

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

**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.

No. 18-5289

DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,

Defendants-Appellants.

GOVERNMENT'S MOTION TO EXPEDITE BRIEFING SCHEDULE

Pursuant to 28 U.S.C. § 1657(a) and D.C. Circuit Rule 27, the government respectfully requests that the Court dispense with procedural and substantive motions and immediately commence with briefing on the following expedited schedule:

Government's opening brief:	Friday, October 26, 2018
Plaintiffs' combined answering brief:	Friday, December 7, 2018
Government's reply brief:	Friday, December 21, 2018

1. This appeal arises from four consolidated actions in district court brought by multiple federal employee labor unions seeking declaratory and injunctive relief against a number of provisions in three recent Executive Orders. *See* No. 18-cv-1261 (D.D.C.) (lead); No. 18-cv-1348 (D.D.C.); 18-cv-1395 (D.D.C.); 18-cv-1444 (D.D.C.).

The President issued three Executive Orders on May 25, 2018, addressing: (1) how federal agencies bargain with federal employee labor unions, *see* Executive Order 13836, 83 Fed. Reg. 25329 (June 1, 2018); (2) various issues regarding paid time that federal employees spend working on behalf of agencies, and time that federal employees spend in a paid but non-duty status, known as official time, during which employees work on behalf of unions, *see* Executive Order 13837, 83 Fed. Reg. 25335 (June 1, 2018); and (3) various issues regarding employee performance and removing employees for misconduct and unacceptable performance, *see* Executive Order 13839, 83 Fed. Reg. 25343 (June 1, 2018). The plaintiff unions challenged a number of provisions from these Executive Orders as exceeding the government's authority under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*

2. On August 24, 2018, the district court issued a final order declaring some of the challenged provisions of these Executive Orders invalid and permanently enjoining the President's subordinates from enforcing them, while denying relief as to other challenged provisions. *See* Order, Docket Entry 57, at 2-3, No. 18-cv-1261 (D.D.C.). The district court rejected the government's threshold argument that the unions' challenges could be brought only before the Federal Labor Relations Authority—the expert agency that Congress created to hear disputes regarding alleged violations of the Federal Service Labor-Management Relations Statute, with appeal to this Court—and that the district court thus lacked jurisdiction to hear these claims in the first instance. *See* Memorandum Opinion, Docket Entry 58, at 33-58, No. 18-cv-

1261 (D.D.C.). On the merits, the district court concluded that certain provisions of the Executive Orders impermissibly constrained the collective bargaining process in violation of the Statute. *Id.* at 76-105.

3. The government filed a timely notice of appeal to this Court on September 25, 2018. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The next day, this Court set a schedule for the filing of preliminary motions, with procedural motions due October 26, 2018, and dispositive motions due November 13, 2018. Aside from the instant motion, the government does not intend to file any other procedural or substantive motions and instead requests that this Court commence with expedited briefing.

4. By statute, courts “shall expedite the consideration of . . . any action” for “good cause.” 28 U.S.C. § 1657(a). There is good cause to expedite this appeal.

The district court’s order declares provisions of three Executive Orders to be unlawful and permanently enjoins all of the President’s subordinates in the Executive Branch from enforcing or otherwise giving effect to those provisions. The President is thereby disabled, with respect to the enjoined provisions, from exercising his authority under the Constitution and statute to superintend the Executive Branch. *See* U.S. Const., art. II § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); 5 U.S.C. § 7301 (“The President may prescribe regulations for the conduct of employees in the executive branch.”).

The injunction has government-wide reach, affecting important issues of agency management and the conduct of ongoing collective bargaining in every federal agency. For example, the district court enjoined Section 5(e) of Executive Order 13836, 83 Fed. Reg. at 25332, which states that “agency negotiators shall request the exchange of written proposals” during collective bargaining and strive to remove any existing agreements or policies that would prevent exchanging written proposals. The district court enjoined this provision as inherently undermining the duty to bargain in good faith. But exchanging written proposals occurs in “most negotiations,” helps “to facilitate[] communication between the parties,” and can help “to objectively evaluate the parties’ good or bad faith” if the another entity, like the Federal Labor Relations Authority, is later called upon to do so. *U.S. Dep’t of Justice Fed. Bureau of Prisons Fed. Corr. Inst. Miami, Fla. Respondent & Am. Fed’n of Gov’t Emps., Local 3690 Charging Party*, No. AT-CA-11-0365, 2015 WL 1879928, at *16 n.17 (Fed. Labor Relations Auth. Admin. Law Judge, Mar. 13, 2015). The district court also enjoined Section 6 of the same Order, which states that agency heads “may not negotiate over the substance of” permissive subjects of bargaining under 5 U.S.C. § 7106(b)(1)—even though that statute allows agencies to negotiate over those subjects—or not—“at the election of the agency,” *id.* § 7106(b)(1).

