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18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 REGENTS OF UNIVERSITY OF CALIFORNIA and
22 JANET NAPOLITANO, in her official capacity as
President of the University of California,

23 Plaintiffs,

24 v.

25 UNITED STATES DEPARTMENT OF HOMELAND
SECURITY and ELAINE DUKE, in her official capacity
26 as Acting Secretary of the Department of Homeland
Security,

27 Defendants.

CASE NO. 17-CV-05211-WHA

**PLAINTIFFS' MOTION TO STAY
IMPLEMENTATION OF THE
COURT'S OCTOBER 17, 2017 AND
NOVEMBER 16, 2017 ORDERS IN
ORDER TO RESOLVE THE
PENDING MOTIONS WITHOUT
FURTHER INTERLOCUTORY
APPEALS BY DEFENDANTS**

Judge: Honorable William Alsup
Hearing: December 28, 2017, 8:00 a.m.

STATE OF CALIFORNIA, STATE OF MAINE,
STATE OF MARYLAND, STATE OF MINNESOTA,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,
ELAINE DUKE, in her official capacity as Acting
Secretary of the Department of Homeland Security, and
the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States, in
his official capacity, ELAINE C. DUKE, in her official
capacity, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05329-WHA

DULCE GARCIA, MIRIAM GONZALEZ AVILA,
SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA
MENDOZA, NORMA RAMIREZ, and JIRAYUT
LATTHIVONGSKORN,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J.
TRUMP, in his official capacity as President of the
United States, U.S. DEPARTMENT OF HOMELAND
SECURITY, and ELAINE DUKE, in her official
capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

County of Santa Clara and Service Employees
International Union Local 521,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, JEFFERSON
BEAUREGARD SESSIONS, in his official capacity as
Attorney General of the United States; ELAINE DUKE,
in her official capacity as Acting Secretary of the
Department of Homeland Security; and U.S.
DEPARTMENT OF HOMELAND SECURITY,

Defendants.

CASE NO. 17-CV-05813-WHA

1 **NOTICE OF MOTION AND MOTION TO STAY IMPLEMENTATION OF THE COURT'S**
2 **OCTOBER 17, 2017 AND NOVEMBER 16, 2017 ORDERS IN ORDER TO**
3 **RESOLVE THE PENDING MOTIONS**
4 **WITHOUT FURTHER INTERLOCUTORY APPEALS BY DEFENDANTS**

5 Please take notice that on December 28, 8:00 a.m., at 450 Golden Gate Avenue, San Francisco,
6 California, Courtroom 8, or such other time as the Court deems appropriate, Plaintiffs in the above-
7 captioned actions will, and hereby do, move for a stay of the Court's October 17, 2017 Order RE Motion
8 to Complete the Administrative Record and the portion of the Court's November 16, 2017 Order
9 requiring Defendants to file and serve their augmented record by November 22. This motion is based on
10 the memorandum of points and authorities, and exhibits hereto, and such additional arguments the
11 parties may make.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 Defendants have filed in the Court of Appeals an Emergency Motion for Stay of the Court of
14 Appeals' Order denying the Defendants' Petition for Mandamus (Exhibit 1). That motion also states
15 that Defendants "will file an application seeking a further stay of all discovery and record expansion
16 pending a petition for mandamus or writ of certiorari from the Supreme Court no later than November
17 20, 2017." Defendants also have informed Plaintiffs that they intend to file a similar motion seeking a
18 stay pending Supreme Court review in this Court. At the same time, there are pending in this Court
19 Plaintiffs' Motion for Provisional Relief and Defendants' Motion to Dismiss, which will be fully briefed
20 by December 8 and heard by this Court on December 20, 2017. Defendants' continued pursuit of
21 interlocutory review of the Court's well-founded October 17 and November 16 Orders is unfortunate
22 and distracts from this Court's effort to reach a prompt judgment on the merits. However, the
23 immediate and vital issue before the Court is Plaintiffs' Motion for Provisional Relief, as that motion, if
24 granted, will enjoin the Rescission of DACA and thereby avoid disruption in the lives of hundreds of
25 thousands of people.

