IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al., Plaintiffs-Appellees, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al., Defendants-Appellants.	No. 18-5289

APPELLANTS' MOTION TO EXPEDITE ISSUANCE OF MANDATE, OR TO STAY INJUNCTION PENDING ISSUANCE OF MANDATE

Pursuant to D.C. Circuit Rules 27 and 41, Appellants respectfully move to expedite the issuance of the mandate, or, in the alternative, to stay the district court's injunction pending issuance of the mandate.

1. On July 16, 2019, this Court vacated the district court's judgment for lack of subject-matter jurisdiction. *See American Fed. of Gov. Emps., AFL-CIO v. Trump*, -- F.3d --, 2019 WL 3122446 (D.C. Cir. 2019). The district court had enjoined all of the President's subordinates, throughout the federal government, from implementing numerous provisions of three recent Executive Orders that affect relations between federal agencies and federal employees. *See American Federation of Government Employees, AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. Aug. 25, 2018).

Under that injunction, agency officials engaged in collective bargaining with federal employee labor unions were prohibited from relying on the Executive Orders as a basis for: (i) striving to achieve presumptively reasonable goals set out in the Executive Orders, such as completing new collective-bargaining agreements within six months of beginning negotiations; (ii) complying with the President's directive to elect against bargaining over permissive subjects, which are negotiable only "at the election of the agency," 5 U.S.C. § 7106(b)(1); and (iii) complying with government-wide rules that took certain discrete matters off the bargaining table under 5 U.S.C. § 7117(a)(1) ("[T]he duty to bargain in good faith shall" not "extend" to any matter that is "inconsistent" with "any Government-wide rule or regulation."). The government appealed, and, because of the injunction's significant effects on ongoing collective bargaining throughout the federal government, sought expedited consideration. *See* Motion to Expedite, No. 18-5289 (D.C. Cir., filed Sept. 27, 2018). Recognizing the urgent need to resolve this matter, the Court partially granted that motion. *See* Order, No. 18-5289 (D.C. Cir. Oct. 18, 2019).

2. In a unanimous decision, this Court held on July 16, 2019, that "the district court lacked subject matter jurisdiction" over the unions' claims. *American Fed. of Gov. Emps. v. Trump*, -- F.3d --, 2019 WL 3122446, at *3. "The unions must pursue their claims through the scheme established by the [Federal Service Labor-Management Relations] Statute, which provides for administrative review by the [Federal Labor Relations Authority] followed by judicial review in the courts of appeals." *Id.* "[T]he

unions may not bypass" that "exclusive statutory scheme" by "filing suit in the district court." *Id.* at *8. The unions are not "entitled to raise a pre-implementation challenge" in district court. *Id.* at *4. Instead, the unions must "litigat[e] their claims through the statutory scheme in the context of concrete bargaining disputes" arising from the implementation of the Orders by the federal agencies. *Id.* at *5. This Court "therefore reverse[d] the judgment of the district court holding that it had jurisdiction," and "vacate[d] the district court's judgment on the merits." *Id.* at *8.

3. This Court "with[e]ld issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc." Order, No. 18-5289 (D.C. Cir. July 16, 2019). That order expressly noted, however, that it was "without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown." *Id.*; *see* Fed. R. App. P. 41(b) ("The court may shorten . . . the time" to issue the mandate "by order."); D.C. Cir. Rule 41(a)(1) (The Court's standard instruction withholding the mandate until seven days after the disposition of a timely rehearing petition "is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.").

4. The government respectfully requests that the Court immediately issue the mandate, so that the President's subordinates may implement the Executive Orders' lawful goals and directives and thereby generate the concrete bargaining disputes necessary to bring plaintiffs' claims before the Federal Labor Relations Authority. *Cf.*

Doe 2 v. Shanahan, No. 18-5257 (D.C. Cir. Mar. 26, 2019) (order granting government's motion to issue mandate, where panel had ruled that injunction should be vacated). As the panel unanimously held, the district court had no jurisdiction to enjoin implementation of the Executive Orders; the government may implement those Orders, and, if that implementation leads to a dispute with a union in a concrete bargaining context, the union may then bring that concrete dispute before the Authority for resolution.

Withholding the mandate only delays that process. It effectively extends the erroneously issued injunction—for at least 45 days following the issuance of Court's opinion (the time that a party in this matter has to petition for panel rehearing or rehearing en banc under D.C. Circuit Rule 35(a)), and likely for a far longer period (seven days after the Court disposes of any timely petition that may be filed). Indeed, at least one plaintiff union has indicated that it intends to seek rehearing. Lisa Rein & Ann E. Marimow, *In Win for Trump Administration, Appeals Court Stymies Union Challenge to Civil Service Restrictions*, Washington Post (July 16, 2019), https://www.washingtonpost.com/politics/in-win-for-trump-administration-appeals-court-stymies-union-challenge-to-civil-service-restrictions/2019/07/16/43a83704-a7e6-11e9-9214-246e594de5d5_story.html ("The National Treasury Employees Union . . . said in a statement after Tuesday's ruling that it would ask the full panel of the D.C. Circuit to rehear the case.").

Keeping the erroneously granted injunction in place, for an indefinite period of time while the Court processes any timely filed rehearing petition, will cause significant and irreparable harm to the government. The injunction impairs the President's ability to supervise his subordinates in the Executive Branch in their conduct of collective bargaining pursuant to the Federal Service Labor-Management Relations Statute. *Cf. Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))).

