

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, *et al.*,
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's
Office Civil Rights Unit,
Intervenor-Plaintiff-Appellee,

No. 18-35347

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, *et al.*,
Defendants-Appellants.

**MOTION TO EXPEDITE ORAL ARGUMENT OR, IN THE
ALTERNATIVE, TO SUBMIT APPEAL WITHOUT ARGUMENT**

This is a preliminary-injunction appeal concerning a military policy announced by Secretary of Defense James Mattis in March 2018. Without offering any justification for disregarding the considered professional judgment of senior military leaders, the district court on April 13 enjoined the 2018 policy on a nationwide basis. Rather than analyzing plaintiffs' likelihood of success on the merits of a challenge to the 2018 policy, the district court relied on a December 2017 injunction, which concerned a now-revoked presidential memorandum and which required the military to implement a policy from 2016 that had not yet gone into full effect. As a result, the Nation's military is now operating under a policy that is two iterations obsolete.

On May 4, the government moved for a stay pending appeal of the district court's decision to preliminarily enjoin the new 2018 policy, and on July 18, a panel of this Court denied the motion. Two days later, the motions panel announced that this Court will hear argument on the appeal in October 2018.

In light of the government's significant interest in developing and implementing its new military policies, and to allow the Supreme Court of the United States the opportunity to consider these issues next Term, the government respectfully requests that this Court calendar the oral argument in this matter for one of the argument sessions scheduled for August 27-31, 2018 (or at a special argument session around the same time period, including by telephone or video, if necessary). In the alternative, the government requests that the Court decide this appeal without oral argument to ensure that a decision is issued as expeditiously as possible, and no later than December 2018—*i.e.*, in time for the Supreme Court to grant a petition for certiorari and hear the case next Term.

1. As explained in greater detail in our briefing on the stay motion and the underlying appeal, the government appeals from the district court's April 13, 2018 order, which imposed a nationwide preliminary injunction blocking the military from implementing the 2018 policy. The district court did so without finding that plaintiffs were likely to succeed on the merits of a constitutional challenge to the 2018 policy, and without offering any justification for disregarding the considered judgment of senior military leaders. Instead, the court simply extended (and refused to dissolve) a previous

preliminary injunction from December 2017, which enjoined a 2017 presidential memorandum addressing a substantially different policy that was expressly “revoke[d]” to allow the military to adopt its 2018 policy, ER.158, and which required the military to implement a policy from 2016 that had not yet fully gone into effect.

On April 30, the government appealed the preliminary injunction against the 2018 policy and sought a stay from the district court pending appeal. Doc.236, 238. After the district court declined to issue an expedited ruling on the stay motion, Doc.240, the government asked this Court for a stay pending appeal on May 4. Pursuant to this Court’s Rule 3-3, the government’s preliminary-injunction appeal was expedited, and briefing was completed on July 17.

On July 18, with the benefit of full briefing both on the stay motion and the underlying appeal, a panel of this Court denied a stay pending appeal. Two days later, the motions panel announced that oral argument will be held in October 2018.

2. There is good cause for expediting oral argument, *see* Cir. R. 27-12, because this is a preliminary-injunction appeal, which is expedited as a matter of course pursuant to this Court’s Rule 3-3 and 28 U.S.C. § 1657(a). Moreover, this appeal challenges a nationwide injunction against a policy that the military, in its best professional judgment, has determined is necessary. This military decision, which involves “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force,” is entitled to great weight. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008) (quotation marks omitted). We ask that the Court

expedite the oral argument so that the military's judgment may be given effect as soon as possible.

Expedition is all the more necessary now that this Court has denied the government's motion for a stay pending appeal. In the absence of expedited argument and decision, the military will be forced to maintain a twice-superseded policy from 2016—a policy that the military has concluded poses “substantial risks” and threatens to “undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.” ER.161.

If argument is not held until October 2018, moreover, it will be difficult for the government, if it loses the appeal, to seek and obtain review during the Supreme Court's 2018 Term absent extraordinary expedition in the Supreme Court, leading to the possibility that the military's 2018 policy could remain enjoined for more than a year as litigation remains pending. To enable the Supreme Court to decide these important issues in the 2018 Term, this Court should hold argument during one of its argument sessions scheduled for August 27-31 (or at a special argument session around the same time period) to ensure that it is able to issue a decision as soon as possible, and no later than December 2018. The appeal is already fully briefed, enabling the parties and this Court to prepare for argument on this timetable. *See* 7/18/18 Order 2 (noting that “[b]riefing is complete”).

3. If the Court denies the request for expedited oral argument, the government respectfully requests, in the alternative, that the case be submitted without oral

argument. That will enable the Court to expedite the issuance of its decision in order to satisfy the timing needs discussed above, while obviating any difficulties in scheduling an argument earlier than October.

4. Counsel for the government contacted counsel for appellees to notify them of the government's intent to file this motion. Opposing counsel, Peter Renn (counsel for plaintiffs-appellees) and La Rond Baker (counsel for intervenor-plaintiff-appellee the State of Washington), indicated that they oppose this motion.

CONCLUSION

The government respectfully requests that this Court hold argument during one of the argument sessions scheduled for August 27-31, 2018 (or at a special argument session around the same time period), or, in the alternative, decide the case without oral argument, to ensure that a decision is issued as expeditiously as possible, and no later than December 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 1,077 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Catherine H. Dorsey
Catherine H. Dorsey

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2018, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey
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