IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al., *Plaintiffs-Appellees*, STATE OF WASHINGTON, *Plaintiff-Intervenor-Appellee*, v. DONALD TRUMP, President of the United States, et al., *Defendants-Appellants*.	No. 18-35347

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION TO EXPEDITE ORAL ARGUMENT OR, IN THE ALTERNATIVE, TO SUBMIT APPEAL WITHOUT ARGUMENT

Defendants have not shown good cause to further expedite oral argument in this already accelerated preliminary-injunction appeal. Defendants' motion hinges on a series of cascading predictions about how and when this litigation will unfold, including that (1) this Court will rule against them, (2) they will then file a *certiorari* petition, (3) the U.S. Supreme Court will grant that petition, and (4) the U.S. Supreme Court will reverse the ruling that this Court has not yet issued. Defendants argue that this Court should truncate its own schedule so that, in case all these events materialize, they can be compressed into the span of less than a

year. The goal would be to enable Defendants to resume unconstitutional discrimination against transgender people in military service "as soon as possible."

None of this speculation constitutes a valid basis for the rushed schedule that Defendants seek. The importance of the issues at stake here counsel in favor of sufficient time for careful deliberation, not haste. This Court already struck an appropriate balance between speed and deliberation when it ordered that this appeal be heard in October 2018. Further expediting oral argument, or refusing to hold it altogether, would undermine the ability of the parties and the Court to exercise the care necessary for fulsome review. In any event, the current schedule already permits this Court to rule by December 2018 if it deems appropriate.

RELEVANT BACKGROUND

This appeal arises from the denial of a motion to dissolve a preliminary injunction—not from the issuance of the preliminary injunction itself—prohibiting Defendants from implementing President Trump's exclusion of transgender people from military service (the "Ban"). Although Defendants initially appealed the preliminary injunction, they voluntarily dismissed that appeal in December 2017, thereby waiving any challenge to the propriety of the injunction's issuance. Service chiefs and other senior military leaders confirmed in Congressional testimony that in the months since that time, there have been "precisely zero reports" of problems, SER.97, and the status quo is "steady as she goes," SER.103.

In March 2018, Defendants released a plan to implement the Ban, which the district court found was not a "new" policy at all but rather the execution of the previously announced policy. ER.12. The court thus denied Defendants' motion to dissolve the preliminary injunction, rejecting that there were changed circumstances justifying dissolution. ER.12. Defendants then appealed that denial, and on July 18, 2018, this Court denied Defendants' motion to stay the preliminary injunction pending appeal. Like every federal court to consider the issue, this Court found no basis to permit the immediate implementation of the Ban, which would "upend" the status quo in which transgender people have been able to serve openly since June 2016. Doc. 90 at 2.

This Court also noted that Defendants' motion had "request[ed] neither emergency nor expedited treatment." *Id.* Nevertheless, it directed that this appeal be calendared for argument in October 2018 under General Order 3.3(g), which permits a case to be ordered onto a specific calendar even though the panels for that calendar have already been assigned their cases. Doc. 92. It also designated that this appeal be heard by a "Ninth Circuit Only Panel" under General Order 3.3(h), thereby limiting the panels to which this appeal may be assigned. As Defendants note, this Court had the benefit of full briefing in this appeal when it decided to set oral argument for October 2018.

ARGUMENT

First, Defendants have not shown good cause to further expedite oral argument beyond this Court's decision to calendar argument in October 2018. This appeal was already expedited and accorded priority by virtue of the fact that it concerns a preliminary injunction, *see* 9th Cir. R. 3-3 and 34-3, and by virtue of this Court setting argument for October 2018, *see* 9th Cir. Gen. Order 3.3(g). Further expediting argument at this point for August 2018 would deprive the parties and the Court of adequate time to prepare for, and thus most benefit from, a hearing. The merits panel will need time to review not only the parties' briefs, but also the extensive record and numerous *amicus* briefs in this appeal.

Second, Defendants' motion is built on presumption after presumption about how they believe one particular litigation timeline could unfold. This Court should not rush to reach a decision based on Defendants' mere speculation that a series of hypothetical actions might come to pass. For example, the presumption that the U.S. Supreme Court will grant a hypothetical petition for *certiorari* in any case—much less on an interlocutory order involving an issue on which lower federal courts have all reached the same conclusion—is anything but certain. And even if *certiorari* were granted, there is no way for any party to divine the precise timeline of when this case would be briefed, argued, and decided before the U.S. Supreme Court, given the many variables that could affect each stage of those proceedings.

Third, in denying the motion to stay, this Court has already rejected Defendants' argument that they will suffer any harm that would justify suspension of the preliminary injunction. For that same reason, Defendants cannot argue that oral argument must be further accelerated in order to avoid purported harms that this Court has already rejected. To the contrary, the only parties who stand to suffer actual harm are the transgender people whose military careers and constitutional rights hang in the balance, but who are currently protected by the preliminary injunction.

Fourth, to the extent that this Court ultimately decides to accede to Defendants' demand that it issue a ruling by December 2018, nothing about the current schedule—in which argument will take place on October 10, 2018—prevents a ruling on that timetable. However, that determination should be made by the merits panel assigned to this appeal, who will be best situated to determine how and when to resolve this appeal after the benefit of oral argument.

Relatedly, a motions panel of this Court should not prematurely deprive the merits panel assigned to this appeal of having the option of argument. If the merits panel later decides that it would not benefit from argument, it always has the option of deciding the appeal on the papers in advance of the argument. Oral argument, however, can often clarify and sharpen the key issues of interest to the Court, and it can be especially important in cases implicating the public interest.

CONCLUSION

Plaintiffs respectfully request that this Court deny Defendants' motion to expedite oral argument in full and retain oral argument for October 10, 2018.

Dated: August 2, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this opposition complies with the length limits permitted by Ninth Circuit Rules 27-1 and 32-3. The opposition is 1,105 words. The brief's typeface and type style comply with Fed. R. App. P. 27.

s/ Peter C. Renn
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 2, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Peter C. Renn
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