And the district court enjoined Section 3 of Executive Order 13839, 83 Fed. Reg. at 25344, which requires agency heads, “[w]henever reasonable in view of the particular circumstances,” to strive to reach agreement with unions to exclude from

collective-bargaining agreements any grievance procedures covering “dispute[s] concerning decisions to remove any employee . . . for misconduct or unacceptable performance.” The district court concluded, *see* Opinion at 100-101, that agencies would violate their duty to bargain in good faith under the Statute if they entered negotiations seeking to achieve a goal, committed the time and resources necessary to achieve that goal, and reported to the President if negotiators were unable to achieve that goal. The district court enjoined several other similar goal-setting provisions of the Executive Orders on the same ground.

Expedited briefing is warranted to resolve the urgent and significant issues presented by this appeal. Prompt resolution is especially needed in light of the ongoing effects of the permanent injunction on agency management and collective bargaining throughout the federal government, and in light of the effect the injunction has on the President’s ability to supervise the conduct of his subordinates in the Executive Branch.

5. The government requests that this Court commence with briefing, beginning with the government’s opening brief due Friday, October 26, 2018. The government’s proposed briefing schedule would provide plaintiffs with six weeks (until Friday, December 7, 2018)—well more than the standard 30 days—to file a combined answering brief. The extra time for the answering brief should allow the multiple plaintiff unions to file a single, combined answering brief, rather than four separate but overlapping merits briefs as they did in district court. This schedule also

takes into account the Thanksgiving holiday, while still having briefing complete before the Christmas holiday so that oral argument may be heard expeditiously in the New Year. The government's motion for an expedited briefing schedule therefore cuts short only its own time to file a brief, and even provides for extra time to accommodate plaintiffs.¹ If this Court does not order plaintiffs to file a single, combined answering brief, the government respectfully requests an additional month to file its reply brief.

6. Counsel for the government contacted counsel for all plaintiffs (Suzanne Summerlin for all plaintiffs in No. 18-cv-1395, Paras N. Shah for the plaintiff in No. 18-cv-1348, Andres M. Grajales for the plaintiff in No. 18-cv-1261, and Teague P. Paterson for both plaintiffs in No. 18-cv-1444). Counsel for the government notified counsel for the plaintiffs of the government's intent to file this motion for expedited briefing. Counsel for plaintiffs have indicated that they oppose expedited briefing.

¹ This schedule would also accommodate paternity leave for the below-signed government counsel, who is the principal attorney for the government in this appeal, as he is expecting a child at the very end of October.

Respectfully submitted,

JOSEPH H. HUNT

Assistant Attorney General

MARK B. STERN

s/Joseph F. Busa

JOSEPH F. BUSA

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice, Room 7537

950 Pennsylvania Ave., NW

Washington, DC 20530

202-353-0261

SEPTEMBER 2018

CERTIFICATION 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 1,343 words, according to the count of Microsoft Word.

s/Joseph F. Busa
JOSEPH F. BUSA

CERTIFICATE AS TO PARTIES

The plaintiffs in district court, and appellees here, are as follows: American Federation of Government Employees, AFL-CIO; American Federation of State, County and Municipal Employees, AFL-CIO; American Federation of Teachers, AFL-CIO; National Federation of Federal Employees, FD1, IAMAW, AFL-CIO; International Association of Machinists and Aerospace Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; National Association of Government Employees, Inc.; International Brotherhood of Teamsters; Federal Education Association, Inc.; Metal Trades Department, AFL-CIO; International Federation of Professional and Technical Employees, AFL-CIO; National Weather Service Employees Organization; Patent Office Professional Association; National Labor Relations Board Union; National Labor Relations Board Professional Association; Marine Engineers Beneficial Association/National Maritime Union (AFL-CIO); and National Treasury Employees Union. The defendants in district court, and appellants here, are Donald J. Trump, in his official capacity as President of the United States; the U.S. Office of Personnel Management; and Jeff T.H. Pon, in his official capacity as Director of the Office of Personnel Management. The following people filed briefs as amici in district court: Elijah E. Cummings, Peter T. King, William Clay, Sr., Jim Leach, and Tom Wolf.

s/Joseph F. Busa
JOSEPH F. BUSA

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2018, I electronically filed the foregoing with the Clerk of the Court 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