

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.

REPLY IN SUPPORT OF MOTION TO EXPEDITE ORAL ARGUMENT

As our motion explained, there is good cause for further expediting argument in this case. This appeal concerns a preliminary injunction against a military policy announced by the Secretary of Defense following an extensive review by a panel of military experts. The government promptly appealed from the preliminary injunction against this new policy and filed briefs on an expedited schedule pursuant to Circuit Rule 3-3. Although the government did not move at the outset for expedited argument, it moved instead for a stay pending appeal. This Court did not act on the stay until after briefing on the merits was complete, at which point it denied the stay and announced that argument would be heard in October 2018. The government then promptly moved to expedite oral argument, in light of the significant continuing harm

posed by the preliminary injunction preventing the military from implementing its new policy, and to give the Supreme Court the opportunity to consider these issues next Term. We requested that this Court hold argument for one of the argument sessions scheduled for August 27-31, 2018 (or at a special argument session around the same time) or, in the alternative, that this Court decide the appeal without oral argument to ensure that a decision could be issued as expeditiously as possible, and no later than December 2018.

Recent developments, however, require modification of the government's request. On August 1, 2018, after the motion to expedite had been filed, the government filed a petition for a writ of mandamus and stay motion with respect to the district court's July 27, 2018, discovery order, which imposed extraordinary discovery obligations on the President and the military, including the creation of a "document-by-document" privilege log on behalf of the President as well as the wholesale production of thousands of documents withheld under the deliberative process privilege, including over 19,000 from the Office of the Secretary of Defense alone. *See In re Trump*, No. 18-72159. The government requested that this Court either order the district court to vacate the July 27 order or, at a minimum, stay the requested discovery until the Court resolves the present appeal. This Court docketed the mandamus petition and granted a temporary stay of the discovery order. D.E.4, *In re Trump*, No. 18-72159 (Aug. 2, 2018). Under this Court's briefing schedule, briefing on the mandamus petition will be completed on August 28, 2018, and argument is scheduled

to take place on October 10, 2018, before the same panel assigned to the present appeal. D.E.4-5, *In re Trump*, No. 18-72159 (Aug. 2, 2018).

Given that the panel evidently wishes to hear argument on the mandamus petition, and that briefing on that petition will not be completed until August 28, the government understands that it would be impracticable to hold oral argument during the August 27-31 argument session. The government thus modifies its motion to request that this Court hold argument during the September 10-14 argument session (or a special argument session around the same time); the government no longer requests that this Court decide the appeal without argument.

Granting the government's motion to expedite oral argument on these terms would not require this Court to sacrifice "careful deliberation," as plaintiffs suggest. Opp. 2. To the contrary, an earlier argument date would give this Court ample time to consider the briefs prior to argument (namely, at least 55 days after the preliminary-injunction reply brief was filed, and 13 days after the mandamus reply brief will be filed), while also ensuring that the panel has sufficient time following oral argument to issue a decision by December 2018, giving the Supreme Court the opportunity to consider these issues next Term. In cases of such importance, this Court has recently and repeatedly heard oral argument on equally or more expedited schedules. *See, e.g., Hawaii v. Trump*, No. 17-17168 (7 days between reply brief and argument); *In re United States*, No. 17-72917 (13 days between reply brief and argument); *Regents of Univ. of Cal. v. DHS*,

Nos. 18-15068 *et al.* (28 days between reply brief and argument, and only 4 days between supplemental briefs and argument).

Even plaintiffs recognize “[t]he importance of the issues at stake,” proving that it is far from “speculat[ive]” that the Supreme Court may wish to consider any petition for a writ of certiorari that may be filed by either side. Opp. 2; *see also* S. Ct. R. 10(c) (considering whether a “court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court”). This Court need not and should not now “predict[]” anything about what it will decide on the merits or how the Supreme Court will react. Opp. 1. This Court should simply recognize that it is responsible and prudent to preserve *the opportunity* for the Supreme Court to decide in an orderly fashion whether it will choose to review the case during the upcoming Term, particularly given that the case involves an injunction against a military policy announced by the Secretary of Defense.

Under plaintiffs’ proposed approach, it would be difficult for the Supreme Court to hear the case during the 2018 Term absent extremely expedited treatment, thus foreclosing the military from implementing its new policy for more than a year. That is a reason to grant the government’s motion, not to deny it. Moreover, as the government recently argued in its petition for a writ of mandamus, resolution of this appeal will inform the scope and extent of discovery in district court, and thus a prompt resolution of the appeal is in the interests of all parties to this litigation. It is therefore *plaintiffs’* proposal that threatens to deprive the panel of sufficient time following oral

argument to engage in “careful deliberation” while still preserving the possibility of prompt Supreme Court review.

In all events, even if this Court decides to hold argument on October 10, the government respectfully requests that the panel make every effort to issue a decision by December 2018.

CONCLUSION

The government respectfully requests that this Court grant the motion to expedite by ordering argument to be held during the September 10-14 argument session (or a special argument session around the same time).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 1,043 words. This Reply 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/ Tara S. Morrissey
Tara S. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2018, I 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. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
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