

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' REPLY SUPPORTING ISSUANCE OF MANDATE

The government has been operating under an erroneously issued injunction for nearly a year. Withholding the mandate, as plaintiffs urge, would effectively extend that injunction—which this Court unanimously held must be vacated—until the Court disposes of the rehearing petition that plaintiffs say is forthcoming. Extending the injunction would significantly harm the government because, as plaintiffs do not dispute, agency officials and unions are presently engaged in collective bargaining throughout the federal government, and agency officials' conduct of those negotiations (and the President's supervision of that conduct) is presently constrained by the erroneously issued injunction. Indeed, it is precisely *because* the injunction constrains ongoing negotiations that plaintiffs sought that injunction in district court,

and why they seek to extend that erroneously issued injunction for as long as possible on appeal. *E.g.*, Response at 6 (“[I]f the Executive Orders go into effect, it is the appellee unions who will suffer immediate and ongoing injury while their challenges to those Orders await prolonged and piecemeal adjudication before the Federal Labor Relations Authority.”).

If this Court agrees that plaintiffs are extraordinarily unlikely to obtain rehearing en banc, *see* Motion at 8, the government respectfully requests that it issue the mandate now so that the President’s subordinates may implement the Executive Orders’ lawful goals and directives. There is plainly good cause to hasten the dissolution of an improper injunction that constrains the government’s conduct of ongoing collective bargaining. And issuing the mandate would not deprive plaintiffs of anything to which they are entitled. To the contrary, implementing the Executive Orders would lead to the kind of “concrete bargaining disputes” that, this Court unanimously held, are necessary to bring plaintiffs’ claims before the Federal Labor Relations Authority. *American Fed. of Gov. Emps.*, -- F.3d --, 2019 WL 3122446, at *5.

Plaintiffs assert that the government will suffer no harm from continuing to bargain under the injunction’s strictures until such time as this Court disposes of plaintiffs’ forthcoming rehearing petition, and plaintiffs even suggest that, where negotiations are scheduled to end soon, the government should seek to extend the duration of negotiations (or proceedings before the Federal Service Impasses Panel). *See* Response at 9-10. But plaintiffs do not dispute that “[t]he 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.” Motion at 6. Indeed, plaintiffs even concede that the parties “have exchanged various bargaining proposals and agreed on certain contract articles or provisions” in ongoing negotiations. Response at 9. Extending the injunction would only further prejudice the course of such negotiations.

Plaintiffs argue that the government cannot now seek relief because the government (accurately) stated in district court that the Executive Orders would not abrogate *existing* collective-bargaining agreements but would affect negotiations over *new* collective-bargaining agreements. *See* Response at 6-8. That is no response at all to the government’s motion. The government is seeking relief precisely because of effects that the injunction has on ongoing negotiations over new collective-bargaining agreements—the exact effects the government correctly identified in district court.

Plaintiffs are on no firmer ground in asserting that the government has somehow been too tardy to obtain the relief it seeks. Plaintiffs note, for example, that the government “waited seven days to file the instant motion.” Response at 14. Plaintiffs thus seek to penalize the government for proceeding swiftly, yet deliberately, to protect the significant interests at stake in this matter. The government is not required to litigate every case on an emergency basis as a precondition to seeking

expedited consideration or issuance of the mandate, where, as here, there is good cause for such relief.

Finally, plaintiffs identify no infirmity in the government's alternative request for a stay of the injunction pending issuance of the mandate. Plaintiffs assert that the government's stay request must "include affidavits or other sworn statements," Response at 16, but such materials are necessary only in support of "facts subject to dispute," Fed. R. App. P. 8(a)(2)(B)(ii), and, as discussed above, plaintiffs do not dispute that there are ongoing negotiations or that the injunction constrains how the government conducts those negotiations. Plaintiffs also argue that the government is too late in seeking a stay, and that such a request should be presented to the district court first. Response 16-17. But exhaustion in district court would serve no purpose where, as here, a panel of this Court has already reached, and unanimously decided, the question presented, and where the government primarily requests immediate issuance of the mandate (relief that only this Court can grant).

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this reply 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 796 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 August 6, 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