26 In order to remove the distraction of further interlocutory appellate proceedings and to permit the
27 Court and the parties to focus on the paramount issue of whether the DACA Rescission should be
28 enjoined, Plaintiffs move this Court to stay Defendants' obligation to file and serve an amended

1 administrative record in compliance with the Court’s October 17 and November 16 Orders until the
2 Court rules on Plaintiffs’ Motion for Provisional Relief and Defendants’ Motion to Dismiss. Plaintiffs
3 anticipate that the Court’s rulings on those motions will either moot or clarify the issues on which
4 Defendants have indicated they will seek emergency review in the Supreme Court.

5 First, the stay requested by the instant motion, and a ruling on the Motion to Dismiss, will moot
6 Defendants’ contention that this Court must assess and find subject matter jurisdiction before ordering
7 completion of the Administrative Record or permitting discovery. The jurisdictional issues have been
8 squarely raised in Defendants’ Motion to Dismiss, will be fully briefed by December 8 and will be heard
9 by this Court on December 20. A decision on those issues will eliminate Defendants’ concern that the
10 Court should rule on subject matter jurisdiction before requiring production of the complete
11 Administrative Record or permitting additional discovery.

12 Second, the requested stay, and further briefing and rulings by this Court, will clarify the issues
13 on review. Defendants argue—and the dissenting judge in the Court of Appeals agreed—that it is
14 improper to require expansion of the Administrative Record, beyond what is presented by Defendants,
15 unless there is a finding of bad faith or improper conduct by Defendants. Although Plaintiffs disagree,
16 the issue of bad faith is squarely presented in Plaintiffs’ Motion for Provisional Relief. (Dkt. 111, pp.
17 29-31.) In that motion, Plaintiffs set forth clear and convincing evidence that the stated reason for the
18 DACA Rescission—the Attorney General’s view that DACA was established without statutory authority
19 and was an unconstitutional exercise of authority by the Executive Branch and therefore is at risk of
20 being overturned by the courts—was not only unsupported, but also a pretext. Evidence demonstrating
21 this fact is described in Plaintiffs’ pending Motion for Provisional Relief:

- 22 • The very same day as the Rescission, the President tweeted: “Congress now has 6 months to
23 legalize DACA (something the Obama Administration was unable to do). If they can’t, I will
24 revisit this issue!”¹ But if the rationale for the Rescission were a genuine belief that DACA
25 was illegal, there would be no basis to “revisit this issue” and possibly reinstate an illegal
26 policy.

26 ¹ See Donald J. Trump (@realDonaldTrump), Twitter (Sept. 5, 2017, 8:38 PM),
27 <https://twitter.com/realDonaldTrump/status/905228667336499200>.

- 1 • DHS did not immediately terminate DACA. Instead, it announced that it would continue
2 processing renewal applications for an additional month for benefits that expired between
3 September 5, 2017 and March 5, 2018, and would recognize DACA grants already conferred,
4 leaving the program in place for at least an additional six months. If DACA were illegal,
5 DHS would have no basis to leave it in place for months and years.
- 6 • On October 18, 2017, the Attorney General testified to Congress that DACA could be legal
7 under *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), if it were implemented “on an
8 individualized basis.” *Oversight of the U.S. Department of Justice: Hearing before the S.*
9 *Comm. on the Judiciary*, 115th Cong. (2017) (testimony of Jefferson B. Sessions, Att’y Gen.
10 of the United States), available at goo.gl/MgT97u. But the government did not implement,
11 or apparently even consider, an alternative program that by their own admission is legal.
- 12 • The Senior Counselor to the Acting Secretary of DHS, who *drafted* the Rescission, undercut
13 the litigation risk justification when he testified that a policy of reacting to litigation threats
14 would be the “craziest policy you could ever have” because “you could never do anything if
15 you were always worried about being sued.” App. at 1929 (Hamilton Dep. 208:5-11).
- 16 • In their Motion to Dismiss, Defendants contend that the rescission of DACA is not
17 reviewable under the APA and that the notice and comment requirement, 5 U.S.C. § 553,
18 does not apply to the Rescission. However, if Defendants really believed that the *Texas*
19 decision presented an unmanageable litigation risk, they also must believe that the *Texas*
20 decision correctly held that a program like DACA is reviewable and that the notice-and-
21 comment requirement applies.
- 22 • On October 8, 2017, President Trump sent a letter to Congressional leaders setting forth the
23 “Immigration Principles and Policies” that he said “must be included as part of any
24 legislation addressing the status of [DACA] recipients.” App. at 1990-99 (Policies and
25 Principles). The *New York Times* described the “Principles and Policies” as “a long list of
26 hard-line immigration measures,” including funding for a border wall. App. at 2004
27 (*NYTimes*). This evidence, linking the Rescission to the administration’s legislative strategy,
28 suggests that the decision to rescind DACA was an effort to make DACA recipients a
bargaining chip to secure support for immigration legislation from members of Congress who
support DACA recipients, and would not otherwise support the administration’s immigration
agenda.

