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 REPLY IN SUPPORT OF ITS MOTION TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE PENDING RESOLUTION OF RELATED NINTH CIRCUIT PROCEEDINGS

The original plaintiffs and intervenor-plaintiff State of California (collectively, "plaintiffs") do not dispute that the resolution of *Karnoski v. Trump*, No. 18-35347 (9th Cir. argued Oct. 10, 2018), by this Court or the Supreme Court, will result in controlling precedent. Indeed, the original plaintiffs admit that "important issues affecting the disposition of this case might actually become settled" in *Karnoski* and that the two cases "raise overlapping legal issues." Pls. Opp. 1, 3. Likewise, California concedes (Opp. 2) that "potentially dispositive issues important to the State may be decided in" *Karnoski*. Plaintiffs' concessions only underscore that an abeyance of the briefing schedule pending resolution of *Karnoski* is warranted. Moreover, plaintiffs will suffer no

prejudice from an abeyance, which is the most efficient way for the Court to resolve this appeal.

1. This Court's decision in *Karnoski*—as well as any decision by the Supreme Court—will be binding precedent that controls this appeal, regardless of how *Karnoski* is ultimately decided. Both this appeal and *Karnoski* involve constitutional challenges to the policy on military service by transgender individuals announced in March 2018 by Secretary of Defense James Mattis. Plaintiffs do not even attempt to dispute the government's contention that the *Karnoski* appeal encompasses the issues in this case, including whether the 2018 policy is "substantially the same as" an earlier 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; *see* Gov't Mot. 2-3 (raising these issues). Nor do they dispute that the district court itself acknowledged the relationship between this case and *Karnoski*, which the court described as "a similar case" in which the government has "made several of the same arguments advanced here." Doc. 124, at 6; *see* Gov't Mot. 2. At a minimum, there is no dispute that *Karnoski* will substantially redefine the contours of this appeal.

Plaintiffs lament that "important issues affecting the disposition of this case might actually become settled" in *Karnoski* "without giving [them] an opportunity to litigate their own claims" in this Court. Pls. Opp. 1; *see* Cal. Opp. 2 (arguing that an abeyance "would delay the State's ability to present its own arguments, while potentially

dispositive issues important to the State may be decided in other proceedings"). But the *Karnoski* appeal was docketed seven months ago, and the parties presented oral argument nearly two months ago. There is thus every reason to believe that a decision in *Karnoski* will precede oral argument and a decision in the present appeal, even if the briefing schedule is not held in abeyance. Indeed, the government has requested that the *Karnoski* panel issue a decision by early January. Plaintiffs' grievance reduces to an objection that this Court (or the Supreme Court) may decide *Karnoski* first. But they have no cognizable interest in deferring resolution of *Karnoski* so that they can proceed with their own appeal in the absence of binding precedent. Plaintiffs' sole complaint is that the judicial process, functioning properly, produces controlling case law that impacts pending cases.

2. Contrary to plaintiffs' contention (Pls. Opp. 2), courts of appeals routinely exercise their discretion to grant abeyances of the briefing schedule pending the disposition of related appeals within the same circuit. *See, e.g.*, Order, *Kidd v. TSA*, No. 16-1337 (D.C. Cir. Jan. 11, 2017) (abeyance pending *Competitive Enter. Inst. v. TSA*, Nos. 16-1135 (D.C. Cir.)); Order, *March for Life v. Burwell*, No. 15-5301 (D.C. Cir. June 17, 2016) (abeyance pending *Priests for Life v. HHS*, No. 13-5368 (D.C. Cir.)); Order, *Christian & Missionary All. Found., Inc. v. Secretary of HHS*, No. 15-11437 (11th Cir. Apr. 12, 2016) (abeyance pending *Eternal Word Television Network, Inc. v. Secretary of HHS*, No. 14-12696 (11th Cir.)); Order, *Armstrong v. Sebelius*, No. 13-1218 (10th Cir. June 20, 2013) (abeyance pending *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.)); Order,

American Pulverizer Co. v. HHS, No. 13-1395 (8th Cir. Feb. 26, 2013) (abeyance pending *O'Brien v. HHS*, No. 12-3357 (8th Cir.)). A temporary abeyance is particularly warranted where, as here, the related appeal was fully briefed and argued when the present appeal was docketed, and where an expedited decision has been requested.

Moreover, the government has requested that the Supreme Court consider a petition for certiorari before judgment in *Karnoski* at its January 11, 2019 conference. That pending certiorari petition is yet another reason to hold the briefing schedule in abeyance. *See, e.g.*, Order, *J.S. Oliver Capital Mgmt., L.P. v. SEC*, No. 16-72703 (9th Cir. Oct. 25, 2017) (abeyance pending certiorari petitions in *SEC v. Bandimere*, No. 17-475 (U.S.); *Raymond J. Lucia Cos. v. SEC*, No. 17-130 (U.S.)); Order, *Bennett Grp. Fin. Servs., LLC v. SEC*, No. 17-9524 (10th Cir. Aug. 30, 2017) (similar).

The original plaintiffs quote *Landis v. North American Co.*, 299 U.S. 248, 255 (1936), for the proposition that abeyances should occur only in "rare circumstances," Pls. Opp. 2, but *Landis* also recognized that a court may "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," and that, "[e]specially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent," 299 U.S. at 254, 256. That guidance plainly applies here, where the *Karnoski* appeal has already advanced considerably, where proceeding with briefing will burden the resources of this Court and the parties, and where plaintiffs will suffer no prejudice from an abeyance, as discussed further below.

