



U.S. Department of Justice

Civil Rights Division

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*Department of Justice  
Civil Rights Division - Appellate Section  
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March 19, 2010

VIA ELECTRONIC MAIL

Joy Fallek  
United States Court of Appeals  
for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007

Re: *United States v. Erie County*, No. 10-942

Dear Ms. Fallek:

In response to your request, we are submitting the following abbreviated response to petitioners' emergency requests for mandamus and a stay, filed earlier today. Please contact me with any questions.

Sincerely,

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Deputy Chief

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cc: Counsel of Record

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 10-942

UNITED STATES OF AMERICA,

Plaintiff-Respondent

v.

ERIE COUNTY, ET AL.,

Defendants-Petitioners

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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RESPONSE OF THE UNITED STATES TO PETITIONERS' MOTION FOR  
STAY AND PETITION FOR A WRIT OF MANDAMUS

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**INTRODUCTION**

Petitioners' request for mandamus relief and accompanying motion for a stay of the district court's March 17, 2010 order represent transparent delaying tactics. The district court's order responded to a spate of recent suicides at defendants' jail – three suicides in the three months following argument on defendants' motion to dismiss, plus an overall suicide rate that is five times the national average for similar facilities – and granted the United States expedited

discovery limited to assessing the suicide prevention practices at the jail. At bottom, this is nothing more than a straightforward discovery dispute – one the district court has addressed in detail and is well-positioned to resolve. Petitioners cannot satisfy the standards for mandamus. Accordingly, it is axiomatic that they also are not entitled to a stay. And, with lives in the balance, the hardships tip decisively against a stay. This Court therefore should deny both requests.

### **BACKGROUND**

On March 11, 2010, the United States filed a motion to compel compliance with the district court's March 6, 2010 order granting the United States' request for expedited discovery regarding mental health and suicide prevention practices at the Erie County Holding Center (EHC). There have been three reported suicides and two attempted suicides in the past three months, the most recent suicide occurred March 3, 2010. The Declaration of Lindsay Hayes, a nationally renowned suicide prevention expert, filed in support of the United States' motion for expedited discovery, noted that the rate of suicides at the Erie County Holding Center was almost five times the national average for local jails. (Hayes Decl. Par. 8). Specifically, the motion requested that the district court direct petitioners to comply with the March 6 order and "permit the Justice Department's attorneys and consultants to enter and inspect the EHC on March 22 and 23, 2010, for the

purposes stated in the First Request for Entry and Inspection [“(Request)”].” Mar. 6 Order 10. These purposes, as specifically outlined in the request, included questioning ECHC staff with respect to the premises and the mental health and suicide prevention processes and interviewing inmates outside the presence of ECHC staff or petitioners’ counsel, on issues of mental health treatment and suicide prevention at the facility. On March 12, 2010, petitioners filed a motion seeking a protective order and a Rule 16 conference to discuss the logistics of the expedited discovery. On March 15, 2010, the United States filed its opposition to petitioners’ motion for a protective order. On March 17, 2010, the Court issued a decision and order, reiterating the direction it had given in its March 6 order, and specifically allowing plaintiff’s consultants “to interview or question ECHC and other County employees as necessary during the course of the site inspection on the issues of suicide prevention and mental health processes and procedures;” and permitting plaintiff’s attorneys and experts “to interview inmates in an appropriate room with reasonable accommodations where the participants can be seen, but not heard, and without County lawyers or employees present.” Mar. 17 Order 5, 7.

Petitioners moved for a stay to challenge a portion of the district court’s March 17 Order, and the district court denied that motion on March 19.

Petitioners have now filed a petition for a writ of mandamus and an accompanying

request for a stay in this Court.

**ARGUMENT**

I

**MANDAMUS IS NOT APPROPRIATE**

*A. Standard Of Review*

“The writ of mandamus is ‘meant to be used only in the exceptional case.’” *In re Security & Exchange Comm’n*, 374 F.3d 184, 187 (2d Cir. 2004) (quoting *In re von Bulow*, 828 F.2d 94, 96 (2d Cir. 1987)). “Pretrial discovery orders like the one issued by the district court in this case generally are not reviewable on direct appeal, and ‘[this Court] ha[s] expressed reluctance to circumvent this salutary rule by use of mandamus.’” *Ibid.* (quoting *United States v. Coppa*, 267 F.3d 132, 137 (2d Cir. 2001)). “Nevertheless, mandamus may be available where ‘a discovery question is of extraordinary significance or there is extreme need for reversal of the district court’s mandate before the case goes to judgment.’” *Ibid.* (quoting *von Bulow*, 828 F.2d at 97). Accordingly, this Court “will entertain a petition for a writ of mandamus . . . to cure a defective pretrial discovery order if the petitioner demonstrates ‘(1) the presence of a novel and significant question of law; (2) the inadequacy of other available remedies; and (3) the presence of a legal issue whose resolution will aid in the administration of justice.’” *Ibid.* (quoting *Coppa*, 267 F.3d at 137-138).