Defendants will have their opportunity to contest this evidence when they file their opposition to Plaintiffs Motion for Preliminary Injunction on November 22, and the Court will be in a position to decide the issue of pretextuality when it rules on Plaintiffs’ motion. Plaintiffs respectfully request that the Court make specific findings on the issue of pretextuality in that ruling.² If the Court finds that the stated reason for the Rescission was a pretext, there is no dispute—even under the dissenting judge’s view of the law—that expansion of the Administrative Record and discovery of DHS is appropriate.

² If the Court would prefer that Plaintiffs make a separate motion on the issue of pretextuality, Plaintiffs will do so.

1 Furthermore, Defendants' counsel have informed Plaintiffs that they need approximately three
2 more weeks to complete the Administrative Record and an additional week beyond that to complete the
3 log of documents that will be withheld from the Administrative Record on grounds of privilege. Thus, if
4 the Court's October 17 and November 16 Orders are not stayed, there will be another distracting battle
5 about whether Defendants can comply with the Court's schedule and perhaps over what the
6 repercussions should be if they do not, and the issues may not be resolved until the pending motions are
7 under submission in any event.

8 Finally, in order to obviate Defendants' efforts to obtain a stay from the Supreme Court,
9 Plaintiffs agree not to recommence discovery pending the Court's rulings on Plaintiffs' Motion for
10 Provisional Relief and Defendants' Motion to Dismiss. Nonetheless, the parties will continue to meet
11 and confer to develop a discovery plan in the event the Court rules that it has subject matter jurisdiction,
12 including by proposing how and when to present any discovery disputes for adjudication.

13 CONCLUSION

14 For the reasons stated above, the Court should stay Defendants' obligation to file and serve an
15 amended administrative record in compliance with the Court's October 17 and November 16 Orders
16 pending its rulings on Plaintiffs' Motion for a Preliminary Injunction and Defendants' Motion to
17 Dismiss. Such a stay will eliminate any need for emergency review of the October 17 and November 16
18 Orders by the Supreme Court, and the Court's rulings on the pending motions may further confirm the
19 correctness of that Order and moot Defendants' objections to it.

1 Dated: November 19, 2017

Respectfully submitted,

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ATTESTATION

I, Jeffrey M. Davidson, hereby attest, pursuant to Civil L.R. 5-1, that I have received authorization to electronically sign and file this document from each of the persons identified in the signature block.

Dated: November 19, 2017

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Exhibit 1

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.

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Defendants request urgent relief on this matter because this Court has denied their mandamus petition, and the district court has ordered the defendants to file a new administrative record that contains privileged material by November 22. The government asks the Court to stay its order pending the Supreme Court's resolution of its forthcoming application and ensuing petition.

Counsel for plaintiffs were notified of this motion on November 17, 2017, and plaintiffs—Real Parties in Interest—take no position at this time, but will review the motion when it is filed. Service will be accomplished via the Appellate CM/ECF system.

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.

EMERGENCY MOTION FOR STAY

CHAD A. READLER
Principal Deputy Assistant Attorney General

BRIAN STRETCH
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This Court's November 16, 2017, order denied the government's mandamus petition and vacated the stay of discovery and record expansion that had been entered. Following this Court's order, the district court ordered the government to file an augmented administrative record by November 22, at noon. The government will file an application seeking a further stay of all discovery and record expansion pending a petition for mandamus or a writ of certiorari from the Supreme Court no later than November 20, 2017.

