

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-51144

EL PASO COUNTY, TEXAS; BORDER NETWORK FOR HUMAN RIGHTS,

Plaintiffs - Appellees Cross-Appellants

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, In his official capacity; MARK ESPER, SECRETARY, DEPARTMENT OF DEFENSE, In his official capacity; CHAD F. WOLF, ACTING SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, In his official capacity; DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, In his official capacity; STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY, In his official capacity; TODD T. SEMONITE, In his official capacity as Commanding General United States Army Corps of Engineers,

Defendants - Appellants Cross-Appellees

Appeals from the United States District Court
for the Western District of Texas

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

The application for a stay of the district court's injunction pending appeal is GRANTED. The Supreme Court recently stayed a similar injunction from our sister circuit. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.); accord

Sierra Club v. Trump, No. 19-17501, slip. op. (9th Cir. Dec. 30, 2019). The Government is entitled to the same relief here for, among other reasons, the substantial likelihood that Appellees lack Article III standing.

IT IS FURTHER ORDERED that Appellees’ motion to expedite appeal is DENIED.

IT IS FURTHER ORDERED that Appellees’ motion for oral argument to be scheduled no later than March 2020 is DENIED.

IT IS FURTHER ORDERED that the unopposed motion for leave to file Amicus Curiae brief of United States Representative Andy Barr in support of Appellants’ motion for stay pending appeal of order granting injunction is GRANTED.

IT IS FURTHER ORDERED that the unopposed motion for leave to file Amicus Curiae brief of Government Oversight, Incorporated, Christopher Shays, Christine Todd Whitman, John Bellinger III, Samuel Witten, Stanley Twardy, and Richard Bernstein in opposition to Appellants’ motion for stay pending appeal of order granting injunction is GRANTED.

STEPHEN A. HIGGINSON, Circuit Judge, dissenting:

Although I agree with my colleagues that this matter presents “a substantial case on the merits” and involves a “serious legal question,” *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982) (citation omitted), I am unable to agree, without focused panel deliberation and discussion—possibly aided by dialogue with counsel—that the government presently has shown either a likelihood of success on the merits or irreparable harm in the absence of a stay, *Nken v. Holder*, 556 U.S. 418, 434 (5th Cir. 2009). Therefore, I dissent.

Regardless, I would expedite merits assessment by our court. The district court’s analysis is comprehensive and probing, granting parsed relief

enjoining the Department of Defense from using funds under 10 U.S.C. § 2808 while simultaneously declining to enjoin the use of border-construction funds under 10 U.S.C. § 284. *El Paso County v. Trump*, 407 F Supp. 3d 655 (W.D. Tex. 2019). That ruling implicates several weighty issues that animate my desire to expedite. These include threshold jurisdictional issues of county and organizational standing; merits issues implicating Executive military authority and Congress’s prohibitory Spending Clause authority; the Ninth Circuit’s recent denial of a motion to lift a stay of a “substantially similar injunction,” *Sierra Club v. Trump*, No. 19-17501, slip. op. (9th Cir. Dec. 30, 2019); and the Supreme Court’s stay of a related but distinct injunction in *Trump v. Sierra Club*, 140 S. Ct. 1 (July 26, 2019) (mem.). Amici have already entered the case, demonstrating the importance of the issues. This constellation of sensitive and complex legal questions, all in the context of a nationwide injunction, warrant expediting the appeal for prompt consideration of the merits.