[JUDGMENT ENTERED JANUARY 4, 2019]

No. 18-5257

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE 2, et al.,
Plaintiffs-Appellees,

v.

PATRICK M. SHANAHAN, in his official capacity as Acting Secretary of Defense, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT'S REPLY IN SUPPORT OF ITS EMERGENCY MOTION FOR CLARIFICATION OF THIS COURT'S JANUARY 4, 2019 JUDGMENT OR, IN THE ALTERNATIVE, FOR A STAY OF ANY INJUNCTION OR FOR ISSUANCE OF THE MANDATE FORTHWITH

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INTRODUCTION

Plaintiffs and the district court insist that the military remains bound by a preliminary injunction that this Court has already vacated. That position is irreconcilable with this Court's per curiam judgment, which concluded that "substantial constitutional arguments" support the enjoined policy, vacated the preliminary injunction, and denied the government's stay motion "as moot." Judgment 1, 4. That view also ignores the Supreme Court's decision to stay two materially indistinguishable preliminary injunctions, thus making clear that the military should be permitted to implement the new policy announced by the Department of Defense.

There is no doubt that the Supreme Court would have granted a stay of the preliminary injunction here, too, if this Court had not yet vacated the injunction. Under plaintiffs' view, however, this Court's judgment in favor of the government places the government in a worse position than in any of the other pending cases, and the military remains prohibited from implementing its new policy nationwide. There is only one explanation for this Court's decision to deny the government's stay motion "as moot," and for Chief Justice Roberts's decision to deny the government's stay application without referring it to the full Court: This Court's judgment became effective immediately, and the preliminary injunction is no longer in place.

The government respectfully requests that this Court clarify that its judgment vacated the preliminary injunction effective immediately. If this Court does not issue

such a clarification, it should stay any injunction pending issuance of the mandate and any further appellate proceedings or, in the alternative, issue the mandate immediately.

ARGUMENT

THIS COURT SHOULD TAKE ALL APPROPRIATE STEPS TO ENSURE THAT THE PRELIMINARY INJUNCTION IS NO LONGER IN EFFECT

1. Plaintiffs acknowledge (Opp. 7) that "the Court has the authority to enter a judgment with immediate effect," and dispute only that "[i]t did not do so here." But as we have explained, this Court's decision to directly vacate the preliminary injunction and simultaneously deny the government's stay motion as moot necessarily implies that the injunction is no longer in place. If the injunction had remained in effect, either this Court or the Supreme Court would have acknowledged that the government still needed a stay. This Court should thus clarify that the preliminary injunction is no longer in place.

Plaintiffs offer no convincing reason why this Court would have denied the government's stay motion "as moot" if its judgment did not have immediate effect. Judgment 1. At most, they speculate (Opp. 8) that "[t]he panel may have denied the motion because that motion sought a stay pending the court's decision," and "once the decision was issued, the stay request no longer needed to be decided." That is incorrect. The government's original stay request sought "a stay of the preliminary injunction . . . pending the resolution of the government's appeal in this Court and any further proceedings in the Supreme Court." Gov't Stay Mot. 7. Such a request would "no

longer need[] to be decided" only if this Court's decision was immediately effective in vacating the preliminary injunction. Opp. 8. Under plaintiffs' view that this "judgment is not final until [this Court] issues its mandate," Opp. 6, the government still would have needed a stay, and the issue would not have been moot. Plaintiffs thus have no explanation for why, under their theory, the panel would have denied the government's stay motion as moot.

Plaintiffs likewise offer no explanation for why Chief Justice Roberts would have denied the government's stay application in this case without comment—and without even referring the application to the full Court—if the preliminary injunction remained in effect. They do not argue that the injunction here was materially distinguishable from the injunctions that the Supreme Court stayed in *Trump v. Karnoski*, No. 18A625, 2019 WL 271944 (U.S. Jan. 22, 2019), and *Trump v. Stockman*, No. 18A627, 2019 WL 271946 (U.S. Jan. 22, 2019). Granting the government's stay applications in *Karnoski* and *Stockman* was warranted because the Ninth Circuit had not yet ruled, whereas in this case, this Court had already issued a judgment vacating the preliminary injunction. Because this Court's judgment was effective immediately, and the preliminary injunction was no longer in place, a stay was no longer necessary.

Plaintiffs argue (Opp. 6) that this Court's decision is not "final" because the mandate has not issued, relying on general propositions regarding the effect of the mandate. But none of the authorities they cite addresses the particular circumstances here. In the context of this case—where this Court directly vacated the injunction and

simultaneously denied a stay motion as moot—it is clear that this Court withheld the mandate not to maintain an injunction, but to retain jurisdiction during the extended time in which plaintiffs could seek rehearing. *See United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (per curiam) (describing the "clear and well-known" "relationship between district court jurisdiction and the issuance of the appeals court mandate"). This Court should accordingly clarify that its judgment became effective immediately, and therefore the preliminary injunction is no longer in place.