*B. The Questioning And Inspection At Issue*

As a preliminary matter, it is necessary to outline what is at issue. The district court is permitting consultants working on behalf of the United States to inspect ECHC.

These consultants must be allowed to obtain verbal information in order to understand the protocols and operations ostensibly occurring at ECHC during the inspection. The United States is not seeking admissions from staff or administrative personnel, who will be accompanied by counsel, but wants the consultants to be able to render informed opinions based on their observations. Without information from inmates and staff to complement what is seen, the purpose of the entry and inspection – to understand suicide prevention and mental health operations within the facility – is defeated.

At this early juncture, where expert witnesses have not been designated pursuant to the Federal Rules of Civil Procedure 26, taking depositions of every person with whom the expert interacts is neither necessary nor efficient. Moreover, if it becomes necessary for the consultants to prepare expert witness reports, which would likely be based to some extent on information obtained through the entry and inspection, depositions, and document review, petitioners will have an opportunity to challenge the reports.

*C. Petitioners Cannot Satisfy The Requirements For Mandamus*

None of the factors required for granting mandamus are present here. First, this is a straightforward discovery dispute. Accordingly, it does not involve novel and significant legal questions justifying extraordinary mandamus relief. Indeed, as the district court noted in rejecting petitioners' request for a stay, "its previous orders provide ample guidance for the interviews." Mar. 19 Order 2. In addition, "County attorneys will be present and able to instruct employees during the interviews, thus giving them the opportunity to protect against improper disclosure." *Id.* at 3.

Second, if there is a dispute as to what was said, or if something potentially objectionable is disclosed during the interviews, petitioners have other available remedies. Per the district court's order, counsel for petitioners will be present at all questioning of employees, and thus will be free to instruct employees throughout. Furthermore, from the outset, it has been clear that this expedited discovery concerns only suicide prevention practice and procedure, so petitioners can be sure of the topics that will be the subjects of questioning. See Mar. 19 Order 2-3. Moreover, as the district court properly observed, concerns that petitioners' counsel "may become fact witnesses," and that "information gathered in the interviews may appear in subsequent expert reports," are "premature," as



petitioners “will have the opportunity to challenge whichever statements they deem necessary.” Mar. 19 Order 3.

Third, there is no significant legal issue to resolve, and thus no issue “whose resolution will aid in the administration of justice.” *In re Security & Exchange Comm’n*, 374 F.3d at 187 (quoting *Coppa*, 267 F.3d at 137-138).

Moreover, equitable considerations weigh heavily in favor of denying mandamus relief. The suicide rate in petitioners’ facility was staggering at the time the United States filed suit, and it has continued unabated during this litigation. As noted by the district court, “[t]here have been three reported suicides and two attempted suicides at the ECHC in the last three months, with the most recent suicide occurring just 16 days ago.” Mar. 19 Order 3. Accordingly, further delay (1) “prevents the Justice Department’s assessment of whether a preliminary injunction imposing certain changes at the ECHC could reduce this suicide rate”; and (2) “allows [petitioners] more opportunity to change conditions at the ECHC, which may be beneficial to inmates and staff, but may also prevent the Justice Department from accurately assessing the true conditions at the facility.” *Id.* at 3-4.

## II

### A STAY IS NOT APPROPRIATE

A. *Standard Of Review*

This Court considers four factors in evaluating requests for stays:

(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected.

*Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d Cir. 1993) (citations and internal quotations omitted). Petitioners satisfy none of these.

First, as described above with regard to the mandamus petition, challenges regarding the admissibility of statements made or information gathered during the inspections can be addressed at a later point in the litigation. Accordingly, petitioners will not suffer irreparable or substantial injury absent a stay.

Second, as set forth above, petitioners' mandamus request is without merit. It therefore does not have a substantial possibility of success.

Finally, as also noted above, the suicides that the United States seeks to investigate and ultimately prevent have continued during the course of this litigation. Accordingly, the public interest weighs heavily against the issuance of a stay.

**CONCLUSION**

For the reasons stated above, this Court should deny the petition for a writ of mandamus and accompanying motion for a stay.

Respectfully submitted,

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