

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

AIDEN STOCKMAN, *et al.*,

Plaintiffs-Appellees,

STATE OF CALIFORNIA,

Intervenor-Plaintiff-Appellee,

v.

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

Defendants-Appellants.

No. 18-56539

**GOVERNMENT'S MOTION TO HOLD THE
BRIEFING SCHEDULE IN ABEYANCE PENDING
RESOLUTION OF RELATED NINTH CIRCUIT PROCEEDINGS**

The government respectfully requests that the Court hold the briefing schedule in abeyance pending the resolution of *Karnoski v. Trump*, No. 18-35347 (9th Cir. argued Oct. 10, 2018), including any proceedings before the Supreme Court in that case. Counsel for the government has corresponded with counsel for plaintiffs and counsel for the intervenor-plaintiff, and those parties have not yet indicated their position on holding the briefing schedule in abeyance. In support of the motion, counsel states as follows:

1. This appeal arises from plaintiffs' action challenging the military's policy regarding service by transgender individuals. In December 2017, the district court

entered a preliminary injunction enjoining multiple directives of a 2017 presidential memorandum concerning such service. Doc. 79. In March 2018, in light of a new policy recommended by a panel of experts and approved by Secretary of Defense James Mattis, the President “revoke[d]” his 2017 memorandum “and any other directive” on military service by transgender individuals. Out of an abundance of caution, the government moved to dissolve the prior preliminary injunction to allow the military to safely adopt its recent 2018 policy.

2. On September 18, 2018, the district court denied the motion and concluded instead that the 2018 policy is a continuation of the same “challenged conduct” at issue in the 2017 presidential memorandum. Doc. 124, at 9.

In the decision below, the district court observed that this Court is currently reviewing a decision in the “similar case” of *Karnoski v. Trump*, No. 18-35347 (9th Cir.), which also involves a challenge to the military’s policy on transgender individuals. Doc. 124, at 6. In *Karnoski*, as in this case, a district court refused to dissolve a prior preliminary injunction to permit the military to adopt its 2018 policy. *See Karnoski v. Trump*, No. 17-1297, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018). As the district court here explained, “the Ninth Circuit has begun the process of reviewing the *Karnoski* decision, including the order upholding the preliminary injunction and striking defendants’ motion to dissolve.” Doc. 124, at 6-7.

Indeed, by the time the district court in this case had ruled on the government’s motion (on September 18, 2018), the *Karnoski* appeal had been fully briefed for more

than two months (on July 17, 2018). *See* Gov't Reply, *Karnoski*, No. 18-35347 (9th Cir.), Doc. 88. Furthermore, at the time of the district court's order, oral argument in *Karnoski* had already been set for October 10, 2018—roughly three weeks away. *See* Notice of Oral Argument, *Karnoski*, No. 18-35347 (9th Cir.), Doc. 95. That argument proceeded as scheduled.

3. The *Karnoski* appeal pending before this Court presents substantially the same legal issues as the present appeal in a similar procedural posture. This appeal, like *Karnoski*, will raise questions such as whether the 2018 policy is “substantially the same as” the 2017 presidential memorandum, whether principles of military deference apply, whether the 2018 policy survives constitutional review, and whether a nationwide preliminary injunction is improper. Doc. 124, at 7-13.

Under these circumstances, this Court should place the briefing schedule in abeyance pending final resolution of *Karnoski*. Regardless of the outcome, a decision by this Court in *Karnoski* would be binding circuit precedent that would control this appeal. That decision will likely resolve or, at a minimum, substantially redefine, the issues in this case. This Court may therefore properly “find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (quoting *Leyva v. Certified Grocers of California, Ltd.* 593 F.2d 857, 863-64 (9th Cir. 1979)).

Moreover, any additional briefing in this case will at best prove duplicative of the briefing in *Karnoski*, presenting again the same issues for this Court to resolve. At worst, any briefing will be superseded by this Court's decision in *Karnoski*, resulting in the parties briefing this appeal a second time under newly controlling circuit precedent. This Court's pending disposition of *Karnoski* is precisely why the government has not sought to expedite this appeal and has not requested to brief it alongside *Karnoski*, so as to spare the parties the burden of duplicative and potentially obsolete briefing. If anything, had the government sought to consolidate or otherwise combine the two related appeals in this Court, that process would have only delayed the resolution of the earlier *Karnoski* appeal—which had long since finished with briefing and was approaching oral argument—and, hence, delayed the resolution of the important military issues present in each of these two cases. Holding the briefing schedule in this appeal in abeyance pending *Karnoski* (and any Supreme Court review of that case) remains the most efficient means for this Court to resolve this case.

4. Additionally, on November 7, 2018, the government informed the *Karnoski* panel that in light of the critical military interests at stake, the Solicitor General has determined that the government would need to seek the Supreme Court's review in *Karnoski* by November 23, 2018 in order to preserve the Supreme Court's ability to hear and decide the case this Term. *See* Gov't Letter, *Karnoski*, No. 18-35347 (9th Cir.), Doc. 124. Therefore, if the panel has not resolved *Karnoski* by that time, the government will file a petition for a writ of certiorari before judgment. *Id.* If the panel has resolved the

case and the government does not prevail, the government likely will file a petition for a writ of certiorari to review the judgment. *Id.*

In light of the nationwide scope of the injunctions at issue, the government also plans to file a petition for a writ of certiorari before judgment in the related case of *Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.), as well as in the present case. These petitions will afford the Supreme Court the opportunity to consider all pending appeals of preliminary-injunction decisions enjoining the 2018 policy on a nationwide basis.

An abeyance of the briefing schedule in this case is warranted regardless of whether the Supreme Court ultimately grants the petitions for certiorari. If the Supreme Court denies the petitions, an abeyance pending this Court's resolution of *Karnoski* is warranted because a decision in that case will control the present appeal, and an abeyance of the briefing schedule therefore remains the most efficient means of resolving this appeal. And if the Supreme Court grants one or more petitions, an abeyance is equally warranted because any decision by the Supreme Court would control this Court's resolution of both *Karnoski* and the present appeal.

5. The government has corresponded with counsel for plaintiffs and counsel for the intervenor-plaintiff, the State of California, who have not yet indicated their position on holding the briefing schedule in abeyance.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court hold the briefing schedule in abeyance pending resolution of *Karnoski v. Trump*, No. 18-35347 (9th Cir. argued Oct. 10, 2018), including any proceedings before the Supreme Court in that case.

Respectfully submitted,

JOSEPH H. HUNT

Assistant Attorney General

HASHIM M. MOOPPAN

Deputy Assistant Attorney General

BRINTON LUCAS

Counsel to the Assistant Attorney General

MARK R. FREEMAN

MARLEIGH D. DOVER

s/ Tara S. Morrissey _____

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 Motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 1,193 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 November 20, 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
Tara S. Morrissey