

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 1:17-cv-02459-GLR

Hon. George L. Russell, III

**PLAINTIFFS' MOTION TO LIFT THE STAY OF COMPLIANCE WITH  
THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER**

Plaintiffs respectfully request that the Court issue an order lifting the stay of compliance with the Magistrate Judge's Memorandum Opinion and Order entered on November 30, 2018 (the "Stay"), and requiring Defendants to begin complying within 10 days. *See* ECF 228. When the Court entered the Stay pending the resolution of similar issues by the Ninth Circuit, it noted that although the Stay "may burden the Plaintiffs by delaying the litigation," this burden was mitigated because "the length of the stay should be brief, given that the Ninth Circuit heard oral argument on the issue on October 10, 2018." ECF 227 at 21. Since the Stay was entered, two months have passed without a ruling from the Ninth Circuit. But while the delay created by the Stay has been longer than anticipated, other developments have made the prejudice to Plaintiffs from delay much more pronounced. Specifically, the protections provided to Plaintiffs by the preliminary injunctions entered in this and other cases challenging the ban on military service by transgender individuals (the "Ban") have eroded significantly, and may shortly disappear entirely. Between the unexpectedly long time for the Ninth Circuit to rule and these changed circumstances, maintaining the Stay imposes significant hardship on Plaintiffs. Plaintiffs

accordingly request that the Stay be lifted so that they may obtain the evidence they need to proceed with their case, evidence to which the Court has already determined Plaintiffs are entitled. *See id.* at 15–17.

### **PROCEDURAL BACKGROUND**

On August 14, 2018, United States Magistrate Judge Copperthite issued a Memorandum Opinion and Order (the “USMJ Order”), granting Plaintiffs’ Motion to Compel production of certain documents that Defendants claimed were protected from discovery under the deliberative process privilege. ECF 204 at 6–7. Defendants moved to stay compliance with the USMJ Order on August 17, 2018 (ECF 208), then lodged objections to the USMJ Order on August 28, 2018 (ECF 209). Because Defendants refused to comply with the USMJ Order, Plaintiffs moved for an order to set a date certain for Defendants’ compliance on October 22, 2018. ECF 222.

These motions were resolved on November 30, 2018, when the Court overruled Defendants’ objections to the USMJ Order, but granted Defendants’ motion to stay compliance, pending resolution by the Ninth Circuit of Defendants’ petition for a writ of mandamus regarding a discovery order issued in the related case *Karnoski et al. v. Trump et al.*, W.D. Wa. Case No. 2:17-cv-01297. ECF 228. The Court determined that the factual findings made in the USMJ Order were reasonable (ECF 227 at 8–11), that Judge Copperthite did not rule contrary to law in granting Plaintiffs’ Motion to Compel (*id.* at 13), and that Judge Copperthite’s determination that documents sought by Plaintiffs’ Motion to Compel were not protectable under the deliberative process privilege was supported by law, both on a categorical basis because governmental intent is at the heart of this case, and under the balancing test described in *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (Table) (4th Cir 1987) (per curiam) (ECF 227 at 15–17). The Court also concluded that all four factors to be considered in a stay request favored a stay of the USMJ

Order at that time, because (1) given that the *Karnoski* petition for a writ of mandamus had already been heard by the Ninth Circuit the stay should be relatively short, (2) denying a stay would burden Defendants by forcing the disclosure of documents subject to the *Karnoski* writ petition, and (3) “although granting a stay may burden Plaintiffs by delaying the litigation,” this burden was offset by (4) the Court’s interest in avoiding duplicative litigation by awaiting a decision in *Karnoski*. *Id.* at 21–22.

More than two months have passed since the Stay was entered, and the Ninth Circuit has not yet issued a ruling in *Karnoski*. In that time, the Supreme Court stayed the preliminary injunctions in *Karnoski v. Trump*, No. 18-35347 (9th Cir.) and *Stockman v. Trump*, No. EDCV 17-01799 (C.D. Cal.), and Defendants moved to stay this Court’s preliminary injunction in its entirety. ECF 234. Plaintiffs oppose the stay of the preliminary injunction as to a specific group of individual Plaintiffs who are currently seeking to enlist or commission as officers. ECF 235.

### **ARGUMENT**

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Donnelley v. Branch Banking & Tr. Co.*, 971 F. Supp. 2d 495, 501 (D. Md. 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). In evaluating entry of a stay, the factors to be considered are “[1] the length of the requested stay, [2] the hardship that the movant would face if the motion were denied, [3] the burden a stay would impose on the nonmovant, and [4] whether the stay would promote judicial economy by avoiding duplicative litigation.” *Donnelly*, 971 F. Supp. 2d at 501–02 (quoting *In re Mut. Funds Inv. Litig.*, 2011 WL 3819608, at \*1 (D. Md. 2011)). The balance of these factors has shifted significantly since the Stay was entered.

*First*, the Court previously determined that the length factor favored the Stay, because “the length of the stay should be brief, given that the Ninth Circuit heard oral argument on the issue on October 10, 2018.” ECF 227 at 21. That was an entirely understandable expectation at the time. But more than three and half months after oral argument, the Ninth Circuit still has not decided the *Karnoski* petition for a writ of mandamus. The Stay has now been in effect for more than two months, with no indication of when it will end. It is too late for the Stay to be merely brief; now the question is only how much longer it will last, and no party to this litigation is in a position to know the answer. Accordingly, this factor now supports lifting the Stay so Plaintiffs’ case may proceed.