We are informed that agency officials are presently engaged in collective bargaining with unions in concrete contexts throughout the federal government, including the Office of Personnel Management, the Department of Veterans Affairs, and the Department of Housing and Urban Development. Those negotiations are currently operating under an injunction that a panel of this Court has unanimously held must be vacated because it was issued without subject-matter jurisdiction. Because of the to-be-vacated injunction, officials who are presently engaged in collective bargaining on behalf of federal agencies are prohibited from relying on the Executive Orders as a basis for complying with the President's directive to, where reasonable, strive to achieve presumptively reasonable goals, such as completing negotiations over ground rules for collective bargaining within six weeks, completing

negotiations over new term collective-bargaining agreements within six months, requesting to exchange written proposals, excluding certain removals from negotiated grievance procedures, and keeping official-time usage within reasonable limits. Officials are also prohibited from relying on the Executive Orders as a basis for complying with the President's directive to exercise their lawful discretion to elect against bargaining over so-called permissive subjects under 5 U.S.C. 7106(b)(1) (providing that certain matters are negotiable only "at the election of the agency"). And officials are prohibited from declining to bargain over proposals inconsistent with certain government-wide rules established in the Executive Orders, such as a government-wide rule that employees may generally not receive a performance-improvement period longer than 30 days.

The injunction also has practical effects on agency negotiators beyond its prohibitions. The injunction creates uncertainty for agency negotiators who, as a matter of independent judgment and discretion, may wish to take the same course that had been required by currently-enjoined provisions of the Executive Orders.

The longer the erroneous injunction is left in place, the greater its prejudicial effect on the overall course of bargaining, the positions that agencies take in bargaining, and the tentative agreements and concessions that agencies and unions make in the course of bargaining—thus potentially affecting the terms of the final collective-bargaining agreement. Indeed, we are informed by the Office of Personnel Management that it has bargained to impasse while operating under the injunction

and that it has been released to submit any remaining disputes to the Federal Service Impasses Panel for final resolution. Absent relief from this Court, there is a risk that the Impasses Panel may resolve those remaining disputes and bring an end to the collective bargaining process before the agency will have had the opportunity to negotiate or take positions before the Impasses Panel free from the restrictions of the injunction that this Court has already unanimously held must be vacated. Similarly, we are informed that the Department of Veterans Affairs is bargaining over a new agreement and that the negotiated ground rules call for bargaining to finish by December 17, 2019. And we are informed that the Department of Housing and Urban Development is engaged in collective bargaining under ground rules imposed by the Impasses Panel that call for bargaining to finish by December 6, 2019. *See In re U.S. Dep't of Hous. & Urban Dev. & AFGE Council 222*, No. 18 FSIP 075, 2019 WL 912008, at *4-*6 (Feb. 14, 2019).

5. Plaintiffs will not be prejudiced by expediting issuance of the mandate. To the contrary, issuing the mandate will help plaintiffs bring their claims in the proper forum. Freeing agency negotiators from the restrictions of the erroneously issued injunction will enable those negotiators to implement the challenged provisions of the Executive Orders in collective bargaining, which may generate the kind of "concrete bargaining disputes" with union negotiators that will enable plaintiffs to present their claims to the Federal Labor Relations Authority (the only forum with jurisdiction to

hear those claims in the first instance). *American Fed. of Gov. Emps.*, -- F.3d --, 2019 WL 3122446, at *5.

Immediate issuance of the mandate will not prejudice plaintiffs' ability to seek rehearing. This Court's unanimous and well-reasoned decision, relying on a long line of Supreme Court and Circuit precedent, makes clear that plaintiffs are exceedingly unlikely to obtain rehearing en banc, given the stringent standards that apply. *See* Fed. R. App. P. 35(a) (requiring a "majority of the circuit judges who are in regular active service" to order rehearing en banc, and providing that such rehearing may be appropriate only where "necessary to secure or maintain uniformity of the court's decisions" or where "the proceeding involves a question of exceptional importance").

In the unlikely event that the full Court grants en banc rehearing in this matter, this Court's rules already provide that "the court will recall the mandate if it has issued." D.C. Cir. Rule 41(a)(4). And, if that were to occur, plaintiffs would be free to seek injunctive relief pending disposition of the en banc proceedings. Particularly in light of the exceedingly small likelihood of this case being reheard en banc, any harm that plaintiffs might incur as a result of the immediate issuance of the mandate does not outweigh the harms the government currently suffers by conducting collective bargaining in contexts across the federal government under the restrictions of an injunction that issued without subject-matter jurisdiction.

6. For similar reasons, if this Court were to decline to issue the mandate immediately, the government respectfully requests that the Court stay the district

court's injunction pending issuance of the mandate. *See* D.C. Cir. R. 8(a). Plaintiffs are unlikely to succeed in any request for further review. And, as explained above, the government is irreparably harmed by conducting collective bargaining under the restrictions of the erroneous injunction, and the balance of the equities favors staying the injunction pending disposition of any timely filed motion for rehearing en banc. Because the government primarily requests immediate issuance of the mandate (relief that only this Court can grant), and seeks to stay the injunction pending issuance of the mandate only in the alternative, the government has not first sought to stay the injunction in district court. If the Court reaches that issue, the Court should excuse exhaustion in district court because a panel of this Court has already reached, and unanimously decided, the question presented on appeal and held that the injunction was entered without jurisdiction.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court expedite issuance of the mandate, or, in the alternative, stay the district court's injunction pending issuance of the mandate.

Respectfully submitted,

MARK B. STERN
s/ Joseph F. Busa
JOSEPH F. BUSA
Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0261
Joseph.F.Busa@usdoj.gov

JULY 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 2,059 words, according to the count of Microsoft Word.

s/ Joseph F. Busa
JOSEPH F. BUSA
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Joseph F. Busa
JOSEPH F. BUSA
Counsel for Defendants-Appellants