No. 20-5197

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK, Chairman of the Yankton Sioux Tribe Business and Claims Committee; OGLALA SIOUX TRIBE,

Plaintiffs-Appellees,

CHEYENNE RIVER SIOUX TRIBE; STEVEN VANCE,

Intervenors for Plaintiff-Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellee,

DAKOTA ACCESS, LLC,

Intervenor for Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia, No. 1:16-cv-1534

INTERVENOR-APPELLANT'S MOTION TO STAY ISSUANCE OF THE MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

Miguel A. Estrada
Counsel of Record
William S. Scherman
David Debold
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Dakota Access, LLC

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GLOSSARY

DAPL:	Dakota Access Pipeline
EA:	Environmental Assessment
EIS:	Environmental Impact Statement
FONSI:	Finding of No Significant Impact
NEPA:	National Environmental Policy Act
the Corps:	the U.S. Army Corps of Engineers

INTRODUCTION

Dakota Access, LLC, moves for a stay of the mandate. The Dakota Access Pipeline ("DAPL") remains in operation after this Court reversed the injunctive portion of the district court's judgment. Dakota Access intends to seek Supreme Court review of the remainder of this Court's judgment. A stay of the mandate would preserve the status quo, allowing this Court to retain jurisdiction if a later shutdown order makes it necessary for Dakota Access to seek a stay of this Court's judgment pending Supreme Court review. Thus, good cause exists to stay the issuance of the mandate.

A stay is further warranted because Dakota Access's petition will present substantial questions of law. The parties to this appeal have hotly contested the standard for determining whether the National Environmental Policy Act ("NEPA") required the U.S. Army Corps of Engineers (the "Corps") to prepare an environmental impact statement ("EIS") before granting DAPL an easement allowing a short segment of the pipeline to cross federal lands at North Dakota's Lake Oahe. The parties have likewise contested the standard for determining whether vacatur of the easement is warranted while the Corps prepares an EIS. This Court sided with Plaintiffs on both questions, affirming the orders requiring the Corps to prepare an EIS and vacating the easement. Dakota Access does not intend to reargue these questions here. Instead, Dakota Access need only show a reasonable probability that the Supreme

Court will grant certiorari on one or both questions and reverse this Court's decision. Because Dakota Access can make that showing, the Court should stay the mandate.

BACKGROUND

1. DAPL has now operated safely for nearly four years without a single spill on its mainline, A1174, 1619, and has continued its unblemished safety record throughout this appeal, D.E. 593-4 ¶ 3(e). DAPL remains a vital utility, bringing to market about 40% of the oil produced in North Dakota, the second largest oil producing State. A1500, 1742-43. The most recent projections are that, without DAPL, oil producers would lose between $3.0 and $5.4 billion in 2021 and between $4.3 and $9.9 billion in 2022. D.E. 593, at 4; D.E. 596-1 ¶¶ 5(d)(i) & 6 tbl. 1. In North Dakota alone, DAPL is responsible for between 14,540 and 24,090 jobs, D.E. 593, at 4; D.E. 596-1 ¶ 5(d)(viii), and over $1 billion in tax revenue annually, D.E. 596-1 ¶ 5(d)(iii). DAPL is vital to Native Americans as well. The Mandan Hidatsa and Arikara Nation (MHA Nation or Three Affiliated Tribes) relies on DAPL to transport more than 60% of its oil production, which provides the basis for more than 80% of the Nation's budget. D.E. 593-1 ¶¶ 6, 9. The MHA Nation estimates a loss of $160 million in revenue from a one-year DAPL shutdown. *Id.* ¶ 10.

Plaintiffs challenge the Corps' decision to grant DAPL an easement for the narrow strip of federally owned lands at Lake Oahe without preparing an EIS. NEPA requires an EIS only if the Corps' initial environmental review—which is expected

to be abbreviated, 33 C.F.R. pt. 325, App. B(7)—finds that federal action will "significantly affec[t]" the environment, 42 U.S.C. § 4332(C).