In accordance with Supreme Court Rule 23.3, the government respectfully requests that this Court stay its order pending the Supreme Court's resolution of its forthcoming application and ensuing petition. In the alternative, we request that this Court enter a stay pending the Supreme Court's disposition of the application, or at a minimum an administrative stay until the end of the day on November 27th in order to allow the Supreme Court to orderly determine whether it wishes to grant an administrative stay while it considers our application.

We will provide this Court with a copy of our Supreme Court filing and advise it promptly of any developments.

Plaintiffs—Real Parties in Interest—take no position at this time, but will review the motion when it is filed.

Respectfully submitted,

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Principal Deputy Assistant Attorney General

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HASHIM M. MOOPAN

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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 257 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 17, 2017, 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

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

REGENTS OF UNIVERSITY OF CALIFORNIA and
JANET NAPOLITANO, in her official capacity as
President of the University of California,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND
SECURITY and ELAINE DUKE, in her official capacity
as Acting Secretary of the Department of Homeland
Security,

Defendants.

CASE NO. 17-CV-05211-WHA

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION TO STAY
IMPLEMENTATION OF THE
COURT'S OCTOBER 17, 2017 AND
NOVEMBER 16, 2017 ORDERS IN
ORDER TO RESOLVE THE
PENDING MOTIONS WITHOUT
FURTHER INTERLOCUTORY
APPEALS BY DEFENDANTS**

Judge: Honorable William Alsup

STATE OF CALIFORNIA, STATE OF MAINE,
STATE OF MARYLAND, STATE OF MINNESOTA,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,
ELAINE DUKE, in her official capacity as Acting
Secretary of the Department of Homeland Security, and
the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States, in
his official capacity, ELAINE C. DUKE, in her official
capacity, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05329-WHA

DULCE GARCIA, MIRIAM GONZALEZ AVILA,
SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA
MENDOZA, NORMA RAMIREZ, and JIRAYUT
LATTHIVONGSKORN,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J.
TRUMP, in his official capacity as President of the
United States, U.S. DEPARTMENT OF HOMELAND
SECURITY, and ELAINE DUKE, in her official
capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

County of Santa Clara and Service Employees
International Union Local 521,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, JEFFERSON
BEAUREGARD SESSIONS, in his official capacity as
Attorney General of the United States; ELAINE DUKE,
in her official capacity as Acting Secretary of the
Department of Homeland Security; and U.S.
DEPARTMENT OF HOMELAND SECURITY,

Defendants.

CASE NO. 17-CV-05813-WHA

1 Having considered Plaintiffs' Motion to Stay Implementation of the Court's October 17, 2017
2 and November 16, 2017 Orders In Order to Resolve the Pending Motions Without Further Interlocutory
3 Appeals By Defendants ("Plaintiffs' Motion"),

4 IT IS HEREBY ORDERED THAT:

5 1) Plaintiffs' Motion is granted;
6 2) Pending this Court's ruling on Plaintiffs' Motion for a Provisional Relief (ECF No. 111)
7 and Defendants' Motion to Dismiss (ECF No. 114):

8 a) Defendants' obligation to file and serve an amended administrative record
9 in compliance with the Court's October 17, 2017 Order RE Motion to Complete the Administrative
10 Record (ECF No. 79) and its November 16, 2017 Order to File Completed Administrative Record and
11 Propose Schedule (ECF No. 188) is hereby STAYED;

12 b) Discovery is hereby STAYED, but the parties are instructed to continue to
13 meet and confer to develop a discovery plan in the event the Court rules that it has subject matter
14 jurisdiction, including the timing of and manner for presenting any discovery disputes for adjudication;

15 3) All other deadlines in this case remain in effect. The Court may address scheduling
16 obligations regarding discovery and compilation of the administrative record in a forthcoming order
17 after hearing the parties' views.

18
19 **SO ORDERED**, this __ day of _____, 2017.

20
21
22 _____
23 WILLIAM ALSUP
24 UNITED STATES DISTRICT JUDGE
25
26
27
28