

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 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 JOSE; DULCE GARCIA; MIRIAM
GONZALEZ AVILA; SAUL JIMENEZ SUAREZ; VIRIDIANA CHABOLLA MENDOZA;
NORMA RAMIREZ; JIRAYUT LATTHIVONGSKORN; COUNTY OF SANTA CLARA; and
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521,
Real Parties in Interest-Plaintiffs.

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY

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As set out below, a ruling of the district court on November 20, 2017 and ongoing discussions between the parties have obviated the need for immediate action by this Court on the pending motion for a stay. We will therefore not be filing a request for review in the Supreme Court today, and we ask that the Court defer ruling on the motion. We will advise the Court immediately of relevant developments.

1. Citing its decision in *Ellis v. U.S. Dist. Court*, 360 F.3d 1022 (9th Cir. 2004) (en banc), this Court has inquired as to its jurisdiction to issue a stay pending Supreme Court review. *Ellis* does not foreclose the exercise of this Court's jurisdiction to continue the stay of proceedings that were the subject of the government's mandamus petition. The Court in *Ellis* granted a writ of mandamus. Responding to a request to recall the mandate, the Court explained that there was no mandate to recall because, in a mandamus proceeding, there is no mandate separate from the issuance of the writ. That case has no bearing on the jurisdictional question presented here: whether, having exercised its mandamus jurisdiction and having denied the requested relief, the Court retains authority under the All Writs Act to continue a previously granted stay of discovery and record expansion. See *Daimler-Benz Aktiengesellschaft v. U.S. Dist. Court for Western Dist. of Oklahoma*, 805 F.2d 340 (10th Cir. 1985) (recognizing that mandamus petition would be unsuccessful under court of appeals' view of the law, but staying district court order pending Supreme Court review).

2. The government has consistently urged that discovery and expansion of the administrative record are neither necessary nor proper. Although plaintiffs have

strenuously urged to the contrary, they moved on November 19 for a stay of discovery and “record completion” in the district court pending a ruling on plaintiffs’ request for a preliminary injunction and the government’s motion to dismiss. Also on November 19, the government sought a stay in the district court pending possible Supreme Court review.

In response, the district court on November 20 issued an order extending the time for the government to file its administrative record until December 22, staying discovery until that date, and denying the government’s emergency motion for stay.

As the government explained to the district court, this relief is insufficient: the government will be required during the pendency of the stay to create an expanded “administrative record” that it continues to believe is legally improper for the reasons expressed in its briefing to this Court and to produce that record a mere two days after the hearing on the government’s motion to dismiss and the plaintiffs’ motion for provisional relief.

The parties are currently engaged in negotiations to address the government’s concerns. In light of these developments, the government will not be seeking Supreme Court relief today, and, depending on the outcome of these discussions and subsequent rulings of the district court, it may be unnecessary for this Court to act on our pending motion. Accordingly, we request that this Court delay resolution of this motion pending further developments in the district court.

Respectfully submitted,

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NOVEMBER 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because the motion contains 522 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Mark B. Stern

MARK B. STERN

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, by 5pm PST, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished through that system.

The district court has been provided with a copy of this reply.

s/ Mark B. Stern
MARK B. STERN