The Corps' extensive environmental analysis ("EA")—completed during the Obama administration—determined that, even if a large spill at Lake Oahe could be serious, the *likelihood* of such a spill was "extremely low" given that "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans," A539, and that Dakota Access has adequate measures in place to ensure that any impacts would be "temporary" and "limited," A1818, 2033-34. The Corps thus issued a Finding of No Significant Impact ("FONSI"), making an EIS unnecessary.

Following highly politicized protests, Plaintiffs' lobbying of political appointees temporarily succeeded in delaying delivery of the easement. A101, 164, 279-80. But the incoming administration removed those political impediments, let stand the Corps' original conclusion that no EIS was necessary, and announced on February 3, 2017 that it would deliver the easement. A18-19. Pipeline construction soon finished, with operations beginning June 1, 2017. A19.

2. In June 2017, the district court held that the Corps had "substantially complied with NEPA," A4, and affirmed the Corps' ultimate "conclusion that the risk of a spill is low," A32. It remanded for the Corps to address three discrete issues "not adequately consider[ed]" in the EA. A4, 441. The one relevant here is "the degree

to which" the project's effects are "highly controversial"—one of many factors that "should be considered" in assessing whether a project will have significant environmental impacts. 40 C.F.R. § 1508.27(b)(4). On remand, the Corps went far beyond NEPA's requirements, adding 280 pages of analysis revalidating the EA and FONSI. A1958-2097.

Plaintiffs again challenged the Corps' conclusions. In March 2020, the district court ordered the Corps to prepare an EIS because "the pipeline's 'effects on the quality of the human environment'" remained "'highly controversial.'" A131. It relied on "new" and "significant guidance" from *National Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019)—a decision *post-dating* the remand's completion, A442—to hold it insufficient that the Corps "'consider[ed]'" Plaintiffs' objections to its analysis and methodologies. A97, 110. The court instead required the Corps to "'succeed' in resolving the points of scientific controversy" that Plaintiffs' consultants raised. A112-13. The court also vacated the easement notwithstanding "the serious effects that a DAPL shutdown could have for many states, companies, and workers," A156-57—including up to $10.23 billion in lost revenues to North Dakota oil producers, residents, and the State itself, and up to 7,063 lost North Dakota jobs, A1542, A1544-45, A1557, A1769—because considering these consequences would "subvert the structure of NEPA," A156-57. Finally, the district court entered an injunction ordering Dakota Access to "shut down the pipeline and

empty it of oil by August 5, 2020." A138-39.

3. On appeal, a motions panel of this Court stayed the injunction because the district court had failed to "make the findings necessary for injunctive relief." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 20-5197 (D.C. Cir. Aug. 5, 2020), Doc. 1855206, at 1. The merits panel ultimately agreed, and vacated the injunction. Op. 35-36.

The merits panel otherwise affirmed the remainder of the district court's rulings, holding that regardless of "the volume of ink spilled in response to criticism," the "highly controversial" factor of NEPA required the court "to delve into the details of [Plaintiffs'] criticisms," and obligated the Corps to "convinc[e] the court" that it has "resolved serious objections to its analysis." Op. 14. In upholding the district court's vacatur of the easement, the panel reasoned that because the Corps could not justify its "refusal to prepare an EIS," it was irrelevant whether the Corps could show "the ultimate action"—the easement—"could be justified." Op. 30-31. The panel also dismissed the risk that vacating the easement would lead to devastating "economic consequences," reasoning that its reversal of the injunction obviated any immediate impact, and that in any event remand without vacatur "would subvert NEPA's purpose" by incentivizing agencies to "build first" and prepare an EIS later. Op. 31. Dakota Access petitioned for rehearing en banc. On April 23, 2021, this Court denied that petition.

4. In light of this Court's decision to stay and ultimately vacate the district court's injunction, DAPL continues to operate. To date, the Corps has not contended that DAPL should shut down while the Corps prepares the EIS. Plaintiffs, on the other hand, have moved in the district court for a permanent injunction pending completion of the new EIS. *See* D.E. 569. That motion is now fully briefed. *See* D.E. 593, 597. For its part, the Corps has stated as recently as April 9, 2021 that, in its view, "the government is able to take an enforcement action at any time." Tr. Of Apr. 9, 2021 Status Conference, at 8:12-13. (Dakota Access has not needed to take a position on that view.)

