

No. 17-72917

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

*IN RE UNITED STATES OF AMERICA, ET AL.,
Petitioners.*

UNITED STATES OF AMERICA; DONALD J. TRUMP, President of the United States; U.S.
DEPARTMENT OF HOMELAND SECURITY; and ELAINE C. DUKE,
Acting Secretary of Homeland Security,
Petitioners-Defendants.

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, President of the University of
California; STATE OF CALIFORNIA; STATE OF MAINE; STATE OF MARYLAND; STATE OF
MINNESOTA; CITY OF SAN JOSÉ; DULCE GARCIA; MIRIAM GONZALEZ AVILA; SAUL JIMENEZ
SUAREZ; VIRIDIANA CHABOLLA MENDOZA; NORMA RAMIREZ; and JIRAYUT LATTHIVONGSKORN;
COUNTY OF SANTA CLARA; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521,
Real Parties in Interest-Plaintiffs,

OPPOSITION TO EMERGENCY MOTION FOR STAY

XAVIER BECERRA
Attorney General of California
Edward C. DuMont
Solicitor General
Michael J. Mongan
Deputy Solicitor General
California Department of Justice
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-3660
(415) 703-2548
michael.mongan@doj.ca.gov
Attorneys for Plaintiff State of California

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr.
Ethan D. Dettmer
333 South Grand Avenue
Los Angeles, CA 90071-3197
Attorneys for Plaintiffs Dulce Garcia, et al.

COVINGTON & BURLING LLP
Jeffrey M. Davidson
One Front Street, 35th Floor
San Francisco, CA 94111-5356
*Attorneys for Plaintiffs The Regents of the
University of California, et al.*

COTCHETT, PITRE & MCCARTHY, LLP
Joseph W. Cotchett
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Attorneys for Plaintiff City of San José

ALTSHULER BERZON LLP
Jonathan Weissglass
177 Post Street, Suite 300
San Francisco, CA 94108
*Attorneys for Plaintiff County of Santa Clara
& Service Employees Int'l Union Local 521*

(Additional counsel listed on signature page)

November 20, 2017

On November 16, 2017, this Court denied defendants’ petition for a writ of mandamus, and correspondingly lifted a stay of certain proceedings in the district court that this Court had entered while it considered defendants’ petition. On the same day, the district court entered an order requiring defendants to promptly file and serve a completed administrative record consistent with the requirements laid out in the district court’s October 17 order that formed the basis for the original mandamus petition. *See* D.Ct. Dkt. No. 188.¹ On November 17, defendants filed an emergency motion asking “this Court to stay its order pending the Supreme Court’s resolution of” a stay application and petition that defendants have indicated they expect to file in that Court. Dkt. No. 36 at 2. In its November 18 order setting a deadline for response to defendants’ motion, this Court directed the parties to “address whether this court has jurisdiction to grant a stay of proceedings, or whether the motion for a stay should instead be filed in the district court. *See Ellis v. U.S. Dist. Court*, 360 F.3d 1022 (9th Cir. 2004) (en banc).” Dkt. No. 37.

As this Court’s November 18 order suggests, defendants’ motion is misdirected. Although defendants style their motion as one seeking a stay of this Court’s order denying the mandamus petition, that order does not compel anyone to do anything—it merely denies extraordinary mandamus relief and immediately restores the *status quo ante* in the district court. There is no mandate from this

¹ “D.Ct. Dkt.” refers to the docket in case No. 17-cv-5211-WHA.

Court to stay, nor any proceeding pending in this Court as to which a stay might operate in aid of this Court's jurisdiction. *See Ellis*, 360 F.3d at 1022-1023; 28 U.S.C. § 1651.

It appears that what defendants are actually seeking is a stay of the *district court's* November 16 order, directing them to proceed promptly to file and serve a completed administrative record. *See* D.Ct. Dkt. No. 188. But that type of stay would ordinarily be sought first from the district court itself. *See* Fed. R. App. P. 8(a)(1)(A) ("A party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal"); *cf.* Sup. Ct. R. 23.3 ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.") Indeed, defendants belatedly filed a motion for a stay in the district court yesterday. *See* D.Ct. Dkt. No. 191.

