U.S. Department of Justice  
950 Pennsylvania Avenue  
Washington, DC 20530  
Tel: 202-353-8189  
Fax: 202-514-7964

#### **Counsel for plaintiffs in *Sierra Club, et al. v. Trump, et al.*:**

Dror Ladin (dladin@aclu.org)  
Hina Shamsi (Hshamsi@aclu.org)  
Jonathan Hafetz (Jhafetz@aclu.org)  
Noor Zafar (Nzafar@aclu.org)  
Omar Jadwat (Ojadwat@aclu.org)  
ACLU Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
Tel: 212-549-2500

Christine Patricia Sun (Csun@aclunc.org))  
Mollie M. Lee (Mlee@aclunc.org)  
ACLU Foundation of Northern California, Inc.  
39 Drumm Street  
San Francisco, CA 94111  
Tel: 415-621-2493

Cecilia D. Wang (Cwang@aclu.org)  
ACLU Immigrants Right Project  
39 Drumm Street  
San Francisco, CA 94111  
Tel: (415) 343-0775

Andre Ivan Segura (Asegura@aclutx.org)  
David A Donatti (Ddonatti@aclutx.org)  
ACLU of Texas  
P.O. Box 8306  
Houston, TX  
77288  
Tel: (713) 325-7011

Gloria D. Smith (Gloria.Smith@sierraclub.org)  
Sanjay Narayan (Sanjay.Narayan@sierraclub.org)  
Sierra Club  
2101 Webster St. Ste 1300  
Oakland, CA 94612  
Tel: (415) 977-5772

**Counsel for plaintiffs in *California, et al. v. Trump, et al.*:**

James F. Zahradka II (james.zahradka@doj.ca.gov)  
California Department of Justice  
1515 Clay Street, Ste 200  
Oakland, CA 94612  
Tel: 510-622-2239

Lee Sherman (lee.sharman@doj.ca.gov)  
California Department of Justice  
300 S. Spring St.  
Los Angeles, CA 90013  
Tel: 213-269-6404

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

These appeals arise out of the same dispute that is at issue in *Sierra Club, et al. v. Trump, et al.*, No. 19-16102 (9th Cir.), in which the government moved for an emergency stay of the district court’s preliminary injunction pending appeal. As set forth in that motion, the district court on May 24, 2019 preliminarily enjoined defendants from completing two border barrier projects the Department of Defense (DoD) is constructing pursuant to its counter-drug support authority in 10 U.S.C. § 284 using funds reprogrammed by DoD under Section 8005 of the Defense Appropriations Act; that injunction imposed irreparable harm on defendants and the public by preventing DoD from completing the projects at issue, which are necessary to block certain drug-smuggling corridors identified by the Department of Homeland Security (DHS) as among its highest priority projects. *See* Stay Motion, *Sierra Club, et al. v. Trump, et al.*, No. 19-16102 (9th Cir.).

On June 28, 2019, the district court issued a permanent injunction in that same case, No. 19-cv-00892-HSG (N.D. Cal.) (Sierra Club Case), preventing defendants “from taking any action to construct a border barrier . . . using funds reprogrammed by DoD under Section 8005” of the DoD appropriations statute and related authorities. *See* Dkt. No. 185 at 10, *Sierra Club, et al. v. Trump, et al.*, No. 19-cv-00892-HSG (N.D. Cal. June 28, 2019) (Sierra Club Op.). The district court also entered a declaratory judgment in the Sierra Club Case declaring DoD’s internal

transfer of funds unlawful, *id.*, and issued an identical declaratory judgment in the companion case brought by several States, Dkt. No. 185 at 10, *California, et al. v. Trump, et al.*, No. 19-cv-00872-HSG (N.D. Cal.) (States Case). The permanent injunction and declaratory judgments cover the two projects at issue in the preliminary injunction, as well as four additional projects. The harms to the government from enjoining the additional projects are materially indistinguishable from the harms from preliminarily enjoining the first two projects. *Compare* Dkt. No. 181 at 23-25, No. 19-cv-00892-HSG (N.D. Cal.) (Def. Mot. for Summ. J.) (describing harms to government if injunction were entered enjoining all six projects) *with* Mot. for Stay at 20-22, No. 19-16102 (9th Cir.) (discussing same harms).

