

No. 23A243

IN THE SUPREME COURT OF THE UNITED STATES

VIVEK H. MURTHY, SURGEON GENERAL, ET AL., APPLICANTS

v.

MISSOURI, ET AL.

SECOND SUPPLEMENTAL MEMORANDUM REGARDING
EMERGENCY APPLICATION FOR A STAY

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1. Earlier today, the government filed a supplemental memorandum in this Court addressing the Fifth Circuit's September 25 order granting panel rehearing in this case. The supplemental memorandum explained (at 2-6) that the grant of panel rehearing was inconsistent with the mandate rule and with Federal Rule of Appellate Procedure 40(a)(3) and (4); that the order's intended effect was unclear; and that any purported extension of injunctive relief should be stayed for the same reasons set forth in the government's stay application and reply.

Less than an hour after the government filed its supplemental memorandum, the Fifth Circuit issued an order stating:

IT IS ORDERED that the court order entered on September 25, 2023, is withdrawn.

IT IS FURTHER ORDERED that the mandate issued forthwith, on September 11, 2023, is recalled.

IT IS FURTHER ORDERED that the Appellants are directed to file a response to the petition for rehearing by September 28, 2023, at 12:00 p.m.

IT IS FURTHER ORDERED that the preliminary injunction issued

on July 4, 2023, by the United States District Court for the Western District of Louisiana will remain STAYED pending resolution of Appellees' petition for panel rehearing.

23-30445 C.A. Doc. 256-2, at 1-2 (Sept. 26, 2023).

2. In light of the Fifth Circuit's most recent order -- and, in particular, the court's grant of an administrative stay -- the government no longer needs relief from this Court before the administrative stay entered by Justice Alito expires at 11:59 pm on September 27. The government respectfully suggests, however, that the Court should nonetheless grant its pending application and stay the district court's preliminary injunction pending any further proceedings in the Fifth Circuit and the filing and disposition of a petition for a writ of certiorari.

Such a stay is warranted because the Fifth Circuit's stay runs only through "resolution of [respondents'] petition for panel rehearing," not during the pendency of further proceedings in this Court. Accordingly, unless this Court grants its own stay now, the government will be forced to return to the Court with another stay application when the Fifth Circuit acts on the petition for panel rehearing. And whether the Fifth Circuit denies rehearing and adheres to its original decision or grants respondents' request to rely on the same flawed reasoning to affirm an even broader portion of the district court's injunction, such a stay application would largely or entirely duplicate the government's pending application.

The recent course of proceedings and the current posture of

this case provide further reason not to burden this Court and the parties with another round of emergency stay briefing after the Fifth Circuit acts on the rehearing petition. The Fifth Circuit issued its decision on September 8 and extended its stay of the district court's injunction for ten days "pending an application to the Supreme Court." Appl. App. 252a. On the government's motion, the Fifth Circuit then issued its mandate on September 11, formally divesting itself of authority over the appeal. As contemplated by the Fifth Circuit, the government sought a stay from this Court on September 14. Briefing on the stay was complete on September 21, and the administrative stay issued and extended by Justice Alito suggested that this Court was actively considering the application with a view towards resolving it by 11:59 p.m. on September 27.

Rather than allowing this Court's proceedings to play out in the ordinary course, the Fifth Circuit first issued an order purporting to grant panel rehearing, then rescinded that order, recalled its mandate, and granted its own stay pending further proceedings on respondents' rehearing petition. Those orders have injected uncertainty into the proceedings during this Court's active consideration of the case. A full stay of the district court's injunction pending certiorari would ensure that any additional orders issued by the Fifth Circuit will not further disrupt the proceedings or needlessly generate additional and duplicative emergency briefing in this Court. Especially because this Court

has likely already invested substantial time and resources in reviewing the briefing on the government's stay application, judicial economy counsels in favor of granting a full stay of the district court's injunction pending certiorari now, to avoid such duplicative proceedings in the near future.

3. For similar reasons, the government respectfully suggests that it would remain appropriate for this Court to construe the government's stay application as a petition for a writ of certiorari to review the Fifth Circuit's judgment -- which has not been withdrawn -- and to grant a stay and certiorari. Cf. Appl. 6, 40. But if the Court does not choose to follow that course, the government will file a petition for a writ of certiorari after the Fifth Circuit has resolved the rehearing petition.

Respectfully submitted.

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