

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.

**RESPONSE TO NOTICE OF WITHDRAWAL OF PLAINTIFFS-
APPELLEES AND WASHINGTON'S OPPOSITION
TO VACATUR AND REMAND**

All parties agree that, “[i]n light of the Supreme Court’s order” staying the preliminary injunction, “vacatur” of that injunction is warranted. Notice at 1. But the request by the *Karnoski* plaintiffs and Washington (collectively, plaintiffs) that this Court therefore simply “enter a summary order vacating the preliminary injunction and remanding to the district court for further proceedings,” *id.* at 2, is misguided and should be rejected.

As plaintiffs acknowledge, the government’s mandamus petition “remains pending” before this Court. Notice at 1 n.1. As previously explained, the discovery order at issue in that petition hinges on key premises of the district court’s preliminary-

injunction order at issue in this appeal. Such premises include, for example, the district court's erroneous assumptions that strict scrutiny applies, that the Mattis policy is not a new policy, and that the military must prove that its process was sufficiently deliberative and independent to receive deference. Pet. 18-21; Mandamus Reply 14-17. This Court should resolve these overlapping merits issues in the context of ruling on the preliminary-injunction appeal, which would both inform the resolution of the mandamus petition and determine the scope of any discovery going forward, thereby reducing the likelihood that future emergency appellate relief will be necessary. For instance, if this Court does not correct the district court's assumption that the Mattis policy is merely the implementation of the President's tweets and memorandum from 2017, plaintiffs might seek additional discovery of the President and his communications. Indeed, in the related case of *Doe 2 v. Shanahan*, No. 1:17-cv-01597-CKK (D.D.C. Jan. 30, 2019) (ECF 188), the district court denied without prejudice discovery requests similar to the ones at issue here after the D.C. Circuit, in the course of resolving a similar preliminary-injunction appeal, ruled that the Mattis policy was a new policy.

Mandamus petition aside, a decision in this appeal addressing these critical premises would affect the course of any further proceedings on the merits. Absent a ruling from this Court correcting these fundamental errors, the district court will proceed on the false premises that the Mattis policy is not a new policy, that it triggers strict scrutiny, and that it does not warrant military deference unless the government

can make certain factual showings. In fact, the district court already has ruled as a matter of summary judgment that the Mattis policy is subject to strict scrutiny. ER20-24, 30-31. Unless this Court addresses that error now, it will significantly affect any final resolution of the merits in the district court. Especially given that this Court already has received full briefing and argument on such critical issues, it should resolve them at this time. Indeed, it is not apparent that this Court even has the ability to vacate a preliminary injunction on appeal simply because plaintiffs belatedly have attempted to avoid a merits ruling by unilaterally withdrawing their opposition to vacatur. *Cf. U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) (party who settles a case while it is on appeal is not entitled to vacatur of the underlying order). In all events, for the reasons discussed in this filing and in the government's previous briefs, the government respectfully requests that this Court issue a reasoned decision vacating the district court's preliminary injunction.

Respectfully submitted,

JOSEPH H. HUNT

Assistant Attorney General

HASHIM M. MOOPPAN

Deputy Assistant Attorney General

s/ Brinton Lucas

BRINTON LUCAS

Counsel to the Assistant Attorney General

MARLEIGH D. DOVER

TARA S. MORRISSEY

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice, Room 7261

950 Pennsylvania Ave., NW

Washington, DC 20530

202-353-9018

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 541 words. This Response 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/ Brinton Lucas
Brinton Lucas

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2019, 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/ Brinton Lucas
Brinton Lucas