ARGUMENT

Dakota Access respectfully requests that this Court stay its mandate pending the filing and disposition of a petition for a writ of certiorari. A stay would preserve the status quo, retaining jurisdiction in this Court to consider a potential request for relief from vacatur while the Supreme Court considers the forthcoming petition. A stay of the mandate is warranted where "the [certiorari] petition would present a substantial question and ... there is good cause for a stay." Fed. R. App. P. 41(d)(1). Courts have interpreted this rule to incorporate the standards applied by Supreme Court Justices in resolving motions to stay: An applicant must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Supreme Court will vote to

reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 977 F.3d 1379, 1380 (Fed. Cir. 2020) (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010)).

Dakota Access has satisfied these requirements. The panel's decision raises two substantial questions: (1) whether an agency has satisfied its NEPA obligations if it prepares an EA and FONSI that carefully considers all criticisms of the agency's environmental analysis but does not "resolve the controversy" to the court's satisfaction, and (2) whether procedural error under NEPA *per se* warrants remand with vacatur. To find these questions "substantial," this Court need not agree with Dakota Access on their resolution, but instead "must perform the predictive function of anticipating the course of decision in the Supreme Court." *See*, *e.g.*, *U.S. ex rel. Chandler v. Cook Cty.*, 282 F.3d 448, 450 (7th Cir. 2002) (Ripple, J., in chambers) (finding a "substantial question" warranting recall of mandate after authoring merits decision). Because the Supreme Court could conclude that the panel's reasoning on both issues conflicts with the Supreme Court's own decisions and decisions of other circuits, there is a reasonable probability that the Court will grant certiorari, *see* Sup. Ct. R. 10(a), and reverse this panel's decision.

There is also "good cause" to maintain the status quo by staying the mandate pending resolution of the certiorari petition. Fed. R. App. P. 41(d)(1). Should the

district court or the Corps seek to order DAPL to cease operations based on the judgment vacating the easement, Dakota Access intends promptly to ask this Court for stay relief pending its request for Supreme Court review of this Court's judgment. Issuing the mandate could divest this Court of jurisdiction to stay that judgment pending a petition for writ of certiorari. The Court would of course have jurisdiction arising to address stay application in connection with any appeal that lies from any new order by the district court, but retaining jurisdiction now will avoid disputes as to the scope of that jurisdiction. It will also ensure that this Court remains available as a forum for Dakota Access to seek relief, with a stay of the vacatur order, in the event the government purports to require DAPL to cease operations. This Court should thus stay the mandate.

I. Dakota Access's Petition Will Raise Substantial Questions.

A. The Panel's Heightened Standard Of Review For NEPA Decisions Conflicts With Decisions By The Supreme Court And Other Circuits.

When determining whether a major federal action will "significantly affec[t]" the "human environment," 42 U.S.C. § 4332(C)—triggering an EIS—agencies must "conside[r]" the action's "context" and ten "intensity" factors. 40 C.F.R. § 1508.27. The panel required an EIS based on just one of those intensity factors—whether the action's environmental effects "are likely to be highly controversial," *id.*

§ 1508.27(b)(4)—because the panel was not "convinced" that the Corps successfully negated a handful of Plaintiffs' litany of criticisms, Op. 14.

The Supreme Court is reasonably likely to review the panel's holding that a single intensity factor suffices to "trigge[r] the need to produce an EIS," Op. 6, because that decision squarely conflicts with the decision of at least six other circuits. Those circuits hold that the "'factors listed in the [CEQ] regulation do not appear to be categorical rules that determine by themselves whether an impact is significant.'" *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 233-34 (5th Cir. 2006); *see also Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 411 (6th Cir. 2016) ("[T]he [agency] was not required independently to evaluate these factors."). These decisions recognize that "controversy" is "only one of the ten factors listed for determining if an EIS is necessary." *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000); *McGuinness v. U.S. Forest Serv.*, 741 F. App'x 915, 927 (4th Cir. 2018) (same). "Controversy is not decisive but is merely to be weighed in deciding what documents to prepare." *Town of Marshfield v. FAA*, 552 F.3d 1, 5 (1st Cir. 2008). Thus, even when "a project is controversial," that "does not mean the Corps must prepare an EIS." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012).