As it happens, the plaintiffs here agree that it would be sensible at this particular juncture for *the district court* to temporarily stay its orders requiring completion and filing of the administrative record by November 22, although not in exactly the manner sought by defendants. Plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss are now pending in the district court, and will be fully briefed and argued by December 20. A temporary stay until after the district court rules on those motions would allow the parties to focus on the

most immediate issue of whether defendants' decision to rescind DACA should be enjoined from taking effect while this litigation proceeds. The district court's ruling on those motions could also either moot or clarify some of the arguments proffered by defendants in support of the extraordinary interlocutory relief that defendants sought from this Court and have now indicated they otherwise intend to pursue immediately in the Supreme Court. A temporary stay would perhaps also obviate any perceived need for defendants to further multiply proceedings in this case.

For all these reasons, on November 19 plaintiffs themselves filed a motion in the district court seeking a stay tailored to the circumstances of this case. *See* D.Ct. Dkt. No. 190. This morning, the district court issued a tentative order that would delay defendants' obligation to file the augmented administrative record and stay discovery until December 22, two days after the scheduled hearing on plaintiffs' motion for preliminary injunction and defendants' motion to dismiss. *See* D.Ct. Dkt. 193. The district court invited the parties to respond to that tentative order by noon today. *See ibid.* The parties' filings in the district court, and the district court's tentative order, make clear that issues relating to the details and timing of proceedings in this complex and rapidly evolving litigation are best managed by the district court.

Finally, even if this Court thought it appropriate to entertain defendants' current stay motion, defendants have failed to carry their burden of establishing any entitlement to a stay from this Court. Their stay motion is perfunctory: it contains just 257 words and no argument or explanation concerning why the present circumstances satisfy the factors governing issuance of a stay. *See, e.g., Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Defendants do not discuss the balance of hardships or the public interest, and they fail to explain why their arguments for extraordinary relief are likely to succeed before the Supreme Court after having failed before this Court.

CONCLUSION

This Court should deny defendants' emergency motion for a stay.

Respectfully submitted,

Dated: November 20, 2017

COVINGTON & BURLING LLP

Jeffrey M. Davidson
One Front Street, 35th Floor
San Francisco, CA 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091
Email: j davidson@cov.com

Lanny A. Breuer
Mark H. Lynch
Alexander A. Berengaut
Megan A. Crowley
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
Telephone: (202) 662-6000
Facsimile: (202) 662-6291
Email: lbreuer@cov.com,
mlynch@cov.com,
aberengaut@cov.com,
mcrowley@cov.com
*Attorneys for Real Parties in Interest-
Plaintiffs The Regents of the University
of California, et al.*

XAVIER BECERRA
Attorney General of California
Edward C. DuMont
Solicitor General
Janill L. Richards
Principal Deputy Solicitor General
s/ Michael J. Mongan

Michael J. Mongan
Deputy Solicitor General
Michael L. Newman
Supervising Deputy Attorney General
Max Carter-Oberstone
Geoffrey H. Wright
Associate Deputy Solicitors General
James F. Zahradka II
Christine Chuang
Rebekah A. Fretz
Ronald H. Lee
Kathleen Vermazen Radez
Shubhara Shivpuri
Deputy Attorneys General
California Department of Justice
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-3660
(415) 703-2548
Email: michael.mongan@doj.ca.gov
*Attorneys for Plaintiff State of
California*

LORI SWANSON
Attorney General
Julianna F. Passe
Assistant Attorney General
State of Minnesota
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
Telephone: (651) 757-1136
Email: julianna.passe@ag.state.mn.us
*Attorneys for Plaintiff State of
Minnesota*

JANET T. MILLS
Attorney General of Maine
Susan P. Herman
Deputy Attorney General
6 State House Station
Augusta, Maine 04333
Telephone: (207) 626-8814
Email: susan.herman@maine.gov
Attorneys for Plaintiff State of Maine

