

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Plaintiff-Intervenor, Appellee,

No. 18-35347

v.

DONALD TRUMP, President of the
United States, et al.,

Defendants-Appellants.

**WASHINGTON’S OPPOSITION TO DEFENDANTS-APPELLANTS’
MOTION TO EXPEDITE ORAL ARGUMENT OR, IN THE
ALTERNATIVE, TO SUBMIT APPEAL WITHOUT ARGUMENT**

I. INTRODUCTION

Defendants-Appellants ask a motions panel of this Court to expedite a future merits panel’s consideration of their appeal of an order denying their request to dissolve a preliminary injunction that protects the status quo and preserves the constitutional rights of thousands of Washingtonians. Although Defendants-Appellants abandoned their appeal of the preliminary injunction itself, and have not requested emergency or expedited review of any other aspect of their most-recent appeal, Defendants-Appellants now request that this Court strike the hearing set two months from now and either reschedule it for later this month or forego a hearing

altogether. Defendants-Appellants proposed approach would deny the private Plaintiffs, the State of Washington, and the Court the opportunity to fully discuss and consider the constitutional issues that the Defendants' ban on open military service by transgender individuals ("the Ban") presents. The only basis Defendants-Appellants proffer for this extraordinary request is that if they lose their appeal it may be difficult for them to seek Supreme Court review on their preferred timeline. This Court should reject Defendants-Appellants' request.

II. BACKGROUND

On December 11, 2017, the U.S. District Court for the Western District of Washington issued a preliminary injunction enjoining Defendants-Appellants from "taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement" of the Ban. ER54. Defendants-Appellants appealed the preliminary injunction but then voluntarily dismissed the appeal on December 29, 2017. *See Karnoski v. Trump*, 17-36009, ECF 22 (9th Cir. Dec. 30, 2017).

Washington and private Plaintiffs filed Motions for Summary Judgment on January 25, 2018. ER9. The District Court heard argument on those motions on March 27, 2018. Four days before the hearing, Defendants-Appellants filed a Motion to Dissolve the Preliminary Injunction based on a February 22, 2018, memorandum from Defense Secretary Mattis and a March 23, 2018, directive from President

Trump. ER5-6. Defendants-Appellants argued that the 2018 materials constituted a “new” policy that was legally unrelated to the prior versions. ER11-14.

The district court ruled on the Motions for Summary Judgment and Motion to Dissolve the Preliminary Injunction together. ER30-31. After granting, in part, private Plaintiffs and Washington’s Motions for Summary Judgment, the District Court struck Defendants-Appellants’ Motion to Dissolve the Preliminary Injunction, concluding that the 2018 implementation directives “do not substantively rescind or revoke the [Ban on transgender military service] but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place.” ER12. After dismissing a claim for injunctive relief against President Trump, the district court ruled that “the preliminary injunction previously entered otherwise remains in full force and effect.” ER30.

Defendants-Appellants appealed the District Court’s striking of its Motion to Dissolve the Preliminary Injunction. Defendants-Appellants filed a Motion for Stay Pending Appeal on May 4, 2018, which a motions panel of this Court denied. *See* ECF 90. In its order, the motions panel noted that “[a] stay pending appeal ‘is an intrusion into the ordinary processes of administration and judicial review.’” *Id.* at 2 (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)). The panel then issued an order under the Circuit’s “Urgent Cases” rule directing that the appeal be “placed on the calendar for October 2018” and “heard by a panel composed of three members” of

the Ninth Circuit. *See* Order, ECF 92 (invoking Ninth Circuit General Orders 3.3(g) and (h)).

Although this Court has already expedited review of this appeal, Defendants-Appellants ask this Court to “calendar the oral argument in this matter for one of the argument sessions scheduled for August 27-31, 2018” or “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.” Mot. to Expedite Oral Argument or, in the Alternative, to Submit Appeal Without Argument (“Mot. to Expedite”) at 2, ECF 93 (emphasis added).

III. ARGUMENT

Defendants-Appellants claim that expedited review is necessary because if Defendants-Appellants lose their appeal “it will be difficult . . . to seek and obtain review during the Supreme Court’s 2018 Term absent extraordinary expedition in the Supreme Court[.]” Mot. to Expedite at 4. Defendants-Appellants’ request for a shortened review period improperly jeopardizes the merits panel’s ability to conduct measured review of the significant constitutional issues raised in the preliminary injunction appeal. The motion should be denied.

