

No. 22-40043

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES; HIGHLAND ENGINEERING,
INCORPORATED; RAYMOND A. BEEBE, JR.; JOHN ARMBRUST; et al,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States;
THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, in his official
capacity as Secretary of Transportation; DEPARTMENT OF TRANSPORTATION;
JANET YELLEN, in her official as Secretary of Treasury; et al,
Defendants-Appellants.

**EMERGENCY MOTION UNDER CIRCUIT RULE 27.3
FOR A STAY PENDING ISSUANCE OF THE MANDATE OR, IN THE
ALTERNATIVE, FOR ISSUANCE OF THE MANDATE FORTHWITH**

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INTRODUCTION AND SUMMARY

On January 21, 2022, the district court issued a nationwide preliminary injunction against “implement[ation] or enforc[ement] of Executive Order 14043.” The government filed a notice of appeal later that day, and on February 4 filed an emergency motion for a stay pending appeal in this Court. On February 9, a motions panel of this Court declined to rule on the stay motion, instead ordering that motion to be carried with the case for resolution by a merits panel. Judge Higginson dissented from that order, stressing that the government had satisfied all the requirements necessary to obtain a stay and was therefore entitled to immediate relief.

On April 7, this Court issued an opinion that “vacate[d] the district court’s preliminary injunction and remand[ed] to the district court with instructions to dismiss for lack of jurisdiction.” Op. 14 (capitalization omitted). The Court also issued a per curiam order denying the government’s “opposed motion to stay the injunction pending appeal . . . as moot.” But the Court has not yet issued the mandate, and the docket entry accompanying the opinion states that the “[m]andate issue date” is May 31, 2022, the default date under Federal Rule of Appellate Procedure 41(b). Because the mandate has not issued, the government respectfully submits that its motion to stay the preliminary injunction is not moot, and the government therefore renews its request for a stay of the injunction pending issuance of the mandate and any further appellate proceedings. *See* Emergency Mot. Under

Cir. R. 27.3 for a Stay Pending Appeal (Feb. 4, 2022) (Stay Motion). In the alternative, the government requests that the Court issue the mandate forthwith.¹

ARGUMENT

This Court Should Take Appropriate Steps So That The Government May Resume Implementation And Enforcement Of Executive Order 14043

Executive Order 14043 has been subject to a nationwide preliminary injunction for more than two months. On April 7, this Court “vacat[ed] the preliminary injunction.” The Court should take appropriate measures to ensure that its judgment is given meaningful effect pending issuance of its mandate. The government therefore respectfully requests that the Court immediately stay the preliminary injunction pending issuance of the mandate and any further appellate proceedings or, in the alternative, issue the mandate forthwith.

1. The Court has determined that the district court lacks jurisdiction over this case and that the preliminary injunction was invalidly issued. The Court also denied the government’s motion for a stay of the injunction as moot, but the government respectfully submits that motion is not moot because the mandate has not yet issued. *See Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 468 (5th Cir. 2013) (“Absent the issuance of a mandate, the original district court judgment remain[s] in effect.”)

¹ Government counsel has contacted counsel for plaintiffs, who stated that plaintiffs oppose the requested relief.

(quotation marks omitted) (alteration in original). So long as the preliminary injunction remains in effect, the need for emergency relief persists.

The government is plainly entitled to a stay of the injunction, particularly in light of this Court’s conclusion that plaintiffs “have not shown a substantial likelihood of success on the merits” because the district court lacks jurisdiction. Op. 14; *see also* Stay Motion (explaining why the requirements for a stay are satisfied). Executive Order 14043 has been invalidly enjoined nationwide since January 21, and the Court should immediately stay the injunction pending issuance of the mandate and any further appellate proceedings so that the government can resume implementation of its important policy.

2. The government alternatively requests that this Court issue the mandate immediately pursuant to Federal Rule of Appellate Procedure 41(b) and the Court’s Internal Operating Procedures. *See* 5th Cir. R. 41 I.O.P. (“[T]he clerk will immediately issue the mandate . . . in such . . . instances as the court may direct.”) (capitalization omitted). There is good cause to issue the mandate forthwith because this Court has concluded that the district court lacked jurisdiction to issue its nationwide preliminary injunction. And, for the reasons discussed above, issuing the mandate immediately is further justified by the serious ongoing harm to the public interest and to the government from the district court’s improper injunction. *See, e.g.*, Stay Motion 15-17; Stay Order 9-11 (Feb. 9, 2022) (Higginson, J., dissenting) (explaining that the injunction “greatly impede[s]” the government’s operational efficiency and leaves “the

President of the United States, in his capacity as CEO of the federal workforce,” disabled from “tak[ing] the same lifesaving workplace safety measures as” a broad range of “private sector CEOs”).

If the Court does not grant the government’s renewed motion for a stay, it should therefore expedite issuance of the mandate so that the government may resume implementation and enforcement of Executive Order 14043. *See, e.g., Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 280 (5th Cir. 2012) (vacating a preliminary injunction, remanding for further proceedings, and specifying that “[t]he mandate shall issue forthwith”); *League of United Latin American Citizens, Dist. 19 v. City of Boerne*, 675 F.3d 433, 441 (5th Cir. 2012) (vacating a district court order, denying the appellant’s motion for a stay as moot, and specifying that “[t]he mandate shall issue forthwith”).

CONCLUSION

The government respectfully requests that this Court stay the preliminary injunction pending issuance of the mandate and any further appellate proceedings or, in the alternative, issue the mandate immediately.

Respectfully submitted,

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APRIL 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 892 words according to the count of Microsoft Word. I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the Clerk's Office, and to the offices of opposing counsel on April 11, 2022, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete. I further certify under 5th Cir. R. 27.4 that appellees oppose this motion and plan to file a response in opposition.

/s/ Casen B. Ross

CASEN B. ROSS

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on April 11, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Casen B. Ross

CASEN B. ROSS
Counsel for Appellants