The Supreme Court could reasonably conclude that the panel's approach conflicts with the Supreme Court's own recognition that NEPA reflects a "'rule of reason,'" not a rigid test. *DOT v. Pub. Citizen*, 541 U.S. 752, 767 (2004). NEPA "imposes only procedural requirements"; it does not "'mandate particular results.'" *Id.* at 756 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). It is up to "agencies"—not courts—to "determine whether" to prepare an EIS "based on the usefulness of any new potential information." *Id.* Courts must "defer to 'the informed discretion of the responsible federal agencies'" when they decide whether to prepare an EIS, so long as the agencies "'consider[ed] … the relevant factors'" and did not commit "'a clear error of judgment.'" *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). Courts apply the well-settled APA standard, *id.* at 375, that "review of agency decisions based on multi-factor balancing tests" is "quite limited," leaving no room for courts to "'substitute the balance [they] would strike for that the agency reached.'" *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 963 F.3d 137, 141 (D.C. Cir. 2020). By effectively giving a single factor dispositive weight if present—instead of deferring to the Corps' "consider[ation]" of the relevant factors, as the regulation and the APA prescribe, 40 C.F.R. § 1508.27; *Marsh*, 490 U.S. at 378—the panel departed from Supreme Court precedent.

The panel's standard for assessing whether agency action is highly controversial exacerbates the conflict. The Supreme Court could reasonably conclude that

requiring an agency to "convinc[e] the court" that it had "resolved serious objections to its analysis" related to the "controversy," Op. 14, is incompatible with the deferential APA-style review required for agency decisions to forgo an EIS if the agency adequately "considered" the objections. *Marsh*, 490 U.S. at 374-78. That standard bars a court from "substitut[ing] its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court's "only role" in NEPA cases "is to insure that the agency has taken a 'hard look' at environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The "agency must have discretion"—including in "decid[ing] whether to prepare an EIS"—"to rely on the reasonable opinions of its own qualified experts *even if, as an original matter, a court might find contrary views more persuasive*," especially where, as here, the decision "'requires a high level of technical expertise.'" *Marsh*, 490 U.S. at 374, 377-78 (emphasis added).

The panel's requirement that agencies "convince[e]" the court deepens this Circuit's 35-year-old split with other circuits, which apply ordinary deferential review to assess an agency's decision to forgo an EIS. *See Gee v. Boyd*, 471 U.S. 1058, 1059 & nn.3-4 (1985) (White, J., dissenting from denial of certiorari). These circuits recognize that the highly controversial factor calls for the same limited "hard look" review as in any case, lest the factor give critics a "heckler's veto" over the EIS decision. *Ind. Forest All., Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 860-61 (7th

Cir. 2003); *see also Hillsdale*, 702 F.3d at 1182 ("all NEPA requires" is a "hard look"); *North Carolina v. FAA*, 957 F.2d 1125, 1134 (4th Cir. 1992) (similar); *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1257, 1263 (10th Cir. 2019) (similar). Courts will not "'substitute [their] judgment … for the judgment of the agency.'" *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006) (Sutton, J.). And the "mere fact" of "disagreement" among "experts" "does not render the [agency] out of compliance under [the 'highly controversial'] factor." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 957 (7th Cir. 2003).

This is true even regarding criticisms from "other agencies," to which the reviewing agency "need not defer … when it disagrees." *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991). The Supreme Court could reasonably conclude that panel's requirement that agencies rebut critics to the court's satisfaction conflicts with these decisions and the Supreme Court's own repeated admonition that deferential APA review applies to agency decisions to forgo an EIS. The Court is reasonable likely to grant certiorari to resolve this conflict.