As with the preliminary injunction, the orders below threaten to permanently deprive DoD of its ability to complete the projects at issue because the district court's orders forbid DoD from spending money it has transferred for construction of the projects but has not yet obligated via construction contracts. Unless those funds are obligated by September 30, 2019, the money will no longer remain available to DoD. The complex and time-consuming process to obligate the remaining money requires DoD to take multiple steps before the September 30 deadline. The contracts contemplate that those steps will take 100 days; DoD thus expected to begin that

process by late June, and continuing delays increase the risk that the process cannot be completed in the limited time available and that the projects will be compromised.

The government's motion for stay of the preliminary injunction is fully briefed, the motions panel heard oral argument, and the parties have completed supplemental briefing. In this Court's most recent order, the panel indicated that it "is endeavoring to issue a decision before the July 4th holiday." Dkt. No. 67, *Sierra Club, et al. v. Trump, et al.*, No. 19-16102 (9th Cir. June 24, 2019) (Order). In order to avoid further delay and prevent duplicative briefing, the government respectfully requests that the Court consider the instant request for a stay of the orders below on the same briefing and on the same timeline as the government's request for stay of the preliminary injunction, with a decision before July 4, 2019.

### **(3) When and how counsel notified**

Counsel for defendants notified plaintiffs' counsel by email and telephone on July 1, 2019, of the defendants' intent to file this motion. Jonathan Hafetz, counsel for plaintiffs-appellees in the Sierra Club Case, No. 19-16102 and No. 19-16300, has authorized us to represent that they do not oppose the request to consolidate the appeals and to rely on the briefing and argument of the stay motion in No. 19-16102. James Zahradka, counsel for plaintiffs-appellees in the States case, No. 19-16299, has authorized us to represent that plaintiffs-appellees do not oppose the request to consolidate the appeals or defendants' request that the Court rely on the briefing and

argument of the stay motion in No. 19-16102, but reserve their right to file a separate brief on the merits in the consolidated proceeding. Service will be effected by electronic service through the CM/ECF system.

**(4) Submissions to the district court**

The district court denied the government a stay pending appeal in its order granting a permanent injunction. *See* Sierra Club Op. 11. The district court certified its orders in the Sierra Club Case and the State Case for immediate appeal.

/s H. Thomas Byron III  
H. THOMAS BYRON III  
*Counsel for Defendants*

**DEFENDANTS' RULE 27-3 EMERGENCY MOTION FOR STAY  
PENDING APPEAL AND MOTION TO CONSOLIDATE APPEALS**

1. These appeals arise from the same dispute as the government's pending preliminary injunction appeal in No. 19-16102. On June 28, 2019, the district court in *Sierra Club, et al. v. Trump, et al.*, No. 19-cv-00892-HSG (N.D. Cal.) (Sierra Club Case), entered a permanent injunction and final judgment under Rule 54(b) on the same claims at issue in the pending preliminary injunction appeal, as well as substantially identical claims addressed to construction projects in additional areas, and denied the government's request for a stay pending appeal. Dkt. No. 185, Sierra Club Case (June 28, 2019) (Sierra Club Op.) 10-11. The permanent injunction prohibits defendants-appellants from using funds transferred across internal Department of Defense (DoD) budget accounts to construct six specified border barrier projects supporting the counter-narcotics efforts of the Department of Homeland Security (DHS) in certain high-priority drug-smuggling corridors along the southern border. *Id.*<sup>1</sup> The district court in the Sierra Club case previously issued