BRIAN E. FROSH
Attorney General of Maryland
Steven M. Sullivan
Solicitor General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
Telephone: (410) 576-6325
Email: ssullivan@oag.state.md.us
Attorneys for Plaintiff State of Maryland

Mónica Ramírez Almadani
1999 Avenue of the Stars
Los Angeles, CA 90067-4643
Telephone: (424) 332-4800
Facsimile: (424) 332-4749
Email: mralmadani@cov.com

Charles F. Robinson
Margaret Wu
University of California
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
Telephone: (510) 987-9800
Facsimile: (510) 987-9757
Email: charles.robinson@ucop.edu
*Attorneys for Plaintiffs The Regents of
the University of California and Janet
Napolitano, in her official capacity as
President of the University of California*

COTCHETT, PITRE & MCCARTHY, LLP

Justin Berger
jberger@cpmlegal.com
Brian Danitz
bdanitz@cpmlegal.com
Tamarah P. Prevost
tprevost@cpmlegal.com
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577

Richard Doyle
Nora Frimann
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San José, California 95113
Telephone: (408) 535-1900
Facsimile: (408) 998-3131
Email: cao.main@sanJoseca.gov

Attorneys for Plaintiff City of San José

GIBSON, DUNN & CRUTCHER LLP

Theodore J. Boutrous, Jr.
tboutrous@gibsondunn.com
Kirsten Galler
kgaller@gibsondunn.com
Jesse S. Gabriel
jgabriel@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Ethan D. Dettmer
edettmer@gibsondunn.com
555 Mission Street
San Francisco, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306
Attorneys for Plaintiffs Dulce Garcia, et al.

PUBLIC COUNSEL

Mark D. Rosenbaum
mrosenbaum@publiccounsel.org
Judy London
jlondon@publiccounsel.org
610 South Ardmere Avenue
Los Angeles, CA 90005
Telephone: (213) 385-2977
Facsimile: (213) 385-9089

BARRERA LEGAL GROUP, PLLC

Luis Cortes Romero
lcortes@barreralegal.com
19309 68th Avenue South, Suite R102
Kent, WA 98032
Telephone: (253) 872-4730
Facsimile: (253) 237-1591

James R. Williams, County Counsel
Greta S. Hansen
Laura S. Trice
laura.trice@cco.sccgov.org
Marcelo Quiñones
marcelo.quinones@cco.sccgov.org
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
East Wing, Ninth Floor
San Jose, CA 95110-1770
Telephone: (408) 299-5900
Facsimile: (408) 292-7240
Attorneys for County of Santa Clara

ALTSCHULER BERZON LLP
Jonathan Weissglass
jweissglass@altber.com
Stacey M. Leyton
sleyton@altber.com
Eric P. Brown
ebrown@altber.com
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
*Attorneys for County of Santa Clara
and SEIU Local 521*

Laurence H. Tribe
larry@tribelaw.com
Harvard Law School*
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-1767

Erwin Chemerinsky
echemerinsky@law.berkeley.edu
University of California, Berkeley
School of Law*
215 Boalt Hall
Berkeley, CA 94720-7200
Telephone: (510) 642-6483

Leah M. Litman
llitman@law.uci.edu
University of California, Irvine School
of Law*
401 East Peltason Drive
Irvine, CA 92697
Telephone: (949) 824-7722

*Attorneys for Plaintiffs Dulce Garcia,
Miriam Gonzalez Avila, Saul Jimenez
Suarez, Viridiana Chabolla Mendoza,
Norma Ramirez, and Jirayut
Latthivongskorn*

*Affiliation for identification purposes
only

CERTIFICATE OF COMPLIANCE

I certify that this opposition complies with the requirements of Federal Rules of Appellate Procedure 27(d), 32(a)(5), and 32(a)(6), because it has been prepared in a proportionately spaced serif font, has a typeface of 14 points, and contains 878 words.

Dated: November 20, 2017

s/ Michael J. Mongan

CERTIFICATE OF SERVICE

I certify that on November 20, 2017, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 20, 2017

s/ Michael J. Mongan
