

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,

v.

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

No. 18-35347

In re DONALD J. TRUMP, et al.,

DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
SEATTLE,

Respondent,

RYAN KARNOSKI, et al.,
Real Parties in Interest.

No. 18-72159

MOTION FOR ADDITIONAL AND SEPARATE ARGUMENT TIME

On October 10, 2018, a panel of this Court will hear oral argument in two related proceedings arising from *Karnoski v. Trump*, Civ. No. 17-1297 (W.D. Wash.). These proceedings include the government's appeal from a preliminary injunction and the

government's petition for a writ of mandamus. Currently, these cases are scheduled for oral argument together, for a combined total of 20 minutes per side. Because each proceeding raises important issues, and because the government would like to have separate counsel present argument in each case, we respectfully request that this Court grant additional argument time and designate separate arguments for each case.

1. This Court is scheduled to hear oral argument in two related proceedings arising from the district-court litigation in *Karnoski v. Trump*, Civ. No. 17-1297 (W.D. Wash.). Case Number 18-35347 is the government's appeal from a preliminary injunction against the Department of Defense's 2018 policy regarding military service by transgender individuals. Case Number 18-72159 is the government's petition for a writ of mandamus, which challenges discovery orders issued by the district court. In July, this Court scheduled the preliminary-injunction appeal for argument on October 10, 2018, allotting 20 minutes per side. *See* Docket Entry, *Karnoski v. Trump*, No. 18-35347 (July 30, 2018). After the government filed its mandamus petition in August, this Court determined that oral argument on the petition is warranted, added the petition to the October 10 argument calendar, and indicated that it would be argued with the preliminary-injunction appeal. Docket Entry, *In re Trump*, No. 18-72159 (Aug. 2, 2018).

2. Each of these proceedings raises important issues. The government's appeal will address whether the district court erred in issuing a nationwide preliminary injunction barring the implementation of the Department of Defense's 2018 policy regarding military service by transgender individuals. The government's mandamus

petition is closely related to the appeal, because the discovery orders at issue are premised on the district court's analysis of the merits of the case. But the mandamus petition also raises several important legal issues that warrant oral argument in their own right, including whether mandamus relief is warranted when a district court orders the President to “‘bear the burden’ of invoking executive privilege with sufficient specificity and of making particularized objections” to overbroad discovery requests, contrary to the Supreme Court's decision in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 381-82, 385 (2004), and whether the district court erred in ordering disclosure of thousands of documents withheld under the deliberative process privilege. In light of the important issues raised in each proceeding, the government proposes to have separate counsel present oral argument on the preliminary-injunction appeal and the mandamus petition.

3. The government respectfully requests that the Court grant additional argument time and designate separate arguments for each case, so that the parties and this Court may devote appropriate attention to the important issues at stake in each proceeding. The government defers to the Court's preferred allocation of argument time between the appeal on the merits and the petition for a writ of mandamus, but suggests that the Court may wish to allocate at least 15 minutes per side for each case. Doing so will permit an orderly opportunity for the parties to present argument and address the Court's questions on the distinct questions raised in each case.

Alternatively, if this Court does not grant separate argument time in each proceeding, it should, at a minimum, increase the total argument time to at least 30 minutes per side. Each side can then determine how to allocate its time with respect to each proceeding. If the Court takes this approach, the government proposes to designate two attorneys for oral argument, who will divide the government's time to allow one attorney to address each case. *See* Guidelines for Oral Argument 2 (Sept. 2016) (providing that “[i]f there will be more than one attorney . . . arguing on one side of [a] case, the attorneys on that side will be required to share the total time allowed for that side” and advising that counsel must indicate agreed-upon time allotment on acknowledgment of hearing notice).¹

4. If this motion is denied, the government proposes to divide its current 20 minutes of allotted time between two attorneys, with one attorney addressing each case. Counsel understands that each government attorney should submit a separate acknowledgment of hearing notice, and that the notices should indicate how time will be allotted. *See* Guidelines for Oral Argument 2.

5. Counsel for the government has contacted counsel for plaintiffs and the State of Washington, who authorized government counsel to state their position as follows: Plaintiffs and Washington agree that the Court and the parties may benefit from bifurcating (1) oral argument on the appeal from the denial of the motion to dissolve

¹ *Available at* http://cdn.ca9.uscourts.gov/datastore/uploads/forms/hearing_notice/ntc_hear.pdf.

the preliminary injunction and (2) oral argument on the petition for a writ of mandamus. They defer to the Court as to how many minutes it wishes to allocate to each issue. Plaintiffs and Washington believe that the existing time allotted by the Court of 20 minutes per side (for both issues) is sufficient.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court grant additional argument time and designate separate arguments for each case.

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 888 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/ Tara S. Morrissey
Tara S. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 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/ Tara S. Morrissey
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