

# Berkeley Law

ERWIN CHEMERINSKY  
Dean and Jesse H. Choper  
Distinguished Professor of Law

University of California, Berkeley  
School of Law  
215 Law Building  
Berkeley, CA 94720-7200  
Tel 510.642.6483  
Fax 510.642.9893  
echemerinsky@law.berkeley.edu  
www.law.berkeley.edu

December 18, 2025

Molly C. Dwyer, Clerk of Court  
Ninth Circuit Court of Appeals  
James R. Browning U.S. Courthouse  
95 Seventh Street  
San Francisco, California. 94103

Re: *Thakur, et al. v. Trump, et al.* (No. 25-4249) (argued November 14, 2025)

Dear Ms. Dwyer,

This is in response to the 28(j) letter filed by the government on December 17, 2025. Under the Federal Rules of Appellate Procedure, a 28(j) letter is for “citation of supplemental authorities” that “come to a party’s attention after the party’s brief has been filed—or after oral argument but before decision.”

The government’s 28(j) letter is entirely based on the Supreme Court’s decision from August 21, 2025, in *National Institutes of Health v. American Public Health Association*, 145 S.Ct. 2658 (2025). This decision was the sole basis for the government’s motion for rehearing and rehearing *en banc*, its argument in appealing the preliminary injunction, and its focus at the oral argument on November 14, 2025. It is inappropriate for a 28(j) letter.

Moreover, as Plaintiffs-Appellees have argued, *National Institutes of Health v. American Public Health Association* is inapposite to this case because the Supreme Court did not address, explicitly or implicitly, the situation of this litigation: plaintiffs who could not sue in the Court of Federal Claims. Nothing in the Supreme Court’s decision, or the Tucker Act, deprives the district court of providing relief where the Court of Federal Claims would not have jurisdiction. This issue is resolved by this Court’s decision in *Community Legal Services*, 137 F.4th 932, 939 (2025): “But there cannot be exclusive jurisdiction under the Tucker Act if there is no jurisdiction under the Tucker Act. For this reason, the D.C. Circuit has categorically rejected the suggestion that a federal district court can be deprived of jurisdiction by the Tucker Act when no jurisdiction lies in the Court of Federal Claims.”

Finally, the government asks this Court to “withdraw” the stay opinion. This is effectively a motion for a stay of the preliminary injunction. This Court, in its decision of

August 21, 2025, denied such a stay. The government has moved for rehearing and rehearing *en banc* of that decision. It also has appealed the preliminary injunction. Those are the ways to address this issue, not re-argument of a matter already submitted, or a motion for stay, in the guise of a Rule 28(j) letter.

Respectfully submitted,



Erwin Chemerinsky  
Counsel for Plaintiffs-Appellees