

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ROBERT M. NELSON, et al.))
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Plaintiffs-Appellants,))
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v.)	No. 07-56424
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NATIONAL AERONAUTICS AND))
SPACE ADMINISTRATION, et al.))
))
Defendants-Appellees.))
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**MOTION TO EXTEND STAY OF MANDATE PENDING FILING
AND DISPOSITION OF PETITION FOR CERTIORARI**

Pursuant to Fed. R. App. P. 41(d)(2), appellees National Aeronautics and Space Administration (NASA), et al., hereby request an extension of this Court’s stay of mandate in the above-captioned case, for a period of 30 days, to and including October 8, 2009.

This Court denied the government’s petition for rehearing and rehearing en banc on June 4, 2009, and granted the government’s motion to stay issuance of the mandate on June 10, 2009, up to and including September 8, 2009. As the Court is aware, the decision to seek certiorari on behalf of the United States must be made by the Solicitor General, see 28 C.F.R. § 0.20(a), and can be made only after extensive consultations and deliberations within the federal government. On

August 21, 2009, the Solicitor General sought an extension for good cause under Supreme Court Rule 13(5). See Attachment A. Thus, a further stay of this Court's mandate is necessary to allow the Solicitor General to determine whether to file a petition for certiorari and, if a determination is made to file, to prepare the petition within the extended time sought from the Supreme Court .

1. A party who seeks a stay of the mandate pending the filing of a petition for a writ of certiorari "must show that a petition for certiorari would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); see also Circuit Advisory Committee Note to Rule 41-1 ("The motion will not be routinely granted; it will be denied if the Court determines that the application for certiorari would be frivolous or is made merely for delay."). As this Court previously recognized in granting the government's motion for a stay of mandate for 90 days, Rule 41's requirements for a stay of mandate are satisfied here.

2. To extend the stay of mandate past 90 days, a party must show "good cause." Fed. R. App. P. 41(d)(2)(B). The Solicitor General has now asked the Supreme Court to extend the time for the government to file a petition for certiorari under Supreme Court Rule 13(5), which permits such extensions when "good cause" exists. In the Solicitor General's filing, she explained that an extension of

the time to file a petition for certiorari is justified because: (1) this Court's "decision raises important questions about the constitutionality of the background check process applicable to federal contractors"; (2) she "is examining the legal and practical significance of the court of appeals' decision"; and (3) "[a]dditional time is needed for further consultation with other components of the Department of Justice and with a number of interested federal agencies, and, if certiorari is authorized, for preparing and printing the petition." See Attachment A at 6. For the same reasons, good cause exists for this Court to extend the stay of mandate.

3. Extending the stay of mandate can result in no harm to plaintiffs. This Court issued an injunction pending appeal shortly after plaintiffs' request for relief was denied by the district court. For that reason, plaintiffs incurred no injury during the pendency of the government's petitions for rehearing, the second of which was filed in August 2008. It is appropriate that the Solicitor General be given the opportunity to exercise her responsibilities in determining whether to seek further review within the extended time requested from the Supreme Court and, if she determines to do so, it is appropriate that the Supreme Court be permitted to determine whether to review this Court's decision. We will inform this Court promptly of any determination made by the Solicitor General in this matter.

CONCLUSION

For the foregoing reasons, the Court should extend its stay of issuance of the mandate for a period of 30 days, to and including October 8, 2009 with the stay to be extended if the Solicitor General files a petition for certiorari within this period.

Respectfully submitted,

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August 2009

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Melissa N. Patterson
Melissa N. Patterson