

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case 1:17-cv-02459-GLR

Hon. George L. Russell, III

**DEFENDANTS' MOTION TO STAY THE PRELIMINARY INJUNCTION AND
REQUEST FOR EXPEDITED RULING**

Defendants respectfully request a stay of the Court's preliminary injunction, pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction, ECF No. 120, and if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further proceedings before the Supreme Court. Although the Court's present injunction applies exclusively to the now rescinded Presidential Memorandum of August 25, 2017, *see* ECF No. 84, the Government requests a stay of that injunction out of an abundance of caution to ensure that the Supreme Court's order of January 22, 2019, *see* ECF No. 232, has full effect and the Department of Defense may begin implementing the policy announced by former Secretary of Defense James Mattis on March 23, 2018.

In their Response to Defendants' Notice of Supplemental Authority, Plaintiffs concede that "it would be appropriate for this Court to stay the nationwide effect of its injunction pending appeal" but believe that the "injunction should remain in effect with respect to a small number of individual plaintiffs who would suffer severe and immediate harm." Pls.' Resp. to Defs.' Notice of Suppl. Authority at 2, ECF No. 233. Thus, the parties

disagree solely as to whether only the nationwide aspects of the Court's injunction must be stayed or the injunction must be stayed in its entirety. Because the Supreme Court's order granted Defendants' stay request in full and stayed the *Karnoski* and *Stockman* injunctions in their entirety, a similar stay of this Court's preliminary injunction, in its entirety, is required here.¹

PROCEDURAL BACKGROUND²

Plaintiffs filed this action on August 28, 2017, raising constitutional challenges to the President's 2017 Memorandum concerning military service by transgender individuals. Compl., ECF No. 1. Similar suits were filed in the District of Columbia, the Western District of Washington, and the Central District of California. *See Doe v. Shanahan*, No. 17-cv-1597 (D.D.C. filed Aug. 9, 2017); *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. filed Aug. 28, 2017); *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal. filed Sep. 5, 2017).

On November 21, 2017, this Court issued a nationwide preliminary injunction, enjoining Defendants from enforcing or implementing certain "policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled 'Military Service by Transgender Individuals[.]'" ECF No. 84. The district courts in *Doe*, *Karnoski*, and *Stockman* similarly issued nationwide preliminary injunctions enjoining Defendants from enforcing or implementing the Presidential Memorandum. *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 60; *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 103; *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 79. In March 2018, the Government informed the

¹ In light of the Supreme Court's order, the Government requests a ruling on its stay request as expeditiously as possible.

² The background regarding the creation of the military's new policy is set forth in Defendants' Motion to Dissolve the Preliminary Injunction. *See* Defs.' Mot. 2–8, ECF No. 120.

Court that the President had issued a new memorandum, which revoked his 2017 memorandum (and any similar directive) and allowed the military to adopt Secretary Mattis's proposed policy. *See* Defs.' Notice, ECF No. 119; *see also* Defs.' Mot. to Dissolve the Prelim. Inj., ECF No. 120. In light of that new policy, on March 23, 2018, the Government moved to dissolve the November 2017 injunction. Defs.' Mot. to Dissolve the Prelim. Inj., ECF No. 120. The Government's motion remains pending before this Court.

In March 2018, the Government also moved to dissolve the three nationwide injunctions issued in the related litigation. *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 96; *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 215; *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 82. In each instance the district court denied the government's motion and declined to dissolve the preliminary injunction. *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 157; *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 233; *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 124. In each instance the Government appealed. *See Doe v. Shanahan*, No. 18-cv-5257 (D.C. Cir.); *Karnoski v. Trump*, No. 18-35347 (9th Cir.); *Stockman v. Trump*, No. 18-56539 (9th Cir.). And in each instance the Government further sought a stay of the district court injunctions pending appeal. *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 183; *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 238; *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 130.

On January 4, 2019, the Court of Appeals for the D.C. Circuit reversed the district court's denial of Defendants' motion to dissolve the preliminary injunction in *Doe v. Shanahan*, vacated the preliminary injunction, and denied the Government's stay request as moot. *See* ECF No. 230. On January 22, 2019, the Supreme Court granted the Government's request for a complete stay of the district courts' preliminary injunctions in both *Karnoski v. Trump* and *Stockman v. Trump* pending the Government's Ninth Circuit appeal and disposition of the

Government's petition for a writ of certiorari, if such writ is sought. *See* ECF No. 232. Among the related cases, this Court's nationwide preliminary injunction is the only injunction that has not been vacated or stayed. However, the Supreme Court's action is binding here and must result in a stay of this Court's preliminary injunction, in its entirety, pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction, and if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further proceedings before the Supreme Court.

ARGUMENT

Because a preliminary injunction and stay are both forms of preliminary equitable relief, courts in the Fourth Circuit have applied the four factor test established in *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), derived from the Supreme Court's decision in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), when considering a stay of an injunction. *See Rose v. Logan*, 13-3592, 2014 U.S. Dist. LEXIS 98404, 2014 WL 3616380 (D. Md. July 21, 2014); *Doe v. Cooper*, No. 13-711, 2016 U.S. Dist. LEXIS 192534, at *3 (M.D.N.C. Mar. 2, 2016). The standard in *Real Truth* requires the movant to establish the following factors: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." 575 F.3d at 346.

