
**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

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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

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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