B. The Panel's *Per Se* Rule That Procedural Errors Compel Vacatur Conflicts With Decisions From Other Circuits.

The panel's decision to affirm vacatur of DAPL's easement pending completion of an EIS also raises "a substantial question." This Court's test for vacatur—like the test in other circuits—comprises *two* factors : (1) "'the seriousness of the order's deficiencies,'" and (2) "'the disruptive consequences'" of vacatur. *Allied-*

Signal, Inc. v. NRC, 988 F.2d 146, 150 (D.C. Cir. 1993). The panel, like the district court, adopted a *categorical* rule that procedural error is too serious to warrant remand without vacatur under this test. This *per se* rule parts with other circuits on each factor.

The first factor addresses "the possibility" the agency "may find an adequate explanation for its actions" on remand. *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008). The panel's decision raises substantial questions about what "action" the agency must be able to justify. Rather than the "ultimate decision" to grant an easement, the panel considered whether the Corps, on remand, could justify "skip[ping] th[e] procedural step" of preparing an EIS—an impossible task given the court's ruling that the Corps *must* take that step. Op. 29, 31.

Other circuits have instead focused on whether the agency can justify the ultimate action to be vacated, not antecedent procedural steps that a court has found erroneous and, therefore, *un*justifiable. The First Circuit remanded without vacatur a penalty imposed on electric utilities, despite the agency failing to "provid[e] even a semblance of serious discussion" of objections, because the error could "probably be mended" on remand. *Cent. Maine Power Co. v. FERC*, 252 F.3d 34, 44, 48 (1st Cir. 2001). Similarly, the Fifth Circuit declined to vacate denial of a variance from

chemical use and disposal requirements, where the agency did not respond to "numerous comments," because on remand the agency could potentially "justify its decision" to deny a variance. *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). And the Eleventh Circuit refused to vacate a nationwide mining permit, because it was "not at all clear" that the agency's erroneous NEPA analysis "incurably tainted the agency's decisionmaking process" or rendered the "ultimate decision … unlawful." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015).

Each of these errors was failure to follow *a procedure* that the court later required—just like the Corps' supposed failure here. Yet none of these courts found the procedural flaw dispositive. Instead, they considered the likelihood that the agency could support its ultimate decision using the correct process—precisely what the panel refused to consider here. While some of these decisions involve failure to address comments, which the panel attempted to distinguish from a "decision to forgo a major procedural step," Op. 30-31, that distinction cannot hold because "respond[ing] to significant comments" *is* a procedural requirement. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

The panel's approach unmoors *Allied-Signal* from its origins: a court's inherent equitable authority to fashion relief for statutory violations. *See Black Warrior*,

781 F.3d at 1290. The APA expressly preserves courts' "'duty' to ensure the propriety of the APA remedy," *Am. Bankers Ass'n v. NCUA*., 934 F.3d 649, 674 (D.C. Cir. 2019), by "deny[ing] relief" on "equitable ground[s]" where "appropriate," 5 U.S.C. § 702. The vacatur decision thus rests on "analogous factors" to those "considered in deciding whether to grant preliminary injunction," *Int'l Union, United Mine Workers of America v. MSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)—except that the focus is on the disruptive consequences of vacatur (which Dakota Access proved, A156) rather than the harm from the challenged agency action (which, in any event, Plaintiffs failed to prove, Op. 33-36). Just as courts consider likely success on the merits for injunctions or stays, courts considering vacatur must address the likelihood that the "interim change … may itself be changed" by later agency action. *Int'l Union*, 920 F.2d at 967. By ignoring whether vacatur would be short-lived, the panel skewed the relevant equitable considerations.

The panel's approach also precluded consideration of "disruptive consequences" under the second *Allied-Signal* factor. According to the panel, allowing "economic consequences" to be a ground for remanding without vacatur would "subvert NEPA's purpose" by incentivizing agencies to "build first" and comply later. Op. 31. In this, the panel echoed the district court's analysis discounting the potentially devastating consequences of vacating the easement as a necessary by-product of preserving "the structure of NEPA." A156-57. The panel endorsed that

analysis as an appropriate exercise of discretion. But both analyses are a recipe for *never* invoking *Allied-Signal* to remand without vacatur, since they reduce the *Allied-Signal* inquiry to the question of whether the error was serious enough to require remand, which by hypothesis the court already found. Yet the question under *Allied-Signal* is what remedy is equitable and appropriate for that error. Vacatur always could be said to incentivize better compliance with applicable laws, but under that reasoning, remand without vacatur never would be available.