Even when courts enter injunctions, those same courts regularly find cause to stay their own rulings entering, dissolving, or modifying injunctions. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977) (holding that district court did not abuse its discretion by entering permanent injunction and then staying it pending appeal); *Thiry v. Carlson*, 891 F. Supp. 563, 567 (D. Kan. 1995) (granting stay pending appeal of court's own order dissolving preliminary injunction). This holds with particular force when

the Supreme Court has intervened to grant a stay of a preliminary injunction. *See Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 274 (4th Cir. 2018) (“In light of the Supreme Court’s order staying this injunction pending disposition of the Government’s petition for a writ of certiorari, if such writ is sought, we stay our decision today pending the Supreme Court’s decision.”) (internal quotations and citation omitted); *see also Hawaii v. Trump*, 878 F.3d 662, 702 (9th Cir. 2017) (“In light of the Supreme Court’s order staying this injunction pending disposition of the Government’s petition for a writ of certiorari, if such writ is sought, we stay our decision today pending Supreme Court review.”) (internal quotations and citation omitted).

Here, the Supreme Court has acted on the Government’s applications in two of the related cases by staying similar injunctions, in their entirety, issued in response to the same legal challenges to the same Department of Defense policies, and that action is binding on this Court. *See* Mem. Op. of November 30, 2018, ECF No. 227 at 4 n.7 (noting that the district courts in *Doe*, *Karnoski*, and *Stockman* issued injunctions similar to this Court’s November 21, 2017 preliminary injunction barring implementation of the same challenged policy); Pls.’ Notice of Suppl. Authority, ECF No. 143 (acknowledging that the *Stone* Plaintiffs bring the same constitutional challenges to the same policies as the *Doe* and *Karnoski* Plaintiffs); Pls.’ Notice of Suppl. Authority, ECF No. 218 (acknowledging that the *Stone* Plaintiffs bring the same constitutional challenges to the same policies as the *Stockman* Plaintiffs). In doing so, the Supreme Court considered the same factors the district court must consider here and determined that a stay of the preliminary injunctions issued in *Karnoski* and *Stockman* was warranted. The Supreme Court’s application of those stay factors to the present injunction is thus binding here and must result in a stay of this Court’s preliminary injunction pending the resolution of Defendants’ Motion to Dissolve the Preliminary Injunction, ECF No. 120, and

if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further proceedings before the Supreme Court. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We reaffirm that “[i]f a precedent of this Court has direct application in a case...[lower courts] should follow the case which directly controls[.]” (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))).

Plaintiffs acknowledge that “in light of the Supreme Court’s Order, it would be appropriate for this Court to stay the nationwide effect of its injunction pending appeal” but believe that the “injunction should remain in effect with respect to a small number of individual plaintiffs who would suffer severe and immediate harm.” Pls.’ Resp. to Defs.’ Notice of Suppl. Authority at 2, ECF No. 233. However, the Supreme Court’s order granted Defendants’ stay request in full and stayed the *Karnoski* and *Stockman* injunctions in their entirety. Thus, a similar stay of this Court’s preliminary injunction, in its entirety, is required here.

Moreover, Plaintiffs err in contending that the Supreme Court’s order leaves this Court room to “exercis[e] its equitable discretion” to stay only the nationwide aspect of the injunction. *Id.* Plaintiffs contend that Defendants’ arguments in the Supreme Court “centered on the nationwide effects” of the injunctions at issue. *Id.* But Defendants’ stay applications in the Supreme Court asked the Court to “stay [each] injunction in its entirety,” *Karnoski* Stay Appl. at 1, No. 18-676 (S. Ct. 2018) and requested a stay of “the nationwide scope of [each] injunction” only in the alternative to a full stay, *id.* at 2; *see id.* at 3 (“*At a minimum*, the Court should stay the nationwide scope of the injunction”) (emphasis added); *id.* at 40 (same). Plaintiffs also contend that, if the injunction in this case is stayed in its entirety, the individual plaintiffs will “suffer severe and immediate harm.” Pls.’ Resp. to Defs.’ Notice of Suppl. Authority at 2, ECF No. 233. But the plaintiffs in the Supreme Court likewise argued

that a full stay would cause the individual plaintiffs to “suffer serious irreparable injury.” Karnoski Stay Appl. Opp’n at 30, No. 18A-625 (S. Ct. 2018). And in applying the stay factors, the Supreme Court nevertheless determined that a full stay of each injunction was warranted. The Supreme Court’s order thus leaves no room for a different result here.

REQUEST FOR EXPEDITED RULING

In light of the Supreme Court’s January 22, 2019 order and the fact that this Court’s nationwide injunction is the only remaining injunction among the related cases, Defendants respectfully request an expedited ruling on this motion.

CONCLUSION

The Government respectfully requests that this Court stay the preliminary injunction, in its entirety, pending the resolution of Defendants’ Motion to Dissolve the Preliminary Injunction, ECF No. 120, and if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further proceedings before the Supreme Court.

January 24, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Courtney D. Enlow
COURTNEY D. ENLOW
ANDREW E. CARMICHAEL
Trial Attorneys

United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-8467
Email: courtney.d.enlow@usdoj.gov

Counsel for Defendants