---

<sup>1</sup> The permanent injunction and accompanying declaratory judgment address transfers of funds that the district court concluded were unlawful. DoD made the transfers pursuant to two provisions in the DoD appropriations statute, Section 8005 and Section 9002. Although the preliminary injunction addressed only Section 8005, Section 9002 is substantively identical to Section 8005, *see* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing that “the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act”), as the district court recognized, *see* Sierra Club Op. 4 (“Defendants’ Section 9002

a preliminary injunction covering two of those same projects (Yuma Sector Project 1 and El Paso Sector Project 1). Dkt. No. 144, Sierra Club Case (May 24, 2019). Defendants appealed from that preliminary injunction and filed an emergency motion for a stay pending appeal, which has been fully briefed and argued, and remains pending before this Court. In this Court's most recent order, the panel indicated that it "is endeavoring to issue a decision before the July 4th holiday." Dkt. No. 67, *Sierra Club, et al. v. Trump*, No. 19-16102 (9th Cir. June 24, 2019) (Order).

In granting a permanent injunction, the district court also issued a declaratory judgment that DoD's reprogramming of funds was unlawful. Sierra Club Op. 10. The court issued an identical declaratory judgment in the companion case brought by several States, *California, et al. v. Trump, et al.*, No. 19-cv-00872-HSG (N.D. Cal.) (States Case), but denied the States' request for a permanent injunction, Dkt. No. 185, States Case, at 10 (June 28, 2019) (States Op.). The States participated as amici in this Court in opposition to the government's motion for a stay of the preliminary injunction pending appeal. See Dkt No. 43-2, No. 19-16102 (9th Cir.). The government has appealed the decisions (including the permanent injunction and the declaratory judgments) in both cases.

---

authority, however, is subject to Section 8005's limitations."'). The court, like the parties, accordingly treated the two provisions together. *Id.* ("Because Defendants agree that all such authority is subject to Section 8005's substantive requirements, the Court refers to these requirements collectively by reference to Section 8005."').

2. Defendants respectfully request that this Court stay the orders below pending appeal, and further request that the Court consider this stay request on the same briefing and on the same timeline as the stay of the preliminary injunction appeal, with a decision before July 4, 2019. *See* June 24 Order, No. 19-16102.

The district court made clear in its opinions that it relied on the same legal analysis underlying the earlier preliminary injunction. *See* Sierra Club Op. 3-5; *see also* States Op. 3-5. As in the preliminary injunction, the district court again concluded that “Defendants’ intended reprogramming of funds under Section 8005” and related statutory provisions “to the Section 284 account for border barrier construction is unlawful.” Sierra Club Op. 4-5 (citing PI Order at 31–42); *see also* States Op. 4-5. The court likewise reiterated its conclusion that the zone-of-interests requirement “has no application in an *ultra vires* challenge, which operates outside of the APA framework, and the Court incorporates here its prior reasoning on this point.” Sierra Club Op. 4 (citing PI Order at 29–30); *see also* States Op. 4. “Because no new factual or legal arguments persuade the Court that its analysis in the preliminary injunction order was wrong, Plaintiffs’ likelihood of success on the merits has ripened into actual success.” Sierra Club Op. 5; *see also* States Op. 5. The district court declined to reach the additional legal arguments plaintiffs raised, relying solely on the court’s interpretation of Section 8005, as in the preliminary injunction. Sierra Club Op. 5-6; *see also* States Op. 5.

The district court similarly reiterated without change its earlier justification for enjoining the government from continuing the border barrier projects. The court again relied on plaintiffs’ “members’ aesthetic and recreational interests in the identified areas.” *Sierra Club Op.* 6; *id.* at 6-7 (citing declarations and concluding plaintiffs had demonstrated irreparable harm). And the court again characterized the government’s interest (mistakenly) as “administration of the immigration laws at the border.” *Sierra Club Op.* 7-8 (referring to preliminary injunction order). The district court concluded, as it had in the preliminary injunction order, that “the balance of hardships and public interest favors Plaintiffs, and counsels in favor of a permanent injunction.” *Sierra Club Op.* 8; *cf.* *PI Order* 53-54.

