[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

PLAINTIFF-APPELLEE NFFE, et al.'s OPPOSITION TO DEFENDANT-APPELLANTS' MOTION TO EXPEDITE BRIEFING SCHEDULE

Plaintiffs-Appellees NATIONAL FEDERATION OF FEDERAL EMPLOYEES, FD-1, IAMAW, AFL-CIO ("NFFE"); INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; 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 ENGINEERS, AFL-CIO & CLC; NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION; PATENT OFFICE

PROFESSIONAL ASSOCIATION; NATIONAL LABOR RELATIONS BOARD UNION; NATIONAL LABOR RELATIONS BOARD PROFESSIONAL ASSOCIATION; and MARINE ENGINEERS' BENEFICIAL ASSOCIATION, DISTRICT NO. 1 PCD, AFL-CIO ("NFFE Plaintiffs" or "NFFE et al.") respectfully oppose the Motion for Expedited Briefing Schedule filed by the Defendant-Appellants President Donald Trump, et al. in the above-captioned matter.

Defendant-appellants seek to rush this case to the top of the docket without the statutorily required showing of good cause, or the heightened requirements established by this Court. By statute, courts may expedite an appeal for "good cause." 28 U.S.C. § 1657(a). Pursuant to the Handbook of Practice and Internal Procedures for the U.S. Court of Appeals, District of Columbia (as amended through July 2018) ("Handbook") when an appeal is not expedited by statute, then "[t]he Court grants expedited consideration very rarely" when a movant has "demonstrate[d] that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge." Handbook at 33.

I. DEFENDANT-APPELLANTS HAVE NOT DEMONSTRATED IRREPARABLE INJURY OR THAT THE DECISION UNDER REVIEW IS SUBJECT TO SUBSTANTIAL CHALLENGE

Defendant-appellants have not averred an irreparable injury it will suffer if its motion to expedite is not granted. On August 24, 2018, the District Court issued a final order declaring most of the challenged provisions of three of the President's Executive Orders invalid, and permanently enjoining the President's subordinates from enforcing them. *See* Order, Docket Entry 57, at 2-3, No. 18-cv-1261 (D.D.C.) ("Order").

There is no harm that befalls the Government by following through the traditional D.C. Circuit litigation process. Unlike other cases where this Court has found cause to expedite briefing, this matter does not concern national security, defense, or any other emergent matter. *See for example Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 854 (D.C. Cir. 2006), Docket Entry 4, No. 05-5437 (2005). The instant motion for expeditious briefing is not like the *Chertoff* case where the Government's case centered on an attempt to create a new "Max HR" program which impeded on subjects which were governed by then-existing collectively bargained agreements. *Id.* at 848.

Instead, in the instant case 40 years of rule by the Federal Service Labor-Management Relations Statute were interrupted by a blip of less than three months where the President's Executive Orders were in effect. That was remedied by the District Court's Order below, and the parties are now back to *status quo ante*. *See* Memorandum Opinion, Docket Entry 59, at 88, No. 18-cv-1261 (D.D.C.) ("Mem. Op."). There is no irreparable injury suggested by the Government, nor could there be because the District Court merely restored the supremacy of the Congressional statute which had been impermissibly subverted by the President of the United States. Mem. Op. 66 *et seq*. The status quo is not an irreparable injury.

If the matter on appeal was significant and urgent, the Government could seek a preliminary stay on the injunction. However, the Order languished for approximately 30 days before the Government submitted its appeal. *Compare* Docket Entry 57, Order, on August 24, 2018 *with* Docket Entry 63, Notice of Appeal, on September 25, 2018.

In the meantime, the Office of Personnel Management made efforts to roll back implementation of the Executive Orders and return federal workers to the status quo that existed prior to the implementation of the Executive Orders.[1] Therefore, the Government understands, or should understand, it is unable to meet the high burden needed to be granted preliminary relief. Instead, it seeks to ram an expedited briefing schedule through the Court. It should not be permitted to do so.

In addition, Defendant-appellants have not shown that they can mount a substantial challenge to the District Court's well-reasoned and thorough Order. The District Court issued a lengthy opinion that carefully examined the text, structure, and history of the Federal Service Labor-Management Relations Statute. The Memorandum Opinion methodically analyzes the case at-issue. *See* Mem. Op. 31-118. The District Court concluded, among other things, that Congress did not intend for the matters raised by the plaintiff unions to be resolved through the administrative scheme ("Defendants' contention that an avenue for meaningful judicial review of the Unions' claims nevertheless exists within the prescribed administrative review scheme, because a court of appeals could still reach and resolve these claims under section 7123 of Title 5 of the United States Code despite the limited jurisdiction of the FLRA, is clever, but ultimately unpersuasive." Mem. Op. 41). It also concluded that the President has the authority to issue executive orders that pertain to the Federal Labor-Management

[1] See memorandum issued by OPM Director Jeff Pon on August 29, 2018, available online at https://chcoc.gov/content/updated-guidance-relating-enjoinment-certain-provisions-executive-orders-13836-13837-and (""[OPM's] guidance of July 5, 2018, that was circulated . . . and that relates to the provisions of the orders that were enjoined should be considered rescinded…").

Relations Statute so long as his orders do not conflict with the will of Congress when it passed that statute. ("…there is no serious dispute that any orders a President issues in this area must be consistent with the will of Congress." Mem. Op. 66 and "… this is now clear beyond cavil, for the D.C. Circuit has held that executive orders that conflict with the purposes of a federal statute are "ultra vires[.]" Mem. Op. 75).

