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 U.S., *et al.*,
Defendants-Appellants.

Case No. 18-56539

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Equality California certifies that is has no shareholders or interests because it is a not for profit corporation organized under 26 U.S.C. § 501(c)(4).

Dated: November 30, 2018

Respectfully submitted,

/s/ Adam S. Sieff
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Plaintiffs-Appellees Aiden Stockman *et al*. oppose the government's motion to stay briefing pending resolution of *Karnoski v. Trump*, No. 18-35347 (9th Cir. argued Oct. 10, 2018). In effect, the government seeks an order commanding Plaintiffs-Appellees to stand aside while important issues relating to their fundamental rights are potentially determined in *Karnoski* by different parties, in different proceedings, and on the basis of distinct facts, solely to avoid the possibility of "duplicative and potentially obsolete briefing." (Defs.' Mot. to Hold Briefing Schedule in Abeyance ("Mot.") at 4, Dkt. No. 11.)

In fact, if this Court were to stay briefing and the Supreme Court were to depart from its typical practice and review the *Karnoski* case on certiorari before judgment, then important issues affecting the disposition of this case might actually become settled without giving Plaintiffs-Appellees an opportunity to litigate their own claims. (*See* Defs.' Pet. for Cert. Before J., *Trump v. Stockman*, No. 18-678 at 14 (filed U.S. Nov. 23, 2018) (contending that the Supreme Court may "prefer to grant certiorari in *Karnoski* over this case," and simply "hold this petition pending resolution of the *Karnoski* petition").) Such a result would prejudice Plaintiffs-Appellees.

This Court has a "virtually unflagging" obligation to require the government to brief the appeal it has elected to pursue in this action and to reject the government's motion. *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) ("[W]hen a

federal court has jurisdiction, it also has a 'virtually unflagging obligation to exercise' that authority") (citations and internal marks omitted); *see also Minucci v. Agrama*, 868 F.2d 1113, 1115 (9th Cir. 1989) (explaining that "stays" to avoid duplicative litigation are "permitted only in exceptional circumstances" because of this rule). "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Any party who asks a court to abandon this obligation "must make out a clear case of hardship or inequity in being required to go forward if there is even a fair possibility that" a pause in process "will work damage to someone else." *Id*.

There is no such hardship or inequity here. The government's motion is predicated on the assumption that *Karnoski* and this case "present[] substantially the same legal issues . . . in a similar procedural posture" and that holding briefing in abeyance would therefore be "efficient." (Mot. at 3.) Even if that premise were correct, the mere possibility of duplicative briefing is not a sufficient basis to thwart a plaintiff's right to prosecute his or her own claims. At most, permitting briefing to proceed in this case risks only the possibility that the *Karnoski* panel or the Supreme Court may render a judgment that requires the parties to file supplemental briefing. It is inappropriate to stay litigation in these circumstances. *See Agcaoili v. Gustafson*, 844 F.2d 620, 624, 625 (9th Cir. 1988), *opinion*

withdrawn for unrelated reasons, 870 F.2d 462 (9th Cir. 1989) ("If the Supreme Court ultimately reverses, the extent of any injury will consist of no more than duplicative litigation. . . . Because the harm in proceeding is relatively minor, but the harm in not proceeding may be to deny some of the plaintiffs relief, we find that the district court abused its discretion in staying the action.").

Moreover, the government's premise that this case and *Karnoski* raise the same legal issues in a similar procedural posture is incorrect. While *Karnoski* and this litigation raise overlapping legal issues, the procedural posture of the two cases, and the records on appeal, are distinct. Procedurally, because the Western District of Washington struck without deciding the government's motion to dissolve the preliminary injunction in *Karnoski*, *see* 2018 WL 1784464 at *14 (W.D. Wash. Apr. 13, 2018), the *Karnoski* appeal presents somewhat different questions than those presented here. *Cf. Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Cal. 2018) (denying the government's motion to dissolve the preliminary injunction after comprehensive analysis). In fact, the government has argued that these differences could be dispositive. (*See* Appellants' Opening Br., *Karnoski v. Trump*, No. 18-35347 at 16-17, 40, 45 ("Karnoski Appellants' Br.") (filed 9th Cir. May 29, 2018) (claiming that the ruling in *Karnoski* was procedurally improper).)

The respective factual records are also significantly different. As the government explained in its opening brief in *Karnoski*, the order under review in

that case emanates from a motion filed "before the parties had even submitted a discovery plan," let alone taken discovery. (*See* Karnoski Appellants' Br. at 14.) Not so here. The *Karnoski* record thus does not include many documents produced by the government in this litigation that form part of the record on appeal in this action, as well as declarations and supporting exhibits that the district court in this case considered when it issued the order that is the subject of this appeal. (*See, e.g.*, *Stockman v. Trump*, No. 5:17-CV-01799, Dkt. Nos. 99-2, 100, 100-8, 101, 102 (filed C.D. Cal. April 25, 2018).) Because this Court will review the underlying orders in *Karnoski* and this case for an abuse of discretion, *see Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1126 n.7 (9th Cir. 2005), the distinct factual records supporting the two decisions are yet another reason that the outcome of *Karnoski* will not necessarily dispose of the issues in this case. Staying briefing here thus is unlikely to economize case management, even if efficiency alone were a sufficiently compelling basis for a stay, which it is not.

For all of these reasons, the government has failed to show that resolution of *Karnoski* will resolve the issues in this case, let alone that the government would suffer any hardship or injustice from having to prosecute in a timely manner an appeal that it initiated. To the contrary, it is Plaintiffs-Appellants who will suffer hardship from any delay in the resolution of their claims, which seek to prevent

further violations of their fundamental constitutional liberties. Plaintiffs-Appellees respectfully request an order denying the government's motion.

Dated: November 30, 2018

Respectfully submitted,

/s/ Adam S. Sieff
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9th Circuit Case Number(s) 18-56539

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