“Motions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause.” 9th Cir. R. 27-12. “‘Good cause’ includes, but is

not limited to, situations in which . . . in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot.” 9th Cir. R. 27-12. Defendants-Appellants have not shown good cause to warrant an expedited hearing as: (1) Defendants-Appellants have not litigated this appeal as an emergency or expedited matter; (2) this Court has already expedited its review of Defendants-Appellants’ appeal including setting an October 10th hearing; and (3) Defendants-Appellants’ effort to obtain faster Supreme Court review does not constitute good cause.

First, while Defendants-Appellants now ask this Court to expedite the merits panel’s appellate review, Defendants-Appellants—seemingly until now—did not see this as an urgent matter. Defendants-Appellants did not move the Court for expedited review when it filed its appeal or otherwise seek “emergency or expedited treatment.” ECF 90 at 2. Now, without identifying any change in law, fact or circumstance that would justify their sudden interest in expedited review, Defendants-Appellants ask this panel to abandon a prior panel’s decision setting a hearing in this matter. Defendants-Appellants history of litigating this matter establishes a lack of good cause for expedited hearing.

Second, pursuant to its rules governing appeals involving preliminary injunctions, this Court has already expedited review of Defendants-Appellants’ appeal. *See* 9th Cir. R. 3-3; 9th Cir. 34-3. Indeed, this Court set oral argument for

this matter for October 10, 2018—just over two months from now. *See* Notice of Oral Argument (9th Cir. July 30, 2018). Dissatisfied with the schedule imposed under the Urgent Cases rule, Defendants-Appellants instead seek a hearing during the August 27-31, 2018, calendar, which will occur just nine days after this motion is fully briefed on August 13, 2018. Defendants-Appellants’ request is impractical as further expedition of this matter is likely to result in private Plaintiffs, Washington, and the merits panel losing the opportunity to adequately prepare for the hearing—including digesting the voluminous briefing submitted by the parties and amici—in advance of the hearing. By now, a merits panel sitting in August already has a full calendar of matters to review and consider in advance of argument. Adding this appeal—and the important constitutional questions it raises—risks that the merits panel will be unduly pressured for time as it reviews an additional record and set of multi-party briefs.

Defendants-Appellants’ alternative request that this Court forego a hearing on this matter altogether would deny Washington the ability to defend the preliminary injunction that protects transgender Washingtonians and Washington State from Defendants-Appellants’ discriminatory Ban. Such a request minimizes the importance of the constitutional rights of thousands of Washingtonians that are implicated by this lawsuit. And, to the extent that Defendants-Appellants’ request to forego argument carries an implied request that the merits panel decide the case on

a prescribed timeline, that request is also improper, particularly where there is no reason to suspect that the merits panel will unduly delay in deciding the appeal.

Third, the only argument Defendants-Appellants offer to support their claim of good cause to expedite or forego the October 10th hearing is their purported concern that if Defendants-Appellants lose their appeal “it will be difficult for the government . . . to seek and obtain review during the Supreme Court’s 2018 Term” which would mean that “the military’s 2018 policy could remain enjoined for more than a year[.]” Mot. to Expedite at 4. The potential that, after reviewing the briefs, record below, and the arguments of the parties, the merits panel affirms the preliminary injunction cannot constitute good cause to alter this Court’s process for adjudicating claims before it. Instead, a ruling affirming the preliminary injunction would simply be the lawful exercise of this Court’s authority and mandate to protect constitutional rights.

Further, even if this Court affirms the preliminary injunction—an outcome Defendants-Appellants appear to assume—they are not without remedy. As they acknowledge, Defendants-Appellants can seek “expedition in the Supreme Court.” Mot. to Expedite at 4. That remedy is sufficient, and makes more sense than the remedy they now request: shortening time or canceling the hearing based on layers of prediction about how this appeal may be resolved, and whether the Supreme Court will respond favorably to a subsequent petition for *certiorari*, and when the Supreme

Court may calendar the case.

VI. CONCLUSION

Defendants-Appellants' request to expedite or abandon the October 10, 2018, hearing should be denied.

RESPECTFULLY SUBMITTED this 2nd day of August, 2018.

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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 1,535 words. The brief's typeface and type style comply with Fed. R. App. P. 27.

s/ La Rond Baker

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. Service of such filing will be accomplished by the CM/ECF system upon all participants.

s/ La Rond Baker

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