Other circuits reject the panel's approach. The Eighth Circuit, for instance, declined to vacate certain Clean Air Act designations for which the agency "dispensed with the usual notice and comment requirements." *U.S. Steel Corp. v. EPA*, 649 F.2d 572, 574 (8th Cir. 1981). And the Ninth Circuit refused to set aside similar designations the agency "promulgat[ed] … without prior notice and comment" because doing so would yield the "undesirable consequenc[e]" of "thwarting" the "operation of the Clean Air Act" during remand. *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 812-13 (9th Cir. 1980); *see also Cook Inletkeeper v. EPA*, 400 F. App'x 239, 241 (9th Cir. 2010) ("leaving the permit in place during remand to avoid disruptive consequences" despite agency's failure to provide "meaningful opportunity for public comment"). These decisions directly conflict with the panel's *per se* rule that procedural error requires vacatur regardless of the consequences. A stay is warranted pending resolution of this "substantial question."

II. There Is Good Cause To Stay Issuance Of The Mandate.

There is also "good cause" to stay the mandate pending resolution of these substantial questions by the Supreme Court. Fed. R. App. P. 41(d)(1). As of April 23, 2021, Plaintiffs' motion for a permanent injunction ordering DAPL's shutdown is fully briefed. *See* D.E. 597. Likewise, the Corps has stated that it maintains "enforcement discretion" to seek a shutdown of the purported encroachment at Lake Oahe. Tr. Of Apr. 9, 2021 Status Conference, at 8:15; *see also id.* 8:12-14 ("[T]he government is able to take an enforcement action at any time, including at a further date."). In either scenario, regardless of other means for challenging such an order, a shutdown would be predicated on this Court's affirmance of the order vacating DAPL's easement—the decision that Dakota Access will ask the Supreme Court to review. There is good cause to stay the issuance of the mandate so that if one of these scenarios arises, this Court retains jurisdiction to grant relief from vacatur of the easement pending further appellate review.

In requesting this stay, Dakota Access seeks to avoid more than "[m]ere litigation expense." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Shuttering DAPL would cause unprecedented irreparable injury, including billions of dollars in unrecoverable costs and lost revenue and thousands unemployed. *See* D.E. 593, 3-7. As the district court recognized, these irreparable, "immediate harm[s]" would be "no small burden." A156. Withholding the mandate

and allowing for immediate recourse to this Court in the event of a shutdown order, whether from the district court or the Corps, would safeguard these interests as Dakota Access continues to pursue its petition for certiorari.

Finally, under the Supreme Court's rules, a party seeking a stay pending that Court's review should first present the request to the court that issued the challenged ruling. Sup. Ct. R. 23.3 (requiring a stay application to "set out with particularity why the relief sought is not available from any other court or judge"). If the mandate issues before Dakota Access needs to seek a stay of this Court's judgment, this Court will lose jurisdiction to address that stay request in the first instance.

CONCLUSION

The motion to stay issuance of the mandate should be granted.

Dated: April 29, 2021

Respectfully submitted,

/s/ Miguel A. Estrada

Miguel A. Estrada
Counsel of Record
William S. Scherman
David Debold
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Dakota Access, LLC

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the motion contains 4262 words; and

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

April 29, 2021

Respectfully submitted,

/s/ Miguel A. Estrada

Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

CERTIFICATE OF SERVICE

I hereby certify that, on April 29, 2021, I electronically filed the foregoing Motion to Stay Issuance of the Mandate Pending the Filing and Disposition of a Petition for a Writ of Certiorari with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

April 29, 2021

Respectfully submitted,

/s/ Miguel A. Estrada

Miguel A. Estrada
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com