*Second*, Defendants have had more than five months since the USMJ Order was entered to collect and identify the documents subject to that order. Plaintiffs’ discovery requests seeking those documents were served more than a year ago, and Defendants have already prepared privilege logs describing these documents. Defendants’ counsel represented that, as a practical matter, they were prepared to begin producing these documents in *October of last year*. ECF 222-2 ¶ 5. Simply put, Defendants cannot claim burden in being forced to produce documents that they could and should have produced long ago.

*Third*, and most critically, the burden the Stay imposes on Plaintiffs is significant, and events since the Stay was entered have intensified this burden. As set forth in prior briefing, the materials covered by the USMJ Order are vital to Plaintiffs’ case (*see, e.g.*, ECF 211 at 16; ECF 216 at 13–17), and in overruling Defendants’ objections to the USMJ Order, the Court agreed these materials should be produced. ECF 227 at 15–17. Defendants’ refusal to produce these documents severely prejudices Plaintiffs’ case. When asking this Court to stay compliance with the USMJ Order, Defendants repeatedly stressed that Plaintiffs would not be prejudiced by a

delay in discovery, because the preliminary injunction remained in place to protect Plaintiffs in the interim. *E.g.*, ECF 208 at 10 (“because there is a preliminary injunction in place, Plaintiffs cannot point to any alleged ongoing harm as grounds to require the immediate production of deliberative materials”); ECF 215 at 6 (“Plaintiffs will suffer *no* harm because a preliminary injunction is in place”). But Defendants have now moved to stay this Court’s preliminary injunction following the Supreme Court’s ruling in *Karnoski* and *Stockman*, and categorically refuse to exempt any individual plaintiffs from the stay. ECF 234. Although Plaintiffs oppose this relief and have asked the Court to continue protecting a narrow and specific group of individual Plaintiffs who are currently seeking to enlist or commission as officers (ECF 235), even if Plaintiffs’ opposition to a stay as to certain plaintiffs is successful, all Plaintiffs still suffer irreparable harm every day that the discriminatory Implementation Plan is in effect (*see* ECF 139 at 31–32; ECF 163-2 at 21–22). And if the Court should do as Defendants request and stay the preliminary injunction as to all named Plaintiffs as well, those Plaintiffs will be exposed to additional severe and immediate harm by being denied the opportunity to enlist or apply for commissions as officers. *See* ECF 235 at 4–5.

In short, whatever protection the preliminary injunction provided to Plaintiffs has been reduced significantly, and may be eliminated altogether. The Stay should thus be lifted because preventing Plaintiffs from proceeding expeditiously with their case by obtaining critical evidence they are entitled to, while they have *lost* the protection of the injunction that previously made that delay less problematic, imposes a major burden on Plaintiffs. This harm only compounds the longer Plaintiffs are delayed in contesting the constitutionality of the Ban. It is thus imperative Plaintiffs be permitted to proceed with this case, which is impossible so long as the Stay remains in place.

*Fourth*, whatever judicial economy interests may be served by maintaining the Stay until the Ninth Circuit issues a decision in *Karnoski* are insufficient to support a stay in view of the high burden imposed on Plaintiffs by the increasingly lengthy Stay. Indeed, lifting the Stay of the USMJ Order without waiting for further action from the Ninth Circuit is consistent with the Supreme Court’s admonition that “[o]nly in rare circumstances [should] 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*, 299 U.S. at 255. To justify such a stay, a litigant “must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.” *Id.* Defendants cannot meet that standard given the harm the Stay works on Plaintiffs. Plaintiffs should not be “compelled to stand aside” while their access to the documents subject to the USMJ Order is settled in *Karnoski*, where the Ninth Circuit considers a meaningfully different discovery order. *See* ECF 211 at 7–8 (explaining that the *Karnoski* mandamus petition implicates presidential communication, executive privilege, and separation-of-powers concerns not at issue here). Plaintiffs should be allowed to litigate their own case.

Finally, should the Court lift the Stay, Defendants would remain free to seek a writ of mandamus and a stay of compliance with the USMJ Order from the Fourth Circuit, if they so choose. Requiring compliance to begin within 10 days would provide Defendants with sufficient time to make such a request.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Stay entered on November 30, 2018 be lifted, and Defendants be ordered to begin complying with the USMJ Order within 10 days.

Dated: January 31, 2019

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Respectfully submitted,

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### **CERTIFICATE OF CONFERENCE OF COUNSEL**

Pursuant to Local Rule 104.7, Plaintiffs hereby certify that, on January 31, 2019, counsel for Plaintiffs and Defendants conferred via email. Counsel for Defendants advised that Defendants opposed a motion to lift the stay of the effect of the Magistrate Judge's

Memorandum Opinion and Order. The parties were thus unable to resolve their dispute and the issue is ripe for the Court's consideration.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of January, 2019, a copy of the foregoing and all accompanying documents were served via CM/ECF on all counsel of record.

/s/ Marianne F. Kies  
Marianne F. Kies

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Case No. 1:17-cv-02459-GLR

Hon. George L. Russell, III

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' MOTION TO LIFT THE STAY OF COMPLIANCE WITH  
THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER**

Upon consideration of Plaintiffs' Motion to Lift the Stay of Compliance With the Magistrate Judge's Memorandum Opinion and Order, and any opposition thereto, it is hereby ORDERED that Plaintiffs' Motion is GRANTED and the stay of the effect of the Magistrate Judge's Memorandum Opinion and Order (ECF Nos. 204, 205) entered on November 30, 2018 is LIFTED.

IT IS FURTHER ORDERED that Defendants shall begin complying with the Magistrate Judge's Memorandum Opinion and Order no later than 10 days from the date of this Order.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2019.

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Hon. George L. Russell, III  
United States District Judge