Insomuch as the President's Executive Orders did conflict with the relevant statute, the District Court resolved the conflict in favor of Congressional intent and returned the parties to *status quo ante*. Mem. Op. 102 ("This Court has no doubt that the net effect of these provisions is to put an entire hand on the scale with respect to certain negotiable provisions of a collective bargaining agreement before negotiations even begin (never mind the thumb), and to require agency negotiators to cut off any digits that union representatives might seek to extend in the hopes of reaching an agreement on these particular issues.") and Mem. Op. 119 ("…this Court has concluded that many of the challenged provisions of the Orders at issue here effectively reduce the scope of the right to bargain collectively as Congress has crafted it, or impair the ability of agency officials to bargain in good faith as Congress has directed, and therefore cannot be sustained…").

II. THERE IS NO OTHER BASIS FOR EXPEDITING THIS APPEAL

The D.C. Circuit's Handbook (at page 33) provides that the Court "may expedite cases in which the public generally, or in which persons not before the Court have an unusual interest in disposition," adding that "[t]he reasons must be strongly compelling." Defendant-appellants have not demonstrated a "strongly compelling"

and "unusual interest" in prompt disposition of this matter for persons not before this Court. Handbook at 33. While litigation involving the President of the United States is generally of interest to the public, this case chiefly involves niche issues of federal workforce collective bargaining – of interest primarily to the unions and union-represented workers who are parties to the litigation. Truly, few outside of the federal sector labor movement have more than a cursory understanding of these issues. Further, there are a the number of law suits and legal battles currently being waged on behalf of the President (approximately 134 of which were filed by the spring of 2017, a year before this case was originally filed).[2] There is nothing about this matter that makes it more urgent on appeal than the 15 cases naming President Trump as a party, that are currently pending before this Court, and were filed prior to the instant appeal.[3]

Finally, the expedited briefing schedule proposed by the Government is potentially prejudicial to the Plaintiff-appellees, and will do a disservice to this Court's understanding of the issues. This appeal arises from four consolidated actions in district court brought by 17 separate and distinct federal employee labor unions seeking declaratory and injunctive relief against 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.).

[2] *See* https://www.bostonglobe.com/news/politics/2017/05/05/trump-has-been-sued-times-federal-court-since-inauguration-day/E4AqZBYaKYHtzwfQ3k9hdM/story.html

[3] Search performed on PACER by the undersigned attorney, Suzanne Summerlin, on October 1, 2018 lists President Donald Trump as a party in the following cases which are open and pending as of that same date: Nos. 18-5023; 18-5025; 18-5065; 18-5097; 18-5105; 18-5121; 18-5148; 18-5150; 18-5211; 18-5240; 18-5257; 18-5260; 18-5272; and 18-5286.

Each of the four actions consolidated in the district court alleged distinct causes of action and supporting facts. *Id*; also summarized in Mem. Op. at 26.

The NFFE Plaintiffs, as identified previously herein, consist of 13 out of the 17 original plaintiffs in this matter. The NFFE Plaintiffs have been, and are continuing to, coordinate their part of this litigation among their respective labor organizations. This effort requires a substantial amount of communication and cooperation among 13 distinct labor organizations, their legal counsel, and their principle officers. The coordination is accomplished through regular meetings and telephone conferences.

Currently, no such formalized coordination with the other named Plaintiff-appellants in this matter exists. Coordination with other Plaintiff-appellant organizations, while likely to be desired by this Court, has not yet been achieved, in spite of the preliminary efforts of the NFFE Plaintiffs and other Plaintiff-appellees in this matter. The expedited schedule suggested by the Defendant-appellees will hamstring the efforts among the Plaintiff-appellants to work as one in defense of this appeal, for the benefit of the Court. Because this Court will best be served with a coordinated, singular defense of the instant appeal, the Court should deny the Motion to Expedite the Briefing Schedule and allow the labor organizations tasked with defending the Order below time to coordinate our efforts and divide the work that needs to be done amicably and sensibly.

Two amicus briefs were filed in the district court in support of the Plaintiff-appellees. Docket Entries 35 and 47. It is expected that more amicus briefs will be filed in the instant matter so that this Court will be fully informed of the discrete and unique

issues at bar. It is anticipated that, if, a number of amici file briefs with this court that the Government will want additional time beyond its expedited schedule to attempt to answer those briefs, which would create a disparity in the briefing schedule and prejudice the Plaintiff-appellees.

Finally, the Plaintiff-appellees do not waive their rights to file procedural or dispositive motions in the instant matter. The Defendant-appellants' motion to expedite all but destroys the time which should be afforded to the Plaintiff-appellees' to fully consider and strategize their litigation efforts.

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Given the importance of the underlying issues here, the Defendants-appellants' failure to articulate any irreparable harm, and the level of extraordinary coordination among the distinct plaintiff unions which this Court will likely require, this Court should ensure that the parties have adequate time to prepare thorough briefs that provide the most possible assistance to the Court.

Therefore, the Court's initial briefing order, which set a schedule for the filing of preliminary motions due October 26, 2018 and dispositive motions due November 13, 2018, should remain in effect and this appeal be allowed to proceed deliberatively and fully without an unnecessary rush which could prejudice the Plaintiff-appellees.

October 5, 2018

Respectfully Submitted,

/s/ Jefferson D. Friday

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7

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 1896 words, according to the count of Microsoft Word.

/s/ Jefferson D. Friday
Jefferson D. Friday

/s/ Suzanne Summerlin
Suzanne Summerlin

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 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/ Jefferson D. Friday
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/s/ Suzanne Summerlin
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