2. Even if this Court were to determine that the preliminary injunction is still in effect, it should stay any injunction. Plaintiffs do not dispute that this Court is bound by the Supreme Court's weighing of the stay factors as to the nationwide preliminary injunctions in *Karnoski* and *Stockman*. Plaintiffs instead argue (Opp. 9) that, because the Chief Justice denied the government's stay application in this case, the Supreme Court must have intended for a materially indistinguishable nationwide injunction to remain in place "until after the expiration of the time for filing a petition for rehearing or the resolution of any timely petition." This is misconceived. As explained, the Chief Justice denied the government's stay application, without referring the application to the full Court, because the injunction here was already vacated. And the Supreme Court stayed the *Karnoski* and *Stockman* injunctions pending *all* further proceedings before the Ninth Circuit and the Supreme Court, including any time period for rehearing. *See Karnoski*, 2019 WL 271944 (granting stay "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the

Government's petition for a writ of certiorari, if such writ is sought," and until "the [Supreme] Court enters its judgment" if certiorari is granted); *Stockman*, 2019 WL 271946 (same). Plaintiffs' reliance (Opp. 10) on the "harm caused" by temporarily staying the injunction here, and the supposed lack of "irreparabl[e] harm[s]" to the military, is misplaced, as the Supreme Court necessarily considered a balancing of harms when it stayed the preliminary injunctions in *Karnoski* and *Stockman*.

3. Despite previously faulting the government for not "mov[ing] for expedited issuance of the mandate," Doc. 191 at 3, plaintiffs offer no valid reason why the mandate should not issue immediately, now that the government has filed such a motion. Contrary to plaintiffs' claims (Opp. 9), issuance of the mandate would not deprive plaintiffs of "a full opportunity to consider" whether to seek rehearing, as this Court's rules specifically contemplate that a party may seek rehearing, and the Court may grant it, even after the mandate has issued. *See* D.C. Cir. Rule 41(a)(4) ("When rehearing en banc is granted, the court will recall the mandate if it has issued."). Plaintiffs make a cursory argument (Opp. 9) that the government has failed to demonstrate good cause to expedite issuance of the mandate, but the Supreme Court made clear that the military should be permitted to implement its new policy during the pendency of all further appellate proceedings, including any time period for rehearing. Absent clarification of the judgment or a stay, the district court's "notice" will prevent the military from implementing a policy that, in this Court's view, is supported by "substantial constitutional arguments" and "plausibly relies upon the 'considered

professional judgment' of 'appropriate military officials.'" Judgment 4 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)).

4. Plaintiffs accuse (Opp. 8, 10) the government of acting too late (by delaying a request for relief for "months") and too soon (by filing a motion that is "premature"). Plaintiffs cannot have it both ways, and there is no reason why this Court should wait to grant relief.

The government has not delayed in this case. Following this Court's judgment on January 4, 2019, three other nationwide preliminary injunctions remained in place. The Supreme Court stayed two of those injunctions on January 22, and the government promptly sought a stay of the third injunction in the remaining district court. *See* Defs.' Notice of Suppl. Authority (Doc. 232), *Stone v. Trump*, No. 17-2459 (D. Md. Jan. 22, 2019); Defs.' Mot. to Stay Prelim. Inj. (Doc. 234), *Stone v. Trump*, No. 17-2459 (D. Md. Jan. 24, 2019). On March 7, that court stayed its injunction; the very next day, the government provided notice to the district courts in each of the four related cases that it therefore planned to release its Directive-type Memorandum. *See* Doc. 190; *see also* Defs.' Notice (Doc. 332), *Karnoski*, No. 17-1297 (W.D. Wash. Mar. 8, 2019); Defs.' Notice (Doc. 146), *Stockman*, No. 17-1799 (C.D. Cal. Mar. 8, 2019); Notice (Doc. 250), *Stone*, No. 17-2459 (D. Md. Mar. 8, 2019). In response, plaintiffs asserted that their injunction—the only one that had been vacated—was still in effect, and the government has moved expeditiously to seek clarification and other relief ever since.

Plaintiffs urge (Opp. 10) that the government should wait and see if they file a petition for panel or en banc rehearing on March 29, 2019, and then "seek a stay at that time" if necessary. But there is no reason to generate another round of emergency filings in three days' time. As we have explained (Mot. 3), the military's new policy is scheduled to go into effect on April 12, and the military must have certainty regarding which policy will be in effect on that date no later than April 4. The government has thus requested a decision from this Court by March 27, to allow sufficient time for the Solicitor General to consider whether to seek relief in the Supreme Court, if necessary, and for such relief to be granted by April 4. In all events, the Supreme Court made clear over three months ago that the military should be permitted to implement its new policy during the pendency of all further appellate proceedings, including any time period for rehearing. Thus, even if plaintiffs seek rehearing three days from now, a stay will remain appropriate.

CONCLUSION

The government respectfully requests that this Court issue a ruling by March 27, 2019, to clarify that its judgment vacated the preliminary injunction effective immediately. If this Court does not issue such a clarification, it should stay the preliminary injunction pending issuance of the mandate and any further appellate proceedings or, in the alternative, issue the mandate immediately. Additionally, this Court should enter an immediate administrative stay pending consideration of this motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 1,826 words. This reply complies with the typeface and the type style requirements of Fed. R. App. P. 27 because it 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 March 26, 2019, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey