[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. DONALD J. TRUMP, in his official capacity as President of the United States, et al., Defendants-Appellants.	No. 18-5289

GOVERNMENT'S REPLY SUPPORTING EXPEDITED BRIEFING

The district court invalidated numerous provisions of three Executive Orders and enjoined the implementation of the President's judgment regarding the best means of fostering federal labor relations and employee accountability and performance that will maximize efficiency and further the interests of the public and the government, consistent with applicable law. It should be beyond controversy that an order of this kind, which infringes on the President's core responsibilities as the head of the Executive Branch, should be reviewed on an expedited basis. That much is required by basic principles of inter-branch comity.

1. Plaintiffs' arguments to the contrary are insubstantial and represent a striking shift in the view of the desirability of expedition from that which they

vigorously asserted in district court. Plaintiffs sought expedited consideration in district court, and the government agreed to a briefing schedule on cross-motions for summary judgment under which the government's opening brief was filed only three weeks after plaintiffs' four opening briefs. Scheduling Order, ECF 16, No. 18-cv-1261 (D.D.C. June 18, 2018). It is only now, on appeal, that plaintiffs cast the controversy as a garden variety dispute not worthy of speedy consideration.[1]

Contrary to plaintiffs' apparent understanding, this Court does not require that an application for expedited briefing make the showing that would be required to warrant a stay pending appeal. We have assumed that the Court at this juncture does not wish to review a comprehensive discussion of the arguments that the government will make in its brief less than three weeks from now, should the Court grant expedition. As for the harm that would follow from denial of expedited consideration, any employer would reasonably assert harm if it were barred from pursuing policies that it believed were consistent with law and necessary to improve productivity. And the issue of injury should be beyond question where, as here, the judgment at issue was made by the President of the United States in his capacity as head of the Executive Branch. *Cf. Maryland v. King*, 567 U.S. 1301 (2012) (Roberts,

[1] As plaintiff National Treasury Employees Union notes, Opp'n 6-7, the government accurately explained to the district court that the Executive Orders do not abrogate existing collective-bargaining agreements. The union does not explain why this Court should therefore decline to review on an expedited basis a sweeping injunction affecting provisions of three Executive Orders, including provisions concerning how agency negotiators engage in ongoing bargaining.

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))).

The district court's order also creates uncertainties for agencies when, as a matter of independent judgment and discretion, they take the same course that had been required by now-enjoined provisions of the Executive Orders. For example, Section 5(e) of Executive Order No. 13836 directs that agency negotiators "shall request the exchange of written proposals" during bargaining. 83 Fed. Reg. at 25332. Section 6 instructs agency negotiators to use their power under 5 U.S.C. § 7106(b)(1) to elect not to bargain over permissive subjects of bargaining. *Id.* And Section 5(a) directs agency negotiators to "commit the time and resources necessary" to strive for the presumptively reasonable goal of completing negotiations over collective bargaining agreements within six months. *Id.* at 25331. It is unclear whether and to what extent unions will assert that agency actions consistent with these now-enjoined provisions of the Executive Orders, but taken independently of them, are at odds with the district court's reasoning.

2. Plaintiffs discuss at some length the difficulties of coordinating their appellee brief on an expedited schedule. AFSCME Opp'n 6; NFFE Opp'n 7. In district court, where plaintiffs sought swift review, the briefing schedule on cross-motions for summary judgment had the government filing its opening brief just three

weeks after plaintiffs filed four of their own opening briefs. Under the government's proposed schedule on appeal, plaintiffs would have six weeks from the filing of the government's brief—the only brief to which plaintiffs will be responding—in which to file their brief as appellees. This schedule allows plaintiffs more time than they would receive under the schedule contemplated by the rules. And the proposed schedule should allow sufficient time for plaintiffs to coordinate: their claims of statutory conflict are all close cousins, and the district court disposed of those claims on the same, purely legal grounds—grounds that plaintiffs appear to support. The government proposed this schedule in the hope that it would be possible to avoid involving the Court in a scheduling dispute. Unfortunately that attempt has not been successful. But plaintiffs' opposition casts no doubt on the propriety of expedition.

CONCLUSION

The Court should grant the motion to expedite and set briefing on the schedule proposed in the government's motion.

Respectfully submitted,

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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 823 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 October 9, 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