3. An abeyance of the briefing schedule will not prejudice plaintiffs but will avoid needless burdens on this Court's and the parties' resources. The original plaintiffs contend (at 1) that an abeyance will deprive them of "an opportunity to litigate their own claims," and California echoes (at 2) that an abeyance would "delay the State's ability to present its own arguments." But these contentions misconstrue the effect of a temporary abeyance. Plaintiffs will have every opportunity to present their arguments, after properly accounting for the resolution of *Karnoski*. It does not prejudice parties to require them to account for the existence of binding precedent.

Finally, proceeding with the briefing schedule at this time would only burden the resources of this Court and the parties. Plaintiffs themselves acknowledge (at 2) that any decision in *Karnoski* may require "the parties to file supplemental briefing" to account for that case. Given that acknowledgment, there is no reason to waste resources on an additional round of nigh-obsolete briefing, when holding the briefing schedule in abeyance would serve the same purpose just as expeditiously.[1]

[1] As California notes (at 2), the government will separately be asking this Court for a stay of the district court's preliminary injunction pending appeal to permit the Solicitor General to file a stay application in the Supreme Court in connection with the pending petition for certiorari before judgment. *See* S. Ct. R. 23.3. This Court, however, should consider this request for an abeyance pending *Karnoski* regardless of its action on the government's separate motion for a stay of the preliminary injunction. In any event, plaintiffs can hardly claim prejudice from a temporary abeyance of briefing if this Court indeed stays the preliminary injunction, as this Court's granting a stay would signify that plaintiffs were unlikely to succeed on the merits of their claims anyway, even absent complete briefing.

4. Unable to dispute that "*Karnoski* and this litigation raise overlapping legal issues," plaintiffs point to two purported distinctions based on "the procedural posture of the two cases, and the records on appeal." Pls. Opp. 3. Those distinctions are unfounded, and in any event, they cannot alter the inescapable conclusion that *Karnoski*'s resolution of the same legal issues will control this appeal.

First, noting that the district court in *Karnoski* "struck" the government's motion to dissolve the preliminary injunction, plaintiffs contend that "the government has argued that these [procedural] differences could be dispositive." Pls. Opp. 3 (citing *Karnoski* Opening Br. 16-17, 40, 45 (filed May 29, 2018)). Not so. In *Karnoski*, the government explained that the district court had "effectively den[ied]" the government's motion to dissolve and had "extended its injunction to preclude the military from implementing its 2018 policy"—which is in substance what happened here. *Karnoski* Opening Br. 15; *see id.* at 40, 45 (characterizing district court's order as "decision to preliminarily enjoin" the 2018 policy and to "extend[] its prior preliminary injunction"). In both cases, the district courts refused to dissolve the preliminary injunctions to allow the government to implement the 2018 policy. In any event, both district court decisions were premised on the belief that the 2018 policy is substantially the same as the 2017 presidential memorandum, making it unnecessary to consider the 2018 policy on its own terms. *Compare Karnoski v. Trump*, No. 17-1297, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018) ("The Court finds that the 2018 [policy] . . . threaten[s] the very same violations that caused it and other courts to enjoin the [2017

presidential memorandum] in the first place."), *with* Doc. 124, at 9 ("[T]he controversy presented by the new policy is substantively the same as the controversy presented by the old policy").

Second, plaintiffs contend that *Karnoski* differs because "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." Pls. Opp. 3-4 (quoting *Karnoski* Opening Br. 14). This is inaccurate on two fronts. The quoted portion of the government's *Karnoski* brief was discussing, as part of the procedural history of the case, the district court's denial of plaintiffs' motion for summary judgment, but that denial is not at issue in the *Karnoski* appeal and is not even appealable. *See Karnoski* Opening Br. 14 ("[B]efore the parties had even submitted a discovery plan, plaintiffs moved for summary judgment."). Additionally, the government's motions to dissolve the preliminary injunction in this appeal and in *Karnoski* were filed in March 2018, right after Secretary Mattis announced the 2018 policy, in each case before discovery on that policy could commence. Doc. 82 (filed Mar. 23, 2018); Doc. 223, *Karnoski*, No. 17-1297 (W.D. Wash. filed Mar. 29, 2018). Plaintiffs' critique (at 4) that the "*Karnoski* record . . . does not include many documents produced by the government in this litigation that form part of the record on appeal" is confusing, because plaintiffs in both cases have received the same administrative record and are parties to a cross-use agreement under which they share discovery. *See* Doc. 96 (Cross-Use Agreement); Doc. 183 (Cross-Use Agreement), *Karnoski*, No. 17-1297 (W.D. Wash. filed Feb. 14, 2018). Moreover,

plaintiffs fail to explain how any minor differences in the factual record would impact this Court's resolution of the fundamental questions that are common to both cases.

In sum, plaintiffs have offered no reason to doubt that *Karnoski* will control this Court's resolution of the present appeal. An abeyance is warranted in light of the substantially similar issues presented in both cases, and it will conserve the resources of the parties and the Court.

CONCLUSION

For the foregoing reasons, this Court should 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,

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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 1,903 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*
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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 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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