The permanent injunction “supersedes the original preliminary injunction” as to the two border barrier projects at issue in the preliminary-injunction appeal. *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 544 (9th Cir. 1996) (citing cases). The permanent injunction covers those two projects (El Paso Sector Project 1 and Yuma Sector Project 1), and further enjoins DoD from completing other specified border barrier projects not subject to the original preliminary injunction. *Sierra Club Op.* 10 (referring to “border barrier construction in El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1–3”).<sup>2</sup> DoD has

---

<sup>2</sup> The harms to the government from enjoining the additional projects are materially indistinguishable from the harms from preliminarily enjoining the first two projects. *Compare* Dkt. No. 181 at 23-25, No. 19-cv-00892-HSG (N.D. Cal.)

undertaken all of those projects pursuant to the same statutory authority as the projects at issue in the original preliminary injunction, 10 U.S.C. § 284, and DoD is funding those projects pursuant to an internal transfer of funds across DoD accounts using statutory authority that is substantially identical to the funds transfer at issue in the original preliminary injunction, as the district court explained. Sierra Club Op. 3-4. The district court recognized the overlap between the permanent injunction and the preliminary injunction pending on appeal in No. 19-16102, acknowledging that this Court recently held briefing in abeyance in that earlier appeal, in anticipation of the district court's decision. Sierra Club Op. 9-10 (referring to pending preliminary injunction appeal as additional basis for certifying final judgment under Rule 54(b)).

3. This Court has indicated that it “is endeavoring to issue a decision before the July 4th holiday” on the government’s motion for stay of the preliminary injunction pending appeal. June 24 Order 1, No. 19-16102. To avoid unnecessary delay and duplicative briefing, the government respectfully requests that the Court consolidate these two appeals with each other and with the government’s appeal from the preliminary injunction, *Sierra Club, et al. v. Trump, et al.*, No. 19-16102. The government also requests that the Court consider this motion for a stay pending

---

(Def. Mot. for Summ. J.) (describing harms to government if injunction were entered enjoining all six projects) *with* Mot. for Stay at 20-22, No. 19-16102 (9th Cir.) (discussing same harms).

appeal on the same briefing and on the same timeline as the government's earlier motion for a stay of the preliminary injunction in No. 19-16102.

The parties and amici have briefed in the original appeal the relevant legal issues and balancing of the equities, the Court has held oral argument, and the parties have filed supplemental briefing. The additional projects included in the orders below do not materially alter the legal or equitable issues raised in the stay motion in the preliminary injunction appeal, and further briefing is unnecessary.

Undersigned counsel has consulted with counsel for plaintiffs-appellees in both the Sierra Club Case and the States Case. Jonathan Hafetz, counsel for plaintiffs-appellees in the Sierra Club Case, No. 19-16102 and No. 19-16300, has authorized us to represent that they do not oppose the request to consolidate the appeals and to rely on the briefing and argument of the stay motion in No. 19-16102. James Zahradka, counsel for plaintiffs-appellees in the States case, No. 19-16299, has authorized us to represent that plaintiffs-appellees do not oppose the request to consolidate the appeals or defendants' request that the Court rely on the briefing and argument of the stay motion in No. 19-16102, but reserve their right to file a separate brief on the merits in the consolidated proceeding.

## CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court stay pending appeal the orders below for the same reasons as set forth in the government's stay request in No. 19-16012, and further requests that the Court consolidate these appeals.

Respectfully submitted,

/s H. Thomas Byron III

H. THOMAS BYRON III

ANNE MURPHY

COURTNEY L. DIXON

*Attorneys, Appellate Staff*

*Civil Division, Room 7529*

*U.S. Department of Justice*

*950 Pennsylvania Avenue NW*

*Washington, DC 20530*

*(202) 616-5367*

COUNSEL FOR  
DEFENDANTS-APPELLANTS

JULY 2019

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing motion complies with the requirements of FRAP 27(d) The motion was prepared in Times New Roman 14-point font, and contains 1570 words, as counted by Microsoft Word 2016.

/s H. Thomas Byron III  
H. THOMAS BYRON III