



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm. 7261
Washington, D.C. 20530-0001

MDD:MRF:CHDorsey:TMorrissey

Tara S. Morrissey
Tara.S.Morrissey@usdoj.gov

Tel: (202) 353-9018
Fax: (202) 514-8151

June 18, 2018

VIA CM/ECF

Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Stay Motion in *Karnoski v. Trump*, No. 18-35347

Dear Ms. Dwyer,

In connection with the government's motion for a stay pending appeal filed in this Court on May 4, 2018, the government submits this letter to notify the Court that the district court has denied the government's motion for a stay pending appeal, which was filed in the district court on April 30, 2018. A copy of the order is attached. The motion filed in this Court remains pending.

Sincerely,

s/ Tara S. Morrissey
Tara S. Morrissey
Attorney for Appellants

cc: Counsel of Record (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Tara S. Morrissey

Tara S. Morrissey

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI,

Plaintiff,

v.

DONALD J. TRUMP,

Defendant.

CASE NO. C17-1297-MJP

ORDER DENYING MOTION TO
STAY PRELIMINARY
INJUNCTION

THIS MATTER comes before the Court on Defendants’ Motion to Stay the Preliminary Injunction Pending Appeal. (Dkt. No. 238.) Having reviewed the Motion, the Responses (Dkt. Nos. 250, 257), the Reply (Dkt. No. 261), the Jurisdictional Briefing (Dkt. Nos. 275, 276, 277) and all related papers, the Court DENIES the Motion.

Background

On December 11, 2017, the Court issued a nationwide preliminary injunction barring Defendants 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 a policy

1 injunction, even pending appeal, in order to preserve the status quo or ensure compliance with its
2 earlier orders.” Doe v. Trump, 284 F. Supp. 3d 1172 (W.D. Wash. 2018) (citing Nat. Res. Def.
3 Council, Inc. v. Southwest Marine, Inc., 242 F.3d 1163, 1166 (9th Cir. 2001)). The Court’s
4 exercise of jurisdiction may not “adjudicate anew the merits of the case” nor “materially alter the
5 status of the case on appeal.” Southwest Marine, 242 F.3d at 1166.

6 **II. Motion to Stay**

7 A stay pending appeal “is an intrusion into the ordinary processes of administration and
8 judicial review.” Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and
9 citation omitted). In determining whether to grant a stay, the Court considers: (1) whether
10 Defendants have made a strong showing that they are likely to succeed on the merits; (2) whether
11 Defendants will be irreparably injured absent a stay; (3) whether a stay will substantially injure
12 Plaintiffs and Washington; and (4) whether the public interest supports a stay. Id. at 434.

13 **A. Likelihood of Success on the Merits**

14 The Court finds that Defendants have not made a “strong showing” that they are likely to
15 succeed on the merits of their appeal.

16 First, each of the arguments raised by Defendants already has been considered and
17 rejected by the Court, and Defendants have done nothing to remedy the constitutional violations
18 that supported entry of a preliminary injunction in the first instance. Instead, Defendants
19 attempt, once again, to characterize the Implementation Plan and 2018 Memorandum as a “new
20 and different” policy, distinct from the one this Court and others enjoined. (See Dkt. No. 261 at
21 3.) The Court was not persuaded by this argument before, and it is not persuaded now.

22 Second, while Defendants claim—without explanation—that “the Ninth Circuit and/or
23 this Court ultimately . . . are highly likely to conclude that significant deference is appropriate”
24

1 (Dkt. No. 238 at 5), whether *any* deference is due remains unresolved. (See Dkt. No. 233 at
2 24-27.) Defendants bear the burden of providing a “genuine” justification for the Ban. To
3 withstand judicial scrutiny, that justification must “describe actual state purposes, not
4 rationalizations” and must not be “hypothesized or invented *post hoc* in response to litigation.”
5 United States v. Virginia, 518 U.S. 515, 533, 535-36 (1996); see also Sessions v.
6 Morales-Santana, 137 S.Ct. 1678, 1696-97 (2012). To date, Defendants have steadfastly refused
7 to put before the Court evidence of any justification that predates this litigation. (See Dkt. No.
8 211.)

9 Finally, the Court notes that the Ban currently is enjoined by four separate courts. See
10 Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 747 (D.
11 Md. 2017); Stockman v. Trump, No. 17-cv-1799-JGB-KK, Dkt. No. 79 (C.D. Cal. Dec. 22,
12 2017). As a practical matter, Defendants face the challenge of convincing each of these courts to
13 lift their injunctions before they may implement the Ban.

14 **B. Likelihood of Irreparable Harm**

15 The Court finds that Defendants have not shown that they will be irreparably harmed
16 without a stay. Defendants contend that unless stayed, the injunction “will irreparably harm the
17 government (and the public) by compelling the military to adhere to a policy it has concluded
18 poses substantial risks.” (Dkt. No. 238 at 2.) In particular, Defendants contend that allowing
19 transgender people to serve openly—as they have for nearly two years—threatens to “undermine
20 readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not
21 conducive to military effectiveness and lethality.” (Id. at 3.)

22 Since the preliminary injunction has been in effect, the Senate Committee on Armed
23 Services has heard testimony from high-ranking military officials on the effect of open service
24

1 by transgender people. Army Chief of Staff General Mark Milley testified that he “monitor[s]
2 very closely” the situation and had received “precisely zero” reports of problems related to unit
3 cohesion, discipline, and morale. (Dkt. No. 255, Ex. 14 at 6.) Chief of Naval Operations
4 Admiral John Richardson testified that he, too, had received no negative reports, and that in his
5 experience, “[i]t’s steady as she goes.” (Dkt. No. 255, Ex. 15.) As this testimony makes clear,
6 Defendants’ hypothetical and conclusory claims are unsupported by evidence and do not
7 establish a likelihood of irreparable harm.

8 **C. Injury to Plaintiffs and Washington and Impact on Public Interest**

9 Having found that Defendants have not established either a likelihood of success on the
10 merits or a likelihood of irreparable harm absent a stay, the Court need not reach these remaining
11 factors. See Washington v. Trump, 847 F.3d at 1164. However, the Court also finds that these
12 factors do not support entry of a stay.

13 The Court already found that Plaintiffs and Washington are likely to suffer irreparable
14 injury absent a preliminary injunction, and for the same reasons, will be injured by a stay. (See
15 Dkt. No. 103 at 20-21.) Further, maintaining the injunction pending appeal advances the
16 public’s interest in a strong national defense, as it allows skilled and qualified service members
17 to continue to serve their country.

18 **D. Scope of the Preliminary Injunction**

19 The Court declines to stay the preliminary injunction insofar as it grants nationwide
20 relief. While Defendants contend that the injunction should be limited to the nine Individual
21 Plaintiffs (Dkt. No. 238 at 2), the Court disagrees. The scope of injunctive relief is to be
22 “dictated by the extent of the violation established.” Califano v. Yamasaki, 442 U.S. 682, 702
23
24

1 (1979). The Ban, like the Constitution, would apply nationwide. Accordingly, a nationwide
2 injunction is appropriate.

3 **Conclusion**

4 Because Defendants have not established that a stay of the preliminary injunction is
5 appropriate, the Court DENIES Defendants’ Motion. The status quo shall remain “steady as she
6 goes,” and the preliminary injunction shall remain in full force and effect nationwide.

7 The clerk is ordered to provide copies of this order to all counsel.

8 Dated June 15, 2018.

9 

10 The Honorable Marsha J. Pechman
11 United States Senior District Court Judge